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PRICE V. TIME REVISITED: THE NEED FOR MEDIUM-NEUTRAL SHIELD LAWS IN AN AGE OF STRICT CONSTRUCTION

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Journalists were alarmed when, in 2005, the United States Court of Appeals for the Eleventh Circuit denied shield-law protection to Don Yaeger, an investigative reporter for Sports Illustrated, *in a libel suit by fired football coach Mike Price. Yaeger is a journalist, and Alabama's shield law offers absolute protection even when a journalist is a party to a case. The court's decision turned on the fact that Alabama's seventy-three-year-old statute does not include the word "magazine." This article shows that this hole in the "covered medium" language of Alabama's statute is not uncommon among the nation's thirty-six shield laws and that the Eleventh Circuit's strict reading of the statute's text is not at odds with current trends in statutory interpretation. Those two facts, combined with the rise of the Internet as an important vehicle for journalism, suggest the time is ripe to scrutinize and modernize shield laws, some of which have been on the books for more than a century.*

In 2005, then-*New York Times* reporter Judith Miller spent eighty-five days in jail for refusing to reveal confidential sources for her coverage of former CIA agent Valerie Plame.[1] Miller's contempt-of-court conviction became a *cause celebre* that helped energize a nationwide campaign for the passage of so-called shield laws to protect journalists from compelled disclosure of confidential sources and information.[2] Lobbying in

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[1]*See* 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.

[2]*See, e.g.*, Press Release, Newspaper Association of America, Jail Time for Miller Stresses the Need for Federal Shield Law (July 6, 2005), *available at* http://www.naa.org/PressCenter/SearchPressReleases/2005/Jail-Time-for-Miller-Stresses-the-Need-for-Federal-Shield-Law.aspx; Press Release, PEN Center USA, In Light of Miller/Cooper Case, a Federal Shield Law Is Vital for Freedom of the Press (July 6, 2005), *available at* http://penusa.org/go/news/comments/194. *See also* Judith Miller's personal Web site, http://judithmiller.com.

Washington pushed Congress closer than ever to passing a federal shield law,[3] and new statutory shield laws were adopted in four states in the last three years: Connecticut,[4] Washington,[5] Maine[6] and Hawaii.[7] In Utah, the state supreme court recently created a *de facto* shield law within the state's rules of evidence.[8]

Also in 2005, however, the United States Court of Appeals for the Eleventh Circuit handed down a decision that called into question the effectiveness of many existing shield laws, especially those created early in the 112-year history of such statutes.[9] In *Price v. Time, Inc.*,[10] the court denied shield-law protection to an investigative reporter for *Sports Illustrated* based on a strict reading of Alabama's seventy-three-year-old statute. That statute does not expressly grant protection to magazines, only to newspapers, television stations and radio stations;[11] therefore, the court ruled, a magazine reporter is not covered.[12] In response to the outcry that followed,[13] a senior state senator submitted bills in 2007 and 2008 to add the word "magazine" to the statute.[14]

This article explores the implications of *Price v. Time* beyond Alabama and explores the "covered medium" language in existing shield laws to

[3]*See House Easily Passes Shield Law — Bush Promises Veto*, EDITOR & PUBLISHER, Oct. 16, 2007, *available at* http://www.editorandpublisher.com/andp/news/article_display.jsp?vnu_ content_id=1003659071. *See also* Free Flow Information Act of 2007, H.R. 2102, 110th Cong. 2007. The Senate's version, Free Flow Information Act of 2007, S. 2035.IS, 110th Cong. 2007, has been reported out of the Senate Judiciary Committee and awaits a floor debate and vote.

[4]*See* CONN. GEN. STAT. ANN. § 52-146T (Thomson West/Westlaw through 2008 Reg. Sess.).

[5]*See* WASH. REV. CODE § 5.68.010 (Thomson West/Westlaw effective Aug. 31, 2008).

[6]*See* Amy Harder, *Maine Governor Signs Shield Law*, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, Apr. 21, 2008, *available at* http://www.rcfp.org/newsitems/index.php?i=6710.

[7]*See Governor Signs Journalist Shield Law*, HONOLULU ADVERTISER, July 2, 2008, *available at* http://www.honoluluadvertiser.com/apps/pbcs.dll/article?AID=/20080702/BREAKING01/80702111/-1/RSS01.

[8]*See* UTAH R. EVID. 509 (Thomson West/Westlaw effective Apr. 1, 2008).

[9]Maryland's legislature adopted the nation's first shield law in 1896. 1896 MD. LAWS 437, *codified at* MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (Thomson West/West law through 2008 Reg. Sess.).

[10]416 F.3d 1327 (11th Cir. 2005).

[11]ALA. CODE 1975 § 12-21-142 (State of Alabama through 2008 Reg. Sess.).

[12]416 F.3d at 1345–48. While denying reporter Don Yaeger protection under the Alabama shield law, the court went on to recognize a limited First Amendment protection applicable in this case. *Id.*

[13]*See* L. Michael Higgins Jr., *Rusty Shields for Those Who Wield the Pen: The State of Alabama's Reporter Shield Law in the Aftermath of* Price v. Time, 37 CUMB. L. REV. 263 (2006-2007) (calling for the Alabama legislature to expand the scope of the shield law).

[14]*See* Phillip Rawls, *After Mike Price case, Alabama Looks at Expanding Shield Law*, THE ASSOCIATED PRESS, Feb. 27, 2008, *available at* http://www.al.com/newsflash/regional/index.ssf?/base/news-34/120415285989020.xml&storylist=alabamanews.

identify holes in statutory language similar to the missing "magazine" in Alabama's shield law.[15] It considers whether trends in statutory interpretation make it more or less likely that a court would adhere to strict construction, as the Eleventh Circuit did. It examines other cases in which courts have been called on to interpret the covered-medium language in state shield laws,[16] and it concludes with recommendations to head off the next *Price v. Time*.[17]

ORIGINS OF THE PROBLEM

Alabama's shield law was enacted during a period, like today, in which journalist-source privilege was a hot-button issue.[18] The first bill to propose a federal shield law was submitted to the Senate in 1929.[19] Nearly a dozen similar bills were introduced in state legislatures around the country following that federal effort.[20] Congress held its first hearing on the issue in 1936.[21] In the 1930s and '40s, congressional leaders

[15]Textual analysis has been supplemented with more detailed historical research. Original versions of older statutes have been retrieved, along with legislative studies and proposed shield laws.

[16]Westlaw was used to retrieve reported cases for each of the statutes. Each of these lists was narrowed to isolate appellate level cases, state and federal, and the pool was narrowed further to isolate cases that turned decisively on the "covered medium" issue. Some district level cases have been included because they are frequently cited.

[17]Legal scholars acknowledge that it might take more cases like *Price v. Time* to prompt legislators to act. *See* Matthew Pollock, *Defining Moments*, NEWS MEDIA & THE L., Winter 2008, at 22. Pollock observes, "It may be that states simply need a test case to recognize the problems with more restrictive definitions before accepting a more progressive one." *Id*.

[18]A string of high-profile cases beginning in 1929 led to two concerted lobbying efforts for shield laws at both the state and federal levels. *See* Walter A. Steigleman, THE NEWSPAPERMAN AND THE LAW 197 (1950). *See, also*, State v. Donovan, 30 Atl. (2d) 421 (N.J. 1943); People ex rel. Clarke v. Truesdell, 79 N.Y. Supp. 2d 413 (1948); People ex rel. Mooney v. Sheriff of New York County, 199 N.E. 415 (N.Y. 1936). Many cases during this period were unreported and must be gleaned from accounts in the popular press. *See, e.g., Capital Reporters Jailed for Withholding Bootleggers' Names From Grand Jury*, N.Y. TIMES, Oct. 31, 1929, at 14.

[19]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). *See also* Associated Press, *Immunity for Reporters Asked by Capper in Senate*, N.Y. TIMES, Nov. 15, 1929, at 22.

[20]At least four shield-law bills were entered in the New York state legislature in 1930 alone. *See* REPORT OF THE N.Y. LAW REVISION COMMISSION, LEG. DOC. NO. 65(A) at 52 (1949). The chapter of the annual report dealing with the shield-law issue was titled "Report and Study Relating to Problems Involved in Conferring Upon Newspapermen a Privilege Which Would Legally Protect Them from Divulging Sources of Information Given to Them." *Id.* at 23.

[21]*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).

submitted eight more bills attempting to create a federal shield law.[22] From 1933 to 1949, ten other states adopted shield laws similar to Alabama's.[23]

Long before Justice Byron White, for a majority of the Supreme Court of the United States, explained the case against basing a testimonial privilege for journalists in the First Amendment,[24] rationales for statutory protections against compelled disclosure were well-established: The watchdog role of the press is vital to a well-functioning democracy; that role often requires the use of confidential sources; those sources are more likely to come forward if they can conceal their identities, and those sources are likely to dry up if they cannot count on a journalist's pledges of confidentiality.[25] A key concern of opponents stretching to the earliest days of the shield law debate has been the perceived danger of a growing list of people who could claim a testimonial privilege, once limited to attorneys and their clients.[26] As one legal scholar summed up that opposition in 1950: "The present tendency toward the indiscriminate privileging of occupational groups is unhealthy."[27]

The 2005 decision in *Price* came amidst an unusually intense period of interest in this issue. Calls to shield journalists from compelled disclosure had grown louder following perceived assaults on the press through an increasing number of subpoenas,[28] high-profile cases with

[22]*See* H.R. 351, 72d Cong. (1931–33); S. 4076 and H.R. 10381, 74th Cong. (1935–36); S. 627 and H.R. 1605, 75th Cong. (1937–38); S. 1027 and H.R. 36, 76th Cong. (1939–41); S. 752, 78th Cong. (1943–44).

[23]The states were New Jersey (1933), California (1935), Kentucky and Arkansas (1936), Pennsylvania and Arizona (1937), Indiana and Ohio (1941), Montana (1943), and Michigan (1949). Maryland's shield law had been on the books since 1896.

[24]Branzburg v. Hayes, 408 U.S. 665, 703 (1972):

> We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as the large metropolitan publisher who utilizes the latest photocomposition methods.

[25]*See, e.g.*, Thomas C. Desmond, *The Newsmen's Privilege Bill*, 13 ALB. L. REV. 1 (1949) (arguing *for* a shield law in New York); Earl H. Gallup Jr., *Further Consideration of a Privilege for Newsmen*, 14 ALB. L. REV. 16 (1950) (arguing *against* a shield law in New York); Walter A. Steigleman, *Newspaper Confidence Laws: Their Extent and Provisions*, 20 JOURNALISM Q. 230 (1943).

[26]*See, e.g.*, Note, *Privilege of Newspapermen to Withhold Sources of Information From the Court*, 45 YALE L.J. 357 (1936); Note*, Privilege of a Newspaper Reporter to Refuse to Testify*, 22 CORN. L. Q. 115 (1936).

[27]Note, *The Right of a Newsman to Refrain From Divulging the Sources of His Information*, 36 VA. L. REV. 61, 83 (1950).

[28]*See* Anthony L. Fargo, *Evidence Mixed on Erosion of Journalists' Privilege*, NEWSPAPER RES. J., Spring 2003, at 50–62.

stiff penalties for journalists who have refused to testify,[29] the new drive to pass a federal shield law,[30] the rise of the Internet as an important news medium,[31] and the question of whether bloggers are protected journalists.[32] There now are shield laws in thirty-five states and the District of Columbia.[33]

The question of who should qualify for protection under such laws remains a sticking point.[34] The Bush administration fought the recently proposed federal shield law on the grounds that a broadly worded law could shield terrorists posing as journalists.[35] Such arguments center on the portion of these statutes known as their "covered person" provisions;

[29]*See* 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 (2005–06). The latest high-profile case involved potentially ruinous fines against former *USA Today* reporter Toni Locy for stories she had written about the government's investigation of Steven J. Hatfill's alleged involvement in the 2001 anthrax attacks. *See, e.g.*, Editorial, *Chill the Press: A Judge's Harsh Penalty Could Limit the Public's Right to Know*, WASH. POST, Mar. 24, 2008, at A12. After holding Locy in contempt, the judge took the unusual step of barring third parties from paying Locy's $5,000-a-day fine, which she appealed. The government settled with Hatfill out of court in June 2008, rendering moot the contempt charge against Locy. *See* Tarah Park, *Federal Appeals Court Vacates Locy Contempt Order in Anthrax Reporting Case*, JURIST, Nov. 20, 2008, *available at* http://jurist.law.pitt.edu/paperchase/2008/11/federal-appeals-court-vacates-locy.php.

[30]*See, e.g.,* Leila Wombacher Knox, *The Reporter's Privilege: The Necessity of a Federal Shield Law Thirty Years After Branzburg*, 28 HASTINGS COMM. & ENT. L.J. 125 (2005-2006); 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 OHIO ST. L. J. 469 (2006); Editorial, *Time for a Shield Law: Reporters and Their Sources Need Protection*, WASH. POST, Mar. 3, 2008, at A16.

[31]*See* John B. Horrigan, *Online News: For Many Home Broadband Users, the Internet Is a Primary News Source*, PEW INTERNET & AMERICAN LIFE PROJECT (2006), *available at* http://www.pewinternet.org/PPF/r/178/report_display.asp.

[32]*See, e.g.*, Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371 (2003); Laura Durity, *Shielding Journalist-'Bloggers': The Need to Protect Newsgathering Despite the Distribution Medium*, 2006 DUKE L. & TECH REV. 11 (2006); Anne Flanagan, *Blogging: A Journal Need Not a Journalist Make*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 395 (2006); Paul Horwitz, *Or of the [Blog]*, 11 NEXUS J. OP. 45 (2006); Donald J. Kochan, *The Blogosphere and the New Pamphleteers*, 11 NEXUS J. OP. 99, 1 (2006).

[33]This tally includes California, but not Utah, because California's shield law, though now part of the state's rules of evidence, started as a legislature-made statute. 1935 CAL. STAT., CH. 532, P. 1608, § 1 (1935) (*now codified at* CAL. EVID. CODE § 1070 (Thomson West/Westlaw through 2008 Reg. Sess.)). California also has ensconced its shield law into its constitution. *See* WEST'S ANN. CAL. CONST. art. 1, § 2(b) (amended June 3, 1980).

[34]*See, e.g.*, Randy Dotinga, *Are Bloggers Journalists? Do They Deserve Press Protections?*, CHRISTIAN SCI. MONITOR, Feb. 2, 2005, *available* at http://www.csmonitor.com/2005/0202/p03s02-usju.html; Randy Dotinga, *Press Splits on How to Protect Confidential Sources*, CHRISTIAN SCI. MONITOR, June 30, 2005, *available at* http://www.csmonitor.com/2005/0630/p02s02-usju.html.

[35]*See* Patrick J. Fitzgerald, *Shield Law Perils*, WASH. POST, Oct. 4, 2007, at A24.

that is, who is covered?[36] This has become a pressing concern and the focus of abundant legal scholarship, in light of the growing role of the Internet and of journalists working outside traditional newsrooms.[37]

In *Price v. Time*, however, there was no question about Don Yaeger's journalistic *bona fides*: He was a full-time reporter for *Sports Illustrated*.[38] Rather, the question before the Eleventh Circuit turned on the "covered medium" portion of Alabama's shield law; that is, what types of media are covered? As adopted in 1935, the statute covered "any newspaper."[39] The state legislature amended the statute in 1949 to add "radio broadcasting station or television station,"[40] and that remains the extent of statute's covered-medium language.[41]

The federal district court hearing Yaeger's request for shield-law protection against Price's subpoenas seemed frustrated by the omission of magazines from the statute. After denying Yaeger's request in 2003,[42] the district court took the unusual step of certifying a question to the Alabama Supreme Court for advice on interpreting the state law: "Does the exemption from disclosing sources of information found in Alabama Code § 12-21-142 apply to a person 'engaged in, connected with, or employed on any [magazine] while engaged in a news-gathering

[36]*Concerning the Free Flow of Information Act of 2007: Hearing on H.B. 2101, Before the H. Comm. on the Judiciary*, 110th Cong., 1st Sess. (2007) (statement of Rachel L. Brand, Assistant Attorney General, U.S. Department of Justice). In her prepared statement, Brand wrote: "[A] broad definition would accord the status of 'covered person' to a terrorist operative who videotaped a message from a terrorist leader threatening attacks on Americans, because he would be engaged in recording news or information that concerns international events for dissemination to the public." *Id*. at 20.

[37]*See* Berger, *supra* note 32; Durity, *supra* note 32; Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn From the States*, 11 COMM. L. & POL'Y 35, 71-72; Flanagan, *supra* note 32; Horwitz, *supra* note 32; Donald J. Kochan, *The Blogosphere and the New Pamphleteers*, 11 NEXUS J. OP. 99, 1 (2006); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L.R. 515 (2007).

[38]The $20 million libel suit in this case was filed by University of Alabama football coach Mike Price against Yaeger, *Sport Illustrated* and the magazine's parent company, Time, Inc., following an article accusing Price of sexual improprieties. Don Yaeger, *Bad Behavior: How He Met His Destiny at a Strip Club*, SPORTS ILLUSTRATED, May 12, 2003, at 38. Yaeger's story led to the firing of a successful and popular football coach. However, Yaeger's reporting also was criticized, for he relied heavily on the anonymous statements of admitted prostitutes and had not kept accurate notes as to who said what. Time eventually settled with Price out of court. *See* Associated Press, *Time Inc. Settles Suit Filed by Former Alabama Coach*, ESPN, Oct. 10, 2005, *available at http://sports.espn.go.com/ncf/news/story?id=2186402*.

[39]1935 ALA. LAWS 649.

[40]1949 ALA. LAWS 548.

[41]ALA. CODE § 12-21-142 (Thomson West/Westlaw effective through 2008 Reg. Sess.).

[42]Price v. Time, Inc., Memorandum Opinion, No. Civ. A. CV03S1868S, N.D. Ala. Dec. 8, 2003 (unreported).

capacity'?"[43] The supreme court declined to answer, so the district court again denied Yaeger's request in 2004.[44]

In accepting an interlocutory appeal from the lower court, the United States Court of Appeals for the Eleventh Circuit agreed that answering the covered-medium question was important because "its significance extends beyond this case."[45] The court explained that, in interpreting the statute, it had to put itself in the shoes of the Alabama Supreme Court and look "to the plain meaning of the words as written by the legislature."[46] If the meaning of the words is clear, "[T]hen there is no room for judicial construction."[47] Judge Edward Earl Carnes summed up the dilemma for the court:

> It seems to us plain and apparent that in common usage, "newspaper" does not mean "newspaper and magazine." There are some meanings so plain that no further discussion should be necessary, but sometimes judges and lawyers act like lay lexicographers, love logomachy, and lean to logorrhea. And so it is here. The lawyers representing the defendants insist that "newspaper" means more than newspaper, the more being "magazine."[48]

In deploying what is commonly called the "Plain Meaning Rule," the court explored various definitions of the word "newspaper" from dictionaries, encyclopedias and thesauri. It also cited twenty Alabama statutes that use the words "newspaper" and "magazine," both separately and together.[49]

In a rare discussion of canons of statutory construction,[50] the court explained that it could not heed *Sports Illustrated*'s request to employ the canon of avoidance; that rule states that if a strict interpretation would lead to a constitutional problem, liberal interpretation is called

[43] Price v. Time, Inc., 304 F. Supp. 2d 1294, 1309 (N.D.Ala. 2004).

[44] *Id*.

[45] Price v. Time, Inc., 416 F.3d 1327, 1335 (11th Cir. 2005) (quoting the lower court).

[46] *Id*.

[47] *Id*. at 1336 (quoting IMED Corp. v. Sys. Eng'g Assocs. Corp., 602 S.2d 344, 346 (Ala. 1992): "Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used, a court is bound to interpret that language to mean exactly what it says.").

[48] *Id*.

[49] *Id*. at 1336–41.

[50] Canons of statutory construction, or canons of interpretation, are rules — such as the Plain Meaning Rule — that grew out of the common law. *See* BLACK'S LAW DICTIONARY 198 (8th ed. 2004). They are not binding rules but rather guides that judges use when deciding how to interpret statutes, especially when the statutory language is thought to be vague or inconclusive. The canons are associated with a nineteenth-century style of legal formalism that fell out of favor among American judges in the twentieth century, but they seem to have come back into favor in recent decades. *See infra* notes 159-78 and accompanying text.

for.[51] Instead, the court said it had to adhere to the canon of statutes in derogation of the common law; that rule says that when a statute might alter the common law, a strict reading is required.[52] Since a shield law confers a privilege to journalists not found in the common law of Alabama, Judge Carnes wrote, that rule of interpretation is most relevant: "Where there is any doubt about the meaning of statutes in derogation of the common law, Alabama courts interpret the statute to make the least, rather than the most, change in the common law."[53] Thus, the appeals court upheld the lower court's ruling that a reporter for *Sports Illustrated* was not eligible for protection under Alabama's shield law.[54] (The court went on to grant Yaeger qualified protection under the First Amendment.[55])

EVOLUTION OF STATUTORY LANGUAGE

The *Price v. Time* problem most commonly begins with a statute written when newspapers dominated journalism, before the rise of broadcast and decades before the invention of the Internet.[56] Adopted in 1935, Alabama's otherwise strong shield law offered protection to one medium, newspapers. It was amended in 1949 to add radio and

[51]*Price,* 416 F.3d at 1341–42. Judge Carnes wrote, "The Alabama Supreme Court would not stretch the canon of constitutional avoidance far enough to make a difference affecting *Sports Illustrated*, which would essentially require adding the word 'magazine' to the statute." *Id*. at 1342.

[52]*Id.* at 1342.

[53]*Id*. at 1342–43

[54]*Id*. at 1343.

[55]One could argue that the court reached this decision simply to avoid applying the absolute protection of Alabama's shield law, preferring instead the qualified protection of a First Amendment-based privilege. That way, the court could order Yaeger to provide information if it determined the information was central to the case, the seeking party had exhausted all other avenues to obtain the information, and the seeking party could not effectively defend himself without the information (the traditional three-part test adopted from Justice Potter Stewart's dissent in *Branzburg*). In vacating the order against Yaeger to testify, the court concluded that the exhaustion prong had not been met but emphasized that, if Price's lawyers made a reasonable effort to interview Yaeger's apparent sources, the lower court was free to reinstate the disclosure order. *Price,* 416 F.3d at 1347.

[56]*See* 1935 ALA. LAWS 649. The original statute read in its entirety:

> No person engaged in, connected with or employed on any newspaper, while engaged in a news-gathering capacity, shall be compelled to disclose in any legal proceeding or trial, before any court or before a grand jury of any court, before the presiding officer of any tribunal or his agent or agents or before any committee of the Legislature or elsewhere the sources of any information procured or obtained by him and published in the newspaper on which he is engaged, connected with or employed.

television to its list of covered media,[57] and it has remained unchanged since.[58]

A review of existing state shield laws shows the problem of incomplete or outdated statutory language is not unique to Alabama.[59] It shows that the process of updating older statutes to reflect a changing media landscape has been halting and inconsistent. It also shows that, despite a logical progression toward medium neutrality, lawmakers continue to grapple with the arrival of new media. (See the APPENDIX for a chronological chart of existing shield laws.)

Medium-Restrictive Statutes: 1933–1949

The medium-restrictive approach of Alabama's shield law was not unusual for the era in which the statute was adopted.[60] Although Maryland's shield law, covering newspapers and "journals," had been on the books since 1896,[61] most of the eleven statutes adopted by states between 1933 and 1949 protected only newspapers.[62] Just two of the eleven covered other types of publications;[63] only four of the eleven covered wire

[57] *See* 1949 ALA. LAWS 548.

[58] The statute was re-codified but not altered in 1975. ALA. CODE § 12-21-142 (Thomson West/Westlaw through 2008 Reg. Sess.).

[59] Little has been written about the legislative histories of the early statutes; the focus has tended to be on court cases that led to statutes rather than on the statutes themselves. *See, e.g.*, David Gordon, *The 1896 Maryland Shield Law: The American Roots of Evidentiary Privilege for Newsmen*, 22 JOURNALISM MONOGRAPHS (1972); David Gordon, Protection of News Sources: The History and Legal Status of the Newsman's Privilege (1971) (unpublished Ph.D. dissertation, University of Wisconsin). As other legal scholars have noted, a key disadvantage of studying statutory law as opposed to court-made law is a lack of documentary evidence to explain decisions made. *See, e.g.*, Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2008 (2002) (observing that "other branches of government generally make their choices without written opinions. Most state and local governments don't even provide a formal legislative history for their enactments"). This is especially true for older statutes.

[60] The fact that these statutes covered only newspapers is explained in part by the fact that all of the early cases involved newspaper reporters. *See, e.g., supra* note 18. Those lobbying for the first shield laws were newspaper executives, including Sen. Arthur Capper, owner of one of the largest newspaper chains in the Midwest. *See, e.g.,* George H. Manning, *Capper Author of Bill Protecting News Men in Contempt Cases*, EDITOR & PUBLISHER, Nov. 16, 1929, at 8.

[61] *See* 1896 MD. LAWS 437. The statute read in its entirety:

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

[62] The states were New Jersey (1933), California and Alabama (1935), Kentucky and Arkansas (1936), Pennsylvania and Arizona (1937), Indiana and Ohio (1941), Montana (1943), and Michigan (1949).

[63] They were statutes in Arkansas and Michigan.

or press services;[64] none of the eleven covered radio.[65] Three statutes that omitted magazines then — Alabama, Arizona and Kentucky[66] — omit them to this day.

The absence of broadcast media in these statutes was questioned at least as early as 1941, when a shield-law bill was entered in the Massachusetts legislature;[67] it would have protected newspapers, radio and television.[68] In 1949, in strongly recommending a shield-law bill, the New York Law Revision Commission wrote: "If a privilege be granted, it should extend to newspapers, periodicals, newsreels, broadcasters by wire, radio, television or facsimile, and to press associations."[69] Neither measure passed, so no models were established.[70]

Media law scholars have long warned of potential problems created by these statutes' medium-restrictive language.[71] As early as 1956, one shield-law advocate called attention to the covered-medium issue and, including state-by-state chart, decried the inconsistency of approaches in the twelve statutes on the books at that time.[72] He criticized such statutory requirements as employment with a named media outlet, writing, "Such elements have, at best, only remote connection with the essential policy questions involved."[73] He went on to propose a model shield law that, taking into account the technology of 1956, would have been considered medium-inclusive.[74]

The process of adding radio and television to statutes from this period began in 1949 and continued in a piecemeal fashion for nearly forty

[64]They were statutes in Indiana, Montana, Ohio and Pennsylvania.

[65]The omission of radio might seem surprising since radio news started as "a child of newspapers" in 1920. LOREN GHIGLIONE, THE AMERICAN JOURNALIST: PARADOX OF THE PRESS 85 (1990). However, at the time these early shield laws were promulgated, print journalists were waging a turf war with broadcast journalists, and newspaper people were vocal in their contempt for their on-air counterparts. *See, e.g.*, GWENTH JACKAWAY, MEDIA AT WAR: RADIO'S CHALLENGE TO THE NEWSPAPERS, 1924–1939 (1995); Giraud Chester, *The Press-Radio War: 1933–35*, 13 PUB. OPINION 252 (1949).

[66]ALA. CODE § 12-21-142 (2008); ARIZ. REV. STAT. ANN. § 12-2237 (Thomson West/Westlaw through July 7, 2008); KY. REV. STAT. ANN. § 421.100 (Thomson West/Westlaw through 2007 Reg. Sess.).

[67]*See* An Act to Create and Protect the Right of Confidence in the Profession of Journalism, Radio and Television,H.B. NO. 194 (Mass. 1941).

[68]*Id.* at § 1.

[69]NEW YORK LAW REVISION COMMISSION, LEG. DOC. NO. 65(A) 27 (1949).

[70]Massachusetts still has no shield law. New York passed a shield law in 1970. N.Y. CIV. RIGHTS LAW § 79-H (McKinney 1992, current through 2008).

[71]*See, e.g.,* Fargo, *supra* note 37, at 59.

[72]W.D. Lorensen, *The Journalist and His Confidential Source: Should a Testimonial Privilege Be Allowed?*, 35 NEB. L. REV. 562 (1955–1956).

[73]*Id*. at 566.

[74]*Id* at 580 ("[N]o person engaged in the work of gathering, writing, publishing or disseminating news for any newspaper, periodical, press association, or radio or television station, shall be held in contempt.").

years. For example, Arkansas amended its 1936 statute in 1949 to add radio but left out television,[75] an omission that stands to this day.[76] California amended its 1935 statute in 1961 to add wire services and broadcasters[77] and, prompted by a court case, amended it again in 1974 to add magazines.[78] Indiana did not add broadcasters to its 1941 statute until 1973;[79] Montana did not add broadcasters to its 1943 statute until 1981,[80] and Michigan did not add broadcasters to its 1949 statute until a court case prompted it to do so in 1986.[81]

However, Maryland legislators pioneered a significant broadening of their statute's covered-medium language as early as 1949. While adding broadcasters, magazines and wire services to its historic statute, legislators also extended protection to "any printed, photographic, mechanical, or electronic means of disseminating news and information to the public."[82] That broad language would be copied in later statutes in other jurisdictions.[83]

Toward Medium Neutrality: 1964–1977

Maryland's medium-neutral approach would become a hallmark of state shield laws adopted during the next significant wave of statutes, in the 1960s and '70s, when thirteen states adopted such laws.[84] An outgrowth of the era's anti-establishment sentiment was the "media democratization" movement, which emphasized the role of underground newspapers, student journalists, documentary filmmakers and book authors

[75] ARK. CODE ANN. § 15-85-510 (2006) (LexisNexis).

[76] An Arkansas court has said that judges in future cases are likely to overlook that deficiency of wording, but only in *dicta* in a case that did not turn on the covered-medium issue. Williams v. American Broad. Cos., 96 F.R.D. 658, 665 (W.D. Ark. 1983).

[77] 1961 CAL. STAT., ch. 629, § 1 (now codified as CAL. EVID. CODE § 1070) (Thomson West/Westlaw through 2008 Reg. Sess.).

[78] 1974 CAL. STAT., ch. 1323. The case was *Cepeda v. Cohane*, 233 F. Supp. 465 (S.D.N.Y. 1964) (heard in a New York court but in which the California shield law was being applied).

[79] 1973 IND. ACTS 319, § 1 (now codified as IND. CODE §§34-46-4-1) (Thomson West/Westlaw through 2008 2nd Reg. Sess.)).

[80] 1977 MONT. LAWS, ch. 225 (now codified as MONT. CODE ANN. §§26-1-902) (Thomson West/Westlaw through 2007 Reg. Sess.)).

[81] 1986 P.A.1986, NO. 293, § 1 (now codified as MICH. COMP. LAWS ANN. § 767.5a) (Thomson West/Westlaw through 2008 Reg. Sess.).

[82] MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (Thomson West/Westlaw through 2008 Reg. Sess.).

[83] *See, e.g.,* D.C. CODE ANN. § 16-4701 (District of Columbia through July 7, 2008).

[84] The states were Louisiana (1964); Alaska and New Mexico (1967); Nevada (1969); New York (1970); Rhode Island (1971); Tennessee (1972); Nebraska, North Dakota, Oregon and Minnesota (1973); Oklahoma (1974), and Delaware (1977). New Mexico's statute was struck down as unconstitutional by the state's Supreme Court and written instead into the judicial branch's rules of evidence.

in addition to the institutional press.[85] This gave rise to a distinction between *traditional* and *nontraditional* journalists, a kind of normative shorthand that would work its way into academic and legal discourse.[86]

The Supreme Court's decision in *Branzburg v. Hayes,*[87] declining to base a journalists' privilege in the First Amendment, arrived in the middle of the era. Justice Byron White's veneration of the "lonely pamphleteer"[88] and reaffirmation of freedom of the press as "a personal right"[89] encouraged a broadened view of what constitutes "news media."[90] That can be seen in the marked difference between the covered-medium language of the six statutes adopted before *Branzburg* and the seven that followed.

Louisiana's 1964 shield law was representative of pre-*Branzburg* statutes in the way it set out a by-then standard list of covered media**:** newspapers, magazines or periodicals, press associations or wire services, radio and television;[91] like some older statutes, it also covered "news reels."[92] New Mexico's 1967 statute, for the first time, added cable television[93] to the standard list. New York's 1970 statute took pains to limit coverage to the standard list and to precisely define each medium;[94] a magazine, for example, is "a publication containing news which is published and distributed periodically, and has done so for at

[85]*See* ERIK BARNOUW, TUBE OF PLENTY (2nd ed. 1990). Summing up media democratization, Barnouw wrote: "Throughout the rise of the Vietnam war and the military atmosphere it involved, many Americans were turning from commercial television and responding to new media. To some extent, noncommercial television, along with segments of radio, became a part of this movement of dissent." *Id*. at 382.

[86]*See, e.g.*, Grant Penrod, *Buttressing the First Amendment*, NEWS MEDIA & THE L., Winter 2005, at 4. In discussing the scope of a proposed federal shield law: "The Reporters Committee has long advocated a functional approach, arguing that freelancers *and other nontraditional journalists* need and deserve the same protections as others." *Id*. (emphasis added).

[87]408 U.S. 665 (1972).

[88]*Id.* at 704.

[89]*Id.* (*quoting* Lovell v. Griffin, 303 U.S. 444, 452 (1938)).

[90]*See* Margaret Sherwood, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CAL. L. REV. 1198 (1970) (still referring to members of the press as "newsmen" and limiting discussion of a journalist privilege to employees of the institutional press). *But see* Bruce L. Bortz & Laurie R. Bortz, *Pressing Out the Wrinkles in Maryland's Shield Law for Journalists*, 8 U. BALT. L. REV. 461, 475 (1979) (urging state legislators to amend Maryland's shield law to include student journalists, book authors, documentary filmmakers and other "nontraditional journalists").

[91]LA. REV. STAT. ANN. §§45:1451-59 (Thomson West/Westlaw through the 2008 Second Extraordinary Sess.).

[92]*Id*. at § 1451(f).

[93]N.M. STAT. ANN. § 38-6-7(b)2 (Thomson West/Westlaw through 2008 2nd Reg. Sess.).

[94]N.Y. CIV. RIGHTS LAW § 79-h(a)1-8 (Thomson West/Westlaw through 2008).

least one year, has a paid circulation and has been entered at a United States post-office as second-class matter."[95] Rhode Island's 1971 statute went so far as to say covered media must be accredited,[96] though no such designation exists.

On the heels of *Branzburg*, Tennessee's 1972 shield law announced a new approach.[97] It dispensed with designated media, reading in the relevant part:

> A person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast, shall not be required . . . to disclose . . . the source of any information procured for publication or broadcast.[98]

Besides freeing a "covered person" from any connection to the institutional press, the statute left open to interpretation what may qualify as "news media or press."

States that followed Tennessee experimented with other ways to open the "covered medium" parameters: Nebraska retained the traditional list but added the caveat "but not limited to."[99] Oregon[100] and Oklahoma[101] expanded the traditional list to include cable television, books and, in a nod to Justice White's *Branzburg* decision, pamphleteers. North Dakota's statute defined a covered medium as "any organization engaged in publishing or broadcasting news";[102] Minnesota's protected the "transmission, dissemination or publication to the public,"[103] and Delaware's covered "the mass reproduction of words, sounds, or images in a form available to the general public."[104]

These experiments in statutory language established a broad-based approach that would become the norm. When Illinois adopted its shield law in 1982,[105] the only one from that decade, it extended coverage to "any newspaper or other periodical . . . whether in print or electronic

[95] *Id*. at § 79-h(a)2.
[96] R.I. GEN. LAWS § 9-19.1-2 (Thomson West/Westlaw current with 2007 legislation).
[97] TENN. CODE ANN. § 24-1-208 (Thomson West/Westlaw through 2008 2nd Reg. Sess.).
[98] *Id.* at § 24-1-208(a).
[99] NEB. REV. STAT. § 20-145 (Thomson West/Westlaw through 2007).
[100] OR. REV. STATE § 44.510 (Thomson West/Westlaw through 2007).
[101] OKLA. STAT. ANN. TIT. 12, § 2506 (Thomson West/Westlaw through 2008 2nd Reg. Sess.).
[102] N.D. CENT. CODE § 31-01-06.2 (Thomson West/Westlaw through 2007).
[103] MINN. STAT. § 595.023 (Thomson West/Westlaw through 2008 Reg. Sess.).
[104] DEL. CODE ANN. TIT. 10, § 4320 (Thomson West/Westlaw through 2008).
[105] 735 ILL. COMP. STAT. ANN. 5/8-901 to -909 (Thomson West/Westlaw through 2008 Reg. Sess.).

format"[106] and "news service whether in print or electronic format."[107] A decade before the arrival of the World Wide Web, that wording anticipated statutory language of the 1990s.

Anticipating the Web: 1990–1999

Press advocates quickly seized on a string of controversies in the 1990s involving journalists held in contempt, fined and/or jailed to lobby for new shield laws. In Georgia, the campaign for a shield law grew out of a contempt holding against a reporter who interviewed a drug dealer;[108] in Colorado, the controversy involved reporting on leaked details of grand jury indictments;[109] in South Carolina, it involved reporting on a federal probe into state government corruption;[110] in Florida, it involved a newspaper reporter's jailhouse interview with a convicted murderer;[111] in North Carolina, it involved a television reporter's interview with a murder suspect's lawyer.[112]

Treatment of the covered-medium issue in these jurisdictions was mixed. Georgia's statute named newspapers, magazines, radio, television and books for protection, leaving wire services unprotected.[113] Florida's statute included wire services in the standard list of media, but it singled out books for *exclusion*, the only statute to do so.[114] Colorado's statute duplicated Florida's list but added cable television.[115]

Two jurisdictions carried forward the all-inclusive-list approach to covered media. The District of Columbia's statute defined "news media" as newspapers, magazines, journals, press associations, news agencies, wire services, radio, television or "any printed, photographic, mechanical, or electronic means of disseminating news and information to the public."[116] South Carolina's statute would cover "a newspaper, book, magazine, radio, television, news or wire service, *or other medium*."[117]

North Carolina's statute was the only one from the period to fully embrace the medium-neutral approach pioneered during the 1970s. It

[106] *Id*. at § 8-902(b).
[107] *Id*.
[108] *See* Vaughn v. State, 381 S.E.2d 30 (Ga. 1989).
[109] *See* Pankratz v. Dist. Ct., 609 P.2d 1101 (Colo. 1980).
[110] *See* In re Shain,978 F.2d 850 (4th Cir. 1992).
[111] *See Legislature Passes Nation's 31st Shield Law After Long Struggle*, NEWS MEDIA & THE L., Summer 1998, at 40.
[112] *See* In re Owens, 496 S.E.2d 592 (N.C. Ct. App. 1998).
[113] GA. CODE ANN. § 24-9-30 (Thomson West/Westlaw through 2008 Reg. Sess.)
[114] FLA. STAT. ANN. § 90.5015(1)(a) (Thomson West/Westlaw through 2008 Reg. Sess.).
[115] COLO. REV. STAT. ANN. § 13-90-119(1)(a) (Thomson West/Westlaw through May 20, 2008).
[116] D.C. CODE ANN. § 16-4701 (District of Columbia through July 7, 2008).
[117] S.C. CODE ANN. § 19-11-100(A) (State of South Carolina through 2007).

defines "news medium" as "Any entity regularly engaged in the business of publication or distribution of news via print, broadcast, or other electronic means accessible to the general public."[118] Bolstering that broad language, its "covered person" section would apply to "any person, company, or entity engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination *via any news medium*."[119]

Dodging the Bloggers: 2006–2008

Today, though the Internet is taken for granted as a journalistic medium, the question of whether independent bloggers should qualify for shield law protection has stalled recent efforts to pass a federal statute.[120] Meanwhile, new shield laws have been promulgated in five states in the last three years: Connecticut, Washington, Utah, Maine and Hawaii. The language of these laws draws a fine line between acknowledging the Internet as a covered medium and largely excluding independent bloggers as covered persons. Maine's is the only shield law from this group to follow North Carolina's embrace of complete medium neutrality and extend that concept to covered persons.

Connecticut's 2006 statute includes the seemingly broad phrase "whether by print, broadcast, photographic, mechanical, electronic or any other means or medium."[121] However, protection is limited to persons who are or have been connected with certain designated entities: "Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite or other transmission system or carrier, or channel or programming service for such station, network, system or carrier, or audio or audiovisual production company."[122] This construction essentially limits coverage to traditional media outlets.

Washington's 2007 statute is the first to mention the Internet specifically as a covered medium.[123] It defines "news media" as:

[118]N.C. GEN. STAT. ANN. § 8-53.11(a)(3) (Thomson West/Westlaw through 2008 Reg. sess.).

[119]*Id*. at § 8-53.11(a)(1) (emphasis added). No case has yet tested the meaning of "in the business of."

[120]*See* Richard S. Dunham, *Cornyn's Open Government Effort No Secret*, HOUSTON CHRON., Mar. 21, 2008, *available at* http://www.chron.com/disp/story.mpl/politics/5639370.html. Republican Sen. John Cornyn, of Texas, was quoted as saying, "Trying to find a reasonable definition that accounts for bloggers, student journalists, freelancers as well as the mainstream press, has proved difficult." *Id*.

[121]CONN. GEN. STAT. ANN. § 52-146t(1)(A) (Thomson West/Westlaw through 2008 Reg. Sess.).

[122]*Id*.

[123]WASH. REV. CODE § 5.68.010 (Thomson West/Westlaw effective Aug. 31, 2008).

> Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any entity that is in the regular business of news gathering and disseminating news or information to the public by any means, including, but not limited to, print broadcast, photographic, mechanical, internet, or electronic distribution.[124]

The statute goes on to define "covered person" as "any person who is or has been an employee, agent, or independent contractor" of the listed entities.[125] So a journalistic Web site could be covered by this statute, but an individual blogger might not be because of the text's emphasis on entities, not individuals.

Hawaii's recently adopted shield law attempts to separate the covered medium and covered person issues while offering courts clearer guidance on when an independent blogger may or may not qualify for protection under the law.[126] The statute's covered-medium language seems to be directed squarely at traditional news outlets: "[A]ny newspaper or magazine or any digital version thereof operated by the same organization, news agency, press association, wire service, or radio or television transmission station or network."[127] However, the statute goes on to allow that individuals not associated with traditional news outlets might qualify for protection if they can show they have "regularly and materially participated in the reporting or publishing of news or information of substantial public interest for the purpose of dissemination to the general public *by means of tangible or electronic media*."[128]

Finally, Maine's legislature took the unusual step of dispensing with both "covered medium" and "covered person" language altogether.[129] Just before enacting the new law in April 2008, legislators struck the entire definitions section from the bill to, in their words, "[A]llow the court to determine on a case-by-case basis whether a person claiming the protection from compelled disclosure is eligible for such protection."[130] The

[124]*Id*. at § 5.68.010(5) (a).

[125]*Id*. at § 5.68.010(5) (b).

[126]*See Governor Signs Journalist Shield Law*, HONOLULU ADVERTISER, July 2, 2008, *available at* http://www.honoluluadvertiser.com/apps/pbcs.dll/article?AID=/20080702/BREAKING01/80702111/-1/RSS01.

[127]H.B. 2557, § 621(a), 24TH LEG. (Hawaii2008).

[128]*Id*. at § 621(b) (emphasis added).

[129]2008 ME. LAW, CH. 654 (signed Apr. 18, 2008, to be codified as 16 ME. REV. STAT. ANN. § 61), *available at* http://janus.state.me.us/legis/LawMakerWeb/externalsiteframe.asp?ID=280027551&LD=2047&Type=1&SessionID=7.

[130]*Id.* A summary of the amended bill is available at http://janus.state.me.us/legis/LawMakerWebexternalsiteframe.asp?ID=280027551&LD=2047&Type=1&SessionID=7.

shield law's only limitation on who or what might be covered is found in the text's requirement that the information being sought was "obtained or received in confidence by the journalist acting in the journalistic capacity of gathering, receiving, transcribing or processing news or information for potential dissemination to the public."[131] Thus, journalistic Web sites and independent online journalists could fall within the shield law's ambit.

In conclusion, any legislative intent that might have explained limiting protection to a few designated media types, in Alabama's statute or others from decades past, has faded. The process of amending older statutes to reflect a changing media environment can be described as slow, uneven and incomplete (see the APPENDIX). Gaps in statutory language, such as the missing "magazine" in Alabama's shield law, are not uncommon.

The movement toward medium-inclusive or medium-neutral language is not new; it was pioneered in the 1960s and '70s. However, statutes adopted after the rise of the World Wide Web in the 1990s have taken a tentative approach to including the new medium; only one mentions it by name. While legislators at both federal and state levels continue to debate whether to extend shield-law protection to independent bloggers — a legitimate policy discussion — the evolution of existing state statutes points unmistakably toward complete medium neutrality.

EVOLUTION OF STATUTORY INTERPRETATION

It is beyond dispute that the word "magazine" does not appear in Alabama's shield law, but that fact does not explain the result in *Price v. Time*. The judges of the Eleventh Circuit might have reasoned that the omission was a matter of sloppy statute drafting. They might have pieced together a legislative history of the 1935 law to conclude that the legislature never intended to leave a full-time professional journalist like Don Yaeger unprotected. They might have pointed to the legislature's expansion of the law in 1949 to cover broadcasters and concluded that leaving magazine reporters unprotected was an oversight unrelated to the overall goal of the law.

However, reaching beyond the statute itself — resorting to so-called extrinsic aids — would have constituted a kind of liberal interpretation that seems to be passing out of favor.[132] The court's unyielding

[131]*Id*. at § 61(1)(c).

[132]Matthew D. McCubbins & Daniel B. Rodriguez, *What Is New in the New Statutory Interpretation*, 14 J. CONTEMP. LEGAL ISSUES 535, 236 (2004–05) (observing that "extrinsic aids have been criticized vociferously by statutory interpretation scholars and,

reliance on the statutory text alone is more in keeping with a mode of strict interpretation — or strict construction — ascendant on the bench today.[133]

Rise of the New Textualists

As a field of study, statutory interpretation has remained relatively undeveloped in comparison to other areas of law.[134] "Judge-made law," as one scholar has observed, "is still the darling of the legal philosophers."[135] The increasing importance and complexity of statutory law in recent decades, however, has led one of the field's most important scholars, Prof. William N. Eskridge Jr., to declare statutory interpretation "the Cinderella of legal scholarship."[136]

Eskridge was one of the first to document a significant shift in the way courts interpret statutes: from liberal to strict construction.[137] "The 1980s witnessed an important revival of formalism, especially in connection with statutory interpretation,"[138] he wrote, and this has made courts less willing to turn to extrinsic interpretive aids such as legislative histories and committee reports to ascertain legislative intent.[139]

increasingly, by conservative jurists disturbed by what they see as the uncritical, undertheorized reliance by the judicial colleagues on legislative history to discern statutory meaning").

[133]*See, e.g.*, Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning,* 1990 SUP. CT. REV. 231. In surveying Supreme Court cases from 1989, Schauer chose as his theme the growing rigidity in the Court's approach to interpreting statutes, especially its use of the Plain Meaning Rule. One advantage of consistently applying strict construction, Schauer concluded, was it created consensus among the justices where political divisions would have been more pronounced had they based their reasoning on attempts to discern a statute's purpose. The disadvantage, he concluded, is that strict construction is a "blunt, frequently crude, and certainly narrowing device." *Id*. at 252. That crudeness, Schauer suggested:

> [E]xplains why interpreting a statute according to its plain meaning will at times generate an absurd result, or at least a result at odds with the best direct application of the purposes underlying that statute, or at odds with best current policy in light of changed circumstances, or at odds with what the drafters would have desired were they faced with the current situation in light of current circumstances.

Id.

[134]*See* Adam W. Kiracofe, *The Codified Canons of Statutory Construction: A Response and Proposal to Nicholas Rosenkranz's Federal Rule of Statutory Interpretation*, 84 B.U.L. REV. 571, 572 (2004) (Reviewing the scant and often conflicting literature available on the subject, the author asserts, "Statutory interpretation is, quite possibly, one of the greatest legal dilemmas of the twentieth century.").

[135]WILLIAM N. ESKRIDGE JR., DYNAMIC STATUTORY INTERPRETATION 1 (1994).

[136]*Id*.

[137]*See* William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

[138]*Id.* at 646.

[139]*Id.* at 650.

Eskridge has dubbed today's more rigid style of statutory interpretation the "New Textualism"[140] and has characterized it as an epochal change,[141] a "return to the nineteenth century treatise approach to statutory interpretation."[142] Pointing to Supreme Court Justice Antonin Scalia as chief proponent of the New Textualism,[143] Prof. Eskridge has shown the stricter approach rests on three key claims: (1) the textualist claim that divining legislative intent beyond the actual words of a statute is too slippery a task for courts to undertake; (2) the historicist claim that present-day interpreters can never reconstruct an accurate legislative history, especially for older statutes, and (3) the separation-of-powers claim that liberal interpretation is inconsistent with constitutional democracy because it gives unelected judges leeway to overrule legislators who wrote the laws under review.[144]

Other legal scholars,[145] lawyers[146] and judges[147] have embraced Eskridge's New Textualism thesis and have expanded on it.[148] John M. Walker, chief judge of the United States Court of Appeals for the Second Circuit, has characterized the shift as a repudiation of the "legal process" approach to judging predominant since the 1950s[149] and a repudiation

[140] *Id.* at 623.

[141] *Id.* at 630–41 (tracing the history of liberal statutory construction from a rejection of nineteenth-century formalism after the Civil War, through the rise of the "purposivist" movement that straddled nineteenth and twentieth centuries, into the "realist" era from 1920 to 1950, and ascendant throughout the "legal process" movement of the 1950s, '60s and '70s).

[142] *Id.* at 623 n.11.

[143] *Id.* at 621. Eskridge points to Justice Scalia's concurring opinion in *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421 (1987), as an early announcement of Scalia's opposition to the use of nearly all extrinsic aids, such as legislative histories, and preference for relying on the plain meaning of a statutory text alone. *Id*.

[144] *Id.*

[145] *See* Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A New-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1 (1993) (decrying the trends Prof. Eskridge outlined).

[146] *See* Jon May, *Statutory Construction: Not for the Timid*, 30 CHAMPION 28 (Jan./Feb. 2006) (acknowledging the current trend toward stricter statutory construction and urging lawyers to better familiarize themselves with rules that courts increasingly follow in interpreting statutes).

[147] *See* John M. Walker Jr., *Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge*, 58 N.Y.U. ANN. SURV. AM. L. 203 (2001-03).

[148] *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (arguing in favor of the New Textualist approach and proposing a codification of binding rules for courts to follow).

[149] Walker, *supra* note 147, at 213. The classic work of the "legal process" school of thought was HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge Jr. & Philip P. Frickey eds., 1994). Hart and Sacks never actually published their 1958 manifesto, but it was copied and circulated widely and is available in photocopied form in most law school libraries.

of sloppy lawmaking.[150] "Text-centered approaches," Judge Walker has written, "tend to shift the spotlight away from the judge and back to the legislature."[151]

Less worried about a narrower interpretive role for judges than Prof. Eskridge,[152] Judge Walker has suggested that a consistently strict approach would force legislators to craft statutes more carefully and not hand off difficult choices to the courts to make at some later date.[153] This has become especially important in recent years, Judge Walker has written, because perceived "judicial activism" has become a recurring point of contention in the political arena.[154] That also is the essence of Justice Scalia's argument in favor of strict construction.[155]

The separation-of-powers rationale for strict interpretation has long been recognized by courts in Alabama.[156] In fact, unlike the implicit doctrine of separation of powers in the U.S. Constitution, the doctrine is an express mandate of the Alabama constitution[157] and is frequently

[150] *Id.* at 204. Judge Walker opines on the state of statutes that judges face every day:

> [L]anguage is inherently imperfect. It also may be deliberately imprecise to accommodate political interests. Even when carefully drafted, a provision may convey different meanings to reasonable people. But careful draftsmanship all too often is absent. Mistakes are made. In addition, a case that comes before the court years after the statute was passed may present an issue that was not in the minds of most, some, or any of the legislators. Or perhaps the case involves factual circumstances, such as technological advances, that could not have been imagined when the statue was passed, but that nonetheless now seem to fall within the scope of its terms.

Id.

[151] *Id.* at 238.

[152] *Id.* at 237 (noting that "as our system of law has become more statutory ... the traditional conception of the common law judge as crafting wide areas of the law even in the context of statutes has to be reconsidered.").

[153] *Id.* at 238.

[154] *Id.*

[155] *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring in judgment). Here is one of Justice Scalia's most concise articulations of a New Textualist approach:

> The meaning of terms on the statute-books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated — a compatibility which, by a benign fiction, we assume Congress always has in mind.

Id. (Scalia, J., concurring in judgment).

[156] *See* Marc James Ayers, *Unpacking Alabama's Plain-Meaning Rule of Statutory Construction*, 67 ALA. LAW. 31 (2006) (rooting the state's tradition of strict construction in the state's constitution).

[157] ALA. CONST. 1901 art. III, § 42.

cited by courts.[158] Thus, the Eleventh Circuit's strict reading of the state's shield law in *Price* was in keeping with long tradition. More unusual was the court's explicit references to the once-moribund canons of statutory construction.

Return of Formal Canons

The canons of statutory construction are not rules courts are bound to follow but rather tools of interpretation that grew out of English common law.[159] Although they were commonly referenced in American courts through the nineteenth century, they fell out of favor as too formalistic during the "purposivist," "realist" and "legal process" eras of the twentieth century,[160] and judges long frowned on using them.[161]

As strict construction has gained favor among judges, so have the canons as tools of that interpretive style.[162] "The canons of statutory interpretation can be defended," Prof. Eskridge has written, "if they generate greater objectivity and predictability in statutory interpretation."[163] While Francis McCaffrey's classic treatise on the canons of statutory construction lists and explains nearly 100 rules,[164] they can be grouped into three broad categories: *intrinsic-aid canons*, *extrinsic-aid canons,* and *substantive canons*. A handful can be singled out as most relevant to the cases that will follow.

[158]*See*, *e.g.*, Ex parte James, 836 So.2d 813, 815 (Ala. 2002) ("In Alabama, separation of powers is not merely an implicit 'doctrine' but rather an express command.").

[159]BLACK'S LAW DICTIONARY 198 (8th Ed. 2004) ("Most states treat the canons as mere customs not having the force of law.").

[160]*See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950). In this famous attack on the canons, Llewellyn, a founder of the legal realist movement, argued that for every canon of statutory interpretation that could be deployed to reach one result in a case, an equally valid canon could be deployed to reach the opposite result. Scholars point to this essay as the funeral for canons in American jurisprudence.

[161]*See* FELIX FRANKFURTER, SOME REFLECTIONS ON THE READING OF STATUTES (1947). As part of his Benjamin Cardozo Lecture before the New York City Bar in 1947, Frankfurter famously said, "Canons cannot save us from the anguish of judgment." *Id*. at 27.

[162]*See* William N. Eskridge Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671 (1999).

[163]*Id.* at 674. Prof. Eskridge wrote: "The canons of statutory interpretation can be defended if they generate greater objectivity and predictability in statutory interpretation." *Id.* at 678.

[164]FRANCIS J. MCCAFFREY, STATUTORY CONSTRUCTION (1953).

Instrinsic-aid canons include rules dealing with words, grammar, punctuation, and other structural features of statutes.[165] The rule of *inclusio unius est exclusio alterius* states that inclusion of one term implies exclusion of others.[166] The rule of *ejusdem generis* holds that terms that are clearly of the same class may sometimes be read into a statute.[167] This is the group of rules most favored by strict constructionists since it focuses concretely on the statute itself and does not call on judges to try to discern the purposes and intentions behind a law that may have been written long ago.

Extrinsic-aid canons allow for reaching outside a statute's text to other sources to help ascertain legislative purpose and intent.[168] Other sources could include legislative histories, records of legislative debates or committee meetings, even contemporary news events that might shed light on motivations behind a law. This is the category most often dismissed by strict constructionists since it requires judges sometimes to speculate about what legislators were thinking when they wrote a particular law.

Substantive canons are rules that help determine when statutes are to be read strictly or liberally.[169] The canon of avoidance, for example, states that when a strict interpretation would create a result violative of someone's constitutional rights, then a liberal interpretation is called for to avoid that violation. Especially on point for this study is the canon of statutes in derogation of the common law, which states that if a statute alters or might alter the common law, it is to be read strictly.[170] Because a statutory shield law for journalists is in derogation of the common law of most states, a strict constructionist would argue, it should be interpreted strictly.

Standing above all others as a tool of strict construction is the canon of literalness, which states that where a legislature's intent is clear by the plain meaning of the words it has adopted, the court's analysis comes to an end and no further interpretation is warranted.[171] This canon is more commonly referred to as the Plain Meaning Rule and was long condemned as simplistic and susceptible to misuse.[172] As recently as 1983, one prominent judge declared the Plain Meaning

[165]*Id*. at 38–55.
[166]*Id*. at 50.
[167]*Id*. at 41.
[168]*Id*. at 62–79.
[169]*Id*. at 145–76.
[170]*Id*. at 92.
[171]*Id*. at 3.
[172]BLACK'S LAW DICTIONARY 1170 (8th ed. 2004) (also known variously as the "Golden Rule," the "Mischief Rule" or the "Equity-of-the-Statute Rule").

Rule dead in American courts,[173] but it has seen a revival in recent years.[174]

The Plain Meaning Rule was at the heart of the Eleventh Circuit's decision to deny a magazine reporter protection under Alabama's shield law. Besides citing Alabama case law to support strict construction, the court cited the Plain Meaning Rule by name,[175] along with the canon of avoidance[176] and the canon of statutes in derogation of the common law.[177] And while the court did cite extrinsic aids such as dictionaries to support its strict reading of the statute's text,[178] it did not seek legislative histories or other outside sources to explore the legislative intent behind the statute. *Price v. Time*, then, can be seen as a paradigmatic example of Prof. Eskridge's New Textualism at work.

In conclusion, legal scholars, lawyers and judges have noted a significant shift from liberal interpretation to strict construction in the area of statutory law. A hallmark of that shift has been a revival of the Plain Meaning Rule and a more explicit use of formalistic canons of statutory construction. This stricter mode of interpretation means judges focus more narrowly on the text of a given statute, eschew legislative histories or other extrinsic aids, and resist stretching words of statutes beyond their plain meanings.

The Eleventh Circuit's holding in *Price v. Time* demonstrates how this stricter approach shifts the spotlight from the courts to the legislatures. Courts using strict construction will be much less willing to fill gaps or correct mistakes in statutory language. This places a premium on well-crafted and up-to-date statutes, including their covered-medium language. Where technological change has left existing shield laws obsolete — especially since the arrival of the Internet — the onus appears to be on legislators, not judges, to make sure these laws reflect the current media landscape.

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[173] *See* Judge Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 (1983) (observing that "although the Court still refers to the 'plain meaning' rule, the rule has effectively been laid to rest. No occasion for statutory construction now exists when the Court will *not* look at the legislative history.").

[174] *See* Maxine D. Goodman, *Reconstructing the Plain Language Rule of Statutory Construction: How and Why*, 65 MONT. L. REV. 229 (2004) (tracing the history of the rule to William Blackstone and English common law, categorizing various ways it has been used by the Supreme Court, and recommending ways it can be applied with more consistency).

[175] Price v. Time, 416 F.3d 1327, 1336 (11th Cir. 2005) ("The defendants do not quarrel with the primacy of the plain-meaning rule when it comes to statutory construction in Alabama courts. They quibble instead with the proposition that 'any newspaper' plainly does not include their magazine.").

[176] *Id*. at 1342.

[177] *Id*. at 1342–43.

[178] *Id*. at 1336–39.

COVERED-MEDIUM LANGUAGE IN THE COURTS

Press advocates were distressed by the Eleventh Circuit's decision in *Price v. Time*.[179] The courts themselves seemed frustrated.[180] However, the reasoning and the holding were not novel. Other courts have strictly construed the "covered medium" provisions of state shield laws, sometimes with strikingly similar circumstances and results.[181] In fact, cases stretching back more than forty years anticipated the result in *Price*.

Strict Construction and the Road to Price

In the 1960 libel case of *Deltec v. Dun & Bradstreet*,[182] a U.S. district court in Ohio concluded that a bi-monthly business magazine did not qualify for protection under that state's shield law. As written in 1941, the statute covered "any newspaper or any press association"; as amended in 1959, it also covered broadcasters.[183] With no prior cases for guidance, the court said it had to rely on the plain meaning of the text:[184]

> [I]t is difficult for us to see how the legislature meant to include such a publication as defendant's [magazine] ... for it would have been a simple thing to do if it so desired. We cannot, under these circumstances, stretch the meaning of 'newspaper or any press association' to include defendant,

[179] *See, e.g.*, Kirsten Murphy, *The Price of Privilege*, NEWS MEDIA & THE L., Spring 2004, at 17.

[180] *See Price*, 415 F.3d at 1334. The federal district court that had previously ruled in the case had certified a question to the Alabama Supreme Court asking if the statute could be construed to include a magazine. The Eleventh Circuit Court of Appeals itself expressed frustration, noting that the case could have been resolved at that stage: "To the disappointment of the district court (and this one as well), the Alabama Supreme Court declined to answer the certified question." *Id*.

[181] Cases that turn definitively on a statute's "covered medium" language are less common than cases that turn on a statute's "covered person" language. The latter cases include Desyllas v. Bernstein, 351 F.3d 934 (9th Cir. 2003); Desai v. Hersh, 954 F.2d 1408 (7th Cir. 1992); *In re* DaimlerChrysler AG Sec., 216 F.R.D. 395 (E.D. Mich. 2003); Quigley v. Rosenthal, 43 F. Supp. 2d 1163 (D. Colo. 1999); Stephens v. American Home Assurance Co., 1995 WL 230333 (S.D.N.Y. 1995); Matera v. Sup. Ct., 825 P.2d 971 (Ariz. Ct. App. 1992); Farr v. Sup. Ct. of California, 99 Cal. Rptr. 342 (Cal. Ct. App. 1971); Henderson v. People, 879 P.2d 383 (Colo. 1994); Becnel v. Lucia, 420 So.2d 1173 (La. Ct. App.1982); State v. Knutson, 523 N.W.2d 909 (Minn. Ct. App. 1994); Las Vegas Sun, Inc. v. Eighth Judicial Dist., County of Clark, 761 P.2d 849 (Nev. Ct. App. 1988); Matter of Beach v. Shanley, 465 N.E.2d 304 (N.Y. 1984); City of Akron v. Cripple, 2003 WL 21697751 (Ohio App. 2003).

[182] 187 F. Supp. 788 (N.D.Ohio 1960).

[183] OHIO REV. CODE ANN. § 2739.12 (Thomson West/Westlaw through Aug. 12, 2008).

[184] *Deltec,* 187 F. Supp. at 790.

> and the very fact that the legislature chose these nouns indicates to us that it realized the ultimate and necessary effect of its language.[185]

The case did not lead to any apparent effort to amend Ohio's shield law, which omits magazines to this day. It did, however, create a precedent for strictly construing covered-medium language that would be cited in cases even outside Ohio.[186]

In the 1964 libel case of *Cepeda v. Cohane*,[187] a U.S. district court in New York, applying California's 1936 shield law,[188] ruled a reporter for *Look* magazine was not covered under the California statute. California had amended its newspaper-only statute in 1961 to add "press association or wire service" and "radio or television news,"[189] but not magazines. "Bearing in mind that a privilege recognized by law constitutes an exception to the general liability of all persons to testify to all matters," the court wrote, "the court must be guided by the rule of strict statutory construction."[190] Citing *Deltec*, the court concluded that the California law "should not be extended to cover other situations not specifically included in the actual terminology of the statute."[191]

That case led to calls to amend California's shield law.[192] In 1974, legislators added "magazine, or other periodical publication" to its covered medium section.[193]

In the 1979 criminal trial of *People v. LeGrand*,[194] a New York appellate court denied motions to quash third-party subpoenas against journalist Lee Hays. The court acknowledged that Hays had been a longtime employee of CBS and NBC news divisions,[195] but the material being sought was related to a book he was writing on New York crime families. The court said that granting Hays protection under New York's

[185] *Id*. The court here is using the canon of *expressio unius est exclusio alterius*, or to expressly include one thing is to exclude another.

[186] *See, e.g.*, Cepeda v. Cohane, 233 F. Supp. 465 (S.D.N.Y. 1964); Forensic Advisors, Inc., v. Matrixx Initiatives, Inc., 907 A.2d 855 (Md. Ct. Spec. App. 2006).

[187] 233 F. Supp. 465 (S.D.N.Y. 1964).

[188] The case originated in California, but depositions were being taken in New York; therefore, the New York Court was bound to apply California's law. *Cepeda*, 233 F. Supp. at 471 (holding that "it is the public policy of California, the place of trial, which should control, and, accordingly, its statute should apply in the determination of whether or not the information sought of Cohane is privileged").

[189] 1961 CAL. STAT., ch. 629, at 1797, § 1 (now superseded by CAL. EVID. CODE § 1070).

[190] *Cepeda*, 233 F. Supp at 472.

[191] *Id*. at 473.

[192] *See* Note, *Criminal Procedure: Review of 1974 Selected California Legislation,* 6 PAC. L.J. 284 (1975) (explaining change to statute, citing Cepeda v. Cohane, 233 F. Supp. 465 (S.D.N.Y. 1964)).

[193] 1974 CAL. STAT., ch. 1323, at 2877, § 1 (now superseded by CAL. EVID. CODE § 1070 (Thomson West/Westlaw through 2008 Reg. Sess.).

[194] 67 A.D.2d 446 (N.Y. App. Div. 1979).

[195] *Id*. at 448.

precisely worded shield law would represent an unacceptably "liberal construction."[196]

The statute's list of covered media was specific: newspaper, magazine, news agency, press association and wire service.[197] Further, the statute expressly limited protection to "professional journalists" working for those media.[198] The court concluded: "These provisions evince a clear legislative design to benefit 'professional journalists' and 'newscasters' only. They should not by judicial fiat and strained interpretation be deemed to encompass those engaged in a different field of writing and research."[199]

New York's legislature reacted to considerable outcry within the year. Although the court's holding blurred the line between "covered medium" and "covered person," the legislature's remedy was to add the phrase "or other professional medium" to the list of covered media.[200] N.Y. courts have tended to interpret the statute strictly ever since.[201]

In the 1986 case *In re Contempt of Stone*,[202] a Michigan appeals court declined to interpret that state's 1949 shield law to include a television reporter subpoenaed by a grand jury investigating the murder of an off-duty police officer. The statute covered only "reporters of newspapers or other publications."[203]

First, reporter Bradley Stone's attorneys argued that the court could read the word "publications" to include television.[204] The court responded by reciting the rules of strict construction:

> Courts may not speculate as to the probable intent of the Legislature beyond the words employed in a statute. Ordinary words are given their plain and ordinary meaning. . . . When the language of a statute is clear and unambiguous, judicial construction is neither required nor permitted.

[196] *Id.* at 450.

[197] N.Y. CIV. RIGHTS LAW § 79-h(a) (1-5) (McKinney 1992).

[198] *Id.* at § 79-h(a) (6).

[199] *LeGrand,* 67 A.D.2d at 451.

[200] N.Y. CIV. RIGHTS LAW § 79-h(a) (6) (McKinney 1992).

[201] *See, e.g.*, *In re* Fitch, Inc. v. UBS PaineWebber, Inc., 330 F.3d 104 (2nd Cir. 2003) (declining to extend New York's shield law to protect a financial ratings agency, turning on "covered person" definition); PPM America, Inc. v. Marriott Corp., 152 F.R.D. 32 (S.D.N.Y. 1993) (denying protection to a business newsletter, turning on distinction between "newsletter" and "newspaper"). *But see* People v. Hendrix, 820 N.Y.S. 2d 411 (N.Y. Sup. 2006) (extending protection to documentary filmmakers working on a "reality" series for the ABC television network, turning on "covered person" definition).

[202] 397 N.W.2d 244 (Mich. Ct. App. 1986).

[203] *See* MICH. COMP. LAWS ANN. § 767.5a (Thomson West/Westlaw through 2008 Reg. Sess.).

[204] *In re* Contempt of Stone, 397 N.W.2d at 246.

> . . . Such a statute must be applied, and not interpreted, since it speaks for itself.[205]

Next, Stone's attorneys argued that a strict reading of the statute would violate the reporter's rights under the Equal Protection Clause of the Fourteenth Amendment and that a liberal interpretation was required to avoid this constitutional infirmity[206] — that is, the court should turn to the canon of avoidance. The court responded by citing *Branzburg*'s holding that there was no First Amendment journalist's privilege against grand jury subpoenas in criminal investigations and, therefore, there was no constitutional infirmity to avoid. "Consequently, the rational basis test is the correct framework for analysis of the shield law," the court said. It continued:

> We believe that the Legislature could have rationally accorded a privilege to the print media and not to the broadcast media. Where there is any justification for the classification, we refrain from questioning the Legislature's wisdom in creating the classification scheme. The United States Supreme Court has concluded that the broadcast media and other media can be treated differently.[207]

The court concluded by suggesting that "arguments concerning the fairness of the statute must be addressed to the Legislature."[208] Within the year, the Michigan legislature amended the statute to add "broadcast" to its covered medium language.[209]

By the time *Price v. Time* arrived before the Eleventh Circuit Court of Appeals in 2005, a pattern was well established. As in the previous cases, the court observed that it would have to strictly construe a statute in derogation of Alabama's common law.[210] As in *Deltec*, in the absence of prior cases in its jurisdiction, the court would have to look "to the plain meaning of the words as written by the legislature."[211] As in *Cepeda*, the court would have to weigh whether the word "newspaper" in the statute could be read to include a magazine.[212] As in *Stone*, the court

[205] *Id*. (citations omitted).
[206] *Id*. at 246–47.
[207] *Id*. at 247–48 (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)).
[208] *Id.* at 246.
[209] MICH. COMP. LAWS ANN. § 767.5a (as amended) (Thomson West/Westlaw through 2008 Reg. Sess.).
[210] *Price*, 415 F.3d 1327, 1342 (11th Cir. 2005).
[211] *Id*. at 1335.
[212] *Id.* at 1336. Reacting to the argument that the phrase "any newspaper" was open to interpretation, the court wrote: "While the scope of the 'any' adjective is plenty wide to sweep in all of the noun category that follows, it ordinarily does not sweep beyond that category. The term 'any dog' does not mean 'any dog or cat' unless a cat is a dog." *Id*.

ruled that the canon of avoidance did not apply because there was no constitutional problem and, hence, no bar to strict construction.[213] And, as in *LeGrand*, the court concluded that the plain meaning of the word "newspaper" was clear enough to deduce the legislature's intent.[214]

As in *Cepeda*, *LeGrand* and *Stone*, the result in *Price* has led to lobbying to persuade legislators to amend Alabama's statute.[215] The consistency of this pattern gives rise to the question: Is this the most efficient way to update old shield laws?

Liberal Construction and the Hope of O'Grady

An alternative to amending existing statutes would be to expect that courts would construe them more liberally than did the Eleventh Circuit in *Price*. Rules of interpretation allow courts to use liberal construction when, for example, they determine that a strict reading would abridge a conflicting constitutional right, would create an unconscionable result, or would conflict with legislative intent as discerned through legislative histories.[216] Some courts, notably in California and New Jersey, have shown a willingness to liberally construe covered-medium language, and in some cases, that has entailed stretching pre-Internet language to accommodate the new medium.

In a closely watched case involving an Internet Web site in 2005, *O'Grady v. Superior Court*,[217] a California appeals court extended protection under the state shield law to Jason O'Grady and fellow bloggers accused by Apple of stealing trade secrets.[218] The decision rested on both "covered person" and "covered medium" aspects of the shield law, which protects any "publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication."[219] On the "covered person" question, the court concluded: "In no relevant respect do [the bloggers] appear to differ from a reporter or editor for a traditional business-oriented periodical who solicits or otherwise comes into possession of confidential internal information about a company."[220]

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[213] *Id*. at 1342.

[214] *Id*. at 1340–41

[215] *See* Editorial, *Protect Magazine Sources*, (Mobile, Ala.) PRESS-REGISTER, Mar. 2, 2008, *available at* http://www.al.com /opinion/press-register/index.ssf?/base/opinion /1204452995131830.xml&coll=3.

[216] *See* MCCAFFREY, *supra* note 164, at 145-76 (discussing canons of statutory construction that serve liberal interpretations).

[217] 44 Cal. Rptr. 3d 72 (Cal. App. 2006).

[218] *Id*. at 76–77.

[219] CAL. EVID. CODE § 1070 (Thomson West/Westlaw through 2008 Reg. Sess.).

[220] *O'Grady,* 44 Cal. Rptr. 3d at 98.

The more problematic "covered medium" question pitted two canons of statutory construction against each other: *expressio unius est exclusio alterius,* or the inclusion of the one is the exclusion of another,[221] and *ejusdem generis*, or of the same kind.[222] Noting that the California legislature last amended the statute in 1974 to add magazines and periodicals, the court reasoned that legislators could not have intended to exclude Web sites since the World Wide Web did not exist at the time.[223] And after exploring dictionary meanings of the word "periodical" and noting that "e-zine" and "electronic magazine" seem to be in common usage, the court held that the Web site was similar enough to a "magazine, or other periodical" to fall within the ambit of the shield law's protection.[224] Bloggers were quick to trumpet the holding's significance.[225]

O'Grady creates a strong precedent in one jurisdiction that, under certain circumstances, a Web site might be considered a "periodical" for litigation purposes. However, another case involving a Web site decided four months later provides a better lesson for states to draw from: In *Forensic Advisors v. Matrixx Initiatives,*[226] the Maryland Court of Special Appeals held that the publishers of an online financial newsletter called *The Eyeshade Report* qualified for protection under the term "news media" in Maryland's shield law.[227] Unlike the narrower language of the California statute, Maryland's statute defines nine types of "news media," concluding with the catch-all category "any printed, photographic, mechanical, or electronic means of disseminating news and information to the public."[228] Thus, all-inclusive wording that rendered the statute medium-neutral saved the court from having to strain, as in *O'Grady*, to bend an old statute to meet new conditions; no liberal construction was required.

[221] *Id*. at 86.

[222] *Id*. at 101.

[223] *Id.* at 104 ("It seems likely that the [California] Legislature intended the phrase 'periodical publication' to include all ongoing, recurring news publications while excluding non-recurring publications such as books, pamphlets, flyers, and monographs.")

[224] *Id*. at 105.

[225] *See, e.g*., J. Craig Williams, *Court Declares Bloggers Journalists*, MAY IT PLEASE THE COURT, May 31, 2006, http://www.mayitpleasethecourt.com/journal.asp?blogid=1188. This is one of many Web logs run by lawyers and law students. Many of them publish as affiliates of the Law.com network, *available at* http://www.law.com.

[226] 907 A.2d 855 (Md. Ct. Spec. App. 2006). Forensic Advisors is located in Maryland; Matrixx Initiatives is located in Arizona.

[227] *Id.* at 863. Only partial protection was conferred. The court ordered the Web publisher to answer questions in a deposition that did not involve confidential information or sources. *Id.* at 863-65.

[228] MD. CODE ANN., CTS. & JUD. PROC. § 9-112(a) (9) (Thomson West/Westlaw through 2008 Reg. Sess.).

Furthermore, *O'Grady* cannot be read to indicate that liberal construction is the rule among California courts. In *Rancho Publications v. Superior Court*,[229] a California appeals court declined to extend protection to "advertorials" in a weekly newspaper. The weekly's claim to the privilege rested on the newspaper's status as a "covered medium" under the statute; that meant, the paper argued, that everything within it was protected. The court strongly disagreed: "We refuse to construe the shield law in such an absurd way. Even in an era awash with hype and overcommercialization, there remains a fundamental distinction between the reporting and editorial functions of a newspaper and the buying, selling and placing of commercial advertisements."[230]

Whether one thinks *Rancho Publications* reached the correct result, it shows that courts in California have recent precedents for both "liberal" and "strict" interpretations of the state's shield law to draw on. *O'Grady* does not guarantee, as one blogging advocate has put it, that "we're all journalists now,"[231] not even in California.

Liberal Construction Beyond California

Liberal construction as demonstrated in the *O'Grady* case would seem to be the exception, not the rule. Courts in only two jurisdictions, Pennsylvania and New Jersey, have stated explicitly that their shield laws are to be interpreted liberally as a matter of fulfilling legislative intent and public policy. It is significant that these stated preferences for liberal construction came in cases in the 1960s and '70s — before the resurgence of strict construction, when liberal interpretation still held sway.

In upholding shield-law protection for a newspaper publisher and city editor subpoenaed by a grand jury in connection with stories about government corruption, the Pennsylvania Supreme Court declared in 1963 that when there is "any doubt as to the interpretation, the Statute must be liberally construed in favor of the newspapers and news media."[232] The court cited the role of the press as "watch-dogs and protectors of honest ... Government"[233] and said "[I]t is vitally important that this

[229]81 Cal. Rptr. 2d 274 (Cal. Ct. App. 1999).

[230]*Id.* at 278 ("Surely Peter Zenger, A.J. Liebling and Rebecca West occupy more hallowed niches in American history than Joe Camel, Tony the Tiger and the Budweiser Talking lizards. We know of no Pulitzer Prizes for want ads.").

[231]SCOTT GANT, WE'RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE 1 (2007) (extended legal discussion in which *O'Grady* decision plays a central role).

[232]*In re* Taylor, 193 A.2d 181, 185 (Pa. 1963).

[233]*Id*. The court wrote of newspapers: "They are, more than anyone else, the principal guardians of the general welfare of the Community and, with few exceptions, they serve

public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion."[234] In unusually strong language, the court concluded:

> The Act of 1937 is a wise and salutary declaration of public policy whose spiritual father is the revered Constitutionally ordained freedom of the press. The Act must therefore, we repeat, be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature.[235]

That case did not touch the covered-medium issue, however. No reported case from Pennsylvania has tested how liberally a court there might interpret that portion of the state's traditionally worded statute.[236]

New Jersey courts have followed their state supreme court's instruction, in 1978, that the state's shield law should be read to "the greatest extent permitted by the Constitution of the United States and that of the State of New Jersey."[237] They have frequently applied that guidance to the statute's covered-medium language.

In 1985, in *In re Avila*,[238] a New Jersey appeals court upheld shield law protection for a free weekly Spanish-language tabloid that fell outside the statute's "covered medium" requirements.[239] The court acknowledged that the tabloid had no paid circulation and no second-class mail permit, as required under the statute; it further acknowledged that the tabloid had no list of people requesting delivery by mail and did not contain twenty-four pages, as required for second-class mail status.[240] However, the court ruled that it was more important that the tabloid was published once a week, contained news and information, did not contain more than 75% advertising, and was not itself advertising.[241] "The Legislature surely did not intend to disqualify a paper simply because

their City, State or nation with High principles, zeal and fearlessness. They are, in the best sense of the maxim, 'pro bono publico.'"

[234]*Id*.

[235]*Id*. at 186.

[236]Pennsylvania's statute covers newspapers, magazines, press associations, radio stations and television stations. *See* 42 PA. CONS. STAT. ANN. § 5942(a) (Thomson West/Westlaw through 2008).

[237]*In re* Myron Farber, 394 A.2d 330, 335 (N.J. 1978). The case turned on other issues, but the court discussed whether Farber and *The New York Times* were covered by the New Jersey statute's covered-person and covered-medium definitions: "It is abundantly clear that appellants come fully within the literal language of the enactment. Extended discussion is quite unnecessary. Viewed solely as a matter of statutory construction, appellants are clearly entitled to the protections afforded by the act." *Id*. at 336–37.

[238]501 A.2d 1018 (N.J. Super. Ct. App. Div. 1985).

[239]*Id*. at 1021.

[240]*Id*. at 1019.

[241]*Id*. at 1020.

it is not mailed," the court wrote, and it concluded that the tabloid was similar enough to a newspaper to qualify for protection.[242]

Citing *Avila*, a state court ruled in 1993 that a publisher of an annual report on the insurance industry qualified for protection under the state's shield law.[243] Conceding it would be creating a novel precedent,[244] the court wrote: "There is no requirement in the statute that the news medium be published at particular intervals. Thus, [the] annual report falls within [the statute's] definition of a news medium if the information it disseminates, namely insurance information, can be characterized as 'news.'"[245] After establishing that the information in the annual report qualified under common definitions of "news," the court explored the state legislature's intent in passing the shield law.[246] Finally, acknowledging that it was stretching the statute's language considerably by finding in favor of the insurance report publisher, the court explained its holding:

> It is a recognition that we live in a society in which people are bombarded with all types of information, from publications which actually do report current events to those esoteric publications which describe the mating rites of penguins in the Antarctic at springtime. And it is the recognition that this society demands the open and full flow of information and ideas whatever they may be and from wherever they may come.[247]

Citing both *Avila* and *Burnett*, a federal district court in New York, interpreting New Jersey's shield law in 1995, extended protection to the publisher of insurance-rating publications.[248] Although New York courts have tended to interpret their state's shield law strictly, the court in this case acknowledged the liberal tradition in New Jersey: "We must be sensitive to the legislative momentum that has steadily expanded the scope of the statutory newsperson's privilege."[249] The court extensively reviewed details of the *Burnett* case before concluding that the insurance-rating publisher also "fit within the statutory definition of 'news media.'"[250]

Also citing *Avila* and *Burnett*, a New Jersey appeals court in 2003 upheld shield-law protection for a film crew of *NYT Television*, a division of

[242] *Id*. at 1021.
[243] In the Matter of Petition of Burnett, 635 A.2d 1019 (N.J. Super. Ct. Law Div. 1993).
[244] *Id.* at 1021.
[245] *Id.* at 1023.
[246] *Id*.
[247] *Id.* at 1024.
[248] Stephens v. American Home Assurance Co., 1995 WL 230333 (S.D.N.Y. 1995).
[249] *Id*. at *8 (citations omitted).
[250] *Id*.

The New York Times Co. that was shooting a segment of the documentary program *Trauma: Life in the E.R.*[251] In *Kinsella v. Welch*, the court rejected the plaintiff's claim that *NYT Television* did not qualify as part of the "news media" as defined by the New Jersey statute because what it produced was "entertainment" and not "news."[252] "We recognize that the mere fact a videotape is taken for use in a television show does not automatically mean that the videotape producer is part of the 'news media,'"[253] the court wrote. "It is clear, however, that 'news' is not limited to reports of significant public events."[254] The court went on to compare television news magazines such as *20/20* and *60 Minutes* before ruling in favor of *NYT Television*'s status as a covered medium.[255]

This tradition of liberal construction does not mean, however, that New Jersey courts never find limits to shield law protection. In *In re Napp Technologies, Inc. Litigation*,[256] a New Jersey appeals court declined to extend protection to a public relations firm hired by a chemical company following an explosion that killed five workers. The court addressed the statute's list of covered media: "[A] public relations firm is neither part of the traditional or nontraditional news media. It also does not fit within any of the constituents of the 'news media' as those terms are defined in the New Jersey Shield Law."[257] Much of the court's reasoning would have fit better under a "covered person" analysis: "As a representative for the client, the public relations firm is in effect its spokesperson. As such, the public relations firm really is part of the news rather than a member of the news media reporting it."[258]

Interpretation Beyond New Jersey

Outside the clear track record in New Jersey to prefer liberal construction, there is not widespread evidence that courts are likely to take that approach. Only two other reported cases turned significantly on that issue.

[251]Kinsella v. Welch, 827 A.2d 325 (N.J. Super. Ct. App. Div. 2003).

[252]*Id*. at 331. The court reiterated the tradition of liberal construction in New Jersey: "Our courts have broadly construed the terms 'news media' and 'news.' " *Id*.

[253]*Id*.

[254]*Id*.

[255]*Id*. *See also* People v. Hendrix, 820 N.Y.S. 2d 411 (N.Y. Sup. 2006) (holding that New York's shield law protects a documentary film company as a "news agency" under that law's definitions, though the "covered medium" issue was a minor part of the case).

[256]768 A.2d 274 (N.J. Super. Ct. Law Div. 2000).

[257]*Id*. at 280.

[258]*Id*.

In Nevada, a federal district court interpreted the state's shield law in a liberal way in the 1985 libel case *Newton v. National Broadcasting Company*.[259] Lawyers for entertainer Wayne Newton had argued that NBC News was not entitled to protection because the statute did not say "television network," only "television station." After discussing the history of the statute, the court held that the terms were interchangeable: "To rule otherwise would torture the generic definition of 'television station' and would defeat the legislative purpose underlying Nevada's shield law as reflected in the Nevada Judiciary Committee Minutes of March 4, 1969."[260]

Similarly, a state appeals court in Illinois in 1994 for the first time "stretched" that state's statute to cover a publication other than a traditional news source.[261] In upholding a lower court's application of the statute's protection to the *Journal of the American Medical Association*, the court noted that the journal is "a weekly general medical journal that publishes scientific articles, commentaries, and news" and that the journal "has approximately 371,000 subscribers in 148 countries."[262] Therefore, the court held, the medical journal qualified as a " 'news medium' as defined" in the statute.[263]

In conclusion, the Eleventh Circuit's holding in *Price v. Time* was not an aberration but was consistent with similar cases stretching back more than forty years. Courts faced with interpreting the covered-medium language of state shield laws have tended to construe them strictly, sticking to the plain meaning of the texts. Courts in only one jurisdiction, New Jersey, have an extensive record of liberally construing a statute's covered-medium language. Courts in only one jurisdiction, California, have a strong precedent for liberally construing a pre-Internet statute to cover Web sites or bloggers. With shield laws on the books in thirty-six jurisdictions, most pre-dating the Internet age, this scant record of reported cases does not support the hope that courts will interpret away incomplete or outmoded statutory language. These cases, along with a general trend toward strict construction, argue for the need to revise many existing shield laws.

[259]109 F.R.D. 522 (D. Nev. 1985).

[260]*Id.* at 530–31 (citations omitted).

[261]Cukier, M.D. v. American Med. Ass'n, 630 N.E.2d 1198 (Ill. App. Ct. 1994).

[262]*Id*. at 1201.

[263]*Id*. at 1202. The statute defines a covered medium in the relevant part as any "newspaper or other periodical issued at regular intervals whether in print or electronic format and having a general circulation." 735 ILL. COMP. STAT. ANN. 5/8-902(b) (West's Smith-Hurd Illinois Compiled Statutes Annotated through 2008 reg. sess.).

CONCLUSIONS AND RECOMMENDATIONS

Not since the Supreme Court handed down its 1972 decision in *Branzburg v. Hayes* has the issue of a journalist's testimonial privilege been as intensely debated as in recent years: Lobbying in Washington has pushed a proposed federal shield law closer to passage than at any time in seventy-nine years, and lobbying in the states has led to the enactment of five new shield laws in the last three years. A key theme of the current debate has been how broadly a shield law's "covered person" language should sweep. Should it cover the proverbial lonely pamphleteer, working today on an Internet blog, or should it be confined to professionals in the mainstream press?

Noticeably absent from the debate has been the question of how broadly a shield law's "covered medium" language should sweep, perhaps because it is assumed that any medium conveying news and information to the public would qualify. That is not a safe assumption, however, as the Eleventh Circuit's decision in *Price v. Time* made clear. Because Alabama's seventy-three-year-old statute only names newspapers, radio and television as covered media, a full-time investigative reporter for *Sports Illustrated* was left unprotected.

As this study has shown, the nation's thirty-six shield laws evolved over 112 years in a way that has created an uncertain patchwork of protection under covered-medium provisions that often seem to be vestiges of earlier eras. Many of these statutes have been on the books for decades and have not been amended since the arrival of television (see the APPENDIX). Although the evolution from medium-restrictive to medium-neutral language has accelerated over time, that evolution remains incomplete.

This study also suggests that the problem of restrictive or outmoded wording might be magnified by a trend in the courts away from liberal interpretation and toward strict construction. A revival of the Plain Meaning Rule and a newfound reliance on formalistic canons of statutory construction are hallmarks of a style of judging scholars have dubbed the New Textualism. This more rigid approach means courts are less likely to fill gaps in statutory language or stretch the meaning of texts to accommodate changes in the media that legislators could not have anticipated decades ago.

Even with few reported cases on the books, it is clear that narrowly worded or outdated shield laws can lead to frustrating, costly and preventable litigation. Cases that have turned on the restrictive covered-medium language of older statutes stretch back more than forty years, and many have ended with *Price*-like results. It would be worth the effort to amend these statutes now rather than wait for court cases and outcry to prompt change, one unsatisfying ruling at a time.

The time is ripe to direct some lobbying effort toward fixing existing problems in existing shield laws. Press advocates and press-friendly legislators might look for guidance to the medium-inclusive language of the Media Law Research Center's model shield law, which would cover every medium "now known or hereafter devised."[264] An alternate model would be the medium-neutral language of North Carolina's shield law.[265] Because the word "any" is read as a powerful modifier when courts interpret statutes, adding phrases such as "*via* any medium available to the public" could solve the *Price v. Time* problem at a stroke. Better yet, covered-medium language could be dropped altogether, with covered-person language sufficient to determine who is protected; that is the approach taken in the most recent proposal for a federal shield law.[266]

Making these sorts of changes is easier said than done, of course. Sen. Jabo Waggoner in Alabama still has not been able to persuade his colleagues to add the word "magazine" to his state's shield law, three years after the Eleventh Circuit's frustrating ruling against reporter Don Yaeger. Not making these changes, however, almost guarantees future cases resembling *Price v. Time*.

[264]Media Law Research Center, *Model Shield Law* (2008), at § 6(a):

> Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite or other transmission system or carrier, or channel or programming service for such station, network, system or carrier, or audio or audiovisual production company that disseminates news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, electronic or other means now known or hereafter devised.

[265]N.C. GEN. STAT. § 8-53.11(a) (3): "Any entity regularly engaged in the business of publication or distribution of news via print, broadcast, or other electronic means accessible to the general public."

[266]*See* Free Flow Information Act of 2007, H.R. 2102, 110th Cong. § 4(2):

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

APPENDIX
Shield Law Chronology

1896 Maryland

Even with Maryland's statute, which covered newspapers and journals, as a model, most statutes from this early period mentioned only newspapers. Only two covered other types of publications, only four covered wire services, and none covered radio. A piecemeal process of amending these statutes to reflect a changing media landscape has dragged on for decades and remains incomplete.

1933 New Jersey
1935 California, Alabama
1936 Kentucky, Arkansas
1937 Pennsylvania, Arizona
1941 Indiana, Ohio
1943 Montana
1949 Michigan

A standard list of covered media in this period included newspapers and magazines, press associations and wire services, radio and television, and sometimes cable. Novel approaches in statutory language broadened lists of covered media to include books, documentary film, college radio, and pamphlets. States pioneered all-inclusive and medium-neutral approaches, sometimes dropping lists of named media altogether.

1964 Louisiana
1967 Alaska, New Mexico
1969 Nevada
1970 New York
1971 Rhode Island
1972 Tennessee
1973 Nebraska, North Dakota, Oregon, Minnesota
1974 Oklahoma
1977 Delaware
1982 Illinois

Statutes in this period did not carry forward the expansive approach of the 1970s. Most did not stray far from traditional news media; one excluded books expressly. No statute acknowledged the rise of the Internet, but some were worded broadly enough to accommodate it.

1990 Georgia, Colorado
1992 District of Columbia
1993 South Carolina
1998 Florida
1999 North Carolina

Although the Internet plays an increasingly important role in journalism, only one shield law so far has specifically referred to the medium. If strictly read, most laws would not apply to independent bloggers, though legislators in Hawaii and Maine have said courts can make that determination on a case-by-case basis.

2006	Connecticut	2008	Maine, Hawaii
2007	Washington		