



# “Minding the Gap”: Reflections on Media Practice & Theory

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## **A Shield for Whom? First Amendment Implications of a Federal Shield Law**

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### **Lack of Analysis Underlies Threat to Constitutional Values**

Much commentary by the voices of traditional print media has been devoted to touting the desired benefits of a federal shield law, namely that of greater trust between reporters and sources and the establishment of 'balanced ground rules for compelled disclosure of sources and information' (Newspaper Association of America 2007). Without encouraging a vigorous debate within the industry, let alone throughout the public, the bill has been hailed by a coalition of more than 40 leading media organisations.<sup>1</sup> Deeply lacking in attention has been an exploration of the negative implications this proposition would bear on the (un)equal treatment of First Amendment rights and practitioners including future agents of evolving information-distribution systems that cannot presently be realised. This section identifies strands of the missing counterargument.

Throughout this paper, the term 'information disseminator' will refer to traditional and non-traditional distributors of information. Non-traditional journalists include citizen journalists, bloggers, public information offices and anyone else who, independent of an established news media organisation, produces information available to members of the public – information that could be scrutinised, and subject to a court of law, under allegations of libel. (A test for slander could also be pursued, but this paper relies primarily on a discourse surrounding print media and libel). The contestability of this paper's arguably liberal definition of non-traditional journalists plants roots for a reflection on the problematic defining, by Congress, of journalists and journalism.

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<sup>1</sup> The coalition includes ABC Inc., Advance Publications Inc., American Business Media, American Society of Newspaper Editors, Associated Press, Association of Alternative Newsweeklies, Association of American Publishers, Association of Capitol Reporters and Editors, Belo Corp., CBS, CNN, Coalition of Journalists for Open Government, The Copley Press Inc., Court TV, Cox Television, Cox Newspapers, Cox Enterprises Inc., Freedom Communications Inc., Gannett Co. Inc., Hearst Corporation, Magazine Publishers of America, The McClatchy Company, The McGraw-Hill Companies, Media Law Resource Center, National Association of Broadcasters, National Newspaper Association, National Press Club, National Press Photographers Association, National Public Radio, NBC Universal, News Corporation, Newspaper Association of America, The Newspaper Guild-CWA, Newsweek, The New York Times Company, Online News Association, Radio-Television News Directors Association, Raycom Media, Inc., The Reporters Committee for Freedom of the Press, E. W. Scripps, Society of Professional Journalists, Time Inc., Time Warner, Tribune Company, The Washington Post, White House Correspondents' Association (Newspaper Association of America 2007).

Though 32 U.S. states already have versions of a state shield law for journalists, the scope and space of this paper prohibit a concurrent analysis of state and federal contexts. In essence, this issue represents at the federal level a potential violation of the First Amendment of the U.S. Constitution, which specifies that 'Congress shall make no law ... abridging the freedom of speech, or of the press'. A federal shield law would effectively expand this freedom for some, while inherently restricting it for others, and in so doing would abridge those very freedoms for anyone outside the law's scope. This becomes more apparent if one imagines a future society that has passed a federal shield law. Next, apply to that situation the chilling-effect argument presently advanced by advocates for a federal shield law.<sup>2</sup> The chilling-effect argument has commonly been used to say that isolated cases, involving journalists who have been subpoenaed allegedly for purposes ranging from national security to the violation of Major League Baseball regulations, send signals to other information distributors that they should not pursue such risky stories requiring source confidentiality. In the imaginative context whereby a federal shield law exists, privileged protection denied of information distributors outside the 'scope of persons covered by these standards' (Newspaper Association of America 2007) would reverberate its own chilling effect because of the problematic way in which select information distributors would qualify for protection, an issue that can only become murkier as new technologies and mediums become introduced.

The context in which Congress ignited the debate in 2004 over a federal shield law centred largely on a high-profile journalist, Judith Miller, at a high-profile publication, *The New York Times*. In quantitative terms of federal subpoenas issued annually to journalists, however, the claim by industry activists that "these are critical times for the reporter's privilege" seems off-kilter (The Reporters Committee 2007). The Justice Department, which exercises an internal policy that all avenues must first be exhausted before subpoenaing journalists, issued 19 federal subpoenas to journalists in 2004, seven in 2005 and three in 2006.<sup>3</sup> Comparatively, the number of information distributors that

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<sup>2</sup> See, for example, Strupp 2007.

<sup>3</sup> The Reporters Committee (2007) monitors these subpoenas, relying on data provided by the Justice Department.

would potentially be excluded from protection should outweigh any anecdotal evidence pushing toward constitutional divergence. The credibility of information distributors should be determined by allowing the marketplace of ideas to flourish, rather than relying on congressional regulation. Even if they do not call themselves journalists, the argument could be made that a Youtube videographer, or someone who links to or posts comments onto news sites, essentially performs the same actions as a journalist, commentator or news organisation reprinting a syndicated story. Activists favouring a federal shield law have largely ignored any test of proportionality in weighing the value of who might gain or lose with the passage of a federal shield law, although in creating this exclusivity they help formally secure positions and power in the information industry.

### **Obligations and Duties, Freedoms and Protections**

As part of the legislative process necessary for bill passage, Congress would be charged with defining who should be considered an official journalist worthy of protection. Admittedly, and for comparative purposes, even the previously ascribed definition of who might be considered a non-traditional journalist (if only in the context of this paper) should be tempered by debate over the reaches of its inclusive nature. Such inclusiveness, after all, bars the non-traditional group from the exclusivity of protections afforded by a shield law that must, at its core, define who is a journalist. As this section elucidates, a democratic society would be amiss to prescribe standard obligations and duties, but deny equivalent freedoms and protections, to those who exercise freedom of speech or freedom of press. Especially, after all, because any clarity of distinction defining what constitutes the press has become, with the evolution of the World Wide Web and other emerging mediums and technologies, perhaps more contestable than ever before.

In that regard, one might begin by considering a primary tenet among those standard obligations: Anyone who publishes, with or without the aid of an established media organisation, must be bound to the same legal principles as those faced by traditional purveyors of the printed word – namely, that they would be prosecuted for committing libel. In the context of U.S. civil libel law, the point of publication, which the plaintiff must establish in a court of law, occurs when a third party hears or sees the content

(Pember 2004: 137). Within and among newspapers, third-party attribution does not protect outlets that reproduce libellous or slanderous statements. Each is liable for the authentic nature of its published statements, even if, for example, a small daily runs an Associated Press article later found to be libellous.

Within the scope of non-traditional media one might classify public information offices, which must also resist facilitating the publication of libel. In 1989, American Express responded to allegations of libel by agreeing to settle out of court with a banker who accused the company of intentionally disseminating false information to the news media (Pressman 1994). Is it fair to say, then, that although non-traditional media assume the same legal obligations required of traditional media, only some of them should enjoy certain additional legal protections? This is like saying Jane is required to pay taxes, Jane is allowed to vote; Jon is also required to pay taxes, but Jon is not allowed to vote.

If one rejects a delineation between or among information disseminators, two options become clear. Either pursuit of a federal shield law should be abandoned, or all present and future forms of information disseminators must be included in its protection. If, on the other hand, one accepts a delineation between or among information disseminators, one must also reinterpret the legal nature of publishing. Legislation for a federal shield law would inevitably initiate this process, but there exist consequences more widespread than those directly related to journalists' privilege.

Because passage of a federal shield law would require review of the act of publication, or at least what is considered worthy of special protection, this could lead to an accreditation-based exclusivity within the media field in policy, practice, or both. Simply entrusting this process of determination to the judiciary would not change the reality of differentiated First Amendment protection. If Congress and the judiciary stopped short of acting as federal bodies responsible for the execution of a systematic determination procedure, perhaps the accreditation process would be delegated to industry powerhouses who financially and vocally advocated for the move toward exclusivity. Media management who fret over the industry's economic future would do

well to consider the adverse ramifications of such a system; an atmosphere of exclusivity would likely produce greater disconnect between information providers and consumers, especially those who would be sceptical of increasingly prevalent dependence on anonymous sources. Fuss over whether the annual White House Correspondents Dinner fosters too cosy a relationship between media elites and government should pale against the arguably more potent threat posed by the persistent and overt relationship, dedicated to influencing policy, between industry lobbyists and congressional members who will vote whether to enact a federal shield law.

### **Conclusion**

Media elites have exerted their power not only through the editorial decision-making process of organisations like *The Kansas City Star* or *The New York Times*, but also in the halls of Congress – a questionable act in itself, regardless of any purported purpose. So long as everyone treads amid the same legal standards, whether they are called a journalist and whether they defend their endeavour as serving the Fourth Estate, it should not matter if in the end they have characteristically performed the same action. A set of congressional criteria, constructed during a politically reactive period, should not restrict some from receiving full protection under the First Amendment. Federal shield law legislation places Congress in the position of abridging the First Amendment freedoms it seeks to uphold.

If Congress passes legislation narrowly defining the professional scope of journalism by omitting some who are otherwise bound by all other legal standards, activists supporting a federal shield law would be responsible for helping create undemocratic conditions that undermine the marketplace of ideas. To prefer a congressional, or institution-based, set of standards over the marketplace of ideas is to not respect the intelligence of those who would be the recipients, consumers and deciders of information. To provide exclusive protection for some information disseminators, while denying others, is to artificially inflate the value of one person's voice over that of another. To follow this forsaken route

is to crystallize a tiered system propagating systematic inequality among First Amendment practitioners.

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