Shield Laws: Defining Journalism and Protection

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Introduction

Traditionally, Americans have turned to television to gather their news. However, trends over the last decade indicate that individuals are beginning to supplement their news gathering from traditional media by turning to the Internet. As of 2013, twenty-one percent of Americans indicated they got their news mainly from online news sources (Gallup, 2013). These changing methods may seem like they are more efficient for consumers of media, but there are also some unintended legal consequences. For example, as news media such as television, radio and newspaper organizations continue into this new age of technology, companies are forced to compete with a news market consisting of smaller news companies and citizen journalists who can reach a large, online market.

The main debates that arise from digital journalism are about who should be considered a journalist and who should be protected under laws designed to help journalists, such as shield laws. By answering these questions, it would be possible to make a clearer, more precise shield law that protects those who are journalists and distinguishes between public and professionals within the field. While some court cases have attempted to resolve parts of these issues by discussing subjects such as privileges of the press and opinion-based ‘news’, the Supreme Court of the United States has not made it clear what differentiates journalists and citizens.

Most traditional journalists are usually trained to gather and distribute news and information in a fair and truthful manner. Citizen journalists, on the other hand, tend to take more of a critical role toward the news they gather by developing discussion and debate surrounding the topics online (Lee, 2014). It is because of neutrality of reporting and trustworthiness of traditional and professional journalists in society that it would not be just to treat these two groups of reporters the same. This paper will suggest a better method to
distinguish between journalists and citizen journalists, as well as a better policy to protect the rights of trained journalists.

**Issue**

With the advent of social media and blogging websites, the manner in which news is distributed has changed from a one-to-many model, with trusted, trained journalists providing the news, to a many-to-many model, where anyone at any time can share their thoughts and feelings about what is happening around them. With the changing manner of news consumption, the main problem lawmakers are facing is determining who qualifies as a journalist.

Maryland became the first state to enact a shield law to protect journalists in 1896. The idea of protecting journalists with such laws, in addition to the first amendment rights journalists already have, has been controversial. This is especially true when new media and self-declared journalists are factored into the equation. Shield laws were designed to protect journalists and encourage them from feeling threatened or compromised in performing their job, in addition to protecting those who are sources from having their identities used against them (Turner, 2012). Newer, online news sources, such as individuals with a blog, or larger organizations, like Wikileaks, create a grey area when debating the creation of a large-scale shield law.

According to Turner (2012), the sheer number of online citizen journalists, if they were protected under shield laws, creates an issue with law enforcement. Under this line of thinking, if every person has access to reporter’s privilege, then no one, unless brought before a grand jury, would ever have to reveal what they witnessed or where their information was from. Theoretically, no one would ever have to testify against another person. While this may hold true in some instances, there are also areas of news that are not widely covered by professional journalists or traditional news sources, such as first-hand accounts of protesting or in locations
where the government may not allow for honest journalism to take place (Medley, 2012). The real question becomes whether or not any law should apply to citizen journalists, regardless of content or association with a trusted news source.

**Previous Debate**

A national shield law has never been in place, and with new technology, there have been numerous cases that argue either for or against more protection for citizen journalists. A handful of cases, such as *Chevron Corporation v. Berlinger* or the case of *United States v. Angleton* include individuals who were journalists who were forced to release information about their sources despite their reputation as journalists. On the other hand, some cases, such as *Obsidian Finance Group, LLC v. Crystal Cox* and the case of Wikileaks have struggled with whether or not citizen journalists should be protected.

*Obsidian Finance Group, LLC v. Crystal Cox* dealt with libel laws. Crystal Cox was a self-proclaimed investigative journalist. She was a blogger who had a website dedicated to discussing the faults of the Obsidian Finance Group, a real estate company, and its owner Kevin Padrick. Within her website, titled obsidianfinancesucks.com, she frequently would create posts accusing the company of tax fraud and other illegal actions. When brought to the court under libel law, many of Cox’s posts were dismissed for being opinion based.

While libel law is not the same as shield laws, the ruling established that there exist differences between citizen and professional journalists because it declared that Crystal Cox was not a journalist. The case explained that, to be a journalist, the writer must demonstrate professionalism or be associated with an established news organization. This begs the question of whether or not having a journalism background could be enough to justify protection under shield laws.
A court case from New Jersey, *Tina Renna v. County of Union* explored the idea that a citizen journalist could be considered protected by shield laws. After reporting about government misconduct following Hurricane Sandy, Renna was asked to reveal her sources. Although her blog was partially personal opinion, she fought for reporter’s privilege, and the county ruled that her writing passed the test for New Jersey’s shield laws. New Jersey has a shield law that encompasses many different definitions for who a reporter can be. Under New Jersey law, anyone who regularly brings news to the public, regardless of whether it is associated with a traditional news medium, can be protected. Therefore, bloggers and people who create their own news sources, such as podcasts or websites, could be protected under the shield law if they consistently are putting out news content (Digital Media Law Project, 2013). The New Jersey law protects not only a journalist’s sources, but also any information that may identify the sources.

While these cases are important to understanding the current debate about shield laws, it is essential to remember that they vary by state, and there is no current federal shield law. *Wikileaks*

One of the most well-known examples of journalism featuring anonymous information in the world is Wikileaks. The website, created by Julian Assange and others, prides itself in anonymously collecting and posting information that may be classified or that proves corruption around the globe. By creating secure ‘drop boxes’, Wikileaks allows users to anonymously upload information to journalists that work at the website, who then investigate the document for authenticity. (Wikileaks, 2014). Wikileaks’s strategy is particularly challenging to lawmakers because of the anonymity of the website’s sources. Advocates for a national shield law, in theory, would not have the ability to force Wikileaks to reveal their sources for released national
confidential information, because the sources are unknown (Dalglish, 2010). Some also believe that Wikileaks should not be considered journalism at all because of their method of data collection and specific target of government documents, and therefore should not be subjected to the same laws as journalists are (Hindman & Thomas, 2014).

Currently, lawmakers are attempting to resolve the long debate over whether or not there should be a national shield law and how to handle new media, including websites like Wikileaks, and citizen journalism.

**Legal Background**

*Shield Laws and Reporter’s Privilege*

Seventeen states had created their own shield laws prior to *Branzburg v. Hayes* in 1972. In this case, Branzburg, a journalist from Kentucky, wrote an article for a newspaper in Louisville for which he interviewed individuals who were associated with drug related crimes. When called to testify in court, Branzburg refused to talk, stating that revealing his sources would violate his rights to freedom of press and speech. When brought to the Supreme Court, it was ruled that Branzburg did not have his rights violated.

Following the ruling of Branzburg, the idea of reporter’s privilege was developed to protect journalists at lower courts from revealing their sources. Reporter’s privilege, when implemented, is typically a three-point test where the government must prove that it has probable cause to believe the reporter in question has information relevant to a specific legal issue, that the journalist is the only means of gaining that information, and that there is a compelling interest in knowing the information (*Branzburg v. Hayes*, 1972). Either the ideas of reporter’s privilege or ideas of shield laws have been implemented in all states, excluding Wyoming. These laws range from states like Wyoming, where no shield laws exist because, according to the state
government, reporters are given the same rights as any citizen, to states like New Jersey. In New
Jersey, journalists are given the right to protect their sources of information and any other
information that may reveal or point to their sources (Digital Media Law Project, 2013). In
states with the most liberal shield laws, such as New Jersey, bloggers have been found to be
journalists as long as they provide information in the public interest regularly in a newsworthy
way (Beaujon, 2013). Most states fall in between these two extremes, with some protection for
traditional journalists, but not to the extreme of allowing anyone to prove that they are a
journalist. While most states do protect journalists in some way, it is important to understand that
these variations exist because there is no national shield law.

There are also contradictions among the rulings surrounding shield laws and reporter’s
privilege. For example, in Chevron Corporation v. Berlinger, the idea of journalistic
independence was used to determine whether Berlinger, a documentary filmmaker, had the right
to reporter’s privilege for the outtakes to his film. It was resolved that, because Berlinger had
consulted lawyers during the production of his documentary, he was not acting as a journalist,
and therefore did not have the ability to claim reporter’s privilege. Conversely, when Ken Burns,
a documentary filmmaker in New York City was asked to surrender his outtakes, the court ruled
that, even if he developed a different motive or opinion while creating his film about crime, he
was still acting as an investigative journalist reporting the news (Buettner, 2013.)

Citizen Journalism

The current problem, however, rests with to whom shield laws should be applied. As the
Internet has gained popularity, more and more individuals are taking action as citizen journalists
in the form of blogs and social media posts (Turner, 2012). Research has shown that some
people believe citizen journalism to be as reliable as mainstream journalism (Carr, Barnidge,
Lee, & Tsang, 2014). Despite these findings, most shield laws were created before the Internet was widely available, so many jurisdictions do not protect citizen journalism under shield laws or mention unconventional journalists at all (Martin & Fargo, 2013).

One recent case dealing with the idea of citizen journalism was Obsidian Finance Group, LLC v. Crystal Cox. In this case, Crystal Cox, an online blogger, wrote news-style articles that consistently made Obsidian Finance Group appear in a negative light. While this case did mostly revolve around libel law, the content of Cox’s blog was determined to be more opinion based than journalistic, even though she considered herself to be an investigative journalist. The ruling in Obsidian Finance Group, LLC v. Crystal Cox revealed that there can be distinctions made between professional and amateur news reporters and those distinctions can determine the right that an individual has to protect their work.

Free Flow of Information Act

The most recent attempt at a federal shield law has come with the Free Flow of Information Act. The Free Flow of Information Act was introduced to the 113th Congress in 2013 and would define who is a journalist and how those journalists would be protected under federal law (Gierhart, 2013). Under the Free Flow of Information Act, people who are journalists would be “covered” by the law and would not have to release information about their sources if they regularly practice newsgathering by publishing information of public interest and reporting or if they recently had been associated with journalism and had the intent to report the information upon hearing it (Free Flow of Information Act, 2013). In order to determine if a journalist currently not associated with an institution would be protected, the Free Flow of Information Act would apply a test to see if the journalist fits into one of three categories. According to the bill, to be protected, a journalist must have been active at a news organization
for one continuous year within the past twenty years or have contributed at a news organization an ‘significant number of times’ in the past five years or was a student at an institution when the story in question was published. Information that would be protected under the Free Flow of Information Act, if passed, would be similar to most state shield laws in that it would include protection of identities of informants.

**Analysis**

Shield laws are not only advantageous for journalists, but also for the general public. The main purpose of these laws are to allow journalists to freely look for reports and individuals who can testify about the subject matter of their report without having to worry about consequences. Additionally, shield laws protect the informants and give them confidence that the information they reveal will be kept confidential. Reporter’s privilege works in a similar manner to shield laws in that journalists can promise confidentiality to obtain this information (Lugar, 2005). Without some type of shield law in place, it is possible journalists would be hesitant to investigate stories that may reveal something that the government or local officials may not like (The Washington Post, 2013). Journalism, at its core, is about informing the public of information in an orderly and honest manner. It is also about keeping people, and the government, in check. Without the ability to protect oneself, a journalist would not be able to hold his or herself up to this standard. While the proposed Free Flow of Information Act does a decent job of attempting to define a journalist, the topic is a bit more complex.

With current technology, including social media and blogging websites, it can be difficult to define exactly who is a journalist. While it would be unreasonable to include every individual who calls themselves a journalist, lawmakers must also consider the quality of the individual’s work. Under the Free Flow of Information Act, a journalist must either be associated with a news
gathering or reporting service or must have worked for one of these services for a certain length of time, as outlined by the bill, in the recent past to be protected.

An alternative to this idea would be to examine the quality of the body of work the journalist has produced on their medium. This would ensure that traditional journalists who work in print or television for large, credible news sources, such as CNN, would be protected. In order to do this, a bill might be proposed similar to the state of New Jersey’s shield law. The quality of a reporter’s work could be measured by the public interest of the news they are providing, how frequently they are providing the news and whether or not they publish articles, blog posts or other media that is straightforward reporting of facts or opinion. This proposal would include journalists who consistently produce quality news material, but not self-proclaimed journalists who mostly publish opinion-based content. An individual’s whole body of work would have to be considered if they were not affiliated with a traditional news organization or company. It would protect people who have established themselves as journalists on Internet platforms as long as what they are producing is factual news and not mostly opinion. Under this paper’s proposed amendment to the Free Flow of Information Act, journalists such as Tina Renna would not be protected, because her blogging website was mostly opinion based, unlike traditional journalism (Tina Renna v. County of Union). Had a majority of her work been news, Renna would have had the advantage in the case under this idea.

Similarly, websites such as Wikileaks would not be protected. Their sources are anonymous, therefore, the information they report, while sometimes accurate, is not guaranteed to be coming from sources that are reliable or sources that a journalist would be able to examine for accuracy beforehand.
Anyone with a computer and access to the Internet has the capability to be a journalist. If this is a serious interest to an individual, protecting serious journalists under the law is a necessity. This would allow people like students studying to be journalists or individuals who have a passion for reporting to release their own information without worry that it would compromise their ability to say what they would like to without legal involvement. Promising confidentiality allows reporters to get the information they need to do their job and can convince people to share confidential or personal information that they otherwise would not talk about.

Currently, in federal trials, a journalist is not able to use reporter’s privilege to withhold information if subpoenaed. Some circuits have decided that this should hold true in lower courts, but others have not (Durity, 2006). Under this paper’s proposed change to the Free Flow of Information Act, a clause would be added that would allow grand juries to continue to require journalists to reveal their sources if it is necessary and the only way for the information to be retrieved. If there are other means, or other people who have information, a journalist should not be required to reveal their sources. If it is the only alternative, however, and the information is critical to the resolution of the grand jury case, journalists should still be subjected to the same laws as they are currently placed under.

Conclusion

Current shield laws are effective for those who are traditional journalists, but no law exists that explicitly states how journalists who operate using new technology, like blogs, are protected. This paper proposes that the definition of a journalist should be expanded to include bloggers and Internet journalists who have a reputation of regularly providing accurate news on their medium. If a person claiming to be a journalist does not fit into this category, or provides
mostly opinion based material rather than factual material, as determined by a judge and the test outlined previously, they would not be protected under the proposition.

Under the proposed changes, reporter’s privilege would be expanded into a nationwide law. It would still, however, be subject to removal in grand jury cases where there is no other means of gaining information than to ask a journalist to reveal his or her sources.

The debate over reporter’s privilege and who deserves the title of reporter has been an ongoing battle and will likely continue to be debated into the future. Contradictory rulings and court cases have developed regarding the right for journalists to refuse to talk about their sources and to publish information. While rights for journalists may not be national at the moment, there is a strong possibility that in the future, a law may be created to establish the definition of a journalist and what legal rights that entails.
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