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## A Paper Shield? Whether State Privilege Protections Apply to Student Journalists

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## Cover Page Footnote

\* Assistant Professor of Journalism, University of Kansas. Professor Peters teaches First Amendment law and media policy, and holds research positions in the KU Information and Telecommunication Technology Center and the KU Surveillance Studies Research Center. He is the First Amendment chair of the American Bar Association's Civil Rights Litigation Committee, and serves on the Society of Professional Journalist's Freedom of Information Committee. The authors are immensely grateful for the help of their research assistants, John Truong and Chris Teters, and of the IPLJ staff. † Associate Professor of Journalism, University of Kansas. Professor Belmas teaches First Amendment law and media policy. Previously, she headed the journalism program at California State University, Fullerton. Her media law research has been cited by numerous courts of appeals. She is Research Chair of the Scholastic Journalism Division of the Association for Education in Journalism and Mass Communication, and the lead author of the popular textbook *Major Principles of Media Law*. ‡ Associate Professor of Journalism, University of Kansas. Professor Bobkowski's research focuses on scholastic journalism and the developmental role of media among adolescents and emerging adults. He serves on the board of directors for the National Scholastic Press Association, and is a recipient of the Gold Key Award and Pioneer Award, both given in recognition of outstanding dedication to the mission of the student press.

# A Paper Shield? Whether State Privilege Protections Apply to Student Journalists

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*Most states recognize a privilege for journalists to protect confidential sources from compelled disclosure. The privilege varies from state to state, and a major difference is how they define a journalist—i.e., a person qualified to claim the privilege. Some schemes are narrow and limit their coverage to employees of professional news organizations. Others are broad and cover freelancers, filmmakers, bloggers, and others who gather information for publication. But what about student journalists? Are they covered? In recent years, as traditional media have adapted to changing circumstances, student journalists have played a vital role in meeting their communities' needs for news. This Article explores whether state reporter's privilege protections cover student journalists by review-*

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*ing existing privilege schemes, ultimately finding that most exclude student journalists. This poses a unique problem because, as one commentator put it, “[i]f we’re going to ask students to fulfill the responsibility of being front-line newsgatherers, the least we can do is send them out into the field with the confidence of meaningful legal protection.” With that in mind, the Article offers solutions and calls for legislative action, arguing that student journalists need more than a paper shield to fulfill their editorial responsibilities. This is the first comprehensive scholarly analysis of these issues.*

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## INTRODUCTION

The facts of the landmark Supreme Court case *Branzburg v. Hayes*,<sup>1</sup> which addressed whether requiring journalists to testify before grand juries abridged the First Amendment, are well known to media attorneys and legal scholars: *Louisville Courier-Journal* reporter Paul Branzburg observed two young people make and use marijuana and hashish, and wrote news articles about his experience and local drug use generally.<sup>2</sup> He promised confidentiality to his sources and later refused to reveal their identities before a state grand jury.<sup>3</sup> Ultimately, the U.S. Supreme Court declined to grant Branzburg—or any other reporter—a First Amendment-based privilege to refuse to testify under those circumstances.<sup>4</sup> However, the concurring and dissenting opinions laid the foundation for such a privilege and outlined how it would work<sup>5</sup> in language that has found its way into numerous statutes, court decisions, and procedural rules—all potential bases today for a reporter to claim a privilege from being compelled to testify about, or otherwise produce, their confidential sources or information.<sup>6</sup>

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<sup>1</sup> 408 U.S. 665 (1972). In the companion cases of *In re Pappas*, 266 N.E.2d 297 (Mass. 1971), and *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), which were consolidated into *Branzburg v. Hayes*, two other reporters, each covering the Black Panther organization, were subpoenaed to testify before grand juries and reveal information that they had received in confidence. *Branzburg*, 408 U.S. at 672–73, 675. Like Branzburg, the reporters refused. *Id.*

<sup>2</sup> *Id.* at 667–68.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 667 (“The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not.”).

<sup>5</sup> *Id.* at 710 (Powell, J., concurring); *id.* at 743 (Stewart, J., dissenting).

<sup>6</sup> Jonathan Peters, *Shield Laws and Journalist’s Privilege: The Basics Every Reporter Should Know*, COLUM. JOURNALISM REV. (Aug. 22, 2016), [http://www.cjr.org/united\\_](http://www.cjr.org/united_)

But what if Paul Branzburg, instead of working as a full-time professional journalist for an established newspaper, was a seventeen-year-old student journalist working today for the *East High Courier*? Imagine he reports a story about teacher misconduct that lands him before a state grand jury, where he is ordered to reveal his confidential sources. Would he have to comply? Or what if Branzburg was a college sophomore writing his first piece for the *Daily Collegian*? Imagine that he reports that a high-ranking administrator once embezzled funds, and the paper receives a subpoena from state prosecutors to obtain his unpublished notes. Would he have to provide them? In either case, could Branzburg as a student journalist reasonably expect to be protected by a state reporter's privilege? Probably not.

While the majority of states offer some protections for journalists to shield their confidential sources, the protections usually do not extend to student journalists—either because the students do not qualify for them, or the qualifying criteria are so unclear that student journalists could not reasonably expect to be covered.<sup>7</sup> This is problematic because of the importance of student journalists' work. The gathering, production, and dissemination of news is increasingly dispersed,<sup>8</sup> and as traditional outlets have adapted to changing circumstances and challenging economics, student jour-

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states\_project/journalists\_privilege\_shield\_law\_primer.php [https://perma.cc/B8R8-M5AG].

<sup>7</sup> See *infra* Section II.A.

<sup>8</sup> See Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV. (Nov./Dec. 2009), [http://archives.cjr.org/reconstruction/the\\_reconstruction\\_of\\_american.php](http://archives.cjr.org/reconstruction/the_reconstruction_of_american.php) [https://perma.cc/2S23-3D7F] (“[T]he economic foundation of the nation’s newspapers, long supported by advertising, is collapsing, and newspapers themselves, which have been the country’s chief source of independent reporting, are shrinking . . . . Commercial television news, which was long the chief rival of printed newspapers, has also been losing its audience, its advertising revenue, and its reporting resources. Newspapers and television news are not going to vanish in the foreseeable future, despite frequent predictions of their imminent extinction. But they will play diminished roles in an emerging and still rapidly changing world of digital journalism, in which the means of news reporting are being re-invented, the character of news is being reconstructed, and reporting is being distributed across a greater number and variety of news organizations, new and old.”).

nalists have played a vital role in meeting their communities' needs for news and information.<sup>9</sup>

For example, student journalists in Kansas recently published an investigative story showing that their newly hired principal lacked the credentials she claimed to have: “[The students] called government offices, dredged databases, interviewed people, and conducted international conference calls—all while some district officials . . . stood by the principal.”<sup>10</sup> But eventually the principal resigned, and professional journalists worldwide praised the students' reporting.<sup>11</sup> Two years ago, in New Jersey, student journalists brought to light misconduct complaints against a superintendent.<sup>12</sup> And at Northwestern University, undergraduate journalism students produced a series of reports that led to the exoneration of seven Illinois prisoners, three of whom were under death sentences.<sup>13</sup> As Frank LoMonte, executive director of the Student Press Law Center, a nonprofit based in Washington, D.C., put it: “If [we are] going to ask students to fulfill the responsibility of being front-line newsgatherers, . . . the least we can do is send them out into the field with the confidence of meaningful legal protection.”<sup>14</sup>

With that in mind, this Article explores whether and how state reporter's privilege protections cover student journalists, focusing on three typical sources of the privilege: statutes, constitutions, and

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<sup>9</sup> Jonathan Peters & Frank LoMonte, *College Journalists Need Free Speech More than Ever*, ATLANTIC (Mar. 1, 2013), <http://www.theatlantic.com/national/archive/2013/03/college-journalists-need-free-speech-more-than-ever/273634> [https://perma.cc/K568-BDQN].

<sup>10</sup> Jonathan Peters, *How Kansas High School Journalists Exposed a Principal's Puffed-up Resume*, COLUM. JOURNALISM REV. (Apr. 6, 2017), [http://www.cjr.org/united\\_states\\_project/kansas\\_high\\_school\\_newspaper.php](http://www.cjr.org/united_states_project/kansas_high_school_newspaper.php) [https://perma.cc/7MVF-EFKT].

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

<sup>12</sup> *SPLC Case File: High School Reporter's Investigative Article Was Censored for Three Months for Using Anonymous Sources*, STUDENT PRESS L. CTR. (Dec. 23, 2015, 4:44 PM), <http://www.splc.org/article/2015/12/splc-case-files-northern-highlands-regional-high-school> [https://perma.cc/EA3C-YT8Y].

<sup>13</sup> Rob Warden, *The Revolutionary Role of Journalism in Identifying and Rectifying Wrongful Convictions*, 70 UMKC L. REV. 803, 845 (2002).

<sup>14</sup> Jonathan Peters, *How a New Campaign Is Trying to Strengthen the Rights of Student Journalists*, COLUM. JOURNALISM REV. (Feb. 19, 2016), [http://www.cjr.org/united\\_states\\_project/new\\_voices\\_campaign.php](http://www.cjr.org/united_states_project/new_voices_campaign.php) [https://perma.cc/VQM5-NT9K].

the common law. Part I explains the theoretical basis for recognizing a reporter's privilege, and discusses both *Branzburg* and its progeny, which offer useful background information for understanding the context in which state protections have developed. Part I also reviews the scholarly literature on state reporter's privilege protections. Part II analyzes the state protections and considers how they apply to student journalists. It analyzes statutes, cases interpreting statutes, cases interpreting constitutional provisions, and the common law. Part III concludes with comments on the growing and ever-important population of student journalists and the need to enhance their privilege protections. It offers some solutions, and it calls for legislative action. This is the first comprehensive scholarly analysis of these issues.

### I. THE BASICS OF A REPORTER'S PRIVILEGE

Any person ordered to testify at a legal proceeding is generally required to comply.<sup>15</sup> If the person refuses, he or she may be subject to a judicial finding of contempt.<sup>16</sup> There are, however, exceptions called privileges.<sup>17</sup> The best known is probably the attorney-client privilege, which exempts attorneys from testifying about their confidential communications with clients.<sup>18</sup> Many states recognize similar privileges for medical doctors, psychological therapists, religious advisors, and spouses.<sup>19</sup> These privileges are all based

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<sup>15</sup> See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (stating that the First Amendment does not "relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation"); *Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972) (finding that "the public interest in law enforcement and in ensuring effective grand jury proceedings" outweighs the burden on news gathering); *United States v. Sterling*, 724 F.3d 482, 493 (4th Cir. 2013) ("[T]he *Branzburg* Court declined to treat reporters differently from all other citizens who are compelled to give evidence of criminal activity . . .").

<sup>16</sup> See FED. R. CIV. P. 45(g); FED. R. CRIM. P. 17(g).

<sup>17</sup> See *generally Privilege*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>18</sup> See *id.*; see also *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.").

<sup>19</sup> See *Privilege*, *supra* note 17.

on the belief that there is a public interest justifying the exclusion of testimony.<sup>20</sup>

In all but one state, journalists may claim a privilege of some kind to protect themselves from legal efforts to compel their testimony about confidential sources or information.<sup>21</sup> The privilege's rationale is that journalists rely on sources to provide the information they publish, and some sources will not share sensitive information without a promise of anonymity. Consider what *Time* magazine's Matthew Cooper wrote in a July 2005 affidavit, filed in a privilege dispute:

I could not effectively report on matters of concern to the public—war, peace, the budget—without using confidential sources; nor could any of my colleagues at *Time* magazine. Many newsworthy stories come to me from people—some connected with the Administration, some not—who make it clear to me that they will not offer the information to me unless I can promise them that their identities will remain secret. This is widely understood to be the case not just for myself but for journalists at all major publications . . . . By promising confidentiality to [those sources who demand it], I am able to report on many things that would otherwise go unreported.<sup>22</sup>

The reporter's privilege, then, recognizes that there is a public interest in encouraging the disclosure of newsworthy information. It also recognizes that the press's credibility depends on its actual and perceived independence.<sup>23</sup> As one of the authors of this Article

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<sup>20</sup> See, e.g., *Upjohn*, 449 U.S. at 389 (“[The] purpose [of the attorney-client privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”).

<sup>21</sup> See *infra* Part II.

<sup>22</sup> Brief of Appellants Judith Miller, Matthew Cooper and Time Inc. at 15, *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005) (Nos. 04-3138, 04-3139, 04-3140) (quoting affidavit of Matthew Cooper).

<sup>23</sup> Cathy Packer, *Confidential Sources and Information*, in COMMUNICATION AND THE LAW 321, 325 (W. Wat Hopkins ed., 2009) (“When police and prosecutors rely on journalists for information, they make the media an arm of law enforcement, although that

previously noted: “If journalists are, or are seen as, investigative arms of the government or private interests, . . . the public might lose faith in their reporting and be loath to trust them with information.”<sup>24</sup>

Privileges, which vary from one state to the next, are found in multiple sources. Lower courts have invoked *Branzburg* to recognize a qualified First Amendment-based privilege,<sup>25</sup> but there is currently no analogous federal shield statute.<sup>26</sup> At the state level, depending on the jurisdiction, journalists can claim the privilege under a state statute<sup>27</sup> or a state’s common law<sup>28</sup> or under the state or federal constitution.<sup>29</sup> The scope of their protections varies, so it is necessary to assess several issues to determine whether a privilege will protect a journalist in a particular case.<sup>30</sup>

Some state privileges, for example, protect only confidential sources and information,<sup>31</sup> while others protect information regardless of its confidentiality.<sup>32</sup> Many privileges are subject to exceptions or balancing tests that enable the party compelling disclosure to overcome the privilege in limited circumstances (say, in criminal cases where the offense is punishable by life imprisonment and the information sought is essential to the proceeding).<sup>33</sup> And, most importantly for this Article, the threshold question in a privilege claim

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is not their proper role in a democracy and undermines their credibility with sources. Journalists are supposed to be watchdogs of law enforcement.”).

<sup>24</sup> Peters, *supra* note 6.

<sup>25</sup> See, e.g., *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *LaRouche v. Nat’l Broad. Co., Inc.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *Zerilli v. Smith*, 656 F.2d 705, 710–11 (D.C. Cir. 1981); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595–99 (1st Cir. 1980); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977).

<sup>26</sup> RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 586 (2008) (“For more than thirty years, a legislative battle has raged over the need for a federal shield law for journalists.”).

<sup>27</sup> See, e.g., WIS. STAT. § 885.14 (2016).

<sup>28</sup> See, e.g., *Sinnott v. Bos. Ret. Bd.*, 524 N.E.2d 100 (Mass. 1988).

<sup>29</sup> See, e.g., *In re Wright*, 700 P.2d 40, 41 (Idaho 1985).

<sup>30</sup> Peters, *supra* note 6.

<sup>31</sup> See, e.g., 9 R.I. GEN. LAWS §§ 9-19.1-1 to 9-19.1-3 (2016).

<sup>32</sup> See, e.g., D.C. CODE §§ 16-4701–16-4704 (2016).

<sup>33</sup> See, e.g., MICH. COMP. LAWS § 767.5a (2016).

is whether the privilege applies to the claimant. In other words: Is the person a journalist as defined by the privilege's source? Some schemes are narrow and cover employees of traditional news organizations,<sup>34</sup> while others are broad and extend to bloggers, researchers, freelancers, filmmakers, and book authors.<sup>35</sup> But what about student journalists?

*A. Few More Words About Branzburg*

*Branzburg* and its progeny offer useful background information to understand the context in which state reporter's privileges have developed. *Branzburg* consolidated the cases *In re Pappas* and *United States v. Caldwell*, in which prosecutors subpoenaed two different reporters covering the Black Panther Party.<sup>36</sup> The prosecutors charged party leaders with various crimes and wanted the reporters to testify before grand juries about party activities. The reporters, Paul Pappas and Earl Caldwell, refused to testify.<sup>37</sup> They argued that the First Amendment protected them from compelled disclosure of their sources' identities, asserting that if they were forced to disclose, then all sources would be reluctant to speak to reporters, and the free flow of information would suffer as a result.<sup>38</sup>

The Supreme Court, in a five-to-four decision written by Justice Byron White, ruled that a journalist has the same duty as all other citizens to testify when called upon.<sup>39</sup> However, Justice Lewis F. Powell, the fifth vote to reject the privilege based on *Branzburg*'s facts, refused to go that far.<sup>40</sup> In a concurring opinion, he left open the possibility that the First Amendment might protect a reporter under other circumstances:

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citi-

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<sup>34</sup> See, e.g., NEV. REV. STAT. § 49.275 (2015).

<sup>35</sup> See, e.g., *In re* Jan. 11, 2013 Subpoena by Grand Jury of Union Cty., 75 A.3d 1260, 1271 (N.J. Super. Ct. Law Div. 2013).

<sup>36</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 672–77 (1972).

<sup>37</sup> *Id.* at 672–73, 675.

<sup>38</sup> *Id.* at 679–80.

<sup>39</sup> *Id.* at 690–91.

<sup>40</sup> *Id.* at 709–10 (Powell, J., concurring).

zens 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. In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.<sup>41</sup>

Justice Potter Stewart, in dissent, expanded on those ideas and explained how a reporter's privilege would work, reasoning that a reporter's right to a confidential relationship with his source stems "from the broad societal interest in a full and free flow of information to the public."<sup>42</sup> He added that "the right to publish is central to the First Amendment and basic to the existence of constitutional democracy," concluding that the "corollary of the right to publish must be the right to gather news."<sup>43</sup> Justice Stewart also outlined three criteria the government must satisfy to subpoena a reporter: The government must demonstrate that (1) "the information sought is clearly relevant to a precisely defined subject of governmental inquiry," (2) "it is reasonable to think the witness in question has that information," and (3) "there is not any means of obtaining the information less destructive of First Amendment liberties."<sup>44</sup>

By reading Justice Powell's concurrence as a check on the majority, and by mining Justice Stewart's dissent for guidance to apply the privilege, lower courts have relied on *Branzburg's* fractured opinions to recognize a qualified First Amendment-based privilege.<sup>45</sup> But courts have struggled to resolve the key issue of who

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<sup>41</sup> *Id.* at 710 (Powell, J., concurring) (footnote omitted).

<sup>42</sup> *Id.* at 725-26 (Stewart, J., dissenting).

<sup>43</sup> *Id.* at 727.

<sup>44</sup> *Id.* at 740 (citations omitted).

<sup>45</sup> See Stephen Bates, *Overruling a Higher Court: The Goodale Gambit and Branzburg v. Hayes*, 14 NEXUS 17, 18 (2009) ("No longer did Branzburg reject a reporter's privilege; it created one. Lower courts generally cited the Powell concurring opinion for the proposition that reporters are entitled to some sort of privilege, and then applied the test from the Stewart dissent."); see also Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1951-52 (2006).

qualifies as a journalist.<sup>46</sup> Notably, this struggle was predicted by the *Branzburg* majority, which stated:

The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.<sup>47</sup>

The U.S. Court of Appeals for the Third Circuit, in the case *In re Madden*, engaged in this type of "questionable procedure," establishing a multi-part test that requires anyone asserting the privilege to satisfy three elements.<sup>48</sup> The court held that "individuals are journalists when engaged in investigative reporting, gathering news, and have the intent at the beginning of the news-gathering process to disseminate this information to the public."<sup>49</sup> Thus, the test requires courts to define "two equally complex concepts: investigative reporting and news,"<sup>50</sup> both of which the Third Circuit failed to define.<sup>51</sup>

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<sup>46</sup> William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635, 663 (2006). Other issues include: whether protection should extend only to a source's identity or also to unpublished information; whether the privilege protects a reporter's notes, outtakes, and similar unpublished materials; whether the privilege protects information possessed by third parties, like telephone companies; whether procedural mechanisms should be in place for asserting or overcoming the privilege; and whether the source may waive the privilege. *Id.*

<sup>47</sup> *Branzburg*, 408 U.S. at 703-04.

<sup>48</sup> 151 F.3d 125, 128-30 (3d Cir. 1998) (citing *Branzburg*, 408 U.S. at 703-04).

<sup>49</sup> *Id.* at 130. Professor Clay Calvert summarized the test as follows: "(1) the claimant was engaged in investigative reporting; (2) the claimant was gathering news; and (3) the claimant possessed the intent at the inception of the newsgathering process to disseminate the news to the public." Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of "Journalist" in the Law*, 103 DICK. L. REV. 411, 426 (1999).

<sup>50</sup> Calvert, *supra* note 49, at 426.

<sup>51</sup> *In re Madden*, 151 F.3d at 130.

Two other circuits have taken similar approaches. In *von Bulow v. von Bulow*, the Second Circuit held that “the individual claiming the privilege must demonstrate, through competent evidence, the intent to use material—sought, gathered or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process.”<sup>52</sup> The court further noted that the person invoking the privilege need not be a member of the “institutionalized press,” as long as she is engaged in “activities traditionally associated with the gathering and dissemination of news.”<sup>53</sup> In *Shoen v. Shoen*, the Ninth Circuit found the Second Circuit’s reasoning in *von Bulow* to be persuasive, stating that a “journalist’s privilege is designed to protect investigative reporting.”<sup>54</sup> The court focused on the activities of the person invoking the privilege, explaining that “what makes journalism *journalism* is not its format but its content.”<sup>55</sup> Thus, the court concluded that the privilege protects information gathered in pursuit of news, but it did not define what constitutes news.<sup>56</sup> Instead, the court simply acknowledged the importance of “bringing to light ‘newsworthy’ facts on topical and controversial matters of great public importance.”<sup>57</sup>

These leading cases define a journalist by way of journalism, and set forth four general principles: (1) the *medium* does not determine whether the claimant is a journalist; (2) the claimant’s *intent* is important, because he/she must seek to disseminate information to the public; (3) the claimant’s *activities* are important, too, because he/she must be engaged in investigative reporting; and (4) the *content* disseminated must be news.<sup>58</sup> The third and fourth principles raise additional questions: What is investigative reporting, and what is news? No post-*Branzburg* court has answered these questions fully, but relevant cases adopt the view that investigative reporting involves people who conduct interviews, analyze

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<sup>52</sup> 811 F.2d 136, 144 (2d Cir. 1987).

<sup>53</sup> *Id.* at 142.

<sup>54</sup> 5 F.3d 1289, 1293 (9th Cir. 1993).

<sup>55</sup> *Id.* (emphasis added).

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

<sup>57</sup> *Id.*

<sup>58</sup> Calvert, *supra* note 49, at 430–31 (emphasis added).

information, and make recommendations; and news involves the corresponding use of quotes, analysis, and recommendations.<sup>59</sup>

*B. Scholarly Literature on State Shield Privileges*

This review focuses on recent scholarly works on state statutory, constitutional, and common-law reporter's privilege protections. To begin, some commentators have focused on the value or quality of speech to determine if it should be protected. Media law professors Jason Martin and Anthony Fargo, along with media lawyer Mark Caramanica, expressed concern in 2011 over news organizations that use state shield laws to protect anonymous commenters' speech at the expense of potentially defamed or injured plaintiffs.<sup>60</sup> The authors urged news organizations to exercise restraint when defending anonymous commenters who post on their websites,<sup>61</sup> advising the organizations to assess the value of commenters' speech and adjust their defenses accordingly.<sup>62</sup> The authors noted that states could alleviate plaintiffs' concerns by amending their shield laws to narrow the scope of their protections, though it is rare for states to do so.<sup>63</sup> More commonly, states amend their shields to provide *more* protections; Maryland's statute, which now explicitly includes college journalists, is a prime example.<sup>64</sup>

Opinions vary on whether reporter's privileges should be expansively or narrowly drafted—and whether they should be recognized at all. Brad A. Greenberg, a visiting fellow at Yale Law School,<sup>65</sup> warned that support for a federal shield law could ignore

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<sup>59</sup> Jonathan Peters & Edson C. Tandoc, Jr., "People Who Aren't Really Reporters at All, Who Have No Professional Qualifications": *Defining a Journalist and Deciding Who May Claim the Privileges*, 2013 N.Y.U.J. LEGIS. & PUB. POL'Y QUORUM 34, 49.

<sup>60</sup> See Jason A. Martin, Mark R. Caramanica & Anthony L. Fargo, *Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online*, 16 COMM. L. & POL'Y 89 (2011).

<sup>61</sup> *Id.* at 125.

<sup>62</sup> *Id.* at 123–24 ("[C]ourts in anonymous comment cases have already differentiated between 'higher value' and 'lower value' speech, mostly in the context of anonymity being used to conceal copyright violators, persons making threats, or persons engaged in commercial speech.").

<sup>63</sup> *Id.* at 119–20.

<sup>64</sup> *Id.* at 119; see *infra* Section II.A.

<sup>65</sup> Brad Greenberg, YALE LAW SCHOOL, <https://law.yale.edu/brad-greenberg> [https://perma.cc/AL8T-VYHP] (last visited Apr. 26, 2017).

greater threats to the independent judiciary.<sup>66</sup> He pointed out that shield laws are not a panacea: “Press advocates should not simply see some shield as superior to no shield. If a shield law is to ensure the free flow of information to the public, it must account for the costs and benefits of what is covered and what is not.”<sup>67</sup>

Other commentators have focused on model shield laws, with one calling *Branzburg* “a model of muddle”<sup>68</sup> and proposing a state statute that represents a sort of blended approach: absolute protection for sources and qualified protection for information, subject to a test not unlike the one outlined in Justice Stewart’s dissent.<sup>69</sup> That commentator also used student-friendly language to define journalists<sup>70</sup>—an issue this Article discusses later.<sup>71</sup>

Another commentator asserted that bloggers should have their own shield laws based on the theory that bloggers work within a horizontal (peer-to-peer) editorial scheme, while full-time professional journalists work within a vertical (editor-to-reporter) scheme.<sup>72</sup> “Courts might best promote the free flow of informa-

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<sup>66</sup> Brad A. Greenberg, *The Federal Media Shield Law Folly*, 91 WASH. U. L. REV. 437 (2013).

<sup>67</sup> *Id.* at 451. Greenberg added that it might be more advantageous to journalists to limit the third-party doctrine, which arose in the context of telephony and is agnostic as to the content: “This [doctrine] poses a problem for the free flow of information because sources have no guarantee that a reporter can keep their identity secret. In fact, a reporter attributing leaked information to an anonymous source invites government investigators to execute a search warrant on that report’s phone logs.” *Id.* at 449.

<sup>68</sup> Joshua A. Faucette, Note, *Your Secret’s Safe with Me . . . Or So You Think: How the States Have Cashed in on Branzburg’s “Blank Check,”* 44 VAL. U. L. REV. 183, 197 (2009) (“Overall, *Branzburg* and its ‘blank check’ to the states have been nothing more than a model of muddle because the decision failed to give the states any guidance as to what type of privilege a reporter’s shield law should grant to newsgatherers.”).

<sup>69</sup> However, Faucette’s proposal suggested a lower standard for Justice Stewart’s third prong—the need for information should be “reasonable,” rather than “compelling and overriding.” *Id.* at 232.

<sup>70</sup> *Id.* at 230 (“Any person associated, employed, or regularly engaged, connected or affiliated for personal, pecuniary, or financial gain with a newspaper or media organization that publishes or broadcasts at regular intervals or has a general circulation shall fall under the protection of this Act.”).

<sup>71</sup> See *infra* Part II.

<sup>72</sup> Benjamin J. Wischnowski, Note, *Bloggers with Shields: Reconciling the Blogosphere’s Intrinsic Editorial Process with Traditional Concepts of Media Accountability*, 97 IOWA L. REV. 327, 330–31 (2011).

tion,” he argued, “by distinguishing the different forms of investigative journalism as a definitional matter and judging them accordingly.”<sup>73</sup> He warned that ignoring the technical nuances between bloggers and full-time professional journalists would create the risk of judicial overprotection for bloggers by granting all-encompassing reporter protections to bloggers who perform only informational, as opposed to investigative, functions.<sup>74</sup>

Several commentators have suggested drafting narrower shield statutes in the hope of allaying legislative concerns. One stressed, for example, that a federal shield bill would not pass if it defined journalists broadly, pointing out that earlier versions failed because of politicians’ fears of the difficulty of defining a journalist.<sup>75</sup> He argued: “[T]he traditional press is most in need of statutory protections, and it would be unwise to burden the bill with provisions that protect persons beyond this group.”<sup>76</sup> He added that “clear lines must separate journalists from amateur writers,”<sup>77</sup> a philosophy that would exclude bloggers, non-traditional reporters, and student journalists.

To a significant degree, that kind of narrowness is already a reality. After analyzing various state shield statutes, media law professors Erik Ugland and Jennifer Henderson concluded that the statutes and their judicial interpretations “reflect[] . . . an expert conception of the press.”<sup>78</sup> It is evident in statutory and judicial references to money and employment, meaning the claimant must demonstrate that he or she is employed as a journalist or earns

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<sup>73</sup> *Id.* at 341–42.

<sup>74</sup> *Id.* at 343; see also Jill Laptosky, *Protecting the Cloak and Dagger with an Illusory Shield: How the Proposed Free Flow of Information Act Falls Short*, 62 FED. COMM. L. J. 402, 434 (2010) (suggesting that the Free Flow of Information Act should provide for the balancing of competing interests, such as protecting the free flow of information versus compelling disclosure in a court setting).

<sup>75</sup> Scott Neinas, Comment, *A Skinny Shield Is Better: Why Congress Should Propose a Federal Reporters’ Shield Statute That Narrowly Defines Journalists*, 40 U. TOL. L. REV. 225, 238 (2008).

<sup>76</sup> *Id.* at 226.

<sup>77</sup> *Id.* at 238.

<sup>78</sup> Erik Ugland & Jennifer Henderson, *Who Is a Journalist and Why Does It Matter? Disentangling the Legal and Ethical Arguments*, 22 J. MASS MEDIA ETHICS 241, 248 (2007).

money doing journalism.<sup>79</sup> Meanwhile, media law professor Jonathan Peters (one of the authors of this Article) and Edson Tandoc, a media scholar in Singapore, found that a major part of being a journalist is a social role: serving the public welfare by reporting on issues and events central to society's well-being in matters of health, safety, economics, and politics.<sup>80</sup> They wrote:

From contributors to CNN iReport . . . to reporters at the *New York Times*, all are capable of gathering, processing, and disseminating news and information to serve the public interest. Some do it better than others, some have more resources than others, and something is gained when reporting is done by stable organizations with money, logistics, and legal services—but all are capable.<sup>81</sup>

For these reasons, they said “an elitist conception of a journalist” that focuses on income or employment would offend the spirit of the First Amendment, “which protects both the institutional press and the lonely pamphleteer.”<sup>82</sup> But Martin and Fargo, noted above, call for a narrow definition, arguing:

Whether it is better, for bloggers and other non-traditional journalists, that a statute is vague or specific in defining who is covered by the law is not as clear as one would think. While it would seem logical to assume that specificity is a commendable trait in a statute, that may not always be the case with press shield laws . . . . [B]ecause the journalist's privilege, or any other privilege for that matter, limits the testimony that might be obtained in a court of law or similar proceedings, the privilege should be narrowly interpreted. Statutes that specify which media or persons may invoke the privilege may in-

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<sup>79</sup> *Id.* at 248–51.

<sup>80</sup> Peters & Tandoc, *supra* note 59, at 61.

<sup>81</sup> *Id.* at 61–62.

<sup>82</sup> *Id.* at 61.

advertently deny the privilege to persons or media not named in the law.<sup>83</sup>

As courts consider the privilege's purpose and scope, the issue of definition is at the forefront. The following sections of this Article explore an increasingly important component of the privilege: whether and how state reporter's privilege protections cover student journalists, concentrating on statutory, constitutional, and common-law sources.

## II. ARE STUDENT JOURNALISTS COVERED?

Currently, forty states and the District of Columbia recognize a reporter's privilege either in statutory form or in a functionally equivalent rule of evidence adopted by the state supreme court.<sup>84</sup> Nine of the other ten states have recognized the privilege through their common law or the state or federal constitution,<sup>85</sup> leaving

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<sup>83</sup> Jason A. Martin & Anthony L. Fargo, *Rebooting Shield Laws: Updating Journalist's Privilege to Reflect the Realities of Digital Newsgathering*, 24 U. FLA. J. L. & PUB. POL'Y 47, 65-66 (2013).

<sup>84</sup> ALA. CODE § 12-21-142 (2016); ALASKA STAT. §§ 09.25.300-09.25.390 (2016); ARIZ. REV. STAT. ANN. § 12-2237 (2016); ARK. CODE ANN. § 16-85-510 (2016); CAL. EVID. CODE § 1070 (West 2016); COLO. REV. STAT. § 13-90-119 (2016); CONN. GEN. STAT. § 52-146t (2015); DEL. CODE ANN. tit. 10, §§ 4320-4326 (2016); D.C. CODE §§ 16-4701 to 16-4704 (2016); FLA. STAT. § 90.5015 (2016); GA. CODE ANN. § 24-5-508 (2016); 735 ILL. COMP. STAT. §§ 5/8-901 to 5/8-909 (2016); IND. CODE §§ 34-46-4-1 to 34-46-4-2 (2016); KAN. STAT. ANN. §§ 60-480 to 60-485 (2016); KY. REV. STAT. ANN. § 421.100 (West 2016); LA. STAT. ANN. §§ 45:1451-45:1459 (2016); ME. REV. tit. 16, § 61 (2016); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (LexisNexis 2016); MICH. COMP. LAWS § 767.5a (2016); MINN. STAT. §§ 595.021-595.025 (2016); MONT. CODE ANN. §§ 26-1-901 to 26-1-903 (2015); NEB. REV. STAT. §§ 20-144 to 20-147 (2016); NEV. REV. STAT. § 49.275 (2015); N.J. STAT. ANN. §§ 2A:84A-21 to 2A:84A-21.13 (West 2016); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2016); N.C. GEN. STAT. § 8-53.11 (2016); N.D. CENT. CODE § 31-01-06.2 (2016); N.M. R. EVID. 11-514(B); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (LexisNexis 2016); OKLA. STAT. tit. 12, § 2506 (2016); OR. REV. STAT. §§ 44.510-44.540 (2015); 42 PA. CONS. STAT. § 5942 (2016); 9 R.I. GEN. LAWS §§ 9-19.1-1 to 9-19.1-3 (2016); S.C. CODE ANN § 19-11-100 (2016); TENN. CODE ANN. § 24-1-208 (2016); TEX. CIV. PRAC. & REM. CODE ANN. §§ 22.021-22.027 (West 2015); TEX. CODE CRIM. PROC. ANN. art. 38.11 (West 2015); UTAH R. EVID. 509(a); WASH. REV. CODE § 5.68.010 (2016); W. VA. CODE § 57-3-10 (2016); WIS. STAT. § 885.14 (2016).

<sup>85</sup> *In re Wright*, 700 P.2d 40, 41 (Idaho 1985); *Waterloo/Cedar Falls Courier v. Hawkeye Cmty. Coll.*, 646 N.W.2d 97, 101-03 (Iowa 2002); *Sinnott v. Bos. Ret. Bd.*, 524 N.E.2d 100, 586-87 (Mass. 1988); *State ex. rel. Classic III Inc. v. Ely*, 954 S.W.2d 650,

Wyoming as the lone state without any kind of reporter's privilege.<sup>86</sup> As noted above, the privilege's scope varies from one state to the next, as does the definition of a journalist.<sup>87</sup> This Part reviews relevant statutes, cases, and the common law, and concludes that the privilege usually does not extend to student journalists—either because students do not qualify for the protections, or the qualifying criteria are so unclear that student journalists could not reasonably expect to satisfy them.

#### *A. Statutes and Cases Interpreting Statutes*

To determine whether state shield statutes and rules protect student journalists, the authors grouped the statutes and rules into ten categories, based on the scope of their coverage and how they define a journalist. The categories range from *student journalists are explicitly covered*, to *covered person must be a professional journalist*. Within each category, the statutes and rules are arranged chronologically by the year each one was enacted. The authors interpreted the statutes and rules using a textualist approach, which “posits that once [a court] has ascertained a statute’s plain meaning, consideration of legislative history becomes irrelevant.”<sup>88</sup>

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655–56 (Mo. Ct. App. 1997); *State v. Siel*, 444 A.2d 499, 502–03 (N.H. 1982); *Hopewell v. Midcontinent Broad. Corp.*, 538 N.W.2d 780, 782 (S.D. 1995); *State v. St. Peter*, 315 A.2d 254, 256 (Vt. 1974); *Brown v. Commonwealth*, 204 S.E.2d 429, 431 (Va. 1974); *Shield Laws*, 11 STUDENT PRESS L. CTR., no. 3, 1990, at 28, 29 (citing two court decisions in Mississippi that recognized a reporter’s qualified privilege).

<sup>86</sup> *Reporter’s Privilege Guide: Rhode Island – Wyoming*, STUDENT PRESS L. CTR. (Dec. 5, 2014, 5:57 PM), <http://www.splc.org/article/2014/12/reporters-privilege-guide-4> [<https://perma.cc/S2GC-US9U>].

<sup>87</sup> *Id.*

<sup>88</sup> William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) (exploring the rise of textualism through the ascension of Justice Scalia to the Supreme Court). As Professor Eskridge commented, there is an “analytic condundrum” at the heart of any court’s statutory interpretation:

The statute’s text is the most important consideration in statutory interpretation, and a clear text ought to be given effect. Yet the meaning of a text critically depends upon its surrounding context. Sometimes that context will suggest a meaning at war with the apparent contextual meaning suggested by the statute’s language. How should the judge proceed? Is contextual evidence even admissible in such cases? How can it be excluded?

*Id.* at 621.

The late Justice Antonin Scalia was perhaps the Supreme Court's most ardent defender of the textualist approach.<sup>89</sup> In his view, if a statute's meaning was clear, it would be a derogation of the court's duty to consult legislative history or other texts to interpret the statute.<sup>90</sup> In that sense, Scalia's textualism was part and parcel of the balance of powers: Congress should not dictate judicial review with directive legislative history, and courts should not impose un-enacted but preferred policy outcomes contained in language from legislative history with the intent or effect of undermining legislative will.<sup>91</sup>

Judge Frank Easterbrook of the Seventh Circuit, in contrast, attempted to clarify his own philosophy on statutory interpretation in an article in which he quoted another circuit judge, who stated: "The enemy is not legislative records—it is bad legislative records."<sup>92</sup> Although he admitted that he is a "notorious opponent of legislative history,"<sup>93</sup> Judge Easterbrook rejected the "plain meaning" notion of statutory interpretation, arguing that "[i]n interesting cases, meaning is not 'plain'; it must be imputed; and the choice among meanings must have a footing more solid than a dictionary."<sup>94</sup> So, the traditional textual approach that relies on outside sources, such as dictionaries, is not the mode of interpretation that Judge Easterbrook would embrace.

Meanwhile, Justice Samuel Alito follows a modified textualist approach that allows for discussions of context: The text is supreme, but legislative history can be consulted to establish the con-

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<sup>89</sup> *Id.* at 623.

<sup>90</sup> *Id.* ("Although it is true that the Court in recent times has expressed approval of this doctrine [that legislative history can sometimes trump plain meaning], that is to my mind an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity." (quoting *Immigration and Naturalization Servs. v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring))).

<sup>91</sup> *Id.* at 654.

<sup>92</sup> Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 61, 61–62 (1994) (quoting Abner J. Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50 OHIO ST. L.J. 979, 982 (1989)).

<sup>93</sup> *Id.* at 62.

<sup>94</sup> *Id.* at 67.

text in which the text should be read.<sup>95</sup> One commentator, comparing the textualist approaches of the justices on the bench, described Justice Scalia’s approach as “ambiguity-avoiding” and Justice Alito’s approach as “ambiguity-seeking,” adding that the latter would consult legislative history if it would aid him in “seeing all possible interpretations and choosing the correct one.”<sup>96</sup> On the other hand, Justice Scalia creatively interpreted the rules of grammar and statutory construction to eliminate the need to consult legislative history.<sup>97</sup> Thus, with textualism on the rise,<sup>98</sup> this Article follows Justice Scalia’s approach—hewing closely to the text and using rules of grammar and construction to illuminate it—to determine whether, and how, the shield statutes cover student journalists.

### 1. Student Journalists Are Explicitly Covered

Student journalists are explicitly covered in two state statutes: Maryland and West Virginia.<sup>99</sup> The Maryland shield protects “any person who is, or has been . . . [e]nrolled as a student in an institution of postsecondary education and engaged in any news gathering or news disseminating capacity recognized by the institution as a scholastic activity.”<sup>100</sup> This statute makes two important distinctions. First, it covers students only at postsecondary institutions, excluding high school and middle school students.<sup>101</sup> Second, the statute appears to distinguish student journalists, who often are affiliated with an independent student media outlet, and journalism students, who often write and report for a class.<sup>102</sup> Counterintui-

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<sup>95</sup> Elliott M. Davis, Note, *The Newer Textualism: Justice Alito’s Statutory Interpretation*, 30 HARV. J. L. & PUB. POL’Y 983, 984 (2007).

<sup>96</sup> *Id.* at 998.

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

<sup>98</sup> See, e.g., John Calhoun, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L. J. 484, 507 (2014) (suggesting that, in an analysis of courts’ increasing uses starting in the 1980s of dictionary definitions in their opinions, “[o]ne possible explanation for the rise in Supreme Court dictionary usage is that both originalism and textualism gained major intellectual currency around the same time”).

<sup>99</sup> MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (LexisNexis 2016); W. VA. CODE § 57-3-10 (2016).

<sup>100</sup> § 9-112(b)(3).

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

tively, a first-year journalism student who is subpoenaed in connection with a story posted on a class blog is likely to have an easier time claiming the privilege than a student journalist writing for an independent campus newspaper with a much larger circulation.

In comparison, the West Virginia shield protects anyone who “regularly” produces “news . . . that concerns matters of public interest for dissemination to the public for a substantial portion of the person’s livelihood.”<sup>103</sup> Protection extends to “a student reporter at an accredited educational institution who meets all of the requirements, except that his or her reporting may not provide a portion of his or her livelihood.”<sup>104</sup> This raises several questions. For example, what about an “educational institution” that is not “accredited”? Presumably, its students are not covered. But accreditation exists at different levels: universities are accredited, schools are accredited, and so on.<sup>105</sup> Therefore, it is unclear whether a student journalist would be covered if, say, an unaccredited communications program housed the news organization where the student worked, but the university as a whole was accredited.

Furthermore, the West Virginia statute is unclear on its protection for students whose reporting *does* “provide a portion of his or her livelihood.”<sup>106</sup> Some are paid for their work, and some receive

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<sup>103</sup> § 57-3-10(a).

<sup>104</sup> *Id.*

<sup>105</sup> See generally *Understanding Accreditation of U.S. Colleges and Universities*, PETERSON’S (Oct. 7, 2015), <https://www.petersons.com/college-search/us-colleges-universities-accreditation.aspx#/sweeps-modal> [https://perma.cc/W974-M8MQ] (“Accreditation is a form of endorsement that colleges and universities use to let potential students know that their program offers a valid education that is officially recognized by the U.S. Department of Education. Earning an accreditation in the United States is a voluntary, nongovernmental process. Schools request to be evaluated and/or have their programs evaluated by an independent accrediting agency. The agency sets its own standards that the school must meet in order to earn their accreditation, and since accrediting agencies vary in their quality standards, some are considered more prestigious than others. Accrediting agencies are private educational associations. The standards they set and which types of colleges and universities they accredit are entirely up to them, thus there are agencies that are specific to certain fields of study, such as engineering or medical schools . . . . Some schools can carry multiple accreditations which cover some or all of their programs.”).

<sup>106</sup> See § 57-3-10.

scholarships for it.<sup>107</sup> The key is whether the word “may,” which has multiple meanings, is read to *express possibility* or to *deny permission*. If it is read to *express possibility* (“except that [it is possible for] his or her reporting . . . not [to] provide a portion of his or her livelihood”), the privilege would apply to money-earning student journalists. If it is read to *deny permission* (“except that his or her reporting [must] not provide a portion of his or her livelihood”), the privilege would not apply to money-earning student journalists unless they qualified as regular journalists under the other statutory provision—a tall order because of the “substantial” reference in that provision. At this time, there are no West Virginia cases addressing these issues.

## 2. Noncommercial Educational Broadcasters Covered Explicitly

One of Ohio’s two shield laws protects from compelled disclosure any “person engaged in the work of, or connected with, or employed by any noncommercial educational or commercial radio broadcasting station, or any noncommercial educational or commercial television broadcasting station” for the purpose of producing news.<sup>108</sup> That is broad enough to apply to student journalists. And while that statute conspicuously omits newspapers,<sup>109</sup> a separate statute provides similar protections to individuals working with or for a newspaper.<sup>110</sup> However, Ohio law does not clearly include school-affiliated papers in that statute, creating an open question of whether they—and the people who work for them—are protected under the shield.<sup>111</sup> No case law addresses these issues.

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<sup>107</sup> See, e.g., *Scholarships*, NEW ENG. NEWSPAPER & PRESS ASS’N., <http://www.nenpa.com/story/scholarships> [<https://perma.cc/EBE3-SR4G>] (last visited Feb. 7, 2017); *Scholarships*, RADIO TELEVISION DIGITAL NEWS FOUND., <http://rtdna.org/content/scholarships> [<https://perma.cc/3BF2-LZZN>] (last visited Feb. 7, 2017) (requiring work samples for eligibility for the scholarship).

<sup>108</sup> OHIO REV. CODE ANN. § 2739.04 (LexisNexis 2016).

<sup>109</sup> See *id.*

<sup>110</sup> OHIO REV. CODE ANN. § 2739.12 (LexisNexis 2016).

<sup>111</sup> See *id.* (“No person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose . . .”).

### 3. Covered Person/Entity Loosely Defined

Four statutes cover a type of person and/or entity but do not provide clear definitions of them, leaving open the possibility for a student journalist to claim protection.<sup>112</sup> First, the Alaska shield refers to a “reporter,”<sup>113</sup> as does the Illinois statute.<sup>114</sup> Meanwhile, the Maine shield refers to a “journalist,”<sup>115</sup> and the Washington law covers “the news media.”<sup>116</sup> These statutes—with the exception of Maine’s, which offers no definition of a journalist<sup>117</sup>—define their terms in relation to conducting business as a journalist, or being employed as one. Schools may treat student journalists as volunteers or enrolled students, rather than employees, so it is possible these statutes would not cover students. The outcome depends

<sup>112</sup> See ALASKA STAT. §§ 09.25.300–09.25.390 (2016); 735 ILL. COMP. STAT. §§ 5/8-901 to 5/8-909 (2016); ME. REV. tit. 16, § 61 (2016); WASH. REV. CODE § 5.68.010 (2016).

<sup>113</sup> ALASKA STAT. §§ 09.25.300–09.25.390. A “reporter” is defined as “a person regularly engaged in the business of collecting or writing news for publication, or presentation to the public, through a news organization; it includes persons who were reporters at the time of the communication, though not at the time of the claim of privilege.” § 09.25.390(4).

<sup>114</sup> 735 ILL. COMP. STAT. § 5/8-901. A “reporter” is defined as “any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis; and includes any person who was a reporter at the time the information sought was procured or obtained.” *Id.* § 5/8-902(a).

<sup>115</sup> ME. REV. STAT. tit. 16, § 61.1.

<sup>116</sup> WASH. REV. CODE § 5.68.010(1). “News media” is defined as:

(a) Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any entity 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;

(b) Any person who is or has been an employee, agent, or independent contractor of any entity listed in (a) of this subsection, who is or has been engaged in bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity; or

(c) Any parent, subsidiary, or affiliate of the entities listed in (a) or (b) of this subsection to the extent that the subpoena or other compulsory process seeks news or information described in subsection (1) of this section.

§ 5.68.010(5).

<sup>117</sup> See ME. REV. STAT. tit. 16, § 61.

on how the student media define their “business,” and manage their student “employees.”

#### 4. Person Is Engaged with or Connected to News Media, But Is Not Necessarily Employed

This is the largest category of statutes, containing ten that define a covered person as someone engaged with, or connected to, the news media.<sup>118</sup> Student journalists may be protected under these statutes. For example, Alabama’s applies to those “engaged in, connected with or employed” by a news organization,<sup>119</sup> while California’s applies to a “publisher, editor, reporter, or other person connected with or employed upon” a news outlet.<sup>120</sup> Meanwhile, the Arkansas law covers “any editor, reporter, or other writer for any newspaper, periodical, radio station, television station, or Internet news source.”<sup>121</sup> The Kentucky shield, in contrast, protects any person who has obtained information for the purpose of publishing it “in a newspaper or [broadcasting it] by a radio or television station by which he is engaged or employed, or with which he is connected.”<sup>122</sup> Finally, Arizona’s law covers any person “engaged in newspaper, radio, television or reportorial work, or connected with or employed by” a news outlet.<sup>123</sup> The remaining statutes in this group—those of Pennsylvania,<sup>124</sup> Montana,<sup>125</sup> Michigan,<sup>126</sup> Tennessee,<sup>127</sup> and North Dakota<sup>128</sup>—all follow a similar pattern.

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<sup>118</sup> ALA. CODE § 12-21-142 (2016); ARIZ. REV. STAT. ANN. § 12-2237 (2016); ARK. CODE ANN. § 16-85-510 (2016); CAL. EVID. CODE § 1070 (West 2016); KY. REV. STAT. ANN. § 421.100 (West 2016); MICH. COMP. LAWS § 767.5a (2016); MONT. CODE ANN. §§ 26-1-901 to 26-1-903 (2015); N.D. CENT. CODE § 31-01-06.2 (2016); 42 PA. CONS. STAT. § 5942 (2016); TENN. CODE ANN. § 24-1-208 (2016).

<sup>119</sup> ALA. CODE. § 12-21-142.

<sup>120</sup> CAL. EVID. CODE § 1070; *see also* CAL CONST. art. 1, § 2 (b) (providing the same language as the statute).

<sup>121</sup> ARK. CODE ANN. § 16-85-510.

<sup>122</sup> KY. REV. STAT. ANN. § 421.100.

<sup>123</sup> ARIZ. REV. STAT. ANN. § 12-2237.

<sup>124</sup> 42 PA. CONS. STAT. § 5942(a) (2016).

<sup>125</sup> MONT. CODE ANN. § 26-1-902(1) (2015).

<sup>126</sup> MICH. COMP. LAWS § 767.5a(1) (2016).

<sup>127</sup> TENN. CODE ANN. § 24-1-208(a) (2016).

<sup>128</sup> N.D. CENT. CODE § 31-01-06.2 (2016).

#### 5. Covered Person Is Engaged in Producing News for the Public

This category includes seven shields that may cover student journalists,<sup>129</sup> although the case is not an easy one because of the inclusion of “the public” as the audience for a journalist’s work. For example, the Minnesota shield covers any person “directly engaged” in the gathering or production of “information for . . . the purpose of dissemination to the public.”<sup>130</sup> Similarly, the Nebraska shield covers “those who gather, write, or edit information for the public.”<sup>131</sup> Oregon protects any “person connected with, employed by or engaged in any medium of communication to the public.”<sup>132</sup> And the Georgia shield covers “any person, company, or other entity engaged in the gathering and dissemination of news for the public.”<sup>133</sup> Again, the remaining laws—those of South Carolina,<sup>134</sup> Wisconsin,<sup>135</sup> and Utah, which is a rule of evidence<sup>136</sup>—follow suit. The courts in these states have not interpreted “public” as it relates to student journalists, so it remains to be seen how students would fare, based on the audiences for their work.

#### 6. Covered Person Must Produce News for the General Public

These statutes go a step farther than those in the previous group by insisting that covered persons disseminate news to the *general* public.<sup>137</sup> This would be a difficult bar for some student journalists to reach. The New Jersey shield, for example, covers any “person engaged on, engaged in, connected with, or employed by news media for the purpose of” disseminating news to the

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<sup>129</sup> See GA. CODE ANN. § 24-5-508 (2016); MINN. STAT. §§ 595.021–595.025 (2016); NEB. REV. STAT. §§ 20-144 to 20-147 (2016); OR. REV. STAT. §§ 44.510–44.540 (2015); S.C. CODE ANN. § 19-11-100 (2016); WIS. STAT. § 885.14 (2016).

<sup>130</sup> MINN. STAT. § 595.023.

<sup>131</sup> NEB. REV. STAT. § 20-144.

<sup>132</sup> OR. REV. STAT. § 44.520(1).

<sup>133</sup> GA. CODE ANN. § 24-5-508.

<sup>134</sup> S.C. CODE ANN. § 19-11-100(A).

<sup>135</sup> WIS. STAT. § 885.14(a) (2016).

<sup>136</sup> UTAH R. EVID. 509(a).

<sup>137</sup> See N.J. STAT. ANN. §§ 2A:84A-21 to 2A:84A-21.13 (West 2016); N.C. GEN. STAT. § 8-53.11 (2016).

“general public.”<sup>138</sup> Although the Superior Court of New Jersey construed the law to apply to bloggers,<sup>139</sup> the court tailored its analysis to whether a blogger qualified as a journalist, rather than interpreting the term “general public.”<sup>140</sup> Similarly, the North Carolina shield protects various people connected with a “news medium,” defined as any “entity regularly engaged in the business of publication or distribution of news . . . to the general public.”<sup>141</sup> It is difficult to imagine that a student journalist producing news for a primarily high school audience would be seen as addressing the general public, but it is a closer call for student journalists producing news for a college or university campus, where in some places the campus and greater community are one and the same. With that in mind, high school journalists probably would not be covered, but some college journalists would be.

#### 7. Publication Frequency, Paying Readership, and Accreditation

These statutes require some connection to a news organization and provide strict definitions of what constitutes a legitimate (i.e., covered) organization.<sup>142</sup> Most student journalists would have trouble claiming to contribute to a news organization so defined. For example, the Indiana shield protects people “connected with” a newspaper or news periodical “issued at regular intervals and having a general circulation.”<sup>143</sup>

Likewise, the Louisiana law applies to reporters “connected with any news media,” defined as “any newspaper or other periodical issued at regular intervals and having a paid general circulation.”<sup>144</sup> Some student media, especially at the high-school level,

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<sup>138</sup> N.J. STAT. ANN. § 2A:84A-21.

<sup>139</sup> *In re* Jan. 11, 2013 Subpoena by Grand Jury of Union Cty., N.J., 75 A.3d 1260, 1271 (N.J. Super. Ct. Law Div. 2013).

<sup>140</sup> *Id.* at 1272.

<sup>141</sup> N.C. GEN. STAT. § 8-53.11(a)(3).

<sup>142</sup> See IND. CODE §§ 34-46-4-1 to 34-46-4-2 (2016); LA. STAT. ANN. §§ 45:1451-45:1459 (2016); 9 R.I. GEN. LAWS §§ 9-19.1-1 to 9-19.1-3 (2016).

<sup>143</sup> IND. CODE § 34-46-4-1(1).

<sup>144</sup> LA. STAT. ANN. § 45:1451. A Louisiana appellate court found that a weekly newspaper owner and editor qualified as a reporter, despite the owner’s claims that he “was not acting as a ‘reporter.’” *Becnel v. Lucia*, 420 So. 2d 1173, 1175 (La. Ct. App.

do not publish at regular intervals; and most student media, at all levels, do not have a paid general circulation. Student journalists working for such media would not qualify for the privilege.

The New Mexico shield, which is actually a rule of evidence, covers any “person engaged or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing, or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited, or disseminated.”<sup>145</sup> It includes exceptions for parties that can prove they need access to the withheld information.<sup>146</sup>

And, finally, Rhode Island protects any “reporter . . . or other person directly engaged in the gathering or presentation of news for any accredited” news outlet.<sup>147</sup> This, of course, raises the questions: What is an “accredited” news outlet, and does a student outlet qualify? Legally, there is no such thing as an “accredited” outlet, because that kind of scheme would constitute licensing in violation of the First Amendment.<sup>148</sup> Legislators most likely used the word here to mean “good” or “professional.”

#### 8. Covered Person Must Earn Livelihood from News Work, Not Necessarily Employed by News Organization

Texas is the lone member of this category. Its statutes are semi-professionalized, insofar as they focus on money earned from journalistic work.<sup>149</sup> The laws cover journalists who, “for a substantial

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1982). The court said it did not matter what the defendant thought he was, but rather what the court believed his status to be. *Id.*

<sup>145</sup> N.M. R. EVID. 11-514(B). It is worth noting that the New Mexico legislature passed a journalist shield statute in 1973, but the New Mexico Supreme Court struck it down as applied to courts and judicial proceedings, finding it to be in violation of the New Mexico Constitution. N.M. STAT. ANN. § 38-6-7(A), *invalidated by* Ammerman v. Hubbard Broadcasting, Inc., 551 P.2d 1354 (N.M. 1976).

<sup>146</sup> N.M. R. EVID. 11-514(C). This makes the privilege more like a limited work-product protection, rather than an absolute privilege.

<sup>147</sup> 9 R.I. GEN. LAWS § 9-19.1-2 (2016).

<sup>148</sup> Lee, *supra* note 46, at 679 (“Lawyers, physicians, and psychotherapists are licensed. This means that no one without a license may lawfully offer services reserved for those professions. A hallmark of American free expression, however, is that every citizen may publish without seeking permission from the government.”).

<sup>149</sup> See TEX. CIV. PRAC. & REM. CODE ANN. §§ 22.021–22.027 (West 2015); TEX. CODE CRIM. PROC. ANN. art. 38.11 (West 2015).

portion of [their] livelihood or for substantial financial gain,” gather and/or publish news and/or information.<sup>150</sup> Presumably, the “gain” required must be more than potential gain in the future (e.g., gainful employment as a result of the skills developed by working or interning with the news organization). A student could argue that she earns a modest livelihood from her work as a journalist. But, overall, it is unclear how a court would evaluate a student’s financial situation, especially if the student was still a dependent, either legally or practically.<sup>151</sup> No court has addressed these issues.

### 9. Covered Person Must Be Employed by the News Media

This category is interesting because of its focus on actual employment, not just a connection with a news organization.<sup>152</sup> Nevada’s shield covers any “editorial employee of any newspaper, periodical or press association or employee of any radio or television station.”<sup>153</sup> Oklahoma’s law protects “any individual employed by” a “news service” that gathers and publishes news.<sup>154</sup> Similarly, the District of Columbia shield covers anyone “employed by the news media in a news gathering or news disseminating capacity.”<sup>155</sup> Finally, the Connecticut statute protects “any person who is or has been an employee, agent or independent contractor of any” news outlet.<sup>156</sup> The remaining shield laws in this group—those of Delaware,<sup>157</sup> Colorado,<sup>158</sup> and Kansas<sup>159</sup>—follow a similar pattern.

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<sup>150</sup> See § 22.021(2); art. 38.11 § 1(2).

<sup>151</sup> Would the gain be relative to what she earns herself, or what she earns plus what she receives from her parents?

<sup>152</sup> See COLO. REV. STAT. § 13-90-119 (2016); CONN. GEN. STAT. § 52-146t (2015); DEL. CODE ANN. tit. 10, §§ 4320-4326 (2016); D.C. CODE §§ 16-4701 to 16-4704 (2016); KAN. STAT. ANN. §§ 60-480 to 60-485 (2016); NEV. REV. STAT. § 49.275 (2015); OKLA. STAT. tit. 12, § 2506 (2016).

<sup>153</sup> NEV. REV. STAT. § 49.275.

<sup>154</sup> OKLA. STAT. tit. 12 § 2506(A)(7).

<sup>155</sup> D.C. CODE § 16-4702.

<sup>156</sup> CONN. GEN. STAT. § 52-146t(a)(2).

<sup>157</sup> DEL. CODE ANN. tit. 10 § 4320(4).

<sup>158</sup> COLO. REV. STAT. § 13-90-119(1) (2016).

<sup>159</sup> KAN. STAT. ANN. § 60-480(a) (2016).

These shields are notable because employment can mean many things, including part-time or otherwise irregular, non-standard employment relationships. For example, consider a student journalist who is under contract as an employee to produce one story per year for a student newspaper in exchange for \$10. That person would satisfy the requirements of many statutes in this category. However, if that same student produced ten stories per week for a student newspaper as part of an academic course, she may not satisfy the requirements.

#### 10. Covered Person Must Be a Professional Journalist and Meet Other Requirements

The final category includes two statutes that require journalists to be “professional” and to satisfy other criteria.<sup>160</sup> The New York shield covers “a professional journalist” who, “for gain or livelihood, is engaged in” gathering and publishing news for an organization that “has as one of its regular functions” the “dissemination [of news] to the public; [and] such person [must do so] either as a regular employee or as one otherwise professionally affiliated for gain or livelihood.”<sup>161</sup> Similarly, the Florida shield applies to a “professional journalist,” defined as a “person regularly engaged in” both gathering and publishing news, “for gain or livelihood, who obtained the information sought while working as a salaried employee of, or independent contractor for,” a news organization.<sup>162</sup> Courts may find the key word in “student journalist” to be *student*, and thus distinguish students and professionals, leaving the former without protections.<sup>163</sup>

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<sup>160</sup> See FLA. STAT. § 90.5015 (2016); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2016).

<sup>161</sup> N.Y. CIV. RIGHTS LAW § 79-h (a)(6).

<sup>162</sup> FLA. STAT. § 90.5015(1)(a).

<sup>163</sup> See, e.g., *Blum v. Schlegel*, 150 F.R.D. 42, 44 (W.D.N.Y. 1993) (noting that if New York’s shield law governed the question of whether a law student reporter qualified for the privilege, the plaintiff’s argument that the privilege does not apply to the student may be correct).

*B. Constitutional and Common-Law Protections*

## 1. State Level

In all but one of the states lacking a shield statute—and even in a few states that have one—it is possible to claim a reporter’s privilege through the common law or the federal or state constitutions. For example, the Supreme Court of Idaho has recognized a qualified privilege based on the First Amendment and the state constitution, allowing a journalist to refuse to disclose confidential sources.<sup>164</sup> However, no Idaho court has addressed whether the privilege covers student journalists, and the state does not have a statutory shield.

Similarly, the Supreme Court of Iowa has recognized a qualified privilege under both the First Amendment and the state constitution that “protects confidential sources, unpublished information, and reporter’s notes.”<sup>165</sup> The privilege covers anyone who “falls within the class of persons qualifying for the privilege,”<sup>166</sup> as long as the information sought was obtained during the “newsgathering process.”<sup>167</sup> Courts in the state, which lacks a statutory shield, have not defined the terms “class of persons” and “news-gathering process,” though one trial court did extend the privilege to a freelance journalist.<sup>168</sup> It is unclear how student journalists would be treated.

Massachusetts also lacks a statutory shield, and so far its courts have declined to recognize one through the state constitution.<sup>169</sup> However, some courts have applied a First Amendment balancing

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<sup>164</sup> *In re Wright*, 700 P.2d 40, 41 (Idaho 1985) (“We hold there is [a newsperson’s qualified privilege to refuse to disclose confidential sources] under the First Amendment to the United States Constitution and Art. I, § 9 of the Idaho Constitution.”).

<sup>165</sup> *Waterloo/Cedar Falls Courier v. Hawkeye Cmty. Coll.*, 646 N.W.2d 97, 101–03 (Iowa 2002) (citing IOWA CONST. art. I, § 7; *Lamberto v. Bown*, 326 N.W.2d 305, 310 (Iowa 1982); *Winegard v. Oxberger*, 258 N.W.2d 847, 852 (Iowa 1977), *cert. denied*, 436 U.S. 905 (1978)).

<sup>166</sup> *Id.* at 101 (citing *Lamberto*, 326 N.W.2d at 309).

<sup>167</sup> *Id.* (citing *Bell v. City of Des Moines*, 412 N.W.2d 585, 588 (Iowa 1987)).

<sup>168</sup> *Stanfield v. Polk Cty.*, No. CE 34-20125, 1990 BL 233, at \*6 (Iowa Dist. Ct. Sept. 13, 1990).

<sup>169</sup> *See Commonwealth v. Corsetti*, 438 N.E.2d 805, 808 (Mass. 1982); *Ayash v. Dana-Farber Cancer Inst.*, 706 N.E.2d 316, 319 (Mass. App. Ct. 1999).

test to that end,<sup>170</sup> and the state's highest court once used a qualified common-law privilege to protect confidential sources in a civil lawsuit.<sup>171</sup> The courts have not addressed whether those privileges apply to student journalists, though, and they have not fully addressed who qualifies to claim them.

Meanwhile, Mississippi, which lacks a shield statute, has recognized a privilege against compelled disclosure of confidential information and sources, based on the First Amendment and the state constitution.<sup>172</sup> However, like Massachusetts, there are no reported cases involving student journalists, and Mississippi courts have not clearly articulated who qualifies to claim the privilege.

In Missouri, which does not have a statutory shield, the Court of Appeals has recognized a qualified First Amendment privilege against the compelled disclosure of confidential sources.<sup>173</sup> But, again, no cases have involved student journalists. Both Vermont<sup>174</sup> and Virginia<sup>175</sup> lack statutory shields, too, and base their privileges on the First Amendment. They have not been applied judicially to student journalists.

New Hampshire is notable because, even though it lacks a statutory shield, its highest court once affirmed a ruling that two stu-

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<sup>170</sup> *Sinnott v. Bos. Ret. Bd.*, 524 N.E.2d 100, 586–87 (Mass. 1988); *In re Promulgation of Rules Regarding Prot. of Confidential News Sources*, 479 N.E.2d 154, 158 (Mass. 1985) (“This court has also noted that the method of case-by-case adjudication involves a balancing between the public interest in every person’s evidence and the public interest in protecting the free flow of information.” (citing *Commonwealth*, 438 N.E.2d at 809)); *In re Roche*, 411 N.E.2d 466, 476–77 (Mass. 1980).

<sup>171</sup> *Sinnott*, 524 N.E.2d at 583–84, 586.

<sup>172</sup> *Shield Laws*, *supra* note 85.

<sup>173</sup> *State ex. rel. Classic III Inc. v. Ely*, 954 S.W.2d 650, 655–56 (Mo. Ct. App. 1997).

<sup>174</sup> *State v. St. Peter*, 315 A.2d 254, 256 (Vt. 1974) (“We hold that, when a newsgatherer, legitimately entitled to First Amendment protection, objects to inquiries put to him in a deposition proceeding conducted in a criminal case, on the grounds of a First Amendment privilege, he is entitled to refuse to answer unless the interrogator can demonstrate to the judicial officer appealed to that there is no other adequately available source for the information and that it is relevant and material on the issue of guilt or innocence.”).

<sup>175</sup> *Brown v. Commonwealth*, 204 S.E.2d 429, 431 (Va. 1974) (“We believe that, as a news-gathering mechanism, a newsman’s privilege of confidentiality of information and identity of his source is an important catalyst to the free flow of information guaranteed by the freedom of press clause of the First Amendment . . . [W]e think the privilege of confidentiality should yield only when the defendant’s need is essential to a fair trial.”).

dent journalists for a college newspaper could claim a qualified privilege against disclosing the identity of confidential sources in a criminal proceeding.<sup>176</sup> The court failed to note explicitly that the reporters worked for a student publication, but it based its decision on the state constitution's guarantee of freedom of the press.<sup>177</sup> It is likely, then, that at least college journalists could claim the shield.<sup>178</sup>

In contrast, South Dakota lacks a statutory shield, and there is only one instance in which a court recognized a privilege to protect confidential information in a civil case.<sup>179</sup> Adopting a qualified privilege over an absolute one, the Supreme Court of South Dakota noted that there are certain circumstances in which "disclosure may be appropriate or necessary."<sup>180</sup> Although the court adopted five factors for trial courts to consider in their determination of whether to compel disclosure,<sup>181</sup> the court made little-to-no effort in defining who qualifies for the privilege.<sup>182</sup> That is still better, however, than the situation in Wyoming, where there is neither a statutory shield<sup>183</sup> nor a reported case in which a court has recognized the privilege on any basis.

## 2. Federal Level

It is worth noting that there are federal cases involving student journalists that could enable other people similarly situated to claim a privilege in those jurisdictions, despite the lack of a federal statute. These cases could be used as persuasive authority, even in state courts. For example, in *Silkwood v. Kerr-McGee Corp.*, the Court of Appeals for the Tenth Circuit recognized a reporter's privilege for a former freelance journalist who enrolled in the University of California, Los Angeles, film department, where he investi-

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<sup>176</sup> State v. Siel, 444 A.2d 499, 502-03 (N.H. 1982).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Hopewell v. Midcontinent Broad. Corp., 538 N.W.2d 780, 782 (S.D. 1995).

<sup>180</sup> *Id.* at 781-82.

<sup>181</sup> *Id.* at 782. The court adopted a five-factor test from a case decided by the Supreme Court of California. See *id.* (citing Mitchell v. Superior Court, 690 P.2d 625, 632 (Cal. 1984)).

<sup>182</sup> *Id.*

<sup>183</sup> Reporter's Privilege Guide: Rhode Island - Wyoming, *supra* note 86.

gated the death of activist Karen Silkwood for a documentary.<sup>184</sup> The company accused of causing Silkwood's death subpoenaed the student journalist to compel him to produce his notes related to the investigation.<sup>185</sup>

After considering whether the privilege extended to someone who is not a "regular newsman," the court applied a First Amendment-based privilege, concluding that the student undertook investigative reporting for the preparation of a documentary film.<sup>186</sup> The court recognized that, though the student was not a salaried reporter, he had a legitimate interest in protecting the fruits of his labor.<sup>187</sup> The court also noted the irony of the company's argument that the student should be denied the privilege because he lacked journalistic qualifications, in the face of the great efforts the company expended to obtain his work product.<sup>188</sup>

Additionally, the District Court for the Western District of New York granted a qualified privilege to a law student writing for a law school newspaper on a volunteer basis who was subpoenaed by a former law professor challenging his termination.<sup>189</sup> In *Blum v. Schlegel*, the terminated professor sought the recording of an interview that the student had conducted with the associate dean.<sup>190</sup> Though New York has a shield law,<sup>191</sup> the court ruled that the evidence sought was relevant to federal constitutional violations alleged in the professor's complaint, and thus the privilege would be governed instead by federal common law.<sup>192</sup> Considering the plaintiff's argument that the privilege does not apply to a law student because he does not qualify as a "professional journalist," the court stated that this point is irrelevant because the federal privi-

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<sup>184</sup> *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 435-37 (10th Cir. 1977).

<sup>185</sup> *Id.* at 434.

<sup>186</sup> *Id.* at 436-37.

<sup>187</sup> *Id.* at 437.

<sup>188</sup> *Id.* at 436-37.

<sup>189</sup> *Blum v. Schlegel*, 150 F.R.D. 42, 43-44 (W.D.N.Y. 1993).

<sup>190</sup> *Id.*

<sup>191</sup> See N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2016).

<sup>192</sup> *Blum*, 150 F.R.D. at 44.

lege is broader than the state shield law.<sup>193</sup> Instead, the proper inquiry is “how the person asserting the privilege intended to use the information gathered.”<sup>194</sup> If the information was gathered for the purpose of dissemination, the court said, the privilege should be available.<sup>195</sup>

In another federal case in New York, *Persky v. Yeshiva University*, the Southern District applied a First Amendment-based privilege to a student journalist who reported on a university employee’s claim that the institution had discriminated against her on the basis of religion.<sup>196</sup> The plaintiff tried to compel the student journalist to reveal her confidential sources and notes,<sup>197</sup> but the court applied the privilege to the student based on the Second Circuit’s *von Bulow* opinion and the Western District of New York’s *Blum* opinion.<sup>198</sup> The court said the student journalist promised his sources confidentiality and gathered all of the relevant information with the intent to disseminate it.<sup>199</sup> Thus, he could claim the privilege.<sup>200</sup>

On the opposite coast, in *Jimenez v. City of Chicago*, the District Court for Western District of Washington allowed a journalism graduate student at Northwestern University<sup>201</sup> to claim the privilege.<sup>202</sup> During the trial of a boy who was convicted of murder at thirteen (and later sentenced to forty-five years in prison),<sup>203</sup> the

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<sup>193</sup> *Id.* at 44–45. The New York shield law’s definition of a professional journalist requires the person to engage in news gathering or preparation for “gain or livelihood.” § 79-h; see also *supra* Section II.A.10.

<sup>194</sup> *Blum*, 150 F.R.D. at 45.

<sup>195</sup> *Id.*

<sup>196</sup> *Persky v. Yeshiva Univ.*, No. 01-CV-5287, 2002 WL 31769704, at \*1–2 (S.D.N.Y. 2002).

<sup>197</sup> *Id.* at \*2.

<sup>198</sup> *Id.* (citing *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987); *Blum v. Schlegel*, 150 F.R.D. 42, 45 (W.D.N.Y. 1993)).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> The school is now called the Medill School of Journalism, Media, Integrated Marketing Communications. See Wendy Leopold, *Medill Expands Name*, *Nw.* (Mar. 15, 2011), <http://www.northwestern.edu/newscenter/stories/2011/03/medill-name-expansion.html> [https://perma.cc/2YSS-LWHQ].

<sup>202</sup> *Jimenez v. City of Chicago*, 733 F. Supp. 2d 1268, 1270–72 (W.D. Wash. 2010).

<sup>203</sup> *Id.* at 1270.

journalism student, Carolyn Nielsen, gathered documents related to the case and published a story about the proceeding in a journalism school magazine.<sup>204</sup> After graduation, Nielsen worked as a freelancer, and then became a journalism professor at Western Washington University.<sup>205</sup> Years later, in 2009, the boy's conviction was reversed, and he filed a lawsuit against the City of Chicago and others.<sup>206</sup> As part of the lawsuit, the plaintiff subpoenaed Nielsen's correspondence with him and a videotape of a deposition.<sup>207</sup> When Nielsen claimed a reporter's privilege, the court, citing *Shoen*, said that a First Amendment privilege was available, so long as the person claiming it gathered the materials at issue with the intent to disseminate them.<sup>208</sup> The court explicitly noted that other circuits had extended the privilege to students, ultimately concluding that Nielsen was eligible for the privilege.<sup>209</sup>

### III. LACK OF PROTECTION IS CONCERNING

Most state reporter's privileges exclude student journalists or make it difficult for such students to claim shield protections.<sup>210</sup> Only two statutes explicitly reference students,<sup>211</sup> and many shields include non-student-friendly language, such as requiring the journalistic work to be done for "substantial financial gain,"<sup>212</sup> or only covering a "professional journalist."<sup>213</sup> Other definitions are so ambiguous that it is difficult to say whether they would include student journalists. For example, would a student journalist be

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 1271 (citing *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995); *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993)).

<sup>209</sup> *Id.* at 1271-72 (citing *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Blum v. Schlegel*, 150 F.R.D. 42 (W.D.N.Y. 1993)) ("Given that other circuits have not differentiated professional journalists from students in this context, this Court finds no reason to deny her standing simply because she was a student when some of the documents were created.").

<sup>210</sup> *See supra* Section II.A.

<sup>211</sup> *See supra* Section II.A.1.

<sup>212</sup> *See supra* Section II.A.8.

<sup>213</sup> *See supra* Section II.A.10.

“engaged in” or “connected with” a news outlet if she wrote for a student paper?<sup>214</sup> Would that outlet be considered “accredited”?<sup>215</sup> And, if the newspaper published only four issues each year, would those intervals be sufficiently “regular”?<sup>216</sup>

Moreover, the case law is sparse.<sup>217</sup> Only a few jurisdictions have reported cases involving privilege claims by student journalists.<sup>218</sup> Beyond that, just a small minority of jurisdictions have reported cases addressing privilege issues at all, and those decisions generally fail to address how student journalists would fare in future cases.<sup>219</sup> In short, privilege protections for student journalists are, at best, uncertain in most states.

The lack of protection is concerning because, as noted above, student journalists play a vital role in meeting their communities’ needs for news and information.<sup>220</sup> In four states, student journalists outnumber professional journalists who report on state legislatures.<sup>221</sup> More generally, fulfilling news needs means candidly covering a range of public issues that might draw government responses—even subpoenas.<sup>222</sup> At the college level alone, campus-based news organizations—and student collaborations with professional outlets—are filling some of the gaps created by the decline of traditional state and local media.<sup>223</sup> Such organizations cover the states and towns where the schools are located.<sup>224</sup> For example,

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<sup>214</sup> See *supra* Section II.A.4.

<sup>215</sup> See *supra* Section II.A.7.

<sup>216</sup> See *supra* Section II.A.7.

<sup>217</sup> See *supra* Part II.

<sup>218</sup> See *supra* Section II.B.

<sup>219</sup> See *supra* Section II.B.

<sup>220</sup> Peters & LoMonte, *supra* note 9; see also ELECTRONIC FRONTIER FOUND. & STUDENT PRESS LAW CTR., NEW SHIELD LAWS COULD LEAVE STUDENT JOURNALISTS, BLOGGERS UNPROTECTED (Sept. 11, 2013), <https://www.eff.org/document/student-activism-shield-laws> [<https://perma.cc/WQ4J-ZBHJ>]; Anna Schiffbauer, *Under the Dome: As Professional News Outlets Vacate State Capitols Because of Budget Constraints, Student Journalists Move in to Fill the Gap*, STUDENT PRESS L. CTR. (Mar. 24, 2015, 11:02 AM), <http://www.splc.org/article/2015/03/under-the-dome> [<https://perma.cc/54KE-TC4X>].

<sup>221</sup> Schiffbauer, *supra* note 220.

<sup>222</sup> Peters & LoMonte, *supra* note 9.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

Arizona State University operates Cronkite News, where students cover public affairs in Phoenix, Arizona, Washington, D.C., and Los Angeles, California,<sup>225</sup> and Boston University runs the New England Center for Investigative Reporting, where professional journalists work with students to produce major stories.<sup>226</sup>

For years, too, there has been a growing consensus that journalism programs should transform themselves into “teaching hospitals” for gathering, producing, and distributing news.<sup>227</sup> For example, in a 2009 report, the Knight Commission on the Information Needs of Communities in a Democracy<sup>228</sup> asserted that colleges needed to enhance their roles as “hubs of journalistic activity.”<sup>229</sup> And, in a 2012 open letter to university presidents, leaders of the nation’s largest journalism foundations stated that journalism programs must “recreate themselves if they are to succeed in playing their vital roles as news creators.”<sup>230</sup>

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<sup>225</sup> *About Us*, CRONKITE NEWS, <https://cronkitenews.azpbs.org/about-us/> [https://perma.cc/6JYG-AMMF] (last visited Apr. 2, 2017).

<sup>226</sup> *New England Center for Investigative Reporting*, BU COLLEGE COMM., <http://www.bu.edu/com/academics/internships-opportunities/opportunities-throughout-the-us/new-england-center-for-investigative-reporting/> [https://perma.cc/65AD-2685] (last visited Apr. 2, 2017).

<sup>227</sup> See Lauren Klinger, *Journalism Program Takes Lessons from Teaching Hospitals*, POYNTER (Oct. 9, 2013), <https://www.poynter.org/2013/journalism-program-takes-lessons-from-teaching-hospitals/225227/> [https://perma.cc/Q5TE-BSHA]; Eric Newton, *Journalism Schools Aren’t Changing Quickly Enough*, NIEMAN LAB (Sept. 10, 2012, 10:40 AM), <http://www.niemanlab.org/2012/09/eric-newton-journalism-schools-arent-changing-quickly-enough/> [https://perma.cc/D2SU-FF8E].

<sup>228</sup> The purpose of the Knight Commission—a panel composed of media, policy, and community leaders—was to “assess the information needs of communities, and recommend measures to help Americans better meet those needs.” *The Knight Commission on the Information Needs of Communities in a Democracy*, ASPEN INST., <https://www.aspeninstitute.org/programs/communications-and-society-program/the-knight-commission-on-information-needs-of-communities-in-a-democracy/> [https://perma.cc/8R48-3RNN] (last visited Apr. 2, 2017).

<sup>229</sup> KNIGHT COMM’N ON THE INFO. NEEDS OF CMTYS. IN A DEMOCRACY, INFORMING COMMUNITIES: SUSTAINING DEMOCRACY IN THE DIGITAL AGE 36 (2009), [https://assets.aspeninstitute.org/content/uploads/files/content/docs/pubs/Informing\\_Communities\\_Sustaining\\_Democracy\\_in\\_the\\_Digital\\_Age.pdf](https://assets.aspeninstitute.org/content/uploads/files/content/docs/pubs/Informing_Communities_Sustaining_Democracy_in_the_Digital_Age.pdf) [https://perma.cc/8YQ8-WJ5K].

<sup>230</sup> *An Open Letter to America’s University Presidents*, KNIGHT FOUND. (Aug. 3, 2012), <http://www.knightfoundation.org/articles/open-letter-americas-university-presidents> [https://perma.cc/5365-778P].

While student journalists make significant contributions through independent reporting, they lack important legal protections. Recently, one student journalist was incarcerated for months after refusing to reveal a source.<sup>231</sup> The lack of protections for student journalists is plainly irreconcilable with watchdog journalism, which is essential for informed communities.<sup>232</sup> Thus, protecting these journalists from disruptions in their classes, lives, and futures is in the best interest of both professional journalists, who will need to hire principled graduates in the future, and the public, which needs good reporters for the free exchange of information. Lawmakers and judges should apply the privileges to student journalists through legislative amendments and judicial recognitions to allow student journalists, where warranted, to make promises of confidentiality with confidence.

#### CONCLUSION

Reporter's privileges are as varied in application as they are controversial in theory. While commentators, jurists, and legislators struggle to agree on the appropriate limitations and interpretations of the privilege, student journalists are often neglected or outright excluded. The majority of states offer some protection to journalists, but most have crafted their laws or interpreted them—intentionally or not—to exclude the growing and ever-important population of student journalists. While more research is needed to deduce the best solution to protect student journalists, it is clear that they are vulnerable and in need of greater legal clarity to perform confidently their increasingly important roles.

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<sup>231</sup> Bob Egelko & Jim Herron Zamora, *Imprisoned Freelance Journalist Released*, SFGATE (Apr. 3, 2007, 3:33 PM), <http://www.sfgate.com/bayarea/article/Imprisoned-freelance-journalist-released-2604814.php> [<https://perma.cc/VNX2-3A77>].

<sup>232</sup> See generally Butch Ward, *Watchdog Culture: Why You Need It, How You Can Build It*, POYNTER (May 26, 2005), <https://www.poynter.org/2005/watchdog-culture-why-you-need-it-how-you-can-build-it/67742/> [<https://perma.cc/27BW-WK3Q>].

**Table 1**  
Ten categories of state reporter's privilege statutes.

Category and State(s)	Students covered?
Student journalists covered explicitly	
Maryland	Yes, in postsecondary institutions.
West Virginia	Yes, in accredited institutions.
Noncommercial educational broadcasters covered explicitly	
Ohio	Yes, in radio or television stations.
Covered person/entity only loosely defined	
Alaska	Unclear
Illinois	Unclear
Maine	Unclear
Washington	Unclear
Covered person is connected to or engaged in news media, but not necessarily employed	
Alabama	Probably
Arizona	Probably
Arkansas	Probably
California	Probably
Kentucky	Probably
Michigan	Probably
Montana	Probably
North Dakota	Probably
Pennsylvania	Probably
Tennessee	Probably
Covered person is engaged in producing news for the public	
Georgia	Unclear
Minnesota	Unclear
Nebraska	Unclear
Oregon	Unclear
South Carolina	Unclear
Wisconsin	Unclear
Utah	Unclear
Covered person must produce news for the general public	
New Jersey	Probably not, unless college, then maybe
North Carolina	Probably not, unless college, then maybe
Entities legitimated by publication frequency, readership, accreditation	
Indiana	Probably not
Louisiana	Probably not
New Mexico	Probably not
Rhode Island	Probably not
Covered person must earn livelihood but not necessarily be employed	
Texas	Unclear
Covered person must be employed by the news media	
Colorado	Probably not
Connecticut	Probably not
Delaware	Probably not
District of Columbia	Probably not
Kansas	Probably not
Nevada	Probably not
Oklahoma	Probably not
Covered person must be a professional journalist	
Florida	No
New York	No

**Table 2**  
Constitutional and common-law reporter's privilege protections.

State	Students covered?
Idaho	Unclear
Iowa	Unclear
Massachusetts	Unclear
Mississippi	Unclear
Missouri	Unclear
Vermont	Unclear
Virginia	Unclear
New Hampshire	Yes
South Dakota	Probably not