JOURNALIST PRIVILEGE IN 1929: THE QUEST FOR A FEDERAL SHIELD LAW BEGINS

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"The difficulty with much constitutional scholarship," Professor Michael Gerhardt has said, "is that it fails to account for, much less examine, the interplay between judicial and non-judicial precedents." Gerhardt's theory of "non-judicial precedents" asserts that rules made outside courts – norms, regulations, statutes – shape constitutional issues long before courts intervene. The question of whether the First Amendment should provide a testimonial privilege to journalists is a case in point: No federal court addressed that issue until 1958, but journalists had framed it as a constitutional issue for decades – even as they lobbied for statutory shield laws.

The primary goal of this paper is to apply Gerhardt's theory to an early turning point in journalist-privilege history: the first attempts, in 1929, to persuade Congress to adopt a federal shield law. On Gerhardt's view, it represented a valuable opportunity for non-judicial actors to lead a national dialogue about constitutional meaning and help define freedom of the press, largely undefined by courts at the time.

A second goal is to use original historical research to correct the record about these events and illuminate their significance. This history will emphasize the role that non-judicial actors – including William Randolph Hearst and Fiorello La Guardia – played in leading a national debate about journalism, and, as Gerhardt's theory would predict, the meaning of the First Amendment. It also will tie these events to a raft of shield laws adopted in the 1930s and 1940s, a link that never has been shown.

Keywords: journalist privilege, shield law, testimonial privilege

I. INTRODUCTION

While the legal landscape of the 19th century was dominated by common-law judges shaping and reshaping common-law precedents, the 20th century saw the rise of statutory law as the engine of an increasingly complex administrative state.[1] Judge-turned-academic Guido Calabresi famously lamented in 1999 that

[1] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1999).

courts were "choking on statutes."[2] Yet, despite its prevalence and importance, statutory law has remained largely understudied and undertheorized in the academy.[3]

Scholars who specialize in statutory law have criticized constitutional-law scholars for focusing too narrowly on court decisions, especially those of the U.S. Supreme Court, and for failing to account for the work that statutes do in giving practical meaning to broad constitutional principles. Eminent scholars such as Peter M. Shane and William N. Eskridge, Jr., working separately, have theorized a sort of "statutory constitution" that operates in concert with court-made law.[4] Both have proposed envisioning a broad framework that joins the "large C Constitutional law" created by courts with a "small c constitutional law" created by statutes that operationalize constitutional principles such as equality and non-discrimination.[5] The most obvious example of their thesis might be to say that the promise of *Brown v. the Board of Education*[6] would have been meaningless without the mechanism of the Civil Rights Act of 1964.[7] Both Shane and Eskridge have used voting rights as another obvious example: You cannot understand the evolution of that right by studying only court decisions; those must be situated in a complex matrix of federal and state rules and regulations, starting with the Voting Rights Act of 1965.[8] Court-myopic scholarship, they have argued, is blind to the reality of how complex and dynamic America's constitutional system is.[9]

In the realm of communication law, scholar Marouf Hasian, Jr., has contended that by focusing narrowly on the internal legal narratives found in court documents while ignoring the external narratives sounding in the wider culture – including in statutory law – constitutional scholars give a false

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[2] *Id.* at 1.

[3] WILLIAM N. ESKRIDGE, JR. DYNAMIC STATUTORY INTERPRETATION 1-8 (1994). *See also* WILLIAM N. ESKRIDGE, JR., AND JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010) (laying out a new theory that integrates statutory law within a constitutional framework).

[4] Peter M. Shane, *Voting Rights and the "Statutory Constitution,"* 56 L & CONTEMPORARY PROBLEMS 243 (1993),; William N. Eskridge, Jr., *American's Statutory "Constitution,"* 41 U.C. DAVIS L. REV. 1 (2007-2008).

[5] *See* SHANE, *supra* note 4, at 243-45; ESKRIDGE, *supra* note 4, at 3-6.

[6] 347 U.S. 483 (1954).

[7] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

[8] Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973, 1973a-1973p). *See also* SHANE, *supra* note 4, at 252-69; ESKRIDGE, *supra* note 4, at 12-17.

[9] Shane has summed up the problem this way: "One way of understanding the capacity of nonjudicial 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." *See* SHANE, *supra* note 4, at 243.

impression of how rights have evolved and who played a role.[10] "In such scenarios, it is empowered individuals with 'sublime' powers who help us obtain fundamental rights," he has written. "The roles of other social agents in the communicative processes are bracketed out so that we can focus on the key words of knowledgeable elites who have handed down this wisdom in the precedents and seminal texts."[11]

The boundary between "legal" and "popular" discourses is permeable, Hasian has argued; vernacular legal discourse – how ordinary people talk about the law and make novel claims on the Constitution – always precedes court-conferred recognition of rights. Privacy law provides a paradigmatic example. The ideograph "right to privacy" was born, nurtured and given meaning wholly outside the courts by a variety of non-judicial actors, from activists and social critics to newspaper editorialists, popular writers and legal scholars.[12] The idea of and demand for such a "right" was firmly embedded in the culture when the U.S. Supreme Court finally began to recognize such a right in 1965.[13] "The supposed 'extra-judicial' forces that operated within the broader public community helped to provide a series of key rationales for accepting the 'right to privacy,'" Hasian concluded.[14] "While orthodox legal scholars pride themselves on the autonomy of the 'rule of law,' many of their arguments are based on selective appropriations of tropes and other prefigurations that have circulated in the larger rhetorical culture for years."[15]

Michael Gerhardt's theory of non-judicial precedents tries to solve the problem identified by these scholars by elevating the role that non-judicial actors play in creating the rules, norms, customs, and traditions that almost always precede recognition in court-made law.[16] "Virtually every question of constitutional law that the Supreme Court hears," he has written, "already has been considered by one or more non-judicial actors."[17] Gerhardt has long acknowledged the role that vernacular legal discourse outside the courts can play in articulating normative aspirations about the Constitution.[18]

Put in the language of Gerhardt's theory of non-judicial precedents,[19] journalists have tried for decades to "send signals to courts"[20] about their belief

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[10] Marouf Hasian, Jr., *Vernacular Legal Discourse: Revisiting the Public Acceptance of the "Right to Privacy" in the 1960s*, 18 POL. COMM. 89 (2001).
[11] *Id.* at 90.
[12] *Id.* at 91-101.
[13] *Id.* at 102.
[14] *Id.*
[15] *Id.*
[16] Michael Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 714 (2008).
[17] *Id.* at 746.
[18] Michael J. Gerhardt, *Constitutional Decision-Making Outside the Courts*, 19 GA. ST. U. L. REV. 1123 (2002-2003).
[19] *See* Gerhardt, *supra* note 16.

that "freedom of the press" should include protection of confidential sources. Individual journalists have gone to jail rather than reveal their sources, thereby creating a kind of non-judicial precedent. Journalists have ensconced the sanctity of protecting sources in their professional code of ethics, creating a stronger non-judicial precedent.[21] Legislatures in many states have adopted statutory shield laws barring compelled disclosure, the strongest type of non-judicial precedent because statutes carry the force of law.

Gerhardt's theory illuminates the communicative nature of these non-judicial activities. "Non-judicial precedents convey agendas just as judicial precedents do," he has observed,[22] and "they send signals in part to make [courts] aware of pertinent non-judicial precedents."[23] They also facilitate dialogues "designed to educate the public, or others, about constitutional issues."[24] Furthermore, non-judicial precedents can be "instrumental in constructing national identity" and can be deployed in "arguments about what makes the American people or nation distinctive."[25]

Four aspects of Gerhardt's theory seem especially relevant to the early history of the journalist-privilege issue: 1) Non-judicial precedents can help set the public agenda by drawing attention to an issue in need of resolution;[26] 2) non-judicial precedents can help facilitate dialogue about a Constitutional question, especially a novel one that courts have not directly addressed;[27] 3) non-judicial precedents can help to implement Constitutional values by interpreting broad concepts, such as freedom of the press, into workable rules – with or without a court's imprimatur;[28] and 4) non-judicial precedents can help shape the direction of legal history.[29]

The primary goal of this paper will be to apply Gerhardt's theory to an early turning point in journalist-privilege history: the first attempts, in 1929, to persuade Congress to adopt a federal shield law.[30] This move significantly raised the stakes in the long-running debate over journalists' claims for a need to protect confidential sources. With only one state-level shield law on the statute

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[20] *Id.* at 765-66.

[21] *See* GEORGE SELDES, FREEDOM OF THE PRESS 370 (1st ed. 1935) (reproducing the code of ethics adopted in 1932 by the American Newspaper Guild). The Society of Professional Journalists' current code of ethics includes, as its fourth edict, "Keep promises." *See* SPJ Code of Ethics, http://www.spj.org/ethicscode.asp (last visited July 12, 2011).

[22] *Id.*

[23] *Id.*

[24] *Id* at 767.

[25] *Id.* at 774.

[26] *Id.* at 765.

[27] *Id.* at 766.

[28] *Id.* at 775.

[29] *Id.* at 772.

[30] A Bill Exempting Newspaper Men From Testifying With Respect to the Sources of Certain Confidential Information, S. 2110, 71st Cong., 1st Sess. (Oct. 30, 1929).

books at the time,[31] a well-organized campaign in Washington raised the specter of the legislative branch intervening in an issue long controlled by the judiciary. According to Gerhardt's theory, it also represented an opportunity for non-judicial actors to help implement the Constitutional value of freedom of the press, which was largely undefined by courts at that time.[32]

A second important goal of this paper will be to correct the historical record about the events of 1929 to illuminate their significance. Although Congress has debated adopting a shield law off and on for 80 years and although it has been the focus of intense debate in the last six years,[33] the campaign of 1929 has remained but a footnote.[34] Some mid-century media scholars took note of these events,[35] but the story has remained largely untold outside of textbooks

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[31] Maryland was unique from 1896 to 1933. *See, e.g.*, David Gordon, *The 1896 Maryland Shield Law: The American Roots of Evidentiary Privilege for Newsmen*, JOURNALISM MONOGRAPHS, No. 22 (Feb. 1972).

[32] The first significant Press Clause case to come before the U.S. Supreme Court did not occur until 1907, and the court denied that the First Amendment protected journalists from contempt convictions for publishing articles critical of court decisions, so-called "contempt by publication" convictions. *See* Patterson v. Colorado, 205 U.S. 454 (1907). The Court would not use the First Amendment to curtail this type of conviction, also called indirect contempt, until 1941. *See* Bridges v. California, 314 U.S. 252 (1941). The Court beat back an effort to quash subpoenas to journalists on constitutional grounds in 1915, though the claim was based on the Fifth Amendment's guarantee of protection against self-incrimination. *See* Burdick v. United States, 236 U.S. 79 (1915). The Court had used a First Amendment speech case to begin the process of "incorporating" the First Amendment into the Fourteenth Amendment's liberty interest under the Due Process Clause in 1925, but it should be remembered the Court still ruled in favor of government control over the speaker. *See* Gitlow v. New York, 268 U.S. 652 (1925), A press-protective First Amendment did not truly begin to come into view until the Court struck down Minnesota's so-called "gag law" two years after the events described in this paper. *See* Near v. Minnesota, 283 U.S. 697 (1931).

[33] *See, e.g.*, Anthony L. 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) (one of many recent articles calling on Congress to adopt a federal shield law to respond to a growing number of subpoenas issued against journalists in the face of diminishing protection in federal courts).

[34] *See, e.g.*, Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 241 (1973-1974). The slightly erroneous footnote in the Ervin article has been reproduced frequently. *See, e.g.*, Leslie Siegel, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 OH. ST. L. J. 469, 507 (2006).

[35] *See, e.g.*, Walter A. Steigleman, *Newspaper Confidence Laws: Their Extent and Provisions*, 20 JOURNALISM Q. 230, 234 (1943).

with few or no references.[36] The history reconstructed here will emphasize the role that non-judicial actors – including William Randolph Hearst and Fiorello La Guardia – played in leading a national debate about journalism, sources and, as Gerhardt's theory would predict, the meaning of freedom of the press. It also will tie these events directly to a raft of shield laws adopted in the 1930s and 1940s, a link that never has been shown (see APPENDIX).

The study will show that journalists and press advocates in 1929 were better organized and more forceful than ever in their response to defeats in court. They more assertively sought to sway public and elite opinion by emphasizing journalism's role as a public good; they were in the process of abandoning unsuccessful legal arguments, such as Fifth Amendment claims against self-incrimination; they were more explicitly framing the journalist-privilege question in First Amendment terms; they seemed more ready than ever to turn away from the courts and to seek relief in the legislatures; and they had no doubts that what they were doing was helping to interpret the First Amendment.

The first part of this paper will briefly sketch the position of journalists in society as of 1929 and the press's legal footing at that time. The second part will sketch the key non-judicial actors who helped drive the events of 1929. The third part will reconstruct the events leading up to and growing out of this initial drive for a federal shield law. The final part will offer an interpretation of these events through the lens of Gerhardt's theory of non-judicial precedents.

II. POSITION OF THE PRESS IN SOCIETY

The journalistic press was at the height of its powers in the late 1920s, bolstered by strong economic conditions and improved government relations. Although the press was still fighting fundamental legal battles, it could point to some significant victories in this era. On the journalist-privilege issue, the press and its advocates appeared to be losing ground in the courts or, at the least, standing still.

A. Image and Influence

Nineteen-twenty-nine was a record-setting and ground-breaking year for the news industry. *The New York Times* reported a daily circulation of 426,007 and a Sunday circulation of 706,927.[37] *Editor & Publisher*'s annual industry survey reported that aggregate advertising revenue had reached a record of $240

[36] The fullest account of these events, running about two pages, was included in a journalism textbook, so scholars have no citations to lead them to further resources. *See* CURTIS D. MACDOUGALL, NEWSROOM PROBLEMS AND POLICIES 320 (1949).

[37] *Circulations, Rates and Personnel of U.S. Daily Newspapers*, EDITOR & PUBLISHER, Jan. 25, 1930, at 76. For the sake of brevity and convenience, Editor & Publisher shall be referred to in notes as E&P.

million for the year.[38] Newspapers such as the *San Antonio Express* were opening million-dollar headquarters.[39] Newspapers were investing in new-fangled methods of reporting, including buying and manning private airplanes.[40] In November of that year, William Randolph Hearst's Fox Film Corp. opened a theater in New York devoted solely to showing news reels, back to back, a forerunner to today's 24-hour news channel.[41]

The press also enjoyed heightened prestige on the national political scene. After suffering through the one of the most repressive eras in its history, during World War I,[42] the press began to push back during the 1920s.[43] Nothing before had cemented the popular image of the press as a check on government corruption like coverage of the Teapot Dome oil-and-kickback scandal, which broke into the headlines early in President Warren G. Harding's administration and remained there through the end of the decade.[44] Paul Y. Anderson of the St. Louis *Post-Dispatch* was one of several reporters whose work was cited as evidence by Congressional investigators,[45] and he ultimately won a Pulitzer Prize for it in 1929.[46] The years-long scandal peaked on Oct. 25 that year, when Albert Fall, former interior secretary under then-dead President Harding, was convicted and sentenced to a year in prison with a $100,000 fine – the first Cabinet member ever brought down by the press.[47]

One explanation for an empowered press during the 1920s was improved relations with the White House. While Woodrow Wilson's presidency had ended on a bitter note, especially after the United States declined to join the League of

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[38] *See 1929 Record Year for National Copy; $240,000,000 Spent, Ad Bureau Says*, E&P, Jan. 11, 1930, at 12.

[39] C.M. Meadows, Jr., *San Antonio Dailies in New Plant*, E&P, Oct. 5, 1929, at 12.

[40] Jerome H. Walker, *Planes Broadened News Field in 1929*, E&P, Dec. 28, 1929, at 9.

[41] John F. Roche, *First Theater Showing All-News Films Opens in New York*, E&P, Nov. 9, 1929, at 28. The theater operated 10 a.m. to midnight, and news buffs paid a quarter for admission.

[42] *See, e.g.*, Margaret A. Blanchard, *"Why Can't We Ever Learn?" Cycles of Stability, Stress and Freedom of Expression in United States History*, 7 COMM L. & POL'Y 347-378 (2002).

[43] WILLIAM L. RIVERS, THE ADVERSARIES: POLITICS AND THE PRESS 24 (1970) (recalling that members of the press had "discovered the full thrust of their power" during the Teapot Dome scandal).

[44] *See* FRANK LUTHER MOTT, AMERICAN JOURNALISM: A HISTORY, 1690-1940 700 (3d Ed. 1962).

[45] *Id.*

[46] *See* The Pulitzer Prizes for 1929, *available at http://www.pulitzer.org/ awards/1929.*

[47] *See* David H. Stratton, *Behind Teapot Dome: Some Personal Insights*, THE BUSINESS HISTORY REVIEW, Vol. 31, No. 4 (Winter 1957), at 385-402.

Nations,[48] the arrival of Harding was greeted by cheers in the press corps.[49] Harding was a newspaperman-turned-politician, and upon his inauguration, 600 newspaper editors from around the country presented him with an editor's chair for the White House.[50] Even after scandal engulfed his presidency, the press carefully protected Harding, often by casting him as a naïf surrounded by crooks.[51] When Calvin Coolidge took the helm in 1923, he vowed to keep press relations cordial and continued Harding's custom of frequent meetings with the press, though he imposed a strict rule: He was never to be quoted. Not only did this help create the image of "Silent Cal," but it also drove reporters to shift their focus from the White House to Congress;[52] the Senate became the coveted beat.[53] Even Herbert Hoover enjoyed a friendly relationship with the press, at least for a time. He had owned an interest in the Washington *Herald* until 1922, and he was a reliable source for the press during his stint as commerce secretary in Coolidge's administration. His troubles with the press did not begin in earnest until the stock market crash in late October 1929.[54]

B. Legal Footing

Just as in the 1890s, the 1920s saw a rising tide of libel lawsuits.[55] It became common in this period for large newspapers to hire in-house legal

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[48] *See* RIVERS, *supra* note 42, at 24. Rivers recalled: "[Wilson] was supersensitive, and he blamed the correspondents for reporting criticism of his Administration voice by Congress. ... He gradually withdrew into a shell of persecution." *Id.*

[49] *See* MOTT, *supra* note 43, at 721.

[50] *See Harding Gets Gift of Editorial Chair, Offering of Friendship From 600 Editors Is Made From Timber of the Old Revenge*, N.Y. TIMES, July 14, 1921, at A2. Sen. Arthur Capper of Kansas was quoted saying:

> We believe the American press, exemplified by your own honorable part in its upbuilding, does much to make men more thoughtful and considerate and upright in the forming of the highest ideals of American citizenship. That the newspaper men have complete confidence in your ability and determination to measure up to the great demands of the time is shown in this spontaneous expression today.

Id.

[51] *Id. See also* RIVERS, *supra* note 42, at 25. Rivers wrote: "Toward the end, as the correspondents and the Congress revealed more of the scandals of his subordinates, Harding seemed to withdraw from life. He died in 1923, leaving a memory of a man who was only gradually becoming aware that he had surrounded himself with thieves."

[52] *See* MOTT, *supra* note 43, at 722.

[53] *See* RIVERS, *supra* note 42, at 25.

[54] *See* MOTT, *supra* note 43, at 722-23.

[55] *See* KATHY ROBERTS FORDE, LITERARY JOURNALISM ON TRIAL 87-88 (2008).

counsel to review sensitive articles for potential problems.[56] By 1929, *Editor & Publisher* magazine reported a stream of new suits and decisions week after week, sometimes lumped under the sub-headline "Libel Epidemic."[57] The tide crested in early 1930 with the largest libel lawsuit ever filed: $48 million in damages sought from nine newspapers and wire services.[58]

Although it is unimaginable today, the press in the 1920s also operated under the onerous threat of so-called indirect contempt, also known as contempt by publication.[59] Writers, editors and cartoonists were routinely cited and fined for criticizing or even questioning judicial decisions.[60] In the late 1920s, fines of up to $1,000 were common.[61] The U.S. Supreme Court in 1907 had ruled that the First Amendment did not protect the press from this sort of contempt citation.[62] So although journalists routinely talked of indirect contempt as a threat to freedom of the press, they were forced to seek relief through statutory law.[63] In 1929, two major lobbying campaigns were launched, in New York[64] and in Washington.[65] At the federal level, Sen. Arthur Vandenberg of Michigan, who was a newspaper publisher, led the effort to adopt a law curtailing judges' powers to hold newspapers in contempt for things they published.[66] There was talk at the time that Vandenburg's bill, if adopted, might also be a solution to the journalist-privilege issue.[67]

Another fundamental legal battle the press was waging in 1929 was against prior restraints – or, as *Editor & Publisher* dubbed the problem,

[56] *Id.*
[57] *See Libel Epidemic, Three St. Louis Dailies Defendants in Actions Totaling $300,000*, E&P, Sept. 28, 1929, at 3.
[58] *See World's Greatest Libel Suit, Asking $45,000,000, Filed by Durant*, E&P, Feb. 8, 1930, at 6.
[59] *See* WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 321-23 (2006).
[60] *Id.*
[61] *See, e.g.*, Jerome H. Walker, *Judges Differ in Views on Contempt, Review of Noted Cases Shows Lack of Unanimity in Administering Law*, E&P, Dec. 7, 1929.
[62] Patterson v. Colorado, 205 U.S. 454 (1907). The Court would not use the First Amendment to curtail so-called indirect contempt until 1941, in Bridges v. California, 314 U.S. 252.
[63] *See, e.g.*, *Revision of Contempt Laws Discussed*, E&P, Nov. 2, 1929, at 32 (stating, "The need for revision of the laws of new York State relating to contempt of court, if the freedom of the press is to be safeguarded" was the topic of a meeting of the Western New York Publishers' Association).
[64] *Id.*
[65] George H. Manning, *Vandenberg Would Limit Power of Judges in Indirect Contempt*, E&P, Sept. 14, at 10.
[66] George H. Manning, *Editors Acclaim Move to Bring Contempt Cases Before Impartial Tribunal*, E&P, Sept. 28, 1929, at 1. The bill died in committee the following year. *See* George H. Manning, *Contempt Bill Held in Committee*, E&P, Feb. 15, 1930, at 5.
[67] *Id.*

"Censorship by Injunction."[68] In one particularly egregious case that year, a streetcar company in Milwaukee sought an injunction to prevent a newspaper from printing a letter to the editor written by a dissatisfied customer; when the newspaper pressed its case in court on First Amendment grounds, the court sided with the streetcar company.[69] The issue was brought to a climax in December that year, when the Minnesota Supreme Court rejected, for a second time, a First Amendment challenge to the state's so-called gag law.[70] Immediately, Robert McCormick, the powerful publisher of the Chicago *Tribune*, vowed to put his paper's influence and money behind an appeal to the U.S. Supreme Court[71] – an effort that led 18 months later to the landmark decision in *Near v. Minnesota*.[72]

Amid these ongoing battles, the press managed to achieve at least one unqualified – and unquestionably important – legal victory in 1929. Since 1789, the Senate had conducted much of its business behind closed doors, in "executive session," including its votes on presidential appointments to the federal bench. That dramatically changed in May 1929, in a bitter fight over President Hoover's appointment of Irvine Lenroot to the U.S. Court of Customs & Patents, not because it was a high-profile post but because Lenroot's name had become tainted by the Teapot Dome oil-and-kickback scandals. Rather than merely report that Lenroot's nomination had gone through 42 to 27, United Press reporter Paul Mallon used confidential sources to piece together a nearly flawless roll call of who supported the controversial nominee and who did not.[73]

The ensuing "bad blood fight" between the Senate and the press included Democratic Senators vowing to conduct a closed-door investigation into Mallon's reporting, to hold him in contempt and, if he still refused to reveal his sources, to throw him in jail.[74] After Sen. David Reed of Pennsylvania railed against "the so-called ethics of your so-called profession" and the Senate barred all reporters from the floor, the press went on the attack; it castigated the senators as a

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[68] *See Censorship by Injunction*, E&P, Jan. 11, 1930, at 32.

[69] *Id.*

[70] *See Minnesota Suppression Law Upheld, State Supreme Court Rules That Act Does Not Infringe Freedom of Press Guarantee*, E&P, Dec. 28, 1929, at 7.

[71] *Id.*

[72] 283 U.S. 697 (1931), handed down June 1. For a complete and compelling account, *see* FRED W. FRIENDLY, MINNESOTA RAG: CORRUPTION, YELLOW JOURNALISM, AND THE CASE THAT SAVED FREEDOM OF THE PRESS (2003).

[73] Journalists of that era have recounted these events with relish. *See, e.g.*, HUGH BAILLIE, HIGH TENSION: RECOLLECTIONS OF HUGH BAILLIE 288 (1959); RAY THOMAS TUCKER, SONS OF THE WILD JACKASS 165 (1969); WALTER TROHAN, POLITICAL ANIMALS: MEMOIRS OF A SENTIMENTAL CYNIC 157 (1975).

[74] Special to the New York Times, *Senate Floor Closed to Press*, N.Y. TIMES, May 23, 1929, at A1. *See also Senate v. Press*, TIME, June 3, 1929, *available at* http://www.time.com/time/magazine/article/0,9171,732427,00.html.

secretive elite and praised reporters as representatives of the people.[75] Sen. Robert La Follette, Jr., a progressive Republican and a newspaper publisher,[76] vowed to start reporting everything done in secret to his constituents in Wisconsin and dared the Democrats to bar him from the floor along with the reporters.[77] After a week of merciless press coverage, the Senate backed down: It canceled the investigation of Mallon[78] and rewrote the rules of the chamber to end closed-door sessions.[79] Washington reporting was forever changed.[80]

C. Status of the Privilege

The journalistic press was in a strong position to fight for a testimonial privilege in the late 1920s. Journalism historian Joe Campbell has documented how, by 1897, the profession had begun to cast off the stigma of "yellow journalism," adopted a more professional image by cultivating the "objectivity standard" and built powerful press clubs to foster best practices.[81] Historian and ethicist Robert Spellman has shown that, about the same time, a defiant stance struck by individual journalists to protect sources had hardened into an industry-wide norm expected of all journalists.[82] Legal historian Eric Easton has argued further that, in the decades that followed, "the press" as an institution emerged as

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[75] M. Farmer Murphy, *Blow at U.P. Closes Senate Floor to Press*, SUN (Baltimore, Md.), May 23, 1929, at 1.

[76] Robert La Follette, Sr., started the left-wing political newspaper *La Follette's Weekly* in 1909. In 1929, the junior La Follette changed the name of the paper to *The Progressive*, and it is still published under that name. *See* The Progressive, History and Mission, *available at* http://www.progressive.org/mission.

[77] Associated Press, *Press Row Defense Given, Rules Committee Denounced, La Follette Dares Senate to Expel Him for Telling How He Votes*, L.A. TIMES, May 24, 1929, at A1.

[78] *See, e.g.*, Special to the New York Times, *Senators Drop Plan for Secret Inquiry*, N.Y. TIMES, May 25, 1929, at A2; United Press, *Senate Gets Report Urging Publicity*, WASH. POST, May 29, 1929, at 2.

[79] *See, e.g.*, Richard V. Oulahan, *Favor Publishing All Senate Votes; Rules Committee Members Advise Ending Secret Roll-Calls on Nominations*, N.Y. TIMES, May 29, 1929, at 24.

[80] Since then, the U.S. Senate has only held closed-door sessions a handful of times, during emergencies. *See generally* Marjorie Cohn, *Senate Impeachment Deliberations Must Be Public*, 51 HASTINGS L.J. 365 (2000).

[81] *See, generally*, W. JOSEPH CAMPBELL, THE YEAR THAT CHANGED JOURNALISM: 1897 AND THE CLASH OF THE PARADIGMS 13 (2006).

[82] Robert Spellman, *Defying the Law in the 19th Century: Journalist Culture and the Source Protection Privilege* (conference paper presented at the annual meeting of the International Communication Association, May 17-31, 2004, New Orleans) (on file with the author).

a powerful special-interest group, a force capable of reshaping the law to serve its own ends.[83]

However, the decade of the 1920s began with a major setback, in the eyes of the press, in the quest for a testimonial privilege.[84] When the U.S. Supreme Court denied *certiorari* in the 1921 case of Hector Elwell, managing editor of the *Wisconsin News*,[85] journalists interpreted it as a reversal of an apparent trend toward recognition of a privilege.[86] *Editor & Publisher* went so far as to announce in a large-type headline, "U.S. Supreme Court Made New Law in Elwell Contempt Case."[87] The trade magazine recounted a string of cases that suggested a de facto privilege or at least a tacit willingness on the part of judges to excuse reporters from revealing sources based on technical grounds or the belief that the information was not necessary.[88] The journalists' sense of a trend was not unfounded: When the question of a journalist privilege first made it to the High Court, in the *Burdick* case of 1915, the reporter won – though only on narrow technical grounds, not because the Court accepted his claim to protection under the Fifth Amendment.[89] When Elwell's petition for *cert.* was denied, journalists

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

[84] Legal scholars often point to 1919 as the birth year of the modern First Amendment because of the famous quartet of cases decided by the Court: Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States,249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Abrams v. United States, 250 U.S. 616 (1919). It is important to remember, however, that the Court ruled against the speakers in all of those cases. Likewise, while scholars rightly celebrate the *Gitlow* case of 1925 as a milestone in the Court's approach to the First Amendment, it would not have provided a strong precedent to lean on in 1929 because, after all, the Court ruled that subsequent punishment in that case did not violate Mr. Gitlow's rights. *See* Gitlow v. New York, 268 U.S. 652 (1925) (upholding conviction under a state law against criminal anarchy).

[85] Elwell v. United States, 275 F. 775 (7th Cir. 1921), *cert. denied*, 257 U.S. 647 (1921) (holding that a court decides from the circumstances whether Fifth Amendment protection applies; it is not up to a witness' discretion).

[86] *See, e.g., No Confessional Seal on News Sources*, E&P, Oct. 29, 1921, at 14 (saying in a sub-headline, "U.S. Supreme Court Says Elwell Was Guilty of Contempt in Not Giving Grand Jury Information – Will Go to Jail, is Belief").

[87] Frank Leroy Blanchard, *U.S. Supreme Court Made New Law in Elwell Contempt Case*, E&P, Nov. 5, 1921, at 15 (saying in a sub-headline, "Overthrows Theory That Reporter's News Sources Are Privileged, Which Has Been Upheld by Lower Courts Actively and by Inference").

[88] *Id.*

[89] Burdick v. United States, 236 U.S. 79 (1915). The circumstances in this rarely cited case were peculiar in the extreme. It involved a presidential pardon and the question of whether the reporter was obligated to accept it. No, the Court said, because doing so might tend to incriminate him. The case did not focus squarely on whether testifying and revealing sources alone would tend to incriminate him. *See* Margaret A. Blanchard, *The*

interpreted it to mean that the Fifth Amendment argument, which he also had made, was effectively foreclosed.[90] "In other words," *Editor & Publisher* editorialized, "there is no law that will protect an editor or reporter in his refusal to tell from whom he has obtained news in confidence."[91]

Thus, journalists in 1929 were in roughly the same position as journalists in the 19th century: There was no solid judicial precedent they could cite to support a testimonial privilege based on the common law, based on the Fifth Amendment's mandate against self-incrimination, or, two years before *Near*, based on the Press Clause of the First Amendment. That explains why, as *Editor & Publisher* presciently predicted,[92] journalists would have to seek protection in a federal statute. "Its success," the magazine said, "will assure to the press the freedom from persecution that is implied, if not called by name, in the nation's fundamental law."[93]

III. KEY NON-JUDICIAL ACTORS

Like so many privilege disputes before it, the scandal of 1929 involved news reporting that exposed corruption and ignited the wrath of red-faced members of Congress.[94] The controversy followed a newspaper expose about lawmakers who publicly called for strict enforcement of Prohibition laws but who secretly visited illegal liquor houses in the capital.[95] Sharpening the charge of hypocrisy,[96] Congress less than a month before the scandal broke adopted the Increased Penalties Act of 1929, which called for sentences of up to $10,000 in fines or five years in jail, or both.[97] To quell public outrage, Congress launched an

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Fifth-Amendment Privilege of Newsman George Burdick, 55 JOURNALISM QUARTERLY 39 (1978).

[90] Editorial, *Privileged News and the Profession*, E&P, Nov. 5, 1921, at 34 (saying the denial "finally establishes beyond question the right of the courts to compel newspapers to reveal the sources of information in cases coming before them").

[91] *Id.*

[92] *Id.* (predicting that "a campaign will have to be undertaken in the near future to establish be Federal statute the privileged character of information given to a reporter or editor in line of duty").

[93] *Id.*

[94] Media scholar Robert Spellman has catalogued the 12 most high-profile privilege disputes that preceded the events of 1929, and every one of them involved a clash between Congress and the press. *See* Spellman, *supra* note 81.

[95] *See, e.g., Probe of Wet Drinking, Dry Voting Is Seen: Congress May Investigate All Incidents Involving Members*, ATLANTA CONST., April 2, 1929, at A1; *Capital Jury to Hunt Drinking by Congressmen*, CHI. DAILY TRIB., Nov. 2, 1929.

[96] Arthur Sears Henning, *Do Unconvicted Felons Govern This Fair Land?*, CHI. DAILY TRIB., Nov. 4, 1929, at A1.

[97] *See, e.g., Coolidge Signs Bill for Stiff Dry Penalties*, N.Y. TIMES, Mar. 3, 1929, at A3.

investigation and sought the identity of the so-called "Man in the Green Hat," the anonymous source for the newspaper stories.[98]

With the investigation launched and subpoenas issued, attention shifted to three reporters of the *Washington Times* who in refusing to testify understood they were playing central roles in a legal struggle important to the entire profession. Their plight was transformed from a local matter into a national *cause célèbre* by the intervention of three high-profile public figures, powerful men who commanded media attention.

A. The Reporters

Gorman M. Hendricks, 35, was a 12-year veteran of the national press corps, having worked at the Washington *Herald* and *Post* before his stint at the *Times*.[99] Linton Burkett, 30, had 10 years of newspaper experience, mostly at papers in the South such as the *Charlotte* (N.C.) *Observer*, before arriving in Washington just months before the dispute began.[100] Jack Nevin, Jr., 24, was only a year into his first full-time newspaper job, but he was the son of veteran Washington reporter John E. Nevin of the International News Service.[101] Because they worked for the *Times*, they were supported by the considerable legal and financial resources of Hearst Newspapers, one of the largest chains in the nation.[102] Rather than appeal their contempt convictions, the reporters volunteered to serve their sentences to take a stand and draw attention to the issue.[103] "As we all stated some 45 days ago, when it might have been a question of doing a year or more," Hendricks said upon release, "we were ready and feel the same way about it (now)."[104] Their roles would be as heroes of the First Amendment.

B. William Randolph Hearst

Because of his immense wealth, outsize ego, political ambitions and business acumen, Hearst was a larger-than-life figure in this era.[105] With

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[98] *See, e.g., Brookhart Subpoenaed in Liquor Probe: Senator Asserts He Will Tell All to Grand Jurors*, ATLANTA CONSTITUTION, Nov. 2, 1929, at A1; *Was This Whisky Intended for U.S. Senators? Capital's Rum Caches Seized, Arrests Made*, CHI. DAILY TRIB., Nov. 3, 1929, at A5.

[99] George H. Manning, *Three Washington Reporters Sent to Jail for Refusing to Reveal Source of News*, E&P, Nov. 2, 1929, at 1.

[100] *Id.*

[101] *Id.*

[102] Hearst added the *Washington Times* to his media empire in 1919. *See* Staff report, *W.R. Hearst Buys Washington Times*, WASH. POST, Nov. 18, 1919, at 8.

[103] George H. Manning, *Reporters Go Back to Jail*, E&P, Nov. 9, 1929, at 6.

[104] George H. Manning, *Ovation Given Jailed Reporters*, E&P, Dec. 14, 1929, at 7.

[105] *See* DAVID NASAW, THE CHIEF: THE LIFE OF WILLIAM RANDOLPH HEARST (2001).

newspapers stretching coast to coast, Hearst had added radio stations to his empire in the 1920s and, in 1929, created Hearst Metrotone News, a newsreel production company.[106] Reports of his activities that year included a feature package in *The New York Times* about his opulent castle in California[107] and, around the time of the jailing of his reporters, news of a party for the visiting British Chancellor of the Exchequer Winston Churchill.[108] Upon hearing of the jailing, he ordered the *Times* to double the reporters' salaries as long as they remained in jailed, and he promised them bonuses after.[109] His role would be to lionize journalists and to try to sway public opinion.

C. Fiorello La Guardia

Having won a seat in the U.S. House of Representatives in 1923, the future mayor of New York had become "a national gadfly" and media magnet known for his colorful antics in Congress.[110] A progressive Republican representing one of the poorest neighborhoods in New York City, he had turned his own humble roots into *bona fides* as a champion of the people.[111] To align himself with the public's growing anger over Prohibition in 1929, he once defied Alcohol Agents to arrest him while he mixed drinks in front of a group of reporters in Washington.[112] He was in the headlines throughout the year as he mounted his first (unsuccessful) campaign for New York mayor against the notoriously corrupt Jimmy Walker.[113] His role in the journalists' dispute would be to champion a shield-law bill in the House while trying to turn the journalist-privilege issue into a populist political cause.

D. Arthur Capper

One of the longest serving members in U.S. Senate history, Sen. Capper of Kansas was at the height of his political powers in 1929.[114] A confidant to three

[106] *Id.* at 414-415.
[107] *Id.* at 417.
[108] *Id.* at 423.
[109] *See* George H. Manning, *supra* note 98.
[110] HARRY PAUL JEFFERS, THE NAPOLEON OF NEW YORK: MAYOR FIORELLO LA GUARDIA 123 (2002).
[111] *See* THOMAS KESSNER, FIORELLO H. LA GUARDIA AND THE MAKING OF MODERN NEW YORK (1989).
[112] *Id.* at 113.
[113] *See* JEFFERS, *supra* note 105, at 15-38.
[114] *See generally* HOMER E. SOCOLOFSKY, ARTHUR CAPPER: PUBLISHER, POLITICIAN, AND PHILANTHROPIST (1962). Socolofsky was Capper's chief biographer and published several books and articles on the politician.

presidents,[115] Capper made national and international headlines throughout the year as chief sponsor of the so-called Capper Resolution, which would have outlawed international arms sales.[116] Like La Guardia, Capper was a progressive Republican whose people-centered political causes included championing equality for women[117] and improving the lives of African Americans.[118] Like Hearst, Capper was a successful newspaper publisher who built an empire of holdings that, by 1929, reached more than three million readers in four states.[119] In 1926, the same year he made the cover of *Time* magazine,[120] Capper pushed through a bill to help create the National Press Building, still home to the bulk of the Washington press corps.[121] Six months before the journalist-privilege dispute, Capper gave a keynote address at the 1929 meeting of the American Society of Newspaper Editors that extolled the role of a free press in a democracy: "American newspapers are the breath of life for this government. Without them, it would perish – disintegrate."[122] His role in the dispute would be to champion a shield-law bill in the all-important Senate, to work behind the scenes to build support among newspaper publishers, and to frame the issue in persuasive First Amendment terms.

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[115] Capper had warm relations with the three Republican presidents of the 1920s, Harding, Coolidge and Hoover. Capper was with Coolidge in 1927 when Coolidge stunned the press by announcing he would not seek re-election. *See* Letter from Everett Sanders, Secretary to President Coolidge, Dec. 1, 1938, in the Arthur Capper Papers, Kansas State Historical Society (recounting events of that day in Rapid City, S.D.).

[116] The Capper Resolution was a proposed amendment to the recently ratified international treaty known as the Kellogg-Briand Peace Pact, which outlawed wars of aggression. *See, e.g.*, Edwin L. James, *Capper Moves to Back Peace Pact With Trade Embargo on Violators*, N.Y. TIMES, Feb. 11, 1929, at 1; *Senator Capper's Anti-War Proposal Wins Praise Here and Abroad*, N.Y. TIMES, Feb. 11, 1929, at 2. Capper's proposal was never adopted.

[117] Capper was one of the earliest champions of an Equal Rights Amendment to the Constitution. *See, e.g., Adopt a Program for "Equal Rights,"* N.Y. TIMES, Dec. 8, 1929, at 16.

[118] Capper was one of the earliest sponsors of anti-lynching legislation in Congress. *See, e.g., New Lynching Ban Offered in Senate*, N.Y. TIMES, Jan. 20, 1939, at 4.

[119] *Id.* at 143.

[120] Cover Story, *The Bloc at Work*, TIME, Jan. 18, 1926, at 1. Capper was mentioned at this time as a possible presidential candidate for 1928.

[121] Letter from Harvey D. Jacob, General Counsel, National Press Building Corp., April 17, 1926, in the Arthur Capper Papers, Kansas State Historical Society (thanking Capper for championing legislation to change District of Columbia zoning laws to allow construction of the press building).

[122] Arthur Capper, *Speech to the American Society of Newspaper Editors*, Apr. 19, 1929, in PROBLEMS OF JOURNALISM: PROCEEDINGS OF THE SEVENTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF NEWSPAPERS 64-74 (1929).

IV. RECONSTRUCTION OF EVENTS

Gerhardt has defined non-judicial precedents as "any past constitutional judgments of non-judicial actors that courts or other public authorities imbue with normative authority."[123] As of 1929, press advocates had persuaded public authorities in just one state, Maryland, to imbue the practice of shielding confidential sources with the normative authority of law. However, that shield law, as a non-judicial precedent, would lend legitimacy to the campaign to adopt a similar law at the federal level as well.

A. Journalist Claims and Judicial Reaction

Events that transformed the question of a journalist's privilege from a local issue into a national one began with a series of investigative articles published in October 1929 in the *Washington Times*. The three reporters – Hendricks, Burkett, and Nevin – took readers on a tour of 49 speakeasies serving liquor illegally in the heart of the nation's capital. They withheld exact addresses but described each "joint" in a way that might have been recognizable to local denizens. They withheld names of proprietors and customers, but they alluded mysteriously to the "Man in the Green Hat," who regularly, they said, provided liquor to members of Congress.[124]

When a grand jury was convened Oct. 30 to investigate Prohibition violations in the District of Columbia, the journalists were its central focus.[125] First to testify, city editor Daniel O'Connell reminded the grand jury that journalists were not prosecutors or policemen or "stool pigeons," and he invited the grand jury to summon witnesses and conduct an investigation of its own. When the reporters appeared, they refused to reveal their sources and claimed that all the relevant information could be found in their published stories. On their behalf, their counsel argued that to reveal the names would 1) be a breach of a confidentiality agreement they had made with their sources (a contract argument); 2) tend to hold them up to dishonor (a common law argument), 3) violate the ethics of their profession (a normative argument that had never been recognized by a court), and 4) hurt their ability to earn a livelihood (a common law argument known as loss of estate).[126] No Fifth Amendment argument was offered.

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[123] Gerhardt, *supra* note 16, at 715.
[124] *See, e.g.*, WALTER A. STEIGLEMAN, THE NEWSPAPERMAN AND THE LAW 198 (1950).
[125] *See, e.g.*, Special to the New York Times, *Capital Reporters Jailed for Withholding Bootleggers' Names From Grand Jury*, N.Y. TIMES, Oct. 31, 1929, at 14.
[126] George H. Manning, *Three Washington Reporters Sent to Jail for Refusing to Reveal Source of News*, E&P, Nov. 2, 1929, at 1. This was an unreported case, so legal proceedings must be gleaned from press reports.

Federal district court Judge Peyton Gordon summarily rejected the reporters' claims based on the fact that a journalist-source privilege had never been recognized at common law. In addition to sentencing each to 45 days in jail, he warned them that he would re-sentence them to an additional 45 days if they continued to be recalcitrant. In an unusual step, the judge also refused to grant them bail and ordered them taken into custody on the spot.[127] In something of a rebuke to Judge Gordon, Justice Frederick L. Siddons of the District Supreme Court the next day granted a writ of habeas corpus and ordered the reporters released on bonds of $500 apiece.

The reporters, vowing to remain silent, were portrayed as defiant celebrities. "Their release came at the end of a full day in jail, during which they reported that they had been accorded splendid treatment," the Associated Press reported. "Other reporters calling to interview them found one in the jail barber shop and another finishing a second helping of breakfast."[128] As if to heighten the drama surrounding their case, the reporters announced four days later that they would surrender themselves to the court rather than appeal its decision and would serve out their sentences in full.[129]

B. Non-Judicial Mobilization

On the same day the reporters reported to jail to serve their terms, *Washington Times* managing editor Ralph Benton sent a letter to Sen. Capper, as chairman of the Senate's District of Columbia Committee, asking him to begin the process of securing legislation to grant journalists a testimonial privilege in federal courts. Louis Fehr, publisher of the *New York American*, agreed to lead a campaign to organize newspaper publishers to support efforts at the state level.[130] Capper told the press corps of his intentions to act as early as Nov. 11, and even small newspapers such as the *Morning Call* in Mississippi carried wire reports saying Capper was drafting a bill that would create a federal law similar to the one in Maryland.[131] Besides forcing reporters to betray personal confidences, Capper said, such treatment "paralyzes the power of the press as an agent of

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[127] *Id.*
[128] Associated Press, *Court Grants Bail to Capital Reporters*, N.Y. TIMES, Nov. 1, 1929, at 14.
[129] Special to the New York Times, *Reporters Go Back to Jail: Washington Times Men Accept Sentence for Contempt of Jury*, THE NEW YORK TIMES, Nov. 5, 1929, at 57.
[130] George H. Manning, *Reporters Go Back to Jail, Refusing Confidential Data to Grand Jury*, E&P, Nov. 9, 1929, at 6.
[131] *Measure for Protection of U.S. Press: Senator Capper Says He Will Push Act Through*, MORNING CALL (Laurel, Miss.), Nov. 12, 1929, at 8. The article mentions Capper was speaking to reporters of the Universal Service, one of several wire outfits operating at the time.

public good and renders the press useless to a large extent in exposure of political and public evils."[132]

On Nov. 14, Capper introduced the first of many bills to create a federal shield law.[133] The Associated Press' dispatch appeared the next day in papers coast to coast.[134] Many of these early reports echoed Capper's emphasis not on the personal rights of the reporters but on the need to protect confidential sources who help journalists serve the public. Editorializing just four days after Capper introduced his bill, the *Herald Examiner* in Chicago argued that reporters working "in the line of duty" are public servants who deserve legal protection. "That is what the Capper bill proposes to do," the paper said, "compel all federal courts to recognize the quasi-public relation of the newspaper to the public and to protect the newspaper in the faithful discharge of its public obligation."[135] Putting an even finer point on that First Amendment rhetoric, the *San Antonio Light* ran its staff-written story under the headline "Bill of Rights Asked for Reporters" and said the plight of the jailed *Washington Times* reporters had sparked "nationwide interest" in the issue.[136]

C. Facilitating a Constitutional Dialogue

Gerhardt would explain that infusion of First Amendment rhetoric into a discussion of a statutory shield law as fulfilling a key function of non-judicial precedents: They facilitate debate about Constitutional principles – to educate the public, to hash out competing claims, to rehearse theories not yet recognized by courts.[137] Capper's strategy of generating public awareness and emphasizing the importance of a free press[138] played a central role in the debate of 1929. Obviously coordinated with Capper in advance, coverage in the weekly trade magazine *Editor & Publisher* included quotes from Capper and the full text of his

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[132] *Id.*
[133] *See* S. 2110, 71st Cong., 1st Sess. (legislative day Oct. 30, calendar day Nov. 14, 1929).
[134] *See, e.g.*, Associated Press, *Immunity for Reporters Asked by Capper in Senate*, N.Y. TIMES, Nov. 15, 1929, at 22; Associated Press, *Capper Bill Would Protect News Sources*, SAN ANTONIO EXPRESS, Nov. 15, 1929, at 20; Associated Press, *Bill to Free Scribes of Pressure by Courts*, INDEPENDENT (Helena, Mont.), Nov. 15, 1929, at 2.
[135] Editorial, *Capper Bill to Protect Public Obligations of Nation's Press*, HERALD EXAMINER (Chicago), Nov. 16, 1929, at 12.
[136] *See Bill of Rights Asked for Reporters: Capper Measure Outgrowth of Imprisonment of Newspapermen*, SAN ANTONIO LIGHT, Nov. 19, 1929, at 6.
[137] Gerhardt, *supra* note 16, at 766.
[138] *See, e.g., Senator Capper Seeks to Protect Information Received Confidentially*, INTELLIGENCER (Edwardsville, Ill.), Nov. 18, 1929, at 8 (saying Capper declares "the power of courts to force newspapermen to reveal the sources of their information endangers freedom of the press").

bill just two days after he entered it in the Senate.[139] "I do not know whether we can get a law through Congress or not," Capper told the magazine. "I am aware that it is a controversial question ... (but it is) a subject that ought to have attention." Capper hoped that action on the floor of the Senate would lead the Judiciary Committee to debate the merits of a shield law. "My bill," he said, "will at least serve the purpose of promoting thought and discussion on the subject."[140]

The lead editorial in the same issue of *Editor & Publisher* excoriated the "merciless, mean, unjust and indecent case" against "three honest reporters sent to jail like common criminals," and it lamented "another instance of blind and staggering justice exacting penalties of blood and torture from those who dare serve spiritual causes!"[141] More soberly, the editorial praised Capper's effort as the start of an important national debate: "He can do nothing for the three reporters in jail, but he might do something for the future."[142] After decrying the fact that no coordinated legal effort was made to support the reporters, the editorial tried to rally journalists around Capper's effort: "We join newspaper men in thanking Senator Capper, a man with a heart as well as head."[143]

Two days later, on Nov. 18, La Guardia put the issue back into national headlines by introducing a companion to Capper's bill in the House and by going much further. While Capper's bill would have covered reporters, editors and publishers "connected with any newspaper published in the District of Columbia," La Guardia's bill would have covered journalists in any federal court or in any grand jury proceeding anywhere – truly a federal shield law.[144] Noting that the jailing of the *Washington Times* reporters was "creating discussion all over the country," Rep. Louis Ludlow, an Indiana Democrat who had been a Washington correspondent for nearly 30 years before going into politics, echoed Capper's free-press rationale for supporting La Guardia's shield law. "A free, alert and courageous press is the nation's strongest safeguard," he told the *New York*

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[139] George H. Manning, *Capper Author of Bill Protecting News Men in Contempt Cases*, E&P, Nov. 16, 1929, at 8.

[140] *Id.*

[141] Editorial, *Hardboiled*, E&P, Nov. 16, 1929, at 36. To underscore the idea of unjust rulers punishing truth-tellers, *E&P* placed a filler quote from the Bible next to the editorial: "And the king said to him, How many times shall I adjure thee that thou say nothing but the truth to me in the name of the Lord?" – II. Chronicles, XVII; 15." *Id.*

[142] *Id.* In case the reader was not sufficiently sympathetic to the reporters' plight, the editorial went on: "Perhaps the three young men in jail, one the father of five children of whom one is a two-months infant, will consider [the shield law effort] sufficient compensation for their sacrifice. We doubt, however, if their mothers, fathers, wives or children would agree." *Id.*

[143] *Id.*

[144] Special to The New York Times, *La Guardia Bill Would Absolve Reporters Who Refuse to Reveal Their News Sources*, N.Y. TIMES, Nov. 19, 1929, at 23.

Times. "There can be no free press in this republic if newspaper reporters are to live in terror of grand jury inquisitions and jail sentences."[145]

Following La Guardia's action by two days, on Nov. 20, Capper returned to the Senate floor to submit a second bill, this one omitting language that would have limited protection to newspapers in the District of Columbia.[146] This prompted a new wave of editorials in which Capper's talking points had crystallized: newspapers perform a public service; fulfilling that public service deserves the protection of the law; reporters who go to jail while performing that public service are "martyrs to an important cause."[147]

D. Trying to Generate Public Support

Hearst and editors at the *Washington Times* capitalized on the jailing to portray the reporters as popular heroes and make the case for a privilege in the court of public opinion. Having ordered the newspaper to double the reporters' salaries while in jail, Hearst also announced that a gold watch, $1,000 apiece and an extra week of vacation would be waiting for them upon their release.[148] When the reporters were released on the 40th day of their 45-day sentences (released early for good behavior), the newspaper rented out the Belasco Theatre on Washington's Lafayette Square and staged a standing-room-only celebration that included speeches and Vaudeville entertainment.[149] Col. Frank Knox, general manager of Hearst's newspaper chain, presented each with a watch inscribed, "From W.R. Hearst for loyalty to newspaper ethics." In toasting them, Knox said, "I believe I speak the sentiments all the editors in America when I express unbounded admiration for the high courage of these three young men, who kept the faith, preserved the honor of their profession and suffered hardships rather than be false to the traditions, ethics and standards of their profession."[150]

La Guardia used the occasion to pit the journalists, as defenders of the people, against callous judges and to generate support for his shield-law bill. He said the reporters were "victims of judicial stupidity" and said his bill was needed "to guard against a type of intellect that, through accident, or politics or otherwise, happens to fall upon the bench."[151]

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[145] *Id.*
[146] *See* S. 2175, 71st Cong., 1st Sess. (legislative day Oct. 30, calendar day Nov. 20, 1929).
[147] Reproduction of wire service articles and editorials were widespread. *See, e.g.*, Editorial, *The Service of News*, OIL CITY DERRICK (Oil City, Penn.), Nov. 30, 1929, at 6; Editorial, *The Service of News*, MORNING CALL (Allentown, Penn.), Nov. 30, 1929, at 8. The editorials in these sister papers were identical.
[148] George H. Manning, *Ovation Given Jailed Reporters*, E&P, Dec. 14, 1929, at 7.
[149] *Id.*
[150] *Id.*
[151] *Id.*

By this time, mid-December 1929, the bills submitted by Capper and La Guardia were in the Senate and House judiciary committees, dying without debate. Momentous news had moved into the headlines as the jailed reporters' story unfolded: Black Thursday on Oct. 24, Black Monday on Oct. 28 and, the greatest stock market crash of them all, Black Tuesday on Oct. 29.[152] Capper himself was busy fighting other uphill battles: re-submitting the so-called "Capper Resolution" to create a ban on international arms sales,[153] fighting against a taxpayer bailout of Wall Street speculators,[154] fighting for a long-sought tariff bill protective of Midwest farmers,[155] and reassuring the Farm Bloc that the stock market crash would not spell doom for agriculture.[156]

The shield-law idea fell by the way at the federal level, and the *Washington Times* incident shriveled to an unsatisfying end. In a brief item, the *New York Times* reported that "The Man With the Green Hat" was identified as George L. Cassiday and was arrested while delivering liquor to the Senate Office Building. Police were able to make the arrest because the *Washington Times*' city editor provided the information his reporters had tried to protect.[157]

E. Creating Network Effects

One of the key functions of non-judicial precedents is creating what Gerhardt has dubbed "network effects,"[158] whereby Constitutional interpretations of non-judicial actors are affirmed and strengthened over time. "The more often that public authorities ... cite or seek to invest past non-judicial activities with normative power," he has written, "the more their meaning and value increase."[159] The existence of the 30-year-old Maryland shield law provided an instant starting place for discussions of a federal law, and it was mentioned in nearly all of the news coverage of the Capper and La Guardia bills.[160]

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[152] *See* JAMES STUART OLSON, HISTORICAL DICTIONARY OF THE 1920S 80 (1988).
[153] Special to the New York Times, *To Urge Arms Embargo at December Session; Senator Capper Says He Will Call Up His Resolution to Enforce Kellogg Pact*, N.Y. TIMES, Oct. 12, 1929, at 3.
[154] Special to the New York Times, *Says Speculators Should Get No Aid; Capper, in Radio Talk, Declares Only Legitimate Business Deserves Help*, N.Y. TIMES, Nov. 18, 1929, at 3.
[155] Special to the New York Times, *Capper Forecasts 'Fair' Tariff Bill; Kansan Defends Senate Against attacks on Its Delay With the Measure*, N.Y. TIMES, Nov. 27, 1929, at 2.
[156] Special to the New York Times, *Capper Says West Is in Fine Shape; Senator, in Radio Talk, Predicts There Will Be No Buyers' Strike as in 1921*, N.Y. TIMES, Dec. 4, 1929, at 46.
[157] Associated Press, *Capital Jury Indicts 'Man in the Green Hat,'* N.Y. TIMES, Dec. 18, 1929, at 2.
[158] Gerhardt, *supra* note 16, at 719.
[159] *Id.*
[160] *See, e.g., Maryland Law of 1896 Safeguards Newspaper Men in Jury Probe*, E&P, Nov. 9, 1929 (a sidebar focusing on the benefits of a shield law, which accompanied coverage of Capper's earliest effort).

Network effects from the dispute in Washington rippled almost immediately through the states. Just a week after Capper and La Guardia submitted their bills in Congress, Rep. Michael Zack introduced a similar bill in the Massachusetts legislature.[161] Within months, legislators had introduced shield-law bills in half a dozen state houses,[162] five in New York alone.[163] Lobbying continued into 1931, spurred on by the jailing of "youthful, dapper Edmond M. Barr," a reporter for the *Dallas Dispatch*, hailed by *Time* magazine as a "martyr" for refusing to divulge his sources.[164] None of those efforts found success, but momentum was building.

Just weeks after Capper had submitted his first bill in Congress, Rep. Harry W. Vanderbach in the New Jersey General Assembly announced he would introduce similar shield legislation there.[165] Submitted at the beginning of 1930, the Vanderbach bill was modeled on the existing Maryland law and offered sweeping protection against disclosure in any legal or legislative proceeding, including before grand juries.[166] Less than three years later, the legislature adopted the second shield law in the nation, exactly as Vanderbach had submitted it.[167] Coverage explicitly tied that press victory to Capper's efforts at the federal level.[168] Thus, passage of the New Jersey shield law grew directly from the dispute of 1929.

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[161] Staff report, *Seeks New Statute to Protect News Men*, E&P, Dec. 7, 1929.
[162] *See* NEW YORK LAW REVISION COMMISSION, LEG. DOC. NO. 65 (A) (1949), at 59-88.
[163] *Id.* at 101-02.
[164] *See* Editorial, *Professional Secret*, TIME, March 23, 1931, *available at* http://www.time.com/time/magazine/article/0,9171,741282,00.html (noting that a bill was entered "straightaway" into the state legislature and tying the measure to Capper's unsuccessful attempt at a federal shield law in 1929).
[165] *See Has Bill Protecting News Confidences*, E&P, Dec. 14, 1929, at 10.
[166] *Id.* The bill read:

> That no person engaged in, connected with or employed on any newspaper shall be compelled to disclose, in any legal proceedings or trial, before any court or before a grand jury of any county or a petit jury of any court or before the presiding officer of any tribunal or his agent or agents, or before any committee of the legislature or elsewhere, the source of any information procured by or obtained by him, and published in, the newspaper on which he is engaged, connected with or employed.

Id.
[167] N.J. STAT. ANN. (West Co.) 2:97-11 (1933); *now codified at* N.J. STAT. ANN. §§2A:84A-21 (Thomson West/Westlaw through 2010).
[168] *See* Editorial, *Off the Record*, TIME, May 22, 1933, *available at* http://www.time.com/time/magazine/article/0,9171,745593,00.html (noting that "in 1929, Senator Arthur Capper proposed a like measure to Congress").

The cycle began anew in 1935 with the headline-generating case of Martin Mooney, a crime reporter for Hearst's *New York American* newspaper.[169] Subpoenaed by a grand jury following a series of stories on racketeering in New York City, he refused to testify. After Mooney was fined $250 and ordered to serve 30 days in jail, his lawyers initiated a series of appeals that worked their way through the court system – and kept the issue in the headlines – for nearly a year. "Reporter's Rights Debated in Court," the *New York Times* declared in a headline, echoing the First Amendment rhetoric that had emerged in 1929.[170] When the New York Supreme Court upheld Mooney's sentence in 1936, it was front-page news, played for outrage.[171]

The court's decision underscored an important legal point for press advocates: If there were to be a reporter-source privilege comparable to the priest-penitent and husband-wife privileges, it would have to be created by statute, not court decision.[172] Not long after Mooney began serving out his sentence in Queens County jail,[173] lobbying and legislative action began in response. Capper returned to the U.S. Senate with a bill identical to his 1929 attempt, and he vowed "to push for its passage."[174] State legislators launched a

[169] *See Reporter's Writ Stays Jail Term, Freed After Court Reaffirms 30-Day Sentence for Silence Before Grand Jury*, N.Y. TIMES, May 17, 1935, at 5.

[170] *See Reporter's Rights Debated in Court*, N.Y. TIMES, May 28, 1935, at 9. Mooney's lawyer framed his defense in freedom-of-the-press rhetoric as well:

> It cannot be doubted that newspapers have been largely instrumental in the exposure of crime and bringing about reform, and to now rule that communications made to a reporter in confidence by an informant are not privileged would be to destroy the efficacy of this great instrument of the public welfare.

Id.

[171] *See* Special to the New York Times, *High Court Upholds Jailing Reporter ... Mooney Sentence Stands*, N.Y. TIMES, Jan. 8, 1936, at A1.

[172] *See* People ex rel. Mooney v. Sheriff of New York County, 199 N.E. 415 (1936). The court concluded:

> It seems clear that this court should not now depart from the general rule in force in many of the states and in England and create a privilege in favor of an additional class. *If that is to be done, it should be done by the Legislature*, which has thus far refused to enact such legislation.

Id. at 295 (emphasis added).

[173] *See Reporter Starts 30-Day Term in Jail*, N.Y. TIMES, Jan. 18, 1936, at 32.

[174] *See* Special to the New York Times, *Would Protect Reporter, Capper Offers Bill to Bar Forcing Press to Divulge New Source*, N.Y. TIMES, Feb. 25, 1936, at 21 (noting that "six years ago, Mr. Capper introduced a similar measure but Congress took no action upon it"). *See also* S. 4076, 74th Cong., 2d Sess. (1936).

new raft of bills, seven in New York state alone in 1935-36.[175] Despite opposition by bench and bar,[176] shield laws were successfully adopted in Alabama and California in 1935, Kentucky and Arkansas in 1936.[177]

Capper lacked high-profile allies of 1929 to join him in these later efforts. La Guardia left Congress in 1933 to become the mayor of New York City,[178] and Hearst's publishing fortunes and political influence never recovered following the stock market crash of 1929 and ensuing depression.[179] In their place, Capper enlisted the help of newer members of the House of Representatives to enter companion bills to mirror his efforts in the Senate.[180]

F. Implementing Constitutional Values

When non-judicial actors create non-judicial precedents, Gerhardt has written, it is often in response to incomplete or imperfect interpretations of Constitutional values, especially those that courts have not elaborated on.[181] In his speeches and writings,[182] Capper often elaborated his own interpretation of the First Amendment's guarantee of freedom of the press, and that meant, above all, complete independence from government interference. That belief could be

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[175] *See* NEW YORK LAW REVISION COMMISSION, LEG. DOC. NO. 65 (A) (1949), at 59-88 and 101-02.

[176] *See News Privilege Bill Is Opposed by Bar*, N.Y. TIMES, Feb. 3, 1936, at 4.

[177] *See* ALA. CODE §12-21-142 (Thomson West/Westlaw through 2010); CAL. EVID. CODE §1070(a) (Thomson West/Westlaw through 2010); KY. REV. STAT. ANN. §421.100 (Thomson West/Westlaw through 2010); ARK. CODE ANN. §15-85-510 (Thomson West/Westlaw through 2010).

[178] *See, generally*, ARTHUR MANN, LA GUARDIA COMES TO POWER: 1933 (1981). Although remembered for his years as mayor of New York, La Guardia had a long and distinguished career in Washington from 1917 to 1933. *See* HOWARD ZINN, LA GUARDIA IN CONGRESS (2010).

[179] Despite the fact that Hearst continued construction on his opulent castle in California throughout the 1930s, he was forced to begin liquidating many of his personal properties and possessions by 1938. *See* BEN H. PROCTOR, WILLIAM RANDOLPH HEARST: FINAL EDITION, 1911-1951 218-20 (2007).

[180] *See infra* note 186 and accompanying text.

[181] Gerhardt, *supra* note 16, at 716 and 784.

[182] *See, e.g.*, Arthur Capper, *Address to the Iowa School of Journalism*, April 13, 1934, in the Arthur Capper Papers, Kansas State Historical Society. He wrote:

> Nothing can be of greater importance to a people living under a democratic form of government than, (1) full information about what is happening day by day in ever department of human activity, and, (2) full opportunity for the discussion of the import, meaning and significance of what transpire.

Id.

seen in his seemingly contradictory stance on radio: He was a pioneer of the new medium, owning one of the most powerful broadcast stations in the Midwest, [183] yet he did not see radio as a force in journalism on par with newspapers. The radio's most important journalistic function, as he saw it, was in delivering bulletins of breaking events.[184] More critically, Capper felt that the very definition of "freedom of the press" precluded the kind of direct government involvement represented by the Radio Act of 1927.[185] "Broadcasting stations now operate in the United States under government license," he wrote in 1941, "therefore, radio broadcasting does not have freedom of expression."[186] In that vein, for him, shielding journalists from compelled disclosure was about maintaining a strict separation between government and the journalistic process.

Capper's ongoing effort to pass a shield law at the federal level made an important advance in 1936. U.S. Rep. Michael Curley of New York, who had entered a companion bill to Capper's in the House, was able to get a hearing before a subcommittee of the House Judiciary Committee, which would have to approve the bill if it were to move forward.[187] In making his case for a federal shield law, he told the committee that he was prompted in part by the Mooney case,[188] he pointed to the fact that several states had already adopted shield laws,[189] and he read from a prepared statement of support from William

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[183] *See, e.g., Capper to Improve WIBW at Topeka*, N.Y. TIMES, Oct. 27, 1929, at 13; *Senator Capper Urges Wider Use of Radio as Aid to Farmers*, NEWS (Nyack, N.Y.), April 2, 1929, at A14.

[184] Arthur Capper, *Power of Radio vs. Press*, Undated Memo, Arthur Capper Papers, Kansas State Historical Society. He wrote:

> The radio is not likely, in my estimation, ever to take the place of the newspaper. The radio is useful in a news way chiefly for getting brief bulletins on important happenings to the public promptly and for broadcasting notable speeches.

Id.

[185] Arthur Capper, *Freedom of the Press*, typed essay dated 1941, in the Arthur Capper Papers, Kansas State Historical Society. He wrote:

> If Government should use its licensing powers to control expression over the radio, then the people would have little practical guarantee of effective expression of views, of opinions, and public policies affecting them.

Id.

[186] *Id.*

[187] *Prohibiting Revelations of Confidential Communications Made to Editors, News Reporters, Correspondents, Journalists, and Publishers*, Hearing on H.R. 10381 Before the H. Comm. on the Judiciary, 74th Cong., 2nd Sess. (1936) (unpublished hearings).

[188] *Id.* at 2.

[189] *Id.* at 6.

Randolph Hearst.[190] However, the crux of his appeal rested on the First Amendment, which he quoted,[191] and the role of the press in a well-functioning democracy. He said that subpoenas against reporters were "absolutely placing a stranglehold" on the press as it tried to fulfill its constitutionally sanctioned role, and "we all know that the newspaper reporters have done a great public service in showing up criminal conditions throughout the country."[192] He urged the committee to allow his bill to go to the floor of the House, and "let us have an open debate upon the question on the merits of it alone."[193]

Capper wanted a similar debate on the Senate side. After submitting another bill in 1937,[194] he worked behind the scenes to generate publicity and pressure the Senate Judiciary Committee into holding a hearing. Capper contacted J.W. Brown, editor of *Editor & Publisher* magazine, who agreed to launch a series of articles on the journalist privilege issue. He also invited Capper to write a guest column about his bill. "This will serve to focus the attention of the fraternity on the subject," Brown wrote back.[195]

At Brown's suggestion, Capper wrote to A.H. Kirchhofer, editor of the *Buffalo Evening News* who was serving as president of the American Society of Newspaper Editors. "We think this is desirable legislation," Kirchhofer wrote back, "and shall be glad to do what we can to help prove the necessity for it."[196] Capper also contacted James G. Stahlman, president of the *Nashville Banner* who was serving as president of the American Newspaper Publishers Association. Stahlman promised to put the matter on the agenda of the association's next meeting.[197] More important, Stahlman promised to line up witnesses for a Congressional hearing who would be unequivocally behind Capper's bill. "We want to be certain that we do not have any namby-pambies of the press testifying in any wishy-washy manner before the committee," he wrote to Capper. "We want a clean-cut, frank, fair and honest statement that will clinch the question."[198]

One of those "namby-pambies of the press" was Col. Robert McCormick, the powerful editor of the *Chicago Tribune* who also was chairman of ANPA's Committee on Freedom of the Press. As someone trained in the law and a

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[190] *Id.* at 11.
[191] *Id.* at 5.
[192] *Id.* at 9.
[193] *Id.*
[194] *See* S. 627, 75th Cong., 1st Sess. (1937).
[195] Letter to from J.W. Brown, Dec. 15, 1937, in the Arthur Capper Papers, Kansas State Historical Society.
[196] Letter from A.H. Kirchhofer, Dec. 21, 1937, in the Arthur Capper Papers, Kansas State Historical Society.
[197] Letter from James G. Stahlman, Dec. 21, 1937, in the Arthur Capper Papers, Kansas State Historical Society.
[198] *Id.*

member of the Illinois Bar Association, he had "spoken vigorously in opposition" to shield law bills such as Capper's.[199] Stahlman, on the other hand, saw the issue as Capper did: in First Amendment terms. "The people of this country are guaranteed a free press," he told Capper, and "they are entitled to all the facts pertaining to the operation of government."[200] In pledging his support for Capper's bill, Stahlman concluded: "If the Congress and the courts of the land have the right to compel every editor and reporter to divulge the confidential sources of their information, we would have a censorship the like of which this country has never seen, and it would not be long before there would be no free press to which a free people are entitled."[201]

G. Extending Network Effects

Capper and Stahlman never got a hearing before the Senate Judiciary Committee, which let Capper's bill die. True to form, however, Capper submitted yet another bill when the next Congress convened in 1939.[202] Meanwhile, press advocates in the states were making significant progress. Legislators were able to push through shield-law bills in Pennsylvania and Arizona in 1937 and in Indiana and Ohio in 1941.[203] It appeared that the shield-law attempts in Washington, though unsuccessful, were themselves acting as non-judicial precedents that helped bolster lobbying efforts in the states.[204]

The recurring pattern of press-averse judicial actions followed by press-friendly legislative responses continued into the next decade. A high-profile case in 1943,[205] this one ensnaring reporters for the *Jersey Journal*, prompted another bill by Capper[206] and was followed by the adoption of a shield law in Montana

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[199] *Id.* McCormick's position mirrored the consensus among lawyers, judges and legal scholars.

[200] *Id.*

[201] *Id.*

[202] *See* S. 1027, 76th Cong., 1st Sess. (1939).

[203] *See* 42 PA. CONS. STAT. ANN. §5942 (Purdon's Pennsylvania Statutes and Consolidated Statutes Annotated 2010); ARIZ. REV. STAT. ANN. §12-2237 (Thomson West/Westlaw through 2010); IND. CODE §§34-46-4-1 (Thomson West/Westlaw through 2010); OHIO REV. CODE ANN. §§2739.04, 2739.12 (Baldwin's Ohio Revised Code 2010).

[204] *See, e.g.*, Editorial, *The Press: Professional Secret*, TIME, Mar. 23, 1931 (referring to the Capper bills when reporting on a shield-law campaign in Texas).

[205] *See* State v. Donovan, 30 Atl. (2d) 421 (1943) (denying a reporter protection under New Jersey's 10-year-old shield law because, the court held, it protected sources but not confidential information).

[206] *See* S. 752, 78th Cong., 1st Sess. (1943). *See also Capper Renews Newspaper Bill*, N.Y. TIMES, Feb. 23, 1943, at 14. Apparently, the reporter for the Times did not speak to Capper, for he or she got the facts wrong: "The Senator's aides said that Mr. Capper had been introducing such legislation for several sessions, prompted by the plight of certain

that year.[207] Another high-profile case in 1948,[208] this one involving the Gannett chain's newspaper in Newburgh, N.Y.,[209] prompted a flurry of bills in the states[210] and was followed by passage of a shield law in Michigan.[211]

H. Shaping Legal History

When non-judicial actors create non-judicial precedents, Gerhardt has observed, they are often shaping legal history, especially if the norms they establish endure over time and can be cited in the future as having created longstanding custom or tradition.[212] When journalists and press advocates launched their quest for a federal shield law in 1929, they redirected the trajectory of the journalist-privilege issue away from courts and decisively toward the legislatures. From 1929 to 1949, a dozen bills to create a federal shield law were submitted in Congress, six by Capper alone.[213] In that time, the number of state-level shield laws grew from one to a dozen.[214] No longer could legal scholars dismiss the Maryland shield law as an undesirable aberration.[215] Journalists were winning support for their cause, among lawmakers at least, and a bona fide movement was under way.[216] Although journalists and press advocates would continue to fight for recognition of a privilege in courts in decades to come, the dispute of 1929 and the legislative victories that followed provided an enduring model for non-judicial mobilization that resulted in concrete changes in the law.

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newspapermen in the Lindbergh kidnapping case." The Lindbergh kidnapping case was in 1935.

[207] *See* MONT. CODE ANN. §§26-1-901 (Thomson West/Westlaw through 2010).

[208] *See* People ex rel. Clarke v. Truesdell, 79 N.Y. Supp. 2d 413 (1948).

[209] *See* Editorial, *There Ought to Be a Law*, TIME, March 8, 1948, *available at* http://www.time.com/time/magazine/article/0,9171,853268,00.html.

[210] *See* NEW YORK LAW REVISION COMMISSION, LEG. DOC. NO. 65 (A) (1949), at 59-88, 101-02. Five bills were submitted into the New York Senate and Assembly. Despite the concerted effort, New York did not adopt a shield law until 1970. *See* N.Y. CIV. RIGHTS LAW §79-h(a)1-8 (Thomson/West 2008).

[211] *See* MICH. COMP. LAWS ANN. §767.5a (Thomson West/Westlaw through 2010).

[212] Gerhardt, *supra* note 16, at 717 and 772.

[213] *The Newsman's Privilege*, Report Submitted by the Subcommittee on Administrative Practice and Procedure to the S. Comm. on the Judiciary, 89th Cong., 2d Sess. (1966), at 62.

[214] *Id.*

[215] *See, e.g.*, Note, *Privilege of Newspapermen to Withhold Sources of Information From the Court*, 45 YALE L. J. 357 (1935) (decrying passage of a shield law in New Jersey in 1933 and the drive for more).

[216] *See* Walter A. Steigleman, *Newspaper Confidence Laws: Their Extent and Provisions*, 20 JOURNALISM Q. 230, 236 (1943) (observing that by the 1940s, "Congressmen and many sections of the general public are sympathetic to this 'customary practice' " of refusing to reveal sources).

V. Discussion and Conclusions

Michael Gerhardt has observed that non-judicial precedents are legal "history in the making" and that non-judicial precedents often "chronicle constitutional history."[217] Viewing the history of the journalist-privilege issue through that lens, one can see that, to borrow from Faulkner, the past is not even past.[218] When reporter Judith Miller was jailed for 85 days in 2005 for refusing to reveal confidential sources to a grand jury,[219] all of the events that followed were predicted by the privilege dispute of 1929: outcry among journalists to put the issue on the national agenda, invocations of freedom of the press to try to sway public opinion, lobbying in Washington to adopt a federal shield law, lobbying in the states to signal support for a federal law, failure at the federal level but success in the states,[220] then silence. The only significant legal difference between these two events was that Miller's lawyers could attempt to make a First Amendment claim to a testimonial privilege in court.

That argument was not available in 1929, when three reporters for the *Washington Times* were sentenced to 45 days in jail for contempt. It was far too early for any well-trained lawyer to make such a Constitutional claim. The U.S. Supreme Court's only press-specific cases at that point were inapposite. In the *Patterson* case of 1907,[221] the Court ruled that the First Amendment did not shield journalists from post-publication punishments such as contempt citations. In the *Burdick* case of 1915,[222] the unusual facts of the case did not necessarily support the press' frequent claim that the Fifth Amendment should shield them from testifying. In the *Elwell* case of 1921,[223] the Court's denial of *certiorari* seemed to confirm the Fifth Amendment argument was dead. Doctrinally, no Constitutional avenue was open.

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[217] Gerhardt, *supra* note 16, at 772. One example offered: President Thomas Jefferson's unilateral decision to execute the Louisiana Purchase set the stage for future debates about the constitutionality of such an Executive decision without Congressional authority; the non-judicial precedent he set could be used to argue both for and against such a use of Executive power.

[218] WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951) (writing, "The past is never dead. It's not even past.").

[219] Susan Schmidt & Jim VandeHei, *N.Y. Times Reporter Released From Jail; Miller to Testify in CIA Leak Probe*, WASH. POST, Sept. 30, 2005, at A1.

[220] *See, e.g.*, Elizabeth Coenia Sims, *Reporters and Their Confidential Sources: How Judith Miller Represents the Continuing Disconnect Between the Courts and the Press*, 5 FIRST AMEND. L. REV. 433 (2006-2007); Daniel Joyce, *The Judith Miller Case and the Relationship Between Reporter and Source: Competing Visions of the Media's Role and Function*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 555 (2006-2007).

[221] Patterson v. Colorado, 205 U.S. 454 (1907).

[222] Burdick v. United States, 236 U.S. 79 (1915).

[223] Elwell v. United States, 275 F. 775 (7th Cir. 1921), *cert. denied*, 257 U.S. 647 (1921).

Faced with another defeat in a long line of cases denying a reporter-source privilege based on common law, the press took its case to the legislatures instead. Why then? Perhaps the reason was tied to the fact that the newspaper industry was at the zenith of its influence, financially strong and enjoying much improved government relations in Washington, thanks in part to the number of journalists in high positions of power.[224] The press was in a better position to take the fight for statutory protection to the federal level and did, resulting in the first shield-law bills submitted in the U.S. Congress.

In harnessing the influence of nationally known public figures such as William Randolph Hearst, Sen. Arthur Capper and Rep. Fiorello La Guardia, press advocates were, according to Gerhardt's theory, putting the journalist-privilege issue on the public's agenda.[225] This was also the point of having the three reporters at the center of the dispute refuse to appeal their convictions and go to jail instead – to increase the perceived urgency for public attention. Because the dispute was unfolding in Washington, because it included accusations of Congressional corruption, and because it involved the deeply unpopular issue of Prohibition, shield-law advocates were able to generate coverage in newspapers coast to coast.

In consistently framing their arguments for a shield law in First Amendment rhetoric, journalists and press advocates were, according to Gerhardt's theory, "facilitating Constitutional dialogue"[226] and "shaping national identity."[227] Invoking the First Amendment could appeal to Americans' pride in their democracy and their Constitutional system, but courts at the time had offered no concrete guidance as to what freedom of the press meant or what it protected. So the journalists themselves used the privilege issue to launch a discussion, to voice opinions, to articulate theories, to rehearse arguments. Many of the ideas they discussed in 1929 – journalism's role in self-government, the checking function of the press – would find their way into scholarly theories and court decisions decades later.[228]

In trying to anchor a testimonial privilege for journalists in the First Amendment, journalists and press advocates were trying themselves to implement Constitutional values.[229] Many of the mandates in the Constitution

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224 Journalist-politicians of this era included President Warren G. Harding and U.S Sen. Robert M. "Fighting Bob" LaFollette of Minnesota.

225 Gerhardt, *supra* note 16, at 765. Gerhardt uses the term "agenda-setting" but not in the sense that media scholars would use it.

226 *Id.* at 766.

227 *Id.* at 774.

228 *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

229 *See* Gerhardt, *supra* note 16, at 775.

and Bill of Rights are so broadly worded as to mean little on their face. Freedom of the press on its own could be described as a "background right" that is "aspirational, embodying ideals."[230] In arguing for a testimonial privilege to protect confidential sources, journalists were proposing a concrete rule they believed would contribute to implementing that larger aspiration.

In lobbying for a federal shield law to create that concrete rule, journalists pointed repeatedly to the existence of such a law in Maryland, on the books more than 30 years. This fulfilled another key prediction of Gerhardt's theory: The longer a non-judicial precedent stands and the more it is cited, the more legitimate it becomes as an influence on future decision-making.[231] Once the lobbying campaign of 1929 got under way, shield-law bills proliferated in state legislatures from New York to Texas and, within three years, began to be adopted. More bills and more adopted statutes created "network effects,"[232] as Gerhardt would predict, so that subsequent campaigns in the late 1930s and 1940s were easier and more fruitful. As a result, the number of state shield laws grew from one to a dozen from 1929 to 1949.

Although success eluded journalists at the federal level – and still does[233] – Gerhardt would view that first wave of shield laws as important. Such state-level enactments are often made, he has observed, "to make a point, appease important constituencies, encourage other states to follow suit."[234] What had been merely a professional norm – protecting confidential sources – now was firmly entrenched in the legal realm. What had seemed an aberration – Maryland's singular statute – now was legitimated by other laws that used it as a model.

Furthermore, viewed through the lens of Gerhardt's theory, the drive for a federal shield law in Congress in 1929 was itself a non-judicial precedent, and, as such, it was not a total failure but a partial success. It put the journalist-privilege issue on the nation's agenda, Gerhardt would point out,[235] and it gave journalists and press advocates an outlet to articulate and rehearse arguments for what they believed freedom of the press should mean. Nearly 30 years before anyone would make the case for a journalist privilege based on the First Amendment in a court of law,[236] these non-judicial actors were making it in the court of public opinion and, thus, paving the way.

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[230] *Id.* at 779.
[231] *Id.* at 784.
[232] *Id.* at 719.
[233] *See, e.g.*, Charlie Savage, *After Afghan War Leaks, Revisions in a Shield Bill*, N.Y. TIMES, Aug. 3, 2010, at 2 (reporting that the latest attempt to adopt a federal shield law is still stalled in the U.S. Senate).
[234] *See* Gerhardt, *supra* note 16, at 766.
[235] *Id.* at 765.
[236] Garland v. Torre, 259 F. 2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1959).

This study has shown that Gerhardt's metaphor of statutes as non-judicial precedents is a powerful one. The constitutional rhetoric that has suffused lobbying, debate, and lawmaking in the statutory realm since at least 1929 testifies to the fact that shield laws convey what their creators believe are deeply felt constitutional judgments. The fact that federal courts in nine of the thirteen circuits have over time recognized a reporters privilege based on the First Amendment[237] lends credence to the idea that statutory shield laws are intended to, and do, implement First Amendment values. As Gerhardt's theory urges us to see, statutes empower non-judicial actors to participate in the nation's ever-evolving constitutional culture. Statutes democratize constitutional law.

APPENDIX: CHRONOLOGY OF SHIELD LAWS AND CURRENT CODIFICATIONS

1896 Maryland – MD. CODE ANN., CTS. & JUD. PROC. §9-112 (Thomson West/Westlaw through 2010).

1933 New Jersey – N.J. STAT. ANN. §§2A:84A-21 to 21.13 (Thomson West/Westlaw through 2010).
1935 California – CAL. EVID. CODE §1070 (Thomson West/Westlaw through 2010).
1935 Alabama – ALA. CODE 1975 §12-21-142 (Thomson West/Westlaw through 2010).
1936 Kentucky – KT. REV. STAT. ANN. §421.100 (Baldwin though 2010).
1936 Arkansas – ARK. CODE ANN. §16-85-510 (West 2003 & Supp. 2010).
1937 Pennsylvania – 42 PA. CONS. STAT. ANN. §5942 (Purdon's Pennsylvania Statutes 2010).
1937 Arizona – ARIZ. REV. STAT. ANN. §12-2237 (Thomson West/Westlaw through 2010).
1941 Indiana – IND. CODE ANN. §§34-46-4-1 to 2 (Thomson West/Westlaw through 2010).
1941 Ohio – OHIO REV. CODE ANN. §§2739.04, 2739.12 (Baldwin's Ohio Revised Code 2010).
1943 Montana – MONT. CODE ANN. §§26-1-901 to 903 (Thomson West Westlaw through 2010).
1949 Michigan – MICH. COMP. LAWS ANN. §767.5a (Thomson West/Westlaw through 2010).

1964 Louisiana – LA. REV. STAT. ANN. §§45:1451-1459 (Thomson West/Westlaw through 2010).
1967 Alaska – ALASKA STAT. §§09.25.300-390 (Matthew Bender 2010).

[237] Cathy Packer, *Confidential Sources and Information, in* COMMUNICATION AND THE LAW 335-38 (W. Wat Hopkins, ed. 2010).

1967 New Mexico – N.M. STAT. ANN. §38-6-7 (Thomson West/Westlaw through 2010).
1969 Nevada – NEV. REV. STAT. §§49.275, 49.385 (Thomson West/Westlaw through 2010).
1970 New York – N.Y. CIV. RIGHTS LAW §79-h (McKinney's Consol. 2010).
1971 Rhode Island – R.I. GEN. LAWS §§9-19.1-1 to 1.3 (Thomson West/Westlaw through 2010).
1972 Tennessee – TENN. CODE ANN. 24-1-208 (Thomson West/Westlaw through 2010).
1973 Nebraska – NEB. REV. STAT. §§20-144 to 147 (Thomson West/Westlaw through 2010).
1973 North Dakota – N.D. CENT. CODE §31-01-06.2 (Matthew Bender 2010).
1973 Oregon – OR. REV. STAT. §§44.510 to 540 (Thomson West/Westlaw through 2010).
1973 Minnesota – MINN. STAT. §§595.021-025 (Thomson West/Westlaw through 2010).
1974 Oklahoma – OKLA. STAT. ANN. TIT. 12, §2506 (Thomson West/Westlaw through 2010).
1977 Delaware – DE. CODE ANN. TIT. 10, §§4320-4326 (Thomson West/Westlaw through 2010).
1982 Illinois – 735 ILL. COMP. STAT. ANN. 5/8-901 to 909 (Thomson West/Westlaw through 2010).

1990 Georgia – GA. CODE ANN. §24-9-30 (Thomson West/Westlaw through 2010).
1990 Colorado – COLO. REV. STAT. ANN. §13-90-119 (Thomson West/Westlaw through 2010).
1992 Dist. of Columbia – D.C. CODE ANN. §§16-4701 to 4704 (District of Columbia through 2011).
1993 South Carolina – S.C. CODE ANN. § 19-11-100 (State of South Carolina through 2010).
1998 Florida – FLA. STAT. ANN. § 90.5015 (Thomson West/Westlaw though 2010).
1999 North Carolina – N.C. GEN. STAT. ANN. §8-53.11 (Thomson West/Westlaw through 2010).

2006 Connecticut – CONN. GEN. STAT. ANN. 52-146t, 2006 P.A. 06-140 (Thomson West/Westlaw through 2010).
2007 Washington – WASH. REV. CODE 5.68.010 (Thomson West/Westlaw through 2010).
2008 Maine – 16 ME. REV. STAT. ANN. §61(Thomson West/Westlaw through 2010).
2008 Hawaii – HAW. REV. STAT. §621 (Thomson West/Westlaw through 2010).

2009 Texas – TEX. CODE OF CRIM. PROC. ANN. §§ 38.11, 38.111; Tex. Civ. Code of Practices & Remedies §22.021-22.027 (Vernon 2011).
2010 Kansas – House Bill No. 2585 (Kansas 2010).
2010 Wisconsin – WIS. STAT. ANN. §885.14 (Thomson West/Westlaw through 2010).
2011 West Virginia – Not yet codified. *See* Kristen Rasmussen, *West Virginia Governor Signs Reporter Shield Law,* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Apr. 6, 2011, *available at* http://www.rcfp.org/newsitems/index.php?i=11810 (last visited July 11, 2011).

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