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## Shielding the "Enemy of the People": Protecting the Reporter's Privilege in the Age of Social Media

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# SHIELDING THE “ENEMY OF THE PEOPLE”: PROTECTING THE REPORTER’S PRIVILEGE IN THE AGE OF SOCIAL MEDIA

**Abstract:** President Donald Trump and his surrogates regularly belittle media outlets that publish articles critical of the administration. Arguably, no newsgathering practice has undergone more scrutiny from the Trump Administration than the use of unnamed sources. During this time, journalists must understand the extent to which the law will protect their reporting and their valuable anonymous sources. Almost forty years ago, the United States Supreme Court held in *Branzburg v. Hayes*, in 1972 that a general federal reporter’s privilege does not exist. Robust reporter shield laws exist in individual states, but these privileges largely lag behind the digital media revolution. When a large percentage of Americans digest news through social media resources like Facebook and Twitter, how can they distinguish between a journalist worthy of protection and an ordinary Facebook friend or Twitter follower? This Note tracks the history of anonymous reporting, discusses the development of the reporter’s privilege, and considers how to ensure protections for modern journalists. This Note argues that to best protect digital journalists and social media users, Congress should enact a federal reporter’s shield that protects journalistic acts, explicitly includes digital media, and requires an intent to disseminate information to the public.

## INTRODUCTION

Since the start of his administration, President Donald Trump has repeatedly referred to members of the media as the “enemy of the people.”<sup>1</sup> He con-

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<sup>1</sup> See, e.g., David Jackson, *Trump Again Calls Media ‘Enemy of the People,’* USA TODAY (Feb. 24, 2017, 10:54 AM), <https://www.usatoday.com/story/news/politics/2017/02/24/donald-trump-cpac-media-enemy-of-the-people/98347970/> [<https://perma.cc/32N3-WCWL>]; President Donald Trump (@realDonaldTrump), TWITTER (Oct. 29, 2018, 7:03 AM), <https://twitter.com/realDonaldTrump/status/1056879122348195841> [<https://perma.cc/3J4Y-2UNH>] (“The Fake News Media, the true Enemy of the People, must stop the open & obvious hostility & report the news accurately & fairly.”); President Donald Trump (@realDonaldTrump), TWITTER (June 9, 2019, 5:26 AM), <https://twitter.com/realDonaldTrump/status/1137697507218264064> [<https://perma.cc/CDN3-M94T>] (“The Failing @nytimes, & ratings challenged @CNN, will do anything possible to see our Country fail! They are truly The Enemy of the People!”); see also Michael M. Grynbaum & Eileen Sullivan, *Trump Attacks the Times, in a Week of Unease for the American Press*, N.Y. TIMES (Feb. 20, 2019), <https://nyti.ms/2GA2bYL> [<https://perma.cc/HL56-EHV6>] (contextualizing President Trump’s harsh words for the media with the special counsel’s investigation into Russia’s impact on the 2016 election and Supreme Court Justice Clarence Thomas’s statements on freedom of the press). This characterization began in early 2017. See Michael M. Grynbaum, *Trump Calls the News Media the ‘Enemy of the American People,’* N.Y. TIMES (Feb. 17, 2017), <https://nyti.ms/2lshYh4> [<https://perma.cc/N3B5-LWHV>] (comparing Trump’s language to that of unruly foreign leaders). Administration officials have not contested this description when asked by reporters. See Press Briefing by Sarah Sanders, Press Sec’y, White

tinues to call news sources “Fake News.”<sup>2</sup> This hostility has come not only from the president, but also from his supporters,<sup>3</sup> who have threatened and physically assaulted so-called active “fake news” reporters.<sup>4</sup> On June 28, 2018,

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House, & Nat’l Sec. Officials, in Wash. D.C. (Aug. 2, 2018, 1:15 PM), available at <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-national-security-officials-08022018/> [<https://perma.cc/4W79-7HYP>] (arguing that the media only wants to provoke anger and avoiding direct questions on President Trump’s comments). *But see* ‘Enemy of the People’: Sanders Refuses to Disavow Trump’s Claim About Media, THE GUARDIAN (Aug. 2, 2018), <https://www.theguardian.com/us-news/2018/aug/03/sanders-trump-acosta-media-enemy> [<https://perma.cc/7ZYV-ACWN>] (clarifying that Ivanka Trump, President Trump’s daughter and adviser, does not share her father’s characterization of the media and that the President believes that, in fact, the “fake news . . . is the enemy of the people”) (emphasis added). The phrase “enemy of the people” has a tumultuous history. *See* A.G. Sulzberger, Opinion, *The Growing Threat to Journalism Around the World*, N.Y. TIMES (Sept. 23, 2019), <https://www.nytimes.com/2019/09/23/opinion/press-freedom-arthur-sulzberger.html?smid=nytcore-ios-share> [<https://perma.cc/MXA8-HP2D>] (“It was used to justify mass executions during the French Revolution and the Third Reich. And it was used by Lenin and Stalin to justify the systematic murder of Soviet dissidents.”).

<sup>2</sup> *See* Jasmine C. Lee & Kevin Quealy, *The 567 People, Places and Things Donald Trump Has Insulted on Twitter: A Complete List*, N.Y. TIMES (last updated Feb. 20, 2019), <https://www.nytimes.com/interactive/2016/01/28/upshot/donald-trump-twitter-insults.html> [<https://perma.cc/4V3P-M78N>] (showing hundreds of mentions of “fake news” by President Trump on Twitter directed at news outlets such as ABC News, CBS, and CNN); *see also* RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 567, 571 (2017) (explaining how President Trump deriding the media is a ubiquitous theme of his presidency). The *Boston Globe* Editorial Board spearheaded an effort by newspapers around the country to jointly condemn attacks on the press. *See* Editorial Board, *Journalists Are Not the Enemy*, BOS. GLOBE (Aug. 15, 2018), <https://www3.bostonglobe.com/opinion/editorials/2018/08/15/editorial/Kt0NFFNrxqBI6NqqennvL/story.html?arc404=true> [<https://perma.cc/4XKJ-6CA4>] (pointing out the inherent danger in turning the public against the press, analogizing such behavior to actions of dictatorships, and compiling hundreds of editorials). President Trump has shown particular disdain for CNN and *The New York Times*. *See* Peter Baker, *Trump Bars CNN’s Jim Acosta from the White House*, N.Y. TIMES (Nov. 7, 2018), <https://nyti.ms/2D9TWQB> [<https://perma.cc/F5GK-F54D>] (reporting that the White House forced Acosta to turn in his White House press pass); Brian Stelter, *Trump’s Love-Hate Relationship with the (Not) ‘Failing’ New York Times*, CNN BUS. (Jan. 2, 2018), <https://money.cnn.com/2018/01/02/media/new-york-times-president-trump/index.html> [<https://perma.cc/MD8P-6ZZU>] (exposing how President Trump seeks the *New York Times*’ favor and approval while consistently referring to the newspaper as a “failing” news source).

<sup>3</sup> *See* Uriel J. Garcia, *Kid Reporter Confronts Officer Who Threatened Her near Arizona-Mexico Border*, ARIZ. REPUBLIC (Feb. 28, 2019), <https://www.azcentral.com/story/news/local/arizona/2019/02/21/hilde-lysiak-orange-street-news-confronts-patagonia-marshal-threatened-arrest-arizona-mexico-border/2940151002/> [<https://perma.cc/3ECF-Y5G2>] (explaining how a town marshal threatened to arrest a twelve-year-old member of the Society of Professional Journalists and told her not to record their interaction); Greg Myre & Vanessa Romo, *Arrested Coast Guard Officer Allegedly Planned Attack ‘on a Scale Rarely Seen,’* NPR (Feb. 20, 2019), <https://n.pr/2Sh2hpA> [<https://perma.cc/6D5M-TXPU>] (detailing how the Federal Bureau of Investigations (FBI) thwarted Christopher Paul Hasson’s planned attack on well-known television news anchors and prominent Democratic politicians); Katherine Tully-McManus, *Capitol Police Crackdown on Press Escalates to Physical Altercation*, ROLL CALL (Feb. 15, 2019), <https://www.rollcall.com/news/congress/capitol-police-crackdown-press-escalates-physical-altercation> [<https://perma.cc/RU7F-W4LH>] (describing Capitol Police separating reporters and senators in an area well-known for the two groups to interact).

<sup>4</sup> *Trump Supporter Attacks BBC Cameraman at El Paso Rally*, BBC (Feb. 12, 2019), <https://www.bbc.com/news/world-us-canada-47208909> [<https://perma.cc/J5MN-HHTE>]; *see* William K.

for instance, an attacker walked into the newsroom of the *Capital Gazette*, a local newspaper in Annapolis, Maryland, and killed five reporters, editors, and staff.<sup>5</sup> This negative treatment of the news media accompanies a decline in public trust in media outlets and a steady decrease in overall press freedom in America.<sup>6</sup>

President Trump and the public have been increasingly skeptical of news articles relying on unnamed sources to criticize the administration and its policies, more so than prior administrations.<sup>7</sup> Although President Barack Obama

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Rashbaum et al., *Outspoken Trump Supporter in Florida Charged in Attempted Bombing Spree*, N.Y. TIMES (Oct. 26, 2018), <https://nyti.ms/2AuQyOH> [<https://perma.cc/K9K9-FYW7>] (describing how a Trump supporter sent a series of explosive devices to prominent Democrats and a CNN political analyst); *Physical Attack*, U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/physical-attack/> [<https://perma.cc/3MTQ-N579>] (describing how forty-six journalists were physically attacked in 2018, and, since 2017, fifty-five reporters have been attacked specifically while covering protests). The President has often joked about violence against the press. See Meagan Flynn, *Trump Inciting 'Violence': More Than 200 Retired Journalists Condemn President's 'Un-American' Attacks on Press*, WASH. POST (Oct. 25, 2018), [https://www.washingtonpost.com/nation/2018/10/25/trump-inciting-violence-nearly-retired-journalists-condemn-presidents-un-american-attacks-press/?noredirect=on&utm\\_term=.dc218840a557](https://www.washingtonpost.com/nation/2018/10/25/trump-inciting-violence-nearly-retired-journalists-condemn-presidents-un-american-attacks-press/?noredirect=on&utm_term=.dc218840a557) [<https://perma.cc/NE2F-B2YH>] (illustrating how a group of journalists believed that Trump's words and actions violated the First Amendment); President Donald Trump (@realDonaldTrump), TWITTER (July 2, 2017, 8:21 AM), <https://twitter.com/realDonaldTrump/status/881503147168071680> [<https://perma.cc/8S6P-SVD4>] (showing a short video clip of President Trump body slamming an opponent whose head was replaced with a CNN logo and referring to CNN as the "fraud news network"). The most notable incident involved Congressman Greg Gianforte (R-MT), who assaulted Ben Jacobs, a political reporter for *The Guardian* at Gianforte's election-eve rally in May 2017. See Ed Pilkington, *'He's My Guy': Donald Trump Praises Gianforte for Assault on Guardian Reporter*, THE GUARDIAN (Oct. 19, 2018), <https://www.theguardian.com/us-news/2018/oct/18/trump-greg-gianforte-assault-guardian-ben-jacobs> [<https://perma.cc/A4CJ-NVZL>] (describing the assault and how it represented the first time President Trump openly supported violence against the press).

<sup>5</sup> Tim Prudente & Scott Dance, *'I Don't Know What Else to Do': Grieving Capital Gazette Journalists Cover the Massacre of Their Own Newsroom*, CAP. GAZETTE (June 29, 2018), <https://www.capitalgazette.com/news/annapolis/bs-md-capital-staff-20180628-story.html> [<https://perma.cc/K3UY-QP42>]; Vanessa Romo et al., *Maryland Newsroom Shooting that Left Five Dead Was 'Targeted Attack'*, NPR (June 28, 2018), <https://www.npr.org/2018/06/28/624392089/active-shooter-at-maryland-newspaper> [<https://perma.cc/245P-6DWB>]. There were questions as to the shooter's exact motive. Timothy Williams & Amy Harmon, *Maryland Shooting Suspect Had Long-Running Dispute with Newspaper*, N.Y. TIMES (June 29, 2018), <https://nyti.ms/2KsZxIP> [<https://perma.cc/475Y-AMG6>] (recounting the suspect's history of anger toward the *Capital Gazette*).

<sup>6</sup> See RSF Index 2018: *US Falls as Canada Rises*, REPS. WITHOUT BORDERS, <https://rsf.org/en/rsf-index-2018-us-falls-canada-rises> [<https://perma.cc/7F2M-JTTU>] (showing that the United States declined two spots to rank 45th in the 2018 World Press Freedom Index). Factors in calculating the WPI scores include a qualitative survey of journalists worldwide along with a quantitative measure of abuses against the press. Detailed Methodology, REPS. WITHOUT BORDERS, <https://rsf.org/en/detailed-methodology> [<https://perma.cc/W6LC-642P>].

<sup>7</sup> See President Donald Trump (@realDonaldTrump), TWITTER (July 7, 2018, 6:21 AM), <https://twitter.com/realDonaldTrump/status/1015586529484443648> [<https://perma.cc/D3D6-8RSV>] (asserting that "the Failing New York Times and . . . the Washington Post, who constantly quote anonymous sources that, in my opinion, don't exist . . . will both be out of business in 7 years!"); see, e.g., Meghan Keneally, *Even Though He Bashes Anonymous Sources, Trump Uses Them Himself*, ABC NEWS (Feb. 24, 2017), <http://abcn.ws/2ISDsEv> [<https://perma.cc/K74U-9Q8Q>] (noting that Trump's speech

was not as openly hostile toward the press, the Department of Justice (DOJ) under his administration aggressively pursued investigations into governmental leaks to the press and monitored reporters' communications.<sup>8</sup>

With the press under ever-increasing scrutiny, a movement has reemerged for Congress to create the first federal reporter's shield law.<sup>9</sup> Reporter's shield privileges, which already exist in several states, allow journalists to refuse to testify, without consequence, about anonymous sources, confidential information, and unpublished materials.<sup>10</sup>

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at the Conservative Political Action Conference that included criticisms of anonymous sources came hours after the White House held a briefing where it asked reporters not to release the speakers' names); Eli Yokley, *Voters Skeptical of Anonymous Sourcing, but Still Trust Political Reporting*, MORNING CONSULT (Mar. 8, 2017), <https://morningconsult.com/2017/03/08/voters-skeptical-anonymous-sourcing-still-trust-political-reporting/> [<https://perma.cc/R98M-BG7A>] (describing a poll showing that over forty percent of voters thought journalists fabricated sources). This has led some news organizations to post how-to guides for reading articles with anonymous sources. See, e.g., Perry Bacon Jr., *When to Trust a Story That Uses Unnamed Sources*, FIVE THIRTYEIGHT (July 18, 2017), <http://53eig.ht/2uQLHCr> [<https://perma.cc/WM8Y-RQD8>] (clarifying that using unnamed sources should not necessarily be a regular practice but that investigative journalism might be impossible without them).

<sup>8</sup> See, e.g., *United States v. Sterling*, 724 F.3d 482, 488 (4th Cir. 2013) (holding that James Risen, a *New York Times* reporter and book author, could not invoke a reporter's privilege concerning leaks he received about a Central Intelligence Agency (CIA) operation targeting Iran's nuclear program); see also Jones & West, *supra* note 2, at 570 (describing how the Obama Administration prosecuted more leakers than all prior administrations combined and monitored reporters' communications (citing James Risen, Opinion, *If Donald Trump Targets Journalists, Thank Obama*, N.Y. TIMES (Dec. 30, 2016), <https://nyti.ms/2kcLy6o> [<https://perma.cc/WUZ7-HTB2>])); *infra* notes 162–166 and accompanying text.

<sup>9</sup> See Free Flow of Information Act of 2017, H.R. 4382, 115th Cong. § 4, <https://www.congress.gov/115/bills/hr4382/BILLS-115hr4382ih.pdf> (introducing a federal reporter's shield modeled after previous attempts); Paul Fletcher, Opinion, *Sessions' Testimony Prompts New Federal Shield Law Bill Protecting Journalists*, FORBES (Nov. 29, 2017), <https://www.forbes.com/sites/paulfletcher/2017/11/29/sessions-testimony-prompts-new-federal-shield-law-bill-protecting-journalists/#4d7674254912> [<https://perma.cc/6G88-E2PU>] (discussing the introduction of the Free Flow of Information Act (FFIA) of 2017 and bipartisan support for freedom of the press); Helen Murillo, Opinion, *Trump Is Going After Legal Protections for Journalists*, FOREIGN POL'Y (Aug. 10, 2017), <https://foreignpolicy.com/2017/08/10/trump-is-going-after-legal-protections-for-journalists/> [<https://perma.cc/US9T-J7X9>] (describing how the lack of a federal shield necessitates a mutual respect between reporters, who often abide by government requests to delay publishing stories, and the government, which has historically not pursued investigations into leaks that only result in political embarrassment); Press Release, Rep. Jamie Raskin, Reps. Raskin & Jordan Introduce Bipartisan Federal Press Shield Law (Nov. 14, 2017), <https://raskin.house.gov/media/press-releases/rep-raskin-jordan-introduce-bipartisan-federal-press-shield-law> [<https://perma.cc/9YZA-X82A>] [hereinafter Raskin Press Release] (explaining that the FFIA of 2017 would become the first and only federal reporter's shield or privilege).

<sup>10</sup> See *Privilege, Journalist's Privilege*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the privilege as “[a] reporter’s protection, under constitutional or statutory law, from being compelled to testify about confidential information or sources”); RonNell Anderson Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221, 1223–24 (2013) (describing how reporters can refuse to respond to subpoenas and avoid subsequent contempt citations). Privileges are generally either absolute or qualified. See *Privilege*, BLACK'S LAW DICTIONARY, *supra* (listing types of privileges). Qualified privileges can be overcome by a court balancing various public policies, while absolute privileges are not subject to a balancing test. Compare *id.* at *Qualified Privilege* (noting that it is also called a “conditional privilege”), with *id.* at *Absolute Privilege* (explaining how absolute privileges eliminate liability).

Nearly fifty years ago, in 1972, the United States Supreme Court decided *Branzburg v. Hayes*, the only case the Supreme Court has heard regarding a federal reporter's privilege.<sup>11</sup> The Court held that requiring journalists to testify before state and federal grand juries did not infringe on the media's First Amendment freedom of speech or press.<sup>12</sup> Justice Stewart dissented, expressing support for the press by calling anonymous sources a necessary tool of effective journalism.<sup>13</sup>

To fill the federal law void left by *Branzburg*, every state but Hawaii and Wyoming has enacted protections for confidential sources and information.<sup>14</sup> These statutes, however, were largely written decades ago, and whom the public identifies as a journalist has broadened in the digital age.<sup>15</sup> As online news-

ity regardless of the action or the individual's intent). A reporter's privilege can also be a testimonial privilege, which allows the reporter to not testify at trial or in a deposition. *Id.* at *Testimonial Privilege*. "Shield laws" refer to "a statute that affords journalists the privilege not to reveal confidential sources." *Shield Law*, BLACK'S LAW DICTIONARY, *supra*.

<sup>11</sup> *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972); see Jones, *supra* note 10, at 1222 (noting how journalists value the reporter's privilege above other First Amendment protections).

<sup>12</sup> *Branzburg*, 408 U.S. at 667. The Court also concluded that reporters had no constitutional testimonial privilege with respect to agreements to conceal criminal acts. *Id.* at 690–91.

<sup>13</sup> See *id.* at 729 (Stewart, J., dissenting) (discussing the necessity of informants to news production and the importance of confidentiality for informants to fully trust journalists); see also Bacon, *supra* note 7 (arguing that investigatory journalism, regardless of subject area, consistently relies on unnamed sources); Lena Sweeten-Shults, Opinion, *Anonymous Sources Vital to Journalism*, TIMES REC. NEWS (Feb. 27, 2017), <http://wtrne.ws/2mx4QoQ> [<https://perma.cc/9RL5-CC99>] (highlighting that many informants would not come forward for fear of professional retribution should a reporter print their name in an article).

<sup>14</sup> See Jonathan Peters et al., *A Paper Shield? Whether State Privilege Protections Apply to Student Journalists*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 763, 779–80 (2017) (noting that only Wyoming lacks a reporter's privilege through a state constitution, state statute, or state rule of evidence). See generally *Reporters' Privilege Compendium*, REP. COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/reporters-privilege/> [<https://perma.cc/82KP-RTJU>] [hereinafter RCFP PRIVILEGE COMPENDIUM] (compiling a comprehensive guide on reporter protections by each state and circuit). Hawaii originally passed a reporter's shield law in 2008, but it included a sunset provision for the law to expire in 2011. H.B. 2557, 24th Leg. (Haw. 2008). The law was renewed for two more years in 2011. John P. Duchemin, *Hawaii*, RCFP PRIVILEGE COMPENDIUM, <https://www.rcfp.org/privilege-compendium/hawaii/> [<https://perma.cc/QK3S-YG2G>]. The legislature failed to extend or replace the shield law in 2013, however, so Hawaii currently has no shield law. See Marina Riker, *Media Shield Law 2015: Who's Really a Journalist?*, HONOLULU CIV. BEAT (Feb. 20, 2015), <https://www.civilbeat.org/2015/02/media-shield-law-2015-whos-really-a-journalist/> [<https://perma.cc/7S66-JK7L>] (describing the bill's failed re-approval). One of the disagreements was over defining "journalist." *Id.* California is the only state to include a reporter's shield in its state constitution. CAL. CONST. art. 1, § 2(b); Jason A. Martin & Anthony L. Fargo, *Rebooting Shield Laws: Updating Journalist's Privilege to Reflect the Realities of Digital Newsgathering*, 24 U. FLA. J.L. & PUB. POL'Y 47, 64 (2013).

<sup>15</sup> See ALA. CODE § 12-21-142 (2012 & Supp. 2018) (originally enacted in 1935); IND. CODE § 34-46-4-1 (2008 & Supp. 2019) (became law in 1941); 42 PA. CONS. STAT. ANN. § 5942 (2015) (noting that this provision is substantially a reenactment of a 1937 act); Adam Cohen, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 3 (2011) (describing how the old "one-to-many" communication where people individually wrote books, gave lectures, or presented their own ideas to the public became "many-to-many" where groups of people can easily share ideas with dozens of other people instantly); Jones & West, *supra* note 2, at 582 (citing Michael

gathering has become commonplace, traditional newspaper and magazine readership has sharply declined.<sup>16</sup> Few protections exist, however, for social media platform users on Facebook, Twitter, and Myspace, for example.<sup>17</sup> Additionally, differences in the content of state statutes mean that a journalist in one jurisdiction could defeat a subpoena to reveal a source but would lack the ability to do so in another.<sup>18</sup>

A federal reporter's shield would protect both the traditional press and digital journalists from unrelenting public criticism.<sup>19</sup> Even with those bene-

Gurevitch et al., *Political Communication—Old and New Media Relationships*, 625 ANNALS AM. ACAD. POL. & SOC. SCI. 164, 167 (2009)) (recognizing that new media sources allow news consumers to access news directly from the government without analysis by traditional media sources); Galen Stocking, *Digital News Fact Sheet*, PEW RES. CTR. (June 6, 2018), <http://www.journalism.org/fact-sheet/digital-news/> [<https://perma.cc/YU6R-UTWH>] (analyzing data showing how over ninety percent of Americans access at least some of their news online, either through a computer or mobile device). As blogs have gained legitimacy and readership, scholars and courts recognize bloggers' important contributions to public discourse. See Martin & Fargo, *supra* note 14, at 49–50 (describing a line of cases extending reporter's shield protections to digital news sources); Mary Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 524 (2007) (observing that blogs have on several occasions publicized stories that the traditional media overlooked).

<sup>16</sup> See Jones & West, *supra* note 2, at 576 (citing Jordan Weissmann, *The Decline of Newspapers Hits a Stunning Milestone*, SLATE (Apr. 28, 2014), <https://slate.com/business/2014/04/decline-of-newspapers-hits-a-milestone-print-revenue-is-lowest-since-1950.html> [<https://perma.cc/H888-Q7GF>]) (focusing on the loss of economic stability felt by newspapers around the country); Michael Barthel, *Despite Subscription Surges for Largest U.S. Newspapers, Circulation and Revenue Fall for Industry Overall*, PEW RES. CTR. (June 1, 2017), <http://pewrsr.ch/2rtKO3s> [<https://perma.cc/Y5J5-RM94>] (noting that although several American newspapers have seen increases in digital subscriptions, overall subscriptions are down). The United States has lost thousands of local newspapers over the last fifteen years. See Penelope Muse Abernathy, Report, *The Expanding News Desert*, UNC CTR. FOR INNOVATION & SUSTAINABILITY IN LOC. MEDIA 6 (2018), [https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10\\_14-Web.pdf](https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf) (concluding that the United States has lost nearly 1,800 local newspapers since 2004); David Bauder & David A. Lieb, *Decline in Readers, Ads Leads Hundreds of Newspapers to Fold*, ASSOCIATED PRESS (Mar. 11, 2019), <https://www.apnews.com/0c59cf4a09114238af55fe18e32bc454> [<https://perma.cc/2AL8-SJ9X>] (presenting data showing that over 1,400 local newspapers have shut down). But see Steven McIntosh, *Magazines: How Print Is Surviving the Digital Age*, BBC (Aug. 12, 2017), <https://www.bbc.com/news/entertainment-arts-40897967> [<https://perma.cc/Z6AW-9P2Y>] (recognizing that magazines like *The Economist* and *The Spectator* have increased readership since 2016).

<sup>17</sup> See Martin & Fargo, *supra* note 14, at 94–95 (highlighting how states have neglected internet technologies in crafting shield statutes); Kathryn A. Rosenbaum, Note, *Protecting More Than the Front Page: Codifying a Reporter's Privilege for Digital and Citizen Journalists*, 89 NOTRE DAME L. REV. 1427, 1431 (2014) (describing how a proposed statute should cover journalists on the Internet and on social media). “Social media” refers to “forms of electronic communication . . . through which users create online communities to share information, ideas, personal messages, and other content.” *Social Media*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/social+media> [<https://perma.cc/7FST-C8L4>].

<sup>18</sup> See Simone Alicea, *Unpacking Government: What Legal Protections Do Reporters Have?*, KNKX (Mar. 13, 2017), <http://www.tinyurl.com/ybsxpb3d> [<https://perma.cc/J6LU-5H4G>] (explaining how *Branzburg* created a system where different state court systems have separate bodies of case law but have the same level of authority in considering journalistic protections).

<sup>19</sup> See Alan Wehbe, *The Free Press and National Security: Renewing the Case for a Federal Shield Law*, 16 FIRST AMEND. L. REV. 512, 519 (2018) (emphasizing the necessity for a federal shield

fits, lawmakers must determine who qualifies as a journalist.<sup>20</sup> Some scholars and lawmakers use a profession-based definition of journalist, which typically includes only those individuals employed by a newspaper, television station, or other traditional news organization.<sup>21</sup> Other jurisdictions employ a functional definition to broadly encompass traditional news media, citizen journalists, and anyone performing journalistic functions.<sup>22</sup> Scholars have questioned whether a definition is even necessary.<sup>23</sup> This Note argues that Congress should protect

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law); Alicea, *supra* note 18 (asserting that a federal shield law would ameliorate a large amount of confusion for reporters).

<sup>20</sup> 23A KENNETH W. GRAHAM, JR. & ANN MURPHY, FED. PRAC. & PROC. EVID. § 5426 (1st ed. 2018) (establishing that one of the most difficult points in crafting a reporter's shield is deciding the scope of who the shield covers); Wehbe, *supra* note 19, at 531. Judge David Sentelle noted this problem in the case of Judith Miller, who was jailed for months for not divulging a source, when he asked of the difference between a professional journalist and a "'blogger' sitting in his pajamas at his personal computer." *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 979 (D.C. Cir. 2005); *infra* notes 102–107 and accompanying text (discussing Miller's case). States must also decide how to define journalists. See N.Y. LAW REVISION COMM'N., NEW YORK LAW REVISION COMMISSION'S REPORT AND STUDY RELATING TO PROBLEMS INVOLVED IN CONFERRING UPON NEWSPAPERMEN A PRIVILEGE WHICH WOULD LEGALLY PROTECT THEM FROM DIVULGING SOURCES OF INFORMATION GIVEN TO THEM 52, 52 n.43 (1949) [hereinafter NEW YORK STUDY] (summarizing the possible news entities that could be included in a shield law, and specifying that many states only included newspapers at the time).

<sup>21</sup> See, e.g., CAL. EVID. CODE § 1070 (West 2009 & Supp. 2019) (applying to "[a] publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, . . . radio or television news reporter or other person connected with or employed by a radio or television station"); NEV. REV. STAT. § 49.275 (2017) (applying protections to employees and others connected to newspapers, periodicals, press associations, radio stations, and television stations); see Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 430 (2006) (summarizing how most reporter's shield laws focused on the types of publications, like television, newspapers, and periodicals, covered by the statute, and noting how reporters wishing to protect the anonymity of their sources must be connected to one of these organizations).

<sup>22</sup> See, e.g., N.J. STAT. ANN. § 2A:84A-21 (West 2011 & Supp. 2019) (creating a functional definition for journalist applying to individuals "engaged in . . . gathering, procuring, transmitting, compiling, editing or disseminating news for the general public"); Eliason, *supra* note 21, at 433 (describing how a common solution to the definitional question is to focus on tasks frequently undertaken by reporters); Papandrea, *supra* note 15, at 584 (proposing a presumption of a privilege for anyone who reports news to the public). "Citizen journalism" refers to "what happens when 'the people formerly known as the audience employ the press tools they have in their possession to inform one another.'" Julia Wick, *Google Just Made a Citizen Journalism App. But Why?*, CITYLAB (Jan. 31, 2018), <https://www.citylab.com/life/2018/01/google-bulletin-citizen-journalism-app-why/551957/> [<https://perma.cc/AV4S-V65M>].

<sup>23</sup> See, e.g., Elizabeth L. Robinson, Recent Development, *Post-Sterling Developments: The Mootness of the Federal Reporter's Privilege Debate*, 95 N.C. L. REV. 1314, 1332 (2017) (arguing that the government's ability to utilize technology to unmask confidential sources renders the definition of journalist moot, as the government could get the information it seeks without forcing a journalist to testify or reveal their sources); see also Trevor Timm: *When It Comes to Government, How Much Do We Have the Right to Know?*, NPR: TED RADIO HOUR (Dec. 1, 2017), <https://www.npr.org/templates/transcript/transcript.php?storyId=567525935> [<https://perma.cc/3DU2-7QYW>] (explaining how the federal government discovered that the massive volume of data from increased use of cell phones and the internet means that prosecutors can prove their cases without journalists testifying).



a constitutionally mandated free press by enacting a federal reporter's shield with a functional definition of journalist, an explicit inclusion of digital media, and a requirement that the individual intends to disseminate information to the public.<sup>24</sup>

Part I explores the history and modern use of anonymous sources in journalism, reporter's shield privilege, and social media.<sup>25</sup> Part II discusses the three primary approaches that scholars utilize when considering the advantages and disadvantages of a federal reporter's shield statute.<sup>26</sup> Part III argues for a federal shield law that uses similar language to the Arkansas statute for digital journalism, models Vermont for journalistic acts, and adopts New Jersey's intent requirement.<sup>27</sup> This proposal balances a need for a broad rule while still providing effective enforcement measures.<sup>28</sup>

## I. THE HISTORICAL DEVELOPMENT OF ANONYMOUS SOURCES PROTECTION AND THE GROWTH OF SOCIAL MEDIA

In nearly every case in which journalists have invoked the reporter's privilege, they have done so to protect anonymous sources.<sup>29</sup> As a result, legislators historically have advanced reporter's shield laws in response to prominent news stories with anonymous sources.<sup>30</sup> New technologies have likewise forced lawmakers to broaden the scope of reporter's shield laws.<sup>31</sup> In general, these laws have yet to adapt to modern internet technology, especially social media.<sup>32</sup>

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<sup>24</sup> See ARK. CODE ANN. § 16-85-510 (2005 & Supp. 2017) (including digital media); N.J. STAT. ANN. § 2A:84A-21 (requiring the intent to disseminate news to the public); VT. STAT. ANN. tit. 12 § 1615 (2017) (providing a functional definition of journalist); *infra* notes 262–304 and accompanying text; see also Joel G. Weinberg, *Supporting the First Amendment: A National Reporter's Shield Law*, 31 SETON HALL LEGIS. J. 149, 175 (2006) (recognizing that the lack of a federal shield law affects policy arguments for state shield laws).

<sup>25</sup> See *infra* notes 29–175 and accompanying text.

<sup>26</sup> See *infra* notes 176–261 and accompanying text.

<sup>27</sup> See *infra* notes 262–304 and accompanying text.

<sup>28</sup> See *infra* notes 262–304 and accompanying text.

<sup>29</sup> See GRAHAM & MURPHY, *supra* note 20 (analyzing data from a survey of journalists finding nearly all participants thought a reporter's privilege was most vital to protect informants' identities).

<sup>30</sup> See, e.g., Raskin Press Release, *supra* note 9 (introducing a federal shield in response to then Attorney General Jeff Sessions' equivocating on whether he would prosecute investigative journalists who refused to disclose the identities of their anonymous sources).

<sup>31</sup> See, e.g., CAL. EVID. CODE § 1070 (including print, broadcast, and wire service sources). California amended its statute to include radio and television reporters. Kelli L. Sager & Rochelle L. Wilcox, *California, RCFP PRIVILEGE COMPENDIUM*, <https://www.rcfp.org/privilege-compendium/california/> [<https://perma.cc/FWH3-PPFU>].

<sup>32</sup> Compare CAL. EVID. CODE § 1070 (excluding Internet sources), with ARK. CODE ANN. § 16-85-510 (including "internet news source").

Section A of this Part addresses the rise of social media use to comment on political and non-political issues.<sup>33</sup> Section B of this Part discusses the early history and importance of anonymous sourcing in journalism.<sup>34</sup> Section C of this Part describes recent leak scandals, especially related to national security.<sup>35</sup> Section D of this Part explores the development of the present-day reporter's privilege from a judicial, legislative, and executive perspective.<sup>36</sup>

### A. Facebook Rants and Twitter Threads: Social Media and Its Contribution to Political Debates

Social media plays a unique role in digital news and presents new challenges for defining who qualifies as a journalist capable of invoking the reporter's shield law.<sup>37</sup> Social media has transformed how society digests news.<sup>38</sup> Instead of waiting for the morning newspaper or cable news analysts, citizens can learn about world events through a variety of internet sources, including blogs, social media profiles, and government websites.<sup>39</sup> This eliminates the public's reliance on layers of media interpretation.<sup>40</sup> Policymakers also take advantage of the disaggregation of the media industry.<sup>41</sup> As politicians have more ways to communicate with their constituents, the relationship between the government and the press is becoming more one-sided, and officials no longer need to rely on maintaining positive relationships with journalists.<sup>42</sup>

The prominence of social media in daily life comes from its differences from traditional media sources.<sup>43</sup> First, social media permits instantaneous,

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<sup>33</sup> See *infra* notes 37–74 and accompanying text.

<sup>34</sup> See *infra* notes 75–100 and accompanying text.

<sup>35</sup> See *infra* notes 101–136 and accompanying text.

<sup>36</sup> See *infra* notes 137–175 and accompanying text.

<sup>37</sup> See Jones & West, *supra* note 2, at 583 (illustrating how social media users will often limit their news consumption to topics they care about rather than searching broad sources for stories that peaked their interest). A reporter's privilege allows journalists to refuse to testify to the identities of their anonymous sources without repercussions. See *Privilege, Journalist's Privilege*, BLACK'S LAW DICTIONARY, *supra* note 10 (defining the privilege as “[a] reporter’s protection, under constitutional or statutory law, from being compelled to testify about confidential information or sources”).

<sup>38</sup> See Jones & West, *supra* note 2, at 582 (describing how most Americans access at least some news on social media platforms).

<sup>39</sup> *Id.*

<sup>40</sup> See *id.* at 582–83 (describing how government officials avoid “filter[ing]” their messages through news organizations).

<sup>41</sup> See *id.* at 583 (noting that politicians can bypass the press and communicate directly with the public).

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

<sup>43</sup> See Emily Anne Vance, Note, *Should Prosecutors Blog, Post, or Tweet?: The Need for New Restraints in Light of Social Media*, 84 FORDHAM L. REV. 367, 379–82 (2015) (providing an overview of the differences between social media and traditional media).

widespread communication.<sup>44</sup> With traditional media sources, individuals must wait for a breaking news bulletin or the next day's newspaper.<sup>45</sup> Today, however, consumers can follow Twitter feeds of reporters on the ground at a war zone or a rally as events are unfolding.<sup>46</sup> Second, the difference in speed results from the distinct purposes of social media and traditional media.<sup>47</sup> Consumers tend to rely on social media for breaking news, while turning to traditional sources for features, analysis, and commentary.<sup>48</sup>

News consumption through social media comes with drawbacks, however.<sup>49</sup> What consumers gain in speed of information can be lost in accuracy, as social media posts do not undergo the editorial scrutiny of television, radio, or newspapers.<sup>50</sup> As a result, social media users have a greater need to distinguish between reputable news and biased reports.<sup>51</sup> Similarly, the easy access to a wide array of information and perspectives encourages social media users to curate their newsfeed to validate their personal worldview.<sup>52</sup> This confirmation bias blinds users to information with which they disagree.<sup>53</sup> Readers cannot as easily avoid unfavorable news coverage from traditional media sources that combine various subjects and points of view.<sup>54</sup>

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<sup>44</sup> See Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 PACE L. REV. 228, 242 (2011) (characterizing social media as "open mikes").

<sup>45</sup> Vance, *supra* note 43, at 379–80.

<sup>46</sup> See, e.g., David Carr, *View of #Ferguson Thrust Michael Brown Shooting to National Attention*, N.Y. TIMES (Aug. 17, 2014), <https://nyti.ms/1qi6VyE> [<https://perma.cc/C9H5-4CCL>] (showing how individuals and media organizations alike gained valuable information through social media on the Ferguson, Mo. protests following the shooting of Michael Brown); *infra* notes 58–74 and accompanying text (discussing several breaking news events reported over social media).

<sup>47</sup> See WIRED Staff, *How to Use Twitter: Critical Tips for New Users*, WIRED (Aug. 29, 2018), <https://www.wired.com/story/how-to-setup-twitter-search-hashtag-and-login-help/> [<https://perma.cc/ZF4G-G8UM>] (describing the impact of Twitter's up-to-the-minute access to news).

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

<sup>49</sup> See Daniel Petty, *Is Social Media Destroying the News?*, DENVER POST (Mar. 24, 2017), <http://dpo.st/2ndq1Qj> [<https://perma.cc/WQZ4-KMKN>] (worrying about the negative effects social media has on local news organizations and explaining how consumers are regularly swayed by click-bait stories).

<sup>50</sup> See Vance, *supra* note 43, at 380 (explaining how the lack of editorial oversight and the impersonal nature of social media leads to careless posts (citing Leonard M. Niehoff, *Of Tweets and Trials*, 27 COMM. LAW. 10, 13 (2010))). Lawmakers have considered the editorial oversight argument in relation to blogs as well. See Jason M. Shepard, *Bloggers After the Shield: Defining Journalism in Privilege Law*, 1 U. BALT. J. MEDIA L. & ETHICS 186, 189 n.15 (2009) (explaining lawmakers' concerns about bloggers' hiding their identity and lacking oversight).

<sup>51</sup> See Vance, *supra* note 43, at 381 (asserting that social media users are responsible for finding objective reporting in a constant flood of information).

<sup>52</sup> See Jeff Stibel, *Opinion, Fake News: How Our Brains Lead Us into Echo Chambers That Promote Racism and Sexism*, USA TODAY (May 15, 2018), <https://usat.ly/2r17zAd> [<https://perma.cc/JG59-8ZZS>] (explaining the psychological underpinnings of individuals separating themselves from opinions with which they disagree).

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

<sup>54</sup> David Robert Grimes, *Opinion, Echo Chambers are Dangerous—We Must Try to Break Free of Our Online Bubbles*, THE GUARDIAN (Dec. 4, 2017), <https://www.theguardian.com/science/blog/>

First-person statements on social media allow posters to directly communicate messages to their followers.<sup>55</sup> Twitter users, for example, can identify sources by their Twitter handle instead of reading an entire article to find information.<sup>56</sup> President Trump has taken advantage of this feature by consistently tweeting presidential proclamations directly to his followers, thus avoiding miscommunication through the Office of the Press Secretary and external news media.<sup>57</sup>

People also use internet tools to broadcast events live to the world, which prevents distortion in the retelling of news.<sup>58</sup> Media scholars widely credit Twitter with playing a substantial organizational role in the Arab Spring revo-

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2017/dec/04/echo-chambers-are-dangerous-we-must-try-to-break-free-of-our-online-bubbles [https://perma.cc/7CTF-C9JB] (noting how traditional media sources are frequently held to a higher legal standard than non-traditional outlets to report unbiased facts). *But see* Amanda Hoover, *How Different 'News Bubbles' Covered the Women's March*, CHRISTIAN SCI. MONITOR (Jan. 22, 2017), https://www.csmonitor.com/USA/Politics/2017/0122/How-different-news-bubbles-covered-the-Women-s-March [https://perma.cc/5PFA-CF8U] (explaining how consumers of traditional cable news gravitate toward networks that confirm their worldview, including MSNBC for left-leaning consumers and Fox News for individuals with conservative views).

<sup>55</sup> Vance, *supra* note 43, at 379. To separate themselves from imposters, the real people have thus commonly added "real" to their Twitter handle. *E.g.*, President Donald Trump (@realDonaldTrump), TWITTER, https://twitter.com/realDonaldTrump [https://perma.cc/44NT-78WV]. Twitter also utilizes a blue check symbol to highlight users whose identity Twitter has independently verified. *See* Sam Machkovech, *Twitter: Our Blue Check Marks Aren't Just About "Verification,"* ARS TECHNICA (Nov. 15, 2017, 6:45 PM), https://arstechnica.com/?post\_type=post&p=1205165 [https://perma.cc/CA4H-L89M] (describing how Twitter had to close its verification system in response to public outcry after Twitter verified a well-known white nationalist); *see also* *About Verified Accounts*, TWITTER, https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts [https://perma.cc/U78G-JUBF] (explaining how the blue check symbolizes an authentic account valuable to the public).

<sup>56</sup> *See* Serri Graslie, *How to Find Sources on Twitter: An Exercise*, NPR (Oct. 28, 2015), https://training.npr.org/social-media/how-to-find-sources-on-twitter-an-exercise/ [https://perma.cc/R9UD-7E37] (describing the best ways to verify Twitter handles). To stay in front of any potential backlash, Twitter users commonly include a disclaimer in their public biography that "retweets do not indicate endorsement." Charlie Warzel, *Meet the Man Behind Twitter's Most Infamous Phrase*, BUZZFEED NEWS (Apr. 15, 2014), https://www.buzzfeednews.com/article/charliwarzel/meet-the-man-behind-tweeters-most-infamous-phrase [https://perma.cc/6JPZ-8UCD].

<sup>57</sup> *See* Elizabeth Landers, *White House: Trump's Tweets Are 'Official Statements,'* CNN (June 6, 2017), https://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html [https://perma.cc/R3KJ-2CQP] (explaining that tweets from @realDonaldTrump are official presidential statements); Jane Mayer, *The Making of the Fox News White House*, NEW YORKER (Mar. 11, 2019), https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house [https://perma.cc/S5B8-X9J2] (lamenting how now former White House communications director, Bill Shine, all but cancelled White House press briefings in favor of President Trump speaking for himself); *see also* Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 575, 577 (S.D.N.Y. 2018) (finding that @realDonaldTrump tweets create a designated public forum and that blocking Twitter users from seeing President Trump's tweets violates the First Amendment).

<sup>58</sup> *See* William E. Lee, *Citizen-Critics, Citizen Journalists, and the Perils of Defining the Press*, 48 GA. L. REV. 757, 770 (2014) (discussing how technology empowers citizen journalists).

lutions in the Middle East and North Africa from 2010–12.<sup>59</sup> In Egypt, the number of tweets increased by a factor of one hundred leading up to President Hosni Mubarak’s resignation.<sup>60</sup> Tunisia’s revolution highlighted how demonstrators prepared for and planned protests on Twitter.<sup>61</sup> Tunisian activists also took to Facebook to combat media censorship and publicize demonstrations.<sup>62</sup>

Organizers and citizen journalists turn to Twitter because it is often a faster source of information on breaking news than the traditional media outlets.<sup>63</sup> For example, the public first saw the aftermath of the April 2013 Boston Marathon bombing on Twitter.<sup>64</sup> Yet, although members of the public can learn critical information through Twitter, they can be misled by lies and misinformation.<sup>65</sup> Newsrooms regularly struggle with the decision of whether to publish quickly or accurately, especially when social media provides a simple way to post stories instantly.<sup>66</sup>

Activists raising awareness for a cause turn to Twitter to attract attention from reporters who are often regular Twitter users themselves.<sup>67</sup> If a journalist

<sup>59</sup> Catherine O’Donnell, *New Study Quantifies Use of Social Media in Arab Spring*, UW NEWS (Sept. 12, 2011), <http://www.washington.edu/news/2011/09/12/new-study-quantifies-use-of-social-media-in-arab-spring/> [https://perma.cc/NY8B-9FUL].

<sup>60</sup> *Id.*

<sup>61</sup> *See id.* (showing how online discussions about revolution and freedom routinely occurred shortly before large public demonstrations).

<sup>62</sup> Peter Beaumont, *The Truth About Twitter, Facebook and the Uprisings in the Arab World*, THE GUARDIAN (Feb. 25, 2011), <https://www.theguardian.com/world/2011/feb/25/twitter-facebook-uprisings-arab-libya> [https://perma.cc/5MPJ-VHG6].

<sup>63</sup> Elena Cresci, *12 Ways Twitter Changed Our Lives*, THE GUARDIAN (Mar. 21, 2016), <https://www.theguardian.com/technology/2016/mar/21/12-ways-twitter-changed-our-lives-10th-birthday> [https://perma.cc/YCT8-42MD]; CBS, *Twitter Suspends Accounts Ahead of ‘Unite the Right’ Rally*, KDKA CBS PITTSBURGH (Aug. 11, 2018), <https://cbsloc.al/2OJ4PY#.XKDY6IDF> [https://perma.cc/N6ZH-GXA4].

<sup>64</sup> *See* Hilary Sargent, *April 15, 2013: How Twitter Informed Us*, BOSTON.COM (Apr. 15, 2014), <https://www.boston.com/news/local-news/2014/04/15/april-15-2013-how-twitter-informed-us> [https://perma.cc/4SSL-8Q8M] (showing how initial tweets had little concrete information but became more robust after a few hours had passed).

<sup>65</sup> *See* Paul Chadwick, Opinion, *Why Fake News on Social Media Travels Faster Than the Truth*, THE GUARDIAN (Mar. 19, 2018), <https://www.theguardian.com/commentisfree/2018/mar/19/fake-news-social-media-twitter-mit-journalism> [https://perma.cc/JV2E-QQBG] (explaining the results of a study by researchers at the Massachusetts Institute of Technology concerning the spread of fake news stories); Sargent, *supra* note 64 (addressing how Twitter was a vehicle for misinformation shortly after the Boston Marathon bombings).

<sup>66</sup> *See, e.g.,* Jim Rutenberg, *BuzzFeed News in Limbo Land*, N.Y. TIMES (Jan. 20, 2019), <https://nyti.ms/2RZSNmD> [https://perma.cc/9ZHU-J3FV] (discussing a report from *BuzzFeed News* concerning the Russia investigation that was explicitly rejected by the special counsel’s office, and characterizing the pressure of reporting as “a very, very, very high wire, with a load of rusty razor blades beneath it”).

<sup>67</sup> Mathew Ingram, *Do Journalists Pay Too Much Attention to Twitter?*, COLUM. JOURNALISM REV. (Oct. 10, 2018), [https://www.cjr.org/the\\_media\\_today/journalists-on-twitter-study.php](https://www.cjr.org/the_media_today/journalists-on-twitter-study.php) [https://perma.cc/67L8-VNXQ] (illustrating how many members of the media struggle to resist Twitter’s addictive qualities).

retweets an activist or includes their tweet in an article, the activist's message can reach a wider audience.<sup>68</sup>

In August 2017, far-right neo-Nazi demonstrators descended upon Charlottesville, Virginia to promote their white nationalist beliefs.<sup>69</sup> A significant part of their organizing efforts took place through social media.<sup>70</sup> To fight back, counter-protestors posted photographs from the rally and crowdsourced the images to identify the demonstrators and have them fired from their jobs.<sup>71</sup> Prior to the Unite the Right 2 Rally in Washington, D.C. on the anniversary of the Charlottesville demonstration, Twitter suspended the account of a far-right group present in Charlottesville.<sup>72</sup> Law enforcement officials, too, exploit the public's reliance on social media organizing tools to monitor protests.<sup>73</sup> They frequently rely on private companies to compile and analyze data from Facebook, Twitter, and Instagram.<sup>74</sup>

### *B. Journalists and the Public Have a Long History of Relying on Anonymous Sources: Early America Through the 1900s*

The concept of a free press is as old as the United States itself and is guaranteed by the First Amendment.<sup>75</sup> The federal government, however, has

<sup>68</sup> See Nicholas Confessore et al., *The Follower Factory*, N.Y. TIMES (Jan. 27, 2018), <https://nyti.ms/2Fm5rCC> [<https://perma.cc/P4TX-AAWB>] (explaining how individuals who want to be popular online have resorted to purchasing followers and retweets).

<sup>69</sup> Richard Fausset & Alan Feuer, *Far-Right Groups Surge into National View in Charlottesville*, N.Y. TIMES (Aug. 13, 2017), <https://nyti.ms/2uTJK77> [<https://perma.cc/54MH-F45B>] (describing the demonstrations and responses and noting that a far-right demonstrator drove a car into a crowd of people, killing thirty-two-year-old Heather Heyer).

<sup>70</sup> Francie Diep, *How Social Media Helped Organize and Radicalize America's White Supremacists*, PAC. STANDARD (Aug. 15, 2017), <https://psmag.com/social-justice/how-social-media-helped-organize-and-radicalize-americas-newest-white-supremacists> [<https://perma.cc/7FJ5-UDVE>] (explaining how the organizers of the Charlottesville riots utilized a Facebook event, a neo-Nazi website, and other Internet tools).

<sup>71</sup> See Alyssa Newcomb, *Twitter Users Are Outing Charlottesville Protesters*, NBC NEWS (Aug. 14, 2017), <https://www.nbcnews.com/tech/social-media/twitter-users-are-outing-charlottesville-protesters-n792501> [<https://perma.cc/6T6R-JSLJ>] (outlining the story of a man named Cole White who was fired after the Twitter handle @YesYoureRacist identified him as a participant in the Charlottesville riots). This practice, known as "doxxing" can mistakenly identify an innocent person and hurt their career and reputation. Rozina Sini, *Professor Wrongly Labelled as Racist in Charlottesville*, BBC (Aug. 15, 2017), <https://www.bbc.com/news/world-us-canada-40935419> [<https://perma.cc/PTH7-8NAR>].

<sup>72</sup> CBS, *supra* note 63.

<sup>73</sup> See Jessica Guynn, *ACLU: Police Used Twitter, Facebook to Track Protests*, USA TODAY (Oct. 12, 2016), <http://usat.ly/2e4erhP> [<https://perma.cc/M2FR-UUXK>] (discussing law enforcement use of data from private company Geofeedia to monitor protests in Baltimore, Md. and Ferguson, Mo.).

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

<sup>75</sup> See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of . . . the press . . ."); Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists' Confidentiality, 1795-2005*, 43 SAN DIEGO L. REV. 425, 426 (2006) (highlighting how government leaks appeared in print even prior to the establishment of the District of Columbia as the national capital). Several scholars consider John Peter Zenger to be one of the first cases where someone re-

long sought to limit this freedom and has actively opposed the use of anonymous sources since the eighteenth century.<sup>76</sup> In 1795, Jeffersonian-Republican senators leaked to a sympathetic journalist details of a treaty with the British that the senators felt gave the British too many concessions.<sup>77</sup> This leak violated a Senate order swearing the members to secrecy about their public policy debates.<sup>78</sup> A few years later, following more disclosures from Republicans, the same newspaper, *Aurora*, was subjected to the nation's first leak investigation.<sup>79</sup> This time, the subject of the leak was a Federalist bill, which sought to modify the procedure for deciding close elections in anticipation of the 1800 election.<sup>80</sup> Editor William Duane was found in contempt of Congress for publishing a story about the bill, amid argument that senators who crafted public policy should be subject to public criticism.<sup>81</sup> Although Duane's contempt charge was not enforced and he was never convicted, he was only one of hundreds of journalists investigated for publishing political leaks.<sup>82</sup>

In 1848, the first contempt of Congress case was argued in court when a journalist revealed communications from a closed-door Senate meeting concerning a treaty to end the Mexican-American War.<sup>83</sup> After John Nugent of the *New York Herald* refused to produce his source, identifying the source only as a member of the U.S. Senate, Congress held Nugent in contempt.<sup>84</sup> Though eventually released, Nugent's case started a trend of jailing journalists for failing to reveal anonymous sources.<sup>85</sup>

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fused to name sources. *E.g.*, John J. Watkins, *The Journalist's Privilege in Arkansas*, 7 U. ARK. LIT-TLE ROCK L. REV. 473, 473 n.1 (1984). In a 1734 libel case, Zenger, the leader of the *New York Weekly Journal*, chose not to give up the name of the writer of the allegedly libelous story. *Id.* He was eventually acquitted having never named the source. *Id.*

<sup>76</sup> See Kielbowicz, *supra* note 75, at 434 (recounting the United States' first major leak inquiry).

<sup>77</sup> *Id.* at 433–34.

<sup>78</sup> *Id.* at 433 (illustrating the bitter rivalry between the Federalists and the Republicans).

<sup>79</sup> *Id.* at 434.

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

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

<sup>82</sup> *Id.* at 435.

<sup>83</sup> *Ex parte Nugent*, 18 F. Cas. 471 (D.C. Cir. 1848) (No. 10,375); see Mark Neubauer, Comment, *The Newsman's Privilege After Branzburg: The Case for a Federal Shield Law*, 24 UCLA L. REV. 160, 161 (1976) (explaining how Nugent shared a draft of the treaty with his editor); Ishaan Tharoor, *Top 10 Leaks: The Treaty of Guadalupe Hidalgo Scandal*, TIME (Nov. 29, 2010), <http://ti.me/1fikcSt> [<https://perma.cc/JNA4-5NRQ>] (noting that *New York Herald* reporter John Nugent was held in the Capitol).

<sup>84</sup> Neubauer, *supra* note 83, at 161; Tharoor, *supra* note 83.

<sup>85</sup> Neubauer, *supra* note 83, at 161, 123 n.125. Nugent's actions mirror those of Daniel Ellsberg's release of the Pentagon Papers in the 1970s. See *id.* (detailing the similarities between Nugent's and Ellsberg's leaks and describing the Pentagon Papers). In 1971, Daniel Ellsberg leaked to the press over 7,000 pages of classified documents detailing the United States' reasons for its involvement in the Vietnam War. *The Pentagon Papers: Secrets, Lies and Leaks*, REVEAL (May 21, 2016), <https://www.revealnews.org/episodes/the-pentagon-papers-secrets-lies-and-leaks/> [<https://perma.cc/8LBG-RLUW>] [hereinafter *The Pentagon Papers*] (providing an account of the Pentagon Papers scandal from interviews with Daniel Ellsberg and Robert J. Rosenthal, one of the reporters to whom Ellsberg

This trend continued throughout the Great Depression and labor movement when the need for protections for journalists began to receive attention.<sup>86</sup> In 1936, in *People v. Sheriff of New York County*, for instance, the New York Court of Appeals held that a newspaper reporter could be jailed for refusing to divulge the names of his confidential sources during grand jury testimony.<sup>87</sup> Martin Mooney, a journalist for the *New York American*, had reported on the illegal gambling and lottery trade.<sup>88</sup> When subpoenaed about their activities, Mooney refused to release the gamblers' names.<sup>89</sup> The Court of Appeals concluded that a common law reporter's privilege did not exist, and it was the job of the New York legislature to enact a reporter's privilege as other states had done.<sup>90</sup> New York first passed a reporter's shield statute in 1970.<sup>91</sup>

Despite efforts to force journalists to reveal anonymous sources, some of the most newsworthy stories of the last century resulted from sources speaking secretly to the press.<sup>92</sup> The Watergate Scandal was among the most infamous to rely on anonymous sources.<sup>93</sup> From 1972 to 1973, William Mark Felt, Sr., then deputy Federal Bureau of Investigations director, met in secret with *Washington Post* reporters Bob Woodward and Carl Bernstein.<sup>94</sup> Using the pseudonym "Deep Throat," Felt disclosed to Woodward and Bernstein critical information about the Nixon administration's involvement in the break-in of the Democrat-

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leaked the papers). Prosecutors initially charged Ellsberg with violations of the Espionage Act of 1917, but after it was discovered that the Nixon administration was unlawfully trying to tarnish Ellsberg's credibility, the government dropped all charges against Ellsberg. *Id.* (describing how Judge Matt Byrne, who was overseeing the Pentagon Papers trial, interrupted proceedings to announce that two individuals involved in Watergate had broken into Ellsberg's psychiatrist's office). Additionally, after the Southern District of New York enjoined the *Washington Post* and the *New York Times* from publishing the materials, the U.S. Supreme Court allowed them to continue publishing the story. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (holding that the government did not meet its high burden to justify restraining the newspapers). President Trump has also expressed support for jailing journalists to gain information. Mary Clare Jalonick et al., *Leak Crackdown Talk Yields Rare Comey, Trump Agreement*, ASSOCIATED PRESS (Apr. 21, 2018), <https://www.apnews.com/dda6eac0eb2b4c8c9ddbfee14f891ccd> [<https://perma.cc/L75S-DERE>] (documenting an exchange between President Trump and former FBI Director James Comey where the President suggested reporters could "spend a couple days in jail, make a new friend, and they are ready to talk").

<sup>86</sup> GRAHAM & MURPHY, *supra* note 20.

<sup>87</sup> *People v. Sheriff of N.Y. Cty. (Mooney)*, 199 N.E. 415, 416 (N.Y. 1936); *see also* NEW YORK STUDY, *supra* note 20, at 40–49 (discussing the trial and appellate proceedings of *Mooney*).

<sup>88</sup> *Mooney*, 199 N.E. at 415.

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

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

<sup>91</sup> N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2019).

<sup>92</sup> *See, e.g.*, CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN 71 (1974) (documenting the Watergate scandal and interactions with Mark Felt); *The Pentagon Papers*, *supra* note 85 (detailing the Pentagon Papers scandal).

<sup>93</sup> *See* BERNSTEIN & WOODWARD, *supra* note 92, at 13 (explaining how the two reporters first learned of the Watergate break-in).

<sup>94</sup> *See id.* at 71 (detailing Woodward's source).



ic National Committee offices at the Watergate complex.<sup>95</sup> In articles detailing the scandal, Woodward referred to Felt as an executive branch source with access to information at the Committee to Re-elect the President and the White House.<sup>96</sup> Though the government never subpoenaed the reporters to reveal Felt's identity, Woodward and Bernstein did not confirm his identity until 2005.<sup>97</sup>

Just as journalists have used unnamed sources in stories involving the executive branch, anonymous sourcing has also had a large impact on stories affecting Congress and the judiciary.<sup>98</sup> In 1991, for instance, Nina Totenberg of National Public Radio (NPR) was one of the first reporters to break the story of Anita Hill's sexual assault allegations against then Supreme Court nominee Clarence Thomas.<sup>99</sup> Although Totenberg spoke with Hill well before publishing the story, she relied on an unnamed source for the initial tip and never revealed the individual's identity, going so far as to burn her notes several years later.<sup>100</sup>

### C. Leaks and Unnamed Sources in the Twenty-First Century

Since 2000, anonymous sources have played a particularly large role in new stories related to national security, as sources choose to be unnamed for fear of losing their jobs.<sup>101</sup> The Central Intelligence Agency (CIA) leak scandal, in which an anonymous government official revealed the identity of then-covert

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<sup>95</sup> Papandrea, *supra* note 15, at 536–37 (describing how Felt required full anonymity in order to speak to the reporters).

<sup>96</sup> See BERNSTEIN & WOODWARD, *supra* note 92, at 71 (“Woodward had a source in the Executive Branch who had access to information at [the Committee for the Re-Election of the President] as well as at the White House. His identity was unknown to anyone else.”).

<sup>97</sup> John D. O'Connor, “I’m the Guy They Called Deep Throat,” VANITY FAIR (Oct. 17, 2006), <https://www.vanityfair.com/news/politics/2005/07/deepthroat200507> [<https://perma.cc/NS3G-ZDLC>] (reporting that Felt finally revealed his identity as Deep Throat at age ninety-one).

<sup>98</sup> See Kielbowicz, *supra* note 75, at 432 (describing the purpose of leaks involving Congress in the 1800s); Nina Totenberg, *NPR’s Nina Totenberg Recalls Breaking Anita Hill’s Story in 1991*, NPR (Apr. 14, 2016), <https://n.pr/1p1V5Ph> [<https://perma.cc/NDG8-9RHS>] (detailing how Totenberg reported the Anita Hill scandal).

<sup>99</sup> Totenberg, *supra* note 98. Totenberg often receives credit, but Timothy Phelps broke the story on the wire services the night before Totenberg’s story. Timothy M. Phelps, Opinion, *I Broke the Anita Hill Story. Here’s What We Need to Learn from Her Treatment*, L.A. TIMES (Sept. 18, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-phelps-anita-hill-christine-blasey-ford-kavanaugh-2018-09-18-story.html> [<https://perma.cc/8NDT-F8Y6>].

<sup>100</sup> See NPR Staff, *The Real Story Behind HBO’s ‘Confirmation’ from the NPR Reporter Who Broke the Story*, NPR (Apr. 13, 2016), <https://n.pr/1NnbmEQ> [<https://perma.cc/Z8LG-PYAA>]; Totenberg, *supra* note 98 (recounting how Totenberg had to acquire a specific affidavit before Hill would speak with her).

<sup>101</sup> Liz Spayd, *The Risk of Unnamed Sources? Unconvinced Readers*, N.Y. TIMES (Feb. 18, 2017), <https://nyti.ms/2lupw2X> [<https://perma.cc/2FVV-JZE3>] (describing how unnamed sources likely worried about professional backlash from leaking information).

CIA officer Valerie Plame to several journalists, illustrates this trend.<sup>102</sup> During the grand jury investigation of the identity leak, federal prosecutors sought the testimony of *New York Times* reporter Judith Miller.<sup>103</sup> Miller, however, refused to reveal who leaked to her Plame's name and status as a CIA operative, and she was subsequently jailed for eighty-five days for contempt of court from 2004–05.<sup>104</sup> Miller was jailed despite never publishing Plame's name or a story about her.<sup>105</sup> In fact, columnist Robert Novak was the first to leak Plame's identity in 2003.<sup>106</sup> It was not until her source, I. "Scooter" Libby, waived his confidentiality agreement that Miller agreed to testify against Libby.<sup>107</sup>

In the summer of 2013, Edward Snowden leaked details about the National Security Agency's (NSA) global surveillance program to three reporters with *The Guardian*.<sup>108</sup> As a contractor assigned to the NSA, Snowden's own knowledge of the surveillance systems informed his careful and covert communication protocols with the reporters.<sup>109</sup> Since the Snowden leak, news organizations have taken significant steps to encrypt and protect communications between reporters and their sources.<sup>110</sup> Some of these involve encrypted mes-

<sup>102</sup> See Sandra Davidson & David Herrera, *Needed: More Than a Paper Shield*, 20 WM. & MARY BILL RTS. J. 1277, 1285–88 (2012) (providing several examples of reporters who faced incarceration).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1286.

<sup>105</sup> *Id.* at 1287.

<sup>106</sup> See Robert D. Novak, Column, *Mission to Niger*, WASH. POST (July 14, 2003), <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/20/AR2005102000874.html> [<https://perma.cc/5THP-WAQF>] ("Wilson never worked for the CIA, but his wife, Valerie Plame, is an agency operative on weapons of mass destruction.").

<sup>107</sup> See William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1458 (2007) (explaining how Miller and *Time Magazine* reporter Matt Cooper both divulged Libby's name after failing to quash subpoenas against them). The government charged Libby under the Intelligence Identities Protection Act (the IIPA), which was enacted after an ex-CIA official released to the public over 1,000 names of CIA operatives. See *id.* at 1496 (questioning whether Plame acted as a "covert agent," as defined by the IIPA); Mary Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L. J. 233, 274 (2008) (elaborating that the IIPA outlaws publicizing the identities of covert agents). See generally 50 U.S.C. § 3121 (2018) (formerly 50 U.S.C. § 421).

<sup>108</sup> Glenn Greenwald et al., *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, THE GUARDIAN (June 11, 2013), <https://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance> [<https://perma.cc/N7DJ-UYBS>]. Snowden's disclosures exposed mass government acquisition of cell phone and internet data, purportedly done to prevent terrorism. Ewen Macaskill & Gabriel Dance, *NSA Files: Decoded*, THE GUARDIAN (Nov. 1, 2013), <https://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded> [<https://perma.cc/558X-2NC9>].

<sup>109</sup> See Micah Lee, *Ed Snowden Taught Me to Smuggle Secrets Past Incredible Danger. Now I Teach You.*, INTERCEPT (Oct. 28, 2014), <http://interc.pt/1DXiB2S> [<https://perma.cc/2BH5-ZA6W>] (explaining how Snowden reached out to Lee because Lee could contact reporter Laura Poitras and because Lee had Snowden's level of knowledge about encryption technology).

<sup>110</sup> See, e.g., Stephen Hiltner, *How to Tell Us a Secret*, N.Y. TIMES (Sept. 19, 2018), <https://nyti.ms/2DjV71w> [<https://perma.cc/7LFC-8QMD>] (pointing out how the *Times* saw immediate benefits after providing readers with simple ways to send anonymous tips through the phone or over the internet).

saging applications, while other anonymous tip methods encourage analog communication by paper.<sup>111</sup>

Although many sources leak anonymously for positive reasons, not all informants share this same motive.<sup>112</sup> Some officials have used their anonymity to pass false information through the press, such as mischaracterizing the effectiveness of the CIA's interrogation program.<sup>113</sup> These events led to a temporary reduction in anonymous sourcing.<sup>114</sup>

Although reporters make regular use of anonymous sourcing today, the practice has come under increased scrutiny.<sup>115</sup> Most major news organizations consequently try to avoid using unnamed sources wherever possible.<sup>116</sup> *The Associated Press* (AP)—a non-profit news agency or wire service that is often considered a gold standard in reporting—for instance, requires its reports to seek managerial approval and disclose the reason for a source's anonymity.<sup>117</sup>

<sup>111</sup> See, e.g., *The Intercept Welcomes Whistleblowers*, INTERCEPT (Oct. 24, 2017), <https://theintercept.com/source/> [<https://perma.cc/6KVQ-YHFF>] (describing applications like SecureDrop, Tor, and Signal that, along with the U.S. Postal Service, leakers can utilize to communicate with *The Intercept*).

<sup>112</sup> See Lee, *supra* note 107, at 1468 (asserting that viewing leakers as wholly brave and always having good intentions is an overly simplified characterization). Leakers may try to serve policy agendas, not necessarily to hurt others. See Papandrea, *supra* note 107, at 251 (describing how executive branch officials admitted leaking confidential information to advance professional or personal agendas). Other benign reasons for sources to leak include bypassing slow bureaucratic communication channels and building a relationship with a reporter. See Kielbowicz, *supra* note 75, at 475–77 (explaining that sources take a number of approaches to gain the favor of the press, including leaking information).

<sup>113</sup> Nicky Woolf, *CIA Gave Faulty Information to Media in Order to Mislead Public on Torture*, THE GUARDIAN (Dec. 9, 2014), <https://www.theguardian.com/us-news/2014/dec/09/cia-false-information-journalists-mislead-public-senate-report> [<https://perma.cc/YN2Y-2735>] (examining how the CIA lied to the public through the press); see also Spencer Ackerman et al., *Senate Report on CIA Torture Claims Spy Agency Lied About 'Ineffective' Program*, THE GUARDIAN (Dec. 9, 2014), <https://www.theguardian.com/us-news/2014/dec/09/cia-torture-report-released> [<https://perma.cc/UFD6-VDDD>] (detailing the torture report, which detailed the CIA's interrogation techniques performed on prisoners at undisclosed prisons throughout the world).

<sup>114</sup> See Katharine Q. Seelye, *Fewer Sources Go Nameless in the Press, Survey Shows*, N.Y. TIMES (Mar. 14, 2005), <https://nyti.ms/2WG5OAF> [<https://perma.cc/72YV-EG38>] (describing a study finding that seven percent of articles used anonymous sources in 2004 compared to twenty-nine percent in 2003).

<sup>115</sup> See Bacon, *supra* note 7 (noting the high volume of stories about the Russia investigations that contain unnamed sources); Yokley, *supra* note 7 (describing polling data showing that a significant number of voters thought reporters fabricated sources).

<sup>116</sup> See, e.g., Washington Post Staff, *Policies and Standards*, WASH. POST (Jan. 1, 2016), <https://wapo.st/2hwLFdv> [<https://perma.cc/GA6D-B38M>] (preferring named sources to unnamed sources).

<sup>117</sup> Associated Press, *Anonymous Sources*, <https://www.ap.org/about/news-values-and-principles/telling-the-story/anonymous-sources> [<https://perma.cc/3NLW-8XE7>]; see Paul Glader, Opinion, *10 Journalism Brands Where You Find Real Facts Rather Than Alternative Facts*, FORBES (Feb. 1, 2017), <https://www.forbes.com/sites/berlinschoolofcreativeleadership/2017/02/01/10-journalism-brands-where-you-will-find-real-facts-rather-than-alternative-facts/> [<https://perma.cc/6GE4-QQB6>] (describing the Associated Press (AP) and other wire services as critical to the flow of political and economic news); see also Associated Press, *About Us*, <https://www.ap.org/about/> [

*USA Today*, meanwhile has significantly reduced reliance on anonymous sources.<sup>118</sup> One commentator noted that as a consequence of this decision, *USA Today* rarely broke national security stories.<sup>119</sup>

In addition to providing information anonymously, informants, politicians and communication professionals often host briefings “off the record” or “on background.”<sup>120</sup> Although each type of conversation’s meaning depends on context, “off the record” generally means that a conversation cannot be published.<sup>121</sup> Information “on background” can be used only if the source is described in general terms and not named.<sup>122</sup> Interviews “on background” or “off the record” allow sources to control the story and potentially manipulate the press for ulterior motives.<sup>123</sup> President Trump, for instance, held an off-the-record meeting with A. G. Sulzberger and James Bennet, the publisher and editorial page editor of the *New York Times*, respectively.<sup>124</sup> Privately, President Trump wanted to promote his positive image to one of the most widely read news sources in the United States.<sup>125</sup> A few days later, though, Trump broke the off-the-record agreement by tweeting to his followers that he had met with Sulzberger to discuss fake news.<sup>126</sup>

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47TG] (stating that over half of the world’s population is exposed to AP reporting every day). Other wire services, also called news agencies, include Agence France-Presse and Reuters. Patrick B. Pexton, Opinion, *Does the Post Rely Too Much on Wire Services?*, WASH. POST (Feb. 17, 2012), [https://www.washingtonpost.com/opinions/does-the-post-rely-too-much-on-wire-services/2012/02/17/gQA8CFiKR\\_story.html](https://www.washingtonpost.com/opinions/does-the-post-rely-too-much-on-wire-services/2012/02/17/gQA8CFiKR_story.html) [<https://perma.cc/2KVB-DUAX>].

<sup>118</sup> David Folkenflik, ‘*USA Today*’ Cuts Use of Anonymous Sources, NPR (Aug. 29, 2005), <https://www.npr.org/templates/story/story.php?storyId=4815420> [<https://perma.cc/64KY-FY45>]. This crackdown came after *USA Today* admitted that one of its reporters “fabricated quotes and entire stories.” *Id.*

<sup>119</sup> Kurt Andersen, Column, *Welcome to the Sausage Factory*, N.Y. MAG., <https://shar.es/amyOp/> [<https://perma.cc/R9GC-ZYTV>].

<sup>120</sup> Matt Flegenheimer, *What Does ‘Off the Record’ Really Mean?*, N.Y. TIMES (Aug. 2, 2018), <https://nyti.ms/2O771N3> [<https://perma.cc/ND7W-WXHL>] (describing experiences with politicians pleading to not have their words published and explaining the distinctions between conversations “on the record,” “off the record,” “on background,” and “on deep background”).

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

<sup>122</sup> *See id.* (describing how a source on background may be characterized as “a government official with access to the information”).

<sup>123</sup> *See* Jonah Goldberg, Opinion, *Goldberg: Trump’s Leaky White House Leads Back to Him*, HOUS. CHRON. (May 13, 2017), <https://www.houstonchronicle.com/opinion/outlook/article/Goldberg-Trump-s-leaky-White-House-leads-back-to-11144292.php> [<https://perma.cc/BMB3-VTCS>] (explaining that administrations regularly give information to the press and ask reporters not to directly attribute the information to any individual and disclosing that Goldberg himself has received such calls from the Trump Administration even though he does not report on politics).

<sup>124</sup> David Remnick, *Trump vs. The Times: Inside an Off-the-Record Meeting*, NEW YORKER (July 30, 2018), <https://www.newyorker.com/news/news-desk/trump-vs-the-times-inside-an-off-the-record-meeting> [<https://perma.cc/76SU-5SUA>].

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

<sup>126</sup> *Id.*

Regardless of whether journalists use anonymous sources, the role of a free and independent press remains a cornerstone of American democracy.<sup>127</sup> Thomas Jefferson famously quipped that he would prefer “newspapers without a government” than “a government without newspapers,”<sup>128</sup> while John Adams wrote that securing freedom requires a free press.<sup>129</sup> An independent press gives citizens the information necessary to participate in civic life.<sup>130</sup> It also allows the public to determine the truth and challenge corruption.<sup>131</sup> Well-researched journalism presents citizens with facts that inform or challenge their worldview.<sup>132</sup> A free press has often been called the “Fourth Estate,” explaining its role in providing a check on government and authority figures.<sup>133</sup>

The same policy arguments that permeated nineteenth-century American journalism still exist today.<sup>134</sup> Just as William Duane wanted to advance a partisan agenda in 1800 and John Nugent wanted to inform the public about an important treaty in 1848, current politicians and reporters have similar motiva-

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<sup>127</sup> See *Branzburg*, 408 U.S. at 726 (Stewart, J., dissenting) (arguing that a truly free society requires a free press to inform the public about everyday events); Robert J. Cordy, *The Interdependent Relationship of a Free Press and an Independent Judiciary in a Constitutional Democracy*, 60 B.C. L. REV. E. SUPP. I-1, I-1 to -2 (2019), <https://lawdigitalcommons.bc.edu/bclr/vol60/iss9/4> [<https://perma.cc/V65A-3XTC>] (asserting that citizens must be well-informed to participate in civic life and the best way for citizens to inform themselves is to consume news gathered by an independent press).

<sup>128</sup> Letter from Thomas Jefferson, to Edward Carrington (Jan. 16, 1787), <https://founders.archives.gov/documents/Jefferson/01-11-02-0047> [<https://perma.cc/62VS-RLXB>].

<sup>129</sup> MASS. CONST. pt. 1, art. XVI (“The liberty of the press is essential to the security of freedom . . .”). John Adams authored the Massachusetts Constitution. *John Adams & the Massachusetts Constitution*, MASS.GOV, <https://www.mass.gov/guides/john-adams-the-massachusetts-constitution> [<https://perma.cc/5A62-LUEH>].

<sup>130</sup> See Cordy, *supra* note 127, at I-2 (describing the benefits of an informed citizenry).

<sup>131</sup> Editorial, *A Free Press Needs You*, N.Y. TIMES (Aug. 15, 2018), <https://www.nytimes.com/interactive/2018/08/15/opinion/editorials/free-press-local-journalism-news-donald-trump.html> [<https://perma.cc/X3DW-KUBP>]. Justice Hugo Black made similar observations in *N.Y. Times Co.* See 403 U.S. at 717 (Black, J., concurring) (lamenting the possibility of government deceiving the public without a strong free press). In praising the *New York Times*’ and *Washington Post*’s work in publishing the Pentagon Papers, Justice Black noted the press’s role is to “serve the governed, not the governors” and that “[o]nly a free and unrestrained press can effectively expose deception in government.” *Id.*

<sup>132</sup> See Cohen, *supra* note 15, at 24 (mentioning how the news media inform the public of current events so they can make informed decisions and shape public opinion).

<sup>133</sup> See *id.* at 3 (referring to traditional media as the “Fourth Estate” and internet media as the “Fifth Estate”). The first three are the clergy, nobility, and commoners, respectively. *Fourth Estate*, BLACK’S LAW DICTIONARY, *supra* note 10.

<sup>134</sup> *E.g.*, *The Pentagon Papers*, *supra* note 85 (detailing how Ellsberg felt compelled to disclose the truth about the Vietnam War); see Kielbowicz, *supra* note 75, at 434 (explaining William Duane’s divulging of secret Senate proceedings).

tions to leak and report with unnamed sources.<sup>135</sup> Anonymous sourcing still has a place in contemporary journalism to protect the country's democratic ideals.<sup>136</sup>

#### *D. Protecting Important Information Sources: Development of the Contemporary Reporter's Shield*

Although a reporter's shield is not yet part of the Federal Rules of Evidence, the rules contemplate several common law privileges that protect parties from being forced to present evidence in federal court.<sup>137</sup> Some privileges allow certain individuals to refuse to testify about specific conversations.<sup>138</sup> A smaller set of privileges protect facts learned from conversations.<sup>139</sup> The most well-known privileges apply to conversations with attorneys, mental health professionals, religious leaders, and spouses.<sup>140</sup> These privileges protect the confidentiality of individuals who speak with someone solving their legal problem, healing their illness, or providing religious guidance, and these professionals can therefore not be forced to reveal their clients identities.<sup>141</sup> Unlike physicians and attorneys, however, practicing journalists are not required to hold a license or certification.<sup>142</sup> Along with the other Federal Rules of Evidence, these privileges apply only in federal courts but nevertheless influence state policies.<sup>143</sup>

Even without a federal reporter's shield, the history of the reporter's shield at the state level largely mirrors that of the use of anonymous sources.<sup>144</sup> Since they started using unnamed sources for reporting, reporters have wanted

<sup>135</sup> See Kielbowicz, *supra* note 75, at 469 (describing how modern leakers turn to newspapers to reach a wide audience); Neubauer, *supra* note 83, at 161 (illustrating Nugent's motivations to leak information about the Treaty of Guadalupe Hidalgo).

<sup>136</sup> See Papandrea, *supra* note 107, at 238 (highlighting the role that access to political information plays in contemporary democracies).

<sup>137</sup> FED. R. EVID. 501 (providing for no express privileges, but rather explaining that privileges are governed by "the common law—as interpreted by United States courts in light of reason and experience," unless superseded by Supreme Court rules, federal statutes, or the Constitution); see GRAHAM & MURPHY, *supra* note 20 (noting that the Advisory Committee rejected the reporter's privilege).

<sup>138</sup> See *Testimonial Privilege*, BLACK'S LAW DICTIONARY, *supra* note 10 (calling these privileges "testimonial privileges").

<sup>139</sup> See, e.g., PAUL F. ROTHSTEIN & SUSAN W. CRUMP, FEDERAL TESTIMONIAL PRIVILEGES § 4:10 (2d ed. 2018) (describing the marital communications privilege that protects confidential spousal communications).

<sup>140</sup> Daniel W. Shuman & Myron S. Weiner, *Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 904 (1981).

<sup>141</sup> See *id.* at 906 (expanding on the notion that personal privacy, in some instances, is more important than a court hearing all relevant testimony).

<sup>142</sup> Randall D. Eliason, *The Problems with the Reporter's Privilege*, 57 AM. U. L. REV. 1341, 1366 (2008).

<sup>143</sup> See GEORGE L. BLUM ET AL., 29 AM. JUR. 2D EVIDENCE § 10 (2d ed. 2019) (discussing the parity between the Uniform Rules of Evidence, used by states, and the Federal Rules of Evidence).

<sup>144</sup> Kielbowicz, *supra* note 75, at 427.

to protect their sources' identities, but have had few options.<sup>145</sup> Most scholars agree that no common law reporter's privilege existed, and as a result, states began to enact their own statutes to protect journalists' ability to conceal their sources.<sup>146</sup>

States provide protections for journalists in two ways: (1) state statutes and (2) developments in common law.<sup>147</sup> State statutes vary widely as to how they define journalists.<sup>148</sup> California, for instance, relies on an individual's profession or personal connection to a traditional news source.<sup>149</sup> New Jersey, in contrast, uses a more functional definition that focuses on journalistic acts rather than an individual's credentials.<sup>150</sup> Vermont, which only enacted its shield statute in 2017, applies the privilege to all individuals engaged in journalism regardless of whether the information will be published.<sup>151</sup>

Other states without statutes have common law reporter's shields.<sup>152</sup> Virginia, for instance, relies on a 1974 Virginia Supreme Court case, *Brown v. Commonwealth*.<sup>153</sup> In *Brown*, the court held that reporters have a privilege related to the First Amendment, but not an absolute First Amendment right, to refuse to disclose confidential information and sources.<sup>154</sup> Similarly, Massachusetts relies on case law for its qualified reporter's privilege.<sup>155</sup> Under this quali-

<sup>145</sup> *Id.* at 428.

<sup>146</sup> GRAHAM & MURPHY, *supra* note 20; *see, e.g.*, ALA. CODE § 12-21-142 (began protecting journalists' sources in 1935); IND. CODE § 34-46-4-1 (enacted in 1941). *But see* Christina Koningisor, *The De Facto Reporter's Privilege*, 127 YALE L. J. 1176, 1181-82 (2018) (rejecting the assumption that no privilege existed at common law and articulating the idea that the judicial system has historically protected reporters with informal measures).

<sup>147</sup> *See Introduction to the Reporter's Privilege Compendium*, REP. COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/introduction-to-the-reporters-privilege-compendium/> [<https://perma.cc/X9ML-MUH8>] [hereinafter *Compendium Introduction*] (explaining that all but two states have shield statutes or court-recognized privileges).

<sup>148</sup> NEW YORK STUDY, *supra* note 20, at 51.

<sup>149</sup> *See* CAL. EVID. CODE § 1070 (applying to, "[a] publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, . . . radio or television news reporter or other person connected with or employed by a radio or television station").

<sup>150</sup> *See* N.J. STAT. ANN. § 2A:84A-21 (creating a functional definition applying to individuals "engaged in . . . gathering, procuring, transmitting, compiling, editing, or disseminating news for the general public").

<sup>151</sup> VT. STAT. ANN. tit. 12 § 1615.

<sup>152</sup> *See, e.g.*, *Brown v. Commonwealth*, 204 S.E.2d 429, 431 (Va. 1974) (finding a First Amendment right to reporter's privilege).

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

<sup>154</sup> *Id.* (explaining how a First Amendment right would be absolute, but a privilege, for example, does not apply in grand jury proceedings (citing *Branzburg*, 408 U.S. at 665)).

<sup>155</sup> *See, e.g.*, *Ayash v. Dana-Farber Cancer Inst.*, 822 N.E.2d 667, 696 n.33 (Mass. 2005) ("We have recognized that values . . . may give rise to a common-law privilege that would allow a news reporter to refuse to reveal his sources.").

fied privilege, Massachusetts judges must balance the public's interest in information disclosure with the judiciary's interest in obtaining evidence.<sup>156</sup>

Journalists have long argued that the First Amendment inherently provides a reporter's shield.<sup>157</sup> The Supreme Court in 1972, in *Branzburg*, however, rejected this argument and declined to find a reporter's privilege grounded in constitutional law.<sup>158</sup> Two reporters refused to reveal sources involved in their reporting on the Black Panthers while a third, Branzburg, sought to maintain the confidence of a source related to drug manufacturing and distribution.<sup>159</sup> While five justices did not find a First Amendment shield, Justice Lewis Powell's concurrence noted the importance of the free press and left open the possibility of a qualified privilege.<sup>160</sup> In fact, Justice Powell and the four dissenters seemed to agree on the possibility of a future qualified reporter's privilege, and courts began to interpret *Branzburg* as tacitly welcoming one.<sup>161</sup>

The Fourth Circuit Court of Appeals recently interpreted *Branzburg* in the context of a modern leak investigation.<sup>162</sup> In 2013 in *United States v. Sterling*, the Fourth Circuit relied on the *Branzburg* majority to deny a reporter's shield protection to *New York Times* reporter James Risen.<sup>163</sup> Jeffrey Sterling, a former CIA agent, had been convicted under the Espionage Act of 1917 for leaking to Risen information about a classified CIA operation.<sup>164</sup> Risen became the object of one of the first leak investigations undertaken by the Obama Admin-

<sup>156</sup> *Id.* Federal courts have also developed case law protecting other nontraditional reporters, like book authors and documentary filmmakers. *See, e.g.,* *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (confirming that a reporter's shield can protect investigative reporting, regardless of the medium); *see also* Martin & Fargo, *supra* note 14, at 51–52 (stating that a book author and a documentary filmmaker could claim a reporter's privilege).

<sup>157</sup> *See, e.g.,* *Branzburg*, 408 U.S. at 679–80 (describing the petitioners' First Amendment arguments).

<sup>158</sup> *See id.* at 667 (holding that requiring reporters to testify before grand juries does not violate the free speech or press clauses of the First Amendment).

<sup>159</sup> *Id.* The Black Panthers were members of a social movement largely advocating for Black Power and equal representation in politics. James Jeffrey, *Shedding New Light on the (Real) Black Panthers*, BBC (Apr. 1, 2018), <https://www.bbc.com/news/world-us-canada-43587976> [<https://perma.cc/39BL-89PY>].

<sup>160</sup> *Branzburg*, 408 U.S. at 710 (Powell, J., concurring) (emphasizing that reporters still have remedies to quash subpoenas for remote or irrelevant information and proposing a balance between a free press and the obligation to testify).

<sup>161</sup> *See id.* (same); *id.* at 726 (Stewart, J., dissenting) (recognizing that an open society requires the public to make informed decisions about civic life); *see also* *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975) (“It is clear that *Branzburg* recognizes some First Amendment protection of news sources.”). *But see* *Citizens United v. FEC*, 558 U.S. 310, 352 (2010) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)) (reaffirming that members of the press have no additional rights than those of ordinary citizens).

<sup>162</sup> *Sterling*, 724 F.3d at 510.

<sup>163</sup> *Id.*

<sup>164</sup> Sarah Ellison, *What Was New York Times Reporter James Risen's Seven-Year Legal Battle Really for?*, VANITY FAIR (Mar. 17, 2015), <https://www.vanityfair.com/news/2015/03/james-risen-anonymous-source-government-battle> [<https://perma.cc/F5PN-9XK7>].



istration.<sup>165</sup> This increased enforcement of leaks came even after administration officials highlighted and praised the Obama Administration's openness toward the press.<sup>166</sup>

Reporters may also rely on the DOJ's Guidelines on Media Subpoenas (Guidelines), which were promulgated in 1970 during the lead up to *Branzburg*, to protect themselves while gathering news.<sup>167</sup> The Guidelines encourage federal prosecutors to exhaust alternative sources for information and instruct them to obtain the Attorney General's authorization before issuing a subpoena to a reporter.<sup>168</sup>

The Guidelines do, however, have several shortcomings.<sup>169</sup> They carry no sanctions, and because they are regulations, any presidential administration can change them at any time, so long as there is political will to do so.<sup>170</sup> In 2017, for example, then Attorney General Jeff Sessions publicly considered tightening the Guidelines to support the increased number of leak investigations.<sup>171</sup>

Congress, however, has attempted to remedy the limited protections reporters have through the introduction of a federal shield law as recently as 2017.<sup>172</sup> Soon after then-Attorney General Sessions' statements on tightening the Guidelines, Congressmen Jamie Raskin (D-MD) and Jim Jordan (R-OH)

<sup>165</sup> *Id.* (detailing investigations into sources held by *The New York Times*, *The Washington Post*, and *60 Minutes*).

<sup>166</sup> *See id.* (observing the irony in Obama officials touting their protection for whistleblowers).

<sup>167</sup> 28 C.F.R. § 50.10 (2015); *see* RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 597 (2008) (confirming that the Department of Justice still follows their Guidelines on Media Subpoenas).

<sup>168</sup> 28 C.F.R. § 50.10(a)(3).

<sup>169</sup> *See* Jones, *supra* note 167, at 598–99 (listing insufficiencies identified by critics of the Guidelines).

<sup>170</sup> *Id.*; *see also* Erik Wemple, Opinion, *William Barr on Jailing Journalists: 'I Know There Are Guidelines in Place'*, WASH. POST (Jan. 15, 2019), <https://www.washingtonpost.com/opinions/2019/01/15/william-barr-jailing-journalists-i-know-there-are-guidelines-place/> [<https://perma.cc/ZNC6-7AFM>] (highlighting how Attorney General William Barr equivocated at his Senate confirmation hearing in response to a question concerning imprisoning reporters).

<sup>171</sup> *See* Josh Gerstein & Madeline Conway, *Sessions: DOJ Reviewing Policies on Media Subpoenas*, POLITICO (Aug. 4, 2017), <https://www.politico.com/story/2017/08/04/doj-reviewing-policies-on-media-subpoenas-sessions-says-241329> [<https://perma.cc/UVA4-8F23>] (quoting A.G. Sessions saying that “we respect the important role that the press plays, and we’ll give them respect, but it is not unlimited”).

<sup>172</sup> *See* Free Flow of Information Act of 2017, *supra* note 9 (introducing a federal reporter's shield modeled after previous attempts). Prior to 2017, the last attempt to enact a federal shield law was in 2013. *See* Burgess Everett, *Senators Introduce Shield Law*, POLITICO (July 17, 2013), <https://www.politico.com/story/2013/07/media-shield-law-chuck-schumer-lindsey-graham-094350> [<https://perma.cc/PFZ4-EV3X>] (explaining the bill's provisions); Koningsor, *supra* note 146 at 1261 (describing the 2013 iteration of the FFIA as the most recent). The 2013 bipartisan effort by Senators Chuck Schumer (D-NY) and Lindsey Graham (R-SC) arose after the AP alerted the public that twenty of their phones had been surveilled without their knowledge. Everett, *supra*; Ravi Somalya, *Head of the A.P. Criticizes Seizure of Phone Records*, N.Y. TIMES (May 19, 2013), <https://nyti.ms/14H0Cvr> [<https://perma.cc/Q6N2-UT92>] (detailing the surveillance of AP reporters).

introduced the Free Flow of Information Act of 2017.<sup>173</sup> Instead of an explicit profession-based requirement, the proposed legislation protected individuals who perform journalistic acts, such as interviewing, writing, and reporting, to earn a living.<sup>174</sup> The future of this bill, which did not make it out of Committee, may be affected by the political will of Congress and the future treatment of journalists.<sup>175</sup>

## II. COMMON ELEMENTS OF REPORTER'S SHIELD LAWS AND THE RELEVANCE OF THE DEFINITION DEBATE

Unlike the federal government's lack of protection for journalists, nearly every state has enacted a reporter's shield law to protect members of the media and their anonymous sources.<sup>176</sup> This Part focuses on statutory solutions and discusses three different components of reporter shield laws.<sup>177</sup> Section A considers two competing methods of defining who qualifies as a journalist and discusses both a profession-based and a functional definition.<sup>178</sup> Section B looks at expanding protections to encompass new technologies and requiring an intent provision.<sup>179</sup> Section C discusses the possible irrelevance of reporter shield laws.<sup>180</sup>

### *A. Element One: Whether to Protect Professional Journalists or Journalistic Acts*

When deciding who qualifies as a journalist, states must choose between a statutory definition that limits the shield to professional journalists or one

<sup>173</sup> See Raskin Press Release, *supra* note 9 (introducing the bill on the same day as Sessions' statements).

<sup>174</sup> Free Flow of Information Act of 2017, *supra* note 9, § 4, (defining "covered person" as "a person who regularly gathers [news] for a substantial portion of the person's livelihood or for substantial financial gain").

<sup>175</sup> See Raskin Press Release, *supra* note 9 (exemplifying the introduction of shield legislation following statements by an administration official critical of the press). Such stories do not need to be factual; they can be opinion or editorial in nature. See *How the Anonymous Op-Ed Came to Be*, N.Y. TIMES (Sept. 8, 2018), <https://nyti.ms/2O2ymjX> [<https://perma.cc/84DR-DZG4>] (answering reader questions and explaining that the *New York Times* chose to publish the anonymous op-ed because of the personal way it conveyed White House operations); Opinion, *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://nyti.ms/2CyF3Jh> [<https://perma.cc/6Y9W-7NPF>] (depicting, in an unsigned opinion piece by a senior Trump Administration official, how this individual and others in the White House were resisting some of President Trump's initiatives).

<sup>176</sup> See Peters et al., *supra* note 14, at 779–80 (recognizing that at that time all states except Wyoming had some protection for journalists). See generally *Compendium Introduction*, *supra* note 147 (describing how nearly every state has a form of shield statute or court-acknowledged rule).

<sup>177</sup> See *infra* notes 176–261 and accompanying text.

<sup>178</sup> See *infra* notes 181–229 and accompanying text.

<sup>179</sup> See *infra* notes 230–250 and accompanying text.

<sup>180</sup> See *infra* notes 251–261 and accompanying text.

that focuses on journalistic acts, such as interviewing, writing, and reporting.<sup>181</sup> Subsection One of this Section analyzes state statutes that protect only journalists employed by traditional news organizations.<sup>182</sup> Subsection Two of this Section discusses another group of statutes—those that protect anyone functioning like a journalist.<sup>183</sup>

### 1. Statutes Protecting Professional Journalists

A majority of states limit their reporter's shield to professional journalists by statute.<sup>184</sup> Ohio, for example, provides separate definitions of professionals for newspapers and broadcasters.<sup>185</sup> Although neither provision defines the term "journalist," an individual must be employed by a broadcaster or newspaper publisher to receive the absolute privilege of protecting their source.<sup>186</sup> In 2004, for instance, in *Svoboda v. Clear Channel Communications, Inc.*, the Ohio Court of Appeals held that reporters must show employment by a commercial radio station to receive protection under the broadcaster shield law and must have acquired confidential information in the course of their journalistic employment.<sup>187</sup> In *Svoboda*, the news director of a local radio station sought to protect the confidential source of an alleged affair between a local newspaper reporter and the paper's publisher.<sup>188</sup> The court, however, found that the news director had not procured information from her source in the course of her employment; rather, she had only passed on rumors that she heard from an acquaintance.<sup>189</sup> As a result of the *Svoboda* decision, Ohio reporters must gather

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<sup>181</sup> Compare COLO. REV. STAT. § 13-90-119 (2016) (limiting protections to professional journalists), with VT. STAT. ANN. tit. 12 § 1615 (2017) (protecting everyone's journalistic acts).

<sup>182</sup> See *infra* notes 184–215 and accompanying text.

<sup>183</sup> See *infra* notes 216–229 and accompanying text.

<sup>184</sup> See, e.g., CAL. EVID. CODE § 1070 (West 2009 & Supp. 2019) (allowing journalists to protect their sources' identities); COLO. REV. STAT. § 13-90-119 (same); FLA. STAT. § 90.5015 (2019) (same); IND. CODE ANN. § 34-46-4-1 (2008 & Supp. 2019) (same); KAN. STAT. ANN. § 60-480 (2005 & Supp. 2018) (same); LA. STAT. ANN. § 45:1451 (2015) (same); NEV. REV. STAT. § 49.275 (2017) (same); N.M. R. EVID. 11-514(B) (same); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2019) (same); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (West 2006 & Supp. 2019) (same); 9 R.I. GEN. LAWS § 19.1-1 (2018) (same); TEX. CIV. PRAC. & REM. CODE ANN. §§ 22.021–.027 (West 2015 & Supp. 2018) (same); TEX. CODE CRIM. PROC. ANN. art. 38.11 (West 2005 & Supp. 2018) (same).

<sup>185</sup> OHIO REV. CODE ANN. §§ 2739.04, 2739.12. Ohio's protections do not apply to non-newsworthy periodicals. See *Deltec, Inc. v. Dun & Bradstreet, Inc.*, 187 F. Supp. 788, 790 (N.D. Ohio 1960) (concluding that including bi-monthly financial reports would impermissibly stretch the statutory definition).

<sup>186</sup> See *Ventura v. Cincinnati Enquirer*, 396 F.3d 784, 792 (6th Cir. 2005) (recognizing that the Ohio shield law only protects journalists from revealing sources "obtained in the course of employment").

<sup>187</sup> *Svoboda v. Clear Channel Commc'ns, Inc.*, 805 N.E.2d 559, 563 (Ohio Ct. App. 2004).

<sup>188</sup> *Id.* at 560.

<sup>189</sup> *Id.* at 565.

information in connection to their employment to claim shield law protections.<sup>190</sup>

Several other states have shield laws that focus only on actual employment with a news organization and which apply regardless of whether a news organization employee is involved in actual reporting.<sup>191</sup> Colorado, for instance, protects any member of the mass media and any employee engaged in covering news.<sup>192</sup> In 1994, the Colorado Supreme Court held in *Henderson v. People* that a helicopter pilot employed by a local television station could invoke the state reporter's shield law.<sup>193</sup> The court concluded that the pilot acted as a newsperson even when flying law enforcement officers over the home of an alleged marijuana cultivator.<sup>194</sup> The court reasoned that the pilot's ability to fly a helicopter did not interfere with his employment duties as a full-time reporter.<sup>195</sup>

Texas' shield law, meanwhile, focuses on the extent to which journalists earn a living through journalism.<sup>196</sup> The state defines a journalist as someone who practices journalism "for a substantial portion of [their] livelihood or for substantial financial gain and does not limit its definition based on organizational affiliation or employment."<sup>197</sup> One Texas court even determined that this definition encompasses bloggers.<sup>198</sup>

New York and Florida, in contrast, have strict definitions of professional journalist, as their shield laws only protect journalists employed by or profes-

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

<sup>191</sup> See Peters et al., *supra* note 14, at 790 n.152 (citing COLO. REV. STAT. § 13-90-119; CONN. GEN. STAT. § 52-146t (2019); DEL. CODE ANN. tit. 10, §§ 4320-4326 (2013 & Supp. 2018); D.C. CODE §§ 16-4701 to 16-4704 (2012 & Supp. 2019); KAN. STAT. ANN. §§ 60-480 to -485; NEV. REV. STAT. § 49.275; OKLA. STAT. tit. 12, § 2506 (West 2011)) (cataloging states that require journalists to be formally employed by a news organization). Other states also require that news sources have a regular publication schedule. See IND. CODE § 34-46-4-1 (applying protections to persons "connected with . . . a newspaper or other periodical issued at regular intervals and having a general circulation; or a recognized press association or wire service"); LA. STAT. ANN. § 45:1451 (including in "news media," in part as "any newspaper or other periodical issued at regular intervals and having a paid general circulation"); 9 R.I. GEN. LAWS § 19.1-1 (requiring that newspapers or periodicals "must be issued at regular intervals and have a paid circulation"); see also Peters et al., *supra* note 14, at 788-89 (discussing regular publication requirements).

<sup>192</sup> COLO. REV. STAT. § 13-90-119 (defining newsperson as, "any member of the mass media and any employee or independent contractor of a member of the mass media who is engaged to gather, receive, observe, process, prepare, write, or edit news information for dissemination to the public through the mass media").

<sup>193</sup> *Henderson v. People*, 879 P.2d 383, 393-94 (Colo. 1994) (en banc).

<sup>194</sup> See *id.* at 392 (finding that KUSA, the local television station, had selected the pilot to report on the illegal drug production). The police wanted to take photographs of Henderson's alleged marijuana-growing operation. *Id.* at 385.

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

<sup>196</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 22.021; TEX. CODE CRIM. PROC. ANN. art. 38.11.

<sup>197</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 22.021; TEX. CODE CRIM. PROC. ANN. art. 38.11.

<sup>198</sup> See *Abraham v. Greer*, 509 S.W.3d 609, 614 (Tex. Ct. App. 2016) (holding that a blog falls under "news medium," meaning a blogger would qualify as a journalist).

sionally associated with news organizations.<sup>199</sup> Like Texas, however, these states also require professional journalists to engage in newsgathering for livelihood or profit.<sup>200</sup> In 2008, in *Trump v. O'Brien*, a lawsuit brought by Donald Trump against one of his biographers, the Superior Court of New Jersey, Appellate Division, interpreted New York's shield law to include an author who relied on information from confidential sources to publish a book.<sup>201</sup> The court reasoned that the law should not treat the author, a former *New York Times* and *Wall Street Journal* reporter, differently for disseminating information to the public in a book rather than in a newspaper.<sup>202</sup> Indeed, the court agreed with a sponsor of the 1981 amendments to the shield law that the law should protect professional journalists, no matter their medium of publication.<sup>203</sup> Florida's statute also extends beyond historical journalistic mediums, as courts have found the law to protect journalists employed with online news sources as well.<sup>204</sup>

Congress's most recent efforts to pass a federal reporter's shield law also included a profession-based definition of journalist.<sup>205</sup> Legislators have noted the narrowness of the profession-based definition of a journalist in the Free Flow of Information Act, which has been introduced in Congress several times

<sup>199</sup> FLA. STAT. § 90.5015; N.Y. CIV. RIGHTS LAW § 79-h; New York tried in 2017 to add blogs to the protected definition but was unsuccessful. Assemb. B. 1249, 240th Leg., Reg. Sess. (N.Y. 2017); S.B. 89, 240th Leg., Reg. Sess. (N.Y. 2017). Nearly identical legislation is currently pending. Assemb. B. 1008, 242d Leg., Reg. Sess. (N.Y. 2019); S.B. 431, 242d Leg., Reg. Sess. (N.Y. 2019).

<sup>200</sup> FLA. STAT. § 90.5015 (defining "professional journalist" as "a person regularly engaged in collecting . . . news, for gain or livelihood") (emphasis added); 5 ROBERT A. BARKER & VINCENT C. ALEXANDER, NEW YORK PRACTICE EVIDENCE § 5:44 (2018) (explaining the test of whether a reporter gathered information "as a job from which she derives her livelihood"). Most nonfiction authors qualify as professional journalists in New York. See, e.g., *Trump v. O'Brien*, 958 A.2d 85, 93 (N.J. Super. Ct. App. Div. 2008) (including book authors with "other professional medium or agency").

<sup>201</sup> *O'Brien*, 958 A.2d at 93. Timothy O'Brien in his 2005 biography of now-President Trump, *TrumpNation*, estimated Trump's wealth to be significantly less than one billion dollars, thereby angering Trump. *Id.* at 86.

<sup>202</sup> See *id.* at 93–94 (realizing that courts would have protected the author from revealing confidential sources or information related to one of his *New York Times* articles on the subject, so they should also protect anyone disseminating news in a book).

<sup>203</sup> *Id.* at 93 (citing Memorandum of Assemblyman Steven Sanders, New York State Legislative Annual—1981, at 257).

<sup>204</sup> See *Gubarev v. BuzzFeed, Inc.*, Case No. 1:17-cv-60426, 2017 WL 6547898, at \*3–4 (S.D. Fla. Dec. 21, 2017) (concluding that Florida's shield law applies to *BuzzFeed* journalists, as no language in the law limits covered entities to print).

<sup>205</sup> See, e.g., Free Flow of Information Act of 2017, *supra* note 9, § 4 (defining "covered person" as someone "who regularly gathers . . . news . . . for a substantial portion of the person's livelihood or for substantial financial gain"); Free Flow of Information Act of 2013, S. 987, 113th Cong., <https://www.congress.gov/113/bills/s987/BILLS-113s987rs.pdf> (defining "covered journalist" as "an employee, independent contractor, or agent of an entity or service that disseminates news or information"); Free Flow of Information Act of 2007, H.R. 2102, 110th Cong., <https://www.congress.gov/110/bills/hr2102/BILLS-110hr2102pcs.pdf> (defining "covered person" as someone "who regularly gathers . . . news . . . for a substantial portion of the person's livelihood or for substantial financial gain").

since 2007, but has yet to pass through both chambers.<sup>206</sup> Although sponsors of the 2007 bill in the House of Representatives initially defined journalists broadly and excluded employment or profit-seeking requirements,<sup>207</sup> lawmakers later narrowed the definition to include both restrictions.<sup>208</sup> This change was based in part on fears that a broad definition could result in protection for too many individuals.<sup>209</sup> Specifically, DOJ leaders worried that gang members could claim the privilege simply by posting photographs of drug deals on Myspace.<sup>210</sup> Scholars note that many freelance journalists may not have the financial resources to quash government subpoenas.<sup>211</sup>

Similarly, courts have noted the inherent difficulty in defining journalists based on profession, especially in an age of new technology.<sup>212</sup> In 2011, in *Glik v. Cunniffe*, the First Circuit Court of Appeals held that citizens had a constitutional right to take videos of police doing their public duties.<sup>213</sup> The court recognized that breaking news is just as likely to come from a blogger as from a traditional media organization.<sup>214</sup> Regardless of how courts interpret profession-based definitions, state shield laws continue to rely on profession-based distinctions between reporters and non-reporters.<sup>215</sup>

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<sup>206</sup> See H.R. REP. NO. 110-370, at 12 (2007) (Rep. Smith, additional views) (applauding the narrowing of the definition within the FFIA of 2007 to only include professional journalists).

<sup>207</sup> Free Flow of Information Act of 2007, *supra* note 205. Vice President Mike Pence, then a Republican Representative from Indiana, co-sponsored the bill. *Id.*

<sup>208</sup> See H.R. REP. NO. 110-370, *supra* note 206, at 12 (publicizing Rep. Lamar Smith's approval of narrowing the definition to only professional journalists); see also 153 Cong. Rec. H11,600 (daily ed. Oct. 16, 2007) (statement of Rep. Boucher) (introducing an amendment to the FFIA of 2007 that would limit the shield only to individuals regularly engaged in gathering news and who receive substantial income from journalism). For a longer discussion of the FFIA of 2007, see James Thomas Tucker & Stephen Wermiel, *Enacting a Reasonable Federal Shield Law: A Reply to Professors Clymer & Eliason*, 57 AM. U. L. REV. 1291, 1311–15 (2008), which details the specific components of the FFIA of 2007.

<sup>209</sup> See Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, to the Honorable Lamar S. Smith, Ranking Member, Committee on the Judiciary, U.S. House of Representatives, at 13–14 (July 31, 2007) in Free Flow of Information Act of 2013, S. REP. NO. 113-118, at 129–30 (illustrating concern that overinclusion of who qualifies as a journalist could inadvertently protect criminal organizations); Lee, *supra* note 58, at 778–79 (explaining how the Supreme Court has rejected uniform reporter credentials, making professional distinctions dangerous).

<sup>210</sup> Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, to the Honorable Lamar S. Smith, Ranking Member, Committee on the Judiciary, U.S. House of Representatives, at 6 (Sept. 26, 2007) in Free Flow of Information Act of 2013, S. REP. NO. 113-118, at 63.

<sup>211</sup> See Morgan Weiland, *Protecting Journalism in the Digital Era*, STANFORD LAW. (Nov. 11, 2013), <https://law.stanford.edu/stanford-lawyer/articles/protecting-journalism-in-%E2%80%A8the-digital-era/> [<https://perma.cc/G8J2-PK93>] (explaining that freelancers lack the resources of employees at traditional media outlets).

<sup>212</sup> See *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (concluding that the ubiquity of video-enabled handsets blurs the lines between citizen and journalist).

<sup>213</sup> *Id.* at 85.

<sup>214</sup> *Id.* at 84.

<sup>215</sup> See CAL. EVID. CODE § 1070 (protecting employees of news organizations); COLO. REV. STAT. § 13-90-119 (providing protections for employees and contractors of mass media).

## 2. Statutes Protecting Anyone Functioning as a Reporter

In contrast to shield laws with narrow profession-based definitions, other shield laws use a broad functional definition.<sup>216</sup> These statutes do not require journalists to work for a news organization or earn substantial financial gain from journalism.<sup>217</sup> Rather, the statutes protect anyone functioning like a reporter.<sup>218</sup> In New Jersey, which provides one of the most robust functional definitions, courts have interpreted the definition to include corporations as well as individuals.<sup>219</sup> The definition, however, is not all encompassing.<sup>220</sup> In 2011, for instance, the New Jersey Supreme Court in *Too Much Media, LLC v. Hale* refused to extend reporter's shield protections to public comment forum contributors.<sup>221</sup> The court determined that contributions to comment message boards were similar to newspaper letters to the editor and therefore too attenuated to constitute journalism.<sup>222</sup> Unlike traditional letters to the editor, however, message board posts are not curated by editors.<sup>223</sup> The court also warned that a wide shield law would protect so many people and would therefore be meaningless.<sup>224</sup> New Jersey courts have also not permitted public relations firms to claim shield law protections; publishers of an annual insurance company report, however, received protection.<sup>225</sup>

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<sup>216</sup> N.J. STAT. ANN. § 2A:84A-21 (West 2011 & Supp. 2019); VT. STAT. ANN. tit. 12 § 1615; see Jason Stverak, Opinion, *Media Shield Law Should Focus on Protecting, Not Defining, Journalists*, FORBES (Apr. 4, 2014), <https://www.forbes.com/sites/realspin/2014/04/04/media-shield-law-should-focus-on-protecting-not-defining-journalists/> [<https://perma.cc/35TP-9AHL>] (recognizing that online media and blogs render meaningless any traditional definition of "journalist").

<sup>217</sup> See, e.g., VT. STAT. ANN. tit. 12 § 1615 (requiring that a "journalist" need only engage or assist in journalism to qualify for the reporter's privilege).

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

<sup>219</sup> See *In re Venezia*, 922 A.2d 1263, 1270 (N.J. 2007) (recognizing the New Jersey legislature's intent to provide reporters with wide protections); *In re Farber*, 394 A.2d 330, 335 (N.J. 1978) (describing New Jersey's shield law as one of the strongest in the country); Thomas J. Cafferty et al., *New Jersey, RCFP PRIVILEGE COMPENDIUM*, <https://www.rcfp.org/privilege-compendium/new-jersey> [<https://perma.cc/XMV3-NFPX>] (characterizing the New Jersey privilege, originally enacted in 1933, as one of the most expansive); see also N.J. STAT. ANN. § 2A:84A-21 (including anyone "engaged in, connected with, or employed by news media") (emphasis added).

<sup>220</sup> See *Gastman v. N.J. Newspapers Co.*, 603 A.2d 111, 114 (N.J. Super. Ct. App. Div. 1992) (characterizing a news publisher as a "fictitious 'person'" and recognizing that any other conclusion would allow plaintiffs to effectively evade the shield laws). But see *Too Much Media, LLC v. Hale*, 20 A.3d 364, 379 (N.J. 2011) (holding that an online comment thread was not protectable news).

<sup>221</sup> See *Too Much Media*, 20 A.3d at 379 (refusing to find legislative-history support for protecting all commenters under the shield law).

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

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

<sup>224</sup> See *id.* at 383 (showing concern that any blogger or "anyone with a Facebook account" could try and claim a privilege); Martin & Fargo, *supra* note 14, at 86–87 (describing how courts have worried about diluting shield protections).

<sup>225</sup> *In re Napp Tech., Inc.*, 768 A.2d 274, 280 (N.J. Super. Ct. Law Div. 2000) (distinguishing between freelance reporters and public relations firms); *In re Burnett*, 635 A.2d 1019, 1024 (N.J. Super. Ct. Law Div. 1993) (embracing a wide protection for journalism, including insurance rate re-

Vermont, whose legislature only passed its shield law in 2017, also provides a wide definition of journalist.<sup>226</sup> Vermont's shield law protects any individual investigating or preparing news related to issues of public concern.<sup>227</sup> Journalists are protected if their primary intent is to report information to the public, regardless of whether they ever publish the information.<sup>228</sup> As it stands, Vermont courts have yet to interpret the state's shield law, and future judicial opinions will be critical in determining the full extent of the state's definition of journalist.<sup>229</sup>

### *B. Elements Two and Three: Intent Provisions and Digital Media Protections*

State lawmakers grappling with reporter's shield laws must decide whether or not to explicitly protect digital or electronic media.<sup>230</sup> Historically, state statutes lagged behind media technology and did not explicitly include digital media in reporter's shield statutes.<sup>231</sup> States, however, have recently

ports). The court recognized the shifting legal landscape for a broad definition of news. *See In re Burnett*, 635 A.2d at 1024 (noting how the breadth of reporting includes general news publications along with "esoteric publications which describe the mating rights of penguins in the Antarctic at spring-time").

<sup>226</sup> *See* VT. STAT. ANN. tit. 12 § 1615 (requiring that a "journalist" need only engage in or assist in journalism to receive protections from the shield law); Robert B. Hemley & Erin M. Moore, *Vermont, RCFPPRIVILEGE COMPENDIUM*, <https://www.rcfp.org/privilege-compendium/vermont/> [<https://perma.cc/CL9N-2D35>] (recognizing that the statute is so new that no published decisions have yet to interpret it).

<sup>227</sup> VT. STAT. ANN. tit. 12 § 1615.

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

<sup>229</sup> *See* Hemley & Moore, *supra* note 226 (noting how Vermont courts have yet to publish cases interpreting the shield law).

<sup>230</sup> *See* ARK. CODE ANN. § 16-85-510 (2005 & Supp. 2017) (accounting for an "internet news source"); KAN. STAT. ANN. § 60-480 (including "an online journal"); TEX. CIV. PRAC. & REM. CODE ANN. § 22.021 (protecting an "Internet company"); WASH. REV. CODE ANN. § 5.68.010(5)(a) (2019) (adding "internet[] or electronic distribution").

<sup>231</sup> Martin & Fargo, *supra* note 14, at 94–95. While reporter's shield laws have yet to match the rise of social media, other state laws illustrate how lawmakers define social media. *See* Taylor N. Brailey, Note, *Discrimination in the Age of Social Media: The New Dangers of Cat's Paw Liability*, 35 J.L. & COM. 271, 273–74 (2017) (analyzing privacy protections in the workplace). For example, several states have specifically defined social media in the context of employer or school access to an employee or student's personal internet accounts. *E.g.*, DEL. CODE ANN. tit. 19, § 709A(a)(6) (2013 & Supp. 2018); MONT. CODE ANN. § 39-2-307(5)(a) (2017); N.J. STAT. ANN. § 34:6B-5 (West 2011 & Supp. 2019). These states typically define social media or social networking services as password-protected, online services where users can interact with other users and share various kinds of media. *See* DEL. CODE ANN. tit. 19, § 709A(a)(6) (defining "social networking site" as, among other things, personalized websites or applications that let users share media, including e-mail). Arkansas even lists specific social media platforms, like Facebook and Twitter, that always fall within the definition. ARK. CODE ANN. § 11-2-124(a)(3)(C) (2012 & Supp. 2017) (listing Facebook, Twitter, LinkedIn, Myspace, and Instagram). While Congress has yet to define social media in a federal statute, lawmakers have introduced legislation that mirrored state definitions. *See, e.g.*, Social Networking Online Protection Act, H.R. 537, 113th Cong. (2013) (defining "social networking website" as (1) an internet



started to pass or amend statutes to include electronic or internet media sources regardless of whether the state uses a profession-based or functional definition of journalist.<sup>232</sup> Currently Arkansas, Kansas, Texas, and Washington are the only states to explicitly include online news sources.<sup>233</sup>

Arkansas, which had one of the oldest reporter's shield laws in the country, amended its law in 2011 to include protections for television and online media outlets.<sup>234</sup> The initial law, which covered only print media and was approved by voters in 1936 as part of a criminal reform package, had been touted for its potential role in increasing prosecutions.<sup>235</sup> The law was first amended in 1949 to include radio broadcasters, and the most recent additions updated the law for the digital age.<sup>236</sup>

Explicitly protecting electronic media increases predictability for digital journalists who interview anonymous sources or maintain confidential notes.<sup>237</sup> Increased specificity, however, in shield statutes could inadvertently limit who can invoke the law's protections rather than expand the scope of protection.<sup>238</sup> Courts could strictly interpret a long list of media forms as exhaustive without considering legislative intent to enact a broad shield law.<sup>239</sup>

A similar definition for journalists under shield laws focuses on intent.<sup>240</sup> If someone intends to disseminate information to the public, then they will

platform protected by a user name and/or password (2) primarily used for storing and handling user content). One federal regulation under the Equal Employment Opportunity Commission groups "social networking sites" with media sources that only provide access to specific individuals or groups. 29 C.F.R. § 1635.8(b)(4)(ii) (2019).

<sup>232</sup> *E.g.*, VT. STAT. ANN. tit. 12 § 1615 (not specifying traditional or digital journalism with a functional definition); see Martin & Fargo, *supra* note 14, at 65 (describing states that explicitly or implicitly include digital journalism in their protections).

<sup>233</sup> ARK. CODE ANN. § 16-85-510; KAN. STAT. ANN. § 60-480; TEX. CIV. PRAC. & REM. CODE ANN. § 22.021; WASH. REV. CODE ANN. § 5.68.010(5)(a).

<sup>234</sup> ARK. CODE ANN. § 16-85-510; S.B. 772, 88th Gen. Assemb., (Ark. 2011); Arkansas, RCFP PRIVILEGE COMPENDIUM, <https://www.rcfp.org/privilege-compendium/arkansas/> [<https://perma.cc/3CMP-Z9BQ>]; see Watkins, *supra* note 75, at 479–84 (exploring the history of Arkansas' reporter's shield law and subsequent amendments).

<sup>235</sup> Watkins, *supra* note 75, at 479, 484 (quoting Dr. Robert A. Leflar, a law professor and member of the Governor's Criminal Law Reform Commission).

<sup>236</sup> 1949 ARK. ACTS 254 § 1; see also S.B. 772, 88th Gen. Assemb. (amending § 16-85-510 to include television and internet sources); Watkins, *supra* note 75, at 484–85 (discussing the overwhelming support for the 1949 amendment).

<sup>237</sup> See Alicea, *supra* note 18 (arguing that a federal shield law would help to reduce confusion).

<sup>238</sup> See Martin & Fargo, *supra* note 14, at 65–66 (explaining how *Price v. Time, Inc.*, 416 F.3d 1327, 1343 (11th Cir. 2005), held that a Sports Illustrated reporter could not invoke the privilege because "newspaper" does not include "magazine" in Alabama's shield law).

<sup>239</sup> See *id.* at 66 (explaining how a statute protecting a specific list of reporters or news entities may unintentionally exclude media not explicitly included in the law).

<sup>240</sup> See Peters et al., *supra* note 14, at 774–75 (discussing cases relying on a reporter's intent to disseminate information to the public).

likely qualify as a journalist.<sup>241</sup> This definition, is reflected in past federal court decisions.<sup>242</sup> In 1987, in *von Bulow v. von Bulow*, the Second Circuit Court of Appeals established a widely used test for shield law protections.<sup>243</sup> The test requires individuals claiming a privilege to have intended to publicly publish any material they gathered from the outset of the newsgathering.<sup>244</sup> The court refused to extend a journalist's privilege to a woman who took notes and spoke to confidential sources in preparation for writing a book or for publishing an article about her boyfriend's trial.<sup>245</sup> Since the girlfriend had no formal agreement to publish an article with the *New York Post*, the court concluded that she lacked any journalistic intent when taking notes on the trial.<sup>246</sup> Furthermore, she could not protect her sources because her relationship with them began before the trial.<sup>247</sup>

Though New Jersey uses an intent test similar to that described in *von Bulow*, the New Jersey Supreme Court has rejected its application without the consideration of additional factors.<sup>248</sup> In 2011, in *Too Much Media*, the court determined that the state's three-part test for defining a journalist included not only an intent test but also required a connection to news media and the pursuit of newsgathering activities.<sup>249</sup> An intent test focusing on the journalist's intent when gathering information may limit journalists who choose to pursue stories only after initial conversations.<sup>250</sup>

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<sup>241</sup> See Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of "Journalist" in the Law*, 103 DICK. L. REV. 411, 430–31 (1999) (summarizing multiple federal cases, including *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987), which combine to create the intent requirement); Shepard, *supra* note 50, at 210–11 (proposing a three-pronged test for determining who is a journalist, including an individual's purpose behind engaging in journalistic acts).

<sup>242</sup> See N.J. STAT. ANN. § 2A:84A-21 ("A person engaged on . . . news media for the purpose of gathering . . . news for the general public . . ."); Calvert, *supra* note 241, at 430–31 (summarizing three federal Circuit Courts of Appeals cases that shape the intent requirement). Several other states have similar requirements. See Peters et al., *supra* note 14, at 787–88 (listing states that require dissemination to the "public" or to the "general public").

<sup>243</sup> *von Bulow*, 811 F.2d at 144.

<sup>244</sup> *Id.*

<sup>245</sup> See *id.* at 146 (affirming the district court's orders of contempt, production, and confidentiality).

<sup>246</sup> *Id.* at 145.

<sup>247</sup> *Id.* at 146 (explaining how Reynolds, the girlfriend, could not claim that her sources spoke to her on conditions of confidentiality when she began speaking with them before she started to write her book).

<sup>248</sup> See *Too Much Media*, 20 A.3d at 382 (requiring at least proof of a link to the news media).

<sup>249</sup> *Id.* at 374.

<sup>250</sup> Papandrea, *supra* note 15, at 572.

*C. Another Way: Why Surveillance Technology Could Make  
a Federal Reporter's Shield Obsolete*

Another approach argues that the debate on how to define who qualifies as a journalist for shield purposes is superfluous.<sup>251</sup> Given the extent to which the government has utilized advanced technology to surveil reporters and other citizens, scholars argue that the government may no longer need to rely on subpoenaing reporters.<sup>252</sup> Instead, they argue, the government can secretly access email accounts or call records—surveillance about which journalists have expressed considerable concern.<sup>253</sup> Regardless of the potential irrelevance of shield laws, however, most states refuse to issue subpoenas to reporters if the government can access the information they desire from other sources.<sup>254</sup>

While this nuanced argument has gained attention, there is still a need for a strong federal reporter's shield.<sup>255</sup> Supporters highlight the significant increase in government's rate of subpoenas on the press.<sup>256</sup> First Amendment advocates also argue that increased government surveillance presents more of a

<sup>251</sup> See Robinson, *supra* note 23, at 1332 (arguing that the government's ability to utilize technology to reveal confidential sources renders the definition of journalist moot).

<sup>252</sup> See *id.* at 1334 (noting that the Fourth Circuit Court of Appeals in *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013), made it apparent that the government had retrieved the reporter's emails and other records without subpoenas); see also Timm, *supra* note 23 (explaining how the federal government discovered that the massive volume of data from increased use of cell phones and the internet means that prosecutors can prove their cases without journalists testifying).

<sup>253</sup> Timm, *supra* note 23; see Amy Mitchell & Jesse Holcomb, *Investigative Journalists and Digital Security*, PEW RES. CTR. (Feb. 5, 2015), <http://pewrsr.ch/16i7560> [<https://perma.cc/QH69-RCG3>] (releasing data showing that nearly two-thirds of investigative journalists believed that the government had monitored their communications); Jonathan Peters, *Shield Laws and Journalist's Privilege: The Basics Every Reporter Should Know*, COLUM. JOURNALISM REV. (Aug. 22, 2016), [https://www.cjr.org/united\\_states\\_project/journalists\\_privilege\\_shield\\_law\\_primer.php](https://www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php) [<https://perma.cc/3RG5-N26X>] (confronting specific episodes of compelled disclosure faced by reporters and educating the press on the basics of reporter's shield laws). In March 2019, leakers disclosed to KNSD a list of individuals at the U.S.-Mexico border who Customs and Border Protection officials recommended for additional scrutiny when crossing the border. Julia Ainsley, *U.S. Officials Made List of Reporters, Lawyers, Activists to Question at Border*, NBC NEWS (Mar. 6, 2019), <https://www.nbcnews.com/politics/immigration/u-s-officials-made-list-reporters-lawyers-activists-question-border-n980301> [<https://perma.cc/3E5H-CXBS>]; Tom Jones et al., *Source: Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Advocates Through a Secret Database*, KNSD-TV (Mar. 6, 2019), <https://www.nbcsandiego.com/investigations/Source-Leaked-Documents-Show-the-US-Government-Tracking-Journalists-and-Advocates-Through-a-Secret-Database-506783231.html> [<https://perma.cc/7ZNP-T57W>].

<sup>254</sup> See, e.g., N.M. R. EVID. 11-514(C)(2) (requiring that the party seeking the confidential information must first utilize all other methods of accessing the information).

<sup>255</sup> See Papandrea, *supra* note 15, at 584 (introducing a comprehensive plan for a federal shield law).

<sup>256</sup> See Jones, *supra* note 190, at 586 (summarizing data showing an increase in subpoenas over a five-year period in the early 2000s); RonNell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 WASH. L. REV. 317, 393 (2009) [hereinafter Jones, *Media Subpoenas*] (explaining that subpoenaing attorneys have felt empowered to issue more subpoenas).

reason for a shield law.<sup>257</sup> A shield law could prevent the DOJ from exploiting loopholes in the Guidelines by subpoenaing records through national security letters and other means.<sup>258</sup>

Journalists themselves continue to assert the relevance and necessity of a federal shield statute.<sup>259</sup> They contend that effectively reporting the news requires anonymous sources, and those sources would be wary of divulging information without a strong assurance of confidentiality.<sup>260</sup> Moreover, without legal protections, whistleblowers will be more cautious about speaking to reporters.<sup>261</sup>

### III. A NEW APPROACH: WHY CONGRESS SHOULD ENACT A FEDERAL REPORTER'S SHIELD AND HOW TO PROTECT SOCIAL MEDIA USERS

State reporter shield laws provide adequate protection for journalists within their jurisdiction, but a void remains at the federal level.<sup>262</sup> Section A explains why Congress should pass a federal reporter's shield.<sup>263</sup> Section B argues that a federal shield should (1) define "journalist" based on journalistic acts, not on employment, (2) explicitly protect internet and social media news sources, and (3) prevent overinclusion by requiring an intent to disseminate information to the public.<sup>264</sup>

#### A. Congress Should Enact a Federal Reporter's Shield

Because the benefits of a federal reporter's shield would outweigh any difficulties in crafting the legislation, Congress should enact a federal reporter's shield.<sup>265</sup> Judges and lawmakers have noted that a federal reporter's shield law would provide helpful guidance to courts and predictability to journal-

<sup>257</sup> Gabe Rottman, *The Darker Side of the DOJ Press Guidelines*, ACLU, SPEAK FREELY (Aug. 1, 2013, 12:26 PM), <https://www.aclu.org/blog/national-security/secretcy/darker-side-doj-press-guidelines> [<https://perma.cc/M8QV-2D8C>].

<sup>258</sup> *Id.*

<sup>259</sup> See Clarence Page, Opinion, *Trump's War Against Leakers Shows Why We Need a 'Shield Law'*, CHI. TRIB. (June 12, 2018), <https://www.chicagotribune.com/news/opinion/page/ct-perspec-page-trump-sessions-espionage-act-cpj-0613-20180612-story.html> [<https://perma.cc/KBK4-9JP9>] (calling for strengthening an independent free press).

<sup>260</sup> See Papandrea, *supra* note 15, at 535 (explaining the purpose of shield laws).

<sup>261</sup> See Jones, *supra* note 10, at 1245–48 (listing and describing several weaknesses in a vague shield law).

<sup>262</sup> See Alicea, *supra* note 18 (calling for a federal reporter's shield); Shepard, *supra* note 50, at 189 (arguing that, while digital media adds additional difficulties to deciding who qualifies as a journalist, Congress can nevertheless enact a satisfactory federal shield law).

<sup>263</sup> See *infra* notes 265–280 and accompanying text.

<sup>264</sup> See *infra* notes 281–304 and accompanying text.

<sup>265</sup> See Davidson & Herrera, *supra* note 102, at 1285 (offering a model federal shield law); Shepard, *supra* note 50, at 209 (arguing that the definitional hurdles should not preclude Congress from enacting a federal shield law).

ists.<sup>266</sup> Reporters would not have to worry which shield law would protect them.<sup>267</sup> Continued confusion resulting from disparate state laws can lead journalists to self-censor articles when they cannot guarantee their sources anonymity.<sup>268</sup> Without the assurance of anonymity, sources may even bypass the press in favor of leaving surreptitious notes or making anonymous phone calls that reporters cannot corroborate.<sup>269</sup> A federal reporter's shield would therefore bring clarity to a patchwork of laws.<sup>270</sup>

Though not binding, a federal reporter's shield would also have persuasive power with state legislatures and state courts.<sup>271</sup> In the years after the Supreme Court's decision in *Branzburg v. Hayes*, for example, states responded by enacting or amending shield laws.<sup>272</sup> States have historically paid attention to changes in federal evidence rules as well, and many have replicated the changes in their own rules of evidence.<sup>273</sup>

A federal reporter's shield would allow journalists to continue to report on issues important to the public.<sup>274</sup> By making it more difficult for government officials to identify journalists' sources, those officials would be free to investigate and resolve the problem identified by the anonymous whistleblower, rather than expending effort taking the journalist to court.<sup>275</sup> Although the government has ever-increasing access to surveillance technology, continued use of subpoenas shows the lengths to which authorities will go to silence leaks; a reporter's shield would limit these subpoenas.<sup>276</sup>

<sup>266</sup> See Jones, *supra* note 10, at 1245–48 (laying out the weaknesses of a vague shield law).

<sup>267</sup> See Alicea, *supra* note 18 (arguing that a federal shield law would help reduce confusion).

<sup>268</sup> See Jones, *supra* note 10, at 1247 (describing how some journalists are wary of relying on anonymous sources).

<sup>269</sup> See Tucker & Wermiel, *supra* note 208, at 1326 (concluding that reporters' willingness to suffer punishment to protect their anonymous sources allows for leaks of historically critical information).

<sup>270</sup> See *id.* at 1310 (noting how state Attorneys General have criticized the wide variety of state reporter's shield laws).

<sup>271</sup> See Alicea, *supra* note 18.

<sup>272</sup> See Kielbowicz, *supra* note 75, at 458 n.214 (recognizing how more than eight states either passed new shield laws or modified existing ones).

<sup>273</sup> See OKLA. STAT. ANN. tit. 12, § 2406 Evidence Subcommittee's Note (West 2014) (describing an amendment to FED. R. EVID. 406 and Oklahoma's subsequent subcommittee recommendation and final passage of an identical amendment); BLUM ET AL., *supra* note 143, § 10 (discussing the similarities between the state Uniform Rules of Evidence and the Federal Rules of Evidence).

<sup>274</sup> Papandrea, *supra* note 15, at 535.

<sup>275</sup> See Kielbowicz, *supra* note 75, at 456 (illustrating how, for example, investigators in Memphis were more concerned with finding the source of leaks about problems at state hospitals than fixing the problems themselves).

<sup>276</sup> See Jones, *Media Subpoenas*, *supra* note 256, at 393, 395 (showing the government's continued practice of issuing subpoenas to compel information from journalists).

Anonymous sources have exposed scandals of national importance.<sup>277</sup> Deep Throat spoke to Woodward and Bernstein; the source of Anita Hill's claims confided in Nina Totenberg; and Edward Snowden revealed NSA surveillance secrets to reporters at *The Guardian*.<sup>278</sup> Each of these sources used extreme caution when speaking with the press, even in an era with strong state-level shield laws.<sup>279</sup> If Congress enacted an expansive federal reporter's shield, anonymous sources like these could feel more comfortable telling their stories, knowing that their anonymity would likely be secured.<sup>280</sup>

### B. Necessary Components of a Federal Reporter's Shield

Congress should not, however, simply pass a weak reporter's shield.<sup>281</sup> Any federal shield law should have three key components, each based on state laws that already have such provisions.<sup>282</sup> Congress should (1) define "journalist" based on journalists' functions, (2) explicitly protect internet and social media, and (3) require an intent to disseminate information to the public to prevent overinclusion.<sup>283</sup>

First, the law should not focus solely on profession.<sup>284</sup> Instead, the law should define journalists to include anyone who conducts interviews, publishes articles, or takes on any other journalistic acts.<sup>285</sup> Too many freelance journalists might not earn enough income to be able to otherwise protect themselves

<sup>277</sup> See Kielbowicz, *supra* note 75, at 434 (discussing William Duane's leak scandal); *supra* notes 75–111 and accompanying text (describing several specific instances of famous events in American history exposed by anonymous sources).

<sup>278</sup> See BERNSTEIN & WOODWARD, *supra* note 92, at 13 (explaining how the two reporters first learned of the Watergate break-in); Jones, *supra* note 10, at 1248 (pointing out that the public misses out on critical information if journalists cannot protect their sources); Greenwald et al., *supra* note 108 (detailing Snowden's leaks to *The Guardian*); Totenberg, *supra* note 98 (detailing how Totenberg reported the Anita Hill scandal).

<sup>279</sup> See, e.g., Papandrea, *supra* note 15, at 536 (describing how Deep Throat required anonymity to speak about the Watergate scandal).

<sup>280</sup> See Tucker & Wermiel, *supra* note 208, at 1326 (concluding that reporters' willingness to suffer punishment to protect their anonymous sources allows for leaks of historically critical information).

<sup>281</sup> See Shepard, *supra* note 50, at 209 (arguing that Congress should enact a federal shield law regardless of the difficulty of defining who is a journalist).

<sup>282</sup> E.g., ARK. CODE ANN. § 16-85-510 (2005 & Supp. 2017) (including "internet news source" in its definition of journalists); N.J. STAT. ANN. § 2A:84A-21 (West 2011 & Supp. 2019) (including an intent requirement); VT. STAT. ANN. tit. 12 § 1615 (2017) (offering wide protections to journalist); see *supra* notes 265–280 and accompanying text.

<sup>283</sup> ARK. CODE ANN. § 16-85-510; N.J. STAT. ANN. § 2A:84A-21; VT. STAT. ANN. tit. 12 § 1615.

<sup>284</sup> See VT. STAT. ANN. tit. 12 § 1615 (not requiring employment).

<sup>285</sup> See *id.* (providing wide protections and a functional definition); Erin Mansfield, *Scott Signs Shield Law for Journalists*, VTDIGGER (May 17, 2017), <https://vtdigger.org/2017/05/17/scott-signs-shield-law-journalists/> [<https://perma.cc/4VSS-68XP>] (acknowledging the purpose of the law is to allow individual sources to speak to reporters without fear).

from government subpoenas.<sup>286</sup> Journalistic acts alone should give individuals the predictability that the law will protect their confidential sources and reporting materials from subpoena power.<sup>287</sup> As the First Circuit Court of Appeals highlighted in *Glik v. Cunniffe* in 2011, it is becoming impossible to distinguish between ordinary citizens and members of the news media.<sup>288</sup> To remedy this ambiguity, Congress can protect both groups by defining journalists based on actions, not profession.<sup>289</sup> Congress should therefore emulate Vermont's new and clear functional definition of journalist by protecting anyone who investigates issues of public concern or who prepares them for publishing, whether or not the information is ever published.<sup>290</sup>

Second, it is important for any federal shield law to protect social media users, as nearly every American gets their daily news on a computer, tablet, or phone.<sup>291</sup> To accomplish this, Congress should explicitly include the internet and social media in any definition of journalist or news organization.<sup>292</sup> A federal reporter's shield should not leave it up to courts to assume that the internet media is protected.<sup>293</sup> Congress should follow states like Arkansas that explicitly include digital journalism as part of its reporter's shield law.<sup>294</sup> While such specificity could lead courts not to include certain forms of media, that risk is worth the added predictability for reporters.<sup>295</sup> Recently, a nuanced argument suggests that the debate over the definition of journalist is an anachronistic relic of the past, but this argument dismisses the distinctions between digital

<sup>286</sup> See Weiland, *supra* note 211 (explaining how freelancers lack the institutional resources of traditional media organizations).

<sup>287</sup> *Id.*

<sup>288</sup> *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011).

<sup>289</sup> See Eliason, *supra* note 21, at 433 (describing how a common solution to the definitional question is to focus on functions frequently undertaken by reporters).

<sup>290</sup> See VT. STAT. ANN. tit. 12 § 1615 (creating wide protections).

<sup>291</sup> See Weiland, *supra* note 211 (describing a scenario where a court may not see an individual posting a video on social media as a journalist); see also Stocking, *supra* note 15 (explaining how over ninety percent of adults in the United States get at least some news online).

<sup>292</sup> See ARK. CODE ANN. § 16-85-510 (including "internet news source"); KAN. STAT. ANN. § 60-480 (2005 & Supp. 2018) (protecting "an online journal"); TEX. CIV. PRAC. & REM. CODE ANN. § 22.021 (West 2015 & Supp. 2018) (accounting for an "Internet company"); WASH. REV. CODE ANN. § 5.68.010(5)(a) (2019) (including "internet, or electronic distribution"); Jones, *supra* note 10, at 1245-48 (describing the need for a specific shield law).

<sup>293</sup> See Martin & Fargo, *supra* note 14, at 65-66 (discussing the positives and negatives of including specific types of media in statutes).

<sup>294</sup> ARK. CODE ANN. § 16-85-510; KAN. STAT. ANN. §§ 60-480 to -485 (2005 & Supp. 2018); TEX. CIV. PRAC. & REM. CODE ANN. §§ 22.021-.027 (West 2015 & Supp. 2018); WASH. REV. CODE ANN. § 5.68.010(5)(a); see Davidson & Herrera, *supra* note 102, at 1325 (discussing how modern technology might necessitate a broad reporter's shield law).

<sup>295</sup> See Martin & Fargo, *supra* note 14, at 65-66 (discussing the benefits and drawbacks of statutory specificity).

and print media.<sup>296</sup> Explicitly including the internet and social media would let reporters at digital media outlets have more predictability and would give them the same protections as reporters at the *New York Times*.<sup>297</sup> New York, which is working to craft protections for blogs, could be a good example to follow.<sup>298</sup>

Third, a federal reporter's shield should limit protection to those individuals with an intention to disseminate information to the public when gathering sources and information.<sup>299</sup> To combat fears that a broad definition would effectively apply to everyone any federal statute must include an intent provision.<sup>300</sup> This would prevent individuals who might only be sharing something with their friends and not broadcasting publicly from receiving protection from a federal shield rule.<sup>301</sup> For social media, this would mean that a private tweet or a Facebook post visible only to a user's friends would not be as protected in the same way as a public tweet or Facebook status would be.<sup>302</sup> New Jersey provides a strong model for this element.<sup>303</sup> While this element may inadvertently eliminate a small group of legitimate journalists, it appropriately limits overinclusion.<sup>304</sup>

## CONCLUSION

Journalists have relied on anonymous sources for hundreds of years. From the founding of the United States, confidential information acquired from unnamed experts has exposed governmental collusion, national security secrets, and plots to surveil the media itself. Anonymous sources allow the press to educate the public and scrutinize government power. To protect anon-

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<sup>296</sup> See Robinson, *supra* note 23, at 1332 (arguing that the government's use of surveillance technology to uncover journalists' sources makes a reporter's shield irrelevant).

<sup>297</sup> See Alicea, *supra* note 18 (arguing that a federal shield law would help to reduce confusion).

<sup>298</sup> See Assemb. B. 1008, 242d Leg., Reg. Sess. (N.Y. 2019) (extending protections to blogs); S.B. 431, 242d Leg., Reg. Sess. (N.Y. 2019) (same).

<sup>299</sup> See Shepard, *supra* note 50, at 210 (proposing a purpose or intent requirement for a federal shield law).

<sup>300</sup> See, e.g., N.J. STAT. ANN. § 2A:84A-21 (requiring the intent to disseminate news to the public); see also Papandrea, *supra* note 15, at 581–82 (discussing the benefits and drawbacks to an intent-based provision).

<sup>301</sup> See N.J. STAT. ANN. § 2A:84A-21 (requiring a purpose to “disseminat[e] news for the general public”).

<sup>302</sup> See *About Public and Protected Tweets*, TWITTER, <https://help.twitter.com/en/safety-and-security/public-and-protected-tweets> [<https://perma.cc/X5D9-FCDM>] (describing public Tweets as visible by anyone on or off Twitter and private tweets as only visible to those users who one accepts as followers); *How Do I Choose Who Can See Previous Posts on My Timeline?*, FACEBOOK, <https://www.facebook.com/help/236898969688346> [<https://perma.cc/P8SX-T73B>] (guiding users through how to pick which of several audiences, such as public, friends, or friends of friends, can view their timeline posts).

<sup>303</sup> See N.J. STAT. ANN. § 2A:84A-21 (including a clear intent provision).

<sup>304</sup> See Papandrea, *supra* note 15, at 572 (cautioning against an intent test that may exclude journalists who only intend to publish a story after making first contact with an anonymous source).



ymous sources, states have created robust statutory protections, but Congress has yet to do the same at the federal level. Congress should therefore enact a federal reporter's shield. This new statute would be most effective by applying to anyone engaging in journalistic acts, not only professional journalists. It should explicitly include digital news sources and public social media posts, but should protect only individuals who intended to disseminate news to the public when gathering information from confidential sources. Although a modern federal reporter's shield is unlikely to ameliorate public hostility toward the press, it will increase reporters' confidence that they can fully report a story without prosecution. Doing so may show readers that the press is truly not the "enemy of the people."

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