
DEVELOPMENTS IN THE LAW
THE LAW OF MEDIA

“[T]he only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment.”

New York Times Co. v. United States,
403 U.S. 713, 728 (1971) (Stewart, J., concurring).

“Only by uninhibited publication can the flow of information be secured and the people informed concerning men, measures, and the conduct of government. . . . Only by freedom of speech, of the press, and of association can people build and assert political power, including the power to change the men who govern them.”

Archibald Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 3 (1980).

“Our liberty depends on the freedom of the press, and that cannot be limited without being lost.”

Letter from Thomas Jefferson to James Currie (Jan. 28, 1786),
reprinted in 9 THE PAPERS OF THOMAS JEFFERSON 239, 239
(Julian P. Boyd ed., 1954)

“[T]he price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.”

United States v. Ballard,
322 U.S. 78, 95 (1944) (Jackson, J., dissenting)

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I. INTRODUCTION: NEW MEDIA, NEW SECRECY, NEW QUESTIONS

The media's influence on American life is pervasive and profound. Although this has been true for some time,¹ changes in social mores, technology, and global politics make the media even more important today than it was in the past. The public now demands and receives from the media the most intimate details of the private lives of celebrities, politicians, and regular Joes.² Meanwhile, the Internet has expanded access to traditional media sources³ and facilitated a proliferation of new information sources,⁴ many of which take novel approaches and raise difficult questions about what even counts as media. Since 9/11, these changes have occurred alongside a heightened American concern with national security and a concomitant increase in tension between the press and the government, as the press tries to report on national security issues and the government tries to keep certain activities secret.

Against this backdrop, the six Parts of this Development describe recent changes in media law.

Part II explores whether blogs, an increasingly important source of news, will receive protections that have long been available to more traditional news sources. After describing the constitutional, common law, and statutory protections available to reporters generally, this Part asks which of these might most readily — and helpfully — be extended to blogs. After concluding that the common law reporter's shield will almost certainly cover bloggers but may provide insufficient protection, this Part discusses a recent, groundbreaking case from California⁵ that extended a statutory reporter's shield to bloggers despite the statute's failure to mention blogs explicitly.⁶ This Part then examines whether this decision is likely the beginning of a trend, and evaluates the steps bloggers could take to increase the likelihood that they will receive such protection in the future.

¹ As just one example of the longtime influence of the media on American life, many scholars believe that William Randolph Hearst's *New York Journal* played a significant role in bringing about the Spanish American War of 1898. See, e.g., Blake D. Morant, *Democracy, Choice, and the Importance of Voice in Contemporary Media*, 53 DEPAUL L. REV. 943, 949–50 & n.20 (2004).

² See, e.g., Abby Goodnough et al., *The 2006 Campaign; A Complex and Hidden Life Behind Ex-Representative's Public Persona*, N.Y. TIMES, Oct. 5, 2006, at A27 (discussing the private life of former Representative Mark Foley).

³ See, e.g., LONDON TIMES, <http://www.timesonline.co.uk/global> (last visited Jan. 14, 2007); SYDNEY MORNING HERALD, <http://www.smh.com.au> (last visited Jan. 14, 2007).

⁴ See, e.g., SLATE, <http://www.slate.com> (last visited Jan. 14, 2007); WONKETTE, <http://www.wonkette.com> (last visited Jan. 14, 2007).

⁵ O'Grady v. Superior Court, 44 Cal. Rptr. 3d 72 (Ct. App. 2006).

⁶ See *id.* at 100–06.

Part III discusses whether, in light of several recent, high-profile news stories that revealed classified information⁷ and corresponding threats of retaliation from the Bush Administration and members of Congress,⁸ members of the press could be prosecuted for reporting classified national security information. After describing the history of government attempts to prevent the press from publishing classified information and outlining the general rules regarding when members of the press can be prosecuted for breaking the law, this Part asks whether a recent case, *United States v. Rosen*,⁹ sets a new precedent suggesting that the press can be successfully prosecuted for publishing classified information.

To analyze further the role of the media in an age of renewed government secrecy, Part IV explores the contours of the relationship between the First Amendment and media access to both government leaks and one-on-one interviews with government actors. Although the First Amendment provides no special right of the press to access government information,¹⁰ the government's selective dissemination of information to only some members of the media based on reporters' past speech may constitute impermissible viewpoint discrimination. This Part catalogues several recent decisions that appear to permit government actors to restrict press access based on reporters' past speech. Analysis of the decisions indicates that although courts are willing to patrol for viewpoint discrimination when the government limits access to a press forum to which other journalists have access, they are less willing to do so when government actors limit access to interactive information-gathering opportunities, such as interviews. After considering the practical implications of these cases, this Part suggests that future courts more clearly distinguish between government action that pragmatically limits access based on time or space constraints and government action that denies certain reporters access based on their past speech.

As new technology sends media content around the globe, comparison of international and domestic laws affecting the media has new

⁷ See, e.g., Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1; James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

⁸ Following the publication of the classified information, Representative Peter King of New York stated, "I'm calling on the attorney general to begin a criminal investigation and prosecution of *The New York Times*, its reporters, the editors . . . and the publisher," Anne E. Kornblutt, *Court Review of Wiretaps May Be Near, Senator Says*, N.Y. TIMES, June 26, 2006, at A12, and Attorney General Alberto Gonzales said that the prosecution of journalists who publish classified information "is a possibility" and "[w]e have an obligation to enforce the law and to prosecute those who engage in criminal activity," Walter Pincus, *Prosecution of Journalists Is Possible in NSA Leaks*, WASH. POST, May 22, 2006, at A4.

⁹ 445 F. Supp. 2d 602 (E.D. Va. 2006).

¹⁰ See *Houchins v. KQED Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring in the judgment).

importance. Parts V and VI explore two classes of recent developments in the United States and Commonwealth countries that affect the potential liability of media defendants.

Part V compares U.S. and Commonwealth doctrine on the exercise of personal jurisdiction over media defendants in defamation cases based on Internet content. U.S. courts have settled on a targeting test, which finds jurisdiction only when a media defendant intentionally directs content specifically at viewers in the forum state.¹¹ In contrast, Commonwealth nations including the United Kingdom, Australia, and Canada have settled on a more lenient foreseeability test, which allows jurisdiction whenever it is foreseeable that content will be available and potentially cause harm.¹² This Part argues that the differing jurisdictional tests stem in part from entrenched differences in the substantive laws of, and the value placed on speech in, the United States and Commonwealth nations. Viewing the procedural tests as outgrowths of substantive differences helps explain why arguments to change procedural tests in Internet cases have failed. Looking forward, this Part predicts that a treaty harmonizing the different jurisdictional approaches would be helpful but is unlikely, and that media defendants will therefore increasingly rely on technology to limit the dissemination of Internet content to avoid being subject to jurisdiction in foreign courts.

Part VI explores the legal implications in the United States and Commonwealth nations of media reports about suspects in criminal cases and investigations. Historically, laws that governed reporting about suspects tended to align with the divergent trends toward media protection in the United States and reputation protection in Commonwealth nations. However, this Part recounts recent developments that imply some convergence in the traditional doctrines. In the United States, a recent Fourth Circuit decision¹³ provided stronger protection to a suspect-plaintiff than traditional U.S. doctrine would have afforded when it evaluated the overall tone of a newspaper's report to find the report capable of defamatory meaning. In the United Kingdom, recent defamation decisions provided new protection to the media by expanding the qualified privilege defense¹⁴ and directing lower courts to apply this privilege more consistently.¹⁵ Similarly, the recent passage of uniform defamation acts in Australia¹⁶ may foreshadow in-

¹¹ See, e.g., *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002).

¹² See, e.g., *King v. Lewis*, [2004] EWHC (QB) 168, *aff'd*, [2004] EWCA (Civ) 1329.

¹³ *Hatfill v. N.Y. Times Co.*, 416 F.3d 320 (4th Cir.), *reh'g en banc denied*, 427 F.3d 253 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1619 (2006).

¹⁴ *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127 (H.L.) (appeal taken from Eng.).

¹⁵ See *Jameel v. Wall St. Journal Europe Sprl.*, [2006] UKHL 44 (appeal taken from Eng.).

¹⁶ See, e.g., *Defamation Act, 2005* (Vict.).

creased protection for the media in that country. However, despite these steps toward more plaintiff protection in the United States and more media protection abroad, this Part concludes that convergence of the laws governing reporting about suspects in these jurisdictions is unlikely due to deep differences in underlying defamation and criminal contempt laws.

Finally, Part VII examines the interaction between the Health Insurance Portability and Accountability Act¹⁷ (HIPAA), a federal law designed to protect the privacy of individuals' health information, and state Freedom of Information (FOI) laws,¹⁸ which are designed to ensure public access to government documents. This Part describes three recent cases from different states that addressed difficult issues about where and how to draw the line between the public's right to know and individuals' rights to keep their medical information secret. This Part concludes that questions about the interaction of state FOI laws and HIPAA should be guided by the framework suggested in HIPAA regulations for understanding the interaction between HIPAA and the federal Freedom of Information Act.¹⁹ State courts and agencies should therefore use the provisions in state FOI laws that regard medical privacy to inform decisions about information requests from citizens and the media.

II. PROTECTING THE NEW MEDIA: APPLICATION OF THE JOURNALIST'S PRIVILEGE TO BLOGGERS

Late last year, the *Washington Post's* political editor and one of the paper's top political reporters announced that they were leaving the newspaper to launch an Internet-focused news organization.¹ The following week, a popular blog devoted to political commentary announced its plans to introduce original news reporting.² As the Internet becomes an increasingly important source of news,³ operators of

¹⁷ Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified in scattered sections of 26, 29, and 42 U.S.C.).

¹⁸ See, e.g., Louisiana Public Records Law, LA. REV. STAT. ANN. § 44:31 (Supp. 2006); Ohio Public Records Act, OHIO REV. CODE ANN. § 149.43 (West 2002); Texas Public Information Act, TEX. GOV'T CODE ANN. §§ 552.001-353 (Vernon 2004).

¹⁹ 5 U.S.C. § 552 (2000 & Supp. IV 2004).

¹ See Katharine Q. Seelye, *Washington Post Reporters To Join Politics Web Site*, N.Y. TIMES, Nov. 21, 2006, at C10.

² See Katharine Q. Seelye, *Huffington Post To Add Original Reporting to Its Web Blog*, N.Y. TIMES, Nov. 30, 2006, at C2.

³ According to one report, 29% of adult Americans sought news online at least three days per week in 2004, up from 23% in 2000. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, NEWS AUDIENCES INCREASINGLY POLARIZED 17 (2004), available at <http://people-press.org/reports/pdf/215.pdf>. An October 2006 poll of registered voters nationwide found that 38% of respondents turned to the Internet for information related to the upcoming national election. IPSOS PUB. AFFAIRS, AP/AOL/IPSOS POLL: MIDDLE CLASS GIVES DEMOCRATS HOPES OF VIC-

news-oriented blogs — most of which are unaffiliated with traditional news media organizations — are coming to play a role within the news media comparable to that of traditional journalists.⁴ A natural consequence of bloggers' increased influence in the provision of news is that they will likely seek to rely on the same evidentiary privileges that traditional journalists have long found vital to the integrity of their profession and to their ability to perform their jobs effectively.⁵ With protection from compelled disclosure of information obtained in the course of gathering news, a journalist can more readily promise confidentiality to those sources who demand it, as well as defend against the practical burdens and distractions that subpoenas often impose.⁶ In most jurisdictions, traditional journalists, such as those employed by newspapers or radio stations, are covered both by a First Amendment privilege and by a state statutory privilege. Journalists unaffiliated with traditional news media organizations, such as nonfiction book authors or student journalists, generally have been successful in invoking the constitutional privilege. In many states, however, they have found protection under the statutory privilege to be elusive. The difference in coverage between these two types of privileges lies in the way in which each type of privilege conceives of who qualifies as a

TORY 15 (2006), available at <http://www.ipsos-na.com/news/pressrelease.cfm?id=3238> (survey results on file with the Harvard Law School Library).

⁴ A recent report found that about twelve million adult Americans, or 8% of all adult Internet users, operate a blog, and about fifty-seven million adult Americans, or 39% of adult Internet users, read blogs. AMANDA LENHART & SUSANNAH FOX, PEW INTERNET & AM. LIFE PROJECT, BLOGGERS: A PORTRAIT OF THE INTERNET'S NEW STORYTELLERS 1-2 (2006), available at http://www.pewinternet.org/PPF/r/186/report_display.asp. Thirty-four percent of bloggers described their blog as a form of journalism, with 56% of that group reporting that they sometimes or often spent "extra time trying to verify facts." *Id.* at 10-11.

⁵ See generally *N.Y. Times Co. v. Gonzales*, 382 F. Supp. 2d 457, 498-99 & n.28 (S.D.N.Y. 2005) (listing important news stories that would not have been reported but for sources relying upon promises of confidentiality); Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 97-98 & n.4, 102 (2002) (emphasizing the importance of the use of confidential sources and the journalist's privilege to American journalism); Laurence B. Alexander & Leah G. Cooper, *Words That Shield: A Textual Analysis of the Journalist's Privilege*, 18 NEWSPAPER RES. J. 51, 54 (1997) (describing empirical and public policy rationales for the journalist's privilege).

⁶ See *Branzburg v. Hayes*, 408 U.S. 665, 729 (1972) (Stewart, J., dissenting) (noting that it is "obvious that the promise of confidentiality [is] a necessary prerequisite to a productive relationship between a newsmen and his informants"); *id.* at 725 (stating that requiring a journalist to respond to a grand jury subpoena "invites . . . authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government"); see also Alexander, *supra* note 5, at 107 (suggesting that advocacy for journalist's privileges gained force in the 1960s when the federal government increasingly issued subpoenas as a way of compelling journalists to reveal information related to "leftist, radical activity" under investigation); Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism To Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1374-75, 1387-88 (2003) (discussing the evolution of the journalist's privilege under federal law).

journalist. The distinction can be consequential because the statutory privileges are often significantly more protective than the constitutional analogue.

This Part assesses the likelihood of bloggers' protection under both the constitutional and the statutory journalist's privileges. Although the case law treating this precise question is sparse, trends in the application of the constitutional privilege to other nontraditional journalists suggest that bloggers will qualify for it as well. As for bloggers' prospects under statutory privileges, however, the outlook is less clear. Language in many state shield statutes is open to interpretation as to whether bloggers unaffiliated with traditional news organizations are covered, and, with one exception, state courts have yet to confront the issue. Also contributing to the uncertainty of bloggers' prospects for statutory protection is the unknown outcome of the growing movements to introduce shield statutes in some of the states that do not have them, as well as recurring debates in Congress over whether to introduce a federal shield law. This Part concludes that with respect to the extension of statutory protection to bloggers, one principle is likely to guide: the level of such protection that bloggers ultimately obtain will be closely tied to their ability, through self-regulation, to act with a level of accuracy and transparency comparable to that of traditional news media organizations.

A. *The Constitutional Privilege*

1. *Precedential Basis for the Privilege.* — Ever since the Supreme Court's 1972 decision in *Branzburg v. Hayes*,⁷ most circuit courts of appeals⁸ and appellate courts in about half the states⁹ have interpreted the First Amendment as mandating a qualified journalist's privilege. This trend may appear surprising on its face because the five-Justice *Branzburg* majority held that the First Amendment does not give a newspaper reporter an absolute right to refuse to testify when called before a grand jury.¹⁰ However, state and lower federal courts recog-

⁷ 408 U.S. 665.

⁸ See Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 224–25 (2005). Only the Sixth Circuit has explicitly refused to recognize the privilege. See *Storer Commc'ns, Inc. v. Giovan* (*In re Grand Jury Proceedings*), 810 F.2d 580, 584 (6th Cir. 1987). However, the Eighth Circuit has characterized the existence of the privilege as an open question, see *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 n.8 (8th Cir. 1997), and the Seventh Circuit has recently signaled its doubts about the privilege with respect to nonconfidential sources, see *McKevitt v. Pallasch*, 339 F.3d 530, 532–33 (7th Cir. 2003).

⁹ See David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 489 n.329 (2002); James C. Goodale et al., *Reporter's Privilege*, in 3 COMMUNICATIONS LAW 371, 380 & n.3 (PLI Intell. Prop. Course Handbook Series No. G-849, 2005), WL 849 PLI/Pat 371.

¹⁰ See *Branzburg*, 408 U.S. at 708–09. The majority opinion recognized an exception in the case of a subpoena executed on the reporter in bad faith or for harassment. See *id.* at 707–08.

nizing a qualified First Amendment privilege have located their authority in Justice Powell's concurring opinion.¹¹ In providing the decisive fifth vote, Justice Powell noted the "limited nature" of the majority's holding¹² and suggested that the application of a First Amendment journalist's privilege should be determined on a case-by-case basis, pursuant to a balancing test with the freedom of the press on one side of the scale and the public interest in the information on the other side.¹³ Once the lower courts thus extracted a qualified constitutional journalist's privilege from *Branzburg*, it was not long before they faced the task of deciding who could qualify as a journalist for purposes of the privilege.

2. *Scope of the Privilege.* — The consensus among courts recognizing the privilege is that the class of persons entitled to invoke it, and thereby to trigger the balancing test, includes anyone who, "at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation."¹⁴ Accordingly, "the journalist's privilege has been invoked successfully by persons who are not journalists in the traditional sense of that term."¹⁵

Because of the expansive way in which courts have applied the First Amendment privilege, Internet journalists of all kinds can likely depend on coverage wherever the privilege is recognized, so long as they can show that they acquired the sought-after information with the intention of publicizing it. Although there is little case law addressing independent Internet journalists specifically, those cases that exist support this conclusion. In *Blumenthal v. Drudge*,¹⁶ the earliest such case, the operator of an online gossip column who distributed content through his own website, through e-mail to his subscribers, and to America Online, which in turn made the content available to its subscribers,¹⁷ received a discovery request to reveal the source of allegedly libelous statements so disseminated.¹⁸ The court did not hesitate to find him eligible for protection under the First Amendment journalist's privilege.¹⁹

¹¹ See, e.g., *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 172–73 (2d Cir. 2006) (citing *Branzburg*, 408 U.S. at 709, 710 (Powell, J., concurring)).

¹² *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

¹³ See *id.* at 710.

¹⁴ *Von Bulow v. Von Bulow*, 811 F.2d 136, 143 (2d Cir. 1987).

¹⁵ *Id.* (citing *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977)); see also, e.g., *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (extending the privilege to "investigative book authors"); *Silkwood*, 563 F.2d at 436–37 (extending the privilege to an independent documentary filmmaker); *King v. Photo Mktg. Ass'n Int'l (In re Photo Mktg. Ass'n Int'l)*, 327 N.W.2d 515, 517–18 (Mich. Ct. App. 1982) (extending the privilege to trade magazines and newsletters).

¹⁶ 186 F.R.D. 236 (D.D.C. 1999).

¹⁷ See *Blumenthal v. Drudge*, 992 F. Supp. 44, 47–48 (D.D.C. 1998).

¹⁸ See *Blumenthal*, 186 F.R.D. at 238–39.

¹⁹ See *id.* at 244.

Since *Blumenthal*, only one other case, *O'Grady v. Superior Court*,²⁰ has considered whether an independent provider of news on the Internet can claim protection under the First Amendment journalist's privilege.²¹ In *O'Grady*, Apple Computer filed complaints against twenty-five anonymous defendants whom it suspected of revealing confidential information and trade secrets to the operators of blogs devoted to news about the company and its products.²² The trial court allowed the company to subpoena the bloggers for information about the identities of the alleged leakers.²³ The California Court of Appeal, however, held that the bloggers were journalists entitled to protection under the qualified First Amendment privilege²⁴ and refused to compel them to reveal the identities of their sources.²⁵

B. Journalist's Shield Statutes

Thirty-two states and the District of Columbia provide statutory journalist's privileges, known as shield laws.²⁶ There are movements in some of the remaining states to introduce them,²⁷ and ever since *Branzburg* there have been repeated calls in Congress to enact a federal shield law.²⁸ Newsgatherers regularly find it advantageous to invoke their state's shield law because the First Amendment privilege is often unavailing for a number of reasons. First, some circuits have either refused to recognize a First Amendment privilege altogether or have signaled doubts about recognizing the privilege should the question arise.²⁹ Second, the types of proceedings in which the First Amendment privilege applies, and the types of information that it pro-

²⁰ 44 Cal. Rptr. 3d 72 (Ct. App. 2006).

²¹ Recently, a videographer-blogger who was summoned to testify before a grand jury claimed protection as a journalist under the First Amendment. See *Wolf v. United States (In re Grand Jury Subpoena)*, No. 06-16403, 2006 WL 2631398, at *1 (9th Cir. Sept. 8, 2006). The Ninth Circuit, in an unpublished opinion, did not reach the question whether the claimant was a qualifying journalist, resting instead on the ground that under *Branzburg*, the First Amendment privilege never applies in a grand jury setting. See *id.* at *1-2. For more on the case, see Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 434 n.235 (2006).

²² See *O'Grady*, 44 Cal. Rptr. 3d at 80-81.

²³ *Id.* at 81.

²⁴ See *id.* at 106.

²⁵ See *id.* at 112, 115-16.

²⁶ See Eliason, *supra* note 21, at 398 n.64 (noting the 2006 enactment of the Connecticut shield law); Nestler, *supra* note 8, at 225 & n.120 (listing the shield laws in existence in 2005).

²⁷ See Christy Hoppe, *Bill To Protect Reporters Falls Short*, DALLAS MORNING NEWS, May 10, 2005, at 4A (describing efforts in Texas); Sarah Lai Stirland, *Privacy: Lobbyist Argues Against 'Shield' Laws for Media*, NAT'L J.'S TECH. DAILY, May 5, 2006 (describing efforts in Massachusetts, Missouri, and Washington).

²⁸ See, e.g., Free Flow of Information Act of 2006, S. 2831, 109th Cong. (2006); Free Flow of Information Act of 2005, H.R. 3323, 109th Cong. (2005).

²⁹ See *supra* note 8.

pects, have been circumscribed — or confounded — by judicial decisions. A majority of the circuits have recognized a broad role for the First Amendment privilege in civil cases, but in criminal contexts, and especially with respect to grand jury proceedings, most circuits have sharply limited the privilege, have made conflicting statements about its strength, or have managed to avoid ruling on the question altogether.³⁰ Third, the First Amendment privilege is highly qualified, and it is usually applied in accordance with the three-part balancing test propounded by Justice Stewart in his *Branzburg* dissent.³¹ Therefore, a party relying on the privilege to resist compelling disclosure cannot know with certainty that its assertion of privilege will succeed.

State shield laws, by and large, are substantially more protective than the First Amendment privilege. Many apply in all civil and criminal contexts, including grand jury proceedings,³² and many provide virtually absolute protection in at least some contexts.³³ At the same time, however, most state shield laws define the protected class more narrowly than the First Amendment privilege does, usually focusing on the claimant's affiliation with a specified type of news entity rather than on the intent that the claimant had in gathering the sought-after information.³⁴ For example, Ohio's shield law protects only "person[s] engaged in the work of, or connected with, or employed by" a radio station, television station, newspaper, or press association.³⁵ Courts construing the Ohio statute and other statutes with a similar "newspaper" limitation³⁶ have done so narrowly. Thus, although the First Amendment privilege, wherever recognized, unquestionably would apply to the publisher of a bimonthly trade newsletter,³⁷ a court

³⁰ See C. THOMAS DIENES ET AL., *NEWSGATHERING AND THE LAW* § 18.02[3], at 1066–89 (3d ed. 2005) (describing, circuit by circuit, the types of proceedings in which the constitutional privilege has, or has not, been held to apply).

³¹ See *Branzburg v. Hayes*, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting).

³² See DIENES ET AL., *supra* note 30, § 17.02[3], at 974–91 (surveying the types of proceedings in which various shield laws either explicitly apply or have been construed to apply).

³³ See *id.* § 17.02[5][a], at 1004–06 (describing the contexts in which various shield laws provide absolute protection). Most typically, when protection is absolute, it is limited to compelled disclosure of a source's identity. See *id.* § 17.02[5][a], at 1005 ("Many states . . . afford[] an absolute privilege to the 'source' of news or information and qualified protection to other unpublished information."); see also Laurence B. Alexander & Ellen M. Bush, *Shield Laws on Trial: State Court Interpretation of the Journalist's Statutory Privilege*, 23 J. LEGIS. 215, 219 & n.30 (1997) (listing, as of 1997, the thirteen states providing absolute protection at least with respect to source identity). Some states, however, extend absolute protection to compelled disclosure of other information. See DIENES ET AL., *supra* note 30, § 17.02[5][a], at 1004 ("A few statutes, on their face, extend an absolute privilege to the compelled disclosure of the identities of sources and other unpublished information.").

³⁴ See DIENES ET AL., *supra* note 30, § 17.02[2][a], at 969–72.

³⁵ OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (West 2006).

³⁶ See, e.g., ALA. CODE § 12-21-142 (2006); ARIZ. REV. STAT. ANN. § 12-2237 (2003).

³⁷ See, e.g., *Apicella v. McNeil Labs., Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975).

held that Ohio's shield law did not, because the publication was not a "newspaper."³⁸ And when radio and television broadcasters began to ask courts to grant them coverage under statutory categories describing traditional print media, the courts refused to construe the statutory categories so broadly, leading legislators to amend their shield laws to include "radio or television" reporters, or "broadcasters."³⁹

Although a blogger has little chance of prevailing under a shield law protecting only "newspapers,"⁴⁰ 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."⁴¹ Colorado's shield law, for example, requires that its protected class be engaged in the dissemination of news through "a newspaper or periodical; wire service; radio or television station or network; news or feature syndicate; or cable television system."⁴² California's statute, similarly, protects journalists "connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service."⁴³ New Jersey's shield law, like a number of others, enumerates several protected entities but leaves the list open to similar entities.⁴⁴ Whether a blog or other news source that is published exclusively on the Internet will receive protection under a state shield statute will therefore often hinge on whether a court is willing to consider it a "periodical," "magazine," or "journal" or, in some cases, as sufficiently similar to one of those entities. Until recently, no appellate court had addressed this precise question.⁴⁵

³⁸ See *Deltec, Inc. v. Dun & Bradstreet, Inc.*, 187 F. Supp. 788, 789–90 (N.D. Ohio 1960); *cf.* *Price v. Time, Inc.*, 304 F. Supp. 2d 1294, 1296 (N.D. Ala. 2004) (refusing to interpret the term "newspaper" to cover magazine reporters); *Matera v. Superior Court*, 825 P.2d 971, 975 (Ariz. Ct. App. 1992) (refusing to extend the shield law to a nonfiction book author).

³⁹ See DIENES ET AL., *supra* note 30, § 17.01, at 964–65 & n.6.

⁴⁰ See *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 100 (Ct. App. 2006) (noting that "newspaper" . . . has always meant, and continues to mean, a regularly appearing publication printed on large format, inexpensive paper").

⁴¹ See Alexander, *supra* note 5, at 117 n.100 (noting that, as of 2002, "[m]agazines or 'other periodicals' were named or referenced in twenty-three of the state statutes"). To this list must be added Connecticut's shield law, enacted in 2006. See Act of Oct. 1, 2006, § 1(2)(A), 2006 Conn. Legis. Serv. 404, 404 (West).

⁴² COLO. REV. STAT. ANN. § 13-90-119(1)(a) (West 2005).

⁴³ CAL. EVID. CODE § 1070(a) (West 1995). Several other state statutes define the privilege's scope by reference to enumerated types of media. See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 9-112(a) (LexisNexis 2002); OKLA. STAT. ANN. tit. 12, § 2506(A)(7) (West Supp. 2006).

⁴⁴ See N.J. STAT. ANN. § 2A:84A-21a(a) (West 1994); see also, e.g., NEB. REV. STAT. § 20-145(2) (1997); OR. REV. STAT. § 44.510(2) (2005).

⁴⁵ See Kimberly Wilmot Voss, *Will Lawmakers Raise Shields To Protect Bloggers?*, ONLINE JOURNALISM REV., Oct. 13, 2004, <http://www.ojr.org/ojr/stories/051013voss>. However, in the

Last year, however, in a ruling that suggests the form the debate may take, the California Court of Appeal in *O'Grady v. Superior Court* interpreted the terms “magazine” and “other periodical publication” in California’s shield statute to embrace the claimants’ blogs. In its analysis of the statutory language, the court noted that “[t]he term ‘magazine’ is now widely used in reference to Web sites or other digital publications of the type produced” by the claimants.⁴⁶ Moreover, it reasoned that even if the term “magazine” did not apply to the blogs at issue, they likely would fall under the category “other periodical publications.”⁴⁷ Significantly, the court dispensed with the possibility that the category should be restricted to print publications by observing that “there is no apparent link between the core purpose of the law, which is to shield the gathering of news for dissemination to the public, and the characteristic of appearing in traditional print, on traditional paper.”⁴⁸

Although acknowledging that “the term ‘publication’” may “carry the connotation of printed matter,”⁴⁹ the court proceeded to draw an analogy between printed publications and the claimants’ websites: “[T]hey consist predominantly of text on ‘pages’ which the reader ‘opens,’ reads at his own pace, and ‘closes.’”⁵⁰ Having found the claimants’ websites likely to be “magazines” or, at the very least, “other periodical publications,” the court concluded that the shield law extended to the bloggers.⁵¹

In construing California’s shield law, the *O'Grady* court followed a functional approach to expand and redefine the facially narrow class of newsgatherers protected by the law. The terms “periodical,” “publi-

few cases that have arisen outside the context of the Internet, courts have tended to construe the definitional language broadly, though within its literal limits. In *Cukier v. American Medical Ass'n*, 630 N.E.2d 1198 (Ill. App. Ct. 1994), for example, the court held that a weekly medical journal fell within the definition of the protected “news medium,” defined as “any newspaper or other periodical issued at regular intervals and having a general circulation.” *Id.* at 1200–01 (quoting 735 ILL. COMP. STAT. 5/8-902(a) (2004)) (internal quotation marks omitted). And in *In re Avila*, 501 A.2d 1018 (N.J. Super. Ct. App. Div. 1985), the court found that, although a twenty-page tabloid was not a “newspaper” within the meaning of New Jersey’s shield law because, among other reasons, it did not have paid circulation, it satisfied the statute’s requirement of being sufficiently “similar” to a “newspaper.” *Id.* at 1020–21 (internal quotation marks omitted).

⁴⁶ *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 100 (Ct. App. 2006).

⁴⁷ *See id.* at 100–05.

⁴⁸ *Id.* at 101.

⁴⁹ *Id.* at 103.

⁵⁰ *Id.* Having found that the websites were “publications,” the court determined that they were also “periodicals” even though they were updated constantly. The court reasoned that the word “periodical” is ambiguous and often refers to printed serials that do not appear with “absolute regularity.” *Id.* at 104. Rather, the court concluded that the legislature likely “intended the phrase ‘periodical publication’ to include all ongoing, recurring news publications while excluding non-recurring publications such as books, pamphlets, flyers, and monographs.” *Id.*

⁵¹ *Id.* at 104–05.

cation,” and possibly “magazine” proved just flexible enough to allow the court to make the constructive leap that its insight into the purpose of the law — to encourage the gathering and dissemination of news to the public — demanded. Relying on the same reasoning that courts have used to extend the First Amendment privilege to newsgatherers who intend to disseminate news to the public, the court dismissed the argument that the shield statute should apply only to print publications. It suggested, in effect, that the real goal of the shield law was to protect the *process* of newsgathering and, in light of this purpose, found the blogs at issue to be functionally indistinguishable from traditional print publications.⁵²

C. Prospects for Bloggers’ Protection Under Shield Laws

On the whole, journalist-bloggers unaffiliated with traditional news media organizations are on shaky ground. They can count on coverage under the First Amendment privilege in those jurisdictions that recognize it — and in some cases that will be enough. But in those cases that call for heightened protection, bloggers in states with shield statutes may find it difficult to come within the statute’s narrowly defined protected classes. If the statutory language can plausibly be extended to bloggers, then they can hope to find a court willing to construe the definition of the class expansively,⁵³ as the *O’Grady* court did. But there is no guarantee of finding a willing court, and therefore, even in the case of a statute that appears elastic, only affirmative legislation could ever truly assure bloggers of coverage. And in states with shield laws allowing for no textually plausible extension to bloggers, as well as in states that lack shield laws altogether, legislative action is bloggers’ only hope for heightened protection.

Whether judicial construction or legislative action is the route to such protection, bloggers’ prospects are likely to improve as (or if) the integrity and the sociopolitical importance of news-oriented blogging increase. A primary rationale for states’ enactment of shield statutes

⁵² In *Wolf v. United States (In re Grand Jury Subpoena)*, No. 06-16403, 2006 WL 2631398 (9th Cir. Sept. 8, 2006), the videographer-blogger claimant asserted that he was being prosecuted in federal court so that California’s shield law would not apply, and that the choice of forum was thus evidence of bad faith that should allow him to prevail on a First Amendment privilege claim. *Id.* at *2. The Ninth Circuit dismissed this assertion of bad faith by noting without analysis and without mention of *O’Grady* that the claimant “produced no evidence” that the sought-after videotape “was made while he was . . . connected or employed” with a “newspaper, magazine, or other periodical publication.” *Id.* at *2 n.1 (quoting CAL. CONST. art. I, § 2(b)).

⁵³ See Nathan Fennessy, Comment, *Bringing Bloggers into the Journalistic Privilege Fold*, 55 CATH. U. L. REV. 1059, 1083 (2006) (describing the Michigan and New York shield laws as containing language allowing for such an expansive construction).

has been to protect the public interest in the free flow of information.⁵⁴ In some cases this policy appears on the statute's face,⁵⁵ whereas in others it underlies the way in which courts apply the privilege.⁵⁶ The closer blogs' contribution to the free flow of information approaches that of traditional print publications, the more likely courts will be to treat blogs as the functional equivalents of those publications and, therefore, as protected by existing shield statutes. By the same reasoning, the more bloggers are perceived as contributing to the free flow of information, the more likely future shield statutes are to cover them, or to be construed as covering them.⁵⁷ Blogs will more likely appear as the functional equivalents of printed periodicals and other traditional news media — and their formal differences will, correspondingly, more likely appear to be immaterial in view of the policies underlying shield laws — if the news coverage that blogs provide is, on the whole, at least as expansive, accurate, and accessible as is the news coverage, on the whole, that the traditional media provide.

Just as traditional news organizations provide formal editorial oversight to ensure the accuracy and integrity of their providers' conduct and thereby improve the public value of the information services that they provide, bloggers who publish news would likewise increase the value of the news that they deliver if they developed analogous, even if less formal, oversight mechanisms to govern their conduct as newsgatherers. To some extent, such a process already exists: bloggers themselves comment upon, correct, and expose inaccuracies in other blogs.⁵⁸ The potential promise of this method of regulation — as well

⁵⁴ See Alexander & Bush, *supra* note 33, at 215, 217; Alexander & Cooper, *supra* note 5, at 53–54.

⁵⁵ See, e.g., MINN. STAT. § 595.022 (2004) (“[T]o protect the public interest and the free flow of information, the news media should have . . . a substantial privilege not to reveal sources of information or to disclose unpublished information.”); NEB. REV. STAT. § 20-144(1) (1997) (“[T]he policy of the State of Nebraska is to insure the free flow of news and other information . . .”).

⁵⁶ See, e.g., *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972) (noting that the New York and Illinois shield statutes “reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters”).

⁵⁷ The recently enacted North Carolina and Connecticut shield laws appear to leave the door open to extending protection to bloggers. See Act of Oct. 1, 2006, § 1(2)(A), 2006 Conn. Legis. Serv. 404, 404 (West) (covering “[a]ny newspaper, magazine or other periodical . . . that disseminates information to the public, whether by print, broadcast, photographic, mechanical, electronic or any other means”); N.C. GEN. STAT. § 8-53.11(a)(3) (2005) (covering “[a]ny entity regularly engaged in the business of publication or distribution of news via print, broadcast, or other electronic means accessible to the general public”); see also Alexander, *supra* note 5, at 97 n.2 (noting that, “[o]n the surface,” the language of North Carolina’s shield statute “would allow an argument for including new-media journalism”). Whether courts accept the invitation, however, is a different question.

⁵⁸ See Grant Penrod, *What About Bloggers?*, 29 NEWS MEDIA & L., Summer 2005, at 34, 35 (“[Bloggers] do actually have an editorial process of sorts, which is that bloggers comment on each other as much as they comment on mainstream media.” (quoting Kurt B. Opsahl, staff attorney

as its advantages over the practices of the traditional media — appeared during the 2004 elections when bloggers, collaborating among themselves, exposed as forgeries documents that had been publicized by CBS News and that suggested that President Bush had benefited from preferential treatment while serving in the Air National Guard.⁵⁹

In addition to the potential of a uniquely effective system of regulation that blogging may offer, another factor that courts and legislators may consider in assessing the public importance of protecting the free flow of information from blogs is the likelihood that certain topics that find a forum there are unlikely to find a place in the traditional media.⁶⁰ The barriers to entry that exist in traditional news media organizations do not exist on the Internet, and as a result, bloggers can provide narrow segments of the public with important, but specialized, information that they might otherwise not obtain. Indeed, even stories with broad interest might go uncovered if not for blogs: in 2002, for example, when Senator Trent Lott spoke favorably of Strom Thurmond's racially divisive presidential campaign of 1948, the traditional media largely ignored the comments until bloggers brought them to the public's attention.⁶¹

To be sure, the lack of a formal editorial process and its attendant system of regulation threatens the accuracy of information posted on blogs and, accordingly, the public value of blogging as a whole. The ease of entry into news blogging poses the risk that some bloggers will unintentionally post inaccurate information out of lack of experience, training, and skill. A related risk is that the notably low level of transparency inherent in the operation of a blog may lead partisan bloggers to post deliberately misleading information.⁶² Perhaps, however, the problems posed by blogs' lack of transparency can be checked by bloggers themselves acting independently or in concert to

at the Electronic Frontier Foundation)). Some bloggers, working in networks, have developed codes of conduct that they have agreed to observe. See, e.g., *A Blogger's Code of Ethics*, CYBERJOURNAL.NET, Apr. 15, 2003, available at <http://www.cyberjournalist.net/news/000215.php>. But see Laura Durity, Note, *Shielding Journalist—"Bloggers": The Need To Protect Newsgathering Despite the Distribution Medium*, 2006 DUKE L. & TECH. REV. 11, ¶¶ 36–37, <http://law.duke.edu/journals/dltr/articles/2006dltr0011.html> (arguing that formal, hierarchical editorial oversight should be a criterion for shield law coverage).

⁵⁹ See Jim Rutenberg, *Web Offers Hefty Voice to Critics of Mainstream Journalists*, N.Y. TIMES, Oct. 28, 2004, at A26.

⁶⁰ See Stephanie J. Frazee, Note, *Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 8 VAND. J. ENT. & TECH. L. 609, 635 (2006); Penrod, *supra* note 58, at 35.

⁶¹ See Noah Shachtman, *With Incessant Postings, a Pundit Stirs the Pot*, N.Y. TIMES, Jan. 16, 2003, at G5.

⁶² See, e.g., Howard Kurtz, *Post Photographer Repays Group for Trip Expenses*, WASH. POST, Oct. 12, 2006, at C2 (describing how a photographer's blog contained favorable commentary on Wal-Mart but did not disclose that the blogger received financial support from Wal-Mart).

investigate who or what lurks beneath them, just as bloggers act to expose inaccuracies represented as news by fellow bloggers.

If legislatures and courts are ever to find that the free flow of information on blogs is of sufficient public interest to merit protection, bloggers will need to develop institutional credibility from the bottom up. Not every news-oriented blog, of course, need be seen as advancing the public interest in the provision of information. The traditional media, after all, have obtained statutory protection as a class even though, at the individual level, some members of the media do not advance the public interest. But if the activity of news-oriented blogging is to be afforded the same protection as is given to the traditional media, then blogging, when assessed as a collective enterprise, must be seen as contributing to the public interest. Whether bloggers, who are at once uniquely independent and uniquely intertwined, can secure such a reputation — and the legal protection that would likely follow from it — remains to be seen.

III. PROSECUTING THE PRESS: CRIMINAL LIABILITY FOR THE ACT OF PUBLISHING

In November 2005 the *Washington Post* published an article headlined: “CIA Holds Terror Suspects in Secret Prisons.”¹ Within a month, “Bush Lets U.S. Spy on Callers Without Courts” appeared on the front page of the *New York Times*.² Both stories revealed classified information leaked by government officials. In response to these disclosures, Attorney General Alberto Gonzales indicated that the Department of Justice was conducting “an investigation” to determine whether certain journalists should be prosecuted under the Espionage Act³ for unveiling state secrets. According to Gonzales, “some statutes . . . seem to indicate that [prosecution] is a possibility We have an obligation to enforce the law and to prosecute those who engage in criminal activity.”⁴ Within weeks, Representative Peter King of New York proclaimed, “I’m calling on the attorney general to begin a criminal investigation and prosecution of the *New York Times*, its reporters, the editors . . . and the publisher.”⁵

¹ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

² James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

³ 18 U.S.C. §§ 792–98 (2000).

⁴ *This Week* (ABC television broadcast May 21, 2006) (transcript on file with the Harvard Law School Library); see also Walter Pincus, *Prosecution of Journalists Is Possible in NSA Leaks*, WASH. POST, May 22, 2006, at A4.

⁵ Anne E. Kornblut, *Court Review of Wiretaps May Be Near, Senator Says*, N.Y. TIMES, June 26, 2006, at A12; see also *The Department of Justice’s Investigation of Journalists Who Publish Classified Information: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006),

Leaks from government officials to the press are as old as the Republic. George Washington himself read newspaper articles cataloguing the minutes of his private cabinet meetings.⁶ However, no administration has ever prosecuted reporters for such leaks.⁷ The recent hostility toward journalists comes in the context of an ongoing “War on Terror” that has already led to heightened scrutiny of journalists covering national security matters.⁸ In light of the sentiments expressed within the executive and legislative branches, this Part examines changes in the law of reporter criminal liability, arguing that recent developments in federal jurisprudence may significantly expand prosecutorial power over the press.

Section A demonstrates that although various Supreme Court Justices have commented on whether criminal liability can attach to the very act of publishing, the lack of actual press prosecutions has forced the Court to leave the core of this question largely unanswered. Section B discusses how the answer to this question depends on whether a journalist *herself* commits any illegal act while pursuing a story. This section concludes that the prosecution of a reporter who commits no other illegal action is likely unconstitutional, but that the converse — prosecution of an otherwise culpable reporter — presents an open question. Section C describes a recent federal prosecution against two lobbyists, *United States v. Rosen*,⁹ that addresses this open question and has direct implications for reporters and newspapers prosecuted under the Espionage Act. Section D presents potential defenses journalists might raise if confronted with a *Rosen* prosecution but ultimately concludes that such defenses have little likelihood of success.

A. Pentagon Papers’ *Unanswered Question*

Settled Supreme Court doctrine holds that reporters can be prosecuted under “criminal statutes of general applicability”¹⁰ for crimes committed in the course of news-gathering.¹¹ But although newspa-

2006 WLNR 9764265 (Statement of Matthew Friedrich, Chief of Staff, Crim. Div., Dept. of Justice) (acknowledging that “it is the position of the Department of Justice today that [the Espionage Act] would authorize the prosecution of a newspaper and a reporter”).

⁶ See Mark Feldstein, *The Jailing of a Journalist: Prosecuting the Press for Receiving Stolen Documents*, 10 COMM. L. & POL’Y 137, 149 (2005).

⁷ The Roosevelt administration came closest during World War II. See sources cited *infra* note 12.

⁸ In 2005, reporter Judith Miller spent eighty-five days in jail for refusing to reveal her source regarding the leaked identity of CIA operative Valerie Plame. Though Miller’s jailing does not implicate liability for the act of publishing, it reflects the current climate journalists face.

⁹ 445 F. Supp. 2d 602 (E.D. Va. 2006).

¹⁰ *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972).

¹¹ See, e.g., *Stahl v. Oklahoma*, 665 P.2d 839, 842 (Okla. Crim. App. 1983) (upholding convictions of journalists who criminally trespassed onto the grounds of a proposed nuclear power plant), *cert. denied* 464 U.S. 1069 (1984).

pers and journalists have been prosecuted for breaking the law in pursuit of a story, no reporter in U.S. history has ever been federally prosecuted for simply publishing a story.¹² Instead, the government typically regulates the flow of classified information at its source by prosecuting government leakers. The history surrounding the famous *Pentagon Papers*¹³ case, in which the Supreme Court refused to enjoin the *New York Times* from printing a story including classified information, exemplifies this strategy. In the aftermath of that case, the government brought criminal charges against Daniel Ellsberg, the government official who leaked information to the *Times*, but not against the journalists or the paper.¹⁴ The government adopted a similar strategy in the recent Valerie Plame affair, investigating the government leak but never bringing charges against the reporter, Robert Novak, who first disclosed Plame's undercover status.¹⁵ This strategy seeks to punish, typically with civil contempt, only those reporters who attempt to withhold information from a prosecutorial investigation.¹⁶

The lack of journalist prosecutions has left the Supreme Court very few opportunities to address the issue of criminal publishing liability. In the 1971 *Pentagon Papers* case, a number of Justices weighed in regarding such liability;¹⁷ in combination, however, their perspectives proved more bewildering than enlightening. Justice Stewart left the question of liability open, stating that "Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. . . . [I]f a criminal prosecution is instituted, it will be the responsibility of the courts to decide the applicability of the criminal law under which the charge is brought."¹⁸ Justice White was more absolute: "Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they in-

¹² See Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL'Y REV. 185, 185–86 (2007). The federal government came close to prosecuting a reporter in 1942 when a *Chicago Tribune* story suggested that the United States had cracked Japanese naval ciphers. See *Navy Had Word of Jap Plan To Strike at Sea*, CHI. TRIB., June 7, 1942, at 1. Roosevelt initially considered commandeering the *Tribune's* office tower with marines before his advisors persuaded him otherwise. Federal prosecutors impaneled a grand jury to indict the *Tribune*, but ultimately dropped the charges after realizing they would need to disclose additional classified information in order to secure the indictment. See RICHARD NORTON SMITH, THE COLONEL 431–37 (1997).

¹³ *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (per curiam).

¹⁴ See Eric B. Easton, *Two Wrongs Mock a Right: Overcoming the Cohen Maledicta That Bar First Amendment Protection for Newsgathering*, 58 OHIO ST. L.J. 1135, 1146 (1997). The charges against Ellsberg were ultimately dropped due to investigatorial misconduct. See *id.*

¹⁵ See JOSEPH WILSON, THE POLITICS OF TRUTH (2004) (giving Ambassador Wilson's account); Robert Novak, *My Leak Case Testimony*, HUM. EVENTS, July 17, 2006, at 1.

¹⁶ See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 668 (1972); *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964, 965 (D.C. Cir. 2005).

¹⁷ *Pentagon Papers* was a per curiam opinion followed by six concurrences and three dissents.

¹⁸ *Pentagon Papers*, 403 U.S. at 730 (Stewart, J., concurring).

sisted on publishing information of the type Congress had itself determined should not be revealed. . . . [I]t seems undeniable that a newspaper . . . [is] vulnerable to prosecution.”¹⁹ However, Justices Douglas and Black concluded the opposite, reasoning that the statute involved in *Pentagon Papers* implicitly denied authority to prosecute the press.²⁰

Because *Pentagon Papers* did not involve criminal charges, these conflicting analyses were simply dicta. In the more than thirty years since that case, the Court has intently refused “to answer categorically whether truthful publication may ever be punished consistent with the First Amendment.”²¹ Instead, the Court has “carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels . . . not resolving anticipatorily.”²²

B. Liability for Publishing

When a Journalist's Prepublication Activity Was Legal

What guidance the Court has provided regarding criminal liability for the act of publishing is best analyzed by dividing the realm of possible scenarios into two categories: those in which the journalist breaks the law in pursuit of her story and those in which she does not. Recently, the Court has held that criminal liability is unconstitutional in the latter scenario but has purposefully left the former question open.

A series of Supreme Court decisions addressing publication liability under state statutes establishes the principle that a reporter cannot be prosecuted for writing a story if no illegal activity is alleged apart from the publication itself. In 1979, in *Smith v. Daily Mail Publishing Co.*,²³ the Court struck down on First Amendment grounds a statute criminalizing the publication “in any newspaper” of the name of a minor charged with a juvenile offense.²⁴ Ten years later, in *Florida Star v. B.J.F.*,²⁵ the Court overturned a lawsuit against a newspaper premised upon a criminal statute forbidding publication of a sex-abuse victim's identity.²⁶ In both cases the press acquired its information through perfectly legal means. In *Daily Mail*, the reporter discovered the juvenile's identity by monitoring a police scanner and interviewing witnesses.²⁷ In *Florida Star*, a bureaucratic error in the police de-

¹⁹ *Id.* at 734, 739 n.9 (White, J., concurring). Chief Justice Burger expressed “general agreement with much of what Mr. Justice White . . . expressed.” *Id.* at 752 (Burger, C.J., dissenting).

²⁰ *Id.* at 722 (Douglas, J., concurring, joined by Black, J.).

²¹ *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001).

²² *Fla. Star v. B.J.F.*, 491 U.S. 524, 532 (1989).

²³ 443 U.S. 97 (1979).

²⁴ *Id.* at 98 (quoting W. VA. CODE ANN. § 49-7-3 (LexisNexis 2004)).

²⁵ 491 U.S. 524.

²⁶ *Id.* at 526.

²⁷ *Daily Mail*, 443 U.S. at 99.

partment resulted in the victim's name being disclosed to the press.²⁸ Thus, these cases represent a “pure form” of the problem: newspapers that were prosecuted solely for the act of publishing.

However, in 2001, the Supreme Court advanced its doctrine one step further when it held that the press cannot be prosecuted for repeating information obtained illegally by *someone else* so long as the journalist did not participate in the illegal act.²⁹ *Bartnicki v. Vopper* involved a radio station and various local newspapers that publicly disclosed the contents of an intercepted cell phone conversation between two members of the local teachers' union.³⁰ During the conversation, one union member suggested that if the school district did not offer a raise he would “have to go to . . . their homes . . . [t]o blow off their front porches.”³¹ This intercepted conversation was recorded by an unknown individual and relayed by an intermediary to the press, who then disclosed the contents of the recording. The newspapers and radio station were prosecuted for “intentionally disclos[ing] . . . the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of [18 U.S.C. § 2511].”³²

The Court held that such a prosecution violated the First Amendment because the “respondents played no part in the illegal interception. . . . [T]heir access to the information on the tapes was obtained lawfully . . . [, and] the subject matter of the conversation was a matter of public concern.”³³ The Court thus added another piece to the puzzle of publication liability: protection for journalists who knowingly use stolen information provided they do not break any laws in the process of gathering it.³⁴ However, Justice Breyer opined in a concurrence that criminal liability in other scenarios might be proper because “the Court's holding does not imply a significantly broader constitutional immunity for the media.”³⁵ The Court specifically avoided discussing “whether, in cases where information has been acquired *unlaw-*

²⁸ *Florida Star*, 491 U.S. at 527.

²⁹ See *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001).

³⁰ *Id.* at 519.

³¹ *Id.* at 518–19 (second omission in original).

³² *Id.* at 520 n.3 (quoting 18 U.S.C. § 2511(1)(c) (2000)).

³³ *Id.* at 525.

³⁴ A three-judge panel of the United States Court of Appeals for the District of Columbia recently placed outside of *Bartnicki*'s protections the retransmission of illegally obtained information where the individual actually knows, as opposed to merely having reason to believe, that the information was obtained by illegal interception. This ruling was vacated by the full court and scheduled for en banc review. As of the printing of this Part, no decision has been rendered. See *Boehner v. McDermott*, 441 F.3d 1010 (D.C. Cir. 2006), *vacated by* No. 04-7203 (D.C. Cir. June 23, 2006) (order granting rehearing en banc).

³⁵ *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring).

fully by a newspaper” prosecution for publication would be legitimate, opting instead to leave that an “open question.”³⁶

*C. Liability for Publishing
When a Journalist’s Prepublication Activity Was Illegal*

The question purposefully left open by the Court in *Bartnicki* recently resurfaced in the context of an Espionage Act prosecution in *United States v. Rosen*. As opposed to the statute at issue in *Bartnicki*, which focused on the act of disclosure of illegally intercepted information without regard to how the discloser obtained that information,³⁷ the Espionage Act criminalizes both the communication of classified information and the acts necessarily leading up to that communication. Specifically, 18 U.S.C. § 793(e) makes it a crime for anyone “having unauthorized possession of . . . information relating to the national defense . . . [to] willfully retain[] the same and fail[] to deliver it to [an authorized] officer or employee of the United States.” Moreover, reporters can be held criminally liable for the act of receiving classified information under a conspiracy theory³⁸ if they assisted or encouraged a government employee to leak the classified information in violation of 18 U.S.C. § 793(d), which applies to government personnel.³⁹ In addition to criminalizing the conduct leading up to publication, the statute criminalizes the act of publication itself in § 793(e).⁴⁰ Therefore, a prosecution under this statutory framework allows a court to address the question left open by *Bartnicki*: can a journalist be prosecuted for the act of publishing leaked information in addition to the act of acquiring that information?⁴¹

United States v. Rosen suggests that in such a scenario, publishing liability would be appropriate. In *Rosen*, two lobbyists from the American Israel Public Affairs Committee (AIPAC) received from a Department of Defense employee classified information that they then repeated to individuals lacking security clearance.⁴² The lobbyists were charged, inter alia, with two counts of conspiracy under the Es-

³⁶ *Id.* at 528 (majority opinion) (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989)).

³⁷ 18 U.S.C. § 2511.

³⁸ See 18 U.S.C. § 793(g) (2000).

³⁹ Section 793(d) targets government employees “lawfully having possession of” national defense material who “transmit[] the same to any person not entitled to receive it.” *Id.* § 793(d).

⁴⁰ *Id.* § 793(e) (penalizing anyone who “willfully communicates . . . [classified information] to any person not entitled to receive it”).

⁴¹ Even though a reporter can always be prosecuted for the crimes leading up to publication, liability under § 793(e) matters for two reasons: First, the independent charges carry potentially independent sentences. Second, the possibility of bringing both charges increases the prosecutor’s power during plea bargaining, thereby disadvantaging the journalist-defendant.

⁴² *United States v. Rosen*, 445 F. Supp. 2d 602, 608–11 (E.D. Va. 2006). For an in-depth discussion of the case’s facts and reasoning, see Recent Case, 120 HARV. L. REV. 821 (2007).

pionage Act: illegally encouraging the employee to leak classified information in violation of § 793(d) and illegally repeating such information to others in violation of § 793(e).⁴³ The lobbyists challenged both counts on First Amendment grounds.

Regarding the first charge, the district court began by noting that the law clearly supported criminal liability for the government leaker.⁴⁴ The court observed that the government may impose prior restraints on its own employees because they have voluntarily entered into “relationship[s] of trust” with the government.⁴⁵ The district court then reasoned that “[b]ecause prior restraints on speech are the most constitutionally suspect form of a government restriction, . . . Congress may constitutionally subject to criminal prosecution anyone who exploits a position of trust”⁴⁶ Because leaking the information was illegal, the court held that the lobbyists could be prosecuted for conspiring with the leaker to violate § 793(d).⁴⁷

The court acknowledged that “the analysis must go beyond this” to charge the defendants with violating § 793(e) because “they did not agree to restrain their speech as part of their employment.”⁴⁸ The defendants argued that if the court accepted conspiratorial criminal liability under § 793(d), it should limit liability by requiring “a special relationship with the government . . . before the government may constitutionally punish the disclosure of information relating to the national defense.”⁴⁹ The court rejected such a rule, however, based on both “common sense and the relevant precedent.”⁵⁰ From a common sense perspective, the court believed the defendants’ argument would mean that “once a government secret has been leaked . . . the government has no recourse but to sit back and watch as the threat to the national security caused by the first disclosure multiplies with every subsequent disclosure.”⁵¹

The court’s precedential argument, however, requires some reading between the lines. Judge Ellis analyzed the nine separate opinions in *Pentagon Papers* and concluded that because three Justices explicitly acknowledged the possibility that a newspaper could be prosecuted

⁴³ *Rosen*, 445 F. Supp. 2d at 607, 636.

⁴⁴ *Id.* at 635–36.

⁴⁵ *Id.* (footnote omitted); see *Snapp v. United States*, 444 U.S. 507 (1980) (per curiam) (upholding imposition of constructive trust on profits of book published by a former CIA agent without prior vetting); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972) (upholding restraints imposed by mandatory secrecy agreement signed by CIA employee).

⁴⁶ *Rosen*, 445 F. Supp. 2d at 636.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 637.

⁵⁰ *Id.*

⁵¹ *Id.*

under § 793(e) — a view uncontradicted by five of the remaining six Justices — “a survey of [the] opinions indicates the likelihood that [the Court] would have upheld a criminal prosecution.”⁵² In essence, Judge Ellis read three votes for criminal liability, one vote against, and five abstentions as decisive approval for press prosecutions.⁵³

Though *Rosen* involves a prosecution against lobbyists, its holding should worry journalists.⁵⁴ The Attorney General has suggested that the Espionage Act imposes criminal liability on anyone who “communicates” or makes known classified information, directly invoking § 793(e).⁵⁵ Under *Rosen*, if the government also brings charges of unlawful retention or conspiracy with the leaker, a reporter who receives classified information from a government source and then publishes that information can be prosecuted under the Espionage Act. Such a scenario is indistinguishable from multiple newspaper stories released in the past year.⁵⁶

D. Journalists' Defense After Rosen

Assuming for the moment *United States v. Rosen* is upheld with respect to lobbyists, is there any reason to think the same case might come out differently if it involved the prosecution of a journalist or newspaper? This section offers statutory, First Amendment, and selective prosecution defenses that journalists could marshal if the government sought to extend *Rosen* to press prosecutions. However, this section concludes that these defenses ultimately provide little actual protection, leaving the press exposed to prosecutors' discretion.

1. *Statutory Interpretation.* — One possible distinction between *Rosen* and a press prosecution is that sections of the Espionage Act may not in fact apply to journalists. Section 793(e) of the Act punishes anyone who “willfully communicates, delivers, [or] transmits” informa-

⁵² *Id.* at 638–39.

⁵³ Judge Ellis's nose count may be inaccurate. He identifies the three Justices in favor of criminal liability as Justices Stewart, White, and Marshall. *See id.* at 638 n.53. But Justice Stewart explicitly left the question of criminal liability open for future “courts to decide.” *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring). And even though Chief Justice Burger did endorse Justice White's views “with respect to penal sanctions,” *id.* at 752 (Burger, C.J., dissenting), which would render accurate Judge Ellis's tally of pro-liability Justices, there are actually two anti-liability Justices, rather than one as suggested by Judge Ellis, *see Rosen*, 445 F. Supp. 2d at 638, because Justice Douglas joined Justice Black's concurrence. *See Pentagon Papers*, 403 U.S. at 714 (Black, J., concurring, joined by Douglas, J.).

⁵⁴ Recognizing *Rosen*'s potential as enabling precedent in press prosecutions, the Reporters Committee for Freedom of the Press moved to file an amicus curiae brief. Judge Ellis denied the motion, stating that the issues in the case had been “fully explicated.” Order Denying Motion to Appear as Amicus Curiae, *United States v. Rosen*, No. 1:05cr225 (E.D. Va. Feb. 27, 2006).

⁵⁵ *See This Week*, *supra* note 4.

⁵⁶ *See* sources cited *supra* notes 1–5.

tion “relating to the national defense.”⁵⁷ For this language to prohibit newspaper disclosure, the statute’s use of “communicate” or “transmit” must include the act of publishing an article. This is certainly a plausible construction from a plain language perspective, but the statutory context and history may yield contradictory interpretations.

As Justice Douglas noted in *Pentagon Papers*, § 793’s statutory context could indicate that it was not intended to create criminal liability for publishing at all.⁵⁸ In contrast to § 793, three other portions of the Act explicitly sanction anyone who “publishes” state secrets. Section 794, which criminalizes disclosures of troop movement during wartime, punishes anyone who “publishes, *or* communicates” national defense information, implying a distinction between “communicate” and “publish.”⁵⁹ Section 797 makes it a crime to “publish[], sell[], or give[] away any photograph” of a military installation without the commanding officer’s permission.⁶⁰ Finally, § 798 penalizes anyone who “communicates . . . or publishes” information about codes, cryptography, or communication systems, again distinguishing the two terms.⁶¹ In this context, the absence of the word “publish” in § 793 is significant. Doctrines of statutory interpretation hold that courts should not read a statute in a manner that would render certain words redundant or “mere surplusage.”⁶² As Justice Douglas observed, “Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act.”⁶³

Furthermore, the history of the Act suggests that perhaps § 793 was not intended to prohibit press publication. According to Justice Douglas, Congress “rejected [a] version of § 793. . . . [that] read: ‘During any national emergency resulting from a war [involving] the United States . . . the President may . . . by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense.’”⁶⁴ The rejection of such a version in favor of a section that prohibits “communication” but not “publication” suggests that Congress explicitly rejected liability for publishing under § 793.

⁵⁷ 18 U.S.C. § 793(e) (2000).

⁵⁸ *Pentagon Papers*, 403 U.S. at 720–23 (Douglas, J., concurring).

⁵⁹ 18 U.S.C. § 794(b) (2000) (emphasis added).

⁶⁰ *Id.* § 797.

⁶¹ *Id.* § 798.

⁶² *Ratzlaf v. United States*, 510 U.S. 135, 140–41 (1994) (quoting *Potter v. United States*, 155 U.S. 438, 446 (1894)) (warning judges not to treat words in a statute as surplusage, especially if those words describe an element of a criminal offense); *see also* *Pa. Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) (expressing “deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment”).

⁶³ *Pentagon Papers*, 403 U.S. at 721 (Douglas, J., concurring) (citing 55 CONG. REC. 1763 (1917)).

⁶⁴ *Id.* at 721–22.

It is possible nonetheless that the current Court could decide that there is no inconsistency in the statute's plain language and therefore no need to examine its statutory history.⁶⁵ Furthermore, even if the Court were to interpret the statute as Justice Douglas did, such an interpretation would protect the press only in certain instances. Some stories, such as the *New York Times* article regarding NSA wiretaps,⁶⁶ are arguably disclosures pertaining to national communication systems and are criminalized under § 798, which explicitly penalizes "publishing." In those instances, advocates for the press must look beyond the statute to the Constitution for protection.

2. "Or of the Press." — One might conceive of the First Amendment's Free Press Clause as an additional source of press protection. Justice Stewart famously expressed this theory when he observed that "[t]he publishing business is . . . the only organized private business that is given explicit constitutional protection. . . . If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy."⁶⁷ This notion of augmented press rights stems in part from Justice Powell's concurrence in *Branzburg v. Hayes*,⁶⁸ which urged courts reviewing grand jury subpoenas to "balance" a reporter's First Amendment interest against the government's interest in the reporter's testimony.⁶⁹ Some commentators have gone so far as to suggest that criminal charges against the press require judges to apply "hypertechnical precision,"⁷⁰ implying an inquiry over and above the standard criminal procedure analysis.

However, modern courts almost universally deny the Free Press Clause any such heightened power.⁷¹ In its recent ruling regarding the

⁶⁵ See *Hubbard v. United States*, 514 U.S. 695, 701 (1995) ("[In] determin[ing] when a presumptive definition must yield[,] . . . [r]eview of other materials is not warranted[,] . . . [including] legislative history . . ." (internal quotation marks omitted) (citing *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 200 (1993))). Notably, Justice Douglas's *Pentagon Papers* concurrence was joined only by Justice Black.

⁶⁶ *Risen & Lichtblau*, *supra* note 2, at A1.

⁶⁷ Potter Stewart, "Or of the Press," 26 HASTINGS L.J. 631, 633 (1975).

⁶⁸ 408 U.S. 665 (1972).

⁶⁹ *Id.* at 709–10 (Powell, J., concurring). By contrast, there are virtually no protections for ordinary citizens called before a grand jury. See, e.g., *United States v. Dionisio*, 410 U.S. 1, 9–10 (1973) (citing cases establishing the "historically grounded obligation of every person to appear and give his evidence before the grand jury").

⁷⁰ Amy Tridgell, *Newsgathering and Child Pornography Research: The Case of Lawrence Charles Matthews*, 33 COLUM. J.L. & SOC. PROBS. 343, 350 (2000) (citing C. THOMAS DIENES ET AL., *NEWSGATHERING AND THE LAW* 619 n.172 (2d ed. 1999)).

⁷¹ This rationale stems from *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), in which Chief Justice Burger argued that "the history of the Clause does not suggest that the authors contemplated a 'special' or 'institutional' privilege" and that the "very task of including some entities within the 'institutional press' while excluding others . . . is reminiscent of the abhorred licensing system . . . the First Amendment was intended to ban." *Id.* at 798, 801 (Burger, C.J., concurring) (citation omitted).

subpoena of journalist Judith Miller, the Court of Appeals for the District of Columbia relied on cases holding that the press does not have a special right of access to places that the public itself cannot access to conclude that the press has no special constitutional rights of expression.⁷² This opinion, which was denied certiorari by the Supreme Court,⁷³ echoes a similarly reasoned opinion by Judge Posner that denied any persuasive authority to Justice Powell's opinion in *Branzburg*, holding instead that press subpoenas, like all subpoenas, simply have to be "reasonable in the circumstances."⁷⁴

3. *Selective Prosecution*. — Even if the Constitution does not, as a rule, protect the press differently from the public, existing constitutional doctrines may protect the press from specific prosecutions. A particularly strong argument might invoke the doctrine of selective prosecution. In *Wayte v. United States*,⁷⁵ the Supreme Court addressed the prosecution of draft dodgers, which appeared to selectively target individuals exercising their right to free speech. In that case, the government prosecuted only those draft dodgers who either informed the government in writing of their refusal to register for the draft or whose refusal was reported by others.⁷⁶ The defendants challenged this prosecution system, arguing it selectively targeted protesters.⁷⁷ The Supreme Court held that to assert a selective-prosecution defense, a defendant must show that other similarly situated offenders are not being prosecuted and that the government prosecuted the defendant because she exercised her right to free speech.⁷⁸

Of these two prongs, a journalist prosecuted under the Espionage Act could probably meet the first, but might have considerable difficulty meeting the second. Most journalist defendants charged with publishing secret information could easily find similarly situated reporters who have not been prosecuted; no reporter has ever been federally prosecuted for publishing an article, but hundreds of articles published over the last decade have revealed classified information.⁷⁹ It would be far more difficult, however, to demonstrate that the gov-

⁷² *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964, 970–72 (D.C. Cir. 2005); see also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) (“[T]he press and general public have a constitutional right of access to criminal trials.” (emphasis added)); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *Pell v. Procunier*, 417 U.S. 817 (1974).

⁷³ *Miller v. United States*, 125 S. Ct. 2977 (2005).

⁷⁴ *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

⁷⁵ 470 U.S. 598 (1985).

⁷⁶ *Id.* at 600–02.

⁷⁷ *Id.* at 604.

⁷⁸ See *id.* at 608.

⁷⁹ A search of Lexis reveals that, over the past fifteen years, over 300 articles in major national newspapers have published information from sources who asked for anonymity because they were “discussing classified information.” Any of these articles that concern the national defense would likely satisfy *Wayte*'s similarly situated requirement with respect to the Espionage Act.

ernment was specifically targeting a journalist for her speech. In press prosecution cases involving governmental secrets, courts may well defer to the executive branch as being in the best position to determine which news articles are most damaging to national security. A journalist may be able to succeed on this prong if she demonstrates she is being individually targeted as opposed to being prosecuted under laws of general applicability. For example, if a number of newspapers break the same story, but only the most historically vocal critic of the administration is prosecuted, that paper may have a stronger constitutional case.⁸⁰ But even this situation would be unlikely to hold sway in a standard selective-prosecution defense, since the defendant must typically show more direct prosecutorial animus.⁸¹

The First Amendment may amplify the protection that standard selective-prosecution doctrine affords by requiring a less onerous burden for press defendants. There is some support for such an approach in cases discussing taxation of the press. In *Minnesota Star & Tribune Co. v. Minnesota Commissioner of Revenue*,⁸² a newspaper challenged a state tax that became effective once a newspaper spent more than \$100,000 on ink and paper. In a similar case, *Grosjean v. American Press Co.*,⁸³ state newspapers were taxed once they reached a certain circulation size. The Supreme Court invalidated both taxes on the ground that they selectively burdened some members of the press while not burdening others. This idea that state sanctions or burdens cannot be unevenly distributed parallels the Court's discomfort with selective prosecution and may suggest that greater deference is owed journalist defendants asserting that they have been unfairly targeted.

E. Conclusion

As *United States v. Rosen* makes its way through the federal courts, lawyers, judges, and journalists alike will attentively note its progress. If the Supreme Court reviews *Rosen's* reasoning, it may fi-

⁸⁰ Compare this hypothetical with reality: On June 23, 2006, four major papers revealed the existence of the Treasury Department's counterterrorism banking surveillance program. See Barton Gellman et al., *Bank Records Secretly Tapped*, WASH. POST, June 23, 2006, at A1; Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. To Block Terror*, N.Y. TIMES, June 23, 2006, at A1; Josh Meyer & Greg Miller, *In Tracking Terrorists, U.S. Taps Bank Data*, CHI. TRIB., June 23, 2006, at 1; Josh Meyer & Greg Miller, *U.S. Secretly Tracks Global Bank Data*, L.A. TIMES, June 23, 2006, at A1. However, the *New York Times* bore the brunt of the criticism. See Kornblut, *supra* note 5, at A12. Yet even this example may not qualify as improper prosecutorial motive if the government argues the *Times* is a repeat offender when it comes to revealing state secrets. Cf. *id.* (quoting Representative Peter King describing the *Times* as a "recidivist").

⁸¹ In *Wayte*, the defendant's conviction was upheld because the government argued that prosecuting vocal, and therefore known, draft dodgers saved investigational resources. See *Wayte*, 470 U.S. at 612-13.

⁸² 460 U.S. 575 (1983).

⁸³ 297 U.S. 233 (1936).

nally have to address a question it has left unanswered for over thirty years. That question arises amidst an ongoing “War on Terror” and increasing pressure to pursue criminal prosecutions against the press. While there are various interpretive and constitutional avenues available to the Court to cabin any attempts to increase journalists’ criminal liability, it remains to be seen whether the current Court will limit executive power in such a fashion. It may be left to the political process, and ultimately the people, to ensure that regardless of whether it has the authority to do so, the executive branch does not take precipitous action against a central institution of American democracy: the free and independent press.

IV. VIEWPOINT DISCRIMINATION AND MEDIA ACCESS TO GOVERNMENT OFFICIALS

The law governing the media’s right to gather information is far from straightforward,¹ but at least one proposition seems to be well settled: The First Amendment does not “guarantee the public a right of access to information generated or controlled by government The Constitution does no more than assure the public and the press equal access once government has opened its doors.”² Therefore, although “news gathering is not without its First Amendment protections,”³ the government is generally not obligated to provide access to the media.⁴

However, exactly when the government has opened its doors enough such that all reporters must be granted equal access is a difficult question. At one extreme, journalists cannot be arbitrarily excluded from press forums to which other journalists have access in re-

¹ See Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards A Realistic Right To Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 254 (2004) (describing the “legal scheme governing a First Amendment right to gather information that is not only fragmented and inconsistent, but appears to be in substantial tension with . . . cardinal tenets of free speech law”).

² *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring in the judgment). This principle remains true notwithstanding Justice Stevens’s concurrence in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), positing that the *Richmond* Court “unequivocally h[eld] that an arbitrary interference with access to important information is an abridgment of . . . the First Amendment.” *Id.* at 583 (Stevens, J., concurring). Subsequent application of the *Richmond Newspapers* test, according to which the media’s right of access to a public proceeding depends on whether the proceeding has been historically open to the public and whether it is enhanced by public presence, has been confined to “quasi-judicial” proceedings. See, e.g., *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 204–09 (3d Cir. 2002); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 694–95 (6th Cir. 2002).

³ *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972).

⁴ See, e.g., *L.A. Police Dep’t v. United Reporting Publ’g*, 528 U.S. 32, 40 (1999); *Houchins*, 438 U.S. at 9 (plurality opinion); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 849–50 (1974); *Pell v. Procunier*, 417 U.S. 817, 833–34 (1974); see also Freedom of Information Act, 5 U.S.C. § 552(b)(1)–(9) (2000 & Supp. IV 2004) (noting nine exemptions from the requirement that administrative agencies make information available to the public).

taliation for previously expressed viewpoints.⁵ At the other, exclusive interviews have been judicially sanctioned.⁶ Between these poles, a number of ambiguities exist. In particular, it is unclear whether the government has opened its doors when some, but not all, reporters have been given access to resources like official press secretaries and military press pools. In cases like these, can access be denied in retaliation for previously expressed viewpoints? Any rule adopted must walk a fine line between allowing socially useful, historically sanctioned exclusive access and giving government officials free rein to engage in viewpoint discrimination when determining who will get access to their administration.

As this Part argues, courts seem to have turned to a press-specific version of the First Amendment's public forum doctrine, normally employed to determine speech rights on government property, in their efforts to make this distinction. This forum-based doctrine allows government officials to discriminate on the basis of viewpoint in a nonforum context, but not in a nonpublic forum, limited public forum, or traditional public forum.⁷ Thus, viewpoint-based denials of access to forums like press conferences are impermissible denials of equal access, whereas denials in more interactive contexts, like a phone call to a press secretary, are permissible denials of preferential access.⁸

Recent cases have demonstrated that the use of the public forum doctrine, although sensible on its face, can provide government officials a safe harbor from which they can engage in undisguised viewpoint discrimination in nonforums. This development writ large could give government the power both to chill dissent and to marginalize less mainstream voices in the public debate even further. As secrecy

⁵ See, e.g., *McBride v. Vill. of Michiana*, 100 F.3d 457, 461–62 (6th Cir. 1996) (finding impermissible a denial of access to a press table); *Am. Broad. Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (denial of access to campaign headquarters); *United Teachers v. Stierheim*, 213 F. Supp. 2d 1368, 1372–73 (S.D. Fla. 2002) (denial of access to press room).

⁶ See, e.g., *Snyder v. Ringgold*, No. 97-1358, 1998 WL 13528, at *4 (4th Cir. Jan 15, 1998) (per curiam).

⁷ See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674–83 (1998); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46–47 (1983); see also Frederick Schauer, *The Supreme Court, 1997 Term—Comment: Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 89 (1998) (interpreting *Forbes* as holding that “the commands of the First Amendment, including the command to avoid viewpoint discrimination, are irrelevant” in the context of “government enterprises that are not forums at all”).

⁸ See, e.g., *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 413 (4th Cir. 2006); *Snyder*, 1998 WL 13528, at *4; *Youngstown Publ'g Co. v. McKelvey*, No. 4:05 CV 00625, 2005 WL 1153996 (N.D. Ohio May 16, 2005), *vacated as moot*, 189 F. App'x 402 (6th Cir. 2006); *Raycom Nat'l, Inc. v. Campbell*, 361 F. Supp. 2d 679, 682–87 (N.D. Ohio 2004); *McBride v. Vill. of Michiana*, No. 4:92-CV-155, 1998 WL 276139, at *9–10 (W.D. Mich. Apr. 2, 1998); *Nation Magazine v. U.S. Dep't of Def.*, 762 F. Supp. 1558 (S.D.N.Y. 1991).

concentrates information in the hands of fewer people,⁹ and as the need for access to generate high-impact journalism grows,¹⁰ this doctrine may corrode the underpinnings of the First Amendment.¹¹ This Part concludes that a more sensible approach to drawing the appropriate distinction would inquire into the motive of the denial, not whether it occurred in a forum of some type.

A. Public Forum Analysis: Sanctioning Viewpoint Discrimination

In the context of tangible information, the Supreme Court may have settled the access question in *Los Angeles Police Department v. United Reporting Publishing Corp.*¹² The merits question was whether the government could deny access to an entity that wanted to use a list of arrestee names for commercial purposes but grant access to noncommercial users.¹³ Although the Court decided the case on standing grounds, all nine Justices recognized that no obligation to release the names of arrested individuals existed,¹⁴ and at least six thought viewpoint-based discriminatory access restrictions would be invalid.¹⁵ However, even assuming the Court is prepared to invalidate such provisions, the access question remains in cases in which the information sought is less well defined.

*Nation Magazine v. United States Department of Defense*¹⁶ marks the judiciary's first step down the road toward sanctioning viewpoint-based discrimination in the media access context, as well as its unfortunate inclination to force the access question into the public forum doctrine.¹⁷ In the case, a coalition of small media organizations sued the Department of Defense (DOD) for restricting access to the "press pools" allowed to cover the Gulf War to outlets "that principally serve[d] the American public and that [had established] a long-term

⁹ See David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 648–49 (2005).

¹⁰ See Barton Gellman, Lecture at the Woodrow Wilson School, Princeton University: *Secrecy, Security and Self-Government: How I Learn Secrets and Why I Print Them* 9–11 (Oct. 9, 2003) (transcript on file with the Harvard Law School Library).

¹¹ Cf. *Police Dep't v. Mosley*, 408 U.S. 92, 95–96 (1972) (noting that the purposes of restricting government power to censor speech include the development of politics, culture, and individual self-fulfillment).

¹² 528 U.S. 32 (1999).

¹³ *Id.* at 34.

¹⁴ *Id.* at 40; *id.* at 45 (Stevens, J., dissenting).

¹⁵ *Id.* at 43 (Ginsburg, J., concurring); *id.* at 45–46 (Stevens, J., dissenting). Justices Scalia and Thomas also hinted that such a restriction would be invalid. See *id.* at 41–42 (Scalia, J., concurring).

¹⁶ 762 F. Supp. 1558 (S.D.N.Y. 1991).

¹⁷ Cf. Schauer, *supra* note 7, at 97–100 (calling the public forum doctrine a "false path" when dealing with the similar issue of access discrimination based on the political viability of a candidate).

presence covering Department of Defense military operations.”¹⁸ The restrictive policy explicitly favored organizations with entrenched relationships with the government.¹⁹

After laying out the framework for the application of the public forum doctrine and declaring that the war zone had become a limited public forum from which diverse viewpoints could not be excluded,²⁰ the court ultimately declined to apply the doctrine, quickly changing course and describing the plaintiffs as seeking a “right to gather news . . . in any manner that may be desired” rather than simply “[t]he right . . . to be free from regulations that are discriminatory.”²¹ Because it was clear that access may be regulated in nondiscriminatory ways,²² the court did not consider whether excluding certain media from the putative limited public forum in retaliation for their prior lack of military content constituted impermissible viewpoint discrimination.

Assuming that the court could have ultimately reached the merits of the case,²³ if the court truly believed that the government had created a limited public forum in the war zone, it could have invalidated the DOD’s policy as using size and past content as impermissible proxies for viewpoint. The war zone would then have been the doctrinal equivalent of a press conference. Granting such a right of access, however, would have meant granting reporters not just the right to “attend the war,” but also the right to *interact* with the military on the front lines.²⁴ Given the exigencies of war, finding a right of interactive access here would seem to preclude denying it in any context. Thus, although the court stated the war zone was a limited public forum, it was able to avoid the far-reaching implications of its declaration by dismissing the case as moot.

Even though it did not explicitly reference the public forum doctrine, the case of *McBride v. Village of Michiana*²⁵ further illustrates the distinction between forums and nonforums. In *McBride*, a reporter alleged that in retaliation for negative reporting, local govern-

¹⁸ *Nation Magazine*, 762 F. Supp. at 1564 (quoting U.S. CENT. COMMAND, CENTCOM POOL MEMBERSHIP AND OPERATING PROCEDURES 1 (1991), reprinted in *Nation Magazine*, 762 F. Supp. at 1578, 1578) (internal quotation mark omitted).

¹⁹ See Michael D. Steger, *Slicing the Gordian Knot: A Proposal To Reform Military Regulation of Media Coverage of Combat Operations*, 28 U.S.F. L. REV. 957, 977–78 (1994).

²⁰ See *Nation Magazine*, 762 F. Supp. at 1573.

²¹ *Id.* at 1574.

²² See *id.* (strongly implying that the restriction in question likely qualifies as a reasonable time, place, or manner restriction). This explanation is problematic, however. How a policy excluding members from the battlefield on the criteria of their size and lack of history covering DOD events qualifies as a time, place, or manner restriction is unclear.

²³ The case was dismissed as moot. *Id.* at 1575.

²⁴ Embedded reporters do not simply observe. Rather, they live with and are protected by — and therefore interact with — the soldiers on whom they report.

²⁵ No. 4:92-CV-155, 1998 WL 276139 (W.D. Mich. Apr. 2, 1998).

ment officials mistreated her in a number of ways, including ordering city employees not to speak with her and refusing to conduct meetings while she sat at the press table.²⁶ On a motion for summary judgment, the district court held that whereas the officials' actions in prohibiting her from sitting at a press table were actionable on First Amendment grounds, their efforts to prevent officials from communicating with her were not.²⁷ Indeed, the court found that "[p]ublic officials are under no constitutional obligation to speak to the press at all."²⁸

Although phrased in terms of the obligations of government officials, the rulings on the two issues combine to indicate the different outcomes inherent in the distinction between forums and nonforums: the ban from a media table, which is a forum, was actionable, but the exclusion from discussions and interviews, which are not forums, was not. This decision implies that government officials are allowed to deprive reporters of interactive exchanges for any reason, including in retaliation for previous First Amendment-protected expressions.

On similar facts, the Fourth Circuit held in *Snyder v. Ringgold*²⁹ that a constitutional right of nondiscriminatory access to information that the government has no obligation to make public was not sufficiently established to warrant a denial of qualified immunity.³⁰ In particular, the court noted that "the broad rule for which [the] plaintiff argue[d] would presumably preclude the common and widely accepted practice . . . of granting an exclusive interview to a particular reporter. And, it would preclude the equally widespread practice of public officials declining to speak to reporters whom they view as untrustworthy"³¹ On remand, the district court held that the plaintiff's rights were not violated when she was denied interviews with government personnel.³² Although the court did not explicitly ground its reasoning in the distinction between forums and nonforums, it said that "[w]hile a constitutional right to equal access . . . may well exist, extending the right to encompass preferential treatment would completely change the longstanding relationship and understandings between journalists and public officials."³³

²⁶ See *id.* at *8–9.

²⁷ See *id.* at *8–10.

²⁸ *Id.* at *10 (alteration in original) (quoting *McBride v. Vill. of Michiana*, No. 93-1641, 1994 WL 396143, at *6 (6th Cir. July 28, 1994) (Nelson, J., concurring)) (internal quotation mark omitted).

²⁹ No. 97-1358, 1998 WL 13528 (4th Cir. Jan. 15, 1998) (per curiam).

³⁰ *Id.* at *3. The court, in addition, noted that "[n]o Supreme Court or Fourth Circuit case has held that reporters have" such a right. *Id.*

³¹ *Id.* at *4 (footnote omitted). The court also noted that it would be difficult to confine any applicable access rule based on the presence or absence of a broad spectrum of reporters. *Id.*

³² *Snyder v. Ringgold*, 40 F. Supp. 2d 714, 718 (D. Md. 1999).

³³ *Id.* The "longstanding relationship" referenced is presumably one of selective and political give and take between the two parties.

Absent the distinction between forums and nonforums, it is difficult to reconcile *Snyder's* "constitutional right to equal access" with its rule against extending it to encompass "preferential treatment." Notably, both the district and circuit courts took pains to distinguish the somewhat factually similar case of *Borreca v. Fasi*,³⁴ in which a reporter's exclusion from press events at a mayor's office because of unfavorable articles was held impermissible.³⁵ Tellingly, the *Borreca* court wrote that "[i]f [the mayor] chooses to hold a general news conference in his inner office, for that purpose and to that extent his inner office becomes a *public gathering place*."³⁶ In highlighting the forum-like nature of *Borreca's* facts and noting that the *Borreca* court expressly reserved the question of access in more interactive contexts, the *Snyder* opinions further serve to emphasize the importance of the difference between forums and nonforums to the access inquiry.³⁷

Nation Magazine, *Snyder*, and *McBride* outline the distinction that seems to drive access decisions. But even though they appear to sanction viewpoint discrimination, other factors also seem important to the result. *Nation Magazine* can be read as merely upholding a rational restriction based on the size of the media organization.³⁸ Despite some sweeping language in both *Snyder* opinions, it is difficult to read the facts and not get the impression that the reporter had not only published unfavorable stories, but also abused the access process.³⁹ And in *McBride*, the court seemed influenced by the plaintiff's petulance.⁴⁰

However, within the last three years, two district court decisions and one court of appeals decision have upheld the right of executive officers to refuse, and to instruct their staffs to decline, to talk to certain media members in retaliation for stories written about them or their administrations. Although the results are the same as the earlier cases, none of the possibly mitigating factors discussed above is present. In the first of these cases, a television station was denied a temporary restraining order after the Mayor of Cleveland issued an edict

³⁴ 369 F. Supp. 906 (D. Haw. 1974).

³⁵ *Id.* at 910.

³⁶ *Id.* (emphasis added).

³⁷ See *Snyder v. Ringgold*, No. 97-1358, 1998 WL 13528, at *3 (4th Cir. Jan. 15, 1998) (per curiam) (finding *Borreca's* facts to be "markedly" distinct); *Snyder*, 40 F. Supp. 2d at 717 (noting that *Borreca* expressly avoided analyzing whether the mayor was required to answer a particular reporter's question).

³⁸ However, size could serve as a proxy for viewpoint discrimination because smaller media are probably more likely to have nonmainstream viewpoints.

³⁹ See *Snyder*, 40 F. Supp. 2d at 715-17.

⁴⁰ See *McBride v. Vill. of Michiana*, No. 4:92-CV-155, 1998 WL 276139, at *7-10 (W.D. Mich. Apr. 2, 1998).

directing city employees not to talk to station representatives.⁴¹ In ruling against the plaintiff, the court cited both *Snyder* and *McBride* and noted that the television station, instead of asserting denial of access to press conferences or press releases, merely complained that it “no longer receiv[ed] interviews or statements off-the-record that it had been receiving.”⁴² Similar factual situations were handled in the same way in *Youngstown Publishing Co. v. McKelvey*⁴³ and *Baltimore Sun Co. v. Ehrlich*.⁴⁴

The *Baltimore Sun* case is especially interesting because the language of the opinion expressly permits broad viewpoint-based discrimination as long as the media is not excluded from information that was distributed in a forum. In that case, Maryland Governor Robert Ehrlich’s press office issued a directive instructing staff not to speak with two *Baltimore Sun* reporters and not to comply with any of their requests for information.⁴⁵ In holding these actions constitutional, the court observed that the reporters were still allowed to attend public press conferences and still received official press releases,⁴⁶ and both the district and circuit courts characterized the case as one of journalists seeking preferential access to nonforum events.⁴⁷

The Fourth Circuit further emphasized this point by accepting this type of viewpoint discrimination as commonplace in interactions between government and the media.⁴⁸ The court found it significant that the *Sun* conceded that its claim would fail if an official simply

⁴¹ *Raycom Nat’l, Inc. v. Campbell*, 361 F. Supp. 2d 679, 681 (N.D. Ohio 2004). The edict was issued after the station aired a story concerning police officers earning overtime for chauffeuring the mayor’s family members. *Id.*

⁴² *Id.* at 683.

⁴³ No. 4:05 CV 00625, 2005 WL 1153996 (N.D. Ohio May 16, 2005), *vacated as moot*, 189 F. App’x 402 (6th Cir. 2006). The Mayor of Youngstown, Ohio, barred city officials from speaking with reporters from a newspaper that had published stories critical of the city government. *Id.* at *1.

⁴⁴ 437 F.3d 410 (4th Cir. 2006).

⁴⁵ *Id.* at 413. The reporters were accused of “failing to objectively report” on the administration. *Id.* The press office did, however, state its intention to comply with requests made pursuant to Maryland’s Public Information Act “as legally required.” *Id.* at 414 (internal quotation mark omitted).

⁴⁶ *Id.* at 414.

⁴⁷ *See id.* at 418 (finding the long-accepted scenario of preferential communications to a favored reporter to be “materially indistinguishable” from the practice challenged in the case); *Balt. Sun Co. v. Ehrlich*, 356 F. Supp. 2d 577, 582 (D. Md. 2005) (characterizing the plaintiff’s position as seeking treatment “far beyond any citizen’s reasonable expectations of access to his or her government”), *aff’d*, 437 F.3d 410.

⁴⁸ *Balt. Sun*, 437 F.3d at 418 (“Having access to relatively less information than other reporters on account of one’s reporting is so commonplace that to allow *The Sun* to proceed on its retaliation claim addressing that condition would ‘plant the seed of a constitutional case’ in ‘virtually every’ interchange between public official and press.” (quoting *Connick v. Myers*, 461 U.S. 138, 149 (1983))).

chose to give preferential treatment to favored reporters.⁴⁹ Highlighting this concession, the court emphasized its belief that there would be no difference “whether the disfavored reporters number[ed] two or two million,” because they could still justifiably be “denied access to discretionarily afforded information on account of their reporting.”⁵⁰ Thus, not only did *Baltimore Sun* approve the use of a forum distinction of the type used in *Nation Magazine*, *Snyder*, and *McBride*, but it also explicitly approved of open retaliation against any number of reporters, at least in nonforum settings, who criticize the government.

B. Problems of Sanctioning Viewpoint Discrimination

On one level, dealing with access questions under the rubric of forums and nonforums may be an example of the law’s acquiescence to a valued social reality. After all, it is unlikely that any court would find the “widely accepted” and seemingly valuable practice of granting exclusive interviews⁵¹ to violate the First Amendment. Indeed, removing the power to reveal news selectively could mean that many stories fail to come to light: information that could not be delivered in a press conference might be distributed in a semiprivate conversation. In this sense, the potential significance of this development may be easily discounted.

However, it is not clear that such discrimination should be so blithely condoned. On numerous occasions, the Supreme Court has indicated its disdain for governmental viewpoint discrimination.⁵² Moreover, viewpoint discrimination, whether of the subtle variety in *Nation Magazine* or of the more blatant types in *Raycom*, *McKelvey*, and *Baltimore Sun*, cannot be dismissed as insignificant because only a small number of voices are excluded; arguing that the “news” still reaches the people misses the point for two reasons.

First, as the court in *Baltimore Sun* indicated, if forum-based distinctions drive the outcomes in media access cases, there is no line that can be drawn to ensure that the discrimination remains confined to two reporters rather than two million. Government officials who want to exclude swaths of journalists could stop holding press conferences and have their press agents have “conversations” with a small group of preferred reporters⁵³ since it could be difficult to discern precisely

⁴⁹ *See id.*

⁵⁰ *Id.*

⁵¹ *Snyder v. Ringgold*, No. 97-1358, 1998 WL 13528, at *4 (4th Cir. Jan. 15, 1998) (per curiam).

⁵² *See, e.g., Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”).

⁵³ Because such a practice is functionally equivalent to instructing staff not to speak with certain reporters, it would seem to be permissible.

when a conference call becomes a press conference–like forum.⁵⁴ Disfavored media, especially increasingly powerful alternative media forums like blogs, and an outraged electorate might act as a political check on widespread viewpoint discrimination. However, because mainstream media still plays a significant role in informing both the electorate and alternative media, this promise, even if fulfilled, seems insufficient.

Second, the mere fact that the news is still delivered does little to protect the underlying values of the First Amendment. Because setting the context and terms of debate can often be as important as the story itself, *who* delivers it can be as important as the fact of its delivery.⁵⁵ At the heart of the most prominent theories underlying the Amendment is a recognition that a variety of voices is essential to free expression in a democracy.⁵⁶ A dearth of voices may create an insidious speech monopoly, stifle democratic participation in government, conceal dangerous fissures in society, or fail to empower segments of the population that feel their perspectives are being shut out.⁵⁷

Unfortunately, the kind of viewpoint discrimination that this development permits will likely benefit only those established media outlets that have developed relationships with the government officials they cover.⁵⁸ This intuition is confirmed by recognizing that such large media outlets, which depend on preferential access for the marketability of their product,⁵⁹ are the entities least likely to object to a development that tends to further legitimate discriminatory treatment. Indeed, the *Baltimore Sun*, knowing this to be the case, was unable to propose a rule that would have allowed it to defeat the ban on its reporters but uphold the legality of exclusive access.⁶⁰

⁵⁴ For example, would a forum be created if a governor ceased having press conferences and instead spoke to his five favorite reporters over lunch? Would an Internet chat room be a forum, but one-on-one instant message exchanges a nonforum?

⁵⁵ The recent leak of a classified National Intelligence Estimate to the *New York Times* is a salient example. See Mark Mazzetti, *Spy Agencies Say Iraq War Worsens Terrorism Threat*, N.Y. TIMES, Sept. 24, 2006, at A1. Once the document was declassified, some media outlets had differing interpretations of it. See, e.g., Ed Royce, *Flawed Terror War Reports*, WASH. TIMES, Nov. 1, 2006, at A15. The *New York Times* story dominated the debate for the critical days after the release. By the time the document was declassified, the story was old news for most people.

⁵⁶ See THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–9 (1970).

⁵⁷ See *id.* at 6–7 (noting four primary justifications for promoting free speech: furthering self-fulfillment, protecting a vibrant marketplace of ideas, ensuring democratic participation, and achieving a society that is stable yet adaptable).

⁵⁸ The *Nation Magazine* case presents a striking example of this phenomenon. Those able to travel to the front lines were those with a relationship with the DOD. See *Nation Magazine v. U.S. Dep't of Def.*, 762 F. Supp. 1558, 1564 (S.D.N.Y. 1991).

⁵⁹ See Gellman, *supra* note 10, at 9–11 (highlighting the perks of his access as a *Washington Post* reporter).

⁶⁰ See *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 418 (4th Cir. 2006). Recognizing that access gives large media entities like the *Sun* the power to control the flow of information to society is

If access law indeed favors media outlets that have entrenched relationships with government officials, and if these officials choose to use their now-sanctioned viewpoint discrimination power, less mainstream media outlets may not have access to the information necessary to present credible interpretations of the news to their audiences. Sanctioned exclusion would place these organizations, already less competitive in the marketplace of ideas, at a further disadvantage. Nonmainstream presentations of the news could become harder to find, engendering feelings of disempowerment and alienation from the political process in segments of the electorate.⁶¹ Thus, selective, viewpoint-based media access ought to give pause to those who believe that the First Amendment should protect nonmainstream, not to mention disfavored, speech.

Importantly, despite the *Baltimore Sun*'s likely recognition of the advantages it gains from preferential access, the disadvantage inherent in such a scheme to smaller, nonmainstream media is not the only concern. Exclusivity may breed coziness, and close relationships between reporters and those they cover can impair objectivity.⁶² Additionally, dissenting views, even from mainstream reporters, may be chilled as reporters compete for access — not in the shadow of the knowledge that congenial reporting may help gain access, but because they know that a judicially sanctioned ban hangs over their heads if they do not.⁶³

In the immediate future, the implications could be especially serious. Post-9/11 government secrecy seems to be on the rise,⁶⁴ and struc-

important. These concerns grow as media consolidation increases. See Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627, 1627 (1999) (“The last fifteen years have seen an ever-increasing pace of media consolidation, which has affected the news media in profound ways.”); see also Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 373 (2006) (discussing methods of preventing “harmful” media ownership consolidation).

⁶¹ To illustrate how access denials can fuel disenfranchisement, imagine the extreme case of a presidential election strategy that fully discounted the value of low-population states, to the extreme of ignoring all media from those states. Not only would voters in those states feel disempowered, but their media likely would not be powerful enough to spread discontent into larger states, and their electorates would not be large enough to impose an electoral sanction on the candidate.

⁶² See David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 57–58 (2006) (opining that the relationships that emerge as a result of embedded reporting can interfere with objective reporting).

⁶³ *But see Balt. Sun*, 437 F.3d at 419 (deeming it implausible that a reporter of ordinary firmness in the “rough and tumble” political world could be chilled by a politician’s refusal of access on account of viewpoint and noting that the plaintiffs had not experienced any chilling effect (internal quotation marks omitted)).

⁶⁴ See Scott Shane, *Since 2001, Sharp Increase in the Number of Documents Classified by the Government*, N.Y. TIMES, July 3, 2005, § 1, at 14 (noting that “federal departments [were] classifying documents at the rate of 125 a minute as they create[d] new categories of semi-secrets bearing vague labels like ‘sensitive security information’”). The number of documents classified in 2004 was nearly twice the number classified in 2001. *Id.*

tural incentives within American government encourage secrecy. For example, the personal and professional sanctions for overclassification are systematically lower than those for underclassification.⁶⁵ In a world in which secrets dominate, an incentive that forces news organizations to conform their reporting to the interests of the holders of those secrets is particularly undesirable.

C. *Are There Legal Solutions?*

It remains — and should remain — the case that there is no constitutional right of access to government information. Equal information access in all situations is a utopian vision, and as discussed in section B, unequal access may actually stimulate information dissemination. Yet recognizing these realities does not mean that it is appropriate to condone a doctrine that countenances blatant governmental viewpoint discrimination. Although no right of access exists, a right to be free from retaliation for the exercise of First Amendment rights does, and it should be better protected.⁶⁶

Conditioning access on whether “government has opened its doors”⁶⁷ has led courts away from the heart of the inquiry, which should be focused on *why*, not whether, the doors have been shut on a particular reporter. By focusing on whether the government has created a forum, courts have lost sight of a serious harm they are supposed to prevent: retaliation for exercising one’s rights. As section B argues, the broad implications of this failure may be serious. Unsurprisingly, however, because the forum question is essentially seen as dispositive, courts have generally failed to consider the effects of their decisions on First Amendment values.⁶⁸

A test that inquires into the motives of shutting the doors on a particular reporter would more effectively account for these interests. Like other motive-based inquiries, such a rule would suffer from significant problems. Most notably, it would often be difficult to determine whether a reporter has been excluded for legitimate reasons such

⁶⁵ See *Public Interest Declassification Act: Hearing on S. 1801 Before the S. Comm. on Governmental Affairs*, 106th Cong. 6–7 (2000) (statement of Rep. Porter J. Goss) (stating his belief that the federal government classifies too much information because it is the “path of least resistance” and is the most likely way to avoid revealing something that should have been kept secret).

⁶⁶ See *Barnes v. Wright*, 449 F.3d 709, 718 (6th Cir. 2006) (noting that the “law is well established that “[a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable” (alteration in original) (quoting *Greene v. Barber*, 310 F.3d 889, 895 (6th Cir. 2002))).

⁶⁷ *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring in the judgment).

⁶⁸ Given the limitations of the public forum doctrine, this failure is not surprising. See, e.g., Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1224 (1984) (arguing that public forum analysis detracts from an analysis of the underlying First Amendment values); see also LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 204–07 (1985) (noting that public forum analysis does not appropriately address the problems of viewpoint discrimination).

as a good faith belief that she is reporting inaccurately, or for illegitimate reasons such as retaliation for criticism of government policy.

However, a motive-based inquiry still possesses virtues that may lead to better solutions to the access question than the current forum-based doctrine, at least in the context of retaliation. A test that forbids denials of access based on motive might sweep into its protective ambit reporters legitimately banned for inaccurate commentary in addition to those wrongfully banned for criticism. However, this overinclusiveness simply means that the test may overprotect diverse and critical speech, the very voices the First Amendment is supposed to protect. To the extent that overinclusiveness is problematic, procedural protections might mitigate its effects. For example, to avoid “‘plant[ing] the seed of a constitutional case’ in ‘virtually every’ interchange between public official and press,”⁶⁹ courts might recognize carve-outs for exclusive and semi-exclusive interviews. The threshold for raising a claim could require a reporter to show a denial of access previously granted, or at least typically granted to similar reporters, and sanctions could be imposed on reporters who bring frivolous claims. Such a test could also require the reporter to carry the burden of proving a viewpoint-based motive. Importantly, government officials could still defend themselves by showing that the access denial was based on legitimate motives, such as logistics, security, or factual inaccuracies.⁷⁰

Another benefit of the motive-based test is that it would likely eliminate the most obvious and egregious forms of viewpoint discrimination. Notwithstanding the Fourth Circuit’s assertions to the contrary in *Baltimore Sun*,⁷¹ by failing to condemn viewpoint discrimination in its most obvious forms, the current doctrine creates a safe zone for government officials to demonstrate openly the consequences of dissent. A motive-based inquiry may at least disincentivize this conduct and thereby make it more difficult for government to control the media by explicitly sending the message that unfavorable reporting will be punished. Such an inquiry might also increase the cost, risk,

⁶⁹ *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 418 (4th Cir. 2006) (quoting *Connick v. Myers*, 461 U.S. 138, 149 (1983)).

⁷⁰ Under this proposed rule, the *Baltimore Sun* reporters would have an easier case than the reporters from *Nation Magazine*. In *Nation Magazine*, retaliation would be particularly difficult to show given the lack of a previous history between the DOD and the excluded reporters. Moreover, legitimate reasons, such as the desire to ensure broad information dissemination, exist for reserving limited spots for large media organizations, and security and efficiency concerns might justify bringing only organizations with which the DOD is familiar to the front lines.

⁷¹ See *Balt. Sun*, 437 F.3d at 419–20.

and inconvenience to the government of engaging in the practice altogether if it knows that it may later have to justify itself to a court.⁷²

Although preferential access may be inherent in the nature of newsgathering, explicitly condoning it does not seem to create any benefits, and it may create significant harms. Ultimately, the law's power to deal with the access question may be limited; even a perfectly implemented motive test may not improve the situation. However, the law's inability to provide an unassailable solution does not justify perpetuating a doctrine that condones actions in direct conflict with fundamental First Amendment values. In contrast to the current, unfortunate development in media access law that looks to the forum of the challenged action to determine if a right of access exists, future developments should address the values that the law should be attempting to safeguard: a robust, democratic marketplace of ideas and the right not to be discriminated against for exercising constitutional rights.

V. INTERNET JURISDICTION: A COMPARATIVE ANALYSIS

The difficult jurisdictional issues raised by the Internet have captured significant attention, prompting one federal judge to comment that, “[t]o paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps ‘no there there,’ the ‘there’ is *everywhere* where there is Internet access.”⁷¹ This lack of clear borders creates tension between different interests. The media desire certainty regarding when online content creates a basis for personal jurisdiction so that they can avoid defamation lawsuits in distant places. Sovereign nations want to ensure that the ubiquitous nature of the Internet does not undermine their ability to enforce substantive laws balancing speech and reputation rights.²

This Part's comparison of U.S. and Commonwealth cases reveals differing approaches to determining when to exercise jurisdiction over media defendants based on Internet content. U.S. courts have adopted a targeting test that requires purposefully directing activity at a forum as opposed to merely providing content accessible there.³ Courts in Commonwealth countries, including Australia, the United Kingdom,

⁷² Additionally, such a motive-based test would also continue to leave enough leeway for the government to exclude speakers from certain forums like political debates on the basis of nonviability, a practice upheld by the Supreme Court in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998).

¹ *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 462 (D. Mass. 1997) (quoting GERTRUDE STEIN, *EVERYBODY'S AUTOBIOGRAPHY* 289 (1937)).

² See JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET?* 156 (2006) (“A government's responsibility for redressing local harms caused by a foreign source does not change because the harms are caused by Internet communication.”).

³ See, e.g., *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002).

and Canada, have based jurisdiction on foreseeability, exercising jurisdiction over any online media content that could harm a plaintiff's reputation in the forum.⁴ Although these inconsistent jurisdictional tests are a matter of procedure, they stem from different substantive laws and from Commonwealth courts' underlying unfriendliness to U.S. free speech protections. Media defendants have argued for special jurisdictional rules applicable to the Internet alone; however, any such call for reform must recognize that the procedural divergence results from entrenched substantive differences. Thus, this Part argues that absent an international agreement harmonizing the jurisdictional analysis, courts are not likely to adopt special Internet rules, and media groups will instead be compelled to turn to technological solutions.

A. *The Current Jurisdictional Landscape*

1. *Internet Jurisdiction in the United States.* — The Fourth Circuit recently allayed the fears of media organizations when it held that “[s]omething more than posting and accessibility” was necessary to subject newspapers to jurisdiction based on Internet content: “The newspapers must . . . manifest an intent to target and focus on [the forum state’s] readers.”⁵ Similarly, the Fifth Circuit held that a Texas court lacked personal jurisdiction over content posted on an out-of-state journalism program’s website because, although the article was “presumably directed at the entire world,” it was “certainly . . . not directed specifically at Texas.”⁶ An Illinois court likewise refused to exercise jurisdiction over an online humor publication because “nothing on the Internet site was specifically targeted at Illinois consumers.”⁷

Notably, U.S. courts have also applied the targeting test to decline jurisdiction over foreign media defendants. A New York court refused to assert jurisdiction over a Philippine Internet news service because it had not directed its website toward a New York audience.⁸ Federal

⁴ See, e.g., *Burke v. NYP Holdings Inc.*, [2005] 48 B.C.L.R. (4th) 363, 383 (Sup. Ct.).

⁵ *Young*, 315 F.3d at 263. Media organizations had filed an amicus brief arguing that a broader jurisdictional test would “dramatically expand” liability, “interfering with the editorial judgment necessary for free communication.” Brief of Amici Curiae in Support of Defendants-Appellants for Reversal of the Dist. Court’s Decision at 12, *Young*, 315 F.3d 256 (No. 01-2340), 2002 WL 32729971 [hereinafter Brief of Amici Curiae].

⁶ *Revell v. Lidov*, 317 F.3d 467, 475 (5th Cir. 2002); see also *Schnapp v. McBride*, 64 F. Supp. 2d 608, 611–12 (E.D. La. 1998) (holding that a newspaper defendant was not subject to personal jurisdiction in Louisiana because the online article at issue “was not purposefully targeted at [the Louisiana plaintiff] nor was it aimed at readers in Louisiana”).

⁷ *Scherr v. Abrahams*, No. 97 C 5453, 1998 WL 299678, at *5 (N.D. Ill. May 29, 1998); see also *Jackson v. Cal. Newspapers P’ship*, 406 F. Supp. 2d 893, 898 (N.D. Ill. 2005) (holding that a media company was not subject to jurisdiction in Illinois for an online article because its website did “not aim its services at Illinois residents”).

⁸ *Realuyo v. Villa Abrille*, No. 01 Civ. 10158 (JGK), 2003 WL 21537754, at *8, *10 (S.D.N.Y. July 8, 2003).

courts have also declined jurisdiction over Canadian⁹ and French¹⁰ media companies that published allegedly defamatory content online because the plaintiffs did not establish targeting of the forum state.

2. *Internet Jurisdiction in Commonwealth Countries.* — Whereas U.S. jurisdictions have generally settled on the targeting test, Commonwealth courts in Australia, the United Kingdom, and Canada have based personal jurisdiction in cases involving Internet content on foreseeability of harm. In *Dow Jones & Co. v. Gutnick*,¹¹ the Australian High Court affirmed an exercise of jurisdiction over a U.S. media corporation that published allegedly defamatory material about an Australian resident in *Barron's* magazine, which could be accessed online through a subscription news site in Australia.¹² Rejecting the defendant's plea for special rules applicable to the Internet to avoid universal jurisdiction, the majority noted that "those who post information on the World Wide Web do so knowing that the information . . . is available to all and sundry without any geographic restriction."¹³ Thus, it does not "impose on . . . publisher[s] an excessive burden."¹⁴ In response to the defendant's claim that it was technologically impossible to control the geographic scope of Internet content, one Justice said: "Publishers are not obliged to publish on the Internet. If the potential reach is uncontrollable then the greater the need to exercise care in publication."¹⁵

Gutnick influenced subsequent decisions in other Commonwealth courts. In *King v. Lewis*,¹⁶ the English High Court exercised jurisdiction over a U.S. resident who allegedly defamed a British citizen in an

⁹ See *Naxos Res. (U.S.A.) Ltd. v. Southam Inc.*, 24 Media L. Rep. (BNA) 2265, 2267–68 (C.D. Cal. 1996) (holding that a *Vancouver Sun* article available on the Internet was not "primarily directed" at the California plaintiff).

¹⁰ See *Copperfield v. Cogedipresse*, 26 Media L. Rep. (BNA) 1185, 1189 (C.D. Cal. 1998) (declining jurisdiction over a French media defendant for its website content because California was not the focus of the story or of the harm suffered).

¹¹ (2002) 210 C.L.R. 575.

¹² See *id.* at 607–08 (opinion of Gleeson, C.J., and McHugh, Gummow, and Hayne, JJ.).

¹³ *Id.* at 605; see also *id.* at 648 (opinion of Callinan, J.) (noting that publishers do not post content on the Internet to "reach a small target" and that "its ubiquity . . . is one of the main attractions to users of it").

¹⁴ *Id.* at 639 (opinion of Kirby, J.). Although it is possible that an Australian court may have properly exercised jurisdiction over Dow Jones even under a targeting test since Dow Jones received a financial benefit from approximately 1700 subscribers in Australia, *id.* at 644 (opinion of Callinan, J.), the foreseeability test lacks any such limiting principle and would cover media organizations with far fewer contacts abroad.

¹⁵ *Id.* at 648 (opinion of Callinan, J.). Following the High Court's decision, Dow Jones settled with Gutnick and printed a statement clarifying the article. See Richard Rescigno, Letter from the Managing Editor, *Kafka Lives, Down Under*, BARRON'S, Oct. 25, 2004, at 51. The magazine's frustration was clear: "Australia has a lot going for it: the Great Barrier Reef, the Sydney Opera House, fabulous beaches and, not least, Nicole Kidman. What it doesn't have is a rational libel law." *Id.*

¹⁶ [2004] EWHC (QB) 168, *aff'd*, [2004] EWCA (Civ) 1329.

interview posted on a boxing news website.¹⁷ The Court of Appeal confirmed that defamatory material posted online would foreseeably cause harm in forums where it was viewed and that this was sufficient for jurisdiction,¹⁸ specifically rejecting the U.S. targeting test because “in truth [the defendant] has ‘targeted’ every jurisdiction where his text may be downloaded.”¹⁹ Similarly, a Canadian court cited *Gutnick* when it exercised jurisdiction over the *New York Post*, observing that “[b]y establishing a website which is available on the Internet worldwide, it is reasonably foreseeable that the story . . . would follow [the plaintiff] to where he resided.”²⁰

*B. Viewing the Jurisdictional Divide
as an Outgrowth of Substantive Differences*

The divergent jurisdictional approaches in the United States and in Commonwealth countries have prompted calls for reform through special domestic rules applicable to the Internet or through an international agreement. But possibilities for reform cannot be analyzed without understanding that these procedural variances are the manifestation of dramatic differences in substantive laws²¹ — namely, Commonwealth countries’ lack of an equivalent commitment to the First Amendment’s underlying values.²² These differences help explain why varied procedural tests have emerged and provide a framework for evaluating the future of jurisdiction over media defendants.

¹⁷ *Id.* [7]–[8], [43]. The court cited *Gutnick* in asserting that website material is published when it is downloaded. *Id.* [15].

¹⁸ See *King*, [2004] EWCA (Civ) 1329, [31] (“[A] global publisher should not be too fastidious as to . . . where he is made a libel defendant.”).

¹⁹ *Id.* [34]. Although Commonwealth cases thus far have involved large media organizations whose websites may be more likely to be accessed abroad, the foreseeability test focuses on harm and could be used to confer jurisdiction even over small newspapers because the Internet gives them a global reach.

²⁰ *Burke v. NYP Holdings Inc.*, [2005] 48 B.C.L.R. (4th) 363, 383 (Sup. Ct.); see also *Bangoura v. Wash. Post*, [2004] 235 D.L.R. (4th) 564, 571 (Ont. Super. Ct. Just.) (holding that a media defendant that placed content on the Internet “should have reasonably foreseen that the story would follow the plaintiff wherever he resided”). The appellate court in *Bangoura* continued to rely on the foreseeability test but stayed the decision because the plaintiff had not resided in Canada until three years after the allegedly defamatory story was published, rendering the action unforeseeable. See *Bangoura v. Wash. Post*, [2005] 202 O.A.C. 76, 82 (Ont.).

²¹ For a discussion of how “avowedly procedural rules may have either substantive purposes or substantive effects,” see Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1473 (1987).

²² See *Bachchan v. India Abroad Publ’ns Inc.*, 585 N.Y.S.2d 661, 665 (Sup. Ct. 1992) (noting “England’s lack of an equivalent to the First Amendment”); GOLDSMITH & WU, *supra* note 2, at 157 (“[T]he First Amendment does not reflect universal values; to the contrary, no other nation embraces these values.”).

1. *Substantive Media Law in the United States.* — Free speech protections granted to the press in the United States are unparalleled.²³ First Amendment jurisprudence places vindication of reputation in a “decidedly subservient” role as compared to “the paramount constitutional concerns with . . . freedom of the press.”²⁴ Courts insist on preventing a substantial chilling effect on speech.²⁵ Although American libel law derived from an English common law heritage, the United States departed from this tradition in *New York Times Co. v. Sullivan*.²⁶ In *Sullivan*, the Supreme Court both eliminated strict liability by announcing the “actual malice” rule, which requires proof of intentional falsity for libel actions brought by public officials, and mandated that the plaintiff bear the burden of proving falsity.²⁷ The Court subsequently expanded *Sullivan* by extending its holding to public figures generally²⁸ and by requiring that even private figures prove negligence to succeed in a libel action.²⁹

Theoretically, the targeting jurisdictional test adopted in the United States should not be influenced by these media-friendly libel laws because the Supreme Court has specifically instructed that First Amendment concerns are already accounted for by substantive laws and that “to reintroduce those concerns at the jurisdictional stage would be a form of double counting.”³⁰ Moreover, focusing on targeting is consistent with typical jurisdictional tests, which look beyond foreseeability to whether a defendant purposefully availed itself of the laws of the forum,³¹ and so the targeting test does seem to stem from traditional procedural due process principles.³²

²³ See generally Frederick Schauer, *The Exceptional First Amendment, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 29 (Michael Ignatieff ed., 2005).

²⁴ *Id.* at 42.

²⁵ See, e.g., *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (noting that “a ‘chilling’ effect would be antithetical to the First Amendment’s protection”); see also Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 685 (1978) (discussing how “the chilling effect has grown from an emotive argument into a major substantive component of first amendment adjudication” (footnote omitted)).

²⁶ 376 U.S. 254 (1964).

²⁷ *Id.* at 279–80. For a comprehensive discussion of *Sullivan*’s holding and its extension in subsequent litigation, see IAN LOVELAND, *POLITICAL LIBELS* 65–85 (2000).

²⁸ See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967).

²⁹ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

³⁰ *Calder v. Jones*, 465 U.S. 783, 790 (1984).

³¹ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

³² In holding that the mere existence of a website is insufficient for jurisdiction, courts have marshaled the conventional due process rationale that an exercise of personal jurisdiction must conform to “traditional notions of fair play and substantial justice.” *E.g.*, *Young v. New Haven Advocate*, 315 F.3d 256, 261 (4th Cir. 2002) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)) (internal quotation marks omitted). The Supreme Court considered these traditional jurisdictional principles in the context of out-of-state print media defendants in the companion cases *Calder v. Jones*, 465 U.S. 783, and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), in

However, despite the Court's express prohibition of substantive considerations, three factors suggest that the American preoccupation with press protection has subtly reinforced adoption of the targeting test. First, media defendants have invoked the First Amendment in arguing for a limited jurisdictional test based on Internet content,³³ placing free speech concerns squarely before courts during the procedural determination. Courts attempting to reconcile conventional methods of assessing jurisdiction with the unique attributes of the ubiquitous Internet proceed from an understanding that "freedom of expression occupies pride of place, prevailing with remarkable consistency in its conflicts with even the most profound of other values and the most important of other interests."³⁴ Although courts cannot officially rest their jurisdictional determinations on the First Amendment, media defendants' arguments ensure that they are keenly reminded of free speech principles, and the targeting test thus further allows courts to protect this essential American value.

Second, First Amendment considerations may have encouraged U.S. courts to adopt the targeting test in the hopes of serving as a model for foreign tribunals grappling with similar procedural issues. Media defendants have argued that a broader jurisdictional test in the United States might embolden foreign courts to exercise jurisdiction over U.S. media organizations, exposing them to the less protective speech laws of other countries.³⁵ In addition, to the extent that the targeting test guards speech by defining jurisdiction narrowly and thus limiting circumstances in which media defendants must defend their speech, foreign adoption of the targeting test in effect imports U.S. free speech principles. Likewise, if the values embodied by the First Amendment are not counted during the jurisdictional determination in suits brought under the different substantive laws of other countries, those values will not be counted at all.³⁶

Finally, free speech protections may have influenced adoption of the targeting test in order to increase options for nonenforcement of foreign judgments if foreign courts fail to follow the example of a lim-

which it held that jurisdiction existed because the defendants aimed behavior toward and deliberately exploited the forum state. See *Calder*, 465 U.S. at 789; *Keeton*, 465 U.S. at 781. Courts struggling to adapt *Calder* and *Keeton* to the Internet arrived at the targeting test. See, e.g., *Young*, 315 F.3d at 262-63.

³³ See, e.g., Reply Brief of Appellants at 20, *Young*, 315 F.3d 256 (No. 01-2340), 2002 WL 32727002 (noting that a broad test would create a "particularly pervasive" chilling effect).

³⁴ Schauer, *supra* note 23, at 42.

³⁵ See, e.g., Reply Brief of Appellants, *supra* note 33, at 20 n.19 (arguing that if "universal jurisdiction for so-called cybertorts gains its first ally among the federal circuits, foreign courts may feel considerably emboldened to exercise jurisdiction over U.S.-based Internet sites").

³⁶ Cf. GOLDSMITH & WU, *supra* note 2, at 149 (noting that "[t]he heated rhetoric about conflicts of laws masks two more salient operating principles" including the libertarian desire to "extend the unusually tolerant values of the U.S. First Amendment across the globe").

ited jurisdictional test. U.S. courts will refuse to enforce foreign libel judgments in contravention of traditional principles of comity if substantive or procedural differences render foreign law repugnant to U.S. public policy.³⁷ In particular, U.S. courts will refuse to enforce a foreign judgment if the foreign tribunal inappropriately exercised personal jurisdiction over the defendant.³⁸ Adopting a restrictive jurisdictional test for Internet content gives U.S. courts an additional device to protect the media by refusing to recognize foreign judgments based on broader jurisdictional tests.³⁹ For these three reasons, the targeting test is fairly viewed not only as arising from traditional procedural doctrine, but also as growing out of media-friendly substantive laws.

2. *Substantive Media Law in Commonwealth Countries.* — The contrast between U.S. free speech jurisprudence and foreign approaches that value reputation over speech⁴⁰ reveals that the First Amendment is “a recalcitrant outlier to a growing international understanding of what the freedom of expression entails.”⁴¹ The foreseeability jurisdictional test in Commonwealth countries arises in part from plaintiff-oriented laws and from hostility to media protections embraced in the United States.⁴²

In the United Kingdom, libel remains a strict liability tort, plaintiffs need not offer proof of actual damage because damage is pre-

³⁷ See *Telnikoff v. Matusevitch*, 702 A.2d 230, 249 (Md. 1997); *Bachchan v. India Abroad Publ'ns Inc.*, 585 N.Y.S.2d 661, 664 (Sup. Ct. 1992). The American Law Institute recently released a proposed federal statute on enforcement of foreign judgments, motivated in part by the need for consistent construction of the public policy exception as transnational litigation based on Internet content increases. See Thomas S. Leatherbury, *ALI Takes Position on Foreign Judgments (Including Those Against the Media)*, COMM. LAW., Summer 2005, at 25, 25.

³⁸ See, e.g., *Bachchan*, 585 N.Y.S.2d at 662 (citing N.Y. C.P.L.R. 5304(a) (Consol. 2006)) (explaining that New York laws specifically preclude recognition of a foreign judgment when the foreign court did not have personal jurisdiction over the defendant).

³⁹ These nonenforcement decisions protect American media defendants lacking assets abroad when a successful foreign plaintiff seeks enforcement of his libel award in the United States. However, large media organizations with significant assets abroad will not be able to contest foreign libel judgments in U.S. courts. Even if a media organization is able to shield its assets, ignoring a libel lawsuit will often not be an attractive option because of reputational concerns. See Jason Krause, *Where in the World Wide Web To Fight?*, ABA J. E-REPORT, Jan. 10, 2003 (quoting a Dow Jones attorney involved in *Gutnick* as arguing that credibility issues require newspapers to defend themselves in libel actions).

⁴⁰ Compare Frederick Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. MEDIA L. & PRAC. 3, 12–13 (1980) (arguing that a fundamental First Amendment principle is that “speech is *always* more important” than reputation), with, e.g., Richard L. Crech, *Dow Jones and the Defamatory Defendant Down Under: A Comparison of Australian and American Approaches to Libelous Language in Cyberspace*, 22 J. MARSHALL J. COMPUTER & INFO. L. 553, 556–57 (2004) (noting that Australian law “views a person’s reputation as the paramount concern” and that harm to reputation is “the gravamen of Australian defamation law”).

⁴¹ Schauer, *supra* note 23, at 30.

⁴² Cf. Eric Barendt, *Jurisdiction in Internet Libel Cases*, 110 PENN ST. L. REV. 727, 737 (2006) (“[D]ispute about the appropriate state for jurisdictional purposes becomes a surrogate for the disagreement about the correct balancing of free speech and reputation rights.”).

sumed, defendants bear the burden of proving the truth of their statements, and courts may assess punitive damages against a defendant that pleads truth but fails to prove it.⁴³ British law “in the main loads the dice very heavily in the plaintiff’s favour.”⁴⁴ Australia similarly considers defamation a strict liability tort and does not require public figures to prove actual malice.⁴⁵ Canada’s plaintiff-friendly libel laws presume damage, do not require actual malice, and place the burden on the defendant to prove the material’s substantial truth.⁴⁶

Although recent changes to defamation law in each of these countries have lessened the burden on media defendants,⁴⁷ Commonwealth courts have historically criticized the U.S. approach of valuing speech above reputation,⁴⁸ and each country has rejected incorporating the full protections of the First Amendment into its substantive law.⁴⁹

⁴³ See *Telnikoff v. Matushevich*, 702 A.2d 230, 247–48 (Md. 1997) (describing English libel law and contrasting it with U.S. law); ERIC BARENDT ET AL., *LIBEL AND THE MEDIA* 1–30 (1997); 1 RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 1:9, at 1–12.1 (2d ed. 2005); Douglas W. Vick & Linda Macpherson, *An Opportunity Lost: The United Kingdom’s Failed Reform of Defamation Law*, 49 FED. COMM. L.J. 621, 647–51 (1997).

⁴⁴ Ian Loveland, *A Free Trade in Ideas — and Outcomes, in IMPORTING THE FIRST AMENDMENT* 7 (Ian Loveland ed., 1998). The United Kingdom’s plaintiff-friendly defamation laws make London “the libel capital of the world.” BARENDT, *supra* note 43, at 16.

⁴⁵ See, e.g., *Gutnick v. Dow Jones & Co.*, [2001] VSC 305, [127] (Vict.). For an extensive discussion of Australian defamation law, see MICHAEL CHESTERMAN, *FREEDOM OF SPEECH IN AUSTRALIAN LAW* (2000).

⁴⁶ See *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, 1187, 1196 (opinion of Cory, J.); SMOLLA, *supra* note 43, § 1:9.75, at 1–14 to 1–14.2; Kimberly Richards, *Defamation via Modern Communication: Can Countries Preserve Their Traditional Policies?*, 3 TRANSNAT’L LAW. 613, 629 (1990).

⁴⁷ Most notably, the British House of Lords recently clarified and simplified the right of the media to plead a public interest defense, offering a *Sullivan*-style protection. See *Jameel v. Wall St. Journal Eur. Sprl.*, [2006] UKHL 44, [43]–[58] (appeal taken from Eng.) (opinion of Lord Hoffman). Although the defense was established in *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127 (H.L.) (appeal taken from Eng.), British judges had continued to “rigidly appl[y] the old law.” *Jameel*, [2006] UKHL 44, [57]. By resoundingly restating *Reynolds*, *Jameel* “brings English law close to the freedom enjoyed by U.S. media.” Frances Gibb, *Libel Ruling Heralds New Era for British Investigative Journalism*, *TIMES* (London), Oct. 12, 2006, at 16. For more information on legal reform in England before *Jameel*, see LOVELAND, *supra* note 27. For a description of defamation reform in Canada and Australia, see Leonard Leigh, *Of Free Speech and Individual Reputation: New York Times v. Sullivan in Canada and Australia, in IMPORTING THE FIRST AMENDMENT*, *supra* note 44, at 51, 51–68. For a discussion of convergence in the laws governing suspect reporting, see *infra* Part VI, pp. 1043–55.

⁴⁸ See, e.g., *Theophanous v. Herald & Weekly Times Ltd.* (1994) 182 C.L.R. 104, 135 (Austl.) (noting that *Sullivan* “gives inadequate protection to reputation”); see also Leigh, *supra* note 47, at 56 (“To a foreign observer the balance struck by the Supreme Court seems at times gravely flawed.”).

⁴⁹ See, e.g., *Theophanous*, 182 C.L.R. at 134 (noting that the full protections of *Sullivan* “should not form part of [Australian] law”); *Hill*, [1995] 2 S.C.R. at 1185–88 (opinion of Cory, J.) (explicitly repudiating *Sullivan* and observing that the United Kingdom and Australia had also rejected U.S. precedent); *Derbyshire County Council v. Times Newspapers Ltd.*, [1992] Q.B. 770, 832 (C.A.) (opinion of Butler-Sloss, L.J.) (noting that “[t]he American law of libel . . . goes further along the road of freedom of the press than the English law; nor would I wish to extend it”), *aff’d*

Further, considerations of the tension between differing substantive defamation laws often enter jurisdictional analyses quite directly in Commonwealth courts. In *Gutnick*, the Australian High Court rejected the media defendant's argument that publishing occurs when material is loaded on a server because that rule would "impose upon Australian residents . . . an American legal hegemony in relation to Internet publications" that would "confer upon one country, and one notably more benevolent to the . . . media than [Australia], an effective domain over the law of defamation, to the financial advantage of [U.S.] publishers."⁵⁰ The court mentioned that U.S. law leans heavily — "some might say far too heavily"⁵¹ — in favor of the media, and contrasted U.S. protections with Australian law, which "[q]uite deliberately, and . . . rightly so, . . . places real value on reputation, and views with skepticism claims that it unduly inhibits freedom of discourse."⁵²

Commonwealth courts are also frequently concerned about substantive inequities and deprivations that might result from forcing a plaintiff to sue in the United States. One Canadian court explained its decision to exercise jurisdiction in part because forcing the plaintiff to sue in New York instead of British Columbia would "unfairly deprive him of a significant juridic[al] advantage" given the important differences in the two jurisdictions' defamation laws.⁵³ The English court in *King* also mentioned juridical advantage, noting that the plaintiff's libel action would not survive if brought in the United States because of different substantive laws.⁵⁴

Just as the United States's media-friendly culture reinforced adoption of the targeting test, Commonwealth countries' focus on reputation, hostility toward expansive press protections, and fear of an American legal hegemony influenced the plaintiff-oriented foreseeabil-

[1993] A.C. 534 (H.L.); see also Schauer, *supra* note 23, at 43 (commenting that "American doctrines and understandings about freedom of expression have typically been rejected as extreme, imbalanced, and hardly worthy of emulation" abroad). In a perpetually reinforcing standoff, the U.S. refusal to honor foreign defamation judgments under traditional comity principles further heightens the hostility of foreign courts toward U.S. protections. See, e.g., *Bangoura v. Wash. Post*, [2004] 235 D.L.R. (4th) 564, 574 (Ont. Sup. Ct. Just.) (noting that the unwillingness of U.S. courts to enforce Canadian libel judgments is "an unfortunate expression of lack of comity" that "should not be allowed to have an impact on Canadian values").

⁵⁰ *Dow Jones & Co. v. Gutnick* (2002) 210 C.L.R. 575, 653–54 (opinion of Callinan, J.); see also *id.* at 633 (opinion of Kirby, J.) (noting that the "vastly disproportionate location of web servers in the United States" would result in an extension of American law to defamation actions brought by foreigners).

⁵¹ *Id.* at 650 (opinion of Callinan, J.).

⁵² *Id.* at 651.

⁵³ *Burke v. NYP Holdings Inc.*, [2005] 48 B.C.L.R. (4th) 363, 384–85 (Sup. Ct.); see also *Bangoura*, [2004] 235 D.L.R. (4th) at 573 ("Our courts do not share the American view that British libel law, which is similar to our own, is any less civilized than the American law.")

⁵⁴ *King v. Lewis*, [2004] EWHC (QB) 168, [36(3)], [37].

ity requirement.⁵⁵ The jurisdictional tests cannot be adequately analyzed without reference to these underlying substantive differences, and recognizing this relationship informs an evaluation of the possibility of harmonizing jurisdictional rules governing Internet content.

C. *The Future of Jurisdictional Tests*

Although American and Commonwealth approaches to substantive and procedural libel laws differ, media defendants both domestically and abroad have advanced the same argument to oppose an exercise of jurisdiction based on website content: the Internet, they say, is different.⁵⁶ Because online publication “differs profoundly from other media in regard to geographic direction and control,”⁵⁷ special jurisdictional rules are necessary to prevent “ceaseless choices of suppressing controversial speech or sustaining prohibitive liability.”⁵⁸ Publishers require certainty and consistency to assess potential liability, but the borderless Internet prevents them from taking reasonable measures to insulate themselves from suits in specific foreign jurisdictions.⁵⁹

In response, courts and commentators have increasingly focused on technological measures that media companies could adopt to limit

⁵⁵ These substantive differences also deter Commonwealth courts from dismissing a defamation action on the ground of forum non conveniens because they are wary of subjecting a plaintiff to rules considered more favorable to defendants. *See, e.g., Gutnick*, 210 C.L.R. at 650–51 (opinion of Callinan, J.); *Burke*, [2005] 48 B.C.L.R. (4th) at 382–83; *see also* SMOLLA, *supra* note 43, § 1:9.75, at 1-14.6 (discussing the reluctance of Canadian courts to dismiss cases on forum non conveniens grounds when doing so would deprive plaintiffs of a juridical advantage). The foreseeability test ultimately moots the relevance of a forum non conveniens inquiry because foreign courts willing to exercise jurisdiction over media defendants based on Internet content have no trouble declaring that the place of harm constitutes the best forum for the plaintiff to vindicate his reputation. *See, e.g., Gutnick*, 210 C.L.R. at 654 (opinion of Callinan, J.).

⁵⁶ *See, e.g., Gutnick*, 210 C.L.R. at 625–26 (opinion of Kirby, J.) (noting that the media defendant urged reformulation of Australian defamation law because of the unique features of the Internet); Brief of Appellants at 36–38, *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002) (No. 01-2340), 2002 WL 32727004 (arguing that the absence of boundaries on the Internet should affect the jurisdictional analysis).

⁵⁷ Brief of Amici Curiae, *supra* note 5, at 17. U.S. courts have generally accepted arguments that the borderless Internet necessitates special consideration. *See, e.g., Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997) (“Typically, states’ jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet.”). In contrast, foreign courts have tended to reject the argument that the Internet requires different standards. *See, e.g., Gutnick*, 210 C.L.R. at 649–50 (opinion of Callinan, J.).

⁵⁸ Brief of Amici Curiae, *supra* note 5, at 18 (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997)) (internal quotation marks omitted).

⁵⁹ *See* Brief of Appellants, *supra* note 56, at 37–38. As a purely defensive measure, many media groups have purchased insurance to protect against liability for defamation in unexpected forums. *See* H. Wesley Sunu et al., *Recent Developments in E-Commerce*, 37 TORT & INS. L.J. 345, 348–49 (2002). Not surprisingly, foreign courts have endorsed media insurance. *See* *Bangoura v. Wash. Post*, [2004] 235 D.L.R. (4th) 564, 572 (Ont. Super. Ct. Just.) (“I would be surprised if [the *Post*] were not insured for damages for libel or defamation anywhere in the world, and if it is not, then it should be.”).

readership — and thus liability — abroad.⁶⁰ In 2000, a French court determined that sufficiently feasible technical solutions existed to require that Yahoo! prevent French citizens from accessing Nazi memorabilia on its auction websites.⁶¹ Foreign courts could easily extend this holding to online media content, and improving geolocation technology would likely strengthen the resolve of foreign courts to impose liability based on foreseeability.

But technological solutions are not without problems. A foreign court unfriendly to U.S. protections might consider it foreseeable that some Internet content will slip through geographic blocking devices so that jurisdiction properly exists over any harm alleged. Even if Commonwealth courts were to hold that technology, although imperfect, renders harm unforeseeable, its use would place undesirable restrictions on speech because editors would have to “examine every reference in a web publication to determine which items might possibly cause offense in which location, and then to parse or fragment the resulting material accordingly.”⁶² Common sense suggests that most media companies do not purposefully defame individuals, so asking publishers to make *ex ante* decisions to limit material geographically would likely lead to risk-averse self-censorship of inoffensive material.⁶³

Despite these concerns, developing technology will likely inform the long-running debate over whether the unique features of the Internet require a separate system of legal rules.⁶⁴ Understanding that the foreseeability jurisdictional test grows out of underlying substantive law

⁶⁰ See, e.g., Dan Jerker B. Svantesson, *Geo-Location Technologies and Other Means of Placing Borders on the ‘Borderless’ Internet*, 23 J. MARSHALL J. COMPUTER & INFO. L. 101, 137 (2004) (arguing that “geo-location technologies may . . . eliminate the regulatory difficulties associated with the Internet’s ‘borderlessness’”); see also *id.* at 109–14 (describing filtering technologies available for website operators and accuracy rates).

⁶¹ See *Yahoo! Inc. v. La Ligue Contre le Racisme et L’Antisemitisme*, 433 F.3d 1199, 1203 (9th Cir. 2006) (describing the French court’s report from three experts on geographic filtration).

⁶² Brief of Amici Curiae, *supra* note 5, at 30.

⁶³ See Molly S. Van Houweling, *Enforcement of Foreign Judgments, The First Amendment, and Internet Speech: Notes for the Next Yahoo! v. LICRA*, 24 MICH. J. INT’L L. 697, 715 (2003) (“Assuming that technology continues to improve, it may become easier to withhold speech from foreign countries than to sort out inconsistent laws that specify what counts as harmful where.”). One newspaper vividly described the editorial chill that would result from a fear of liability: only a “skeleton of a newspaper” would remain after editors chose the prophylactic measure of removing any controversial text from a website. Brief of Appellants, *supra* note 56, at 38.

⁶⁴ Compare Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1213 (1998) (contending that legal and technological options available to resolve international Internet disputes render “regulation of cyberspace transactions . . . no less feasible than regulation of other transnational transactions”), with David R. Johnson & David Post, *Law and Borders — The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1376 (1996) (arguing that cyberspace requires its own system of legal rules distinct from those governing geographically defined territories because “events on the Net occur everywhere but nowhere in particular”).

explains why Commonwealth courts have generally rejected requests for special treatment based on the ubiquity of the Internet: there is more at stake than a mere procedural rule. Substantive variances stem from different cultures, different traditions, and different weighing of values, and they are therefore deeply entrenched. Even in the face of complications posed by a “unique and wholly new medium of worldwide human communication,”⁶⁵ media defendants will likely be unable to persuade foreign courts to adopt a jurisdictional test that mimics U.S.-style press protections, and the United States does not appear poised to compromise First Amendment values by allowing jurisdiction over Internet claims unless the publication targets the forum.

Because the jurisdictional tests are unlikely to converge on their own, some commentators have argued that international agreements are needed to address the unique attributes of the Internet.⁶⁶ At least one judge has issued a plea for multijurisdictional cooperation, arguing that jurisdictional problems “require international discussion in a forum as global as the Internet itself.”⁶⁷ International agreement on substantive legal norms governing free speech may be undesirable and even impossible,⁶⁸ but jurisdictional conformity would allow for differences in substantive law while providing doctrinal coherence and consistency to publishers regarding jurisdiction. The substantive differences between the United States and Commonwealth countries could actually inspire cooperation if the differing jurisdictional approaches to Internet content ultimately compelled international discussion and resolution. However, although a treaty solution may be the only way to harmonize the different jurisdictional approaches, the negotiation and compromises required seem unlikely to occur in the near future.⁶⁹

⁶⁵ *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996)) (internal quotation mark omitted).

⁶⁶ See, e.g., Matthew Fagin, Comment, *Regulating Speech Across Borders: Technology vs. Values*, 9 MICH. TELECOMM. & TECH. L. REV. 395, 448 (2003) (arguing that the Internet requires “international arrangements that transcend state borders and originate beyond independent state governmental processes”).

⁶⁷ *Dow Jones & Co. v. Gutnick* (2002) 210 C.L.R. 575, 643 (Austl.) (opinion of Kirby, J.). Justice Kirby continued: “In default of . . . international agreement, there are limits on the extent to which national courts can provide radical solutions . . .” *Id.*

⁶⁸ See GOLDSMITH & WU, *supra* note 2, at 152 (arguing that decentralized governance better reflects differences in values among different countries); Justin Hughes, *The Internet and the Persistence of Law*, 44 B.C. L. REV. 359, 364 (2003) (arguing that free speech is the “most obvious area of law where the Internet is unlikely to produce substantial harmonization of legal norms”).

⁶⁹ The recent failed negotiations in the Hague to craft a treaty on jurisdiction and the enforcement of judgments illustrates the difficulties inherent in securing multinational cooperation even on procedural issues. See Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT’L L. 175, 177–79 (2005) (describing the history and demise of the Hague negotiations on jurisdiction).

D. Conclusion

Recent cases considering whether media defendants expose themselves to personal jurisdiction in distant forums by placing content on the Internet reveal a division between domestic and foreign law. While U.S. courts have adopted a targeting test that requires defendants to specifically target the forum, Commonwealth courts have implemented a foreseeability test that confers jurisdiction when it is foreseeable that defamatory material will cause harm in locations where it may be viewed. These disparate approaches can be explained as developing from the substantive differences between U.S. and Commonwealth libel laws. Because the procedural divide stems from deeply entrenched values, arguments to create special rules applicable only to the Internet have failed. Although international cooperation would be the most effective resolution of the jurisdictional issues raised by online media content, technological solutions are likely to gain more immediate attention as courts continue to struggle with the concern that there is “no there there.”

VI. MEDIA LIABILITY FOR REPORTING SUSPECTS’ IDENTITIES: A COMPARATIVE ANALYSIS

In the United States, media outlets are generally able to disclose the identities of criminal suspects without fear of liability. In contrast, countries such as Australia and the United Kingdom, which value private reputational interests more and speech protections less than the United States, have suspect-reporting laws that have traditionally restricted the media’s freedom in this regard.¹ One example of this divergence is that in the United States, liability for reporting suspects’ identities is confined primarily to defamation suits, whereas in the United Kingdom and Australia, restrictive contempt of court laws also prevent the media from freely reporting on ongoing trials. In addition, countries are increasingly claiming jurisdiction over foreign media defendants,² making foreign suspect-reporting laws more relevant.

Despite these significant normative intercountry differences, recent developments have moved the United States, Australia, and the United Kingdom closer together. This convergence may have important practical implications. For example, if the laws of these countries become sufficiently similar, courts in the United States will be more likely to enforce foreign defamation judgments. However, this Part’s examina-

¹ See Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 38–41 (Michael Ignatieff ed., 2005).

² See *supra* section V.A.2 pp. 1033–34 (discussing the expansive “foreseeability” test employed by Australia, the United Kingdom, and Canada in increasingly claiming jurisdiction over media defendants for defamatory content posted on the Internet).

tion of the developments reveals that significant barriers to convergence remain.

The first three sections of this Part discuss recent American, British, and Australian developments in the potential liability of media organizations for reporting the identities of suspects. The fourth section compares the developments and assesses the likelihood of convergence of the three countries' laws, as well as the implications for enforcement of foreign judgments in U.S. courts.

A. American Developments

Suspect-plaintiffs in the United States have had a difficult time recovering from media organizations. This difficulty largely stems from American law's media-friendly stance in defamation cases. Although the Supreme Court has recognized that "there is no constitutional value in false statements of fact,"³ it has been hesitant to punish innocent errors by the press out of fear of chilling important speech.⁴ The Court's pro-media line of cases began with the landmark decision in *New York Times Co. v. Sullivan*,⁵ in which the Court held that public figures had to prove "actual malice" to recover for libel.⁶ Subsequent cases have expanded this pro-media posture by placing the burden of proof on private-figure plaintiffs to show that a journalist's allegations are false⁷ and by holding that plaintiffs must prove actual malice to recover presumed or punitive damages.⁸

Because of these barriers, suspect-plaintiffs have found recovery difficult under American defamation law. Although technically a suspect who is falsely accused of a crime can recover from a media defendant under the republication principle,⁹ judges and juries tend to fear

³ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

⁴ *See id.* ("Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties."); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . and especially one that puts the burden of proving truth on the speaker.").

⁵ 376 U.S. 254.

⁶ *Id.* at 279-80 (internal quotation marks omitted). According to *Sullivan*, a statement is made with actual malice if the speaker makes it "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*

⁷ *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). Private-figure plaintiffs must prove at least negligence to recover. *Gertz*, 418 U.S. at 347. Negligence is the standard in many states. *See, e.g., Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161, 168 (Mass. 1975); *see also* Alain Sheer & Asghar Zardkoobi, *An Analysis of the Economic Efficiency of the Law of Defamation*, 80 NW. U. L. REV. 364, 412 n.151 (1985) (collecting cases). In some states, private-figure plaintiffs must prove actual malice for matters of public interest. *See, e.g., Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1106 (Colo. 1982).

⁸ *See Gertz*, 418 U.S. at 349.

⁹ According to this principle, anyone who publishes a defamatory statement is liable for the substance of the statement. *See* RESTATEMENT (SECOND) OF TORTS § 578 & cmt. b (1977).

chilling the media's speech, which has made it difficult for suspect-plaintiffs seeking to recover damages.¹⁰ Proving actual malice presents additional obstacles for a suspect-plaintiff, and such a requirement can arise in at least three ways. First, courts have construed the definition of "public figure" broadly to include many more plaintiffs than the term would suggest.¹¹ In some cases, suspect-plaintiffs, such as the suspected Olympic Park bomber in *Atlanta Journal-Constitution v. Jewell*,¹² are classified as limited-purpose public figures.¹³ For suspects who are in any way involved in the investigation of a high-profile case, this classification is a realistic possibility. Second, in some states suspect-plaintiffs must prove actual malice for matters of public interest, as occurred in the *JonBenét Ramsey* case.¹⁴ Third, suspect-plaintiffs must prove actual malice to obtain presumed or punitive damages, and because many plaintiffs can afford to bring defamation lawsuits only if they can find attorneys willing to represent them for a contingent fee, the availability of these exemplary damage awards is often a practical necessity.¹⁵

Notwithstanding these significant barriers, a recent decision has shown slightly more willingness to engage with the overall tone of the allegedly defamatory material, a move that may bode well for suspect-plaintiffs. In *Hatfill v. New York Times Co.*,¹⁶ a divided panel of the Fourth Circuit held that a series of columns in the *New York Times* by Nicholas Kristof calling for the government to investigate Dr. Steven Hatfill in the anthrax mailings was "capable of defamatory meaning under Virginia law."¹⁷ The columns presented detailed reasons why the FBI should investigate Hatfill more aggressively.¹⁸ Kristof did,

Consequently, a media outlet cannot avoid liability by claiming it reported the statements of an accuser accurately.

¹⁰ See Robert D. Richards & Clay Calvert, *Suing the News Media in the Age of Tabloid Journalism: L. Lin Wood and the Battle for Accountability*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 467, 476–79 (2006).

¹¹ See RUSSELL L. WEAVER ET AL., THE RIGHT TO SPEAK ILL 51–53 (2006).

¹² 555 S.E.2d 175 (Ga. Ct. App. 2001).

¹³ Richard Jewell, the security guard who discovered the Olympic Park bomb and was later a suspect in the investigation, was classified as a limited-purpose public figure because he gave several interviews regarding the situation. See *id.* at 183–86.

¹⁴ See *Ramsey v. Fox News Network, L.L.C.*, 351 F. Supp. 2d 1145, 1148–49 (D. Colo. 2005) (applying Colorado law, which requires plaintiffs to prove actual malice if the matter is one of public concern).

¹⁵ See David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 502–03 (1991).

¹⁶ 416 F.3d 320 (4th Cir.), *reh'g en banc denied*, 427 F.3d 253 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1619 (2006).

¹⁷ *Id.* at 334.

¹⁸ For example, Kristof wrote that a person he later identified as Hatfill "worked for the . . . biodefense program and had access to the labs," that "he unquestionably had the ability to make first-rate anthrax," and that "he was upset at the United States government in the period

however, qualify his accusations by stating that the FBI should move forward more aggressively either to prove Hatfill's guilt or to exonerate him, and that Hatfill was innocent until proved guilty.¹⁹ In reversing the lower court's dismissal of the suit, the Fourth Circuit noted that "the unmistakable theme of Kristof's columns [was] that the FBI should investigate Hatfill more vigorously because all the evidence (known to Kristof) pointed to him."²⁰

Despite *Hatfill's* pro-plaintiff outcome and the court's willingness to engage with the tone of the articles, significant obstacles to media liability for reporting suspects' identities remain. First, even the *Hatfill* court's modest holding that Hatfill stated claims upon which relief could be granted was contested within the court itself,²¹ suggesting that any gains for plaintiffs will not come easily. The accusations in the articles were stronger than will often be the case: although Kristof only wanted the government to move forward, he indicated that in his mind, all evidence pointed toward Hatfill. In addition, *Hatfill* did not deal with many of the more difficult issues for suspect-plaintiffs, such as the circumstances in which they must prove actual malice and juries' fear of chilling media speech.

B. British Developments

Unlike American suspect-reporting law, British suspect-reporting law has until very recently been decidedly anti-media. Two components of the law have worked against the media: restrictive contempt of court laws and pro-plaintiff defamation doctrine. Perhaps the largest divergence from U.S. suspect-reporting law is found in restrictive contempt of court laws regarding interference with court proceedings. These laws are relevant in the suspect-reporting context because once a matter is before a court, and particularly during the period between arrest and trial, the media must take care not to report the matter in a way that could prejudice the defendant. The Contempt of Court Act²² imposes strict liability for "tending to interfere with the course of jus-

preceding the anthrax attack." *Id.* at 325 (quoting Nicholas D. Kristof, Op-Ed., *Connecting Deadly Dots*, N.Y. TIMES, May 24, 2002, at A25) (internal quotation mark omitted).

¹⁹ See *id.* (citing Nicholas D. Kristof, Op-Ed., *Anthrax? The F.B.I. Yawns*, N.Y. TIMES, July 2, 2002, at A21); *id.* at 327 (citing Nicholas D. Kristof, Op-Ed., *The Anthrax Files*, N.Y. TIMES, Aug. 13, 2002, at A19).

²⁰ *Id.* at 333.

²¹ In dissent, Judge Niemeyer wrote that he could "find nothing in the letter or spirit of the columns that amount[ed] to . . . an accusation" that Hatfill was the anthrax murderer. *Id.* at 337 (Niemeyer, J., dissenting). Judge Wilkinson dissented from the denial of rehearing en banc, claiming that "[t]he panel's decision in this case will restrict speech on a matter of vital public concern." *Hatfill v. N.Y. Times Co.*, 427 F.3d 253, 253 (4th Cir. 2005) (Wilkinson, J., dissenting from the denial of rehearing en banc).

²² 1981, c. 49 (U.K.).

tice in particular legal proceedings regardless of intent to do so,”²³ unless the media defendant can prove that it fairly and accurately reported judicial proceedings.²⁴ Recently, the *New York Times* blocked online readers in Britain from accessing an article that disclosed the identities of those suspected of attempting to hijack transatlantic planes.²⁵ The *Times* was most likely afraid of being held in contempt for interfering with the accused hijackers’ right to a fair trial.

Historically, defamation law in the United Kingdom has been favorable to plaintiffs. Media defendants who published the identities of suspects had to prove that the story was true or that an alternative defense was available. One common defense was “qualified privilege,” under which a media defendant had to prove that it had a duty to publish the information and that the readers had a reciprocal interest in receiving it.²⁶ Under traditional common law, this defense was narrowly construed, and mass media outlets had difficulty proving that any publication served the interest of its entire audience.²⁷ In the context of suspect reporting, media defendants faced the same high barriers under the traditional system. In particular, courts took the view that the public did not have an interest in knowing information that had not been fully investigated by reporters or that might be untrue.²⁸ This somewhat circular analysis led to findings of liability in cases in which a suspect’s identity was disclosed broadly.

Reynolds v. Times Newspapers Ltd.,²⁹ hailed as a landmark decision in British libel law,³⁰ appeared to significantly alter the traditional approach. It expanded the defense of qualified privilege to reflect a

²³ *Id.* § 1. Strict liability applies only to publications “addressed to the public at large.” *Id.* § 2(1).

²⁴ *Id.* §§ 3(3), 4(1).

²⁵ See Tom Zeller Jr., *Times Withholds Web Article in Britain*, N.Y. TIMES, Aug. 29, 2006, at C7 (referring to Don Van Natta Jr. et al., *In Tapes, Receipts and a Diary, Details of the British Terror Case*, N.Y. TIMES, Aug. 28, 2006, at A1).

²⁶ See *Pullman v. Walter Hill & Co.*, (1891) 1 Q.B. 524, 528; see also PAUL MITCHELL, *THE MAKING OF THE MODERN LAW OF DEFAMATION* 155–63 (2005).

²⁷ See, e.g., *Blackshaw v. Lord*, [1984] Q.B. 1, 26 (opinion of Stephenson, L.J.).

²⁸ For example, in discussing the history of the qualified privilege, the High Court observed that, traditionally:

Where damaging facts have been ascertained to be true or been made the subject of a report, there may be a duty to report them, provided the public interest is wide enough. But where damaging allegations or charges have been made and are still under investigation or have been authoritatively refuted, there can be no duty to report them to the public.

GKR Karate (U.K.) Ltd. v. Yorkshire Post Newspapers Ltd., [2000] E.M.L.R. 410, 417 (Q.B.) (citations omitted) (quoting *Blackshaw*, [1984] Q.B. at 26 (opinion of Stephenson, L.J.)).

²⁹ [2001] 2 A.C. 127 (H.L.) (appeal taken from Eng.).

³⁰ See, e.g., Andrew T. Kenyon, *Lange and Reynolds Qualified Privilege: Australian and English Defamation Law and Practice*, 28 MELB. U. L. REV. 406, 422 (2004).

growing concern with the importance of free expression.³¹ The *Reynolds* court identified a nonexhaustive list of ten factors to be used in determining whether a particular publication is defamatory.³²

In the wake of *Reynolds*, lower courts struggled to apply these factors consistently.³³ The ensuing cases revealed conflicting trends regarding suspect reporting. In some cases, the outcomes remained plaintiff-friendly notwithstanding *Reynolds*.³⁴ For example, judges in *Armstrong v. Times Newspapers Ltd.*³⁵ and *Chase v. Newsgroup Newspapers Ltd.*³⁶ were willing to consider the overall tone of the articles in question and find potential liability. Other judges, drawing on *Reynolds*'s sweeping language, were willing to allow qualified privilege defenses, especially when dealing with crimes that could affect the public.³⁷ These cases identified three different categories of suspect

³¹ See *Reynolds*, [2001] 2 A.C. at 205 ("Above all, the court should have particular regard to the importance of freedom of expression."). British courts have become increasingly focused on freedom of expression in light of developing European Court of Human Rights concerns for expression as a type of human right, and this focus is reflected in both *Reynolds*, see *id.* at 203–04, and *Jameel v. Wall Street Journal Europe Sprl*, [2006] UKHL 44, [98]–[99] (appeal taken from Eng.).

³² *Reynolds*, [2001] 2 A.C. at 205. These factors are:

1. The seriousness of the allegation. . . . 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. . . . 4. The steps taken to verify the information. 5. The status of the information. . . . 6. The urgency of the matter. . . . 7. Whether comment was sought from the plaintiff. . . . 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. . . . 10. The circumstances of the publication, including the timing.

Id.

³³ Although British judges and attorneys generally view *Reynolds* as an improvement over the previous, more limited defense, many note that the test is quite unpredictable. See Kenyon, *supra* note 30, at 423.

³⁴ See Ian Cram, *Reducing Uncertainty in Libel Law After Reynolds v Times Newspapers? Jameel and the Unfolding Defence of Qualified Privilege*, 15 ENT. L. REV. 147, 149 (2004) (noting that in the lower court's decision in *Jameel*, "the court favour[ed] interpretations which narrow the scope of qualified privilege").

³⁵ [2006] EWHC (QB) 1614. In *Armstrong*, cyclist Lance Armstrong sued based on an article implying that he had taken performance-enhancing drugs. Although the article did not specifically say that Armstrong had taken the drugs and included quotations from him denying that he had done so, the judge ultimately found that the article implied that Armstrong was guilty of taking performance-enhancing drugs. *Id.* [33]–[34].

³⁶ [2002] EWCA (Civ) 1772, 2003 E.M.L.R. 218. In *Chase*, the *Sun* newspaper published a story that a nurse was suspected of giving lethal overdoses of medicine to children. The *Sun* defended itself by claiming that there were reasonable grounds to suspect the nurse. *Id.* [18], 2003 E.M.L.R. at 223–25. The court noted that the newspaper had clearly gone beyond simply reporting suspicions and had instead implied that there were reasonable grounds to suspect the nurse. *Id.* [49], 2003 E.M.L.R. at 231. In holding for the claimant, the court seemed to consider it significant that the nurse was suspended from work and could no longer have harmed children, intimating that the public's need to know was not urgent enough to overcome the nurse's right to her reputation. *Id.* [21], 2003 E.M.L.R. at 225.

³⁷ For example, in *GKR Karate*, Sheila Holmes, a reporter for the *Leeds Weekly News*, reported that a karate studio was unlicensed and was defrauding local residents by selling karate

reports: an article that showed “the fact of an inquiry,” an article that showed there were “reasonable grounds for [the inquiry],” and an article that implied “proof of guilt.”³⁸ Although these categories seem very similar and in many cases substantially overlapped, they were treated differently by the courts and led to different outcomes.³⁹

Recently, the House of Lords strengthened the *Reynolds* defense in *Jameel v. Wall Street Journal Europe Sprl.*⁴⁰ In *Jameel*, the *Wall Street Journal Europe* published an article claiming that the Saudi Arabian Monetary Authority, at the U.S. Treasury’s request, was monitoring the accounts of Saudi companies for outgoing payments funding terrorist organizations.⁴¹ The article named a group of which Jameel was the principal director. The trial judge rejected the *Journal’s Reynolds* defense, and the jury found the article defamatory.⁴² The Court of Appeal upheld the lower court’s rejection of the *Reynolds* defense principally because the *Journal* had not given Jameel enough opportunity to comment on the article’s allegations.⁴³

Lord Hoffman, whose sentiments carried majority support, thought that the lower courts had given *Reynolds* “too narrow a scope.”⁴⁴ Finding it “necessary to restate the principles” in light of the lower courts’ inconsistent application of *Reynolds*,⁴⁵ he recast the traditional qualified privilege test, which required a duty to communicate and an interest in receiving the information, as a test based solely on the public interest.⁴⁶ Once a matter has been found to be in the public interest, the newspaper must show that the decision to publish the defamatory statement was justifiable, but “allowance must be made for editorial judgment.”⁴⁷ As a final consideration, the newspaper must

lessons door to door and later disappearing. See *GKR Karate (U.K.) Ltd. v. Yorkshire Post Newspapers Ltd.*, [2000] E.M.L.R. 410, 414–15 (Q.B.). Although finding that several *Reynolds* factors weighed in favor of the plaintiff, see *id.* at 423–29, the judge concluded that, because the paper was distributed only in and around Leeds, where people had a legitimate interest in the scheme, *id.* at 422, and because he “found Mrs Holmes to be an honest, sensible and responsible person,” *id.* at 429, the newspaper should escape liability. After balancing the factors weighing against Holmes with society’s interest in the free flow of information, the court held that the interest in information outweighed the countervailing factors. See *id.* at 429–30.

³⁸ *Bennett v. News Group Newspapers Ltd.*, [2002] E.M.L.R. 860, 869 (quoting *Lewis v. Daily Telegraph Ltd.*, [1964] A.C. 234, 282 (opinion of Lord Devlin)).

³⁹ See, e.g., *Armstrong*, [2006] EWHC (QB) 1614, [4]–[12], [30]–[32]; *Chase*, [2002] EWCA (Civ) 1772, [49], 2003 E.M.L.R. at 230–31.

⁴⁰ [2006] UKHL 44 (appeal taken from Eng.).

⁴¹ *Id.* [37] (opinion of Lord Hoffman).

⁴² *Id.* [7] (opinion of Lord Bingham).

⁴³ See *id.* [81]–[82] (opinion of Lord Hoffman).

⁴⁴ *Id.* [37].

⁴⁵ *Id.* [38].

⁴⁶ See *id.* [50] (“If the publication is in the public interest, the duty and interest [in receiving the information] are taken to exist.”).

⁴⁷ *Id.* [51].

have practiced “responsible journalism.”⁴⁸ In laying out the “responsible journalism” inquiry, Lord Hoffman identified three relevant factors: the steps the *Journal* took to verify the story, its efforts to provide Jameel an opportunity to comment, and the propriety of publication given diplomatic concerns.⁴⁹

Although *Jameel* was not focused directly on reforming liability for suspect reporting, the holding will likely allow the media to plead the *Reynolds* defense successfully in more suspect-reporting cases. Once a matter is deemed to be in the public interest under the *Jameel* test, assuming the newspaper has conducted an adequate investigation, the courts should defer to the editorial decisions of the newspapers regarding what information to publish. However, there is a long tradition in British courts of inquiring into editorial decisions, and *Jameel* may not overcome this history entirely.⁵⁰ Of great importance for suspect reporting is how the lower courts identify the public interest in the wake of *Jameel*⁵¹: even though the House of Lords indicated that the public interest had been interpreted narrowly following *Reynolds*, the Lords did not say that all reports of criminal suspicion were in the public interest, and it took care to note that the public interest did not include all things the public may want to know. Therefore, the definition of the public interest is an open question that may be outcome-determinative. The three categories of suspicion may become less important as less oversight of editorial decisions is required. In effect, the *Jameel* rule shifts the important classification made by the judge from determining which category the article falls under to determining whether publishing the article was in the public interest.

Jameel has not, however, changed English contempt law; therefore, the media still must be careful in reporting on matters that are before courts. Although *Jameel* may have an impact on liability for reporting suspects’ identities before they are tried or arrested, it will likely have little impact thereafter.

C. Australian Developments

Like the United Kingdom, Australia has historically provided limited protection to media defendants and has extensive contempt laws that prevent reporting on trials. Publication of material that tends to

⁴⁸ *Id.* [53]–[54] (quoting *Bonnick v. Morris*, [2002] UKPC 31, [23], [2003] 1 A.C. 300, 309 (appeal taken from Jam.) (opinion of Lord Nicholls)).

⁴⁹ *Id.* [58].

⁵⁰ For example, future judges may read *Jameel* as having yielded to editorial discretion only because of the extensive inquiries the journalists made before publication.

⁵¹ This question of interpretation has always been important. See MITCHELL, *supra* note 26, at 276 (“The story of qualified privilege for reports was the story of the conflicts and tensions between . . . competing ideas of ‘the public.’”). But this new test appears to elevate the importance of defining “public interest” given that *Jameel* instructs judges to defer to editorial judgments.

interfere with the administration of justice in a criminal proceeding is grounds for contempt.⁵² A clear form of contempt is when a publication “asserts, suggests or creates the impression” that the accused is guilty,⁵³ but “[c]ourts make allowances for the fact that the memories of jurors and witnesses fade over time.”⁵⁴ Therefore, reporters must be cautious in terms of both how and when they report on the happenings at a trial. Although reports of the proceedings themselves are protected by privilege, any editorial interpretations are potential grounds for contempt: should a report be perceived as slanted by a judge, the reporter could face contempt charges.⁵⁵

Under the Australian common law of defamation, the defense of qualified privilege was generally not available when the media made defamatory statements to a broad audience because the public was not seen as having an interest in false or unproven allegations except in limited circumstances.⁵⁶ The burden was on the media defendant to prove truth⁵⁷ or, in very limited circumstances, qualified privilege.⁵⁸ Each state had its own common law and statutory law regarding defamation, which led to confusion and forum shopping.⁵⁹

Australian defamation law has not been media-friendly regarding reporting of suspects’ identities. Tone and context matter; however, a *Reynolds*-type defense does not exist. Commentators observe that, because of the potential for liability, “the media must take particular care when reporting, for example, police investigations and court proceedings. . . . [I]f the report goes beyond a factual account and is embellished so as to impute guilt, or at least that the plaintiff was suspected on reasonable grounds, then the publication may be defamatory.”⁶⁰ The media must exercise greater caution when reporting on matters outside the scope of official investigations, such as general suspicions

⁵² See N.S.W. LAW REFORM COMM’N, REPORT 100, CONTEMPT BY PUBLICATION 4–6 (2003).

⁵³ DES BUTLER & SHARON RODRICK, AUSTRALIAN MEDIA LAW 188 (1999).

⁵⁴ *Id.* at 202.

⁵⁵ See MICHAEL GILLOOLY, THE LAW OF DEFAMATION IN AUSTRALIA AND NEW ZEALAND 222–24 (1998).

⁵⁶ See BUTLER & RODRICK, *supra* note 53, at 61 (noting that a “defamatory publication made to the general public” will receive qualified privilege only in “certain circumstances,” and that “the nature of the source is the best practical guide to the likely result, at least where the material is published at large”).

⁵⁷ See ANDREW T. KENYON, DEFAMATION 70 (2006). In at least one state, even proof of truth was not enough: a defendant had to prove both truth and either a public benefit or public interest. See *id.* at 71. This requirement has changed with the adoption of the new defamation acts, discussed below.

⁵⁸ See Chris Dent & Andrew T. Kenyon, *Defamation Law’s Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers*, 9 MEDIA & ARTS L. REV. 89, 93 (2004).

⁵⁹ See BUTLER & RODRICK, *supra* note 53, at 25 (noting the “confusing morass of uncertainty” resulting from the lack of uniformity among the states’ defamation laws).

⁶⁰ *Id.* at 36.

or rumors, because “simply adding the adjectives ‘alleged,’ ‘allegedly’ or words to that effect” is not enough to remove a defamatory meaning.⁶¹ Even a qualification that there is no reason to believe the accusation does not dispel the defamatory meaning.⁶²

The landmark case of *Lange v. Australian Broadcasting Corp.*⁶³ was expected to broaden protections for the media in reporting on public figures,⁶⁴ but its holding has been sharply circumscribed by lower court decisions limiting the protections to electoral matters.⁶⁵ The *Lange* defense as so interpreted is not useful to media defendants in limiting liability for reporting the identities of suspects, and even if *Lange* had been construed more broadly, it would have applied only to reporting on public figure suspects.

Because of *Lange*'s limitations, media defendants are forced to resort to general qualified privilege defenses in most instances involving suspect reports, and such defenses often fail. Several recent cases illustrate Australian law's continued pro-plaintiff stance regarding reports of suspects' identities. In *Favell v. Queensland Newspapers Pty Ltd*,⁶⁶ the High Court held that a newspaper article presented a genuine issue of fact whether it accused a family of arson when the article reported that the family was out of town when its house burned down, that an arson squad was investigating the fire, that the family intended to develop the land, and that this plan was arguably advanced by the house's destruction.⁶⁷ In so holding, the court noted:

A mere statement that a person is under investigation, or that a person has been charged, may not be enough to impute guilt. If, however, it is accompanied by an account of the suspicious circumstances that have aroused the interest of the authorities, and that points towards a likelihood of guilt, then the position may be otherwise.⁶⁸

The Supreme Court of South Australia, relying in part on *Favell*, held in *Channel Seven Adelaide Pty Ltd v. S*⁶⁹ that “the expression ‘he is a suspect in a murder case’ is capable of meaning that there are reasonable grounds to suspect him of the crime of murder.”⁷⁰

⁶¹ *Id.* at 35–36.

⁶² *See id.* at 36.

⁶³ (1997) 189 C.L.R. 520 (Austl.).

⁶⁴ *See* Kenyon, *supra* note 30, at 408.

⁶⁵ *See id.* at 416; *see also id.* at 431 (noting that Australian practitioners favored *Reynolds* as fairer to the media than *Lange*).

⁶⁶ (2005) 221 A.L.R. 186.

⁶⁷ *See id.* at 191.

⁶⁸ *Id.* at 190 (emphasis omitted) (footnote omitted).

⁶⁹ (2006) S.A. St. R. 296.

⁷⁰ *Id.* at 304–05 (opinion of Debelle, J.).

Australian states have recently enacted uniform defamation acts,⁷¹ which may relax this traditional pro-plaintiff stance. Although the acts have not been in effect long enough for a substantial body of case law to develop around them, they provide hope for media organizations that the courts will interpret them in a way that will shift Australian law in a media-friendly direction. In particular, the acts provide for a *Reynolds*-type defense,⁷² which was unavailable in all the states except New South Wales under the previous schemes. In New South Wales, however, this defense has been largely ineffective for media defendants.⁷³ Nonetheless, the language of the new provision and its adoption by all the states could lead to reliance on British precedents like *Reynolds* and *Jameel*, which would in turn make the media's privilege claims more viable.⁷⁴

There is already some indication, however, that any defense developed under the new acts will fall short of the protection provided by *Reynolds* and *Jameel*. In *Ahmed v. John Fairfax Publications Pty Ltd*,⁷⁵ the Court of Appeal of New South Wales held that because the state's defamation act did not cover "imputation," common law principles would continue to govern the meaning of the term.⁷⁶ This holding, if adopted by other courts, would mean that decisions such as *Favell* and *Channel Seven Adelaide* will remain good law. And because courts remain willing to evaluate editorial decisions, it is unlikely the acts will have a sweeping impact on the uncertainty surrounding defamation liability for media defendants.

D. Comparisons: Toward Convergence?

The potential convergence of American suspect-reporting laws with those of the United Kingdom and Australia is important to media organizations for two reasons. First, if the laws converge, U.S. courts would be more likely to enforce foreign judgments in this area. This possibility creates a tension for media defendants. On the one hand, they should prefer foreign regimes that are friendlier to the media. On

⁷¹ See, e.g., Defamation Act, 2005 (Vict.).

⁷² See, e.g., *id.* § 30. The factors relevant to the reasonableness of publication under the Act include the public interest; the relation to the performance of public functions of the suspect-plaintiff; the seriousness of the defamatory imputations; the extent to which the publication distinguishes among suspicions, allegations, and proven facts; whether public interest demanded expeditious publication; the nature of the defendant's business environment; the defendant's sources and their integrity; whether the plaintiff's side of the story is represented, or whether reasonable attempts were made to contact him; any other steps taken to verify the information; and any other circumstances the court deems relevant. *Id.* § 30(3). These factors align closely with the *Reynolds* factors. See *supra* note 32.

⁷³ BUTLER & RODRICK, *supra* note 53, at 69.

⁷⁴ See KENYON, *supra* note 57, at 377-79.

⁷⁵ [2006] NSWCA 6, 2006 WL 269786.

⁷⁶ See *id.* [106].

the other hand, if those regimes become too media-friendly, U.S. courts will become more likely to enforce adverse judgments. Second, the increasing globalization of jurisdiction makes it more likely that U.S. media organizations will have to defend themselves in foreign countries. Even if foreign judgments are not enforceable in the United States, the jurisdictional issue will be important to larger media defendants that have assets in these foreign countries. Recent developments in the three countries' suspect-reporting laws — the Fourth Circuit's willingness to consider tone, *Jameel's* indication that British courts should refrain from making editorial decisions, and Australian uniform acts' provision of a potential *Reynolds*-type defense — indicate limited movement toward convergence.

As a practical matter, however, at least three barriers to convergence of the three countries' suspect-reporting laws remain. First, U.S. Supreme Court precedent prevents requiring a newspaper to prove the truth of its reports. Because British and Australian courts, while potentially broadening the scope of the qualified privilege defense, show no signs of shifting the burden of proof in its entirety, their laws are unlikely to converge fully with American law. Second, British and Australian contempt of court laws prevent reporting on suspects' identities in a way the U.S. courts would likely find to offend the Constitution. Although the increased focus on the United Kingdom as a result of the *New York Times's* online content screening may draw attention to British contempt law as a speech inhibitor, there is not a strong push for reform in that area. Finally, U.S. courts tend to view the public interest more broadly than do British and Australian courts. As a result, British and Australian courts believe publications of suspects' identities should be more narrowly targeted, making it difficult for mass publications to claim qualified privilege.⁷⁷

Most likely, these barriers and remaining differences will prevent U.S. courts from recognizing and enforcing British and Australian defamation judgments. Thus far, U.S. courts have been unwilling to enforce such judgments based on public policy concerns, worrying that the British judgments do not sufficiently protect free speech.⁷⁸ The

⁷⁷ See, e.g., *Chase v. Newsgroup Newspapers Ltd*, [2002] EWCA (Civ) 1772, [58], 2003 E.M.L.R. 218, 232–33 (distinguishing a police officer who must carry out his duty based on incomplete information from a publisher who generally has no duty to publish).

⁷⁸ See, e.g., *Telnikoff v. Matusevitch*, 702 A.2d 230, 247–51 (Md. 1997); *Bachchan v. India Abroad Publ'ns Inc.*, 585 N.Y.S.2d 661, 663–65 (Sup. Ct. 1992). Enforcement of money judgments generally takes place at the state level; therefore, patterns of enforcement can be somewhat unpredictable. The closest thing to a common theme is the Uniform Foreign-Country Money Judgments Recognition Act. Several commentators note that U.S. courts are unlikely to enforce British judgments for defamation. See Thomas S. Leatherbury, *ALI Takes Position on Foreign Judgments (Including Those Against the Media)*, COMM. LAW., Summer 2005, at 25, 26 (summarizing commentators' debate).

courts also might be unwilling to enforce a foreign judgment if the foreign court lacked jurisdiction.⁷⁹ Because U.S. courts are not following the trend in the United Kingdom and Australia toward increased jurisdiction over foreign media defendants, they may be unwilling in many cases to enforce foreign judgments against media defendants.

Even if U.S. courts fail to enforce the judgments, however, media organizations should keep abreast of these foreign developments if they have assets abroad. With other countries increasingly claiming jurisdiction over the media, greater potential for foreign liability makes their substantive laws more pertinent.

VII. NEWSGATHERING IN LIGHT OF HIPAA

The media is society's watchdog, exposing government corruption and disseminating information to which citizens do not readily have access. Recently, media advocates have noted with concern the passage and implementation of the Health Insurance Portability and Accountability Act¹ (HIPAA), which they claim puts the media watchdog on too short a leash.² HIPAA serves as a new source of authority for restricting public disclosure of certain medical information — information that could form the basis of important news stories about health or other topics. These restrictions are at odds with state freedom of information (FOI) laws, which the media has historically used to obtain information about the government's workings. This Part examines the conflict between HIPAA and these state laws as it has emerged in state court cases over the last fifteen months.³

Part A reviews newsgathering, the federal Freedom of Information Act⁴ (FOIA), and state FOI laws. Part B examines HIPAA and its defined terms. Part C describes the facts and reasoning of recent cases considering the interaction of HIPAA and state FOI laws in Louisiana,

⁷⁹ UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(b)(2) (2005).

¹ Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified in scattered sections of 26, 29, and 42 U.S.C.).

² HIPAA has, for example, impeded journalists' attempts to access patient information from hospitals. *See, e.g.*, Associated Press, *New Patient-Privacy Rules Will Hamper Some Newsgathering*, FIRST AMENDMENT CTR. NEWS, April 14, 2003, <http://www.firstamendmentcenter.org/news.aspx?id=11336>; Associated Press, *Privacy Law Frustrates a Daughter — and Journalists*, FIRST AMENDMENT CTR. NEWS, Mar. 16, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16645>.

³ Litigation concerning release of information, even health information, predates HIPAA. *See, e.g.*, *S. Illinoisan v. Ill. Dep't of Pub. Health*, 844 N.E.2d 1 (Ill. 2006) (requiring the disclosure of a cancer registry without any discussion of HIPAA as the initial request for information occurred before the promulgation of the HIPAA regulations). However, state agencies are now able to invoke HIPAA as well as other privacy laws.

⁴ 5 U.S.C. § 552 (2000 & Supp. IV 2004).

Ohio, and Texas. Finally, Part D offers a framework for the resolution of the conflict between HIPAA and state FOI laws.

A. Newsgathering, FOIA, and State FOI Laws

Newsgathering is essential to the production of news.⁵ However, whereas the right to publish information has received significant constitutional protection,⁶ the right to newsgathering or access has been denied similar recognition.⁷ Even Justice Stewart, although sympathetic to the functions of newsgathering, did not believe that there was a “constitutional right to have access to particular government information, or to require openness from the bureaucracy.”⁸

While the Supreme Court has not granted these rights constitutional status, Congress and state legislatures have provided them in statutory form. In 1966, Congress passed the Freedom of Information Act, which enables individuals or the media to obtain information from the federal government upon request, subject to nine exemptions. Exemptions Three and Six are the most relevant to the application of FOIA in the medical privacy context. Respectively, they allow an agency to withhold information when it is “specifically exempted from disclosure by statute” or when “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” are at stake.⁹

⁵ See *Branzburg v. Hayes*, 408 U.S. 665, 728 (1972) (Stewart, J., dissenting) (“No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist.”).

⁶ See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (“Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.”).

⁷ See *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“The right to speak and publish does not carry with it the unrestrained right to gather information.”); see also *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (“[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.”); Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 928 (1992) (“While the press has not always been successful in asserting claims for special treatment, . . . the Supreme Court [has been willing] to interpret the First Amendment as affording the press a broad range of freedom from restraints on publication. Notably, however, . . . the Court has yet to explicitly afford special protections to the newsgathering process.” (footnotes omitted)).

⁸ Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 636 (1975) (citing *Pell*, 417 U.S. 817, and *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974), both opinions of Justice Stewart).

⁹ 5 U.S.C. § 552(b)(3), (6). The language of subsection (b)(6) implies a balancing test. See *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976) (“Congress sought to construct an exemption that would require a balancing of the individual’s right of privacy against the preservation of the basic purpose of the Freedom of Information Act ‘to open agency action to the light of public scrutiny.’ The device adopted to achieve that balance was the limited exemption, where privacy

All states have adopted freedom of information laws,¹⁰ but these laws vary considerably. Most state FOI laws retain a presumption of open access, either through statutory language¹¹ or case law,¹² whereas others contain more ambivalent policy statements recognizing competing privacy interests.¹³ Exemptions analogous to those in FOIA constitute perhaps the most concrete way of expressing commitment to other legislative priorities, such as privacy, and state laws differ in the degree to which these exemptions are discretionary or mandatory.¹⁴

State versions of FOIA's Exemptions Three and Six diverge in ways particularly relevant to state FOI laws' interactions with HIPAA. Exemption Three analogues sometimes create a specific exemption for

ened, for 'clearly unwarranted' invasions of personal privacy." (quoting *Rose v. Dep't of the Air Force*, 495 F.2d 261, 263 (2d Cir. 1976); 5 U.S.C. § 552(b)(6)).

Normally, exemptions under FOIA are discretionary. However, the Privacy Act of 1974, 5 U.S.C. § 552a (2000 & Supp. IV 2004), applicable to federal agencies, prohibits the disclosure of personal information that is maintained in a "system of records," defined as a "group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." *Id.* § 552a(a)(5). Federal courts have strongly suggested that Exemption Six is mandatory for this type of information. See *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 964 F.2d 26, 30 n.6 (D.C. Cir. 1992); *Cochran v. United States*, 770 F.2d 949, 955 (11th Cir. 1985). Even if the exemption is mandatory, the balancing test in Exemption Six injects some element of discretion into the process.

¹⁰ See Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 65 (1996).

¹¹ See, e.g., TEX. GOV'T CODE ANN. § 552.001 (Vernon 2004) ("[I]t is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. . . . The provisions of this chapter shall be liberally construed to implement this policy."). Some states put an even greater emphasis on open access, requiring exemptions to be reauthorized every five years or expire. See, e.g., FLA. STAT. ANN. § 119.15 (West Supp. 2006).

¹² See, e.g., *State ex rel. Miami Student v. Miami Univ.*, 680 N.E.2d 956, 958 (Ohio 1997) ("The Ohio Public Records Act is intended to be liberally construed 'to ensure that governmental records be open and made available to the public . . . subject to only a few very limited and narrow exceptions.'" (omission in original) (quoting *State ex rel. Williams v. City of Cleveland*, 597 N.E.2d 147, 151 (Ohio 1992))). See generally Thomas J. Moyer, *Interpreting Ohio's Sunshine Laws: A Judicial Perspective*, 59 N.Y.U. ANN. SURV. AM. L. 247 (2003) (providing an account from the Chief Justice of the Ohio Supreme Court of courts' interpretation of the state's FOI law).

¹³ See, e.g., R.I. GEN. LAWS § 38-2-1 (Supp. 2005) ("The public's right to access to public records and the individual's right to dignity and privacy are both recognized to be principles of the utmost importance in a free society."); VT. STAT. ANN. tit. 1, § 315 (2003) ("It is the policy of this subchapter to provide for free and open examination of records All people, however, have a right to privacy . . . which ought to be protected unless specific information is needed to review the action of a governmental officer.").

¹⁴ Most states follow FOIA and make exemptions discretionary. See, e.g., IOWA CODE ANN. § 22.7 (West Supp. 2006); NEB. REV. STAT. ANN. § 84-712.05 (LexisNexis Supp. 2006). However, others include mandatory exemptions as well. See, e.g., MD. CODE ANN., STATE GOV'T §§ 10-615, 10-618 (LexisNexis 2004 & Supp. 2006); WYO. STAT. ANN. § 16-4-203 (Supp. 2006). Separate state privacy laws may also make discretionary exemptions in the state FOI law mandatory, just as the Privacy Act of 1974 does for FOIA's Exemption Six.

other laws, as in the Ohio Public Records Act,¹⁵ or they may place the exemption in the provision dealing with the right to examine records, as in the Louisiana Public Records Law.¹⁶ In an effort to consolidate information, California compiles within the statute itself all state laws that provide an exemption to California's FOI law.¹⁷

Analogues to Exemption Six occasionally mimic FOIA's language nearly exactly,¹⁸ preserving the balancing test implicit in it. However, some states have broadened the language to cover "information"¹⁹ rather than "files," required only an "invasion of privacy"²⁰ rather than the more subjective "clearly unwarranted invasion of privacy" for the exemption to apply, or stated that a public interest must be demonstrated by "clear and convincing evidence" before an invasion of privacy would be warranted.²¹ The Ohio Public Records Act contains an exemption simply for medical records,²² thus effectively eliminating a balancing test and replacing it with a determination of whether something qualifies under the definition of a medical record. The Louisiana Exemption Six analogue is derived from a confidentiality law identified in the Exemption Three analogue,²³ while Texas has created a separate confidentiality exemption that covers "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."²⁴ Finally, Utah has integrated protected health information as defined by HIPAA into its FOI law exemptions directly,²⁵ eliminating the need to consider the conflict between the two statutes.

¹⁵ OHIO REV. CODE ANN. § 149.43 (West 2002). The Exemption Three analogue exempts "[r]ecords the release of which is prohibited by state or federal law." *Id.* § 149.43(A)(1)(v).

¹⁶ LA. REV. STAT. ANN. § 44:31 (Supp. 2006).

¹⁷ See CAL. GOV'T CODE § 6276.02-.48 (Deering 2002 & Supp. 2006).

¹⁸ See, e.g., *id.* § 6254(c).

¹⁹ See, e.g., ILL. COMP. STAT. ANN. 5/140-7(b) (West Supp. 2006); MICH. COMP. LAWS ANN. § 15.243(a) (West 2004).

²⁰ See, e.g., DEL. CODE ANN. tit. 29, § 10,002(d)(1) (1997); GA. CODE ANN. § 50-18-72(2) (West Supp. 2002).

²¹ See, e.g., OR. REV. STAT. § 192.502(2) (2005); W. VA. CODE ANN. § 29B-1-4(2) (LexisNexis Supp. 2006).

²² OHIO REV. CODE ANN. § 149.43(A)(1)(a) (West 2002). Medical records are defined as "any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment." *Id.* § 149.43(A)(3).

²³ See, e.g., LA. REV. STAT. ANN. § 44:4.1(B)(5) (Supp. 2006) (citing LA. REV. STAT. ANN. § 13:3734 (2006)).

²⁴ TEX. GOV'T CODE ANN. § 552.101 (Vernon 2004).

²⁵ See UTAH CODE ANN. § 63-2-107 (2004).

B. Medical Privacy and HIPAA

In 1996, Congress enacted HIPAA, which, among other things, set standards for disclosure of health information.²⁶ Although many states have general or medical privacy laws, HIPAA was intended to preempt them to the extent that it is more stringent.²⁷ HIPAA was conceptualized as setting a floor of medical privacy protection for American citizens to replace the patchwork protections that states and healthcare providers had provided in the past.²⁸

Determining whether information is covered by HIPAA is a multi-step process. For information to be protected it must be “individually identifiable.”²⁹ The entity that controls the information must also be considered a “covered entity.”³⁰ HIPAA allows covered entities to disclose protected health information without the written authorization of an individual if the “use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.”³¹

²⁶ The HIPAA statute itself was somewhat vague in establishing disclosure standards, but in 2001 the Department of Health and Human Services (HHS) issued detailed regulations interpreting the statute, which took effect for most covered entities on April 14, 2003. See 45 C.F.R. §§ 160, 164 (2005).

²⁷ *Id.* § 160.203.

²⁸ Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,464 (Dec. 28, 2000). For commentary on HIPAA's effects, see Lawrence O. Gostin & James G. Hodge, Jr., *Personal Privacy and Common Goods: A Framework for Balancing Under the National Health Information Privacy Rule*, 86 MINN. L. REV. 1439 (2002), and Peter D. Jacobson, *Medical Records and HIPAA: Is It Too Late To Protect Privacy?*, 86 MINN. L. REV. 1497 (2002). There has been little scholarly commentary about the interaction of HIPAA and the First Amendment. For an exception, see David R. Morantz, Comment, *HIPAA's Headaches: A Call for a First Amendment Exception to the Newly Enacted Health Care Privacy Rules*, 53 U. KAN. L. REV. 479 (2005).

²⁹ 45 C.F.R. § 160.103. The relevant regulation provides:

Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:

- (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
 - (i) That identifies the individual; or
 - (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Id.

³⁰ *Id.* “Covered entity” is defined as:

- (1) A health plan.
- (2) A health care clearinghouse.
- (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.

Id. As the definition demonstrates, not all state or federal agencies are covered entities under HIPAA.

³¹ *Id.* § 164.512(a).

C. Recent Cases

Three state courts have recently resolved controversies surrounding state FOI laws and HIPAA. These cases all involved journalists who requested information using FOI laws but were rebuffed by the government agencies that controlled the information. These agencies stated that the information was protected either by HIPAA or by exemptions within the state FOI law. The courts diverged in their opinions on disclosure, but this divergence may be explained in part by the courts' consideration of separate information requests under different state statutory schemes.

1. *Louisiana*. — In *Hill v. East Baton Rouge Parish Department of Emergency Medical Services*,³² the First Circuit Court of Appeal of Louisiana ruled that 911 tapes controlled by the Louisiana Department of Emergency Medical Services were exempted from public inspection by provisions of both HIPAA and the Louisiana Public Records Law.³³ On February 21, 2005, Gannett newspaper correspondent John Hill requested 911 tapes of the call made on behalf of Louisiana Secretary of State Fox McKeithen, who had been transported from his home to the hospital.³⁴ The trial court, reviewing the tapes in camera, concluded that they contained protected health care information as defined by HIPAA and thus were not disclosable.³⁵

Affirming, the Court of Appeals analyzed the issues under both the Louisiana Public Records Law and HIPAA, holding that the 911 call was not disclosable under either statutory scheme.³⁶ The court highlighted an Exemption Three analogue in the state FOI law that required disclosure “[e]xcept . . . as otherwise specifically provided by law.”³⁷ The majority then noted that a law protecting the confidentiality of privileged communications between a health care provider and patient applied to the 911 call, preventing disclosure.³⁸ Turning to HIPAA, the court found that the relevant division of the Department of Emergency Medical Services met the definition of a health care

³² 925 So. 2d 17 (La. Ct. App. 2005).

³³ *Id.* at 23. The Supreme Court of Louisiana denied certiorari. *Hill v. E. Baton Rouge Parish Dep't of Emergency Med. Servs.*, 927 So. 2d 311 (La. 2006) (mem.). Some states have explicitly protected 911 calls from disclosure. *See, e.g.*, R.I. GEN. LAWS § 39-21.1-17 (1997).

³⁴ *Hill*, 925 So. 2d at 19.

³⁵ *Id.* at 19–20.

³⁶ *Id.* at 22.

³⁷ *Id.* at 20 (emphasis omitted) (quoting LA. REV. STAT. ANN. § 44:31(B) (Supp. 2006)).

³⁸ *Id.* at 19–20 (citing LA. REV. STAT. ANN. § 13:3734 (2006)). Since the confidentiality law points to the Louisiana Evidence Code for definitions of when such privileges apply, the court also consulted the Code to arrive at its judgment. *Id.* (citing LA. CODE EVID. ANN. art. 510(B) (2006)).

provider and thus was a covered entity under HIPAA.³⁹ The 911 calls received by the division contained health information protected under HIPAA, so tapes of the calls were also not disclosable under federal law.⁴⁰

Judge Guidry dissented, arguing that the relationship between a 911 caller and an operator did not rise to the level of a confidential communication and that the calls only served the purpose of arranging for transportation to a hospital.⁴¹ He then stressed the fundamental right of freedom of access to public records contained in both the Louisiana Constitution and the Public Records Law.⁴² Further, he opined that HIPAA was inapplicable because the division that took the call did not fit the definition of a covered entity under the HIPAA regulations.⁴³

2. *Ohio*. — In *State ex rel. Cincinnati Enquirer v. Daniels*,⁴⁴ the Supreme Court of Ohio held that the state's Public Records Act required disclosure of notices and assessment reports regarding lead contamination maintained by the Cincinnati Health Department.⁴⁵ On January 16, 2004, *Cincinnati Enquirer* reporter Sharon Coolidge requested lead citation reports, issued between 1994 and 2004, that indicated that children living at certain residences had elevated levels of lead in their blood.⁴⁶ According to the Health Department, providing the unredacted reports would make it too easy to discover the identities of the children whose health information the reports contained.⁴⁷ The Hamilton County Court of Appeals upheld the agency's decision not to disclose.⁴⁸

The Ohio Supreme Court reversed and granted a writ of mandamus. It analyzed the potential conflict between the state FOI law and HIPAA. First, the court reviewed the relevant records to determine whether they contained health information protected under HIPAA.⁴⁹

³⁹ *Id.* at 22–23. This finding was supported by the fact that the respondents at the division were, at the very least, required to have EMT training and were trained to dispense medical advice if necessary. *Id.* at 22.

⁴⁰ *Id.* at 23.

⁴¹ *Id.* at 24 (Guidry, J., dissenting).

⁴² *Id.*

⁴³ *Id.* at 25.

⁴⁴ 844 N.E.2d 1181 (Ohio 2006).

⁴⁵ *See id.* at 1184.

⁴⁶ *Id.* at 1183–84. The Department of Health obtained this medical information about blood lead levels through its administration of blood tests to children in the state. *See* Brief of Respondents-Appellees Judith Daniels & the City of Cincinnati Health Dep't at 1, *Daniels*, 844 N.E.2d 1181 (No. 05-0068), 2005 WL 2402040.

⁴⁷ *See Daniels*, 844 N.E.2d at 1184. The Health Department released 170 unredacted lead citations for multiple-family residences, but it still refused to provide unredacted copies of 173 other reports from single-family residential properties. *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 1185–86.

Because the only sentence in the reports the court found relevant to its inquiry — “[t]his unit has been reported to our department as the residence of a child whose blood test indicates an elevated lead level” — was a mere “nondescript reference,” the court concluded that HIPAA did not protect the records.⁵⁰

The court proceeded to consider whether HIPAA would preempt the state FOI law if HIPAA did protect the health information contained in the reports. It noted that the regulations interpreting HIPAA contained “a ‘required by law’ exception” and that the Ohio Public Records Act contained an exemption for disclosure that is prohibited by federal law, creating a problem of “circular reference.”⁵¹ Consulting the Health and Human Services (HHS) Secretary’s commentary accompanying HIPAA, the court determined that the Secretary did not intend for HIPAA to override all state and federal laws requiring disclosure, including FOIA.⁵² Drawing an analogy to FOIA, which the Secretary indicated came within HIPAA’s “required by law” exception, the court concluded that the Ohio Public Records Act was not preempted by HIPAA.⁵³ Thus, disclosure was required.⁵⁴

3. *Texas*. — In *Abbott v. Texas Department of Mental Health & Mental Retardation*,⁵⁵ the Third District Court of Appeals of Texas held that statistical information does not constitute protected health information under HIPAA, and even if it did, this information is disclosable under Texas’s FOI law.⁵⁶ In this case, a reporter made a request to the Texas Department of Mental Health and Mental Retardation for “statistical information regarding allegations of abuse and subsequent investigations of abuse in state facilities” as well as the names of said facilities.⁵⁷ The Department, concerned that HIPAA

⁵⁰ *Id.* at 1185. The court likely arrived at the wrong conclusion as to whether at least some of the reports contained information that was not sufficiently de-identified. A covered entity would have a “reasonable basis to believe” that the presence of an address for a single-family home could identify the person from whom the information came, at least for the more recent records, and thus the information would qualify as “individually identifiable health information” under HIPAA. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,542–43 (Dec. 28, 2000).

⁵¹ *Daniels*, 844 N.E.2d at 1186 (citing OHIO REV. CODE ANN. § 149.43(A)(1)(v) (West 2002)).

⁵² *Id.* at 1187 (citing Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,667–68).

⁵³ *Id.* (citing Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,482).

⁵⁴ *Id.* at 1188. The circularity problem may not be so easily solved. Although federal legislators may not have intended to preempt state freedom of information laws, it is not clear that the authors of the state-level legislation intended to override privacy laws like HIPAA either. Because the exemptions in this case mirror each other, there may be no way to ensure a principled statutory interpretation. See *infra* note 72.

⁵⁵ No. 03-04-00743-CV, 2006 Tex. App. LEXIS 7655 (Tex. App. Aug. 30, 2006).

⁵⁶ See *id.* at *39–40.

⁵⁷ *Id.* at *1.

protected the information, requested an opinion on the matter from the Attorney General of the state.⁵⁸ The Attorney General issued an opinion stating that the information had to be disclosed pursuant to the Texas Public Information Act,⁵⁹ as the Act fell within the exception to HIPAA requiring compliance with laws that compel disclosure.⁶⁰ The Department disagreed and filed suit.⁶¹ The trial court declared the information confidential and thus not subject to disclosure under state law, avoiding the HIPAA preemption issue.⁶²

The Court of Appeals reversed, finding that the information requested did not “relate to issues regarding health or condition in general and certainly [did] not relate to the health or condition of an individual” and therefore was not protected health information under HIPAA.⁶³ However, the court still considered the issue assuming that the information was protected, as neither party contested that point in their briefs.⁶⁴ The *Abbott* court first found that the Public Information Act fell within the exception stated in the HIPAA regulations.⁶⁵ The court then reasoned that an exemption preventing disclosure of “confidential” information within the Texas Public Information Act⁶⁶ did not apply under usual state law considerations. Further, drawing support from Ohio’s *Daniels* decision, the court pointed out that it would be circular for information to be “confidential” and thus exempted under state law merely because it might be considered protected health information under HIPAA, given the applicability of the HIPAA “required by law” exception.⁶⁷ The court therefore concluded that “disclosure of the information requested [would] comply with all relevant requirements of the Public Information Act, HIPAA, and the [HIPAA regulations].”⁶⁸

⁵⁸ *Id.* The Texas FOI law is peculiar in that it places the burden of enforcement on the Texas Attorney General rather than on the requester of the information. The agency that receives the request must either release the records or request an opinion from the Attorney General’s office. See TEX. GOV’T CODE ANN. § 552.301 (Vernon 2004). If the agency does not request an opinion, then the information “is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.” *Id.* § 552.302.

⁵⁹ TEX. GOV’T CODE ANN. §§ 552.001–.353.

⁶⁰ *Abbott*, 2006 Tex. App. LEXIS 7655, at *4–5.

⁶¹ *Id.* at *6.

⁶² *Id.*

⁶³ *Id.* at *14–15.

⁶⁴ See *id.* at *18.

⁶⁵ See *id.* at *32–34.

⁶⁶ See TEX. GOV’T CODE ANN. § 552.101 (Vernon 2004).

⁶⁷ See *Abbott*, 2006 Tex. App. LEXIS 7655, at *34–39.

⁶⁸ *Id.* at *40.

D. Analysis

The courts in these cases struggled to interpret HIPAA and their own state FOI laws to strike the proper balance between medical privacy and the media's right to gather information. The Secretary of HHS anticipated these controversies and included the "required by law" exception to nondisclosure in the HIPAA regulations to address them.⁶⁹ FOIA was intended to fall within this exception.⁷⁰ The Secretary further suggested that "generally a disclosure of protected health information [as defined by HIPAA], when requested under FOIA, would come within FOIA Exemption Six."⁷¹ As Exemption Six is the statutory provision in FOIA that addresses privacy, this is a reasonable proposition. The federal agency in this scheme would determine through a balancing test whether the requested information fell within Exemption Six, and all the normal FOIA analyses would apply. The Secretary wisely avoided trying to resolve directly through statutory interpretation the circularity problem posed by the interaction of Exemption Three with the "required by law" exception in HIPAA.⁷²

Because of the structural similarities between FOIA and state FOI laws, state agencies and courts would do well to apply the framework outlined by the Secretary, using the relevant Exemption Six analogue that deals with medical privacy or privacy more generally to resolve these controversies. There are two main practical benefits to state entities in adapting the HHS Secretary's analysis of FOIA to their state FOI laws. First, this approach simplifies the analysis by requiring

⁶⁹ HHS noted that it received many comments urging the deletion of the "required by law" section of the HIPAA Privacy Rule so as to be more protective of privacy. See Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,666 (Dec. 28, 2000). In response, HHS noted the many situations in which disclosures required by state or federal law might be warranted and stated that "given the variety of these laws, the varied contexts in which they arise, and their significance in ensuring that important public policies are achieved, we do not believe that Congress intended to preempt each such law unless HHS specifically recognized the law or purpose in the regulation." *Id.* at 82,667. Although this conjecture as to congressional intentions may be accurate, the exception does poke many holes, of which FOIA is only one, in the privacy coverage that HIPAA was supposed to supply.

⁷⁰ See *id.* at 82,482 ("Uses and disclosures required by FOIA come within § 164.512(a) of the privacy regulation that permits uses or disclosures required by law if the uses or disclosures meet the relevant requirements of the law.")

⁷¹ *Id.* It should be noted that the HHS Secretary's interpretation of FOIA would receive no deference in court. See 5 U.S.C. § 552(a)(4)(B) (2000 & Supp. IV 2004) ("On complaint, the district court of the United States . . . shall determine the matter de novo . . .").

⁷² The interaction of these clauses may pose an insurmountable obstacle for both textualist and intentionalist theories of statutory interpretation. For the former, the words themselves seem to present an inescapable circularity for the interpreter. For the latter, the breadth of both FOIA's Exemption Three and HIPAA's "required by law" exception suggest that the legislature and agency meant to defer to all other statutes, or they would have only included enumerated exemptions. This does not resolve the question of which statute governs when the two conflict. Thus, for practical purposes, focusing on Exemption Six and its analogues may be the soundest option.

only an interpretation of state law. Second, there is a wealth of persuasive authority on which to draw to assist in the task. At the federal level, Exemption Six has spawned a large body of case law interpreting its provisions,⁷³ and state courts could look to this case law for guidance in interpreting state FOI laws. Other states' case law could also serve as a source of persuasive authority.⁷⁴

The Texas court in *Abbott* was the only one to articulate and apply this strategy. In Texas, the Exemption Six analogue comes in the form of a confidentiality exemption, and it clearly did not apply to the statistical information at issue in *Abbott*. This example demonstrates that under the interpretive strategy suggested here, the result in a given case will be highly dependent on the statutory language of the state Exemption Six analogue and the nature of the information requested.⁷⁵ The state legislatures have chosen numerous paths to protecting medical information in their Exemption Six analogues, and courts should give force to these different approaches.

The Ohio Supreme Court in *Daniels* correctly took notice of the "required by law" exception, focusing its analysis on the circularity problem and the definition of protected health information under HIPAA. However, it failed to consider explicitly whether the lead risk assessment reports in question fell under its Exemption Six analogue, which takes a different line than Texas by exempting medical records, defined as "any document or combination of documents . . . that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment."⁷⁶ Because the lead risk assessment reports and notices were generated as a result of the provision of medical services, it is plausible that they would fall within this exemption.

The Louisiana court in *Hill* made an error of a different sort. It considered its Exemption Three analogue, which provides an exception "as otherwise provided by law" and incorporates by reference a confidentiality exemption similar to Texas's, finding over a vigorous dissent that it applied. But remarkably, it failed to discuss HIPAA's "required by law" exception, applying HIPAA directly to the 911 calls

⁷³ See, e.g., U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 602 (1982); Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976); Sherman v. U.S. Dep't of the Army, 244 F.3d 357, 361 (5th Cir. 2001); N.Y. Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc).

⁷⁴ In fact, state courts already reference both federal courts, see, e.g., Campbell v. Town of Machias, 661 A.2d 1133, 1136 (Me. 1995), and other state courts, as the *Abbott* court did in considering *Daniels*.

⁷⁵ For instance, states that use more subjective language similar to that of FOIA likely require application of a balancing test of medical privacy interests and the public interest in disclosure. Those states that make use of more objective language will require judgments merely classifying information instead.

⁷⁶ OHIO REV. CODE ANN. § 149.43(A)(3) (West 2002).

and finding the information protected from disclosure on that basis. Because the court arrived at the same result under state law, the outcome of this case would not have been altered by the correct reading of HIPAA. However, with another Exemption Six analogue, the conclusion may have been different.

Journalists and other media entities should be pleased by the Secretary of HHS's commentary and its application to state law as suggested in this Part. In theory, the breadth of the Secretary's "required by law" exception should lead state agencies and courts to proceed as they did prior to HIPAA, considering health information under state Exemption Six analogues. The courts have not yet uniformly followed this approach, so it remains to be seen if HIPAA will in practice have a wider impact.⁷⁷ If it does not, this limited effect may be a source of dismay for medical privacy advocates, as it leaves HIPAA toothless when interacting with state FOI laws.⁷⁸ However, these backers of stronger medical privacy protections are not without recourse. They could urge state legislatures to modify their FOI laws, as Utah has,⁷⁹ to exempt protected health information as defined by HIPAA.⁸⁰ Although the outcome under this method would clearly fail to live up to the ideal of a national standard of medical privacy, the completed battle to remove the "required by law" exception to the HIPAA regulations has made that a *fait accompli*.

E. Conclusion

Courts in Louisiana, Ohio, and Texas have been the first to consider the conflict between HIPAA and state FOI laws. The analysis suggested in this Part provides a framework for states to decide future cases that is consonant with the HIPAA regulations as articulated by the Secretary of HHS and faithful to the myriad statutory exemptions to the state FOI laws enacted by the state legislatures. HIPAA may have the effect of raising awareness about medical privacy in many states, but its actual impact on newsgathering from public records will likely be minimal. The media check on the government's activity will continue, and the media watchdog will roam as free as it has in the past.

⁷⁷ One could also argue that HIPAA has at least raised awareness of medical privacy concerns, and this heightened awareness might affect judgments about whether information is disclosable.

⁷⁸ Some of those who commented on the proposed HIPAA regulations predicted this result. *See supra* note 69.

⁷⁹ *See* UTAH CODE ANN. § 63-2-107 (2004).

⁸⁰ They could also push for state court judges to expand interpretations of existing Exemption Six analogues, as the Louisiana court may have done in *Hill*. However, the case for this judicial "updating" of state FOI laws in reaction to HIPAA is particularly weak, as the HIPAA regulations were only recently implemented, and legislatures have not had much time to react.