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REPORTERS IN PRACTICE: THE ROLE OF PRIVILEGE IN CONTEMPORARY
JOURNALISM

by

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A Dissertation submitted to the
Graduate School-New Brunswick
Rutgers, The State University of New Jersey
in partial fulfillment of the requirements

for the degree of

Doctor of Philosophy

Graduate Program in Communication, Information and Library Science

written under the direction of

Dr. Susan Keith

and approved by

New Brunswick, New Jersey

[October, 2012]

ABSTRACT OF THE DISSERTATION

Reporters in Practice: The Role of Privilege in Contemporary Journalism

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Journalists often take the position that confidential sources should remain anonymous. One tool journalists invoke when pressure is exerted by the government to reveal a source's identity is reporters' privilege, basing this right on the First Amendment, which protects freedom of speech and the press. Yet the interpretation of exactly what this Amendment promises is much debated.

Studies on reporter's privilege and shield laws usually focus on three arenas: historical developments (Allen, 1992), analysis of legislation and court cases (Fargo, 2006-c; Fargo, 2002; Schmid, 2001) and whether the First Amendment promises privilege at all (Marcus, 1983). Little research, however, looks at reporter's privilege and shield laws through the eyes of practitioners and whether they think the threat of source exposure corrupts the newsperson's ability to inform the public, thus hurting free speech. Similarly, there is little research on how the mainstream news media frame reporter's privilege and shield laws and what the public thinks of them.

The first purpose of this dissertation is to understand journalists' perceptions of the importance of the reporter/anonymous source relationship and whether they think the threat of revealing sources alters the newsgathering process by interviewing

journalists who went to jail rather than expose their sources. The second goal is to understand how reporter's privilege and shield laws are portrayed to the public by looking at the frames four major metro newspapers, in different geographical regions, used in their editorial pages when discussing reporter's privilege and shield laws over the span of 38 years, starting in 1972, the year of the pivotal Supreme Court decision in *Branzburg v. Hayes*¹. The findings may provide insight into how the media explain such issues to the public and how the media establishment can better construct their narratives to educate its audience on such concerns.

The last purpose is to suggest how the public may understand the issues of shield laws and reporter's privilege through the media they consume. The findings from focus groups conducted with three demographic groups—students, baby boomers, and seniors—provide insight into how the public may perceive and misinterpret such issues, and how media institutions can better educate the public on shield laws and reporter's privilege.

¹ The idea of a federal shield law has been a much-talked about media topic since the U.S. Supreme Court's ruling in *Branzburg v. Hayes* (1972), a pivotal case in how the courts look at reporter's privilege where a 5-4 ruling deemed that journalists do not have a First Amendment right to refuse testimony before a grand jury.

Dedication and Acknowledgements

Dedicated to Ruben Quintero and my children, Ariane, Estela, Kira and Carter

Acknowledgements

Special thanks to my dissertation adviser, Dr. Susan Keith, and my committee members:

Dr. Barbara Fowles, Dr. Montague Kern, and Dr. John Pavlik.

Thanks to Erin Christie and Dr. Elizabeth Wollman for their unflagging support.

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Introduction

“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.”

—The First Amendment of the Constitution

Throughout history, journalists and the governments they cover often have engaged in contentious relationships—although certain administrations seem to have hindered the media more than others. One point of conflict comes when the government insists that journalists reveal their sources in court cases. For the news media, maintaining promises to confidential sources, a term used by reporters to describe unidentified individuals from whom they get information for stories, is paramount since they believe violating such trust not only breaks basic tenets of journalism, but could potentially prevent sources from coming forward in the future. When secrecy and obfuscation hinder fact-finding, some journalists contend the only way to uncover certain information is through such confidential sources. As Elrod (2003) frames it, “The difficulty is that ordinary citizens are limited to the information that the media makes available” (pp. 122). Without access to whistleblowers (insiders who give information about their institution, often to the news media), a reporter’s ability is hampered, sometimes to the extent that the truth cannot surface. Because of this belief in the value of confidential sources, some journalists will go to great lengths to protect them—including serving jail time in lieu of exposing their sources.

Various governmental administrations have impinged on this conviction of the news media. For example, Richard Nixon employed several methods of controlling information disseminated by news organizations, including hiring “plumbers,” people who tried to plug leaks within the White House and Congress (Do journalists need a better shield?, 2004), and subpoenaing dozens of journalists in the late 1960s and early 1970s (Schmid, 2001). In fact, the administration even attempted to discover the identity of “Deep Throat,” the source journalists Bob Woodward and Carl Bernstein used in their series of *Washington Post* articles on Watergate (“Do Journalists Need a Better Shield?,” 2004). At one point, Woodward and Bernstein gave all their notes to then-publisher Katharine Graham in a strategy they called the “grandmother defense” since she was in her 60s. As Bernstein said in a Frontline TV special, “As [Ben] Bradlee² said, ‘Wouldn’t that be something? Every photographer in town would be down at the courthouse to look at our girl going off to the slam.’ And Mrs. Graham was ready to go to jail because she understood the principle” (“Secrets, Sources & Spin,” 2007). The tactic wasn’t needed, however, because U.S. District Judge Charles Ritchey dismissed the subpoenas (“Do Journalists Need a Better Shield?,” 2004).

The administration of George W. Bush often battled with the press about the access to information—and the position of whistleblowers—as intently as in the Nixon era (Shaw, 2005). From 2001-2008, the U.S. government actively pursued journalists and their confidential sources, threatening to impose hefty punishments on individuals who released information deemed classified or imperative to national security. In 2006, *The Washington Post* revealed that in attempting to limit classified information leaks, the Bush administration had targeted journalists and their government-based sources,

² Then executive editor

intimidating them by saying that publication of information deemed to harm national security could result in jail time, with journalists being prosecuted under the 1917 Espionage Act (Eggen, 2006). Although that never occurred, several administration officials insinuated that when *The Washington Post* and *The New York Times* published stories on secret prisons in Eastern Europe³ and undercover surveillance of Americans⁴, that legal ramifications could occur. Such specific threats are troubling. As Stone (2006) said, “They must...be taken seriously. Not because newspapers are really in danger of being prosecuted, but because such intimidation is the latest step in this administration’s relentless campaign to control the press and keep the American people in the dark.” This type of pressuring also takes the forms of subpoenas —something that is increasing for journalists. According to a 2001 study by The Reporters Committee for Freedom of the Press (RCFP), 823 subpoenas were served on 319 news organizations surveyed in 2001. The RCFP estimated that applying that data to the about 2,300 news media institutions nationwide would equal roughly 5,930 subpoenas—an average of almost 2.6 per group, for that year (Reporters Committee for Freedom of the Press, 2012). The situation hadn’t changed much a few years later when Daglish (2004) said, “Nearly every major media company in the country is fighting at least one subpoena from a federal prosecutor” (p. 1).

It is hard to know for certain how many subpoenas are currently circulating; even when numbers are divulged they may not tell the entire story. For example, in 2006,

³ *The Washington Post*’s Dana Priest won the 2006 Pulitzer Prize for Beat Reporting while covering this story. Her articles include (Priest, 2005): “CIA Holds Terror Suspects in Secret Prisons: Debate is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11” and “Foreign Network at Front of CIA’s Terror Flight: Joint Facilities in Two Dozen Countries Account for Bulk of Agency’s Post-9/11 Successes.”

⁴ *The New York Times* ran “Bush Lets U.S. Spy on Callers Without Courts,” on December 16, 2005 (Risen & Lichtblau), among other articles and editorials.

2010, and 2011, the RCFP filed Freedom of Information requests with the Department of Justice, and learned that the U.S. attorney general had approved 89 requests for media subpoenas from 2001 to 2010 (Reporters Committee for Freedom of the Press, 2012). Although this number was lower than the number of subpoenas reported in the 2001 survey, this information does not include online content providers. The Citizen Media Law Project, which tracks subpoenas aimed at such parties, notes on its online database that more than 70 subpoenas were issued since 2002. The actual number is probably higher since so many of these type of cases rarely become public (Citizens Media Law Project, 2012).

Even during Bill Clinton's more media-friendly presidency (1993-2001), freedom of the press was hindered by threats to the reporter-confidential source relationship. As Lee noted in 1999:

Attempts by prosecutors and other lawyers to learn the identities of confidential sources and to obtain other unpublished information were once routinely rejected. Today, however, judges are granting these requests with alarming frequency. Reporters in California and North Carolina are awaiting appellate court decisions to learn whether they must disclose their confidential sources or serve jail sentences. A reporter in Georgia was ordered to testify about an interview subject's mental state. A Pennsylvania court required a reporter to surrender his notes from an interview. A New Orleans television station was one of several stations across the country ordered to provide lawyers with unaired portions of interviews. Several newspapers also were forced to turn over unpublished photographs, including the Casper, Wyo., *Star-Tribune* (para. 6).

The presidency of President Barack Obama started in a promising manner when the new president emphasized the importance of an open government in a January 21, 2009 ceremony, saying, "Transparency and the rule of law will be the touchstones," before signing new executive orders that could facilitate quicker responses to Freedom of Information Act (FOIA) requests (Columbia Journalism Review Campaign Desk, 2009).

During his campaign, President Obama even said he supported shield laws for reporters (Johnson, 2008). Despite this promising beginning, however, some would argue the Obama administration has not always been friendly to First Amendment issues and supported such things as mandating that businesses offer insurance coverage for birth control (Rosenthal, 2012), the DISCLOSE Act⁵ (Klukowski, 2010) and the renewal of the PATRIOT Act⁶ (Hudson, 2011). Additionally, the Obama Administration has charged six individuals (Harris, 2012) with leaking classified information, including Bradley Manning, who allegedly released confidential documents to WikiLeaks founder Julian Assange, former CIA official Jeffrey Sterling for allegedly giving information to *New York Times* reporter James Risen, and Steven Kim, a state department analyst, for supposedly giving a reporter secret material about North Korea (Benjamin, 2011). Using the Espionage Act to press charges, the Obama Administration exceeded the number of prosecutions conducted in all of the previous presidencies combined (Mayer, 2011).

Privilege and the First Amendment

One tool journalists invoke when pressure is exerted by the government, big business, or other institutions to expose confidential sources is reporter's privilege—the idea that the First Amendment insures the right of journalists to maintain sources' confidentiality—which, in turn, protects freedom of speech and the press. Yet the interpretation of exactly what the First Amendment promises is much debated. Many journalists insist that they, acting as a fourth estate, have a constitutional right to protect their sources under the idea that to preserve freedom reporters need to collect information

⁵ The DISCLOSE Act forces corporations to disclose political spending (DISCLOSE Act, 2012).

⁶ The USA PATRIOT ACT (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (H.R. 3162) was introduced in 2001. It incorporated two earlier anti-terrorism bills: H.R. 2975 and S. 105 also passed in 2001 (<http://thomas.loc.gov>).

from sources who can speak the truth without fear of retribution from their employers, society, or the government. Consequently, reporter's privilege is imperative to fostering investigative journalism and maintaining democracy (Wirth, 1995; Siegel, 2006). The function of the press, after all, is to keep the public informed of important matters through fair, in-depth, and accurate reporting—and sometimes that requires using anonymous sources. Although confidential sources can be overused, they can allow essential information to enter the public sector, and help the news media fulfill their watchdog function, uncovering malfeasance as they expose governmental or big business abuse of power.

Reporter's privilege also helps journalists maintain credibility with their sources and the public, supporters argue. "If the public begins to see the media not as a watchdog, but as an arm or extension of law enforcement, it will begin to distrust both journalists and the stories they produce," Walker (2005, para. 1220) asserted. Privilege, many also argue, is imperative to fostering investigative journalism and maintaining democracy (Wirth, 1995; Siegel, 2006). In fact, the *San Francisco Chronicle* admitted in March 2007 that editors abandoned at least three stories regarding government activity solely because of the "hostile legal environment" toward confidential sources (Yen, 2007). What makes all this even more complex, though, is that privilege can conflict with the Sixth Amendment, which guarantees each citizen a fair trial with the right to compel witnesses to testify on his or her behalf. This makes honoring privilege problematic.

Although journalists argue that it is important for reporters to be able to promise confidentiality, it is also necessary for them to comply with the legal system (Pember, 2006). As Meiklejohn (2003) said, "Political freedom does not mean freedom from

control” (pp. 9). Perhaps the potentially high price journalists pay for protecting their sources—going to jail for contempt of court—is fair. Breaking the law, after all, is breaking the law. Meiklejohn illustrates this with a story about Aristotle, who chose to teach subjects outlawed in Athens. “No official, no judge ... may tell me what I shall or shall not, teach or think,” he quotes Aristotle as saying (pp. 10). However, Aristotle also admitted that the government then had a legal right to kill him as punishment for his actions. Still, the consequences of journalists revoking confidentiality are great: Once journalists break such promises, sources forfeit trust and a valuable information tool may be lost. Punishing a journalist who honors the promise of confidentiality—despite subpoenas—seems unfair to many, especially when it’s an important story that could benefit the public.

History and the Current State of Shield Laws

The first federal shield bill⁷ was introduced in 1929, and more than 100 bills have been proposed and discarded since then (Daglish, 2004). The first major push for a federal shield law occurred after *Branzburg v. Hayes* (1972), when 99 bills were introduced from 1973 to 1978. The question of who is a journalist partly hurt the legislation (Lydon, 2005, pp. 14) as indicated by an analysis of the bills introduced in the ’70s and ’80s by The Reporters Committee for Freedom of the Press, which found that federal shield law bills never got far because journalists and lawyers couldn’t agree if a federal law should have “absolute privilege from compelled disclosure (the traditional Reporters Committee position) or is a qualified privilege an acceptable compromise? Who do we consider to be a journalist? If we go to Congress asking for a privilege, will

⁷ To enhance journalists’ protection, some states have adopted shield laws, legislation that offers limited protection to journalists asked to expose their sources (VanArsdall, 2005, pp. 15).

lawmakers use it as an excuse to legislatively regulate the press?” (Daglish, 2004, p.1). A 1973 article in *Columbia Journalism Review* about federal shield law bills also noted, “This threshold question—of who should receive shield law protection—poses most disturbing moral, political, and legal problems, which could easily fragment the media” (Graham, 1973, pp. 28).

In recent years, though, as the jailing of journalists for protecting sources’ anonymity has garnered media attention, the importance of privilege and a federal shield law has circulated through Congress. Since 2004, six federal shield bills have floated around without making much progress. Sen. Christopher Dodd (D-Conn.) proposed the first of this collection, the Free Speech Protection Act of 2004 in December of that year, near the end of the 108th Congress, and it was not acted on. Reps. Mike Pence (R-Ind.) and Rick Boucher (D-Va.) followed this in the House of Representatives with the Free Flow of Information Act of 2005. A few days later, Sen. Richard Lugar (R-Ind.) spearheaded an identical Free Flow of Information Act of 2005 in the Senate. Both died while in committee. Lugar also introduced the Free Flow of Information Act of 2006 in the Senate. The bill received bipartisan support, but it never passed out of committee (Soja, 2007, pp. 7).

In October 2007, though, history was made when the U.S. House of Representatives passed a federal shield law proposal for the first time, overwhelmingly supporting the “Free Flow of Information Act of 2007” 398 -21 (Williamson, 2007). According to Rep. Mike Pence (R-Ind), one of the co-sponsors of the bill, the Free Flow of Information Act was essential to fix “a tear in the fabric of the First Amendment freedom of the press” (Reporters Committee for Freedom of the Press, 2007). The Justice

Department argued, though, that such a law could hurt national security as well as criminal investigations, and although a Senate version of the bill passed through the U.S. Senate Judiciary Committee with a 15-2 vote, it never was scheduled for a full Senate vote (Broache, 2007). On March 31, 2009, the U.S. House passed H.R. 985, the Free Flow of Information Act, sponsored by Rep. Frederick Boucher (D-Va.)—but the bill died. The Free Flow of Information Act of 2011, H.R. 2932, introduced by Rep. Pence on September 14, 2011, also never got out of committee (Media Law Resource Center, medialaw.org).

Those in favor of reporter's privilege feel that the news media should be able to promise confidentiality without legal consequences. In some part, state governments support this; As of 2011, there were shield laws in 39 states and Washington D.C. (Reporters Committee for Freedom of the Press, 2011). Additionally, other states recognize privilege through common law or other statutes—only Wyoming offers no protection (Eliason, 2006; Penrod, 2005).

Reporters subpoenaed in federal court cases, however, are not protected from revealing sources because there is no federal shield law. Several federal appellate courts do embrace the idea of reporter's privilege though and recognize its contribution to journalistic fact-finding. For example, in *Baker v. F & F Investment*, the Second U.S. Circuit Court of Appeals said, in an opinion written by Circuit Judge Irving R. Kaufman, that forcing source disclosure “unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis” (*Baker v. F & F Inv.*, 1972).

As this legislative history demonstrates the idea of implementing a federal shield law is full of controversy. Even those who favor such legislation debate what it should provide: Should a federal shield law offer absolute (in all circumstances) or qualified (limited) privilege? Who should be considered a journalist under such a law? Someone who works fulltime with a media institution? Freelance journalists or bloggers? What would be covered? In recent years, journalists invoking privilege have sought to protect not only sources' identities, but also notes, emails, and any written/oral materials considered confidential. Not all journalists, though, advocate such a law; some believe that a federal shield law would limit rather than increase freedom of the press (Eliason, 2006; Killenberg, 1975). For example, a law that protects only journalists working for a traditional media outlet would not cover new ways of newsgathering, such as citizen journalism or blogging by those outside the mainstream media. As the ramifications of the 2008-2009 financial crisis, and its effect on the media industry become more apparent, this definition could be of paramount importance. According to the State of the News Media Report (2009) produced by the Pew Research Center's Project for Excellence in Journalism, "Power is shifting to the individual journalist and away, by degrees, from journalistic institutions. The trend is still forming and its potential is uncertain but the signs are clear. Through search, e-mail, blogs, social media and more, consumers are gravitating to the work of individual writers and voices, and away somewhat from institutional brand." Even as the media recovered in 2011, the State of the News Media report (2011) acknowledged, "When the final tallies are in, we estimate 1,000 to 1,500 more newsroom jobs will have been lost—meaning newspaper newsrooms are 30% smaller than in 2000."⁸ 2011 also marked the first year more people admitted to

⁸ It should be noted that some of these jobs were replaced by online positions, as the report said, "Together

using the web over a newspaper as the source for their news. As the old media morph into different ways of newsgathering and dissemination, it is imperative that the journalists of the future are protected.

Given the long legislative history of shield laws, it is not surprising that studies on reporter's privilege and shield laws usually cover historical developments (Allen, 1992), analysis of legislation and court cases (Bates, 2010; Fargo, 2006-a; Fargo, 2006-b; Saperstein, 2005; Fargo, 2002; Schmid, 2001), why journalists need a federal shield law (West, 2009; Elrod, 2003; Knox, 2005), how privacy legislation impacts privilege and the newsgathering process (Calvert, 2005) and who should be defined as a journalist (Peters, 2011; Salkin, 2011; Docter, 2010). Little of this research looks at the issue through the eyes of practitioners—the reporters, editors, and bloggers who produce the news—or at whether they perceive the threat of source exposure corrupts the newsperson's ability to inform the public, thus hurting free speech. Nor does the literature discuss how the media portrays shield laws and reporter's privilege or what the public knows about the subjects, and whether they support shield laws and reporter's privilege.

Dissertation Purpose

The purpose of this dissertation is to examine the human narratives of reporter's privilege and shield laws. In particular, this research seeks to explore personal narratives and newspaper coverage for insight on how reporter's privilege issues are framed for public consumption, how reporters perceive the threat of subpoenas change the newsgathering process, and how the public understands the issue. The dissertation will first report on an interview study with journalists who faced contempt of court charges

these hires come close to matching the jobs in 2010 we estimate were lost in newspapers, the first time we have seen this kind of substitution.”

for protecting confidential sources as well as others in the industry—including scholars who specialize in First Amendment rights—with the goal of gathering evidence about whether (and, if so, how) being jailed:

- Affects journalists' perceptions of the journalist-source and reporter-media institution relationship;
- Changes the way, in the reporters' perception, the media practice journalism;

Next, the dissertation reports on a study of how four U.S. metropolitan newspapers—the *New York Times*, *Washington Post*, *Chicago Tribune*, and the *Los Angeles Times*—framed shield laws, reporter's privilege and coverage of jailed journalists in their editorial sections, which were used since it showcases the opinion of the public, the newspaper, and its columnists rather than news articles that normally intend to present a fair and balanced representation of events. The goal of this research was to see how such issues have been covered and consequently portrayed to the public.

Finally, the dissertation reports on a focus group study that examined how members of the public feel about reporter's privilege and shield laws. This section offers general perspectives on how students, baby boomers, and seniors may understand shield laws and reporter's privilege and whether they support them.

Ultimately, using interviews, framing analysis, and focus groups, this dissertation attempts to understand the importance of the reporter/anonymous source relationship, how reporters and others perceive the threat of revealing sources alters the newsgathering process, and how the coverage of the journalist/informant relationship is framed for the public.

This dissertation begins with a brief discussion of the doctrine of privilege and why its supporters say laws that back it are needed. The second section covers background information on the issue, including the history of privilege, the philosophical importance of free speech and the journalistic ethics that guide reporter-source relationships. It also looks at the traditional definition of a journalist is and how that is changing. This is something that is important since many state shield laws still cling to a traditional definition that favors legacy media entities and ignores news types of information-sharing, such as blogging and citizen journalism. Next, this chapter details the current literature on federal shield laws and reporter's privilege and explains the research questions that guide this project. Later chapters explain the dissertation methods, findings, and conclusions.

The Background of Privilege

Tracing the history of privilege from First Amendment Theory to the marketplace of ideas to the evolution of the news media's watchdog role.

Historically, privilege—a word that comes from common Latin: *primus* (private) and *legium* (law) (Bates, 2000)—is derived from common or statutory law. Privilege allows parties to keep their conversations confidential. Some relationships in addition to source-journalist that are considered inherently privileged include doctor-patient, husband-wife, and attorney-client (Lauderdale, 2005), with the last two having their foundations in English Common Law (Schmid, 2002).

The doctrine of a reporter's right to privilege is more than 150 years old. The first recorded U.S. case occurred in 1848 when John Nugent of the *New York Herald* refused to reveal the source of a secret draft treaty with Mexico. Nugent was charged with contempt of Congress and, subsequently, jailed. During Nugent's imprisonment, the *Herald* stood behind the reporter, even doubling his salary during his confinement while he filed articles for publication from his cell. Eventually, the Senate freed him (Bates, 2000). During the 19th century, similar cases followed, with other journalists refusing to testify in front of Congress (Gordon, 1998, p. 295).

The first shield laws—legislation that guaranteed journalists various forms of privilege—were passed in the late 1800s and early 1900s. Maryland adopted the first in 1896, after a *Baltimore Sun* reporter, John Morris, refused to divulge his source to a grand jury and was jailed for two days (Siegel, 2005). Seven other states passed similar

laws in the 1930s, and three more in the 1940s. A federal shield law was proposed in 1929, but was unable to get enough votes to pass (Bates, 2000).

Journalists began championing privilege as a First Amendment right, guaranteed in the press clause, in the late 1950s. The first case that used the First Amendment as a defense was *Garland v. Torre* in 1957. Marie Torre, a columnist for the *New York Herald Tribune*, quoted an unnamed CBS executive as saying actress Judy Garland was upset over her weight. Garland sued CBS for \$1.4 million, charging libel and breach of contract (Today, Garland probably would not be able to successfully sue for libel since public figures need to prove actual malice.).⁹ During the suit, Torre said if she revealed her sources, her ability to cover stories would evaporate as her informants disappeared. Ultimately, the judge jailed her for 10 days (Bates, 2000). As Gordon (1998) noted, “In *Torre*, as in most journalistic confidentiality cases, the news medium was not directly involved. Rather, the journalist was asked the identity of sources who might be useful witnesses but who had provided information under a promise that their identities would not be revealed” (p. 295).

The most important court case to date regarding privilege is the Supreme Court’s 5-4 decision in *Branzburg v. Hayes* that a reporter’s right to refuse grand jury subpoenas based on privilege was not protected by the First Amendment. The case consolidated four lower court cases, two of which involved a Louisville *Courier-Journal* reporter, Paul

⁹ *New York Times v. Sullivan* (1964) involved an elected official in Montgomery, Alabama, who sued the *New York Times*, claiming that an advertisement, entitled “Heed Their Rising Voices” and published on March 29, 1960, libeled him though it did not mention him by name. When the lawsuit made its way to the U.S. Supreme Court, the justices ruled that libel suits by public officials needed show that the defendant acted with actual malice—that the publisher of the information under scrutiny had knowledge that the statement was false and still disseminated it or acted with reckless disregard for the truth when presenting the story (Parkinson, 2006). The U.S. Supreme Court later extended the actual malice standard to public figures, like Garland, in the consolidated cases of *Curtis Publishing Co. v. Butts* and *The Associated Press v. Walker*, 388 U.S. 130 (1967).

Branzburg, who wrote stories in 1969 and 1971 about hashish manufacturing and illegal drug use and was subsequently subpoenaed by two different grand juries. He refused to disclose his source, citing privilege under the U.S. and Kentucky state constitutions as well as Kentucky law (*Branzburg v. Hayes*, 1972). The third case involved a Massachusetts reporter/photographer, Paul Pappas, who, in 1970, visited Black Panther headquarters but never wrote about the experience. The final case, *Caldwell v. U.S.*, involved Earl Caldwell of *The New York Times*, who was also covering the Panthers (*Branzburg v. Hayes*, 1972).

Justice Byron White wrote the 5-4 majority opinion of the Court, joined by Justice Warren Burger, Justice Harry A. Blackmun, Justice Lewis F. Powell and Justice William H. Rehnquist. Four justices (Potter Stewart, William J. Brennan, William O. Douglas, and Thurgood Marshall) sided with the press, writing that it deserved qualified privilege because it fulfilled a watchdog role. Judge Potter Stewart constructed a three-part balancing test that considered the following: the relevance and need for information from the media by the defendant; whether the defendant can get the same information elsewhere; and whether the reporter in question actually has the needed information. In their dissent, Brennan and Marshall agreed with Judge Stewart's proposed test, rephrasing it to say that before a journalist was forced to reveal his or her sources, the government must show the following: "(1) probable cause to believe that the newsman has information clearly relevant to a specific probable violation of law, (2) that the information cannot be obtained by alternative means less destructive of First Amendment rights, and (3) a compelling and overriding interest in the information" (*Branzburg v.*

Hayes, 1972). Stewart also asserted that a reporter does have the constitutional right to protect a source.

What makes the case ambiguous, though, is that Justice Lewis F. Powell Jr., who voted with the majority against the media, filed an enigmatic separate opinion that made a case for qualified reporter's privilege, warning that without it, the press could be undermined and that such claims should be looked at on a case-by-case basis. As he said, "The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct" (*Branzburg v. Hayes*, 1972).

Because of this, some interpret *Branzburg* as recognizing a qualified reporter's privilege. This concurrence provided wiggle room that the press has used as supporting qualified privilege ever since (Murphy, 2003). Some lower courts refer to the *Branzburg* decision as a plurality and state that Powell's opinion actually conflicts with Justice White's (Daglish, 2005, pp. 31). Many lower courts have sided with Stewart's dissent, especially in civil cases, such as 1972's *Baker v F&F Investment*, which the Supreme Court declined to review, "thus giving tacit approval to the use of Stewart's dissenting test as precedent" (Gordon, 1998, p. 295). The highest court considered just one other case regarding privilege, *Cohen v. Cowles Media*¹⁰ (1991), where the justices decided (5-4) that when an editor breached a reporter's confidentiality pledge to a source because the identity was newsworthy, the publication violated an oral agreement. The First Amendment did not free the press from legal obligations (*Cohen v. Cowles Media*).

¹⁰ Although this case involved privilege, it was considered more of a dispute regarding breach-of-contract than First Amendment issues (O'Neill, 2001).

Still, the vote in *Branzburg* still confounds people today. Lucy Dalglish, the executive director of the Reporters Committee for Freedom of the Press, said, in a *Nieman Reports* article that *Branzburg* was “one of those exasperating 4-1-4 decisions that can only lead to confusion and creative layering” (Dalglish, 2005, pp. 31). At the time of the decision just 19 states had legislation that protected journalist’s privilege (Campagnolo, 2002), so one could hypothesize why the Court voted as it did—why honor a federal shield law at a time when so few states with their own shield laws existed? Since 1972, courts have interpreted the *Branzburg* decision differently, with some believing it supported a qualified reporter’s privilege and others seeing it as an absolute refusal to recognize privilege (Campagnolo, 2002).

Branzburg and Its Effect on Journalists in the Miller/Cooper Case

Since *Branzburg*, the Supreme Court has not looked at reporter’s privilege in a substantive way again, and even refused to hear appeals from *Time Magazine*’s Matt Cooper and *The New York Times*¹¹ Judith Miller during the Valerie Plame leak investigation in 2004, when a federal prosecutor asked the two reporters to divulge their sources. This very visible reporter’s privilege case involved Plame, a CIA operative whose identity was disclosed in a nationally syndicated column written by Robert Novak¹². Some say the disclosure was a vendetta against Joseph Wilson IV (Conery, 2009), a retired diplomat and Plame’s husband, who, in a July 6, 2003, Op-Ed for *The New York Times*, accused the Bush administration of misrepresenting intelligence that said Saddam Hussein tried to buy uranium from Niger in order to begin a nuclear weapons program in Iraq (Wilson, 2003). How Novak received such information was a

¹¹ Both Cooper and Miller subsequently left those media institutions.

¹² “Mission to Niger” was published on July 14, 2003.

point of contention because of a law that prohibits the naming of an undercover intelligence operative.

Interestingly enough, Novak, who died in 2009, never faced a subpoena in the grand jury investigation headed by Special Counsel Patrick Fitzgerald, the federal investigator on the case. Several other reporters did, however, including Walter Pincus and Bob Woodward from *The Washington Post*; Tim Russert of NBC, who died in 2008; *Time Magazine*'s Matt Cooper; and *The New York Times*' Miller, who merely had made notes about the information; she never actually wrote anything on the case that was published. Both *The Washington Post* and NBC believed that the situation could not involve a privilege issue since there was no federal shield law¹³ (Auletta, 2005) and began negotiating with Fitzgerald on what questions they would willingly answer (Jaffe, 2005). The *Post* also negotiated with Fitzgerald on what questions the prosecutor could not ask (Jaffe, 2005).

Reporters Cooper and Miller¹⁴ took another route and refused to testify, unwilling to compromise their source's confidentiality. Initially, *Time* and *The New York Times* chose to support these decisions. Even after the U.S. Court of Appeals for the District of Columbia ruled against Cooper and Miller, the two media institutions stood by the reporters as they appealed to the U.S. Supreme Court (Auletta, 2005).

Still, there were doubts if this was the right course. In a *New Yorker* article, then-*Times* Executive Editor Bill Keller admitted to some misgivings on *The Times*' stance when he saw the position the *Washington Post* took on the issue and after the Court of

¹³ State shield laws were not applicable since this was a federal case.

¹⁴ Judith Miller also wrote a 2001-2002 series of stories for *The New York Times* about Iraq having weapons of mass destruction, a claim the Bush Administration used as a reason to engage in the Iraqi War in 2003 (Foer, 2005).

Appeals ruling (Auletta, 2005). *Time* magazine would eventually stop their fight, with the publication eventually giving Fitzgerald Cooper's notes and emails, despite the reporter's objections (Phelps, 2006). Miller eventually spent 85 days in jail before her source, Vice Presidential Chief of Staff I. Lewis "Scooter" Libby, signed a waiver releasing her from confidentiality (Natta, 2005).

As Fitzgerald called a series of high-profile reporters to testify in his initial investigation of who exposed the federal agent's identity, and the subsequent I. Lewis "Scooter" Libby trial on perjury, obstruction of justice and other charges, the general public got an unprecedented glimpse of how reporters formed and nurtured the journalist/source relationship as well as how the newsgathering process worked. In an age where transparency is valued, journalists face a difficult decision when subpoenaed by a grand jury: testify or go to jail. The Plame case forced journalists to come forward because legislation does not exist to protect reporters in federal courts. This case was additionally problematic because of the Intelligence Identities Protection Act of 1982, which makes revealing the identity of a covert operative a criminal act (Eu, 2005).

Other prominent examples of journalists being caught between courts and sources include the subpoena issued in January 2008 to *New York Times* reporter James Risen demanding that he reveal his sources for a chapter in his 2006 book, *State of War*, where Risen asserted that the CIA had attempted and failed to penetrate Iran's nuclear program. As of April 2012, Risen is still fighting the subpoena (Healy, 2012). Risen and five others (Jeff Garth, *The New York Times*; Bob Drogin, *The Los Angeles Times*; Pierre Thomas, CNN; Josef Herbert, Associated Press, Walter Pincus, *The Washington Post*) were also subpoenaed (Reporters Committee for Freedom of the Press, 2009) in the trial of Wen Ho

Lee, a Los Alamos scientist accused of spying for the Chinese, to reveal confidential sources used during 1999 coverage of Lee (Liptak, 2004). After being held in contempt during Lee's civil suit (Lee v. Department of Justice, 2000) accusing the government of privacy violations, Drogran, Herbert, Risen and Thomas requested that the U.S. Supreme Court review the case. Before that could happen though, Lee settled with the U.S. government in 2006, with the news media sharing in the settlement, contributing \$750,000 (Reporters Committee for Freedom of the Press, 2009).

According to *New York Times* onetime Executive Editor Bill Keller, in a *Washington Post* article, "There's a tone of gleeful relish in the way they talk about dragging reporters before grand juries, their appetite for withholding information, and the hints that reporters who look too hard into the public's business risk being branded traitors." (Eggen, 2006, p. 1). As reporters continue to be subpoenaed and go to court to protect their sources, the question of whether a First Amendment right to reporter's privilege exists and to what extent will continue to be explored.

Philosophical Perspectives on Free Speech

Free speech theory, developed from the First Amendment (and the idea of a free press) and the Fourteenth Amendment (which guarantees that states cannot subvert constitutional speech rights), can help make sense of some of the confusion surrounding reporter's privilege. A variety of other scholars and activists, such as British philosopher John Locke, U.S. Supreme Court Justice Oliver Wendell Holmes, Supreme Court Justice Louis Brandeis, and judge and judicial philosopher Learned Hand offer theories on free speech, which embrace the discussion on what freedom of expression was in the past,

how it evolved from common law to constitutional concepts, and what it should be today (Reed, 1997, p.3).

According to Johann Gottlieb Fichte (1762-1814), there's a delicate balance between a nation's rules and free speech, and the ruling establishment should not hamper an individual's intellectual development: "You thus have no rights at all over our freedom of thought, you princes; no jurisdiction over that which is true or false; no right to determine the objects of our inquiry or to set limits to it; no right to hinder us from communicating its results, whether they be true or false to whomever or however we wish (Fichte, 1996, pp. 136)." Ultimately, when speech is restricted and open discussions cannot be maintained, it is difficult to find truth and produce an enlightened citizenry. Yet, the public and the government can have a symbiotic relationship. In the end, the government benefits from protecting human rights and people profit from a government that leads them in this way: "In soil thus prepared, good will easily prosper. When men shall no longer be divided by selfish purposes, nor their powers exhausted in struggles with each other, nothing will remain for them but to direct their united strength against the one common enemy which still remains unsubdued, —resisting, uncultivated nature (Fichte, 1955, pp. 127).

The marketplace theories of Holmes, John Stuart Mills, and the writer John Milton (1608-1674), who first introduced the marketplace idea in his (1644) work, *Areopagitica*, support the idea that truth can rise only when the public is exposed to various ideas and messages, which they ultimately accept or reject (p. 4). This theme comes up again and again throughout history. U.S. Supreme Court Justice Oliver Wendell Holmes (1841-1935) emphasized the importance of "the marketplace of ideas"

philosophy in his dissent in *Abrams v. United States* in 1919. During this case, which ruled that prohibiting critiques of American symbols doesn't violate the First Amendment's free speech edict, Holmes promoted that "the free trade in ideas" benefits "ultimate good" (Fitzpatrick, 2006, p. 2).

Thomas Scanlon in "A Theory of Freedom of Expression" (1972, p. 205) calls this defense of freedom of expression a consequentialist one. As he explains:

This may take the form of arguing with respect to a certain class of acts, e.g., acts of speech, that the good consequences of allowing such acts to go unrestricted outweigh the bad. Alternatively, the boundaries of the class of protected acts may themselves be defined by balancing good consequences against bad, the question of whether a certain species of acts belongs to the privileged genus being decided in many if not all cases just by asking whether its inclusion would, on the whole, lead to more consequences than bad. This seems to be the form of argument in a number of notable court cases, and at least some element of balancing seems to be involved in almost every landmark first amendment decision.

Many political theorists (Jefferson, 1939; Mill, 1859; Locke, 1960) also concur that the free exchange of ideas is an essential component for the discovery of truth and for a working democracy. In a letter to Judge John Tyler on June 28, 1804, former President Thomas Jefferson (1743-1826) wrote:

No experiment can be more interesting than that we are now trying, and which we trust will end in establishing the fact, that man may be governed by reason and truth. Our first object should therefore be, to leave open to him all the avenues to truth. The most effectual hitherto found, is the freedom of the press. It is, therefore, the first shut up by those who fear the investigation of their actions. The firmness with which the people have withstood the late abuses of the press, the discernment they have manifested between truth and falsehood, show that they may safely be trusted to hear everything true and false, and to form a correct judgment between them....I hold it, therefore, certain, that to open the doors of truth, and to fortify the habit of testing everything by reason, are the most effectual manacles we can rivet on the hands of our successors to prevent their manacled the people with their own consent (cited in Whitman, 1960, p. 222).

Jefferson also advocated vigorously for a Bill of Rights, writing several times to James Madison, emphasizing the need for one: On December 20, 1787, he stated, "I will

now tell you what I do not like. First, the omission of a bill of rights, providing clearly, and without the aid of sophism, for freedom of religion, freedom of the press.” (p. 84) and on July 31, 1788, he reiterated the sentiment with, “I sincerely rejoice at the acceptance of our new constitution by nine States. It is a good canvass, on which some strokes only want retouching. What these are, I think are sufficiently manifested by the general voice from north to south, which calls for a bill of rights” (95).

In his essay, “On Liberty,” Mill (1806-1873) writes about the necessity of maintaining free speech, his opposition to censorship, and why alternative voices are paramount to decision-making. In summary, his four primary reasons for that particular belief system are: 1. Censored opinions could be correct; 2. Even if incorrect, the censored opinion might contain a nugget of truth; 3. Even if no morsel of truth exists, the censored opinions could prevent a true ones from becoming dogma; 4. An unchallenged opinion loses its meaning (Mill, 1966).

As David O. Brink in his essay, “Mill’s Deliberative Utilitarianism,” explains, “Reasons 3 and 4 really represent just one ground of freedom of speech. They offer a more secure defense of freedom of speech and expression; they are supposed to rebut the case for censorships even on the assumption that all and only false beliefs would be censored... Mill’s claim is that these freedoms are necessary conditions for the exercise of people’s deliberative capacities and for fulfilling our natures as progressive beings” (Lyons, 1997, pp. 165). Therefore, it is the deliberative process that makes freedom of the press so very important. The public must have a choice of information to participate in the reflective process necessary in becoming truly informed. Without an unencumbered media, the possibility of seeing alternative voices and opinions diminishes.

Mill also embraced the idea that the minority view, so often oppressed, needed hearing as well. Journalists, because of the nature of their watchdog role, want to uncover that silent voice, which is why they sometimes promise not to divulge their sources. Part of what gives free expression its value is the feeling that it performs the important function of checking the abuse of power by officials, called the “checking value” (Blasi, 1977). Confidentiality is important, as previously discussed, because it provides informants the ability to give reporters information that the public might not have access to in normal circumstances (Eun, 2005).

Although free speech is promised to American citizens, there is a caveat: not all types of speech are defined as “free.” Both the courts and the public consider certain speech with “putative political, commercial, obscene, provocative, or conduct-based characteristics” (Reed, 1997, pp. 6) differently. This language is a gray area, and much debate, legislation, and court trials go into determining when and if these cases have free speech. Much of free speech theory looks at what is and isn’t covered by the First Amendment.

Because of this, the Supreme Court itself determines free speech in terms of precedent developed through court cases and legislation when making decisions. According to Reed (1997), the Court and those scholars that share its interpretation look at how “theories arise from liberal political philosophy, which has as its premise ‘that the state ought to leave individuals alone to establish and pursue their ends and values’” (p. 4).

To many theorists, the individual is the most important part of free speech theory. Philosophers such as Locke, Mill, and John Rawls emphasized the importance of the self

and recognized that free speech ought to be protected so the individual could obtain self-realization, self-fulfillment, and free development. This perspective depends on people maintaining their autonomy without being manipulated by the government or by others.

The American view of freedom of the press, which recognizes the importance of self-realization, originates with ideas from the British and French Enlightenment, according to Merrill (1989) who credits Locke, Mill and Milton for the rationale of what he dubs “a libertarian press.” The heart of this theory lies in eight premises:

1. That the press is free from government control; 2. That the press operates in a *laissez-faire* system; 3. That the press is in private hands; and 4. That the press is at least a quasi-public service. Onto this basic core of beliefs about press freedom in America has been grafted some additional characteristics, though unlike the first four, they are all still subject to debate: 5. That the press is a check on government excesses and corruption, 6. That the press is diversified and presents a wide range of information and pluralism of viewpoints, 7. That the press is accessible to the public, and 8. That the press has a responsibility to use its freedom for the good of society (Merrill, 1989, pp. 125).

Merrill’s qualifications for the press add fodder to the idea that the media serve a watchdog role—something journalists sometimes say they cannot fulfill without reporter’s privilege. This identity is so ingrained that many schools teaching media emphasize it to their students: For example, at the University of Missouri’s School of Journalism, future reporters walk under an arch that contains the words “Schoolmaster to the People.” The phrase copies the philosophies of the founding fathers, especially Thomas Jefferson, who believed a well-informed public was the key to democracy, and a sentiment they echoed with action by pledging “freedom of the press” and subsidizing newspapers with a second-class mailing privilege (Parsons, 1984, pp. 4). When Joseph Pulitzer helped establish the School of Journalism at Columbia University in 1912, he did it to establish a public trust—“it was for the public good and for freedom of expression that he wanted to establish what would become a distinguished school of journalism,”

said Everette Dennis, one-time director of the Gannett Center for Media Studies at Columbia University (Parsons, p. 7). The idea that journalism feeds the public is not a new one. Nor, is the thought that the practice of newsgathering is hindered when freedom of speech or of the press has been stifled.

Hugo Black and First Amendment

Another advocate the importance of First Amendment freedoms and their essential role to American democracy was Supreme Court Justice Hugo Black (1886-1971). He agreed with the founding fathers' view that the Bill of Rights functioned as the core of American ideals. "Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death," he wrote in his dissent in *Milk Wagon Drivers Union v. Meadowmoor Dairies*.

Even in cases of national security, Black supported freedom of speech. During the Hugo Black Symposium on "The Bill of Rights and American Democracy on February 27, 1976, The University of Alabama in Birmingham Donald Meiklejohn addressed this conflict in his presentation, "The First Amendment: Freedom of Speech," explaining, "The Court should not, in the name of balancing and weighing, metaphorically hold in either hand, with eyes closed, competing gravities of such entities as individual freedom and public security. Such pretended measurement is deeply subjective and virtually certain to favor the supposed public need over the individual. The 'weighing' which Mr. Justice Black did accept involved accommodating or reconciling to one another constitutional claims none of which could be ignored. It is possible to maintain full

freedom of discussion without imperiling national security; it may be impossible to promote national security without fully free discussion” (Van Der Veer Hamilton, 1978, pp. 31).

In the famous Pentagon Papers¹⁵ case, Black discussed his perspective on the importance of a free press further:

I believe that every moment’s continuance of the injunction against these newspapers amounts to a flagrant indefensible and continuing violation of the First Amendment...Now, for the first time in the 182 years since the founding of the Republic, the Federal Courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country. The press was to serve the governed, not the governors. The government’s power to censor the press was abolished so that the press would remain forever free to censor the government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and informed press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to foreign lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, *The New York Times* and *The Washington Post* and other newspapers should be commended for serving the purposes that the Founding Fathers saw so clearly (*New York Times v. United States and United States v. Washington Post*, 1971).

Although this case enforced the importance of whistleblowers and the media’s right to cover issues of public importance despite the delicacy of showing how governmental procedures work as secret and confidential documents are exposed, it does not perpetuate reporter’s privilege per se. However, it is paramount to note that the press must be allowed to cover government in an unhindered way so deception and misdeeds can be revealed.

¹⁵ Daniel Ellsberg photocopied 7,000 pages of a top-secret U.S. study of decision-making in Vietnam from 1945-1968, later known as the Pentagon Papers, and gave it to various newspapers in 1971, including the *New York Times*, and the *Washington Post*.

Journalists' Responsibility to Their Source

Despite the benefits of using confidential sources suggested by First Amendment theory, such secrets can lead to many problems. Sometimes journalists use suspect sources—informants who are committing a crime by sharing information, insider sources who become friends, people with vendettas—without truly thinking about the consequences. Smith (2003) points to three fears editors have about journalists using confidential sources: that confidentiality is promised because reporters are too lazy to find sources willing to go on the record; reporters may make things up, and credit them to unnamed sources; and, often, such sources offer inaccurate or self-serving information (p. 142).

So media ethicists and media codes of ethics generally encourage journalists to be careful in their promises of confidentiality. The code of ethics of the Society of Professional Journalists, for example, cautions journalists to “identify sources whenever feasible” and “to always question sources’ motives before promising anonymity” (Society of Professional Journalists, 1996). There are practical and philosophical reasons for such a stance. As Black (1995) notes, “Audiences and conventional wisdom expect sources to be fully identified as a way of assessing and assigning media credibility. Audiences generally have a right to detailed information held by reporters and editors. Only an argument of seeking a greater good, or trying to avoid grievous harm, can justify not identifying the sources of information” (p. 197). Similarly, Bok (1983) notes that “Secrecy ... removes accountability, and thus the chance of disapproval or sanctions ” (p. 107). It can also “diminish the sense of personal responsibility for joint decisions and facilitate all forms of skewed or careless judgment, including that exhibited in taking

needless risks,” she adds (p. 109). As a result, reporters should consider such questions as “Do I use information from those breaking the law to give it to me?” “Will the public gain from such information?” “Is the story important?” “What are the motives of my source?” and “Can I get that information elsewhere?” before confidentiality is promised (Smith, 2003). Besides adhering to institutional and association ethics policies, generally journalists should create and maintain their own ethical standards. Occasionally, the two guidelines may contradict each other. “In some cases, reporters have to use what their gut says, rather than refer to the company policy” (Yopp & McAdams, 2007).

When journalists choose to protect a confidential source with questionable motives, the industry often condemns them. A modern-day example of this is the 2004 Bay Area Laboratory Cooperative (BALCO) story, where two *San Francisco Chronicle* reporters, Lance Williams and Mark Fainaru-Wada steadfastly refused to name the informant that helped them break a story about the federal investigation regarding Major League baseball players and their use of steroids. When defense attorney Troy Ellerman admitted in February 2007 that he leaked testimony from the grand jury probe in an attempt to get a mistrial or the case dismissed from court, *Slate* magazine, the *San Francisco Examiner* and others criticized the newspaper’s choice to use a confidential source. Still, both reporters felt strongly enough about the story to face jail time. Ultimately, “do you want the information or not, is what it comes down to,” Williams told *Editor & Publisher*, “As reporters, we have so few means to persuade people to talk to us. You can offer confidentiality – and once you have done that, you have to keep your word” (Strupp, 2007).

What to do about whistleblowers is a gray area. The act often breaches legal and ethical modes of conduct with informants forsaking their institution with the hope of serving the greater good, or as Bok said, “Loyalty to colleagues and to clients comes to be pitted against concern for the public interest and for those who may be injured unless someone speaks out” (1983, pp. 214). However, sometimes such an informant is essential to providing the public with important information as when Daniel Ellsberg made revelations about the Vietnam War through the release of the Pentagon Papers, confidential documents he photocopied and gave to newspapers.

Historically, the press has mixed feelings about publishing/broadcasting material that endangers national security. Although both the *New York Times* and the *Washington Post* gained many supporters when the two published the Pentagon Papers, many media institutions have been reluctant to cover other similar cases, such as Victor Marchetti leaking CIA information exposing flaws in the agency¹⁶ and CBS correspondent Daniel Schorr for offering a secret House Intelligence Committee report on intelligence agency failures¹⁷. According to Lofton (1988), “More often than not, however, the challenging of a national security claim has been treated by the press like criticism of the nation in wartime—a practice not to be welcomed” (p. 283). Although both leaked information and whistleblowers have a place in journalism, reporters must consider the individual’s authenticity and intent before using such information—only then can confidentiality be promised.

¹⁶ Marchetti worked at the CIA for several decades, and wrote a book, *The CIA and the Cult of Intelligence* (New York: Alfred A. Knopf, 1974) that critiqued the intelligence community during that time period.

¹⁷ In 1976, Schorr, a CBS reporter, took an advance copy of a House Intelligence Committee report on illegal CIA and FBI findings and arranged to have it published. His colleagues criticized the decision because a donation was given to an organization that helped journalists with First Amendment issues and because Schorr didn’t immediately come forward when another correspondent, Lesley Stahl, was accused of leaking the information. Ultimately, Schorr was suspended and he subsequently resigned. The House started an investigation but dropped the case (CBS, 2010).

Once confidentiality has been promised, however, revealing a source traditionally has been anathema to the journalist. According to Black, Steele and Barney (1995), “Sources are the foundation of a journalist’s success, developed and nurtured and often protected for the future. The reputation a reporter or newspaper or television station has for protecting sources who provide sensitive information is a part of the continuing dynamic of successful journalism” (p. 197). The issue is important enough that many professional associations and organizations address anonymous sourcing in their codes of ethics. For example, The American Society of Newspaper Editors (ASNE) maintains that, “Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly. Unless there is clear and pressing need to maintain confidences, sources of information should be identified” (American Society of Newspaper Editors, 1975). Addressing ethical questions such as fair play and freedom of the press isn’t a new concern for ASNE; The group began in 1922 to create ethical standards for the industry and to redeem newspapers’ reputation during a time when “jazz journalism” sensationalized news (Wilkins & Brennan, 2004). The group wrote “Seven Canons of Journalism” in 1923, their first code of ethics. In 1975, ASNE revised this document and renamed it “Statement of Principles,” adding their recommendation on addressing confidential sources to the “Fair Play” section—something that was not mentioned specifically previously (American Society of Newspaper Editors, 1975).

Eleven years after ASNE formed, another organization, the American Newspaper Guild¹⁸ (ANG) also sought to perpetuate honesty in journalism. Although primarily

¹⁸ Now known as The Newspaper Guild, Communications Workers of America. The organization affiliated itself with the American Federation of Labor in 1936 and the Congress of Industrial Unions in 1937. In 1997, the Guild became part of the Communication Workers of America. The name of the organization changed in the 1970s (Newspaper Guild, 2012).

concerned with the economic situation of journalists then and now, the organization has actively advocated for ethics in the profession as well, with “raise the standards of journalism and ethics of the industry” listed in the current Newspaper Guild Constitution (Newsguild, 2012). Early on the national organization embraced ASNE’s social responsibility slant as it created its own ethics code and in one instance addressed the issue of confidentiality: “reporters are told that confidential sources are never to be compromised, even if an editorial worker changes jobs. Journalists are counseled that the sanctity of a source relationship is a fundamental aspect of journalism and that they should refuse to reveal confidential sources of information to any court or to legal or investigative organizations” (Wilkins & Brennan, 2004, p. 300).

The modern-day code of ethics from the Society of Professional Journalists also encourages media professionals who grant confidentiality to “keep promises” (Society of Professional Journalists, 1996). In several codes of ethics¹⁹ two themes regarding confidentiality seem apparent: reporters should consider whom they grant confidentiality to carefully—often using such sources as a last resort—and if they make a pledge, they need to honor it.

Ultimately, though, despite these considerations, confidential sources have played an important part in U.S. journalism by making information available to the public in many instances, including one of the most famous examples, the use of “Deep Throat” (later revealed as Mark Felt) during Watergate. Although Woodward and Bernstein never

¹⁹ (Society of Professional Journalists, 1996), (RTNDA, 2000), and (Gannett, 1999). Note: an exception to this is the *New York Times* code, which offers only the following on confidential sources: “In the case of government orders or court directives to disclose a confidential source, journalists will consult with the newsroom management and the legal department on the application of this paragraph” (*New York Times*, 2005).

went to jail for protecting their confidential sources, ever since 9/11 journalists have faced threats and actual prison sentences for maintaining their pledges. Shield laws are a legal device that can help journalists fulfill their ethical commitment to confidential sources.

The Problem with Shield Laws

How shield laws are constructed is important to how well they protect journalist's privilege, and currently state laws vary as widely as interpretations of these laws do, with federal guidelines existing only in bill form (Fargo, 2006-c). For instance, some state shield laws have never been amended to include new technologies: The Arkansas shield law hadn't been amended since 1949 and still doesn't cover television (Ark. Code Ann. 16-85-510) until a 2011 amendment that upgraded protection to include television and Internet journalists (Deamer, 2011). Additionally state shield laws do not provide protection in federal courts, which was why Jim Taricani, an investigative TV reporter for NBC-affiliate WJAR in Providence, Rhode Island could be sentenced in 2004 to six months of house arrest after refusing to identify the individual that gave him a copy of an FBI surveillance videotape—even though his own state of Rhode Island had a shield law.

This is the result of Rule 501 of the Federal Rules of Evidence, which, since 1975, has guided privilege decisions in federal courts on a case-by-case basis, allowing them to be “governed by the principles of the common law as they may be interpreted by the courts of the U.S. in the light of reason and experience” (The Committee on the Judiciary House of Representatives, 2006). Sometimes Rule 501 can override state shield laws, which is what has happened with the Taricani case and others where journalists have been subpoenaed to reveal their sources in federal criminal court proceedings. As Beattie

(2006) has noted, “The disparity of rulings ... makes it difficult to generalize one ‘rule’ for reporters regarding whether they are likely to be able to maintain confidentiality” (p. 26).

Despite the number of states that have shield laws, judicial support for reporter’s privilege is still not as strong as some would like. In fact, the spate of subpoenas in the early 21st century is often blamed on the 2003 ruling by the U.S. Court of Appeals for the Seventh Circuit in *McKevitt v. Pallasch* that such a right was not assured, with Judge Richard Posner reaffirming the majority opinion in *Branzburg v. Hayes*. Posner rejected the appeal of three Chicago newspaper reporters fighting an order to turn over tape recordings of interviews with an informant who infiltrated a Northern Ireland terrorist group, writing, “The federal interest in cooperating in the criminal proceedings of friendly foreign nations is obvious; and it is likewise obvious that the news-gathering and reporting activities of the press are inhibited when a reporter cannot assure a confidential source of confidentiality. Yet that was *Branzburg* and it is evident from the result in that case that the interest of the press in maintaining the confidentiality of sources is not absolute. There is no conceivable interest in confidentiality in the present case” (*McKevitt v. Pallasch*, 2003, p. 7).

Additionally, the Fifth U.S. Circuit Court of Appeals found in 2001 that privilege did not exist in the case of freelance writer Vanessa Leggett,²⁰ and she was subsequently jailed in contempt of court for 168 days (Murphy, 2003). Similarly, judges on the First U.S. Circuit Court of Appeals and the Circuit Court of Appeals for the District of

²⁰ Vanessa Leggett, a freelance writer, was jailed for 168 days, for refusing to comply with subpoenas asking her to turn over her taped interviews—both original and copies, notes and transcripts of interviews she conducted with the confessed killer of a Houston socialite, Doris Angleton, which she intended to use for a book (Elrod, 2003). Prosecutors contended they required the research for their investigation. Leggett refused to divulge her source and went to jail for 168 days (Kirkpatrick, 2002).

Columbia Circuit would not squash the subpoenas of, respectively, Rhode Island TV reporter Taricani and *New York Times* reporter Judith Miller because the courts found that the First Amendment did not provide protection for journalists during criminal investigations (Munihill, p. 16). Since then, many media institutions have seen an increase in subpoenas (Daglish, 2005). The Hearst Corp., for instance, which owns the *San Francisco Chronicle*, faced 84 subpoenas in 2006-2007; previously it might have been hit with just five in the same amount of time. Eve Burton, general counsel for Hearst, blamed the jump partially on the George W. Bush administration and its zeal to go after journalists (Yen, 2007).

What Deserves Privilege?

What is interesting about the jailing of writers and reporters who opted for prison over divulging their sources from 1993 to 2012 is the variety of newsgathering roles they represent—many of them are not mainstream journalists. For example, Scholar Rik Scarce, a freelance book author and a sociology professor at Skidmore College, went to prison in 1993 for five months when he refused to divulge to a federal grand jury information on Rod Coronado, a radical environmentalist he interviewed for a book he worked on during the winter of 1989-90 entitled *Eco-Warriors: Understanding the Radical Environmental Movement*. Coronado was suspected of raiding a Washington State University animal experimentation laboratory.

The Vanessa Leggett case in 2001 is another example of a more non-traditional newsgatherer, who was jailed for 168 days for refusing to give her notes and records gathered during research for a “true crime” book to a grand jury looking at a case about a 1997 murder in Houston. Leggett did not have a publisher for the book and had not

published any news article about the murder. Josh Wolf, a freelance video journalist, also does not fit in with the traditional definition of a reporter. Still, when he would not comply with a grand jury asking for his unpublished footage of a 2005 protest demonstration against the G-8 economic summit in San Francisco, where an individual set fire to a police car, he was subsequently jailed for 226 days.

With Scarce, Leggett and Wolf, all asserted that giving up the material would hurt their newsgathering efforts. In fact, Wolf said exposing his sources would damage his “ability to gather news because groups will perceive him as being an investigative arm of the law” (*Wolf v. United States*, 9th Circ., 2006). Leggett explained her position in a *Houston Chronicle* (2004) article, offering “confidentiality plays a vital role in the news-gathering process.”²¹ Scarce (2005) also pointed out, “What else does a member of the press, whether journalist or scholar ever really have other than information? What we do is inform. Information is the obverse of our sole currency; on the reverse is trust: the trust of readers that we are honestly reporting information and the trust of those who provide us with information that we will abide by our agreements with them—including assurances of confidentiality” (p. 5).

Around this time period, two more conventional journalists also went to jail. Judith Miller was a *New York Times* staff reporter, who was asked to reveal who told her the identity of CIA operative Valerie Plame, a story she had pursued but never wrote an article on. When she wouldn’t divulge her source, she went to prison for 85 days in 2005

²¹ It is interesting to note that soon after Leggett’s jailing, the Justice Department secretly subpoenaed an Associated Press journalist’s telephone records, wanting to know whom reporter John Solomon spoke with about Sen. Robert Torricelli (D-NJ). Over a year later, the government intercepted and held an unclassified FBI report mailed to Solomon for an investigative piece (“Do journalists need a better shield?” 2004). In 2003, the FBI conducted an internal inquiry on the seizing to see if the action was merited (Kurtz, 2003) and later apologized to Solomon (Harper, 2008). So bringing a journalist to court is not the only way, the government tries to identify sources.

(Friedman, 2006). Taricani was sentenced to six months of house confinement in 2004 for refusing to identify his source (Penrod, 2005).

Only two of the five cases mentioned above represent the conventional definition of a journalist: someone who works fulltime as part of an organized media institution. Scarce, Leggett, and Wolf, as freelancers, are not necessarily covered by shield laws. In fact, during Leggett's case the FBI argued that since she was unpublished, Leggett could not be a journalist. So was she? The Reporters Committee for Freedom of the Press, the Society of Professional Journalists, the American Society of Newspapers and the Radio-Television News Directors Association all must believe she was since they filed a court brief on her behalf stating as much (Schechter, 2001).

Limiting reporter's privilege to professional journalists cannot work in today's tech-savvy environment, some argue, where bloggers and citizen reporters often scoop the mainstream media. According to Walker (2005), privilege, therefore, should be extended to anyone disseminating information on a regular basis and should especially be given in cases where the public sphere will be interested in the topic.

As NYU professor Jay Rosen pointed out on his blog, PressThink, in Colonial times, journalists were printers or postmasters—the people who had access to the technology to disseminate news. “If printers and postmasters, who didn't set out to be journalists, can wind up as that, then in any era we should think it possible for people to wind up doing journalism because they find it a logical, practical, meaningful, democratic, and worthwhile activity” (Rosen, 2001). Many contend (e.g. Rosen, 2001; Graham, 1973) that the First Amendment was actually created in a time when the journalists were pamphleteers and letter writers and that a historical definition would

actually encompass people from this type of framework. Thus, freelancers, bloggers, citizen journalists, and others would be protected from testifying about confidential sources in court. Already bloggers are nearly harassed as much as traditional journalists, according to a 2007 Worldwide Press Freedom Index study by Reporters Without Borders, citing the fact that 26 bloggers and online journalists were jailed along with 64 cyber-dissidents, from September 2006 until the study's completion (Anderson, 2007).

The journalism world is entering into a new era where traditional methods of practice are superseded by modern ways of news covering. Technology is allowing consumers of news to become active participants in media dissemination. Any individual may use the Internet to research, report, and distribute his or her accounts of current events and problems. This is the era of citizen and participatory journalism where the public not only often dictates what constitutes news, they sometimes even contribute in the gathering process. A few examples of this are Korea's Ohmynews website, where readers post the daily happenings, or *Las Ultimas Noticias* (LUN) also known as *The Latest News* in Chile, which produces a reader-driven product on a daily basis through a system that measures clicks on their website to determine the news—more clicks will make editors assign a follow-up story for future papers, but if a story only gets a few clicks, it is killed. All these new technologies and ways of newsgathering are redefining how communication is done.

Quite often now, blogs become sources for other broadcast and print media. Blogs and traditional media have a symbiotic relationship, with broadcast and print outlets legitimizing blogs by using them as sources and with blogs spreading content from the conventional press on its webpages. For instance, according to a content analysis study

from Messner and Watson DiStaso of 2,059 articles over a six-year period (2000-2005) from *The New York Times* and *The Washington Post*, the use of blogs as a news source increased substantially from 2002 (15 articles) to 2005 (436 articles).

Untested methods are also appearing. For instance, Paul E. Steigher, a former managing editor on *The Wall Street Journal* joined forces in 2007 with financiers Herbert M. and Marion O. Sandler to form the nonprofit group, Pro Publica, a group of experienced and neophyte reporters who do in-depth investigative work and often give it to third parties, such as magazines and newspapers, free of charge—providing a wire services of sorts for more extensive reporting. ProPublica received the 2011 Pulitzer Prize for National Reporting and a 2010 Pulitzer Prize in Investigative Reporting (ProPublica, 2012). On a local level, both New York University and City University of New York journalism programs have partnered with *The New York Times* to provide hyperlocal content, written by students and overseen by the universities and *The Times* (Davis, 2012). Journalism is constantly evolving and deciding who the professionals are is challenging.

Besides determining who should receive privilege, there is an additional dilemma that lies in the ambiguousness of the First Amendment's wording, which leaves the courts to interpret what exactly privilege is. In general, two translations have emerged: a narrow definition and one that is a more press-friendly constructionist view. Still, there is no standardized definition of what press freedom consists of, although as Merrill points out, "whatever it is, there is rather general opinion that at least the idea of such freedom is a good thing and should be valued and protected" (1989, pp. 127). The *Branzburg v. Hayes* pronouncement contributes to the blurred lines of who can seek protection using

the First Amendment as a defense. Because of the decision, reporter's privilege is recognized, if at all, in a case-by-case manner. As Killenberg noted nearly 30 years ago, "To date, every post-*Branzburg* decision in favor of journalists has been a qualified one. Moreover, in absence of a more precise decision by the United States Supreme Court, the boundaries of newsmen's privilege will continue to be drawn case by case in the lower courts by ad hoc balancing" (Killenberg, 1978, pp. 710). Killenberg's words are still relevant. As federal courts of appeals (the Supreme Court has not heard a privilege case since *Branzburg*) rule against privilege, this weakens journalists' claims to the necessity of the right.

According to a 2005 Pew Center survey, though, most Americans think that using confidential sources can be sometimes justified. Over three-quarters (76%) think reporters should sometimes be allowed to keep their sources confidential if that is the only way to get information, while 19% say reporters should always reveal their sources. Americans are divided on whether news organizations should use unnamed sources in their reporting (Pew Center, 2005).

Although, it is difficult to determine how many sources are deterred from speaking to journalists because of the subpoenas, some evidence is beginning to appear. *Time* magazine editor-in-chief, Norman Pearlstein, when testifying before the Senate Judiciary Committee Hearing, admitted that his reporters showed him letters and emails from sources saying they no longer trusted the publication after it complied with a court order and released Matthew Cooper's reporting notes, stating, "This uncertainty chills essential newsgathering and reporting. It also leads to confusion by sources and reporters" (Pearlstein testimony, 2005, p. 3). Editors, such as one at the *Cleveland Plain*

Dealer, have also come forward, saying they are sitting on stories because the publications cannot insure protection for the sources (Saperstein, 2006).

There is more at stake here than maintaining free speech and a free press in the United States. As the world watches the outcome of the cases against American journalists, precedent is being set. The European Federation of Journalists reports an increased legal attack throughout the world on journalists unwilling to divulge their sources—something true even in Portugal, a country where privilege is written into the Constitution (Pederson, 2005, pp. 9).

LITERATURE REVIEW: ACADEMICS ON PRIVILEGE

There is a wealth of literature on reporter's privilege. Much of it looks at shield laws: examining their histories (Bates, 2010; Lee, 2006; Kirtley, 2007; Bates, 2000), analyzing various state guidelines (Stewart, 2008; Fargo, 2006-b; Fargo, 2006-c; Fargo, 2002; Fargo, 1999), arguing against (Castiglione, 2007; Eliason, 2008) or for the implementation of a federal shield laws (Lee, 2008; Fargo, 2006-c), or offering guidelines on how to structure such legislation (Kwiatkowski, 2006; Dudley, 1994; Mangan, 1994). Additionally, researchers analyze past and proposed shield law legislation (Laptosky, 2010; Smith, 2009; Higgins, 2006/2007; Saperstein, 2006) and past court decisions (Kimball, 2008; Kelly, 2007; Spinneweber, 2006). This literature also extends into discussions on how a journalist is defined and how to determine who is entitled to claim reporter's privilege (Peters, 2011; Docter, 2010; Toland, 2009; Fennessy, 2006; Praul, 2006; Durity, 2006; Flanagan, 2006; Berger, 2003). There are also some discussions on the role of the journalist during criminal proceedings (Schmid, 2002), whether reporter's privilege is guaranteed by the First Amendment (Fargo, 2006-a; Brewer, 2006) and how certain individual court cases affect the future of journalists (West, 2009; Graham, 2007; Joyce, 2007; Eun, 2005; Fargo, 2003-b).

This literature review is divided into three research sections: one covers academic work regarding the effectiveness of shield laws and reporter's privilege; another discusses the possible long-term consequences for forced disclosure and court cases; and,

lastly, the review addresses research devoted to defining what a journalist is and who, ultimately, deserves privilege.

How Effective Is Shield Law?

In general, research on whether or not the quality of journalism is eroding due to loss of reporter's privilege is inconclusive. Although many news organizations and associations assert the importance of privilege, it is difficult to quantify what, if any, sources have been lost due to fear of exposure – although Wirth (1995) did show that newspapers in states with such legislation did do more investigative journalism as well as received more awards for their reporting. Whether shield laws are the answer to protecting journalist's privilege is uncertain as well. A 1970s study actually found that in states with shield laws, more journalists went to jail for refusing to testify than in states without them (Gordon, 1998, p. 296). But as Wirth (1995) states, “evaluating the shield laws solely on their success on court cases is too narrow a perspective. Consideration must also be given to the informal use of shield laws in the investigative process, including the verbal use of laws to deter lawsuits” (p. 73).

Eliason (2008) points out there are many myths surrounding reporter's privilege, including the assertion that a federal shield law is necessary for investigative journalism to be performed. After all, he contends, Woodward and Bernstein found Deep Throat and stories on topics such as Iran-Contra, Abu Ghraib, secret CIA prisons, and the domestic National Security Agency (NSA) surveillance all used confidential sources and did not benefit from a federal shield law. “Journalists rightly expect that both government officials and private citizens will obey lawful court orders, and justly criticize them when they do not,” he said. “The media rely on the courts and on respect for the rule of law to

protect them from unjustified libel suits, to prevent prior restraints on publication, and otherwise to safeguard their legal rights. ...When it comes to the reporter's privilege, however, many journalists' respect for the rule of law seems to take a back seat" (p. 1372). Interestingly, although protecting national security is an oft-given reason on why reporters must testify in proceedings, Knox (2005) notes that "most arguments against any journalist's privilege are made in the context of criminal law, not national security" (Knox, 2005, p. 138).

Long-Term Consequences of Compelled Disclosure and Court Cases

Whether forced disclosure affects future cases regarding privilege is oft discussed. The Plame case, and the journalists involved, such as Judith Miller and Robert Novak, could have long-term effects, according to Eun (2005), who wrote, "In developing a body of law that would allow journalists to face criminal prosecution for either revealing information the government believes they should not have or for refusing to divulge to officials the names of confidential sources, those who call for this type of change should realize the crushing impact these penalties would have on the protections of the First Amendment" (p. 1090). The Miller case, in particular, undergoes much dissection in the literature, some of it dismantling the myth of the heroic reporter. Miller is even compared unfavorably to Henry James' title character in the novel *Daisy Miller* by Penther (2007), who writes that both "carve out spaces beyond the rule of law" (p. 201). Other work discusses the nature of the reporter-source relationship through the lens of the Miller story (Joyce, 2007), which notes that incidents like hers contribute to "the ambivalence now felt by many about the media, and the law's toughening stance. Ultimately we are caught between a vision of the media as watchdog and our suspicion that in certain cases

the dog has jumped the fence and may now need watching itself” (p. 589). Other work looks at the legal aspect of the case (Sims, 2007; Schlichter, 2007) offering that in light of Miller’s experience, “Branzburg’s refusal to extend the press’s First Amendment right to gather news should be reconsidered” (Schlichter, p. 192) since reliance on confidential government informants has increased. Other individual cases and their possible effects are these on the future are also discussed, including *Price vs. Time*²² (Smith, 2009; Higgins, 2006/2007); the subpoenas involving reporters Tim Phelps and Nina Totenberg²³ (Mangan, 1994); *Apple v. Does*²⁴ (Toland, 2009); *Cohen v. Cowles* (Youm & Stonecipher, 1992), and the Taricani house arrest (Knox, 2005).

Few studies have examined whether cases such as these damage the doctrine of reporter’s privilege over time. Fargo (2003-a), however, reviewed the cases covered in the Society of Professional Journalists (SPJ) 1997 report, “The Erosion of the Reporter’s Privilege,” as well as other federal and state appellate courts from January 1998 to June 2002 (a total of 39 cases) and found mixed evidence on the dismantling of reporter’s privilege. Some jurisdictions showed a continuing or increased support for privilege, while other courts displayed a growing pattern of hostility, especially through decision commentary and harsh contempt charges toward journalists attempting to protect their sources by invoking privilege.

²² *Sports Illustrated* magazine, which is owned by Time, published a story about Price that he felt was libelous. *Sports Illustrated* refused to divulge the source for the story and said that Alabama State Statute shielded them from revealing the individual. However, it was found that since the publication was a magazine, it was not covered since the Statute listed only newspapers, or radio and television stations as protected media (*Price v. Time* 416F.3d 1327, 2005).

²³ Tim Phelps, then at *Newsday*, and NPR reporter Nina Totenberg reported that Anita Hill accused then-Supreme Court nominee Clarence Thomas of sexually harassing her when she worked for him. Both of them were subpoenaed. (Phelps, 2006)

²⁴ In 2004, Apple sued for misappropriation and publication of trade secrets that appeared on Mac enthusiast websites that provided Apple-related information. Ultimately, the Court of Appeals quashed the subpoenas and Apple withdrew the lawsuit (Citizen Media Law Project, 2007).

What is the Definition of a Journalist?

Much literature exists on what the definition of a journalist is—and whether shield laws should use tight criteria or take a wider approach when considering who is a practitioner. Since most media institutions and individuals frown upon government licensing of journalists (Merritt, 2005), scholars often write about other possible solutions for the situation. Some suggest that today's definition of a journalist, with the advent of citizen journalism, podcasts and blogs, should be broad. According to Papandrea (2006), “everyone who disseminates information to the public should be presumptively entitled to invoke the reporter's privilege, whether based on the First Amendment, federal common law, or a state shield laws” (2006, pp. 2). But broad definitions of what constitutes a journalist invite entities outside journalism—courts, individuals, etc.—to interpret who such an individual is and do not offer the standardization that is needed in the terminology. How to tackle this situation is unresolved in current literature. “Tying the definition too closely to the traditional media risks under-covering the people who may need the protection,” Fargo (2006-c) wrote. “At the same time, if the definition includes too many people, the law would risk incurring the wrath of a court system in need of competent witness. This may prove to be the toughest part of the bill to draft” (p. 71).

An additional problem comes in the form of new technology. As information dissemination changes, who will be the journalists of the future: Bloggers? Citizen journalists? Macrander (2008) points out that it was bloggers who reported on the credibility of documents that then-CBS News anchor Dan Rather used while questioning

President George W. Bush's National Guard service, eventually causing the longtime media professional's resignation. "At a time when an individual sitting in front of a computer can wield enormous political and social influence through his or her journalistic efforts, the traditional concept of what constitutes a journalist or a member of the news media should change," she said. "Today, citizens can disseminate news to the public themselves, regardless of their professions, resources or training" (p. 1075). Others also agree that new media should be considered when privilege issues are raised: Fennessy (2006) asserts that a federal shield law should cover bloggers (p. 1089); Toland (2009) describes incidences where privilege was denied to online reporters/bloggers and recommends that such protections be extended to online periodicals; Woan (2008) writes about the measures required to preserve alternative journalism; Martin, Caramanica and Fargo (2011) discusses the role of anonymous speakers in online media and where they fit in under shield laws.

Some have written that the definition of a journalist should depend on the function a person performs (Berger, 2003; Durity, 2006). In this model, a good way to look at who a journalist is to consider what an individual's work functions as, with the emphasis on setting requirements for the work itself—a sort of utility test considering questions such as "Is the work timely?," "Was the work commissioned by a media organization or intended for a particular institution?" Was the work imperative to get out into the public sphere? Is the work essential to keeping the public informed? Another method would be to emphasize whether the work is of "public concern." Fargo (2006-c) suggests that particular method would be a fair way of extending privilege to all those that need it, citing several state shield laws limit protection this way. Defining journalists

by the job they do or the values they practice is also proposed. Flanagan (2006) points out that the 1998 data protection laws in the United Kingdom also provide a way to identify who a journalist is—through the ethics code the individual practices: “It would be largely irrelevant whether this was a member of a professional journalist society, an employee subject to an employment code by a media organization that has identified its own ethical criteria or as an individual blogger who has chosen to identify and follow such standards” (p. 417).

Other researchers look toward creating a test that would provide a standard definition. The Journalist’s Communication Act (Elrod, 2003) attempted to propose a standard for courts, litigants and journalists and recommended that journalists—not the source—be protected. It also made provisions for nontraditional reporters. The definition for journalist in that proposed legislation was “a person who is regularly engaged in newsgathering for the purpose of disseminating the information gathered from sources and communications and is, or has been, associated with a news entity.” The JCA pointed out that “those individuals regularly engaged in newsgathering include reporters, editors and photojournalists” as well non-traditional journalists, who “by clear and convincing evidence, that at the inception of the newsgathering project a issue, the individual’s motivation and intent focused on the dissemination of the final work product to the public” (p. 127). The JCA, however, was never formally adopted by any organization. An alternative approach to a federal shield law is the “no-source presumption,” where in cases where the situation meets the tripartite test²⁵ used in *Garland v. Torre*, the court determines that the reporter has no source. This technique, similar to the approach used in

²⁵ The government must show certain criteria in order to ask a reporter to divulge a confidential source: First, that the journalist has information that is relevant. Secondly, that the information cannot be gotten another way. Lastly, they must show a compelling need for the information (Bates, 2010).

instances where evidence is destroyed, would allow the journalist to offer information he/she obtained without referring to the source directly (Berger, 1987). Several articles also offer other legislative solutions regarding privilege problems, such as how to revise Federal Rule of Evidence 501 (Campagnolo, 2002/2003; Dudley, 1994)²⁶

To pass a federal shield law, many contend, a definition of a journalist needs to be established that takes into account the modern information age and is narrow enough that it politically can “calm fears that extending a reporter’s privilege could compromise national security” (Durity, 2006, p. 3). But as Papandrea (2007) asserted this does not mean that the problem of defining who journalists are should prevent a privilege from being established.

How Extensive Should Privilege Be?

Another topic current researchers look at when considering the creation of a federal shield law is what type of privilege would be given: the all-encompassing absolute privilege or qualified privilege, which creates an opening for journalists to disclose sources in certain situations. Most of the recent federal shield law bills have offered a qualified privilege, although some researchers assert that nothing but an absolute privilege will insure that reporters can keep their promises to sources (Siegel, 2006).

²⁶ Campagnolo suggests creating an evidentiary exception for reporter’ modifying it so it can be applied in federal grand jury and criminal proceedings as well as in situations where the state does not have a shield laws. As he said, “Congress should specifically provide that the forum state’s reporter’s privilege, if one exists, shall be applied in federal grand jury and criminal proceedings. Congress should also amend Rule 501 to provide that in the few state jurisdictions that do not have a shield law, Branzburg should then apply. This solution would reinforce the ruling in Branzburg and would prevent the possibility of a media source receiving protection from disclosure in a state grand jury or criminal action while receiving none in the federal system in the same state” (Campagnolo, 2002, p. 334). Dudley, on the other hand, argues that Rule 501 should be revised and offers an extensive draft on what the new guidelines should look like (Dudley, 1994).

It's not just confidentiality cases that receive subpoenas. Some (Fargo, 1999; Fargo, 2001; Fargo, 2002; Clark, 1999) argue that privilege should also cover nonconfidential information since a vast "majority of subpoenas received by news organizations are for nonconfidential material, including copies of published or broadcast stories as well as unpublished notes, photographs and outtakes. If, as some journalists claim, all subpoenas infringe upon important First Amendment and public policy interests by compromising the free flow of information to the public and the media's autonomy from government, then the amount of protection afforded to nonconfidential information is a particularly important issue" (Fargo, 2002, p. 242).

Qualified or absolute privilege aside, many suggest that a federal shield law will not solve the expose-your-source-or-not debate. First, there would still be the question of who is defined as a journalist. Even if privilege on a federal level is established, some "journalists" may still not be granted privilege in particular cases and would face jail time. In addition, the ethics behind using anonymous sources may still be contested by the public and the media community as well. "Journalists ... go to jail not because of what they wrote, but because they refuse to recognize the authority of the courts to determine what the law and the Constitution require," said Eliason (2006). "Solving that problem does not require a new privilege statute; it requires a cultural change within journalism and a recognition that reporters are not above the law" (p. 387). Other researchers (Eliason, 2006; Eliason, 2008; Mangan, 1994) don't advocate a federal shield law at all. As Mangan pointed out, "The constitutional bases for such First Amendment privilege are flawed" (p. 164). Ultimately, though, most research points toward the need for a federal shield law (e.g., Berger, 1987; Siegel, 2006; Fargo, 2006-b).

Research Questions

Although many of these aforementioned issues have been discussed in other works, there is no current study that looks at the mass of current subpoenas and what they are doing to the newsgathering process, through the eyes of journalists. No matter what questions surround a federal shield law, it may be the only thing that will allow freedom of the press to exist during time periods where the government is secretive and seeks to crush journalism's muckracking power. Additionally, journalism is changing and how the news is covered and who is a journalist are not certain terms any longer. So, ultimately, who deserves privilege? This is one of the questions this dissertation hopes to begin to answer. In the literature reviewed, the personal narrative of the practicing journalist is minimal, contained mainly in quotes taken from newspaper and magazine articles to illustrate points. What privilege means to the practitioners and the public needs more exploration as several important questions have not yet been addressed in this respect. Therefore, this dissertation will explore the following research questions:

For Interviews

- RQ1: Do reporters perceive that contempt of court cases alter journalism practices?
- RQ2: Do reporters, who have been cited for contempt, perceive that institutional support during their lawsuit was sufficient?
- RQ3: Do reporters and others interviewed believe that maintaining confidential sources is important? Why or why not?

For Framing Analysis

- RQ 1: How have newspapers framed discussions of reporter's privilege?
- RQ2: What do letters and op-ed columns reveal about public perceptions of reporters' privilege?

For Focus Groups

RQ 6: Does the general public support shield laws?

RQ 7: Does the public think reporter's privilege is necessary to maintain the free flow of information?

RQ 8: Who does the public think is considered a journalist and should be covered by shield laws?

For Overall Discussion

RQ 9: What role do newspaper texts and reporters suggest the role of public perception is in contempt cases?

Chapter III in the dissertation discusses the research completed. The first section in this chapter is an interview study, which will look at how practitioners of journalism navigate issues surrounding shield laws and reporter's privilege. Through interviews with jailed journalists and media scholars, this chapter discusses why journalists believe protecting their confidential sources in court-room situations is paramount to the free flow of information, and how institutional support can impinge on the promises journalists make.

This section will be followed by a framing study that examines how four major metro newspapers depicted reporter's privilege and shield laws issues on its editorial page from the years 1972 through 2010. This part will offer several narratives that newspapers tend to frame these issues around and will suggest better ways of educating the public on journalistic perspectives. The framing study will be followed by a focus group study that delves into what three demographic groups—students, baby boomers and seniors—know about shield laws and reporter's privilege. It also seeks to assess how much support these groups have for these issues. The dissertation ends with a chapter discussing the three studies embedded within it, concluding thoughts and ideas for future research.

Jailed! Journalists Incarcerated for Protecting Sources Speak Out on the Importance of Reporters' Privilege

Introduction to the Interview Section

To fully explore why and how shield laws and reporter's privilege affect journalism, it becomes imperative to understand why practicing journalists sacrifice their freedom for an ethical and legal construct. This section reports on an interview-based study that examined the experience of journalists who were jailed on contempt charges after either refusing to identify sources or hand over newsgathering material.

Typically, journalists provide a good source for qualitative studies since they have a distinct knowledge about press issues and usually can communicate in an effective manner (Lindlof & Taylor, 2002), and hearing the stories of those individuals who faced jail time to protect their confidential sources or notes can provide insight into the following questions:

RQ1: Do reporters perceive that contempt of court cases alter journalism practices?

RQ2: Do reporters, who have been cited for contempt, perceive that institutional support during their lawsuit was sufficient?

RQ3: Do reporters and others interviewed believe that maintaining confidential sources is important? Why or why not?

By conducting interviews, it may be possible to better understand the benefit reporter's privilege and shield laws provide and why these issues remain relevant in today's media landscape. Personal narratives of reporters facing compelled disclosure remain untapped in current academic research on the topic. Their stories appear mostly

appear in trade magazines such as *The Quill*, *American Journalism Review* and *Columbia Journalism Review*. Other fields of media research have found journalist interviews informative on a wide range of topics, such as news classification (Lehman-Wilzig & Seletzky, 2010) public engagement (Besley & Roberts, 2010; Clark & Monserrate, 2011), newsgathering value and practices (Granado, 2011; Lassila-Merisalo, 2011; Boudana, 2010), and the nature of journalism as a public service (Hujanen, 2009).

Berg (1989) defines interviews as a “conversation with a purpose. Specifically, the purpose is to gather information” (p.29). Such dialogues “enable researchers to learn how people make sense of their worlds and how they interpret their own actions” (Rakow, 2011, pp. 417). Seidman (2006) feels interviews are effective because:

The participants’ thoughts become embodied in their words. To substitute the researcher’s paraphrasing or summaries of what the participants say for their actual words is to substitute the researcher’s consciousness for that of the participant. Although inevitably the researcher’s consciousness will play a major role in the interpretation of interview data, that consciousness must interact with the words of the participant recorded as fully and accurately as possible (p. 114).

Since interviews “are particularly useful in tracing causes, especially when these lie in the personal meanings of a common experience,” they were chosen as the research method for this study over other methodologies such as surveys (Kratwohl, 1998, p. 358). As Atkinson (1998) points out, “Story gives us lived experience in its purest, and rawest, form. Story gives us the real context within which a thing needs to be seen to understand it effectively” (p. 74). Interviews are structured conversations with a targeted mission: “to obtain descriptions of the life world of the interviewee with respect to interpreting the meaning of the described phenomena” (Kvale, 1996, pp. 6). The structure of an interview works best with this study because the researcher not only has the opportunity to ask questions, but to also follow-up on the interviewee’s answers.

Additionally, interviewees were located all over the United States, so methods such as focus groups were not feasible.

For this study, interviews were conducted over the telephone and through written correspondence (email and letter) with journalists who were held in contempt of court for failing to reveal information requested by court systems. The journalists interviewed in the study went to jail for one of two basic reasons: They were unwilling to reveal the identity of a source or they refused to turn over notes taken while researching published articles. To date, 25 journalists have gone to jail to protect sources' anonymity (Leonnig, 2005), 19 of these since 1984 (Reporters Committee for Freedom of the Press).²⁷ For this portion of the dissertation, eight people who were jailed for contempt of court were interviewed, along with one of the reporters from the landmark *Branzburg v. Hayes* case and a scholar who writes frequently on shield laws. The following journalists and scholars were interviewed:

- **Lisa Abraham**, who worked as a reporter for *The Tribune Chronicle*, a daily newspaper in Warren, Ohio, and was jailed 22 days in 1994 when she refused to testify about an on-the-record interview before a state grand jury.
- **Bruce Anderson**, who was the editor of the *Anderson Valley Independent*, a semi-weekly newspaper in Ukiah, California, when he was jailed for 13 days in 1996 for not handing over a letter to the editor received from prison.
- **Tim Crews**, who was the editor and publisher of the semi-weekly *Sacramento Valley Mirror* covering Glenn County, California, when he went to jail for five days in 2000 for not naming a source in a story about a theft charge leveled against a highway patrol officer.

²⁷ According to published records, this is the number used most. However, this dissertation contends there have been more journalists jailed than indicated. See Appendix IX for a compiled list from various sources.

- **Brian Karem**, who worked as a TV reporter for a KMOL Television, an NBC affiliate, in San Antonio, Texas, in 1990 when he was subpoenaed to testify in a case about a police shooting. He refused to name the individuals who had arranged a jailhouse interview with the shooter, who had turned himself in. As a result, Karem was jailed for 13 days.
- **David Kidwell**, a reporter for *The Miami Herald*, who refused to testify about an on-the-record interview he conducted in jail with a suspect in the death of a 7-year-old girl and was sentenced to 70 days imprisonment for contempt in 1996. He served 14 days.
- **Schuyler Kropf**, who—along with fellow South Carolina *Post and Courier* reporters Sid Gaulden, Cindi Scoppe, and Andrew Shain—was jailed for eight hours over the course of two days in 1991 before being released on appeal. Prosecutors wanted the group to provide unpublished conversations with a state senator for his corruption trial.
- **Jim Taricani**, a reporter for WJAR-TV, the NBC affiliate in Providence, Rhode Island, who was sentenced to six months of house arrest in 2004 after he refused to divulge who had provided him with a videotape showing a Providence official taking a bribe from the FBI.
- **Josh Wolf**, an independent journalist/ blogger /videographer who spent 225 days in jail—the longest of any reporter—after refusing to give unpublished video to a federal grand jury investigating a July 2005 demonstration against the G8 Summit, a yearly meeting of government heads from the world's leading economies.

In addition, interviews were conducted with:

- **Earl Caldwell**, a journalist who refused to disclose his confidential sources within the Black Panther party in the 1972 *Branzburg v. Hayes* case. In early 2012, he was a professor at Hampton University, Hampton, Virginia, and the host of the Pacifica radio broadcast “The Caldwell Chronicle.”
- **Anthony Fargo**, an associate professor at Indiana University. A former reporter and copy editor, he often writes about shield laws and reporter’s privilege.

Ultimately, interviews were discontinued when no other reporters who had gone to jail on contempt charges could be found to participate in the study. The following people who were jailed on contempt charges were not included in the study for the reasons cited below.²⁸

- Refused to be interviewed: *New York Times* reporter Judith Miller; Libby Averyt, who refused to give prosecutors information about a jailhouse interview as a reporter for the Corpus Christi (Texas) *Caller-Times*;
- Never responded to requests: Myron Farber, a *New York Times* reporter who would not reveal sources during a criminal trial in 1978; Felix Sanchez (*The Houston Post*) and James Campbell (*The Houston Chronicle*), who would not identify potential crime eyewitnesses in court in 1991;
- Could not be found: Freelance writer Vanessa Leggett, who would not disclose research or identify her sources in court in 2001; Three South Carolina reporters—Sid Gaulden (*The Post and Courier*, Charleston), Cindy Scoppe (*The State*) and

²⁸ Unless otherwise noted, all information on the jailing of the following journalists comes from <http://www.rcfp.org/jailed-journalists>, a web page maintained by the Reporter’s Committee for Freedom of the Press and from <http://archive.firstamendmentcenter.org/about.aspx?id=16896>, a site maintained by the First Amendment Center.

Andrew Shain (*The Sun News*, Myrtle Beach), who along with Schuyler Knopf (who was interviewed) declined prosecutors requests for unpublished conversation material in 1991; *Los Angeles Times* reporter Roxana Kopetman, who would not give eye witness testimony in a criminal trial in 1987; Detroit television reporter Bradley Stone, who refused to identify interview subjects for a Grand Jury in 1986; Freelance writer Chris Van Ness in 1985, who revealed his source after a few hours in jail in 1985; *The Belleville (Illinois) News-Democrat* editorial writer Richard Hargraves, who spent a weekend in jail rather than reveal a source and was released when the individual came forward in 1984; Barry Smith and Dave Tragethon, a *Durango Herald* (Colorado) reporter and a KIUP-KRSJ radio reporter refused to reveal sources in a murder case in 1982; *The Idaho Statesman* Ellen Marks, who was jailed for a day because she refused to reveal the location where she interviewed a source in 1981; Longview, Texas, KLUE news director Wayne Harrison spent three hours in jail in 1979 after refusing to reveal a news source in a murder case; Peter Bridge, *Newark Evening News* (New Jersey) was jailed for 21 days in 1972 for refusing to answer questions from a grand jury about a bribery story he wrote; in 1972, Edwin A. Goodwin, the general manager of NYC radio station WBAI was jailed 44 hours after he refused to provide tapes of a October 1970 a prison riot to the district attorney's office (Montgomery, 1972).

- Have died: Tim Roche, who did not divulge the source that leaked a sealed court order while he was a reporter for the *Stuart News* in Stuart, Florida; *Los Angeles Herald-Examiner* journalist William Farr, who would not reveal sources during a criminal trial; John F. Lawrence, Washington bureau chief for the *Los Angeles*

Times was jailed briefly in 1972 for refusing to turn over newsgathering materials in a case regarding the Watergate break-in.

For the research involving interviewing, IRB approval was obtained and an approved consent form was used. All oral interviews were taped, something that should not have inhibited the participants' answers since most of the subjects live out of state and were interviewed over the phone: Although each individual knew the conversation was recorded, the physical presence of a machine wasn't there. In addition, many of the interviewees, as journalists, were accustomed to the interview process. The researcher or a professional transcriptionist transcribed all the interviews. After transcription was completed, interviews were analyzed for common themes and experiences.

Interviewees were told the context of the study and then asked a series of questions about their experiences and whether being found in contempt of court and jailed affected their practice of journalism and, if so, how. They were also asked about their opinions about the current climate for reporter's privilege as well the recent spate of subpoenaed journalists and the resulting court cases. Questions regarding the definition of what a journalist is and who should be covered by reporter's privilege were also asked as were questions about how reporters perceived institutional support during their cases.

In the interviews, a semistandardized approach was employed, which means that although the common script listed in Appendix I was used for all interviews, it served only as a guide, and appropriate follow-up questions addressing additional information and clarifications were added to each interview. Due to the personal nature of information sought, the semi-structured list of questions was designed to collect similar information from each informant but allow room to explore other pertinent issues that were raised

during the interview. This method, as Berg (1989) points out, allows questions to, “reflect an awareness that individuals understand the world in varying ways. Researchers thus approach the world from the subject’s perspective. Researchers can accomplish this through unscheduled probes ... that arise from the interview process itself” (p. 33).

The analysis was conducted using McCracken’s five-stage process. As McCracken (1998) explains, an examination of the data should “determine the categories, relationships, and assumptions that informs the respondent’s view of the world in general and the topic in particular” (p. 42). First, the researcher must capture the subject’s words. Next, observations may be made and developed according to the words themselves and in consideration of the general nature of the transcript. In the third stage, the researcher examines how the observations are related and looks at the material through the lens of the current culture and scholarly literature. The transcript is only used at this juncture to vouchsafe the ideas that emerge from comparing the observations. The fourth stage takes all the material generated and exposes it to collective examination. In the last stage, the researcher collects all the topics and patterns that appeared in the interviews and scrutinizes them once more.

When moving through such an analysis, Seidman (2006) recommends using a sequential approach, first marking sections of note and labeling those parts. He suggests creating a single document including all this material for further scrutiny, while retaining the original transcripts. When producing material to use, he suggests keeping the voice of the participant, “using the third-person voice distances the reader from the participant and allows the researcher to intrude more easily than when he or she is limited to selecting compelling material and weaving it together into a first-person narrative” (p. 121).

When analyzing interviews, there are no absolute formats for establishing narrative validity. There are, however, a few measures that can be used, such as examining internal consistency—a term that refers to the process of looking at the entire narrative and insuring that emerging themes and stories stay constant throughout the whole document. “This means that what is said in one part of the narrative should not contradict what is said in another part. There are inconsistencies in life, and people may react one way one time and a different way at another time, but their stories of what happened and what they did should be consistent within itself” (Atkinson, 1998, p. 60).

Findings

Do Contempt Charges Alter Practices?

For the press, reader credibility is essential. Without it, not only audiences but also, potentially, sources may disappear. Hovland and Weiss (1951) maintain that a journalist offers such authority through his or her expertise and trustworthiness. When that is tarnished, it is possible for a reporter to lose his/her ability to cover the news as successfully as before. As shield law scholar Anthony Fargo points out:

“If you are a source and you have some information you think the public might ought to know, the lack of a consistent protection, the fact that you’ve seen all these cases where all these reporters have ended up in jail, but then begged their sources to let them off the hook so they could testify and get out of all jail or avoiding going, the fact that courts have become increasingly skeptical about whether journalists should have this privilege ... if I were a source, I would be really hesitant to go to a journalist and spill my guts” (A. Fargo, personal communication, February 3, 2012).

For a subpoenaed journalist, there are just three choices: give prosecutors what they want, which is often seen as dishonorable or as a breach in journalistic ethics; go to jail; or to negotiate to stay out of jail, which isn’t ideal since journalists bargaining with lawyers, negotiating what notes, what sources are permissible for exposure can be

potentially interpreted as a breach in the fidelity of the source-reporter relationship (Pember, 2005).

While some journalists do not want to give up anything—as editor of the Anderson Valley (California) Independent Bruce Anderson said, “We felt, and still feel, that government, if a free press is to be preserved, has no right whatsoever to a journalist’s sources” (B. Anderson, personal communication, April 19, 2006)—others will negotiate with prosecutors slightly. Reporters and their news organizations might remain steadfast about not releasing information, such as notes and sources, but as an alternative, offer to give already aired or published material on the topic. Yet, journalists aren’t always in charge of these decisions. In the case of former Texas TV reporter Brian Karem, management proposed giving lawyers additional material, such as the unedited portions of interviews. Karem disagreed with this decision because these things:

“are as much a part of my notes as my actual physical notes in my note pad. But they took that unprecedented stuff in order to try to placate the powers that be, and it didn’t work. It was simply the more that we gave them, the more that they wanted, the more that whetted their appetite for stuff that they couldn’t have” (B. Karem, personal communication, April 14, 2006).

When such events occur, and that information circulates it is possible that it affects the perception of others about journalists’ trustworthiness. Kovach & Rosenstiel (2001) speak about the importance of transparency in journalism—that hidden motives shouldn’t be apparent in reporters. But negotiations with lawyers and the secrecy of these portray the media as if it is hiding something. Fargo does point out that it is difficult to pinpoint how all these cases affect sources coming forward; he believes it does, but he

cannot prove it. “You don’t necessarily know of the untold stories” (A. Fargo, personal communication, February 3, 2012).

Although some of the journalists interviewed were mostly against negotiating with prosecutors about revealing sources, Ohio newspaper reporter Lisa Abraham, Karem, and Crews, had sympathy for others who did so, with Abraham saying:

I would like to think that everyone would take a really hard-line position and stand up and fight for what they believe in. But they might have really good reasons for not doing that ... And people feel pressure, I mean there is a lot of pressure from management ... It was very easy for me to be stubborn and take the position that I took. I mean I was single. I had no children, and I working at a small paper so I wasn’t making a lot of money anyway. What’s the worst they could do to me? But stakes are much higher as you get older and have more responsibility, and I don’t know what kind of pressure comes into play from the corporations that own major media outlets. (L. Abraham, personal communication, April 17, 2006).

The journalists went to jail to protect sources and to prevent the court from accessing their notes—a cause that none of them regretted sacrificing their freedom over. Often, the journalists felt that they were being subpoenaed because the prosecutors and other lawmakers wanted the journalists to do their jobs for them.

The Aftermath of Jail

Most of the journalists interviewed, though, said that their experiences changed how they performed their craft. Sometimes, the sentiment indicated that it made them more responsible journalists. Independent journalist/blogger/videographer Josh Wolf said, “I’m just more conscious of recording stuff that I wouldn’t publish in the first place” (J. Wolf, personal communication, February 6, 2012). He won’t shoot for the sake of capturing all the events around him; he seeks to find what’s truly newsworthy. Abraham really assesses if anonymous sources are necessary in her current work:

All we really have is our reputation and the integrity of our work—how accurately we report things, how trustworthy we are with our sources, how our sources trust us. It does go to the issue of trust, so if you are willing to protect your source and say you are going to protect your source, then you need to stick by that and pay the price, which is all the more reason why it is not a pledge that you make lightly. And if I revise my thinking in any way, certainly when it comes to confidential sources; that's not something you take lightly (L. Abraham, personal communication, April 17, 2006).

Several of the journalists who went to jail said the experience made them more careful about things like how they kept their notes and when they destroyed them. “I used to keep all of my notebooks, and now as a matter of course I keep them for 6–8 weeks at the maximum and that way I can never be accused of destruction of evidence or destruction of property. The only information that I have left at the end of the project is that which is on the public record,” said Karem, the editor of *The Sentinel*, a small newspaper in Montgomery County, Maryland. “That way they (the lawyers) cannot go after ... you for information and interpret it the wrong way” (B. Karem, personal communication, April 14, 2006). South Carolina journalist Schuyler Kropf, who was still a reporter at the *Post and Courier* as of April 2012, also does not keep notes—something he did sometimes prior to his experience. Unless he is going to need the notes in the future, he discards them after a few days, partly because of space limitations, but also, he acknowledges, because of what happened to him (S. Kropf., personal communication, December 18, 2006).

One of the plaintiffs in the 1972 *Branzburg v. Hayes* case, Earl Caldwell, then a *New York Times* reporter who often covered the African American militant group the Black Panthers, found that the prospect of having to testify in court changed the nature of his work. The subpoena for his notes and information immediately took him off the story of covering the Black Panthers. “It ended my relationship because I knew that I could no

longer promise my sources anything,” he said. “It was out of my hands. My word meant nothing and so, once the subpoena came, that ended my work on that story” (E. Caldwell, personal communication, February 10, 2012).

Abraham said she found herself passed over for the job of city editor at her paper because, as she recalls her supervisor saying, “I couldn’t trust you.” Eventually, after 13 years at the *Tribune*, she left to go to work at the *Toledo Blade* before becoming a reporter at the *Akron Beacon Journal* (L. Abraham, personal communication, April 17, 2006).

None of the jailed journalists reaped huge financial rewards from the experience. Karem became an investigative reporter for Fox’s “America’s Most Wanted,” wrote books, and began to manage *The Sentinel* because as he says, “I have to put my son through school” (B. Karem, personal communication, April 14, 2006). As of February 2012, Wolf was looking for a full-time job after completing a master’s in journalism at University of California, Berkeley, in May 2011. Whether his reputation hurts him, he can’t say since there are so many unemployed journalists at the moment. But he’s hopeful. After all, “how many people can put their (prison) record on their resume?” he said (J. Wolf, personal communication, February 6, 2012).²⁹

Journalists On Institutional Support

The journalists interviewed had different experiences related to institutional support. Of the seven who were not freelancers, two felt supported, two (Crews and Anderson) as editor/publishers were managers themselves, and three thought the support

²⁹ The others interviewed continue working in journalism: Schuyler Kropf continues to work on *The Post and Courier*; Jim Taricani is still an investigative reporter for WJAR-TV, NBC 10; Bruce Anderson is still the editor and publisher of the *Anderson Valley Advertiser*; David Kidwell is a reporter at the *Chicago Tribune*. In 2011, Tim Crews, the editor and publisher of the *Sacramento Valley Mirror*, won the NORCAL Society of Professional Journalists chapter’s Norwin Yoffie Award for Career Achievement.

was too little—either at some point their media institutions withdrew support or didn’t give it as full-heartedly as they would have liked.

On the positive side, Rhode Island TV reporter Jim Taricani and Kropf both felt that their organizations bolstered them throughout the experience. NBC spent more than \$600,000 on Taricani’s case after he refused to expose the source of a FBI videotape showing Frank Corrente, an aide to the then-Providence Mayor Vincent A. Cianci, taking a \$1000 bribe (Donnis, 2005). The network even supported the decision to broadcast the tape—something Taricani and others urged because it offered a vivid example of dishonesty—despite the fact that a judge had ruled the tape to remain under seal. “That’s why we thought it was very important for the public to see this tape, not only because of the public corruption involved but to also see how the FBI was conducting the investigation,” said Taricani. “It made a huge difference in how the public viewed ... [the mayor’s] administration” (J. Taricani, personal communication, December 18, 2006).

Karem had a different experience, however. “At first there was some good solid support, but there was some ambivalence,” he said. “Higher up in the chain of command, the station manager and people who are the regional managers of that particular chain of stations didn’t see any ‘advantage’ to supporting me, but my news director was very supportive and the assistant news director was supportive, and they stuck with me and eventually the people in the station management hierarchy decided, ‘We’ll have to stick by him’” (B. Karem, personal communication, April 14, 2006).

As part of their support, five of the journalists’ employers either paid for lawyers initially or entirely. (Crews, Wolf, and Anderson had lawyers working *pro bono*.) Although Abraham’s newspaper paid for representation, Abraham felt that the attorney

assigned to her listened to her publisher's instructions and didn't always act in her best interest. Eventually, she found media lawyers in the area to work *pro bono* (L. Abraham, personal communication, April 17, 2006).

Caldwell also felt his lawyers had other priorities:

Ownership is key. The owner has to back up the reporter. In my case, involving the Black Panthers, the New York Times hired a law firm in San Francisco to defend me [who told him to] 'Bring all your information involving the Panthers here and we'll go through everything We have a big problem with law and order out here and I'm sure that some of your information ought to be turned over to the FBI.' Now that makes it clear to the reporter that the newspaper's lawyer is not defending him. A reporter cannot build solid relationships with sources without the backing of the employer. It is as simple as that (E. Caldwell, personal communication, February 10, 2012).

With Kidwell, the former *Miami Herald* reporter, the media institution withdrew its lawyer when it thought the journalist needed to give up the fight. The newspaper sided with him at first, according to Kidwell, but then public outcry over who he was protecting—an alleged child killer—made the *Herald* reconsider. Kidwell always took the position, though, that a journalist keeps his promises and protects his source, no matter whom that source is.

I immediately thought, and the newspaper agreed with me on principle, that we should not be put in the situation that we are acting as police officers. You know, jailhouse snitches—that's not our role. ... So they agreed with me and they supported me and they paid for the legal bills. But at the eleventh hour when it came down to testifying or going to jail ... they decided that, "You know what, you need to give up your principles. ... We can't buy violating the law. We agree with you that you shouldn't have to, but the law says you should and therefore you are going to have to." And we parted ways. ... They told me that I would have to hire my own lawyer and that they were going to publicly disagree with me ... As I went to jail they changed around again. They said, "Oh, we're with you now" (D. Kidwell, personal communication, April 15, 2006).

For Crews' semiweekly newspaper, the *Sacramento Valley Mirror*, the contempt-of-court charge that threw the editor/publisher in jail might have ended the 3,000-

circulation paper since it basically consisted of Crews, a one-third-time graphics person, a half-time copy clerk and some stringers. To support the *Mirror*, the *Bay Guardian* sent an editor, Bruce Berkman, to help put out the newspaper while its editor/publisher was jailed. As mentioned, Crews was able to get an attorney *pro bono*, but additional expenses were difficult to fund. “You know, for us to make the trip to San Francisco or a trip somewhere to deal with the legal issues, \$400 to \$500 – we don’t have that laying around,” he said (T. Crews, personal communication, April 3, 2006).

How the Media Covers Its Own—in Jail

Part of institutional support comes in how the media entity covers the situation. Most of the journalists interviewed were satisfied with the amount of coverage their cases received, but not always the way the cases were depicted—both by their own institutions and other media organizations. In general, the journalists said news tended to cover the cases as personality pieces, focusing on the journalist and their “sacrifice” and not on the issue of free speech and First Amendment rights. For instance, as Karem explains:

It seemed ... at the time ... it was certainly covered on our television station and on the local press every day, and it was the national news for probably a week. ... I remember watching the nightly news from jail and seeing my picture and my name mentioned. ... I think the issue itself is never explored fully and the issue itself is under-covered. ... What is covered is the personalities involved and that’s almost the wrong thing to cover. ... What people should care about, and what they do care about, is how does that affect them? And that’s one thing I don’t think we do in the news very well is let people know how this issue affects them (B. Karem, personal communication, April 14, 2006).

The media did play an important part in Crews’ case. After he was released from jail, Crews was served with another subpoena over a similar issue, and the prosecuting attorneys told him that they would put him in jail until he was ready to divulge his sources. However, according to Crews, “the heat from the press was ungodly” (T. Crews,

personal communication, April 3, 2006), with calls coming in to the lawyers and the judges night and day, and the subpoena was eventually dropped.

But not everyone received such positive feedback from the media. Kidwell found that some professional organizations, such as The Reporters Committee for Freedom of the Press and the Freedom Forum, helped him, but many of his colleagues and other media institutions covering the case thought he was in the wrong for refusing to testify against John Zile, a possible child killer. Zile was ultimately convicted of murdering his 7-year-old stepdaughter.

If there is one thing that I learned from this whole experience is that I can't believe how incredibly naïve I was about my own profession. ... I was stunned by the lack of comprehension among my colleagues and among other newspapers and competitors. I was attacked and vilified at other newspapers. I was called stupid and glory-seeking and I was trying to advance my career. ... It is not about reporters, you know, it's not about protecting reporters. It's about protecting the people's right to a free press. People are not invested anymore in the idea that newspapers are their last line of defense against corruption. We just are (D. Kidwell, personal communication, April 15, 2006).

Taricani found at first that public support for his case was minimal since the local talk show circuit was lambasting him.³⁰ However, according to Taricani, the biggest newspaper in Rhode Island, *The Providence Journal*, did a good job over the course of his experience and explained the importance of a federal shield laws and why journalists used anonymous sources to its readers. By the time he was sentenced to jail, the mail at his station was running 9-to-1 in favor of what he did (J. Taricani, personal communication, December 18, 2006). Taricani may have received more support than Kidwell, however, since he was outing a crooked politician rather than protecting someone charged with killing a child.

³⁰ For example, according to a report in the *Boston Phoenix*, WPRO-AM talk-show host Dan Yorke downplayed "the news value of the tape" and contended "that its broadcast was motivated by 'a major ratings coup'" (Donnis, 2004).

Anderson received support from a “few tepid editorial defenses” from the corporate press; however, a swelling of support came from his readers. “There was a large-scale demonstration on my behalf outside the Mendocino County Courthouse,” he said (B. Anderson, personal communication, April 19, 2006). His jailing also received news coverage from the San Francisco media and *The Los Angeles Times* as well as *The Nation* magazine. Wolf also believes that the amount of coverage for his case seemed good—although he admits he felt that some of “the reporting at the time was clearly more critical than what the support from the Society of Professional Journalists and the DC Press Club and all these things would indicate” (J. Wolf, personal communication, February 6, 2012).

Why Confidentiality Is Important

When journalists are upfront with a source, it only amplifies their “credibility and respectability,” according to Kovach & Rosenstiel (2001, p. 82). Similarly, the journalists interviewed found that maintaining confidentiality often facilitated source-finding in the future. All the journalists felt that to release information would only damage their reputations. “You’re only as good as your word,” said Taricani. “As soon as you violate that promise, you’re done” (J. Taricani, personal communication, December 18, 2006). Karem agreed with this, adding, “All I have is the ability to ask questions. People can either tell me go screw myself or they can talk to me. ... the prosecution has the power of subpoena. ... Why should they not exercise their power of subpoena and leave the reporters alone? What happens is... that prosecutors and cops are lazy. And if someone else has already done the work, they would rather just dump them upside down and see what falls out of their pockets, rather than doing the work themselves.”

Crews believed so fervidly in protecting his source, he was willing to lose his newspaper—a real possibility if the *Bay Guardian* hadn't sent an editor to insure production would continue. "Anybody who tells me he can function without anonymous tips and anonymous sources is lying in his teeth," said Crews. "... That's no. 1. No. 2 is that when you give people your word that you are not going to give them up—you are not going to give them up. ... You give up that tip, and that person is harmed in any way, you have broken a contract. (The) contract not to give your word has to be honored. It is a legal, binding contract" (T. Crews, personal communication, April 3, 2006).

From the perspective of most of those interviewed, it is this contract that becomes most important for the journalist. Protecting confidentiality is only part of keeping a strong reporter/source network; it also promotes the integrity of the journalist and their profession. "For myself it is not really about the source," said Kidwell. "It's about us, and extending a promise ... the primary reason I went to jail was to protect my own credibility. ... We can't do our jobs without that, that's all we have" (D. Kidwell, personal communication, April 15, 2006).

Everyone Loves the Anti-Snitch

Seven of the eight journalists³¹ interviewed perceived they were more trusted by sources because they were jailed of sources that came forward after they were jailed and that they received recognition from the public for their efforts. "To this day I still get stopped in the street and people give me a slap on the back and say, 'Good going, we admire what you did,'" said Taricani, who got several stories as a result of sources coming forward because they could "trust him" (J. Taricani, personal communication,

³¹ Anderson is the exception.

December 18, 2006). Even in jail, for instance, Karem discovered that inmates would come up to him and tell him things. Years later he got an interview with ex-Richard Nixon aide G. Gordon Liddy because of his stance on protecting informants (B. Karem, personal communication, April 14, 2006).

Kidwell says that people track him down all the time because they know he keeps his promises. “People are out there looking for people they can trust. They just are,” he said (D. Kidwell, personal communication, April 15, 2006). Kidwell recounted a case in point: About six years after Kidwell got out of jail, he was doing a story on police shootings and looking for witnesses. He and a colleague went underneath an interstate and visited cardboard box after cardboard box, talking to homeless people in case any of them had seen a police shooting that occurred in the area. He gave one homeless man his card and the man recognized his name as the journalist who went to jail to protect his source. Two weeks later, the homeless man called and told Kidwell that he had found three guys who said they saw the shooting.

Journalists on Shield Laws

The journalists interviewed mostly favor a federal shield law, but few think that legislation alone will keep journalism healthy. They lament corporate ownership of newspapers and broadcast units that puts business ahead of journalism’s goals. The reporters interviewed also feel there is too much “chain-store” journalism, with insignificant, sensationalized stories being covered. As Karem explained:

I watched the *Courier-Journal/Louisville Times* turn from one of the 10 best newspapers in this country, when it was privately owned, to one of the worst I have ever seen in my life as owned by Gannett,” said Karem. It’s nothing more than a shopper. ... The media has to not be consolidated. There is too much power and too few hands. ... Journalism should never have a vested interest in the status quo. Shield laws can help, but it’s like a sugar tablet. It’s not going to help

if you don't provide the support. ... Shield laws is like a false sense of well being because there already exists legislation in many states, but you have to have the people who will press it, support it and supporting it means dollars. ... There was no shield laws for me in Texas. Had there been would I have been better off? Maybe, but maybe not, because at some point in time the support dwindles as the dollars dwindle (B. Karem, personal communication, April 14, 2006)

Journalists also worry that shield laws don't protect reporters enough—especially in these times when it is difficult to define exactly what is a journalist: Is a blogger a journalist? Is a freelancer a journalist? Is someone who works for a major media organization a journalist? Abraham put it this way:

A free press will certainly help ensure a free society. So from that perspective, I think we could use every tool in the arsenal that we can get ... But I will say that particularly under the current climate, which is to suppress information and to suppress the media as much as possible, I think ... more than ever whistleblowers are going to be all the more important and I believe to protect them is going to be all the more crucial if you want to get information out and to continue this great experiment of a free society that we have been living in (L. Abraham, personal communication, April 17, 2006).

A federal shield law also would only offer so much protection—even for those affiliated with an established media organization, working in a full-time capacity. As Kidwell offered:

In my situation I'm not sure a shield law would have helped me. Even with a shield laws there are going to be times that you are going to be asked to violate the promise, and that's just something you just do not do. You just do not do it. I would never say I would never testify. I mean if I were to ... (see) a crime, if I witness somebody being murdered, a direct witness, then I would have to re-evaluate. ... To come after me for ... information that I gathered as part of my newsgathering, that's just wrong. And they know it's wrong. It's not what they intended when they wrote the First Amendment. It's just not (D. Kidwell, personal communication, April 15, 2006).

Although Caldwell ardently defends the First Amendment, he feels a federal shield law might give the government too much power, with them “deciding who can have a press card” or “who ‘real’ reporters are and who is legitimate and who isn't.” Instead, he believes that the First Amendment should be absolute. As he points out:

Lawsuits are a big problem and the state laws may be of help for news organizations combating litigation. But I write not as an owner but as a reporter, and news organizations have grown so timid that they shackle their reporters and they stay away from stories they ... (should) be running toward because they are afraid of the legal entanglements (E. Caldwell, personal communication, February 10, 2012).

Ultimately, most of those interviewed don't think a federal shield law is likely in the immediate future since the definition of who is a journalist remains problematic—especially in light of the Wikileaks situation. Fargo feels that the government fears a law that might protect someone such as Wikileaks founder Julian Assange³² and that passing a federal bill would create a too-narrow definition of a journalist. “I don't know how to get around that without making the law worse than it already is” (A. Fargo, personal communication, February 3, 2012).

Conclusion

Going to jail often changed how the journalists practiced their craft, sometimes making them more cautious in how they used anonymous sources and/or how long they stored their notes before discarding them. In the case of Taricani, his station actually changed its policy in regard to the source-reporter relationship, and now, according to Taricani, requires journalists to reveal sources to the news director—something he did not need to do during his case (J. Taricani, personal communication, December 18, 2006).

Some of these changes may improve journalism, especially since a few of the reporters admitted that over-reliance on anonymous sources leaves the field vulnerable.

“Quotes with no names attached has ruined journalism,” according to Caldwell, who

³² Julian Assange calls himself a journalist but others find his method of operating more criminal since he publishes classified documents and other material disseminating them widely *en masse*, often without filtering the material or providing context as journalists do. In 2010, Assange became especially controversial after publishing confidential Pentagon and State Department records and cables that he allegedly received from an army analyst, Bradley Manning. (Sullum, 2010).

offers that “by and large the best rule might be this: If you can’t use the name, don’t use the quote” (E. Caldwell, personal communication, February 10, 2012).

Reporter’s privilege and shield laws are important for many reasons: First, they set a precedent on what is acceptable in society. If the government can force journalists to break promises then what is going to stop them from going after private citizens in the same way? “Which is why your library records are being checked,” stated Karem. “Which is why the whole PATRIOT Act ³³ got passed, because we sit there complacent, flaccid, and happy with the way life is and [we] don’t understand how far we have come and [what] we have to do to guard our civil liberties and why those civil liberties are important” (B. Karem, personal communication, April 14, 2006).

Second, reporter’s privilege and shield laws promote journalists’ watchdog function. Without exception, all of the interviewed journalists jailed for protecting confidential sources or reporter’s notes believed their ability to get good sources relied on their willingness to not disclose information in a court setting. If the journalist/source relationship is jeopardized by the recent spate of subpoenas and contempt-of-court cases, freedom of speech will suffer, at least according to the reporters interviewed. As they indicated, the flow of information is contingent on sources coming forward as whistleblowers. If this source well dries up, both journalism and the public suffer.

But this issue revolves around more than protecting confidential sources. As Kidwell said, “I did not go to jail to protect a source I went to jail to protect my integrity” (D. Kidwell, personal communication, April 15, 2006). For many of the journalists, going

³³ The USA PATRIOT ACT (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (H.R. 3162) was introduced in 2001. It incorporated two earlier anti-terrorism bills: H.R. 2975 and S. 105 also passed in 2001 (<http://thomas.loc.gov>). Karem is referring to sections of the act that allow for subpoenas for records of electronic communications (such as library records), access to records and the authority to intercept electronic communications.

to jail also meant defending the right not to disclose their notes and/or unpublished interviews or video material. By going to jail, the reporters reinforced their credibility, that they had earned the trust of their sources because they chose to keep confidences. Most of the journalists could cite examples where sources came forward or interview subjects felt more ease offering information because the reporter had gone to jail to protect a journalistic principle.

Some of the journalists perceived that the news media did not cover the contempt-of-court charges and subsequent jailings of the reporters as an opportunity to educate the public about shield laws or reporter's privilege. Instead, these situations were sometimes covered as personality pieces that did not explain the nuances of protecting an ethical concept. This might explain why certain reporters noticed more positive coverage—it is easier for the public to understand that Taricani exposed government corruption and faced jail time because of it than to describe why Kidwell was imprisoned because he wouldn't release information on a child killing suspect.

The journalists also conveyed that the public's trust was essential to good journalism, which makes explaining those basic journalistic tenets important. When a journalist breaches ethical codes it tarnishes the field for everybody. "I believe that is why we're bleeding circulation and that is why people don't like us anymore," hypothesized Kidwell. "Because they can't trust us" (D. Kidwell, personal communication, April 15, 2006). The jailed journalists sometimes faced criticism for their stance, with their media institutions withdrawing their support—both financially and publically. Besides becoming more credible to sources, journalists received very little personal gain from their experience—and some sought journalism jobs elsewhere after

everything was all over because their company did not back them up to the extent the individuals felt they should.

Several of the journalists lamented the current state of journalism, where big business and government pressures news sources, limiting the availability of information, and where reporters become pawns for prosecutors. Because of this, all the journalists interviewed supported the general idea of shield laws. However, when it came to implementing a definition for who gets “journalist status” most professed that licensing media practitioners or allowing the government to create a classification could be dangerous and limit protections to those working fulltime jobs at established media institutions.

The next section of the dissertation will further explore this idea that media institutions do not always portray jailed journalists, shield laws, and reporter’s privilege in the best way. A framing study will examine how four major metro newspapers depicted reporter’s privilege and shield laws issues on its editorial page from the years 1972 through 2010. This section looks at what frames the media constructs when telling stories about reporter’s privilege and shield laws. It will also examine the possible effectiveness of these frames, questioning if the narratives offered provide an effective tool to educate the general public.

That section will be followed by another section from the research chapter containing a focus group study that delves into what three demographic groups—students, baby boomers and seniors—know about shield laws and reporter’s privilege. The dissertation ends with a chapter discussing the three studies embedded within it, concluding thoughts and ideas for future research. That final section makes suggestions

on how to construct better narratives on jailed journalists, reporter's privilege and shield laws.

What Newspapers Tell Their Readers About Shield Law and Reporter's Privilege: A Framing Analysis of Editorial Pages from 1972 to 2010

Introduction to the Framing Analysis

This chapter will look at how the editorial sections of the U.S. newspapers in four geographic areas framed the issues of shield laws, reporter's privilege, and the jailing of journalists for refusing to name sources from 1972, the date of the Branzburg decision, through 2010. The study sought to answer the following research questions:

RQ 1: How have newspapers framed discussions of reporter's privilege and shield laws?

RQ2: What do letters and op-ed columns reveal about public perceptions of reporters' privilege and shield law?

Using framing analysis the special attention was paid to the differences in coverage within this section of the newspaper. Rather than offering a quantitative analysis of predetermined frames, this qualitative study looks at emergent frames present in editorials, op-ed columns, and letters to the editor, in the manner of work by scholars such as Dahmen (2010), de Souza (2010), and Barnett (2005).

Gamson and Modigliani (1987) present a media frame as "a central organizing idea or story line that provides meaning to an unfolding strip of events" since "the frame suggests what the controversy is about, the essence of an issue" (p. 143). Similarly, Entman (1993) pegs frames as specific ways content creators frame "some aspects of a perceived reality and make them more salient in a communicating text, in such a way as

to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation” (p. 52).

Sometimes, the media frame information intentionally, “driven by ideology and prejudice” (Edelman, 1993, p. 232), but, often the sender of a message is unconscious of the act (Gamson, 1989). As Gitlin (1980) suggested, framing occurs as journalists classify news, often quickly under deadline, and “package it for efficient relay to their audiences” (p. 7). Other scholars agree with this assessment that news frames are constructed largely through journalist work routines, something that isn’t always a conscious act to the practitioner (Van Dijk, 1985; Gamson & Modigliani, 1987³⁴, Tuchman, 1978). Whether premeditated or not, though, framing events may affect how consumers understand the issues written about (Price, Tewksbury, & Powers, 1995, p. 4). So understanding the frames created in editorials, op-eds and letters to the editor in newspapers may offer some insight to how an issue is perceived by the public.

Traditionally, the editorial section has served as the mouthpiece for the newspaper’s own perspective as well as the voice of its readers whereas other sections, at least tacitly, follow the journalistic edict of objective reporting. For example, *The New York Times* started allocating space for letters from readers in 1896—something the newspaper (as well as others) had vigorously resisted. As Davis (1969) wrote, “The new management of the *Times* now made a point of opening its columns to the presentation of views on any side of any subject, as a matter of news and as a contribution to the formation of well-grounded opinion. Almost all decent newspapers do that now, but it was a novelty in the nineties” (p. 217). When the *Times* introduced the op-ed page on

³⁴ Gamson and Modigliani also credit the influence of special interest groups, along with journalism practices.

September 21, 1970, the objective of then-editorial page editor, John Oakes, and foreign correspondent Harrison Salisbury was to give a bigger forum to community voices. The new spot, the op-ed section, sought “to be a venue for writers with no institutional affiliation with the paper, people from all walks of life whose views and perspectives would often be at odds with the opinions expressed on the editorial page across the way” (An Introduction, 2010).

Since their introduction, editorials, op-eds and letters to the editor have offered so much rich material to scholars that they have been widely studied (Ryan, 2004; Richardson. & Lancendorfer, 2004), with researchers examining various elements from including editorials and letters (Downs, 2002; Cooper & Pease, 2009) or just letters to the editor (Buerkle, Mayer, & Olsen, C., 2003) to study how narratives on topics are created.

The purpose of this analysis is to examine how leading U.S. newspapers have framed the issue of shield laws and reporter’s privilege for the public through their editorial sections—a topic that is rarely researched. Combined with the results from the focus group study, this section of the research chapter will offer evidence of whether the media’s own coverage might contribute to diminishing trust from the public, which increasingly views the media as unprofessional and inaccurate as indicated by a 2005 study by the Project for Excellence in Journalism, an institute affiliated with Columbia University Graduate School of Journalism and funded by the Pew Charitable Trusts. This research that showed the number of Americans who thought news organizations were highly professional declined from 72% to 49% from 1985 to 2002, as the number who thought the press got the facts straight fell from 55% to 35%. It is possible that shield laws and privilege issues face fading support partly because of the type of narratives the

media offer its audience. After all, as Reese (2001, p. 143) notes, frames can linger throughout time. If audiences don't respond to the way shield laws and reporter's privilege are framed in the editorial section, support for those issues could falter. Additionally, misinformation introduced within the editorial pages could portray the issue in an incorrect and, even, an unfavorable light.

Overview of Framing Analysis

To examine these writings, framing analysis, which offers researchers a way to describe the communicative power of text, was used. As noted by Scheufele (1999), "framing has been used repeatedly to label similar but distinctly different approaches" (p. 103). Scholars explain frames using various semantics. Goffman (1974), for instance, viewed frames as a way to interpret how individuals or groups "locate, perceive, identify, and label" (p. 21) events in order to find meaning and organization in such experiences. Goffman based this on the idea that frames serve as cognitive structures that individuals unconsciously use to define a situation or issue. An example he uses to explain this process is a "stop light frame," where factors important to an individual are the ones he or she notices. Other elements in the experience fade into the background. Another example is Reese (2001), who defined frames as "organizing principles that are socially shared and persistent over time, that work symbolically to meaningfully structure the social world," (p. 142). Lakoff loosely defined frames as "mental structures that shape the way we see the world" (2004, pp. XV). Many governments, businesses, and individuals, as well as media institutions use such frames to maximize their self-interest through what is said and shown to the public (Lakoff, 2004). Later framing analysis work (Lakoff, 2004; Feldman, 2007) as well as agenda setting theory (McCombs & Shaw, 1972) focus less on

the subconscious and more on the idea that frames can be manufactured.

For media studies, Entman's work is considered the starting point even though Iyengar (1991) began using frame analysis in his media studies in the early 1990s (Fisher, 1997). In media studies, framing offers insight on why the media covers the stories they do, and how the public interprets these and decides which events are important. Entman defines such media frames in this way:

[t]o frame is to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation (1993, p. 52).

Entman, for example, in his book *Projections of Power, Framing News, Public Opinion, and U.S. Foreign Policy* (2004), shows that the way foreign policy was perceived by journalistic outlets made the media coverage more extensive and positive during America's participation in Grenada and Panama while it only glossed over missions in Haiti and Kosovo. He also shows how framing works (2004) with an example about September 11, 2001, quoting the speech President George Bush made the day after the attacks: "The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror, they were acts of war" (Bush, 2001, in Entman, 2004, pp. 1). Bush continued using the words "war," "terror," and "evil" in many other appearances later on, mentioning "war" 12 times in his 2002 State of the Union address alone. When people use words consistently this way, they frame the issue—highlighting certain aspects of it in order to make connections that will push forward a particular interpretation. Using techniques such as these, agencies, like the White House, hope to control the political communication that appears in the media—and, for a time after 9/11, they were successful. The media reiterated the frames it had been given (Entman, 2004).

The press also creates news frames itself—conventional ones that give meaning to complex situations by putting events, actions, and ideas into familiar storylines. Much has been written, for example, about the frames surrounding 9/11 (Archetti, 2004; Norris, Kern, & Just, 2003) and the effect of them on public perception. For instance, fear of terrorism increased after 9/11 despite worldwide decline and the “power of consensual news frames, exemplified by the ‘war on terrorism’ frame in America cannot be underestimated” (Norris et al., 2003, p. 283). Some of the frames were created by the magnitude of the event broadcast vividly on television. The government constructed frames through press releases, and speeches and briefings given by officials. The Bush Administration also used censorship to constrain the press while providing narratives that showed America as the victim “The use of the terrorism frame serves several functions, both cognitive by linking together disparate facts, events and leaders, and also evaluative by naming perpetrators, identifying victims, and attributing blame. It allows political leaders to communicate a coherent simple message to the public, while also reshaping perceptions of ‘friends’ and ‘enemies.’ In the words of President Bush: ‘Every nation in every region now has a decision to make. Either you are with us, or you are with the terrorists’” (Norris et al., p. 9).

Entman (2003) offers another model to understand how events come to be portrayed in the media: Cascading activation, where ideas mostly cascade downward like a waterfall from one group to another, tries to explain how ideas and situations are covered by the media. This movement constructs the interpretation of issues and events, sometimes coloring perception and knowledge building. For instance, if reporters hear only ideas that confirm their own thoughts, the news will reflect that. If they are exposed

to more varied ideas, more frames, then the news may be less one-sided. This is why it is beneficial for the media to cover things toward the public interest, such as governmental decision-making or accountability. High-quality journalism offers concrete advantages to society. The media also need to consider all the variables of information possible when covering a story, instead of relying on only one or two frames to create stories, society would see more perspectives contained in news stories and would, subsequently, be better informed.

In general, with Entman's cascading model, ideas flow from the administration to other elites, such as Congress members and leaders, before hitting the media, which creates news frames for the public. Some participants in this model have more power than others, such as the government, which can construct certain frames for the public and try to push those into the media. Certain media institutions, such as the *New York Times*, also have more pull with the public—in particular, the elites, who follow such media on a regular basis—and thus the frames they create are passed around and accepted more freely.

Frames can be especially problematic for political reporting because when a news media outlet repeatedly frames a situation in a certain way, those who create public policy may offer an inappropriate resolution or not even look at the real issue. For example, in the *Columbia Journalism Review*, Graff (2007) cites a 2003 *New York Times Magazine* story (Belkin, 2003) that reported professional women who left their high-powered careers for motherhood were happy about their decision—even though 70 percent of families with children in the U.S. are two-income households. “The problem is that the moms-go-home storyline presents all those issues as personal rather than

public—and does so in misleading ways,” said the *CJR* piece. “The stories’ statistics are selective, their anecdotes about upper-echelon white women are misleading, and their ‘counterintuitive’ narrative line parrots conventional ideas about gender roles. Thus they erase most American families’ real experiences and the resulting social policy needs from view.” As the real situation is obfuscated, then public policy becomes geared toward the misconception being perpetuated. So, real issues, such as the lack of good day care or an inadequate family sick leave policy go ignored (Graff, 2007). When an article misses the real story, it violates one of the main purposes of journalism, which “is to provide citizens with the information they need to be free and self-governing” (Kovach & Rosenstiel, 2001, p.17). If the public doesn’t know what issues to fight for, and the lawmakers weigh issues inaccurately, either through misinformation or self-interest, community life suffers. Unfortunately, news coverage and selection is often effected by things such as corporate ownership, advertiser interests and other factors. Scholars, in fact, have often written about how the corporate class and its holdings dominate the culture and that media sometimes misses the true story while catering to owners’ biases and wants (e.g. Parenti, 1993; McChesney, 1999; Bagdikian, 1983).

One of the perceived weaknesses of framing, in general, is that it is not considered a full-fledged theory—with an accepted, across-the-board definitive statement on how frames embed and manifest a text or how they influence human thinking. This is mostly because framing is looked at in a number of disciplines in the humanities and social sciences, and much of the research lacks a coherent methodological approach. Often these separate disciplines don’t communicate, and hypotheses accepted as true in one

area may be discredited in another. According to Fisher, what joins such various approaches together is their loose connection to Goffman's (1974) work on framing.

Such fractured paradigms (Entman, 1993) do not offer a comprehensive guide for researchers, and that can sometimes be problematic. As Hertzog & McLeod (2001) write in *A Multiperspectival Approach to Framing Analysis: A Field Guide*, "the range of approaches political scientists, sociologists, media researchers, and others bring to the study of frames and framing is both a blessing and a curse. Entman (1993) has suggested that researchers need to bring framing studies to one location, to synthesize related theories and to expose them to rigorous exploration. "Reaching this goal would require a more self-conscious determination by communication scholars to plumb other fields and feed back their studies to outside researchers," he said. "At the same time, such an enterprise would enhance the theoretical rigor of communication scholarship proper" (p. 51).

Although framing analysis has limitations, it remains a popular method in media studies since it provides a way for researchers to examine texts and understand how meaning is constructed. Data for such studies is collected from various types of media (Fisher, 1997) and undergo various forms of qualitative (Entman, 1993; Kerbel, Apere & Ross, 2000; Scheufele, 2006) and quantitative analyses (Esser & D'Angelo, 2003; Bullock, 2007).

Data Collection

This section of the research chapter is based on a qualitative framing analysis focused on discovering narratives in editorials, op-eds and letters to the editor that illustrate the research questions, with categories for discussion emerging as the research

was performed. For purposes of this study, editorials are defined as texts with no bylines that represent the collective opinion or majority of the newspaper's editorial board. Op-eds are opinion texts with bylines, so-called because of their placement opposite the editorial page. Letters to the editor are commentary sent to the newspapers by their readers and published under that title.³⁵ News articles were not used for this study, which chose to look at the conversations created on the editorial pages by the staff, op-ed contributors, and the newspaper's readers because these are the texts that most likely would capture the overtly subjective ways opinion journalists, contributors, and readers would frame shield laws and privilege.³⁶

While it is true that the letters to the editor are subject to selection bias that can frame how readers' viewpoints are showcased (Hynds, 1991; Lemert & Larkin, 1979; Renfro, 1979) tend to come from specific demographics (Reader, Stempel & Daniel, 2004) and occasionally are hoaxes (Silverman, 2009), they nonetheless were useful for this research, which aims to show how the ideas of reporter's privilege and shield laws were framed for the public. So the study was not concerned with whether the letters represented a wide demographic or if their purported authors wrote them. Instead, it was more interested in looking at the ideas such materials portray.

The following newspapers were used in this study: *The Washington Post*, *The Los Angeles Times*, *The Chicago Tribune* and *The New York Times*. These newspapers were selected because they are major metro dailies based on the East and West coasts and in

³⁵ Definitions come from *The Boston Globe* at <http://services.bostonglobe.com/news/faqs/faq.aspx?id=6260>).

³⁶ An exception to this is the *Washington Post* July 8, 2005 Robin Givhan's article, "No False Moves In These Sentencing Walks," placed in the *Style* section since two letters to the editor referenced it and a *Washington Post* Howard Kurtz piece, "The Allure of Leaks Dries Up," because he often writes media commentary and that piece read more like an op-ed than a traditional news story.

the center of the U.S. Although all four newspapers have regional audiences, the *Times* aims to be a national newspaper, publishing a national edition and the other newspapers are well-known outside their circulation areas. The terms “reporter’s privilege” and “shield laws” were used, along with the names of jailed journalists, in keyword searches to locate relevant editorials, op-eds and letters to the editor. In all, 472 pieces were gathered from the editorial and op-ed pages (185 op-eds, 128 letters to the editor, and 159 editorials). The data were collected as follows:

The Washington Post

The ProQuest Historical Archives for the *Washington Post* (from January 1, 1972-December 31, 1993) and the newspaper’s website archives (from January 1, 1994-December 31, 2010) were used for data collection. The ProQuest Historical Archives, a digital archive that provides full-text articles for newspapers dating back to the 18th century, was used in lieu of the newspaper’s website whenever possible for the *Post* and the other papers in the study because of a more comprehensive search engine. (See Appendix II for specific search terms and categories used. Jailed journalists’ names were used from The Reporter’s Committee for Freedom of the Press list, available at <http://www.rcfp.org/jail.html>. Note: List is no longer active, but the list is contained in Appendix IX. Also, a similar list is located at <http://www.rcfp.org/jailed-journalists>). For this study 104 documents (58 op-eds, 24 letters to the editor, and 22 editorials) were obtained from the *Washington Post* website and 41 (21 op-eds, seven letters to the editor, 13 editorials) from the ProQuest archives.

Los Angeles Times

The ProQuest Historical Archives for the *Los Angeles Times* (from January 1, 1972-December 31, 1986) and the newspaper's website archives (from January 1, 1987-December 31, 2010) were used for data collection. A total of 74 documents (27 op-eds, 14 letters to the editor, and 33 editorials) were obtained from the *Los Angeles Times* website and 61 (12 op-eds, 19 letters to the editor, 30 editorials) from the ProQuest archives.

The New York Times

The ProQuest Historical Archives for the *The New York Times* (from January 1, 1972-December 31, 2006) and the newspaper's website archives (from January 1, 2007-December 31, 2010) were used for data collection. Nine documents (two op-eds, three letters to the editor, and four editorials) were obtained from the *New York Times* website and 103 documents (17 op-eds, 55 letters to the editor, 31 editorials) from the ProQuest archives.

Chicago Tribune

The ProQuest Historical Archives for the *Chicago Tribune* (from January 1, 1972-December 31, 1984) and the *Chicago Tribune* archives (from January 1, 1985-December 31, 2010) were used for data collection. Fifty-one documents (34 op-eds, two letters to the editor, and 15 editorials) were obtained from the *Chicago Tribune* website and 29 (14 op-eds, four letters to the editor, 11 editorials) from the ProQuest archives.

Data Analysis

This study used constant comparative data analysis, a part of grounded theory, a qualitative research methodology, originally developed by Barney Glaser and Anselm Strauss (1967), which allow theories and categories to emerge from the data. In such analysis, patterns in the data often inductively indicate general concepts, which can be further evaluated and grouped into categories. As Glaser & Strauss (1967) explained, “In discovering theory, one generates conceptual categories or their properties from evidence, then the evidence from which the category emerged is used to illustrate the concept” (p. 23). Strauss and Corbin (1998) further suggested that researchers should “uncover relationships among categories...by answering the questions of who, when, why, how, and with what consequences...to relate structure with process” (p. 127).

All articles were read a minimum of three times to determine what categories to place the material in. Guided by Gamson and Modigliani (1987)’s media frame conceptualization that “a central organizing idea or story line that provides meaning to an unfolding strip of events...The frame suggests what the controversy is about, the essence of the issue” (p. 143) along with Altheide’s distinction of themes, acting as “recurring typical theses” and frames as a deliberate “focus, (p. 31)” the material was broken down, first into themes. These included such as general concepts like: Did editorials portray shield law/privilege as a social issue, a legal case or as a historical reference? How is the role of the journalist looked at? Word-choice—when do editorials tend to label something a shield law or reporter’s privilege. Individual journalist—how are various jailed

journalists discussed?). During the second and third readings, categories were further broken down into specific frames or master narratives.

According to Hertzog & McLeod (2001), such narratives “are powerful organizing devices, and most frames will have ideal narratives that organize a large amount of disparate ideas and information” (p. 149). For instance, a theme might suggest that editorials look at shield laws as a social issue; however, the frame that resulted from this perspective would be that shield laws serve the public good. When articles suggested additional frames, the articles already analyzed were re-read to insure categorization remained consistent. The last step in the process involved collapsing duplicated categories and, in some cases, articles needed re-reading to insure proper placement. Sometimes articles displayed more than one frame, and that information was duly noted. Frames either appeared in the headline, or in a few sentences or paragraphs of the piece.

Findings

Four frames emerged in this analysis: “the public good,” “courts/government as adversary,” “the journalist as a hero,” and “the irresponsible journalist.” This section of the dissertation will explain each of these frames, with excerpts from the editorial pages used to demonstrate how the various newspapers embraced these frames again and again, fairly consistently from 1972 through 2010. It is interesting to note that for 38 years, newspapers in four locations used these four frames consistently during discussions about shield laws, reporter’s privilege and jailed journalists.

The Public Good Frame

Most often, the reason editorials, op-eds, and, even, letters to the editor gave for supporting the idea of shield laws or reporter's privilege was that the free flow of information perpetuated democracy and kept the citizenry informed. An example of this was seen in an op-ed (Fritchey, 1972) in *The Chicago Tribune*:

The First Amendment is not a piece of special-interest legislation for the news and publishing industries but a "governmental guarantee to a free people without which they could not remain free (p. A5).

Linking a frame to an "enduring value in society" (Pan & Kosicki, 2001, p. 49) is a common strategy, especially in political communication, for offering a readily acceptable positive spin to an issue. The newspapers especially used narratives about jailed journalists or those reporters threatened with imprisonment if they didn't reveal their source's identity as a way of engaging the reader in a conversation on shield laws (Neitnor, 1973; "Correcting a Threat to Freedom," 1978; "Legal Siege on a Free Press," 2000; "Reporters and Sources; Congress Considers a Federal Shield Law, 2006). They also used the same narrative to emphasize the idea that journalists deliberately choose jail to protect the free flow of information ("Locking Up the Free Press," 1976; Goldstein, 2005; Rainey, 2009) as well as the point out that whistle-blowing benefits society by revealing malfeasant acts and other important information ("The Court and Congress (I), 1972; Partee, 1973; Tokoph, 1988; "Smoking Out the Whistle-Blowers," 1994; Kinsley, 2005; Kaufman, 2010). Editorials and op-eds especially, used this story line, usually insinuating that critical stories depended on anonymous sources, as in the *Los Angeles Times* editorial "A Victory for the Public" (1984), which said:

The issue of confidentiality is often described as a conflict between the press and the courts, but that view is a misconception. The conflict essentially is between the government and the people. Government actions that inhibit the ability of the press to gather news are restrictions that deprive the public access to information (p. D6).

Another example of this appeared in a *Washington Post* op-ed, “Reporting at Risk” (2004) by Chris Dodd, a Democratic Senator who represents Connecticut in the U.S. Senate. He wrote about journalists Judith Miller’s and Jim Taricani’s sentences:

If reporters are unable to promise confidentiality to their sources, many conscientious citizens will choose not to come forward with information out of fear for their jobs, their reputations, even their lives. The public’s ability to hold those in power accountable—whether in the government or in the private sector—will be severely compromised. In a real sense when the public’s right to know is threatened, so are all of the other liberties we hold dear. (p. A 19)

Similar themes are evident in an op-ed, “Our History of Media Protection” (2005), that Nathan Siegel, a Washington lawyer, wrote for *The Washington Post*:

Exactly 35 years after the first Nixon-era subpoenas, six reporters from many of the country’s most prominent news organizations, including Judith Miller, have been jailed or fined. And that number is likely to increase. As a result, Congress for the first time in a generation is seriously considering a federal shield law similar to those some states started passing over a century ago.

This pattern is not mere coincidence. Rather, I think, it reflects a fundamental conflict between the judiciary and the press that tends to recur whenever a new generation of judges and prosecutors uninfluenced by the memory and lessons of prior conflicts emerge. This time either Congress or the Supreme Court should take the lessons of history to heart and put this recurring controversy to rest (p. A17).

This frame was also evident in headlines in *The Los Angeles Times*, including the editorial, “The Public’s Right to Know” (1972, p. D8), and in the editorial, “The Losers Will Be the People” (1977, p. 14), and the op-ed “Commentary: An Exchange on Reporters and Their Confidential Sources; *N.Y. Times* Editor: Protecting our sources serves the public interest” (Keller, 2004, p. B11).

But the public good frame was not used just as a link to show that preventing journalists' access to information hurts democracy. It also was used to advocate for shield laws. For example, Percy wrote in a *Chicago Tribune* op-ed headlined, "Press must resist subpoenas" [SIC]: "I feel it is vital to a free society that there be a free press. Having recently visited several so-called democracies in Asia where there is a government-controlled press, I can report that the effect is stifling (1973, p. 14)." The subhead of the piece read: "Legal protection essential," which reinforced the idea that legislation was needed to protect the flow of information for the public. Headlines sometimes set up this adversarial relationship as well, as in "Protecting Sources. A Free Press vs. Criminal Justice," a headline on the clash between the First and Eighth Amendments in the jailing of the *New York Times*' reporter Myron Farber (Fuller, 1978, p. C4).

Another example was seen at the conclusion of a *Los Angeles Times* editorial discussing a 2009 federal shield law bill that ended with: "The final version of this legislation should make clear that it's protecting an activity—public-spirited journalism—not just a profession" (Journalists Need a Federal Shield Law, 2009, para.7). Here, the deliberate choice of "public-spirited" even implied a community involvement—one beneficial to all.

Courts as an Adversary Frame

Editorial and op-ed page discussions of shield laws, jailed journalists, and court cases, sometimes framed the court system itself as in an adversarial relationship with the free press. Newspapers consistently wrote editorials admonishing any investigation that goes after journalists' sources for information, a situation freelance writer Vanessa

Leggett faced while researching and writing a book. As a *Chicago Tribune* op-ed pointed out (Chapman, 2001) pointed out:

The fact that Leggett isn't working for a big newspaper or TV station may explain why the U.S. attorney felt free to harass her. Prosecutors don't go out of their way to pick fights with people who buy ink by the barrel. Leggett, without the protection of an institution with the resources to fight back, is a more inviting target (p. 23).

But support of a big institution doesn't immunize a reporter, either, as can be seen in the editorial "Investigating Leaks" (2003) regarding the Valerie Plame case, in which a secret agent's identity was revealed in a syndicated Robert Novak column. *The New York Times* stated that with the investigation, "the Bush administration should not use the serious purpose of this inquiry to turn it into an investigation of Mr. Novak or any other journalist, or to attempt to compel any journalists to reveal their sources" (p. A30).

Another example occurred in a *New York Times* editorial aptly titled, "A Leak Probe Gone Awry" (2004), which stated:

In an ominous development for freedom of the press and government accountability that hits particularly close to home, a federal judge in Washington has ordered a reporter for *The New York Times*, Judith Miller, to testify before a grand jury investigating the disclosure of the covert operative's identity and to describe any conversations she had with "a specified executive branch official" (p. A26).

The editorial went on to explain that the subpoena held even though Miller never named the undercover agent. "Making matters worse," the *Times* wrote, "the newly released decision by Judge Thomas Hogan takes the absolutist position that there is no protection whatsoever for journalists who are called to appear before grand juries" (p. A26).

In these editorial pages, both the text and headlines depicted this persecution of journalists as unfair. This is seen again in a September 29, 2004, op-ed in *The New York*

Times by William Safire (2004), a Pulitzer-Prize winning political columnist. “The Runaway Prosecutor,” called Plame case prosecutor Patrick Fitzgerald’s investigation a “campaign to undermine the tradition of protecting the confidentiality of a journalist’s sources, without which officials could conceal ineptitude, nepotism, corruption and worse” (p. A25). Both the text and the headline perpetuated the idea that the court system took a deliberate, and unfair, stance against journalists. In fact, throughout 2004, *The New York Times* painted Fitzgerald as someone invested in a “major assault on the confidential relationship between journalists and their sources” (“Showdown for Press Freedom,” 2004, p. WK12). Fitzgerald wasn’t the only prosecutor censured, however. A *Los Angeles Times* editorial headlined “The D.A.’s Press Attack” (2002) noted that District Attorney Steve Cooley had sent officials to search a local L.A. newspaper to find evidence that a local law firm had paid for a legal notice, even though it seemed they could find the information through the law firm itself. The investigators insinuated that the newspaper would be harassed unless it revealed the information:

Marching in with a search warrant, investigators shut down the newspaper for three hours Thursday, ordering reporters and editors out to the sidewalk. *Metropolitan News* owner Roger M. Grace said the agents initially told him the search could last up to three days and that the reporters’ desks would be searched unless Grace handed over the ad invoice and other documents, which he and his wife finally did (2002, p. B22).

Judges and Courts: Using Journalists for Investigations

Not only were prosecutors shown as individuals who used journalists in lieu of obtaining accessible information themselves, but also judges and court systems also often were portrayed as embracing that same agenda. This was seen in both headlines and text. For example, headlines such as “Open Season on Reporters” (1972, p. A4), “Tyranny in

Judicial Robes” (1975, p. D6), “Judges—The New Ruling Class” (1978, p. C1) and “Lies, politics and the law” (1984, p. E2) demonstrated this frame.

This perspective was also shown in the text within editorials. For instance, a 1988 *Los Angeles Times* editorial “Breaking the Shield” said “once again, a California court has chosen to ignore the newsman’s shield” (p. 6) about the jailing of *Los Angeles Times* reporter Roxana Kopetman. In the *Los Angeles Times*’ “Legal Siege on a Free Press” (2000) inferred the same strategy in its editorial’s first line: “California’s press shield law and its federal counterpart (federal protections as dictated by the 1972 Supreme Court decision) seem to be developing gaps, with a number of judges in California trying to force journalists to turn over documents or testify at trials” (p. M4). A *Los Angeles Times* editorial calling for a federal shield law offered that: “Judges too often have given short shrift to the public interest in news gathering, making such guidance critical (“A Shield for All; By Protecting Journalists’ Confidential Sources, A House Bill Ultimately Safeguards the Public’s Right to Know, 2007, p. A16).

This idea that journalists were assaulted not only by the courts, but, by an agenda perpetuated by the federal government—and then enacted in the court system—also came up. In a 1972 editorial, “The Press Must Fight,” the *Chicago Tribune* noted that, “The Nixon administration itself is guilty of creating a climate in which it is acceptable to impose upon the freedom of the press” (p. 12). In the op-ed, “Press Shield Law Is Still Necessary” (Kohlmeier, 1973), for instance, *The Chicago Tribune* pointed out that despite the investigative success journalists Bob Woodward and Carl Bernstein had uncovering the illegal behavior of President Nixon, reporters were still under government attack:

[E]arly in the Nixon administration, the press was bombarded, not only with hostile words, but with subpoenas. Federal grand juries, usually in the course of investigating political dissent, drugs, and other forms of the new criminality, began to subpoena [sic] newsmen who had written about these matters (p. 26).

In some editorial pieces, this idea was reflected in both text and headlines. The *Los Angeles Times* editorial “News as an Arm of the Government” (1979), for example, suggested a big-brother presence in both the headline and the conclusion, which stated: “This decision and other similar rulings, if they finally prevail, will convert news reporters into an arm of the government, and undermine the independence of the press”—although the piece really spoke about how an appeals court overrode California shield law (p. C4). This was also apparent in the *Los Angeles Times* op-ed “Journalists Are Working in a Dark and dangerous era,” in which Shaw (2004) wrote that: “reporters in this country are under siege” (p. E. 18). In 2009, the *Chicago Tribune* emphasized in the editorial “Blocking the Sunlight,” how legislation could be altered:

During last year’s presidential campaign, Barack Obama indicated he understood the problem. He endorsed a tough federal shield law that would protect journalists from being forced to identify their sources. But now that he’s in charge of the executive branch, he is less convinced that government leaks serve the public interest. So the administration is trying to weaken the shield proposals before Congress (p.22).

Journalist as Hero Frame

Often in the editorials, op-eds, and letters, journalists were depicted as heroes who suffered persecution to perpetuate a free press—in a sense contributing to another frame, the social good—at the expense of themselves. For instance, when discussing the Myron Farber jailing in *The Washington Post* op-ed, “Shields for the Press” Clayton Fritchey (1979) showed the magnitude of what Farber and his

newspaper went through to protect a journalistic ideal. Farber, a *New York Times* reporter, went to jail for 40 days in 1978 to avoid turning over his notes:

In challenging the subpoena, *The Times* and Farber relied not only on the First Amendment, but also on the New Jersey shield law, supposed to be the strongest in the United States in protecting confidential news sources. *The Times* further argued that the subpoena was so sweeping and imprecise as to be little more than a fishing expedition.

The judge brushed aside the shield laws and rejected a plea for a hearing on the merits of the subpoena as well. His order was to bring in everything, and he would decide privately what, if anything, was relevant to the trial. His order is being appealed, but meanwhile *The Times* has been fined \$100,000, plus \$5000 a day, for non-compliance, and Farber is behind bars for who knows how long. The state senator who sponsored New Jersey's shield law called the imprisonment of Farber a "disgraceful" act that put into "grave danger" the public's right to know through a free press (p. A19).

This frame was also seen in a *Los Angeles Times* editorial on *USA Today* reporter Toni Locy, who implicated Dr. Steven Hatfill, a virologist who worked as a civilian researcher for the military, in her reporting of the 2001 anthrax attacks³⁷. In this editorial she was portrayed as an individual who did her job yet faced "financial ruin" for shielding a confidential source. Even if an appeal were to succeed, the newspaper noted, "Other reporters could be pressed to choose between bankruptcy and a violation of professional ethics" (2008, p. A16).

This frame was also evident in discussions about other jailed and subpoenaed journalists, including:

- William Farr, a reporter for the *Los Angeles Herald Examiner*, and Peter Bridge, a *Newark* (New Jersey) *Evening News* reporter (Maynard, 1972)
- Richard Hargraves, an editorial writer for *The Belleville News-Democrat* (Illinois) (Hentoff, 1984)

³⁷ After an eight-year investigation, the Justice Department concluded that biologist Bruce E. Ivins was probably responsible for a spate of bioterrorism, where anthrax spores were mailed. Five people died in the attacks (Warrick, 2010).

- Vanessa Leggett, a freelance writer (Chapman, 2001)
- Jim Taricani, a Rhode Island TV reporter (“Jailing reporters,” 2004)
- Judith Miller, a *New York Times* reporter; Matthew Cooper, a *Time* magazine reporter; and Locy (Specter, 2008)

Op-eds and editorials such as these showed how the editorial page portrayed the dire consequences journalists faced and usually implied at some point that it was not just the reporter who suffered, but also the public’s free flow of information (for example, see *Washington Post*: Fritchey, 1972; Osterhout, 1972; “Ethics, Professionalism and a Free Press,” 1972; Seib, 1978-a and c; “The Farber Case (Cont.),” 1978; Fritchey, 1979; Hentoff, N., 1984; “A Shield for Journalists,” 2005; Olson, 2006; “More Journalists Facing Jail; Time to Pass a Federal Shield Law,” 2006). In these persecution narratives, the journalists are depicted as heroic since their suffering aims to aid the public’s access to information. This was typified by showing the reporter as a fighter, protecting his or her source while discovering information for the public good despite consequences (“A Reporter Goes to Jail,” 1978; Getler, 2005; “A Shield for Journalists,” 2005). For example, then-U.S. Senator Arlen Specter (2008) wrote in an op-ed in the *Washington Post*:

The federal courts are split, however, on whether reporters have a common-law privilege to withhold information from a federal court. Attorneys general of 34 states recently urged the Supreme Court to recognize a federal reporters’ privilege because the lack of a federal standard undermines state shield laws and the public interest embodied in those laws. It takes only a few well-publicized cases of the government or federal courts forcing reporters to reveal confidential sources – *Time*’s Matt Cooper; former *New York Times* reporter Judith Miller spending 85 days in jail; or former *USA Today* reporter Toni Locy being ordered to pay up to \$5,000 for each day she remains silent, with no contributions allowed from her employer, family or friends – to chill those who have important things to say (p. A 17).

The frame of journalist as hero was also seen in initial editorializing in the *New York Times* about its reporter Judith Miller, who was jailed for 85 days for refusing to name a source. Her newspaper wrote six editorials in 2005, from February 17 through June 29 alone, mentioning the Miller case. Most featured strong, pointed headlines, including “The Need for a Federal Shield,” “A Victory for Press Freedom,” “A Slap in the Face,” and “At the End of a Session; And Strikes a Blow at a Strong Press.” All editorials upheld *The Times*’ opinion that a free press should have privilege rights. For example, William Safire (2005), a *Times* columnist wrote in “The Jailing of Judith Miller”: “The principle at stake here is the idea of ‘reportorial privilege,’ embraced in 49 states and the District of Columbia, but not in federal courts” (p. A23).

The New York Times editorial page generated 14 editorials about Miller’s 85 days in jail (Auletta, 2005). The first one, published on July 7, 2005, “Judith Miller Goes to Jail,” told readers that the editors were proud of Miller’s decision to accept jail time rather than reveal her confidential source: “She is surrendering her liberty in defense of a greater liberty, granted to a free press by the founding fathers so journalists can work on behalf of the public without fear of regulation or retaliation from any branch of government” (para. 2). Miller was compared to civil rights activist Rosa Parks, Pentagon Papers whistleblower Daniel Ellsberg, and Woodward and Bernstein’s famous confidential Watergate “Deep Throat” source Mark Felt. The column generated much reader response, and *The New York Times* published 12 readers’ letters the next day. Nine supported Miller and three portrayed the contempt of court ruling that resulted in her jailing as justified.

The next few columns covered a multitude of subjects, always mentioning Miller in an affirmative light, but often in passing. Nicholas Kristof (2004) managed to even work Miller into a July 26 column chastising President Bush on his passivity on the genocide in Darfur, writing “I’m outraged that one of my Times colleagues, Judith Miller, is in jail for protecting her sources. But if we journalists are to demand a legal privilege to protect our sources, we need to show that we serve the public good—which means covering genocide as seriously as we cover, say, Tom Cruise” (p. A17).

The Irresponsible Journalist Frame

In this frame, journalists were portrayed as pursuing First Amendment rights overzealously in more nebulous contempt-of-court cases where substantiation for the battle relied on less clear-cut reasoning or unreliable premises. Rather than cooperating before situations required a subpoena, the media institution and the reporter pursued a fight that could have been a compromise, to the extent sometimes that a precedent was set and a bad case potentially produced bad law against more credible, more responsible requests for protection under shield law. This is seen in an editorial about the Farber case in the *Chicago Tribune*, which pointed: “*The Times* has asserted its willingness to risk martyrdom in pursuit of freedom of the press; but as we said earlier this month, it may find that it is jeopardizing freedom of the press in its pursuit of martyrdom” (1978, p. C2).

Journalists were also portrayed as irresponsible when they used leaks inappropriately as in the Richard Jewell case³⁸ in *The Los Angeles Times*’ op-ed “Not All News Leaks Deserve Law’s Shield” (Ulemen, 1996). This example

³⁸ Jewell, a former deputy sheriff, found a bomb hidden in a knapsack in a park and hustled people away from the area before it exploded. First, he was lauded as a hero, but then law enforcement officers made him a suspect (Pember, 2005).

referred to the investigation of the 1996 Olympic Park bombing in Atlanta, where during a newscast, NBC anchor Tom Brokaw said that authorities had information about Jewell that was as the op-ed quoted, “enough to arrest him right now, probably enough to prosecute” (p. B5). Brokaw based his remarks on unnamed sources in law-enforcement agencies. Later, the FBI exonerated the security guard, who then threatened to sue NBC. Eventually Jewell received a cash settlement from NBC. The problem in this particular case was, as Ulemen explained:

Strict federal regulations specify with great precision the information that can and cannot be released in pending Justice Department investigations. Leaking information protected by these regulations cannot be equated with "whistle-blowing." Such leaks compromise an ongoing investigation rather than expose a cover-up (p. B5).

Other examples that framed media practitioners as irresponsible, journalists accused of doing bad reporting included KNBC reporter Tracie Savage’s TV story on O.J. Simpson. In this case, Savage invoked shield law to protect a source after she reported that DNA tests affirmed that Nicole Brown Simpson’s blood was on socks discovered in Simpson’s mansion—the problem with that information was that no DNA tests had been conducted at that point. A

Los Angeles Times op-ed noted:

The heroine’s mantel is a bad fit here. Savage would be this season’s Joan D’Arc of journalism—a potential shining martyr for the cause of press freedom—if not for the fact that the story she’s now being held accountable for was flat-out wrong (Rosenberg, 1995, p. B5).

Some other reasons journalists were deemed “irresponsible” was because they were subject to the manipulation of elites and the government (Dowd 2005; Rutten, 2007;

Rainey, 2009) or did not do their due diligence on the job (Gartner, 1978; Uelmen, 1996; “The Plame Blame game,” 2005).

Cozying up to sources was a prominently discussed peg that cast journalists, involved in contempt-of-court cases, in a negative light. The Valerie Plame case and the Libby trial brought up this narrative, with one *Los Angeles Times* op-ed by Tim Rutten (2007) offering this tart assessment:

Most of the reporters who trooped into the Libby trial’s witness box were part of a fairly unlovely parade. Most, though, not all, had made themselves willing tools of an administration bent on discrediting a guy whose offense was to inform people about how the White House had misled the country about its reasons for invading Iraq. Most, though not all, had chosen to save their own well-cared-for skins by going back on the promise of confidentiality they had given their self-interested and manipulative sources (p. E1).

Although this narrative appeared in text, headlines also sometimes projected this line of thought. For example, two *Los Angeles Times* op-eds carried these headlines: “Reporters aren’t above the law; The courts have spoken in the Plame case. Why does the New York Times think it doesn’t have to listen?” (Kinsley, 2005, p. M5) and “Protect public interest, not journalists’ self-interest” (Rutten, 2007, p. E1) projected this line of thought. The first example portrayed not only the journalist but also the media institution as demonstrating bad practices. As the op-ed offered: “So the noble principle for which *New York Times* reporter Judith Miller—egged on by her employer—now sits in jail is the right of journalists to participate in efforts to stifle dissent, censor free speech, abuse power and then cover it all up” (Kinsley, 2005). Miller was held accountable, but so was the newspaper.

Echoing the sentiment that the media weren't doing their job properly was the *Washington Post* op-ed "Legacies of a Leak Case" (Hoagland, 2005-d), which despite declaring Judith Miller's incarceration unjust, leveled harsh criticisms at *The Times*, which it described as "a newspaper that editorially calls for a standard of accountability in others that it did not meet in this case":

Miller's account of agreeing to misidentify a source, her murky reference to a "security clearance" that she surely should not have had, and her failure to accept supervision from or to share vital information with her editors strike at the system of checks and balances that credible journalism requires. So does her editors' mystifying willingness to tolerate that behavior (A27).

The idea that editors allowed reporters unlimited freedom, without curtailing any problematic ethics, was also perpetuated on other 2005 opinion pages as well, including in "Lessons of the Miller Affair" (2005) an op-ed that said:

The big lesson of the Miller affair, for me, is that editors are crucial in mediating the relationship between reporters and sources. Almost by definition, those relationships become incestuous—with journalists and their sources chasing the same facts and often seeking to right the same wrongs. It's the job of editors to intervene in this process—and demand to know, on behalf of readers, whether a story is really true. In Miller's case, she filed stories about Iraqi weapons of mass destruction based on what her sources had told her, but the crucial judgment lay in the hands of her editors (Ignatius, 2005, p. A 23).

Part of the problem with the Miller case, as the commentary pieces showed, was the reversal of the reporter's position, from heroic fighter for journalistic values to a pariah with negligible ethics whose editors allowed her too much freedom. The imbroglio allowed all the flaws of modern-day journalism to be discussed and examined in a public forum, as newspapers rallied around reporter's privilege and asked the public to support shield law legislation. "The Year in Bad News" (Ignatius, 2005), which discussed the difficulty of balancing public opinion with ethical guidelines, acknowledged the

dichotomy of the situation with the insinuation that maybe Miller and media organizations were vilified unfairly, offering advice that they should “be careful about making promises you can’t or shouldn’t keep; and don’t try to please everyone, or you may end up pleasing no one at all” (para. 11). Others complained that journalists were hypocritical, with Toensing (2007) saying “On ‘Meet the Press,’ journalists lamented that the Libby trial was revealing how government officials can use their relationships with reporters to plant stories that hurt their political enemies. Where was the voice at the table asking, ‘Didn’t Wilson also use the media with his assertions in the New York Times and The Post?’” Some pieces such as Tina Brown’s *Washington Post* op-ed (2005), accused the media of offering a “fake transparency,” as Brown critiqued the *Times*’ coverage like this:

After reading the 6,000-word takeout in *Sunday’s Times* on the Judith Miller/I. Lewis Libby farrago in the Valerie Plame/CIA leak case, accompanied by Miller’s own strangely cryptic narrative of her belated grand jury testimony, I know even less than I thought I knew before (para. 2).

The essential conflict of the confidentiality Miller promised was that it did not promote transparency, at least not according to the commentary pages (Weir, 2004; Bentley, 2005; Broder, 2005). As David Broder wrote in a *Washington Post* op-ed about Miller’s reliance on Ahmed Chalabi, an Iraqi exile who gave reporters questionable information, “her use of an unnamed source in that case was a distinct disservice to the country; had we known his name and motivation, much less credibility would have been attached to her reports” (p. B07). A letter to the editor in the same publication noted that, “use of anonymous sources has become excessive,” (Weir, 2005, p. A17) and cited Miller’s weapons of mass destruction misinformation. Transparency also appeared as an issue when commentary pages questioned why certain information does not get

coverage—for example, why Novak was dismissed so quickly from the Plame investigation (Melis, 2004; Hopkins, 2005) or what were the *Times* guidelines were in how far a reporter should go when protecting an anonymous source (Kinsley, 2005).

The saturation of Judith Miller coverage in 2003 and beyond not only painted *The New York Times*' reporter in a negative light, but also led to discussions of other media practitioners' failings. Letters to the editor showed readers chiding other reporters for not getting facts straight as well, such as Howard Kurtz, then the *Washington Post* media critic who allegedly inserted "distortions" in a story³⁹ about embedded reporters and weapons of mass destruction (Gonzales, 2003) and alleged misquoting (Sethna, 2003). Three letters also appeared criticizing *Washington Post* reporter Bob Woodward (Mackay, 2005; Cobb, 2005; Pappas, 2005), offering strong critiques such as:

Over the past 30 years, Bob Woodward has morphed from an investigative reporter into more of a historian (more David McCulloch than Dana Priest). Rather than further risking their credibility by loyally defending Woodward, it's about time that Kurtz and The Post admitted such and moved on (Cobb, 2005, p. A23)

and

Bob Woodward and Judith Miller have at least two things in common regarding the CIA leak case—both received privileged information from sources whose identities they sought to protect from Special Counsel Patrick Fitzgerald, and both neglected to inform their editors until circumstances forced them to divulge this information (Pappas, 2005, p. A23).

Ultimately, the Miller case gave the public a chance to see the media in an extremely negative light as various ethical issues appeared on the commentary page through the lens of the Valerie Plame investigation, notably the general lack of transparency in journalism and the failures of journalists to behave ethically.

³⁹ Kurtz, H. (2003, June 25). Embedded reporter's role in Army unit's actions questioned by military." Retrieved on April 26, 2012 from washingtonpost.com

The Merging of Frames

Among the narratives regarding the jailed journalists, it was not unusual to see two or more of the frames merged. As mentioned previously, part of the heroism component often involved the reporter promoting societal good by defending his or her source in a way that combined the “journalist as hero” and “public good” frames. An example of this is the 1972 *Los Angeles Times* editorial “Part of Your Freedom Is Missing,” which shows as a breach of the free flow of information the jailing for 21 days of *Newark Evening News* reporter Peter Bridge who refused to answer questions about a bribery story he wrote:

A newspaper reporter has gone to jail in New Jersey, and he is not alone. A part of your freedom went with him. Let there be no mistake about that, and let there be no misunderstanding about the cause. The First Amendment’s guarantee of a free press is under attack. That freedom is not freedom for the press as a privileged entity, but freedom for the function of the press to serve the people’s right to know (p. C6).

It was also common to see the journalists held up as both heroic and irresponsible. Most representative of this was Miller. Other journalists were more consistently portrayed as champions. For example, in the *Washington Post* editorial coverage, except for one negative editorial (Seib, 1978-c)⁴⁰, Farber received positive coverage of his decision to go to jail rather than disclose his source. The depiction of Leggett was also sympathetic, although it focused more on the frame of who is a journalist and whether Leggett’s role as a freelance writer gave her the status of a legitimate journalist who can invoke privilege under Texas law.

⁴⁰ The author of the op-ed felt that Farber’s book contract on the same story he went to jail for cheapened his appeal as a modern-day John Peter Zenger.

Even later coverage maintained that those who chose jail over revealing a source were heroic. For instance, Taricani was referred to in a 2004 op-ed (Dionne) in *The Washington Post*, headlined “Jailing Reporters,” showed him as someone who:

[H]onorably has refused to violate the promise of confidentiality he had to give his source to get important information to the public. As a consequence, Mr. Taricani, who has a history of heart trouble, could face up to six months in jail (B06).

Of all the journalists, Miller received the most coverage, with her name mentioned in 66 editorials, op-eds, and letters to the editor in *The Washington Post*, 33 in the *Chicago Tribune*, 53 in the *New York Times*, and 14 in the *Los Angeles Times*.⁴¹ Miller is predominantly discussed in these commentary pieces in two basic ways: either in “the journalist as hero” or “journalist is irresponsible” frame. This constant depiction of Miller overwhelmed the other coverage of specific journalists mentioned in the editorial material, especially as a representative of a jailed journalist choosing prison over violating source ethics. Many of *The New York Times* pieces, for instance, depicted Miller’s actions in mixed judgments (Cohen, 2005-b; Cohen, 2005-c; Copeland, 2005). Generally, though, early coverage of Miller was mostly supportive and perpetuated the “journalist as hero” frame. After Miller was released from jail that coverage coverts to a more “irresponsible” frame. Many editorials agreed, as well, that the Plame case did not make a good case for a federal shield law (Dionne, 2004; Ignatius, 2005; Kinsley, 2005-c; Kinsley, 2005-d; Hullinger, 2005). Hullinger (2005) explained this point of view in his

⁴¹ Other jailed reporters received significantly less attention, with, for instance, Farber appearing in nine pieces in *The Washington Post* and seven in the *Los Angeles Times*; Bridge in seven in *The Washington Post* and once in the *Los Angeles Times*; Farr in five in *The Washington Post* and 11 in the *Los Angeles Times*; Leggett in four in *The Washington Post*; Hargraves in three; Wolf in two piece in the *Los Angeles Times*; Crews and Van Ness once in the *Los Angeles Times*; and Taricani in three in *The Washington Post*.

op-ed, which also showed that even though Miller's public image depicted a "journalist as hero" frame, her behavior really was "irresponsible"⁴²:

Many people seem to think that Judith Miller has been defending a whistleblower's attempt to unearth corruption, mismanagement and fraud in refusing to reveal her sources (front page, July 7). I'd be behind her if that were the case. Private individuals, even government employees, frequently come into possession of information that, when revealed, could clean up our government or some other corrupt entity. Anonymity is often the only way the information can be revealed in safety and exposure brought about. This relationship between a reporter and a source must be protected at all costs. The Constitution obviously says so. But exposing the identity of a covert CIA operative, undercover police officer or similar individual is a crime that puts him or her in danger and endangers other people who are involved in the undercover operation. It is inexplicable, therefore, that these reporters and their attorneys could field a defense of freedom of the press and protecting the confidentiality of a source (p. A14).

Ignatius (2005) noted that cases like this can make bad law, which would hurt reporters' ability to protect sources:

That's one reason why some prominent reporters—including ones with The Post and NBC News—let their lawyers work out arrangements that would provide Fitzgerald with information he wanted, without compromising the confidentiality agreements the reporters had made with their sources. These negotiations were delicate, involving sources' consent that reporters testify about their conversations. But they allowed both sides to preserve the essential points of principle—and avoid the train wreck that obviously lay ahead (p. 23).

The *Washington Post* editorial page ran several pieces in favor of Miller ("Respecting Sources," 2004; "A Shield for a Free Press," 2005; Hoagland, 2005-b; Goldstein, 2005) depicting her in the "journalist as hero" frame but it also ran op-eds that questioned whether her case deserved privilege (Kinsley, 2005-a; Raspberry, 2005) before presenting a mix of the two frames (Broder, 2005; Cohen, 2005-b; Cohen, 2005-c; Kinsley, 2005-c; Kurtz, 2005; Givhan, 2005; Hoagland, 2005-d) even addressing her mixed review in the editorial "Rush to Judgment" in October 2005:

⁴² Note: Hullinger insinuates here that Miller exposed Plame's name. However, Miller never wrote about the case in *The New York Times*. Plame's identity was actually divulged by Robert Novack in a syndicated column.

Nonetheless, it's astonishing to see many in the journalism establishment, and in the media trade press, turn on Ms. Miller not just for questions surrounding the waiver but also for refusing now to identify all of her sources, turn over all of her notes and otherwise lay bare her reporting. Normally these commentators are among the first to defend journalists who seek to protect a confidential source. Reporters often rely on unnamed sources to expose corruption and incompetence in government. Neither Ms. Miller nor the other reporters in this case (including two at *The Post*) faced an easy choice in deciding the circumstances under which they could testify, but their struggle with the dilemma, and her decision to go to jail, merit some sympathy and respect (A20).

But Miller was not the only one portrayed in a negative light. Some of the editorials, op-eds, and letters analyzed also questioned the motives and the results of the Plame investigation, intimating that it merely wasted time and made reporters' sources more vulnerable in leak cases (Toensing, 2007; Sanford & Brown, 2006; Hoagland, 2005-a; Hoagland, 2005-d; Cohen, 2004). "The Dangerous Business of Leaking Secrets" (King, 2005) also pointed out that, "if Miller's grand jury account about discussing classified material with Libby is true, Cheney's chief of staff may have run afoul of regulations and the law. Miller certainly was not authorized to receive sensitive government information" (p. A21).

The *Chicago Tribune* was different from the other papers in that it rarely cast Miller in the dual role of villain and hero. Instead, the paper generally promoted the idea that reporter's privilege and shield law (Chapman, 2007; Chapman, 2006-a; Ryan, 2005; "Weakened Freedoms," 2005; Wycliff, 2004) was important but, in this case, Miller should have testified since "the information sought is crucial and the prosecutor has exhausted every other means in getting it" (Chapman, 2004), and no one gets complete confidentiality (Page, 2005-a). The paper also showed support without setting her up as a journalistic role model (Page, 2004). Many of the editorials, op-eds and letters reflected the attitude presented in the op-ed "The Messiness of Promises" (Wycliff, 2005), which

stated: “I don’t mean to make light of the predicament of Judith Miller and Matthew Cooper...but I do think all of us in the news business need to get a grip on ourselves and think more clearly about what’s happening here” (p. 23). The only exceptions to this sentiment was Parker’s op-ed, “In a Free America, it’s called Miller time” (2005), which is not necessarily the perspective of the Tribune since Parker is a syndicated columnist for the *Orlando Sentinel* and some op-eds by Page, who mentioned Miller in op-eds as a reference point for discussions on Bush political advisor Karl Rove (2005-b) and former Vice President Dick Cheney (2006), but also flip-flops back and forth between supporting Miller (2004, 2005-a; 2005-b) and not (2005-c).

Additional Themes

As mentioned previously, the definition of framing used in this study is taken from work by Gamson and Modigliani (1987) and their conceptualization that a frame is “a central organizing idea or story line that provides meaning to an unfolding strip of events” and “suggests what the controversy is about, the essence of the issue” (p.143). This study distinguishes themes from frames using Altheide’s (1996) distinction that themes are more of a “recurring typical theses” rather than a frame, which acts as a deliberate “focus” (p. 31). For the purpose of this dissertation analysis, frames were considered as a central purpose or narrative that acted as an organizing idea. The frames were persistent across time and resonated with larger social context than a theme, which was defined as an occasionally recurring sub-topic, opinion or idea.

Besides the four frames that have been discussed, the editorial pages examined also contained several themes and unanswered discussions. Three major themes emerged from this analysis that will be discussed in the next section. These include “Is a

Journalist's Role Special?," "Who Deserves Privilege," and "Legal Omissions, Mistakes and Obfuscation."

Is a Journalist's Role Special?

Whether journalists deserved a reporter's privilege was a topic of discussion within the commentary pieces. Typically, editorials advocated for reporter's privilege or supported shield laws the most ("Ethics, Professionalism and a Free Press," 1972; "The Farber Case (Cont.), 1978; "A Free Press: from Jefferson to Reagan," 1973; "A Shield for a Free Press," 2005) whereas letters to the editor (Lewis, 1972; Mackey, 2005; Eliason, 2006) and op-eds (Stewart, 1972; Fritchey, 1978; Eliason, 2005) offered more varied opinions, such as that reporters were able to get information without confidential sources (Mackey, 2005), journalists were part of the citizenry and therefore had no more rights than other citizens to withhold information sought by prosecutors (Taft, 1972; McGinness, 1974; Eliason, 2005; Kinsley, 2005; Mackey, 2005) and, in cases where a crime or national security is involved, privilege was limited (Montgomery, 2005).

Even journalists did not always offer unequivocal support to a federal shield law and reporter's privilege issues. In an op-ed in the *Washington Post*, for instance, Michael Kinsley (2005), despite acknowledging the public's lack of belief in journalism, offered that, "the folks who become journalists (including me) are more likely to regard journalism as a noble calling that serves the nation, its values and the world. That is why, even in this low point in public esteem, many journalists are unembarrassed to assert that they are above the law" (p. B07). *The Washington Post* also pointed out that a federal shield law was not necessarily the way to preserve privilege. "We urge Congress not to legislate this kind of protection for reporters," it said in an editorial. "As a matter of

principle, the press should not ask Congress for this or other special treatment because it might come to rely on favors that another Congress at a later date could take away” (p. A12).

Richard Hargraves (1984), who accepted jail time rather than expose a source after an editorial he wrote was the subject of a libel suit, also reflected on the conflict between the rights of journalists and other individuals said in a *Washington Post* letter to the editor:

The implication, of course, is that I am wrapping myself in a First Amendment cloak to avoid paying the price for reckless comment. Nothing could be further from the truth. Although it is my personal belief that this particular lawsuit is frivolous and has absolutely no merit, I recognize that the public official who filed it may believe differently. He has rights as a plaintiff in a libel suit; I have rights as a journalist and a defendant. Neither’s rights are more important than the other. (p. A14)

This idea about whose rights are more valid appeared in several commentaries, with some pieces showing both sides of the situation (Kastenmeier, 1974; “The Problem of ‘Shield Laws,’” 1974). For instance, *The Post*, wrote, “The difficulties in the issue begin with its name. The terms ‘newsmen’s privilege’ and ‘reporters’ shield’ suggest some kind of exclusive, private benefit, as if the purpose of the claim were merely to relieve one class of citizens—those in the news business—of a painful choice between revealing secrets and going to jail for contempt of court. But, in fact, the right at stake is the right of the public to be fully informed” (p. A20). The commentary pages showed how conflicted news organizations, themselves, were about the topic. It was no wonder the public might feel the same.

Others felt that journalists did not necessarily merit such a privilege (Goldberg, 1982; Kingsley, 2005; Dunlap, 2005). As Eliason (2005) wrote: “Finally, critics complain

that reporters are being threatened with jail for simply ‘doing their jobs.’ This has a nice rhetorical ring to it, but it isn’t true. Nobody’s job description includes disobeying lawful court orders. The reporters have been found in contempt not for any news-gathering or reporting but for refusing to testify without a recognized legal excuse” (p. A21). Emery, (1973) in the *Los Angeles Times*, noted that the press showed so many failings between sensationalism and one-sided reporting that maybe it hadn’t earned the right to a reporter’s privilege.

Who Deserves Privilege?

Other commentaries, mostly those in the past six years, address the point that to honor reporter’s privilege, it was necessary to define what a journalist was—something that is hard to do in the era of citizen journalists, bloggers, and crowdsourcing (Kinsley, 2005; Raspberry, 2005). This point of discussion usually occurred in regard to either freelance writer Vanessa Leggett or videographer/blogger Josh Wolf. Positions on who deserved journalist status varied, from suggestions that rigid labels were not beneficial (Goldfarb, 2001) to staunch support (“Who Defines a Journalist,” 2001). For example, one *Washington Post* editorial (2001) put it this way:

You don’t in this country need a license to practice journalism, and the boundaries of the profession are porous. Freelancers have no institutional affiliations, but that doesn’t mean they aren’t journalists. Does the government get to decide which of them count? The fact that Ms. Leggett had not yet published could mean that she is an undiscovered journalist, or a failed one, or one who has not yet finished the book she is writing. But if she was gathering information with the intention of making news available to the public on a matter of controversy, she was functioning as a journalist and servicing the precise function the department’s guidelines on subpoenas were designed to protect. We trust the Justice Department wouldn’t be going after a major news organization under similar circumstances; it should not be locking up Vanessa Leggett, either. (p. A14)

Readers supported this assessment in the letters to the editor page (East, 2001; Blackman, 2001), pointing out in the latter case that Leggett had already published academic research.

The issue of who deserved journalistic status appeared in the editorial pages either when a new shield law bill underwent discussion (“Journalists Need a Federal Shield Law,” 2009) or when reporter’s privilege was claimed by unconventional content creator, such as Wikileaks (“The Wikileaks Exception,” 2010) documentary filmmakers (“Sued over ‘Crude,’” 2010), bloggers (e.g. Shaw, 2005; McGough, 2007; Skube, 2007; Gant, 2008), a newsletter maker (McGough, 2007), a paid journalist (McGough, 2007), a book author (“Press Watch Books Can Be News,” 1991; “Plot Thickens,” 1992; Chapman, 2001). These op-eds and editorials tended to offer explanatory information, such as definitions, and did not necessarily address the bigger process of how to determine who received reporter’s privilege.

Legal Omissions, Mistakes and Obfuscation

Another theme seen occasionally in the editorials was confusion regarding legal doctrine. Sometimes the media added to this by not explaining terms and by offering misinformation, as indicated by a letter to *The Washington Post* from an adjunct law professor (Martin, 2005) who corrected an article, stating, “Miller was not in court to be ‘sentenced’ to anything. She has not been accused of a crime. She is being held to coerce her to testify as a ‘recalcitrant witness’” (p. A 15). Similarly, a 1978 editorial in the *Los Angeles Times* chastised the press covering the Farber case, “whose comments indicated that they had only nodding acquaintance with the First Amendment” (“The Jailing of the First Amendment,” 1978, p. H4).

Sometimes even the commentary section did not seem to provide enough explanation for the issues discussed (e.g. “The Court and Congress (I), 1972; “Correcting a Threat to Freedom,” 1978; “A Victory for the Public,” 1984). For example in “Reporting at Risk (Dodd, 2004), the author wrote:

Currently, 31 states and the District of Columbia have “shield laws,” which protect the anonymity of reporters’ confidential sources. This patchwork quilt of legislation –which does not cover federal courts—is inadequate for an issue of such fundamental importance as the public’s right to know. (p. A19)

What the writer meant here was unclear: Was it inadequate because reporters were going to jail or because 19 states do not have a law or because there was no federal law? Part of the difficulty of writing commentary on shield law or reporter’s privilege was the complexity of the situation. In addition to understanding the law, commentators needed to be able to express the legal doctrine and necessary background in simple terms without removing too much context. At the same time, the writer needed to avoid overwhelming readers with too much case talk. For example, in “Bad Case for a Fight” a *Washington Post* op-ed about the Miller case, David Ignatius (2005) wrote:

The New York Times and Miller decided not to try to finesse the issue. Instead, they opted for what the *Times* editorially has described as an act of “civil disobedience,” in which Miller refused to comply with a grand jury subpoena even after the issue had been litigated to the U.S. Supreme Court. *The Times* has been a crusader, but the paper admitted in an editorial yesterday: “To be frank, this is far from an ideal case. We would not have wanted our reporter to give up her liberty over a situation whose details are so complicated and muddy.” So the train wreck happened. The U.S. Court of Appeals for the D.C. Circuit, in affirming the district court’s findings that Miller was in contempt, bluntly rejected the idea that journalists have any privilege that allows them to ignore grand jury subpoenas. That appeared to narrow slightly the scope of journalists’ privilege that developed after the Supreme Court’s 1972 decision in *Branzburg v. Hayes*, and last month the high court let this narrower opinion stand (p. A23).

A piece such as this could provide only so much background. Readers not following this case might not understand *Branzburg* or why the decision about Miller was

so detrimental. Additionally, educating readers on legalities was inherently difficult since interpretation varies, i.e. is the First Amendment absolute (“The Farber Case (Cont.),” 1978) or not (Fritchey, 1979).

Still, some readers were sophisticated enough to understand the vagaries of shield laws. For example, reader Martha Hullinger (2005) wrote this letter to the editor in the *Washington Post*:

Private individuals, even government employees, frequently come into possession of information that, when revealed, could clean up our government or some other corrupt entity. Anonymity is often the only way the information can be revealed in safety and exposure brought about.

This relationship between a reporter and sources must be protected at all costs. The Constitution obviously says so.

But exposing the identity of a covert CIA operative, undercover police officer or similar individual is a crime that puts him or her in danger and endangers other people who are involved in the undercover operation.

It is inexplicable, therefore, that these reporters and their attorneys could field a defense of freedom of the press and protecting the confidentiality of a source. (p. A14)

Also, in some cases, perhaps the situation was big enough that people did not need supplementary information. In an editorial headlined “The ‘Nixon Court’ and the First Amendment,” (1972), the *Washington Post* never mentioned *Branzburg v. Hayes* when citing Justice Potter Stewart in a decision that occurred two days prior:

The contention of the news media, at its heart, is that it is better for both the public and the government to learn *something* about the forces loose in our society than to learn *nothing*, a contention set out forcefully by Justice Stewart in his dissent, extracts from which appear elsewhere on this page. (p. A18)

This also occurred in another *Washington Post* editorial, “A Free Press and a Free Society” (1972), which quoted Justice Stewart’s dissenting opinion without any explanation to the reader. Not including this information might just mean that the case received so much coverage during its time period that the publication assumed everyone

already knew all the basic information. Still the opinions section should target both an elite population as well as a less informed one, who might need a little context.

Sometimes, too, proper linkage was not made. In the *Chicago Tribune's* "Why is the Journalist in Jail?" (Chapman, 2001), the op-ed looked at the jailing of freelance writer Vanessa Leggett and addressed the question of who deserved to be called a journalist without ever mentioning shield laws. The op-ed mentioned that to the prosecutors Leggett was not a journalist since she was not employed by a media institution and did not have a book contract. This also occurred in a *Chicago Tribune* editorial, "Contempt for a Free Press" (2001).

Of course, the commentary page also very often offered the public straightforward explanations on legal issues, such as why protecting a source can interfere with a trial (Klein, 1972; "Plame, Lee and Reporters' 'Absolute' Rights," 2005; Eliason, 2005) Congress's power to compel testimony (Askin, 2007), and why *Branzburg* was so pivotal (Goldfarb, 2001; "Plame, Lee and Reporters' 'Absolute' Rights," 2005), etc.

Sometimes on the editorial page, strange connections were made. For instance, when discussing the Free Flow of Information Act in 2007, Tim Rutten wrote in *The Los Angeles Times* that President Bush said he would veto the House bill, adding that Attorney General-designate Michael B. Mukasey, also opposed the measure. Then Rutten noted that:

"Later in his testimony, Mukasey also refused to accept the idea that waterboarding is torture. None of the senators being particularly quick, he was not asked where he stood on waterboarding reporters." (para. 5)

In a serious piece, in which, no other humor was used, such an unrelated comment diluted the argument that a shield law was needed to protect anyone who does journalism.

Making a correlation between unrelated facts was not an isolated occurrence: in *The Los Angeles Times* editorial “Jailing Journalists” (2005), the piece started off with the words, “You won’t often read this on an editorial page, but journalists are not above the law” (p. B12) before referring to a reaffirmation by federal judges of a lower court ruling that said Miller and Cooper would go to jail if they didn’t reveal their source. Although the editorial supported the two reporters, anyone who read only the headline and lead would not know this.⁴³

DISCUSSION

This section looks at the effectiveness of the frames used within the editorial section of the four newspapers used from 1972 through 2010 and suggests options newspapers should consider when choosing future opinion-page material on reporter’s privilege and shield laws or that journalists might use to create persuasive arguments that might perpetuate public support on those issues.

Ineffectual Use of the Social Good Frame

Sometimes the frames used in the editorial pages were less effective than they could be. For instance, the public good frame did not always create a convincing argument. For example, when writing about shield laws, Kaufman (2010) offered:

Though not all bloggers are potential candidates for a Pulitzer Prize—indeed, some are terribly irresponsible—as a group they are today’s street-corner pamphleteers, protecting our freedom and strengthening our democracy. Their predecessors in the founding generation surely would have understood the dangers in allowing Congress, or the executive, to deny the law’s protection to whole categories of journalists based simply on their employment status or the medium in which they

⁴³ Other examples: Hatfill reference in “A Shield for All; By Protecting Journalists, 2007; “Sources of Controversy; A Ruling Ordering Journalists to Name Their Confidential Informant Illustrates the Need for a Shield Law,” 2007.

work. We in government must not permit our aversion to criticism, or our hostility to a particular message, to dictate who's in and who's out.

A free press, like free elections, is essential to a robust democracy. Around the world, we see governments bent on repression doing all they can to intimidate and control journalists. Tragically, that repression sometimes takes the form of literally shooting the messenger. The number of journalists slain worldwide climbed steadily from 2001 through 2007 (p. A19).

Although this op-ed asserted that a free press was important to democracy, it never offered a rationale for why that is so: It was merely assumed that, of course, a free press leads to this outcome. Additionally, the social good aspect was slid in among all types of thoughts: from who was a journalist to how repression takes the form of journalist assassination. Yet, the goal of this editorial seemed to have been endorsing shield-law legislation: “The Free Flow of Information Act...springs from the central principles of the 1st Amendment and should be passed without delay. Our founders understood, and we should reaffirm, that the key to a free society is a free press.”

Another example of using the “social good” frame ineffectively was in an op-ed in *The Los Angeles Times* (Gant, 2008):

Shield laws protect journalists from having to turn over certain information to courts—such as the identity of a source, story notes or documents. Advocates contend that safeguarding journalists and their sources ensures that the public has access to the information it needs to watch over the government, powerful corporations and other important social institutions (p. A15).

Without showcasing a public benefit in a more specific way, the public good frame seemed like spare verbiage—and utterly unconvincing. Yet, this was how the social good frame was most often depicted in the editorial section: a line or two was inserted, usually without any explanation or examples, and then the issue was expounded upon without making connections to the frame that might anchor it in the public mind. Rarely, were the names Woodward and Bernstein or John Peter Zenger cited—or those of

any modern-day muckracker. Even when journalists facing jail were mentioned, there rarely were specific examples or a discussion about how protecting sources helped a reporter find or research a story or right a wrong. Usually when the social good frame appeared, the link between free discourse and shield laws or freeing a jailed journalist was made without substantiating it. The words had to be accepted on face value alone.

That's not to say that the social good frame never offered any link: a *Los Angeles Times* editorial, "Legal Siege on a Free Press" (2004) discussing the jailing of a local newspaper editor used narratives effectively to illustrate how easily the press can be quieted:

For small papers, the cost may be crushing. Last month, Crews, who does all the jobs at his tiny Sacramento Valley Mirror, told a Times reporter his out-of-pocket legal costs had reached \$70,000. And he still ended up in jail. These are real threats to all who value a free press." (p. M4)

Periodically, a piece on the editorial page cited a case to link social good to a free press, such as 1984's *Zerilli vs. Smith*⁴⁴, in which a federal appeals court found that "news gathering is essential to a free press,' which is 'protected so that it could bare the secrets of government and inform the people. Without an unfettered press, citizens would be far less able to make informed political, social and economic choices. But the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired'" (Rutten, 2005, p. E1).

Another example of the social good frame used well came from a *Los Angeles Times* editorial headlined "Shielding Journalism; Reporters, and the Country, Would Benefit from a Proposed Federal Law to Protect Confidential Sources" (2007). In it,

⁴⁴ In *Zerilli v. Smith*, 656 F.2d 705 (1981) the DC Circuit Court of Appeals said that reporter's privilege existed under certain circumstances.

editors showed specifically what stories the public received because of anonymous sourcing:

[C]riminal misconduct in the Nixon administration and the secret history of the Vietnam War. They helped uncover the Bush administration's surveillance of American citizens, and they supplied important information on CIA detention facilities in Eastern Europe (p. M2).

Linking the public good frame with more concrete evidence like this and showing that shield laws, privilege, and a free press actually created a situation that was beneficial to the public would present a more persuasive argument. In a world where the trust in the media falters, the social good message may lose its luster without more solid material behind it.

Looking at the letters to the editor sections, it was difficult to tell if the readers echoed the same sentiment. References occasionally were made connecting free speech to the public benefit of enjoying access to information (Evans, 2003). In general, though, whether the general public supported shield laws because it perpetuated a greater good seemed unclear, especially since the letters to the editor section by its nature offers perspectives on both sides of the issues and editorial page editors sometimes deliberately choose missives that represent a widespread group of opinions (Jorgensen, 2002). Some of the letters to the editor regarding shield laws showed understanding of such protections and indicated that the issue was important but some in the public did not want to protect criminal acts such as divulging Plame's status as a CIA operative (Gage, 1973; Buchanan, 1978; Enzer, 2004; Ash, 2004; Tillotson, 2008) or actions that might threaten

national security (Condon, 2007). Or course, some letters to the editor were flat-out against a shield law (Dempsey, 1973).⁴⁵

The Conflicting Miller Frames

The saturation of the Miller case and the negativity associated it with did not help perpetuate a positive portrayal of the contemporary working journalist. In fact, it invited discourse on a variety of journalism critiques. A look at the editorial pages during the Plame entanglement indicated a vigorous discussion on all of media's ills, reflecting and reinforcing a media-as-irresponsible frame.

The New York Times, which initiated coverage with a "journalist as hero" frame, and ultimately withdrew all support, was the worst offender. Throughout Miller's 85 days in prison, the newspaper published more than a dozen editorials and op-eds in support of her. On September 30, 2005, when Miller was released from jail, short statements by publisher Arthur Sulzberger Jr. and executive editor Bill Keller were printed in the newspaper. All reiterated the duty of a journalist to protect his or her source and the need for a federal shield law. Both Sulzberger and Keller praised Miller's "steadfastness" and "commitment."

Then nothing was written about the matter in the op-ed or editorial sections until October 16. Miller did not explain herself in the paper's pages, nor did the paper address the questions swirling around from other media, such as "Why isn't Miller speaking for herself?" "Why did it take so long to get a waiver?" "Why did *The New York Times* choose to treat this case as a First Amendment issue?" A 6,200-word news article on

⁴⁵ Op-ed and editorial topics varied as well, from updating the public on shield law legislation (MacKenzie, 1972; Pence & Lugar, 2005; Olson, 2006) to using cases to explain constitutional law (Maynard, 1973; Fritchey, 1978). Still, some advocated for a federal shield law but with conditions such as provisions to maintain national security (Levin, 2008).

October 16, “The Miller Case: A Notebook, a Cause, a Jail Cell and a Deal (Natta, Liptak & Levy, 2005) tried to answer these queries. In the explanation though, Miller was not upheld as the triumphant, intrepid reporter heralded in the editorial section. Instead she was shown as someone with major flaws. Under a subhead, “A Divisive Newsroom Figure,” the paper also discussed her inaccurate articles on WMD’s, a blow to the Pulitzer Prize-winning reporter’s reputation.⁴⁶ It was revealed that some of her colleagues refused to work with her. Douglas Frantz, an editor, recalled Miller once calling herself “Miss Run Amok.” When he asked her what she meant, she reportedly told him, “I can do whatever I want” (p. 1).

The news piece also began to dismantle the myth that *The Times* supported her wholeheartedly, saying that tensions grew as Keller and Miller declined to tell others, colleagues and readers, who the source was—even after it was announced by other media. The day after the article appeared, the opinions section published six readers’ letters—four criticizing either Miller or *The Times*—portraying a different balance than before as most of the letters echoed sentiments like, “In my view, *The Times*’s first responsibility in covering the news should be not to itself and its reporters, but to its readers” (Shamoon, 2005, p. A18).

But this was the mere tip of the criticism iceberg. On October 22 and 23, 2005, well-known columnist Maureen Dowd and public editor Byron Calame delivered a one-two punch to Miller’s reputation. Calame’s October 23 column, “The Miller Mess: Lingering Issues Among Answers,” explained the situation as: “...the journalistic practices of Ms. Miller and *Times* editors were more flawed than I feared” (p. C12). Dowd offered that an email note by Keller to the staff on October 21st indicated that

⁴⁶ She won in 2002 with Jim Risen in Explanatory Reporting for articles on global terrorism.

Miller “misled” the Washington bureau chief about how involved she was in the Plame case. Dowd insinuated that Miller lied on other occasions, for instance about how the words “Valerie Flame” got written on her notebook, and about when exactly she met with Scooter Libby⁴⁷ (a jail visitor log shows June 23, a fact Miller admitted only when prosecutors confronted her with the document). “I admire Arthur Sulzberger Jr. and Bill Keller for aggressively backing reporters in the cross hairs of a prosecutor,” Dowd wrote. “But before turning Judy’s case into a First Amendment battle, they should have nailed her to a chair and extracted the entire story” (2005, p. A17).

Dowd was absolutely right that before engaging in a First Amendment crusade, the editors should have really understood the situation. Focusing on a controversial case to such an extreme has not helped foster support for issues like shield laws and reporter’s privilege since then. Naturally, if a reporter committed an irresponsible act, the newspaper needed to address it; where the problem lies is the contradiction of the two frames “journalist as hero” and “the irresponsible reporter.” Portraying Miller in one way in such an extreme and then reversing positions so absolutely invited mistrust in the very frame that supported shield laws and privilege. How will an audience trust a frame that insisted a reporter was heroic when the highest profile case disproves the theory that the journalist was the good guy? The *Times* should have been more careful when extolling the virtues of Miller. Of course, the newspaper needed to be transparent about the WMD and Scooter Libby situation, but the explanation the institution offered bordered on bashing Miller—and transparency does not need to be that extreme. Of the four reader responses to the public editor’s column the newspaper printed on November 13, 2005, all

⁴⁷ Former chief of staff to former Vice President Dick Cheney

found *The Times*' behavior, rather than Miller's, the more troubling (Berger, p. C12; Dorfman, p. C12; Eidelberg, p. C12; Wenner, p. C12).

The New York Times, however, was not the only newspaper to overemphasize the case. This is something that is evident across all four newspapers, especially in the *Times* and *The Washington Post*, where Miller's name appeared on the opinion page 66 times (in op-eds, editorials, and letters to the editor). Some of the references to her were unnecessary, such as in a Jim Hoagland op-ed "Pricey Rendition"⁴⁸ (2005-b) on covert operations and the ramifications for then-Italian Prime Minister Silvio Berlusconi and Bush, Hoagland inserted a paragraph on Miller and Cooper, suggesting, "The quickness of CIA officials⁴⁹ to give up sources makes reporters Judith Miller and Matt Cooper look even more heroic for stubbornly resisting the disclosure of theirs." (p. B07).

Hoagland wrote about the case often: four op-eds in 2005 alone. In his June 5 piece, "Nixon's Echoes," he suggested that the Nixon-era tradition of information control was returning with the "nonsensical federal prosecution by Patrick Fitzgerald of the *New York Times*' Judith Miller and *Time*'s Matthew Cooper for shielding sources in the Valerie Plame case" (p. B7). "Pricey Rendition," discussed above, appeared, on July 3. In the July 20 op-ed, "Claws and Effects," he chastised the press for hectoring Miller "to go back on her word to assuage a public supposedly fed up with the media" (p. A23). "Legacies of a Leak Case" on October 20 offered a mixed opinion on Miller, calling her incarceration "unjust" but also chided her for "agreeing to misidentify a source" and "her murky reference to a 'security clearance' that she surely should not have had, and her failure to accept supervision from or to share vital information with her editors" as well

⁴⁸ This editorial was showing why America's spy agencies needed reforming by offering the example of Egyptian cleric's Hassan Mustafa Osama Nasr's kidnapping.

⁴⁹ Unnamed in the op-ed.

as *The New York Times* “willingness to tolerate that behavior” (p. A 27). What Hoagland constructed in his four-part narrative was a weave of confusion for anyone who followed his work. An op-ed often presents varying viewpoints on the same issue; however, he/she needs to offer the audience a reason why an opinion may change. Nor does he reference any of his op-eds to explain why he called Miller “heroic” in “Pricey Rendition” (Hoagland, 2005-b) and how his opinion changed, at least in print, by “Legacies of a Leak Case” (2005-d). Instead, of using his sequence of op-eds to produce comprehensive context, he presented a patchwork of thinly related sub-topics that did not help the public understand the complexity of shield laws or reporter’s privilege.

Richard Cohen, another *Washington Post* opinion writer, mentioned Miller eight times over four years in his op-eds, with some of the references almost arbitrary. For example, in a “Torture’s Unanswerable Questions,” Miller appeared in one paragraph on the op-ed on torture:

Special prosecutors are often themselves like interrogators—they don’t know when to stop. They go on and on because, well, they can go on and on. One of them managed to put Judith Miller of *The New York Times* in jail—a wee bit of torture right there (p. A13).

Cohen also started another piece (2006) with “*The New York Times* is once again under attack. This time, though, the attack is not related to its coverage of Iraq or to Jayson Blair or Judith Miller ...but to its stock price. Wall Street thinks it is too low” (p. A 21)⁵⁰ Another commentary piece, “Candor? Call the Special Prosecutor” about a separate case where Monica Goodling, a former senior counselor to former Attorney General Alberto

⁵⁰ Three other op-eds, “Rove Isn’t the Real Outrage” (July 14, 2005), “Judith Miller in Jail: Principle vs. Politics” (August 5, 2005) and “Why We Need Leakers” (February 21, 2006), also mentioned the Miller case. But the “Rove Isn’t the Real Outrage” and “Why We Need Leakers” did so to provide historical context to related issues about the government chasing leakers and “Judith Miller in Jail” dissected the Miller case. “The Runaway Train That Hit Scooter Libby” (June 19, 2007) used the sentencing of Libby to revisit familiar op-ed topics such as dismissing Fitzgerald’s work and the mess of the investigation.

Gonzales, took the Fifth rather than speak to Congress about what transpired in that office, has an unnecessary two-sentence mention of Miller's jailing (2007, April 10). Using Miller as such a casual reference point trivialized the situation and could make it difficult for the public to understand the seriousness of how the Plame affair and its aftermath effected shield laws and reporter's privilege.

Cohen also used hyperbole to make his points—and this, too, was not always an effective way of discussing the issues. In “Let This Leak Go” on October 13, 2005, Cohen vehemently argued why Fitzgerald should drop his investigation, mentioning Miller in over-the-top lines, such as:

Whatever the case, I pray Fitzgerald is not going to reach for an indictment or, after so much tumult, merely fold his tent, not telling us, among other things, whether Miller is the martyr to a free press that I and others believe she is or whether, as some lefty critics hiss, she's a double-dealing grandstander, in the manner of some of her accusers.

and

More is at stake here than bringing down Karl Rove or some other White House apparatchik, or even settling some score with Miller, who is sometimes accused of taking this nation to war in Iraq all by herself (p. A23).

Another role Miller played in the commentary section was as an archetype. In one narrative, Miller almost became a negative footnote in all kinds of activity where journalists behave badly, including confidentiality (Getler, 2005), ethical issues (Ivins, 2005; Hoagland, 2005; Ignatius, 2005), jail inequities (Golden, 2005), torture (Cohen, 2009) or the power/problem of independent counsel (Toensing, 2007; Cohen, 2005).

She also became the representative for most discussion on the Valerie Plame case—even when the editorial, op-ed or letter to the editor did not directly concern her (“The Libby Verdict; The Serious Consequences of Pointless Washington Scandal,” 2007; Dionne, 2005; Hoagland, 2005; Ignatius, 2005; Kamen, 2005). In “Trial in Error; If

You're Going to Charge Scooter, Then What About These Guys? (Toensing, 2007), for instance, she was cited in a piece about the inconsistency of who got blamed in the Valerie Plame leak, with the author insinuating that Fitzgerald's decision-making seemed arbitrary. In these references, Miller almost served as an aside—her case was so recognizable that it gave the reader an instant identifier, and after a sentence or two she was not mentioned for the remainder of the piece. Even *Post* Ombudsman Michael Getler (2005) engaged in this technique when addressing confidentiality in another situation regarding a reporter granting anonymity to a graffiti artist—something *Washington Post* readers found questionable—starting his piece with:

This column is not about White House powerhouse Karl Rove or New York Times reporter Judith Miller, who went to jail rather than reveal a confidential source, or Time magazine reporter Matt Cooper, who got a last-minute "Get Out of Jail Free" card from Rove in the never-ending investigation of who leaked the name of an undercover CIA agent to columnist Robert D. Novak two years ago. But this column is about confidentiality and the various ways in which the press grants anonymity to sources and how that is often confounding to readers (p. B 06).

After that segment, all Miller references disappeared as Getler focused exclusively on the issue at hand.

Using Miller as a footnote in a conversation about Karl Rove's alleged quest to stop administration opposition (Broder, 2006) or as a critique of Fitzgerald's techniques (Toensing, 2007; Hoagland, 2005; Cohen 2005, October 13) sometimes made sense. But it does not in a story comparing Miller's entry into jail to that of rapper Lil' Kim, who spent a year in a federal detention center for a perjury conviction (Givhan, 2005). Miller's case in unrelated situations did not offer any benefit to the press—instead it attached any remaining negativity about the Plame investigation to the topic being discussed.

Of course, Miller was not the only presence whose image suffered; the venerable *Times* took some hits as well. On November 9, 2005, after a 28-year-career there, Miller resigned from the paper. As part of the retirement agreement, *The Times* agreed to print a letter to the editor Miller wrote that explained her position. It ran on November 10, and in it Miller explained that she went to jail to protect her confidential source and to dramatize the need for a federal shield law. She admitted, “several articles I wrote or co-wrote were based on this faulty intelligence” (p. A28). Miller also responded to the public editor’s accusations, emphasizing that although she did base her reporting on faulty sources, so did others who were not being castigated. She pointed out that, “you accuse me of taking journalistic shortcuts, but take your own by supplying no evidence” (p. A28).

The Miller situation brought up many journalistic issues, from what constituted a good source to how closely an editor should monitor a reporter, but it also showed that the way media institutions depicted an issue was important. Without a thorough explanation of why the *Times* chose to so vigorously change its stance, too many questions were left and the disparity of the frame reversal still lingers. The October 16, 2005, article, “The Miller Case: A Notebook, A Cause, a Jail Cell and a Deal” attempted to explain the Miller case and the *Times*’ part in it, and to an extent it does—blemishes and all. However, when discussing the editorial page, *The Times* never justified the extreme it went to, running more than 15 editorials on the Miller case and the importance of a federal shield law. It said on the matter:

Mr. Sulzberger said he did not personally write the editorials, but regularly urged Ms. Collins⁵¹ to devote space to them. After Ms. Miller was jailed, an editorial acknowledged that “this is far from an ideal case,” before saying, “If Ms. Miller testifies, it may be immeasurably harder in the future to persuade a frightened government employee to talk about malfeasance in high places.

⁵¹ Editorial page editor

Asked in the interview whether he had any regrets about the editorials, given the outcome of the case, Mr. Sulzberger said no. “I felt strongly that, one, Judy deserved the support of the paper in this cause—and the editorial page is the right place for such support, not the news pages,” Mr. Sulzberger said, “And secondly, that this issue of a federal shield law is really important to the nation (p. 1).

While this statement offered some insight into *The Times*’ decision-making process, it does not explain why so many editorials were necessary and why the opinion page never confronted the mixed message it sent to the public. The article ended with a quote from the executive editor: “I hope that people remember that this institution stood behind a reporter, and the principle, when it wasn’t easy to do that, or popular to do that” (p. 1). Despite that sentiment, what people may recall of the time period was the dismantling of a reporter’s reputation—perhaps deservedly so—and not the importance of shield laws. How the *Times* addressed all the conflict surrounding the Miller case was partly to blame; at no point did it ever run an editorial on why a federal shield law was necessary despite the mistakes made. Amid the *mea culpa* and Miller-bashing, the real issue was lost.

Portraying Privilege More Effectively

Overall, the framing study showed that reporter’s privilege and shield laws were typically covered by four frames: “courts as adversary,” “journalists as hero,” “the irresponsible journalist” and “social good.” Sometimes the frames were not used effectively to promote reporter’s privilege and shield laws. These findings suggest that the news media should approach shield laws and reporter’s privilege differently from the ways these four newspapers did from 1972 to 2010.

Media institutions should think about how they portray privilege on the commentary pages. As Kinsley (2005) wrote, “Asking the government to protect

journalists who protect leakers who expose what the government wants to keep secret amounts to asking democracy to institutionalize the assumption that it can be wrong. A great and stable democracy like ours can and should do this. But it is a lot to ask, and it might be asked with a bit more humility” (B07). The extremes in the Miller editorials and op-eds begged consideration of this plea. As portrayed in the commentary section of newspapers, reporter’s privilege goes from an absolute right that Miller deserved to more mitigated responses. Such distinct parallels only contribute to the public’s poor embrace of media issues; why, after all, would anyone offer special privileges to a group that continually breached its own ethical standards, such as not cozying up to a source or embracing sloppy reporting techniques.

Since “frames influence opinions by stressing specific values, facts and other considerations, endowing them with greater apparent relevance to the issue than they might appear to have under an alternative frame” (Nelson et al., 1997, p. 569), creating storylines that confused the public or made it mistrustful only hurt the discourse revolving around shield laws and privilege. Advocating for a federal shield law using issues that the public found more relatable could help foster support. Showcasing shield laws as something that added to the social good and strengthened democracy promoted the issue better than editorials and op-eds that clamored for reporter’s privilege because the press supposedly deserved it. It would be possible to replace the ideas that previous frames left in the public mind. As Hertog & McLeod (2001) assert, although frames are “relatively stable cultural structures,” “new frames are at times created and existing ones modified or replaced, or they may simply fade from use” (p. 147). The contradictory frames the newspapers offered in the past can be supplanted by a better message.

Emphasizing the social benefits of shield laws and reporter's privilege could be a more compelling narrative than a soliloquy on what privileges the press requires to function appropriately. For instance, Kurtz (2005) offered that, "Doug Clifton, editor of the *Cleveland Plain Dealer*, wrote recently that he is sitting on 'two stories of profound importance,' but that both are based on leaked documents and publication 'would almost certainly lead to a leak investigation and the ultimate choice: talk or go to jail'" (C01).

The media should also look at commentary pages from the past in order to construct better conversations for the future. Hindsight comes over time and it could be helpful when writing an op-ed or editorial to look at what others have written on the same issue to become more cognizant of the ambiguity and/or arrogance shown in previous arguments. Gitlin (1980) offered that frames, "largely unspoken and unacknowledged, organize the world both for journalists who report it and, in some important degree, for us who rely on their reports" (p. 7). By becoming aware of the frames they used—both through personal work habits and organizational ideology—journalists could replace the inefficient ones they offer with others more supportive of the situation. Sometimes, of course, this might not be possible. Frames, as discussed previously, are often constructed subconsciously (Van Dijk, 1985; Gamson & Modigliani, 1987⁵²; Tuchman, 1978). However, media professionals could question their work more after its completion and compare it to archived work on the issue. This probably is unrealistic for breaking news, but certainly commentary pages offer more time to research and reflect on whether the editorial or op-ed really gives the public an understandable and persuasive perspective, framed in a way that maximizes impact. Fishman (1980) suggested that journalists, like

⁵² Gamson and Modigliani also credit the influence of special interest groups, along with journalism practices.

audiences, can subscribe to other news media frames, creating an influx of similar stories because the new media follows each other so closely. With this, too, journalists should regularly question their media coverage, especially if their frames look similar to those used in other media outlets.

Of course, this seems antithetical to the basic tenets of reportage, which seeks to unmask the truth without interjecting subjectivity. The media should not censor these frames if they naturally occur; however, showing judiciousness when choosing editorial topics would prevent issues such as the *Times* absolute turnaround on the Miller case. To run so many editorials endorsing a reporter as a hero and then to suddenly change that position left a lingering impression. *The Times* should have been more sparing in its praise of Miller when she went to jail—especially since it seemed that at least some in the organization knew her flaws. In a 2005 column, “A Slap in the Face,” *New York Times* opinion writer Nicholas D. Kristof, wrote about the importance of public perception to journalism issues, offering then-recent stats to demonstrate the problem, noting that “Trends 2005⁵³,” a study published by the Pew Research Center, stated that 45 percent of Americans believe almost nothing written in their daily papers—up from 16 percent 20 years ago. Kristof spoke then about the fragility of freedom of the press and suggested two appropriate responses—passage of a federal shield law and for journalists to reflect on exactly why all these conflicts were happening? Was it because the media were perceived as being out-of-touch? “In this kind of environment, it’s not surprising that journalists are headed for jail,” wrote Kristof. “The safety net for American journalism throughout history has been not so much the First Amendment—rather, it’s been public

⁵³ Pew Research Center. (2005, January 20). “Trends 2005.” Retrieved April 29, 2012 from <http://pewresearch.org/pubs/206/trends-2005>.

approval of the role of the free press. Public approval is our life-support system” (p. A21).

This is why newspaper commentary sections, especially editorials and op-eds written by staff writers, also should consider carefully how descriptions of law and legal cases are explained. This framing chapter has shown that authors sometimes refer to cases without defining them or with explanations full of legalese. For readers to understand reporter’s privilege and shield laws properly, they need to be able to understand the ramifications of the legal doctrine behind them. As Hertog & McLeod (2008) emphasized, frames offer not only symbolic power but a common recognition, a universal reference point—and to have shield laws and/or reporter’s privilege framed negatively or ambiguously could be damaging. As they write, “When the applied frame is too detrimental to the group’s efforts to journalism’s efforts to obtain legal protection for reporters and sources. It may be wiser to attempt to reframe the debate so that the odds are more in its favor. This is a difficult task and usually unsuccessful, but it represents a major improvement in the group’s chances for ultimate success if it can be accomplished” (p. 149).

The next section of the research chapter in this dissertation takes a look at what members of three demographic groups—students, baby boomers and seniors—know about shield laws and reporter’s privilege. This section will be followed by final conclusions for the interview, framing and focus group studies.

Editorials, Reporter's Privilege, and Public Perception—A Qualitative Look at Audiences' Opinions and Attitudes about Shield Laws

Introduction to Focus Group Section

The purpose of this chapter is to gain insight on what members of the public know about the issue of reporter's privilege, where they get their information, and what their opinions are regarding reporter's privilege and the pursuit of a federal shield law. In addition, the study aims to generate ideas on how the media and other institutions can better inform the public on this issue. Generally, in academic literature on shield laws and reporter's privilege, the human narrative is minimal, contained mainly in quotes taken from consumer newspaper and magazine articles to illustrate points. Yet, insight on what the public knows about reporter's privilege offers valuable information the news media could use when framing the issue.

Whether the public understands or cares about the topic needs more exploration. Public perception on issues such as freedom of the press is occasionally sought by organizations such as The First Amendment Center, which, since 1997, has published its "State of the First Amendment" report, a nationwide survey that measures opinions and attitudes regarding freedom of speech, the press and religion. However, such polls tend to ask questions regarding privilege and shield laws as a small part amid a group of queries about all types of issues. For example, the 2007 study⁵⁴ did report responses to a question about whether "journalists should be allowed to keep a news source confidential," with 43% answering they strongly agreed, up 1% since the question was asked in 2004, but down from 1997's 58%. The remainder of the 51 questions focused on other topics.

⁵⁴ 1003 people were surveyed in this study.

In comparison, this study examined these attitudes and perceptions at length, posing multiple questions to the three demographic groups before and after they read materials about reporter's privilege and shield laws. For this study, three focus groups were conducted from in 2009 and 2010 with specific demographic groups: students, baby boomers and seniors. This methodology was chosen because "focus groups may be valuable to those exploring new territory in which little is known beforehand, or to gain unique insight into existing beliefs, behaviors, and attitudes" (Byers & Wilcox, 1991, pp. 71). Ultimately, focus groups made sense for this research because it addressed people's understanding and feelings, an element this study wanted to focus on since the public's stance on the issue could affect future pushes for legislation.

Research Questions

RQ1: Does the general public support shield laws?

RQ2: Does the public think reporter's privilege is necessary to maintain the free flow of information?

RQ3: Who does the public think is considered a journalist and should be covered by shield laws?

Methods

Focus groups' roots go back to the 1930s when sociologists and psychologists, dissatisfied by traditional survey techniques, experimented with various interviewing practices (Schutt, 2004). A common methodology in marketing research, focus groups have become an accepted technique in social research over the past 60 years. Much of the current practice is modeled on American sociologist Robert Merton's work on the focused interview of groups, where a trained interviewer (also known as a moderator)

posed inquiries, using guided questions, to a company of individuals that centered on the “subjective experiences” (Merton & Kendall, 1946, p. 541) of the members regarding some commonality. Typically the focus group represents a target population reacting to “something presented to them—an idea, a product, a speech, an advertisement” (Krathwohl, 2004, p. 295). Usually made up of five to 10 people, the grouping can be as little as four or as big as 12. Ideally such a grouping is “small enough for everyone to have opportunity to share insights and yet large enough to provide diversity of perceptions” (Krueger & Casey, 2009, pp. 6).

Such interviews are more productive when the interviewer appraises respondents’ answers as the focus group progresses, insuring that the data offer material that is specific and allow glimpses of how personal and social context effect opinion on the topic. Although participant questioning should invite individuals to verbalize their feelings with a minimum of moderation by the interviewer, or as Merton and Kendall (1946) frame it, “a nondirective approach” (p. 545), the interviewer should maximize the range of responses by introducing new topics based on subject conversation or through the study’s interview guide, as appropriate. Focus groups often benefit from the dynamics of the collective’s interactive process, and quotations from the interviews can offer valuable information for analysis, since they can “provide valuable evidence for the credibility of the analysis, because they generate a direct link between the more abstract content of the results and the actual data; in addition, they are also the strongest connection between the reader and the voices of the original participants” and this can enhance the validity of a study’s claim (Morgan, 2010, p. 718).

Other strengths of the technique include its ability to glean information from those who are illiterate or who are reluctant interview subjects and need a more conversational environment that gives them a comfortable platform to expose their thoughts and feelings. This synergistic platform can also facilitate conversation as more talkative members open up discussions, making the less-outgoing participants more active respondents (Kitzinger, 1995). Used appropriately, focus group interviews can provide insight into patterns in how knowledge is collected and transferred or, as Merton said, showing “the aspects of situational experience leading to the observed outcomes” (Merton, 1987, p. 557). Information collected from such research can also often “stimulate the thinking of the researchers” (Calder, 1977, p. 356). The responses may help discover constructs not previously considered, inspiring subsequent study through other methodologies. Focus groups are often conducted in social research and have been used for a variety of studies, including journalism (Fry, 2008; Johansson, 2008; Borden, 2003; et. al.) and communication and media studies (e.g. Quan-Haase & Collins, 2008; Southwell, Blake & Torres, 2005; Borden, S.L., 2003).

Still, focus groups do have some limitations. Such group communications, for instance, may discourage individual voices afraid of dissenting from the others or uncomfortable with exposing private thoughts in a public forum. Many (Southwell, Blake & Torres, 2005; Merton, 1987; Merton & Kendall, 1946) believe that such group interviews are best used to collect new ideas and generate hypotheses rather than “as demonstrated findings with regard to the extent and distribution of the provisionally identified qualitative patterns of response” (Merton, 1987, p. 558) or as a way to further interpret previous findings (Merton & Kendall, 1946). Most published research using the

technique combine it with other methodologies, frequently either in-depth or one-on-one interviews or surveys (Morgan, 1996).

Reynolds and Johnson (1978) point out that focus-group research reflects a somewhat “contradictory attitude” (p. 21) toward its own validity even when valuable insights come from it, because of an inability to make distinct inferences from data gleaned from a limited population not selected by random sampling. Calder also indicates that conducting additional focus groups can offer better generalizability “in an attempt to cover as many different social groupings as possible” (p. 361). Generally, according to Calder, researchers should continue running focus groups until a saturation point where the moderator can anticipate the responses—usually after three or four sessions.

Data Collection

This study consisted of three focus groups: One in November 2009 took place at St. Thomas Aquinas College in Sparkill, New York, and involved eight undergraduate students (three women and five men).⁵⁵ Another, in April 2010, featuring six “baby boomers,”⁵⁶ (three women and three men) at the Oceanside Friedberg Jewish Community Center, in New York, culled from its membership, Baby Boomer Club and friends of the organization. Another was conducted in January 2010 with nine seniors (five men and four women, born from 1928 to 1942), recruited from the 60+ club at Hemlock Farms in Lords Valley, Pennsylvania, and conducted at a private home there.

The focus groups, which were offered refreshments as an incentive, all used the same semi-structured script (see Appendix III) that included questions on media usage, as well as knowledge of and attitudes about reporter’s privilege and shield laws. It also

⁵⁵ The group offered a variety of majors from biology to history to psychology to education. Only one was a Communication Arts minor.

⁵⁶ The U.S. Census Bureau defines a “baby boomer” as someone born from the years 1946-1964.

sought to discover the group's perceptions after reading several editorials on the topic as well as some short paragraphs on individual journalists who were jailed for protecting confidential sources. All focus groups were video and audiotape recorded and subsequently transcribed by the researcher. An abridged transcript that removed irrelevant conversation and unneeded moderator directions was used for the analysis. All comments related to the study's purpose were recorded verbatim, as suggested by Kruger and Casey (2009).

Concepts Used in Analysis

To analyze the transcripts, the researcher read them several times to allow themes and patterns to emerge from individual opinions expressed. Several factors, suggested by Krueger and Casey (2009), were looked at, including:

Frequency—In a focus group, it is important to consider how often ideas come up. It is possible though that “cutting-edge thinking may have been voiced once in a series of groups, but it may be crucially important to the study” (Krueger & Casey, p. 121), so a researcher should look at not only how many times a topic is spoken about, but also what the individual says regarding each subject. Additionally, Morgan (1997) suggests three ways of understanding focus group transcripts: noting general themes or codes, looking at individual references to such frames, or looking at the general group response. This study sought to compare answers across groups as well as pinpoint individual narratives that demonstrate the ideas being discussed as per Morgan's three methodologies.

Extensiveness—This concept is similar to frequency but remains distinct because it measures “how many different people said something” (Krueger & Casey, 2009, p.

122). Some issues are talked about several times throughout the focus group, but only by one individual so the theme may seem more resonant than it is. In moments such as these the interviewer opened the topic to the floor, asking for the group's viewpoint to determine whether others shared the opinion.

Specificity— This study looked closely at details provided by members of the groups.

Emotion—More weight is typically credited to items or comments where respondent answers show intense emotion, such as passion or enthusiasm (Krueger & Casey, 2009, p.121). Some of the quotes chosen in this study typified moments during the focus group where strong enthusiasm was shown for certain topics.

Findings

News Preferences

In order to put these findings in context, members were asked questions about their news preferences. The senior community embraced traditional media more than the other two groups as their main news sources, citing television (Fox News and CNN), radio, news magazines and newspapers (*The Wall Street Journal*, *The New York Times*, and the *Pike County Dispatch*—a weekly newspaper that covers Lords Valley, Pennsylvania) as their go-to places for information. These were also the materials they thought were most reliable, especially Fox News and CNN.

The baby boomers group utilized a combination of traditional media sources and the Internet. This group used the greatest variety of material, including newspapers (*The New York Times* and *Wall Street Journal*'s online portals and print versions; *Newsday*, a Long Island daily newspaper; *USA Today*); magazines: (*Newsweek*, *Time*, *U.S. News and*

World Report); and television: (Fox News; local news channels; WNET channel 13, a public broadcaster; ABC News' "World News Tonight" evening news cast; NBC's morning "Today Show"; and CNN and its online version). The baby boomers believe the media they used were the most reliable.

Students were more inclined to get their information from the Internet (such as aggregation sites like Yahoo and online portals of legacy media) with some looking at newspapers and television as well. Two said they thought the Internet is a better information source since it contains more depth and is updated constantly. Yet, the bulk of the students indicated that more reliable information comes from traditional sources—the ones they don't necessarily read, since they are not as convenient. For example, student focus group members offered this exchange:

Woman: I think newspapers give the most facts just because on TV they can put in or leave out whatever they want and also on the Internet you don't exactly know what you are reading.

Man: Yeah, I kind of agree with her. I don't read newspapers often, but even when I do, it seems to be more reliable than the Internet.

The others opted to use newspapers or magazines for information, citing that these sources usually contained the most reliable information because of research and fact checking, while TV tended to twist a story "anyway they want."

Knowledge and Perceptions on Reporter's Privilege and Shield laws

General Summary

Many of the participants had never heard of reporter's privilege or shield laws prior to the focus group session. The least knowledgeable were the students, with just one student vaguely remembering the subject had something to do with "people going to prison." The baby boomers and the seniors knew some information regarding the issues,

but also mentioned several cases that they believed involved reporter's privilege, that, in fact, were not valid examples. In general, the college students and the baby boomers were more likely to support the issues of reporter's privilege and shield laws, saying that the need for accurate and thorough information was important enough to society to justify some sort of First Amendment privilege. There was not an overriding unanimous stance, however, regarding a federal shield law. Some indicated that rather than establishing one national law, the states should continue deciding shield-law legislation. Others wanted to see Congress pass a federal shield law, but only if it provided "qualified" protection.

Some group members, in all demographics, expressed concern about the credibility of using anonymous sources. Of all the demographic groups, the seniors showed the least support for shield laws. Most of them expressed a severe distrust for the news media, stating that much news selection was based on sensationalism and ratings.

Students, Reporter's Privilege and Shield Laws

Despite their lack of previous knowledge about reporter's privilege, the students quickly warmed to supporting it when the moderator gave a general definition of the term. Students expressed the view that they did think reporter's privilege affected journalism—all but two of the eight students (a male and a female) endorsed the idea of a federal shield law. This occurred shortly after the focus group commenced (prior to any reading materials on the subject being given to participants).

Transparency played a role in why some disagreed with shield laws, with the non-supporters indicating that journalists should show their sources to the public, insuring their legitimacy or, as one woman stated, "this is where I got my information. This is what happened." Most of the students, however, correlated the use of confidential

sources to getting better public information and indicated that without some sort of reporter's privilege, the availability of valuable data could diminish. For instance there was this exchange at one point:

Woman: Yeah, I think the public should be concerned about it because reporters are writing stories on things that happen to the public, things that are going on in the public eye and exposing, they're supposed to be exposing, factual evidence of things that occur. If they aren't given the opportunity to provide accurate stories then the quality of the pieces will go down the toilet because they can't get accurate sources because nobody will give them information. ...

Man: Yeah, it may actually be even the most important thing the public would have to worry about because people always worry about healthcare and public safety and every other thing that's out there is more important than this protection, but if you don't have that journalism protection, then what are you going to know about what's right and what's wrong, let's say on the healthcare bill now or another piece of legislation right now. So it really should be taken very seriously and should be up there in the public eye.

Some of the students who supported privilege also showed confidence in the media, intimating that journalists were responsible enough to ascertain when anonymous sources were needed and would do so judiciously. As one woman stated, "Reporters are out there every day getting stories and obtaining materials from different sources. If they need to keep it confidential for whatever reasons, they need to be trusted."

A federal shield law was needed, according to the students, for a variety of reasons. Some wanted one coherent policy so reporters and sources would "know what to expect" and could make decisions accordingly. Having "no consensus to what's right and what's wrong" bothered students, and the current situation seemed impractical, one student said, because a "reporter could go into New York and do one thing and they could be protected, but then they could do the same thing in Pennsylvania" and go to jail.

Others thought shield laws were valuable, yet opposed a federal shield law and thought states should continue to legislate protection for reporters. After some

conversation about shield laws and reporter's privilege, three individuals who initially said they supported a federal shield laws seemed more inclined to keep allowing states to determine their own codes or, at least, establish basic "ground rules" that allowed states the ability to "tweak" protection for reporters. One male emphasized that some states are more of a "media state," for example, New York, and inferred that they might merit greater protections. Still, he said, "I don't think a federal shield law would hurt, but, at the same time, I don't think not having one will hurt either." Another individual was more adamant about leaving reporter protection to states, stating:

Man: I feel like things carry regionally, especially for states, so I feel like what might be appropriate for some states might not be appropriate for some others. And more so because then you'll have a better idea of a general consensus of the people in that state as opposed to a federal, which is just one opinion for the whole nation...

Baby Boomers, Reporter's Privilege and Shield laws

More informed about the topic prior to the group interviews were the baby boomers, whose knowledge varied from a basic understanding of the issue to believing Martha Stewart's 2004 insider trading case⁵⁷ (McClam, 2004) or the 2001 Enron scandal (Oppel & Atlas, 2001)⁵⁸ had something to do with protecting a confidential source. All the baby boomers seemed to have some understanding about what a confidential source was—although one woman did want to know at what point a conversation between a journalist and a source became confidential. Most of the boomers recalled reading or viewing something on shield laws or reporter's privilege, but couldn't remember specific sources or names of journalists who went to jail:

⁵⁷ Martha Stewart went to jail for obstructing justice and lying to the government after she sold \$228,000 of ImClone Systems in 2001. The sale was made a day prior to an announcement that the Food and Drug Administration rejected approval for its cancer drug.

⁵⁸ The collapse of Enron in 2001 is one of several cases where Wall Street companies placed profit over ethics.

Woman: I've heard of it, but I really don't know what it means and what it entails exactly. It has to do with confidentiality of people they have interviewed. I just know a little bit about cases where people had to go to jail because they didn't want to reveal their sources, but I really don't know that much about it at all.

Man: Confidentiality is something you know but you don't have to say it. I think a reporter went to jail for about a year or so because she wouldn't reveal a source or whatever. You would think that the reporters wouldn't ask certain questions but sometimes they come right at you.

Like the students, they mostly expressed support for the idea of reporter's privilege and shield laws, indicating a connection between the free flow of information and the ability of a journalist to protect a source's identity. As one woman phrased it:

I think if you didn't have the issue of confidentiality people may not be as free or open to give you the information because they may be implicating themselves or others, and they may also feel in danger—whether it's in jeopardy of losing their job or being physically, or their families, hurt. So I think without that issue of confidentiality you probably wouldn't get the same level of information in the news.

Although one male said, “confidential sources should be kept confidential unless the source wants to be found and known,” most of the baby boomers saw more “gray” in the situation. Despite their desire to facilitate better newsgathering through confidential sources, baby boomers offered that while confidentiality might generate the “really important information,” certain situations might trump this reporter-source agreement. For instance, one individual conceded that some national security matters could force reporters to expose their source's identity. Group members offered the idea, as well, that sometimes a source was not credible and hid behind anonymity, disseminating wrong information, sometimes with a hidden agenda, into the public sector. As one woman said,

referring to media reports⁵⁹ before the 2003 U.S.-led invasion of Iraq that Saddam

Hussein possessed nuclear weapons:

I just keep hearing weapons of mass destruction. Somebody said there were some, and then they were off to the races and nobody knew who it was, where it was and we end up in a war somewhere on the other side of the world. I just think that for the information to get out there the source needs to be fully researched and verified before it gets out to the media. And even afterwards I think it needs to be pursued, especially if it is such a critical piece of information. But the information is more important than the source if the information is true.

Ultimately, though, baby boomers supported a federal shield law, believing, like most of the students, that the majority of journalists “are professional and they would have good judgment to say whether a source was credible or not ... because their careers and jobs are based on that information.” The baby boomers were the only group to use the term “qualified” shield laws, with the majority backed a limited rather than a blanket protection for journalists. As one male baby boomers explained:

I would like to see some type of qualifying shield laws where there is definitely protection given, but when things kind of progress to a more serious nature, that maybe involving actual security issues, that you really do need to meet behind closed doors now and reveal who those sources are. I kind of like the idea of a qualifying shield; it’s seems more of a middle ground than a yes or no.

Others recognized, though, that a shield law offering qualified protection had its problems, too. “It’s not black or white,” explained one woman. “That’s scary because then who decides when it should take effect and when it doesn’t?” The baby boomers, in general, tended to look at reporter’s privilege and shield laws with greater scrutiny than the college students, appreciating their ability to facilitate the flow of information and yet wary about how to define the parameters to insure proper protection without compromising other rights and safety concerns.

⁵⁹ Although the participant did not mention this article in particular, she most likely meant news pieces such as “Illicit Arms Kept Till Eve of War, an Iraqi Scientist Is Said to Assert,” by Judith Miller, which appeared on April 21, 2003 in the *New York Times*.

Seniors, Reporter's Privilege and Shield Laws

The senior group seemed to have the strongest opinions against reporter's privilege and the news media in general. Most professed to having heard the term "reporter's privilege" in the news—although when asked to illustrate instances of stories they remembered from the news media just one vaguely recalled an actual case that involved a confidential source where "spies and names were divulged and they should not have been" (an apparent reference to the exposure of CIA agent Valerie Plame). Some individuals misunderstood the term and referred to unrelated stories—such as Dan Rather's 2004 reporting that questioned then-President George W. Bush's national guard service, based on an unauthenticated memo (Gold, 2009) or the reporting on Tiger Wood's marital indiscretions (Spillius & Singh, 2009)—as an example of a journalists protecting sources.

Additionally, most of the senior group deemed reporter's privilege potentially dangerous to the country if the news media gave too much information at the expense of national security:

Woman: There are times where things have been said publicly and I say to myself, "Wait a minute aren't we just sitting here and telling the enemy this is what we're doing. We're going to be at point A at two o'clock in the afternoon. Come and get us. Or make sure you're not around so we can't get you." Can I say, duh?

Man: Reporter's privilege has been used and abused depending on what the viewpoints are of the reporter and the people they've interviewed. They print news that could be a security problem and they put out news that could also be a security problem. It's overused because of it.

Another popular theme to emerge from the focus group was that the news featured too much entertainment and sensationalism. The push for that type of diversion compromised safety, some said, and as one focus group member put it, "put the country

at risk.” In general, the senior cohort portrayed the news media as an industry full of corruption and one that abused reporter’s privilege:

Man: They use it to cover up lies. They use it to cover up security problems. They use it to give news programs entertainment, as [] said. Entertainment and then you find out two weeks later that it was totally false. So that’s why everyone hesitates on it. ... And I agree with [], every reporter on TV with the exception of Fox News and sometimes CNN is giving us strategic information. Let us tell you what the latest security rules are and how we’re going to prevent it. And they are all listening and saying, ‘we know this now.’

Man: I would agree that it is misused because it’s a matter of money. The more they get out to the public, the more their companies make. It seems incredible. They divulge far too much of it. Every day you turn on a program and it’s three people sitting at a table. At least once a day you find them beating to death the country. It is a matter of divulging information at the end. I am firmly against that. Shut up.

Ultimately, few in this cohort supported shield laws or reporter’s privilege, but even those who did not dismiss the idea never rallied fully behind it either. As one woman pointed out, the issue invoked “mixed feelings” and made her “confused” even though “it’s kind of a basis of one of our beliefs in our country.” Just one woman fully supported reporter’s privilege and the idea of shield laws, saying:

We’re assuming—some of us are assuming—that the reason is not to protect the person but for bigger reasons. Maybe I’m too optimistic. But I think that we give up something when we assume somebody is doing it for the wrong reasons ... I always rather walk on the side that assumes there’s a rightful cause not to tell their source.

Reading the Editorial Page

Since editorial page material were used as a discussion prompt in the focus group, participants were asked about their use of editorial pages. Most of the participants in the focus groups said they did not read the editorial section on a regular basis. Just one member of the student group read them at all and only about half of the seniors surveyed admitted to looking at them as often as “occasionally.” Baby boomers expressed the most

enthusiasm for editorials, with one saying: “I love them because they, it’s the most honest piece of information you can read because it’s just someone’s opinion.” One woman mentioned how editorials could educate readers, especially with community issues “because there are some people who experience things that I may not be aware of, so it is enlightening me about something that’s happening near to home.” Still, some showed negative feelings for the forum because editorials are “one-sided.” One woman said, [I] “get frustrated with it because that’s not what I think.” One male said, “I like to come to my own opinion, and I don’t tend to be very trustful of editorial writers.”

Few remembered reading editorials on shield laws or reporter’s privilege prior to the focus group. One member in both the baby boomer and the senior populations recalled the names Valerie Plame and Judith Miller before seeing the focus group reading materials. After reviewing the focus group documents, some of the members remembered the Plame/Miller case more, with three of the seniors saying that the coverage contained some sympathy toward Miller’s situation, although two believed she was cast as a “bungling heroine.” Three baby boomers remembered that the journalists were portrayed negatively in the media in connection with Plame’s identity as a CIA operative being exposed. As one said, “There was so much anger and the fact that she had her profession revealed and damaged her career and her family’s fear of harm.” In general, though, few of the participants recalled seeing the topic in the media at all.

Halfway through each focus group, the participants were asked to read and react four newspaper op-eds. Two were from 1974 (two years after the Supreme Court ruled against the existence of First Amendment protection for reporters refusing to reveal sources to grand juries in *Branzburg v. Hayes* (1972)). Two members of the U.S. House

of Representatives wrote these: Robert W. Kastenmeier (D-Wisconsin), who defended shield laws, and Edward Mezvinsky (D-Iowa), who opposed them. The other two pieces were from 2005 and featured celebrity authors, former U.S. Sen. Bob Dole, a Republican, supporting privilege, and the conservative blogger Glenn Harlan Reynolds looking more negatively at it. (See Appendix III). The op-eds were specifically chosen for their contrasting positions, authorship, structure of argument, word choice used, etc.

In general, the student group focused on how the arguments were structured, not necessarily the positions advanced. Of the eight students, three (two men and a woman) liked the Kastenmeier (1974) piece because of its thoroughness in presentation. As one member said, “He really covered all the bases, and at the end he stated well these are my reasons for both of them. This is why I agree with. This is why I think that. This is my opinion. He just wasn’t one-sided.” Another pointed out, “There was more structure to it. There was a plan going forward like how you would define what a professional is, who should be held to that standard, not so much exactly what that standard was but knowing that there would have to be work done to become more clear as to what could be accepted, to what would be accepted. He gave a better direction than any of the other articles did as to where they still should go, where it could go.” The Kastenmeier op-ed seemed reasonable to the students because of its organization and well-constructed argument.

The others were split between the Dole (2005) commentary (two women), because it contained a reference to the Judith Miller case and they could connect to her personal situation, and the Glenn Harlan Reynolds (2005) piece (three men) because of

its perspective that if a shield law passed it should cover everyone, not just specific people.

The baby boomer group had a similar reaction. All professed to like the Bob Dole op-ed best, although several individuals had a close second or referenced a position from another editorial as a discussion point. For example one male also liked the part of the Mezvinsky op-ed that discussed “being a better watchdog for the public instead of advocating.” Another woman adamantly opposed the Reynold’s *USA Today* op-ed that compared blogs to editorials, saying, “I have a huge disdain for blogs because anyone with access to a computer can write anything about any situation or anyone, and it’s completely irresponsible. And I don’t believe that someone who is writing a blog should get the same type of courtesy or privilege as a professional reporter.”

Five of the six boomers found the structure of the argument most important in their decision to favor the viewpoint of an editorial. For instance, one group member stated:

What’s important is that facts that you’re presenting convince your reader of the truth and be able to discern that by reading different positions and understanding what’s intelligently written—not just a stream of consciousness—and what it does is it requires you to become involved more in the information that’s being presented and to come to your own conclusions.

Celebrity status wasn’t a concern; however, the boomers indicated, “it’s important to have some background, like who the author is.” Members of the boomers group were also eager to hear from disparate positions, with one person saying, “I personally like a diversity of sources because we know every publication will come at it from its own angle” and another stating, “what’s important is that (the) facts that you’re presenting convince your reader of the truth and be able to discern that by reading

different positions and understanding what's intelligently written—not just a stream of consciousness—and what it does is it requires you to become involved more in the information that's being presented and to come to your own conclusions.”

The best-received editorials for the senior group were Reynold's (one man, one woman) and Dole's (two men), generally because they matched the senior's individual opinion on shield laws (either for or against) and also, in the case of Dole's piece because he made a clear, concise argument. Some of the seniors stated they had no favorite. Several agreed with Reynold's premise that if reporters did their jobs better, they would not need privilege: That means they really need to as Reynold articulated, “actually investigate” and “have to authenticate their sources.” As one male explained further, “Media stands a much better chance of winning freedom from subpoenas from government interference with vigorous, accurate, fair reporting, not by lobbying on Capitol Hill. Period. End of story.”

If a federal privilege was granted though, it should not be absolute: criteria such as national security and the conditions of the situation should be taken into account. That meant if a reporter witnessed a crime, “they'd have to talk about it,” said one woman quoting from Reynold's editorial. The seniors' earlier-expressed skepticism about the news media carried over into the editorial reading exercise, with one male professing that he had no favorite because, “everybody has their own ax to grind.”

How Reading Editorials Influenced Opinions

The students stated that reading the editorials didn't generally change their positions on reporter's privilege and shield laws—although the initial questions of the

focus group showed that prior to the interview no one in the group knew much about the topic. Most admitted that reading the editorials either introduced them to new ideas or strengthened their position on the subject:

Man: I wouldn't say that my views changed at all. Yeah, I just think I learned more about the topic in general.

Man: I feel that my view did change. It actually made it stronger in that I felt that everybody should be covered under a federal shield laws.

Woman: My views really didn't change. I had never been introduced to this topic before but reading the first article [Kastenmeier, 1974] made me understand it a bit more.

Two male students found it disturbing that those passing information through new technologies might not find coverage under shield laws, with one saying, "It hit home, if it were to be passed the way that article expresses, the people on Facebook and Twitter are like, 'I can get charged with this? You know.' That's probably the most shocking thing. You'd never expect it to get to that kind of level personally."

The baby boomers indicated that some formed more of an opinion on the topic after reading the op-eds, with one woman saying the information caused her to believe "we do need some type of reporter's privilege." One (a woman) felt more confused about the issue after the discussion and several (three men and a woman) seemed more favorable toward the reporter's privilege and shield laws as they learned more about them.

The senior group said that reading the op-eds did not affect their views on shield laws or reporter's privilege at all. Although two admitted that doing the activity did show them another side, neither was swayed, with one saying, "it just showed me there is

another half to a certain story—another part of the story. But usually when I make up my mind about something, I don't deviate.”

Who Deserves Privilege and What Is the Definition of a Journalist?

Focus group members also were asked to consider who should be labeled as a journalist and eligible to claim reporter's privilege. The students offered the broadest definitions of who should be covered under shield laws. Most considered anyone who released information to the public in a professional way to be a journalist—whether that meant a newspaper, radio, TV, or Internet reporter. One commented that citizen journalists, even college students who work for a campus newspaper or radio station, should be considered for shield-law coverage. The boomers preferred to bestow the title “journalist” only on those with professional credentials—someone who worked full-time at a more traditional media institution, such as a newspaper, magazine or TV/radio station. The seniors generally defined the term as someone who reports the news. One made the distinction between the levels of news reporting, saying, “A reporter, I think, is just reporting the breaking news of the day that grabs his audience's attention. Journalist, I think, goes further than that. They examine possibly some of that news and they go into it more deeply and treat it as such. Go into it to a much further extent.” A consistent theme with the seniors throughout the focus group appeared again in the discussion of who was a journalist. Comments seemed to indicate participants thought that the profession had become tainted as it focused more on entertainment. For example, one of the seniors offered:

I don't think in today's world there are any true journalists left. The people that you see on TV are mostly news readers. They read what's put in front of them on the teleprompter and they call themselves reporters ... And he may only show one

side of what he sees and not the other side. So, I don't think there are any true journalists. They're all, as ____ said, it's entertainment now.

During the last portion of the focus group, participants were asked to read a few paragraphs about five journalists who went to jail to protect their sources confidentiality (see Appendix III for handout) and then asked the participants to comment on which cases merited the protection of reporter's privilege. When the students reviewed the sheet, they didn't recognize any of the individuals. Most in the group defined those with professional affiliations with journalistic organizations as more appropriate candidates for reporter's privilege, including Tim Crews, a newspaper editor and publisher; Jim Taricani, a TV reporter; and Judith Miller, who was a *New York Times* writer when she was jailed. One college student believed that Vanessa Leggett, a freelance book writer, also should be considered since "just because you're freelance doesn't mean you're not getting your articles published in either newspapers or magazines or what have you." Just one student thought all on the list deserved coverage.

The students also believed that some criteria should be met before awarding reporter's privilege. For example, some believed that in cases of compelling government interest or national security, privilege should be forsaken:

Man: When you hear about, FBI and CIA, with the ... undercover operatives. It's a very thin line. There are some things the public wants to know. Why were they able to get away with this or get away with that? Also, it's like if you reveal too much then maybe the greater cause is sacrificed because, you know, you are trying to get one small thing and there's bigger fish to fry.

Others pointed out that who received reporter's privilege depended on "the situation." One woman argued, for instance that Vanessa Leggett shouldn't receive privilege because, "She's dealing with a murder in Houston. That's kind of important because someone's killing another person. ... In that specific situation ... [the source]

should be exposed.” Another woman expressed more empathy for Leggett’s case because “she didn’t publish anything about the murder” and for Judith Miller since “she never wrote about it for publication.” This student said that subpoenaing Leggett and Miller was “almost a violation of privacy,” implying that publication should be a criterion for being asked to reveal source material.

Baby boomers responded similarly, saying that bloggers, “shouldn’t belong in the same level” as journalists who work for professional news organizations. The bulk of the group agreed that Crews, Taricani, and Miller deserved privilege because of their professional affiliations. Two others (two women) supported Crews and Miller, but not Taricani since “a TV reporter reads from a prompter. That person didn’t do research.” One of the women who did support Taricani did so because “a TV reporter does go out into the field, interview people and get information. If you’re an anchor that’s working in the studio, you read off the prompter. But there are field reporters that go out into the field and get the information.” A few baby boomers also felt that cases regarding national security should not necessarily merit reporter’s privilege.

The seniors’ opinions were like those of the baby boomers, with Judith Miller and Timothy Crews described as journalists because of their professional stature. Vanessa Leggett was considered a reputable candidate because “usually, to me, a freelance writer is a person that doesn’t necessarily write on something without doing the research first, without doing the hard work. I’d consider that definitely a form of journalistic reporting.” Jim Taricani was also mentioned, but some questioned his validity as a journalist and his integrity as a reporter, saying, “I don’t know exactly when you say a TV reporter in what context. I don’t know if it’s somebody sitting there reading above the screen. ... A

journalist is a person really who has the skills or ... does the work ” and “What bothers me about Jim Taricani is that he—and I don’t know if this should affect it, but it does—it was concealed evidence that he had.”

Practicing ethical journalism was an overriding theme for the senior group. If something was against the law or would hurt national security, the group members indicated that the journalist should cooperate with investigators. The group also continued expressing negativity toward the journalistic profession, with the most vitriolic member saying:

Man: I don’t consider any of them reporters or journalists. They’re just people with their own agendas, hiding information that should be disclosed. There’s no reason not to hide it. Someone is getting a career ruined then you have to disclose the information. If you don’t, you’re not a reporter. And as far as the NYT being valid for someone’s credentials, they have more of this type of stories than most newspapers that I know of.

The students were the most impressed that the journalists went to jail to protect source confidentiality, viewing this decision as something that seemed admirable and courageous:

Woman: I think it’s very noble. They have the guts to not say anything. In some situations, I think pride kind of took over and they didn’t reveal things how they should have. But I do think it is a noble thing to do. Not many people would have the guts to stand up to the government basically and say, “Sorry I can’t give you that.”

Man: You rarely see anybody sacrifice for other people in this kind of matter. The fact that they didn’t reveal right away give up their source and say I’m not going to jail, it is noble.

Woman: I definitely look up to all these people but especially Vanessa Leggett. I mean she spent 160⁶⁰ days in jail for refusing to give up her own personal notes that she wrote. So there is no reason for her to be harassed about since it was everything she wrote.

⁶⁰ Note: Vanessa Leggett spent 168 days in jail. See Appendix I for the material the focus group member is referencing.

The baby boomer group offered a more practical stance on journalists going to jail to protect their sources, with one saying, “That’s what the law is. Then they should protect their sources and take the consequences.” The boomers also expressed that the viewpoint that protecting promises of confidentiality was important to obtaining future information. As one member put it, “if I know that you are going to reveal my source then I won’t tell you anything. I think it would be hard for them to ever get a confidential source ever again.”

The seniors offered the most negative opinion on journalists and the news media, in general. Because of their opinions, most did not want to support a federal shield law or reporter’s privilege, offering comments such as: “I think journalism is dead. I think it’s been dead for about two years perhaps. I’m very hesitant to grant anybody, I would say, a privilege of immunity when I really believe they are not doing the job that they chose to do” and “I’m against shield laws. Because you can’t have it for one particular person.”

Conclusions

Understanding public knowledge and opinions of reporter’s privilege and shield laws has the potential to give insight to how the news media can better frame the issue. It also is important to understand whether there would be public support if Congress introduced new federal shield law legislation. One disturbing factor shown throughout the focus groups was the misconceptions about what situations involved confidential sources. Information collected in this research indicates that the student and baby boomer participants generally supported reporter’s privilege, especially when it brought important knowledge to the public forefront. The seniors in this focus group did not generally support reporter’s privilege or shield laws consistently throughout the conversation. Confusing coverage of Tiger Wood’s marital infidelities or Martha

Stewart's insider trading with issues surrounding reporter's privilege, as some of the seniors and baby boomers did, does not help garner support for the issue since these are celebrity-related stories and speak to the criticisms that senior participants lobbed at the news media for covering material just to garner ratings.

It is evident by such confusion that these group members do not really understand reporter's privilege and/or shield laws. That suggests that the news media have not covered those issues in a way that resonates with the public. The question for the news media, therefore, is how can they package stories on the issues of reporter's privilege and shield laws that simply explain a complex subject and engage consumers enough that the topic remains in their memories? Most of the baby boomers and the seniors, for instance, were old enough to remember the *Branzburg v. Hayes* (1972) decision, yet none mentioned their personal memories during any discussions. Indeed, the seniors remained steadfast in their resistance to reporter's privilege and shield laws. All of the participants were alive and old enough to monitor news media coverage of Judith Miller's jailing, perhaps the most recent high-profile case of a journalist choosing prison rather than exposing a source, yet few recalled it. More research is necessary to determine why these things are not remembered but false information, such as crediting Dan Rather's resignation for a flawed story as a case of reporter's privilege, is.

The data collected also shows that some of the individuals involved in the focus groups, especially in the senior community, had a distrusted the news media. Baby boomers indicated some problems with subjectivity and entertainment in the news but also showed respect for the journalistic form, citing particular writers such as former

New York Times opinion writer Frank Rich, *Times* columnist Maureen Dowd, and journalist Pete Hamill as producing good work. The boomers and the seniors shared the opinion that the way the media cover news could be better; in fact, both expressed the desire to see more informative and comprehensive updates in their news.

This sentiment from the small groups in this study is corroborated by a 2011 Pew Research Center for the People & the Press study, titled *Press Coverage and Public Interest: Matches and Mismatches*, in which the nonprofit organization discovered that “there were moments, and stories, when the public’s interests diverged substantially from the press’ coverage. And those discrepancies, moreover, tended to fit a broader pattern” (Pew Center, 2011, p. 2). In general, according to the study, the press often dismisses major breaking news stories before the interest of the public wanes. It also tends to cover events in the Washington area longer than the audience wants.

So, if the news media are misjudging consumer interest in major stories, might they also be missing their audience when writing about more media-centric topics such as reporter’s privilege and shield laws? Few members of the focus groups conducted for this study knew what shield laws or privilege were prior to joining the focus group, and only a handful of members remembered seeing or hearing the terms in the mainstream media. If the news media believe that such topics are worth becoming part of public discourse, they need to consider how they frame the issues for their audiences. This study indicates that perhaps the coverage the news media currently disseminates is not being noticed by the population, at least in so far as the three focus groups conducted here are representative of audience segments.

Of course, this could be for a number of reasons. The coverage may be there and people are not paying attention. The issues may be covered predominantly by platforms not used by members of the focus groups. Or there may be relatively few stories on the issue. Focus group members could also be uninformed because they simply don't consume hard news, preferring to read just soft, entertainment and feature-related pieces—despite some group members' disdain of such news. In the case of the student group, most members received their news media through the Internet. It is possible that to reach such a demographic, the news media and/or its supporters may need to change modes of information delivery and use more emerging technologies. If stories that explain reporter's privilege and shield laws well available in such forums currently, the media may need better ways to draw attention to them. In general, shield laws stories don't necessarily offer visually stimulating narratives, making for boring TV or video. Election campaigns, for instance, have demonstrated much success using social media. Some 22% of adults who go online used Twitter, Facebook or MySpace prior to the November 2010 elections for information and community connection purposes (Pew Center, 2011). Politicians have widened their base with new communication strategies. For example, New Jersey Governor Chris Christie found viral success by posting clips from his town-hall meetings on YouTube, where they moved throughout the country “the way tween girls circulate Justin Bieber videos,” according to a November 29, 2010 article in *New York* magazine. One video of Christie responding to a public-school teacher even generated over 750,000 views (Zengerle, 2010, p. 27).

Another possibility for extending the media's message is by finding stories that will resonate with demographics such as the student and boomer populations, who

seemed especially receptive in this research to learning about shield laws and reporter's privilege. The students, especially, are ideal to focus on since research indicated that they are still developing their ideas and that their position on the topic of reporter's privilege and shield laws quickly changed during the focus group as they were presented with op-eds for and against it. For example, the students seemed impressed by the personal stories of Judith Miller (2005) and Vanessa Leggett (2001). Traditional news vehicles did cover these two women before their jail sentences and afterward. Yet, these stories occurred during the infancy of Facebook (started in 2003) and YouTube (begun in 2005). Perhaps if the news media altered their traditional form and did stories that emphasized individuals and released them on YouTube or through social media, there could possibly be a better response. If the news media could create more compelling material on shield laws and privilege for various platforms, such as YouTube, perhaps it, too, could get such attention. In May 2011, Google, with the Washington, D.C.-based Newseum, launched a YouTube channel to honor journalists who died while covering news, which, perhaps, could serve as a model.

Most news organizations' focus remains on providing unbiased, well-researched news. Normally, opinions in the print media are reserved for editorial pages—a medium that, as the focus groups indicated, may not be delivering a message on reporter's privilege and shield laws that is registering with readers. Few of the participants in the focus group even read editorial pages. So how can the media insure that information penetrates the groups of people most receptive to education, such as the students and the baby boomers? Perhaps creating additional spaces for such commentary on blogs, discussion groups, etc. on online portals could reach more individuals. Both

Martin Luther King, Jr., and John Peter Zenger, after all, wrote letters during their jail time that were published. Journalists might be able to write about their experience from the subpoena process through incarceration and release.

Additionally, media institutions could better partner with nonprofit organizations—such as The Reporter’s Committee for Freedom of the Press, the First Amendment Center, or the Freedom Forum—to disseminate information to the public on issues such as reporter’s privilege and shield laws on a regular basis. Such groups seem an appropriate forum to engage support for specific journalistic issues. They are better suited for creating more deliberate messages aimed at certain population demographics, since traditional news media are expected to remain more objective about their coverage. These groups should seek ways of finding the individuals in the student and baby boomer demographics. As the focus groups indicated, these populations, for the most part, seem ready to lend their support, once made aware of the principle. To do so, social networking is one possible avenue to explore. While the Freedom Forum does not have a Facebook page, the First Amendment Center and The Reporters Committee for Freedom of the Press do (although as of January 27, 2011, only 1,223 and 562 Facebook users respectively have clicked on the “like” buttons and receive status reports from the organizations. (In comparison, an industry networking website, Help a Reporter Out⁶¹, designed to link journalists with information sources, such as public relations professionals, had 23,444 “likes”). Whatever the solution, the focus group research points to three separate demographics that apparently are not being exposed to information on

⁶¹ HARO was founded in 2008 by entrepreneur Peter Shankman. The social media service seeks to match media professionals with sources for their news products.

shield laws and reporter's privilege and that means that voices who might advocate for change are possibly silenced.

The next chapter of the dissertation discusses the results of the three studies and offers concluding thoughts and ideas for future research. In this section, the role of public perception in issues such as reporter's privilege, shield laws and journalist contempt cases is addressed, basing commentary on all the findings of the dissertation.

Additionally, suggestions are offered on how the media can better address these issues in their coverage.

Conclusion

Summary

This dissertation employed three methods to examine reporter's privilege and shield laws through the perspective of news media producers, published news media content, and potential news audiences. Through interviews with jailed journalists and others, the dissertation obtained narratives from practicing media professionals about shield laws and reporter's privilege to understand how they perceived jailing reporters affected the source-reporter relationship and the flow of information to the public. In the editorial page study, the dissertation looked at what frames the media created in their editorial, op-ed, and letters to the editor sections and what those master narratives conveyed to the public. In the focus group study, the dissertation questioned three demographic groups on their media usage, their thoughts on reporter's privilege and shield laws and if they would be likely to support the issues.

Ultimately, what the dissertation discovered was that privilege and shield laws remain important concerns to the interviewed journalists. Many of them offered stories showing how sources appreciated their refusals to identify sources or relinquish notes and/or videos to the authorities, and would come forward with information because the reporter was deemed trustworthy. Media institutions sometimes supported the journalists who worked for them as the reporters fought subpoenas requiring them to testify in court, and there were a few journalists satisfied with the coverage of their case and financial and emotional backing of their companies. However, some journalists felt their media institutions withdrew aid or offered legal counsel that seemed to benefit the organization more than the reporter. Five journalists turned to *pro bono* attorneys, either from the

onset of their legal situation (Crews, Anderson, Wolf) or at some point throughout (Abraham, Kidwell), to represent them.

The framing study examined 472 pieces (185 op-eds, 128 letters to the editor, and 159 editorials) from the editorial pages of four major metro newspapers: *The New York Times*, *The Washington Post*, the *Chicago Tribune*, and the *Los Angeles Times*. Using framing analysis (Entman, 1993) and the constant comparative method (Glaser & Strauss, 1967), this study determined that four frames were present on the editorial pages from 1972-2010: “the public good,” “courts/government as adversary,” “the journalist as a hero,” and “the irresponsible journalist.” Additionally, research indicated that these frames did not always effectively communicate to the public why reporter’s privilege and shield laws were important issue. Sometimes news media merged these frames, creating a mixed message about reporter’s privilege and shield laws that often cast these topics in a negative light. Besides the four frames, three major themes were present in the study. These were: “Is a Journalist’s Role Special?,” “Who Deserves Privilege,” and “Legal Omissions, Mistakes and Obfuscation.” Of these themes, the last one proved to be most problematic to the public’s understanding of reporter’s privilege and shield laws by interjecting mistakes and missing information into the information released about these complex issues that are easily misunderstood.

The focus group study confirmed this observation, with participants misunderstanding the definition of shield laws and reporter’s privilege, in some cases attributing events such as the Tiger Woods marital/sex scandal as examples of instances where journalists and the courts grappled with First Amendment protections. While the senior population showed an overwhelming mistrust of the media, focus groups

conducted with baby boomers and students indicated that support for reporter's privilege could emerge from these groups—especially when these participants read editorials concerning the sacrifices of the jailed journalists.

In-Depth Conclusions

This research has value because it gives insight into why a federal shield law hasn't been passed in all the attempts that have been made over the past several decades since the 1972 *Branzburg v. Hayes* decision. In a time when the public perception of journalism is at an all-time low, the public dismantling of any journalist, as shown in the framing chapter, can only damage the profession's image more, perhaps even eventually making the public unwilling to support a reporter's efforts to protect his or her sources. These are dangerous times for such a thing. According to Daniel Ellsberg, the former RAND employee responsible for leaking the Pentagon Papers to the media in 1971, the Bush Administration pushed for tougher measures that restricted freedom of the press as well as an individual's right to speak against the government with the renewal of the PATRIOT Act (Freemarketnews.com, 2005)—legislation that the Obama Administration extended ("A Patriot Act Surprise," 2011).

At the same time, some of the negative narratives attached to journalists who have been found in contempt of court for refusing to reveal sources are deserved and unavoidable. Miller's depiction, for instance, does straddle the frames of irresponsible journalist and crusader of free speech: Between her weapons of mass destruction reporting and the holes in her story regarding the Plame investigation, she is not the ideal poster person for reporter's privilege and shield laws. Still, her actions did jumpstart a conversation on a federal shield law—something that has been lost in all the drama of her

imprisonment, her release, and her resignation. By writing about the situation so much initially and steadfastly supporting Miller before revoking its allegiance suddenly, *The New York Times* sent a mixed message to the public about reporters and the value of privilege. Additionally, many journalists and commentators inserted Miller's name into their op-eds on unrelated topics gratuitously or as an afterthought or, even as, a symbol of all irresponsible journalism. Journalists, especially, should be judicious when citing Miller's name since so much controversy surrounds her. Why reinforce unconstructive imagery in the public mind when dealing with issues that don't merit the mention of Miller?

There is also a problem in the type of information that the public receives. As Fargo (2012) noted:

When it comes to issues like this, I think sometimes the press does too little reporting and when it does do reporting, it's trying to basically simplify the issue for a general public and oftentimes simplification leads to oversimplification and it's hard to take seriously (A. Fargo, personal communication, February 3, 2012).

Fargo also acknowledges that sometimes reporters do not understand the legal system well. This was evident, for example, in 2011 coverage of the *Too Much Media, LLC, et. al. v. Shellee Hale* (2011), a case that grew out of a Washington state resident Shellee Hale's criticism of a New Jersey software company on an electronic message board. Hale subsequently was sued for defamation and attempted to avoid deposition by claiming that she was protected by New Jersey's shield law (N.J.S.A. 2A:84A-21 to -21.8). The New Jersey Supreme Court ruled that while Hale could not claim reporter's privilege, it did not mean necessarily that privilege would be denied to a blogger. Media coverage of the story, however, concluded that bloggers are not journalists with CBS even reporting in a piece headlined, "N.J.: No Shield Protection for Bloggers," that "New

Jersey's Supreme Court ruled that bloggers and online posters don't have the same protections for sources as mainstream journalists" (CBS News, 2011, para. 1). In actuality, the main part of the story should have been that message boards do not meet criteria for coverage. As Judge Rabner (2011) wrote:

Although New Jersey's Shield Law allows news reporters to protect the confidentiality of sources and information gathered through their work, online message boards are not similar to the types of news entities listed in the statute; therefore, defendant Shellee Hale was not entitled to claim the privilege in this defamation case that is grounded in comments she posted on an Internet message board. (*Too Much Media, LLC, et. al. v. Shellee Hale*, para. 6)

This kind of misleading report only makes a complicated issue, so easily misunderstood, even harder to embrace.

Despite the clamor of many media organizations for a federal shield law, it is not an issue that draws much public outcry—perhaps because many members of the American public have little sympathy for journalists. Many studies (First Amendment Center, 2005, 2006, 2011) show not only that trust in the media has declined, but also that a reliance on anonymous sources can add to the public's negative perception (First Amendment Center, 2005). The media need to do something about this before any federal legislation will be passed or before support for privilege is fully embraced. As Calvert (2005) proposed, "Journalists must educate the public (judges and legislators included) through their actions, and not simply their pontifications in self-serving editorials and commentaries, about the importance of their roles as both watchdogs of government abuses of power and conveyors of truthful and accurate news" (p. 697). This is especially important in a time when the media are not trusted, as media lawyer Bernie Rhodes has said: "I am concerned that there is an overarching belief that the media is evil, that

government is good, and that in a battle between the two, government will win virtually every time. I believe this view is the bigger problem facing the press in today's environment" (quoted in Mitchell, 2006, p. 5).

Part of the problem may be that the media does not have the influence they once did in the legislative process so it becomes essential for them that public opinion supports their endeavors. When the media tried to garner support for a federal shield law in the 1970s, much of the testimony during the congressional hearings revolved around the idea that privilege was really for the public—not the media. That privilege wasn't merely essential because it protected journalists; it was paramount for justice and truth to surface into the public sphere—"the press articulated a public mission that put it above the public" (Allen, 1995, p. 202). So offering the news media privilege in federal courts might give them rights that ordinary citizens did not have, but ultimately this would not serve news media; it would be for the greater good. The focus group research in this dissertation suggests there may be a desire for education about reporter's privilege and shield laws among baby boomers and college students. Furthermore, the study showed that with the right narratives, especially in the student population, support for the issue grew.

Educating the public properly is essential. This is especially important during a time when it seems that the public may be warming to issues such as shield laws. According to the 2011 State of the First Amendment survey, 76 percent of those surveyed agreed that the news media should act as a "watchdog" over the government and 75 percent said that reporters should not have to expose their confidential sources—the most

support shown in the survey's results in the past decade⁶² (First Amendment Center, 2011).

The media must also educate the public on who deserves coverage under shield laws. Currently, state shield laws can be broken up into three groups. The first, and biggest, group defines journalists as those from traditional media. Included in this segment is Kentucky's shield law, which restricts coverage to "newspaper, radio or television broadcasting station[s]" (Pollack, 2008, p. 22). This definition of who is a journalist matches what many other countries endorse: that journalists must either work for an established media outlet or be licensed—and these properly accredited individuals are the only legitimate journalists (Schechter, 2001).

But some states offer wider versions of what constitutes a journalist. For instance, Delaware offers coverage to anyone who earns most of his or her income through professional journalism⁶³. Other states embrace a more expansive version that focuses on the function the individual performs. This version is seen in Nebraska, where anyone "engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public" (Nebraska Code Section 20-146, 2006) receives protection under its shield law.

Not only is there a question of who constitutes a journalist, though, there is also

⁶² Although, this survey shows a public more receptive to media concerns, it is important to note that in that same year Gallup (2011) conducted a poll that determined that most Americans do not have confidence in the media to report accurate and fair. The poll offered that 44% of Americans have a great deal or fair amount of trust and 55% have little or none. So the public might want the media to become a watchdog—even if its trust in the institution is not high.

⁶³ As Delaware Code Sec 4320 et sec (1953) states, "At the time he or she obtained the information that is sought was earning his or her principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks had spent at least 20 hours engaged in the practice of, obtaining or preparing information for dissemination with the aid of facilities for the mass reproduction of words, sounds, or images in a form available to the general public."

trouble classifying some of the new elements of communication technology. For instance, not everyone agrees on what the definition of a blogger should be (Hudson, 2006). So even those who support shield law protection of those who use newer media technologies don't know how to determine those participants. The media should find a consensus on this issue and, instead of presenting confusing and conflicting frames to the public, present this new version to their audience. A possible way to do this would be to have professional associations, such as The Society of Professional Journalists, create a definitional handbook based on membership input. Just as the organization has a code of ethics that describes ideal journalistic practice, it could have guidelines about reporting on reporter's privilege or shield laws.

Additionally, the media need to use technology more appropriately to explain issues such as reporter's privilege and shield laws. To avoid oversimplifying the story, Fargo (2012) suggests media use their online portals: "where in addition to reproducing the print newspaper's 12-inch story about the legal battle they just won or lost over confidential sources, you can then, on the online version, have a separate, more law-based story on the privilege" (A. Fargo, personal communication, February 3). This would let newspapers fully discuss such factors as what really goes into a court's decision and how this will affect future cases.

The media should also find new ways to incorporate social media into their coverage. In this ever-changing world of evolving technology, the editorial page may lose its value as a forum for public commentary and education. Other platforms may offer interested parties a better way of communicating with the public, engaging them in a better discourse. Sometimes, important stories get noticed simply because of the viral

nature of this technology. The death of Trayvon Martin, an unarmed 17-year-old, boy who was fatally shot by a volunteer of the local neighborhood watch⁶⁴ in Sanford, Florida, became a national campaign for justice—partly because of social media. As the *New York Times* pointed out in 2012, “Some reporters and anchors...said they were urged by their followers on Facebook and Twitter to find out about the shooting — evidence of the effect that the Web can have on news coverage (Stelter, 2012).”

Ultimately, too, the news media should reconsider how they depict themselves internally, presenting more appealing narratives to audiences. They also must insure they understand the complexities of the stories they cover concerning reporter’s privilege and shield laws. Accurate coverage is a must, of course, but the news media also need to provide the audiences with additional tools so they, too, can fully comprehend the situation—and the online portals of publications offer all sort of interactive, hyperlinkable possibilities. Doing all this could change the current discussion on privilege and shield laws. If the public can discover, foster and care for issues such as Martin, they might support journalistic causes—especially when faced with the narratives some of the reporters interviewed provided that show why privilege and shield laws are important, and the sources lost and found through court cases and subsequent jailing of journalists.

Last, it is important for the media to understand how they portray issues such as reporter’s privilege and shield laws. Without public support these matters wither. If one concern some supporters of reporter’s privilege and shield laws have—that without strong protections whistleblowers will not come forward and release valuable information

⁶⁴ George Zimmerman, who claimed self-defense, was no charged with any crime until after the case received nationwide attention.

for public dissemination—is true that will certainly be a loss for our society. If the press cannot function as a watchdog in our society, how much free speech will the American public enjoy? According to the journalists interviewed for this study, the answer to the question doesn't seem hopeful. "Important stories don't get done so it's harmful to the public," said Taricani. "If we want to have a truly free press and an informed public, reporters need to do their job freely" (J. Taricani, personal communication, December 18, 2006). Caldwell echoes this: "What kind of press (media) can you have when the reporter is not free to be the best reporter he/she can be?" (E. Caldwell, personal communication, February 10, 2012). When looking at the journalists' responses through the lens of free speech theory, it is quite evident that without the free flow of information, the general public can be manipulated by the government and others since they do not have the facts to understand situations properly. "Free speech has never been more precarious than now under the present government⁶⁵ and, given the levels of fear in our society, most sources, unfortunately, cannot speak for attribution because they rightly fear retaliation," said Anderson (B. Anderson, personal communication, April 19, 2006).

Final Recommendations

This dissertation recommends that the following be done to create a more supportive and fruitful environment for reporter's privilege and shield laws:

1. Media institutions need to provide better backing for journalists who are jailed on contempt of court charges. The interview chapter indicated that several journalists perceive that their organizations stopped providing financial and emotional support during their cases. Even at some of the news organizations that supported their

⁶⁵ Note: Anderson's interview was done during the Bush Administration so when he speaks about present government, he is referring to the Bush years.

journalists, however, a journalist's jailing has consequences for news policy. "We now have a policy where if I am talking to a source and I am promising confidentiality, I have to tell the source NBC will fight the court up until the circuit [court] level, and if we are not successful there we will ask you [the source] to come forward, and I need to get that in writing," Taricani said in a transcript of the conference "The End of Confidentiality? Journalists, Sources and Consequences," hosted by the *American Journalism Review*, the Knight Center for Specialized Journalism and the Philip Merrill College of Journalism at the University of Maryland on April 2-3, 2006. "I don't know if it is network-wide, but we now have to tell our news director who our sources are if we have a source. Prior to my case, we did not have to do that" (Meyers⁶⁶, 2006).

2. Better educate the public about reporter's privilege and shield laws by:
 - a. Devoting attention to privilege and shield laws as important topics by themselves—issues that should be written about regularly, not just when a journalist is jailed or threatened with contempt charges, or when shield law legislations is being proposed.
 - b. Using the capabilities of online media to link from episodic coverage of journalists faced with jail time to more substantive material, including background on reporter's privilege and shield laws as legal concepts.
 - c. Framing the argument about privilege and shield laws around the narrative that the public needs information from a "watchdog" on government and corporations, rather than making these issues seem like a legal (and deserved) perk for media industries that many of the public distrust.

⁶⁶ Note: Meyers prepared a version of this transcript for dissemination on the Internet. See reference section for more information.

- d. Explaining to the public in better ways why media institutions might withdraw their support from journalists who have claimed reporter's privilege or shield law protection when the cases turn out to be problematic, as Miller's did.
 - e. Coming up with some consensus about how to explain reporter's privilege and shield laws to the public by encouraging professional organizations, such as the American Society of News Editors (ASNE), the Society of Professional Journalists (SPJ), etc. to promote a common message. Professional associations, guided by their professional memberships, should attempt to pool resources and ideas to promote and push forward such issues, and should present these ideas to the public in a cohesive and compelling way.
3. Try to educate future journalists more about how frames are constructed in the media. Since frames are often created subconsciously through work practices, it could be valuable to teach students about framing through a more media literacy-focused approach and less of a theoretical one. While many journalism schools offer courses in media literacy, educators should have students question how they construct their articles and news packages as part of their news reporting coursework.

Limitations and Future Research

The research that produced these findings, like all research, it does contain some limitations.

Interview Section

The major limitation to this part of the dissertation is one of selection. This study examined only the experiences of journalists who were jailed for contempt of court. These individuals, naturally, were unable to fully utilize shield laws to protect themselves, and have a different perspective from reporters who were able to avoid contempt proceedings when privilege was honored in their situations.

Additionally, not every journalist held in contempt of court could be interviewed for this study. Those who could not be located or would not agree to an interview might offer different opinions. Furthermore, as journalists were recalling events in the past, memories could be corrupted and the answers to questions may not have been entirely factual. A better understanding of this situation might be found if the scope of the study was increased, and more interviews were conducted.

It is true, too, that the concept of journalist's privilege is wide in scope and can be looked at from many angles. More research should be done, for example, on whether revealing the identities of confidential sources to authorities prevent individuals with important information from coming forward. Although common sense would indicate that the possibility of exposure and repercussions could stifle the free flow of information, there is a need for studies that show this definitively whether this is true. This might be done via surveys of informants and whistleblowers, asking whether they

would have spoken to journalists who had revealed sources in the past. Although it would be difficult to show what stories might have been missed in such circumstances, it would certainly be of some value to interview confidential sources who have revealed their identity or had it revealed by journalists and are willing to speak about their experiences.

Denzin & Lincoln (2003) offer as well that multiple methods often add richness to findings. Further research might discover valuable information by first surveying reporters and editors who have been subpoenaed, and then interviewing a sample of the participants, a technique embraced in other scholarly work (Lassila-Merisalo & Uskali, 2011; Lehman-Wilzig & Seletzky, 2010; Lodamo & Skjerdal, 2009, et. al.).

Framing Section

Framing analysis has the same limitations as other qualitative methods of analyzing media content. Although, this study looked at four newspapers over a 38-year period, there still might be an issue with selection bias since the major metros used might frame reporter's privilege and shield laws differently from smaller publications or from other mediums, such as network or local broadcasts.

In addition, observations gleaned from published editorial content tell us only what news media producers deemed important. They cannot offer a perspective on what the audience obtained from the printed material, or give any insight into who was reading the commentary sections or the reach of the information the editorial pages offered. Ultimately, it does not reveal what citizens know about shield laws and reporter's privilege. Even letters to the editor do not offer a complete understanding of audience views, since editors choose the notes for publication. Nor do the letters to the editor tell

us how different groups of citizens view reporter's privilege and shield laws, since the letters do not include demographic information.

Another avenue for framing research could look at how the media have actually covered reporter's privilege and shield laws since many of the participants involved in the focus group were unaware of seeing it in the media. Gathering such data might help suggest more ways the news media can better target their message on shield laws and reporter's privilege to optimize education on the topics.

Focus Group Section

The focus group study was conducted in an attempt to bring the audience perspective, which cannot be gleaned from framing analysis, into the dissertation study. Focus groups, however, can provide only provisional understanding and insight through qualitative data. They by no means offer a reliable gauge of the opinions of the general public. They merely present a limited narrative that should invite further exploration. It might be useful to match this study with one that provides for a quantitative measure that makes the observations cited in this paper more generalizable. For example, surveying random samples of Americans from the same three demographic groups—college students, baby boomers, and seniors—to determine whether similar results were found would give more credence to this particular analysis if it confirmed some of its indications.

Another possibility could also include conducting additional focus groups of other social groupings to see whether members acted in different ways. For instance, it would

be interesting to see what Generation X, the group of individuals between college students and baby boomers, would offer.

One of the other limitations of this particular focus-group study was the amount of time participants had to read materials. It would be beneficial to offer group members several opportunities to go through selected editorials to see if more engagement with the information had an effect. It might also be valuable to measure social media usage in the three demographics to discover how often news is obtained by that means.

Additional Recommendations for Future Research

Besides the suggestions above, there are also several places that merit further research. It would be interesting to interview various management representatives from media institutions and their journalists to see if support for those threatened with jail time shows similar results to the ones conveyed in the interview chapter. One benefit of pursuing cases that may not or have not resulted in jail time is there are many more potential interview subjects. Additionally, the perspective of both the media institution (via the editor, publisher, etc.) and the journalist would offer a more broad perspective.

It would also be beneficial to look at professional trade organizations of the journalism field and see what education campaigns they engage in. It would be possible to survey these groups and measure what they felt their success rate was and what technologies they use to communicate to the public. By understanding which promotions work and why, it would be easier to direct such groups about the most effective way to tackle an issue such as reporter's privilege or shield laws in a collaborative manner.

Last, surveying journalism schools about how they teach subjects such as framing, shield laws and reporter's privilege could provide insight into how future journalists

might cover the issue, and could offer education alternatives that help the reporter's depict these things in a more engaging, understandable way for the audience consumption.

Reporter's privilege and shield laws are important issues. Great philosophers such as Mill, Milton, and many others understood the connection between the free flow of information and a democracy. The research in this dissertation indicated that journalists who went to jail perceived that they found credibility with sources for upholding their journalistic values. They believed privilege and shield laws aid the process of finding and telling the stories that need to be known. The framing chapter offered four distinct frames the media has relied on, for the past 38 years, when discussing shield law and reporter's privilege—and those narratives often lacked effectiveness. The focus group chapter intimated that there might be certain individuals willing to support privilege and shield laws, if only the right stories were presented to them. Much of the research on shield laws and reporter's privilege discusses legislation, the structure of the shield laws themselves, and the consequences of certain court cases. Though all of that material has merit, it lacks what this dissertation has attempted to provide: the spirit of what practitioners and the public feel and what the news media have told them. This dissertation has attempted to show privilege and shield law through a more personal perspective—for sometimes it is in the human element that the potential for change is found.

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Appendix I: Guide for Journalist Interviews

1. What is your publications' policy regarding anonymous sources? When can reporter's use them? How often do you use anonymous sources?
2. Has it ever become a legal issue that a source was anonymous? How did your newspaper/magazine/station react? Did you feel its reaction was sufficient? If not, why not?
3. If a you (or a journalist you employ) was subpoenaed how do you think your media organization would respond? If your institution was ever in this situation before, how did your media organization try to resolve this situation without going to court?
4. What role does an employer play in the journalist/source relationship?
5. What do you think the state of reporter's privilege is currently? In particular, what are your thoughts on recent cases such as Judith Miller? How do you think her employer, *The New York Times*, handled the situation? How do you find the media coverage of such stories? Is the amount sufficient? If not, why aren't media institutions covering the story more, in your opinion?
6. How important is a federal shield laws? How effective are the state shield laws currently? How does not maintaining reporter's privilege affect journalism?
7. How will all these subpoenas and court cases affect the journalist/source relationship? Have you noticed any changes in how information is collected or accessible in your current work since these cases have taken place?

Appendix II—ProQuest Historical Search Terms/Categories

Reporters privilege (cit/doc)

Reporters privilege (doc text)

Shield laws (cit/doc)

Shield laws (doc text)

Reporters privilege (cit/doc) and editorials (doc type)

Reporters privilege (doc text) and editorials (doc type)

Shield laws (cit/doc) and editorials (doc type)

Shield laws (doc text) and editorials (doc type)

Reporters privilege (cit/doc) and editorials (cit/doc)

Reporters privilege (doc text) and editorials (cit/doc)

Shield laws (cit/doc) and editorials (cit/doc)

Shield laws (doc text) and editorials (cit/doc)

Reporters privilege (cit/doc) and editorials (doc text)

Reporters privilege (doc text) and editorials (doc text)

Shield laws (cit/doc) and editorials (doc text)

Shield laws (doc text) and editorials (doc text)

Reporters privilege (cit/doc) and editorials (section)

Reporters privilege (doc text) and editorials (section)

Shield laws (cit/doc) and editorials (section)

Shield laws (doc text) and editorials (section)

Reporters privilege (cit/doc) and letters to the editor (doc type)

Reporters privilege (doc text) and letters to the editor (doc type)

Shield laws (cit/doc) and letters to the editor (doc type)

Shield laws (doc text) and letters to the editor (doc type)

Reporters privilege (cit/doc) and letters to the editor (section)

Reporters privilege (doc text) and letters to the editor (section)

Shield laws (cit/doc) and letters to the editor (section)

Shield laws (doc text) and letters to the editor (section)

Journalists:

1. Name (cit/doc & doc text) + editorial (s)(type and section)

2. Name (cit/doc) + editorials (cit/doc & doc text)

3. Name (doc text) + editorials (cit/doc & doc text)

Josh Wolf

Judith Miller

Jim Taricani

Vanessa Leggett

Timothy Crews

David Kidwell

Bruce Anderson

Lisa Abraham

Sid/Schuyler/Cindi/Andrew

Tim Roche

Libby Averyt

Brian Karem

Roxana Kopetman

Brad Stone

Chris Van Ness

Richard Hargraves

Myron Farber

William Farr

Appendix III–Focus Group Materials

Focus Group Script

After a general welcome where the “Consent to Participate Forms” will be given out, explained and then signed, the focus group will be asked to discuss the following questions:

1. What types of media do you consume for news and other information?
2. What, do you feel, are the most reliable forms of media?
3. What do you know about reporter’s privilege? How would you define the term?
Why has the issue been in the news? Do you think it is an important concept?
Why or why not?
4. Where did your knowledge about the topic/answers for the above questions come from? Media? Other people? If media, what publication/broadcast/Internet site? What message about reporter’s privilege do you get from the media you use? What types of articles on the topic do you remember reading/seeing? Do you remember the names of any journalists who are mentioned when reporter’s privilege is discussed? What do you remember about them?
5. Do you read editorials or other opinion pieces? If you read them, how often do you do so? Do you remember any that concerned reporter’s privilege? If so, what do you remember them saying? How did they frame the issue of reporter’s privilege?
6. Do you think reporter’s privilege affects the practice of journalism? If so, how? If not, why? Do you remember what the media you’ve consumed said on the

relationship between reporter's privilege and how it impacts journalistic practices? Please mention the type of media specifically, if possible.

7. What do you know about shield laws? Is reporter's privilege and/or shield laws something the public should be concerned about? What affect do you think it has on the type of information that reaches the public? How much has the media informed you on the relationship between public discourse and reporter's privilege? Which media, in particular?
8. Do you think a federal shield laws is necessary? Why or why not? If so, how do we define who gets protection? What is your definition of a "journalists?"

Before answering the next set of questions, the focus group will be asked to read several editorials (see attached):

4. Has reading these editorials changed your understanding of reporter's privilege in any way?

1. Which op-ed(s) do you agree with most? Why? What tends to convince you the most: structure of argument, vocabulary used, identity of the author, position that the author takes?
2. When reading these editorials, what was your stance of reporter's privilege before you read the editorial? Did it change afterward? If so, in what way? What changed your opinion?
3. Which editorial seems most relevant to you? Why?
4. Has reading these editorials changed your understanding of reporter's

privilege in any way?

Before answering the next set of questions, the focus group will be asked to read the following blurb:

Partial List of Individuals Jailed After Refusing to Reveal Confidential Sources to a Court

In 2000, **Timothy Crews**, the editor and publisher of the Red Bluff, California-based semi-weekly *Sacramento Valley Mirror* went to jail for five day after he refused to reveal the names of confidential sources used in a story he wrote about the sale of firearm allegedly stolen from a state patrol officer.

In 2001, **Vanessa Leggett**, a freelance writer was jailed for 168 days for refusing to give her notes and records gathered during research for a “true crime” book to a grand jury looking at a case about a 1997 murder in Houston. Leggett did not have a publisher for the book and had not published any news article about the murder.

In 2004, **Jim Taricani**, a WJAR TV reporter in Providence, RI, an NBC affiliate, refused to disclose who provided him with a videotape showing a local city official taking a bribe from an undercover FBI member. The tape had been sealed evidence from an investigation the FBI was conducting on corruption in Providence, involving various officials, including a former Mayor. After refusing to reveal his source, Taricani was sentenced to a six-month home confinement.

In 2005, **Judith Miller**, a *New York Times* reporter was jailed for 85 days after refusing to divulge the source that leaked the name of an undercover CIA operative,

Valerie Plame. Miller took notes on the conversation, but never wrote about it for the *Times* or any other publication.

In 2006, **Josh Wolf**, a freelance videographer and blogger, was jailed for eight months after refusing to give federal authorities a videotape shot during a July 2005 protest of the G-8 economic summit in San Francisco. The footage wanted by the grand jury was of protesters vandalizing a police car.

Sources: <http://www.rcfp.org/jail.html>; McKinley, J. (2007, April 4). "8-month jail term ends as maker of video turns over a copy." *The New York Times*; 2005, July 7). "Judith Miller goes to jail." *The New York Times*; Milloy, R.E. (2002, January 5). "Writer who was jailed in notes dispute is freed." *The New York Times*.

Questions:

1. Which of these individuals do you consider fits the definition of a journalist? Why?
2. Which of these cases, in your opinion, merit the protections of reporter's privilege? Why? In your opinion, what criteria should be met before awarding reporter's privilege?
3. Do you recall reading/seeing any of these cases in the media? What do you remember about the coverage? How were these people portrayed? How do you feel about these journalists going to jail to protect their sources?

Editorials Used: (See Following Page)

ROBERT W. KASTENMEIER
The Washington Post (1974-Current file); Mar 25, 1974;
 ProQuest Historical Newspapers The Washington Post (1877 - 1993)
 pg. A20

Robert W. Kastenmeier

The Case for a Media 'Shield Law'

Should Congress provide newsmen with the right to refuse to testify about their confidential news sources and information?

This is one of the most perplexing Constitutional issues of our day, and one which my House Judiciary Subcommittee has struggled with over the past 18 months. A compromise bill with considerable support from the news community has now been forged, but faces ambush from both the political left and right when it moves soon to full Judiciary Committee consideration.

The need for such legislation was argued by scores of hearing witnesses who claimed that forcing reporters to reveal identity of confidential news sources and information would retard the flow of sensitive information to the news media, and in turn, harm the public's right to know. Although it is difficult to demonstrate this result empirically, the subcommittee is convinced that unbridled subpoena power, or threat of such power, would cause certain news sources to withhold critical information necessary for an informed public.

While the controversy traces back through our colonial history, the demands for legislation were not forcefully presented until after June 29, 1972, when the Supreme Court in *Branzburg v. Hayes* held that the First Amendment does not in itself protect newsmen against compelled disclosure of confidential news sources and information. At the same time, however, the Court made clear that Congress has power to legislate in this area.

I am well aware that some of my colleagues feel strongly that newsmen should not be treated differently from other citizens. That is to say, when newsmen have information relevant to a matter under consideration by the courts, they should be compelled to provide such evidence even if it involves confidential news sources and information. This position causes the free press guarantees of the First Amendment to fall before other Constitutional provisions requiring citizens to testify when they have relevant facts.

On the other hand, there are others who believe that the free press guarantees of the First Amendment must take precedence over all other Constitutional guarantees. They argue with vigor that under no circumstances should a reporter be compelled to divulge news sources, since such disclosure would restrict the flow of news to the public. The only dispute among those holding this point of view is whether the news shield is implicit in

The writer, the U.S. Representative from Wisconsin's Second District, is chairman of the House Judiciary Subcommittee on Courts, Civil Liberties and Administration of Justice. An opposing view, by Rep. Edward Mezvinsky (D-Iowa), appeared on this page last Monday. An editorial today also concerns "shield law" legislation.

the First Amendment and should be pursued through further court action, or whether it should be provided through federal legislation.

Unfortunately, there is virtually no prospect that the Congress will enact an absolute news shield bill. Instead of pursuing that illusory goal, the subcommittee has directed its efforts toward the development of news shield legislation which offers the maximum amount of protection to newsmen and the public's right to know without infringing on the rights of a defendant and society to command testimony under certain paramount circumstances.

The measure broadly defines newsmen, and provides protection for news sources and information at both state and federal proceedings. The two-tiered subpoena protection is absolute in proceedings other than courtroom trials, and qualified at the trial level. A newsmen, for example, could not be compelled to reveal confidential news sources at a grand jury or pretrial proceeding, or at a legislative or executive investigation. But at trial level, because of a defendant's Sixth Amendment rights, the shield must afford some flexibility. A newsmen could at this level be compelled to testify if the court found by clear and convincing evidence 1) that the information was indispensable to the matter being tried, 2) that it was not available from alternative means, and 3) that there was an overriding and compelling public interest in requiring the disclosure. Further, the bill requires a reporter to testify in defamation actions when he is a defendant and when the information would lead to persuasive evidence on the issue of malice.

The bill is, of course, a compromise, and like most compromises, it is not perfect. When great principles collide, as they do in this issue, compromise is difficult and any deviation from one's favored principle in the eventual outcome is magnified. However, despite its well exposed imperfections, I feel the bill has a great deal to recommend it.

It would preserve a defendant's right in a court action to compel testimony from newsmen when such testimony is crucial and available from no other witness. It would avoid the protracted and costly litigational pursuit of a presumed testimonial privilege for

newsmen in the First Amendment—a privilege which the Supreme Court has once rejected. "Cost" here includes newsmen who would be imprisoned while court decisions took forward, backward and sideways steps toward the desired Constitutional shield.

It would provide at both the state and federal level more protection of confidential news sources and information than eight of the nine Supreme Court justices in *Branzburg v. Hayes* were willing to grant. It would not set a dangerous precedent for future punitive legislation against the press. Half of the states have already enacted news shield laws, and in any case, Congress cannot legislate away press freedoms which the Supreme Court finds guaranteed by the Constitution.

It would not rigidly define "newsmen," but rather broadly frames a definition which, like the First Amendment itself, compels a degree of interpretation by the courts.

It has substantial and growing support of the news media, including the Associated Press Managing Editors, Radio and Television News Directors Association, National Press Photographers Association, Sigma Delta Chi, Authors League of America, National Association of Broadcasters, CBS, and NBC television networks, and the American Newspaper Publishers Association.

It has bipartisan support and a reasonable chance for enactment. And more important, it would prohibit a shower of frivolous harassing or malicious subpoenas on the working press, and thus would be an important gain both for journalists and for the public's right to know.

The Case Against a Press Shield Law

Edward Mezvinsky

The Washington Post (1974-Current file); Mar 18, 1974;
ProQuest Historical Newspapers The Washington Post (1877 - 1993)
pg. A20

Edward Mezvinsky

The Case Against a Press Shield Law

I can't help but see an element of irony in the combination of issues now before the House Judiciary Committee. While the impeachment inquiry is proceeding—precipitated to a great extent by the press' dogged pursuit and exposure of the truth—the committee is preparing to resurrect the smoldering issue of so-called newsmen's privilege.

This week, the subcommittee which held lengthy hearings on this issue a year ago, is scheduled to report a long-dormant qualified privilege bill to the full committee. The appealing idea behind a shield law for reporters is that Congress should step in to protect the public's right to know by repairing the damage to press freedom inflicted by the 1972 U.S. Supreme Court *Branzburg* decision. The proposal is designed to shore up the First Amendment by enacting into law a testimonial "privilege" for newsmen—allowing reporters to protect their confidential sources and information—which the court held was not provided in the Constitution.

Supporters of such legislation contend that the *Branzburg* decision has had a chilling effect on news sources. It is argued that many prefer to remain silent rather than gamble that a reporter will choose to go to jail instead of revealing his source's identity. This in turn has impeded the free flow of information by "drying up" important news sources. During hearings on proposed newsmen's privilege legislation, the stated goal of most of the media was an unqualified shield law. Many witnesses, including some reporters who had been jailed for refusing to disclose confidential information, argued persuasively that no law at all would be preferable to a qualified statute riddled with loopholes through which the chilling wind of *Branzburg* could blow.

But the realities of Congress made this goal unattainable. Since last summer, when the subcommittee approved a qualified privilege bill, the search has been on to find language that could make a qualified shield acceptable to the all-or-nothing proponents. It is both amazing and perplexing to me that this apparently has been accomplished. Most major media organizations have pledged their support to the proposal if the full committee approves amendments to be offered by Subcommittee Chairman Robert Kastenmeier (D-Wisc.)—amendments which leave the bill providing only qualified privilege.

This is what I find so ironic. How can it be at this time, which some have proclaimed the press' finest hour, that the media is not only willing to accept but even ready to advocate a qualified

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privilege? The Watergate affair stands out as a perfect example of the need for an unfettered press, free from the intrusions of government in the performance of its news-gathering duties. I am surprised that in the midst of the kind of increased dedication to courage, skill and accuracy that can deny its critics their excuses for intimidation, the press seems even more determined to seek statutory protection, even if it means accepting a defective shield. I have strong doubts that even this watered-down compromise proposal will become law. Even if it somehow breezes through the committee with the Kastenmeier amendments intact, the bill would run into brutal opposition on the floor.

On the one hand, opponents will contend that it offers too much, that newsmen are not a privileged caste to be exempted from the duties of other citizens. The apprehension that reporters would abuse such a privilege surfaced often during our hearings a year ago. Critics reached to the bounds of their imaginations to conjure up hypothetical cases in which a reporter's invocation of a testimonial privilege could be damning to the public interest. There is also the threat that by meeting the essential requirement of broadly defining "newsmen" the privilege could be abused by persons it was never intended to cover. A third complaint aimed at any kind of shield law is that it could foster irresponsible reporting by exempting the media from the questionable form of accountability subpoenas present.

On the other side, it can be argued that the proposal falls far short of the need. A qualified shield law could aggravate the problems facing the press. By setting forth circumstances in which a reporter could be required to reveal the identity of a confidential source, the so-called privilege could actually invite harassing subpoenas. Indeed, the shield proposal goes beyond the Supreme Court decision in opening the door to governmental interference with the press.

It appears clear to me that enactment of such a law would run contrary to the hopes of those who view the shield as a means to advance the free flow of information in this nation. Instead of accomplishing this goal, I think the qualified privilege approach would serve to further muffle the important voices of confidential sources.

So, what is the answer to the chilling effect of *Branzburg*? I personally do not believe it is within the power of

the 93rd Congress to devise a *duces er machina* to close this controversy with a happy and satisfactory ending. The First Congress enacted the best, and in the long run the only workable shield law—the First Amendment.

By enacting any kind of shield law, Congress would be setting the dangerous precedent of legislating within the realms of the First Amendment. If the press is open to laws which provide privileges, it must also be susceptible to laws that can regulate or curtail its freedom. As we on the Judiciary Committee are well aware from our study of the definition of impeachable offenses, the founding fathers could write general and flexible standards into the Constitution. However, they did not do so in the First Amendment. I believe that the admonition "no law" is most clear.

Judge Harold Medina has suggested that instead of running to Congress for a shield, the press should be "fighting like tigers" in the courts until the right of confidentiality of sources is recognized. I agree that the courts are the arena for this question. But, beyond fighting to quash harassing subpoenas and appealing unjust contempt citations, I believe the press can best advance its position by doing its job. The media stand a much better chance of winning freedom from subpoenas and government interference through vigorous, accurate and fair reporting than by lobbying on Capitol Hill.

Of course Congress also has a responsibility in this area. Our job is to pursue the attack on governmental secrecy, the abuse of executive privilege and the proliferation of document classification. Our job is to start being a better watchdog for the public instead of abdication so much of this responsibility to the media.

The kind of reporting that disclosed Watergate should prod Congress to be more alert in its duty to protect the public interest. The enactment of a shield law would be an irreparable step away from that goal.

THE SEATTLE POST-INTELLIGENCER
August 18, 2005, GIVE THE MEDIA FEDERAL PRIVILEGE
BYLINE: BOB DOLE Guest columnist

Like many Americans, I am perplexed by the federal investigation into the alleged leak of classified information that exposed Valerie Plame, the wife of Joseph Wilson, a former ambassador, as a Central Intelligence Agency officer.

So far the special prosecutor, Patrick Fitzgerald, has achieved one notable result: putting a New York Times reporter, Judith Miller, in jail for refusing to break her promise of confidentiality to her sources in response to a grand jury subpoena. The incarceration of Miller is all the more baffling because she has never written a word about the CIA flap.

If state rather than federal authorities were conducting this investigation, Miller most likely would not be in jail. Today 49 states and the District of Columbia recognize a "reporter's privilege," either by statute or through state judicial decisions, which allows journalists to report information and protect confidential sources without fear of imprisonment.

Unfortunately, at the federal level the legal landscape is much less clear. In 1972, the Supreme Court held that reporters do not have an absolute privilege to protect their sources from prosecutors. And various federal appeals courts have developed inconsistent standards on how and when such a privilege may apply.

Congress can help rectify this situation by passing a bill introduced by Sen. Richard Lugar and Rep. Mike Pence, both Indiana Republicans that sets clear standards the federal government must meet before it issues a subpoena to a reporter in a criminal or

civil case. For example, in a criminal investigation, a reporter would be required to turn over confidential information only if a court determines that there are reasonable grounds to believe a crime has been committed, that the requested information is essential to the investigation and that it could not be obtained from non-media sources.

This is hardly a free pass for journalists; it's important that the bill specifically authorizes the forced disclosure of a source's identity if doing so is necessary to prevent imminent and actual harm to national security.

As someone with a long record of government service, I must admit that I did not always appreciate the inquisitive nature of the media. But I do understand that the purpose of a reporter's privilege is not to somehow elevate journalists above other segments of society. Instead, it is designed to help guarantee that the public continues to be well informed.

Of course, some critics will contend that protecting the news media along the lines of the Lugar-Pence bill would make it harder to prosecute crimes because of the potential loss of relevant evidence. But this argument ignores the dozens of whistle-blowers who would not share information about government wrongdoing with the media unless they felt reporters could protect their identities.

This is why the attorneys general of 34 states filed an amicus brief in May asking the Supreme Court to recognize a federal reporter's privilege.

I am also greatly concerned about Miller's situation because she has been incarcerated as a result of an investigation into possible violations of the Intelligence Identities Protection Act of 1982, of which I was a sponsor.

The law was intended to protect covert intelligence operatives whose lives would be endangered if their identities were publicly disclosed. We were particularly concerned about people such as the notorious Philip Agee, a former CIA officer who systematically exposed the agency's covert operatives.

Thus the act was drafted in very narrow terms: Our goal was to criminalize only those disclosures that clearly represented a conscious and pernicious effort to identify and expose agents with the intent to impair the United States' foreign intelligence activities. Not surprising, there has been only one prosecution under the act since it was passed.

With the facts known publicly today regarding the Plame case, it is difficult to see how a violation of the Intelligence Identities Protection Act could have happened. For example, one of the requirements is that the federal government must be taking "affirmative measures" to conceal the agent's intelligence relationship with the United States.

Yet we now know that Plame held a desk job at CIA headquarters and could be seen traveling to and from work. Journalist Robert Novak, whose July 14, 2003, column mentioned Plame and set off the investigation, has written that CIA officials confirmed to him over the telephone that she was an employee before he wrote his column.

I, of course, do not know what evidence Fitzgerald has presented to the grand jury, nor will I hazard a guess as to the final outcome of his investigation. But the imprisonment of Judith Miller will be even more troubling if it turns out that no violation of the Intelligence Identities Protection Act has occurred.

As she sits in jail, Congress can honor her commitment to principle and her courage, and that of all reporters who have helped expose wrongdoing by protecting their sources, by passing the Lugar-Pence bill and creating a federal privilege for reporters.

USA TODAY

June 29, 2005

No 'Journalistic Privilege'

BYLINE: Glenn Harlan Reynolds

Many people would find their jobs easier if they didn't have to respond to those pesky subpoenas. Journalists seem to feel that way: Keeping promises about confidentiality is more important, they tell us, than fulfilling their duty as citizens to testify.

I disagree, especially in those cases of leaked government secrets in which the journalist isn't a disinterested observer but something more like an accomplice. It has certainly seemed that way in the case of leaked information about Valerie Plame. The same news organizations that originally were calling for a no-holds-barred investigation of the leak turn out to know who the leaker is already. They're just not telling.

That's one of the problems with claims to "journalistic privilege." Journalists aren't claiming the right to tell us things we want to know. They're claiming the right to not tell things they'd rather we didn't know.

Another problem is that claims of privilege turn the press into a privileged class. If ordinary people witness a crime, they have to talk about it. If they participate in a crime -- say, by receiving classified documents -- they have to say where they got them.

Journalists want to be treated differently, but the First Amendment doesn't create that sort of privilege. Nor should we.

Many people who support these privileges say that they would be limited to "real" journalists. But who decides when a journalist is real? If the government decides, isn't that like licensing the press, something the First Amendment was designed to prevent? And if journalists decide, isn't that likely to lead to a closed-shop, guild mentality at exactly the moment when citizen journalism by non-professionals is taking off? All sorts of people are reporting news via Web logs and the Internet. Shouldn't they be entitled to the same privilege?

Press freedom is for everyone, not just professionals. James Madison wrote about "freedom in the use of the press," making clear that the First Amendment is for everyone who publishes, not just members of the professional-media guild.

I think that reporter's privileges are a dubious idea, but if we're to have them, let's have them for everyone who reports news, not just professional journalists.

Glenn Harlan Reynolds is a law professor at the University of Tennessee. He publishes the Instapundit.com Web log.

APPENDIX IX—LIST OF JOURNALISTS JAILED FOR REFUSING TO DISCLOSE INFORMATION⁶⁷

From the Reporters Committee for Freedom of the Press, <http://www.rcfp.org/jail.html>. Accessed March 20, 2006. No longer available. Similar list available though at <http://www.rcfp.org/jailed-journalists>. Accessed on April 9, 2012.

1978, Myron Farber, New York. *New York Times* reporter.

1972, William Farr. *Los Angeles Herald-Examiner*.

1984, Richard Hargraves, Belleville, Ill. Newspaper reporter.

1985, Chris Van Ness, California. Freelancer.

1986, Brad Stone, Detroit. TV reporter.

1987, Roxana Kopetman, Los Angeles. Newspaper reporter.

1990, Brian Karem, San Antonio. TV reporter.

1990, Libby Averyt, Corpus Christi, Texas. Newspaper reporter.

1990, Tim Roche, Stuart, FL. Newspaper reporter.

1991, Sid Gaulden, Schuyler Kropf, Cindi Scoppe, Andrew Shain, South

Carolina. Reporters. Gaulden and Kropf (*The Post and Courier*, Charleston) ,

Scoppe (*The State*), and Shain (*The Sun News*, Myrtle Beach).

1991, Felix Sanchez and James Campbell, Houston. Newspaper reporters.

1994 Lisa Abraham, Warren, Ohio. Newspaper reporter.

1996, Bruce Anderson, Ukiah, CA. Editor of *Anderson Valley Independent*.

1996, David Kidwell, Palm Beach Country, FL. *Miami Herald* reporter.

2000, Timothy Crews, Red Bluff, CA. *Sacramento Valley Mirror* editor and publisher.

⁶⁷ Note: This list only includes individuals who were actually jailed not sentenced to jail or found in contempt of court for failing to disclose information.

2001, Vanessa Leggett, Houston, TX. Freelance author.

2004, Jim Taricani, Providence, RI. WJAR TV reporter (NBC affiliate)

2005, Judith Miller, New York. *New York Times* reporter.

2006, Josh Wolf, California. Freelance blogger, videographer.

From RCFP, <http://www.rcfp.org/news/mag/25-4/con-jourjail.html>. Accessed March 20, 2006. No longer available.

1998, Sarah Owens, Charlotte, NC. WCNC-TV reporter.

From Pember (2006). *Mass Media Law*. McGraw Hill: New York, NY.

1995, Jennifer Lenhart, *Houston Chronicle* reporter

From dissertation framing study

1976, Fresno Bee four (City Editor James Bort, Jr.; Bill Patterson; Joe Rosato; and Managing Editor George Gruner), California. Newspaper reporters/editors.

From Belt, G.T. “Jailed & subpoenaed journalists—a historical timeline.” First

Amendment Center. Available at

<http://archive.firstamendmentcenter.org/about.aspx?id=16896>. Accessed March 13, 2012.⁶⁸⁶⁹

⁶⁸1913, Julius Grunow, a reporter for the *Jersey Journal*; 1950, Reubin Klein, an editor for *Miami Life* magazine; 1968, and Annette Buchanan, managing editor of *The Daily Emerald*; 1972; are listed as individuals who were sentenced to jail. However, the site never mentions if they are actually jailed and additional research was unable to confirm this as well. Additionally, Wood’s case was not about reporter’s privilege.

- 1735, New York. John Peter Zenger. Printer.
- 1848, John Nugent, U.S. Senate Correspondent for *New York Herald*.
- 1886, John T. Morris, *Baltimore Sun* reporter.
- 1911, T.J. Hamilton, Augusta, GA. *Herald* newspaper reporter.
- 1917, Robert E. Holliway, *St. Louis Republic* reporter.
- 1936, Martin Mooney, New York *American* reporter.⁷⁰
- 1958, Marie Torre, *New York Herald Tribune* reporter.
- 1970, Mark Knops, editor of the underground Madison (WI) *Kaleidoscope*.
- 1972, Peter Bridge, *Newark Evening News*, Newspaper reporter.
- 1972, Edwin A. Goodman, New York. General manager of radio station WBAI.
- 1972, John F. Lawrence. *Los Angeles Times* Washington bureau chief.
- 1979, Wayne Harrison, Longview, TX. News director, radio station KLUE.
- 1981, Ellen Marks, Idaho Boise. Reporter for *The Idaho Statesman*⁷¹
- 1982, Barry Smith, Durango, CO, *Herald Reporter* and David Tragethon, KIUP-KRSJ radio.
- 1988, John Rezendes-Herrick, CA. Reporter for *Inland Valley Daily Bulletin*.

From Shepard, J. (2010, March 13). Legalizing a professional ethic: the development of the journalist's privilege in early American legal and journalism

⁶⁹ Farr, Farber, Hargraves, Van Ness, Stone, Kopetman, Karem, Averyt, Gaulden/Kropf/Scoppe/Shain, Sanchez and Campbell, Roche, Abraham, Kidwell, Anderson, Crews, Leggett, Taricani, Miller and Wolf are also mentioned in the First Amendment Center List

⁷⁰ Nelson, J. (1973, January 14) said Mooney's jailing occurred in 1935 as did (Shepard, 2010).

⁷¹ Friendly, J. (1982, January 24). states Marks was jailed in 1980.

history. Presented at The Joint Journalism Historians Meeting of American Journalism Historians Association and the AEJMC History Division.

1857, James W. Simonton, *New York Daily Times*, journalist.

1871, Zeb L. White and Hiram J. Ramsdell, *New York Tribune*, reporters.

1929, Gorman M. Hendricks, Linton Burkett, and Jack E. Nevin, Jr., *Washington Times*, reporters.

1931, J.W. Mapoles, *Hopwell (Va.) News*, editor.

1934, L. Vance Armentrout, *Louisville Courier-Journal*, acting editor.

1948, Douglas Clarke and Charles Leonard, *Newburgh News*, editor and reporter.