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THE REAL STORY BEHIND THE NATION'S FIRST SHIELD LAW: MARYLAND, 1894–1897

DEAN C. SMITH*

Blame it on H.L. Mencken. His unsupported account of how Maryland adopted the nation's first shield law in 1896 has been repeated in books and articles for seventy-five years, but it was a fabrication based on shoddy reporting. This article will show the law was not prompted, as Mencken claimed, by the jailing of Baltimore Sun *reporter John T. Morris but by the criminal indictments of reporters John S. Shriver and Elisha J. Edwards in 1894. Passage of the law was not connected to local events but was sparked by a scandal unfolding in Washington. The drive for a shield law was not isolated to Maryland but was part of a national lobbying campaign that included talk of a federal shield law. Finally, that campaign did not emanate from* The Baltimore Sun *but from* The Baltimore American.

John Henry Wigmore, the great legal treatise writer and expert on evidence,[1] was wrong at least once. In 1923, when Maryland still had the nation's only statutory shield law to protect journalists from compelled disclosure of confidential sources, Wigmore declared the law "as detestable in substance as it is crude in form"[2] and predicted it would "probably remain unique."[3] Today, however, there are similar shield

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[1]*See, e.g.*, JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE (Arthur Best ed., 4th ed. 2008).

[2]5 WIGMORE ON EVIDENCE § 2286 n. 7 (2d ed. 1923).

[3]*Id*.

laws on the books in thirty-nine states and the District of Columbia.[4] In Washington, after more than eighty years of failure,[5] Congress has again drafted a shield law bill,[6] and President Barack Obama has said he would support it.[7]

The history of the journalist's struggle to protect confidential sources is long. The story stretches into Colonial times, at least to 1722 and the jailing of James Franklin, Benjamin's older brother.[8] The recurrent drama pitting journalists against Congress dates at least to 1800, when the Senate cited *Philadelphia Aurora* editor William Duane for contempt for refusing to reveal his sources, and he was forced into hiding until the Senate session's end.[9] The story in the realm of statutory law begins in 1896 with the Maryland legislature's creation of the nation's first shield law, which was prompted by the jailing of a *Baltimore Sun* reporter named John T. Morris – or so we have been told.

The trouble with the oft-repeated story of how Maryland's shield law came to be is that it is based partly on a mistake printed in *Editor & Publisher*[10] and partly on a fabrication by H.L. Mencken.[11] In writing a tribute piece about the *Sun* on the occasion of the paper's centennial, Mencken asserted with confidence that there was a direct link between Morris' jailing and the law's adoption: "The Maryland legislature was in session at the time, and on April 2, 1896, it passed an act ... giving

[4]*See* Anthony L. Fargo, *Confidential Sources and Information*, *in* COMMUNICATION AND THE LAW 333–34 (W. Wat Hopkins ed., 2013).

[5]*See* Dean C. Smith, *Journalist Privilege in 1929: The Quest for a Federal Shield Law Begins*, 3 J. MEDIA L. AND ETHICS 136 (Winter/Spring 2012) (chronicling the first bill entered in Congress).

[6]Barack Obama, *Remarks by the President at the National Defense University*, WHITE HOUSE OFFICE OF THE PRESS SECRETARY, May 23, 2013, *available at* http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university (saying journalists should not be at legal risk for doing their jobs).

[7]*See* David Jackson, *President Obama to Back a Federal "Shield Law" for Reporters Who Want to Protect Confidential Sources*, USA TODAY, May 15, 2013, *available at* http://www.usatoday.com/story/news/politics/2013/05/15/obama-schumer-associated-press-shield-law/2161913.

[8]*See* AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 69 (Leonard W. Larabee et al. eds., 1964).

[9]*See* Robert Spellman, Defying the Law in the 19th Century: Journalistic Culture and the Source Protection Privilege (paper presented at the annual convention of the International Communication Association, New Orleans, La., May 27, 2004) (on file with the author).

[10]Ellen Ryniker, *Press Winning Fight to Guard Sources*, EDITOR & PUBLISHER, Sept. 1, 1934, at 9 (erroneously placing the Morris affair and passage of the shield law in the same year).

[11]*See* GERALD W. JOHNSON, FRANK R. KENT, H.L. MENCKEN & HAMILTON OWENS, THE SUNPAPERS OF BALTIMORE 215 (1937) (hereinafter SUNPAPERS). Mencken wrote chapters XI–XVIII.

newspaper men the immunity commonly enjoyed by lawyers, physicians and clergymen."[12] That could not have been true because ten years separated the Morris jailing in 1886 and passage of the law.[13] But with Mencken's imprimatur, the story has made its way into books[14] and scholarly articles[15] for more than seventy-five years.

It should not come as a surprise that this flawed history has had such staying power. Since the 1972 ruling by the Supreme Court of the United States in *Branzburg v. Hayes*,[16] a bias that Frederick Schauer has dubbed "First Amendment magnetism"[17] has kept most scholars glued to the constitutional side of this issue, thereby bracketing out

[12]*Id*. at 215–16.

[13]*See infra* note 281 and accompanying text. Mencken's two-page account contains three footnotes. The first is an aside about a brush with the law Morris had years later, in 1913; the second refers to the first time the shield law was used in court in 1925, and the third sets out the text of the original shield law. *See* SUNPAPERS, *supra* note 11, at 215–16.

[14]*See, e.g.*, MATTHEW PAGE ANDREWS, HISTORY OF MARYLAND: PROVINCE AND STATE 591 (1965); MARGARET A. BLANCHARD, REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA 27 (1992); C. THOMAS DIENES, LEE LEVINE & ROBERT C. LIND, NEWSGATHERING AND THE LAW 648 (1997); WILLIAM E. FRANCOIS, MASS MEDIA LAW AND REGULATION 404 (1986); CURTIS DANIEL MACDOUGALL, THE PRESS AND ITS PROBLEMS 319 (1964); NORMAN PEARLSTINE, OFF THE RECORD: THE PRESS, THE GOVERNMENT, AND THE WAR OVER ANONYMOUS SOURCES 157 (2008); MATTHEW W. SEEGER, FREE SPEECH YEARBOOK 27 (2000); WALTER A. STEIGLEMAN, THE NEWSPAPERMAN AND THE LAW 197 (1950).

[15]*See, e.g*., J.S. Bainbridge Jr., *Subpoenaing the Press*, 74 A.B.A. J. 68, 72 (1988); Robert L. Berchem, *Evidence: Privilege: Statutory Privilege Against Disclosure of Reporter's Sources Should Be Liberally Construed to Include Information in Documents*, 9 VILL. L. REV. 155, 158 (1964); Bruce L Bortz & Laurie R. Bortz, *Pressing Out the Wrinkles in Maryland's Shield Law for Journalists*, 8 U. BALT. L. REV. 461 (1979); Nathan Fennessy, *Bringing Bloggers Into the Journalistic Privilege Fold*, 55 CATH. U. L. REV. 1059, 1073 (2006); Diane Geraghty & Alan Raphael, *Reporter's Privilege and Juvenile Anonymity: Two Confidentiality Policies on a Collision Course*, 16 LOY. U. CHI. L.J. 43 (1984–85); Stephen R. Hofer, *Fallacy of Farber: Failure to Acknowledge the Constitutional Newsman's Privilege in Criminal Cases*, 70 J. CRIM. L. & CRIMINOLOGY 299, 302 (1979); B.K.K., *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61 (1950); W.D. Lorensen, *The Journalist and His Confidential Source: Should a Testimonial Privilege Be Allowed*, 35 NEB. L. REV. 562, 574 (1955–56); Sharon K. Malheiro, *Journalist's Reportorial Privilege: What Does It Protect and What Are Its Limits*, 38 DRAKE L. REV. 79, 85 (1988–1989); Phillip Randolph Roach Jr., *Newsman's Confidential Source Privilege in Virginia*, 22 U. RICH. L. REV. 377, 387 (1987–1988); Walter A. Steigleman, *Newspaper Confidence Laws: Their Extent and Provisions*, 20 JOURNALISM Q. 230 (1943); John J. Watkins, *The Journalist's Privilege in Arkansas*, 7 U. ARK. LITTLE ROCK L. REV. 473, 477 (1984); Kyu Ho Youm, *International and Comparative Law on the Journalist's Privilege: The Randal Case as a Lesson for the American Press*, 1 J. INT'L MEDIA & ENT. L. 1, 9 (2006).

[16]408 U.S. 665 (1972)(holding that the First Amendment does not provide a basis for a testimonial privilege for journalists).

[17]Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1787 (2004).

seventy-six years of lawmaking in the statutory realm.[18] Anthony L. Fargo is perhaps alone among media law scholars in focusing a significant part of his scholarly output on legislature-made shield laws.[19] A. David Gordon is alone in having tried to produce a detailed history of the Maryland shield law.[20] And Patrick C. File is alone in having written more than a few pages about the protracted dispute and court case that actually did lead to the Maryland shield law,[21] though he did not make that connection.[22]

The primary goal of this article, then, is to recover the events surrounding passage of the nation's first shield law and consider their significance. Original historical research will show that the law was not prompted by the Morris affair of 1886 but by the criminal indictments of reporters John S. Shriver and Elisha J. Edwards in 1894. Passage of the law was not connected to local events but was sparked by a national scandal unfolding in Washington. The drive for a shield law was not isolated to Maryland but was part of a national effort that included talk of a federal shield law. The Maryland effort did not emanate from *The Baltimore Sun* but from *The Baltimore American*. This shift in perspective is important because it shows that journalists were not merely engaged in a local dispute but were successfully putting their claim to a privilege on the national agenda. It also shows them planting the seeds of what would become First Amendment rationales far into the future.

[18]The eclipsing of statutory law by constitutional law could be seen in the ahistorical title to Stephen Bates' otherwise expert recent article in this journal. *See* Stephen Bates, Garland v. Torre *and the Birth of Reporter's Privilege*, 15 COMM. L. & POL'Y 91 (2010) (referencing the first time lawyers based a claim to privilege on the First Amendment in court).

[19]*See, e.g.*, Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn From the States,* 11 COMM. L. & POLICY, 35 (Winter 2006); Anthony Fargo, *Common Law or Shield Law: How Rule 501 Could Solve the Journalist Privilege Problem,* 33, WM. MITCHELL L. REV. 1347 (2006–2007); Anthony Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege,* 14 WM. & MARY BILL RTS. J. 1063 (2005–2006). *See also, See* DEAN C. SMITH, A THEORY OF SHIELD LAWS: JOURNALISTS, THEIR SOURCES AND POPULAR CONSTITUTIONALISM 15–43 (2013)(surveying more than a century of scholarly literature).

[20]A. David Gordon, *The 1896 Maryland Shield Law: The American Roots of Evidentiary Privilege for Newsmen*, 22 JOURNALISM MONOGRAPHS (1972).

[21]United States v. John S. Shriver, 25 Wash. L. Rptr. 414 (D.C.Sup.Ct. 1897). That was the final appeal. A lower court ruling against the reporters came in 1894, two years before the shield law was adopted. The dispute continued into 1895 and 1896 with a *habeas corpus* appeal to the U.S. Supreme Court and a national campaign to adopt shield laws, including at the federal level. *See infra* notes 143–254 and accompanying text.

[22]Patrick C. File, United States v. Shriver and the Rise of the Public Policy Rationale for the Journalist's Privilege (paper presented at the convention of the Association for Education in Journalism and Mass Communication, Aug. 5, 2010, Denver, Colo.)(on file with the author).

A second goal of the article is to employ the emergent theory of popular constitutionalism to explore the larger import of events surrounding passage of the Maryland law. The article will proceed first by outlining that theory and its relevance in contemporary legal history scholarship. The next section will sketch the position of the press in society in the late nineteenth century and its legal footing when the Shriver-Edwards affair unfolded. The next section will profile key non-judicial actors driving legal developments, including a judge-turned-celebrity attorney and a Civil War hero-turned-publisher. The next four parts will reconstruct events year by year and link them to passage of the shield law – a link that never has been shown. The final part will offer an interpretation of these events through the lens of the theory.

POPULAR CONSTITUTIONALISM: A CONCEPTUAL FRAMEWORK

This historical study is grounded in emerging theories that have gone under various names – legisprudence, legislative constitutionalism, democratic constitutionalism[23] – to offer a unifying description of what legislatures are doing when they adopt statutory shield laws: They are expressing an interpretive view of what the Press Clause of the First Amendment means. The idea that legislators play a role in helping to interpret the Constitution is not new. It flows from the Jeffersonian idea of "departmentalism" — that is, all three branches of the government are co-equally responsible for fidelity to the Constitution, especially when their actions touch on fundamental personal rights.[24] The idea of departmentalism was eclipsed by the rise of judicial review more than 200 years ago, and, over time, judicial review has hardened into an almost universally accepted judicial supremacy, with the Supreme

[23]*See, e.g.*, Tsvi Kahana, *Legalism, Anxiety and Legislative Constitutionalism*, 31 QUEEN'S L.J. 536 (2006). Some scholars have adopted an older term, "legisprudence," for the proposition that legislatures play an important role in interpreting the Constitution. *See, e.g.*, LUC J. WINTGENS, LEGISPRUDENCE: A NEW APPROACH TO LEGISLATION (2002). That term dates to the 1950s and 1960s. *See, e.g.*, Julius Cohen, *Towards Realism in Legisprudence*, 59 YALE L.J. 886 (1950). Contemporary scholars seem to prefer the more descriptive term "legislative constitutionalism." *See, e.g.*, Daniel A. Farber, *Legislative Constitutionalism in a System of Judicial Supremacy, in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 431 (Richard W. Bauman & Tsvi Kahana eds., 2006).

[24]*See* Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 106 (2004) (summarizing the debate among constitutional scholars as "a choice between 'judicial supremacy,' which emphasizes the need for the political branches to defer to the Court as the 'ultimate interpreter of the Constitution,' and 'departmentalism,' which recognizes the authority of each federal branch or 'department' to interpret the Constitution independently").

Court alone as interpreter.[25] However, for more than twenty years, a growing number of scholars have theorized that constitutional meaning emerges over time through a kind of national dialogue that includes many more voices than those of judges alone.[26] That is the essence of popular constitutionalism.

A key axis of this ongoing dialogue runs between courts and legislatures, with court opinions and legislative enactments acting as a kind of running record of their interaction. Legal scholar Ira Lupu has observed that statutes revolving in constitutional-law orbits often draw on the language of court-made law because legislators are self-consciously treading into substantive areas, such as freedom of the press, normally left to the Supreme Court of the United States.[27] "Legislative selection of judge-made concepts of constitutional law helps to minimize the risk of subsequent invalidation on constitutional grounds," he has written.[28] A First Amendment example would be the way local governments often model parade and demonstration ordinances on language from court cases such as *Shuttlesworth v. Birmingham*.[29]

Conversely, debates and lawmaking in the statutory realm can influence the development of constitutional law. Legal scholar Anuj Desai has shown how congressional statutes and regulatory rules governing the U.S. Postal Service nurtured the concept of a constitutional right to receive information.[30] Those non-judicial rules were promulgated and

[25]*See id*. at 105.

[26]*See, e.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993). Friedman's thesis:

> Our Constitution is interpreted on a daily basis through an elaborate dialogue as to its meaning. All segments of society participate in the constitutional interpretive dialogue, but courts play their own unique role. Courts serve to facilitate and mold the national dialogue concerning the meaning of the Constitution, particularly but not exclusively with regard to the meaning of our fundamental rights.

Id. at 580–81.

[27]Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993). Lupu's title is a play on the title of a famous address, later published, by California Supreme Court Chief Justice Roger Traynor. *See* Roger J. Traynor, *Statues Revolving in Common Law Orbits*, 17 CATH. U. L. REV. 401 (1968). In that essay, Traynor observed that statutes revolving in common-law orbits have influenced court-made law when, for example, judges have seen merit in policy decisions made by legislators and have borrowed ideas or even verbatim language from the statutory realm.

[28]Lupu, *supra* note 27, at 22.

[29]394 U.S. 147 (1969) (holding unconstitutional the literal application of a state statute to prevent a civil rights march, stating that application of the statute seemed to target ideas). Lupu just as easily could have used as an example the way proposed federal shield laws track closely to the Court's language in *Branzburg v. Hayes*.

[30]Anuj C. Desai, *The Transformation of Statutes Into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671 (2007).

refined decades before the Supreme Court articulated a right now considered a bedrock First Amendment doctrine.[31] "Policymakers likely understood at some level the importance of their choices as a matter of communications policy," Desai has written, "but it seems just as likely that they did not realize the impact their choices were going to have on First Amendment jurisprudence in the twentieth century."[32]

This transfer of ideas between legislature-made law and court-made law illustrates what legal scholar Robert Post has described as the "porous membrane dividing constitutional law from constitutional culture."[33] While constitutional law is ultimately articulated by the Supreme Court, the Court's decisions are influenced by many non-judicial actors participating in the wider constitutional culture — lawmakers in Congress, the president in the White House, state legislators, legal scholars, and, yes, journalists and other members of the public who have a stake in the outcome of a given constitutional debate. "Constitutional law could not plausibly proceed without incorporating the values and beliefs of non-judicial actors," Post has written, so "constitutional law will be as dynamic and as contested as the cultural values and beliefs that inevitably form part of the substance of constitutional law."[34]

Because non-judicial and judicial actors are "locked in a dialectical relationship"[35] that shapes and reshapes law over time, scholars have begun to look more seriously at the role non-judicial actors play in articulating constitutional values. Marouf Hasian has observed that "vernacular legal discourse" — how ordinary people talk about law—precedes judicial pronouncements because, after all, they generate the disputes that give rise to litigation.[36] "We have too often focused almost exclusively on the hermeneutic interpretations of the Supreme Court and its edicts," Hasian has written, and "inadvertently constricted the number of social actors that should be credited with having crafted our conceptions of free expression and its limitations."[37]

The role of non-judicial actors in constitutional interpretation is at the forefront of legal scholarship today. Statutory law scholar Peter Shane

[31]*See* Lamont v. Postmaster General, 381 U.S. 301 (1965).

[32]Desai, *supra* note 30, at 723.

[33]Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 9 (2003).

[34]*Id*. at 10.

[35]*Id*.

[36]Marouf Hasian Jr., *Vernacular Legal Discourse: Revisiting the Public Acceptance of the "Right to Privacy" in the 1960s*, 18 POL. COMM. 89, 90–91 (2001).

[37]Marouf Hasian Jr., *Communication Law as a Rhetorical Practice: A Case Study of the* Masses *Decision*, 1 COMM. L. & POL'Y 497, 501 (1996).

has explained the shift in focus: "One way of understanding the capacity of non-judicial actors to create the operational meaning of our Constitution is to relate the topic to a larger problem perennially plaguing U.S. constitutional theorists, namely, accounting for legal change."[38] At the same time, scholars who do not necessarily consider themselves historians have increasingly incorporated history into their work to support various, and sometimes radical, theories: that constitutional law evolves over time through a kind of national dialogue;[39] that constitutional law is shaped by an ambient "constitutional culture" in which many people participate;[40] that alternative narratives of what the Constitution means should call into question whether the Supreme Court is the only, or even the best, interpreter;[41] and that judicial supremacy should be abandoned in favor of a more democratic system of interpretation.[42] In the First Amendment realm, Alexis J. Anderson has used history to show that we cannot understand how notions of freedom of expression were changing in the late nineteenth century by studying only legal materials because new ideas were emerging in society long before lawyers gave voice to them in courts.[43] "The rubric of 'First Amendment theory' must be broadened," she has written, to account for novel claims about what the First Amendment should mean – claims sometimes adopted by courts many decades later.[44]

[38]Peter M. Shane, *Voting Rights and the "Statutory Constitution*," 56 L. & CONTEMP. PROBS. 243, 243 (1993) (arguing that statutes play a larger role than as mere policy – that they often are the mechanisms by which the government carries out broad constitutional mandates, such as the right to vote).

[39]*See* Barry Friedman, *Dialogue and Judicial Review,* 91 MICH. L. REV. 577 (1993) (focusing on the relationship between Congress and the Court and casting their roles as co-equal interpreters of the Constitution).

[40]Post, *supra* note 33, at 9 (2003) (arguing that the Supreme Court is much more responsive to politics outside the courts than it likes to admit and that this responsiveness is positive because it helps protect the court's legitimacy in the eyes of the public).

[41]*See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS x (2000) (arguing for weaker judicial review and greater deference to Congress and state legislatures).

[42]*See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2006) (calling for increased use of direct democracy methods, such as the Article V amendment process and ballot referenda).

[43]Alexis J. Anderson, *The Formative Period of First Amendment Theory, 1870–1915*, 24 AM. J. LEGAL HIST. 56 (1980). Anderson focuses on repressive local ordinances and the people who challenged them – usually women, African Americans, Communists and other minorities. Of them, she wrote, "By confronting the public with their free speech concerns, these nineteenth century individuals were instrumental in hammering out the principles behind a mature theory for protecting the free speech guarantee during the twentieth century." *Id*. at 59.

[44]*Id*.

NON-JUDICIAL PRECEDENTS: A NARROWER LENS

Working in this vein for more than a decade, Michael Gerhardt has tried to outline systematically ways in which people outside the courts participate in ongoing dialogues about constitutional meaning.[45] He theorizes that a wide range of social actors — activists, journalists, industry leaders, lobbyists, legislators and others — contribute to the creation of what he has dubbed "non-judicial precedents." These can include legislative statutes, regulatory rules, professional standards, even long-held social norms that feed into constitutional discourse.[46] Non-judicial precedents usually "pre-exist judicially created constitutional doctrine, and so they govern particular constitutional matters . . . unless or until they are addressed by courts," Gerhardt has observed, and "consequently, they fill gaps in evolving constitutional doctrine."[47] Statutes play an especially important role in Gerhardt's model because they are the strongest types of non-judicial precedents: They carry the force of law.

When non-judicial actors create non-judicial precedents, they often do so by initiating a dialogue about a constitutional concept long before the Supreme Court has said anything about it.[48] "All the ways in which the public expresses constitutional judgments," Gerhardt has observed, can help put an issue (such as journalist privilege) into play as individuals interact with elected officials.[49] This dialogue, he has written, can result in statutes intended "to make a point, to appease important constituencies, to encourage other States to follow suit."[50] Such non-judicial precedents also can "send a signal to courts"[51] about how the public feels about an issue.[52] Non-judicial judgments of constitutional meaning can

[45]*See* Michael J. Gerhardt, *Constitutional Decision-Making Outside the Courts*, 19 GA. ST. U. L. REV. 1123 (2003).

[46]Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008). Gerhardt's premise: "The conventional perspective equates precedent with judicial decisions, particularly those of the Supreme Court, and almost totally ignores the constitutional significance of precedents made by public authorities other than courts. Yet non-judicial actors produce precedents which are more pervasive than those made by courts in constitutional law." *Id*. at 714–15.

[47]*Id*. at 718.

[48]*Id*. at 776.

[49]*Id*. at 748.

[50]*Id*. at 775.

[51]*Id*. at 785.

[52]The paradigmatic example of Gerhardt's model that would be familiar to all media scholars would be reaction to the Court's 1978 ruling that the First Amendment did not give newsrooms any special protection from police searches; following outcry and lobbying by press advocates, Congress created stringent rules for such searches. *See* Zurcher v. Stanford Daily, 436 U.S. 547 (1978); *but see* Privacy Protection Act of 1980, 42 U.S.C. § 2000aa (2006).

remain and endure outside the courts – through statutory law, for example – but they also can create "background norms or default rules" that in time influence judicial precedents.[53]

Events surrounding adoption of the Maryland shield law exhibited key functions Gerhardt has ascribed to non-judicial precedents: (1) "serving as modes of constitutional argumentation," (2) "facilitating national dialogues on constitutional law," (3) "settling legal disputes" outside the courts, and (4) shaping "constitutional culture and history."[54] These events, from 1894 through 1897, unfolded decades before claims to a privilege based on the First Amendment plausibly could be made in court.[55] Yet, as Gerhardt's theory would predict, non-judicial actors were beginning to articulate First Amendment rationales. Their success in securing a shield law moved their claim to a privilege into the legal realm for the first time, enhanced the plausibility of that claim, and increased chances of judicial recognition in the future.

POSITION OF THE PRESS IN SOCIETY

Journalism historian W. Joseph Campbell, in his critically acclaimed study *The Year That Changed Journalism: 1897 and the Clash of Paradigms*,[56] cited the trial of reporters John S. Shriver and Elisha J. Edwards as one of the hallmarks of a transformation emerging in the 1890s, a turn that led American journalism away from the parochial traditions of the nineteenth century and toward a more professional model for the twentieth.[57] Journalists were trading their pencils and note pads for the newest model typewriters,[58] and the first half-tone

[53]Gerhardt, *supra* note 46, at 774–75.

[54]*Is.* at 717.

[55]A First Amendment claim was not made in a federal court until 1958. *See* Garland v. Torre, 259 F.2d 545 (2d Cir. 1958).

[56]W. JOSEPH CAMPBELL, THE YEAR THAT CHANGED JOURNALISM: 1897 AND THE CLASH OF THE PARADIGMS 13 (2006). Campbell devotes only a paragraph to the case, but he pegs its significance: Although Shriver won on a technicality, journalists interpreted it as a victory for a testimonial privilege, putting them on the same professional plane as attorneys and doctors.

[57]JOHN S. SHRIVER, SUPREME COURT OF THE DISTRICT OF COLUMBIA: UNITED STATES V. JOHN S. SHRIVER AND ELISHA J. EDWARDS: RECORD OF PROCEEDINGS AND ARGUMENTS OF COUNSEL (1897) [hereinafter SHRIVER]. Sensing the importance of their legal fight, Shriver's newspaper, the *Mail and Express* in New York, documented events from beginning to end, including compiling all of the court filings and motions, lower court and appeals court opinions, excerpts from Senate committee hearings, and, incredibly, verbatim transcripts of what transpired in court. The materials were memorialized in the book cited here, which will be cited throughout this article.

[58]CAMPBELL, *supra* note 56, at 14–16.

photographs appeared in print.[59] Guglielmo Marconi incorporated the first wireless telegraph company, an innovation that soon would accelerate journalism to twentieth-century speed.[60] Reporters like Francis Scovel were defining what it meant to be a "star reporter," and bylines atop stories were proliferating.[61] Most significant, the "yellow journalism" of William Randolph Hearst's *New York Journal* was being eclipsed by the objective reporting style of Adolph Ochs' *New York Times*.[62] The professionalization movement was under way.[63]

Legal Footing of the Press

Unfortunately for journalists, the law was not keeping pace with progress in the field. The First Amendment was languishing in its "forgotten years," before the Supreme Court began to map the contours of its modern jurisprudence with the famous quartet of free speech cases in 1919.[64] Between 1791 and 1889, the Court heard only twelve First Amendment cases; between 1890 and 1917, it heard just fifty-three.[65] All of these cases, constitutional scholar Michael Gibson has observed, "are examples of how the Constitution's guarantees of free speech and a free press should *not* be interpreted."[66] The Court did not adjudicate a Press Clause case until 1907, in *Patterson v. Colorado*,[67] and there the

[59]*Id*. at 21–22.

[60]*Id*. at 3.

[61]*Id*. at 122–30.

[62]*Id*. at 69–118.

[63]Campbell summed up the period:

> American journalism faced the riptide of profound change in the late nineteenth century, and emerged the stronger for it. The turbulence of 1897 helped give rise to a newsgathering model that has served American journalism well for more than 100 years.

Id. at 200.

[64]*See generally* DAVID RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS: 1870–1920 (1999). The cases were Schenck v. United States, 249 U.S. 47 (1919), Frohwerk v. United States, 249 U.S. 204 (1919), Debs v. United States, 249 U.S. 211 (1919), and Abrams v. United States, 250 U.S. 616 (1919). Although the Court sided with the government against the speaker in all four cases, Associate Justice Oliver Wendell Holmes' famous dissent in Abrams introduced the idea of a marketplace of ideas, which later became a recurring feature of the Court's First Amendment jurisprudence. *See* W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40 (Spring 1996).

[65]*See* Michael T. Gibson, *The Supreme Court and Freedom of Expression From 1791 to 1917*, 55 FORDHAM L. REV. 263, 270 (1986–87). Gibson points out that many of the procedural and substantive rules created by the Judiciary Act of 1789 simply precluded the Court's hearing many speech and press cases. For example, declaratory judgments were not allowed, and the Court was severely limited in its authority to review lower court decisions. *Id.* at 267–69.

[66]*Id*. at 267.

[67]205 U.S. 454 (1907).

Court ruled the First Amendment did not provide a basis to strike down a contempt-of-court conviction against a newspaper.[68] The same year as Shriver's trial, in 1897, journalists saw a glimmer of change in a ruling by a federal court in Virginia – where newspaper lawyers successfully used the First Amendment to get a tax on newspapers in Norfolk struck down – but that ground-breaking decision was reversed by the Supreme Court of Appeals in Richmond.[69] Presaging the Supreme Court's decision in *Patterson*, the court of appeals said flatly, "A tax imposed upon the business of publishing a newspaper is not an abridgement of the freedom of the press."[70]

In his seminal history of journalism, Frank Luther Mott wrote of the decade of the 1890s, "Few important attacks on freedom of the press are to be noted."[71] That could not be further from the truth. As the Shriver-Edwards affair began, in 1894, the *Chicago Herald* was ordered to pay $15,000 in compensatory damages in a libel suit for an article none of its reporters wrote;[72] the winning plaintiff then vowed to sue every paper in the country that ran the Associated Press item at issue.[73] In 1895, a California judge held a reporter in contempt of court and ordered him to serve 100 days in jail and pay a fine of $2,000 – an enormous sum in that day.[74] That same year, *New York Sun* editor Charles Dana was arrested and charged with criminal libel in a case that was covered nationwide as front-page news.[75] The same year as the Shriver-Edwards trial, in 1897,

[68]*See* Gibson, *supra* note 65, at 283–90. Justice Oliver Wendell Holmes wrote the decision, which Gibson called "a narrow and dangerous interpretation of the First Amendment." *Id*. at 286. In recanting the decision later, Justice Holmes said, "I surely was ignorant." *Id*. at 288.

[69]That court would become what we know today as the United States Court of Appeals for the Fourth Circuit. *See* City of Norfolk v. Norfolk Landmark Publ'g Co., 3 VA. L. REG. 890 (1898) (4th Cir. Jan. 27, 1898).

[70]*Id*. at 891.

[71]FRANK LUTHER MOTT, AMERICAN JOURNALISM: A HISTORY: 1690–1960 605 (3d ed. 1962).

[72]*See An Extraordinary Verdict*, FOURTH EST., Jan. 11, 1894, at 4. That news article referred to the lower court verdict against the paper, which was later set aside as excessive. *See also The Courts, Circuit Court of Cook County, Ill*., 26 CHI. LEGAL NEWS 317 (1893–94) (carrying the court's complete opinion of June 2, 1894). Emphasizing the frequency of libel lawsuits in this period, the judge listed more than a dozen recent cases in Illinois alone that resulted in large damage awards. *An Extraordinary Verdict, supra* at 4.

[73]The wire service defense did not emerge until 1933. *See* Layne v. Tribune Co., 146 So. 234 (Fla. 1933); James E. Boasberg, *With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage*, 13 HASTINGS COMM. & ENT. L.J. 455, 458–66 (1991).

[74]*See Newspaper Enterprise and Contempt of Court*, 29 AM. L. REV. 585 (1895). The writer mockingly predicted journalists would decry "muzzling the freedom of the press." *Id*. at 585.

[75]Dana ultimately won. *See, e.g.*, *C.A. Dana Indicted, He and W.M. Laffan Charged With Criminal Libel*, CHI. TRIB., Mar. 8, 1895, at 1; *In Favor of Editor Dana*, WASH.

there was a drive in state legislatures to pass statutes making it libelous to publish a photograph without someone's permission.[76] Also that year, the publisher of *The Baltimore American*, General Felix Agnus, was sued for $100,000 – the fifty-third time he had been sued.[77]

From 1894 to 1897, the press felt so threatened that it mounted an unprecedented lobbying campaign to stanch a deluge of lawsuits that had given rise to the phrase "the libel industry."[78] Press associations, inspired by a successful campaign in Georgia, began lobbying state legislatures to adopt uniform libel laws,[79] chiefly to bar a plaintiff from collecting punitive damages if a newspaper had printed a retraction and making it a misdemeanor for lawyers to file nuisance suits that had little chance of success.[80] At the federal level in 1894, the American Newspaper Publishers' Association began a lobbying campaign to persuade Congress to pass a libel law that would supersede state statutes and thus harmonize the law nationwide.[81] The Shriver-Edwards affair would add a campaign for shield laws to these ongoing efforts.[82]

POST, June 25, 1895, at 1; *Sues Charles Dana for Libel*, CHI. TRIB., Feb. 23, 1895, at 1; *They Saw It in The Sun, Says It's Not So and Brought Suit Against Mr. Dana*, ATLANTA CONST., Mar. 9, 1895, at 1.

[76]*See Preventing Newspapers From Publishing Portraits of Persons Without Their Consent*, 31 AM. L. REV. 421 (1897).

[77]Agnus ultimately won. *See, e.g.*, *Wellington Charges Libel, Gen. Felix Agnus Prosecuted by the Maryland Senator*, N.Y. TIMES, Dec. 1, 1897, at 1; *Wellington Turned Down, Grand Jury Ignores the Libel Charge Against Gen, Agnus*, WASH. POST, Dec. 16, 1897, at 1.

[78]*The Baltimore Sun* summarized the situation: "The law of libel as far as newspapers are concerned is chiefly employed at the present day for blackmailing purposes, or to silence or punish journalists whose criticisms have stung or terrified political offenders and plunders." Editorial, *Amend the Law of Libel*, BALT. SUN, Feb. 27, 1894, at 4.

[79]*Id*. (noting bills had been submitted in the legislatures of New York, New Jersey and Massachusetts). *See also Leads the World in Journalism, Gen. Atkins' Tribute to Chicago Papers, New Libel Laws Needed*, CHI. TRIB., Feb. 22, 1894, at 10 (detailing lobbying efforts in Illinois); Special to The Sun, *Virginia Legislature, A Newspaper Libel Bill*, BALT. SUN, Feb. 1894, at 2 (discussing the debate in Virginia about adopting a new statute).

[80]These drives were the seeds for retraction statutes and anti-SLAPP statutes, common fixtures in media law today but bitterly opposed by the legal community at the time. *See, e.g.*, D.M. Mickey, *Reforms in the Law of Newspaper Libel*, 42 CENT. L.J. 475 (1896).

[81]*See The Libel Laws: Text of the Ainsworth Bill as Amended*, FOURTH EST., Mar. 22, 1894, at 1; *A National Law: Libel Measure Endorsed by Publishers*, FOURTH EST., Mar. 15, 1894, at 1.

[82]A final word about the shifting landscape in libel law: This era also saw the roots of the "actual malice" defense, which many associate with the Court's landmark decision in *New York Times Co. v. Sullivan*. In an 1894 case against *The Buffalo Express*, the newspaper's lawyers argued that "unless the defendants were moved by actual malice in the publication of the libel, the jury should not award damages by way of punishment." The judge in the case agreed, saying, "Yes, I charge you they must be moved by actual malice if you find they failed to make an investigation as the truthfulness of the charge."

Status of the Privilege

Journalist-privilege disputes played out most often in state courts, and journalists' claims to a testimonial privilege at common law were summarily dismissed as novel and absurd.[83] From a modern perspective, it would seem surprising that a First Amendment argument was not pressed in court until 1958[84] in light of the number of disputes in the nineteenth century that pitted the press against Congress. As journalism historian and ethicist Robert Spellman has documented,[85] there were a dozen high-profile cases involving journalists threatened under Congress' self-asserted contempt power during the century, starting with the four-day imprisonment of William Duane in 1800[86] and ending with Shriver's trial in 1897. In 1848, jailed reporter John Nugent mounted the first legal challenge to Congress' contempt power, but not on First Amendment grounds. Nugent argued simply that Congress had exceeded its authority under the Constitution by giving itself quasi-judicial power; the judge in his case dispensed with the constitutional argument by saying Congress had that power as a matter of common law.[87] Nine years later, emboldened by that victory and incensed by bribery accusations in *The New York Times*,[88] Congress codified its common law contempt power into a statute, the Contempt of Congress Act of 1857, making it a misdemeanor for anyone to refuse to testify. That law remains on the books today.[89]

On that basis, the jury found the paper liable. *Another Libel Decision*, FOURTH EST., July 26, 1894, at 2.

[83]*See, e.g.*, People v. Durant, 48 P. 75 (Cal. 1897); Pledger v. State, 3 S.E. 320 (Ga. 1887); People *ex rel.* Phelps v. Fancher, 2 Hun. 226 (N.Y. 1874). The most notable exception would be the conviction of John Nugent in 1848, often cited as the first significant case of the Congress holding a journalist in contempt, a case heard in a federal court in the District of Columbia. *See Ex Parte* Nugent, 18 F. Cas. 471 (D.C. Cir. 1848).

[84]*See* Garland v. Torre, 259 F.2d 545 (2d Cir. 1958).

[85]*See* Spellman, *supra* note 9.

[86]6 ANNALS OF CONG. 63 (1800).

[87]Spellman has constructed a detailed account of the incident and the judicial ruling against Nugent. Spellman, *supra* note 9, at 8–12.

[88]*Id*. at 12–15 (recounting the case against reporter James Simonton).

[89]2 U.S.C. § 192 (2011). It currently reads:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Id.

Shriver and Edwards were the only journalists ever prosecuted under that statute.[90] Yet their defense team did not use the occasion to advance a First Amendment argument. In light of the Supreme Court's non-existent First Amendment jurisprudence, such a claim would have seemed absurd or, to borrow Jack Balkin's term, "off the wall."[91] The case was nonetheless important because, as Spellman noted, "[P]rotecting sources in defiance of the law solidified in the second half of the century as the press corps became larger, more professional, and more concentrated along newspaper row."[92] The individual choice of refusing to testify had hardened into an accepted and expected profession-wide norm,[93] and journalists began to justify that norm by tying it to freedom of the press as a deeply engrained part of America's national ethos.[94]

KEY NON-JUDICIAL ACTORS IN THE SHRIVER-EDWARDS AFFAIR

The Shriver-Edwards affair was the nineteenth-century equivalent of the Judith Miller affair of 2005 – a high-profile dispute that journalists thrust into headlines to spark a national debate, which led to a major lobbying effort to adopt shield laws in the states and in Congress.[95] Journalists were able to seize on the Shriver-Edwards affair as a *cause celebre* partly because of the high profile of the non-judicial actors involved: two Ivy League-educated journalists, one of whom held a law degree from Yale; a former judge who had become a celebrity attorney,

[90] *See* Spellman, *supra* note 9, at 38.

[91] Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 52 (2005). His key observation:

> [T]he constitutional text and the materials of constitutional interpretation are *resources* for social movements, and successful social movements are those that make the most out of the limited resources the Constitution provides. . . . Thus, the fact that a particular claim is "off the wall" at a particular point in history does not mean that it must always remain so.

Id.

[92] *See* Spellman, *supra* note 9, at 41.

[93] *Id*. at 41–42.

[94] This phenomenon of popular discourse pushing its way into legal discourse has been dubbed "law talk" by legal historian Steven Wilf, who has shown that the way ordinary people talked about law and justice in the eighteenth century did in time affect the direction of American law in its formative years. STEVEN WILF, LAW'S IMAGINED REPUBLIC: POPULAR POLITICS AND CRIMINAL JUSTICE IN REVOLUTIONARY AMERICA 1–4 (2010).

[95] *See, e.g.*, Press Release, Newspaper Association of America, Jail Time for Miller Stresses the Need for Federal Shield Law (July 6, 2005); Kelley Vlahos, *Journalists Press for Protection in Wake of Plame Prosecution*, FOX NEWS CHANNEL (Aug. 9, 2005), *available at* http://www.foxnews.com/story/0,2933,165131,00.html.

a Johnny Cochran of his day; and a decorated Civil War hero who had become the powerful publisher of *The Baltimore American* and a prominent politician on the national scene.

John S. Shriver

Shriver was not just "any tramp reporter," as one legal writer called journalists in reaction to passage of the Maryland shield law.[96] He was "for a quarter of a century one of the best known of the Washington newspaper correspondents," as *The Baltimore Sun* described him.[97] He also was a scion of one of Maryland's most famous families, the Shrivers of Baltimore.[98] He was the grandson of John S. Shriver and son of J. Alexander Shriver, both early presidents of the transportation empire built around the historic Ericsson Line.[99] The younger Shriver was born into wealth in 1857, started his own home-printed newspaper as a boy, and went on to graduate from Princeton University with honors in 1878. The author of three books,[100] Shriver worked for much of his journalism career as a correspondent for *The Baltimore American* newspaper.[101] At the time of events recounted in this article, he was working briefly as a Washington correspondent for *The Express and Mail* of New York. Based in Washington as a correspondent for twenty-five years, he was a founding member of the Gridiron Club for journalists.[102] Perhaps because of his prominent background, Shriver was on friendly terms with Presidents William Henry Harrison, William McKinley and Theodore Roosevelt. President William Howard Taft, a lifelong friend, was a pallbearer at Shriver's funeral in 1915.[103]

[96]John Henderson Garnsey, *Demand for Sensational Journals*, 18 ARENA 681, 683 (1897).

[97]*John S. Shriver Dead*, BALT. SUN, Apr. 12, 1915, at 12.

[98]More recent members are Robert "Sargent" Shriver Jr., Eunice Kennedy Shriver and Maria Shriver.

[99]The line was significant because it was the first in the nation to use propeller-driven ships, as opposed to steam-driven. *See, e.g.*, *Death of Mr. Shriver, Well-Known President of the Ericsson Line of Steamers*, BALT. SUN, Mar. 2, 1891, at 4.

[100]ALMOST, A NOVEL (1888) (narrating the adventures of an impressionable young man traveling with his two aunts across Europe); THE CONDUCT OF THE WAR (1898) (chronicling the Spanish-American War); THROUGH THE SOUTH AND WEST WITH THE PRESIDENT, APRIL 14-MAY 15, 1891 (1891) (with the description on its title page, "The only complete and authorized collection of President Harrison's great and eloquent speeches made during the tour.").

[101]*See John S. Shriver Dead, supra* note 97, at 12.

[102]Obituary, *John S. Shriver*, N.Y. TIMES, Apr. 12, 1915, at 9.

[103]*Id*.

Elisha J. Edwards

Edwards was the scion of one of the nation's most famous families,[104] the branch of the Edwards family that traced its roots to the great American theologian-philosopher Jonathan Edwards.[105] Born in Norwich, Connecticut, in 1847, he graduated from Yale University in 1870 and Yale Law School in 1873, and he earned a doctorate in law from Seton Hall College in 1898.[106] While his rich journalism career included a stint as managing editor of *The Evening Sun* in New York, he gained national and international acclaim writing under the pen name "Holland."[107] Beginning in 1889, Edwards as Holland sent nearly daily dispatches to the *Philadelphia Press* that tartly addressed topics as diverse as business and finance, art and culture, law and society.[108] An instant success, these letters were syndicated nationally and widely read throughout the United States and Europe.[109] His most famous dispatch, besides the one that is the focus of this article, was one in which he disclosed that President Grover Cleveland secretly had cancer.[110] As E.J. Edwards, he wrote voluminously for *The Wall Street Journal*, *The New York Times, The Atlanta Constitution,* and numerous magazines until his death in 1924.[111]

A. J. Dittenhoefer

Shriver and Edwards hired Dittenhoefer to represent them. He became something of a celebrity for representing Enrico Caruso when the opera star was accused of molesting a woman at the Brooklyn Zoo.[112]

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[104]Jonathan Edwards' biographer, George Marsden, has written that "the Edwards family produced scores of clergymen, thirteen presidents of higher learning, sixty-five professors, and many other persons of notable achievements." *See* GEORGE MARSDEN, JONATHAN EDWARDS: A LIFE 500–01 (2003).

[105]*See* Elisha Jay Edwards, *Greenwich: A Community of Beautiful Estates*, 11 CONN. MAG. 619 (1907). It begins with a short biography of the author by the editor of the magazine. *Id*. at 619.

[106]*See id*.

[107]*See* Marson La France, *A Few Facts About Stephen Crane and "Holland,"* 37 AM. LITERATURE 195 (1965).

[108]Edwards' interest in the law is evident in many of his articles. *See, e.g.*, E.J. Edwards, *Members of the Supreme Court as Human Beings*, N.Y. TIMES, May 15, 1910, at SM6.

[109]*See Biographical Record of the Class of '70*, *in* YALE UNIVERSITY: 1870–1904 75–76 (Lewis W. Hicks ed., 1904).

[110]*See* ROBERT H. FERRELL, ILL-ADVISED: PRESIDENTIAL HEALTH AND PUBLIC TRUST 9 (1996).

[111]*See* Obituary, *Elisha Jay Edwards*, N.Y. TIMES, Apr. 27, 1924, at S6; *Holland Dead*, WALL ST. J., Apr. 28, 1924, at 2.

[112]*See Caruso Convicted But Will Appeal*, N.Y. TIMES, Nov. 24, 1906, at 1. Caruso paid the $10 fine and soon dropped his appeal for fear of more bad publicity.

His oft-cited claim to fame was that he was the last surviving elector who cast a vote giving Lincoln the presidency in 1864,[113] and he later wrote a book about it.[114] Lincoln offered him a federal judgeship in his native South Carolina, but he turned it down.[115] Dittenhoefer graduated first in his class from Columbia University, was admitted to the New York bar at age 21, and was a year later selected as a judge for the City Court of New York.[116] As an expert in law related to the theater, especially contract and copyright law, Dittenhoefer was instrumental in lobbying for changes to U.S. copyright law to better protect theatrical materials.[117] On behalf of the press, he successfully defended the legality of New York's placement of newspaper stands on the streets.[118] In 1897, *The American Lawyer* cited his defense of Shriver and Edwards as a milestone of his career.[119]

General Felix Agnus

Behind the scenes, Agnus was the main connection linking Shriver's plight with the Maryland shield law. He was a decorated war hero of both Napoleon's army in France and the Union Army during the Civil War.[120] After the war, he joined the staff of *The Baltimore American* and became its publisher in 1883,[121] a job he held for nearly forty years.[122] He also was a founding member of the Associated Press.[123] Born in 1839 in Lyons, France, Agnus nonetheless became an influential player in the Republican party in the United States[124] and, at the time of the events in this article, was being courted to run for the U.S. Senate.[125] His legacy can be seen today in the fourteen-story American Building

[113]*See History of the Bench and Bar of the Greater New York*, 5 AM. LAW. 345, 363 (1897).

[114]ABRAM JESSE DITTENHOEFER, HOW WE ELECTED LINCOLN: PERSONAL RECOLLECTIONS OF LINCOLN AND MEN OF HIS TIME (1916)(still available in newer editions by various publishers).

[115]*See History of the Bench and Bar, supra note* 113, at 363.

[116]*See id*.

[117]*See Judge Dittenhoefer Dies of Hemorrhage*, N.Y. TIMES, Feb. 4, 1919, at 13.

[118]*See History of the Bench and Bar of the Greater New York, supra note* 113, at 363.

[119]See *id*.

[120]*See Gen. Agnus Passes at Baltimore*, L.A. TIMES, Nov. 1, 1925, at 7.

[121]See *id*.

[122]*See Munsey Buys Two Papers*, N.Y. TIMES, Nov. 20, 1920, at 12.

[123]*See* Associated Press, *Press Association to Meet*, BALT. SUN, Feb. 14, 1895, at 6.

[124]*See General Agnus One of Big Four*, N.Y. TIMES, May 4, 1916, at 22 (reporting that he would be a "super delegate" at the Republican National Convention that year).

[125]*See* Editorial, *Gen. Agnus for Senator*, WASH. POST, Nov. 14, 1895, at 6.

in downtown Baltimore, a beautiful Beaux Arts structure Agnus commissioned after the Great Baltimore Fire of 1904 destroyed the paper's original building.[126]

Press Clubs

One advantage that these men had over journalists involved in earlier privilege disputes can be attributed to a hallmark of the professionalization movement: organization. "The nineties were the great years of the press clubs," historian Frank Luther Mott has said of this decade.[127] These organizations helped bring journalists together, develop higher standards, and transform the image of the drunken Bohemian into that of a competent professional.[128] Once organized, they were better able to mobilize and make coordinated campaigns to affect the law.[129]

Both Agnus and Shriver were longtime members of the Journalists' Club of Baltimore, one of the oldest[130] and most influential of the press clubs.[131] The club was intimately entwined in Maryland politics, for many of the state's leading politicians were former journalists and newspaper owners.[132] (The governor at the time, Lloyd Lowndes, was owner of the *Cumberland Daily News*.)[133] On the eve of the Shriver-Edwards affair, the club hosted a talk by U.S. Vice-President Adlai Stevenson and,

[126]*See About Our Facility*, THE AMERICAN BUILDING, www.theamericanbuilding.net/About.aspx.

[127]MOTT, *supra* note 71, at 604.

[128]*See The Influence of Press Clubs*, FOURTH EST., Mar. 8, 1894, at 10 ("The old order has changed, giving place to new, and the press club is responsible in a large measure for the metamorphosis. The Saloon is no longer the newspaper man's home.").

[129]*See* Eric Easton, *The Press as an Interest Group: Mainstream Media in the United States Supreme Court*, 14 UCLA ENT. L. REV. 247 (2007). Easton's empirical study of 100 cases involving the journalistic press showed a winning average of 54%, a slimmer margin than he had anticipated, but it showed conclusively that efforts by, among others, the American Newspaper Publishers Association contributed to press success. *Id*. at 259. Other scholars have observed that that win-loss ratio has not yielded the kind of robust First Amendment protection the journalistic press needs to encourage serious public-interest journalism – the very thing the Court has said warrants constitutional protection. *See* William Marshall & Susan Gilles, *The Supreme Court, the First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169 (1994).

[130]It was started in 1884. *See Maryland Legislature*, BALT. SUN, Mar. 28, 1884, at 4 (announcing that incorporation of the club had been approved).

[131]The club routinely had national political leaders at its meetings as speakers, and reports of its meetings made it into *The New York Times*. *See, e.g.*, *Wilson and Reed to Discuss the Tariff, Baltimore Journalists Will Listen to Interesting Addresses*, N.Y. TIMES, Dec. 24, 1893, at 8.

[132]*See* Gordon, *supra* note 20, at 38.

[133]*See* Biographical Series, *Lloyd Lowndes, Jr. (1845–1905)*, ARCHIVES OF MARYLAND, *available at* http://www.msa.md.gov/megafile/msa/speccol/sc3500/sc3520/001400/001474/html/1474bio.html (last visited Nov. 23, 2011).

fatefully, a discussion by two U.S. senators about legislation to change tariffs on commodities such as sugar.[134]

Agnus was also a founding member and officer of the International League of Press Clubs, an umbrella organization of more than forty press clubs stretching from Philadelphia to Portland, Oregon.[135] While most clubs were segregated by gender,[136] the league was the first to bring journalists of both sexes together, and many of its earliest officers were women.[137] The club was organized in 1891 and was launched with great fanfare with a convention in 1892 in San Francisco.[138] Five years later, about the time of Shriver's trial, one writer predicted that in unifying the press clubs, the league would "rear an organization of tremendous power."[139]

Finally, the professionalization movement meant Shriver and Edwards had a thriving nationalized press corps on their side to generate public awareness and support.[140] The 1890s saw the rise of professional trade journals such as *The Journalist* and *Newspapering*.[141] *The Fourth Estate*, forerunner of *Editor & Publisher*, was started the same year the Shriver-Edwards affair began.[142] Journalists at these publications and at newspapers covering the events bolstered a sense that important non-judicial precedents were being set by consistently framing discussion of the issue in terms we would recognize today as First Amendment rhetoric. At stake to them, as will be shown, were the rights of journalists and the meaning of freedom of the press.

[134]*See Journalists' Club Banquet, Vice-President Stevenson, Congressmen Wilson and Cummings Present*, BALT. SUN, Dec. 29, 1893, at 8.

[135]*See* Harry Wellington Wack, *The International League of Press Clubs*, 29 OVERLAND MONTHLY 631 (1897).

[136]*See, e.g.*, *Clubs and Associations*, FOURTH EST., Mar. 22, 1894, at 6 (using a weekly column to report on club news – in this case leading with news from the Women's Press Association of Boston).

[137]*See* Wack, *supra* note 135, at 625.

[138]Travel from the East Coast was a considerable undertaking in 1892. The journalists' journey for the League's convention was immortalized in a book. *See* THOMSON P. MCELRATH, A PRESS CLUB OUTING: A TRIP ACROSS THE CONTINENT TO ATTEND THE FIRST CONVENTION OF THE INTERNATIONAL LEAGUE OF PRESS CLUBS (1893).

[139]Wack, *supra* note 134, at 631.

[140]*See* MOTT, *supra* note 71, at 577 (calling the period from 1892 to 1914 "a great news period"). Mott noted that a signal of the newspapers' reach and influence at this time was the introduction of Sunday editions, some of them up to fifty pages and quite profitable. *Id*. at 584.

[141]*See Along the Line: Journals of Interest to Newspaper Men*, FOURTH EST., Mar. 1, 1894, at 5.

[142]*The Fourth Estate* started in 1894. *See* Editorial, *Our Second Year*, FOURTH EST., Mar. 7, 1895, at 2.

1894: A MODE OF LEGAL ARGUMENT

The Shriver-Edwards affair began with the publication of two controversial news reports in 1894: One by Edwards under the pen name "Holland" on May 14 in *The Philadelphia Press* and one by Shriver on May 19 in *The Mail and Express*. The central claim of both was that executives of sugar refining companies – known as the Sugar Trust – had bribed members of the senate to keep tariffs on imported sugar high to protect the companies' domestic monopoly.[143] The sums reported were high, as much as $500,000 in bribes directed to Democrats and potential profits for the sugar refiners of $50 million.[144] In a passage that drew considerable outrage, Edwards quoted one sugar company executive as saying, "We don't care what the House does. We own the Senate, and we control the people at the other end of the avenue."[145]

On May 16, Sen. Henry Cabot Lodge of Massachusetts introduced a resolution calling for a Senate probe into the bribery allegations.[146] On May 17, a resolution was entered in the Senate directing the U.S. attorney general to investigate the possibility of prosecuting the Sugar Trust under the Sherman Anti-Trust Act.[147] The same day, the Senate adopted the Lodge resolution and formed a five-member Special Committee to Investigate Bribes.[148] On May 19, Shriver's article appeared, largely reiterating the allegations in Edwards' story.[149] On the same day, the *New York Times* ran an editorial (embarrassingly) calling allegations against Democrats ridiculous.[150] On May 21, the committee met for the first time and issued subpoenas to Edwards and Shriver.[151]

[143]The stories were put in the record. S. REP. NO. 53–457, pt. 2, at 16 (1894) (detailing bribery attempts in the U.S. Senate).

[144]*Id*. at 18.

[145]*Id*.

[146]*See To Investigate*, WALL ST. J., May 16, 1894, at 4.

[147]*See Fifty-Third Congress*, BALT. SUN, May 18, 1894, at 2.

[148]*See id*.

[149]S. REP. NO. 53–457, pt. IV (1894) (including a reproduction of Shriver's article).

[150]Editorial, *That Memorandum*, N.Y. TIMES, May 19, 1894, at 4. That denial of Democrat wrongdoing would be proved quite wrong. The Democrats – most notoriously, Senator Nelson Aldrich of Rhode Island – were eventually revealed to have been thoroughly bought off by the Sugar Trust. *See, e.g.*, David Graham Phillips, *The Treason of the Senate: Aldrich, The Head of It All*, COSMOPOLITAN, Mar. 1906, at 1; Lincoln Steffens, *Rhode Island: A State For Sale*, MCCLURE'S MAG., Feb. 1904, at 337; Jerome L. Sternstein, *Corruption in the Gilded Age Senate: Nelson W. Aldrich and the Sugar Trust*, 6 CAPITOL STUD., no. 1, 1978, at 14.

[151]*See* S. Rep. No. 53–457, pt. I (1894).

The Testimony

Edwards arrived in Washington the evening of May 23.[152] The next morning, the *Times* ran a story saying the committee's decision to bar the public from its proceedings had created the appearance of a "star-chamber investigation."[153] Making a farce of the attempt at secrecy, the *Times* said, reports of each day's testimony were leaked to the press and published daily in newspapers nationwide.[154]

On May 24, the committee grilled Shriver and Edwards for several hours in the morning and in the afternoon.[155] Because of a delay, Dittenhoefer had not arrived to represent them.[156] Both reporters refused to reveal the names of the sources who had told them of the alleged bribery scheme. Edwards justified his refusal by saying, "The information was given to me under obligations of the highest confidence by the one who entailed that obligation, so that I do not feel at liberty to reveal his name."[157] Shriver justified his refusal by saying, "A newspaper man considers when information is given to him in confidence he should not violate the confidence."[158] These were normative arguments that had never gained traction in court. When a committee member told Shriver the only legal ground on which he could refuse would be self-incrimination, Shriver said he didn't think that was a danger – "No not at all."[159]

On May 25, the reporters continued, this time having consulted with Dittenhoefer.[160] Shriver said, on advice of counsel, he would decline to reveal his sources.[161] Asked on what grounds, he said he had not gotten the sources' permission and revealing his sources would damage "my entire reputation as a newspaper correspondent."[162] Asked if those

[152]*See Buttz Before the Committee*, N.Y. TIMES, May 24, 1894, at 5.

[153]*Id*.

[154]*Id*.

[155]The *Times* called the proceedings "the star chamber Sugar Trust investigation" even in news pages. *The Bribery Investigation, Little Information Given by Witnesses*, N.Y. TIMES, May 25, 1894, at 4.

[156]*Id*.

[157]S. Rep. No. 53–457, pt. II.

[158]*Id*. pt. V. Shriver then elaborated: "You know, when a newspaper man is told a thing, he is generally supposed to hold the confidence of the man. . . . And this is a case where I have requested the Congressman to use his name, and he declines to allow me to do it." *Id*.

[159]*Id*. pt. IV.

[160]*See Correspondents' Mouths Closed*, N.Y. TIMES, May 26, 1894, at 8.

[161]*See* S. REP. NO. 53–457, pt. II (1894), at 48.

[162]*Id.*

were the only grounds, he said, "There may be others; I do not know until I see my counsel" again.[163]

Edwards then arrived with Dittenhoefer.[164] When the committee chairman asked his first question, Dittenhoefer intervened and verbally elaborated a legal argument on Edwards' behalf. He told the committee that Edwards objected because: (1) determining the source of the news story was not part of the Senate resolution creating the committee; (2) the question did not fall within the Senate's power to compel an outside witness; (3) the identity of the reporter's source was wholly unnecessary for the committee's investigation into the bribery allegations, an investigation that could seek information elsewhere; (4) answering the question could incriminate the witness; and (5) being a journalist, the witness was under an "honorable obligation" to keep his confidences and violating them would "degrade him" in the eyes of his colleagues.[165]

After those objections were overruled, questioning continued, and Edwards again refused to reveal his sources.[166] Asked if he would continue to refuse because the evidence might incriminate him, Edwards answered, "I would [refuse] on that ground alone."[167] When Shriver was recalled for a third round of questioning, his answers had grown terse: "Under advice of my counsel, I formally decline to answer."[168] The legal dispute was coming into focus.

The Indictments

A unique feature of this case was the severity of the Senate's effort to force the journalists to comply – a severity that transformed the affair into a Judith Miller-type rallying cry for the nation's press. While the committee initially was unsure what steps it could take, the committee's clerk researched the issue and seized on the idea of using the congressional contempt statute adopted in 1857.[169] The statute allowed a maximum penalty of $1,000 and twelve months in jail.[170] During a

[163]*Id.*
[164]*Id.*
[165]*Id.* at 49.
[166]*Id.* at 50.
[167]*Id.* at 50.
[168]*Id.* at 51.
[169]*See War on the Correspondents*, N.Y. TIMES, May 30, 1894, at 8.
[170]2 U.S.C. § 192 (2011). The statute was never again used against a journalist. Congress has tried to use it in other contexts, however, such as during the House Un-American Activities Committee hearings in the 1950s. *See, e.g.*, Quinn v. United States, 349 U.S. 155 (1955) (concluding that the contempt statute did not trump a committee witness's right to invoke the Fifth Amendment's protection against self-incrimination).

contentious debate on May 29 in the Senate, Joseph Dolph of Oregon defended the committee's decision to use the long-forgotten law, and he pushed through a resolution to certify to the district attorney of the District of Columbia that Shriver and Edwards had refused to answer pertinent questions and were indictable.[171] On May 31, Vice-President Stevenson, as presiding officer of the Senate, certified the facts of the case to District Attorney Arthur Birney, who predicted on June 1 that the grand jury would issue indictments immediately and the trial would be over by month's end.[172]

Because the indictments of Shriver and Edwards were being considered along with indictments of several sugar company executives, the process slowed as the grand jury weighed the strength of the cases against them.[173] Shriver and Edwards were twice notified of days to appear and post bail, and both times the orders were rescinded at the last minute.[174] Finally, on July 3, the grand jury handed down indictments, twenty pages apiece, against the reporters.[175] Offers flowed in from prominent journalists and even some members of Congress to post the reporters' $1,000 bonds, but they accepted financial help from two fellow reporters instead.[176] It was a heroic moment, as reported in the press.[177]

Rhetoric in the Press

A key distinction was emerging that would set this case apart from earlier disputes, such as the jailing of John T. Morris: It was tied to a national scandal unfolding in Washington, so it was generating nationwide newspaper coverage, often on front pages. [178] In a multi-deck headline, *The New York Times* framed the issue as a stand-off between the Senate and the press: "The War of the Correspondents and the Senate, The Writers Will Submit to Imprisonment Rather Than Reveal the Names of Their Informants, Ready to Fight the Senate in Defense of

[171]*See War on Correspondents*, *supra* note 168 (describing Senator Dolph's advocacy of prosecuting the journalists as a "ridiculous attempt made by Mr. Dolph to induce the Senate to assume the responsibility of 'disciplining' the correspondents").

[172]*See District Attorney to Act*, WASH. POST, June 1, 1894, at 1.

[173]*See Correspondents Not Yet Indicted*, WASH. POST, June 12, 1894, at 4; *Grand Jury and Recalcitrant Witnesses*, WASH. POST, June 16, 1894, at 3.

[174]*See Grand Jury Reluctant to Act*, CHI. TRIB., June 23, 1894, at 4; *Holding Witnesses in Suspense, Queer Conduct of the Government Touching Shriver and Edwards*, CHI. TRIB., June 22, 1894, at 3.

[175]*See Are Indicted at Last*, WASH. POST, July 4, 1894, at 5.

[176]*See id*.

[177]*See The Newspaper Men Indicted, Many Offers of Bail for Messrs. Shriver and Edwards*, N.Y. TIMES, July 4, 1894, at 1.

[178]*See, e.g*., *Correspondents Indicted*, ATLANTA CONST., July 4, 1894, at 1.

Their Prerogatives."[179] The tone of the coverage turned combative after the Senate took the unusual step of bringing indictments. The *Times* was especially vicious in its attacks on Senator Dolph for advancing the idea. It called him bloodthirsty and unintelligent, and it accused him of using the incident to intimidate the entire press corps.[180]

A frequent rhetorical frame the press employed in reporting and editorializing mirrored the key assertion Shriver and Edwards had made to the committee: that to reveal their sources would damage their honor as journalists. Edwards' paper, *The Press* of Philadelphia, said in an editorial that his refusal to reveal a source "goes to the very heart of the honor, honesty, independence and public fidelity of journalism." It warned that the investigating committee threatened to "muzzle journalism, shield wrong-doers and leave the public without defense."[181] In a similar vein, the Milwaukee *Sentinel* editorialized that for a reporter to reveal confidential sources "is distinctly dishonorable, and no amount of browbeating is likely to have any effect" on Shriver and Edwards.[182]

The Fourth Estate, by contrast, consistently employed rights rhetoric and First Amendment allusions in its coverage, even running the *Press* editorial discussed above under the headline "The Rights of Journalism."[183] In an editorial at the time of the indictments, the magazine emphasized not the journalists' honor but the press' role in a democracy and journalism's service to the public as a conduit of information about the government.[184] "The newspaper and its correspondents have their rights no less than the legislative bodies," the editorial asserted. "They are no less indispensable to liberty." The editorial pointed out that these "rights" have been "won in a long contest, for the most part from legislative bodies." Then, uncannily, it predicted that the Senate's actions could cause a backlash in the form of a drive to secure the "right" to protect confidential sources. "Before their fruitless contest and conflict is over," it concluded, "they will find themselves face to face with the aroused press of the land, and they will but establish another precedent in defense of a free press."[185]

[179]N.Y. TIMES, May 28, 1894, at 4.

[180]*See Merciless Senator Dolph, Another Long Speech Devoted to the Wicked Newspaper Correspondents*, N.Y. TIMES, June 1, 1894, at 4. The over-the-top column said Dolph wanted to set up a "prison pen" in the Senate and use "a rack and thumbscrews" on the reporters. *Id*.

[181]The editorial was reprinted in *The Fourth Estate* magazine. *The Rights of Journalism*, FOURTH EST., May 31, 1894, at 3.

[182]*Id*.

[183]*Id*.

[184]Editorial, *The Issue at Washington*, FOURTH EST., June 21, 1894, at 3.

[185]*Id.*

The Demurrers

The Shriver-Edwards affair marked a milestone in the journalist privilege issue, as Spellman has noted, because moving beyond normative arguments, the case advanced substantive legal arguments for courts to consider.[186] Although similar demurrers on behalf of two stock brokers indicted along with Shriver and Edwards were overruled November 14 by the federal district court in Washington,[187] Dittenhoefer believed he could succeed by drawing a distinction between the non-journalists and the journalists.[188] On November 24, he filed demurrers on behalf of Shriver and Edwards, again making front-page news.[189]

Building on the verbal objections he had made before the investigative committee, Dittenhoefer's demurrer laid out twenty-four points for the court to consider.[190] Most of them were technical and procedural, having to do with whether the Senate had jurisdiction to compel testimony from non-members, whether the Senate resolution launching the investigation had given the committee power to compel such testimony, and whether the Senate could delegate responsibility for enforcing that power to the district court. More particular to Shriver and Edwards, he argued that the source of their information was not relevant to the committee's investigation, only the information itself.[191] Furthermore, forcing them to reveal "private, confidential and privileged communications" would degrade them. Finally, Dittenhoefer offered two constitutional arguments: that to force them to reveal the information would violate their Fourth Amendment rights against improper search and seizure and that it would violate their Fifth Amendment rights against self-incrimination.[192] He did not mention the First Amendment.

In a lengthy and eloquent brief filed simultaneously, Dittenhoefer expanded on eleven main points of the demurrer.[193] In one, he distinguished Shriver and Edwards from the non-journalist defendants based on the fact that a reporter's communications with a confidential source

[186]Spellman, *supra* note 9, at 40.

[187]*See Decision Against the Sugar Witnesses*, CHIC. TRIB., Nov. 14, 1894, at 3.

[188]*See Another Move in the Sugar Cases*, CHIC. TRIB., Nov. 18, 1894, at 11 (quoting Dittenhoefer as saying, "I feel confident . . . the indictments found against Shriver and Edwards cannot on other grounds be sustained").

[189]*See Attacking the Indictments*, WASH. POST, Nov. 25, 1894, at 1.

[190]*See* SHRIVER, *supra* note 56, at 73–75.

[191]*See id.* at 74.

[192]*Id*. at 74–75.

[193]*See id.* at 75–90.

are privileged.[194] He emphasized the changing role of the press in society: "The public press has become an important agent to ferret out crime and dishonesty."[195] He emphasized the need to protect whistleblowers as an incentive for their coming forward.[196] He noted that some courts had, on a case-by-case basis, released journalists from testifying.[197]

Dittenhoefer argued that the law had fallen behind a rapidly changing society and did not reflect professionalization in the field of journalism.[198] He urged the court to use this case as an occasion to catch up. "New principles have been established and old doctrines have been changed and enlarged to make them applicable to the new conditions created by the telegraph, telephone and the steam engine," he said, "and the courts should not hesitate ... to include the modern newspaper within the protection of privileged communications."[199] As in the demurrer, even while trying to draw a distinction between the reporters and the non-journalist defendants, Dittenhoefer did not invoke the First Amendment as a justification for that distinction.

Dittenhoefer presented his case to Judge C.C. Cole in the Supreme Court of the District of Columbia, sitting in criminal session,[200] on December 8.[201] Lawyers for two of the non-journalists – stock brokers Elverton Chapman and John MacArtney – had vowed to appeal the denial of their demurrers all the way the Supreme Court.[202] The fate of Shriver and Edwards would hang on whether the court saw a distinction between these two classes of recalcitrant witnesses.[203]

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[194]*See id*. at 83–84.

[195]*Id*. at 83.

[196]*See id.*, at 83.

[197]See id.

[198]*See id*. Dittenhoefer observed:

> When the doctrine of privileged communications was first established, the newspaper had not exhibited its great usefulness and power to aid in the administration of justice. It is only within the last quarter of a century that this power has been fully developed, requiring the broadening of the doctrine so as to include communications made to newspaper men.

Id.

[199]*Id*.

[200]Before the Judiciary Act of 1925 reorganized the courts, the Supreme Court of the District of Columbia was a federal court that served as both a trial court, sitting in criminal session, and an appeals court, sitting in appellate session. *See In re* Chapman, 156 U.S. 211, 215–16 (1894) (Chief Justice Fuller described the creation of this court under the Judiciary Act of 1893.).

[201]*See Argued on the Demurrers*, WASH. POST, Dec. 9, 1894, at 7.

[202]*See Appeal From Judge Cole's Decision, Senate Witness Cases to Be Taken to the Supreme Court if Necessary*, WASH. POST, Nov. 18, 1894, at 4.

[203]*See Postponed His Decision*, ATLANTA CONST., Jan. 13, 1895, at 15.

1895: FACILITATING A DIALOGUE ON CONSTITUTIONAL LAW

It did not bode well for Shriver and Edwards that Judge Cole consolidated their cases with those of two non-journalists: H.O. Havemeyer, millionaire president of American Sugar Refining Co., and John E. Searles, the company's secretary and treasurer.[204] On January 17, Judge Cole delivered an oral opinion from the bench that started by noting his earlier denial of demurrers in the cases of Chapman and MacArtney, the stock brokers. He then announced that all of the cases would be decided the same way – denied – because, he said, "I do not see any difference between them."[205]

As for Shriver and Edwards, Judge Cole said their cases were largely the same as those of Chapman and MacArtney, with two additional points to address: Whether demanding their sources was pertinent to the investigation and whether answering those questions would incriminate them.[206] On the issue of pertinence, Judge Cole said knowing the source became pertinent when the reporters admitted they had no direct knowledge of the events they wrote about, that the information came only through their sources; therefore, he reasoned, knowing the sources became urgently relevant to the committee so it might summon those sources to testify.[207] On the issue of self-incrimination, Judge Cole noted that declining to answer for fear it might incriminate is a personal privilege that must be claimed or waived by an individual; since the record did not indicate that either Shriver or Edwards claimed in their testimony before the committee that they feared self-incrimination, then, *ipso facto*, they had waived the privilege.[208]

Judge Cole then addressed the specific question of whether their communications were privileged because they were journalists.[209] That claim, he wrote, "is new," and he knew of no court precedent to sustain it.[210] He acknowledged that the case represented a chance to establish a precedent:

> If that ought to be the law and ought to be declared law by courts, some court has first got to do it; and if the argument seemed a sound one to

[204] *See* SHRIVER, *supra* note 56, at 91.
[205] *Id.*
[206] *Id.*
[207] *Id*.
[208] *Id*.
[209] *Id*. at 92.
[210] *Id.*

> me, I should have no hesitation in extending the rule to cover that class of people and that class of communications.[211]

However, he ruled, "[T]here could be no more dangerous doctrine" than to allow people to pass libelous material to journalists and remain hidden by a cloak of secrecy.[212] It would be, he wrote, "very demoralizing."[213] So he overruled the demurrers of all four defendants.[214] All would have to stand trial.[215]

Appeal to the Supreme Court

Shriver decided to make a dramatic stand to draw attention to his case. Five days after Judge Cole delivered his opinion, Robert Wynne, the *Tribune* reporter who had put up the $1,000 bond for Shriver, walked into the Supreme Court of the District of Columbia and, with Shriver at his side, withdrew his pledge of surety for the appearance of Shriver in future proceedings and demanded to be released from the obligation.[216] With Shriver in default of bail, the U.S. Marshal took him into custody,[217] releasing him soon after with a deputy marshal assigned to follow his whereabouts. To celebrate, Shriver held what he called an "At Jail Party" at his apartment attended by four U.S. senators and an assistant secretary of the Navy.[218]

On January 23, Dittenhoefer filed a petition for *habeas corpus* and for *certiorari* with the Supreme Court. "Said imprisonment of said petitioner and the deprivation of his liberty is unlawful and wholly without any jurisdiction or authority of said court to make," Dittenhoefer

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[211]*Id.*

[212]*Id.*

[213]*Id.* In his written opinion, filed two days later, Judge Cole added the following passage: "Let it once be established that the editor or correspondent cannot be called upon in any proceeding to disclose the information upon which the publications in his journals are based and the great barrier against libelous publications is at once stricken down." DIGEST OF DECISIONS AND PRECEDENTS OF THE SENATE AND HOUSE OF REPRESENTATIVES 856 (Henry H. Smith ed., 1894).

[214]*See* SHRIVER, *supra* note 56, at 94.

[215]*See Demurrers All Void, Judge Cole Rules Against the Senate Witnesses*, WASH. POST, Jan. 18, 1895, at 7; *The Sugar Trust Witnesses, Judge Cole Decides That Their Demurrers Are Void and That They Will Have to Stand Trial*, BALT. SUN, Jan. 18, 1895, at 9.

[216]To be released on bond in the District of Columbia at this time, a defendant had to be released on someone else's recognizance—that is, someone must pledge to make sure the defendant appeared in court when summoned.

[217]*See* SHRIVER, *supra* note 56, at 94 (containing a copy of Shriver's petition for habeas corpus and certiorari to the Supreme Court).

[218]Special Dispatch to The Baltimore Sun, *Mr. Shriver's "At Jail,"* BALTIMORE *SUN*, Jan. 28, 1895, at 2. The article said Shriver spent but a day in jail, but a deputy marshal was assigned to follow him daily and stand guard at his home.

began.[219] He recapitulated a handful of arguments from the earlier proceedings, mostly technical and procedural, and he reiterated the claim that Congress' contempt statute was unconstitutional under the Fourth and Fifth amendments.[220] He also claimed that forcing Shriver to testify would be "manifestly unconstitutional" because it would compel him to answer questions that "may disgrace him or otherwise render him infamous."[221] However, he did not draw any distinction between Shriver and the non-journalist witnesses; he did not even identify Shriver as a journalist in the petition. Nor did he say why making Shriver answer the questions posed to him would "disgrace him." The freedom-of-the-press rhetoric of his earlier filings was completely absent.[222]

On the same day that Dittenhoefer filed the petition for Shriver, the lawyers of Elverton Chapman, one of the indicted brokers, did the same.[223] They argued on largely the same grounds as Dittenhoefer had: that it was not within the Senate's jurisdiction to compel outside witnesses to testify and that the contempt statute was unconstitutional under the Fourth and Fifth amendments.[224] The Court handed down its decision February 4, denying Chapman's petition.[225] Writing for the majority, Chief Justice Melville Fuller ruled that the Court did not have appellate jurisdiction over the Supreme Court of the District of Columbia when it was operating in criminal session.[226] "We discover no exceptional circumstances which demand our interposition in advance of adjudication by the courts of the District upon the merits of the case before them," he concluded.[227] Seeing no material difference between Chapman's case and Shriver's, the Court denied Shriver's appeal with a one-sentence ruling.[228] They would have to stand trial.[229]

Mobilization in Baltimore

The day before the Supreme Court handed down its ruling, *The New York Times* reported that the Journalists' Club of Baltimore on February

[219]*Id*. at 95.
[220]*Id*. at 95–96.
[221]*Id*. at 96.
[222]*Id*. at 94–97.
[223]*See The Recusant Witnesses, Their Case Is Now Before the United States Supreme Court*, BALT. SUN, Jan. 23, 1895, at 2.
[224]*Id.*
[225]*In re* Chapman, 156 U.S. 211 (1895).
[226]*Id.* at 217–18.
[227]*Id.* at 218.
[228]*In re* Shriver, 156 U.S. 218 (1895).
[229]*See No Habeas Corpus Can Issue, Chapman and Shriver Must Answer Their Indictments*, N.Y. TIMES, Feb. 5, 1895, at 16; *They Must Stand Trial*, WASH. POST, Feb. 5, 1895, at 4; *Will Have to Stand Trial*, ATLANTA CONST., Feb. 5, 1895, at 1.

2 had adopted a resolution calling for a national campaign to adopt statutory protections for confidential sources.[230] The *Times* reported that the campaign was to be directed at state legislatures and Congress. *The Baltimore Sun* carried a similar item on February 4.[231] It added that the effort was prompted specifically by the indictments of Shriver and Edwards.[232]

The club's resolution was written by Edgar Goodman, who worked for General Agnus as a telegraph editor at the *American.*[233] Their newspaper ran a complete copy of the resolution.[234] The resolution opened by noting that the law governing journalism had not kept up with society: "The judiciary throughout the country is not yet educated to an understanding of the necessity of confidential relations between newspaper men and their sources."[235] It asserted that a journalist-source privilege was as much in the public's interest as an attorney-client privilege.[236] It called for creating a three-person committee whose job it would be to lobby the Maryland legislature in its next session, and it called for submitting the same resolution to the International League of Press Clubs at its next meeting.[237] The *Sun* noted that the resolution was adopted unanimously, after which the club elected five delegates to attend the International League's next meeting. Agnus was elected to lead the delegation.[238]

Mobilization of the League

On June 11, more than 100 delegates convened in Philadelphia for the fifth annual meeting of the International League of Press Clubs.[239] In its opening session, Agnus pushed the journalist-privilege issue to the top of the agenda and onto the front page of *The Washington Post*.[240]

[230]*The Rights of Newspaper Writers, Appeal for Their Protection Against the Violation of Confidences*, N.Y. TIMES, Feb. 3, 1895, at 4.
[231]*Journalists' Club, An Effort to Legalize the Secrecy of Confidential Information*, BALT. SUN, Feb. 4, 1895, at 6.
[232]*Id*.
[233]*Id*.
[234]*Journalists' Club Resolution*, BALT. AM., Feb. 3, 1895, at 5.
[235]*Id*.
[236]*Id*.
[237]*Id*.
[238]*See Journalists' Club, supra* note 231.
[239]*See International League of Press Clubs Meets in Philadelphia*, ATLANTA CONST., June 12, 1895, at 1.
[240] 1 *See Protection of Newspaper Men, Their Relations With Sources of Information to Be Discussed*, WASH. POST, June 12, 1895, at 1.

He read the Baltimore club's resolution in full and urged the league to adopt it.[241] It was made the topic of a special session the next day.[242]

The first order of business on June 12 was Agnus' proposal for a concerted lobbying campaign for shield laws.[243] "We come," he said, "to protest against the insults to our profession."[244] He said the topic was urgent, then he related in detail the plight of Shriver and Edwards.[245] Charles Emory Smith of the Philadelphia *Press* – the paper that published Edwards' work – then read a proposed resolution based on the one drafted in Baltimore.[246] It called for the league's member clubs to form committees to lobby legislatures in every state.[247] Smith sparked "thunderous applause" by pledging that every "worthy journalist ... would rather rot in jail than betray his confidences," and the resolution was adopted unanimously.[248] Thus, on June 12, 1895, the shield law movement in America was born.

Rhetoric in the Press

The league's meeting and discussion of the privilege issue was covered extensively in newspapers across the country.[249] In these reports, two dominant frames emerged. One was about protecting the "dignity" of the press and recognition of its stature as a profession. The *Daily Journal* in Kansas City, Missouri, in an editorial echoing Agnus' speech

[241]*See International League of Press Clubs, Movement to Protect Newspaper Men in the Preservation of Confidences*, N.Y. TIMES, June 12, 1895, at 9.

[242]*See id*.

[243]*See Liberty of the Press, The Sources of Information Should Be Privileged, Protection for Newspaper Men*, WASH. POST, June 13, 1895, at 3.

[244]*Id.*

[245]*Id.*

[246]*Id.*

[247]*Id.* It read:

> Resolved, That the International league of Press Clubs urges all press clubs, members of the League, to appoint committees to secure from the legislatures of the various States in which such league clubs are located, the adoption of laws to protect newspaper men in preserving inviolate confidential information communicated to them in the ordinary course of their duties.

Id.

[248]*Id*. Joel Cook of the Washington press corps added an interesting observation: "If laws cannot be enacted, custom can lead to the recognition of the privilege." *Id.*

[249]*See, e.g., League of Press Clubs, Legislation to Be Asked to Pass a General Libel Law*, [Sacramento, Calif.] RECORD-UNION, June 13, 1895, at 1; *Press Asks for More Liberal Laws, Confidences Should Be Held Sacred and Libel Laws Less Stringent*, [Omaha, Neb.] DAILY BEE, June 13, 1895, at 1; *Protecting the Press, Unanimous Demand for a Law on the Confidence Question*, [St. Paul, Minn.] DAILY GLOBE, June 13, 1895, at 5; *Protection for Newspaper Men in the Preservation of Confidences*, [St. Paul, Minn.] DAILY GLOBE, June 12, 1895, at 5.

at the convention,[250] concluded, "The dignity of the newspaper profession calls for legislation of this sort."[251] The other dominant frame cast the issue as a matter of "rights" and "freedom of the press," even though it was statutory law under discussion. In the same editorial, the *Daily Journal* went on to argue that statutory protection was needed to safeguard the "rights of professional men" and protect the "sacred right" of keeping confidences.[252] *The New York Times*' early coverage of the Baltimore resolution ran under the headline "The Rights of Newspaper Writers."[253] *The Washington Post*'s front-page coverage of the league meeting ran under the headline "LIBERTY OF THE PRESS, The Sources of Information Should Be Privileged."[254] They were lobbying for statutory protections, but they were articulating First Amendment values.

1896: SETTLING A LEGAL DISPUTE OUTSIDE THE COURTS

The cases against Shriver and Edwards ground to a halt in 1896. The delay was caused by Elverton Chapman, one of the indicted stock brokers. He was convicted in February, fined $100 and ordered to serve thirty days in jail.[255] He appealed and lost again in April.[256] When he applied to the Supreme Court for a writ of error, lawyers in the other cases asked for a continuance until a ruling in Chapman's petition came down.[257]

During the delay, focus shifted to the states, where the International League's shield law campaign was gaining traction. Bills were submitted in the legislatures of Massachusetts, Minnesota and Utah, which had recently become a state.[258] These early efforts failed, though the

[250]In talking about the insult that the press endures at the hands of judges, Agnus said, "[T]he press sometimes takes a poor boy and by its power makes him a judge, yet he turns on those who elevated him." *To Protect Newspaper Men, International League of Press Clubs Takes Important Action*, [Kansas City, Mo.] DAILY J., June 13, 1895, at 4.

[251]Editorial, *Timely Action*, [DAILY J., June 14, 1895, at 4.

[252]*Id.*

[253]*See The Rights of Newspaper Writers, supra* note 230.

[254]*See Liberty of the Press, supra* note 243.

[255]*See Punished For Not Testifying*, L.A. TIMES, Feb. 2, 1896, at 1.

[256]*See The Sugar Trust Witnesses, Chapman's Sentence Affirmed by Court of Appeals*, N.Y. TIMES, Apr. 8, 1896, at 1.

[257]See The Sugar Witness Cases, Application for a Writ of Error Filed by Mr. Chapman, N.Y. TIMES, Apr. 17, 1896, at 1.

[258]*See* Wack, *supra* note 135, at 629.

Massachusetts bill did make it through the state Senate before being defeated in the House.[259]

In Maryland, a draft bill was drawn up, and *Fourth Estate* magazine gave credit for the drafting to Edgar Goodman,[260] the telegraph editor at the *American* who also held a law degree from University of Maryland and was a member of the state bar.[261] On March 10, Sen. Hattersley Talbott introduced the bill in the Senate as Goodman had written it.[262] The *American* assured its readers that the bill was not intended to protect newspapers from libel suits, that similar bills had been introduced in other states, and that these bills had the support of the International League of Press Clubs.[263] On March 18, when the bill was read for a second time in the Senate, a paragraph stating that nothing in the bill precluded libel suits was struck.[264] (The *Sun* noted that only fourteen senators were present.)[265] On March 20, the law passed in the Senate and was sent to the House of Delegates.[266] On March 30, it passed in the House without debate.[267] On April 2, Governor Lloyd Lowndes signed the nation's first shield statute into law.[268] Thus, a longstanding professional norm was instantiated into law.

The New York Times ran a free-standing news article the next day that included the law's full text and trumpeted the fact that only five legislators voted against it.[269] The *Fourth Estate* trumpeted the press

[259]*Id*. The article went on to say, "The League is now bending its energies to enact a uniform . . . law in every State. That it will before long accomplish this, the prospect assuredly indicates." *Id.*

[260]*The Maryland Bill*, FOURTH EST., Apr. 9, 1896, at 2.

[261]1 BETA THETA PI, CATALOGUE OF BETA THETA PI IN THE SIXTY-SEVENTH YEAR OF THE FRATERNITY 287 (1905) (listing Goodman's degrees and employment at The Baltimore American).

[262]*See Forecast for Baltimore and Vicinity*, BALT. SUN, Mar. 11, 1896, at 1. The law as it passed read:

> No person engaged in, connected with or employed on a newspaper or journal shall be compelled to disclose, in any legal proceeding or trial or before any committee of the legislature or elsewhere, the source of any news or information procured or obtained by him for and published in the newspaper on and in which he is engaged, connected with or employed.

Acts of 1896, Ch. 249 (Maryland).

[263]*A Bill to Protect Newspaper Confidences*, BALT. AMERICAN, Mar. 11, 1896, at 3.

[264]*See Work of the Senate and House: Proceedings in Detail of Each Branch of the General Assembly*, BALT. SUN, Mar. 19, 1896, at 2.

[265]*Id.*

[266]*See Forecast for Baltimore and Vicinity*, BALT. SUN, Mar. 21, 1896, at 1–2.

[267]*See id.* at 2.

[268]Special Dispatch, *Legislative Matters, A Large Batch of Bills for the Governor to Sign*, BALT. SUN, Apr. 2, 1896, at 2 (listing shield law as among dozens of bills Governor Lowndes would sign that day).

[269]*To Protect the Reporters, A Bill to Secure Their Secrets Signed by Gov. Lowndes of Maryland*, N.Y. Times, Apr. 4, at 10.

victory in a large-type headline that read "WORTH WINNING, Maryland Newspaper Men Triumph Over Legal Tyranny."[270] The trade magazine applauded General Agnus for having "fought in season and out of season for the new law."[271] When looking back on developments in the press a few months later, the magazine summed up: "In the legislative acts of the past year, none has been more important than a bill passed in Maryland largely through the personal efforts of General Felix Agnus of the *Baltimore American*."[272]

The Morris Disconnect

None of the contemporary accounts tied passage of the shield law to the jailing of John T. Morris, though the *Times* insinuated a connection without attribution or evidence. The third paragraph of its news story began, "Several years ago, one of the reporters of *The Baltimore Sun* went to jail in preference to disclosing the source of information upon on important local matter."[273] The fourth paragraph began, "The present law was drawn by Edgar Goodman, a member of the Baltimore bar and one of the editors of *The American*, and it was pressed at the Legislature by all the correspondents."[274]

Those two statements juxtaposed became the foundation of the Morris legend, and that insinuated connection took on a life of its own starting in 1934. New Jersey had just adopted the nation's second shield law, and *Editor & Publisher* magazine devoted significant coverage to it that included a short sidebar about the Maryland law.[275] Compounding the *Times*' original error, the *E&P* article put the Morris affair and passage of the law in the same year, 1896.[276] That error entered the journalism history literature with Mencken's version in 1937. It entered the media law literature in 1943.[277] It entered the general law literature in 1950.[278] And it entered the general history literature in 1965.[279]

[270]Editorial, *Worth Winning*, FOURTH EST., Apr. 9, 1896, at 2.
[271]*Id.*
[272]*The Year Behind*, FOURTH EST., Jan. 7, 1897, at 3.
[273]*To Protect the Reporters, supra* note 269.
[274]*Id.*
[275]Ryniker, *supra* note 10 (quoting only journalists from *The Baltimore Sun* at a time when participants in the events were no longer on the scene).
[276]*Id.*
[277]*See* Walter A. Steigleman, *Newspaper Confidence Laws: Their Extent and Provisions*, 20 JOURNALISM Q. 230 (1943).
[278]*See* B.K.K., *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61 (1950).
[279]*See* Matthew Page Andrews, History of Maryland: Province and State 591 (1965).

As thin as the evidence was, the connection between Morris and the law was not even questioned until 1970, when A. David Gordon did the first – and only – significant research into the bill's passage and the early decades of shield law history.[280] Expanding on a chapter from his doctoral dissertation, Gordon's 1972 monograph[281] reconstructed in detail the events surrounding Morris' jailing and definitely pinned the date to 1886, not 1896.[282] He also debunked the claim that an editorial campaign led by Morris' newspaper, the *Sun*, helped push the shield law toward passage.[283] Not a single newspaper in Maryland, Gordon showed, published an editorial in support of the bill in the months before its passage.[284] In its news pages, the *Sun* did not run a single separate story about the bill, Gordon showed, only fleeting mentions in roundups of legislative activity.[285] Lobbying for the law was, he surmised, "a backstage effort."[286]

However, after presenting extensive research leading away for the conventional narrative, Gordon concluded, oddly, "It thus appears that the Morris incident of 1886 set in motion an effort by the Baltimore Journalists' Club to secure legal protection against a repetition."[287] He seemed to go out of his way to minimize the role that Agnus played[288] and even implied that contemporary accounts crediting him were wrong.[289] Although Gordon himself noted that the *American* published more detailed reports about the bill than any other newspaper in Maryland,[290]

[280]David Gordon, Protection of News Sources: The History and Legal Status of the Newsman's Privilege (1971) (unpublished Ph.D. dissertation, University of Wisconsin) (on file with Davis Library, University of North Carolina-Chapel Hill).

[281]Gordon, *supra* note 20.

[282]*Id*. at 7–22 (deploying an impressive array of press account, court documents and government records). Gordon's monograph also contains the only detailed account of the failed attempt to pass a shield law the same year in Utah. *Id*. at 36–37. Gordon also is the only media law scholar ever to note that the first shield law *bill* that we know of was introduced in the Iowa legislature in 1890. *Id*. at 1.

[283]That claim first appeared in a 1943 article in *Journalism Quarterly*. *See* Steigleman, *supra* note 277.

[284]Gordon, *supra* note 20, at 26.

[285]*Id*. at 29–31.

[286]*Id*. at 25.

[287]*Id*. It seemed equally odd that, after presenting meticulous research into the time element of the Morris incident, Gordon would conclude, "No indication was found . . . as to the origin of the error that switched one digit in the year Morris was jailed and created this 10-year mistake which has been quoted faithfully since the 1930s." *Id*. at 41. The paper trail seems perfectly clear: *The New York Times*, in its initial report on passage of the shield law in 1896, vaguely indicated the Morris incident without giving a name or precise date. *Editor & Publisher* magazine, relying partly on the *Times* story, made the connection express in 1934.

[288]Gordon, *supra* note 20, at 42.

[289]*Id*. at 31–32.

[290]*Id*. at 24, 28.

he speculated that the *Sun* was the shield law's main champion.[291] He surmised, finally, that it must have been the *Sun*'s capital correspondents who pushed through the law.[292]

The Shriver Connection

The missing piece that might have altered Gordon's conclusion was Shriver – longtime resident of Baltimore, former reporter for the *American*, member of the Journalists' Club, and close friend to Agnus.[293] The *Sun*'s own report on the launch of the Journalists' Club lobbying effort was unambiguous: "The resolution was the outcome of the arrest of two Washington correspondents for refusal to reply to certain questions asked some time ago by a Senate investigating committee."[294] Perhaps that sentence did not stand out for Gordon because he was looking for a triggering event in Maryland instead.

Nearly every news account of Agnus' speech at the Philadelphia convention, when he pressed the International League to adopt the shield law campaign, reported that the drive was inspired by the legal ordeal of Shriver and Edwards.[295] Agnus also was one of the most influential Republicans in Maryland in an era when Democrats had been driven from power in a landslide election,[296] when he was being courted to run for the U.S. Senate,[297] and when he was rumored to be on a short list for President William McKinley's cabinet.[298] His exact role in lobbying for the shield law cannot be known,[299] but he was deeply involved in a

[291]*Id*. at 39–41.

[292]*Id*. at 32.

[293]*See supra* notes 96–103 and 120–26 and accompanying text.

[294]*Journalists' Club, An Effort to Legalize the Secrecy of Confidential Information*, BALT. SUN, Feb. 4, 1895, at 6.

[295]*See, e.g., Liberty of the Press, The Sources of Information Should Be Privileged, Protection for Newspaper Men*, WASH. POST, June 13, 1895, at 3.

[296]*See Lowndes Elected, He Sweeps Our Maryland and Baltimore Against the Bosses, The People's Victory, Legislature Is Republican*, BALT. SUN, Nov. 6, 1895, at 1.

[297]*See* Editorial, *For the New Maryland Senator*, WASH. POST, Nov. 10, 1895, at 6.

[298]*See Making Up the Cabinet, Washington Politicians Are Mentioning Names*, N.Y. TIMES, Nov. 11, 1896, at 3 (reporting that Agnus was being considered for postmaster general).

[299]The Felix Agnus Papers are housed at the University of Maryland. Unfortunately, they cover only his military career and experiences during the Civil War. *See* Finding Aid, Felix Agnus Papers, University of Maryland Archives, *available at* http://www.lib.umd.edu/archivesum/actions.DisplayEADDoc.do?source=MdU.ead.histms.0012.xml&style=ead#series2.a (last visited Nov. 23, 2011).

Republican party[300] that controlled the governor's mansion [301] and the House of Delegates, and nearly controlled the Senate as well.[302] In that light, it would seem hard to maintain that a Democrat-aligned newspaper like the *Sun* – whose influential Democrat publisher had died two years earlier[303] – would have held more sway over local politics in 1896 than Agnus and the *American*.[304] It seems equally strange that a newspaper credited with lobbying for ten years to secure a shield law would not even publish a news article or editorial about its passage, though *The New York Times* did.

The Smoking Gun

The first significant hint that the Morris connection might be a myth came in 1925 with the trial of Hamilton Owens,[305] editor of *The Baltimore Evening Sun*.[306] This was the first use of the shield law in a court case. The paper argued that the law should protect not only the identity of a reporter's source but also the identity of a reader who penned a letter to the editor signed only "A Daily Reader." Surprisingly, the court sided with the paper's interpretation of the never-interpreted law.[307]

Owens himself unwittingly contributed to the Morris myth. Asked after his trial about what he knew of the shield law's origins, he speculated in a letter to historian Matthew Page Andrews that he thought perhaps the Morris incident began in 1895 or possibly 1894.[308] He was

[300]Agnus led the campaign effort in Baltimore for Governor Lloyd Lowndes. *See, e.g.*, *Grand Republicans*, BALT. SUN, Oct. 14, 1895, at 1 (detailing rally for Lowndes, presided over by Agnus, on the eve of a landslide election for the Republicans).

[301]Agnus also happened to be a personal friend of the governor's. *See, e.g.*, *Governor-Elect Lowndes Here*, N.Y. TIMES, Nov. 15, 1895, at 2 (reporting on Lowndes' trip to New York and noting that "after dinner, he and Gen. Felix Agnus of Baltimore went to the Horse Show").

[302]*See The Maryland Election*, BALT. SUN, Nov. 7, 1895, at 2.

[303]*See* Obituary, *George W. Abell Dead*, BALT. SUN, May 2, 1894, at 1. *See also Death of George W. Abell*, WASH. POST, May 2, 1894, at 4.

[304]This section is not intended to be read as criticism. Gordon's work remains invaluable. In 1970, however, he did not have computer-assisted search tools that would have enabled him to cast a wider net.

[305]State v. Hamilton Owens, No. 677 Misc. 1925, Circuit Court, Carroll County, Md., May 11, 1925.

[306]*See* Special to The Sun, *Editor Sustained in Guarding Name,* BALT. SUN., May 12, 1925, at 3.

[307]*See id*. The case represents an interesting parallel with cases today in which courts weigh whether shield laws should protect anonymous commenters. In 1925, the *Sun* described the court's reasoning: "The case involved the question, 'What is news?' said the judge. It was difficult, he continued, for the court to define what is news. That, he said, might be a matter of opinion." *Id*.

[308]Letter from Hamilton Owens to Matthew Page Andrews, Sep. 22, 1928 (on file in the Maryland Room, Enoch Pratt Free Library, Baltimore).

only guessing, but his guesses made it into Andrews' comprehensive history of the state published in 1965.[309] Those guesses also made it into the law journal literature in 1979, when Bruce and Laurie Bortz relied heavily on Owens' account of the Morris affair to claim it happened "[d]uring the first weeks of 1896"[310] while demurring in a footnote that "[t]he actual date is uncertain."[311] That was not true. As mentioned earlier, Gordon had definitively pegged the Morris affair to 1886 in his published monograph five years earlier.[312]

Owens might have questioned the Morris connection himself if he had reviewed the *Sun*'s coverage of his own trial. In addition to its news coverage, the paper ran a full-length editorial opining on the need to protect sources and saluting the state for having adopted such an important law.[313] The editorial reported vaguely that the law was adopted "a number of years ago" and that it grew out of bad "political conditions" that "newspapers were endeavoring to correct."[314] Nowhere in its editorial or news articles did the *Sun* mention the Morris affair. Nowhere did the paper take any credit for passage of the law.

However, the editorial prompted a reader to write in to add his personal recollections to the paper's coverage.[315] "Will you permit one who was instrumental in having the law placed upon the statute book to give the history of the law?" wrote a reader identified only as "E.G."[316] He gave this succinct account of the law:

> It was suggested not by a political campaign, but by the arrest and jailing of several Washington correspondents, including the late John S. Shriver, of Baltimore, as a result of their refusal to answer questions in the famous Sugar Trust scandal which was being investigated by a committee of the United States Senate. Mr. Shriver and the other "recalcitrant witnesses" were haled before the bar of the Senate and, still refusing to answer, were given jail sentences.[317]

"E.G." is most certainly Edgar Goodman, the telegraph editor at the *American* who drew up the Baltimore plan to lobby the International

[309]ANDREWS, *supra* note 279.
[310]Bruce L. Bortz & Laurie R. Bortz, *"Pressing" Out the Wrinkles in Maryland's Shield Law for Journalists*, 8 U. BALT. L. REV. 461 (1979).
[311]*Id*. at 461 n.2.
[312]Gordon, *supra note* 20, at 7–22.
[313]Editorial, *Newspaper Privilege*, BALT. SUN, May 13, 1925, at 10.
[314]*Id*.
[315]Letter to the Editor, *Another Version of the Origin of the Maryland Law Allowing Newspapers to Protect Their Sources of Information*, BALT. SUN, Jun. 6, 1925, at 10.
[316]*Id*. It was common for authors of letters to the editor to be identified by initials.
[317]*Id*.

League of Press Clubs to take up Shriver's and Edwards' cause.[318] In his letter, he directly contradicted the original, erroneous *New York Times* report about the law, which had credited him with drafting the bill. He wrote instead: "The law now on our books was drafted through the intervention of Mr. Shriver by Judge Dittenhoefer, who was counsel for Mr. Shriver in the sugar case. It was taken to the Legislature by the correspondents of the various Baltimore papers and introduced by Tom Hayes."[319]

Even if "E.G." were not Edgar Goodman, the letter writer's account sounded far more plausible than the later claim that the Morris affair of 1886 prompted lawmaking a decade later. Furthermore, what would be the letter writer's motive to lie about events twenty-nine years in the past? There would be no motive because, as evidence amassed here has shown, the Shriver-Edwards affair was in fact the shield law's proximate cause.

1897: SHAPING CONSTITUTIONAL CULTURE AND HISTORY

The new year started with a macabre twist in the ongoing Sugar Trust scandal: On January 1, William Park, an agent of the Trust accused of embezzling, shot and killed himself in Duluth, Minnesota, to avoid arrest.[320] On April 19, the Supreme Court finally handed down its decision on Elverton Chapman's second petition for a writ of error: It was denied,[321] and the non-journalist recalcitrant witness agreed to pay a $1,000 fine and serve thirty days in jail.[322] Trials of the journalists could proceed.[323]

After nearly three years, Shriver's trial finally began May 15 in the Supreme Court of the District of Columbia, sitting in criminal session, Judge A.C. Bradley presiding.[324] Dittenhoefer was joined by Jere Wilson, another retired judge, to represent Shriver at trial.[325] While

[318]*See supra* note 260–61 and accompanying text.

[319]Letter to the editor, *supra* note 315.

[320]*See Forecast for Baltimore and Vicinity*, BALT. SUN, Jan. 2, 1897, at 1.

[321]*In re* Chapman, 166 U.S. 661 (1897) (stating that Congress' contempt statute was constitutional and that the court in the District of Columbia had jurisdiction to render a judgment in Chapman's case).

[322]*See Chapman Goes to Jail, Occupies Two Cells and Lives Like a Prince*, CHIC. TRIB., May 18, 1897, at 1. H.O. Havemeyer, the millionaire president of the trust, was found not guilty on May 27. *See Havemeyer Goes Free*, CHIC. TRIB., May 28, 1897, at 6.

[323]*See To Try Two Newspaper Men*, ATLANTA CONST., June 2, 1897, at 2.

[324]*See* SHRIVER, *supra* note 54, at 120.

[325]*Id.*

Dittenhoefer declined to make an opening statement, District Attorney Henry Davis accepted.[326]

After reviewing the facts for the jury, Davis, anticipating the defense team's legal arguments, said the prosecution would rest its case on just two key points: The questions posed to Shriver were pertinent to the committee's investigation, and he "willfully refused" to comply under the terms of Congress' contempt statute.[327] Dittenhoefer interrupted to object several times,[328] most pointedly when Davis proposed to have Shriver's article about the Sugar Trust entered into the record. His objection stemmed from the fact that Shriver's article did not appear in print until two days after the Senate had passed its resolution launching the investigation; therefore, he said, the article could not properly be part of that investigation.[329]

When it came the defense team's turn to question the day's first witness, Senator George Gray, a member of the Sugar Trust investigation committee, Dittenhoefer used his questions to hammer two points: Was the *name* of the Congressman who spoke to Shriver necessary for the committee's investigation into the bribery allegations? And couldn't the Senate, which had considerable power to punish its own members, have obtained this information elsewhere?[330] "Then pray," Dittenhoefer asked, "what was the purpose . . . of asking a newspaper man who his informant was when they had the Senators themselves to make this admission, and no action was taken by the Senate?"[331]

After the government finished calling its witnesses for the day, Dittenhoefer moved that the case be dismissed on six grounds, mostly technical and having to do with the committee's jurisdiction.[332] However, bringing back the journalistic arguments he had propounded three years earlier, Dittenhoefer argued that Shriver's communication with his source was privileged.[333] "The court will take judicial notice of the fact that many of the most flagrant crimes affecting the welfare of society have been exposed and brought to punishment through the agency of the newspaper," he said.[334] Then he compared the role of the journalist's source with that of a police informant: "To bring about the discovery of crime, the law permits information to be given to the Government and will not

[326]*Id*. at 91.
[327]*Id*. at 133–34.
[328]*Id*. at 134–36.
[329]*Id*. at 138.
[330]SHRIVER, *supra* note 56, at 146–47.
[331]*Id*. at 146.
[332]*See Trial of John S. Shriver*, N.Y. TIMES, June 16, 1897, at 4.
[333]*See* SHRIVER, *supra* note 56, at 146.
[334]*Id*.

compel the name of the person giving the information to be revealed. . . . The same rule should be applied for the same reasons."[335]

The trial's second day began with a lengthy opening statement by Dittenhoefer.[336] Putting aside technical legal grounds for dismissal, the ex-judge engaged Judge Bradley in an unusually frank discussion about the need to change the law under which journalism operated.[337] "I know that I am approaching a question that has not as yet received much judicial consideration," he said, "but it is an immensely important question."[338] Dittenhoefer pointed to quotes by Thomas Jefferson, law journal articles, and treatises by experts on the rules of evidence – non-judicial precedents he urged the judge to consider.[339] He talked about changes in society, about how the telegraph and telephone led to changes in the law, and how journalism played an increasingly important role as a check on wrongdoing and corruption.[340] "Some judge, some court, will have the honor at some time to lay down the all-important principle which I am now asking this court to establish," Judge Dittenhoefer[341] told Judge Bradley. "So I now ask this court, on the ground of public policy, to extend the principle of a privilege to the profession of journalism."[342]

On the trial's third day, co-counsel Wilson presented the defense's closing arguments and a motion to direct a verdict of not guilty.[343] After reviewing legal points that had been made in filings and in court, Wilson returned to the issue of a testimonial privilege for journalists. This former judge engaged Judge Bradley in a remarkably candid discussion about judicial precedents and how the law responds – or fails to respond – to changes in society.[344] "I admit now we have no precedent upon which

[335]*Id*.

[336]*Id.* at 167–71.

[337]*Id.* at 177–80.

[338]*Id*. at 178.

[339]*Id.* at 178–80. Judge Bradley said, "I do not see how you could have a free government without a free press." Dittenhoefer replied: "That, of course, is so. The principle was stated in that epigrammatic and concise way, a method often adopted by Mr. Jefferson in the statement of his propositions." *Id*. at 178.

[340]*Id*. at 178. He pointed to judicial precedents for changing the law to reflect changing times: "We are making wonderful progress every day, requiring the application of new principles of law. Some court always must make the beginning. The creation of the telegraph and telephone have compelled the courts to extend the old law of common carrier to their operations." *Id.*

[341]He always was referred to as "Judge Dittenhoefer" in the press, though he had not been a judge for many years.

[342]SHRIVER, *supra* note 56, at 178.

[343]*Id*. at 202–11.

[344]*Id*. at 209–11. He criticized the inflexibility of the courts: "The question is, when new conditions arise, whether the courts are to be limited in dealing with these new conditions and the precedents that have been established in respect of other matters and under different conditions and for certain matters of public policy." *Id.* at 211.

we can go in this case," he began.[345] He then pointed out that while common-law judges had never recognized such privileges as the doctor-patient privilege or the priest-penitent privilege, state legislatures had stepped in to create what the courts would not.[346]

In a remarkable stroke of creative lawyering, Wilson then directed the judge's attention to the nation's one and only shield law. "In the State of Maryland," he said, "a statute has been enacted by which this privilege is extended to this class of persons, newspaper men."[347] The statute was the strongest sort of precedent he could cite. He was asking the judge to analogize a common-law rule from the statute.

"Why is such legislative action necessary?" Wilson asked, and answered that it was because no court had addressed the question in light of modern journalism.[348] He, like Dittenhoefer, discussed the role of the press in an increasingly complex society. He talked about the need to protect confidential sources of information in order to encourage whistleblowers to come forward.[349] He asked rhetorically if the time had not come to create a journalist privilege "either through judicial action or through legislative action."[350] The broad question in this case, he said, "is whether the courts will themselves do that or whether the courts will lag behind and ... wait until the legislative authority has commanded the courts to do that which the courts ought to do."[351] The related narrow question, he said, was whether seeking Shriver's source was pertinent.[352] The defense rested, and the court adjourned.[353]

Judicial Precedent Set

On May 18, Judge Bradley made journalist-privilege history by thoroughly exploring the question of whether journalists should be privileged as a distinct class.[354] He pointed out that only the attorney-client

[345]*Id*. at 210.
[346]*Id*.
[347]*Id*. at 209.
[348]*Id*. at 210.
[349]*Id*. at 210–11.
[350]*Id*. at 211.
[351]*Id*.
[352]*Id*. He concluded: "I submit that upon the one question alone ... this motion that we have made should prevail." *Id*.
[353]*Id*.
[354]SHRIVER, *supra* note 56, at 212. The significant passage of his decision read in full:

> Communications by client to attorney in the course of professional employment, and confidential communications between husband and wife, are privileged at common law, and protected from disclosure in judicial proceedings. In some of the States of the Union, this protection has been extended by the statute to confidential communications made by a patient to his physician in his professional capacity, and to information obtained by the

and husband-wife privileges were recognized at common law.[355] He acknowledged that states, through statutes, had extended testimonial privileges to the doctor-patient and priest-penitent relationships.[356] He acknowledged that the Maryland shield law similarly extended the privilege to journalists, but he pointed out that it was the only one of its kind in the nation.[357] He also pointed to the lack of a shield law at the federal level, which would be controlling in his court.[358] He acknowledged the defense team's urging that he analogize from the state statutes.[359] He concluded, however, that he could not draw a distinction between journalists and non-journalists as a matter of common law.[360]

Nevertheless, Judge Bradley directed the jury to return a verdict of not guilty.[361] He reached this result on two grounds the defense team had argued. On a technical point, he agreed that the Senate committee had not followed correct procedures in issuing a summons to Shriver to appear.[362] On a more substantive point, he agreed that seeking the reporter's source was not pertinent to the committee's investigation.[363] After quoting a dictionary and citing several treatises on the rules of evidence, he deduced that "pertinent" was sufficiently synonymous with "relevant" to conclude that the committee had run afoul of accepted rules of evidence by seeking the name of the source, rather than

> physician in his attendance upon the patient. It has been extended by state in some of the States to communications made to spiritual advisers. It appears that communications made to editor, or reporters, or correspondents of newspapers, have received such legislative protection in but one of the States. The Congress of the United States has not yet so yielded to the force of the demand of public policy for such legislation, strenuously urged in argument, as to provide a statute protecting newspaper men, called as witnesses before a Congressional committee, or before a court of justice, from disclosing relevant facts within their knowledge. Until it does, I will not be able to distinguish the public duty of the newsgatherer from that of other individuals to make such disclosures when called to do so by a court of justice, or by an inquisitorial body having jurisdiction of the subject.

Id.

[355]*Id.*

[356]*Id.*

[357]*Id.*

[358]*Id.*

[359]*Id.*

[360]*Id.*

[361]*Id.* at 216.

[362]*Id.* at 213–14.

[363]*Id.* at 214–15.

the information provided by the source.[364] He admonished the committee for having undertaken, in modern parlance, a fishing expedition: "If a Congressional committee sees fit to roam in the realm of collateral, irrelevant, immaterial, impertinent matters, the witness who refuses to accompany it will not be amenable to the penalties of this statute."[365]

On Judge Bradley's direction, the jury returned a verdict of not guilty, Shriver's bail was canceled, and he was discharged.[366] In a similar memorandum, Judge Bradley directed a verdict of not guilty for Edwards.[367] The journalists had won.

Rhetoric in the Press

The national press covered Shriver's trial day by day and never failed to underscore the fact that Shriver, unlike Chapman and other Sugar Trust witnesses, was a journalist.[368] The press seized on the argument that the court should use the occasion to establish a privilege.[369] *The Washington Post* indicated hope that the court might "establish a precedent as to liberty of the press."[370]

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[364]*Id*. The judge explained his logic:

> The reason given by the committee for its insistence upon an answer . . . was that, given the name of the member of Congress, he could be summoned and compelled (to testify). . . . This shows that an answer giving the name might have been a matter of convenience to the committee, but it does not indicate that the name would be a material fact in proving or disproving the charges specified.

Id.

[365]*Id*. at 215.

[366]*Id.* at 216.

[367]*See Acquitted Both Men, Shriver and Edwards Not Legally Summoned, The Questions Not Pertinent*, WASH. POST, June 19, 1897, at 2.

[368]*See Trial of John S. Shriver, Another Recusant Witness of the Sugar Investigation in Court Before Judge Bradley, A New York Newspaper Man*, N.Y. TIMES, June 16, 1897, at 4. The article did a remarkably thorough job of summarizing Dittenhoefer's legal arguments in his motion to dismiss. It ends with his citation of a legal treatise for the proposition that "those persons which are the channel by means of which" wrongdoing is communicated to the public should not be disclosed or punished – the essence of the free-flow-of-information argument that would be made for the same proposition today. Id.

[369]*See Shriver's Trial Goes On, Judge Dittenhoefer Advances Another Ground for Dismissal – For the Protection of Newspaper Men*, N.Y. TIMES, June 18, 1897, at 4. It noted that Edwards attended along with Charles Emory Smith, Edwards' boss at the *Philadelphia Press* and the officer who presented the resolution to start a shield law campaign at the League of Press Clubs' meeting. *Id*.

[370]*See Wait Court's Decision, End of Argument on Motion to Dismiss*, WASH. POST, June 18, 1897, at 10.

Coverage of Judge Bradley's ruling prompted a deluge of articles coast to coast in newspapers large and small.[371] Stories in the popular press praised the decision as a victory for journalism in general.[372] While legal writers emphasized that the decision rested on technical grounds, particularly the defective summons,[373] the journalistic press seized on the result as establishing a broader precedent.[374] Most stories quoted or paraphrased Dittenhoefer's interpretation of the case: By accepting the argument that the identity of Shriver's source was not relevant, a precedent was set whereby a journalist asked to reveal a source in a future case might argue and win on the same grounds.[375] "It practically amounts to the same thing" as a journalist privilege, Dittenhoefer wrote in a follow-up essay in Shriver's newspaper, *The Mail and Express*.[376]

While legal writers condemned the result as an invitation to print libelous material with impunity,[377] the press hailed it as progress for a maturing profession and for the normative ideal of freedom of the press. A multi-deck headline in *The Mail and Express* neatly encapsulated those two rhetorical frames: "RIGHTS OF THE PRESS, Judge Dittenhoefer Discusses Acquittal of Mr. Shriver, VICTORY FOR JOURNALISM, The Newspaper Has Become a Most Potent Factor in the Detection of Crime and the Correction of Wrongs."[378] *The Boston Post* likewise framed its coverage, in headline and text, as "rights of the press" and the "right" of a journalist to protect confidential sources.[379] *The Washington Post*'s interpretation, under the headline "The Liberty of the Press," went so far as to claim that Judge Bradley "has affirmed (for the press) its right and its duty as one of the great bulwarks of a free government to be ever vigilant, fearless and the faithful servant of the people."[380] *The Democrat and Chronicle* in Rochester, New York, asserted that to force any journalist to reveal a source was "a clear violation of the constitutional right of free criticism of existing

[371]*See* SHRIVER, *supra* note 56, at 250–61. The book memorializing the trial, published by Shriver's *Mail and Express*, compiled eighteen articles drawn from a variety of sources.

[372]*See id.*

[373]*See, e.g.*, *Current Topics*, 55 ALB. L.J. 425, 426 (1897).

[374]*See Shriver and Edwards Free*, N.Y. TIMES, June 19, 1897, at 3.

[375]*See Acquitted Both Men, Shriver and Edwards Not Legally Summoned*, WASH. POST, June 19, 1897, at 2.

[376]SHRIVER, *supra* note 56, at 250–51.

[377]*See Current Topics*, 56 ALB. L.J. 37, 38 (1897–98).

[378]The capitalization was in the original. *See* SHRIVER, *supra* note 57, at 250.

[379]*See id*. at 260.

[380]*See id*. at 259.

government."[381] These non-judicial actors, as Gerhardt's theory would predict, were making "constitutional judgments" that courts and legislatures in 1897 were only beginning to "imbue with normative authority."[382]

DISCUSSION AND CONCLUSIONS

"There is . . . no such thing as an inherently 'frivolous' legal argument considered transhistorically," Jack Balkin and Sandy Levinson have written.[383] "The judgments of well-socialized lawyers about what is more plausible and less plausible . . . are not fixed. Rather, they evolve over time in response to historical and political forces in addition to the inevitable internal changes in legal doctrine."[384] Balkin has proposed a "Spectrum of Plausibility" to describe how the claims of non-judicial actors gain acceptance over time: Claims on the Constitution proceed from (1) completely "off the wall," to (2) "interesting but wrong," to (3) "plausible but unconvincing," to (4) "plausible and possibly right," to (5) "the better argument," to (6) "natural and completely obvious."[385]

On this view of legal history, you could draw a line from the arguments made by the Shriver-Edwards legal team in 1897 to the parallel arguments made by Justice Potter Stewart in his famous dissent in *Branzburg v. Hayes* seventy-six years later.[386] They argued that (1) the names of Shriver's and Edwards' sources were not relevant to the Senate committee's investigation of the Sugar Trust scandal; (2) the committee had not exhausted other sources for its investigation, such as members of the Senate; and (3) knowing the names of the reporters' sources did not go to the heart of the bribery case under investigation.[387] The key

[381]*Current Topics, supra* note 373, at 432 (quoting *The Democrat and Chronicle* editorial).

[382]*See* Gerhardt, *supra* note 46, at 715.

[383]Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of* Bush v. Gore, 90 GEO. L.J. 173, 180 (2001). "Indeed," they wrote, "one of the most remarkable features of any study of American legal history is watching arguments migrate from the category of 'frivolous' or 'unthinkable' . . . to being so overwhelmingly persuasive that to criticize them is to be tarred with the brush of 'frivolity.'" *Id*.

[384]*Id*. at 179.

[385]*See* Balkin, *supra* note 91, at 52.

[386]408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

[387]*Id*. at 743. Stewart proposed a three-part test later adopted by many federal courts:

> [W]hen a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

difference between their three-pronged argument and Stewart's proposed three-part test in *Branzburg* is that they could not plausibly have staked that claim on the First Amendment. In 1897, that would have seemed totally "off the wall," to borrow Balkin's term. By 1972, in *Branzburg*, it was at least plausible and possibly right.

Michael Gerhardt's theory of non-judicial precedents can track the progress of claims about constitutional meaning by focusing especially on the first movers in the evolutionary process Balkin described. Non-judicial actors operating outside courts often establish non-judicial precedents whose functions include "settling legal disputes, serving as modes of constitutional argumentation, facilitating national dialogues on constitutional law ... [and] shaping national identity, judicial doctrine, and constitutional culture and history."[388] Non-judicial precedents – including norms and customs, statutes and regulations – can remain operable outside court-made law, or they can be absorbed into constitutional doctrine.

When the Shriver-Edwards affair began in 1894, journalists were at the mercy of often-hostile common-law judges.[389] So after a century of defeats, they developed a two-prong strategy: take their case to legislators in hopes of finding statutory solutions and frame the protection of sources as serving a public good related to the Founders' vision of a free press. Such a strategy, viewed through Gerhardt's model, would be a way of "implementing constitutional values."[390]

Shriver and Edwards were the only journalists ever indicted under the Contempt of Congress Act of 1857. To fight back, these prominent reporters retained a judge-turned-celebrity lawyer to rally public support. By seizing on their headline-generating plight and tying it to a corruption scandal in Washington, these non-judicial actors were, in accord with Gerhardt's theory, facilitating a national debate about constitutional values.[391]

The journalistic press was well positioned for such a fight in the late 1890s. Legal historian Eric Easton has identified this period as the birth of "The Press" as a special interest that could command attention in the

Id.

[388]*See* Gerhardt, *supra* note 46, at 717.

[389]*See* RABBAN, *supra* note 64, at 15 ("No group of Americans was more hostile to free speech claims ... than the judiciary, and no judges were more hostile than the justices on the United States Supreme Court.").

[390]Gerhardt, *supra* note 46, at 775.

[391]*Id*. at 765–70.

corridors of power.[392] In the same period, Robert Spellman has shown,[393] a defiant stance struck by individual journalists to protect sources had hardened into an industry-wide norm. Still, in Gerhardt's model, such a non-judicial precedent would be susceptible to challenge because it would not carry the force of law.[394]

Journalists set out to change that in 1895. After Shriver and Edwards lost in a federal court and the Supreme Court refused to hear their plea for a writ of *habeas corpus*, journalists mobilized. Using the annual meeting of the International League of Press Clubs as a platform, leaders launched a national campaign to press state legislatures and Congress to adopt statutes that would become known as shield laws. Success came a year later in Maryland with adoption of the nation's first shield law. That success can be explained partly by a connection that has remained hidden until now: Shriver was from one of Maryland's most powerful families, had worked for years at *The Baltimore American,* and was a friend of its powerful publisher, General Felix Agnus, who led the nationwide campaign. Gerhardt's theory would count passage of the law as a significant development, for it marked the instantiation of a professional norm into law – the very model of a non-judicial precedent.[395]

That statute had the potential to influence court-made law. To borrow Judge Roger Traynor's metaphor, Maryland had launched a statute into a common-law orbit, and its presence could exert influence on judges confronting the journalist-privilege question for the first time.[396] That was the hope of the Shriver-Edwards defense team during the reporters' appeal in 1897. In a remarkably candid three-day exchange with the judge in the case, the lawyers pointed to the Maryland statute as evidence of popular and elite support for the reporters' claim to a privilege, and they expressly urged the judge to analogize a common-law rule based on the statute.

[392]Eric Easton, *The Press as an Interest Group: Mainstream Media in the United States Supreme Court*, 14 UCLA ENT. L. REV. 247 (2007).

[393]Spellman, *supra* note 9, at 41–43.

[394]Gerhardt, *supra* note 46, at 763.

[395]*See id*. at 715.

[396]Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U. L. REV. 401 (1968). Traynor explained:

> It should not surprise us that (some) judicial rules analogized from statute are at one with other judicial lawmaking. They always have been, despite the protestations of those who would have us believe that judicial rules and statutory rules are like set pieces of an automaton clock, springing from separate covertures to make wooden appearances at separate times.

Id. at 415.

This episode precisely fulfilled a prediction of Gerhardt's theory. The campaign for shield laws in the states could not have directly helped Shriver and Edwards because their case was being heard in a federal court. Instead, the defense team was counting on the signaling function of such a strong non-judicial precedent on the books. "Non-judicial actors send signals to courts," Gerhardt has written, and "non-judicial actors also seek to construct precedents to influence not only the agendas of their respective states but also the agendas of other states and the federal government."[397]

At trial, the Shriver-Edwards defense team made two constitutional arguments based on the Fourth and Fifth amendments. More important, they laid out an elaborate argument based on freedom of the press: that journalism had grown reliable enough to be considered a public utility; that journalism played a vital role as an intermediary between the people and their government; that journalism was an important check on government power. We would recognize these as First Amendment rationales, though lawyers in 1897 could not plausibly have argued on that basis in court. Instead, according to Gerhardt's theory, they were facilitating a dialogue about constitutional values.[398]

The trial ended with an order to the jury to find the reporters not guilty. Like Justice Stewart in his holding in *Garland v. Torre* in 1958,[399] Judge A.C. Bradley conceded that there might be merit in the policy argument for protecting reporters' sources, though he said that it should be left to the legislatures. Further, like Justice Stewart in his dissent in *Branzburg*, Judge Bradley based his decision partly on his belief that the names of the sources were not relevant. The judge emphasized that he was not establishing a journalist privilege as a matter of common law, but headlines nationwide hailed the decision as a victory for the "rights of the press" and the "rights of journalists." This same sort of rights rhetoric suffused the shield-law campaign. Journalists hailed the passage of the Maryland law as a victory for "freedom of the press," one that secured a journalist's "right" to protect his or her sources.

Gerhardt would not chastise those journalists for blurring the lines between common law, constitutional law and statutory law. Telling journalists in the 1890s that only courts conferred rights while legislatures made public policy would have been a distinction without a difference. At a time when courts had said next to nothing about the First Amendment, these non-judicial actors were first movers in defining the aspirations of a free press. They were, as Gerhardt's theory would predict,

[397]Gerhardt, *supra* note 46, at 765–66.
[398]*Id*. at 778–79.
[399]Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

shaping national identity[400] and shaping legal history.[401] Journalists, not judges, were establishing a concrete norm they believed would give substance to the vague promise of the Press Clause. A legislature, not a court, instantiated that norm into law for the first time. The Maryland shield law, on Gerhardt's view, is an example of how statutes can, and do, embody deeply felt constitutional values. Statutes help democratize constitutional law.

[400]Gerhardt, *supra* note 46, at 774.
[401]*Id*. at 772.