Minnesota Journal of Law, Science & Technology

Volume 10 | Issue 2 Article 11

2009

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Amy Bauer

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Note

Blogging on Broken Glass: Why the Proposed Free Flow of Information Act Needs a Specific Test for Determining When Media Shield Laws Apply to Bloggers

*Amy Bauer**

INTRODUCTION

In 2007, Washington became the thirty-third state to enact a statute protecting newspeople from compelled discovery of their sources.[1] While passing such a "shield law"[2] was certainly not novel, Washington's statute is unique in that it is the first statute specifically applying the journalist's nondisclosure privilege to information disseminated on the Internet.[3] Other state shield laws have been or could be interpreted as encompassing a privilege for Internet newsgatherers,[4] but most state shield laws explicitly limit

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* Amy Bauer is a J.D. candidate at the University of Minnesota. She would like to thank her family and friends, the MJLST volume 10 staff and editors, and her favorite blogger, Jim Conway.

1. *See* WASH. REV. CODE ANN. § 5.68.010 (West Supp. 2009).

2. Laws shielding journalists from mandatory discovery of their sources are collectively known as "shield laws." *See* Citizen Media Law Project, State Shield Laws, http://www.citmedialaw.org/state-shield-laws/ (last visited Feb. 24, 2008). States may also refer to a shield law as a "journalist's privilege," "reporter's privilege," "newsperson's privilege," or "news media privilege." *See, e.g.*, FLA. STAT. ANN. § 90.5015 (West 1999) ("[j]ournalist's privilege"); 735 ILL. COMP. STAT. ANN. 5/8-901 (West 2003) ("reporter's privilege"); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2006) ("news media" privilege); N.J. STAT. ANN. § 2A:84A-21 (West 1994) ("[n]ewsperson's privilege"). This Note will refer to any such statute as a "shield law."

3. WASH. REV. CODE ANN. § 5.68.010 ("The term 'news media' means . . . any entity that is in the regular business of news gathering and disseminating news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, *internet, or electronic distribution . . . .*") (emphasis added).

4. *See, e.g.*, O'Grady v. Superior Court, 139 Cal. App. 4th 1423, 1468

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protection to professional journalists or newspersons affiliated with a traditional form of media like a newspaper or magazine.[5]

While this patchwork of privileges is difficult for a traditional journalist to navigate, the situation is even more precarious for bloggers—people who maintain Web sites and make regular entries and commentaries.[6] Though many blogs take the form of an online diary and arguably do not serve the news dissemination purpose that shield laws are intended to protect, other blogs provide analysis of news and current events in a manner comparable to traditional media outlets.[7] A recent report by the Pew Research

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(Cal. Ct. App. 2006) (holding that bloggers are within the class of persons protected by California's shield law); *see also, e.g.*, MINN. STAT. ANN. § 595.023 (2006) (drafting the shield law broadly to apply to any "person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication"); NEB. REV. STAT. § 20-146 (2007) (broadly shielding "information obtained or prepared in gathering, receiving, or processing of information for any medium of communication to the public").

5. Twenty-one state shield laws would likely not confer a privilege to most bloggers because of such limitations. ALA. CODE § 12-21-142 (LexisNexis 2005); ALASKA STAT. § 09.25.300 (2008); ARIZ. REV. STAT. ANN. § 12-2237 (2003); ARK. CODE ANN. § 16-85-510 (2005); CONN. GEN. STAT. ANN. § 52-146T (West 2006); DEL. CODE ANN. tit. 10 §§ 4320–26 (1999); FLA. STAT. ANN. § 90.5015 (West 1999); GA. CODE ANN. § 24-9-30 (1995); 735 ILL. COMP. STAT. ANN. 5/8-902 (West 2003); IND. CODE ANN. § 34-46-4-1 (LexisNexis 2008); KY. REV. STAT. ANN. § 421.100 (LexisNexis 2005); LA. REV. STAT. ANN. § 45:1451 (1999); MONT. CODE ANN. § 26-1-902 (2007); NEV. REV. STAT. ANN. § 49.275 (LexisNexis 2006); N.M. STAT. ANN. § 38-6-7 (West 2003); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992); N.D. CENT. CODE § 31-01-06.2 (1996); OHIO REV. CODE ANN. § 2739.04 (LexisNexis 2008); OKLA. STAT. tit. 12 § 2506 (2002); 42 PA. CONS. STAT. § 5942 (1976); R.I. GEN. LAWS § 9-19.1-2 (1971). Seventeen states do not have a shield law of any sort, though some have recognized a constitutional journalistic privilege. The seventeen states without shield laws are: Hawaii, Idaho (recognizing some protection through IDAHO CONST. art. I, § 9), Iowa (recognizing some protection through IOWA CONST. art I, § 7), Kansas, Maine (recognizing a limited privilege through the U.S. Constitution in *In re* Denis Letellier, 578 A.2d 722, 726 (Me. 1990)), Massachusetts, Mississippi, Missouri, New Hampshire, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia (recognizing some protection under the U.S. Constitution and the state constitution in State *ex rel.* Hudok v. Henry, 389 S.E.2d 188, 192 (W.Va. 1989)), Wisconsin, and Wyoming.

6. *See* Wikipedia, Blog, http://en.wikipedia.org/wiki/Blog (last visited Oct. 6, 2008). While Wikipedia is not a traditionally reliable source of information, it fits with the nature of blogs and has been cited for the definition of "blog" in *O'Grady*, 139 Cal. App. 4th at 1464, and various journal articles.

7. *See* Technorati, State of the Blogosphere 2008, Day 2: The What

Center for the People & the Press indicates that people are increasingly using the Internet as a source of news, with 37 percent of Americans going online for news three or more times per week (up from 31 percent in 2006) and 10 percent regularly reading blogs about current events and politics.[8] As more Americans turn to the Internet for information previously found in older forms of media, the shield laws protecting those older media need to move online, as well.

In an attempt to standardize shield laws and ensure some protection across the nation, Senator Arlen Specter proposed the Free Flow of Information Act of 2008 (FFOIA) as alternative language to the Free Flow of Information Act of 2007.[9] This language sought to extend protection from compelled source disclosure to any person who, at the onset of the newsgathering process, has intent to disseminate public news or information by various means, including "electronic or other form."[10] While the FFOIA's functional approach to determining who should be protected by a shield law could certainly encompass bloggers, its language is perhaps too broad to the extent that bloggers and courts would need to interpret elusive phrases like "primary intent," "regularly gathers," and "electronic or other form."[11] The apparent breadth of the proposed shield law extension may actually give bloggers a sense of security that may be false should the language be interpreted narrowly. How the FFOIA, if enacted, would be interpreted cannot yet be seen—but this uncertainty leaves bloggers in a dangerous situation.

This Note will explore whether the FFOIA, if enacted in the form proposed by Senator Specter, would provide sufficient protection to bloggers from compelled divulgence of information

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and Why of Blogging, http://technorati.com/blogging/state-of-the-blogosphere/the-what-and-why-of-blogging/ (last visited Feb. 23, 2009) (a blog search engine report indicating that fifty-four percent of bloggers regularly post about their personal life, forty-two percent regularly post about news, and thirty-five percent regularly post about politics).

8. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, AUDIENCE SEGMENTS IN A CHANGING NEWS ENVIRONMENT: KEY NEWS AUDIENCES NOW BLEND ONLINE AND TRADITIONAL SOURCES 3, 26 (2008), http://people-press.org/reports/pdf/444.pdf (noting that fifteen percent of Americans who regularly use the Internet also regularly read blogs for information about current events and politics).

9. 154 CONG. REC. S7704–08 (daily ed. July 29, 2008).

10. *Id.* at S7707 (§ 10(2)(A)(i)(III)).

11. *Id.* (§ 10(2)(A)(i)).

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uncovered in the newsgathering process. Part I of this Note examines the background of the ongoing controversy by explaining the history and purpose of shield laws, the recent explosion of blogging, how present shield laws impact bloggers, and the likely effects of the proposed FFOIA on Internet journalism. Part II addresses the current debate about the reach of the FFOIA and whether bloggers would or should be protected from compelled source disclosure. This Note concludes that the FFOIA would better serve Internet journalism by giving bloggers notice about whether they are covered through a specific test that considers both the form and function of the blog.

I. BACKGROUND

A. THE HISTORY AND PURPOSE OF KEEPING JOURNALISTS' SOURCES CONFIDENTIAL IN AMERICAN JURISPRUDENCE

The leading U.S. Supreme Court case on shield laws, *Branzburg v. Hayes*, dates back to 1972.[12] Despite several opportunities to do so, the Court has never specifically revisited *Branzburg*,[13] leaving the state and federal circuit courts grappling with the Court's somewhat enigmatic ruling.

Branzburg consisted of consolidated appeals from cases where journalists sought to enforce a First Amendment privilege not to divulge their sources upon subpoena.[14] Stressing its doubt that journalists' work would be seriously impaired without a constitutional privilege to promise source confidentiality,[15] the Court nonetheless weighed the potential chilling effect on freedom of the press with the people's right to "every man's evidence" at trial.[16] The Court ultimately concluded that requiring journalists to testify before state or federal grand juries was not an infringement on the First Amendment,[17] citing among its concerns that

12. 408 U.S. 665 (1972).

13. *See In re* Grand Jury Subpoena, Judith Miller (*Miller*), 397 F.3d 964, 970 (D.C. Cir. 2005) (finding that *Branzburg* remains the leading authority in shield law cases because "[t]he Highest Court has spoken and never revisited the question").

14. 408 U.S. at 667–68.

15. *See id.* at 691, 695–96.

16. *Id.* at 688 (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).

17. *Id.* at 667.

> The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.[18]

Despite these difficulties, however, the Court added a caveat hinting that a qualified privilege may be appropriate in some cases because the newsgathering process merits some First Amendment protection.[19]

Later cases interpreting *Branzburg* looked to Justice Powell's concurring opinion for guidance.[20] Providing *Branzburg*'s fifth and deciding vote, Justice Powell wrote separately to emphasize the "limited nature of the Court's holding" and his view that "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."[21] Four justices dissented, arguing that the "full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which the news is assembled and disseminated."[22] The dissenters would have adopted a qualified journalistic privilege that could be overcome if government officials showed that there was: (1) probable cause to believe the journalist's information was relevant to a legal violation, (2) no way to get the information by "means less destructive of First Amendment rights," and (3) a "compelling and overriding interest in the information."[23]

When the Court decided *Branzburg*, only seventeen states provided a statutory protection for a journalist's confidential

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18. *Id.* at 703–04.

19. *See id.* at 707–08 ("[N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification.").

20. *See, e.g.*, New York Times Co. v. Gonzales, 459 F.3d 160, 174 (2d Cir. 2006); *Miller*, 397 F.3d at 971–72 (majority opinion), 987 (Tatel, J., concurring).

21. *Branzburg*, 408 U.S. at 709–10 (Powell, J., concurring).

22. *Id.* at 727 (Stewart, J., dissenting).

23. *Id.* at 743.

sources.[24] In the aftermath of the case—and particularly in the 1970s, after journalists Bob Woodward and Carl Bernstein used confidential sources to expose the Watergate scandal—several states interpreted *Branzburg* as supporting a qualified privilege for journalists and enacted their own shield laws.[25] Currently, thirty-three states have shield laws.[26] As the number of states recognizing the privilege grew, so too did the range of "journalists" the laws covered.

The Second Circuit adopted a broad definition of the reporters' privilege in *von Bulow v. von Bulow*.[27] Instead of applying the privilege based on formal notions of newspaper affiliation or professional journalist status, the *von Bulow* court held that any individual could be covered by the privilege if she demonstrated an "intent to use [the] material sought to disseminate information to the public and that such intent existed at the inception of the news-gathering process."[28] The court noted that the rationale for shield laws "emanates from the strong public policy supporting the unfettered communication of information by the journalist to the public."[29] This functional test for determining who receives the journalists' privilege has been specifically adopted in the Third and Ninth Circuits.[30] Under this type of test, shield laws have been held to apply to non-traditional members of the news media, including academics engaged in pre-publication research[31] and some Internet

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24. *Id.* at 689 n.27 .

25. *See, e.g.*, DEL. CODE ANN. tit. 10 §§ 4320–4326 (1999); N.D. CENT. CODE § 31-01-06.2 (1996); N.M. STAT. ANN. § 38-6-7 (West 2003); OHIO REV. CODE ANN. §§ 2739.04 (LexisNexis 2008). For more information about Bob Woodward and Carl Bernstein, see generally ALICIA C. SHEPARD, WOODWARD AND BERNSTEIN: LIFE IN THE SHADOW OF WATERGATE (2007).

26. *See* Citizen Media Law Project, *supra* note 2 (mentioning thirty-two states). WASH. REV. CODE ANN. § 5.68.010 (2007) is the thirty-third shield law.

27. 811 F.2d 136, 142–43 (2d Cir. 1987).

28. *Id.* at 147.

29. *Id.* at 142.

30. *See In re* Madden, 151 F.3d 125, 129 (3d Cir. 1998) ("We find the reasoning of the court in *von Bulow* and by extension in *Shoen* to be persuasive."); Shoen v. Shoen, 5 F.3d 1289, 1293 (9th Cir. 1993) ("We find the Second Circuit's reasoning in *von Bulow* persuasive. The journalist's privilege is designed to protect investigative reporting, regardless of the medium used to report the news to the public.").

31. *See* Cusumano v. Microsoft Corp., 162 F.3d 708, 714 (1st Cir. 1998).

newsgatherers.[32] Courts have found shield laws inapplicable to a writer who began research without intent to publish anything,[33] a World Championship Wrestling commentator,[34] and an independent videographer who taped a violent protest rally in a public place.[35]

Many scholars believed the Supreme Court would revisit *Branzburg* in the wake of the high-profile jailing of New York Times reporter Judith Miller.[36] However, the Supreme Court declined to hear Miller's case and the D.C. Court of Appeals' ruling to hold her in contempt stood.[37] Without specific direction from the Supreme Court, the existence of the newspersons' privilege remains uncertain across the country, and states that do have shield laws offer varying levels of protection. The jurisdictions that recognize a privilege generally do so under the *von Bulow* rationale: "Like the compelled disclosure of confidential sources, [the compelled production of a reporter's resource materials] may substantially undercut the public policy favoring the free flow of information to the public that is the foundation of the privilege."[38]

B. THE RISE OF BLOGS AS A NEWSGATHERING AND DISTRIBUTION MEDIUM

When Justice White expressed concern in *Branzburg* about the difficulties of defining who would qualify for a journalists' privilege, he seemed primarily concerned about extending the privilege

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32. *See* O'Grady v. Superior Court, 139 Cal. App. 4th at 1460–62.

33. von Bulow v. von Bulow, 811 F.2d at 145.

34. *In re* Madden, 151 F.3d at 130.

35. *In re* Grand Jury Subpoena, Joshua Wolf (*Wolf*), Witness, 201 F.App'x 430, 432–33 (9th Cir. 2006).

36. *See generally* Laura Durity, Note, *Shielding Journalist-'Bloggers': The Need to Protect Newsgathering Despite the Distribution Medium*, 2006 DUKE L. & TECH. REV. 0011, http://www.law.duke.edu/journals/dltr/articles/pdf/2006DLTR0011.pdf.

37. *Miller*, 397 F.3d 964, 976 (D.C. Cir. 2005), *cert. denied*, 545 U.S. 1150 (2005). The *Miller* court took a particularly harsh view toward the existence of the journalists' privilege, ruling that, "Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury . . . regardless of any confidence promised by the reporter to any source." *Miller*, 397 F.3d. at 970. The court went on to declare that, even if Miller had a qualified privilege, the government's need for the information would have overcome it. *Id.* at 973.

38. *von Bulow*, 811 F.2d at 143 (quoting United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980)).

broadly to the "lonely pamphleteer[s]" seeking protection.[39] While it could be argued that bloggers are simply the lonely pamphleteers of the twenty-first century, statistics indicate that they could also be a substantial component of the contemporary news media.

When the Internet was invented, it quickly changed the way people sought information and became a new medium for news distribution. However, even now that Internet use is widespread, the number of Internet news consumers continues to surge. The Pew Research Center for the People & the Press reported that Internet news readership increased 6 percent within the past two years, with 37 percent of Americans now going online for news at least three times per week.[40] Arguably, Americans are more likely to get their news from the Internet than a newspaper (34 percent), the radio (35 percent), the nightly network news (29 percent), or the network morning news (22 percent).[41] Cable TV news (39 percent) and local TV news (52 percent) may be the only news media more popular.[42] Daily online news use increased by about a third from 2006 to 2008.[43] While a good portion of Internet news readership comes from online versions of traditional news publications, 23 percent of the general public regularly read political blogs, and, of those who use the Internet, this number is at 34 percent.[44]

One tracking source estimates that as of August 2008, blogs received 77.7 million unique visitors in the United States.[45] Many of the blogs visited post information about politics and current events, but the largest block of blogs devote their space to personal and lifestyle issues.[46] Political and current events bloggers in particular have sought recognition as a legitimate news medium.[47] Bloggers

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39. Branzburg v. Hayes, 408 U.S. at 704 (1972).

40. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *supra* note 8, at 3.

41. *Id.*

42. *Id.*

43. *Id.* at 4.

44. *Id.* at 25.

45. Technorati, State of the Blogosphere 2008, Introduction, http://technorati.com/blogging/state-of-the-blogosphere/ (last visited Mar. 16, 2009).

46. *See supra* note 7.

47. *See* Media Bloggers Ass'n, About, http://www.mediabloggers.org/about (last visited Oct. 5, 2008) ("The Media Bloggers Association is a nonpartisan . . . organization dedicated to . . . supporting the development of 'blogging' or 'citizen journalism' as a distinct form of media; and helping to extend the power of the press, with all the

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have created their own codes of ethics and responsibility modeled after the Society of Professional Journalists' Code of Ethics.[48] The main provisions cited by CyberJournalist.net for responsible blogging include "be[ing] honest and fair in gathering, reporting, and interpreting information;" "treat[ing] sources and subjects as human beings deserving of respect;" and being accountable for postings.[49] The Media Bloggers Association proclaims: "When our members practice journalism, they have the same rights and responsibilities of any other journalist and must be accorded the same First Amendment rights and legal privileges as those who work for traditional media organizations."[50] While some bloggers have made efforts to align their practices with journalists' practices, the simple declaration that bloggers are journalists does not, in reality, afford them shield law protection.

C. HOW BLOGGERS FARE UNDER PRESENT PROTECTIVE STATUTES

In 2005, blogger Joshua Wolf videotaped a San Francisco demonstration against the G-8 meeting, where a police car was allegedly set on fire by one of the protesters.[51] A grand jury subpoenaed Wolf's videotape, but he refused to produce it, claiming the journalists' privilege.[52] The Ninth Circuit upheld the district court's contempt order, and Wolf spent nearly 200 days in prison.[53] Much of the Ninth Circuit's rationale in *Wolf* was that California's shield law did not protect bloggers like Wolf.[54] However, one year

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rights and responsibilities that entails, to every citizen.").

48. *See, e.g.*, *id.*; CyberJournalist.net, A Bloggers' Code of Ethics, http://www.cyberjournalist.net/news/000215_print.php (last visited Oct. 5, 2008); SOC'Y OF PROF'L JOURNALISTS, CODE OF ETHICS (1996) [hereinafter SPJ], http://www.spj.org/pdf/ethicscode.pdf.

49. CyberJournalist.net, *supra* note 48.

50. Media Bloggers Ass'n, *supra* note 47.

51. *See Wolf*, 201 F. App'x at 432–33; Howard Kurtz, *Jailed Man Is a Videographer and a Blogger but Is He a Journalist?*, WASH. POST, Mar. 8, 2007, at C1. Wolf blogs at Freedomedia, http://joshwolf.net/blog/ (last visited Feb. 25, 2009).

52. Kurtz, *supra* note 51.

53. *Wolf*, 201 F. App'x at 431–34. Wolf kept a blog of his prison experiences. A Journalist's Notes from Behind the Wall, http://joshwolf.net/prisondiaries (last visited Feb. 25, 2009). Tellingly, Wolf titled this blog "A *Journalist's* Notes from Behind the Wall" (emphasis added).

54. 201 F. App'x at 432 n.1 ("The California Shield law protects a 'publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press

earlier in *O'Grady v. Superior Court*, a California court interpreted the exact same shield law as protecting Web sites, albeit under slightly different circumstances.[55]

O'Grady involved an appeal from a district court's order denying bloggers protection from compelled source disclosure.[56] The bloggers claimed shield law protection under Art. I, § 2(b) of the California Constitution and California Evidence Code § 1070 (1965).[57] However, the district court, despite assuming the bloggers to be journalists, denied them protection on grounds that the publications in question—postings about new computer software which respondent Apple claimed misappropriated trade secrets—were not in the public interest.[58] In reversing the district court and granting the petitioners' motion for a protective order, *O'Grady* further explored both the status of the bloggers as journalists and the nature of the postings. The court first noted that it declined to enter into a debate about what constitutes "legitimate journalism" because a judicial determination of this question would run contrary to the First Amendment.[59] The court next read California's shield law broadly, concluding that it exists to protect newsgatherers and finding that the statute protected bloggers as "publishers":

> We can think of no reason to doubt that the operator of a public Web site is a "publisher" for purposes of this language; the primary and core meaning of "to publish" is "[t]o make publicly or generally known; to declare or report openly or publicly; to announce; to tell or noise abroad; also, to propagate, disseminate (a creed or system)."[60]

Outside of these seemingly contradictory rulings in California, however, few states have examined the potential for blogger protection under their state shield laws. Some state shield laws require a person claiming the protection to be affiliated with a traditional news medium or specifically employed as a journalist.[61]

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association or wire service.' . . . Wolf produced no evidence this videotape was made while he was so connected or employed.").

55. 139 Cal. App. 4th at 1459.

56. *Id.* at 1438–39.

57. *Id.* at 1437.

58. *Id.* at 1438–39.

59. *Id.* at 1457.

60. *Id.* at 1459 (quoting THE OXFORD ENGLISH DICTIONARY 784–85 (2d ed. 1989)).

61. *See, e.g.*, DEL. CODE ANN. tit. 10, § 4320 (1999) (applying the

These laws offer non-professional bloggers no protection. Some shield laws could likely deny bloggers protection by not including the Internet in an enumerated list of media the shield applies to.[62] Other states' shield laws could apply to bloggers, depending on how the courts interpreted phrases like "member of the mass media"[63] or "entity regularly engaged in the business of publication or distribution of news via print, broadcast, or other electronic means accessible to the general public."[64] Finally, some states' shield laws seem to certainly encompass bloggers through broad protective language, but they have yet to be applied in such contexts.[65] While the varied scope of shield law protection is a concern for any journalist, it is perhaps more troubling for bloggers because the very nature of the medium is not clearly contained to one state and one shield law.

D. THE CURRENT UNCERTAINTY SURROUNDING THE EXTENT OF FFOIA'S APPLICATION TO BLOGGERS

In an effort to create uniform shield laws across the country, Congress has considered eight different forms of a federal shield law over the past three years.[66] The House of Representatives passed a

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privilege only in cases where the person seeking protection is "earning his or her principal livelihood" as a newsgatherer); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992) (applying the privilege only to "professional journalists," which in part means newsgathering "for gain or livelihood").

62. *See, e.g.*, ALA. CODE § 12-21-142 (LexisNexis 2005) (applying the privilege to persons "connected with or employed on any newspaper, radio broadcasting station or television station"); MONT. CODE ANN. § 26-1-902 (2007) (applying the privilege to persons connected with "any newspaper, magazine, press association, news agency, news service, radio station, television station, or community antenna television service").

63. COLO. REV. STAT. § 13-90-119 (2008).

64. N.C. GEN. STAT. § 8-53.11(a)(3) (2007) (defining "[n]ews medium").

65. The shield laws that would most likely protect bloggers do so by extending the protection based on the newsgathering function, not the newsgatherer's media affiliation. *See, e.g.*, MICH. COMP. LAWS ANN. § 767A.6 (West 2000) (applying the privilege to "[a] reporter or other person who is involved in the gathering or preparation of news for broadcast or publication"); MINN. STAT. ANN. § 595.023 (West 2006) (applying the privilege to any person "who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public"); NEB. REV. STAT. § 20-146 (2007) (applying the privilege to any person "engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public").

66. Free Flow of Information Act of 2005, S. 340, 109th Cong. (2005) (failing past the Judiciary Committee); Free Flow of Information Act of 2005,

version of the FFOIA in 2007,[67] but the sister bill in the Senate did not make it past introduction.[68] Instead, the Senate of the 110th Congress debated a 2008 version of the FFOIA. While the bill garnered support from high-profile senators and media organizations,[69] it failed a cloture vote on July 30, 2008.[70] Shield law application to bloggers could vary significantly depending on which—if any—version of the FFOIA passes.

The House bill, H.R. 2102, provides protection from compelled source disclosure to:

> A person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person's livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person.[71]

The part of this language that may exclude many bloggers from

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H.R. 581, 109th Cong. (2005) (having language identical to S. 340); Free Flow of Information Act of 2005, S. 1419, 109th Cong. (2005) (failing past introduction); Free Flow of Information Act of 2005, H.R. 3323, 109th Cong. (2005) (having language identical to S. 1419); Free Flow of Information Act of 2006, S. 2831, 109th Cong. (2006) (failing past the Judiciary Committee); Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007) (passing the House by a 398-21 vote on Oct. 16, 2007); Free Flow of Information Act of 2007, S. 1267, 110th Cong. (2007) (having language identical to H.R. 2102); Free Flow of Information Act of 2008, 154 CONG. REC. S7704–08 (daily ed. July 29, 2008). For a detailed history of these bills (except the alternative language proposed in debate by Sen. Specter), see Govtrack.us, H.R. 2012: Free Flow of Information Act of 2007, http://www.govtrack.us/congress/bill.xpd?bill=h110-2102 (follow "Related Legislation" hyperlink to see the history of related bills) (last visited Feb. 28, 2009).

67. Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007) (passing the House by 398-21 vote on Oct. 16, 2007).

68. Free Flow of Information Act of 2007, S. 1267, 110th Cong. (2007) (introduced May 2, 2007).

69. Letter from Sens. Patrick Leahy & Arlen Specter to Sens. Harry Reid & Mitch McConnell (Mar. 6, 2008), *available at* http://leahy.senate.gov/press/200803/030608e.html; Letter from Media Coalition to Sen. Harry Reid (Mar. 11, 2008), *available at* http://www.asne.org/files/CoalitionLetter_03_11.pdf (emphasizing the bipartisan support for media shield bills, urging action in the Senate, and signed by sixty-three prominent news media organizations).

70. Govtrack.us, *supra* note 66.

71. Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007) at § 4(2).

protection is the requirement that the person seeking to invoke the privilege engage in newsgathering for a "substantial portion of the person's livelihood or for substantial financial gain." Depending on how verbs like "writes" and "reports" are interpreted, general commentary about news items on a blog could also fall outside the bill's scope. Some representatives expressed concerns that the passage of H.R. 2102 would provide too broad of a privilege,[72] but the bill's proponents assured them that "the definition will exclude casual bloggers but not all bloggers."[73]

Meanwhile, the FFOIA that received the most attention was Senator Specter's 2008 proposed amendments to the 2007 version of the Act. Senator Specter's amendments contained no requirement that the person seeking protection under the shield law engage in newsgathering for financial gain. The bill, S. 2035, defines a "covered person" protected by the shield as a person who:

> (i) with the primary intent to investigate events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest, regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes on such matters by . . . collecting [sic] reviewing or analyzing original writings, statements, communications, reports, memoranda, records, transcripts, documents, photographs, recordings, tapes, materials, data or other information whether in electronic or other form; and (ii) has such intent at the inception of the newsgathering process . . . .[74]

Legislative history indicates that this functional definition of a "journalist" was adopted largely from the Second Circuit's test in *von Bulow*.[75] In crafting the language this way, a broad application of the federal shield law to bloggers is certainly possible, but legislators are quick to clarify that the statute is still only meant to protect "legitimate bloggers"[76]—and this, of course, may put

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72. *See* 153 CONG. REC. H11589 (daily ed. Oct. 16, 2007) (statement of Rep. Smith).

73. 153 Cong. Rec. H11157-03, at *H11600 (daily ed. Oct. 16, 2007) (statement of Rep. Pence).

74. Free Flow of Information Act of 2008 § 10(2)(A), 154 CONG. REC. S7704–08 (daily ed. July 29, 2008).

75. 154 CONG. REC. S7600 (daily ed. July 29, 2008) (statement of Sen. Schumer) ("[T]he definition of a covered person—and this has been one of two areas of some controversy—has been narrowed to ensure that it protects only legitimate journalists, first used in the Second Circuit case of von Bulow v. von Bulow to determine who qualifies as a covered person.").

76. *Id; see also* 154 CONG. REC. S7596 (daily ed. July 29, 2008) (statement of Sen. Leahy) ("I am pleased that language has been drafted to

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bloggers right back where they started: unsure of their parameters of protection.

II. ANALYSIS

A. MANY BLOGGERS DESERVE SHIELD LAW PROTECTION

First, it is worth noting why bloggers should be included in the FFOIA at all. Skeptics sometimes raise concerns that bloggers who merely opine about the news of the day should not receive the journalists' privilege.[77] They fear that the FFOIA will extend protection to everyone with access to the Internet, effectively shielding the "lonely pamphleteer" that Justice White worried about in *Branzburg*.[78] While extending such wide-ranging protection could indeed be problematic, it is unlikely that this would be the actual effect of the FFOIA, particularly if the bill included both formal and functional criteria to differentiate the Internet's lonely pamphleteers from its Joshua Wolfs.

Second, it is unlikely that the lonely pamphleteer who critics usually allude to—for example, an online diarist—would ever post information essential to a court proceeding to implicate the FFIOA. The same is true for someone who merely opines online about news events she learned about from other sources; it would be rare indeed for a court to need that particular blogger's opinions and be unable to get them anywhere else.

Third, while application of the FFOIA to bloggers would necessarily be a case-by-case analysis, the possibility that an online diarist would pass the formal and functional test—and receive protection—is so slight that such fears should not outweigh the real benefits that the bill would bring to online newsgatherers.

B. CURRENT STATE LAWS AND THE FFOIA ARE INCONSISTENT AND

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address my concerns about making sure that legitimate bloggers and freelance journalists are included in the definition of the persons covered by this bill.").

77. *See, e.g.*, 154 CONG. REC. S7613 (daily ed. July 29, 2008) (statement of Sen. Kyl) ("We don't know whether a blogger, who is trying to put material out on the blogs, is in the media."); Anne Flanagan, *Blogging: A Journal Need Not a Journalist Make*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 395, 397 (2006) ("Blogs are a potentially unlimited publication format. They are often characterized by casualness and unedited dialog akin to chatting with those familiar to you.").

78. *See supra* note 18 and accompanying text.

CONTINUALLY CHANGING

Until or unless a federal shield law like the FFOIA with the proposed language by Senator Specter is passed,[79] bloggers seeking protection from compelled source disclosure must look to state law. While the fuzzy language of many state shield laws could leave even traditional journalists confused about what types of information are protected, bloggers face an additional dilemma—jurisdiction. A reporter at the Minneapolis Star Tribune can be reasonably sure that she will be protected from compelled disclosure under Minnesota's shield law,[80] but a person who blogs primarily from Minnesota might not have the same comfort. A casual Minnesota blogger who would likely be protected under Minnesota's functional definition of "journalist"[81] would suddenly lose her privilege if hauled into a Montana court.[82] While the wide range of protection from state to state presents a predicament for any newsperson, it is particularly problematic for Internet journalists because the intangible nature of the medium makes them susceptible to lawsuits in places they may never have contemplated.[83]

Even if the 2008 amendments to the Act eventually become law,[84] their application to bloggers is still by no means certain. If the version that passed the House is enacted, most bloggers will

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79. *See supra* notes 9 and 10 and accompanying text.

80. MINN. STAT. ANN. § 595.023 (2006) (protecting any "person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public").

81. *Id.*

82. Montana's shield law, MONT. CODE ANN. § 26-1-902 (2007), protects only a newsperson gathering information "in the course of his employment or . . . business."

83. If a blogger were subpoenaed into a foreign court, however, she may have a strong argument for lack of personal jurisdiction. Some courts have held that mere operation of a Web site is insufficient to confer at least general jurisdiction over a party. *See, e.g.*, Millennium Enters., Inc. v. Millennium Music, 33 F. Supp. 2d 907, 910 (D. Or. 1999) ("[T]he court is aware of no case in which a court asserted general jurisdiction based on the existence of an Internet Web site."); McDonough v. Fallon McElligott, Inc., No. CIV. 95-4037, 1996 WL 753991, at *3 (S.D. Cal. Aug. 5, 1996) ("[A]llowing computer interaction via the Web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists.").

84. S. 2035 has strong bipartisan support, including the support of President Obama. *See* 154 CONG.REC. S7600 (daily ed. July 29, 2008) (statement of Sen. Leahy); Letter from Sens. Patrick Leahy & Arlen Specter to Sens. Harry Reid & Mitch McConnell, *supra* note 69.

probably be excluded from protection because of H.R. 2102's requirement that the news dissemination be for the covered person's "livelihood or for substantial financial gain."[85] S. 2035 appears to be the more likely candidate for codification, but even though its language of "covered person" is broad,[86] bloggers still face uncertainties about its application.

The most significant problem with the 2008 Act is that it contains language so ambiguous that bloggers cannot reasonably know whether they are protected until the statute, if enacted, is interpreted in court. The first unclear standard that a person seeking protection under the FFOIA must meet for coverage is that her "primary intent" must be "to investigate events" and gather information for public dissemination.[87] The Act also requires that this intent be present "at the inception of the newsgathering process."[88] While the law does not and should not shy away from asking important questions simply because the answers are difficult to ascertain, it will be nearly impossible to determine what a blogger's "primary intent" was when she began the newsgathering process. Unlike traditional journalists—who are usually assigned stories and thus almost certainly begin investigations with a news dissemination purpose in mind—bloggers may begin an investigation out of sheer curiosity and only discover that what they found was worthy of publication in the middle of the newsgathering process.[89] Bloggers may be unable to remember, much less prove, their "primary intent" at the inception of newsgathering. If bloggers do not have further guidance about how "primary intent" can be established, they will remain unsure about whether they are protected under the FFOIA.

A second unclear standard in the 2008 Act is its requirement that a covered person "regularly" gather news by conducting

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85. *See supra* notes 71 and 72 and accompanying text.

86. Free Flow of Information Act of 2007, S. 2035, 110th Cong. (as reported to Senate, Oct. 22, 2007); Free Flow of Information Act of 2008 § 10(2)(A), 154 CONG. REC. S7704–08 (daily ed. July 29, 2008) (adopting a functional test for persons covered by the federal shield law).

87. Free Flow of Information Act 2008 § 10(2)(A)(i).

88. § 10(2)(A)(ii).

89. *Cf.* von Bulow v. von Bulow, 811 F.2d at 139. *Von Bulow* held that California's shield law, while broad, did not apply to the plaintiff because she did not begin the newsgathering process with the requisite intent; rather, she sought information as evidence for an impending lawsuit and for her "own piece of mind." *Id.* at 139.

interviews, making direct observation of events, or collecting and analyzing written materials.[90] Since newspapers, magazines, and broadcast media are disseminated on a continual basis, traditional journalists would not have a difficult time satisfying the "regularly" component. Bloggers who publish daily or at least at relatively consistent intervals would likely be covered by this language, but the sporadic blogger may not be. The line between "regular" and "irregular" blogging must, of course, be drawn, but the FFOIA as drafted does not provide much guidance for a blogger who wants to ensure her protection.

A final dilemma regarding the most recent version of the Act is the seemingly contradictory amendment it proposes to the Act's preamble. As originally stated in the 2007 Act, the FFOIA's purpose is to "maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media."[91] The most recent amendments, however, propose changing the preamble to read: "A bill to maintain the free flow of information to the public by prescribing conditions under which Federal entities may compel disclosure of confidential information from *journalists*" (emphasis added).[92] It seems odd for a bill that never mentions the word "journalist" in its text—including in its definition of "covered person"—to explain its purpose by referring to journalists specifically. Whether this proposed amendment represents mere semantics or a real shift back toward protection only for traditional newsgatherers is unclear, and in such cases of vagueness, courts may turn to the bill's legislative history for guidance.[93]

If the FFOIA is enacted in its present form, courts may resolve some of its ambiguities by turning to S. 2035's legislative history. Unfortunately, congressional debates concerning the bill are laden with further ambiguous terms—most notably the elusive concept of "legitimate" bloggers and journalists. Senator Schumer attempted to supply some clarity:

> [T]he definition of a covered person—and this has been one of two

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90. § 10(2)(A)(i).

91. Free Flow of Information Act of 2007, S. 2035, 110th Cong. (as reported to Senate, Oct. 22, 2007).

92. 154 CONG. REC. S7708 (daily ed. July 29, 2008) (proposed by Sen. Specter).

93. *See, e.g.*, Blum v. Stenson, 465 U.S. 886, 896 (1984) (explaining that the Court will seek clarity from a bill's legislative history when "the statutory language is unclear").

> areas of some controversy—has been narrowed to ensure that it protects only legitimate journalists, first used in the Second Circuit in the case of *von Bulow v. von Bulow* to determine who qualifies as a covered person. Someone who blogs occasionally is not going to get the protection here. Of course, someone on a blog who is a regular journalist but happens to use the blog as a medium will be protected. And that is how it ought to be.[94]

Senator Schumer's statement provides comfort to bloggers in only one meaningful way: it establishes that legislators anticipated that at least some blogging would be protected under the Act. Less comforting for bloggers is that the only example Senator Schumer could muster of when a blogger would be protected was when the blogger is someone who is a "regular journalist" but "happens to use" blogging as a medium. A court could plausibly read Senator Schumer's reference to a "regular journalist" as meaning a "traditional journalist" who works for an established news medium but simply blogs on her own time. Additionally, while Senator Schumer's statement indicates that "occasional" bloggers are not intended to be covered by the FFOIA, it remains uncertain where the line between "occasional" and "regular" blogging should be drawn. This uncertainty leaves bloggers lost in essentially the same slew of questions they currently face under the patchwork of state shield laws.

Even if courts construe Senator Schumer's statement to mean that the FFOIA should apply liberally to bloggers, the legislative history indicates at other points that at least some senators found the text of "covered person" in the bill impermissibly vague. Senator Kyl expressed this concern:

> The first problem is it doesn't even define media in a way with which everyone can agree. We don't know whether a blogger, who is trying to put material out on the blogs, is in the media . . . . They have tried and tried to get a good definition. It is very difficult to do.[95]

Senator Kyl's statement echoes the *Branzburg* majority's reasoning that creating any sort of definition of "journalist" for the

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94. 154 CONG. REC. S7600 (daily ed. July 29, 2008) (statement of Sen. Schumer); s*ee also* 154 CONG. REC. S7596 (daily ed. July 29, 2008) (statement of Sen. Leahy) ("I am pleased that language has been drafted to address my concerns about making sure that legitimate bloggers and freelance journalists are included in the definition of the persons covered by this bill.").

95. 154 CONG. REC. S7613 (daily ed. July 29, 2008) (statement of Sen. Kyl).

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purposes of shield law protection is "a questionable procedure."[96] However, while it may be true that it is a challenge to determine which newsgatherers should be covered by a federal shield law, it does not follow that this difficulty makes enactment of such a law undesirable or impossible.[97] The proposed language of the FFOIA that is ambiguous as applied to bloggers would almost certainly be clear with regard to traditional journalists. This proposed FFOIA, therefore, is a positive step toward a uniform protection of the mainstream media—it is primarily with regard to bloggers and other nontraditional journalists that further lucidity is needed.

C. A SPECIFIC TEST WEIGHING THE FORM AND FUNCTION OF A BLOG SHOULD BE PART OF THE FFOIA

The proposed 2008 amendments to the FFOIA use a purely functional test to determine whether someone is a "covered person" entitled to the Act's protections.[98] As drafted, the 2008 amendments only ask what the person seeking protection did—whether her intent was to disseminate information, whether she had that intent at the inception of the newsgathering process, and whether she, in fact, engaged in newsgathering.[99] *What* a newsgatherer does (her function) is certainly more important than *how* she does it (her form). Form and function, however, are more bound together than proponents of the functionality test seem willing to admit.

While elite credentials and experience do not necessarily produce high-quality journalism,[100] these characteristics do help establish that a person is acting as a journalist. Shield laws are not

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96. Branzburg v. Hayes, 408 U.S. at 704.

97. *See* Durity, *supra* note 36, at 6–7 (describing the ambiguity and frailty of privilege under the current patchwork of judicial precedent and state law).

98. *See* 154 Cong.Rec. S7600 (daily ed. July 29, 2008) (statement of Sen. Schumer) (explaining that "the definition of a covered person . . . has been narrowed" in conformity with the thinking of *von Bulow*).

99. Free Flow of Information Act of 2008 § 10(2)(A), 154 CONG. REC. S7704–08 (daily ed. July 29, 2008).

100. *See, e.g.*, Julie Hilden, *Bloggers Deserve the "Journalist's Privilege"*, CNN.COM, Apr. 27, 2005, http://www.cnn.com/2005/LAW/04/27/hilden.blogging/index.html ("For one thing, elite credentials, like experience, don't always produce high-quality journalism. It bears remembering that in the recent fight between bloggers and CBS News anchor Dan Rather, bloggers prevailed. It also bears remembering that bloggers—not a rival network—took Rather on in the first place.").

intended to protect only high-quality journalists; in fact, judging who is or is not a high-quality journalist would run afoul of the First Amendment.[101] Without shield laws, "[t]he full flow of information to the public protected by the free-press guarantee would be severely curtailed . . . ."[102] Shield laws provide a qualified protection to journalists in order to preserve and incentivize the people's right to the free flow of information, but this privilege is balanced against another important right—the public's right to "every man's evidence" at trial.[103] If a person does not serve the press-like role of promoting the free flow of information, the people's interest in having all the available evidence at trial likely prevails. Therefore, it is essential to determine whether a person claiming protection under a shield law is truly acting as part of the media. Function as a newsgatherer is undoubtedly the key to this question, but the form of the claimant's newsgathering process is relevant in making that determination.[104]

Bloggers who seek traditional journalists' privileges and protections have promulgated standards for themselves similar to the Society of Professional Journalists' (SPJ) Code of Ethics.[105] This indicates that bloggers believe that, to at least a certain extent, the form of their postings should comply with certain standards in order to practice ethical publishing and convey trustworthiness to their readers.[106] Many "traditional journalists" do not abide by SPJ rules, and yet no one would propose a test that required that a certain procedure be followed before a New York Times reporter would qualify for shield law protection. It may be true that certain bloggers could be covered as clearly as journalists working in print or broadcast media because they have established a high level of respect and authenticity. For the majority of bloggers, however, the

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101. *See supra* note 59 and accompanying text.

102. Branzburg v. Hayes, 408 U.S. at 727 (Stewart, J., dissenting) (discussing the need to protect the news gathering and distribution process).

103. *See id.* at 688 (majority opinion).

104. *See* 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, 1375 (2003) ("[P]rotection should be extended to the work process of journalism. When individuals are engaged in this journalistic work process, they should be eligible for the [journalist's] privilege no matter who they are, [or] in what medium they publish . . . .").

105. *See, e.g.*, CyberJournalist.net, *supra* note 48.

106. *Id.*

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line between protected newsgathering and unprotected personal ramblings is less obvious.

The need for a clear and at least somewhat objective test for shield law protection is illustrated by the *Wolf*[107] and *O'Grady*[108] cases in California. The blogger in each case claimed protection under the California Constitution, which prevents a "publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service" from being held in contempt for refusing to disclose the source of any of its information.[109] The Sixth Circuit decided *O'Grady* in May 2006, finding that the bloggers were clearly "publishers" within the meaning of this language.[110] The Sixth Circuit also determined that a website constituted an "other periodical publication."[111] Yet less than four months later in *Wolf*, the Ninth Circuit quickly dismissed a blogger's claim under the same language, simply stating "Wolf produced no evidence this videotape was made while he was so connected or employed."[112] Whereas the *O'Grady* court engaged in a painstaking analysis involving many dictionary definitions to interpret California's shield law,[113] the *Wolf* court conducted no examination whatsoever to determine whether the terms "publisher" and "other periodical publication" could apply to Wolf. Even if the *Wolf* blog differed from the *O'Grady* blog to the point where the former would receive no shield law protection, the vast discrepancy in how the courts handled the issue is troubling. A specific test for bloggers in the FFOIA could avoid this problem by promoting consistency and accuracy.

By introducing specific formal criteria into the FFOIA, bloggers would also have notice of what steps they could take to increase their chances for shield law protection and what evidence they could present to demonstrate that their blogs truly serve the same function as traditional media. The test should not be a determinative checklist where every element must be satisfied before shield law protection is granted; as previously noted, it is not for the courts to determine who is or is not a "high-quality"

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107. *Wolf*, 201 F. App'x 430.
108. *O'Grady*, 139 Cal. App. 4th 1423.
109. CAL. CONST. art. I, § 2(b).
110. *See supra* note 60 and accompanying text.
111. *O'Grady*, 139 Cal. App. 4th at 1460–66.
112. *Wolf*, 201 F. App'x at 433 n.1.
113. *See O'Grady*, 139 Cal. App. 4th at 1459–66.

journalist. Rather, specific formal criteria could be weighed to serve as evidence of the newsgathering function in situations where it is unclear whether a blogger meets the FFOIA's functional test. Relevant formal factors may include the number and type of sources a blogger consults, the procedures a blogger uses to verify information, and the subject matter of the blog.

1. Formal Factor: The Number and Type of Sources a Blogger Consults

The first formal criterion that could help establish a blogger's journalistic function is the number and type of sources a blogger utilizes in her research. Whereas if a lack of citations might indicate that a blog functions more as an online diary than as a news publication, frequent quotes and attributed research would weigh more in favor of a newsgathering and news dissemination function.

Journalists in so-called traditional media certainly use anonymous sources, but most major media outlets also have specific policies governing anonymous informants.[114] While nothing in the Bloggers' Code of Ethics specifically mentions anonymous interviews, it does advise that bloggers should "[i]dentify and link to sources whenever feasible [because] [t]he public is entitled to as much information as possible on sources' reliability."[115] Except for the mention of linking, the same statement also appears in the SPJ Code of Ethics.[116] If a blogger regularly quotes anonymous sources, that would tend to weigh against her status as a journalist. A blogger who uses anonymous sources sparingly and justifiably, however, is more likely engaging in a newsgathering and news dissemination function.

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114. *See, e.g.*, Am. Soc'y of Newspaper Editors [ASNE], Compendium of News Organizations' Policies on Anonymous Sources (2008), http://www.asne.org/index.cfm?id=4694. Newspapers emphasize that anonymous sources should be used as a last resort and some have specific tests that must be met before such a source is used. For example, the Orlando Sentinel's policy states that an anonymous source cannot be employed unless (1) the information from the anonymous source is necessary to the article, (2) the information cannot be obtained on the record from anyone else, (3) the anonymous source has a legitimate reason for remaining unidentified, and (4) that reason can be explained in the article. *Id.*

115. CyberJournalist.net, *supra* note 48.

116. SPJ, *supra* note 48.

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2. Formal Factor: The Procedures a Blogger Uses to Verify Information

The second formal criterion that would aid in establishing a blogger's journalistic function is the procedure used by the blogger to verify information. Part of information verification is simply stating the source of information whenever possible.[117] A major reason why shield laws exist is because confidentiality is sometimes necessary to fulfill the news dissemination function of journalism.

Other methods of information accountability and verification can be identified to help a blogger establish her status as a newsgatherer. The SPJ Code of Ethics directs journalists to "[t]est the accuracy of information from all sources and exercise care to avoid inadvertent error. Deliberate distortion is never permissible."[118] Newspapers and other longstanding media typically employ copy editors and other employees whose main role is to verify facts before a story is published. Most bloggers lack these resources, but they could demonstrate their commitment to accuracy by conducting independent research and taking thorough notes. Such notes, even if not turned over to a court, would serve as evidence that the blogger made attempts to verify information. Linking to sources, as advised by the Bloggers' Code of Ethics, would also establish attempts at information verification.

Regardless of the verification process before publication, it is inevitable that inaccurate news stories will be published in the blogosphere, as well as in older media outlets. The SPJ Code of Ethics advises that journalists be accountable to their readers after the fact by:

- Clarifying and explaining news coverage and inviting dialogue with the public over journalistic conduct;
- Encouraging the public to voice grievances against the news media;
- Admitting mistakes and correcting them promptly;
- Exposing unethical journalistic practices; and
- Abiding by the same high standards to which they hold

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117. *Id.*

118. *Id.* The Bloggers' Code of Ethics, by contrast, does not contain an express provision requiring bloggers to test the accuracy of information. It does, however, contain statements discouraging "misrepresentation" and advising bloggers to "[n]ever publish information they know is inaccurate—and if publishing questionable information, make it clear it's in doubt." CyberJournalist.net, *supra* note 48.

others.[119]

These accountability practices exhibit commitment to truth, even after information has been published, by correcting mistakes and responding to public comments and criticism. The Bloggers' Code of Ethics echoes these values,[120] and the more a blogger can establish that she values these ethics as well, the more likely she can show that she serves a truly journalistic function.

3. Formal Factor: The Subject Matter of the Blog

The third formal criterion useful in establishing a blogger's journalistic function is the subject matter of the blog. Blogs that function exclusively as online diaries are clear examples of blogs unlikely to warrant shield law protection. While over half of bloggers post about personal matters, 42 percent regularly post about news and 35 percent about politics.[121] The more frequently a blogger posts about newsworthy information, the more likely she is functioning as a journalist within the meaning of the FFOIA and the purpose of shield law protection.

This is not to say, however, that personal opinions necessarily tend to disqualify bloggers from the journalists' privilege. Many established media contain at least some—and a number contain almost exclusively—editorials and opinion pieces. Whether the blogger opines about something newsworthy is the relevant inquiry here. Bloggers who typically muse only about their co-workers are less likely to receive protection than those who editorialize about current events and other newsworthy topics.

The Hybrid Formal-Functional Test:

When a blogger's function as a newsgatherer is in doubt, fulfilling these formal factors would serve as evidence that the blogger acted or intended to act as a journalist. No one factor need be dispositive, and function remains the overriding concern. By laying out some formal criteria in the FFOIA, however, Congress could help bloggers—and courts—understand more clearly when they would and would not receive protection from forced source disclosure.

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119. SPJ, *supra* note 48.
120. *See* CyberJournalist.net, *supra* note 48.
121. *See* Technorati, *supra* note 7.

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CONCLUSION

Currently, state shield laws provide some protection for journalists who seek a privilege not to disclose their sources. However, shield laws are widely varied, and this provides particular uncertainty for bloggers. The FFOIA is a significant step toward unifying the present patchwork of legislation and establishing a qualified protection to ensure a free press. Bloggers who serve a newsgathering and news dissemination function deserve to fit within the 2008 FFOIA amendments' definition of a "covered person,"[122] but as currently drafted, these amendments do not give bloggers enough guidance about when they will be deemed as fulfilling this function. To provide clarity and to ensure that all those aiding in the free flow of information are able to do their jobs, formal criteria should be included into the FFOIA § 10 as factors that would help bloggers establish that they qualify for protection under the Act. Clarity and transparency are not only goals for bloggers and journalists,[123] but for government as well.

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122. *See* Free Flow of Information Act of 2008 § 10(2)(A), 154 CONG. REC. S7704–08 (daily ed. July 29, 2008).

123. *See* SPJ, *supra* note 48 ("Journalists should . . . [r]ecognize a special obligation to ensure that the public's business is conducted in the open and that government records are open to inspection.").