

## Defending the Press: The Shield that Sets Minnesota Apart

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*One year after the 1972 U.S. Supreme Court case Branzburg v. Hayes, the Minnesota legislature passed the Minnesota Free Flow of Information Act, a shield law providing a reporter's privilege to protect confidential sources, as well as unpublished information, regardless of whether it identifies a source. This article first provides important background information and new analysis regarding the implications of Branzburg, the current state of the reporter's privilege at the federal level, and the history of Minnesota's statute, including the intentions of the drafters of the law, who crafted the statute to be among the strongest in the nation. Second, this article discusses the three strengths of the statute, including its 1) strong purpose statement, 2) broad definition of journalists, and 3) several protections for journalists' sources and information, all of which set Minnesota's law apart from those in several other states. Third, this article acknowledges the limitations of the statute, though it also notes how a 1998 amendment helped alleviate some of these concerns. Finally, this article suggests that the strengths of the Minnesota Shield Law can, and should, be used in drafting a federal shield law, especially in an era of anti-press rhetoric and government interference in the newsgathering process. In so doing, this article not only builds on existing literature regarding the importance of a federal shield law and protections for the press, but also suggests a way in which Congress can begin taking meaningful steps toward passing such a statute.*

During an August 4, 2017 news conference, then-Attorney General Jeff Sessions indicated that the U.S. Department of Justice (DOJ) was "reviewing its policies" regarding subpoenas for members of the press.<sup>1</sup> He suggested that the DOJ would consider

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<sup>1</sup> Jonathan Easley, *DOJ warns the media could be targeted in crackdown on leaks*, HILL (Aug. 4, 2017), <https://thehill.com/homenews/administration/345316-justice-to-review-media-subpoenas-policy-in-crackdown-on-leaks>; Tom LoBianco, *Sessions: Trump admin reviewing policy on media subpoenas*, CNN (Aug. 4, 2017), <https://www.cnn.com/2017/08/04/politics/jeff-sessions-media-subpoenas/index.html>; Josh Gerstein and Madeline Conway, *Sessions: DOJ reviewing policies on media subpoenas*, POLITICO (Aug. 4, 2017), <https://www.politico.com/story/2017/08/04/doj-reviewing-policies-on-media-subpoenas-sessions->

targeting journalists as part of leak investigations regarding classified government information, stating, “We must balance the press’ role with protecting our national security and the lives of those who serve in the intelligence community, the Armed Forces, and all law-abiding Americans.”<sup>2</sup> On June 7, 2018, *The New York Times* reported that federal officials had secretly seized several years’ worth of *Times* reporter Ali Watkins’ phone and email records as part of an investigation into classified leaks by former U.S. Senate Select Committee on Intelligence (SSCI) director of security James A. Wolfe.<sup>3</sup> In each instance, among others, observers argued that such actions could, and would, make it increasingly difficult for journalists to do their jobs of holding government accountable, including by creating a chilling effect on their sources.<sup>4</sup>

However, although most states now have their own shield laws providing a reporter’s privilege to protect journalists from being “compelled to testify or disclose sources and information,”<sup>5</sup> no federal shield law exists, despite numerous attempts to draft such legislation.<sup>6</sup>

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says-241329; Scott Memmel, *Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ*, 22 SILHA BULLETIN 3 (Summer 2017).

<sup>2</sup> *Sessions: The Department of Justice is reviewing its policies on media subpoenas*, WASH. POST (Aug. 4, 2017), [https://www.washingtonpost.com/video/politics/sessions-the-department-of-justice-is-reviewing-its-policies-on-media-subpoenas/2017/08/04/5185630c-792f-11e7-8c17-533c52b2f014\\_video.html?utm\\_term=.67e3296f32a9](https://www.washingtonpost.com/video/politics/sessions-the-department-of-justice-is-reviewing-its-policies-on-media-subpoenas/2017/08/04/5185630c-792f-11e7-8c17-533c52b2f014_video.html?utm_term=.67e3296f32a9).

<sup>3</sup> Adam Goldman, Nicholas Fandos, & Katie Benner, *Ex-Senate Aide Charged in Leak Case Where Times Reporter’s Records Were Seized*, N.Y. TIMES (June 7, 2018), <https://www.nytimes.com/2018/06/07/us/politics/times-reporter-phone-records-seized.html>.

<sup>4</sup> See Memmel, *supra* note 1. See also Scott Memmel, *Trump Administration Targets Journalist, Leaker of Government Information, and Former Government Employees Who Took Classified Documents*, 23 SILHA BULLETIN 3 (Summer 2018).

<sup>5</sup> *Sources and Subpoenas (Reporter’s Privilege)*, REP. COMM. FOR FREEDOM OF THE PRESS, accessed Nov. 12, 2018, available at <https://www.rcfp.org/digital-journalists-legal-guide/sources-and-subpoenas-reporters-privilege>. See also Laurence B. Alexander & Anthony L. Fargo, *Sources of Protection: A Case Study of the Evolution of the Common Law and Statutory Journalist’s Privilege*, 37 FREE SPEECH Y.B. 1 (1999), available at: <https://www.tandfonline.com/doi/abs/10.1080/08997225.1999.10556236>; Casey Carmody & David Pritchard, *Policy Liberalism, Public Opinion, and Strength of Journalist’s Privilege in the American States*, 49 FIRST AMEND. STUD. 1 (2015), <https://www.tandfonline.com/doi/full/10.1080/21689725.2015.1019285>.

<sup>6</sup> Renato Mariotti, *Can Trump Prosecute the NYT’s Secret Op-Ed Writer?*, POLITICO (Sept. 6, 2018), <https://www.politico.com/magazine/story/2018/09/06/new-york-times-anonymous-op-ed-trump-prosecute-liability-219734>. See generally *Time for a Federal Shield Law*, N.Y. TIMES (July 21, 2005), <https://www.nytimes.com/2005/07/21/opinion/time-for-a-federal-shield-law.html>; *A shield law is necessary to protect U.S. journalists*, WASH. POST (Sept. 22, 2013), [https://www.washingtonpost.com/opinions/a-shield-law-is-necessary-to-protect-us-journalists/2013/09/22/a3449104-20af-11e3-966c-9c4293c47ebe\\_story.html?noredirect=on&utm\\_term=.09a2ea61245c](https://www.washingtonpost.com/opinions/a-shield-law-is-necessary-to-protect-us-journalists/2013/09/22/a3449104-20af-11e3-966c-9c4293c47ebe_story.html?noredirect=on&utm_term=.09a2ea61245c); Rem Rieder, *Rieder: Shield law for journalists a gridlock casualty*, USA TODAY (Sept. 22, 2014),

This article argues that one such state law, the Minnesota Free Flow of Information Act, provides a good model for several elements of a “much-needed” federal shield law,<sup>7</sup> which, among other things, can provide protection for journalists to perform their role of holding the government accountable,<sup>8</sup> especially in an era of anti-press rhetoric and government interference in the newsgathering process.<sup>9</sup>

This article first provides important background information on: 1) *Branzburg v. Hayes* (1972), in which the U.S. Supreme Court left the door open for states to continue drafting shield laws, an area of discussion somewhat missing from current studies of the reporter’s privilege, 2) the current state of the reporter’s privilege at the federal level and why a federal shield law is necessary, and 3) the legislative history of the Minnesota Shield Law, which demonstrates that it was meant to be among the strongest in the nation for protecting journalists from government subpoenas and searches.

Second, this article discusses the three strengths of the statute, including its 1) strong purpose statement, 2) broad definition of journalists, and 3) several protections for journalists’ sources and information, all of which set Minnesota’s law apart from those in several other states. Third, this article acknowledges the limitations of the statute while also discussing how a key amendment in 1998 helped alleviate some of these problems.

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<https://www.usatoday.com/story/money/columnist/rieder/2014/09/22/federal-shield-law-for-journalists-doomed-a/16050353/>. See also William E. Lee, *The Demise of the Federal Shield Law*, CARDOZO ARTS & ENT. L. J. (2012); Stephanie B. Turner, *Protecting Citizen Journalists: Why Congress Should Adopt a Broad Federal Shield Law*, 30 YALE L. & POL’Y REV. 503 (2012); *Struggling To Report: The Fight for a Federal Shield Law*, SOC’Y PROF. JOURNALISTS, <http://www.spj.org/shieldlaw.asp>; Leslie Siegel, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 OHIO ST. L. J. 469 (2006); Jeffrey Benzing, *Falling on Their Shield*, AM. JOURNALISM REV. (June/July 2011), <http://www.ajr.org/article.asp?id=5029>.

<sup>7</sup> *Id.* See also Judith Miller, *Federal shield law is needed to protect your right to know*, RENO GAZETTE-JOURNAL (Aug. 24, 2010), <http://www.judithmiller.com/7884/federal-shield-law-needed>.

<sup>8</sup> See generally David R. Dewberry, *Checking the Checking Value in the Teapot Dome Scandal*, 15 COMM. L. REV. 2 (2015), available at [http://www.commlawreview.org/Archives/v15i2/CLRv15i2\\_Checking\\_the\\_Checking\\_Value\\_in\\_the\\_Teapot\\_Dome\\_Scandal.pdf](http://www.commlawreview.org/Archives/v15i2/CLRv15i2_Checking_the_Checking_Value_in_the_Teapot_Dome_Scandal.pdf); Vincent Blasi, *The Checking Value in First Amendment Theory* 1977 AM. B. FOUND. RESEARCH J. 521 (1977).

<sup>9</sup> See generally M. Elizabeth Thorpe, *Trump, Nixon, and the War on the Press*, 18 COMM. L. REV. 1 (2018); Ann E. Burnette, *War Stories: Trump’s Narratives and Freedom of the Press*, 18 COMM. L. REV. 1 (2018); Bruce E. Drushel, *“I Will Fight (For) You”: Donald Trump, The First Amendment, and the LGBTQ Community*, 18 COMM. L. REV. 1 (2018).

Finally, this article suggests that the strengths of the Minnesota Shield Law can, and should, be applied to a federal shield law. In so doing, this article not only goes beyond existing literature by providing new research and analysis on the reporter's privilege, but also takes an important step in suggesting how legislators can begin taking meaningful steps toward passing a federal shield law.

### Background

Before turning to the strengths of the Minnesota Shield Law, it is necessary to provide background information on: 1) the U.S. Supreme Court's 1972 ruling in *Branzburg v. Hayes*, 2) the current state of the reporter's privilege at the federal level and why a federal shield law is necessary, and 3) the legislative history of Minnesota's law, three areas of research requiring further attention.

#### A. *Branzburg v. Hayes* (1972)

The 1972 U.S. Supreme Court case *Branzburg v. Hayes* brought the issue of a reporter's privilege to the forefront of national attention. And although the case was decided 47 years ago, it remains the pivotal case regarding reporter's privilege, therefore necessitating greater emphasis and attention in current research.

Paul Branzburg, writer for *The Louisville Courier-Journal*, published two stories concerning drug use in Kentucky, with his sources asking to not be identified.<sup>10</sup> In a similar case, Earl Caldwell, a reporter for *The New York Times*, got access to Black Panther meetings and interviewed several members.<sup>11</sup> In a third case, Paul Pappas, a television reporter in Massachusetts, also reported on the Black Panthers after spending several hours at their headquarters.<sup>12</sup> All three journalists were subpoenaed to testify before a grand jury, but refused and were found in contempt.<sup>13</sup> The question for the Supreme Court was narrow: whether reporters should be held to the same standards as average citizens, compelling their disclosure of source information before a grand jury.<sup>14</sup>

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<sup>10</sup> *Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>11</sup> *Id.* at 675.

<sup>12</sup> *Id.* at 672.

<sup>13</sup> *Id.* at 679.

<sup>14</sup> *Id.* at 697.

There are three particularly important elements of the case. First, while the majority opinion, written by Justice Byron White, sided against the press, it was a limited decision that focused only on journalists appearing before a grand jury in relation to revealing confidential sources.<sup>15</sup> The majority ruled that because citizens are not constitutionally immune from testifying before a grand jury under a subpoena, this same standard should be applied to the press.<sup>16</sup> However, the majority still believed there is importance in a free press and did not prevent states from drafting their own statutes:

There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas.<sup>17</sup>

Second, Justice William Douglas's dissent further pushed for a reporter's privilege:

A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended.<sup>18</sup>

Finally, Justice Lewis Powell filed an ambiguous concurrence:

[T]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.<sup>19</sup>

Powell, despite filing a concurring opinion, seemed to argue in favor of situations in which journalists can receive privileges. Thus, Powell's concurrence left the door open for a reporter's privilege on a "case-by-case basis," including in Minnesota.<sup>20</sup>

## **B. Current State of a Federal Reporter's Privilege & Why a Federal Law is Needed**

Before arguing that the Minnesota Shield Law provides at least three elements

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<sup>15</sup> *Id.* at 709 ("The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do, and to answer questions relevant to an investigation into the commission of crime.").

<sup>16</sup> *Id.* at 682.

<sup>17</sup> *Id.* at 706.

<sup>18</sup> *Id.* at 722.

<sup>19</sup> *Id.* at 710.

<sup>20</sup> *Id.*

that can (and should) be applied to a federal law, it is necessary to first lay out the current state of the reporter's privilege at the federal level and why a federal law is necessary.

As discussed above, *Branzburg* provides the most significant case regarding whether there is First Amendment protection for journalists who refuse to reveal their confidential sources and information. Media attorneys have argued that Justice Powell's concurrence, when combined with the four dissenting justices, creates a five-judge majority supporting at least a qualified First Amendment reporter's privilege.<sup>21</sup> Most federal circuits, as well as several states, have used this reasoning to recognize some form of a First Amendment qualified privilege.<sup>22</sup>

However, despite the existence of some First Amendment protection, it is often "inconsistent" with reporters sometimes receiving no First Amendment protection at all.<sup>23</sup> It is also important to note that there is no federal shield law providing a reporter's privilege, despite various attempts by Congress in the past.<sup>24</sup> The result is that journalists do not have statutory protection at the federal level if their attempts to cite the First Amendment or common law fail.

As alluded to above and in past literature, a federal shield law could accomplish several important purposes for the press. Perhaps most significant, a federal law would provide additional protection for journalists in federal prosecutions<sup>25</sup> where the First Amendment and state laws may not suffice given their

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<sup>21</sup> RonNell A. Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221 (2013), <http://repository.law.umich.edu/mlr/vol111/iss7/1>. See also REP. COMM. FOR FREEDOM OF THE PRESS, REPORTER'S PRIVILEGE COMPENDIUM, <https://www.rcfp.org/reporters-privilege/>; Lucy A. Dalglish & Casey Murray, *Deja Vu All Over Again: How a Generation of Gains in Federal Reporter's Privilege Law Is Being Reversed*, 29 U. ARK. LITTLE ROCK L. REV. 13, 19 (2006) ("[Many subpoenaed reporters and their lawyers convinced courts all over the country that Justice Powell's concurrence represented the true majority view."].

<sup>22</sup> REP. COMM., *supra* note 21; Jones, *supra* note 21.

<sup>23</sup> Jonathan Peters, *The time is right for the Journalist Protection Act. But we need a federal shield law*, COLUM. JOURNALISM REV. (Feb. 9, 2018), [https://www.cjr.org/united\\_states\\_project/journalist-protection-act.php](https://www.cjr.org/united_states_project/journalist-protection-act.php).

<sup>24</sup> Renato Mariotti, *Can Trump Prosecute the NYT's Secret Op-Ed Writer?*, POLITICO (Sept. 6, 2018), <https://www.politico.com/magazine/story/2018/09/06/new-york-times-anonymous-op-ed-trump-prosecute-liability-219734>. See generally *Time for a Federal Shield Law*, *supra* note 6; *A shield law is necessary to protect U.S. journalists*, *supra* note 6; Rieder, *supra* note 6. See also Lee, *supra* note 6; Turner, *supra* note 6; Siegel, *supra* note 6; Benzing, *supra* note 6.

<sup>25</sup> Casey Murray & Kirsten B. Mitchell, *Would a shield law matter?*, REP. COMM. FOR FREEDOM OF THE PRESS (2006), <https://www.rcfp.org/journals/the-news-media-and-the-law-summer-2006/would-shield-law-matter/>.

“inconsistent protections.”<sup>26</sup> A result of such protection would be that the press would now be better able to accomplish its purpose of holding government and public officials accountable,<sup>27</sup> with less fear of prosecution.<sup>28</sup>

### C. History of the Drafting of the Minnesota Free Flow of Information Act

In the wake of *Branzburg v. Hayes* (1972), several states began creating their shield laws,<sup>29</sup> including Minnesota with the passage of the Minnesota Free Flow of Information Act on May 24, 1973.<sup>30</sup> The statute was immediately viewed as among the strongest in the nation,<sup>31</sup> including because several early proponents of a reporter’s privilege statute in Minnesota believed the *Branzburg* decision was too limited in terms of freedom of the press. These proponents included John Finnegan, editor of the *St. Paul Pioneer Press*; Don Gillmor, Silha Professor of Media Ethics and Law at the University of Minnesota; and Peter Popovich who, at the time, was an attorney representing the *Pioneer Press* and later became the chief justice of the Minnesota Supreme Court.

One particularly important individual in the development of the shield law was Minnesota State Senator Allan Spear, who commented in a committee hearing in 1998 that he had pushed for the original law in 1973 to protect all unpublished information, even if it did not identify confidential sources.<sup>32</sup> This would prove to be a key element that made the shield law one of the strongest in the nation, but also raised questions from 1994-1998.

The Minnesota legislature and early proponents of the law contended that *Branzburg* “was too limited an acknowledgement of a constitutionally-based

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<sup>26</sup> Peters, *supra* note 23.

<sup>27</sup> Dewberry, *supra* note 8; Blasi, *supra* note 8.

<sup>28</sup> Peters, *supra* note 23. See also Clarence Page, *Column: Trump’s war against leakers shows why we need a ‘shield law’*, CHI. TRIB. (June 12, 2018), <https://www.chicagotribune.com/news/opinion/page/ct-perspec-page-trump-sessions-espionage-act-cpj-0613-20180612-story.html>; Paul Fletcher, *Sessions’ Testimony Prompts New Federal Shield Law Bill Protecting Journalists*, FORBES (Nov. 29, 2017), <https://www.forbes.com/sites/paulfletcher/2017/11/29/sessions-testimony-prompts-new-federal-shield-law-bill-protecting-journalists/#251931f34912>.

<sup>29</sup> *The Reporter’s Privilege: Minnesota*, REP. COMMITTEE FOR FREEDOM OF THE PRESS, available at <https://www.rcfp.org/reporters-privilege>.

<sup>30</sup> Minnesota Senate, *Journal of the Minnesota Senate*, Reg. Sess. No. 23, March 1997.

<sup>31</sup> *The Reporter’s Privilege: Minnesota*, *supra* note 29.

<sup>32</sup> *Id.*

newsgatherers' privilege."<sup>33</sup> At an April 1973 Senate Judiciary Committee hearing, the bill's author, Senator Hubert "Skip" Humphrey III, the son of former Vice President Hubert H. Humphrey and the Minnesota Attorney General from 1983-1999, explained this frustration:

[T]he question is raised primarily because of a recent Supreme Court decision which states that there is no constitutional right or protected privilege from disclosure of sources of information for reporters and those involved in gathering information for the news media. The effect of this bill would be to provide that no person engaged in gathering news for publication or dissemination shall be required to disclose his sources of information. In effect the bill grants a limited privilege of non-disclosure.<sup>34</sup>

As a result of this push by early proponents and the overall feelings by Minnesota lawmakers, the legislature passed the Minnesota Free Flow of Information Act on May 24, 1973, incorporating Spear's and other's suggestions to make the law one of the strongest nationwide.

### **Three Strong Elements of the Minnesota Shield Law**

In order to demonstrate the strength of the Minnesota Shield Law, it is necessary to identify the relevant language in the statute and to compare the strong elements of the law with other shield laws across the country. The three elements include: its 1) strong purpose statement, 2) broad definition of journalists, and 3) several protections for journalists' sources and information, all of which set Minnesota's law apart from those in several other states.

#### **A. Purpose Statement**

The first element that sets the Minnesota Free Flow of Information Act apart is its strong purpose statement, which provides a "substantial privilege" to journalists to avoid disclosing their confidential sources and information in most circumstances.<sup>35</sup>

The original law, like the current version, includes five sections, 595.021 through 595.025, with Section 2, titled "Public Policy," providing the purpose of the statute:

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<sup>33</sup> Amicus Brief and Appendix on Behalf of Minnesota Society of Professional Journalists, et al. at 5, *Weinberger v. Maplewood Review*, No. C7-01-2021 (2002).

<sup>34</sup> *Heaslip v. Freeman*, 511 N.W.2d 21, 24 (Minn. Ct. App. 1994).

<sup>35</sup> Minn. Stat. § 595.022; Alexander and Bush, *supra* note 37.

In order to protect the public interest and the free flow of information, the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information. To this end; the freedom of press requires protection of the confidential relationship between the news gatherer and the source of information. The purpose of this act is to insure and perpetuate, consistent with the public interest, the confidential relationship between the news media and its sources.<sup>36</sup>

This strong purpose statement is significant for two reasons. First, this section is quite rare in the United States, with Minnesota being one of only three states, including Illinois and Nebraska that “really give a strong indication of the policy reasons behind enactment.”<sup>37</sup> Second, it connects freedom of the press with the protection of the confidential relationship between the news gatherer and the source. In developing the law, legislators “determined as a policy matter that the gathering and disseminating of news was more important than the disclosure of confidential sources and information at least in some circumstances.”<sup>38</sup> In fact, the statement goes so far as to claim that freedom of the press “requires” this protection or privilege to ensure the press can properly function in the United States.<sup>39</sup>

## **B. Definition of Journalist**

The second element of the Minnesota Shield Law that sets it apart is its definition of who constitutes a journalist.<sup>40</sup> Section 3, titled “Disclosure Prohibited” provides this definition:

No person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public...<sup>41</sup>

This broad definition of journalists is a strength of the Minnesota Shield Law because it includes not only the traditional press and reporters, but also anyone else who

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<sup>36</sup> Id. § 595.022.

<sup>37</sup> Anthony Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL’Y 35 (2006). See also Laurence B. Alexander & Ellen M. Bush, *Shield Laws on Trial: State Court Interpretation of the Journalist’s Statutory Privilege*, 23 J. OF LEGIS., 2 (2015).

<sup>38</sup> Alexander & Bush, *supra* note 37.

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

<sup>40</sup> *State Shield Laws*, DIGITAL MEDIA L. PROJECT (May 25, 2017), available at <http://www.dmlp.org/state-shield-laws>.

<sup>41</sup> Minn. Stat. § 595.023.

participates in the actions or functions of journalism. This is further demonstrated in that the law does not require that an individual be employed by a news organization. Instead, the Minnesota Free Flow of Information Act can apply to any individual “directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication.”<sup>42</sup> As a result, the statute likely covers citizen journalists in Minnesota because the definition is not limited to professional reporters.<sup>43</sup> Additionally, it can be argued that a student journalist or a freelancer in Minnesota could also be protected, and perhaps even a blogger, though there is no case law in Minnesota to determine whether this is the case.

Conversely, as alluded to above, several states require that journalists work for a professional print, radio, or television organization in order to receive protection from the state shield law. Alabama, for example, requires that the individual be “connected with or employed on any newspaper, radio broadcasting station or television station, while engaged in a news-gathering capacity” in order to fall under the law.<sup>44</sup> Similarly, Arizona requires that the individual be “engaged in newspaper, radio, television or reportorial work” or that he or she be “connected with or employed by a newspaper, radio or television station.”<sup>45</sup> California, Delaware, Indiana, and Florida, among others, are additional examples of states that require the individual be a “professional” journalist in order to qualify for the privileges afforded by the state shield law.<sup>46</sup>

### C. Protection of Nonconfidential Information

Finally, Minnesota’s Shield Law is particularly strong because it protects not only an individual’s sources, but also unpublished information, even if it is not tied to a

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<sup>42</sup> *Id.* § 595.022

<sup>43</sup> Mary Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 567 (2007).

<sup>44</sup> Ala. Code § 12-21-142 (2006). *See also* Ariz. Rev. Stat. §12-2237 (2016); Cal. Evid. Code § 1070 (2005); Del. Code § 4320 et sec. (2006); Ind. Code § 34-46-4 (2017); Fla. Evid. Code § 90.5015 (2016); La. Rev. Stat. § 45: 1451-1459 (2017).

<sup>45</sup> Ariz. Rev. Stat. §12-2237 (2016)

<sup>46</sup> Cal. Evid. Code § 1070 (2005); Del. Code § 4320 et sec. (2006); Ind. Code § 34-46-4 (2017); Fla. Evid. Code § 90.5015 (2016); La. Rev. Stat. § 45: 1451-1459 (2017).

confidential source.<sup>47</sup> Section 3, in addition to providing the broad definition of journalists, also outlines which bodies are restricted from taking action against the newsgatherers:

... shall be required by any court, grand jury, agency, department or branch of the state, or any of its political subdivisions or other public body, or by either house of the legislature or any committee, officer, member, or employee thereof...<sup>48</sup>

Additionally, Section 3 lists what information the statute protects:

... to disclose in any proceeding the person or means from or through which information was obtained, or to disclose any unpublished information procured by him in the course of his work or any of his notes, memoranda, recording tapes, film or other reportorial data which would tend to identify the person or means through which the information was obtained.<sup>49</sup>

Thus, Section 3 provides an additional strength of the statute by outlining the protection of both source information as well as nonconfidential unpublished information. Senator Spear's comments suggest that the intention of this section was to protect unpublished information, even if it did not identify a confidential source.<sup>50</sup> Conversely, several states limit protections to only "sources of information," including Alabama, Arizona, Illinois, and Indiana, among others.<sup>51</sup>

### Limitations of the Statute

Although there are three elements of the Minnesota Shield Law that make it a strong statute, it is not without its limitations. Despite the perceived strength of the statute after it was passed and in the ensuing two decades,<sup>52</sup> a shift occurred from 1994 to 1998 as the Minnesota Court of Appeals and Minnesota Supreme Court more narrowly read the statutory language of the act, raising concerns for journalists and press advocates across the state. To reaffirm the strength of the Minnesota Shield Law, lawmakers passed a key

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<sup>47</sup> *The Reporter's Privilege: Minnesota*, *supra* note 29.

<sup>48</sup> Minn. Stat. § 595.023.

<sup>49</sup> *Id.*

<sup>50</sup> *The Reporter's Privilege: Minnesota*, *supra* note 29.

<sup>51</sup> Ala. Code § 12-21-142 (2006); Ariz. Rev. Stat. §12-2237 (2016); 735 ILCS 5 § 8-901 et sec. (2017); Ind. Code § 34-46-4 (2017).

<sup>52</sup> Nancy Mate, *Piercing the Shield: Reporter Privilege in Minnesota Following State v. Turner*, 82 MINN L. REV. 1563-1565 (1998)

amendment on April 6, 1998 in order to clarify ambiguity in the statute.<sup>53</sup> The following sections will discuss the portions of the Minnesota Shield law at issue, the four court cases in which the statute was more narrowly read, and the amendments in 1998 meant to address the limiting of the law.

### A. Portions of the Statute at Issue

Section 3, despite its strong protections, is also the part of the statute that was more narrowly read by Minnesota courts from 1994 to 1998. In the portion starting with “procured by him,” there is ambiguity as to what extent the statute covers unpublished materials if a source is not revealed.<sup>54</sup> Under some interpretations, “would tend to identify a source” can be applied to the protection of unpublished information, meaning any information that does not identify a confidential source must be disclosed.<sup>55</sup>

Also relevant is Section 4, titled “Exception and Procedure,” which provides a three-part test in which the court determines whether the journalist must disclose source information:

(1) that there is probable cause to believe that the source has information clearly relevant to a specific violation of the law other than a misdemeanor, (2) that the information cannot be obtained by any alternative means or remedy less destructive of First Amendment rights, and (3) that there is a compelling and overriding interest requiring the disclosure of the information where the disclosure is necessary to prevent injustice.<sup>56</sup>

Finally, Section 5 (595.025) is the defamation exception of the statute. There are three requirements that must be considered under this section:

(1) the person seeking disclosure demonstrates that the identity of the source will lead to relevant evidence on the issue of actual malice... (2) there is probable cause to believe that the source has information clearly relevant to the issue of defamation... [and] (3) the information cannot be obtained by any alternative means or remedy less destructive of First Amendment rights.”<sup>57</sup>

The burden of this three-part test is placed not on the journalist, but the party bringing the action.

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<sup>53</sup> Minnesota House of Representatives, *Journal of the Minnesota House of Representatives*, Reg. Sess., No.71, Feb. 9, 1998.

<sup>54</sup> Minn. Stat. § 595.023.

<sup>55</sup> *The Reporter’s Privilege: Minnesota*, *supra* note 29.

<sup>56</sup> *Id.*

<sup>57</sup> Amicus Brief, *supra* note 33.

## B. Four Court Cases Narrowly Apply the Minnesota Shield Law

However, despite the perceived strength of the Minnesota Free Flow of Information Act, things began to change in 1994 with four Minnesota cases, three at the Court of Appeals and one at the Supreme Court, including *Heaslip v. Freeman* (1994), *State v. Knutson* (1994 and 1995), and *State v. Turner* (1996).<sup>58</sup>

*Heaslip* marks perhaps the first instance in which a court narrowly read the law and sided against the press.<sup>59</sup> In this case, the Minnesota Court of Appeals held that the statute only protected confidential sources, meaning it did not protect unpublished photos that were not tied to confidential source information.<sup>60</sup> The main action relates to personal injuries sustained by the McLaughlin family in a car accident in December 1988 and photos taken by *The Duluth News-Tribune*.<sup>61</sup> After the McLaughlins' attorney purchased reprints of two photos of the accident, which were not protected by the Minnesota Shield Law since they were published material, he learned that the newspaper photographer had taken more photos that were not published and sought to use them as evidence in the case.<sup>62</sup> *The Duluth News-Tribune* refused to provide them, leading to a subpoena.<sup>63</sup> The newspaper objected to the production of the unpublished material, claiming it was protected by the Minnesota Free Flow of Information Act.<sup>64</sup> As stated at oral arguments in the district court level, the newspaper did not claim to be protecting sources, but instead only complying with their internal policy to release only published photos.<sup>65</sup> Thus, the issue before the court was whether the statute “[gave] the newspaper a privilege not to produce unpublished materials, even though the newspaper does not seek to protect any sources?”<sup>66</sup>

The court looked not only if the information was unpublished, but also if it would identify a source. When looking at the legislative history and the language of Section 3,

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<sup>58</sup> *The Reporter's Privilege: Minnesota*, *supra* note 29.

<sup>59</sup> *Id.*

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

<sup>61</sup> *Heaslip v. Freeman*, 511 N.W.2d 21, 22 (Minn. Ct. App. 1994).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

the court determined that the statute does not protect information that does not identify a source.<sup>67</sup> The court found that “the privilege not to disclose unpublished information appears to relate to unpublished information that would identify a source.”<sup>68</sup> Thus, the statement in Section 3 “would tend to identify a source” was applied broadly to the statute, including to the clause discussing the protection of unpublished materials. Therefore, the court interpreted Section 3 to say that the unpublished information must identify a source in order to be protected.<sup>69</sup> This is in stark contrast to Spear’s comments during the original drafting of the legislation pushing for the law to protect all unpublished information whether confidential or not.<sup>70</sup>

This view was problematic for the press for two reasons. First, the opinion required the disclosure of unpublished photos, even though the court itself cited several cases that extended the reporter’s privilege to unpublished photos regardless of if the information is confidential.<sup>71</sup> Consequently, the public interests of a police investigation and evidence in a court case were weighed more heavily than a journalist’s privilege to protect their unpublished information. Second, the court acknowledged that its interpretation of the statute was “finely tuned.”<sup>72</sup> This narrow reading of the statutory language set a precedent in three more cases through 1996.

The second case following this trend of narrowly reading the statute was *State v. Knutson* (1994).<sup>73</sup> In October 1993, the Progressive Students Organization held a rally on the University of Minnesota campus opposing a demonstration by neo-Nazis during the same time.<sup>74</sup> As Daniel Simmer and his fiancé arrived, they became part of an altercation because a group of people thought Simmer was a neo-Nazi.<sup>75</sup> Simmer was injured and Jesse Rosen, a writer for *The Minnesota Daily*, witnessed the assault.<sup>76</sup> Rosen

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<sup>67</sup> *Id.* at 24.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *The Reporter’s Privilege: Minnesota*, *supra* note 29.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *State v. Knutson*, 523 N.W.2d 909 (Minn. Ct. App. 1994).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

would later co-write a piece about the rally and the assault published in *The Daily*.<sup>77</sup> When interviewed by the police, Rosen identified Kieran Knutson as the probable assailant, leading the police to charge Knutson with two counts of assault.<sup>78</sup> The state served Rosen a subpoena requiring him to testify at Knutson's trial and also required Pamela Louwagie, *The Daily's* editor-in-chief, to hand over all unpublished photos as part of the evidence for the trial, fulfilling an important state interest.<sup>79</sup>

There are two portions of the decision directly related to the Minnesota Shield Law that once again shows the court had a narrow view of the statutory language. First, like in *Heaslip*, the court held that the statute did not protect information that does not identify a source. The court reasoned that "a fair reading of both the operative portion of the section and the section's legislative history indicates that the statute only protects reporters from compelled disclosures that would identify their sources."<sup>80</sup>

Second, going beyond *Heaslip*, the court focused on whether the law protected a journalist who witnessed a crime. The court found that Rosen's testimony was necessary and could be compelled by looking at the three-part test in Section 4.<sup>81</sup> The court ultimately held that the test was satisfied. First, Rosen's testimony was relevant to the assault.<sup>82</sup> Second, the existence of another witness was not enough to stop Rosen from testifying because he was the best means of obtaining the information. Finally, the "evidence surrounding the assault [was] largely testimonial" because there was disagreement between the witnesses.<sup>83</sup> Although Rosen believed Knutson assaulted Simmer without provocation, other witnesses said Knutson was the one who acted in self-defense.<sup>84</sup> The court concluded that eliminating Rosen's testimony could shift the weight of the evidence.<sup>85</sup> Thus, "there [was] a compelling and overriding interest in obtaining Rosen's testimony," satisfying the final portion of the test.<sup>86</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

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

<sup>80</sup> *Id.* at 912.

<sup>81</sup> Minn. Stat. § 595.024.

<sup>82</sup> *Knutson*, 523 N.W.2d at 912.

<sup>83</sup> *Id.*

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

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

<sup>86</sup> *Id.* at 913.

In the second part of this case (*Knutson 2*), the Minnesota Court of Appeals focused on whether the unpublished photos needed to be disclosed, not just Rosen's testimony, in connection with the assault investigation and trial, again aiming to fulfil important state interests. Here, like in *Heaslip*, the court determined that the photos needed to be handed over for several reasons.<sup>87</sup> First, it was likely that one of the photos would provide "conclusive information as to whether Simmer was wearing brass knuckles at the time of the assault."<sup>88</sup> Second, *The Daily* did not specify why these particular photos should be protected.<sup>89</sup> Third, the court held that the First Amendment did not protect the press from incidental burdening that is the result of enforcing civil or criminal statutes.<sup>90</sup> Thus, the court weighed the public interest of a police investigation over a reporter's privilege.

Finally, the court ruled that the order to produce the unpublished photos met these criteria and satisfied the three-part test in Section 4.<sup>91</sup> The photos, like Rosen's testimony, (1) were clearly relevant to a felony, (2) provided more accurate information than conflicting eyewitness accounts, making them the best means of getting the necessary information, and (3) were necessary for the determination of Knutson's argument of self-defense, an overriding interest in disclosure and once again siding against the press when applying the statute.<sup>92</sup>

The final of the four cases in which courts ruled against the press in relation to the Minnesota Shield Law was *State v. Turner*, a case before the Minnesota Supreme Court.<sup>93</sup> It would prove to be the turning point before the 1998 amendment because it further eroded the reporter's privilege in Minnesota by "reject[ing] the argument that the Act applies to reporters who personally witness crimes, and to unpublished, nonconfidential information possessed by a newspaper."<sup>94</sup> In 1995, the *Pioneer Press*

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<sup>87</sup> *State v. Knutson*, 539 N.W.2d 254 (Minn. Ct. App. 1995).

<sup>88</sup> *Id.* at 258.

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

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

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *The Reporter's Privilege: Minnesota*, *supra* note 29.

<sup>94</sup> *State v. Turner*, 550 N.W.2d 622 (Minn. 1996).

began studying efforts that aimed to control criminal activity.<sup>95</sup> Chris Polydoroff, a photographer for the *Pioneer Press*, accompanied two police officers as they patrolled the St. Paul area.<sup>96</sup> The officers pulled over a vehicle they believed was being driven by Trinis Edwards, who had an active felony warrant.<sup>97</sup> However, when they stopped the vehicle and apprehended the suspect, it became clear it was Steven Turner, not Edwards.<sup>98</sup> Nevertheless, because Turner was in possession of crack cocaine, he was arrested. Polydoroff witnessed the arrest and took several photos of the encounter, one of which was later published.<sup>99</sup> Turner served Polydoroff with a broad subpoena requesting “all notes, records, photo[s] or recordings in your possession or which you may have knowledge of.”<sup>100</sup>

Northwest Publications argued that “the [Minnesota Free Flow of Information] Act protects the identity of any confidential source, plus all unpublished information however derived, plus any resource materials that would tend to identify a source.”<sup>101</sup> However, just as the Minnesota Court of Appeals reasoned in *Heaslip* and *Knutson*, and for the same reasons, the Minnesota Supreme Court held that the Act was meant to only protect confidential relationships between a reporter and his/her sources.<sup>102</sup> Because confidentiality was not at issue in this case, the language of the Act was again narrowly read with the court siding against Northwest.<sup>103</sup>

The decision, along with the other three rulings, led to frustration from press advocates and media organizations, who contended that the intention of the original legislation was to protect confidential and nonconfidential information as part of the statute’s broad purpose, suggesting that there was a need to strengthen the statute once again.<sup>104</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 625.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 630.

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

<sup>104</sup> Mate, *supra* note 52.

### C. 1998 Amendment

Introduced by Senator Richard J. “Dick” Cohen on March 17, 1997, the most significant change to the Minnesota Free Flow of Information Act was viewed by the Minnesota legislature for the first time.<sup>105</sup> Filed without the governor’s signature on April 6, 1998, an amendment made a fundamental change in response to *Turner* and the related cases that had narrowed the scope and power of the statute.<sup>106</sup>

In Section 3, the amendment added “whether or not it” after the words “other reportorial data” and before “would tend to identify the person or means” in the section prohibiting disclosure of information.<sup>107</sup> The effect of this change was to ensure that information would be protected regardless of whether it revealed a confidential source or not. Thus, this amendment, combined with the existing strengths of the Minnesota Shield Law, demonstrates a renewed emphasis on press freedom by the legislature, ensuring that a greater amount of material was protected.

### Applying the Three Strengths of the Minnesota Shield Law to Federal Legislation

In order for the press in the United States to receive the benefits associated with a federal shield law, including being able to perform their “checking value,”<sup>108</sup> Congress must successfully draft and pass such a statute, which it has failed to do to this point.<sup>109</sup> Thus, it is necessary for research in this area to begin considering ways to make a federal shield law possible. This paper argues that the three strong elements of the Minnesota Shield law can and should be applied to a federal shield law. However, this paper does not argue that they should simply be copied and pasted into a federal law, but instead provide a model for how such a statute could be drafted.

First, the strong purpose statement makes clear that a “substantial privilege” exists for the relationship between a broad definition of journalists and their sources, as well as

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<sup>105</sup> Minnesota Senate. Journal of the Minnesota Senate. Reg. Sess. No. 23, March 1997.

<sup>106</sup> Minnesota House of Representatives. Journal of the Minnesota House of Representatives, Reg. Sess., No. 71 Feb. 9, 1998.

<sup>107</sup> *The Reporter’s Privilege: Minnesota*, *supra* note 29.

<sup>108</sup> Blasi, *supra* note 8; Dewberry, *supra* note 8.

<sup>109</sup> *Time for a Federal Shield Law*, *supra* note 6.

their newsgathering materials.<sup>110</sup> Such a purpose statement is not only rare, but also sends a strong message that although a reporter's privilege is not absolute, it can still be a substantial protection, at the federal level.

Second, the broad definition of a journalist would provide protection to a wide range of individuals who "participate[] in the actions of journalism, regardless of where or for whom they work."<sup>111</sup> Thus, such a definition would largely eliminate one of the main arguments against a federal shield law: that it would "artificially circumscribe the classification of 'journalists' in America and thereby curtail freedom of expression by leaving some people out."<sup>112</sup>

Finally, the inclusion of nonconfidential information broadens journalists' materials protected by a state or federal shield law, helping prevent government intrusion into the newsgathering and editorial processes, as well as decreasing concerns about journalists being seen as an investigative arm of the government.<sup>113</sup> Such protections are relatively uncommon across states' shield laws, thus suggesting a means of strengthening protections for journalists.

Using the strengths of the Minnesota Shield Law would create "strong national standards" for courts while preventing against "restrictive parameters [of] defin[ing] who is and isn't a journalist."<sup>114</sup> Furthermore, applying strengths of the law would protect more materials from government intrusion, providing stronger protection for journalists, as well as to their sources, therefore helping to ensure that there is not a chilling effect on

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<sup>110</sup> Minn. Stat. § 595.022.

<sup>111</sup> Jason Stverak, *Media Shield Law Should Focus on Protecting, Not Defining, Journalists*, FORBES (April 4 2014), <https://www.forbes.com/sites/realspin/2014/04/04/media-shield-law-should-focus-on-protecting-not-defining-journalists/#3783eaa1239b>

<sup>112</sup> Gabriel Schoenfeld, *Time for a Shield Law?*, HUDSON INST. (March 24, 2014), <https://www.hudson.org/research/10187-time-for-a-shield-law->. See also Morgan Weiland, *Congress' Dangerous Attempts to Define "Journalist" in Shield Law Threaten to Exclude Bloggers*, FREEDOM OF THE PRESS FOUND. (July 25, 2013), <https://freedom.press/news-advocacy/congress-dangerous-attempts-to-define-a-journalist-in-shield-law-threaten-to-exclude-bloggers/>.

<sup>113</sup> See Anthony L. Fargo, *The Journalist's Privilege For Nonconfidential Information In States With Shield Laws*, 4 COMM. L. & POL'Y 325-352 (1999). See also 1997-98 Not a Good Year for Reporters' Privilege, 26 MEDIA REP. (BNA) (Nov. 24, 1998).

<sup>114</sup> Sophia Cope, *A Federal Shield Law is Needed to Protect Confidential Sources and the Public's Right to Know: A Reply to David Pozen*, JUST SEC. (Oct. 21, 2013), <https://www.justsecurity.org/2243/media-shield-sophia-cope-reply-david-pozen/>. See also Geoffrey R. Stone, *We Need a Federal Shield Law Now!*, HUFFPOST (May 25, 2011), [https://www.huffingtonpost.com/geoffrey-r-stone/we-need-a-federal-shield-\\_b\\_4265.html](https://www.huffingtonpost.com/geoffrey-r-stone/we-need-a-federal-shield-_b_4265.html).

confidential sources or on press coverage.<sup>115</sup> But even if the federal statute is not invoked, does not provide adequate protection, or proves to be ineffective, as some observers suggest, it may still serve as a symbolic move by Congress to protect press freedom, especially in an era of increased hostility and anti-press rhetoric, as well as decreased trust in the press.

### Conclusion

Ultimately, this paper provides several contributions to our understanding of the Minnesota Free Flow of Information Act and reporter's privilege more generally. By providing the history of Minnesota's shield law, as well as an overview of the statute's language, this paper identified the strengths of the law, namely its strong purpose statement, its broad definition of journalists, and its protection of not only a journalist's sources, but also unpublished information, even if it is not tied to a confidential source. Compared to other states, these strengths set the Minnesota Shield Law apart as among the strongest in the nation.

By providing a background on *Branzburg* and the reporters privilege at the federal level, this paper added to existing literature arguing for a federal shield law. However, this paper then went a step further to suggest some initial steps that legislators could take to begin crafting a strong, yet passable, federal shield law.

A limitation of this paper is that it does not fully compare the Minnesota Shield Law to other states, which may provide other strengths for a federal law, a basis for future research. Additionally, as noted above, some observers contend that a federal law would be ineffective, including because its definition of journalists could be "constitutionally suspect,"<sup>116</sup> also warranting future research. Nevertheless, this paper takes the important step of suggesting elements that make up a strong shield law at the state or federal levels,

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<sup>115</sup> *Id.*

<sup>116</sup> See Randall D. Eliason, *No federal shield law: Opposing view*, USA TODAY (March 16, 2014), <https://www.usatoday.com/story/opinion/2014/03/16/federal-shield-law-randall-d-eliason-editorials-debates/6499809/>. See also Matthew Cooper, *Why a Media-Shield Law Isn't Enough to Save Journalists*, ATLANTIC (May 29, 2013), <https://www.theatlantic.com/national/archive/2013/05/why-a-media-shield-law-isnt-enough-to-save-journalists/276353/>; Rick Sarre, *Why shield laws can be ineffective in protecting journalists' sources*, CONVERSATION (Aug. 12, 2018), <https://theconversation.com/why-shield-laws-can-be-ineffective-in-protecting-journalists-sources-101106>.

especially in an era where the press faces frequent challenges to its reporting and practices.