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

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

INTRODUCTION

Since the start of his administration, President Donald Trump has repeatedly referred to members of the media as the “enemy of the people.” He con-
continues to call news sources “Fake News.” This hostility has come not only from the president, but also from his supporters, who have threatened and physically assaulted so-called active “fake news” reporters. On June 28, 2018, President Trump made a series of statements regarding the media, including an interview with Sarah Sanders and a press briefing, which have been the subject of criticism by journalists and media watchdogs. The phrase “fake news” has a tumultuous history, and the question of its appropriateness and impact on journalistic freedom and safety is a matter of ongoing debate.
for instance, an attacker walked into the newsroom of the *Capital Gazette*, a local newspaper in Annapolis, Maryland, and killed five reporters, editors, and staff. This negative treatment of the news media accompanies a decline in public trust in media outlets and a steady decrease in overall press freedom in America.

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

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

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

at the Conservative Political Action Conference that included criticisms of anonymous sources came hours after the White House held a briefing where it asked reporters not to release the speakers’ names; Eli Yokley, Voters Skeptical of Anonymous Sourcing, but Still Trust Political Reporting, MORNING CONSULT (Mar. 8, 2017), https://morningconsult.com/2017/03/08/voters-skeptical-anonymous-sourcing-still-trust-political-reporting/ [https://perma.cc/R98M-BG7A] (describing a poll showing that over forty percent of voters thought journalists fabricated sources). This has led some news organizations to post how-to guides for reading articles with anonymous sources. See, e.g., Perry Bacon Jr., When to Trust a Story That Uses Unnamed Sources, FIVETHIRTYEIGHT (July 18, 2017), http://53eig.ht/2uQLHC [https://perma.cc/WM8Y-QD8] (clarifying that using unnamed sources should not necessarily be a regular practice but that investigative journalism might be impossible without them).

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


10 See Privilege, Journalist’s Privilege, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining the privilege as “[a] reporter’s protection, under constitutional or statutory law, from being compelled to testify about confidential information or sources”); RonNell Anderson Jones, Rethinking Reporter’s Privilege, 111 MICH. L. REV. 1221, 1223–24 (2013) (describing how reporters can refuse to respond to subpoenas and avoid subsequent contempt citations). Privileges are generally either absolute or qualified. See Privilege, BLACK’S LAW DICTIONARY, supra (listing types of privileges). Qualified privileges can be overcome by a court balancing various public policies, while absolute privileges are not subject to a balancing test. Compare id. at Qualified Privilege (noting that it is also called a “conditional privilege”), with id. at Absolute Privilege (explaining how absolute privileges eliminate liabil-
Nearly fifty years ago, in 1972, the United States Supreme Court decided *Branzburg v. Hayes*, the only case the Supreme Court has heard regarding a federal reporter’s privilege. The Court held that requiring journalists to testify before state and federal grand juries did not infringe on the media’s First Amendment freedom of speech or press. Justice Stewart dissented, expressing support for the press by calling anonymous sources a necessary tool of effective journalism.

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

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

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

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


15 See ALA. CODE § 12-21-142 (2012 & Supp. 2018) (originally enacted in 1935); IND. CODE § 34-46-4-1 (2008 & Supp. 2019) (became law in 1941); 42 PA. CONS. STAT. ANN. § 5942 (2015) (noting that this provision is substantially a reenactment of a 1937 act); Adam Cohen, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 3 (2011) (describing how the old “one-to-many” communication where people individually wrote books, gave lectures, or presented their own ideas to the public became “many-to-many” where groups of people can easily share ideas with dozens of other people instantly); Jones & West, supra note 2, at 582 (citing Michael
gathering has become commonplace, traditional newspaper and magazine readership has sharply declined.\textsuperscript{16} Few protections exist, however, for social media platform users on Facebook, Twitter, and Myspace, for example.\textsuperscript{17} Additionally, differences in the content of state statutes mean that a journalist in one jurisdiction could defeat a subpoena to reveal a source but would lack the ability to do so in another.\textsuperscript{18}

A federal reporter’s shield would protect both the traditional press and digital journalists from unrelenting public criticism.\textsuperscript{19} Even with those bene-

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\textsuperscript{17} See Martin & Fargo, supra note 14, at 94–95 (highlighting how states have neglected internet technologies in crafting shield statutes); Kathryn A. Rosenbaum, Note, \textit{Protecting More Than the Front Page: Codifying a Reporter’s Privilege for Digital and Citizen Journalists}, 89 NOTRE DAME L. REV. 1427, 1431 (2014) (describing how a proposed statute should cover journalists on the Internet and on social media). “Social media” refers to “forms of electronic communication . . . through which users create online communities to share information, ideas, personal messages, and other content.” \textit{Social Media}, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/social+media [https://perma.cc/7FST-C8L4].
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\textsuperscript{18} See Simone Alicea, \textit{Unpacking Government: What Legal Protections Do Reporters Have?}, KNKX (Mar. 13, 2017), http://www.tinyurl.com/ybssxp3d [https://perma.cc/J6LU-5H4G] (explaining how \textit{Branzburg} created a system where different state court systems have separate bodies of case law but have the same level of authority in considering journalistic protections).
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fits, lawmakers must determine who qualifies as a journalist. Some scholars and lawmakers use a profession-based definition of journalist, which typically includes only those individuals employed by a newspaper, television station, or other traditional news organization. Other jurisdictions employ a functional definition to broadly encompass traditional news media, citizen journalists, and anyone performing journalistic functions. Scholars have questioned whether a definition is even necessary. This Note argues that Congress should protect

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

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

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

23 See, e.g., Elizabeth L. Robinson, Recent Development, Post-Sterling Developments: The Mootness of the Federal Reporter’s Privilege Debate, 95 N.C. L. REV. 1314, 1332 (2017) (arguing that the government’s ability to utilize technology to unmask confidential sources renders the definition of journalist moot, as the government could get the information it seeks without forcing a journalist to testify or reveal their sources); see also Trevor Timm: When It Comes to Government, How Much Do We Have the Right to Know?, NPR: TED RADIO HOUR (Dec. 1, 2017), https://www.npr.org/templates/
a constitutionally mandated free press by enacting a federal reporter’s shield with a functionally defined journalist, an explicit inclusion of digital media, and a requirement that the individual intends to disseminate information to the public. 24

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

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

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


25 See infra notes 29–175 and accompanying text.

26 See infra notes 176–261 and accompanying text.

27 See infra notes 262–304 and accompanying text.

28 See infra notes 262–304 and accompanying text.

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

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


32 Compare CAL. EVID. CODE § 1070 (excluding Internet sources), with ARK. CODE ANN. § 16-85-510 (including “internet news source”).
Section A of this Part addresses the rise of social media use to comment on political and non-political issues. Section B of this Part discusses the early history and importance of anonymous sourcing in journalism. Section C of this Part describes recent leak scandals, especially related to national security. Section D of this Part explores the development of the present-day reporter’s privilege from a judicial, legislative, and executive perspective.

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

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

The prominence of social media in daily life comes from its differences from traditional media sources. First, social media permits instantaneous,
widespread communication. With traditional media sources, individuals must wait for a breaking news bulletin or the next day’s newspaper. Today, however, consumers can follow Twitter feeds of reporters on the ground at a war zone or a rally as events are unfolding. Second, the difference in speed results from the distinct purposes of social media and traditional media. Consumers tend to rely on social media for breaking news, while turning to traditional sources for features, analysis, and commentary.

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

44 See Ken Strutin, Social Media and the Vanishing Points of Ethical and Constitutional Boundaries, 31 PACE L. REV. 228, 242 (2011) (characterizing social media as “open mikes”).
46 See, e.g., David Carr, View of #Ferguson Thrust Michael Brown Shooting to National Attention, N.Y. TIMES (Aug. 17, 2014), https://nyti.ms/1qi6VyE [https://perma.cc/C9H5-4CCL] (showing how individuals and media organizations alike gained valuable information through social media on the Ferguson, Mo. protests following the shooting of Michael Brown); infra notes 58–74 and accompanying text (discussing several breaking news events reported over social media).
48 Id.
49 See Daniel Petty, Is Social Media Destroying the News?, DENVER POST (Mar. 24, 2017), http://dpo.st/2ndq1Qj [https://perma.cc/WQZ4-KMNK] (worrying about the negative effects social media has on local news organizations and explaining how consumers are regularly swayed by click-bait stories).
51 See Vance, supra note 43, at 381 (asserting that social media users are responsible for finding objective reporting in a constant flood of information).
53 Id.
54 David Robert Grimes, Opinion, Echo Chambers are Dangerous—We Must Try to Break Free of Our Online Bubbles, THE GUARDIAN (Dec. 4, 2017), https://www.theguardian.com/science/blog/
First-person statements on social media allow posters to directly communicate messages to their followers. Twitter users, for example, can identify sources by their Twitter handle instead of reading an entire article to find information. President Trump has taken advantage of this feature by consistently tweeting presidential proclamations directly to his followers, thus avoiding miscommunication through the Office of the Press Secretary and external news media.

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


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

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

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

60 Id.
61 See id. (showing how online discussions about revolution and freedom routinely occurred shortly before large public demonstrations).
65 See Paul Chadwick, Opinion, Why Fake News on Social Media Travels Faster Than the Truth, THE GUARDIAN (Mar. 19, 2018), https://www.theguardian.com/commentisfree/2018/mar/19/fake-news-social-media-twitter-mit-journalism [https://perma.cc/JV2E-QQBG] (explaining the results of a study by researchers at the Massachusetts Institute of Technology concerning the spread of fake news stories); Sargent, supra note 64 (addressing how Twitter was a vehicle for misinformation shortly after the Boston Marathon bombings).
66 See, e.g., Jim Rutenberg, BuzzFeed News in Limbo Land, N.Y. TIMES (Jan. 20, 2019), https://nyti.ms/2RZSnmD [https://perma.cc/9ZHJ-J3FV] (discussing a report from BuzzFeed News concerning the Russia investigation that was explicitly rejected by the special counsel’s office, and characterizing the pressure of reporting as “a very, very, very high wire, with a load of rusty razor blades beneath it”).
retweets an activist or includes their tweet in an article, the activist’s message can reach a wider audience.\footnote{68 See Nicholas Confessore et al., The Follower Factory, N.Y. TIMES (Jan. 27, 2018), https://nyti.ms/2Fm5rCC [https://perma.cc/P4TX-AAWB] (explaining how individuals who want to be popular online have resorted to purchasing followers and retweets).}

In August 2017, far-right neo-Nazi demonstrators descended upon Charlottesville, Virginia to promote their white nationalist beliefs.\footnote{69 Richard Fausset & Alan Feuer, Far-Right Groups Surge into National View in Charlottesville, N.Y. TIMES (Aug. 13, 2017), https://nyti.ms/2uTJK77 [https://perma.cc/54MH-F45B] (describing the demonstrations and responses and noting that a far-right demonstrator drove a car into a crowd of people, killing thirty-two-year-old Heather Heyer).} A significant part of their organizing efforts took place through social media.\footnote{70 Francie Diep, How Social Media Helped Organize and Radicalize America’s White Supremacists, PAC. STANDARD (Aug. 15, 2017), https://psmag.com/social-justice/how-social-media-helped-organize-and-radicalize-americas-newest-white-supremacists [https://perma.cc/7FJ5-UDVE] (explaining how the organizers of the Charlottesville riots utilized a Facebook event, a neo-Nazi website, and other Internet tools).} To fight back, counter-protestors posted photographs from the rally and crowdsourced the images to identify the demonstrators and have them fired from their jobs.\footnote{71 See Alyssa Newcomb, Twitter Users Are Outing Charlottesville Protesters, NBC NEWS (Aug. 14, 2017), https://www.nbcsnews.com/tech/social-media/twitter-users-are-outing-charlottesville-protesters-n792501 [https://perma.cc/6T6R-JSLJ] (outlining the story of a man named Cole White who was fired after the Twitter handle @YesYoureRacist identified him as a participant in the Charlottesville riots). This practice, known as “doxing” can mistakenly identify an innocent person and hurt their career and reputation. Rozina Sini, Professor Wrongly Labelled as Racist in Charlottesville, BBC (Aug. 15, 2017), https://www.bbc.com/news/world-us-canada-40935419 [https://perma.cc/PTH7-8NAR].} Prior to the Unite the Right 2 Rally in Washington, D.C. on the anniversary of the Charlottesville demonstration, Twitter suspended the account of a far-right group present in Charlottesville.\footnote{72 CBS, supra note 63.} Law enforcement officials, too, exploit the public’s reliance on social media organizing tools to monitor protests.\footnote{73 See Jessica Guynn, ACLU: Police Used Twitter, Facebook to Track Protests, USA TODAY (Oct. 12, 2016), http://usat.ly/2e4erhP [https://perma.cc/M2FR-UUXK] (discussing law enforcement use of data from private company Geofeedia to monitor protests in Baltimore, Md. and Ferguson, Mo.).} They frequently rely on private companies to compile and analyze data from Facebook, Twitter, and Instagram.\footnote{74 Id.}

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

The concept of a free press is as old as the United States itself and is guaranteed by the First Amendment.\footnote{75 See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of . . . the press . . . .”); Richard B. Kielbowicz, The Role of News Leaks in Governance and the Law of Journalists’ Confidentiality, 1795-2005, 43 SAN DIEGO L. REV. 425, 426 (2006) (highlighting how government leaks appeared in print even prior to the establishment of the District of Columbia as the national capital).} The federal government, however, has
long sought to limit this freedom and has actively opposed the use of anonymous sources since the eighteenth century. In 1795, Jeffersonian-Republican senators leaked to a sympathetic journalist details of a treaty with the British that the senators felt gave the British too many concessions. This leak violated a Senate order swearing the members to secrecy about their public policy debates. A few years later, following more disclosures from Republicans, the same newspaper, *Aurora*, was subjected to the nation’s first leak investigation. This time, the subject of the leak was a Federalist bill, which sought to modify the procedure for deciding close elections in anticipation of the 1800 election. Editor William Duane was found in contempt of Congress for publishing a story about the bill, amid argument that senators who crafted public policy should be subject to public criticism. Although Duane’s contempt charge was not enforced and he was never convicted, he was only one of hundreds of journalists investigated for publishing political leaks.

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

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76 See Kielbowicz, supra note 75, at 434 (recounting the United States’ first major leak inquiry).
77 Id. at 433–34.
78 Id. at 433 (illustrating the bitter rivalry between the Federalists and the Republicans).
79 Id. at 434.
80 Id.
81 Id.
82 Ex parte Nugent, 18 F. Cas. 471 (D.C. Cir. 1848) (No. 10,375); see Mark Neubauer, Comment, The Newsman’s Privilege After Branzburg: The Case for a Federal Shield Law, 24 UCLA L. REV. 160, 161 (1976) (explaining how Nugent shared a draft of the treaty with his editor); Ishaan Tharoor, Top 10 Leaks: The Treaty of Guadalupe Hidalgo Scandal, TIME (Nov. 29, 2010), http://ti.me/1fikcSt [https://perma.cc/JNA4-5NRQ] (noting that *New York Herald* reporter John Nugent was held in the Capitol).
83 Neubauer, supra note 83, at 161; Tharoor, supra note 83.
This trend continued throughout the Great Depression and labor movement when the need for protections for journalists began to receive attention. In 1936, in People v. Sheriff of New York County, for instance, the New York Court of Appeals held that a newspaper reporter could be jailed for refusing to divulge the names of his confidential sources during grand jury testimony. Martin Mooney, a journalist for the New York American, had reported on the illegal gambling and lottery trade. When subpoenaed about their activities, Mooney refused to release the gamblers’ names. The Court of Appeals concluded that a common law reporter’s privilege did not exist, and it was the job of the New York legislature to enact a reporter’s privilege as other states had done. New York first passed a reporter’s shield statute in 1970.

Despite efforts to force journalists to reveal anonymous sources, some of the most newsworthy stories of the last century resulted from sources speaking secretly to the press. The Watergate Scandal was among the most infamous to rely on anonymous sources. From 1972 to 1973, William Mark Felt, Sr., then deputy Federal Bureau of Investigations director, met in secret with Washington Post reporters Bob Woodward and Carl Bernstein. Using the pseudonym “Deep Throat,” Felt disclosed to Woodward and Bernstein critical information about the Nixon administration’s involvement in the break-in of the Democrat-
ic National Committee offices at the Watergate complex.95 In articles detailing the scandal, Woodward referred to Felt as an executive branch source with access to information at the Committee to Re-elect the President and the White House.96 Though the government never subpoenaed the reporters to reveal Felt’s identity, Woodward and Bernstein did not confirm his identity until 2005.97

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

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

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

95 Papandrea, supra note 15, at 536–37 (describing how Felt required full anonymity in order to speak to the reporters).
96 See BERNSTEIN & WOODWARD, supra note 92, at 71 (“Woodward had a source in the Executive Branch who had access to information at [the Committee for the Re-Election of the President] as well as at the White House. His identity was unknown to anyone else.”).
98 See Kielbowicz, supra note 75, at 432 (describing the purpose of leaks involving Congress in the 1800s); Nina Totenberg, NPR’s Nina Totenberg Recalls Breaking Anita Hill’s Story in 1991, NPR (Apr. 14, 2016), https://n.pr/1p1V5Ph [https://perma.cc/NDG8-9RHS] (detailing how Totenberg reported the Anita Hill scandal).
100 See NPR Staff, The Real Story Behind HBO’s ‘Confirmation’ from the NPR Reporter Who Broke the Story, NPR (Apr. 13, 2016), https://n.pr/1NhbmEQ [https://perma.cc/Z8LG-PYAA]; Totenberg, supra note 98 (recounting how Totenberg had to acquire a specific affidavit before Hill would speak with her).
CIA officer Valerie Plame to several journalists, illustrates this trend. During the grand jury investigation of the identity leak, federal prosecutors sought the testimony of *New York Times* reporter Judith Miller. Miller, however, refused to reveal who leaked to her Plame’s name and status as a CIA operative, and she was subsequently jailed for eighty-five days for contempt of court from 2004–05. Miller was jailed despite never publishing Plame’s name or a story about her. In fact, columnist Robert Novak was the first to leak Plame’s identity in 2003. It was not until her source, I. “Scooter” Libby, waived his confidentiality agreement that Miller agreed to testify against Libby.

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

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103 Id.

104 Id. at 1286.

105 Id. at 1287.


110 See, e.g., Stephen Hiltnor, *How to Tell Us a Secret*, N.Y. TIMES (Sept. 19, 2018), https://nyti.ms/2DjV71w [https://perma.cc/7LFC-8QMD] (pointing out how the *Times* saw immediate benefits after providing readers with simple ways to send anonymous tips through the phone or over the internet).
saging applications, while other anonymous tip methods encourage analog communication by paper.111

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

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

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

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


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


USA Today, meanwhile has significantly reduced reliance on anonymous sources. One commentator noted that as a consequence of this decision, USA Today rarely broke national security stories.

In addition to providing information anonymously, informants, politicians and communication professionals often host briefings “off the record” or “on background.” Although each type of conversation’s meaning depends on context, “off the record” generally means that a conversation cannot be published. Information “on background” can be used only if the source is described in general terms and not named. Interviews “on background” or “off the record” allow sources to control the story and potentially manipulate the press for ulterior motives. President Trump, for instance, held an off-the-record meeting with A. G. Sulzberger and James Bennet, the publisher and editorial page editor of the New York Times, respectively. Privately, President Trump wanted to promote his positive image to one of the most widely read news sources in the United States. A few days later, though, Trump broke the off-the-record agreement by tweeting to his followers that he had met with Sulzberger to discuss fake news.
Regardless of whether journalists use anonymous sources, the role of a free and independent press remains a cornerstone of American democracy. Thomas Jefferson famously quipped that he would prefer “newspapers without a government” than “a government without newspapers,” while John Adams wrote that securing freedom requires a free press. An independent press gives citizens the information necessary to participate in civic life. It also allows the public to determine the truth and challenge corruption. Well-researched journalism presents citizens with facts that inform or challenge their worldview. A free press has often been called the “Fourth Estate,” explaining its role in providing a check on government and authority figures.

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

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


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


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

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

134 E.g., The Pentagon Papers, supra note 85 (detailing how Ellsberg felt compelled to disclose the truth about the Vietnam War); see Kielbowicz, supra note 75, at 434 (explaining William Duane’s divulging of secret Senate proceedings).
tions to leak and report with unnamed sources. Anonymous sourcing still has a place in contemporary journalism to protect the country’s democratic ideals.

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

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

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

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

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

137 Fed. R. Evid. 501 (providing for no express privileges, but rather explaining that privileges are governed by “the common law—as interpreted by United States courts in light of reason and experience,” unless superseded by Supreme Court rules, federal statutes, or the Constitution); see Graham & Murphy, *supra* note 20 (noting that the Advisory Committee rejected the reporter’s privilege).

138 See Testimonial Privilege, Black’s Law Dictionary, *supra* note 10 (calling these privileges “testimonial privileges”).

139 See, e.g., Paul F. Rothstein & Susan W. Crump, Federal Testimonial Privileges § 4:10 (2d ed. 2018) (describing the marital communications privilege that protects confidential spousal communications).


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


144 Kielbowicz, *supra* note 75, at 427.
to protect their sources’ identities, but have had few options.145 Most scholars agree that no common law reporter’s privilege existed, and as a result, states began to enact their own statutes to protect journalists’ ability to conceal their sources.146

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

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

145 Id. at 428.
146 GRAHAM & MURPHY, supra note 20; see, e.g., ALA. CODE § 12-21-142 (began protecting journalists’ sources in 1935); IND. CODE § 34-46-4-1 (enacted in 1941). But see Christina Koningisor, The De Facto Reporter’s Privilege, 127 YALE L. J. 1176, 1181–82 (2018) (rejecting the assumption that no privilege existed at common law and articulating the idea that the judicial system has historically protected reporters with informal measures).
148 See CAL. EVID. CODE § 1070 (applying to, “[a] publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, . . . radio or television news reporter or other person connected with or employed by a radio or television station”).
149 See N.J. STAT. ANN. § 2A:84A-21 (creating a functional definition applying to individuals “engaged in . . . gathering, procuring, transmitting, compiling, editing, or disseminating news for the general public”).
150 VT. STAT. ANN. tit. 12 § 1615.
152 Id.
153 Id. (explaining how a First Amendment right would be absolute, but a privilege, for example, does not apply in grand jury proceedings (citing Branzburg, 408 U.S. at 665)).
154 See, e.g., Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 696 n.33 (Mass. 2005) (“We have recognized that values . . . may give rise to a common-law privilege that would allow a news reporter to refuse to reveal his sources.”).
fied privilege, Massachusetts judges must balance the public’s interest in information disclosure with the judiciary’s interest in obtaining evidence.\footnote{156} 

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

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

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

\footnote{157}\textit{See}, e.g., \textit{Branzburg}, 408 U.S. at 679–80 (describing the petitioners’ First Amendment arguments).

\footnote{158}\textit{Id.} at 667 (holding that requiring reporters to testify before grand juries does not violate the free speech or press clauses of the First Amendment).


\footnote{160}\textit{Branzburg}, 408 U.S. at 710 (Powell, J., concurring) (emphasizing that reporters still have remedies to quash subpoenas for remote or irrelevant information and proposing a balance between a free press and the obligation to testify). \textit{See id.} (same); \textit{id.} at 726 (Stewart, J., dissenting) (recognizing that an open society requires the public to make informed decisions about civic life); \textit{see also} Farr v. Pitchess, 522 F.2d 464, 467 (9th Cir. 1975) (“It is clear that \textit{Branzburg} recognizes some First Amendment protection of news sources.”). \textit{But see} Citizens United v. FEC, 558 U.S. 310, 352 (2010) (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)) (reaffirming that members of the press have no additional rights than those of ordinary citizens).

\footnote{161}\textit{Sterling}, 724 F.3d at 510.

\footnote{162}\textit{Id.}


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istration.\textsuperscript{165} This increased enforcement of leaks came even after administration officials highlighted and praised the Obama Administration’s openness toward the press.\textsuperscript{166}

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

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

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

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\item \textsuperscript{165} \textit{Id.} (detailing investigations into sources held by \textit{The New York Times}, \textit{The Washington Post}, and 60 Minutes).
\item \textsuperscript{166} \textit{See id.} (observing the irony in Obama officials touting their protection for whistleblowers).
\item \textsuperscript{167} 28 C.F.R. § 50.10 (2015); \textit{see} RonNell Andersen Jones, \textit{Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media}, 93 MINN. L. REV. 585, 597 (2008) (confirming that the Department of Justice still follows their Guidelines on Media Subpoenas).
\item \textsuperscript{168} 28 C.F.R. § 50.10(a)(3).
\item \textsuperscript{169} \textit{See} Jones, \textit{supra} note 167, at 598–99 (listing insufficiencies identified by critics of the Guidelines).
\item \textsuperscript{171} \textit{See} Josh Gerstein & Madeline Conway, \textit{Sessions: DOJ Reviewing Policies on Media Subpoenas}, POLITICO (Aug. 4, 2017), https://www.politico.com/story/2017/08/04/doj-reviewing-policies-on-media-subpoenas-sessions-says-241329 [https://perma.cc/UVA4-8F23] (quoting A.G. Sessions saying that “we respect the important role that the press plays, and we’ll give them respect, but it is not unlimited”).
\item \textsuperscript{172} \textit{See} Free Flow of Information Act of 2017, \textit{supra} note 9 (introducing a federal reporter’s shield modeled after previous attempts). Prior to 2017, the last attempt to enact a federal shield law was in 2013. \textit{See} Burgess Everett, \textit{Senators Introduce Shield Law}, POLITICO (July 17, 2013), https://www.politico.com/story/2013/07/media-shield-law-chuck-schumer-lindsey-graham-094350 [https://perma.cc/PFZ4-EV3X] (explaining the bill’s provisions); Koningisor, \textit{supra} note 146 at 1261 (describing the 2013 iteration of the FFIA as the most recent). The 2013 bipartisan effort by Senators Chuck Schumer (D-NY) and Lindsey Graham (R-SC) arose after the AP alerted the public that twenty of their phones had been surveilled without their knowledge. Everett, \textit{supra}; Ravi Somalya, \textit{Head of the A.P. Criticizes Seizure of Phone Records}, N.Y. TIMES (May 19, 2013), https://nyti.ms/14H0Cvr [https://perma.cc/Q6N2-UT92] (detailing the surveillance of AP reporters).
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introduced the Free Flow of Information Act of 2017. Instead of an explicit profession-based requirement, the proposed legislation protected individuals who perform journalistic acts, such as interviewing, writing, and reporting, to earn a living. The future of this bill, which did not make it out of Committee, may be affected by the political will of Congress and the future treatment of journalists.

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

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

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

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

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173 See Raskin Press Release, supra note 9 (introducing the bill on the same day as Sessions’ statements).
174 Free Flow of Information Act of 2017, supra note 9, § 4, (defining “covered person” as “a person who regularly gathers [news] for a substantial portion of the person’s livelihood or for substantial financial gain”).
175 See Raskin Press Release, supra note 9 (exemplifying the introduction of shield legislation following statements by an administration official critical of the press). Such stories do not need to be factual; they can be opinion or editorial in nature. See How the Anonymous Op-Ed Came to Be, N.Y. TIMES (Sept. 8, 2018), https://nyti.ms/2O2ymjX [https://perma.cc/84DR-DZG4] (answering reader questions and explaining that the New York Times chose to publish the anonymous op-ed because of the personal way it conveyed White House operations); Opinion, I Am Part of the Resistance Inside the Trump Administration, N.Y. TIMES (Sept. 5, 2018), https://nyti.ms/2CyF3Jh [https://perma.cc/6Y9W-7NPF] (depicting, in an unsigned opinion piece by a senior Trump Administration official, how this individual and others in the White House were resisting some of President Trump’s initiatives).
176 See Peters et al., supra note 14, at 779–80 (recognizing that at that time all states except Wyoming had some protection for journalists). See generally Compendium Introduction, supra note 147 (describing how nearly every state has a form of shield statute or court-acknowledged rule).
177 See infra notes 176–261 and accompanying text.
178 See infra notes 181–229 and accompanying text.
179 See infra notes 230–250 and accompanying text.
180 See infra notes 251–261 and accompanying text.
that focuses on journalistic acts, such as interviewing, writing, and reporting.\footnote{181} Subsection One of this Section analyzes state statutes that protect only journalists employed by traditional news organizations.\footnote{182} Subsection Two of this Section discusses another group of statutes—those that protect anyone functioning like a journalist.\footnote{183}

1. Statutes Protecting Professional Journalists

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


\footnote{182} \textit{See infra} notes 184–215 and accompanying text.

\footnote{183} \textit{See infra} notes 216–229 and accompanying text.


\footnote{186} \textit{See} Ventura v. Cincinnati Enquirer, 396 F.3d 784, 792 (6th Cir. 2005) (recognizing that the Ohio shield law only protects journalists from revealing sources “obtained in the course of employment”).


\footnote{188} \textit{Id.} at 560.

\footnote{189} \textit{Id.} at 565.
information in connection to their employment to claim shield law protections.\textsuperscript{190}

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

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

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

\begin{footnotes}
\item[190] Id.
\item[191] See Peters et al., supra note 14, at 790 n.152 (citing COLO. REV. STAT. § 13-90-119; CONN. GEN. STAT. § 52-146t (2019); DEL. CODE ANN. tit. 10, §§ 4320–4326 (2013 & Supp. 2018); D.C. CODE §§ 16-4701 to 16-4704 (2012 & Supp. 2019); KAN. STAT. ANN. §§ 60-480 to -485; NEV. REV. STAT. § 49.275; OKLA. STAT. tit. 12, § 2506 (West 2011)) (cataloging states that require journalists to be formally employed by a news organization). Other states also require that news sources have a regular publication schedule. See IND. CODE § 34-46-4-1 (applying protections to persons “connected with . . . a newspaper or other periodical issued at regular intervals and having a general circulation; or a recognized press association or wire service”); L.A. STAT. ANN. § 45:1451 (including in “news media,” in part as “any newspaper or other periodical issued at regular intervals and having a paid general circulation”); 9 R.I. GEN. LAWS § 19.1-1 (requiring that newspapers or periodicals “must be issued at regular intervals and have a paid circulation”); see also Peters et al., supra note 14, at 788–89 (discussing regular publication requirements).
\item[192] COLO. REV. STAT. § 13-90-119 (defining newsperson as, “any member of the mass media and any employee or independent contractor of a member of the mass media who is engaged to gather, receive, observe, process, prepare, write, or edit news information for dissemination to the public through the mass media”).
\item[194] See id. at 392 (finding that KUSA, the local television station, had selected the pilot to report on the illegal drug production). The police wanted to take photographs of Henderson’s alleged marijuana-growing operation. Id. at 385.
\item[195] Id.
\item[196] TEX. CIV. PRAC. & REM. CODE ANN. § 22.021; TEX. CODE CRIM. PROC. ANN. art. 38.11.
\item[197] TEX. CIV. PRAC. & REM. CODE ANN. § 22.021; TEX. CODE CRIM. PROC. ANN. art. 38.11.
\end{footnotes}
sionally associated with news organizations. 199 Like Texas, however, these states also require professional journalists to engage in newsgathering for livelihood or profit. 200 In 2008, in Trump v. O’Brian, a lawsuit brought by Donald Trump against one of his biographers, the Superior Court of New Jersey, Appellate Division, interpreted New York’s shield law to include an author who relied on information from confidential sources to publish a book. 201 The court reasoned that the law should not treat the author, a former New York Times and Wall Street Journal reporter, differently for disseminating information to the public in a book rather than in a newspaper. 202 Indeed, the court agreed with a sponsor of the 1981 amendments to the shield law that the law should protect professional journalists, no matter their medium of publication. 203 Florida’s statute also extends beyond historical journalistic mediums, as courts have found the law to protect journalists employed with online news sources as well. 204

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


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

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

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

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


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

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

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

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


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


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

213 *Id.* at 85.

214 *Id.* at 84.

215 See CAL. EVID. CODE § 1070 (protecting employees of news organizations); COLO. REV. STAT. § 13-90-119 (providing protections for employees and contractors of mass media).
2. Statutes Protecting Anyone Functioning as a Reporter

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

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217 See, e.g., VT. STAT. ANN. tit. 12 § 1615 (requiring that a “journalist” need only engage or assist in journalism to qualify for the reporter’s privilege).

218 Id.

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


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

222 Id.

223 Id.

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

225 In re Napp Tech., Inc., 768 A.2d 274, 280 (N.J. Super. Ct. Law Div. 2000) (distinguishing between freelance reporters and public relations firms); In re Burnett, 635 A.2d 1019, 1024 (N.J. Super. Ct. Law Div. 1993) (embracing a wide protection for journalism, including insurance rate re-
Vermont, whose legislature only passed its shield law in 2017, also provides a wide definition of journalist. Vermont’s shield law protects any individual investigating or preparing news related to issues of public concern. Journalists are protected if their primary intent is to report information to the public, regardless of whether they ever publish the information. As it stands, Vermont courts have yet to interpret the state’s shield law, and future judicial opinions will be critical in determining the full extent of the state’s definition of journalist.

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

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

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

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

See VT. STAT. ANN. tit. 12 § 1615.

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


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

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

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

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

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

241 See Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411, 430–31 (1999) (summarizing multiple federal cases, including *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987), which combine to create the intent requirement); Shepard, supra note 50, at 210–11 (proposing a three-pronged test for determining who is a journalist, including an individual’s purpose behind engaging in journalistic acts).
242 See N.J. STAT. ANN. § 2A:84A-21 (“A person engaged on . . . news media for the purpose of gathering . . . news for the general public . . . .”); Calvert, supra note 241, at 430–31 (summarizing three federal Circuit Courts of Appeals cases that shape the intent requirement). Several other states have similar requirements. See Peters et al., supra note 14, at 787–88 (listing states that require dissemination to the “public” or to the “general public”).
243 *von Bulow*, 811 F.2d at 144.
244 Id.
245 See id. at 146 (affirming the district court’s orders of contempt, production, and confidentiality).
246 Id. at 145.
247 Id. at 146 (explaining how Reynolds, the girlfriend, could not claim that her sources spoke to her on conditions of confidentiality when she began speaking with them before she started to write her book).
248 See *Too Much Media*, 20 A.3d at 382 (requiring at least proof of a link to the news media).
249 Id. at 374.
250 Papandrea, supra note 15, at 572.
C. Another Way: Why Surveillance Technology Could Make a Federal Reporter’s Shield Obsolete

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

While this nuanced argument has gained attention, there is still a need for a strong federal reporter’s shield.\(^\text{255}\) Supporters highlight the significant increase in government’s rate of subpoenas on the press.\(^\text{256}\) First Amendment advocates also argue that increased government surveillance presents more of a

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\(^\text{251}\) See Robinson, supra note 23, at 1332 (arguing that the government’s ability to utilize technology to reveal confidential sources renders the definition of journalist moot).

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


\(^\text{254}\) See, e.g., N.M. R. EVID. 11-514(C)(2) (requiring that the party seeking the confidential information must first utilize all other methods of accessing the information).

\(^\text{255}\) See Papandrea, supra note 15, at 584 (introducing a comprehensive plan for a federal shield law).

\(^\text{256}\) See Jones, supra note 190, at 586 (summarizing data showing an increase in subpoenas over a five-year period in the early 2000s); RonNell Andersen Jones, Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism, 84 WASH. L. REV. 317, 393 (2009) [hereinafter Jones, Media Subpoenas] (explaining that subpoenaing attorneys have felt empowered to issue more subpoenas).
reason for a shield law.\textsuperscript{257} A shield law could prevent the DOJ from exploiting loopholes in the Guidelines by subpoenaing records through national security letters and other means.\textsuperscript{258}

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

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

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

A. Congress Should Enact a Federal Reporter’s Shield

Because the benefits of a federal reporter’s shield would outweigh any difficulties in crafting the legislation, Congress should enact a federal reporter’s shield.\textsuperscript{265} Judges and lawmakers have noted that a federal reporter’s shield law would provide helpful guidance to courts and predictability to jour-
ists. Reporters would not have to worry which shield law would protect them. Continued confusion resulting from disparate state laws can lead journalists to self-censor articles when they cannot guarantee their sources anonymity. Without the assurance of anonymity, sources may even bypass the press in favor of leaving surreptitious notes or making anonymous phone calls that reporters cannot corroborate. A federal reporter’s shield would therefore bring clarity to a patchwork of laws.

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

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

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266 See Jones, supra note 10, at 1245–48 (laying out the weaknesses of a vague shield law).
267 See Alicea, supra note 18 (arguing that a federal shield law would help reduce confusion).
268 See Jones, supra note 10, at 1247 (describing how some journalists are wary of relying on anonymous sources).
269 See Tucker & Wermiel, supra note 208, at 1326 (concluding that reporters’ willingness to suffer punishment to protect their anonymous sources allows for leaks of historically critical information).
270 See id. at 1310 (noting how state Attorneys General have criticized the wide variety of state reporter’s shield laws).
271 See Alicea, supra note 18.
272 See Kielbowicz, supra note 75, at 458 n.214 (recognizing how more than eight states either passed new shield laws or modified existing ones).
273 See OKLA. STAT. ANN. tit. 12, § 2406 Evidence Subcommittee’s Note (West 2014) (describing an amendment to FED. R. EVID. 406 and Oklahoma’s subsequent subcommittee recommendation and final passage of an identical amendment); BLUM ET AL., supra note 143, § 10 (discussing the similarities between the state Uniform Rules of Evidence and the Federal Rules of Evidence).
274 Papandrea, supra note 15, at 535.
275 See Kielbowicz, supra note 75, at 456 (illustrating how, for example, investigators in Memphis were more concerned with finding the source of leaks about problems at state hospitals than fixing the problems themselves).
276 See Jones, Media Subpoenas, supra note 256, at 393, 395 (showing the government’s continued practice of issuing subpoenas to compel information from journalists).
Anonymous sources have exposed scandals of national importance. Deep Throat spoke to Woodward and Bernstein; the source of Anita Hill’s claims confided in Nina Totenberg; and Edward Snowden revealed NSA surveillance secrets to reporters at *The Guardian*. Each of these sources used extreme caution when speaking with the press, even in an era with strong state-level shield laws. If Congress enacted an expansive federal reporter’s shield, anonymous sources like these could feel more comfortable telling their stories, knowing that their anonymity would likely be secured.

**B. Necessary Components of a Federal Reporter’s Shield**

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

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

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

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


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

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


284 See *VT. STAT. ANN.* tit. 12 § 1615 (not requiring employment).

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

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

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

287 *Id.*

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

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

290 See VT. STAT. ANN. tit. 12 § 1615 (creating wide protections).

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


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


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

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

CONCLUSION

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

296 See Robinson, supra note 23, at 1332 (arguing that the government’s use of surveillance technology to uncover journalists’ sources makes a reporter’s shield irrelevant).
297 See Alicea, supra note 18 (arguing that a federal shield law would help to reduce confusion).
299 See Shepard, supra note 50, at 210 (proposing a purpose or intent requirement for a federal shield law).
300 See, e.g., N.J. STAT. ANN. § 2A:84A-21 (requiring the intent to disseminate news to the public); see also Papandrea, supra note 15, at 581–82 (discussing the benefits and drawbacks to an intent-based provision).
302 See About Public and Protected Tweets, TWITTER, https://help.twitter.com/en/safety-and-security/public-and-protected-tweets [https://perma.cc/X5D9-FCDM] (describing public Tweets as visible by anyone on or off Twitter and private tweets as only visible to those users who one accepts as followers); How Do I Choose Who Can See Previous Posts on My Timeline?, FACEBOOK, https://www.facebook.com/help/236898969688346 [https://perma.cc/P8SX-T73B] (guiding users through how to pick which of several audiences, such as public, friends, or friends of friends, can view their timeline posts).
303 See N.J. STAT. ANN. § 2A:84A-21 (including a clear intent provision).
304 See Papandrea, supra note 15, at 572 (cautioning against an intent test that may exclude journalists who only intend to publish a story after making first contact with an anonymous source).
ymous sources, states have created robust statutory protections, but Congress has yet to do the same at the federal level. Congress should therefore enact a federal reporter’s shield. This new statute would be most effective by applying to anyone engaging in journalistic acts, not only professional journalists. It should explicitly include digital news sources and public social media posts, but should protect only individuals who intended to disseminate news to the public when gathering information from confidential sources. Although a modern federal reporter’s shield is unlikely to ameliorate public hostility toward the press, it will increase reporters’ confidence that they can fully report a story without prosecution. Doing so may show readers that the press is truly not the “enemy of the people.”

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