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Protecting Citizen Journalists: Why Congress Should Adopt a Broad Federal Shield Law

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INTRODUCTION

On August 1, 2006, a federal district judge sent Josh Wolf, a freelance video journalist and blogger, to prison.¹ Wolf, a recent college graduate who did not work for a mainstream media organization at the time, captured video footage of an anti-capitalist protest in California and posted portions of the video on his blog.² As part of an investigation into charges against protestors whose identities were unknown, federal prosecutors subpoenaed Wolf to testify before a grand jury and to hand over the unpublished portions of his video.³ Wolf refused to comply with the subpoena, arguing that the First Amendment allows journalists to shield their newsgathering materials.⁴ The judge disagreed, and, as

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1. See Order Finding Witness Joshua Wolf in Civil Contempt and Ordering Confinement at 2, *In re Grand Jury Proceedings to Joshua Wolf*, No. CR 06-90064 WHA (N.D. Cal. 2006); Jesse McKinley, *Blogger Jailed After Defying Court Orders*, N.Y. TIMES, Aug. 2, 2006, at A15.

2. For a detailed description of the facts of this case, see Anthony L. Fargo, *The Strange Case of Josh Wolf: What It Tells Us About Privilege Law*, in *LAW OF PRIVILEGES: JOURNALISTS AND EXECUTIVES* 1-36 (R. Satyanarayana ed., 2008).

3. *Id.*

4. See Motion To Quash Subpoena at 1-2, *In re Grand Jury Subpoena to Joshua Wolf*, No. CR 06-90064 WHA (N.D. Cal. 2006).

a result, Wolf spent 226 days in federal prison,⁵ “the longest incarceration ever of an American journalist.”⁶

This case illustrates the need for a federal shield law.⁷ Such a law would codify a reporter’s privilege, which protects journalists from being compelled to testify about or disclose their newsgathering materials, including the identities of confidential sources.⁸ At least forty states have adopted shield statutes to date, but no such statute exists at the federal level. Moreover, the Supreme Court held in *Branzburg v. Hayes* that the Constitution does not grant journalists this kind of protection.⁹ Following *Branzburg*, several federal courts recognized a qualified constitutional privilege,¹⁰ but this trend has halted in recent years, leaving journalists completely unprotected at the federal level. Media organizations,¹¹ scholars,¹² and President Barack Obama¹³ have called on Congress to fill this gap.

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5. Philip Shenon, *Leak Inquiry Said To Focus on Calls with Times*, N.Y. TIMES, Apr. 12, 2008, at A16.
 6. Jesse McKinley, *8-Month Jail Term Ends as Maker of Video Turns Over a Copy*, N.Y. TIMES, Apr. 4, 2007, at A9.
 7. In addition to the Josh Wolf case, two other prominent cases brought the attention of scholars and lawmakers to this issue. First, in 2001, freelance writer Vanessa Leggett spent 168 days in jail for failing to disclose information relating to a Texas homicide. See Paul Duggan, *Writer Freed After Five Months in Jail, but New Subpoena Likely*, WASH. POST, Jan. 5, 2002, at A7. Second, in 2005, Judith Miller, a reporter for the *New York Times*, spent eighty-five days in jail for refusing to identify a confidential source in response to a federal subpoena. See *New York Times Reporter Jailed*, CNN (Oct. 28, 2005), <http://edition.cnn.com/2005/LAW/07/06/reporters.contempt/>.
 8. The reporter’s privilege is similar to other evidentiary privileges, such as the attorney-client and doctor-patient privileges. See Geoffrey R. Stone, *Why We Need a Federal Reporter’s Privilege*, 34 HOFSTRA L. REV. 39, 39-41 (2005). For the purposes of this Comment, the term “newsgathering materials” refers to all the materials that a given version of the reporter’s privilege protects. Different variations of the privilege shield different materials. Some shield laws are broad, protecting testimony, published and unpublished information and notes, and the identities of confidential and nonconfidential sources; other shield laws are less protective. Moreover, most shield laws are qualified, not absolute, meaning that the privilege can be overcome in certain circumstances. See generally *The Reporter’s Privilege*, REPORTERS COMMITTEE FOR FREEDOM PRESS, <http://www.rcfp.org/reporters-privilege/> (last visited May 30, 2012).
 9. 408 U.S. 665 (1972). The Court held in a five-to-four decision that the First Amendment does not allow journalists to refuse to testify before a grand jury about stories they have written.
 10. See, e.g., *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972); *Burse v. United States*, 466 F.2d 1059 (9th Cir. 1972); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972).
 11. See, e.g., *Struggling To Report: The Fight for a Federal Shield Law*, SOC’Y PROF. JOURNALISTS, <http://www.spj.org/shieldlaw.asp> (last visited Mar. 27, 2012).

In response, legislators have introduced several shield bills in Congress.¹⁴ For instance, Representative Mike Pence introduced the Free Flow of Information Act of 2011 in the House of Representatives.¹⁵ Despite the fact that “the issue [has] bipartisan support,”¹⁶ none of these bills has passed in both the House and the Senate.¹⁷ This holdup has occurred largely because legislators have been unable to agree on whom exactly the law should cover.¹⁸ In particular, legislators have wondered: Should the law protect individuals like Josh Wolf?¹⁹

This Comment argues that Congress should adopt a broad federal shield law that would cover many citizen journalists—individuals, like Wolf, who lack professional training and have no affiliation with a mainstream media organization.²⁰ Commentators generally agree that a federal shield law should cover tra-

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12. See, e.g., Leslie Siegel, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 OHIO ST. L.J. 469 (2006); Stone, *supra* note 8, at 48.
 13. See Cristina Abello, *Obama Administration Publicly Endorses Shield Bill*, REPORTERS COMMITTEE FOR FREEDOM PRESS (Nov. 5, 2009), <http://www.rcfp.org/newsitems/index.php?i=11099>.
 14. See, e.g., H.R. 985, 111th Cong. (2009); S. 448, 111th Cong. (2009); S. 281, 111th Cong. (2006).
 15. H.R. 2932, 112th Cong. (2011); see J.C. Derrick, *Federal Shield Law Introduced in House Once More*, REPORTERS COMMITTEE FOR FREEDOM PRESS (Sept. 19, 2011), <http://www.rcfp.org/newsitems/index.php?i=12156>.
 16. KATHLEEN ANN RUANE, CONG. RESEARCH SERV., RL34193, *JOURNALISTS' PRIVILEGE: OVERVIEW OF THE LAW AND LEGISLATION IN RECENT CONGRESSES*, at Summary (2011).
 17. Two recent versions of the Free Flow of Information Act passed the House by large margins, but both died in the Senate. See H.R. 985, 111th Cong. (2009); H.R. 2102, 110th Cong. (2007).
 18. See Jeffrey Benzing, *Falling on Their Shield*, AM. JOURNALISM REV. (June/July 2011), <http://www.ajr.org/article.asp?id=5029> (“[I]t’s clear [that] an overriding factor [in the failure of past shield bills] was the disagreement over who would be considered a journalist.”). Lawmakers have also disagreed, for example, as to whether a federal shield law would pose a threat to national security. See Julianne Nowicki, *The Federal Shield Law*, MICH. REV. (Oct. 29, 2009), <http://www.michiganreview.com/archives/711>. This Comment focuses only on the definitional question.
 19. See Anne Lowe, *Feinstein: No Shield Law for Bloggers, Wikileaks*, CALAWARE TODAY (Aug. 31, 2010), http://calaware.typepad.com/calaware_today/2010/08/feinstein-no-shield-law-for-bloggers-wikileaks.html.
 20. See Mark Glaser, *Your Guide to Citizen Journalism*, MEDIA SHIFT (Sept. 27, 2006), <http://www.pbs.org/mediashift/2006/09/your-guide-to-citizen-journalism270.html> (“The idea behind citizen journalism is that people without professional

ditional journalists,²¹ and some have argued that it should also cover certain online writers²² (who increasingly have attempted to invoke the privilege in both state and federal courts²³). But many commentators worry that protecting citizen journalists would allow “every self-appointed newsperson”²⁴ to hide behind the privilege, resulting in significant social and economic costs.²⁵

This Comment demonstrates both that citizen journalists should be covered and that Congress can protect them without causing an avalanche of negative consequences. Part I describes the reporter’s privilege and its rationales, which focus on preserving the functions that journalists fulfill in society. Part II illustrates that citizen journalists fulfill the same valuable functions as traditional journalists in society and argues that they should therefore receive the same protection. Part III discusses two proposals that Congress has considered and determines that neither option passes muster. Instead, Congress should follow states such as California and New Jersey and adopt a federal shield law that is broad enough to cover many citizen journalists but narrow enough to maintain effective law enforcement.

journalism training can use the tools of modern technology . . . to create, augment or fact-check media on their own or in collaboration with others.”).

21. For purposes of this Comment, the term “traditional journalist” means the opposite of a citizen journalist—i.e., an individual who is professionally trained, works for a mainstream media organization, and publishes in print.
22. This Comment employs the term “online writers” to refer to all individuals who publish content online, including those who write or blog for mainstream media organizations as their full-time job. For examples of scholars who argue that some or all online writers should be covered, see Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism To Protect the Journalist’s Privilege in an Infinite Universe of Publication*, 39 Hous. L. Rev. 1371 (2003); and Anne M. Macrander, Note, *Bloggers as Newsmen: Expanding the Testimonial Privilege*, 88 B.U. L. Rev. 1075 (2008).
23. See, e.g., *Obsidian Fin. Grp. v. Cox*, No. CV-11-57-HZ, 2011 WL 5999334 (D. Or. Nov. 30, 2011) (blogger); *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006) (blogger); *TheStreet.com, Inc. v. Carroll*, 20 So. 3d 947 (Fla. Dist. Ct. App. 2009) (website publisher and reporter); *Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus.*, 999 A.2d 184 (N.H. 2010) (website publisher); *Too Much Media, LLC v. Hale*, 20 A.3d 364 (N.J. 2011) (commenter on Internet message board).
24. *Too Much Media*, 20 A.3d at 368.
25. See, e.g., Scott Neinas, Note, *A Skinny Shield Is Better: Why Congress Should Propose a Federal Reporters’ Shield Statute That Narrowly Defines Journalists*, 40 U. Tol. L. Rev. 225 (2009).

I. THE PURPOSES OF THE PRIVILEGE

Lawmakers generally cite two related rationales for enacting a reporter's privilege.²⁶ First, without the privilege, journalists would "write with [a] more restrained pen," and "[f]ear of exposure [would] cause dissidents to communicate less openly to trusted reporters."²⁷ By encouraging sources to give and journalists to disseminate information freely, the privilege encourages the free flow of information to the public and ensures a robust marketplace of ideas.²⁸ Second, without the privilege, journalists would be reduced to "an investigative arm of the government."²⁹ By allowing journalists to operate independently, the privilege creates "a fourth institution outside the Government as an additional check on the three official branches."³⁰ Importantly, these objectives focus on what journalists *do*—on the functions that they fulfill in society—and not on for whom they work.

These purposes do not require that the privilege be limited to traditional journalists. To the contrary, as Justice White recognized in the majority opinion of *Branzburg v. Hayes*, defining the privilege narrowly would be "a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher."³¹ "Freedom of the press," White explained, "is not confined to newspapers and periodicals."³² The privilege could conceivably cover "every sort of publication which affords a vehicle of information" to the public.³³

At the same time, granting protection to a broad range of individuals could result in significant social and economic costs. Most critically, allowing journal-

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26. Both rationales appear in the legislative history of a recently proposed version of the Free Flow of Information Act. See H.R. REP. NO. 111-61, at 2-3 (2009). These rationales are especially strong when confidential sources are involved, but they also apply to the newsgathering process more generally.
27. *Branzburg v. Hayes*, 408 U.S. 665, 711 (1972) (Douglas, J., dissenting). Although the Supreme Court held in *Branzburg* that the First Amendment does not create a federal reporter's privilege that would allow journalists to refuse to testify before a criminal grand jury, federal courts have turned to the two dissents in this case to justify granting the privilege in various contexts.
28. See Joseph S. Alonzo, *Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 751, 762-63 (2006).
29. *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting) (arguing that, without the privilege, journalists would effectively become policemen because their reporting would aid the government in civil and criminal investigations, and therefore they would be unable to serve as an independent check on the government).
30. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).
31. 408 U.S. at 704.
32. *Id.* (citations omitted).
33. *Id.* (emphasis added).

ists to hold on to their newsgathering materials could interfere with “effective law enforcement and the fair administration of justice.”³⁴ The privilege could potentially “exclude a huge amount of information from the legal system,” which might thwart attempts to prosecute criminals.³⁵ Moreover, if too many individuals are able to invoke the privilege, it could become exceedingly difficult to apply. Courts might draw unprincipled distinctions, while parties might “battle[] over the applicability” of the privilege, resulting in “substantial litigation costs.”³⁶

In crafting a federal shield law, lawmakers must balance the significant benefits of granting the privilege against these potential costs. Some observers have suggested that extending the privilege to cover citizen journalists would upset this balance.³⁷ This Comment argues, however, that citizen journalists should receive protection—and that Congress can shield them without leading to unmanageable consequences.

II. CITIZEN JOURNALISM

Over the past decade, the Internet has dramatically transformed the nature of journalism. As one commentator explains, “With the traditional media of newspapers, radio, and television, there was a natural physical limit to the space and time available for individual participation. With the Internet, these . . . barriers no longer exist.”³⁸ Advances in technology now allow citizen journalists

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34. H.R. REP. NO. 111-61, at 2 (2009); see Stone, *supra* note 8, at 48 (noting that the privilege “deprives the judicial process . . . of relevant evidence”). *But see Branzburg*, 408 U.S. at 746 (Stewart, J., dissenting) (“The sad paradox of the Court’s position is that when a grand jury may exercise an unbridled subpoena power, and sources involved in sensitive matters become fearful of disclosing information, the newsman will not only cease to be a useful grand jury witness; he will cease to investigate and publish information about issues of public import.”); Stone, *supra* note 8, at 48 (pointing out that “[a]lmost all rules of evidence deprive the fact-finder of relevant evidence”).
 35. Randall D. Eliason, *The Problems with the Reporter’s Privilege*, 57 AM. U. L. REV. 1341, 1367 (2008).
 36. *Id.* at 1367; see also Jason M. Shepard, *Bloggers After the Shield: Defining Journalism in Privilege Law*, 1 J. MEDIA L. & ETHICS 186, 188 (2009) (“If Josh Wolf can be considered a journalist, couldn’t anybody?”).
 37. See, e.g., Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter’s Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 386 (2007) (arguing that protecting nontraditional journalists might make the privilege complicated to apply and that “rapid technological changes . . . suggest that a reporter’s privilege may soon have to be considered a relic of a simpler era”); Neinas, *supra* note 25, at 242-43 (noting that protecting bloggers would increase the likelihood that the privilege would be abused).
 38. Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 523 (2007).

like Josh Wolf to “play[] an active role in the process of collecting, reporting, analyzing and disseminating news” through various online media.³⁹ For example, a student who observes a congressman acting inappropriately in public might write about the incident on her blog or post a video on YouTube.⁴⁰

Citizen journalists constitute a significant source of the news today⁴¹ and often fulfill the same functions as traditional journalists in society. First, citizen journalists disseminate crucial information to the public. For example, citizen journalists have revealed controversial information about public figures;⁴² broadcast the devastation of natural disasters;⁴³ and captured the details of riots, protests, and terrorist attacks for the world to see.⁴⁴ In putting together these

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39. SHAYNE BOWMAN & CHRIS WILLIS, *THE MEDIA CTR. AT THE AM. PRESS INST., WE MEDIA: HOW AUDIENCES ARE SHAPING THE FUTURE OF NEWS AND INFORMATION* 9 (J.D. Lasica ed., 2003), available at http://www.hypergene.net/wemedia/download/we_media.pdf. For an excellent account of the development of the citizen journalism phenomenon, see DAN GILLMOR, *WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE* (2006).
40. This hypothetical is based on a real example. See Edecio Martinez, *Bob Etheridge Video: Congressman Gets “Touchy” with Camera Crew, then Apologizes for how He “Handled” Them*, CBSNEWS (June 14, 2010, 3:43 PM), http://www.cbsnews.com/8301-504083_162-20007631-504083.html.
41. In some parts of the world, citizen journalists have even become the primary news source. See Anne Medley, *Why Training Citizen Journalists Is So Important After the Arab Spring*, PBS’s MEDIASHIFT (Jan. 13, 2012), <http://www.pbs.org/mediashift/2012/01/why-training-citizen-journalists-is-so-important-after-the-arab-spring013.html> (“As protests and revolutions sweep across the Arab world, citizen journalism has become the primary source of news for thousands in the Arab world.”). In 2008, the *Washington Times* reported that “[a]bout 77 percent [of surveyed Americans] said that so-called citizen journalism has a ‘vital role’ in journalism’s future.” *Web Surpasses TV, Papers as Top News Source*, WASH. TIMES (Feb. 28, 2008), <http://www.washingtontimes.com/news/2008/feb/28/web-surpasses-tv-papers-as-top-news-source/?page=all>.
42. See, e.g., James Rainey, ‘Citizen Journalist’ Broke Obama Story, L.A. TIMES, Apr. 15, 2008, at A11 (describing how a citizen journalist revealed that Obama said, on the campaign trail in 2008, that job losses had caused small-town Americans to become “bitter” and to “cling to guns or religion”).
43. See, e.g., Antone Gonsalves, *Bloggers Tell Their Stories*, INFO. WK., Sept. 5, 2005, at 12, available at 2005 WLNR 15037705.
44. See, e.g., Stuart Allan, *Citizen Journalism and the Rise of “Mass Self-Communication”: Reporting the London Bombings*, 1 GLOBAL MEDIA J. (AUSTL.), no. 1 (2007), http://www.commart.s.uws.edu.au/gmjau/iss1_2007/stuart_allan.html; Brian Stelter & Noam Cohen, *Citizen Journalists Provided Glimpses of Mumbai Attacks*, N.Y. TIMES, Nov. 30, 2008, at A26; Mandy Jenkins, *Occupy Wall Street: Citizen Journalists Document Protests Nationwide*, HUFFINGTON POST (Oct. 6, 2011, 3:47 PM), http://www.huffingtonpost.com/2011/10/06/occupy-wall-street-citizen-journalism_n_998529.html.

stories, citizen journalists undoubtedly collect materials, such as tips from confidential sources, that they would not want to reveal later.⁴⁵ Second, citizen journalists serve as a check on the government. For example, they have exposed inappropriate behavior and spurred the resignations of several public officials.⁴⁶ Citizen journalists are often the first to break these stories, and they may provide details, such as on-the-scene video footage, that traditional journalists are unable to capture.⁴⁷ Recognizing their unique contribution, mainstream media organizations such as CNN now regularly solicit contributions from citizen journalists.⁴⁸

Citizen journalism undoubtedly differs from traditional journalism. Traditional journalists are generally subject to formal editorial procedures at newspapers and television stations, while citizen journalism is a “bottom-up, emergent phenomenon in which there is little or no editorial oversight.”⁴⁹ Citizen journalists tend to lack professional training and experience in the field, and

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45. But note that tips from confidential sources are not the only materials that a journalist might want to shield. For example, Josh Wolf wanted to protect his unpublished video footage. Likewise, a journalist might not want to reveal, for a variety of reasons, her notes, her nonconfidential sources, or other materials.
46. See, e.g., Papandrea, *supra* note 38, at 524 (describing how bloggers revealed that former Senator Trent Lott made controversial comments at Senator Strom Thurmond’s 100th birthday party, leading to Lott’s resignation as Senate Republican Leader); Eric Boehlert, *Saradise Lost: How Alaska Bloggers Dethroned Sarah Palin*, MEDIA MATTERS (July 14, 2009, 8:08 AM), <http://www.mediamatters.org/columns/200907140005> (noting that bloggers played a “key role” in Sarah Palin’s resignation as Alaska Governor); Amanda Muñoz-Temple, *The Man Behind Weiner’s Resignation*, NAT’L J. (June 16, 2011, 5:16 PM), <http://www.nationaljournal.com/the-man-behind-weiner-s-resignation-20110616> (explaining that citizen journalist Andrew Breitbart brought attention to explicit photographs that former Congressman Anthony Weiner released on Twitter, spurring Weiner’s resignation). In addition, citizen journalists have exposed the extreme views of public figures. See, e.g., Paul Miller, *The Power and Importance of New Media*, AM. THINKER (Sept. 10, 2009), http://www.americanthinker.com/2009/09/the_power_and_importance_of_ne.html (describing citizen journalists’ involvement in exposing the controversial leanings of presidential advisor Van Jones).
47. Citizen journalists may simply be faster than traditional journalists. For example, a citizen journalist who happens to witness a newsworthy event can pull out her camera and record the incident almost instantaneously; in contrast, a traditional reporter would have to learn of the event, go to the scene, and only then begin to report on the incident.
48. CNN.com now contains a feature called iReport, through which “people take part in the news . . . [and] help[] shape how and what CNN covers every day.” CNN IREPORT, <http://ireport.cnn.com> (last visited Mar. 28, 2012).
49. BOWMAN & WILLIS, *supra* note 39, at 9.

they may not contribute to the marketplace of ideas on a regular basis.⁵⁰ These distinctions have led some critics to characterize citizen journalists as unskilled amateurs who publish inaccurate information.⁵¹

However, scholars such as Clay Shirky have pushed back on this characterization, pointing out that, in fact, citizen journalism allows for editorial control: If an individual disseminates inaccurate information on the Internet, others can instantly correct her mistake, or simply choose not to return to that source in the future.⁵² As Shirky puts it, “[T]he Internet is strongly edited, but the editorial judgment is applied at the edges, not the center, and it is applied after the fact, not in advance.”⁵³ And while it is true that citizen journalists have broken false stories,⁵⁴ the same can be said for traditional journalists.⁵⁵

Furthermore, some of these differences actually strengthen the rationales for a broad reporter’s privilege. For example, because citizen journalists are not tied to mainstream media organizations or other “potentially biased gatekeepers,”⁵⁶ they may be more likely to voice controversial concerns and even scrutinize the work of traditional journalists.⁵⁷ In addition, low access costs allow citi-

50. *Id.*

51. See, e.g., ANDREW KEEN, *THE CULT OF THE AMATEUR: HOW TODAY’S INTERNET IS KILLING OUR CULTURE* 46-56 (2008).

52. See Clay Shirky, *Broadcast Institutions, Community Values*, CLAY SHIRKY’S WRITINGS ABOUT INTERNET, http://www.shirky.com/writings/broadcast_and_community.html (last visited Mar. 28, 2012). See generally BOWMAN & WILLIS, *supra* note 39.

53. Shirky, *supra* note 52. Whereas staff members at the *New York Times* edit newspaper articles before publication, many different parties may participate in the editorial process of a citizen journalist’s article after it has been published. For example, “Google edits web pages by aggregating user judgment about them, Slashdot edits posts by letting readers rate them, and of course users edit all the time, by choosing what (and who) to read.” *Id.*

54. See, e.g., JR Raphael, *Bogus Jobs’ Heart Attack Report Rattles Citizen Journalism*, PCWORLD (Oct. 3, 2008, 10:11 PM), http://www.pcworld.com/article/151871/bogus_jobs_heart_attack_report_rattles_citizen_journalism.html.

55. See, e.g., Lindsay Powers, *NPR Apologizes for ‘Grave Error’ of Falsely Reporting Rep. Gabrielle Giffords’ Death*, HOLLYWOOD REP. (Jan. 10, 2011, 6:35 AM), <http://www.hollywoodreporter.com/news/npr-apologizes-grave-error-falsely-69848>. For numerous examples of mistakes made by traditional journalists in 2011, see Craig Silverman, *The Year in Media Errors and Corrections Features Osama/Obama, Giffords*, POYNTER (Dec. 19, 2011, 7:13 AM), <http://www.poynter.org/latest-news/regret-the-error/156515/the-year-in-media-errors-and-corrections-2011/>. These examples indicate that the extent of mistakes made by traditional journalists is no less than that of citizen journalists.

56. Larry E. Ribstein, *Initial Reflections on the Law and Economics of Blogging* 3 (Univ. of Ill. Coll. of Law, Working Paper No. 25, 2005).

57. See, e.g., GILLMOR, *supra* note 39, at xiv; Beth Gillin & David Hiltbrand, *Rather Apologizes, Says Papers May Not Be Real*, PHILA. INQUIRER, Sept. 21, 2004, at A1

zen journalists to fill significant gaps in mainstream media coverage, such as local news and areas of specialty knowledge that would be “too narrow for a conventional source.”⁵⁸ In this way, citizen journalists increase the flow of information to the public and expand the marketplace of ideas.

Given that citizen journalists fulfill, at a minimum, the same functions as traditional journalists—the very functions that the reporter’s privilege aims to protect⁵⁹—a federal shield law should protect citizen journalists. Shielding traditional journalists but not citizen journalists would frustrate the purposes of the privilege, for if citizen journalists are not protected, they might choose not to publish at all.⁶⁰ Likewise, sources might not share controversial information with citizen journalists out of fear that their identities will later be revealed.⁶¹ This result would seriously impede the flow of information to the public, especially considering that traditional sources, such as newspapers, may soon see their demise.⁶²

(detailing how bloggers revealed that CBS reporter Dan Rather used falsified documents to criticize President George W. Bush on *60 Minutes*).

58. Ribstein, *supra* note 56, at 7; *see also* Jon Friedman, *Citizen Journalism Filling Local News Void*, MARKETWATCH (Aug. 14, 2006), <http://www.marketwatch.com/story/citizen-web-journalism-filling-local-news-void>; Paul H., *Why Is Citizen Journalism Important?*, SIERRABEAR (Mar. 2, 2011), <http://www.sierrabear.com/> (search for “citizen journalism”; then follow “Why is Citizen Journalism important?”) (“Topics that may not have even made it into the local print publications have unlimited space to be published [on the Internet], something unheard of in traditional print models.”).
59. *See supra* Part I.
60. For example, Josh Wolf might not have revealed clips from his video on his blog if he had known that he would later be forced to reveal the unpublished portions. One might respond that many citizen journalists do not think about the privilege at all, and thus the privilege’s existence would not change citizen journalists’ behavior. However, it is precisely those citizen journalists who break the most important and controversial stories that are most likely to know and care about the privilege. *See* Neinas, *supra* note 25, at 242 (pointing out that those individuals who have the most resources and experience are “most likely to use the privilege”).
61. *See* Zerilli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981) (noting that “[u]nless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters”).
62. *See* John Nichols & Robert W. McChesney, *The Death and Life of Great American Newspapers*, NATION, Mar. 18, 2009, at 11 (“[N]ewspapers, as we have known them, are disintegrating and are possibly on the verge of extinction.”); *see also* Eliason, *supra* note 37, at 432 (“[I]n the modern media era, it would be hard to justify excluding Internet blogs and on-line news sites from the privilege: newspaper readership is declining, and more and more people today get their news from the Internet. If the purpose of the privilege is to encourage the free flow of information to the public, what rational basis could there be for a law that shields communications to a small local newspaper with a few hundred readers but de-

Treating citizen journalists differently from traditional journalists also raises First Amendment concerns. Freedom of the press protects the “lonely pamphleteer” just as much as the “large metropolitan publisher.”⁶³ Thus, as one commentator puts it, “creat[ing] two classes of First Amendment speakers . . . is difficult to square with First Amendment principles.”⁶⁴ These criticisms are too significant for Congress to ignore.

III. A BROAD FEDERAL SHIELD LAW

The preceding Parts have demonstrated that Congress should adopt a federal shield law that covers citizen journalists. This Part proposes that, in crafting the statute, Congress should look to states such as California and New Jersey, which have already adopted laws that protect many citizen journalists. First, this Part discusses two alternatives: a broad functional approach and the narrow approach taken in the Free Flow of Information Act of 2011. It then explains why an approach modeled after California’s and New Jersey’s laws would strike an appropriate balance between these two extremes.

A. A Functional Approach

Several early versions of the Free Flow of Information Act took a broad functional approach to the privilege, which would cover many citizen journalists. For example, in 2009, Senator Arlen Specter introduced a bill that would protect any “person who is engaged in journalism.”⁶⁵ This bill defined journalism as “the regular gathering, preparing, collecting, photographing, recording,

nies the privilege to the proprietor of an established political blog reaching hundreds of thousands of people each day?”). An additional reason for protecting citizen journalists is that, unlike traditional journalists who work for large mainstream media organizations, citizen journalists are unlikely to have easy access to the legal resources that may be necessary to litigate privilege claims. If citizen journalists are unable to invoke the privilege, they may be more likely to be bullied by prosecutors into handing over their newsgathering materials.

63. *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

64. Eliason, *supra* note 35, at 1368. For a more in-depth discussion of how treating traditional journalists differently from citizen journalists might create First Amendment issues, see, for example, Eliason, *supra* note 37, at 432-33 (“Giving the force of law to any such distinction [between traditional and nontraditional journalists] conflicts with the Supreme Court’s admonition that freedom of the press is a fundamental personal right belonging equally to the lowly street corner pamphleteer and to the large institutional media.”); and Eugene Volokh, Op-Ed., *You Can Blog, but You Can’t Hide*, N.Y. TIMES, Dec. 2, 2004, at A39 (“The First Amendment can’t give special rights to the established news media and not to upstart outlets like [blogs]. Freedom of the press should apply to people equally, regardless of who they are, why they write or how popular they are.”).

65. S. 448, 111th Cong. (2009).

writing, editing, reporting, or publishing of news or information that concerns . . . matters of public interest for dissemination to the public.”⁶⁶

Many scholars favor this approach, since it focuses on the purposes of the privilege without discriminating among different types of speakers.⁶⁷ Unfortunately, however, members of Congress have already considered and rejected this approach on several occasions, specifically because of the concern that it would cover “every self-appointed newsperson” and therefore become unworkable.⁶⁸ Thus, it seems highly unlikely that Congress would return to this approach in the future.⁶⁹

B. *The Free Flow of Information Act of 2011*

The most recently proposed federal shield bill, the Free Flow of Information Act of 2011, goes in the opposite direction, taking an exceedingly narrow approach to the reporter’s privilege. This bill would cover only individuals who gather or disseminate information to the public “for a substantial portion of [their] livelihood or for substantial financial gain.”⁷⁰ In other words, an individual would have to write for pay to be protected. This language would apply to some online writers (i.e., traditional journalists who publish their content on

66. *Id.*

67. Numerous scholars have put forth similar proposals. While these proposals vary widely, they all focus on whether an individual acts like a journalist. *See, e.g.,* Alonzo, *supra* note 28 (arguing that the privilege should cover anyone who has the intent at the beginning of the newsgathering process to disseminate information to the public); Berger, *supra* note 22 (anyone who follows certain editorial standards); Macrander, *supra* note 22 (anyone who produces a journalistic product); Papandrea, *supra* note 38 (anyone who disseminates information to the public); Shepard, *supra* note 36, at 215 (anyone who adheres to “journalistic ethics, norms, and practices”).

68. *Too Much Media, LLC v. Hale*, 20 A.3d 364, 368 (N.J. 2011); David Saleh Rauf, *Shield Law Showdown*, AM. JOURNALISM REV. (Sept. 2010), <http://www.ajr.org/article.asp?id=4959> (“Some lawmakers feared the original bill was too broad, granting potential protection to just about anyone who claimed to be a journalist.”).

69. *See* Neinas, *supra* note 25, at 242 (“[I]t is unlikely that [a] bill would have much success [in Congress] if the definition of a journalist is too broad.”). This approach faces an additional criticism: that it requires individuals to resemble “the ‘ideal’ journalist who is part of [the] traditional, mainstream media.” Papandrea, *supra* note 38, at 583. For example, Senator Specter’s bill, S. 448 111th Cong. (2009), would cover only individuals who, like traditional journalists, publish on a regular basis. As Part II showed, citizen journalists in many ways differ from traditional journalists, but it is not clear that they should be excluded solely because of these differences.

70. H.R. 2932, 112th Cong. (2011).

the Internet), but it would exclude citizen journalists, who by and large do not write for pay.⁷¹

This narrow approach clearly attempts to avoid the potential pitfalls of a broad shield law.⁷² For example, this type of law would be relatively simple to apply, and it might “prevent special interests from posing as journalists in order to hide behind the privilege.”⁷³ However, this approach focuses solely on the costs of the privilege at the expense of its many benefits. In excluding all citizen journalists, such a law threatens to stunt the valuable social functions that the privilege is meant to promote.⁷⁴

C. *The New Jersey/California Approach*

Thus far, federal lawmakers have failed to notice that a middle ground exists between the functional and narrow approaches. New Jersey and California have already adopted shield laws that would cover many citizen journalists without leading to unmanageable consequences.⁷⁵ For example, the New Jersey statute applies to any “person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public.”⁷⁶ This statute defines “news media” as “newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public.”⁷⁷ The California law applies to any person “connected with . . . a newspaper, magazine, or other periodical publication.”⁷⁸

These laws resemble the functional approach in that they cover individuals who engage in journalistic activities, such as gathering and disseminating news—but they also contain a crucial backstop. In recent cases, courts in each state have interpreted these shield laws as encompassing a “similarity standard,” requiring that any “other” means of disseminating information be similar to the

71. For example, a reporter or even a blogger for CNN.com who earns a salary would be covered, while an individual who earns a living as a computer programmer, but blogs about technology part-time without pay, would not be covered.

72. See *supra* notes 34-36 and accompanying text.

73. Neinas, *supra* note 25, at 241.

74. See *supra* notes 59-62 and accompanying text. This proposal also would not cover freelance journalists, whom most commentators agree should be protected.

75. N.J. STAT. ANN. § 2A:84A-31 (West 2012); CAL. EVID. CODE § 1070 (West 2012).

76. N.J. STAT. ANN. § 2A:84A-21. The New Jersey legislature enacted this law with the goal of making it “as broad as possible.” *State v. Boiardo*, 414 A.2d 14, 20 (N.J. 1980) (citing *In re Myron Farber*, 394 A.2d 330, 336 (N.J. 1978)).

77. N.J. STAT. ANN. § 2A:84A-21.

78. CAL. EVID. CODE § 1070.

traditional news media.⁷⁹ This principle was the key factor in *Too Much Media, LLC v. Hale*,⁸⁰ a case recently decided by the New Jersey Supreme Court. In this case, Shellee Hale, a citizen journalist who posted commentary on an Internet message board, attempted to invoke the New Jersey shield law to protect her confidential sources.⁸¹ Hale ostensibly engaged in the journalistic process: She conducted a “detailed probe” of an alleged security breach at a software company and published her findings on an Internet forum.⁸² However, the court determined that Hale was not entitled to protection because message boards “are not the functional equivalent of the types of news media outlets outlined in” the New Jersey law.⁸³

The *Too Much Media* court made clear, however, that the similarity standard *would* cover many other citizen journalists. The court explained that “[a] single blogger might qualify for coverage under the Shield Law provided she met the statute’s criteria.”⁸⁴ Since blogs resemble newspapers and magazines, there would be “no theoretical basis for treating [them] differently.”⁸⁵ In fact, a California court recently used this logic to hold that the California shield law covers bloggers.⁸⁶ By extension, the New Jersey/California approach would cover citizen journalists who disseminate information through Web radio, regular podcasts, and video-sharing platforms, because all of these media resemble traditional news media (specifically, radio and television).⁸⁷ Someone like Josh

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79. See, e.g., *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 103 (Cal. Ct. App. 2006) (interpreting the California shield law to cover a blogger because blogs are “analogous” to “other periodical publications”); *Too Much Media, LLC v. Hale*, 20 A.3d 364, 368 (N.J. 2011).
 80. 20 A.3d 364 (N.J. 2011).
 81. *Id.* at 367-68.
 82. *Id.* at 369.
 83. *Id.* at 379.
 84. *Id.* at 380.
 85. *Id.* (quoting *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 99 (2006)) (internal quotation marks omitted).
 86. *O’Grady*, 44 Cal. Rptr. 3d 72. Like the *Too Much Media* court, the *O’Grady* court interpreted California’s “other periodical publication” provision to refer only to means of publishing that are similar to traditional news media. *Id.* at 103 (explaining that the California law covers bloggers because blogs are “highly analogous to printed publications”).
 87. See *New Jersey Protections for Sources and Source Material*, CITIZEN MEDIA L. PROJECT, <http://www.citmedialaw.org/legal-guide/new-jersey/new-jersey-protections-sources-and-source-material> (last visited March 28, 2012). Indeed, the similarity standard is so appealing in part because it is so flexible. Rather than only and explicitly adding blogs to the list of covered media—as some commentators have proposed, see, e.g., Macrander, *supra* note 22—this approach leaves room for transformations in journalism, of which there will undoubtedly be more in the future.

Wolf, for instance, would be able to invoke the protections of a law conforming to this approach.

These laws' limiting principle, which looks to whether the medium through which an individual publishes is similar to the traditional news media, does not focus on shielding a particular group of speakers. Instead, it protects the vehicles of information that are best suited to carrying out the purposes of the reporter's privilege. The traditional news media and their electronic analogues are highly accessible to the public at large, and members of the public already turn to these sources to retrieve news.⁸⁸ Thus, citizen journalists who publish through these media clearly fulfill the functions that the privilege aims to protect.⁸⁹

In contrast, message boards and other online media through which citizen journalists might disseminate information—such as chat rooms, instant messaging platforms, and Facebook—do not facilitate the journalistic function in the same way. These media are conversational in nature, and they are less accessible to the public at large. For example, message boards are usually geared toward specific topics, and they often require users to create an account in order to read posts, while instant messages are viewable only to participants in a given conversation.⁹⁰ Excluding these media would not frustrate the purposes of the privilege in the same way that excluding citizen journalists as a class would. Indeed, rather than chill speech, the New Jersey/California approach simply encourages citizen journalists to disseminate information through certain media; those who wish to share news will publish it on a blog, for example, instead of on a message board.⁹¹

Furthermore, because this approach has already been adopted in several states, it overcomes the biggest criticism that has been lodged against other approaches: Despite its broad reach, this approach has not proven to be excessively costly. New Jersey's law has remained in place with the current language since 1977, indicating that if New Jersey has suffered social or economic costs at all,

88. See *Newspapers Face a Challenging Calculus*, PEW RES. CTR. (Feb. 26, 2009), <http://www.pewresearch.org/pubs/1133/decline-print-newspapers-increased-online-news> (explaining that online newspaper readership is growing rapidly while print readership is dropping).

89. See *supra* Part I.

90. See BOWMAN & WILLIS, *supra* note 39, at ch. 3. Similarly, Facebook and Twitter allow users to prevent the general public from viewing users' postings.

91. Skeptics might respond that distinguishing among "vehicles of information" is no better than arbitrary discrimination between different types of speakers—and they would have a point. Defining the contours of journalism may always involve drawing somewhat haphazard lines because journalism itself is not a fixed concept. But the New Jersey/California approach described herein more clearly comports with the First Amendment concept of freedom of the press than does distinguishing between traditional and citizen journalists, in that it does not shut out any individuals' voices—it simply incentivizes individuals to speak through particular channels.

they have not been unduly burdensome.⁹² In fact, there is no evidence to suggest that the law has hampered law enforcement efforts or caused an increase in litigation.⁹³ In addition, *Too Much Media* demonstrates that courts find the current language workable; that is, they are able to interpret it in a principled manner that does not cover “every self-appointed newsperson.”⁹⁴ Finally, given that several states have already experimented successfully with this approach, federal lawmakers should be much more willing to take this route (relative to the functional approach, for example).⁹⁵ Congress would be wise to follow New Jersey and California,⁹⁶ as these states’ shield laws promote the positive aspects of the privilege without leading to an onslaught of negative consequences.⁹⁷

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92. It is true that the framers of the New Jersey law probably did not mean to cover citizen journalists as we know them today since the legislature enacted the law in 1977. However, the framers did intend for the law to be “as broad as possible,” *State v. Boiardo*, 414 A.2d 14, 20 (N.J. 1980) (citing *In re Myron Farber*, 394 A.2d 330, 336 (N.J. 1978)), meaning that they likely meant for the law to be flexible and to cover various nontraditional journalists. The fact that current lawmakers have not repealed the law, moreover, suggests that the New Jersey legislature approves of its present language.
93. Cf. *Reporters’ Shield Legislation: Issues and Implications: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (testimony of Professor Geoffrey Stone) (noting that studies comparing criminal prosecutions in states with strong shield laws versus states with weaker shield laws have not shown noticeable differences in effectiveness of law enforcement). These broad shield laws may even aid the government in carrying out law enforcement because reporters may be more likely to publish stories revealing criminal activities if they are protected. See Robert A. Leflar, *The Criminal Procedure Reforms of 1936—Twenty Years After*, 11 ARK. L. REV. 117, 126 (1956) (noting that Arkansas’s adoption of the reporter’s privilege was “connected,” albeit indirectly, “with the enforcement of the criminal law”).
94. *Too Much Media, LLC v. Hale*, 20 A.3d 364, 368 (N.J. 2011).
95. See *supra* notes 68-69 and accompanying text.
96. Congress could model the federal shield law after the language of either the New Jersey law or the California law, or it could come up with new language that likewise encompasses a similarity standard. The federal shield law should also serve as a model for state shield laws. If states do not follow the federal model, citizen journalists could be left in a precarious situation: In many cases, the federal shield law will be more protective than a given state shield law, and yet the citizen journalists will not know *ex ante* whether she will be subpoenaed by a state or federal court. To avoid this scenario, states should adopt the language of the federal shield law, just as many states have done, for example, with the Federal Rules of Evidence. All of the arguments in this Comment apply just as strongly to the states as they do to the federal government.
97. It is important to keep in mind that these state shield laws, and the proposed federal shield laws, all provide qualified, *not* absolute, coverage. In other words, these laws prescribe situations in which law enforcement officials can overcome the privilege—for example, because an important national security issue is at risk or

CONCLUSION

Congress seems closer than ever to passing a federal shield law: The last two versions of the Free Flow of Information Act passed in the House of Representatives by a large margin.⁹⁸ This Comment has shown that, in refining such a law, Congress should ensure that citizen journalists receive protection just as similarly situated traditional journalists do. To achieve this goal, Congress should follow states such as New Jersey and California and adopt a broad shield law that would cover many citizen journalists. This approach would strike an appropriate balance between encouraging access to information and maintaining effective law enforcement.

to prevent imminent bodily harm. These limitations ensure that even a broad shield law would not block the most crucial information from getting into court.

98. See Press Release, Congressman Mike Pence, Pence Re-introduces Federal Media Shield Bill: Free Flow of Information Act (Sept. 17, 2011), *available at* <http://mikepence.house.gov/> (search for “federal media shield bill”; then follow “9-17-2011 - Pence Re-introduces Federal Media Shield Bill: Free Flow of Information Act”).

