STATE SHIELD LAWS: AN OVERVIEW

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The United States Supreme Court last addressed the constitutionality of a reporter's privilege in Branzburg v. Hayes, 408 U.S. 665 (1972). The journalists in the consolidated Branzburg cases argued that the free flow of information would be chilled if they could not ensure the anonymity of sources.[1] If a reporter's privilege does not exist to protect journalists from disclosing unpublished information, they argued, sources will be less likely to speak and the First Amendment will be greatly harmed.[2] Though sympathetic to their case, the court clearly held that (1) there is no privilege to refuse to appear before a grand jury until the government demonstrates a compelling need for the testimony; and (2) there is no privilege to refuse to answer questions that directly relate to criminal conduct that a journalist has observed and written about.[3]

Despite the 5-4 ruling against a reporter's privilege, the court did say that there is "merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards."[4] Nearly 40 years after Branzburg and as of November of last year, 37 states and the District of Columbia have some form of a shield law. Thirteen states do not and of those only 8 recognize a qualified reporter's privilege based on their state constitutions, common law or the First Amendment. Of those states that do have a shield law or recognize a qualified privilege, the protection granted to journalists varies. The most contentious issues concern the scope of protection:

■ **Who is protected?** Full-time employees of larger, traditional media organizations, for example, or part-time online journalists as well?
■ **What is protected?** The identities of sources or notes and materials too? Are confidential and non-confidential materials protected equally? Is an eye-witness account of a journalist protected?
■ **How strong is the protection?** What balancing tests do courts use when determining if a reporter's privilege applies?

As states continue to enact and refine their shield laws, the answers to these questions become more clear. But the inconsistency among shield laws is worrisome. Efforts to pass federal shield law legislation, though recently amplified, continue to stall and in the words of one court, Branzburg will not be overturned. Said the D.C. Circuit after rejecting a reporter's privilege argument in 2006: "Unquestionably, the Supreme Court decided in Branzburg that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source. The Highest Court has spoken and never revisited the question. Without a doubt, that is the end of the matter."[5] When it comes to forcing journalists to testify, state law may be the last line of defense.

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[1] Branzburg v. Hayes, 408 U.S. 665, 679-81 (1972).
[2] Id.
[3] Id. at 708.
[4] Id. at 706.
[5] In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1147 (D.C. Cir. 2006).

Who is Protected?

Maryland enacted the first state shield law in 1896, responding to the imprisonment of a *Baltimore Sun* reporter for refusing to reveal a confidential source to a grand jury. Technology changed considerably since then, providing new media through which journalists can report. While most shield laws protect print and broadcast journalists, states have been slow to include bloggers as well.

Whether or not an individual should be considered a journalist under shield laws "has to do more with the function that person is performing," said Gregg Leslie, legal director for the Reporters Committee for Freedom of the Press.[6] "If the blogger's involvement is to report information to the public and to gather information for that purpose openly then they should be treated like a journalist."[7]

There are several bills sitting in state legislatures that would extend shield law protection to bloggers. Massachusetts, one of the states without a shield law, is currently debating a bill that defines a journalist by his or her actions — engagement in "bona fide news gathering" — rather than for whom the journalist is employed.[8] It also describes the "news media" not as a traditional print or broadcast entity, but as any organization that "is in the regular business of news gathering and disseminating news or information to the public by any means, including *but not limited to*, print broadcast, photographic, mechanical, internet, or electronic distribution (emphasis added)."[9] New York considered an extension of its current shield law to "journalist bloggers."[10] Its law now covers only print, broadcast and wire services.[11] Kansas is on the verge of passing perhaps the most progressive shield law, one that explicitly provides coverage to "online journal[s]" that are engaged in "the regular business of newsgathering and disseminating news or information to the public."[12] The bill offers protection based primarily on whether an individual engages in journalism, not whether he or she is a professional journalist.[13] That means student journalists could be covered as well.

Current shield laws largely focus on "traditional" forms of journalism. Alabama's shield law, for example, protects only journalists at "any newspaper, radio broadcasting station or television station."[14] The same for Kentucky[15] and Ohio.[16] Florida's shield law covers

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[6] The First Amendment Center, *Blogging Overview*, http://www.firstamendmentcenter.org/press/topic.aspx?topic=blogging, (last visited April 6, 2010).
[7] Id.
[8] Massachusetts House Bill 1650 §2 (2009)
[9] Id.
[10] Sewell Chan, The New York Times, *Bill Would Extend Shield Law to Cover Bloggers*, May 20, 2009 http://cityroom.blogs.nytimes.com/2009/05/20/bill-would-extend-shield-law-to-cover-bloggers/ (last visited April 7, 2010).
[11] New York Civil Rights Law Article 7 § 79-h.
[12] Kansas Senate Substitute for House Bill No. 2585 (2010).
[13] Id.
[14] Ala. Code § 12-21-142 (1986).
[15] Ky. Rev. Stat. Ann. 421.100 (Baldwin 1990).
[16] Ohio Rev. Code Ann. §§ 2739.04, §§ 2739.12 (Baldwin 1981 & 1990 Supp).

only those journalists who work as a salaried employee or independent contractor of "a newspaper, news journal, news agency, press association, wire service, radio or television station, network, or news magazine."[17] The statute explicitly excludes book authors and those who are not professional journalists, meaning those who do not gather news for "gain or livelihood."[18] Georgia also excludes any journalist whose work is not published in a "newspaper, book, magazine, or [on] radio or television broadcast."[19] New York provides absolute protection for a journalist's confidential information and sources;[20] but a "journalist," according to the state's shield law, is only one who is paid for his or her reporting.[21] In Texas, a journalist is one who gathers news "for a substantial portion of the person's livelihood or for a substantial financial gain."[22]

Legislation that defines a journalist by income or a particular type of media is nonsensical, wrote John Eden of the Partnership for a Secure America, a bipartisan foreign policy think tank.[23] "In an era of instantaneous dissemination of information over the Internet by bloggers and other part-time pundits, it's hard to see why the privilege should be limited to journalists who are getting paid to collect news," Eden said.[24] "If what we care about is getting the most up-to-date, accurate information, why should it matter whether a blogger or a CNN reporter has delivered the news to us?"[25]

In Hawaii, it doesn't matter. That state protects those whom disseminate information to the public "by means of tangible or electronic media."[26] Though the wording of California's shield law implies coverage for traditional media only, a 2006 ruling extended that coverage to online news sites as well.[27] Nebraska's Free Flow of Information Act is one of the more liberal. Its shield law doesn't use of the word "journalist" at all but instead protects any "person engaged in procuring, gathering, writing, editing, or disseminating news or other information."[28] The types of media covered by the statute include, *but are not limited to*, "any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system."[29]

This type of statute begs the question: Why define "news media" at all? A broad definition of "professional journalist" may be the only thing that's needed, said Lucy

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[17] Fla. Stat. § 90.5015(1)(a) (1998).
[18] Id.
[19] Ga. Code Ann. § 24-9-30 (1993).
[20] N.Y. Civ. Rights Law § 79-h(b).
[21] Id. at § 79-h(a)(6).
[22] H.B. 670, 81st Leg., Reg. Sess. (Tex. 2009).
[23] John Eden, The Partnership for a Secure America, *Fixing the Federal Shield Law*, Sept. 24, 2009 http://blog.psaonline.org/2009/09/24/fixing-the-federal-shield-law/ (last visited April 6, 2010).
[24] Id.
[25] Id.
[26] Hi. ALS 210 (2008).
[27] See O'Grady v. Superior Court, 139 Cal. App.4th 1423 (Cal. Ct. App. 2006) (holding that the shield law applies to persons gathering news for dissemination to the public, regardless of whether the publication medium is print or online.)
[28] Neb. Rev. Stat. §§ 20-146 (1992).
[29] Id. at §§ 20-145(2).

Dalglish, executive director of the Reporters Committee for Freedom of the Press.[30] Critiquing New York's recent effort to expand its shield law last year, Dalglish noted that "blogging is a technology and a method of delivery."[31]

"Some people are doing valuable journalism when they blog. Others do not," she said.[32] "What you are trying to protect is the journalism function, not the technology or the platform."[33]

What is Protected?

The most narrow shield laws and interpretations of a reporter's privilege protect journalists only against the disclosure of anonymous sources. The most broad also protect them from disclosing confidential and non-confidential materials, published and unpublished information, eye witness accounts and details about their news organization's editorial process.

"The sources are not the only things sought in these forays into reporting practices and newsroom procedures," wrote the First Amendment Center's Paul McMasters in 2004.[34] "Federal officials also have gone after telephone records and reporters' notes and reportedly have tried to enlist journalists as informants, get certain information from being reported and forced reporters off of stories they have covered for months or years."[35]

Kentucky's shield law is one of the more narrow, only protecting journalists from disclosing the "source of any information procured or obtained."[36] There is no protection from disclosing notes or eyewitness accounts unless doing so would identify a confidential source.[37] Louisiana,[38] Ohio[39] and Pennsylvania[40] have similar statutes. Though Colorado's shield law protects journalists from disclosing "any news information received, observed, procured, processed, prepared, written, or edited by a newsperson, while acting in the capacity of a newsperson," there are several exceptions.[41] The privilege of non-disclosure doesn't apply to information received at a

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[30] Sewell Chan, The New York Times, *Bill Would Extend Shield Law to Cover Bloggers*, May 20, 2009 http://cityroom.blogs.nytimes.com/2009/05/20/bill-would-extend-shield-law-to-cover-bloggers/ (last visited April 7, 2010).
[31] Id.
[32] Id.
[33] Id.
[34] Paul K. McMasters and Geoffrey R. Stone, The First Amendment Center, *Do Journalists Need a Better Shield?*, Dec. 14, 2004, http://www.firstamendmentcenter.org/commentary.aspx?id=14547, (last visited April 7, 2010).
[35] Id.
[36] Ky. Rev. Stat. Ann. 421.100 (Baldwin 1990).
[37] See Maddox v. Williams, 23 Med. L. Rptr. 2118 (Ky. Cir. Ct. 1995).
[38] La. Rev. Stat. Ann. §§ 45:1451-1459 (West 1992).
[39] Ohio Rev. Code Ann. §§ 2739.04, §§ 2739.12 (Baldwin 1981 & 1990 Supp.).
[40] 42 Pa. C.S.A. § 5942 (1993).
[41] Colo. Rev. Stat. Ann. § 13-90-119(2).

press conference, previously published or broadcast or based on the journalist's personal observation of a crime.[42]

Many states, however, protect not just materials related to confidential sources, but all materials produced while gathering news. Under Montana's shield law, for example, no journalist is required "to disclose any information obtained, or prepared or the source of that information."[43] New Mexico,[44] Tennessee,[45] Rhode Island[46] and Washington[47] offer similar protection. While some state courts distinguished confidential information (more coverage) from non-confidential information (less or no coverage),[48] journalists in North Carolina can claim protection for both under its shield law.[49] North Dakota offers just as broad protection, preventing the disclosure of any information or source, unless a district court determines that "the failure of disclosure of such evidence will cause a miscarriage of justice."[50] Several states believe such a miscarriage of justice would occur if their respective shield laws applied in defamation cases. Illinois,[51] Oregon,[52] Rhode Island[53] and Tennessee[54] all prevent a journalist from using any type of reporter's privilege as a defense .

Federal courts generally hold that the First Amendment does not excuse reporters from testifying about eyewitness observations. This finding of law is often reflected in state shield laws. North Carolina, for example, doesn't offer journalists a privilege against "disclosure of any information, document, or item obtained as the result of the journalist's eyewitness observations of criminal or tortious conduct, including any physical evidence or visual or audio recording of the observed conduct."[55] New Jersey's otherwise broad shield law expressly prohibits protection to journalists testifying about eyewitness observations of "any act of physical violence or property damage."[56] The limitation, however, is narrowly construed and doesn't apply to observations of the aftermath of such crimes.[57]

How Strong is the Protection?

Very few shield laws are absolute. New York, for example, provides absolute protection for confidential information and "related material" gathered by the journalist under an

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[42] Id.
[43] Mont. Code Ann. §§ 26-1-902.
[44] N.M. Stat. Ann. § 38-6-7 (Michie 1987).
[45] Tenn. Code Ann., Title 24, Ch. 1, Part 2, § 24-1-208 (1996).
[46] R.I. Gen. Laws, Title 9, §§ 9-19.1-3(b)(1).
[47] Wash. Rev. Code § 5.68.010.
[48] See State v. Turner, 550 N.W.2d 622 (Minn. 1996); CBS Inc. v. Jackson, 578 So.2d 698, 700 (Fla. 1991); Marketos v. American Employers Ins. Co., 185 Mich. App. 179 (1990).
[49] N.C. Gen. Stat. Ch. 8, Art. 7 § 8-53.9 (1999).
[50] N.D. Cent. Code § 31-01-06.2 (1991).
[51] 735 ILCS 5/8-901-909.
[52] Or. Rev. Stat., Title 4, Ch. 44, §§ 44.530(3).
[53] R.I. Gen. Laws, Title 9, §§ 9-19.1-3(b)(1).
[54] Tenn. Code Ann., Title 24, Ch. 1, Part 2, § 24-1-208 (1996).
[55] N.C. Gen. Stat. Ch. 8, Art. 7 § 8-53.9 (1999).
[56] N.J.S.A. 2A:84A-21a(h).
[57] See Matter of Woodhaven Lumber & Mill Work, 123 N.J. 481 (1991).

express agreement of confidentiality.[58] A balancing test is used, however, when determining if non-confidential information should be disclosed.

The dissent in Branzburg endorsed such a balancing test, or qualifications to a reporter's privilege: When a grand jury asks a reporter to reveal confidences, the government should have to (1) demonstrate probable cause to believe that the reporter has information clearly relevant to a specific probable violation of law; (2) demonstrate that the information cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.[59] This opinion reflected an influential decision by the Second Circuit 14 years earlier in Garland v. Torre, 259 F.2d 545 (1958), in which the court laid out its own test: To overcome privilege and obtain compelled disclosure, a litigant must make a clear and specific showing that the information sought is (1) highly material and relevant to the underlying claim; (2) necessary or critical to maintenance of the claim; and (3) unavailable from alternative sources.

States have considered these tests — most often the Garland factors — when balancing their own shield laws with governmental interests. When dealing with non-confidential information, New York uses a test nearly identical to that in Garland.[60] Texas, which passed its shield law last year, uses a six-part test that includes showing that the subpoena is not overbroad, that timely notice was given to the journalist and that "the interest of the party subpoenaing the information outweighs the public interest in gathering and dissemination of news, including the concerns of journalists."[61]

Generally, if the party seeking information fails to fulfill any of the Garland factors, the privilege is upheld. Other courts find that if so many as one factor isn't satisfied, none are. There are certain circumstances that tend to favor disclosure: if upholding the privilege would infringe the constitutional rights of the defendant, if the information request has already been published or if the information is not confidential. The tests are very fact-intensive and can lead to unpredictability across jurisdictions. In absence of a federal shield law, this is what makes discrepancies among state statutes so concerning.

Following Branzburg, "a host of different approaches were adopted at the state and federal levels," wrote First Amendment scholars James Thomas Tucker and Stephen Wermiel in their defense of a federal shield law.[62] "What has resulted is a lack of uniformity and uncertainty that can lead to different results for the same set of facts."[63]

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[58] N.Y. Civ. Rights Law § 79-h(b).
[59] Branzburg v. Hayes, 408 U.S. 665, 744.
[60] N.Y. Civ. Rights Law § 79-h(c).
[61] H.B. 670, 81st Leg., Reg. Sess. (Tex. 2009).
[62] James Thomas Tucker and Stephen Wermiel, *Enacting a Reasonable Shield Law: A Reply to Professors Clymer and Eliason*, 57 American University L. Rev. 1291, 1298 (2008).
[63] Id.