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POLITICAL CULTURE, POLICY LIBERALISM, AND THE STRENGTH OF
JOURNALIST'S PRIVILEGE IN THE STATES

by

Casey Carmody

A Thesis Submitted in

Partial Fulfillment of the

Requirements for the Degree of

Master of Arts

in Media Studies

at

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August 2013

ABSTRACT

POLITICAL CULTURE, POLICY LIBERALISM, AND THE STRENGTH OF JOURNALIST'S PRIVILEGE IN THE STATES

by

Casey Carmody

The University of Wisconsin-Milwaukee, 2013
Under the Supervision of Professor David Pritchard

This study examined the relationships between the strength of states' journalist's privileges and state characteristics. The state characteristics included political culture and policy liberalism. The study created an index to identify and score several important components of journalist's privilege in each state. The various components included the legal source of the privilege, when journalists could use the privilege, what types of information the privilege protected, and who could invoke the privilege. The study then used statistical tests to test the relationships between state characteristics and privilege strength. The results indicated that policy liberalism was a significant predictor of a state's journalist's privilege strength. Political culture was not related to privilege strength. In a larger context, the study's results added evidence to a larger trend that policy liberalism influences state media law. The results also found that several states limited journalist's privilege to traditional journalists. Only a small number of states have extended the privilege to non-traditional journalists, such as Internet journalists and book authors.

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TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION	1
CHAPTER 2: LITERATURE REVIEW	6
A Federalism System	6
State Political Culture	7
Policy Liberalism	9
A Basis for Journalist's Privilege	11
Journalists and Confidential Sources	15
The Historical Development of Journalist's Privilege	18
<i>Branzburg v. Hayes</i>	23
Shield Statutes, Journalist's Privilege, and the States	26
Empirical Approaches to Analyzing Law	28
Hypotheses	35
CHAPTER 3: METHODS	37
Methodological Approach	37
Data Collection	38
Index of Shield Breadth	39
Coding and Analysis	42
Validity Check	47
CHAPTER 4: RESULTS	48
Coding Results	48
Political Culture and Journalist's Privilege Protections	54
Policy Liberalism and Journalist's Privilege Protections	54
CHAPTER 5: DISCUSSION	61
Discussion	61
Limitations	65
Further Research	66
WORKS CITED	68
APPENDIX A: CODING SCHEME	76
APPENDIX B: CODING RESULTS	84
APPENDIX C: JOURNALIST'S PRIVILEGE BY STATE	89

LIST OF FIGURES

ILLUSTRATIONS

Figure 2-1: Concepts and Hypothesized Influence	36
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GRAPHS

Figure 4-1: Distribution of shield strength according to Klingman & Lammers (1984) Scores	56
---	----

Figure 4-2: Distribution of shield strength according to Erikson, Wright, & McIver (1993) Scores	57
--	----

Figure 4-3: Distribution of shield strength according to Sorens, Muedini & Ruger (2008) scores	58
--	----

Figure 4-4: Distribution of shield strength according to Sorens, Muedini & Ruger (2010) scores	59
--	----

LIST OF TABLES

TABLES

Table 3-1: State Policy Liberalism Scores	45
Table 3-2: State Political Cultures	46
Table 4-1: Index Score of Individual State Shield Breadth	53
Table 4-2: Means Comparison Test of Shield Strength According to Political Culture	54
Table 4-3: Correlations of Policy Liberalism and Shield Strength	55

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Chapter 1: Introduction

The definitions of who exactly is a journalist are a mess. Some definitions are limited to traditional newsgatherers such as newspaper and television journalists. Others claim that “we’re all journalists now” because technological advancements have made self-publishing easier than ever.¹ An internet search of “who is a journalist” leads down an endless rabbit hole of debate and discussion. The idea of who qualifies as a journalist has ranged from traditional reporters² to lonely pamphleteers³ to online bloggers⁴ to Internet publishers of classified documents⁵ with many definitions in between. The U.S. Supreme Court has refused to establish a definition of a journalist on multiple occasions.⁶ A clear designation of who can be considered a journalist has not emerged. Granted, the discussion is not entirely new.⁷ It has merely intensified in a world where publishing has become more convenient.⁸

The importance of the definitions of journalists cannot be understated. In the United States, the press has several privileges that other citizens do not enjoy.⁹ One privilege is a journalist’s privilege to keep information about sources confidential. Most

¹ See SCOTT GANT, WE’RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE (2007).

² STANLEY JOHNSON & JULIAN HARRISS, THE COMPLETE REPORTER 3-8 (1942).

³ See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

⁴ *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 99 (Cal. Ct. App. 2006).

⁵ Scott Gant, “Why Julian Assange is a Journalist,” SALON, Dec. 20, 2010, http://www.salon.com/2010/12/20/wikileaks_gant_journalism/.

⁶ See *Branzburg*, *supra* note 3, at 704; *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 927-928 (2010) (Scalia, J., concurring).

⁷ See *Branzburg*, *supra* note 3, at 704.

⁸ See *Citizens United*, *supra* note 6; Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist’s Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371 (2003); Erik Ugland & Jennifer Henderson, *Who is a Journalist and Why Does it Matter? Disentangling the Legal and Ethical Arguments*, 22 J. OF MASS MEDIA ETHICS 241 (2007); Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515 (2007); Sharon Docter, *Blogging and Journalism: Extending Shield Law Protection to New Media Forms*, 54 J. OF BROADCASTING & ELECTRONIC MEDIA 588 (2010).

⁹ GANT, *supra* note 1, at 87.

states have enacted shield statutes to give journalists this privilege that non-journalists do not receive. Shield statutes grant journalists a privilege from testifying about their news sources in state courts or before state agencies.¹⁰ In several states that have not enacted shield statutes, state courts have decided that journalists are granted immunity through existing legislation or state constitutions.¹¹

Many journalists argue that these privileges are essential to the free flow of information. Journalists suggest that confidential sources of important information will dry up if authorities require journalists to expose the sources' identities. The result of few sources is that less information can be given to citizens. Without information, citizens do not have the ability to effectively participate in democracy. Therefore, many journalists maintain that the protection of sources is crucial to a well-functioning democracy. This concept would also suggest that states with broad protections established through shield statutes have greater democratic participation than in states without shield statutes.

The nature of journalist's privilege lies at the heart of this study. This study adds to the existing literature about journalist's privilege in several important ways. This thesis advances theory that a particular state characteristic influences media law. It adds to discussions about the nature of federalism through the differences in state laws. This study contributes to the understanding of how different states protect journalists, whether it is based on who they work for or whether the person is engaged in news gathering and disseminating. This thesis examines the ways in which states have been willing to make

¹⁰ PAUL SIEGEL, *COMMUNICATION LAW IN AMERICA* 7 (2d ed. 2008).

¹¹ Cong. Research Serv., *CRS Report for Congress: Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes*, No. RL32806 (June 27, 2007), available at <http://www.fas.org/sgp/crs/secretcy/RL32806.pdf>.

clear definitions of journalists, which can ultimately lead to more First Amendment rights for journalists that other citizens do not receive.

A prior study into media law posited that the liberalism of a state's policies influences state media law.¹² States with more liberal policies tend to have laws that are more favorable to journalists. Few studies have aimed to test this theory, though. No studies have examined whether a state's policy liberalism can affect the law of journalist's privilege. Previous research on journalist's privilege has simply focused on press subpoenas or the textual analysis of shield statutes. This study, in contrast, uses content analysis to identify key provisions of states' journalist's privilege protections. The data are compared to specific state characteristics to see the influence on the state's media laws. The examination of the state characteristics and state journalist's privilege protections fills a gap in the literature of the understanding of the privilege.

This study's focus on state law is important to the basic understanding of the American system of federalism. As Justice Louis Brandeis once said, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."¹³ It is under this theory that states have held different views on press protection even with the First Amendment of the Constitution stating "Congress shall make no law...abridging the freedom of speech, or of the press."¹⁴ The Fourteenth Amendment¹⁵ requires that states must respect the First Amendment's guarantees at a

¹² David Pritchard & Neil Nemeth, *Predicting the Content of State Public Record Laws*, NEWSPAPER RES. J., Fall 1989.

¹³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

¹⁴ U.S. CONST. amend. I.

¹⁵ U.S. CONST. amend. XIV, § 1.

minimum,¹⁶ but states can establish broader protections for the press than the First Amendment requires. Although states take cues from one another,¹⁷ states have not followed a particularly uniform approach to establishing shield protections for journalists. States have independently made decisions on how to approach press privileges. This study looks to explain whether some state characteristics explain differences in state media law. Identifications of the characteristics also provide a framework to understand the development of state law. Several factors can play a role in the way legislation is developed, shaped, and passed into law. Ultimately, the study can provide more insight into the understanding of the American federalism system.

The study is important in that it focuses on the different ways that states have decided to provide protections to journalists. Some states provide journalist's privilege protections to journalists based on who is their employer. Other states provide protections based on whether a person is involved in journalistic activities. The distinctions are very important because of Internet self-publishing. Citizen journalists have more opportunities than ever before to gather and disseminate news. States are beginning to grapple with the idea that these types of journalists may deserve protections even though they do not work for traditional media outlets.

This study's examination of how states define journalists is crucial to the current state of journalism. States that recognize journalist's privilege inherently define that some people are journalists while others are not. Such designations can be problematic. Essentially, the clear definitions can create different levels of First Amendment privileges for different citizens. Journalists receive more First Amendment privileges than non-

¹⁶ *Gitlow v. New York*, 268 U.S. 652 (1925).

¹⁷ ANDREW KARCH, *DEMOCRATIC LABORATORIES: POLICY DIFFUSION AMONG THE AMERICAN STATES* 3 (2007).

journalists. The problem has often been the reason that the Supreme Court is hesitant to create a definition of journalists. The accessibility of Internet publishing only compounds the problem. The modern-day lonely pamphleteers no longer stand on the street corner to disseminate their message. The pamphleteers now publish online through blogs and discussion forums. The clear-line definitions of a journalist in state law has the potential to become troublesome when people can publish information easily online.

Overall, this study seeks to add to the discussion of whether state characteristics influence media law. The study also looks to provide explanations of who might be considered a journalist for the purposes of special press privileges. More specifically, the study seeks to discover whether non-traditional journalists, such as bloggers or Internet publishers, enjoy the privileges that state governments have granted to traditional journalists. With the continuing advancement of Internet self-publishing and citizen journalism, questions about who exactly is a journalist become all the more difficult.

Chapter 2: Literature Review

A Federalism System

State governance differs in the United States because of federalism. Federalism is a system of government in which authority is divided among multiple realms. Each realm maintains its own autonomy, but the possibility remains for the realms to work cooperatively.¹⁸ In the United States, this authority is shared between the federal government and state governments. This system of shared authority is established through the United States Constitution, which establishes specific powers for the federal government and reserves certain roles for the states. States are granted equal representation in the Senate, play a prominent role in the selection of the president, approve constitutional amendments, and have guarantees of maintaining their own government.¹⁹

Through the maintenance of their own governments, states govern over most Americans' everyday activities within constitutional limits. States have the power to regulate taxes, criminal law, education, the creation of local governments, capital punishment, and social issues, such as gay marriage and abortion requirements.²⁰ With the various issues to tackle, states approach public policy from many different angles. Unsurprisingly, laws and policies on similar issues can widely vary from state to state.

It is important to note that states do not always act independently of each other, though. In fact, the opposite can happen. Policy diffusion occurs when state decision makers look to other states to imitate policy innovation.²¹ Even with states taking cues

¹⁸ KYLE SCOTT, *FEDERALISM: NORMATIVE THEORY AND ITS PRACTICAL RELEVANCE* 1 (2011).

¹⁹ DAVID BRIAN ROBERTSON, *FEDERALISM AND THE MAKING OF AMERICA* 2 (2012).

²⁰ *Id.* at 31.

²¹ KARCH, *supra* note 17, at 3.

from other states, variations are still likely to develop. Many factors can cause these differences. Two particular characteristics that create these differences are political culture and policy liberalism.

State Political Culture

In his study of American federalism, Elazar noted that states had varying political cultures. Elazar defined political culture as “the particular pattern of orientation to political action in which each political system is imbedded.”²² Essentially, political culture plays a significant role in the way a state’s political system operates. Elazar suggested that three main aspects influence a state’s political culture. The first aspect was the perceptions of what politics is and what is expected of government. The second was the type of people who are active in politics and serve as officials. The final aspect was the way citizens, politicians and government officials actually take part in practicing government according to their perceptions.²³

Elazar’s examination of these characteristics led him to conclude that states can fall into one of three distinct political cultures. Although some states had mixed cultures, Elazar found a dominant culture in each state. The first political culture is individualistic. In states with individualistic cultures, government is viewed in mostly economic terms. Government must be limited and encourage private initiatives. The government also should aim to expand access to the marketplace. The people involved in government view politics as a way to advance both socially and economically. Party loyalty is very important because the political system relies on mutual obligations within parties rather

²² DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 109 (3d ed. 1984).

²³ *Id.*, at 112.

than a focus on issues. Often, government official corruption is high, but it is also widely accepted.²⁴

The second political culture is moralistic. In states with moralistic cultures, politics is viewed as a way to improve society. The goal of the government is to promote the public good. When involved with politics and government, people don't view the involvement as a means to advance economically. Rather, government service is viewed as public service. Party loyalties are not strong in moralistic cultures. The importance of issues and public good outweigh loyalties to a specific party. Politics is considered to be the concern of every citizen. There are fewer career politicians. Political corruption is also very low.²⁵

The final political culture is traditionalistic. For states with traditionalistic cultures, politics and government maintain existing societal hierarchies and structures. Paternalism and elitism are valued in this political culture. People who serve in government often come from the social elite or have long-standing family ties to governing. These ties are of the utmost importance because value is placed on these ties rather than political party allegiance. People who are not part of the existing political system are not encouraged to become involved in politics.²⁶

Elazar's political culture typology has held up over time. One criticism of Elazar's classifications was that it did not rely on statistical procedures or empirical data to determine his cultures.²⁷ The critical study did find that Elazar's typologies were as an effective predictive tool as the study's statistically created regional subcultures. Both

²⁴ *Id.* at 115-117.

²⁵ *Id.* at 117-118.

²⁶ *Id.* at 118-119.

²⁷ Joel Lieske, *Regional Subcultures of the United States*, 55 THE J. OF POL. 888, 889 (1993).

cultural measures were similar in predicting habitual political behavior and political behavior that is arranged according to state-party lines.²⁸ Other studies have also found that Elazar's typologies remain an effective way to explain variations in policies among states.²⁹ Political culture also remains an enduring trait of states because Elazar based it on migration patterns.³⁰

Policy Liberalism

Distinct from political culture, policy liberalism is a state's tendency to foster the social and civic lives of its citizens. Liberalism should not be understood in its classical definition. The term is used in its modern American connotation. It is a term that describes the ideological orientations of a state's policies. States with higher levels of policy liberalism tend to spend more public money on social welfare programs underprivileged residents. High policy liberalism states tend to use the government to place more regulations on businesses than states with low levels of policy liberalism. States with high policy liberalism also hold more expansive views on civil rights and voter protections. It is important to note that policy liberalism is not intended to label policies as good or bad. Rather, it is merely a descriptive term that suggests what type of ideological viewpoints might favor the particular types of policy.

²⁸ *Id.*, at 908-909.

²⁹ See Steven G. Koven & Christopher Mausolf, *The Influence of Political Culture on State Budgets: Another Look at Elazar's Formulation*, 32 *Am. Rev. of Pub. Admin.* 66, 74 (2002). A state's budget expenditures vary depending on its type of political culture; Lawrence M. Mead, *State Political Culture and Welfare Reform*, 32 *THE POL'Y. STUD. J.* 271, 286 (2004). Moralistic states were most successful at welfare reform. The author states successful reform is the process as well as a state avoiding political and administrative problems; Patrick Fisher, *State Political Culture and Support for Obama in the 2008 Democratic Presidential Primaries*, 47 *SOC. SCI. J.* 699, 708 (2010). Political culture was correlated with support for Barack Obama during the 2008 primaries; David A. Tandberg & Erik C. Ness, *State Capital Expenditures for Higher Education: "Where the Real Politics Happens,"* 36 *J. OF EDUC. FIN.* 394, 411 (2011). Political culture was a significant predictor of state capital expenditures on higher education.

³⁰ ELAZAR, *supra* note 22, at 122.

Klingman and Lammers' examination of several different policies indicated that states differ in the tendency of public sector use.³¹ The policies they examined were associated with liberal positions in American politics, thus creating the label of "general policy liberalism." Klingman and Lammers concluded that policy liberalism was an enduring trait of states and was dependent on multiple factors. The factors include socioeconomic and political structures of the state, the state's society, and the state's political structure.³²

Subsequent research on policy liberalism has indicated that it develops from public opinion. Erikson, Wright, and McIver's research suggested that public opinion was the strongest indicator of state policy. They found very strong correlations between the ideology of public opinion and the ideological approach of state policies. Erikson, Wright and McIver also suggested that socioeconomic variables were not significantly related to policy liberalism. They found that when public opinion was omitted from analysis, socioeconomic factors had a significant influence.³³ The likely explanation for this finding is that public opinion is a mediator between socioeconomic variables and policy liberalism. Subsequent research has also indicated that public opinion is more important in predicting policy liberalism than the influence of organized interests³⁴ or the use of ballot initiatives.³⁵

³¹ David Klingman & William W. Lammers, *The 'General Policy Liberalism' Factor in American State Politics*, 28 AM. JOUR. OF POL. SCI. 598, 600 (1984).

³² *Id.*, at 608.

³³ ROBERT S. ERIKSON ET AL., *STATEHOUSE DEMOCRACY: PUBLIC OPINION AND POLICY IN THE AMERICAN STATES* 78-86 (1993).

³⁴ Virginia Gray et al., *Public Opinion, Public Policy, and Organized Interests in the American States*, 57 POL. RES. Q. 411, 419 (2004).

³⁵ James Monogan et al., *Public Opinion, Organized Interests, and Policy Congruence in Initiative and Noninitiative U.S. States*, 9 ST. POL. & POL'Y Q. 304, 319 (2009).

Additionally, policy liberalism is associated with a variety of different liberal policies. Various indicators that are not overtly ideological can include issues such as education spending, the extension of Medicaid eligibility beyond minimal federal regulations, and consumer protections.³⁶ Other indicators have much clearer partisan divides. These indicators include gun regulation, abortion issues, and tax progressivity.³⁷ Overall, these different types of issues can be used to determine the general policy liberalism of a state.

A Basis for Journalist's Privilege

The underlying rationale for the First Amendment is that free expression is crucial to a functioning democracy.³⁸ Many journalists have maintained that the First Amendment's guarantees of free expression include a journalist's privilege.³⁹ Some First Amendment theorists have agreed with this idea. Particularly, Vincent Blasi has suggested that courts should recognize that the First Amendment protects journalist's confidential sources.

Blasi explained that First Amendment theories established three rationales to justify the freedom of expression.⁴⁰ The rationales included individual autonomy, diversity, and self-government.⁴¹ The individual autonomy rationale suggested that an uninhibited flow of information allowed individuals to develop personal beliefs.⁴² The diversity rationale rested on the principle that diverse ideas and opinions are good for a

³⁶ Erikson et al., *supra* note 33, at 75.

³⁷ Gray et al., *supra* note 34, at 415.

³⁸ See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

³⁹ *Garland v. Torre*, 259 F.2d 545 (2nd Cir. 1958).

⁴⁰ Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 524 (1977).

⁴¹ *Id.*, at 524.

⁴² *Id.*, at 544.

society.⁴³ The self-government rationale was based on the idea that citizens need information to make choices about their government.⁴⁴ The rationales were not independently unique from each other.⁴⁵ Each rationale also primarily focused on the freedom of speech.

Blasi suggested that First Amendment theory should include a fourth rationale that was specific to the press. He called the additional rationale the checking value. The checking value is the idea that freedom of expression is crucial because it checks the abuse of governmental power.⁴⁶ Blasi argued that this rationale should create protections specifically for the press. A strong institutional press could check the power of large corporations and governmental institutions.⁴⁷ One specific protection Blasi suggested was the protection of newsgatherers from subpoenas requesting information about confidential sources.⁴⁸ A journalist's sources could be the subject of punishment from the exposed power abusers. Therefore, the checking power of the press needed to place high value on the protection of journalists' confidential sources who expose corruption to the public.⁴⁹

Blasi's ideas of the value of checking the abuse of power was not new. Historic discussions of a free press have often focused on a checking value. Andrew Hamilton, serving as defense attorney in the famous libel case against John Peter Zenger, argued that people had the right to expose and oppose the abuse of official power through the

⁴³ *Id.*, at 549-550.

⁴⁴ *Id.*, at 554-555.

⁴⁵ *Id.*, at 565.

⁴⁶ *Id.*, at 527.

⁴⁷ *Id.*, at 541.

⁴⁸ *Id.*, at 605.

⁴⁹ *Id.*, at 603.

press.⁵⁰ In his opposition to the Alien and Sedition Acts of 1798, James Madison argued that the press' role was to have a critical eye on the government.⁵¹ Alexis de Tocqueville suggested that press freedom was the only way to protect citizens from government agents who violated the law.⁵² More recent discussions of a free press have also noted a checking function. Former Justice Potter Stewart suggested that the purpose of a constitutional guarantee for a free press was to create a fourth branch of government. A free press was an additional check on the three branches of government.⁵³ Baker suggested a free press plays an important role in checking governmental and corporate power.⁵⁴

The checking value of the press provides a strong argument for journalist's privilege. Confidential sources who expose the corruption of power provides information to citizens so they can make informed decisions. In fact, the checking value of the press was invoked in one of the press' greatest victories at the Supreme Court. Former Justice Hugo Black's concurring opinion in *New York Times Co. v. United States*⁵⁵ stated that the press was protected specifically so it could inform citizens of government wrongdoings.⁵⁶ This important role for the press should not be understated.

Journalist's privilege can certainly have drawbacks, though. Journalist's privilege can create significant legal problems. The privilege can conflict with a criminal

⁵⁰ See a reprint of the famous case in *The Trial of John Peter Zenger*, in THREE TRIALS: ZENGER, WOODFALL & LAMBERT: 1765-1794 46 (Stephen Parks ed., 1974).

⁵¹ James Madison, *Report on the Virginia Resolutions, January 7, 1800*, in SELECTED WRITINGS OF JAMES MADISON (Ralph Ketcham ed. 2006).

⁵² ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 211 (Gerald E. Bevan trans., 2003).

⁵³ Potter Stewart, *Or of the Press*, 26 HASTINGS L. J. 631, 708 (1975).

⁵⁴ C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 132-134 (2002).

⁵⁵ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

⁵⁶ *Id.*, at 717.

defendant's constitutional rights.⁵⁷ The protection of confidential sources can also prevent all of the facts coming to light in civil litigation. Journalists who invoke a journalist's privilege and refuse to reveal the names of confidential sources could potentially prevent justice.⁵⁸

An example of such a situation was Judith Miller's protection of a source who leaked the name of C.I.A. operative Valerie Plame. The confidential source, later identified as Vice President Dick Cheney's chief of staff, I. Lewis "Scooter" Libby, gave Miller information about Plame as a way to strike back at Plame's husband. Her husband had been critical of statements that President George Bush had made about Iraq's attempts to develop weapons of mass destruction. The disclosure of a covert C.I.A. operative is a violation of federal law. When Miller was called to testify before a federal grand jury, she refused to provide information. As a result, she was found in contempt and jailed. Miller appealed, but the U.S. Court of Appeals for the D.C. Circuit refused to grant Miller's release. Eventually, Libby released Miller from their confidentiality agreement. Miller testified before the grand jury after spending 85 days in jail.⁵⁹

Although Miller's source was eventually identified, the case highlighted multiple problems that could arise when a journalist refuses to identify a confidential source. The revelation of Plame's status as an undercover operative could have put her and perhaps other C.I.A. operatives in danger. The government was delayed from moving forward with an investigation into a clear violation of law. Plame was prevented from learning who derailed her career. The fact that Miller refused to name her source for so long also

⁵⁷ See generally David N. Edelstein and Robert P. LoBue, *Journalist's Privilege and the Criminal Defendant*, 47 *FORDHAM L. REV.* 913 (1979).

⁵⁸ Randall D. Eliason, *The Problems with Reporter's Privilege*, 57 *AM. U. L. REV.* 1341, 1375 (2008).

⁵⁹ For a more detailed account of the Miller affair, see Jill Lapotsky, *Protecting the Cloak and Dagger with an Illusory Shield: How the Proposed Free Flow of Information Act Falls Short*, 62 *FED. COMM. L. J.*, 403, 415-419 (2010).

did not result in a free flow of information. Rather, Miller's belief in journalist's privilege hindered the public from learning which government official was unlawfully releasing information.⁶⁰ Journalists often laud the protection of confidential sources as noble. In reality, a journalist's protection of a source can have several negative consequences.

Journalists and Confidential Sources

Journalists use sources, people with direct knowledge of the information being reported, to provide insight on subjects.⁶¹ Effective journalism practice typically requires a reporter to fully disclose the name and pertinent information about a source. Full disclosure makes a journalist's reporting reliable, believable and verifiable.⁶² At times, though, some sources will only provide information if journalists make a promise of confidentiality.⁶³ Journalists will make such a promise so that more information can be provided to citizens.⁶⁴

Confidential sources come in several different types. Accusers hide behind the cloak of confidentiality to make accusations about another person. Tipsters direct journalists to important, unknown information. The stigmatized sources could face public ridicule because they reveal potentially embarrassing information about themselves. Explainers provide background information about the inner-workings of government or corporations. Informants expose governmental and corporate abuses of power. Typically, the informant is the type of source that a journalist's privilege aims to protect. As Blasi

⁶⁰ Eliason, *supra* note 58, at 1375-1378.

⁶¹ JAMES W. KERSHNER, *THE ELEMENTS OF NEWS WRITING* 48 (2005).

⁶² HOWARD C. HEYN & WARREN J. BRIER, *WRITING FOR NEWSPAPERS AND NEWS SERVICES* 48 (1969).

⁶³ HERBERT STRENTZ, *NEWS REPORTERS AND NEWS SOURCES: ACCOMPLICES IN SHAPING AND MISSHAPING THE NEWS* 63 (1978).

⁶⁴ *Id.*, at 55.

suggested, confidential sources who expose the abuse of power are the people that need the most protection.⁶⁵

Unsurprisingly, surveys have shown journalists most often use confidential sources to report on governmental affairs, crime and politics.⁶⁶ Although state and federal whistleblower statutes provide some protection, government officials can still threaten sources. This situation is especially evident with White House administrations increasing the use of the Espionage Act to prosecute information leaks.⁶⁷ The federal and state governments have increased the use of subpoenas to gain information from news organizations in both criminal and civil proceedings.⁶⁸ These governments have also increased the number of subpoenas seeking information that journalists gained from sources in confidence.⁶⁹

The use of confidential sources is widespread, although it appears to be declining. A 1971 survey of journalists indicated that journalists relied on confidential sources in about 20 percent of stories. The survey also found that more experienced journalists used confidential sources more frequently.⁷⁰ A survey of Florida journalists found that the use of confidential sources had declined over the ten years from 1974 to 1984.⁷¹ A survey of Pulitzer Prize winners indicated they used some type of confidential information in about 30 percent of their stories during the same time period, though.⁷² An additional survey of

⁶⁵ Blasi, *supra* note 40, at 603.

⁶⁶ John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence after a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 73-74 (1985).

⁶⁷ David Carr, *Blurred Line Between Espionage and Truth*, N.Y. TIMES, Feb. 26, 2012, at B1

⁶⁸ RoNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 656-658 (2008).

⁶⁹ *Id.*, at 642-643.

⁷⁰ Vincent Blasi, *Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 247 (1971).

⁷¹ Byron St. Dizier, *Reporters' Use of Confidential Sources, 1974 and 1984: A Comparative Study*, NEWSPAPER RES. J., Summer 1985, at 44-50.

⁷² Osborn, *supra* note 66, at 73.

300 television and newspaper journalists indicated that 76 percent believed the use of confidential sources was essential to reporting some of their stories.⁷³

Overall, journalists also do not take the use of confidential sources lightly. Most journalists are dedicated to protecting their sources. Surveys of journalists in 1982, 1992, and 2002, found that less than 10 percent of journalists believed that there was justification for agreeing to protect confidentiality and not doing so.⁷⁴

A 1996 survey of editors at 64 large-circulation American daily newspapers found that 92 percent allowed the use of confidential sources.⁷⁵ Even though using confidential sources was widespread, editors allowed journalists to use these sources only with discretion. Nearly all surveyed editors allowed the use of confidential sources only as a last resort to gain information. About 80 percent of the editors said confidential sources must be described in as much detail as possible in a story. More than three-fourths of editors required reporters to disclose names of confidential sources to them. A similar proportion of papers required additional verification steps of the confidential source's information.⁷⁶

The use of confidential sources has benefits. One study found that stories with confidential sources were more critical than other stories. The research suggested that confidential sources lead to greater diversity of viewpoints and criticism of those in

⁷³ U. OF CONN., NATIONAL POLLS OF JOURNALISTS AND THE AMERICAN PUBLIC ON FIRST AMENDMENT AND THE MEDIA RELEASED 3 (2005), <http://www.ux1.eiu.edu/~bpoulter/2001/pdfs/ucon%20first%20amendment.pdf>.

⁷⁴ DAVID H. WEAVER ET AL., THE AMERICAN JOURNALIST IN THE 21ST CENTURY: U.S. NEWS PEOPLE AT THE DAWN OF A NEW MILLENNIUM 162-163 (2007).

⁷⁵ Charles N. Davis & Susan D. Ross, *How Newspaper Editors Feel about Confidential Sources in Wake of Cohen v. Cowles*, NEWSPAPER RES. J., Summer/Fall 1996, at 93.

⁷⁶ *Id.*, at 93-94.

power. The author suggested that this diversity and criticism has civic value.⁷⁷ Sources could also be more willing to publicly share information when a journalist promises confidentiality. The ability to grant confidentiality to a source allows journalists to present a richer understanding to citizens. Journalists can then provide a more accurate picture of reality to the public.⁷⁸

Journalists' use of unnamed sources has significant pitfalls, though. Readers view stories without named sources as less credible.⁷⁹ Sources who are granted confidentiality also could feel free to say whatever they want without feeling accountable for their statements.⁸⁰ In the most alarming situations, journalists can completely fabricate information and then claim that it came from confidential sources. One high profile example of this was former *Washington Post* reporter Janet Cooke's story about "Jimmy," an 8-year-old heroin addict. Cooke convinced her editors that she could not reveal the identity of Jimmy because of promises of confidentiality. The revelation that the story was fabricated came out after Cooke had won a Pulitzer Prize.⁸¹

The Historical Development of Journalist's Privilege

Journalistic protections of confidential information can be found as early as colonial times in America. Shepard suggested that the duty to protect confidential identities started with colonial publishers who kept the names of their anonymous writers

⁷⁷ William B. Blankenburg, *The Utility of Anonymous Attribution*, *NEWSPAPER RES. J.*, Winter/Spring 1992, at 18-19.

⁷⁸ JIM WILLIS, *THE MIND OF A JOURNALIST: HOW REPORTERS VIEW THEMSELVES, THEIR WORLD, AND THEIR CRAFT* 19 (2010).

⁷⁹ Miglena Mantcheva Sternadori & Esther Thorson, *Anonymous Sources Harm Credibility of All Stories*, *NEWSPAPER RES. J.*, Fall 2009, at 62-64.

⁸⁰ WILLIS, *supra* note 78, at 20.

⁸¹ Alicia C. Shepard, *Anonymous Sources*, *AM. JOURNALISM REV.*, (Dec., 1994), available at <http://www.ajr.org/Article.asp?id=1596>.

confidential.⁸² Particularly, the early cases of jailed publishers James Franklin and John Peter Zenger set the foundation for such protection.⁸³ James Franklin began publishing the *New-England Courant* in 1721. The *Courant* made a habit of criticizing both public and religious officials.⁸⁴ The *Courant* used writers who had pseudonyms or were anonymous. The *Courant's* criticisms often resulted in Franklin being the subject of local government's ire. Unsurprisingly, Franklin was jailed several times but did not reveal the names of the different writers.⁸⁵

In 1734, Zenger, publisher of the *New York Weekly Journal*, ran into trouble when he published a series of critical articles about Governor William Cosby. Unappreciative of the criticism, Cosby ordered Zenger to be arrested and charged with seditious libel. The jailed Zenger refused to reveal the names of people who had written the offensive articles.⁸⁶ Zenger was eventually acquitted of the charges after his lawyer, Andrew Hamilton, convinced a jury that the truth could not be libelous. Although the case focused on libel, Shepard pointed out that Hamilton addressed the idea of confidentiality. Hamilton maintained that Zenger's protection of the authors' identities was rooted in the right of speaking and writing to oppose unrestrained power.⁸⁷

Granted, neither of these publishers held the conception of a privilege that many journalists hold today. Rather, both publishers placed high value on anonymous speech. The publishers protected the writers of news stories, which Shepard suggested is not dissimilar from contemporary journalists' arguments to protect information about

⁸² JASON M. SHEPARD, PRIVILEGING THE PRESS: CONFIDENTIAL SOURCES, JOURNALISM ETHICS AND THE FIRST AMENDMENT, 112 (2011).

⁸³ *Id.*

⁸⁴ See JEFFERY A. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM 96-104 (1988).

⁸⁵ SHEPARD, *supra* note 82, at 108-111

⁸⁶ CHARLES W. WHALEN, JR., YOUR RIGHT TO KNOW 12 (1973).

⁸⁷ SHEPARD, *supra* note 82, at 112

sources.⁸⁸ Modern journalists argue that many sources need assurances of confidentiality. Any revelation of a source's identity might lead to some form of punishment. Both Franklin's and Zenger's anonymous writers could have faced sanctions if the government knew their identities.

During the 19th and 20th centuries, journalism continued to develop. The 19th century saw the rise of modern conceptions of journalism through the penny press.⁸⁹ Newspapers changed from being the mouthpieces of political parties to objective purveyors of truth. Journalism also began its professionalization process in the early 20th century. The process resulted in universities creating journalism programs, journalists stating their importance to the public, the creation of professional organizations, and the development of journalistic codes of ethics.⁹⁰

During the 1800s and early 1900s, journalist's privilege also developed. The 19th century saw multiple examples of journalist being jailed for refusing to disclose the names of confidential sources.⁹¹ In 1848, the United States Senate held New York Herald journalist John Nugent in a committee room for a month. Nugent refused to identify who gave him information about a secret treaty to end the United States' war with Mexico.⁹² James W. Simonton of the New York Daily Times was jailed in 1857 for refusing to disclose who gave him information about land speculators giving bribes to U.S. representatives.⁹³ Journalists Elisha J. Edwards and John S. Shriver found themselves in

⁸⁸ *Id.*, at 112-113.

⁸⁹ See MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* 12-59 (1978).

⁹⁰ See generally MARION TUTTLE MARZOLF, *CIVILIZING VOICES: AMERICAN PRESS CRITICISM 1880-1950*, 14 (1991); Stephen A. Banning, "Truth is Our Ultimate Goal": A Mid-19th Century Concern for Journalism Ethics, 16 *AM. JOURNALISM* 17 (1999); SHEPARD, *supra* note 82, 113-120.

⁹¹ SHEPARD, *supra* note 82, 120-125.

⁹² *Id.*, at 121.

⁹³ *Id.*, at 122.

jail after they refused to reveal their sources of information about senators receiving bribes from the sugar industry.⁹⁴ The 20th century also had several instances of journalist's privilege cases. State and federal appellate courts had addressed issues of journalist's privilege in nine criminal cases between 1900 and 1960.⁹⁵ Journalists lost all decisions on the privilege during that time span, even in states that had enacted a shield statute.⁹⁶

During the 19th and early 20th century, journalist's used different justifications for concealing the identities of their sources. Journalists argued that they would lose the ability to effectively do their jobs if the government required the disclosure of confidential sources' names.⁹⁷ Journalists invoked constitutional rights against self-incrimination.⁹⁸ Journalistic codes of ethics also began to allude to the idea that journalist's had a duty to protect sources. By the 1940s, many ethical codes specifically addressed the protection of confidential sources.⁹⁹ In fact, codes of ethics continue to state the importance of journalists keeping promises of confidentiality.¹⁰⁰ All of these arguments rose out of the idea that journalists were professionals. As professionals, journalists needed to distinguish themselves from other citizens. The argument that journalists should not be required to testify about sources was one way in which they could set themselves apart from the general populace.

⁹⁴ *Id.*, at 123.

⁹⁵ David S. Allen, *Professionalization and the Narrative of Shield Laws: Defining Journalism and the Public Sphere*, 229 (1992) (unpublished Ph.D. dissertation, University of Minnesota) (on file with Wilson Library, University of Minnesota).

⁹⁶ *Id.*

⁹⁷ *Id.*, at 231-232.

⁹⁸ *Id.*, at 230-231.

⁹⁹ SHEPARD, *supra* note 82, at 116.

¹⁰⁰ See "Statement of Principles," American Society of News Editors, <http://asne.org/content.asp?pl=24&sl=171&contentid=171> (last visited Jul. 1, 2013); "SPJ Code of Ethics," Society of Professional Journalists, <http://www.spj.org/ethicscode.asp> (last visited Jul. 1, 2013); "RTDNA Code of Ethics," Radio Television Digital News Association, http://www.rtdna.org/content/rtdna_code_of_ethics (last visited Jul. 1, 2013).

In the middle of the 20th century, journalists began making a new argument in courts of the basis for a privilege. The advancement came in 1958 when a reporter made the argument that the First Amendment provided journalists a testimonial privilege to protect sources.¹⁰¹ *Garland v. Torre*¹⁰² was a libel case in which actress Judy Garland sought the name of a person who made defamatory comments about her in a *New York Herald Tribune* article. Marie Torre, the author of the article, refused to reveal the name of her source because she had promised confidentiality. The trial court held Torre in contempt for her refusal to identify the source. She appealed the decision to the United States Second Circuit of Appeals. In her appeal, Torre claimed that the First Amendment granted journalists a right to protect confidential sources.¹⁰³

Justice Potter Stewart, before his appointment to the United States Supreme Court, wrote the opinion for the Second Circuit Court of Appeals. In the opinion, the court rejected Torre's First Amendment claims. The court acknowledged that the required disclosure of a journalist's sources could potentially abridge press freedom. The court stated that the freedom of the press was not absolute, though. The rights of the press must be balanced against the need of the courts to discover truth.¹⁰⁴ Stewart explained that Garland's request for the name of Torre's source was directly relevant to the case. Stewart also noted that Garland had exhausted all other means to learn the name of the source before she requested the information from Torre. Thus, Torre was obligated to reveal the information.¹⁰⁵ Torre appealed the decision to the United States Supreme

¹⁰¹ SHEPARD, *supra* note 82, at 154.

¹⁰² *Garland v. Torre*, *supra* note 39.

¹⁰³ SHEPARD, *supra* note 82, at 154-155.

¹⁰⁴ *Garland*, *supra* note 39, at 548-549.

¹⁰⁵ *Id.*, 549-551.

Court, but the Court declined to hear the case.¹⁰⁶ Ultimately, Torre spent 10 days in jail.¹⁰⁷ She never revealed her source to anyone, including her family.¹⁰⁸

Garland v. Torre was a significant move forward for journalist's privilege. Prior to the case, journalists had not argued in court that the First Amendment provided journalists the ability to protect sources. Despite Torre's lack of success, other journalists began making similar arguments. Some journalists were even successful in their cases.¹⁰⁹ Over time, state and federal courts began to take different approaches on whether the First Amendment provided a journalist's privilege. The United States Supreme Court needed to determine whether the privilege could be found in the Constitution.

Branzburg v. Hayes

The only time the United States Supreme Court has addressed whether the First Amendment grants a journalist's privilege was in *Branzburg v. Hayes*.¹¹⁰ The case consolidated four cases from lower courts. Two involved Paul Branzburg, a Kentucky journalist, who had written stories about drug use in Jefferson and Franklin counties. In both cases, a grand jury ordered Branzburg to appear and answer questions about the sources of his stories. Branzburg refused to answer maintaining he had a First Amendment privilege to protect the confidentiality of his sources. The Kentucky appellate courts decided that Branzburg did not have such a privilege.¹¹¹

The third case focused on news coverage of the Black Panthers. The Black Panther party in New Bedford, Massachusetts, allowed journalist Paul Pappas into the

¹⁰⁶ *Torre v. Garland*, 358 U.S. 910 (1958) (cert denied).

¹⁰⁷ Nick Ravo, "Marie Torre, 72, TV Columnist Jailed for Protecting News Source," N.Y. TIMES, Jan. 5, 1997, <http://www.nytimes.com/1997/01/05/nyregion/marie-torre-72-tv-columnist-jailed-for-protecting-news-source.html>.

¹⁰⁸ *Id.*

¹⁰⁹ SHEPARD, *supra* note 82, at 158.

¹¹⁰ *Branzburg v. Hayes*, 408 U.S. 665 (1972).

¹¹¹ *Id.*, at 667-672.

group's headquarters to report on an expected police raid. The condition of entry was premised on Pappas' agreement to not disclose anything he saw or heard other than the raid. The raid never occurred. As a result, Pappas did not write a story about what had happened inside the headquarters. Nonetheless, a Bristol county grand jury subpoenaed Pappas. Pappas attempted to have a court dismiss the subpoena on First Amendment grounds without success. Eventually, the Massachusetts Supreme Court ruled that the First Amendment did not grant journalists a testimonial privilege.¹¹²

The final case also involved coverage of the Black Panthers. Earl Caldwell was a *New York Times* reporter assigned to cover various black militant groups. A federal grand jury ordered Caldwell to testify about information on the Black Panthers he obtained in various interviews. Caldwell and the *Times* moved to dismiss the subpoena, stating that the mere appearance before a grand jury would hinder his ability to work with sources in the different groups. A court denied the motion to dismiss. Caldwell still refused to appear, which led to a court finding him in contempt. Eventually, the United States Ninth Circuit Court of Appeals held that the First Amendment did provide a qualified testimonial privilege to protect sources.¹¹³

After hearing the consolidated cases, the Supreme Court determined that the First Amendment did not empower journalists to defy grand juries. Justice Byron White wrote the opinion for the five justice majority. The court held that the Constitution provided a testimonial privilege only against self-incrimination through the Fifth Amendment. The First Amendment did not provide a similar privilege.¹¹⁴ White's opinion also stated that the court was hesitant to grant such a privilege because of the inherent problems in

¹¹² *Id.*, at 672-675.

¹¹³ *Id.*, at 675-679.

¹¹⁴ *Id.*, at 689-690.

defining journalists. The First Amendment did not simply protect professional journalists. The idea of who was a journalist was far more encompassing.¹¹⁵ White's opinion was limited, though. He stated that state courts had the ability to read their state constitutions in a way that provided a journalist's privilege. Also, state legislatures were free to enact statutes that granted journalists a testimonial privilege.¹¹⁶

Justice Lewis Powell wrote a concurring opinion. Justice Powell's opinion has provided the basis for important interpretations of *Branzburg*. He stated that journalists could use the court system if they believed the government was harassing them. Justice Powell believed that courts needed to take a case-by-case approach to balancing press freedoms and the need for journalists' testimony. His opinion suggested that courts should compel a journalist's testimony only when the information was relevant to the case at hand.¹¹⁷

The decision prompted two dissenting opinions. Justice William Douglas dissented because of his belief that the First Amendment was absolute. On those grounds, a journalist did not have to testify.¹¹⁸ He was concerned that journalists' sources would be reluctant to provide important information. The majority's decision could also lead to journalists becoming hesitant to write about particular topics.¹¹⁹ Justice Potter Stewart wrote the other dissenting opinion. Justice Stewart's dissent indicated that he believed the First Amendment did provide a qualified privilege for journalists. His opinion laid out a three-part test that the government must meet before a journalist could be required to disclose a confidential source. The test required the government to show that a

¹¹⁵ *Id.*, at 704.

¹¹⁶ *Id.*, at 706.

¹¹⁷ *Id.*, at 709-710.

¹¹⁸ *Id.*, at 712.

¹¹⁹ *Id.*, at 721.

journalist's testimony was relevant, unavailable through other means, and the government had a compelling need for the information. Upon such a showing, a court could require a journalist to testify.¹²⁰

Over time, both Justice Powell's and Justice Stewart's opinions have been significant. After *Branzburg*, Caldwell's attorney, James Goodale, made the case that Justice Powell's opinion created a plurality decision. He suggested that the concurring opinion recognized that situations could occur when journalists would not be required to provide testimony.¹²¹ Justice Powell's decision also highlighted that the government did not have an absolute right to require a journalist's testimony. If the government has only a qualified right to obtain testimony, Goodale reasoned, then journalists must have a qualified privilege to withhold testimony.¹²² Unsurprisingly, this type of thinking has caused many state and federal courts to recognize a First Amendment privilege in the *Branzburg* decision.¹²³ Justice Stewart's dissenting opinion has become critical because many judges have adopted the three-part test he laid out to balance journalist's rights with a court's search for truth.¹²⁴

Shield Statutes, Journalist's Privilege, and the States

It is important to note the conceptual distinction between journalist's privilege and shield statutes. Journalist's privilege is a testimonial privilege that courts typically find in common law or constitutional law. A person who is allowed to invoke a testimonial privilege can refuse to provide information or testimony that could be

¹²⁰ *Id.*, at 743.

¹²¹ James C. Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L. J. 709, 741 (1975).

¹²² SHEPARD, *supra* note 82, at 219.

¹²³ Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL'Y. 35, 39 (2006).

¹²⁴ SHEPARD, *supra* note 82, at 220-221.

relevant to a trial, hearing, or proceeding. Testimonial privileges typically conflict with the discovery of truth. Therefore, privileges are rare exceptions to rules that require testimony.¹²⁵ Privileges are typically discouraged unless certain conditions are met.¹²⁶ Conceptually different, shield statutes grant journalists a testimonial privilege in some form.¹²⁷ Essentially, all shield statutes are a type of journalist's privilege, but not all forms of journalist's privilege are shield statutes.

Federally, no shield legislation has been passed, but it has been considered. The first significant push for a federal shield law came immediately after the decision of *Branzburg* in 1972.¹²⁸ In the six years following *Branzburg*, Congress made several attempts to pass federal shield legislation. The proposals failed primarily because supporters could not agree on the definition of journalist and press groups' demands for an absolute privilege.¹²⁹ During the 2000s, several high profile cases of journalists spending time in jail for refusing to reveal confidential sources have encouraged Congress to reconsider a federal shield law.¹³⁰ More recently, controversies surrounding the United States Justice Department's use of subpoenas to obtain the phone records of Associated Press journalists have reinvigorated a push for the law.¹³¹ The Free Flow of Information Act¹³² has had some support in Congress over time, but the proposed shield

¹²⁵ See John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW at § 2192 (1961).

¹²⁶ See *Id.* at § 2285.

¹²⁷ See Reporters Committee for Freedom of the Press, "The Reporter's Privilege Compendium: An Introduction," available at <http://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/introduction>.

¹²⁸ SHEPARD, *supra* note 82, at 180.

¹²⁹ Robert D. Lystad, *Anatomy of a Federal Shield Law: The Legislative and Lobbying Process*, 23 COMM. LAW. 3, 14 (2005).

¹³⁰ Charlie Savage, *White House Proposes Changes in Bill Protecting Reporters' Confidentiality*, N.Y. TIMES, Sep. 30, 2009, at A17.

¹³¹ Charlie Savage, *Criticized on Seizure of Records, White House Pushes News Media Shield Law*, N.Y. TIMES, May 15, 2013, at A19.

¹³² The legislation's most recent form was Free Flow of Information Act of 2013, S. 987, 113th Cong. (2013), available at <http://www.govtrack.us/congress/bills/113/s987/text>.

law has consistently failed to gain full approval.¹³³ Controversies surrounding WikiLeaks' disclosure of highly classified government information in 2010 have previously weakened the case for the legislation.¹³⁴

At the state level, thirty-nine states have adopted shield statutes to protect journalists.¹³⁵ In other states, court opinions have provided journalists with shield protection.¹³⁶ States vary in the types of protection provided to journalists. States differ in who is eligible for protection as well as what situations allow journalists to have protection. Some states provide absolute testimonial privileges to journalists. Other states allow the privilege to be overcome if a party seeking information can meet particular conditions.¹³⁷ States have developed differing views as to whether non-confidential information fell under journalist's privilege.¹³⁸ Overall, states have not taken a uniform approach to establish a journalist's privilege.

Empirical Approaches to Analyzing Law

A call for the use of social science techniques to study media law came from Cohen and Gleason. They suggested that communication scholars should not use the same tools as legal scholars to study media law. Rather, communication scholars should

¹³³ Lapotsky, *supra* note 59, at 406-407.

¹³⁴ See Christina Abello, *Leaked War Documents Spark Federal Shield Law Provisions*, Reporters Committee for Freedom of the Press (Aug. 4, 2010), <http://www.rcfp.org/node/98044>; See Charlie Savage, *After Afghan War Leaks, Revisions in a Shield Bill*, N. Y. TIMES (Aug. 3, 2010), at A12; See Paul Farhi, *Wikileaks Controversy Highlights Debate Over Shield Law*, Washington Post (Aug. 21, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/20/AR2010082005402.html>.

¹³⁵ Kristen Rasmussen, *West Virginia Acting Governor Signs Reporter Shield Law*, Reporters Committee for Freedom of the Press: News Media Update (Apr. 6, 2011), <http://www.rcfp.org/newsitems/index.php?i=11810>. The article states that 40 states have enacted shield laws. On June 30, 2013, Hawaii's shield law was repealed, which brings the total number of states down to 39. See Jack Komperda, *Hawaii Shield Law Will Expire after Lawmakers Unable to Reconcile Competing Bills*, Reporters Committee for Freedom of the Press (May 3, 2013), <http://www.rcfp.org/browse-media-law-resources/news/hawaii-shield-law-will-expire-after-lawmakers-unable-reconcile-compe>.

¹³⁶ See Cong. Research Serv., *supra* note 11.

¹³⁷ See *Id.*

¹³⁸ Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States with Shield Laws*, 4 Comm. L. & Pol'y 325, 349 (1999).

use the tools of communication research to develop additional perspectives on law.¹³⁹

Several scholars have used this type of approach to study variations in media law among states.

Hale attempted to find correlations in an ambitious study of legal press rights in states and categories of state characteristics. He identified 43 variables that fell into five broad categories including media, political, economic, sociological and cultural characteristics.¹⁴⁰ His results indicated that only 25 of the 344 correlations were significant.¹⁴¹ Of the correlations that were significant, most fell within the state's social characteristics. Characteristics such as population size, suburbanism and concentrations of population in a central city were positively correlated with laws protecting the press and access to government information.¹⁴² Political and economic characteristics provided few correlations, though.¹⁴³ Hale concluded that many press law provisions were independent of state characteristics.¹⁴⁴ The conclusion may have been a result of Hale's lack of precision in measuring press law provisions and state characteristics rather than a lack of a state's characteristics in affecting press law.

Other studies have focused on particular laws affecting the press. Pritchard and Nemeth compared state characteristics, specifically policy liberalism and political culture, to the content of the state's public records laws. Their findings indicated that states with higher levels of policy liberalism tended to have more open public record laws. Political culture was not associated with the openness of the state laws, though.¹⁴⁵

¹³⁹ JEREMY COHEN & TIMOTHY GLEASON, *SOCIAL RESEARCH IN COMMUNICATION & LAW* 8 (1990).

¹⁴⁰ F. Dennis Hale, *State Press Law Provisions and State Demographics*, 6 *COMM & L* 31, 33 (1984).

¹⁴¹ *Id.*, at 34.

¹⁴² *Id.*, at 35.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Pritchard & Nemeth, *supra* note 12, at 54.

The results of the study suggested that particular state characteristics influenced laws within a state. If state characteristics influenced one specific type of law, such as public records laws, these characteristics could affect other state media laws.

Pajari compared the relative openness of a state's open records and meeting laws to state characteristics, such as demographics, political culture and regionalism.¹⁴⁶ He used content analysis to classify the openness of the law and then made comparisons. Pajari's findings suggested that states with broader sunshine laws tended to have lower per capita incomes, smaller amounts of public education funding and economic systems that were not heavily based on manufacturing. States with open laws tended to be located in the South and Mountain West regions of the United States.¹⁴⁷ Pajari also found that states with a moralistic political culture tended to have narrow sunshine laws. The relationship between moralistic culture and open records laws was weak, though.¹⁴⁸ Pajari concluded that several sweeping changes in these regions, such as civil rights legislation and economic development, impacted the development of the laws.¹⁴⁹ This study's findings suggested that significant changes to state characteristics, such as the civil rights movement in the south, influenced the make-up of a state's laws.

Some additional studies have provided a basis for comparing state media laws. Hale and Scott examined the impact of the Minnesota News Council on libel litigation. The Minnesota News Council was designed to hear complaints about the accuracy and fairness of Minnesota's news media. Many complaints involved alleged reputational damages. The researchers hypothesized that the presence of the council would slow the

¹⁴⁶ Roger N. Pajari, *A Comparative Analysis of Correlates of State Sunshine Laws* SOUTHEASTERN POL. REV., Sept. 1989, at 77.

¹⁴⁷ *Id.*, at 97.

¹⁴⁸ *Id.*, at 91

¹⁴⁹ *Id.* at 98.

rate of libel suits involving mass media compared to Minnesota's bordering states. Their findings supported the hypothesis. The rate of libel litigation involving mass media was indeed lower in Minnesota than in surrounding states.¹⁵⁰ Their findings indicated that even small changes in state characteristics can have impacts on the law between states.

Hale conducted an additional study that compared the impact of state prohibitions of punitive damages on libel litigation. Hale compared the number of libel litigation appeals involving mass media organizations in five states allowing punitive damages and five states that did not. His findings indicated that the number of appeals was similar in states that did and did not allow punitive damages. The average amount of damages awarded was also similar in both types of states.¹⁵¹ Hale's methodological approach provided alternative insight to defamation law. His findings seem to challenge common thought that plaintiffs and lawyers are more likely to aggressively pursue libel litigation in states allowing opportunities to collect larger amounts of damages. The study also focused on the effects that legal differences between states could potentially have on media law.

Few studies have used empirical methods to analyze the law of journalist's privilege. Most studies on the subject have focused on journalists' use of confidential sources. Many of the studies have examined the effect of subpoenas on journalistic activity. Blasi surveyed journalists on the use of confidential sources and the effects of court subpoenas to testify. Blasi's findings indicated that journalists typically used

¹⁵⁰ F. Dennis Hale & Robert O. Scott, *Impact of the Minnesota News Council on Libel*, AEJMC Southeast Colloquium, Mar. 1991, Orlando, Florida.

¹⁵¹ F. Dennis Hale, *The Impact of State Prohibition of Punitive Damages on Libel Litigation: An Empirical Analysis*, 5 VAND. J. ENT. L. & PRAC. 96 (2002).

confidential sources to verify information that they already have.¹⁵² Reporters believed that subpoena threats made interpretive reporting more difficult.¹⁵³ The surveyed journalists also expressed that ethical obligations to sources should be determined personally rather than in a court.¹⁵⁴ Blasi's findings also indicated that only 35 percent of journalists were certain whether their state had a shield law.¹⁵⁵ His study was a precursor to his further studies on press subpoenas.¹⁵⁶ Osborn also conducted a survey of journalists to measure the effects of subpoenas on the use of confidential sources. His findings suggested that journalists still used confidential sources despite the threat of subpoenas.¹⁵⁷ St. Dizier surveyed Florida reporters to examine whether they used sources differently after the *Branzburg* decision and Janet Cooke scandal. His findings indicated that journalists used confidential sources less frequently and more cautiously.¹⁵⁸

In a study similar to Blasi's study on the impact of subpoenas, Jones conducted a survey of more than 750 daily newspaper editors and television station news directors affiliated with ABC, NBC, CBS and FOX.¹⁵⁹ Among other items, the survey measured newsroom leaders' knowledge of possible protections from subpoenas, such as shield statutes and case law. The results indicated that approximately 20 percent of editors and news directors were not sure whether their state had a shield statute. The results also indicated that news leaders in states with a court-made journalist's privilege were less

¹⁵² Blasi, *supra* note 70, at 284.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*, at 275.

¹⁵⁶ *Id.*, at 230.

¹⁵⁷ Osborn, *supra* note 66, at 77.

¹⁵⁸ St. Dizier, *supra* note 71, at 48-49.

¹⁵⁹ RonNell Anderson Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 WASH. L. REV. 317, 350 (2009).

likely to be aware of protections.¹⁶⁰ Jones suggested that some media members are confused about legal protections in their state. Particularly, smaller news organizations tend to be the most misinformed about journalist's privilege.¹⁶¹ Jones' study provided insight into news leaders understanding of journalist's privilege. Unfortunately, it does not provide much information on the law itself.

A 2005 University of Connecticut survey focused on the opinions of the public and journalists. The findings indicated that 87 percent of journalists supported the passage of a federal shield law. The results also suggested that 55 percent of the American public support federal shield legislation for journalists.¹⁶² A 2001 Reporters Committee for the Freedom of the Press (RCFP) survey of journalists about subpoenas suggested some unusual results. In states with shield statutes, news organizations received an average of 3.1 subpoenas per news outlet. News organizations located in states without a shield statute reported receiving an average of 1.7 subpoenas per outlet. These results were similar to previous RCFP surveys that indicated news organizations in states with shield statutes received, on average, more subpoenas than organizations in non-shield statute states.¹⁶³ This finding suggested that one potential reason for the development of a state shield statute could be the number of subpoenas news organizations received. The study also found that news organizations were more likely to have a court dismiss a subpoena in states with shield statutes. News organizations in states with shield statutes reported they were able to quash subpoenas 22 percent of the

¹⁶⁰ *Id.*, at 390.

¹⁶¹ *See Id.*, at 391-392.

¹⁶² U. OF CONN., *supra* note 73.

¹⁶³ AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 2001 (Lucy A. Dalglish & Gregg P. Leslie, eds., 2001), <http://www.rcfp.org/sites/default/files/agents-of-discovery.pdf>.

time.¹⁶⁴ The results could indicate that investigators, courts, or parties to litigation are issuing subpoenas to journalists only when the shield could likely be overcome. Granted, the rate did seem low, but it was higher than the five percent of subpoenas dismissed in non-shield statute states.¹⁶⁵

One study has focused on an analysis of the content of shield statutes.¹⁶⁶ Alexander and Cooper conducted a textual analysis of state shield statutes to determine each statute's relative strength. They judged the statutes based on who was protected, what was protected, when protections apply and whether the privilege had qualifications. The results indicated that many of the state statutes protected similar people and industries. Nearly all newspaper and broadcast outlet employees were protected. Additionally, all state statutes explicitly protected confidential sources. The states did vary what non-traditional journalists might receive protection, though. The states also varied in whether the statutes provided an absolute or qualified privilege. States had several different qualifications that could override a journalist's privilege.¹⁶⁷ Overall, this study provided different insight from other studies because it examined the text of individual statutes. Unfortunately, the researchers did not examine any relevant court decisions on journalist's privilege. The court opinions could establish how journalist's privilege was actually interpreted in the state. The study did not account for how the laws actually behaved because it did not examine court opinions. Several states were also not considered for study because the journalist's privilege had not been written into law.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Laurence B. Alexander & Leah G. Cooper, *Words that Shield: A Textual Analysis of the Journalist's Privilege*, *NEWSPAPER RES. J.*, Winter/Spring 1997, at 51.

¹⁶⁷ *Id.*, 64-65.

The previous studies, while informative, provided very little information on the law of journalist's privilege. In fact, most of the studies focused on ways that the privilege was related to subpoenas. The studies also tended to focus on the perceptions of journalists and editors. The study that focused on the text of shield statutes failed to consider the influence court decisions can have on the interpretation of law. Additionally, the study did not provide any comparison to state characteristics that potentially influenced the development of a state's shield statute. Thus, there is a major gap of knowledge on what state factors can influence the development of states' journalist's privilege.

Hypotheses

The variation of shield protections from state to state leads to the question this thesis will focus on. What characteristics influence the breadth of shield protections in the states? States differ in many ways, but two particular ways in which states can vary are in political culture and policy liberalism. Political culture influences citizen's views of government political participation,¹⁶⁸ so policies shaping the flow of information could also be influenced. Specifically, moralistic political cultures encourage citizens to participate in government. A way to involve people in political participation is to develop a setting with a free flow of information. Moralistic states may recognize that journalist's privilege protections could provide a more open setting for producing information, thus:

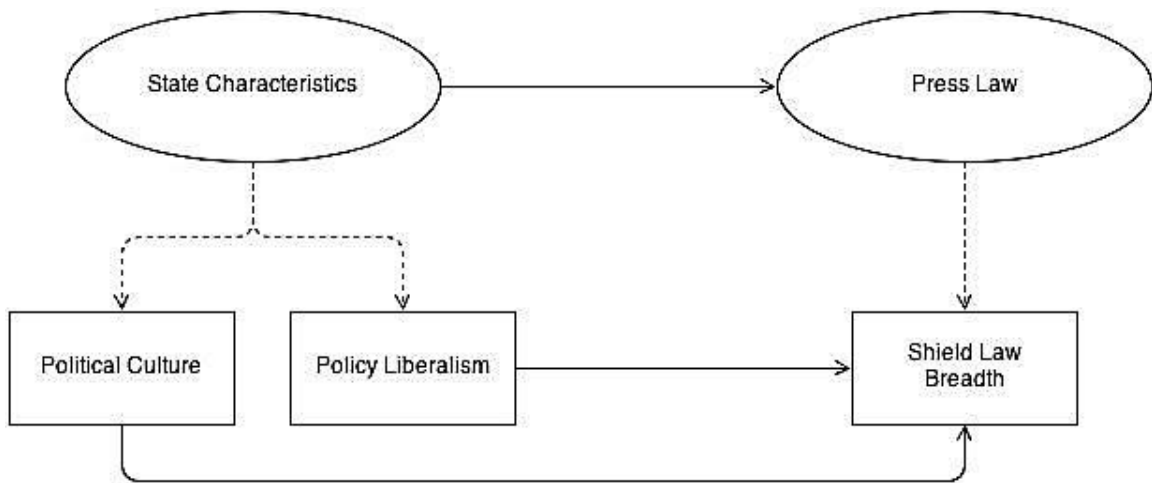
H1: States with moralistic political cultures will provide a broader testimonial privilege for journalists than states with traditionalistic or individualistic cultures.

¹⁶⁸ Elazar, *supra* note 22, at 109.

Policy liberalism has wide-ranging implications for how laws and policies are shaped in a particular state. Shield protections are not likely immune from this influence. Typically, journalists favor legislation that grants more rights for and fewer restrictions on the press. States with higher levels of policy liberalism may tend to have more expansive views of protection for journalists, therefore:

H2: States with higher scores of policy liberalism will provide a broader testimonial privilege for journalists than those states with lower scores.

Figure 2-1: Concepts and hypothesized influence



Chapter 3: Methods

Methodological Approach

This research focused on journalist's privilege as recognized in state constitutions, statutes and state appellate court decisions. Specifically, the goal was to identify whether certain state characteristics influence how broadly a state recognizes journalist's privilege. The units of analysis for the study were states. The units of observation were state constitutions, statutes and relevant state appellate court decisions as well as indicators of political culture and policy liberalism.

The method for the study was content analysis. Content analysis is the systematic analysis of recorded communication.¹⁶⁹ An advantage of this method is that it can turn significant amounts of complicated raw data into a standardized arrangement. The advantage was particularly useful in this study because of the various and complex ways states have recognized journalist's privilege. Content analysis is also useful because the data are quantified. The quantified data are beneficial because comparison and analysis with other quantified data become very easy.

Although the standardization of data is advantageous, it comes at a price. One disadvantage of content analysis is that detail can be lost. This fact is especially important because legal analysis relies on interpretations, context, and the interaction of law. Content analysis of laws and court opinions cannot always account for these factors.¹⁷⁰ Another disadvantage is that content analysis can prevent research from obtaining a high level of validity. It is possible that I overlooked important provisions of journalist's privilege. To counteract this problem, I identified and classified as many provisions of

¹⁶⁹ EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 314 (10th ed. 2004).

¹⁷⁰ Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 *HASTINGS L. J.* 478, 501 (2009).

journalist's privilege as possible. Also, the study examined both shield statutes and state appellate court opinions about journalist's privilege to capture more detail.

Another method this study could have used was textual analysis. Textual analysis is similar to content analysis in that both methods examine recorded communication. Textual analysis, which uses a qualitative approach, aims to provide an understanding of the meaning behind texts. Most legal analysis takes this approach. Although this method provides a deeper understanding of the law, the study's goal was not designed to specifically understand what the law meant. Rather, the study focused on what specific state characteristics can predict the breadth of journalist's privilege. Textual analysis would not produce the proper data to make relevant comparisons.

Data Collection

As noted previously, state statutes, constitutions, and state appellate court decisions shape journalist's privilege. I compiled a variety of information to understand any given state's breadth of journalist's privilege. I identified state shield statutes in several ways. Websites such as the First Amendment Center at Vanderbilt University¹⁷¹ and the *Digital Media Law Project*¹⁷² have compiled lists of state shield statutes. I used the lists to identify the 39 different shield statutes. I then viewed the full text of the statutes in LexisNexis. I used several sources to identify state appellate court decisions that focused on journalist's privilege. Primarily, Westlaw's Key Number Digest database found most opinions.¹⁷³ The Media Law Resource Center's *Media Libel Law* guide¹⁷⁴ and

¹⁷¹ See First Amendment Center, *State Shield Statutes & Leading Cases*, available at <http://www.firstamendmentcenter.org/state-shield-statutes-leading-cases> (last visited July 4, 2013).

¹⁷² See Digital Media Law Project, *State Shield Laws*, available at <http://www.dmlp.org/state-shield-laws> (last visited July 4, 2013).

¹⁷³ The specific key numbers used were 92k2073 (Constitutional Law; Freedom of Speech; Expression and Press, Press in General; Reporter's Privilege), 92k2074 (Constitutional Law; Freedom of Speech;

the Reporters Committee for Freedom of the Press' reporter's privilege compendium¹⁷⁵ provided additional references for state appellate court decisions.

I excluded state trial court opinions primarily for two reasons. First, state trial court decisions rarely appear in standard case law reporters. As a result, a significant number of trial court decisions were unavailable. Second, a trial court's decision is not binding upon higher courts within a state. Therefore, the influence of trial court decisions is limited.

The study limited the analysis to state appellate court decisions from 1964 through 2012. The concept of journalist's privilege certainly extends well beyond the previous five decades. Journalism law markedly changed, with *New York Times Co. v. Sullivan*¹⁷⁶ in 1964, though.¹⁷⁷ The *Sullivan* decision ushered in a new wave of First Amendment understanding. This change shaped the modern forms of media law.

Index of Shield Breadth

I created an index to create a score for the breadth of journalist's privilege in each state. The index allowed for a comparison between state characteristics and a journalist's privilege in states. The index provided equal weight to each factor of law. States that had more factors providing journalist's privilege indicated broader protection.

I used existing literature¹⁷⁸ and state statutes to identify several key factors of the journalist's privilege index. Multiple categories made up a state's journalist's privilege.

Expression and Press, Press in General; Disclosure of Sources), and 311Hk404 (Privileged Communications and Confidentiality; Other Privileges; Journalists).

¹⁷⁴ MEDIA LIBEL LAW 2009-2010: REPORTS FROM ALL FIFTY STATES, THE FEDERAL COURTS OF APPEALS, U.S. TERRITORIES, CANADA, AND ENGLAND (Media Law Resource Center, Inc. ed., 2010).

¹⁷⁵ See Reporters Committee for Freedom of the Press, *The Reporter's Privilege*, available at <http://www.rcfp.org/reporters-privilege> (last visited July 4, 2013).

¹⁷⁶ *Sullivan*, *supra* note 38.

¹⁷⁷ See generally Anthony Lewis, MAKE NO LAW (1991).

¹⁷⁸ Alexander & Cooper, *supra* note 175, at 51-71; Cong. Research Serv., *supra* note 11.

Each category had several different provisions. The first category was the source of protection. States have found a basis for journalist's privilege in several different ways. States have enacted statutes that create a testimonial privilege. States could base the protection in state constitutions through amendments or court opinions. State appellate courts have also found a basis for journalist's privilege in the First Amendment. Another source for journalist's privilege also came from the judge-created common law.

Each source for journalist's privilege had advantages and disadvantages. Shield statutes and amended constitutions provided specific language of the types of protections. Specific language gave journalists a relatively clear idea of whether certain types of information could be protected. Courts were often reluctant to interpret statutes in ways that are outside the plain meaning of a statute, though. Therefore, a shield statute could be limiting at times. A journalist's privilege based in court opinions could potentially be more dynamic. Courts have the ability to be flexible. Courts could continue to broaden protections for journalists in states without a privilege. The disadvantage of a privilege based in court opinions was that some decisions were later overruled. Courts that once provided broad protections could certainly narrow the privilege in the future.

The second category was the scope of journalist's privilege. States with a broader privilege recognized that journalists protected information other than a confidential source. Additional materials included unpublished information such as notes, drafts, unused footage, tape recordings, and photographs. States that protected these types of materials, even if they did not identify a confidential source, had a broader privilege. In some states, the privilege only applies if journalists made an explicit promise of confidentiality to a source. States with a broader privilege provided protection for sources

regardless of confidentiality. Finally, some states granted protection for a journalist's eyewitness observations. States that protected such observations had a broader privilege.

The third category was the different contexts in which journalists could invoke the privilege. States that grant broad protections protect in several different situations.

Journalists receive subpoenas that request information in a variety of settings.

Investigators or investigative bodies, such as grand juries, have requested information from journalists. Legislative bodies have called upon journalists to reveal information.

Criminal defendants asked for information to aid in their defense. Parties in civil

litigation attempted to require testimony from non-party journalists. Libel plaintiffs

sought the names of confidential sources to pursue legal action. States with a broader

privilege provided protection in more of these contexts. The type of protection was also

important. An absolute privilege provided more protection than a privilege that could be

overturned under certain circumstances. States with broader privileges granted an

absolute privilege in more contexts. Additionally, some states provided a qualified

privilege. Any form of a privilege was stronger than no privilege at all.

The final category was based on who was eligible to invoke the privilege. States

with a broader privilege allowed for shield protections to extend to people besides

traditional media. Traditional journalists are not the only people who use confidential

sources while engaged in journalistic activities. Freelance journalists, authors, bloggers,

academics, students, documentarians and issue activists have used confidential sources to

gather information. These types of people gathered information with the specific intent to

disseminate and publish. States with broader protections extended privileges to more

kinds of information gatherers and disseminators. States that had a narrow privilege protected only journalists associated with traditional news organizations.

Coding and Analysis

The coding varied slightly depending on the information. I coded both the source of journalist's privilege and who could invoke the privilege as either a 2 or 0 for yes or no, respectively. I coded the scope of a state's privilege as a 2, 1, or 0. A 2 meant that the type of information was protected. A 1 meant some types of the information could be protected. A 0 meant that the information was not protected. I also coded the context in which the privilege applied as a 2, 1, or 0. A 2 meant that journalists had an absolute privilege in that type of setting. A 1 meant that journalists had a qualified privilege in that type of setting. A 0 meant journalist's privilege was not available in that setting. Upon completion of the state's coding, I summed the state's coded numbers to create a final score for a state's journalist's privilege shield strength.¹⁷⁹

Once in numerical form, the breadth of journalist's privilege was compared to state characteristics. The two characteristics for comparison were policy liberalism and political culture. Policy liberalism had four scores. The first score was Klingman and Lammers' measure of states' general policy liberalism. Klingman and Lammers used six variables to develop a state's score.¹⁸⁰ The variables represented a range of expenditure-based and non-fiscal policy. The measures were based on data that ranged from 1961 to 1977. The second score was Erikson, Wright, and McIver's score of composite policy liberalism. The scores were based on eight different variables.¹⁸¹ The variables were based primarily on non-fiscal policy areas. The data for the variables represented a state's

¹⁷⁹ The coding scheme materials can be found in Appendix A.

¹⁸⁰ For a full explanation of the variables, see Klingman & Lammers, *supra* note 28, at 599-600.

¹⁸¹ For a full explanation of the variables, see ERIKSON ET AL., *supra* note 30, at 75-76.

policy liberalism around 1980. The third and fourth scores were Sorens, Muedini, and Ruger's scores of state policy liberalism. The scores were based on more than 170 different state and local policies.¹⁸² The variables included both fiscal and non-fiscal state policies. The 2008 score represented a state's policy liberalism as of December 31, 2008. The 2010 score represented a state's policy liberalism as of December 31, 2010.

Table 3-1 reports the policy liberalism scores. The Policy Liberalism Score (1984) indicated the Klingman and Lammers state factor scores of general policy liberalism in the second column.¹⁸³ The scores ranged from -2.061 to 1.862. The higher state scores represented higher levels of policy liberalism. Negative scores indicated a state's tendency to adopt conservative-oriented policies. The Policy Liberalism Score (1993) indicated the Erikson, Wright, and McIver scores in the third column.¹⁸⁴ The scores ranged from -1.54 to 2.12. Once again, higher scores represented a higher level of state policy liberalism. The negative scores indicated states with more conservative policies. The number in parentheses next to each score reported the state's rank on that particular policy liberalism scale. Neither set of researchers had data to for Alaska or Hawaii. The table does not include a score for either state.

The Policy Liberalism Score (2008) indicated the Sorens, Muedini, and Ruger policy liberalism scores for 2008 in the fourth column. The scores ranged from -6.558986 to 14.65067. The Policy Liberalism Score (2010) indicated the policy liberalism scores for 2010 in the fifth column. The scores ranged from -5.700675 to 14.65067. For both scores, higher scores represented higher levels of policy liberalism.

¹⁸² For a full explanation of the variables, see Jason Sorens et al., *U.S. State and Local Public Policies in 2006: A New Database*, 8 ST. POL. & POL'Y. Q. 309 (2008).

¹⁸³ Klingman & Lammers, *supra* note 28, at 601-203.

¹⁸⁴ ERIKSON ET AL., *supra* note 30, at 77

Sorens, Muedini, and Ruger did have policy liberalism scores for Alaska and Hawaii. I excluded the scores for two reasons, though. First, Klingman and Lammers as well as Erikson, Wright, and McIver did not have scores for Alaska and Hawaii. Therefore, to make the analysis of policy liberalism more comparable across time, I did not include the Sorens, Muedini, and Ruger scores for those states. Second, Alaska and Hawaii are much newer states than the 48 contiguous states. The development of journalist's privilege in the United States began well before either state was a part of the union. The policy liberalism of the other 48 states likely influenced the early development of journalist's privilege before Hawaii and Alaska had applied for statehood.

Table 3-1: State Policy Liberalism Scores

State	Liberalism Score (1984)	Liberalism Score (1993)	Liberalism Score (2008)	Liberalism Score (2010)
Alabama	-1.285 (44)	-1.45 (45)	-3.86446 (42)	-4.330914 (43)
Arizona	-1.403 (45)	-1.05 (43)	-2.650717 (30)	-3.101448 (38)
Arkansas	-1.863 (47)	-1.54 (48)	-3.561909 (41)	-3.181858 (39)
California	1.464 (4)	1.49 (3)	14.65067 (1)	14.80074 (1)
Colorado	1.121 (9)	0.48 (17)	-0.5932837 (21)	-0.3259152 (23)
Connecticut	1.453 (5)	1.19 (7)	6.87584 (7)	7.541123 (8)
Delaware	0.09 (24)	1.11 (9)	2.719852 (10)	3.481929 (10)
Florida	-0.481 (31)	-0.37 (28)	-0.4811046 (20)	-0.2184499 (21)
Georgia	-0.933 (41)	-1.04 (42)	-3.43501 (39)	-2.934662 (35)
Idaho	0.138 (21)	-0.87 (36)	-5.713753 (45)	-5.594581 (46)
Illinois	0.539 (14)	0.41 (20)	6.8053970 (8)	7.957626 (7)
Indiana	-0.615 (35)	-1.2 (44)	-2.281557 (29)	-2.504499 (29)
Iowa	0.303 (18)	0.44 (18)	-0.4326032 (19)	-0.0544632 (19)
Kansas	0.207 (19)	0.24 (22)	-3.2685320 (36)	-2.92412 (34)
Kentucky	-0.304 (29)	-0.32 (26)	-2.211666 (28)	-2.586181 (31)
Louisiana	-0.668 (36)	-1.04 (41)	-1.773365 (26)	-1.615295 (27)
Maine	0.119 (22)	-0.02 (24)	1.663444 (12)	2.163893 (12)
Maryland	0.393 (15)	0.85 (11)	8.49905 (6)	9.179784 (5)
Massachusetts	1.805 (2)	1.64 (2)	12.6944 (3)	12.58624 (4)
Michigan	1.1 (10)	1.18 (8)	3.35728 (9)	3.886693 (9)
Minnesota	1.227 (8)	0.79 (12)	1.457715 (13)	1.523621 (14)
Mississippi	-2.061 (48)	-1.51 (46)	-4.714653 (43)	-4.158239 (42)
Missouri	-0.895 (39)	-0.55 (31)	-3.490848 (40)	-2.952449 (36)
Montana	0.107 (23)	0.6 (16)	-3.201081 (33)	-2.712624 (32)
Nebraska	-0.251 (28)	0.44 (19)	-3.271613 (37)	-2.76664 (33)
Nevada	-1.17 (42)	-0.35 (27)	-1.7216 (25)	-1.329185 (26)
New Hampshire	0.386 (16)	-0.14 (25)	-0.6467845 (22)	-0.2324234 (22)
New Jersey	1.518 (3)	1.34 (5)	13.11908 (2)	13.12912 (3)
New Mexico	-0.146 (27)	-0.99 (40)	-2.027544 (27)	-1.210673 (25)
New York	1.862 (1)	2.12 (1)	12.60431 (4)	13.15749 (2)
North Carolina	-0.923 (40)	-0.96 (38)	0.2267685 (17)	0.6476505 (17)
North Dakota	-0.11 (26)	-0.52 (30)	-6.558986 (48)	-5.700675 (48)
Ohio	0.145 (20)	0.64 (15)	1.012002 (15)	0.5903817 (18)
Oklahoma	-0.86 (38)	-0.98 (39)	-3.325849 (38)	-3.240067 (40)
Oregon	1.436 (6)	1.39 (4)	0.2098694 (18)	1.387446 (15)
Pennsylvania	1.06 (11)	1.01 (10)	0.6582834 (16)	1.165166 (16)
Rhode Island	0.871 (12)	0.68 (14)	8.74255 (5)	8.671363 (6)
South Carolina	-1.491 (46)	-1.53 (47)	-3.151124 (32)	-2.476265 (28)
South Dakota	-0.582 (32)	-0.95 (37)	-5.468121 (44)	-4.756213 (44)
Tennessee	-1.209 (43)	-0.85 (35)	-3.213797 (34)	-2.582896 (30)
Texas	-0.389 (30)	-0.65 (32)	-3.257484 (35)	-3.431674 (41)
Utah	-0.584 (33)	-0.44 (29)	-5.848618 (46)	-5.03959 (45)
Vermont	0.352 (17)	0.79 (13)	1.394279 (14)	1.936672 (13)
Virginia	-0.738 (37)	-0.84 (34)	-3.144677 (31)	-3.048693 (37)
Washington	0.576 (13)	0.35 (21)	2.63167 (11)	3.041979 (11)
West Virginia	-0.608 (34)	0.12 (23)	-1.5328 (24)	-1.197113 (24)
Wisconsin	1.378 (7)	1.23 (6)	-0.9285712 (23)	-0.1621033 (20)
Wyoming	-0.081 (25)	-0.7 (33)	-6.367966 (47)	-5.5982920 (47)

Note: The number in parentheses indicated the state's overall rank on a scale of 1 to 48.

Sharkansky's state political culture classifications determined a state's political culture.¹⁸⁵ Sharkansky's designations were based on Elazar's work with minor adjustments. Sharkansky identified a variety of indicators that allowed for an empirical measure of state political culture.¹⁸⁶ The process was different than Elazar's, who created his designations based primarily on personal observations. Overall, though, Sharkansky's and Elazar's designations were closely matched.¹⁸⁷

Table 3-2 reports the results of Sharkansky's classifications. Sharkansky's scores identified 18 moralistic states, 18 traditionalistic states, and 14 individualistic states

Table 3-2: State Political Cultures

Moralistic	Individualistic	Traditionalistic
California	Alaska	Alabama
Colorado	Arizona	Arkansas
Connecticut	Hawaii	Delaware
Idaho	Illinois	Florida
Iowa	Indiana	Georgia
Maine	Kansas	Kentucky
Michigan	Massachusetts	Louisiana
Minnesota	Nebraska	Maryland
Montana	Nevada	Mississippi
New Hampshire	New Jersey	Missouri
North Dakota	New York	New Mexico
Oregon	Ohio	North Carolina
Rhode Island	Pennsylvania	Oklahoma
South Dakota	Wyoming	South Carolina
Utah		Tennessee
Vermont		Texas
Washington		Virginia
Wisconsin		West Virginia

¹⁸⁵ Ira Sharkansky, *The Utility of Elazar's Political Culture: A Research Note*, POLITY, Autumn 1969, at 72.

¹⁸⁶ *Id.*, at 74.

¹⁸⁷ *Id.*, at 83.

Validity Check

To ensure that I coded the statutes and court opinions accurately, an additional person coded one state for a validity check. The additional coder and I agreed on most provisions. Of the few disagreements, the other coder and I discussed the particular provision of journalist's privilege. After discussion, we agreed on the correct coding of the law in all cases.

Chapter 4: Results

Coding Results

I collected and analyzed the statutes of 37 states and more than 250 state appellate court decisions for this research.¹⁸⁸ In several states, the shield statute was split between multiple sections of the state code. In two states, the state legislature had not enacted a state shield statute. Rather, the state supreme courts promulgated shield protections into the state rules of evidence.¹⁸⁹ Five states had a shield statute but did not have any state appellate court decisions within the past 50 years that addressed journalist's privilege.¹⁹⁰ Three states did not have a shield statute or have any state appellate court decisions within the past 50 years that addressed journalist's privilege.¹⁹¹

Several states based a journalist's privilege in multiple sources of law.¹⁹² The results of the coding indicated that appellate courts in 19 states recognized a basis for journalist's privilege in the First Amendment. Courts in eight of those 19 states interpreted that their state constitution also provided a journalist's privilege. Every state that had a basis for the privilege in the state constitution also found the privilege in the First Amendment. No state held that the state constitution alone provided a journalist's privilege. California was the only state that had language that explicitly created a journalist's privilege in the state constitution.

Thirty-seven states had legislatively enacted shield statutes. In 23 of those states, the statute was the only source of the state's journalist privilege. One state, New Mexico,

¹⁸⁸ See Appendix C for a complete list of the laws and appellate court decisions analyzed. A description of each state's journalist's privilege is also included in Appendix B.

¹⁸⁹ Utah's and New Mexico's shield laws were both established through the actions of the state supreme court.

¹⁹⁰ See Appendix C: Alabama, Connecticut, Delaware, Nebraska, and Utah.

¹⁹¹ See Appendix C: Hawaii, Mississippi, and Wyoming.

¹⁹² See Appendix B: Results of coding for the source of journalist's privilege.

had legislatively enacted a shield statute that the state supreme court later declared unconstitutional.¹⁹³ Although New Mexico's statute is still on the books, I did not code New Mexico as having a legislatively-enacted shield statute.

Six states found a basis for journalist's privilege in the common law. The common law was the only basis for journalist's privilege in South Dakota and Massachusetts. In Utah and New Mexico, the state supreme court promulgated the privilege into the state rules of evidence. Therefore, I coded that the shield protection in Utah and Mexico were found in the common law. The other two states, Idaho and Washington, based the journalist's privilege in other sources of law in addition to the common law basis.

Hawaii, Mississippi and Wyoming did not have any source for journalist's privilege. The appellate courts within those states had not recognized journalist's privilege in the First Amendment, state constitution, or the common law. The three states also did not have a legislatively enacted shield. Hawaii previously had a shield statute, but it expired in 2013.¹⁹⁴

The scope of protection represented the different types of information that journalists could protect.¹⁹⁵ The coding for this category represented only whether information could potentially receive protection. Every state that recognized a journalist's privilege provided protection for confidential sources. Thirty-four states allowed journalists to refuse to reveal information about sources whether or not the journalists promised confidentiality.

¹⁹³ *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (N.M. 1976).

¹⁹⁴ Jack Komperda, *Hawaii Shield Law Will Expire after Lawmakers Unable to Reconcile Competing Bills*, Reporters Committee for Freedom of the Press (May 3, 2013), <http://www.rcfp.org/browse-media-law-resources/news/hawaii-shield-law-will-expire-after-lawmakers-unable-reconcile-compe>.

¹⁹⁵ See Appendix B: Results of coding for scope of privilege protections.

Thirty states extended some form of protection to journalists' unpublished information. Unpublished information that was protected typically included notes, outtakes, photographs, and film recordings. Statutes and state appellate court decisions provided protection for unpublished information. None of the states made distinctions among different types of information. The only distinction that courts made was for personal observations. Observations were accounted for in a different category.

Six states expressly provided protection to journalists' personal observations. Many states did not address whether a journalist's personal observations were protected. The six states that protected observations specifically discussed that type of information either in the shield statute or court decisions. Of the six states, California was the only one that indicated it protected all of a journalist's observations. The other five states made exceptions for the different kinds of observations a journalist could protect. Typically, journalists could not refuse to testify about eyewitness observations of certain crimes or acts of violence.

Journalists could invoke the different types of a testimonial privilege in different settings.¹⁹⁶ Thirty-two states had a qualified privilege in the situations when the privilege applied. The other 15 states provided journalists with an absolute privilege in at least one setting. In five states, journalist's privilege could be used in only one context. Each of these states had only recognized a privilege through court opinions.

Journalist's privilege in 36 states granted journalists some form of protection from investigative subpoenas. Thirty-one states provided journalists a privilege in legislative hearings. Forty-three states provided protection to journalists in non-libel civil litigation. In each of the different situations, twelve states granted an absolute privilege. Journalists

¹⁹⁶ See Appendix B: Results of coding for situations when privilege applies.

could refuse to provide information to criminal defendants in 44 states. Only five states provided an absolute privilege in this context. Finally, 39 states granted journalists a privilege when they are libel defendants. Nine states allowed an absolute privilege.

Four states appeared to provide an absolute journalist's privilege in any type of setting. In two of the states, Alabama and Nebraska, appellate courts had not interpreted the statute. Another four states provided an absolute privilege in all settings except when criminal defendants needed information to maintain a defense. In those situations, each of the states held that the privilege was qualified. In several of these states, the shield statute had granted an absolute privilege but state appellate courts indicated that a criminal defendant's constitutional rights trumped the shield.

States varied on who could invoke the journalist's privilege.¹⁹⁷ A total of 44 states expressly allowed newspaper employees to claim journalist's privilege. Three states that did not protect newspaper journalists had established journalist's privilege through court opinions. None of the cases had involved newspapers. Although newspaper reporters would likely be covered, the state had not specifically addressed the issue. Therefore, I did not code newspaper reporters as having the privilege. The other three states where newspaper journalists were not protected did not recognize a journalist's privilege.

Forty-four states provided journalist's privilege to television reporters. Employees of radio media could invoke journalist's privilege in 39 states. Journalists in television and radio media are typically considered traditional journalists. The likelihood of a state extending the privilege to these types of journalists is very high. States without shield statutes have simply not addressed cases that involve radio and television journalists in state appellate courts. Once again, I did not code these journalists as having the privilege.

¹⁹⁷ See Appendix B: Results of coding for who can invoke journalist's privilege.

Journalists for print media other than newspapers could invoke the privilege in 36 states. Freelance journalists could also claim the privilege in 37 states. Freelance journalists were often covered in state statutes that granted protection to any person connected with news media. Only 10 states allowed book authors to use the privilege.

Journalists who work for news media that publish exclusively online were explicitly covered in nine states. Bloggers who publish independently were not covered in any state. The language of some state shield statutes stated that journalists who published information electronically were entitled to protection. Internet journalists and bloggers certainly publish information electronically. The state was coded as providing the privilege to Internet journalists only if a state's statute or appellate courts specifically addressed Internet journalists, though.

As a whole, many states did not extend protections to non-traditional journalists. The Maryland and West Virginia shield statutes granted student journalists protection. Academic researchers in Delaware and Texas could invoke the privilege. Alaska, Illinois, and Louisiana have extended the privilege to documentary filmmakers. California allowed issue activists to use journalist's privilege when they function as journalists. Finally, New Jersey has considered the publisher of an annual report rating insurers as a journalist for the purposes of the privilege.

On average, states that recognized journalist's privilege protected 4.85 different categories of people. New Jersey and Texas had the broadest definitions of journalists. Both states provided the privilege to eight types of people. California, Maryland and Washington also granted the privilege to seven different categories. Missouri, South

Dakota, Vermont and Virginia’s definition were the narrowest with each state providing the privilege to one category. None of these states had a shield statute, though.

Table 4-1 reports the total score for each state on the state shield breadth index. California’s score of 36 was the highest among the states. Three states, Hawaii, Mississippi and Wyoming, had scores of zero. None of the three states had recognized journalist’s privilege in state appellate court decisions or state statutes. The mean score was 21.36. The mode for the data set was 23 with seven states having that score.

If the three states without a statute or appellate court decision recognizing journalist’s privilege are removed, the mean score was 22.72. The lowest score was seven. Missouri, South Dakota, and Virginia all scored seven on the shield breadth index.

Table 4-1: Index score of individual state shield breadth

State	Total	State	Total
California	36	North Carolina	24
New Jersey	34	Alaska	23
Texas	31	Arkansas	23
Nebraska	30	Colorado	23
Wisconsin	30	Indiana	23
Louisiana	29	Michigan	23
New York	29	North Dakota	23
Washington	29	South Carolina	23
Delaware	28	Georgia	22
Florida	28	Tennessee	22
West Virginia	28	Utah	19
Maryland	27	New Mexico	18
Oregon	27	Maine	17
Kansas	26	Rhode Island	17
Montana	26	Idaho	16
Oklahoma	26	Iowa	13
Illinois	25	New Hampshire	13
Minnesota	25	Massachusetts	12
Nevada	25	Vermont	9
Ohio	25	Missouri	7
Pennsylvania	25	South Dakota	7
Alabama	24	Virginia	7
Arizona	24	Hawaii	0
Connecticut	24	Mississippi	0
Kentucky	24	Wyoming	0

Political Culture and Journalist's Privilege Protections

Table 4-2 reports the means comparison test of the state shield strength index score according to state political culture.

Table 4-2: Means comparison test of shield strength according to political culture.

Political Culture	Mean	Number of cases	Standard Deviation
Individualistic	21.50	14	10.301
Moralistic	20.94	18	7.658
Traditionalistic	21.67	18	8.534
Shield Strength Index Score	21.36	50	8.595

The first hypothesis suggested that states with moralistic political culture would provide broader protections for journalists than states with traditionalistic or individualistic cultures. Individualistic states had an average score of 21.50. Traditionalistic states had an average score of 21.67. Moralistic states had an average score of 20.94. The scores were not significantly different from each other. Therefore, the data did not support the first hypothesis.

Policy Liberalism and Journalist's Privilege Protections

The second hypothesis suggested that states with higher scores of policy liberalism would provide broader protections for states than those with lower scores. To test the hypothesis, I used Pearson correlations to examine the relationships between the Klingman and Lammers (1984) policy liberalism scores, the Erikson, Wright, and McIver (1993) policy liberalism scores, Sorens, Muedini, and Rutgers 2008 and 2010 policy liberalism scores, and the index of shield strength. The results of the test are reported in Table 4-3.

Table 4-3: Correlations of policy liberalism and shield strength.

	<i>Klingman & Lammers Score (1984)</i>	<i>Erikson, Wright, & McIver Score (1993)</i>	<i>Sorens, Muedini, & Ruger Score (2008)</i>	<i>Sorens, Muedini, & Ruger Score (2010)</i>
<i>Index of Shield Strength</i>	.272*	.346**	.345**	.337**
<i>R²</i>	.074	.120	.119	.113

N = 48 * p < .05 ** p < .01

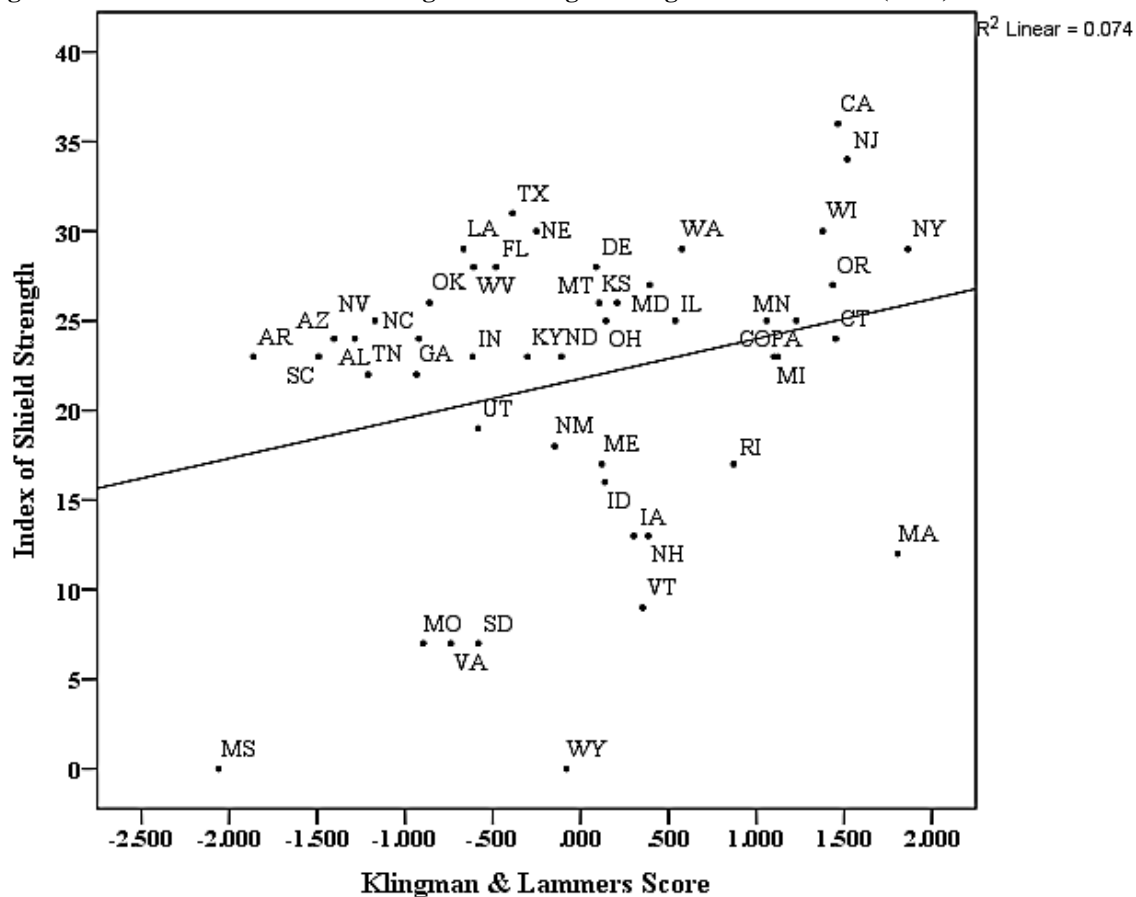
First, the correlation between the Klingman and Lammers (1984) score and Erikson, Wright, and McIver (1993) score was .906 ($p < .01$). The correlation between the Klingman & Lammers (1984) score and the Sorens, Muedini, & Ruger 2008 and 2010 scores were .710 ($p < .01$) and .720 ($p < .01$), respectively. The correlation between the Erikson, Wright, & McIver (1993) score and the Sorens, Muedini, & Ruger 2008 and 2010 scores were .755 ($p < .01$) and .768 ($p < .01$), respectively. The high level of correlation among the scores is unsurprising. All scores aimed to measure state policy liberalism. The Erikson, Wright, & McIver (1993) score also incorporated two of the same policy issue indicators as the Klingman and Lammers (1984) score.

The correlation between the index score of shield strength and the Klingman and Lammers (1984) score was .272 ($p < .05$). The correlation between the shield strength index score and the Erikson, Wright, & McIver (1993) score was .346 ($p < .01$). The correlation between the shield strength index score and the Sorens, Muedini, & Ruger (2008) score was .345 ($p < .01$). The correlation between the shield strength index score and the Sorens, Muedini, & Ruger (2010) score was .337 ($p < .01$). Thus, the hypothesized relationship between policy liberalism and the strength of journalist's protections within a state was supported. The Erikson, Wright, & McIver (1993) score

was the most strongly correlated with the state shield strength. Both versions of the Sorens, Muedini, & Ruger scores were also strongly correlated.

Figure 4-1 is a scatterplot of the correlation between the Klingman and Lammers policy liberalism score and a state's shield strength score.

Figure 4-1: Distribution of shield strength according to Klingman & Lammers (1984) scores

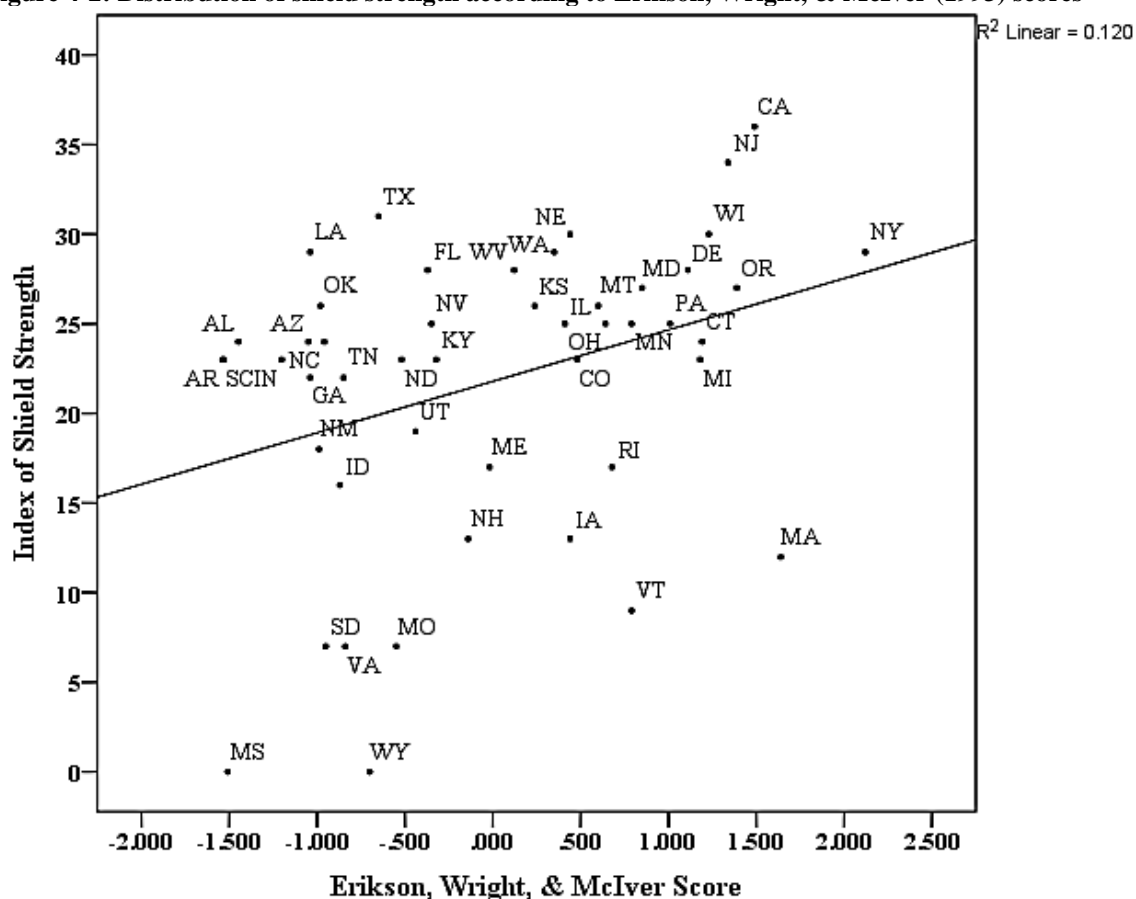


The graph showed the trend of the shield strength index score increasing as the Klingman and Lammers policy liberalism score increases. States that fell below the correlation line tended to be states that had not enacted a state shield statute. The biggest outliers of all the states were Mississippi and Wyoming. Neither state had recognized a journalist's privilege in state appellate court decisions or through legislation. Massachusetts had a high policy liberalism score but a lower score on the shield strength index. The state had only recognized a journalist's privilege in the common law.

California was an outlier because it provided expansive protections. The state had recognized several sources for journalist's privilege and several different people could invoke the privilege. Several of California's protections were also absolute.

Figure 4-2 is a scatterplot of the correlation between the Erikson, Wright, and McIver policy liberalism score and a state's shield strength score.

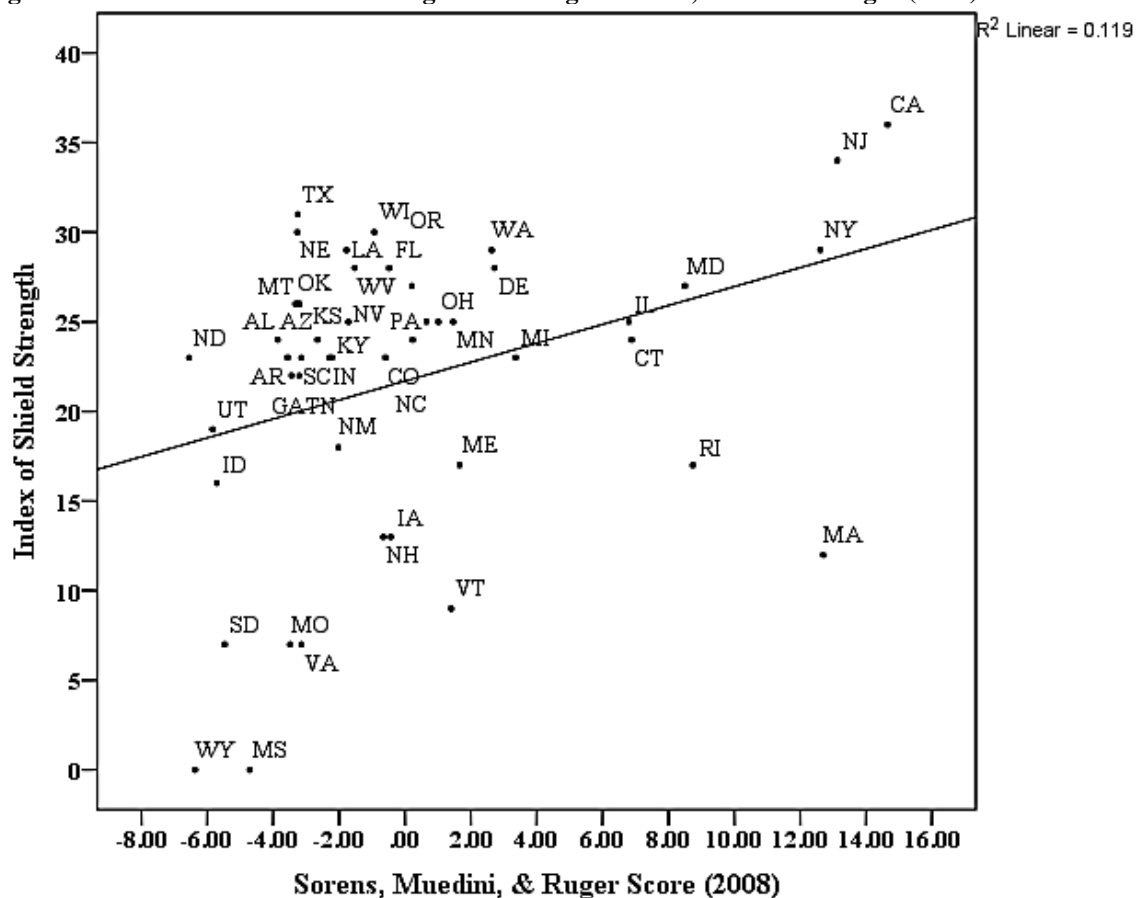
Figure 4-2: Distribution of shield strength according to Erikson, Wright, & McIver (1993) scores



Once again, the graph showed a trend of the state shield strength score increasing as the policy liberalism score increases. The correlation was stronger with the Erikson, Wright, and McIver (1993) policy score as compared to the Klingman and Lammers (1984) score. Many of the states that fell below the line were states without shield statutes. The outliers were also similar to the outliers on the Klingman and Lammers (1984) graph.

Figure 4-3 is a scatterplot of the correlation between the Sorens, Muedini, & Roger policy liberalism score from 2008 and a state's shield strength score.

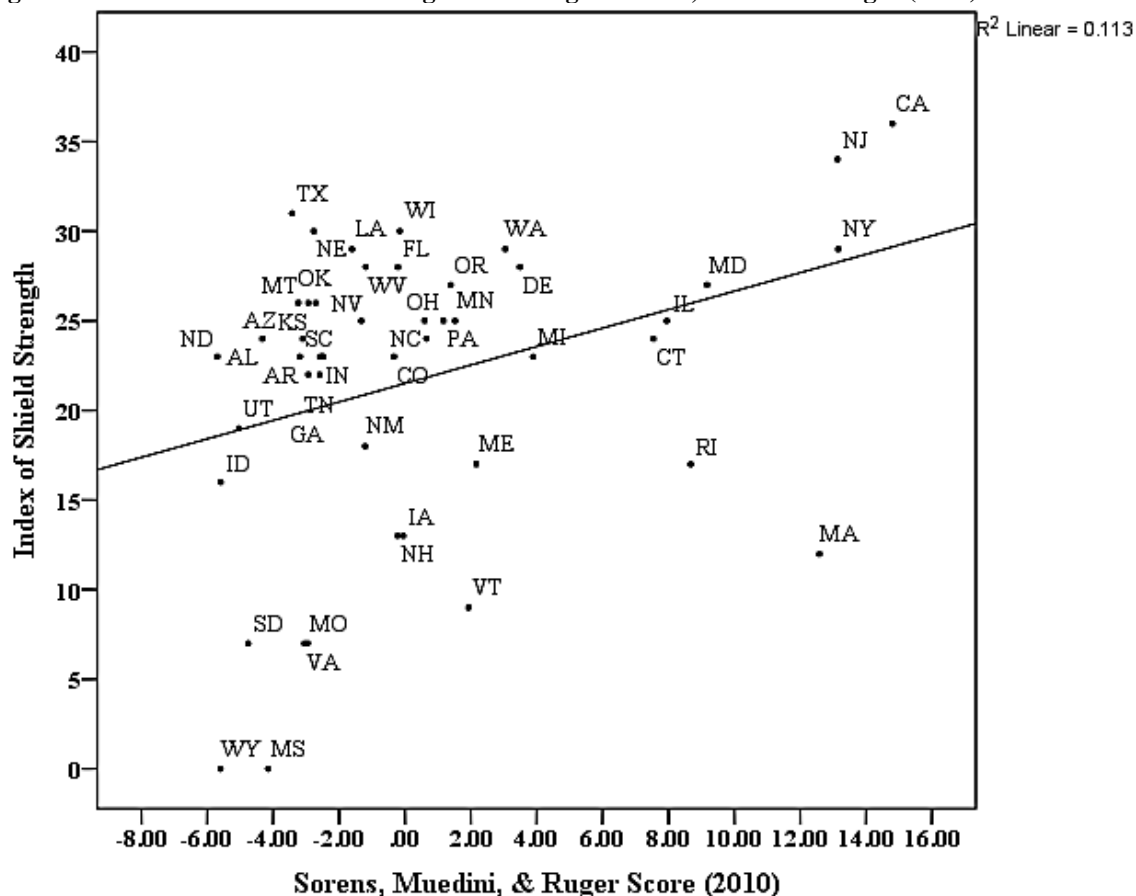
Figure 4-3: Distribution of shield strength according to Sorens, Muedini & Ruger (2008) scores



The graph showed the trend of state shield strength increasing as the policy liberalism increases. Several of the states that fell under the line were states that did not have a shield statute. Massachusetts, Mississippi, and Wyoming remained obvious outliers. California was not nearly as much of an outlier as it had been on the previous graphs.

Figure 4-4 is a scatterplot of the correlation between the Sorens, Muedini, & Roger policy liberalism score from 2010 and a state's shield strength score.

Figure 4-4: Distribution of shield strength according to Sorens, Muedini & Ruger (2010) scores



The graph once again showed the trend of state shield strength increasing as policy liberalism increases. Many of the states that fell below the line had not enacted shield statutes. Several of the outliers were similar to the outliers on the previous graphs.

As an additional check of other factors that may influence a state's shield strength, I conducted correlation tests of the index of shield strength score and other state characteristics. Different state characteristics included the percentage of the two-party vote for Barack Obama in 2008¹⁹⁸ and 2012,¹⁹⁹ the percentage of high school graduates in

¹⁹⁸ Federal Election Commission, *Federal Elections 2008: Election Results for the U.S. President, the U.S. Senate and the House of Representatives*, available at <http://www.fec.gov/pubrec/fe2008/federalections2008.pdf>.

¹⁹⁹ Federal Election Commission, *Official 2012 Presidential General Election Results*, available at <http://www.fec.gov/pubrec/fe2012/2012presgeresults.pdf>.

the state,²⁰⁰ the percentage of people who had bachelor's degrees in the state,²⁰¹ and per capita personal income within the state.²⁰² None of the additional state characteristics were significantly correlated with state shield strength.

²⁰⁰ United States Census Bureau, *American Community Survey: Educational Attainment, 2011 5-year estimates*, available at <http://www.census.gov/acs/www/>.

²⁰¹ *Id.*

²⁰² Bureau of Economic Analysis, *2012 Per Capita Personal Income Summary*, available at <http://www.bea.gov>.

Chapter 5: Discussion

Discussion

The results of this study add to the evidence that state characteristics are important determinants of state media law. Specifically, the results suggested that policy liberalism is a better indicator of state shield protections than political culture. The relationships between several different measures of policy liberalism and the strength of protection journalists have were significant. The different policy liberalism scores created from several different years of data were similarly correlated with state shield strength.

State political culture did not seem to influence the breadth of states' journalistic protections. The result was not entirely surprising because a previous study failed to find a significant relationship between political culture and the openness of public records law.²⁰³ Elazar highlighted that the major components of political culture include citizens' perceptions of politics and government, the types of people involved in government, and the art of individuals practicing government.²⁰⁴ Each aspect highlighted the way individuals interact with government. None focus on the actual actions of government to create law. Certainly, political culture could influence the development of law, but it might be limited to affecting certain types of law. Media law does not appear to be one of the types of law that political culture influences.

The relationship between policy liberalism and a state's breadth of journalist's privilege is important for several reasons. The results indicated that states with higher levels of policy liberalism tended to grant broader protections for journalists. Liberal states are more likely to grant journalists protections for different types of information

²⁰³ Pritchard & Nemeth, *supra* note 12, at 54.

²⁰⁴ ELAZAR, *supra* note 22, at 112.

and in different situations. Liberal states also tend to have more diverse definitions of journalist. The finding is particularly significant because issues surrounding journalist's privilege are not fully settled. Courts are still determining whether the United States Constitution or their state constitutions provide journalists a privilege. Courts are also still discussing who can be considered a journalist under their state laws. Also, several states have not enacted a shield statute that would create a journalist's privilege. If those states do enact shield statutes, this study's results suggest that the states with higher levels of policy liberalism will likely create broader protections for journalists. The results also suggest that even if states with low levels of policy liberalism enact a shield statute, protection would likely be greater than having no statute at all. Thus, journalists are justified in working toward the passage of shield legislation if they want broader protections.

The results also suggest a larger trend in the development of media law in individual states. A previous study has suggested that policy liberalism was an important determinant of media law.²⁰⁵ This study's results demonstrated that policy liberalism was a predictor of the strength of a state's journalist's privilege. The combination of the two studies begins to suggest that policy liberalism influences laws that affect journalists. Granted, broad conclusions about the nature of a particular type of law cannot be made from two studies alone. The results of the two studies are merely a starting place for a potential trend.

The law of journalist's privilege exemplifies Justice Brandeis' idea that states are "the laboratories of democracy."²⁰⁶ Without any federal mandates of how a privilege

²⁰⁵ Pritchard & Nemeth, *supra* note 12, at 54.

²⁰⁶ *New State Ice Co.*, *supra* note 13.

must be interpreted, states have been free to experiment within the confines of their own borders. States have shaped journalist's privilege through statutes and court opinions in ways that are best suited for the state. As a result, states like California and New Jersey have granted journalists a strong privilege to protect information. Other states like Hawaii, Mississippi, and Wyoming have not found the need to clearly establish a testimonial privilege for journalists through statutes or appellate court decisions. The wide-range of diversity in the law of journalist's privilege is a clear example of the American system of federalism.

Another finding of this study is that states regularly define who is a journalist. The coding for who can invoke the privilege shows that most states have clearly established definitions of a journalist for purposes of the privilege. Several statutes explicitly spell out who is eligible for protection. State appellate courts have also limited definitions of journalists to certain types of people. The statutes and decisions usually place limits on who can invoke the privilege based on a person's employment. Employees of traditional media are far more likely to be eligible for journalist's privilege protections. As a result of defining journalists by their employment, few states have extended journalist's privilege to non-traditional journalists. Some states are willing to view book authors as journalists. Fewer states explicitly include documentary filmmakers, student journalists, academics, or issue activists in the definition of journalists. Overall, states are clearly willing to define who is a journalist. This situation is quite the opposite of the philosophy of the U.S. Supreme Court. The Court has been unwilling to create definitions of a journalist.²⁰⁷

²⁰⁷ See *Branzburg*, *supra* note 3, at 703-704; *Citizens United*, *supra* note 6, at 891 (2010).

This study also found that states have not significantly considered journalist's privilege for new forms of media. State appellate courts or shield statutes in nine states have explicitly granted journalist's privilege to people who work for Internet media. State appellate courts have not granted a privilege to any individual bloggers or lone internet publishers. New Jersey was the only state with an appellate court that considered whether a lone individual publishing online could qualify for the privilege.²⁰⁸ The lack of appellate court decisions doesn't necessarily mean that bloggers are not facing subpoena challenges, though. Individual bloggers likely have limited monetary resources. They do not have the ability to pursue expensive, drawn-out legal actions. As a result, trial courts are likely the only courts resolving any issues involving bloggers and journalist's privilege.

Ultimately, one of the most significant questions about journalist's privilege is whether it is good or bad. The answer is both. The fact that so many states have recognized a journalist's privilege suggests that states believe the protection of sources is important to journalism. Many states are willing to provide a wide variety of shield protections to journalists, which suggest that many states recognize the importance of a privilege. Critics of a privilege argue that journalists' suggestions of sources drying up are unfounded. Reporters will still use confidential sources despite the lack of protection. While this situation might be true, the general idea of jailing journalists for non-criminal reasons seems like a troubling proposition in any society that wants to foster free flowing information.

The downside of journalist's privilege is the current state of definitions of journalists. Many states define journalists by their employers. The landscape of

²⁰⁸ Too Much Media, LLC v. Hale, 206 N.J. 209, 20 A.3d 364 (N.J. 2011).

journalism is steadily evolving to include people who will never work for a traditional media outlet. Journalists are leaving traditional media outlets to start their own blogs and websites to report news. Citizen journalists are finding ways to practice journalism without journalistic training. People like Wikileaks founder Julian Assange have the ability to produce news through non-traditional journalistic means. Granted, many people, like Assange, might not actually be journalists. Definitions of journalists need to begin to focus more on the practice of journalism than the employment status of a journalist. The privilege will quickly become outdated if the current definitions of journalists do not change.

States will need to grapple with the problems of new media as Internet publishing continues to expand. States will need to update their laws to determine whether Internet journalists deserve the protections that traditional news media retain. Questions will also arise as to whether users of social media could invoke the privilege. These problems are not limited to issues of journalist's privilege alone. As others have pointed out, the current state of media-related law has a variety of new challenges in the Internet age.²⁰⁹ The law will remain relevant only if states begin adapting the laws they developed before the advent of the online world.

Limitations

Every study has its limitations, and this study is no exception. Laws are not static. They are constantly being amended or repealed. They are always being interpreted and re-interpreted. Therefore, the coded laws can represent only the information that was

²⁰⁹ For examples see GANT, *supra* note 1; Michael Russo, Note, *Are Bloggers Representative of the News Media Under the Freedom of Information Act?* 40 COLUM. J.L. & SOC. PROBS. 225 (2006); Amy Bauer, Note, *Blogging on Broken Glass: Why the Proposed Free Flow of Information Act Needs a Specific Test for Determining When Media Shield Laws Apply to Bloggers*, 10 MINN. J.L. SCI. & TECH. 747 (2009). Amy Kristin Sanders, *Defining Defamation: Plaintiff Status in the Age of the Internet*, 1 J. Media L. & Ethics 155 (2009).

available at the time of the study. The values given to the various provisions could certainly change in future replications of this study as journalist's privilege continues to evolve. Content analysis is the process of simplifying complex information into manageable numbers. In the conversion process, detail is undoubtedly lost. Laws are complex and dependent on detail. A single number cannot always fully represent every dimension of a particular law. Even though I coded many provisions of journalist's privilege, some information about each state's law could have been lost.

Additionally, the research at hand was limited to the analysis of state appellate court decisions. State trial court decisions can also provide insight into how a state views media law. Granted, decisions of such courts are not always binding on the way state appellate courts interpret the law. Nonetheless, the decisions of those courts could provide useful insight into the law.

Further Research

Future studies should continue to look at the relationships between policy liberalism and state media law. Further research into these relationships could develop stronger evidence that policy liberalism has an effect on media law. Research also needs to be conducted into individual states' definitions of journalists. Many states did not have clear or precise definitions of who is eligible to invoke journalist's privilege. Examinations of the legislative history of statutes, trial court opinions, and appellate court decisions related to other types of media law could provide better insight into who might be considered a journalist within a state. Research of this nature will become increasingly important. In a world where publishing simply requires an Internet connection, media

laws that were created before the existence of computers will have trouble remaining relevant.

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Appendix A: Coding Scheme

Coding Sheet

STATE	
POLCULT	1=Individualistic, 2=Moralistic, 3=Traditionalistic..... _____
POL-LIB	Policy liberalism scores..... KL _____ EWM _____
SOURCE1	Source of protection for journalists is found in the U.S. Constitution: 0=no, 2=yes..... _____
SOURCE2	Source of protection for journalists is found in the state constitution: 0=no, 2=yes..... _____
SOURCE3	Source of protection for journalists is found in a state statute: 0=no, 2=yes..... _____
SOURCE4	Source of protection for journalists is found in state common law: 0=no, 2=yes..... _____
SCOPE1	Does the law give the right to withhold the identity of a confidential source? 0=no, 1=it depends, 2=yes..... _____
SCOPE2	Does the law give the right to withhold unpublished info even if it does not reveal the identity of a confidential source? 0=no, 1=it depends, 2=yes _____
SCOPE3	Does the law give the right to protect non-confidential sources? 0=no, 1=it depends, 2=yes _____
SCOPE4	Does the law give the right to withhold personal observations? 0=no, 1=it depends, 2=yes _____
CONTEXT1	Does the law give the right to withhold information from investigators or investigative bodies that have issued a subpoena? 0=no, 1=it depends, 2=yes..... _____
CONTEXT2	Does the law give the right to withhold information from legislative bodies? 0=no, 1=it depends, 2=yes _____
CONTEXT3	Does the law give the right to withhold information from criminal defendants seeking it for their defense? 0=no, 1=it depends, 2=yes _____
CONTEXT4	Does the law give the right to withhold information from parties to non-libel civil litigation? 0=no, 1=it depends, 2=yes..... _____
CONTEXT5	Does the law give libel defendants a right to withhold info from plaintiffs needing to know the name of a source to pursue a claim? 0=no, 1=it depends, 2=yes _____

- COVERS1 The law protects employees who work for newspapers that publish daily or weekly: 0=no, 2=yes..... _____
- COVERS2 The law protects employees who work for other forms of print media: 0=no, 2=yes..... _____
- COVERS3 The law protects employees who work for television media: 0=no, 2=yes..... _____
- COVERS4 The law protects employees who work for radio media: 0=no, 2=yes..... _____
- COVERS5 The law protects employees of internet only media: 0=no, 2=yes..... _____
- COVERS6 The law protects freelancers who sell their material to established media: 0=no, 2=yes..... _____
- COVERS7 The law protects bloggers who do not work for established media: 0=no, 2=yes..... _____
- COVERS8 The law protects students working for student media: 0=no, 2=yes..... _____
- COVERS9 The law protects book authors: 0=no, 2=yes..... _____
- COVERS10 The law protects academic researchers: 0=no, 2=yes..... _____
- COVERS11 The law protects issue activists: 0=no, 2=yes..... _____
- COVERS12 The law protects documentary filmmakers: 0=no, 2=yes..... _____
- COVERS13 The law protects other groups of people not previously mentioned: 0=no, 2=yes..... _____

Coding Instructions

In the packet of information, you will be reading state laws and court opinions. As you read, please pay close attention to and note the following topics. Please feel free to code areas as you read. Some packets of information will contain several pages and coding only upon completion will not be sufficient.

Some court opinions can contradict each other. If this situation exists, please code for the most recent interpretation. For example, if a court opinion determines that book authors receive journalist's privilege in 2000, but another court opinion says that book authors do not receive journalist's privilege in 2010, please code that book authors do not receive protection.

If a situation arises whether it is unclear if a particular provision exists, please code that the provision as a 0. For example, if no court opinions or law have addressed whether unpublished information can be withheld from authorities, code that withholding unpublished material is not protected.

1. STATE

Each packet has a name of a state written on the upper right. Write the name of the state on the line.

2. POLCULT

Each packet has a political culture on the upper right corner. Write a 1 for an individualistic state. Write a 2 for a moralistic state. Write a 3 for a traditionalistic state.

3. POL-LIB

Each packet has two policy liberalism scores written on the upper right corner. One is labeled KL. The other is labeled EWM. Write the number on the appropriate line.

4. SOURCE1

If a court opinion indicates that a journalist's privilege can be found in the United States Constitution, mark a 2. If the opinions do not find a basis for journalist's privilege in the United States Constitution, mark a 0.

5. SOURCE2

If a court opinion indicates that a journalist's privilege can be found in the state's constitution, mark a 2. Also, if a constitutional amendment establishes a journalist's privilege, mark a 2. If the opinions do not find a basis for journalist's privilege in the state constitution or a constitutional amendment does not exist, mark a 0.

6. SOURCE3

If a state statute, law, provision or code establishes a journalist's privilege, mark a 2. If the state does not have a statute, law, provision or code present, mark 0.

7. SOURCE4

If a journalist's privilege has been established through the common law, mark a 2. If there are no opinions finding a journalist's privilege in other laws, mark a 0.

8. SCOPE1

If the state's journalist's privilege allows individuals to withhold the identities of confidential sources, mark a 2. Confidential sources are sources whose identity a journalist keeps secret in a news story. If some types of confidential sources are protected but others are not, mark a 1. If the privilege does not state that confidential sources are protected, mark a 0.

9. SCOPE2

If the state's journalist's privilege allows individuals to withhold unpublished information even if it does not reveal the identity of a confidential source, mark a 2. Unpublished information can include, but is not limited to, notes, photographs, recordings, video footage, outtakes and observations. If some types of unpublished information is protected but other types are not, mark a 1. If the privilege does not explicitly state unpublished information is protected, mark a 0.

10. SCOPE3

If the state's journalist's privilege allows individuals to protect non-confidential sources of information, mark a 2. If some types of non-confidential sources are protected but others are not, mark a 1. If the privilege only exists in situations where an individual explicitly makes a promise of confidentiality to a source, mark a 0.

11. SCOPE 4

If the state's journalist's privilege allows individuals to withhold information gathered from personal observations, mark a 2. If some types of personal observations are protected but others are not, mark a 1. If the privilege does not provide protection for an individual's personal observations, mark a 0.

12. CONTEXT1

If the state's journalist's privilege grants an absolute privilege to withhold information from people or bodies that have issued an investigative subpoena, mark a 2. Grand juries, prosecutors, and other types of investigators can issue investigative subpoenas. If the law provides a qualified privilege, mark a 1. If the law does not allow individuals to withhold information from bodies that issued an investigative subpoena, mark a 0. .

13. CONTEXT2

If the state's journalist's privilege grants an absolute privilege to withhold information from legislative bodies, mark a 2. A legislative body can include, but is not limited to, legislative sub-committee, committee, house of representatives, senate, assembly, or legislature. If the law provides a qualified privilege, mark a 1. If the law does not allow individuals to withhold information from legislative bodies, mark a 0.

14. CONTEXT3

If the state's journalist's privilege grants an absolute privilege to withhold information from criminal defendants seeking it for their defense, mark a 2. Most often, criminal defendants will be seeking the information from individuals during trial court proceedings. If the law provides a qualified privilege, mark a 1. If the law does not allow individuals to withhold information from criminal defendants, mark a 0.

15. CONTEXT4

If the state's journalist's privilege grants an absolute privilege to withhold information from parties to non-libel civil litigation, mark a 2. Non-libel civil litigation includes any type of non-criminal litigation other than defamation suits. Parties to this type of litigation can include individuals, groups, organizations, businesses and governments. If the law provides a qualified privilege, mark a 1. If the law does not allow individuals to withhold information from parties in non-criminal litigation, mark a 0.

16. CONTEXT5

If the state's journalist's privilege grants an absolute privilege to media defendants in libel suits a right to withhold information from plaintiffs needing the name of a source to pursue a claim, mark a 2. Libel suits are litigation concerning defamation in a print, broadcast or published medium. Typically, the media defendant is not the source of libelous information. Rather, the media defendant published alleged libelous statements from a source. As a result, the plaintiff is attempting to get information about the source from the defendant. If the law provides a qualified privilege, mark a 1. If the libel defendants are not able to withhold information from plaintiffs, mark a 0.

17. COVERS1

If the state's journalist's privilege protects employees who work for newspapers, mark a 2. An employee is a person who a newspaper business employs on a full-time or part-time basis. This type of employment is different from newspapers hiring a freelance worker. If the law does not protect newspaper employees, mark a 0.

18. COVERS2

If the state's journalist's privilege protects employees who work for other forms of print media, mark a 2. Other forms of print media can include, but are not limited to, magazines, wire services, newsletters, brochures, flyers and posters. An employee is a person who the print media business officially employs on a full-time or part-time basis. This type of employment is different from businesses hiring a freelance worker. If the law does not protect employees of other print media, mark a 0.

19. COVERS3

If the state's journalist's privilege protects employees who work for television media, mark a 2. An employee is a person who a television station officially employs on a full or part-time basis. This type of employment is different from a station hiring a freelance worker. If the law does not protect television employees, mark a 0.

20. COVERS4

If the state's journalist's privilege protects employees who work for radio media, mark a 2. An employee is a person who a radio station officially employs on a full or part-time basis. This type of employment is different from a station hiring a freelance worker. If the law does not protect radio employees, mark a 0.

21. COVERS5

If the state's journalist's privilege protects employees of Internet only media, mark a 2. Internet only media can include, but are not limited to, web sites, blogs, social media sites, electronic newsletters, podcasts and online videos. An employee is a person the online medium employs on a full or part-time basis. This type of employment is different from an online medium hiring a freelance worker. If the law does not protect employees of internet only media, mark a 0.

22. COVERS6

If the state's journalist's privilege protects freelancers who sell their work to established media, mark a 2. A freelancer is a person who is self-employed who creates media content. The freelancer then sells that content to media organizations. A freelancer is not committed to working for only one media organization on a long-term basis. If the law does not protect freelancers, mark a 0.

23. COVERS7

If the state's journalist's privilege protects bloggers who do not work for established media, mark a 2. This type of blogger is a person that runs a blog independently of any media organization. The content of the blog can include factual reports. It can include a person's own commentary and opinions. The content could not be construed to be reflective of any media organization. If the law does not protect bloggers, mark a 0.

24. COVERS8

If the state's journalist's privilege protects students working for student-run media, mark a 2. Students include, but are not limited to, people attending middle school, high school, colleges or universities. Student-run media are any publications for which students have primary control over the content. If the law does not protect students, mark a 0.

25. COVERS9

If the state's journalist's privilege protects book authors, mark a 2. A book author is any person that is collecting information with the intent to publish in book form. If the law does not protect book authors, mark a 0.

26. COVERS10

If the state's journalist's privilege protects academic researchers, mark a 2. Academic researchers can include, but are not limited to, professors, teachers, instructors, historians, scientists and students. These types of people collect information with the intent to add to existing knowledge. If the law does not protect academic researchers, mark a 0.

27. COVERS11

If the state's journalist's privilege protects issue activists, mark a 2. Issue activists include people who are associated with an interest or issue. These people are often pursuing specific goals. An activist will typically be gathering information specifically on the interest or issue with the intent to publish with a particular agenda. If the law does not protect issue activists, mark a 0.

28. COVERS 12

If the state's journalist's privilege protects documentary filmmakers, mark a 2. Documentary filmmakers are people who are collecting information to create a record of an event or to explore an issue in-depth. Documentary filmmakers typically use several interviews to gain the information they need. If the law does not protect documentary filmmakers, mark a 0.

29. COVERS13

If the state's journalist's privilege protects other groups of people not previously mentioned, mark a 2. Please write the type of person protected on the coding sheet. If the law does not cover any groups beyond what has already been coded, mark a 0.

Appendix B: Coding Results

Results of coding for the source of journalist's privilege.

State	First Amendment	State Constitution	State Statute	Common Law	Index Score
Alabama	No	No	Yes	No	2
Alaska	No	No	Yes	No	2
Arizona	Yes	No	Yes	No	4
Arkansas	No	No	Yes	No	2
California	Yes	Yes	Yes	No	6
Colorado	No	No	Yes	No	2
Connecticut	No	No	Yes	No	2
Delaware	No	No	Yes	No	2
Florida	Yes	No	Yes	No	4
Georgia	No	No	Yes	No	2
Hawaii	No	No	No	No	0
Idaho	Yes	Yes	No	Yes	6
Illinois	Yes	No	Yes	No	4
Indiana	No	No	Yes	No	2
Iowa	Yes	Yes	No	No	4
Kansas	Yes	No	Yes	No	4
Kentucky	No	No	Yes	No	2
Louisiana	Yes	Yes	Yes	No	6
Maine	Yes	No	Yes	No	4
Maryland	No	No	Yes	No	2
Massachusetts	No	No	No	Yes	2
Michigan	No	No	Yes	No	2
Minnesota	No	No	Yes	No	2
Mississippi	No	No	No	No	0
Missouri	Yes	No	No	No	2
Montana	No	No	Yes	No	2
Nebraska	No	No	Yes	No	2
Nevada	No	No	Yes	No	2
New Hampshire	Yes	Yes	No	No	4
New Jersey	No	No	Yes	No	2
New Mexico	No	No	No	Yes	2
New York	Yes	Yes	Yes	No	6
North Carolina	No	No	Yes	No	2
North Dakota	No	No	Yes	No	2
Ohio	No	No	Yes	No	2
Oklahoma	Yes	No	Yes	No	4
Oregon	No	No	Yes	No	2
Pennsylvania	Yes	No	Yes	No	4
Rhode Island	No	No	Yes	No	2
South Carolina	No	No	Yes	No	2
South Dakota	No	No	No	Yes	2
Tennessee	No	No	Yes	No	2
Texas	Yes	No	Yes	No	4
Utah	No	No	No	Yes	2
Vermont	Yes	No	No	No	2
Virginia	Yes	No	No	No	2
Washington	No	No	Yes	Yes	4
West Virginia	Yes	Yes	Yes	No	6
Wisconsin	Yes	Yes	Yes	No	6
Wyoming	No	No	No	No	0

Results of coding for scope of privilege protections.

State	Confidential Source	Unpublished Information	Non-Confidential Source	Personal Observations	Index Score
Alabama	Yes	No	Yes	No	4
Alaska	Yes	No	Yes	No	4
Arizona	Yes	No	No	No	2
Arkansas	Yes	No	Yes	No	4
California	Yes	Yes	Yes	Yes	8
Colorado	Yes	Yes	Yes	Maybe	7
Connecticut	Yes	Yes	Yes	No	6
Delaware	Yes	Yes	Yes	Maybe	7
Florida	Yes	Yes	Yes	Maybe	7
Georgia	Yes	Yes	Yes	No	6
Hawaii	No	No	No	No	0
Idaho	Yes	No	No	No	2
Illinois	Yes	Yes	Yes	No	6
Indiana	Yes	No	No	No	2
Iowa	Yes	Yes	No	No	4
Kansas	Yes	Yes	Yes	No	6
Kentucky	Yes	No	Yes	No	4
Louisiana	Yes	Yes	Yes	No	6
Maine	Yes	No	No	No	2
Maryland	Yes	Yes	Yes	No	6
Massachusetts	Yes	No	No	No	2
Michigan	Yes	Yes	Yes	No	6
Minnesota	Yes	Yes	Yes	No	6
Mississippi	No	No	No	No	0
Missouri	Yes	No	No	No	2
Montana	Yes	Yes	Yes	No	6
Nebraska	Yes	Yes	Yes	No	6
Nevada	Yes	Yes	Yes	No	6
New Hampshire	Yes	No	No	No	2
New Jersey	Yes	Yes	Yes	Maybe	7
New Mexico	Yes	No	No	No	2
New York	Yes	Yes	Yes	No	6
North Carolina	Yes	Yes	Yes	Maybe	7
North Dakota	Yes	Yes	Yes	No	6
Ohio	Yes	No	Yes	No	4
Oklahoma	Yes	Yes	Yes	No	6
Oregon	Yes	Yes	Yes	No	6
Pennsylvania	Yes	Yes	Yes	No	6
Rhode Island	Yes	No	No	No	2
South Carolina	Yes	Yes	Yes	No	6
South Dakota	Yes	No	No	No	2
Tennessee	Yes	Yes	Yes	No	6
Texas	Yes	Yes	Yes	No	6
Utah	Yes	Yes	No	No	4
Vermont	Yes	No	Yes	No	4
Virginia	Yes	No	No	No	2
Washington	Yes	Yes	Yes	No	6
West Virginia	Yes	Yes	Yes	No	6
Wisconsin	Yes	Yes	Yes	No	6
Wyoming	No	No	No	No	0

Results of coding for situations when privilege applies.

State	Investigatory Subpoenas	Legislative Hearings	Criminal Defendants	Non-Party Civil Litigation	Defamation Litigation	Index Score
Alabama	Absolute	Absolute	Absolute	Absolute	Absolute	10
Alaska	Qualified	Qualified	Qualified	Qualified	Qualified	5
Arizona	Absolute	Absolute	Absolute	Absolute	Absolute	10
Arkansas	Qualified	Qualified	Qualified	Qualified	Qualified	5
California	Absolute	Absolute	Qualified	Absolute	Qualified	8
Colorado	Qualified	None	Qualified	Qualified	Qualified	4
Connecticut	None	Qualified	Qualified	Qualified	Qualified	4
Delaware	Absolute	Absolute	Qualified	Qualified	Qualified	7
Florida	Qualified	Qualified	Qualified	Qualified	Qualified	5
Georgia	Qualified	Qualified	Qualified	Qualified	None	4
Hawaii	None	None	None	None	None	0
Idaho	Qualified	None	Qualified	Qualified	Qualified	4
Illinois	None	None	Qualified	Qualified	Qualified	3
Indiana	Absolute	Absolute	Qualified	Absolute	Absolute	9
Iowa	None	None	None	Qualified	None	1
Kansas	None	Qualified	Qualified	Qualified	Qualified	4
Kentucky	Absolute	Absolute	Absolute	Absolute	Absolute	10
Louisiana	Qualified	Qualified	Qualified	Qualified	Qualified	5
Maine	Qualified	Qualified	Qualified	Qualified	Qualified	5
Maryland	Qualified	Qualified	Qualified	Qualified	Qualified	5
Massachusetts	Qualified	None	Qualified	Qualified	Qualified	4
Michigan	Absolute	None	Qualified	Qualified	Qualified	5
Minnesota	Qualified	Absolute	Qualified	Absolute	Qualified	7
Mississippi	None	None	None	None	None	0
Missouri	None	None	None	None	Qualified	1
Montana	Absolute	None	Absolute	Absolute	Absolute	8
Nebraska	Absolute	Absolute	Absolute	Absolute	Absolute	10
Nevada	Absolute	Absolute	Qualified	Absolute	Absolute	9
New Hampshire	None	None	Qualified	Qualified	Qualified	3
New Jersey	Absolute	Absolute	Qualified	Absolute	Absolute	9
New Mexico	Qualified	None	Qualified	Qualified	Qualified	4
New York	Qualified	Qualified	Qualified	Qualified	Qualified	5
North Carolina	Qualified	Qualified	Qualified	Qualified	Qualified	5
North Dakota	Qualified	Qualified	Qualified	Qualified	Qualified	5
Ohio	Absolute	Absolute	Qualified	Absolute	Absolute	9
Oklahoma	Qualified	Qualified	Qualified	Qualified	None	4
Oregon	Absolute	Absolute	Qualified	Absolute	Qualified	7
Pennsylvania	Qualified	Qualified	Qualified	Qualified	Qualified	5
Rhode Island	Qualified	None	Qualified	Qualified	None	3
South Carolina	None	Qualified	Qualified	Qualified	None	3
South Dakota	None	None	None	None	Qualified	1
Tennessee	Qualified	Qualified	Qualified	Qualified	None	4
Texas	Qualified	Qualified	Qualified	Qualified	Qualified	5
Utah	None	None	Qualified	Qualified	Qualified	3
Vermont	None	None	Qualified	None	None	1
Virginia	None	None	Qualified	None	None	1
Washington	Qualified	Qualified	Qualified	Qualified	Qualified	5
West Virginia	Qualified	None	Qualified	Qualified	Qualified	4
Wisconsin	Qualified	Absolute	Qualified	Qualified	Qualified	6
Wyoming	None	None	None	None	None	0

Results of coding for who can invoke journalist's privilege.

Type of journalist	States
Newspaper employees:	Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin
Other print media employees:	Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin
Television media employees:	Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin
Radio media employees:	Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin

Type of journalist	States
Internet-only media employees:	Arkansas, California, Florida, Kansas, Maryland, New Hampshire, New Jersey, Texas, Washington
Freelance journalists:	Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin
Independent bloggers:	No states
Student journalists:	Maryland, West Virginia
Book authors:	Connecticut, Nebraska, New Jersey, New York, Oklahoma, Oregon, South Carolina, Texas, Washington, Wisconsin
Academic researchers:	Delaware, Texas
Issue activists:	California
Documentary filmmakers:	Alaska, Illinois, Louisiana
Other potential journalists:	New Jersey

Appendix C: Journalist's Privilege by State

Alabama

State Shield Statute:

Ala. Code § 12-21-142 (2012)

State Cases Analyzed:

No state appellate courts have addressed journalist's privilege.

Description:

Alabama's shield statute provides an absolute privilege for journalists to protect sources of published information.²¹⁰ The statute does not distinguish between confidential and non-confidential sources. The statute provides protection in any legal proceeding or trial and before any court, grand jury, tribunal, or legislative committee.²¹¹ The statute grants protection to journalists for newspapers, radio stations, and television news stations.²¹² The United States Court of Appeals for the Eleventh Circuit construed the statute very literally when it refused to provide protection to a magazine reporter.²¹³ The Alabama state appellate courts have not interpreted the shield statute. The state appellate courts have also not addressed whether a basis for journalist's privilege is found in the First Amendment or state constitution. Alabama falls within the jurisdiction of the Eleventh Circuit which has recognized a qualified journalist's privilege in the First Amendment.²¹⁴

²¹⁰ ALA. CODE §12-21-142.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Price v. Time*, 416 F.3d 1327 (11th Cir. 2005).

²¹⁴ *See Id.*

Alaska

State Shield Statute:

Alaska Stat. § 09.25.300 – 09.25.390 (2013)

State Cases Analyzed:

Coney v. State, 699 P.2d 899 (Alaska Ct. App. 1985)

Description:

Alaska's state statute provides a qualified privilege for journalists to protect a "source of information"²¹⁵ used while acting in the course of their duties as a journalist. The privilege can be overturned if the journalist's lack of testimony would "result in the miscarriage of justice or the denial of a fair trial to those who challenge the privilege"²¹⁶ or "be contrary to the public interest."²¹⁷ The only state appellate court case to discuss journalist's privilege, *Coney v. State*, stated that "a newspaper reporter's privilege is limited and must give way to more important constitutional values, such as a defendant's right to a fair trial."²¹⁸ The appellate court held that the trial judge did not err in refusing to require a journalist to provide testimony to a criminal defendant in that particular situation, though.

²¹⁵ ALASKA STAT. § 09.25.300

²¹⁶ ALASKA STAT. § 09.25.310

²¹⁷ *Id.*

²¹⁸ *Coney v. State*, 699 P.2d 899, 902 (Alaska Ct. App. 1985)

Arizona

State Shield Statute:

Ariz. Rev. Stat. § 12-2237 (LexisNexis 2013)

Ariz. Rev. Stat. §12-2214 (LexisNexis 2013) (describes the requirements for subpoena of media witnesses)

State Cases Analyzed:

Flores v. Cooper Tire and Rubber Co., 218 Ariz. 52, 178 P.3d 1176 (Ariz. Ct. App. 2008)

State v. Moody, 208 Ariz. 424, 94 P.3d 1119, (Ariz., 2004)

Matera v. Superior Court In and For County of Maricopa, 170 Ariz. 446, 825 P.2d 971 (Ariz. Ct. App. 1992)

Bartlett v. Superior Court In and For Pima County, 150 Ariz. 178, 722 P.2d 346 (Ariz. Ct. App. 1986).

Description:

Arizona's shield statute provides an absolute privilege for journalists to protect confidential sources of information. The statute does not provide protection for non-confidential sources. The statute also states that the absolute privilege to protect confidential sources applies in "a legal proceeding or trial or any proceeding whatever." The Arizona courts have refused to extend the privilege to a book author.²¹⁹ The court explained the plain language of the statute protects journalists only for newspapers, radio and television.²²⁰ Journalists in Arizona also have a qualified privilege found in the First Amendment. Once again, the privilege only applies to confidential sources of information.²²¹

²¹⁹ Matera v. Superior Court In and For County of Maricopa, 170 Ariz. 446, 825 P.2d 971 (Ariz. Ct. App. 1992)

²²⁰ *Id.*

²²¹ *See Id.*; Bartlett v. Superior Court In and For Pima County, 150 Ariz. 178, 722 P.2d 346 (Ariz. Ct. App. 1986).

Arkansas

State Shield Statute:

Ark. Code Ann. § 16-85-510 (West 2012)

State Cases Analyzed:

Saxton v. Arkansas Gazette Co., 264 Ark. 133, 569 S.W.2d 115 (Ark. 1978)

Description:

The Arkansas shield statute provides journalists with a qualified privilege. The privilege can be overcome if a party can be shown that an article “was written, published, or broadcast in bad faith, with malice, and not in the interest of the public welfare.”²²² The statute also explicitly provides protection for journalists of Internet news.²²³ The statute states that journalists cannot be required to disclose a source “to any grand jury or to any other authority.”²²⁴ The only case to address the statute stated that “any other authority” includes both civil and criminal proceedings.²²⁵ The state appellate courts have not addressed whether the privilege extends protections beyond a source of information.

California

²²² ARK. CODE. ANN. § 16-85-510.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Saxton v. Arkansas Gazette Co., 264 Ark. 133, 569 S.W.2d 115 (Ark. 1978).

State Shield Statute:

Cal. Evid. Code § 1070 (2013)
 Cal. Const. art. I § 2

State Cases Analyzed:

McGarry v. University of San Diego, 154 Cal.App.4th 97, 64 Cal. Rptr. 3d 467 (Cal. Ct. App. 2007)
 O’Grady v. Superior Court, 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006)
 People v. Vasco, 131 Cal. App. 4th 1423, 31 Cal. Rptr. 3d 643 (Cal. Ct. App. 2005)
 People v. Ramos, 34 Cal. 4th 137, 101 P.3d 478, 21 Cal. Rptr. 3d 575 (Cal. 2005)
 Foster v. Superior Court, 80 Cal. App. 4th 724, 95 Cal. Rptr. 3d 575 (Cal. Ct. App. 2005)
 Miller v. Superior Court, 21 Cal. 4th 883, 986 P.2d 170, 89 Cal. Rptr. 2d 384 (Cal. 1999)
 Rancho Publication v. Superior Court, 68 Cal. App. 4th 1538, 81 Cal. Rptr. 2d 274 (Cal. Ct. App. 1999)
 Anti-Defamation League of B’nai B’rith v. Superior Court, 67 Cal. App. 4th 1072, 79 Cal. Rptr. 2d 597 (Cal. Ct. App. 1998)
 SCI-Sacramento, Inc. v. Superior Court, 54 Cal. App. 4th 654, 62 Cal. Rptr. 2d 868 (Cal. Ct. App. 1997)
 In re Willon, 47 Cal. App. 4th 1080, 55 Cal. Rptr. 2d 245 (Cal. Ct. App. 1996)
 People v. Sanchez, 12 Cal. 4th 1, 906 P.2d 1129, 47 Cal. Rptr. 2d 843 (Cal. 1996)
 People v. Von Villas, 10 Cal. App. 4th 201, 13 Cal. Rptr. 2d 62 (Cal. Ct. App. 1992)
 People v. Cooper, 53 Cal. 3d 771, 809 P.2d 865, 281 Cal. Rptr. 90 (Cal. 1991)
 New York Times Co. v. Superior Court, 51 Cal. 3d 453, 796 P.2d 811, 273 Cal. Rptr. 98 (Cal. 1990)
 Delaney v. Superior Court, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (Cal. 1990)
 Hallissy v. Superior Court, 200 Cal. App. 3d 1038, 248 Cal. Rptr. 635 (Cal. Ct. App. 1988)
 Dalitz v. Penthouse International, Ltd., 168 Cal. App. 3d 468, 214 Cal. Rptr. 254 (Cal. Ct. App. 1985)
 Mitchell v. Superior Court, 37 Cal. 3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (Cal. 1984)
 Playboy Enterprises, Inc. v. Superior Court, 154 Cal. App. 3d 14, 201 Cal. Rptr. 207 (Cal. Ct. App. 1984)
 Fisher v. Larsen, 138 Cal. App. 3d 627, 188 Cal. Rptr. 216 (Cal. Ct. App. 1982)
 KSDO v. Superior Court, 136 Cal. App. 3d 375, 186 Cal. Rptr. 211 (Cal. Ct. App. 1982)
 Hammarley v. Superior Court, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (Cal. Ct. App. 1979)
 CBS, Inc. v. Superior Court, 85 Cal. App. 3d 241, 149 Cal. Rptr. 421 (Cal. Ct. App. 1978)
 Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 649 (Cal. Ct. App. 1974)
 Farr. v. Superior Court, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (Cal. Ct. App. 1971)

Description:

California's shield statute and state constitution both provide journalists with absolute protections for sources and unpublished information.²²⁶ The statute does not grant a privilege, though. Rather, the statute prevents any authority from finding a journalist in contempt for refusing to disclose information. The statute itself protects traditional journalists. California state appellate courts have extended the privilege to Internet journalists²²⁷ and the journalistic activities of issue activists.²²⁸ The California Supreme Court has also stated that a journalist's eyewitness observations in public are protected from disclosure.²²⁹ In the same case, the court also stated a criminal defendant's constitutional rights to a fair trial could potentially overcome the absolute shield.²³⁰ In criminal cases, though, journalists are absolutely protected from prosecutors seeking information.²³¹ As stated previously, the statute provides journalists immunity from contempt charges. Therefore, journalists do not have much protection in defamation cases. If a journalist refuses to disclose information, a court can use other sanctions, such as a summary judgment, for a journalist's failure to disclose information.²³² The California Supreme Court has also held that the First Amendment does provide journalists with a qualified reporter's privilege.²³³

²²⁶ CAL. EVID. CODE § 1070; CAL. CONST. art. I § 2.

²²⁷ O'Grady v. Superior Court, 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006).

²²⁸ Anti-Defamation League of B'nai B'rith v. Superior Court, 67 Cal. App. 4th 1072, 79 Cal. Rptr. 2d 597 (Cal. Ct. App. 1998).

²²⁹ Delaney v. Superior Court, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (Cal. 1990).

²³⁰ *Id.*, at 765.

²³¹ Miller v. Superior Court, 21 Cal. 4th 883, 986 P.2d 170, 89 Cal. Rptr. 2d 384 (Cal. 1999).

²³² New York Times Co. v. Superior Court, 51 Cal. 3d 453, 796 P.2d 811, 273 Cal. Rptr. 98 (Cal. 1990).

²³³ Mitchell v. Superior Court, 37 Cal. 3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (Cal. 1984).

Colorado

State Shield Statute:

Colo. Rev. Stat. 13-90-119 (2012)
Colo. Rev. Stat. 24-72.5-101 – 106 (2012)

State Cases Analyzed:

Gordon v. Boyles, 9 P.3d 1106 (Colo., 2000)
Henderson v. People, 879 P.2d 383 (Colo., 1994)
People v. Henderson, 847 P.2d 239 (Colo., 1993)
Gagnon v. District Court In and For Fremont County, 632 P.2d 567 (Colo., 1981)
Pankratz v. District Court In and For City and County of Denver, 199 Colo. 411, 609 P.2d 1101 (Colo., 1980)

Description:

The Colorado shield statute provides a qualified privilege for journalists to protect news information. News information includes, but is not limited to, sources, observations, documents, photographs and knowledge. The privilege does not apply to information received at a press conference, published information, personal observations of crimes in instances when no other witnesses are available, or personal observations of a class 1, 2, or 3 felony.²³⁴ Also, the privilege is codified in two different statutes. C.R.S. 13-90-119 applies to judicial proceedings. A separate, similarly worded statute applies to governmental administrative proceedings.²³⁵ The Colorado Supreme Court has ruled that there is no basis for journalist's privilege found in the First Amendment or state constitution.²³⁶ Although, a more recent decision implied that the First Amendment does provide protection. The court did not make an explicit statement indicating as much.²³⁷

²³⁴ COLO. REV. STAT. § 13-90-119.

²³⁵ COLO. REV. STAT. § 24-72.5-101 – 106.

²³⁶ See Pankratz v. District Court In and For City and County of Denver, 199 Colo. 411, 609 P.2d 1101 (Colo. 1980); Gagnon v. District Court In and For Fremont County, 632 P.2d 567 (Colo. 1981).

²³⁷ Gordon v. Boyles, 9 P.3d 1106 (Colo. 2000).

Connecticut

State Shield Statute:

Conn. Gen. Stat. § 52-146t (2013)

State Cases Analyzed:

No state appellate courts have addressed journalist's privilege.

Description:

The Connecticut shield statute provides a qualified privilege for journalists. The statute protects both information and sources. Information can include notes, outtakes, film or "other data of whatever sort in any medium."²³⁸ The statute also provides protection for news media that publish through electronic means. This provision would likely protect Internet news media, but no state appellate court has addressed the issue. The statute also states that confidentiality is not a requirement for protection. The privilege also establishes a multi-step process to overturn the privilege. A party that wants to issue a subpoena must first negotiate with the targeted news media to receive requested information.²³⁹ If a deal is not made, then the party seeking a subpoena must establish through other sources that a crime has occurred or a civil action can be sustained. Then the party must establish that the information or identity of the source is critical or necessary, not obtainable through other means, and there is an overriding public interest in the disclosure.²⁴⁰ After all the steps, a court can then require a journalist to testify. No state appellate courts have ruled on journalist's privilege. One published trial court decision did suggest that the First Amendment provides a journalist's privilege in the state.²⁴¹

²³⁸ CONN. GEN. STAT. § 52-146t(a)(1).

²³⁹ CONN. GEN. STAT. § 52-146t (c).

²⁴⁰ CONN. GEN. STAT. § 52-146t(d).

²⁴¹ Connecticut State Bd. of Labor Relations v. Fagin, 33 Conn. Supp. 204, 370 A.2d 1095 (Conn. Super. Ct. 1976).

Delaware

State Shield Statute:

Del.Code Ann. tit. 10 § 4320 to 4326 (2013)

State Cases Analyzed:

No state appellate courts have addressed journalist's privilege.

Description:

The Delaware shield statute provides an absolute testimonial privilege for journalists in nonadjudicative proceedings.²⁴² The statute also provides a qualified privilege in all adjudicative proceedings.²⁴³ The statute specifically states that grand jury proceedings are not considered adjudicative proceedings. The statute also provides protection for journalists, scholars, educators, polemicists, or any individual who meets a minimum number of hours engaged in newsgathering activity.²⁴⁴ In adjudicative proceedings, journalists can invoke the privilege if they swear under oath that disclosure would violate an agreement with the source so that the information could be obtained. The journalist could also swear that disclosure would hinder the cultivation of source relationships.²⁴⁵ The privilege for the content of information can be overturned if a judge determines that the public interest of the testimony outweighs the public interest of the maintenance of confidential information. Also, the privilege to protect the source or content can be overturned if a preponderance of evidence shows that the reporter's sworn statement is false.²⁴⁶ No state appellate courts have specifically addressed the Delaware shield statute or a constitutionally-based journalist's privilege.

²⁴² DEL. CODE ANN. tit. 10 § 4321.

²⁴³ DEL. CODE ANN. tit. 10 § 4322.

²⁴⁴ DEL. CODE ANN. tit. 10 § 4320.

²⁴⁵ DEL. CODE ANN. tit. 10 § 4322.

²⁴⁶ DEL. CODE ANN. tit. 10 § 4323.

Florida

State Shield Statute:

Fla. Stat. Ann. § 90.5015 (LexisNexis 2012)

State Cases Analyzed:

WTVJ-NBC 6 v. Shehadeh, 56 So. 3d 104 (Fla. Dist. Ct. App. 2011)
 TheStreet.com, Inc. v. Carroll, 20 So. 3d 947 (Fla. Dist. Ct. App. 2009)
 News-Journal Corp. v. Carson, 741 So. 2d 572 (Fla. Dist. Ct. App. 1999)
 Ulrich v. Coast Dental Services, Inc., 739 So. 2d 142 (Fla. Dist. Ct. App. 1999)
 Morris Communications Corp. v. Frangie, 720 So. 2d 230 (Fla., 1998)
 Kidwell v. State, 730 So. 2d 670 (Fla., 1998)
 State v. Davis, 720 So. 2d 220 (Fla., 1998)
 Morris Communications Corp. v Frangie, 704 So. 2d 1143 (Fla. Dist. Ct. App. 1998)
 Kidwell v. State, 696 So. 2d 399 (Fla. Dist. Ct. App. 1997)
 Davis v. State, 692 So. 2d 924 (Fla. Dist. Ct. App. 1997)
 Gold Coast Publications, Inc. v. State, 669 So. 2d 316 (Fla. Dist. Ct. App. 1996)
 Tampa Television, Inc. v. Norman, 647 So. 2d 904 (Fla. Dist. Ct. App. 1994)
 Investigation: Florida Statute 27.04, Subpoena of Roche v. State, 589 So. 2d 978 (Fla. Dist. Ct. App. 1991)
 CBS, Inc. v. Jackson, 578 So. 2d 698 (Fla., 1991)
 Russell v. Miami Herald Pub. Co., 570 So. 2d 979 (Fla. Dist. Ct. App. 1990)
 Miami Herald Pub. Co. v. Morejon, 561 So. 2d 577 (Fla., 1990)
 CBS, Inc. v. Cobb, 536 So. 2d 1067 (Fla. Dist. Ct. App. 1988)
 Miami Herald Pub.. Co., a Div. of Knight-Ridder, Inc. v. Morejon, 529 So. 2d 1204 (Fla. Dist. Ct. App. 1998)
 Carroll Contracting, Inc. v. Edwards, 528 So. 2d 951 (Fla. Dist. Ct. App. 1988)
 Tribune Co. v. Huffstetler, 489 So. 2d 722 (Fla., 1986)
 Satz v. News and Sun-Sentinel Co., 484 So. 2d 590 (Fla. Dist. Ct. App. 1985)
 Kridos v. Vinskus, 483 So. 2d 727 (Fla. Dist. Ct. App. 1985)
 Tribune Co. v. Huffstetler, 463 So. 2d 1169 (Fla. Dist. Ct. App. 1984)
 Johnson v. Bentley, 457 So. 2d 507 (Fla. Dist. Ct. App. 1984)
 Tribune Co. v. Green, 440 So. 2d 484 (Fla. Dist. Ct. App. 1983)
 Gadsden County Times, Inc. v. Horne, 426 So. 2d 1234 (Fla. Dist. Ct. App. 1983)
 Times Pub. Co. v. Burke, 375 So. 2d 297 (Fla. Dist. Ct. App. 1979)
 Campus Communications, Inc. v. Freedman, 374 So. 2d 1169 (Fla. Dist. Ct. App. 1979)
 Morgan v. State, 337 So. 2d 951 (Fla., 1976)
 In re Tierney, 328 So. 2d 40 (Fla. Dist. Ct. App. 1976)
 Laughlin v. State, 323 So. 2d 691 (Fla. Dist. Ct. App. 1975)
 Morgan v. State, 325 So. 2d 40 (Fla. Dist. Ct. App. 1975)

Description:

The Florida shield statute provides journalists a qualified privilege to protect sources and information.²⁴⁷ The statute defines professional journalists broadly but specifically excludes book authors.²⁴⁸ A Florida appellate court has also recognized that website publishers and Internet journalists are protected under the statutory privilege.²⁴⁹ The statute provides protection for both information and the identity of a source. It does not make a distinction between confidential or non-confidential information. The statute also specifically states that protection does not apply to physical evidence, eyewitness observations or recordings of crimes.²⁵⁰ Journalists' observations of non-criminal activity are protected as long as the journalist was performing journalistic duties.²⁵¹ A court can overturn the qualified privilege if a party can demonstrate that the information sought is relevant and material to unresolved issues in a proceeding, unavailable from other sources, and a compelling interest exists to require disclosure.²⁵² The Florida Supreme Court has also specifically stated that the privilege applies in both criminal and civil proceedings.²⁵³ The Florida Supreme Court has also found a basis for a qualified reporter's privilege in the First Amendment.²⁵⁴

²⁴⁷ FLA. STAT. § 90.5015(2).

²⁴⁸ FLA. STAT. § 90.5015(1).

²⁴⁹ *TheStreet.com, Inc. v. Carroll*, 20 So.3d 947 (Fla. Dist. Ct. App. 2009).

²⁵⁰ *News Journal Corp. v. Carson*, 741 So.2d 572 (Fla. Dist. Ct. App. 1999).

²⁵¹ *Id.*

²⁵² FLA. STAT. § 90.5015(2).

²⁵³ *Morris Communications Corp. v. Frangie*, 720 So.2d 230 (Fla. 1998).

²⁵⁴ *Morgan v. State*, 337 So.2d 951 (Fla. 1976).

Georgia

State Shield Statute:

Ga. Code Ann. § 24-5-508 (2012)

State Cases Analyzed:

Bryant v. Cox Enterprises, Inc., 311 Ga. App. 230, 715 S.E.2d 458 (Ga. Ct. App. 2011)
 In re Morris Communications Co., 258 Ga. App. 154, 573 S.E.2d 420 (Ga. Ct. App. 2002)

Atlanta Journal-Constitution v. Jewell, 251 Ga. App. 808, 555 S.E.2d 175 (Ga. Ct. App. 2001)

In re Paul, 270 Ga. 280, 513 S.E.2d 219 (Ga. 1999)

Nobles v. State, 201 Ga. App. 483, 411 S.E.2d 294 (Ga. Ct. App. 1991)

Stripling v. State, 261 Ga. 1, 401 S.E.2d 500 (Ga. 1991)

Howard v. Savannah College of Art and Design, Inc., 259 Ga. 795, 387 S.E.2d 332 (Ga. 1990)

Vaughn v. State, 259 Ga. 325, 381 S.E.2d 30 (Ga. 1989)

Georgia Communications Corp. BA-145 v. Horne, 164 Ga. App. 227, 294 S.E.2d 725 (Ga. Ct. App. 1982)

Description:

Georgia's shield statute provides journalists a qualified privilege to protect any information gained during news gathering activities. The shield provides protections for journalists at newspapers, radio stations, television stations, and magazines as well as book authors. The statute also provides protection for people who publish through electronic means.²⁵⁵ Thus, the statute likely protects Internet journalists, but a state appellate court has not addressed the issue. The statute also specifically states that the privilege only applies in situations where journalists are not a party.²⁵⁶ The Court of Appeals of Georgia has stated that public policy does require a balancing test to determine whether confidential sources must be revealed in defamation suits, though.²⁵⁷ The journalist's privilege can be overturned when the requested information is material and relevant, alternative means to gain the information is unavailable, and the information is necessary to prepare for or present a case.²⁵⁸ The Georgia Supreme Court has found that the statute applies whether the journalist's information was confidential or non-confidential.²⁵⁹ Finally, the Georgia appellate courts have not found a basis for a journalist's privilege in the First Amendment or Georgia state constitution.

²⁵⁵ GA. CODE ANN. § 24-5-508.

²⁵⁶ *Id.*

²⁵⁷ Atlanta Journal-Constitution v. Jewell, 251 Ga. App. 808, 555 S.E.2d 175 (Ga. Ct. App. 2001).

²⁵⁸ GA. CODE ANN. § 24-5-508.

²⁵⁹ In re Paul, 270 Ga. 280, 513 S.E.2d 219 (Ga. 1999).

Hawaii

State Shield Statute:

On June 30, 2013, the Hawaii shield statute expired because of a sunset clause. Hawaii does not have a state shield statute.

State Cases Analyzed:

No state appellate courts have addressed journalist's privilege since 1964.

Description:

The Hawaii legislature enacted a shield statute in 2008. The statute included a sunset clause that would cause the statute to expire unless the state legislature passed an extension. The legislature did not come to an agreement on extending the shield statute which caused it to expire on June 30, 2013.²⁶⁰ The Hawaii state appellate courts have not addressed journalist's privilege since 1961. In the 1961 case, the Hawaii Supreme Court found that the First Amendment did not provide protection for confidential sources of information.²⁶¹ Hawaii falls under the United States Ninth Circuit Court of Appeals' jurisdiction. The Ninth Circuit Court of Appeals has recognized a qualified journalist's privilege in the First Amendment.²⁶²

²⁶⁰ Jack Komperda, *Hawaii Shield Law Will Expire after Lawmakers Unable to Reconcile Competing Bills*, Reporters Committee for Freedom of the Press (May 3, 2013), <http://www.rcfp.org/browse-media-law-resources/news/hawaii-shield-law-will-expire-after-lawmakers-unable-reconcile-compe>.

²⁶¹ *In re Goodfader*, 45 Haw. 317, 367 P.2d 472 (Haw., 1961).

²⁶² *See Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993).

Idaho

State Shield Statute:

Idaho does not have a state shield statute.

State Cases Analyzed:

State v. Salsbury, 129 Idaho 307, 924 P.2d 208 (Idaho, 1996)

Matter of Contempt of Wright, 108 Idaho 418, 700 P.2d 40 (Idaho, 1985)

Marks v. Vehlou, 105 Idaho 560, 671 P.2d 473 (Idaho, 1983)

Sierra Life Ins. Co. v. Magic Valley Newspapers, Inc., 101 Idaho 795, 623 P.2d 103 (Idaho, 1980).

Caldero v. Tribune Pub. Co., 98 Idaho 288, 565 P.2d 791 (Idaho, 1977)

Description:

Idaho has not enacted a state shield statute. The Idaho Supreme Court has found the basis for a qualified journalist's privilege in the First Amendment, Idaho Constitution, and common law.²⁶³ The supreme court has addressed only the privilege in relation to newspaper and television journalists. It has not specifically defined who is considered a journalist. A court can overturn the qualified privilege if the party seeking information meets all three prongs of Justice Stewart's test laid out in *Branzburg*.²⁶⁴ The supreme court has expressly stated that the type of case must play a factor during a balancing test. In criminal cases that involve Sixth Amendment rights, disclosure should be more heavily favored.²⁶⁵ The Idaho Supreme Court has also noted that most Idaho cases have focused on confidential sources or confidential information. When confidentiality is not at stake, the court has been hesitant to provide a privilege for journalists.²⁶⁶

²⁶³ Matter of Contempt of Wright, 108 Idaho 418, 700 P.2d 40 (Idaho 1985).

²⁶⁴ *Id.*, at 423.

²⁶⁵ *Id.*

²⁶⁶ State v. Salsbury, 129 Idaho 307, 924 P.2d 208 (Idaho 1996).

Illinois

State Shield Statute:

735 Ill. Comp. Stat. Ann. 5/8-901 – 5/8-909 (LexisNexis 2013)

State Cases Analyzed:

People v. Slover, 323 Ill. App. 3d 620, 753 N.E.2d 554, 257 Ill. Dec. 359 (Ill. App. Ct. 2001)

People v. Pawlaczyk, 189 Ill. 2d 177, 724 N.E.2d 901, 244 Ill. Dec. 13 (Ill. 2000)

Cukier v. American Medical Ass'n, 259 Ill. App. 3d 159, 630 N.E.2d 1198, 197 Ill. Dec. 74 (Ill. App. Ct. 1994)

People v. Palacio, 240 Ill. App. 3d 1078, 607 N.E.2d 1375, 180 Ill. Dec. 862 (Ill. App. Ct. 1993)

In re Arya, 226 Ill. App. 3d 848, 589 N.E.2d 832, 168 Ill. Dec. 432 (Ill. App. Ct. 1992)

In re Special Grand Jury Investigation of Alleged Violation of Juvenile Court Act, 104 Ill. 2d 419, 472 N.E.2d 450, 84 Ill. Dec. 490 (Ill., 1984)

People ex rel. Scott v. Silverstein, 87 Ill. 2d 167, 429 N.E.2d 483, 57 Ill. Dec. 585 (Ill., 1981)

People ex rel. Scott v. Silverstein, 89 Ill. App. 3d 1039, 412 N.E.2d 692, 45 Ill. Dec. 341 (Ill. App. Ct. 1980)

People v. Childers, 94 Ill. App. 3d 104, 418 N.E.2d 959, 49 Ill. Dec. 939 (Ill. App. Ct. 1981)

Description:

The Illinois shield statute provides journalists with a qualified privilege to protect the source of any information.²⁶⁷ The statute defines a source as “the person or means from or through which the news or information was obtained.”²⁶⁸ An Illinois appellate court has used this definition to extend protection beyond just the identity of a source. The court found that photographs could also be considered a source of information.²⁶⁹ The statute also states that a reporter is considered any person engaged in collecting, writing or editing news on a full or part-time basis that will be published in a news medium. The statute does state that a news medium does include electronic publication,²⁷⁰ but the state appellate courts have not addressed whether Internet publications receive protection. A court can overturn the privilege if it decides that the reporter’s information does not concern matters that state and federal law require to be secret, such as educational or health records. The court must also find that other sources are unavailable and disclosure is in the public interest. In defamation cases, the privilege can be overturned if all other sources have been exhausted and the plaintiff’s need for the information outweighs the public interest in the journalist’s protection of confidential

²⁶⁷ 735 ILL. COMP. STAT. 5/8-901.

²⁶⁸ *Id.*

²⁶⁹ People v. Slover, 323 Ill.App.3d 620, 753 N.E.2d 554, 257 Ill. Dec. 359 (Ill. App. Ct. 2001).

²⁷⁰ 735 ILL. COMP. STAT. 5/8-902.

sources.²⁷¹ The Illinois Supreme Court has found that the public interest in the proper operations of a grand jury is enough to overturn the qualified privilege.²⁷² The court's holding casts doubt on whether journalist's privilege could apply in any grand jury situation.

²⁷¹ 735 ILL. COMP. STAT. 5/8-907.

²⁷² *People v. Pawlaczyk*, 189 Ill.2d 177, 724 N.E.2d 901, 244 Ill. Dec. 13 (Ill. 2000).

Indiana

State Shield Statute:

Ind. Code Ann. § 34-46-4-1 – 34-46-4-1 (LexisNexis 2013)

State Cases Analyzed:

In re Indiana Newspapers Inc., 963 N.E.2d 534 (Ind. Ct. App. 2012)

In re WTHR-TV, 693 N.E.2d 1 (Ind. 1998)

Klagiss v. State, 585 N.E.2d 674 (Ind. Ct. App. 1992)

In re Subpoena Duces Tecum to Stearns v. Zulka, 489 N.E.2d 146 (Ind. Ct. App. 1986)

Hitt v. State, 478 N.E.2d 65 (Ind. 1985)

Jamerson v. Anderson Newspapers, Inc., 469 N.E. 2d 1243 (Ind. Ct. App. 1984)

Northside Sanitary Landfill, Inc. v. Bradley, 462 N.E.2d 1321 (Ind. Ct. App. 1984)

Shindler v. State, 166 Ind. App. 258, N.E.2d 638 (Ind. Ct. App. 1975)

Hestand v. State, 257 Ind. 191, N.E.2d 282 (Ind. 1971)

Lipps v. State, 254 Ind. 141, 258 N.E.2d 622 (Ind. 1970)

Description:

The Indiana shield statute provides journalists with an absolute privilege to protect confidential sources of information.²⁷³ The statute protects journalists working for newspapers, periodicals, press associations, wire services, television stations, and radio stations.²⁷⁴ The statute specifically states that it only protects sources of information. The statute is not clear whether a journalist must promise confidentiality. The Indiana state appellate courts have differed on whether the First Amendment provides a basis for a journalist's privilege. In a civil case, the Indiana Court of Appeals for the third district found that First Amendment did provide journalists with a qualified privilege to protect unpublished information.²⁷⁵ In a later criminal case, though, the Indiana Supreme Court found that the journalists did not have a First Amendment basis for a journalist's privilege to protect unaired footage from a known source.²⁷⁶ The supreme court did not address whether its decision would also apply to civil cases, thus, the case law is not entirely settled.

²⁷³ IND. CODE ANN. § 34-46-4-2.

²⁷⁴ IND. CODE ANN. § 34-46-4-1.

²⁷⁵ In re Subpoena Duces Tecum to Stearns v. Zulka, 489 N.E.2d 146 (Ind. Ct. App. 1986).

²⁷⁶ In re WTHR-TV, 693 N.E.2d 1 (Ind. 1998).

Iowa

State Shield Statute:

Iowa does not have a state shield statute.

State Cases Analyzed:

Waterloo/Cedar Falls Courier v. Hawkeye Community College, 646 N.W.2d 97 (Iowa 2002)

Bell v. City of Des Moines, 412 N.W.2d 585 (Iowa 1987)

Lamberto v. Bown, 326 N.W.2d 305 (Iowa 1982)

Winegard v. Oxberger, 258 N.W.2d 847 (Iowa 1977)

Description:

Iowa does not have a state shield statute. Rather, the Iowa Supreme Court has recognized a journalist's privilege through interpreting the Iowa Constitution and First Amendment.²⁷⁷ The court has adopted a three-prong test to determine whether the journalist's privilege can be overturned. A court can overturn the privilege if a party can show that the information is critical to the action or defense, other means to gain the information have been exhausted, and the record shows that the action or defense is not frivolous.²⁷⁸ The court has also specifically stated that privilege protects confidential sources, unpublished information and journalist's notes.²⁷⁹ The Iowa Supreme Court has applied the privilege only in civil proceedings. It has suggested that the privilege does apply in criminal proceedings, though.²⁸⁰ The court has not specifically defined who qualifies as a journalist. Newspaper and television journalists have been able to invoke the privilege successfully.

²⁷⁷ Winegard v. Oxberger, 258 N.W.2d 847 (Iowa, 1977).

²⁷⁸ *Id.*, at 852.

²⁷⁹ Waterloo/Cedar Falls Courier v. Hawkeye Community College, 646 N.W.2d 97, 102 (Iowa 2002).

²⁸⁰ *Winegard*, at 852.

Kansas

State Shield Statute:

Kan. Stat. Ann. § 60-480 – 60-485 (2012)

State Cases Analyzed:

State v. Sandstrom, 224 Kan. 573, 581 P.2d 812 (Kan., 1978)

Pennington v. Chaffee, 1 Kan. App. 2d 682, 573 P.2d 1099 (Kan. Ct. App. 1977)

Description:

The Kansas shield statute provides journalists with a qualified privilege to protect any information or the source of any information obtained during journalistic duties.²⁸¹ The statute protects journalists for newspapers, magazines, news wire services, television stations and radio stations. The statute also specifically protects online journals that regularly gather and publish news.²⁸² The statute protects journalists' notes, photographs, outtakes, tapes and other recordings.²⁸³ The shield statute also does not distinguish between confidential and non-confidential information. A court can overturn the privilege if the party seeking the information shows that the information is material and relevant, unavailable through other means, and of compelling interest to the case.²⁸⁴ The Kansas Supreme Court also found a limited privilege based in the First Amendment.²⁸⁵ The protections found in the shield statute likely provide broader protections than what the supreme court initially recognized.

²⁸¹ KAN. STAT. ANN. § 60-481.

²⁸² KAN. STAT. ANN. § 60-480.

²⁸³ *Id.*

²⁸⁴ KAN. STAT. ANN. § 60-482.

²⁸⁵ State v. Sandstrom, 224 Kan. 573, 581 P.2d 812 (Kan. 1978).

Kentucky

State Shield Statute:

Ky. Rev. Stat. Ann. § 421.100 (LexisNexis 2012)

State Cases Analyzed:

The Lexington Herald-Leader Co. v. Beard, 690 S.W.2d 374 (Ky. 1985)

Branzburg v. Meigs, 503 S.W.2d 748 (Ky. 1971)

Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970)

Description:

The Kentucky shield statute provides an absolute privilege for journalists to protect a source of information.²⁸⁶ The statute does not make a distinction between confidential or non-confidential sources. The statute also protects journalists in “any legal proceeding or trial” as well as before a grand jury, the General Assembly, or any city or county legislative body. The statute expressly protects only journalists working for newspapers, radio, or television.²⁸⁷ The state appellate courts have not recognized a journalist’s privilege in the First Amendment or state constitution. The appellate courts have narrowly construed the shield statute to protect only the source from which information was obtained. The shield statute does not protect the actual information itself.²⁸⁸ Journalists also do not have a shield privilege when they personally witness the commission of a crime.²⁸⁹ The Kentucky appellate courts have found that the shield statute does not protect a journalist from being required to appear before a grand jury.²⁹⁰

²⁸⁶ KY. REV. STAT. ANN. § 421.100

²⁸⁷ *Id.*

²⁸⁸ Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970).

²⁸⁹ *Id.*

²⁹⁰ Branzburg v. Meigs, 503 S.W.2d 748 (Ky. 1971).

Louisiana

State Shield Statute:

La. Rev. Stat. § 45:1451 – 1459 (2012)

State Cases Analyzed:

In re Grand Jury Proceedings (Ridenhour), 520 So.2d 372 (La. 1988)

In re Burns, 484 So.2d 658 (La. 1986)

Becnel v. Lucia, 420 So. 2d 1173 (La. Ct. App. 1982)

Dumez v. Houma Municipal Fire and Police Civil Service Bd., 341 So.2d 1206 (La. Ct. App. 1977)

Description:

The Louisiana shield statute provides a qualified privilege for journalists to protect the source of any information. The statute does not distinguish between confidential or non-confidential sources.²⁹¹ A party seeking to overturn the privilege must provide a written statement to the journalist explaining why disclosure of a source is required for the protection of the public's interest. A court is then required to hear testimony from all parties. After testimony, a court can decide whether disclosure is essential to the public interest.²⁹² The statute also provides a qualified privilege to journalists for non-confidential news information. The privilege can be overturned if a party can show the information wanted is highly material and relevant, critical to a party's claim, defense, or issue, and is not obtainable from any other sources.²⁹³ The Louisiana Supreme Court also stated that a qualified privilege for journalists to protect information is found in both the First Amendment and state constitution. Courts can make an exception when the journalist has witnessed criminal activity.²⁹⁴ The supreme court has also interpreted that state statute as protecting any information that could potentially identify a source of information.²⁹⁵

²⁹¹ LA. REV. STAT. ANN. § 45:1452.

²⁹² LA. REV. STAT. ANN. § 45:1453.

²⁹³ LA. REV. STAT. ANN. § 45:1459.

²⁹⁴ In re Grand Jury Proceedings (Ridenhour), 520 So.2d 372 (La. 1988).

²⁹⁵ In re Burns, 484 So.2d 658 (La. 1986).

Maine

State Shield Statute:

Me. Rev. Stat. tit. 16 § 61 (2013)

State Cases Analyzed:

In re Letellier, 578 A.2d 722 (Me. 1990)
State v. Hohler, 543 A.2d 364 (Me. 1988)

Description:

Maine's shield statute provides journalists with a qualified testimonial privilege to protect confidential sources.²⁹⁶ The shield statute simply states that journalists receive shield protection without specifically defining who is a journalist. The statute also protects any information that identifies a confidential source or any information journalists received in confidence while in a journalistic capacity.²⁹⁷ A court can require disclosure of a confidential source after a multi-prong test. The identity of the source must be material and relevant, must be critical to a claim or defense, is not obtainable through other means, and an overriding public interest in disclosure must exist.²⁹⁸ In criminal investigations or prosecution, the government must also show through other sources that reasonable grounds exist to believe a crime has occurred. In civil proceedings a party must also show through other sources that a prima facie cause of action exists.²⁹⁹ Maine's Supreme Judicial Court has acknowledged that the First Amendment does provide protection through a case-by-case balancing test.³⁰⁰ The potential harm to the free flow of information must be balanced against the need for the requested information.³⁰¹

²⁹⁶ ME. REV. STAT. tit. 16 § 61.

²⁹⁷ ME. REV. STAT. tit. 16 § 61(1).

²⁹⁸ ME. REV. STAT. tit. 16 § 61 (2)(A).

²⁹⁹ ME. REV. STAT. tit. 16 § 61 (2)(B).

³⁰⁰ In re Letellier, 578 A.2d 722 (Me. 1990).

³⁰¹ *Id.*, at 726.

Maryland

State Shield Statute:

Md. Code Ann., Cts. & Jud. Proc. § 9-112 (LexisNexis 2012)

State Cases Analyzed:

Forensic Advisors, Inc. v. Matrixx Initiatives, Inc., 170 Md. App. 520, 907 A.2d 855 (Md. Ct. Spec. App. 2006)

Prince George's County v. Hartley, 150 Md. App. 581, 822 A.2d 537 (Md. Ct. Spec. App. 2003)

WBAL-TV Div., Hearst Corp. v. State, 300 Md. 233, 477 A.2d 776 (Md. 1984)

In re State of Cal. for Los Angeles County, Grand Jury Investigation, 57 Md. App. 804, 471 A.2d 1141 (Md. Ct. Spec. App. 1984)

Tofani v. State, 297 Md. 165, 465 A.2d 413 (Md. 1983)

Bilney v. Evening Star Newspaper Co., 43 Md. App. 560, 406 A.2d 652 (Md. Ct. Spec. App. 1979)

Lightman v. State, 15 Md. App. 713, 294 A.2d 149 (Md. Ct. Spec. App. 1972)

State v. Sheridan, 248 Md. 320, 236 A.2d 18 (Md. 1967)

Description:

The Maryland shield statute provides journalists with an absolute privilege to protect sources and a qualified privilege to protect unpublished information.³⁰² The statute provides protection to traditional journalists as well as student journalists.³⁰³ A Maryland appellate court has extended the privilege to Internet news media.³⁰⁴ The statute states that journalists can protect sources whether or not a promise of confidentiality was made.³⁰⁵ The court can overturn the privilege for unpublished information if a party can show that the information is relevant to a significant legal issue, could not be obtained through any other means, and disclosure is in the public's overriding interest.³⁰⁶ The statute states that a court cannot require a journalist to disclose the source of any information.³⁰⁷ The Maryland state appellate courts have interpreted journalist's privilege only through the shield statute. The courts have not found an additional basis for journalist's privilege in the First Amendment or state constitution.

³⁰² MD. CODE ANN., CTS. & JUD. PROC. § 9-112(C).

³⁰³ MD. CODE ANN., CTS. & JUD. PROC. § 9-112(a)-(b).

³⁰⁴ Forensic Advisors, Inc. v. Matrixx Initiatives, Inc., 170 Md. App. 520, 907 A.2d 855 (Md. Ct. Spec. App. 2006).

³⁰⁵ MD. CODE ANN., CTS. & JUD. PROC. § 9-112(C)(1).

³⁰⁶ MD. CODE ANN., CTS. & JUD. PROC. § 9-112(d).

³⁰⁷ *Id.*

Massachusetts

State Shield Statute:

Massachusetts does not have a state shield statute.

State Cases Analyzed:

Ayash v. Dana-Farber Cancer Institute, 442 Mass. 367, 822 N.E.2d 667 (Mass. 2005)
 Wojcik v. Boston Herald, Inc., 60 Mass. App. Ct. 510, 803 N.E.2d 1261 (Mass. App. Ct. 2004)
 Ayash v. Dana-Farber Cancer Institute, 46 Mass. App. Ct. 384, 706 N.E.2d 316 (Mass. App. Ct. 1999)
 Promulgation of Rules Regarding Protection of Confidential News Sources, 395 Mass. 164, 479 N.E.2d 154 (Mass. 1985)
 Com. v. Corsetti, 387 Mass. 1, 438 N.E.2d 805 (Mass. 1982)
 Matter of Roche, 381 Mass. 624, 411 N.E.2d 466 (Mass. 1980)
 Dow Jones & Co., Inc. v. Superior Court, 364 Mass. 317, 303 N.E.2d 847 (Mass. 1973)
 In re Pappas, 358 Mass. 604, 266 N.E.2d 297 (Mass. 1971)

Description:

The Massachusetts legislature has not enacted a state shield statute. The state appellate courts have also been reluctant to find a basis for a journalist's privilege in the First Amendment or state constitution. Rather, the courts have developed protections for journalists through the common law. The Massachusetts Supreme Judicial Court has emphasized a balancing test between the public's interest in the need of every person's evidence and the protection of the free flow of information.³⁰⁸ The court did not specifically establish what factors must be considered in the balancing test. The situations in which courts have granted protection for journalists have typically involved confidential sources.³⁰⁹ The Massachusetts Supreme Judicial Court has found that published information from a known source does not receive protection, though.³¹⁰ Massachusetts state appellate courts have provided protection in the context of grand juries,³¹¹ criminal proceedings,³¹² non-libel civil litigation³¹³ and libel litigation when the media was a party.³¹⁴

³⁰⁸ Promulgation of Rules Regarding Protection of Confidential News Sources, 395 Mass. 164, 479 N.E.2d 154 (Mass. 1985).

³⁰⁹ See Wojcik v. Boston Herald, Inc., 60 Mass. App. Ct. 510, 803 N.E.2d 1261 (Mass. App. Ct. 2004); Com. v. Bui, 419 Mass. 392, 645 N.E.2d 689 (Mass. 1995); Matter of John Doe Grand Jury Investigation, 410 Mass. 596, 574 N.E.2d 373 (Mass. 1991); Sinnott v. Boston Retirement Bd., 402 Mass. 581, 524 N.E.2d 100 (Mass. 1988).

³¹⁰ Com. v. Corsetti, 387 Mass. 1, 438 N.E.2d 805 (Mass. 1982).

³¹¹ Matter of John Doe Grand Jury Investigation, 410 Mass. 596, 574 N.E.2d 373 (Mass. 1991).

³¹² Com. v. Bui, 419 Mass. 392, 645 N.E.2d 689 (Mass. 1995).

³¹³ Sinnott v. Boston Retirement Bd., 402 Mass. 581, 524 N.E. 2d 100 (Mass. 1988).

³¹⁴ Wojcik v. Boston Herald, Inc., 60 Mass. App. Ct. 510, 803 N.E.2d 1261 (Mass. App. Ct. 2004).

Michigan

State Shield Statute:

Mich. Comp. Laws Serv. § 767.5a (LexisNexis 2013) (statute for grand jury proceedings)
 Mich. Comp. Laws Serv. § 767A.6 (LexisNexis 2013) (statute for investigatory subpoenas from prosecutors)

State Cases Analyzed:

In re Subpoenas to News Media Practitioners, 240 Mich. App. 369, 613 N.W. 2d 342 (Mich. Ct. App. 2000)
 Marketos v. American Employers Ins. Co., 185 Mich. App 179, 460 N.W.2d 272 (Mich. Ct. App. 1990)
 In re Contempt of Stone, 154 Mich. App. 121, 397 N.W.2d 244 (Mich. Ct. App. 1986)
 Matter of Photo Marketing Ass'n Intern., 120 Mich. App. 527 327 N.W.2d 515 (Mich. Ct. App. 1982)

Description:

Michigan's shield statute provides a qualified privilege in grand jury proceedings for journalists to protect informants.³¹⁵ The statute also protects unpublished information obtained from or relating to an informant. The statute does not distinguish between confidential and non-confidential sources. The shield can be overturned in inquiries of crimes with sentences of life imprisonment. In those situations, a court can require a journalist to reveal information if it is essential to the proceeding and alternative sources have been exhausted.³¹⁶ Michigan also has a statute that protects journalists from investigatory subpoenas that prosecutors have issued.³¹⁷ The statute provides an absolute privilege for journalists to protect sources in any inquiry using investigative subpoenas. Journalists are required to reveal information only if it has been disseminated to the public or the journalist is the subject of the inquiry.³¹⁸ A Michigan appellate court has applied the grand jury shield statute in civil proceedings. The court found that the statute does not provide protection for non-confidential information in such cases. The statute protects the identity of the informant as well as communications between a journalist and informant.³¹⁹ Michigan appellate courts have refused to find a basis for a journalist's privilege in the First Amendment or state constitution.

³¹⁵ MICH. COMP. LAWS § 767.5A (2013).

³¹⁶ *Id.*

³¹⁷ MICH. COMP. LAWS § 767A.6 (2013).

³¹⁸ In re Subpoenas to News Media Practitioners, 240 Mich. App. 369, 613 N.W. 2d 342 (Mich. Ct. App. 2000).

³¹⁹ Marketos v. American Employers Ins. Co., 185 Mich. App 179, 460 N.W.2d 272 (Mich. Ct. App. 1990).

Minnesota

State Shield Statute:

Minn. Stat. § 595.021 – 595.025 (2013)

State Cases Analyzed:

In re Death Investigation of Skjervold, 742 N.W.2d 686 (Minn. Ct. App. 2007)
 In re Charges of Unprofessional Conduct Involving File No. 17139, 720 N.W.2d 807
 (Minn. 2006)
 Weinberger v. Maplewood Review, 668 N.W.2d 667 (Minn. 2003)
 Weinberger v. Maplewood Review, 658 N.W.2d 249 (Minn. Ct. App. 2002)
 Bauer v. Gannett Co., Inc. (Kare 11), 557 N.W.2d 608 (Minn. Ct. App. 1997)
 State v. Turner, 550 N.W.2d 622 (Minn. 1996)
 State v. Knutson, 539 N.W.2d 254 (Minn. 1995)
 State v. Knutson, 523 N.W.2d 909 (Minn. 1994)
 Heaslip v. Freeman, 511 N.W.2d 21 (Minn. Ct. App. 1994)
 State v. Brenner, 488 N.W.2d 339 (Minn. Ct. App. 1992)
 Cohen v. Cowles Media Co., 445 N.W.2d 248 (Minn. Ct. App. 1989)
 State v. Astleford, 323 N.W.2d 733 (Minn. Ct. App. 1982)

Description:

Minnesota's shield statute provides a qualified privilege for journalists to protect sources and unpublished information gathered during the course of journalistic work.³²⁰ The statute includes language that discusses the public policy intent of the statute. The statute is intended to protect news media sources and unpublished information.³²¹ The statute does not distinguish between confidential and non-confidential sources or information. The statute also states that the protections apply in courts, grand juries, agency hearings and legislative proceedings.³²² The statute does not specifically define who is considered a journalist. The Minnesota Supreme Court did suggest that the definition of a journalist can be very broad, though.³²³ A court can overturn the privilege if a party can demonstrate all factors under a three-prong test. The first prong requires one of two situations. A party must show there is probable cause that the information is relevant to a gross misdemeanor or felony. If the information is relevant to only a misdemeanor, the party must show that the information will not reveal the identity of the source. The second prong requires that the information cannot be obtained through means less destructive to First Amendment rights. The third prong requires that the party show a compelling and overriding need for the information to prevent injustice.³²⁴ The requirements to overturn the privilege in a defamation case are slightly different. A party

³²⁰ MINN. STAT. § 595.023.

³²¹ MINN. STAT. § 595.022.

³²² MINN. STAT. § 595.023.

³²³ In re Charges of Unprofessional Conduct Involving File No. 17139, 720 N.W.2d 807, 816 (Minn. 2006).

³²⁴ MINN. STAT. §595.024.

seeking disclosure must show that the identity of the source will lead to evidence of actual malice. A journalist will not be required to disclose the source of information unless there is probable cause that the source has information relevant to the issue of defamation and the information cannot be obtained through alternative means.³²⁵ The Minnesota appellate courts have consistently declined to find a basis for a journalist's privilege in the First Amendment or state constitution.

³²⁵ MINN. STAT. §595.025.

Mississippi

State Shield Statute:

Mississippi does not have a state shield statute.

State Cases Analyzed:

No state appellate courts have addressed journalist's privilege.

Description:

Mississippi has not enacted a state shield statute. The Mississippi state appellate courts have not addressed any journalist's privilege issues. At least one federal district court in Mississippi has stated that the First Amendment provides a basis for a qualified journalist's privilege.³²⁶ The court held that a journalist can only be required to reveal unpublished information after a court balances First Amendment interests of a free press against a defendant's interest in obtaining information.³²⁷ Mississippi falls under the jurisdiction of the United States Fifth Circuit Court of Appeals. The Fifth Circuit has recognized a qualified journalist's privilege in the First Amendment.³²⁸

³²⁶ *Brinston v. Dunn*, 919 F. Supp. 240 (S.D. Miss. 1996)

³²⁷ *Id.*, at 243

³²⁸ *See* *Mill v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983).

Missouri

State Shield Statute:

Missouri does not have a shield statute.

State Cases Analyzed:

State ex rel Classics III Inc. v. Ely, 954 S.W.2d 650, (Mo. Ct. App. 1997)
CBS Inc. (KMOX-TV) v. Campbell, 645 S.W.2d 30 (Mo. Ct. App. 1982)

Description:

Missouri does not have a shield statute for journalists. Also, the state appellate courts have addressed the issue only twice. In an 1982 case, the Missouri Court of Appeals in the eastern district found that a television station could not refuse to disclose unpublished information to a grand jury.³²⁹ The other case that focused on journalist's privilege was in the context of a libel suit against a magazine. The Missouri Court of Appeals in the western district held that journalists did have a qualified privilege to protect a confidential background source for an allegedly libelous article.³³⁰ The court indicated that the foundation for a privilege could be based on the First Amendment.³³¹ The court adopted a four-part balancing test for media defendants in a libel context. A court must balance whether alternative sources have been exhausted, the importance of protecting confidentiality under the circumstances, whether the information is crucial to the plaintiff's case, and whether the plaintiff has made a prima facie case of defamation.³³² The state appellate courts have not stated whether the privilege applies in criminal proceedings. The Missouri appellate courts have not defined who is eligible for the journalist's privilege.

³²⁹ CBS Inc. (KMOX-TV) v. Campbell, 645 S.W.2d 30 (Mo. Ct. App. 1982).

³³⁰ State ex rel Classics III Inc. v. Ely, 954 S.W.2d 650, (Mo. Ct. App. 1997).

³³¹ *Id.*, at 653.

³³² *Id.*, at 655.

Montana

State Shield Statute:

Mont. Code Ann. § 26-1-901 – 26-1-903 (2012)

State Cases Analyzed:

State v. Slavin, 320 Mont. 425, 87 P.3d 495 (Mont. 2004)

Sible v. Lee Enterprises, Inc., 224 Mont. 163, 729 P.2d 1271 (Mont. 1986)

State ex rel. Adams v. District Court of Third Judicial Dist., 169 Mont. 336, 546 P.2d 988 (Mont. 1976)

Description:

Montana's shield statute provides an absolute privilege for journalists to protect any sources or information used during the course of the journalist's work.³³³ The statute provides protections for journalists working for newspapers, magazines, press associations, news agencies, news services, radio stations, television stations or community antenna television services.³³⁴ The shield statute does not provide any exceptions in which the privilege can be overturned. The statute also specifically states that journalists can waive the privilege only if they voluntarily agree to or voluntarily disclose the source during testimony.³³⁵ This section of the statute was likely amended after a court found that a journalist waived the privilege after he simply agreed to provide general testimony during a trial.³³⁶ The Montana appellate courts have not directly addressed whether the absolute privilege conflicts with other constitutional rights. In the only case touching on the matter, a district trial court dismissed a motion to require journalist's testimony in a criminal proceeding. The defendant stated that the excluded testimony harmed his Sixth Amendment and Montana constitutional rights to compel witnesses on his behalf. The Montana Supreme Court stated that even if the district court had made an error, it was harmless because other testimony could provide similar information.³³⁷

³³³ MONT. CODE ANNO. § 26-1-902.

³³⁴ *Id.*

³³⁵ MONT. CODE ANNO. § 26-1-903.

³³⁶ Sible v. Lee Enterprises, Inc., 224 Mont. 163, 729 P.2d 1271 (Mont. 1986).

³³⁷ State v. Slavin, 320 Mont. 425, 87 P.3d 495 (Mont. 2004).

Nebraska

State Shield Statute:

Neb. Rev. Stat. § 20-144 – 20-147 (2012)

State Cases Analyzed:

No state appellate courts have addressed journalist's privilege.

Description:

Nebraska's shield statute provides journalists with an absolute privilege to protect both sources and unpublished information.³³⁸ The statute provides protection for traditional journalists as well as book and pamphlet authors.³³⁹ The statute states that the privilege applies in any judicial, executive, legislative or administrative hearing, or investigation.³⁴⁰ The statute does not provide any exceptions. Nebraska's state appellate courts have not addressed journalist's privilege.

³³⁸ NEB. REV. STAT. § 20-146.

³³⁹ NEB. REV. STAT. § 20-145(2).

³⁴⁰ NEB. REV. STAT. § 20-145(1).

Nevada

State Shield Statute:

Nev. Rev. Stat. Ann. § 49.275 (LexisNexis 2012)

State Cases Analyzed:

Diaz v. Eighth Judicial Dist. Court ex rel. County of Clark, 116 Nev. 88, 993 P.2d 50 (Nev. 2000)

Las Vegas Sun, Inc. v. Eighth Judicial Dist. Court In and For Clark County, 104 Nev. 508, 761 P.2d 849 (Nev. 1998)

Newburn v. Howard Hughes Medical Institute, 95 Nev. 368, 594 P.2d 1146 (Nev. 1979)

Description:

The Nevada shield statute provides journalists with an absolute privilege to protect published and unpublished information as well as sources.³⁴¹ The statute does not distinguish between confidential and non-confidential information. The statute provides protection from any court, grand jury, coroner's inquest, legislature, department, agency, commission or local governing body proceedings, trials or investigations.³⁴² The statute limits protections to journalists, former journalists, or editors of newspapers, periodicals or press associations. The statute also provides protection to employees of any radio or television station.³⁴³ The Nevada Supreme Court has interpreted the statute as providing an absolute privilege to journalists.³⁴⁴ The court did state, though, that situations might exist in which the shield will have to yield to a criminal defendant's opposing constitutional rights.³⁴⁵ The Nevada state appellate courts have not specifically had a case that addresses such an issue. The state appellate courts have interpreted only the state statute as providing a journalist's privilege rather than the First Amendment or state constitution.

³⁴¹ NEV. REV. STAT. § 49.275

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ Diaz v. Eighth Judicial Dist. Court ex rel. County of Clark, 116 Nev. 88, 993 P.2d 50 (Nev. 2000).

³⁴⁵ *Id.*, at 101.

New Hampshire

State Shield Statute:

New Hampshire does not have a state shield statute.

State Cases Analyzed:

Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc., 160 N.H. 227, 999 A.2d 184 (N.H. 2010)

State v. Siel, 122 N.H. 254, 444 A.2d 499 (N.H. 1980)

Downing v. Monitor Pub. Co. Inc., 120 N.H. 383, 415 A.2d 683 (N.H. 1980)

Opinion of the Justices, 117 N.H. 286, 373 A.2d 644 (N.H. 1977)

Description:

New Hampshire has not enacted a shield statute. The New Hampshire Supreme Court has found a basis for a qualified reporter's privilege to protect confidential sources in both the First Amendment and state constitution.³⁴⁶ The court has also found that the privilege applies in both criminal³⁴⁷ and civil proceedings.³⁴⁸ The privilege has not been determined to extend beyond confidential sources because the supreme court has not addressed a case in which other information was at stake. The supreme court has also provided protection to newspaper journalists and a website publishing financial news.³⁴⁹ Journalists working for other news media would likely be protected, but no cases have addressed the issue. The supreme court has also laid out different tests to overturn the privilege depending on the context. In a criminal context, a court can overturn the privilege if a defendant can show that all other reasonable means to gain the information have been exhausted, the information is not irrelevant to a defense, and a reasonable possibility exists that the information would affect the verdict.³⁵⁰ In defamation suit, a plaintiff must provide evidence that "there is a genuine issue of fact regarding the falsity of the publication."³⁵¹ In civil suits where the news media is not a party, the court can overturn the privilege after conducting a balancing test that weighs the plaintiff's asserted need of information against the free flow of information.³⁵²

³⁴⁶ See State v. Siel, 122 N.H. 254, 258, 444 A.2d 499 (N.H. 1980).

³⁴⁷ *Id.*

³⁴⁸ See Downing v. Monitor Pub. Co. Inc., 120 N.H. 383, 415 A.2d 683 (N.H. 1980); Opinion of the Justices, 117 N.H. 286, 373 A.2d 644 (N.H. 1977).

³⁴⁹ See Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc., 160 N.H. 227, 999 A.2d 184 (N.H. 2010).

³⁵⁰ State v. Siel, 122 N.H. 254, 444 A.2d 499 (N.H.,1980).

³⁵¹ Downing v. Monitor Pub. Co. Inc., 120 N.H. 383, 387, 415 A.2d 683 (N.H. 1980)

³⁵² Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc., 160 N.H. 227, 236, 999 A.2d 184 (N.H. 2010).

New Jersey

State Shield Statute:

N.J. Stat. § 2A:84A-21 – 2A:84A-21.8 (2013)

State Cases Analyzed:

Too Much Media, LLC v. Hale, 206 N.J. 209, 20 A.3d 364 (N.J. 2011)

Too Much Media, LLC v. Hale, 413 N.J. Super. 135, 993 A.2d 845 (N.J. Super. Ct. App. Div. 2008)

Trump v. O'Brien, 403 N.J. Super. 281, 958 A.2d 85 (N.J. Super. Ct. App. Div. 2008)

Senna v. Florimont, 196 N.J. 469, 958 A.2d 457 (N.J. 2008)

In re Venezia, 191 N.J. 259, 922 A.2d 1263 (N.J. 2007)

Kinsella v. NYT Television, 370 N.J. Super. 311, 851 A.2d 105 (N.J. Super. Ct. App. Div. 2004)

Kinsella v. Welch, 362 N.J. Super. 143, 827 A.2d 325 (N.J. Super. Ct. Law Div. 2000)

Petition of Burnett, 269 N.J. Super. 493, 635 A.2d 1019 (N.J. Super. Ct. Law Div. 1993)

Gastman v. North Jersey Newspapers Co., 254 N.J. Super. 140, 603 A.2d 111 (N.J. Super. Ct. App. Div. 1992)

State v. Santiago, 250 N.J. Super. 30, 593 A.2d 357 (N.J. Super. Ct. App. Div. 1991)

Matter of Woodhaven Lumber and Mill Work, 123 N.J. 481, 589 A.2d 135 (N.J. 1991)

In re Schuman, 114 N.J. 14, 552 A.2d 602 (N.J. 1989)

In re Schuman, 222 N.J. Super. 387, 537 A.2d 297 (N.J. Super. Ct. App. Div. 1988)

In re Avila, 206 N.J. Super. 61, 501 A.2d 1018 (N.J. Super. Ct. App. Div. 1985)

Maressa v. New Jersey Monthly, 89 N.J. 176, 445 A.2d 376 (N.J. 1982)

Resorts Intern., Inc. v. NJM Associates, 180 N.J. Super. 459, 435 A.2d 572 (N.J. Super. Law Div. 1981)

Matter of Grand Jury Subpoena of Fawn Vrazo, 176 N.J. Super. 455, 423 A.2d 695 (N.J. Super. Law Div. 1980)

State v. Boiardo, 83 N.J. 350, 416 A.2d 793 (N.J. 1980)

State v. Boiardo, 82 N.J. 446, 414 A.2d 14 (N.J. 1980)

Matter of Farber, 78 N.J. 259, 394 A.2d 330 (N.J. 1978)

In re Bridge, 120 N.J. Super. 460, 295 A.2d 3 (N.J. Super. Ct. App. Div. 1972)

Beecroft v. Point Pleasant Printing & Pub. Co., 82 N.J. Super. 269, 197 A.2d 416 (N.J. Super. Law Div., 1964)

Description:

The New Jersey Shield statute provides journalists with an absolute privilege to protect sources and information.³⁵³ The statute provides protection for traditional journalists as well as information published through “other similar printed, photographic, mechanical or electronic means.”³⁵⁴ The New Jersey state appellate courts have found the

³⁵³ N.J. STAT. § 2A:84A-21.

³⁵⁴ N.J. STAT. § 2A:84A-21a.

privilege extends to book authors,³⁵⁵ Internet journalists,³⁵⁶ and publishers of an annual report rating insurers.³⁵⁷ The statute provides protection to journalists in any legal proceeding, quasi-legal proceeding, or before an investigative body.³⁵⁸ The statute does not distinguish between whether the information is confidential and non-confidential. The only exceptions the statute makes are for when journalists intentionally conceal their identities or are eyewitnesses to an act that involves physical violence or property damage.³⁵⁹ The New Jersey Supreme Court viewed the exception narrowly when it refused to require journalists to provide photographs of a burning building.³⁶⁰ The court held that journalists could be required to testify only if they personally witness the act itself.³⁶¹ The supreme court has held that the absolute privilege could fall when it conflicts with a criminal defendant's constitutional rights.³⁶² A court can overturn the privilege if a criminal defendant shows that the information was material and relevant, unavailable from other sources, and legitimately needed to see and use it.³⁶³ In defamation actions, though, the supreme court held that the shield statute was absolute.³⁶⁴

³⁵⁵ *Trump v. O'Brien*, 403 N.J. Super. 281, 958 A.2d 85 (N.J. Super. Ct. App. Div. 2008).

³⁵⁶ *See Too Much Media, LLC v. Hale*, 206 N.J. 209, 233, 20 A.3d 364, 378 (N.J. 2011).

³⁵⁷ *Petition of Burnett*, 269 N.J. Super. 493, 635 A.2d 1019 (N.J. Super. Ct. Law Div. 1993).

³⁵⁸ N.J. STAT. § 2A:84A-21.

³⁵⁹ N.J. STAT. § 2A:84A-21a(h).

³⁶⁰ *Matter of Woodhaven Lumber and Mill Work*, 123 N.J. 481, 589 A.2d 135 (N.J. 1991).

³⁶¹ *Id.*, at 488.

³⁶² *Matter of Farber*, 78 N.J. 259, 394 A.2d 330 (N.J. 1978).

³⁶³ *Id.*, at 276-277.

³⁶⁴ *Maressa v. New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376 (N.J. 1982).

New Mexico

State Shield Statute:

Rule 11-514 NMRA (2013)

State Cases Analyzed:

Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (N.M. 1982)

Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (N.M. 1976)

Description:

New Mexico journalists have a qualified testimonial privilege under Rule 11-514 of New Mexico's Rules of Evidence.³⁶⁵ The rule states that journalists have a privilege to refuse to testify about confidential sources or confidential information obtained in the course of journalistic duties.³⁶⁶ The rule protects journalists who work for "newspapers, magazines, press associations, news agencies wire services, radio or television or other similar printed, photographic, mechanical or electronic means of disseminating news to the public."³⁶⁷ Journalists working for Internet news could possibly fall under this definition, but no court decision has addressed the issue. A court can overturn the privilege if a party can show that a journalist has confidential information that is material and relevant, all other sources of gaining the information have been exhausted, the information is crucial to the case of the party, and the need of the information outweighs the public interest protecting the information and sources.³⁶⁸ The source of the shield is in the New Mexico rules of evidence because the state supreme court declared the legislatively enacted shield statute unconstitutional because the legislature did not have the constitutional power to dictate judicial rules.³⁶⁹ The supreme court then promulgated a testimonial privilege for journalists into the state's rules of evidence. The New Mexico legislature's original enactment does remain in the books.³⁷⁰ The New Mexico courts have not found a journalist's privilege in either the First Amendment or state constitution.

³⁶⁵ Rule 11-514 NMRA 2013.

³⁶⁶ *Id.*, at (B).

³⁶⁷ *Id.*, at (A)(6).

³⁶⁸ *Id.*, at (C).

³⁶⁹ Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (N.M. 1976).

³⁷⁰ N.M. STAT. ANN. § 38-6-7 (2012).

New York

State Shield Statute:

N.Y. Civ. Rights Law § 79-h (2013)

State Cases Analyzed:

Perito v. Finklestein, 51 A.D.3d 674, 856 N.Y.S.2d 677 (N.Y. App. Div. 2008)
 People v. Combest, 4 N.Y.3d 341, 828 N.E.2d 583, 795 N.Y.S.2d 481 (N.Y. 2005)
 Emerson v. Port, 303 A.D.2d 229, 757 N.Y.S.2d 18 (N.Y. App. Div. 2003)
 Flynn v. NYP Holdings Inc., 235 A.D.2d 907, 654 N.Y.S.2d 833 (N.Y. App. Div. 1997)
 Application of CBS Inc., 232 A.D.2d 291, 648 N.Y.S.2d 443 (N.Y. App. Div. 1996)
 Brown & Williamson Tobacco Corp. v. Wigand, 228 A.D.2d 187, 643 N.Y.S.2d 92 (N.Y. App. Div. 1996)
 Application of Codey, 183 A.D.2d 126, 589 N.Y.S.2d 400 (N.Y. App. Div. 1992)
 Sands v. News America Pub. Inc., 161 A.D.2d 30, 560 N.Y.S.2d 416 (N.Y. App. Div. 1990)
 O'Neill v. Oakgrove Const., Inc., 71 N.Y.2d 521, 523 N.E.2d 277, 528 N.Y.S.2d 595 (N.Y. 1988)
 Knight-Ridder Broadcasting, Inc. v. Greenberg, 70 N.Y.2d 151, 511 N.E.2d 116, 518 N.Y.S.2d 595 (N.Y. 1987)
 O'Neill v. Oakgrove Const., Inc., 122 A.D. 2d 570, 505 N.Y.S.2d 477 (N.Y. App. Div. 1986)
 In re Penzoil Co., 108 A.D.2d 666, 485 N.Y.S.2d 533 (N.Y. App. Div. 1985)
 Beach v. Shanley, 63 N.Y.2d 241, 465 N.E.2d 304, 476 N.Y.S.2d 765 (N.Y. 1984)
 People v. Korkala, 99 A.D.2d 161, 472 N.Y.S.2d 310 (N.Y. App. Div. 1984)
 Oak Beach Inn Corp. v. Babylon Beacon, Inc., 92 A.D.2d 102, 459 N.Y.S.2d 819 (N.Y. App. Div. 1983)
 Matter of Beach v. Shanley, 94 A.D.2d 542, 466 N.Y.S.2d 725 (N.Y. App. Div. 1983)
 Hennigan v. Buffalo Courier Exp. Co., Inc., 85 A.D.2d 924, 466 N.Y.S.2d 767 (N.Y. App. Div. 1981)
 Greenleigh Associates, Inc. v. New York Post Corp., 79 A.D.2d 588, 434 N.Y.S.2d 388 (N.Y. App. Div. 1980)
 People v. LeGrand, 67 A.D.2d 446, 415 N.Y.S.2d 252 (N.Y. App. Div. 1979)
 WBAI-FM v. Proskin, 42 A.D.2d 5, 344 N.Y.S.2d 393 (N.Y. App. Div. 1973)
 People v. Dan, 41 A.D.2d 687, 342 N.Y.S.2d 731 (N.Y. App. Div. 1973)
 People v. Wolf, 39 A.D.2d 864, 333 N.Y.S.2d 299 (N.Y. App. Div. 1972)

Description:

The New York shield statute provides journalists with an absolute privilege to protect confidential information.³⁷¹ The statute also provides a qualified privilege to protect non-confidential news.³⁷² The statute provides protection for traditional

³⁷¹ N.Y. CIV. RIGHTS LAW § 79-h(b).

³⁷² N.Y. CIV. RIGHTS LAW § 79-h(c).

journalists as well as people working for any “other professional medium or agency.”³⁷³ The New York state appellate courts have stated that the statute extends protection to book authors.³⁷⁴ A New York trial court has extended the statute to protect Internet journalists.³⁷⁵ The statute provides journalists with protection in any civil, criminal, grand jury or legislative proceedings.³⁷⁶ A New York appellate court has held that the statute provides protection for journalist’s eyewitness observations.³⁷⁷ A court can overturn the privilege for non-confidential information if a party shows that the journalist’s information is highly material or relevant, necessary to the maintenance of a claim or defense, and is unavailable from other sources.³⁷⁸ The statute protects journalists only from contempt.³⁷⁹ A court could potentially use other sanctions, such as summary judgment, in defamation cases. New York Appellate courts have recognized a basis for a qualified journalist’s privilege in the First Amendment and state constitution.³⁸⁰

³⁷³ N.Y. CIV. RIGHTS LAW § 79-h(a)(6).

³⁷⁴ *Perito v. Finklestein*, 51 A.D.3d 674, 856 N.Y.S.2d 677 (N.Y. App. Div. 2008)

³⁷⁵ *Morgan Keegan & Co., Inc. v. Eavis*, 37 Misc. 3d 1058, 955 N.Y.S.2d 715, 2012 N.Y. Slip Op. 22310 (N.Y. Sup. Ct. 2012).

³⁷⁶ N.Y. CIV RIGHTS LAW § 79-h(b) & (c).

³⁷⁷ *Beach v. Shanley*, 63 N.Y.2d 241, 465 N.E.2d 304, 476 N.Y.S.2d 765 (N.Y. 1984).

³⁷⁸ N.Y. CIV. RIGHTS LAW § 79-h(c).

³⁷⁹ *Id.*

³⁸⁰ *See O’Neill v. Oakgrove Const., Inc.*, 71 N.Y.2d 521, 523 N.E.2d 277, 528 N.Y.S.2d 595 (N.Y. 1988).

North Carolina

State Shield Statute:

N.C. Gen. Stat. § 8-53.11 (2013)

State Cases Analyzed:

In re Owens, 128 N.C. App. 577, 496 S.E.2d 592 (N.C. Ct. App. 1998)

Description:

The North Carolina shield statute provides journalists with a qualified privilege to protect confidential and non-confidential information in any legal proceeding.³⁸¹ The statute specifically includes any grand jury proceeding or investigation, criminal prosecution or civil suit in its definition of legal proceeding.³⁸² The statute states that a news medium is any entity that publishes or distributes news through print, broadcast, or electronic means.³⁸³ The definition likely covers journalists working for Internet news organizations, but a court has not specifically addressed the issue. To overcome the privilege, a party seeking the journalist's information must establish that the information is relevant and material, cannot be obtained through alternative sources, and is essential to the maintenance of a claim or defense.³⁸⁴ The North Carolina appellate courts have not interpreted the shield statute. The only case focusing on a journalist's privilege occurred before the legislature enacted the statute. In that case, the Court of Appeals of North Carolina refused to recognize a journalist's privilege for non-confidential information from a non-confidential source.³⁸⁵

³⁸¹ N.C. GEN. STAT § 8-53.11(B).

³⁸² N.C. GEN. STAT § 8-53.11(A)(2).

³⁸³ N.C. GEN. STAT § 8-53.11(A)(3).

³⁸⁴ N.C. GEN. STAT § 8-53.11(c).

³⁸⁵ In re Owens, 128 N.C. App. 577, 496 S.E.2d 592 (N.C. Ct. App. 1998).

North Dakota

State Shield Statute:

N.D. Cent. Code § 31-01-06.2 (2013)

State Cases Analyzed:

Grand Forks Herald v. District Court in and for Grand Forks County, 322 N.W.2d (N.D. 1982)

Description:

The North Dakota shield statute provides journalists with a qualified privilege to protect sources or any information in any proceeding or hearing.³⁸⁶ The statute does not distinguish between confidential and non-confidential information. The statute requires that the journalists must have gained the information while working. The journalist must also be working for or acting for an organization that publishes or broadcasts news. The privilege can be overturned if a district court finds that a lack of disclosure will result in a miscarriage of justice.³⁸⁷ The statute does not specifically explain what a district court must consider. In interpreting the statute, the North Dakota Supreme Court provided several aspects that a district court must consider. The supreme court factors included whether the information was confidential, whether all other possible sources had been exhausted, and whether a compelling interest existed. The court stated that the type of proceeding should be considered as well as whether the action or suit was patently frivolous.³⁸⁸ Overall, a district court must balance a variety of factors rather than using a uniformly established test. The North Dakota courts have not found a basis for a journalist's privilege in the First Amendment or state constitution.

³⁸⁶ N.D. CENT. CODE § 31-01-06.2 (2013).

³⁸⁷ *Id.*

³⁸⁸ Grand Forks Herald v. District Court in and for Grand Forks County, 322 N.W.2d (N.D. 1982).

Ohio

State Shield Statute:

Ohio Rev. Code Ann. § 2739.11 – 2739.12 (LexisNexis 2013) (shield for newspaper journalists)

Ohio Rev. Code Ann. § 2739.04 (LexisNexis 2013) (shield for broadcast journalists)

State Cases Analyzed:

Svoboda v. Clear Channel Communications, Inc., 156 Ohio App. 3d 307, 805 N.E.2d 559 (Ohio Ct. App. 2004)

In re April 7, 1999 Grand Jury Proceedings, 140 Ohio App. 3d 755, 749 N.E.2d 325 (Ohio Ct. App. 2000)

In re Grand Jury Witness Subpoena of Abraham, 92 Ohio App. 3d 186, 634 N.E.2d 667 (Ohio Ct. App. 1993)

State ex rel. Nat. Broadcasting Co., Inc. v. Court of Common Pleas of Lake County, 52 Ohio St. 3d 104, 556 N.E.2d 1120 (Ohio 1990)

State v. Geis, 2 Ohio App. 3d 258, 411 N.E.2d 803 (Ohio Ct. App. 1982)

Matter of McAuley, 63 Ohio App. 2d 5, 408 N.E.2d 697 (Ohio Ct. App. 1979)

Description:

The Ohio shield statute grants journalists an absolute privilege to protect the identity of sources.³⁸⁹ The shield is divided between two different statutes. One statute protects newspaper journalists³⁹⁰ while the other protects broadcast journalists.³⁹¹ The statutes do not distinguish between confidential or non-confidential sources. The statute provides protection to journalists in any legal proceeding, trial or investigation.³⁹² The Ohio state appellate courts have not recognized a journalist's privilege in the First Amendment or state constitution. An Ohio state appellate court has found that the statute is limited to only the source of information.³⁹³ Another state appellate court has protected information that could lead to the identity of a source, though.³⁹⁴ A state appellate court stated that the absolute privilege could fall if it conflicts with a criminal defendant's constitutional rights.³⁹⁵ When the statute and constitutional rights conflict, the criminal defendant must show that the journalist's information can provide relevant evidence of guilt or innocence.³⁹⁶

³⁸⁹ OHIO REV. CODE ANN. § 2739.12; OHIO REV. CODE ANN. § 2739.04.

³⁹⁰ OHIO REV. CODE ANN. § 2739.12.

³⁹¹ OHIO REV. CODE ANN. § 2739.04.

³⁹² OHIO REV. CODE ANN. § 2739.12; OHIO REV. CODE ANN. § 2739.04.

³⁹³ State v. Geis, 2 Ohio App. 3d 258, 411 N.E.2d 803 (Ohio Ct. App. 1982).

³⁹⁴ In re April 7, 1999 Grand Jury Proceedings, 140 Ohio App. 3d 755, 749 N.E.2d 325 (Ohio Ct. App. 2000).

³⁹⁵ Matter of McAuley, 63 Ohio App. 2d 5, 408 N.E.2d 697 (Ohio Ct. App. 1979).

³⁹⁶ *Id.*, at 22.

Oklahoma

State Shield Statute:

Okla. Stat. tit. 12 § 2506 (2013)

State Cases Analyzed:

Taylor v. Miskovsky, 640 P.2d 959 (Okl. 1981)

Description:

The Oklahoma shield statute provides a qualified privilege for journalists to protect both sources and unpublished information in state proceedings.³⁹⁷ The statute defines state proceedings as any investigation or judicial, legislative, executive or administrative proceeding.³⁹⁸ The statute protects traditional journalists as well as book authors.³⁹⁹ The statute does not make a distinction between confidential and non-confidential sources. The statute also specifically states that the privilege does not apply to allegedly defamatory information in proceedings which a defendant asserts a defense based on the information.⁴⁰⁰ A court can overturn the privilege if a party establishes that the information or source's identity is relevant to a significant issue and could not be discovered through alternative means.⁴⁰¹ The Oklahoma Supreme Court has found a basis for a qualified reporter's privilege in the First Amendment.

³⁹⁷ OKL. STAT. tit. 12 § 2506(B).

³⁹⁸ OKL. STAT. tit. 12 § 2506(A)(1).

³⁹⁹ OKL. STAT. tit. 12 § 2506(A)(2).

⁴⁰⁰ OKL. STAT. tit. 12 § 2506(B).

⁴⁰¹ OKL. STAT. tit. 12 § 2506(B)(2).

Oregon

State Shield Statute:

Or. Rev. Stat. § 44.510 – 44.530 (2011)

State Cases Analyzed:

Brown v. Gatti, 195 Or. App. 695, 99 P.3d 299 (Or. Ct. App. 2004)
 State v. Pelham, 136 Or. App. 336, 901 P.2d 972 (Or. Ct. App. 1995)
 State ex rel. Meyers v. Howell, 86 Or. App. 570, 740 P.2d 792 (Or. Ct. App. 1987)
 McNabb v. Oregonian Pub. Co., 69 Or. App. 136, 685 P.2d 458 (Or. Ct. App. 1984)
 State v. Buchanan, 250 Or. 244, 436 P.2d 729 (Or. 1968)

Description:

The Oregon shield statute provides journalists with an absolute privilege to protect sources and unpublished information.⁴⁰² The statute protects traditional journalists as well as book authors.⁴⁰³ The statute protects journalists from testifying before any executive, legislative, or judicial body.⁴⁰⁴ The statute also prohibits authorities from conducting searches of journalists' papers or work areas unless probable cause exists to believe that the journalist has committed or will commit a crime.⁴⁰⁵ The statute does provide one exception in the case of defamation actions. Journalists are not allowed to withhold the name of a source or information if they are using the information as the basis for a defense.⁴⁰⁶ The state appellate courts have interpreted journalist's privilege only through the statute. The Oregon Supreme Court has declined to find a basis in the First Amendment for journalist's privilege.⁴⁰⁷ A court of appeals stated that the absolute privilege can be overcome when it is in conflict with a criminal defendant's constitutional rights of compulsory process.⁴⁰⁸ In such situations, criminal defendants can overcome the privilege if they show that the journalist's information would be both material and favorable to a defense.⁴⁰⁹

⁴⁰² OR. REV. STAT. § 44.520.

⁴⁰³ OR. REV. STAT. § 44.510(2).

⁴⁰⁴ OR. REV. STAT. § 44.520(1).

⁴⁰⁵ OR. REV. STAT. § 44.520(2).

⁴⁰⁶ OR. REV. STAT. § 44.520(3).

⁴⁰⁷ State v. Buchanan, 250 Or. 244, 436 P.2d 729 (Or. 1968)

⁴⁰⁸ State ex rel. Meyers v. Howell, 86 Or. App. 570, 740 P.2d 792 (Or. Ct. App. 1987).

⁴⁰⁹ *Id.*, at 578.

Pennsylvania

State Shield Statute:

42 Pa. Cons. Stat. § 5942 (2013)

State Cases Analyzed:

In re Dauphin County Fourth Investigating Grand Jury, 610 Pa. 296, 19 A.3d 491 (Pa. 2011)

Castellani v. Scranton Times, L.P., 598 Pa. 283, 956 A.2d 937 (Pa. 2008)

Castellani v. Scranton Times, L.P., 916 A.2d 648 (Pa. Super. Ct. 2007)

Commonwealth v. Bowden, 576 Pa. 151, 838 A.2d 648 (Pa. 2003)

Commonwealth v. Tyson, 800 A.2d 327 (Pa. Super. Ct. 2002)

Davis v. Glanton, 705 A.2d 879 (Pa. Super. Ct. 1997)

McMenamin v. Tartaglione, 139 Pa. Commw. 269, 590 A.2d 802 (Pa. Commw. Ct. 1991)

Sprague v. Walter, 518 Pa. 425, 543 A.2d 1078 (Pa. 1988)

Hatchard v. Westinghouse Broadcasting Co., 516 Pa. 184, 532 A.2d 346 (Pa. 1987)

Sprague v. Walter, 357 Pa. Super. 570, 516 A.2d 706 (Pa. Super. Ct. 1986)

Description:

The Pennsylvania shield statute provides journalists with an absolute privilege to protect sources.⁴¹⁰ The statute provides protection for traditional journalists. Journalists retain the privilege in any governmental legal proceeding, trial, or investigation.⁴¹¹ Although the statute does not make a distinction between confidential and non-confidential sources, the Pennsylvania Supreme Court has determined that statutory protection applies only to confidential sources.⁴¹² Pennsylvania state appellate courts have recognized a basis in the First Amendment for a qualified journalist's privilege to protect information other than the source.⁴¹³ A court can overturn the privilege if the party seeking the information can show that it is material, relevant, and necessary, unavailable through other means, and crucial to the case.⁴¹⁴ The Pennsylvania Supreme Court has not directly ruled whether the First Amendment provides journalists a testimonial privilege.⁴¹⁵

⁴¹⁰ 42 PA. CONS. STAT. § 5942.

⁴¹¹ *Id.*

⁴¹² Commonwealth v. Bowden, 576 Pa. 151, 838 A.2d 648 (Pa. 2003).

⁴¹³ See McMenamin v. Tartaglione, 139 Pa. Commw. 269, 590 A.2d 802 (Pa. Commw. Ct. 1991); Davis v. Glanton, 705 A.2d 879 (Pa. Super. Ct. 1997).

⁴¹⁴ *McMenamin*, at 287.

⁴¹⁵ See *Bowden*, footnote 10, at 753.

Rhode Island

State Shield Statute:

R.I. Gen. Laws § 9-19.1-2 – 9-19.1-3 (2012)

State Cases Analyzed:

Giuliano v. Providence Journal Co., 704 A.2d 220 (R.I. 1997)

Lett v. Providence Journal Co., 703 A.2d 1125 (R.I. 1997)

Outlet Communications, Inc. v. State, 588 A.2d 1050 (R.I. 1991)

Capuano v. Outlet Co., 579 A.2d 469 (R.I. 1990)

Description:

The Rhode Island shield statute provides journalists with a qualified privilege to protect confidential information and sources.⁴¹⁶ The statute protects journalists working for newspapers, periodicals, press associations, newspaper syndicates, wire services, radio stations and television stations.⁴¹⁷ The statute provides protection only when the information or source is confidential.⁴¹⁸ The statute provides protection before any court, grand jury, agency, department, or commission.⁴¹⁹ The statute does provide several conditions for the privilege.⁴²⁰ The statute does not apply to any information that has been made public, in cases in which a defamation defendant asserts a defense based on the source of information, or to information about the details of any grand jury or other secret proceeding.⁴²¹ A court can overturn the privilege if a party can show that disclosure of the source of information is necessary to allow a criminal prosecution of a specific felony or to prevent a threat to human life. The party must also show that the information is not available from other witnesses.⁴²² The Rhode Island Supreme court has refused to find a privilege based in the First Amendment or state constitution.

⁴¹⁶ R.I. GEN. LAWS § 9-19.1-2.

⁴¹⁷ *Id.*

⁴¹⁸ Outlet Communications, Inc. v. State, 588 A.2d 1050 (R.I. 1991).

⁴¹⁹ R.I. GEN. LAWS § 9-19.1-2.

⁴²⁰ R.I. GEN. LAWS § 9-19.1-3.

⁴²¹ *Id.*

⁴²² *Id.*

South Carolina

State Shield Statute:

S.C. Code Ann. § 19-11-100 (2012)

State Cases Analyzed:

In re Decker, 322 S.C. 215, 471 S.E.2d 462 (S.C., 1995)

Description:

South Carolina's shield statute provides journalists with a qualified privilege to protect information.⁴²³ The statute provides protection for traditional journalists as well as book authors.⁴²⁴ The statute does not distinguish between confidential and non-confidential information. A court can overturn the privilege if the party seeking information can show that the information is material and relevant, unavailable through other means, and necessary to the preparation or presentation of the case.⁴²⁵ The South Carolina appellate courts have not recognized a basis for journalist's privilege other than the statute. In the only case on journalist's privilege, the South Carolina Supreme Court required a journalist to disclose information to a trial court judge.⁴²⁶ The supreme court stated that the statute only prevented parties in a case from gaining information from journalists. The trial court was not a party in the case, so disclosure needed to take place.⁴²⁷

⁴²³ S.C. Code Ann. § 19-11-100.

⁴²⁴ S.C. Code Ann. § 19-11-100(A).

⁴²⁵ S.C. Code Ann. § 19-11-100(B).

⁴²⁶ In re Decker, 322 S.C. 215, 471 S.E.2d 462 (S.C., 1995).

⁴²⁷ *Id.*, at 463.

South Dakota

State Shield Statute:

South Dakota does not have a state shield statute.

State Cases Analyzed:

Hopewell v. Midcontinent Broadcasting Corp., 538 N.W.2d 780 (S.D. 1995)

Description:

South Dakota has not enacted a state shield statute. The South Dakota state appellate courts have considered journalist's privilege only once.⁴²⁸ At issue in the case was whether a television station and journalist needed to disclose the name of a confidential source in a libel suit. The South Dakota Supreme Court determined that journalists do have a qualified testimonial privilege in civil litigation to protect confidential sources.⁴²⁹ The supreme court established a five factor test to determine when a court could overturn the privilege. The factors included the nature of the litigation, the relevancy of the information, the existence of alternative sources, the importance of confidentiality, and whether the journalist's statements were false.⁴³⁰ The supreme court stressed that the decision was limited to civil litigation only. The case focused on a television journalist. Other traditional journalists would likely have protection but the state appellate courts have not discussed the privilege in other contexts.

⁴²⁸ Hopewell v. Midcontinent Broadcasting Corp., 538 N.W.2d 780 (S.D. 1995).

⁴²⁹ *Id.*, at 782.

⁴³⁰ *Id.*

Tennessee

State Shield Statute:

Tenn. Code Ann. § 24-1-208 (2013)

State Cases Analyzed:

State v. Kendrick, 178 S.W.3d 734 (Tenn. Crim. App. 2005)

Dingman v. Harvell, 814 S.W.2d 362 (Tenn. Ct. App. 1991)

State ex rel. Gerbitz v. Curridan, 738 S.W.2d 192 (Tenn. 1987)

Austin v. Memphis Pub. Co., 655 S.W.2d 146 (Tenn. 1983)

Austin v. Memphis Pub. Co., 621 S.W.2d 397 (Ten. Ct. App. 1981)

Description:

The Tennessee shield statute provides journalists with a qualified privilege to protect any information or the source of any information.⁴³¹ The statute's language provides protection for traditional newsgatherers but also protects people who independently gather information for publication or broadcast. This language could likely protect non-traditional newsgatherers such as Internet media or authors. The Tennessee appellate courts have not specifically addressed non-traditional newsgatherers, though. The statute does not distinguish between confidential and non-confidential information.⁴³² A court can overturn the privilege if the person seeking the information can show that the journalist has information clearly relevant to a probable violation of law, the information is unavailable through other means, and the information is in the compelling and overriding interest of the people of Tennessee.⁴³³ The Tennessee appellate courts have interpreted the journalist's privilege only through the state statute. The courts have not found a basis for a journalist's privilege in the First Amendment or state constitution.

⁴³¹ TENN. CODE ANN. § 24-1-208.

⁴³² Austin v. Memphis Pub. Co., 655 S.W.2d 146 (Tenn. 1983).

⁴³³ TENN. CODE ANN. § 24-1-208(c).

Texas

State Shield Statute:

Tex. Civ. Prac. & Rem. Code § 22.021 – 22.027 (2012) (shield in civil proceedings)
 Tex. Code Crim. Proc. Ann. art. 38.11 (2012) (shield in criminal proceedings)

State Cases Analyzed:

Nelson v. Pagan, 377 S.W.3d 824 (Tex. App. 2012)
 In re Rabb, 293 S.W.3d 865 (Tex. App. 2009)
 In re Union Pacific R. Co., 6 S.W.3d 310 (Tex. App. 1999)
 Coleman v. State, 966 S.W.2d 525 (Tex. Crim. App., 1998)
 Degarmo v. State, 922 S.W.2d 256 (Tex. App. 1996)
 Coleman v. State, 915 S.W.2d 80 (Tex. App. 1996)
 Dolcefino v. Ray, 902 S.W.2d 163 (Tex. App. 1995)
 State ex rel. Healy v. McMeans, 884 S.W.2d 772 (Tex. Crim. App. 1994)
 Dallas Morning News Co. v. Garcia, 822 S.W.2d 675 (Tex. App. 1991)
 Channel Two Television Co. v. Dickerson, 725 S.W.2d 470 (Tex. App. 1987)
 Ex parte Grothe, 687 S.W.2d 736 (Tex. Crim. App. 1984)
 Dallas Oil & Gas, Inc. v. Mouer, 533 S.W.2d 70 (Tex. App. 1976)

Description:

Texas has two shield statutes that differ based on the type of proceeding.⁴³⁴ Both statutes provide a qualified privilege to journalists. Both statutes grant protection for journalists' sources and unpublished information.⁴³⁵ Both statutes provide protection for traditional journalists as well as journalists for Internet media, book authors, and academics.⁴³⁶ Neither statute distinguishes between confidential and non-confidential sources or information. The primary differences between the two statutes are the processes for overturning the privilege. In civil proceedings, a court can overturn the privilege if a party can show: 1) all reasonable efforts to obtain the information from other sources have been exhausted; 2) the subpoenas is not overbroad, unreasonable, or oppressive, and limited to the verification and accuracy of published information when appropriate; 3) the party gave reasonable and timely notice to journalist of the demand for information; 4) the party's interest of need for information outweighs public interest in the gathering and dissemination of news; 5) the subpoena or disclosure is not to obtain peripheral, non-essential or speculative information; and 6) the information is relevant and material to the administration of the proceeding and is essential to a claim or defense of the party desiring the information.⁴³⁷ In criminal proceedings, the process to overturn the privilege depends on the type of information sought. A court can overturn a

⁴³⁴ See TEX. CIV. PRAC. & REM. CODE § 22.021 – 22.027 for civil proceedings; see TEX. CODE CRIM. PROC. ANN. art. 38.11 for criminal proceedings.

⁴³⁵ TEX. CIV. PRAC. & REM. CODE § 22.023; TEX. CODE CRIM. PROC. ART 38.11 § 3.

⁴³⁶ TEX. CIV. PRAC. & REM. CODE § 22.021; TEX. CODE CRIM. PROC. ART 38.11 § 1.

⁴³⁷ TEX. CIV. PRAC. & REM. CODE § 22.024.

journalist's privilege to protect confidential sources if a person desiring the testimony can show that the journalist's source committed a felony, confessed or admitted to the commission of a felony, or probable cause exists that the source participated in a felony criminal offenses. In each instance, the person seeking information must show that reasonable efforts to obtain the information from other sources have been exhausted.⁴³⁸ A court can also require a journalist to disclose information if it finds that the information could be reasonably necessary to stop or prevent death or substantial bodily harm. A court can overturn a journalist's privilege to protect non-confidential sources or unpublished information if the person seeking information can show that all reasonable efforts to obtain information from other sources have been exhausted and the information is relevant and material to a claim or defense, or is central to an investigation or prosecution.⁴³⁹ The statute requires the court to consider multiple factors before overturning the privilege.⁴⁴⁰ Finally, some Texas state appellate courts have found a basis in the First Amendment for a qualified journalist's privilege for confidential information.⁴⁴¹

⁴³⁸ TEX. CODE CRIM. PROC. ART 38.11 § 4.

⁴³⁹ TEX. CODE CRIM. PROC. ART 38.11 § 5.

⁴⁴⁰ *Id.*

⁴⁴¹ *See* Nelson v. Pagan, 377 S.W.3d 824 (Tex. Ct. App. 2012) and Dallas Morning News Co. v. Garcia, 822 S.W.2d 675 (Tex. Ct. App. 1991).

Utah

State Shield Statute:

Utah Rules of Evidence, Rule 509

State Cases Analyzed:

No state appellate courts have addressed journalist's privilege.

Description:

Utah's state legislature has not enacted a shield statute. Rather, the Utah Supreme Court adopted Rule 509 of the Utah Rules of Evidence which granted a qualified journalist's privilege.⁴⁴² The privilege provides protection for journalists at newspapers, magazines press associations, wire services, television stations or radio stations. The rule grants journalists a privilege to protect confidential source information, confidential unpublished news information, and other types of unpublished news information. Depending on the type of information, the rule also requires courts to apply different balancing tests to overturn the privilege. For confidential sources, a court must find that the person wishing to overturn the privilege has provided clear and convincing evidence that disclosure is necessary to prevent substantial injury or death. For confidential unpublished information, a court must find that the person seeking information has shown that the need for information outweighs the journalist's continued interest in the free flow of information. Also, journalists have a testimonial privilege for non-confidential unpublished information if they can demonstrate that the continued need of the free flow of information outweighs the need for disclosure.⁴⁴³ The Utah state appellate courts have not specifically addressed rule 509. The courts have not addressed journalist's privilege generally. Utah falls under the United States Tenth Circuit Court of Appeals' jurisdiction. The Tenth Circuit Court has used the First Amendment as a basis for a qualified journalist's privilege.⁴⁴⁴

⁴⁴² Utah Rules of Evidence, Rule 509.

⁴⁴³ *Id.*

⁴⁴⁴ *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1997).

Vermont

State Shield Statute:

Vermont does not have a state shield statute.

State Cases Analyzed:

Spooner v. Town of Topsham, 182 Vt. 328, 937 A.2d 641 (Vt. 2007)
In re Inquest Subpoena (WCAX), 179 Vt. 12, 890 A.2d 1240 (Vt. 2005)
State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (Vt. 1974)

Description:

Vermont has not enacted a shield statute. The Vermont Supreme Court has used the First Amendment as a basis for qualified journalist's privilege in criminal proceedings.⁴⁴⁵ The court granted the privilege to a television reporter, which likely means most traditional journalists qualify for the privilege. Other state appellate courts have not specifically addressed who is entitled to the privilege, though. The supreme court has placed limits on the situations in which a journalist is entitled to First Amendment protections.⁴⁴⁶ Specifically, the court refused to recognize a journalist privilege in an inquest, which is equivalent to grand jury proceedings.⁴⁴⁷ The state appellate courts have not addressed whether the privilege would apply in a civil context. The supreme court specifically refused to provide protection for a journalist's personal observations at a public hearing.⁴⁴⁸

⁴⁴⁵ State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (Vt. 1974).

⁴⁴⁶ See In re Inquest Subpoena (WCAX), 179 Vt. 12, 18, 890 A.2d 1240, 1244 (Vt. 2005) interpreting *State v. St. Peter*.

⁴⁴⁷ *Id.*

⁴⁴⁸ Spooner v. Town of Topsham, 182 Vt. 328, 937 A.2d 641 (Vt. 2007).

Virginia

State Shield Statute:

Virginia does not have a state shield statute.

State Cases Analyzed:

Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429 (Va. 1974)

Description:

Virginia has not enacted a state shield statute. The Virginia state appellate courts have addressed journalist's privilege only once. The Virginia Supreme Court found a basis in the First Amendment for a qualified journalist's privilege to protect confidential sources in criminal proceedings.⁴⁴⁹ The court provided a privilege to a newspaper journalist, so other traditional journalists would likely receive protection. The supreme court stated that a court should overturn the privilege if the journalist's information was essential for a trial to be fair. A court must examine the facts and circumstances of each case to decide whether the information is essential.⁴⁵⁰ The state appellate courts have not considered the privilege in other contexts. Some Virginia trial courts have considered the privilege in a civil context, though.⁴⁵¹

⁴⁴⁹ Brown v. Com., 214 Va. 755, 204 S.E.2d 429 (Va. 1974).

⁴⁵⁰ *Id.*, at 431.

⁴⁵¹ See Philip Morris Companies, Inc. v. American Broadcasting Companies, Inc., 36 Va. Cir. 1 (Va. Cir. Ct. 1995); Clemente v. Clemente, 56 Va. Cir. 530 (Va. Cir. Ct. 2001).

Washington

State Shield Statute:

Wash. Rev. Code Ann. § 5.68.010 (LexisNexis 2013)

State Cases Analyzed:

Olsen v. Allen, 42 Wash. App. 417, 710 P.2d 822 (Wash. Ct. App. 1985)
 State v. Rinaldo, 102 Wash. 2d 749, 689 P.2d 392 (Wash. 1984)
 State v. Rinaldo, 36 Wash. App. 86, 673 P.2d 614 (Wash. Ct. App. 1983)
 Clampitt v. Thurston County, 98 Wash. 2d 638, 658 P.2d 641 (Wash. 1983)
 Senear v. Daily Journal-American, a Division of Longview Pub. Co., 97 Wash. 2d 148,
 641 P.2d 1180 (Wash. 1982)
 Senear v. Daily Journal American, 27 Wash. App. 454, 618 P.2d 536 (Wash. Ct. App.
 1980)

Description:

The Washington shield statute provides a qualified protection for journalists to protect sources and information.⁴⁵² Besides protecting traditional journalists, the statute provides protection for book authors and journalists working for Internet-only news media.⁴⁵³ The statute appears to apply to both confidential and non-confidential information.⁴⁵⁴ The statute provides a two-step process for a court to overturn the privilege. In a criminal investigation or prosecution, a party must first show through other sources that reasonable grounds exist to believe that a crime has occurred. In a civil action, a party must show a prima face cause of action through other sources of information. A court can overturn the privilege in either a criminal or civil proceeding if a party shows that the information is highly material and relevant, the information is critical or necessary to the maintenance of a claim, defense or material issue, all other sources have been exhausted, and compelling public interesting in disclosure exists.⁴⁵⁵ Washington state appellate courts have not interpreted the statute since it was enacted. Prior to the statute, the Washington Supreme Court had recognized a common law privilege in both criminal⁴⁵⁶ and civil contexts.⁴⁵⁷

⁴⁵² WASH. REV. CODE § 5.68.010(1).

⁴⁵³ WASH. REV. CODE § 5.68.010(5)(A).

⁴⁵⁴ WASH. REV. CODE § 5.68.010(1).

⁴⁵⁵ WASH. REV. CODE § 5.68.010(2).

⁴⁵⁶ State v. Rinaldo, 102 Wash. 2d 749, 689 P.2d 392 (Wash. 1984).

⁴⁵⁷ Senear v. Daily Journal-American, a Division of Longview Pub. Co., 97 Wash. 2d 148, 641 P.2d 1180 (Wash. 1982).

West Virginia

State Shield Statute:

W. Va. Code Ann. § 57-3-10 (LexisNexis 2012)

State Cases Analyzed:

State ex rel. Lincoln Journal, Inc. v. Husted, 228 W. Va. 17, 716 S.E.2d 507 (W. Va. 2011)

State ex rel. Charleston Mail Ass'n v. Ransom, 200 W. Va. 5, 488 S.E.2d 5, (W. Va. 1997)

State ex rel. Hudok v. Henry, 182 W. Va. 500, 389 S.E.2d 188 (W. Va. 1989)

Description:

The West Virginia shield statute provides a near-absolute privilege for journalists to protect confidential sources of information.⁴⁵⁸ The statute provides journalists protection in any civil, criminal, administrative or grand jury proceeding in a court.⁴⁵⁹ The statute also protects any information that could possibly identify a confidential source.⁴⁶⁰ The protection is near-absolute because court can require testimony only if the journalist's information is necessary to prevent imminent death, serious bodily injury, or unjust incarceration.⁴⁶¹ The statute has a broad definition of who is a journalist but does require that journalism work make up a substantial portion of the person's livelihood. The statute does protect student journalists even if they are not compensated.⁴⁶² In addition to the statute, the West Virginia Supreme Court of Appeals has found the basis for a qualified journalist's privilege in the First Amendment and state constitution.⁴⁶³ The court stated that the privilege applies to both sources and information whether confidential or non-confidential.⁴⁶⁴ A court could overturn the privilege only after a party seeking the information shows that the information is highly material and relevant, necessary or critical to a claim, and unavailable from other sources.⁴⁶⁵

⁴⁵⁸ W. VA. CODE § 57-3-10(B).

⁴⁵⁹ W. VA. CODE § 57-3-10(B)(1).

⁴⁶⁰ W. VA. CODE § 57-3-10(B)(2).

⁴⁶¹ W. VA. CODE § 57-3-10(B).

⁴⁶² W. VA. CODE § 57-3-10(A).

⁴⁶³ State ex rel. Hudok v. Henry, 182 W. Va. 500, 389 S.E.2d 188 (W.Va. 1989).

⁴⁶⁴ *Id.*, at 504.

⁴⁶⁵ *Id.*, at 505.

Wisconsin

State Shield Statute:

Wis. Stat. § 885.14 (2012)

State Cases Analyzed:

Kurzynski v. Spaeth, 196 Wis. 2d 182, 538 N.W.2d 554 (Wis. Ct. App. 1995)
 State ex rel Green Bay Newspaper Co. v. Circuit Court, Branch 1, Brown County, 113
 Wis. 2d 411, N.W.2d 367 (Wis. 1983)
 Zelenka v. State, 83 Wis. 2d 601, 266 N.W.2d 279 (Wis. 1978)
 State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (Wis. 1971)

Description:

Wisconsin's state shield statute provides an absolute privilege for journalists to protect confidential sources and information.⁴⁶⁶ The statute also provides a qualified privilege for journalists to protect non-confidential information.⁴⁶⁷ The privilege provides protection for traditional news gatherers as well as book authors.⁴⁶⁸ The statute also grants the privilege to a person who works for a business or organization that publishes electronically.⁴⁶⁹ This language would likely protect Internet news media, but the Wisconsin state appellate courts have not specifically addressed the issue. A circuit court can issue a subpoena that requires a journalist to reveal non-confidential sources after multiple steps. In a criminal prosecution or investigation, the person seeking information must show that reasonable grounds exist to believe that a crime has been committed.⁴⁷⁰ In a civil procedure, the person must show that the complaint states a claim which the information could provide relief.⁴⁷¹ A circuit court can issue a subpoena if it finds that the requested information is highly relevant, necessary to the maintenance of a claim, defense or issue, unavailable through other means, and disclosure is in the overriding public interest.⁴⁷² Before the statute was enacted, the Wisconsin Supreme Court found the basis for a qualified journalist's privilege in the state constitution⁴⁷³ and in the First Amendment for civil actions.⁴⁷⁴

⁴⁶⁶ WIS. STAT. § 885.14(2).

⁴⁶⁷ WIS. STAT. § 885.14(2)(b).

⁴⁶⁸ WIS. STAT. § 885.14(1).

⁴⁶⁹ *Id.*

⁴⁷⁰ WIS. STAT. § 885.14(2)(b)(1).

⁴⁷¹ WIS. STAT. § 885.14(2)(b)(2)

⁴⁷² WIS. STAT. § 885.14(2)(c).

⁴⁷³ Zelenka v. State, 83 Wis. 2d 601, 266 N.W.2d 279 (Wis. 1978).

⁴⁷⁴ Kurzynski v. Spaeth, 196 Wis. 2d 182, 538 N.W.2d 554 (Wis. Ct. App. 1995).

Wyoming

State Shield Statute:

Wyoming does not have a state shield statute.

State Cases Analyzed:

No state appellate courts have addressed journalist's privilege.

Description:

Wyoming does not have a state shield statute. The state appellate courts have not addressed whether a journalist's privilege exists under the First Amendment, state constitution or common law. Wyoming falls under the United States Tenth Circuit Court of Appeals' jurisdiction. The Tenth Circuit Court has recognized a qualified journalist's privilege in the First Amendment.⁴⁷⁵ Journalists could potentially look to that court's decision as a basis for protection.

⁴⁷⁵ *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1997).