

NOVEMBER/DECEMBER 2013

VOL. 85 | NO. 9

NEW YORK STATE BAR ASSOCIATION

Journal



Jackson Estate Says, "Beat It, IRS."

By Robert W. Wood

Also in this Issue

Are Bloggers Journalists?

2013 Criminal Legislation

Plea Counsel Cases and
Retroactivity

Appeals in Arbitration



Bloggers, Journalists, Reporting, and Privilege

By Ronald D. Coleman

Introduction

Are bloggers journalists? Does it matter?

The question has become more ripe in recent months in view of the scandals involving leaks of government secrets and the resulting renewed focus on whether journalists can be forced to disclose confidential sources and other newsgathering material. The legal status of bloggers is among the more controversial questions in connection with defining who is, and who is not, a journalist. From a strict legal point of view, the fulcrum of the question is what right and privileges are afforded to journalists that may or may not encompass publication by bloggers. No single legal right is so dependent on the status and definition of a journalist as the “reporter’s privilege.”

In a recent New Jersey decision,¹ for example, a Superior Court judge ruled that a blogger acting as a journalist was protected by that state’s journalist’s shield law. That law provides as follows in relevant part:²

[A] person engaged on, engaged in, connected with, 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 has a privilege to refuse to disclose, in any legal or quasilegal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere. . . .

a. “News media” means newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic,

mechanical or electronic means of disseminating news to the general public.

Interpreting this statute and a number of appellate decisions that had analyzed its application to online publications, the trial court found that while Internet message boards do not qualify for protection under New Jersey’s shield law, under the circumstances presented a blog could and, in that case, did qualify. The court based this conclusion on its findings that (notwithstanding its uneven quality) (1) the blog provided the public with reporting relating to Union County governance and politics not covered, or not covered as thoroughly, by traditional media, and (2) notwithstanding the blogger’s lack of affiliation with a recognized traditional news outlet, her reporting involved recognized journalistic information-gathering techniques, constituting a sufficient “connection to the news media” as contemplated by the statute.³ The court also found support for the conclusion that the blogger’s activities were “similar” to the enumerated news outlets in the evidence that her blog disseminated news and had “wide readership” of 500–600 unique users per day.⁴ Given that the information she sought to protect from disclosure under the shield law was itself information gathered in connection with these protected activities, her blog-based reporting was deemed protected under the New Jersey statute.⁵

RONALD D. COLEMAN is a partner with Goetz Fitzpatrick LLP, based in its New York office. This article first appeared, in a slightly different format, in *Bright Ideas*, Fall 2013, a publication of the New York State Bar Association’s Intellectual Property Law Section.

The New York “Shield Law,” codified as Civil Rights Law § 79-h, also provides an absolute privilege against forced disclosure of materials obtained or received in confidence by a “professional journalist or newscaster,” including the identity of sources on which press reports are based.⁶ The original statute defined a professional journalist as someone who works in the chain of newsgathering and publication “for gain or livelihood.”⁷ In 1981, the statute was amended, and the term “professional journalist” was revised to include “not only those working for traditional news media (newspapers, magazines, and broadcast media), but those working for any ‘professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public,’ as well.”⁸

The limitation of the Shield Law’s protections to a narrowly defined class of “professional” journalists may appear archaic now, even though it is in fact typical.⁹ The statutory definition is wordy because the very concept of the journalism “profession” was a conceit. There are no formal qualifications, licenses, or training required to be a journalist. The statute therefore focuses on what this category of person does – and significantly, where he or she does it, i.e., mainly at “real” journalistic enterprises that would be familiar to our grandparents and probably theirs as well: newspapers, wire services, magazines, broadcasters.¹⁰

Today, in light of the Internet, the employment-based definition of “journalist” seems problematic, but until fairly recently it seemed pretty sensible. Decrying what sometimes seems like the cancerous growth of malicious online defamation cloaked by the anonymity that is unique to the Internet, I wrote this in 2006:

During the entire previous history of humanity until just a few minutes ago, elites – who usually had the stability of society, for good or for bad, as a central goal, as elites will – controlled the medium and the message. And the result was indeed a high degree of stability. You could not easily ruin a man’s life by communicating something false or scurrilous, though if you did it could hardly be undone. And little saw the light of day in print – be it by the hand of a scribe painstaking scratching out sacred writ, as the product of the crudest printing presses or over the air of the oligopoly broadcasters – without being weighed and vetted – no, not always, maybe not even mostly, for truth or neutrality, but at least for cost and usually for effect.

This sense of accountability flowed from the fact of accountability, often in its literal sense. Your quills could be blunted, your press smashed, and in a more enlightened era and place, your assets and good name put at risk through legal process. There was a high cost of entry to the market of expression, and that cost was, especially in unfree societies (as is still the case), often far greater than any true economic assessment; but once borne, this cost provided a counterweight – not

a perfect one, but a real one – to the inclination to take no consideration of what costs others might bear as a result of your expression. . . .

In the old days, cranks and complainers and scandalmongers [lacking such accountability] used to peddle [their] wares via stolen reams of photocopy paper or purple mimeograph printouts. Mailed anonymously or pinned up on storefronts they were easily enough recognized as the rantings of marginal people; once pulled down and crumpled up, they were gone forever, and usually rightfully so.¹¹

That was true when the Shield Law was enacted and when it was amended in 1981. But a lot has changed since 1981. You remember the state of blogging and the Internet in 1981, don’t you? Here’s a reminder: “The IBM PC, Commodore 64 and the ZX81 were among personal computers to hit the shelves in 1981. The first IBM PC had a 4.7 MHz processor and the cheapest model had 16K of memory. Disk drives were an optional extra but each 5.25-inch disk could hold 160K of data...”¹² There was no blogging because there was no Internet – well, not for you and me, although in 1981, following in the footsteps of ARPANET, the City University of New York established BITNET to provide electronic mail, listserv servers and file transfers to member academic institutions.¹³ This was not exactly Facebook. Indeed, as anyone who did legal research on a Westlaw “Walt” terminal in the 1980s will recall, it would be four more years before connection speeds on these Internet precursors would reach a blazing 56 Kbps.¹⁴ Even then any serious multi-database search run online entitled the lawyer running it to a leisurely dinner while the result seemingly walked out to Minnesota, where Westlaw’s servers live, clunked and chunked through their state-of-the-art computers, and then ambled back to New York, squeezing its way, one character at a time (thank God for sans-serif type!), through an electronic pinhole, if it didn’t get flagged down for speeding in Ohio on the way.

The Press, the Powerful, and the Proposed Federal Shield Law

That Internet experience with information dissemination was still a dream in 1981. In that year former Assemblyman Charles “Chuck” Schumer began his first term in Congress¹⁵ and his legendary love affair with the establishment press – which in 1981, was the only press that mattered. Senator Schumer’s relationship with the traditional press is widely acknowledged. A standing joke in Washington: “What’s the most dangerous place on Capitol Hill? Between Chuck Schumer and a television camera.”¹⁶ Senator Schumer has sought to repay the attention those cameras lavish on him, prompting President Barack Obama to joke that Schumer brought along the press to a banquet as his “loved ones.”¹⁷

One manifestation of that love was Senator Schumer’s introduction of an amendment to a 2009 Senate bill that proposed to create a federal reporter’s shield law much

like the New York Shield Law. It was an amendment that, when he first got to Congress in 1981, might have made perfect sense but, in 2009, could hardly be justified on principled grounds. Like the original New York law, it required that to benefit from the privilege a journalist had to be a “professional” journalist, i.e., one who was paid to report by a traditional press entity.¹⁸ As a blogger for the Berkman Center for Internet & Society at Harvard wrote, in what was at once an accurate analysis of the amendment and a fusillade of what can charitably be called naïve earnestness:

This language is in fact more restrictive than its House counterpart, which only limits the shield to those who gather or disseminate news “for a substantial portion of [their] livelihood or for substantial financial gain.” The Judiciary Committee’s “salaried employee . . . or independent contractor” language on its own would be sufficient to deprive most non-traditional journalists of protection. But the requirement that the hosting entity both disseminate information by electronic means and

I looked into the idea that Schumer’s amendment was influenced by lobbyists and, indeed, a cursory examination of Schumer’s funding sources reveals that he is the go-to Senator when big media wants to make a donation in return for a favor.²⁰

No one knows for sure if the cynical view of the matter was the correct one; the bill may have simply reflected Senator Schumer’s longstanding discomfort with the Internet. According to one source, Schumer opposed placing DARPA – the successor to ARPA, which eventually became the Internet as we know it now – into the public domain, describing it as a “waste of the taxpayers’ money.”²¹ Later he sponsored the unsuccessful PROTECT IP Act, also known as PIPA,²² which failed as a result of critics’ vigorous opposition to it as a grant of unprecedented power to government to unilaterally protect the rights of intellectual property stakeholders.²³ Whatever the case, the federal shield bill went nowhere, derailed by the Wikileaks controversy.

Today, in light of the Internet, the employment-based definition of “journalist” seems problematic, but until fairly recently it seemed pretty sensible.

operate a publishing, broadcasting, or news service of some kind ices it. . . .

Of course, a cynical fellow might suggest that perhaps the Senate isn’t so concerned about people getting “the most up-to-date, accurate information.” But I think it’s far more likely that citizen journalists just aren’t on the radar of your average senator. . . .¹⁹

“Cynical fellows,” however, were not hard to find. One opined:

Why on Earth did Schumer do this? Schumer’s spokespeople were not available for comment. But I’ve been taking a look at the matter, and from my vantage point, what seems to be at work here is an effort to find common ground between a Justice Department that does not want to expend its resources extending blanket protection to all journalistic entities, and powerful corporate media interests who don’t want to expend their dwindling resources keeping their reporters out of the stir. Schumer’s amendment creates this common ground by putting up a big sign that reads: NO BLOGGER OR CITIZEN JOURNALIST WELCOME.

Keep in mind: big media has been extensively lobbying for federal shield law protection for some time now. On September 9, over 70 news organizations sent a letter to Senator Pat Leahy (D-Vt.), asking him to not water down the bill, which was wending its way through his Senate Judiciary Committee. Good news for them – the changes that Schumer made to the bill won’t affect them in the least. . . .

But the year of Senator Schumer’s “professional journalists only need apply” amendment was also the year an equal and opposite amendment to New York’s existing Shield Law was proposed by State Senator Thomas K. Duane and Assemblywoman Linda B. Rosenthal.²⁴ One commentator observed that rather than *adding* bloggers to an already awkward statute, it would make more sense simply to eliminate the fiction of “professional journalism”:

Lucy A. Dalglish, executive director of the Reporters Committee for Freedom of the Press, an organization in Arlington, Va., that defends First Amendment rights of journalists, said she was sympathetic with the bill’s mission, but she said that using the word “blog” in the language of the proposal might be too broad. . . .

“Blogging is a technology and a method of delivery,” Ms. Dalglish said in a phone interview. “Some people are doing valuable journalism when they blog. Others do not. What you are trying to protect is the journalism function, not the technology or the platform.”²⁵

Dalglish hit on a point that many had been making for years. In an echo of Wittgenstein’s axiom that philosophy is properly seen not as a theory “but an activity,”²⁶ Dalglish argued that only a person who is **doing journalism** is a journalist – regardless of job description, rate of pay, or motivation. A similar conclusion was reached in an award-winning student law review article that questioned the posited distinctions between traditional

journalistic outlets and bloggers who perform journalistic functions:

A federal shield law for reporters and citizen journalists would benefit the public by protecting whistleblowers and encouraging anonymous sources to reveal information to responsible disseminators of the news. Because the purpose of the privilege is to help the flow of information to the public, Congress should pass a federal shield reporter's shield law that protects traditional and citizen journalists. The privilege should not simply cover members of the traditional press, for "[t]he First Amendment does not guarantee the press a constitutional right . . . not available to the public generally." Congress should combine the traditional definition of a reporter associated with a media entity with an intent-based inquiry based on the function of journalism to create a federal reporter's shield law to enhance the First Amendment and encourage the free flow of information in our democracy.²⁷

The Duane-Rosenthal amendment did not pass in 2009,²⁸ for reasons I have been unable to determine. It is still rattling around Albany, but it is, by all indications, going nowhere.²⁹

Defining Journalists: Not "Who" or "How" but "What"

Perhaps it is just as well, however. The concept that journalism is an activity, not a status, does not lead all commentators to the conclusion that bloggers should

be included in press shield laws. Rather, it calls into question the wisdom of press shield laws. Perhaps the most prominent spokesman for this view is law professor Glenn Reynolds, one of the most influential bloggers on the Internet.³⁰ He argues:³¹

Ordinarily, people are required to respond to subpoenas by providing information....

Journalists, however, claim a special status: They argue that complying with subpoenas in ways that would identify their sources might make people less likely to confide in them in the future. There are two problems with this argument: The first is that the Constitution doesn't require it. The second is that we're all journalists now.

The Constitution merely protects the freedom of speech and publication – not the freedom to keep secrets, which is what journalists are asking for when they seek special privileges of non-disclosure....

The other problem with journalist shield laws is that journalism isn't a profession; it's an activity, one now engaged in by many. With the proliferation of blogs, podcasts, YouTube videos and the like, anyone can be a journalist. But if anyone could assert a journalistic privilege not to disclose sources, the work of the courts would be far tougher.

Efforts to limit the privilege to "professional" journalists, on the other hand, quickly transform into a sort of guild or licensing system for the press – ironically, something that the First Amendment clearly prohibits.

The Ronald O. Perelman and Claudia Cohen Center for Reproductive Medicine

Zev Rosenwaks, M.D.
Director

Owen Davis, M.D. • Ina Choltz, M.D.
Pak Chung, M.D. • Rony T. Elias, M.D.
Dan Goldschlag, M.D. • Hey-Joo Kang, M.D.
Isaac Kligman, M.D. • Glenn Schattman, M.D.
Steven Spandorfer, M.D.

Psychologists

Linda Applegarth, Ed.D. • Elizabeth Grill, Psy.D.
Laura Josephs, Ph.D.

Weill Cornell Medical College
1305 York Avenue
NY, NY 10021 (646) 962-2764

Weill Cornell Medical College
2315 Broadway, 2nd Floor
NY, NY 10024 (646) 962-3767

Northern Westchester
657 Main Street
Mount Kisco, NY 10549 (914) 242-3700

Garden City, Long Island
1300 Franklin Avenue
Garden City, NY 11530 (516) 742-4100

Flushing Hospital Medical Center
146-01 45th Avenue
Flushing, NY 11355 (646) 962-5626

Trying to have a baby?



We can help. At the Center for Reproductive Medicine, Dr. Zev Rosenwaks and his outstanding team of physicians offer couples the most advanced and effective treatments for infertility. With multiple offices located conveniently for patients in the tri-state area, we provide comprehensive and compassionate care.


For more than two decades we have made your desire to build a family our main priority. If you or someone you know is experiencing infertility, contact us at (646) 962-CRMI or visit us on the web at www.ivf.org.

We accept **UnitedHealthcare**, **Oxford Health** and **Cigna** insurance plans for most fertility treatments.

Turning Patients into Parents



Weill Cornell Medical College
The Ronald O. Perelman and Claudia Cohen
Center for Reproductive Medicine

 **NewYork-Presbyterian**
Weill Cornell Medical Center

Reynolds is not alone in this view; even some journalists agree with it. One editorial page editor wrote back in 2005 that it is “contradictory that a free and independent press, which is supposed to be the ‘watchdog of the government,’ would be, in effect, licensed by that government. . . . The First Amendment was not drafted for the benefit of an elite few; it was meant to protect the rights of all Americans to express themselves in a robust, cantankerous exchange of opinions. In case you hadn’t noticed, ‘the press’ is rapidly becoming ‘the people.’”³²

Application of even the broadest shield laws by sympathetic courts turns on fairly arbitrary line-drawing.

More recent commentators have made the same point, especially in light of the growth of popular journalism and in response to news in recent months that the White House, under criticism for its surveillance of Associated Press reporters in connection with leak investigations, has asked Senator Schumer to revive his federal reporter’s shield law bill.³³ For example, the *Washington Times* opined that a shield law for the media “gives the government the chance to decide who does, and who does not, qualify for this privilege. In that respect, a media shield law represents a diminution of liberty. Free speech is something that belongs to everyone.”³⁴

On the other hand, Christopher Daly, a journalism professor and former AP reporter, opposed the legislation on the ground that “a proper reading of the First Amendment makes a shield law superfluous,”³⁵ though he cited the U.S. Supreme Court’s decision in *Branzburg v. Hayes*, which, he acknowledged, held otherwise. “The practice of journalism includes both a news-gathering function and a news-disseminating function,” Daly insisted.

Neither one is of much use without the other. That is, if journalists are free to disseminate news but not to gather it, they will have nothing of value to share with the people. Conversely, if they are free to gather news but not to disseminate it, the people will again be thwarted in their ability to learn the things they need to know to govern themselves. Thus, journalists must be free to gather news (by reporting) and to disseminate news (by printing, broadcasting or posting).

Because journalists typically cannot bring important investigative stories to light without promising their sources confidentiality, he stated, they must be allowed to honor that commitment. He added:

It is perfectly predictable that those in power (from either party) will reflexively attempt to control the flow of information to the people. One attractive

mechanism for doing that is to force journalists to name their confidential sources and then to go after the sources and punish them. If I were a tyrant seeking to use the limited powers of government to create unlimited personal power, that is one of the ways I would go about it.

That is exactly what Thomas Jefferson and his supporters among the Founders foresaw and sought to prevent. One of the remedies they came up with was an absolute guarantee of press freedom. That’s why I believe we journalists do not need to ask Congress to bestow such protections on the practice of journalism. Indeed, we should be wary of inviting Congress to legislate about the press at all, because once legislators start writing laws, it is exceedingly difficult to get them to stop. Today, they may say they are proposing to do us a favor by granting us a shield. Tomorrow, having established the precedent, they may decide to improve that law by “clarifying” just who is a journalist. Before long, Congress might decide to license journalists or protect confidential sources in the Executive branch but deny such protection to their own staffers. There would be no end to it.

Not everyone agrees with Daly.³⁶ More generally, however, while Daly did not use the “journalism is an activity, not a station” formula, his argument implies that no legislature should be permitted to define who is a journalist – or, axiomatically, to deprive a journalist of whatever protection he is entitled to by fiat. Indeed, as Daly noted in another post responding to the National Security Agency leak first reported by writer Glenn Greenwald:³⁷

[T]he entire [journalism] industry was based on content created by people with an ax to grind. Often, they were political activists (like Sam Adams or Tom Paine) or surrogates for office-holders (like James Callender).

The idea that a journalist should be defined as a full-time, professional fact-gatherer who has no political allegiances is not only unrealistic, but it is already a historical artifact.

As another recent commentator noted in the telling title of his column, “The Value of a New Media Shield Law Depends on Your Definition of ‘Media.’”³⁸

The Standoff

Clearly, however, certain elites continue to resist an understanding of the genuine journalistic value of non-traditional media while displaying what is actually a counterintuitive fetish for ascribing higher journalistic value to people who profit financially. Thus, Senator Lindsey Graham asks: “[I]f classified information is leaked out on a personal website or [by] some blogger, do they have the same First Amendments rights as somebody who gets paid [in] traditional journalism?”³⁹ In fact, Senator Schumer’s new shield law bill does not make this distinction. Rather, it would apply anyone who “regularly” gathers and disseminates news:

COVERED PERSON – The term “covered person” –

(A) means a person who –

(i) with the primary intent to investigate events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest, regularly gathers, prepares, collects, photographs, records, writes, edits, reports or publishes on such matters by –

(I) conducting interviews;

(II) making direct observation of events; or

(III) collecting, reviewing, or analyzing original writings, statements, communications, reports, memoranda, records, transcripts, documents, photographs, recordings, tapes, materials, data, or other information whether in paper, electronic, or other form;

(ii) has such intent at the inception of the process of gathering the news or information sought; and

(iii) obtains the news or information sought in order to disseminate the news or information by means of print (including newspapers, books, wire services, news agencies, or magazines), broadcasting (including dissemination through networks, cable, satellite carriers, broadcast stations, or a channel or programming service for any such media), mechanical, photographic, electronic, or other means.⁴⁰

This is a broad definition of a “covered person” – to the extent, of course, it is not eviscerated in practice by the bill’s qualifications, exceptions, and limitations on its protection for “covered persons.”⁴¹

Notwithstanding Senator Schumer’s evident, if qualified, acceptance of a modern definition of the journalistic enterprise, however, other members of the Senate are still stuck on a more traditional conception. In addition to the view of Senator Lindsey Graham, noted above, Senator Richard Durbin of Illinois wrote the following in a July 2013 op-ed:

Journalists should have reasonable legal protections to do their important work. But not every blogger, tweeter or Facebook user is a “journalist.” While social media allows tens of millions of people to share information publicly, it does not entitle them to special legal protections to ignore requests for documents or information from grand juries, judges or other law enforcement personnel.

A journalist gathers information for a media outlet that disseminates the information through a broadly defined “medium” – including newspaper, nonfiction book, wire service, magazine, news website, television, radio or motion picture – for public use. This broad definition covers every form of legitimate journalism.⁴²

To Senator Durbin, there is journalism, and there is “legitimate” journalism – the latter defined by affiliation with traditional media (“motion picture”?) that he describes as being produced “for public use” – as opposed to social media, which, by his own definition, “allows tens of millions of people to share information publicly.”

Durbin’s “public use” versus “tens of millions of people sharing information” distinction is not only an obvious factual contradiction. It is one that, if challenged legally, arguably would be deemed unconstitutional, or at least arbitrary and capricious. It also reminds one perusing the New Jersey blogger decision discussed above that application of even the broadest shield laws by sympathetic courts turns on fairly arbitrary line-drawing. This is so not only with respect to defining what kind of “affiliation,” if any, a journalist seeking shield protection must have with a “news organization” – a fundamentally indefensible position – it also raises questions about how to apply the vaunted “what you do, not who you are” standard. Senator Durbin scoffs at tens of millions of Twitter users passing along some datum as unworthy of protection, but a New Jersey court finds 500–600 unique website visitors a day to be an adequate basis for finding a journalistic enterprise.

As long as courts utilize arbitrary quantitative criteria for qualifying as a journalist based on popularity, whether in terms of circulation, listenership, unique visitors, or otherwise – standards that are empirically and conceptually unexamined – the application of journalist shield laws will raise unexamined, and troubling, doctrinal and constitutional questions. At the very least, the use of such criteria will, as critics maintain, nearly always result in a practical bias respecting the application of the shield in favor of larger media outlets, even if formal affiliation is not required. And this will be true regardless of the accuracy, quality, or other purported indicia of “legitimacy” in journalism, including the subjective intent of the writer or publisher, as demonstrated by the published work in question.

Conclusion

Regardless whether Professor Daly is right as to whether there is, or should be, a penumbral journalistic privilege emanating from the First Amendment, his formulation is probably the most useful one. It provides solid ground for the argument, hinted at in the arguably radical approach of commentators such as Glenn Reynolds, that legislation that extends membership in the Fourth Estate and any appurtenant legal privilege to an elite, presumably favored, class of old-media stakeholders is itself likely a violation of the First Amendment.

Ultimately, as the NSA scandal and the Wikileaks controversies demonstrate, much of the debate is itself arguably hurtling toward irrelevance. Today, those who possess confidential information have little use for media interlocutors, digital or otherwise. They publish the secrets with which they have been entrusted on their own, utilizing famous media outlets or journalists merely as leverage to garner publicity for their initial rollout of secrets. In an era that has little use for privacy and exalts narcissism, and where former politicians masquerade on “the news” as journalists, confidentiality itself is

arguably becoming as antique a concept as press passes, journalistic “ethics,” and editorial responsibility.

Are bloggers journalists? If it matters at all now, it is doubtful that it will for much longer. To the extent the government can and will bring its destructive investigative and prosecutorial powers to bear on those who do not work for supposedly “legitimate” or “real media” outlets, while those who do are exempt from such treatment, there is, in 2013, no principled argument to support such a distinction. Nor is there a cogent ground for such a counterproductive policy, which will produce only more direct leakers, exiles, and media stars out of those who have erroneously been trusted with secrets. ■

1. *In re January 11, 2013 Subpoena by the Grand Jury of Union County, New Jersey* (Sup. Ct. of New Jersey, Union County, Criminal Div., Docket No. 13-001, Apr. 12, 2013), <http://unioncountywatchdog.org/docs/Renna%20is%20a%20Journalist.pdf> (Union County).
2. N.J.S.A. 2A:84A-21, *et seq.*
3. *Union County* at 15-17.
4. *Id.* at 18.
5. *Id.* at 19-20.
6. Laura Handman, Peter Karanjia, Bryan Tallevi & Elissa Krall, *New York – Privilege Compendium; I. Introduction: History and Background*, Reporters Committee for Freedom of the Press, <http://www.rcfp.org/new-york-privilege-compendium/i-introduction-history-background>.
7. Civil Rights Law § 79-h(a)(6).
8. *Id.*
9. “Protecting the New Media: Application of the Journalist’s Privilege to Bloggers,” 120 Harv. L. Rev. 996, 1002 (2007) (“Although a blogger has little chance of prevailing under a shield law protecting only ‘newspapers,’ most shield laws include definitional language that leaves open the question whether bloggers are covered. Most commonly, statutes require that the claimant be affiliated with – or in some cases be affiliated with a medium similar to – one of several enumerated news media, usually including ‘newspaper,’ but also usually including ‘magazine,’ ‘journal,’ or ‘periodical.’”).
10. Civil Rights Law § 79-h reads: (a) Definitions. As used in this section, the following definitions shall apply:
 - (1) “Newspaper” shall mean a paper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at United States post-office as second-class matter.
 - (2) “Magazine” shall mean a publication containing news which is published and distributed periodically, and has done so for at least one year, has a paid circulation and has been entered at a United States post-office as second-class matter.
 - (3) “News agency” shall mean a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.
 - (4) “Press association” shall mean an association of newspapers and/or magazines formed to gather and distribute news to its members.
 - (5) “Wire service” shall mean a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.
 - (6) “Professional journalist” shall mean one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.

(7) “Newscaster” shall mean a person who, for gain or livelihood, is engaged in analyzing, commenting on or broadcasting, news by radio or television transmission.

(8) “News” shall mean written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare....

(f) The privilege contained within this section shall apply to supervisory or employer third person or organization having authority over the person described in this section.

11. Ron Coleman, *Asymmetric Cultural Warfare*, Dean’s World Blog, Oct. 10, 2006, <http://deanemay.com/2006/10/04/asymmetric-cultural-warfare/>.
12. *Royal Wedding: The Way We Were in 1981*, BBC News Mag., Nov. 19, 2010, <http://www.bbc.co.uk/news/uk-11789191>.
13. Robert Zakon, “Hobbes’ Internet Timeline 10.2” (found at <http://www.zakon.org/robert/internet/timeline/>).
14. *Id.*
15. “About Chuck,” Senator Charles E. Schumer official website, <http://www.schumer.senate.gov/About%20Chuck/biography.htm>.
16. Todd Purdum, *I Yam What I Yam*, Vanity Fair, Feb. 7, 2013, <http://www.vanityfair.com/politics/purdum/2013/02/chuck-schumer-show-horse-workhorse-profile>.
17. “Chuck Schumer,” Wikipedia, https://en.wikipedia.org/wiki/Chuck_Schumer (accessed June 30, 2013).
18. Andrew LaVallee, *Shield-Law Amendment Excludes Unpaid Bloggers*, WSJ Blogs, Sept. 23, 2009, <http://blogs.wsj.com/digits/2009/09/23/shield-law-amendment-excludes-unpaid-bloggers/>.
19. Arthur Bright, “Senate Cuts Citizen Bloggers from Federal Shield Bill,” Digital Media Law Project blog, Sept. 28, 2009, <http://www.dmlp.org/blog/2009/senate-cuts-citizen-bloggers-from-federal-shield-bill>.
20. Jason Linkins, “Why Did Sen. Schumer Attempt to Limit the Press Shield Law?,” Huffington Post, Dec. 12, 2009, http://www.huffingtonpost.com/2009/10/01/why-did-sen-schumer-attem_n_306661.html.
21. “Chuck Schumer,” Wikipedia, https://en.wikipedia.org/wiki/Chuck_Schumer#Technology_and_the_Internet (accessed July 1, 2013). There is no citation for the quote.
22. RIAA, “Senate Introduces PROTECT IP Legislation to Confront Foreign Counterfeiting Websites,” undated, https://riaa.com/newsitem.php?content_selector=newsandviews&news_month_filter=5&news_year_filter=2011&id=CA760710-42DA-C51C-CC87-D924608F7ACB.
23. Julianne Pepitone, *SOPA and PIPA Postponed Indefinitely After Protests*, CNN Money blog, Jan. 20, 2012, http://money.cnn.com/2012/01/20/technology/SOPA_PIPA_postponed/index.htm.
24. Sewell Chan, *Bill Would Extend Shield Law to Cover Bloggers*, N.Y. Times, May 20, 2009 (found at <http://cityroom.blogs.nytimes.com/2009/05/20/bill-would-extend-shield-law-to-cover-bloggers/>).
25. *Id.*
26. Ludwig Wittgenstein, *Tractatus Logico-Philosophicus: Side-by-Side Edition* (London 1922), Proposition 4.112, <http://people.umass.edu/phil335-klement-2/tp/tp-ebook.pdf>.
27. Laura Layton, *Defining “Journalist”: Whether and How A Federal Reporter’s Shield Law Should Apply to Bloggers*, Nat’l L. Rev., Mar. 16, 2011, <http://www.natlawreview.com/article/defining-journalist-whether-and-how-federal-reporter-s-shield-law-should-apply-to-bloggers> (footnote omitted).
28. Bill S2353-2013, Open NY Senate Website, <http://open.nysenate.gov/legislation/bill/S2353-2013>.
29. *Id.*
30. “[C]onsider Glenn Reynolds’ 85JD whose blog *Instapundit* is one of the most influential on the Web. (It’s also one of the oldest – *Wired* called him The Blogfather.)” Yale Alumni Mag., Feb. 1, 2008, http://www.yalealumnimagazine.com/blog_posts/888.
31. Glenn Reynolds, *No Freedom to Keep Secrets: If Anyone Can Be a Journalist, Anyone Could Defy a Subpoena*, p.10A, Mar. 10, 2008, <http://usatoday30.usatoday.com/printedition/news/20080310/oppose10.art.htm>.
32. Leo Morris, “We are all the Press,” Opening Arguments blog, Nov. 17, 2005, <http://openingarguments.wordpress.com/2005/11/17/we-all-are-the-press/>. According to the blog, Morris is editorial page editor of the Fort Wayne, Indiana *News-Sentinel*.

33. Zach Carter and Sam Stein, *Reporter Shield Law: Obama Asks Schumer for New Bill After Hampering Prior Efforts*, Huffington Post, May 15, 2013, http://www.huffingtonpost.com/2013/05/15/reporter-shield-law-obama_n_3280025.html.

34. *Editorial: Shield Laws Isn't the Answer*, Wash. Times, May 31, 2013, <http://www.washingtontimes.com/news/2013/may/31/shield-law-isnt-the-answer/>.

35. Christopher Daly, "A Shield Law for Reporters? Thanks, but no thanks!," Prof. Chris Daly's Blog, May 18, 2013, <http://journalismprofessor.com/2013/05/18/a-shield-law-for-reporters-thanks-but-no-thanks/>.

36. See, e.g., Laura Durity, *Shielding Journalist-"Bloggers": The Need to Protect Newsgathering Despite the Distribution Medium*, Duke L. & Tech. Rev., Apr. 7 2006, at 11, 13 ("Despite the legislative history of [Federal] Rule [of Evidence] 501 and the recognition by more than thirty state legislatures of the need to protect a reporter's sources, the Supreme Court has not recognized a reporter privilege. Further, the Supreme Court's refusal to grant certiorari in *Miller* suggests that the Court is unlikely to recognize a reporter's privilege in the immediate future.")

37. Christopher Daly, *NSA Leak: Is Greenwald a Journalist or an Activist?*, Prof. Chris Daly's Blog, June 29, 2013, <http://journalismprofessor.com/2013/07/01/nsa-leak-is-greenwald-a-journalist-or-activist-does-it-matter/>.

38. Phillip Blum, *The Value of a New Media Shield Law Depends on Your Definition of "Media,"* Atlanticwire.com blog (*Atlantic* magazine), June 5 2013, <http://www.theatlanticwire.com/politics/2013/06/value-new-media-shield-law-depends-your-definition-media/65930/>.

39. *Id.*

40. "Free Flow of Information Act of 2013," Bill Text 113th Congress (2013-2014) S.987.IS, <http://thomas.loc.gov/cgi-bin/query/z?c113:S.987>.

41. The efficacy of the bill as written, even to the extent it covers new media, has been questioned. One commentator, focusing on the bill's many hedges and exceptions, doubted that this extent was truly as broad as advertised, especially in light of the many hedges and exceptions in the bill as currently written:

The act will go a long way toward establishing a government-sanctioned journalistic class. There will be, on the one hand, approved reporters who are immune to certain kinds of governmental inquiry, and, on the other hand, everyone else, those less exalted citizens who, faced with the same governmental inquiry, would just have to suck it up. The act is a classic restraint of trade, protecting favored journalists from the pressure of competitors who lack the proper credential. . . .

By the time Schumer's 2009 bill died, Obama's Justice Department had managed to weaken the journalistic privilege with special exceptions, allowing judges to approve the release of private records to prosecutors and to compel reporters to testify about leaks that endanger national security.

Those exceptions will likely remain in the current bill, which means it could not have inhibited the Justice Department from doing what it did to the AP and its phone records. The Free Flow of Information Act is, in other words, completely beside the point. But if it passes now it will not be without effects, most of them pernicious.

Andrew Ferguson, *Shielding What From Whom?*, The Weekly Standard, June 2, 2013, http://www.weeklystandard.com/articles/shielding-what-whom_729012.html?page=1.

42. Dick Durbin, *Sen. Dick Durbin: It's Time to Say Who's a Real Reporter*, Chicago Sun-Times, June 26, 2013, <http://www.suntimes.com/news/otherviews/20978789-452/sen-dick-durbin-its-time-to-say-whos-a-real-reporter.html>.

NEW YORK STATE BAR ASSOCIATION



ADVANCE YOUR KNOWLEDGE,
CONNECTIONS AND CAREER.



ANNUAL MEETING 2014
JAN 27 - FEB 1, 2014
NEW YORK CITY

