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The Untold History of Nevada's Shield Statute

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THE UNTOLD HISTORY OF NEVADA'S SHIELD STATUTE

By

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ABSTRACT

The Untold History of Nevada's Shield Statute

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The history of American journalism is replete with anecdotes about news reporters enduring jail and other penalties to protect the identities of confidential sources of information. Since as early as the American Revolution journalists have often found themselves at odds with established authority. In the political cauldron of the late 1960s and early 1970s, U.S. government intrusion into the news gathering process was widespread. The notion the First Amendment protected journalists from revealing sources was invalidated by the Supreme Court's 1972 decision in *Branzburg v. Hayes*. Many states throughout the nation reacted by codifying a reporter's privilege. Nevada did so in 1969, protecting members of the working media from having to divulge confidences to the government. The statute was revised in 1975 to cover former media members, but the law has remained unchanged since, despite much technological innovation and economic changes in the media industry. This study tells the untold story of Nevada's shield statute, the 1968 news story that sparked the quiet crusade for its

passage, and the not-so quiet efforts in 1975 to make the already strong protections even stronger. It details as well a later unsuccessful attempt to modernize the law.

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CHAPTER 1

INTRODUCTION

“I want to know who those felons are” (W. Lerude, personal communication, September 20, 2014).

It is to these eight words, spoken in 1968 in a not-so-unthreatening manner to Warren Lerude, then editor of the *Reno Evening Gazette*, to which one can trace the lineage of Nevada’s Revised Statute 49.275. This is the state’s shield law, Nevada’s statutory embrace of a testimonial privilege reserved for journalists. The privilege itself is a social and political construct that has its roots in pre-colonial American history. In its modern incarnation, though, this construct reflects a set of sometimes contradictory ideals uniquely representative of the American constitutional experience, with its competing values involving free expression and the right to publish versus the rule of law and equal protection. Lerude was on the side of free expression and protecting his First Amendment right to gather and disseminate news in 1968. William Raggio, the man who asked for the identities of “those felons,” was on the other side. He was the law (W. Lerude, personal communication, September 20, 2014).

Raggio was then serving as the elected district attorney for Washoe County, where “the Biggest Little City in the World” is located. Raggio would earn the distinction of being the longest serving state senator in Nevada history before he died in 2012. In 1968, Raggio had been Washoe County’s top law enforcer for a decade already. He even ran for the Republican nomination for U.S. senator in 1968, losing in the GOP primary election (*Reno Evening Gazette*, April 26, 1968, A1). Raggio was in a unique position to

witness firsthand how the political and social fabric of both the nation and his own community had so drastically changed in the decade leading up to 1968.

The assassination of a U.S. president in broad daylight, the eruption of full-scale combat in Southeast Asia, bloody divisions over civil rights, the rise of anti-war and hippie movements and the attendant emergence of a drug culture along with them: All tentacles of momentous shifts in American life that impacted Reno, Nevada just as they did communities across the nation. The front pages of the *Reno Evening Gazette* throughout 1968 served helpings of everything momentous—fighting the “Reds” in Vietnam, astronauts traveling to the moon, Bobby Kennedy’s and Martin Luther King Jr.’s cold-blooded slayings, the Nevada National Guard called to Korea in the wake of the U.S.S. Pueblo incident, and this new national scourge, drugs. It was this last subject—specifically marijuana use—that spurred Raggio’s demand for names from the editor of the local daily newspaper that year.

The *Reno Evening Gazette* had just published a story about University of Nevada students smoking marijuana on campus. A photograph accompanying the story slyly silhouetted a group of students partaking in cannabis, hiding their identities. As Lerude would later explain in a letter provided as part of testimony to the Nevada Assembly Judiciary Committee on March 27, 1975—and again 39 years later during an interview with the author—he and his newspaper were concerned with the burgeoning drug culture and its effects on Reno’s young people. “We knew if the story were to truthfully inform the public of this problem, we would have to go to the offenders and get their views,” Lerude wrote to state legislators. He continued by describing that conversation with

Raggio, without identifying the, by then, former district attorney. “The district attorney at that time quickly reminded me that the marijuana smoking sources of ours were criminals, felons.” Indeed, in 1968, possession of *any* amount of marijuana was sufficient to earn one a felony criminal charge in Nevada. “And the district attorney told me he could seek out the names of those criminal/sources of ours. And should we, as newspapermen, refuse to reveal our sources, we could end up in jail.

“The reason: Nevada had no shield law,” he wrote (Lerude, 1975).

The 1975 letter is only a snippet of a larger history. Lerude’s letter does not hint at how he was able to get a shield law passed in the first place. It does not reveal that before 1968 he was *opposed* to enacting a shield law in Nevada altogether. He did not reveal in 1975 what he and others modeled Nevada’s statute upon or why they chose in 1968 to keep the new shield law virtually hidden from public view by not even reporting its passage in their own newspapers. The purpose of this thesis is to uncover this history and with it to contribute to a wider understanding of the current state of the reporter’s privilege, both in Nevada and throughout the nation. Shield laws and efforts to enact similar legislation in Congress have been fodder for a much broader debate on First Amendment principles and the tension between press freedoms and the government’s right to collect evidence and seek justice for more than 100 years (Smith, 2013, Martin & Fargo, 2013, Docter, 2010, Bates, 2010, Easton, 2009, Abramowicz, 2008, Pieroni, 2008, Siegel, 2006, Durity, 2006, Lee, 2006, Van Gerpen, 1979, Semeta, 1960, Beatman, 1959).

To better establish the context in which Nevada legislators agreed to consider a shield law and then revise it just six years later, the following pages will highlight first

the long and, some would argue, sketchy history of the reporter's privilege in America in general. The following chapter will examine the attempts at various federal legislative efforts to protect reporters. This thesis will examine the differences between an absolute versus qualified reporter's privilege. Also, an explication of federal and state court decisions regarding the privilege and state shield laws is in order, particularly since one of the reasons cited by advocates urging legislators to revise Nevada's law in 1975 was the U.S. Supreme Court decision in *Branzburg v. Hayes* (1972). That 1972 decision was a seminal moment in the history of the reporter's privilege, because in a still controversial and widely debated 5-4 decision the court found that the First Amendment's press clause contains no special protections for journalists that are not also in place for the average citizen (*Branzburg v. Hayes*, 1972). In addition, one leg of the *Branzburg* case, its namesake in fact, involves a Kentucky reporter refusing to divulge the identities of drug-using sources in news stories he produced when asked to do so by law enforcement authorities.

No examination of the literature surrounding the reporter's privilege is complete without also describing the subject's central conundrum. Much scholarship has been dedicated to debating how state and federal reporter's privileges, whether codified by statute or qualified by court precedent, define the term "reporter" or "journalist." The various conflicts that have arisen as a result of legislators attempting to define these terms in crafting shield protections has led to much debate. Even as Nevada crafted its own shield statute in 1969 this question was raised. Defining the term "journalist" is still pertinent to Silver State media professionals today because Nevada's shield statute does

not offer protections to digital or non-traditional journalists. A review of the current state of journalism in Nevada and across the United States has shown a quick evolution toward digital media formats as traditional media forms diminish more and more each year (Mitchell, 2014, Moody's Investor Service, 2014). Shield laws in Nevada and many other states simply have not kept pace with this media evolution (Martin & Fargo, 2013, Robben, 2012, Durity, 2006). In fact, the patchwork of qualified and absolute protections across the country is generally the reason given for urging Congress to pass a model federal shield. The literature shows, however, that the 80-year-old effort to do that has in fact been most bedeviled by this one facet of the subject: How does one define the term journalist?

After an examination of the literature and this central issue at the privilege's heart, this thesis will tell the history of the Nevada shield law, from Raggio's demand for the names of "those felons" to efforts undertaken during the summer of 2014 when a committee created by the Nevada Attorney General's Office examined whether the state should attempt to modernize the shield statute to make it more inclusive in the face of so much change in the media landscape since 1975. This section will include details that even Lerude admits—today the 77-year-old is professor emeritus at the University of Nevada, Reno, where he taught media law for three decades—were never made public. Voices from the past will be heard again, including from Bill Farr, who served 46 days in jail in 1972 for declining to reveal his sources to a superior court judge. This was the most lengthy recorded jail term served by a U.S. journalist for not revealing a source to government authorities until 2001, when a novice author served 168 days in jail for not

handing over her source material to federal authorities in Texas (Garcia, 2002). Pulitzer Prize winning journalist Ron Einstoss, a 1955 University of Nevada graduate, testified on behalf of Nevada's shield protections in 1975. Joining him was also *Reno Evening Gazette* reporter Mark Oliva and Tad Dunbar of KOLO-TV in Reno. Their arguments echoed sentiments raised during the Supreme Court's *Branzburg* case, raising important issues about the freedom of the press, its function as a check on government authority, the practice of keeping confidences in order to gain the trust of important sources, all equally important efforts to keep the "free flow of information" unobstructed (See appendices G, K, and L). It is argued that all of this is necessary to protect the public's right to know. A better informed public ideally leads to better self-governance. Advocates for a strong reporter's privilege have long argued that this is precisely the purpose of pursuing and protecting these lofty goals (Pracene, 2005, Van Gerpen, 1979, Whalen, 1973).

Finally, this thesis will address recent efforts to overhaul the Nevada shield statute. The underlying philosophical arguments for modernizing the law will be addressed. The pros and cons of doing such will be set out. The finer points of whether the law should be made more inclusive by embracing an emerging method of thinking about protections for journalism over journalists will be expounded upon as well. In the conclusion, this thesis will compare and contrast the three defining eras of the statute's existence—passage, revision and attempted modernization—to place Nevada's shield law and its history in context with radical changes to the state's—and the nation's—media landscape.

CHAPTER 2
LITERATURE REVIEW

Origins of a Testimonial Privilege

A court's ability to obtain "every man's evidence" is a doctrinal centerpiece of western jurisprudence. The guarantee of a fair trial rests on the ability of jurists to collect and weigh evidence, including testimony from citizens with knowledge deemed important to a criminal or civil inquiry (*Blackmer v. United States*, 1932; *Blair v. United States*, 1919). Often this is done through a legal instrument called a subpoena, which can be served on any person by legal authorities. Subpoenas are most often served on witnesses called to testify before grand juries, or in civil and criminal court trials. Ignoring a subpoena is often punishable by a contempt of court citation, which can spell jail time, heavy fines, or both.

Exceptions to this practice of compelling and collecting witness testimony are few. Common law in the U.S. originated with states adopting English rules and court precedents at the birth of the nation with slight modification over time (Wigmore, 1961). This body of law recognizes several types of privileged communications—attorney-client, spousal, and priest-parishioner privileges to name a few. This means an attorney can not be called to testify against a client, a wife against a husband and vice versa, or a pastor against a member of his flock. Privileges in the common law have been extended before, to doctors and their patients for example, through judicial rulings or via statute, codified by state legislatures or in Congress. Journalists in America have attempted since

pre-colonial days to persuade authorities to recognize a similar such testimonial privilege for their work with little success.

John Peter Zenger's name is frequently invoked when discussion and debate erupt over the reporter's privilege and its historical origins. His name is listed first in a 2010 First Amendment Center historical timeline of journalists jailed in America for refusing to reveal the identities of confidential sources and other information. "John Peter Zenger, the German-born immigrant publisher of the *New York Weekly Journal*, was acquitted of seditious libel for his newspaper's anonymous criticisms of New York's Colonial Gov. William Cosby. Some scholars say this trial was the first documented case in American history of a journalist's defiance of a government order to reveal sources" (Belt, 2010). Van Gerpen (1979) similarly refers to Zenger's 1735 arrest and trial as among the first instances of an American journalist being jailed for not cooperating with authorities (5). In his book *Privileged Communication and the Press: The citizen's right to know versus the law's right to confidential news source evidence*, Van Gerpen points out that most accounts of this historic event center around lawyer Andrew Hamilton's masterful defense of Zenger, who was facing seditious libel charges and sat in jail for nine months awaiting trial. It was during this jail term that Zenger was steadfast in his refusal to name the author of his newspaper's critical commentary.

Van Gerpen cites Zenger's case and Benjamin Franklin's autobiography to illustrate an early adherence to a professional code of ethics when it came to keeping confidential sources critical of government (5-6). Franklin described his own early confrontation with authorities: "One of the Pieces in our News-Paper, on some political

Point which I have now forgotten, gave Offense to the Assembly. He (Franklin's employer, a printer) was taken up, censur'd and imprison'd for a month by the Speaker's Warrant, I suppose because he would not discover his Author. I too was taken up and examin'd before the Council; but tho' I did not give them any Satisfaction, they contented themselves with admonishing me, and dismiss's me; considering me perhaps as an Apprentice who was bound to keep his Master's Secrets" (cited in Van Gerpen, p. 6). It is out of such confrontations with authorities in colonial America that an emphasis on freedom of the press emerged in the codified language of America's Bill of Rights.

Van Gerpen illustrates various clashes between the press and government authorities throughout his tome, providing rich anecdotal information about how journalists sometimes fell afoul of officialdom. There was Simonton of the *New York Times* in 1857, jailed by the House of Representatives for an editorial criticizing lobbying practices in Congress (7). In 1870, Scott Smith of the *New York Evening Post* wrote an article exposing payments to several congressmen from a faction of Cubans seeking to influence the vote to recognize the island republic. Smith based his story on information from a confidential source. He refused to identify his source when asked to testify and was threatened with losing his seat in the House press gallery (7). In 1871, two *New York Tribune* reporters acquired a copy of the Treaty of Washington, then before the Senate for ratification. The Senate wished to keep the treaty's contents a secret. When the reporters were subpoenaed to appear before a committee and name their source, they refused. "They rested refusal on the grounds of professional honor" (7). In 1897, a man who told a reporter he witnessed a murder tried in court to claim that what he said was confidential

because he was talking to a reporter. In 1911, a Georgia reporter was fined \$50 for refusing to name a police officer who had given him information about a crime (14). In 1913, *New York Tribune* city editor George Burdick, author of a series of stories on customs fraud, invoked the Constitution's Fifth Amendment protections to keep from being compelled to name his sources.

Burdick v. United States (1915) was the first federal case to go to court involving the reporter's privilege, though Burdick utilized Fifth Amendment arguments rather than a First Amendment one (Smith, pp. 16-17). When Burdick was pardoned by President Woodrow Wilson, he rejected the presidential pardon and continued to maintain his Fifth Amendment right not to incriminate himself (Van Gerpen, 14). In 1929, three reporters for the *Washington Times* were jailed after refusing a grand jury's demand for the names of speakeasy operators who sold the newsmen liquor as part of a story they wrote. The trio was sentenced to 45 days in jail for refusing to testify. Their incarceration likely helped spur the first legislation introduced in Congress that same year to protect reporters from forced disclosure (14-15). Only one case, from 1914, is cited whereby a reporter actually acquiesced to a demand to reveal his source (*In re Wayne*, 1914, cited by Van Gerpen, 1979, Sherwood, 1970). Dozens more journalists would continue to go to jail in defiance of legal authorities throughout the 1900s and into the 2000s.

High-profile prosecutions of journalists undoubtedly led to judicial and legislative action, some in favor of the press, some not, often followed closely by academic scholarship on the subject. The literature can be divided into three distinct periods—pre-1970s, 1970s and post-1970s. The 1970s were both a turning point and a mid-point

because a new wave of political and social upheaval brought about some of the biggest clashes between press and government leading to calls for more state shield laws. Before then scholarship regarding the reporter's privilege was noticeably antagonistic toward the professional media's attempt to invoke any sort of testimonial privilege. In 1959, for example, a privilege symposium was hosted by the *Connecticut Law Review*. Student authors researched and wrote about court-recognized testimonial privileges, including the attorney-client privilege, the physician-patient privilege, the priest-parishioner privilege, the spousal privilege and, finally, the "newsman's" privilege (Beatman, Baum & Greene, 1959). The authors noted that some privileges were enshrined in state statute and others grounded in common law or court precedent. One student writer cited research that suggested the attorney-client privilege first originated in London in 1280 (Baum, 170). The case of the journalist's privilege, however, was less settled. After all, "Dean Wigmore has declared that a testimonial privilege for journalists is not justifiable, and the American Bar Association has recommended that legislatures not enact such a privilege" (Beatman, 223). The year 1959 also happened to be the year that a federal court first considered a case involving the privilege where the defendant attempted to use a First Amendment argument to withhold the identity of a source (*Garland v. Torre*, 1959). Before then, journalists had simply invoked their professional credo of maintaining confidences, an English tradition that harkened back to a much earlier time.

Beatman was aware that by 1959 12 states had already conferred "an absolute, or 'blanket,' privilege of non-disclosure of the source upon the journalist" (221). She recorded her concern that these state shield laws were "excessive in scope and as

hampering investigation and legal proceedings” (222). Similar musings were set forth in Semeta (1960). Citing a 1930 meeting of the New York Bar Association Committee on State Legislation, Semeta reported how lawyers were then viewing the spate of state shield laws growing organically out of free press concerns in various states; nearby New Jersey would adopt one in 1933. “They open the way to reckless publication and abuse, and while on their face they seem to protect the editor and reporter, in reality they protect the informant. It seems to us that the informant, who furnishes information to a reporter for the express purpose of having it published, should have no such immunity as these bills propose” (315). In 1959, a 15-month study of the reporter’s privilege issue was concluded by the American Civil Liberties Union. A March 18, 1959 *New York Times* article announced the group’s finding that “the legislative approach in this field is neither necessary nor at the present time desirable,” which reflected widespread agreement among many in the legal profession and in academia prior to the social upheaval of the 1960s and 1970s (317). The 1959 ACLU report continued that “Most of the proposed or enacted (state shield) statutes seem dangerously loose (in their definition); none of the statutes has yet been tested for constitutionality, and their survival of such a test may be doubtful.”

It is no surprise that legal scholars before 1970 considered traditional media’s claims to a reporter’s privilege spurious at best. The early literature is filled with references to John Henry Wigmore’s *Treatise on Evidence*, “probably the most useful and heavily cited law text of its day” (Northwestern University Archives online). It is as ubiquitously cited as the *Branzburg* Supreme Court decision would be in legal

scholarship post 1972 regarding the reporter's privilege. Wigmore was a prolific scholar. He was dean of Northwestern University's law school from 1901 to 1929. During his tenure and after, he made several major contributions to American legal studies, including an oft-cited treatise on evidence that included a dissection of privileges—he did not support a privilege for reporters (Wigmore, 1961).

Wigmore's disdain for recognizing a reporter's privilege is well known and was echoed by many scholars of his time. Sherwood (1970) cites Wigmore's response to a 1938 report by the American Bar Association. "Of recent years, there have appeared on the statute books of several legislatures certain novel privileges . . . [T]hey bear the marks of having been enacted at the instance of certain occupational organizations The demand for these privileges seems to have been due, in part to a pride in their organization and a desire to give it some mark of professional status, and in part to the invocation of a false analogy to the long-established privileges for certain professional communications. The analogies are not convincing . . . [W]e recommend against any further recognition of . . . privilege for information obtained by journalists" (Quoted by Sherwood, 1214). Numerous judges over many years cited Wigmore in their decisions denying a reporter's privilege. Legal scholars before 1970 took note of these decisions. Beatman cited six early state court cases: *Clein v. State* (1951), a Florida case involving gambling and bribery; *People ex. rel. Mooney v. Sheriff* (1936), a New York gambling case; *In re Grunow* (1913), a New Jersey case involving graft by public officials; *Plunkett v. Hamilton* (1911), a Georgia case examined below; *Ex parte Lawrence* (1897), a California case about state senators taking bribes; and *Ex parte Sparrow* (1953), a North

Dakota case involving state prison conditions. The reporter's privilege was cited but failed to sway the judge in all of these cases. The courts repeatedly invoked Wigmore's treatise on evidence in deciding them as well.

One of the earliest and most cited state reporter's privilege cases in the early academic scholarship on the subject is *Plunkett v. Hamilton* (1911). The case originated in 1910 when a police source tipped off *Augusta Herald* reporter T. J. Hamilton about a murder. The First Amendment Center's historical timeline of jailed journalists notes: "Hamilton served five days in jail and was fined \$50 for refusing to disclose to a police review board the name of an officer who had leaked information about a murder" (First Amendment Center online). Georgia Superior Court Judge J. Lumpkin wrote in his opinion that Wigmore had laid out clear and convincing arguments for denying a reporter's right to refuse to testify. "The real point which the applicant apparently seeks to make is, that, by promising to keep the name of his informant a secret, he can free himself from the duty of testifying in a court, when called on so to do, and that employees can claim an exemption from testifying, because they apprehend that they will be discharged if they do so. Neither one of these positions is tenable. In *4 Wigmore on Evidence*, § 2192, it is said: 'For three hundred years it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence'" (*Plunkett*).

Judge Lumpkin continued in his 1911 opinion to sketch a brief history of the reporter's privilege that is valuable here. The judge wrote that journalists and others who refused to identify sources to authority figures in England did so out of a sense of

integrity; it was a “point of honor” and it was utilized by colonists in America as well. “This claim of exemption from testifying . . . was considered and overruled in 1776 in the Duchess of Kingston's case, *20 How. St. Tr. 586*, and again in 1777 in Hill's trial, *20 How. St. Tr. 1362*. Professor Wigmore states that ‘The ‘point of honor’ thus disappeared forever as a motive for recognizing a privilege’” (*Plunkett*). Van Gerpen wrote that as early as 1562, English judges made no exceptions on the obligation to testify. He wrote that eventually two exceptions developed, one a short-lived “point of honor” construct, which was invoked to protect communications between two “gentlemen” (63). Lumpkin returned to Wigmore multiple times in his decision in *Plunkett*. He quoted the much-respected professor over and over. “In general, then, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege. This rule is not questioned today. No pledge of privacy, nor oath of secrecy, can avail against demand for the truth in a court of justice. . . . Accordingly, a confidential communication to a clerk, to a trustee, to a commercial agency, to a banker, to a journalist, or to any other person not holding one of the specific relations hereafter considered, is not privileged from disclosure” (*Plunkett*).

Smith (2013) referred to this consistent reliance on Wigmore’s influential treatise by the courts when he wrote that early legal writing regarding the reporter’s privilege was shaped by “parochial” concerns of law school professors and legal practitioners. “Their single lens for viewing the issue was the common law as they understood it: A testimonial privilege did not exist.” It was not until the subject moved into the constitutional realm,

particularly after *Garland v. Torre*, that “scholars began to theorize rationales based on, among other theories, the role of the press in a democratic society, the press as a check on government power, and the press as conduit for the free flow of information to the public.” Smith (2013), which represents perhaps the latest in-depth scholarship about the reporter’s privilege, argues that the weight of these contributions combined helped shape the “noticeable” consensus among scholars since *Branzburg* in favor of a privilege despite continued judicial divisions on the subject (43). In other words, the 1960s and 1970s clashes between press and authority were seismic enough to force many legal scholars to embrace the idea of a testimonial privilege for journalists when very few had ever done so previously.

In summary regarding the origins of the reporter’s privilege as well as the nature of early scholarly efforts, two trends are clear: First, many, many journalists went to jail rather than reveal confidential sources of information going back to pre-colonial days; second, before the 1970s, legal scholars almost universally disavowed any notion of a reporter’s privilege and even expressed concerns when state legislatures (no doubt mostly as reactions to journalists in their state protesting government interference for jailing them) dared circumvent the courts and common law by enshrining a privilege for journalists in statute. Starting in 1896 with Maryland, a dozen states had statutory shield laws in place by 1949 (Semeta, 313). Many members of the press endured jail and other government sanctions long before then, based on their professional credo and its inextricable links to the eighteenth century’s “point of honor” construct. In 1934, the American Newspaper Guild, for example, adopted a code of ethics. It stated in part:

“Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies . . .” (Sherwood, 1203). Today, the Society of Professional Journalists treats the subject somewhat more softly. Its Code of Ethics urges caution when making promises, “but keep the promises” you make. It urges journalists to identify sources in an effort to provide the public “as much information as possible to judge the reliability and motivations of sources.” But the modern code of ethics also urges reporters to “reserve anonymity for sources who may face danger, retribution or other harm” (Society of Professional Journalists online). Nowhere, however, does it urge journalists to refuse to testify in court or answer subpoenas from government authorities.

Early State Shield Laws

The first time a state legislature enshrined a testimonial privilege for journalists—they were called “confidence laws” at the time—was in 1896 in Maryland. Eleven more legislatures passed similar laws shielding journalists over the next 50 years—New Jersey in 1933, Alabama 1935, California 1935, Arkansas 1936, Kentucky 1936, Arizona 1937, Pennsylvania 1937, Indiana 1941, Ohio 1941, Montana 1943, and Michigan 1949. By 1959, Alabama, Arkansas, Indiana, Kentucky, Maryland, Montana, and Ohio extended their protections to include radio. Alabama, Indiana, Kentucky, Maryland, Montana, and Ohio extended theirs to include television by then as well. Indiana, Montana, Ohio, and Pennsylvania also extended theirs to include protections for

members of press associations, a trend adopted later by Nevada (Beatman, 220, Semeta, 313).

No one disputes that many of these states adopted shield laws in response to localized confrontations between press and government authorities. However, the historical record is incomplete and many times also inaccurate. “One problem with the lack of ongoing historical research is the perpetuation of small mistakes in the narrative, such as wrongly attributing Maryland’s 1896 shield law to the jailing of *Baltimore Sun* reporter John T. Morris in 1886” (Smith, 32). Smith (2013) showed that Maryland’s statute was likely the result of an unfolding national scandal in nearby Washington, D.C., not over the oft-repeated tale of Morris’ jailing. The same can be said of the literature’s treatment of the first effort in Congress in 1929 to pass a federal shield. “One would think that with Congress debating a federal shield law off and on for the last 80 years, there would be a well-developed record of the first attempt to pass such a law, in 1929. Yet that important event has been a footnote in the literature, and often an incorrect footnote at that” (Smith, 33). Smith argued that much less attention has been paid to the statutory realm compared to the constitutional, which did not even begin to draw scrutiny until *Garland v. Torre* in 1959. A body of statutory laws now exists in states across the country, origins of which trace back 113 years. Historical research that might add valuable context to current debates remains spotty at best. “Most noticeably absent from the literature is material that would shed light on the development of shield laws at the state level. The little scholarship there is hints at the role that journalists, press advocates

and the public have played in helping to shape the direction of the law” (43). This last statement could certainly apply to the story of Nevada’s shield law.

Nevada’s original 1969 shield law stated that “No reporter or editorial employee of any newspaper, periodical, press association or radio or television station may be required to disclose the source of any information procured or obtained by such person, in any legal proceedings, trial or investigation” (See Appendix A). The law’s authors deemed it necessary to recount all the authoritative bodies that could *not* call on a reporter to testify: state courts, a grand jury, coroner’s inquest, jury or jury officer, the legislature, or any legislative committee, any government department, agency or commission, or by any local governing body, local committee or officer thereof. The shield law was amended in 1975 to include the words “or former” with regard to the types of journalists protected, thereby preventing authorities from waiting until a reporter left his or her employer before attempting to subpoena them. The 1975 amended law also added the words “any note, photograph, film, tape recording or other document acquired or prepared by him in his professional capacity” to the shield law, while keeping the remainder of the original language (See Appendix F). The shield law is broad in its protections by any measure. Traditional journalists simply have blanket protection to shield their sources and their work product from any type of government intrusion.

The academic literature regarding Nevada’s shield law, however, is scant. Like many of the early states that adopted such laws in the first part of the twentieth century, Nevada decided to enact an absolute shield privilege. Most states today have only qualified statutory and court-precedent-styled protections, so any reference to Nevada is

usually because it is among the minority of states that offer an absolute protection. Van Gerpen wrote in his 1979 book that “A reporter for the *Las Vegas Sun* noted that there was only one incident in which the court was asking for a disclosure of confidences, and the Nevada shield law protected those involved” (136-137). Martin & Fargo (2013) mention Nevada only once, concluding that its statute is among five that “stand out for the brevity of their definitions of both function and format in regard to covered persons and organizations” (62). Siegel (2006) called Nevada and Montana both models for strong, absolute reporter protections. The research noted that “Nevada’s statute protects journalists from having to reveal their sources, as well as published and unpublished information” (503). At various times in the literature, however, Nevada is not even considered. Pieroni (2008) took a detour to explain the vast differences among states even when their laws offered similar protections, and in a list of states having absolute privileges, Nevada was accidentally omitted (814).

The Reporters Committee for Freedom of the Press—founded in 1970 by among others Earl Caldwell, one of the three reporters who made up the soon-to-be addressed *Branzburg* Supreme Court case—features only a few pithy lines about the history and protections of the Nevada statute: “Nevada is often recognized as having the strongest shield law in the country. The law protects unpublished and published materials and protects the confidential sources of libel defendants” (Reporters Committee for Freedom of the Press online). There is little case law interpreting the shield law, unlike in many other states. Among the few times the state’s Supreme Court has addressed the issue, the shield statute has maintained its integrity and served its purpose. Most recently, in *Aspen*

v. Gentry (2013), Nevada’s Supreme Court said the statute serves to “enhance the news gathering process and to foster the free flow of information.”

Absolute Versus Qualified Privilege

Before addressing the constitutional scholarship that arose out of federal case law starting in 1959, a brief discussion on the vagaries of absolute versus qualified privilege is in order. Van Gerpen laid out nine questions to be considered when drafting a shield statute. Among these are: “Who does the privilege protect? Where may the privilege be asserted? Absolute versus a qualified shield?” (10). Van Gerpen admitted, however, that what is absolute in one place, may simply not be the case in another, though both make the same claims. In 1979, it was “somewhat hazardous to attempt to classify state privilege statutes as conferring an absolute or qualified privilege; in several instances where it was assumed that the statute conferred an absolute privilege courts have held otherwise” (18). Simply put, an absolute privilege is designed to protect the journalist “absolutely” from almost any type of interference from government authorities who seek to identify confidential sources of information.

Qualified privileges generally are the result of two situations: a state statute clearly spells out exceptions to the protections—for example, if the reporter should witness a criminal act firsthand—or the law outlines a balancing test for courts to apply. These balancing tests can further differentiate types of qualified privileges by allowing more or less protection depending upon whether information is being sought from a journalist in a civil versus criminal proceeding. Whatever shield protection a state statute

offers, it only protects the journalist in “qualified” circumstances. Most state statutes today are qualified. In federal circuits where a privilege is recognized, they are always qualified. Examples of states with qualified statutes are California, Colorado and Delaware. In California the “reporter's privilege only prevents a finding of contempt for refusal to comply with a subpoena; consequently, it provides virtually no protection to reporters who are parties to the litigation In addition, the California Supreme Court has held that the privilege must be balanced against the criminal defendant's right to a fair trial” (Reporters Committee for Freedom of the Press). In Colorado, “the law states that ‘no newsperson shall, without such newsperson's express consent, be compelled to disclose, be examined concerning refusal to disclose, be subject to any legal presumption of any kind, or be cited, held in contempt, punished, or subjected to any sanction for refusing to disclose information obtained while ‘acting in the capacity of a newsperson.’ The Shield Law does not apply where the news information: a) was received at a press conference; (b) has actually been published or broadcast through a medium of mass communication; (c) was based on a news person's personal observation of the commission of a crime if substantially similar news information cannot reasonably be obtained by any other means; and (d) was based on a news person's personal observation of the commission of a class 1, 2, or 3 felony” (Reporters Committee for Freedom of the Press). In Delaware, the “statutory privilege is limited to information obtained within the scope of the reporter's professional activities. ‘Professional activities’ may include social gatherings, but do not include instances of intentional concealment of the reporter's identity as a reporter, or instances wherein the reporter personally witnesses or

participates in acts of physical violence or property damage” (Reporters Committee for Freedom of the Press).

Pieroni (2008) and Siegel (2006) both advocated for a federal shield law that offers absolute protections and shields journalists in states where similar statutes either don't exist, are weak or simply outdated. Both point out that a model federal shield law offers a solution to the patchwork of qualified and absolute state privilege laws offering varying degrees of protection across the country. States could, of course, expand the protections on their own, but at least journalists could count on the consistency offered by a new federal shield. Siegel used an analogy to explain the problem with many state shield laws and their statuses: “The inevitable disparity in treatment from case to case is further exacerbated by the current hodgepodge of state shield law protection. For example, imagine three reporters, one of each living in the neighboring states of Georgia, Alabama, and Mississippi. The Alabama reporter would enjoy absolute protection against compelled disclosure, the Georgia journalist would be covered by a qualified privilege, and the Mississippi reporter would receive no protection at all” (520). Peironi argued that the states with judicially-conferred privileges presented similar problems. For example, the Supreme Court of South Dakota acknowledged a qualified privilege for confidential information in a civil case, but also recognized that “the interest of the public in law enforcement and the defendant in discovering exculpatory evidence” may outweigh the privilege in criminal cases. The Supreme Court of Vermont, conversely, recognized a qualified privilege in a criminal case, but it has not decided whether the privilege exists in civil cases (815).

Peironi (2008) noted that numerous lawsuits naming journalists as well as efforts in Congress to enact a federal shield have continued to highlight the lack of uniformity across the nation. An October 2007 report prepared by the House Committee on the Judiciary concurred. It stated: “A Federal shield law is also needed because of the lack of uniform standards—at both the Federal level and State level—to govern when testimony can be sought from reporters” (815). Peironi acknowledged also that the fast-paced change in the media landscape, the move from traditional news sources to digital and social media outlets has served to “exacerbate” the problem of inconsistent approaches all the more. “The days of a reader picking up a newspaper from the front porch and reading a daily digest of news collected by local reporters from local sources is rapidly coming to an end. When it does, applying the distinctly local law of a reader's jurisdiction to a reporter's work in another state, collected from sources in a third state, will cease to make much sense.” (816)

While the media landscape changes rapidly, including in Nevada, legal protections for journalists clearly remain problematic in some jurisdictions. Up until now this review of literature has examined the origins of a testimonial privilege, the early adherence by some states to create their own statutory privileges outside of the judicial setting, and the difference between qualified and absolute protections. Now let us shift to the constitutional debate and the hefty scholarship defining that topic. This piece of the privilege puzzle concerns scholars the most because a clear answer on whether the First Amendment provides shield protection remains elusive even 42 years after *Branzburg*.

A Constitutional Question: Pre-*Branzburg*

In the annals of reporter's privilege literature, scholars agree a turning point of sorts occurred in 1958, setting the stage for later constitutional squabbles in federal courts over whether the First Amendment's press clause provides for a right to gather news, and thus a right to protect confidential sources from disclosure. What had long been a common law dispute was about to turn into a First Amendment crusade. The case was *Garland v. Torre* (Smith, 2013, Bates, 2010, Fargo, 2003, Van Gerpen, 1979). Marie Torre was a *New York Herald Tribune* gossip columnist. She reported a confidential source telling her that famed actress Judy Garland thought herself "terribly fat," and refused to continue a project with CBS. Garland filed a lawsuit against CBS for \$1,393,000 for defamation and breach of contract. But Garland's attorneys needed Torre's source in order to make their case. Torre said at the time she believed "no judge in the land would ask a reporter to name a news source" (quoted in Bates, 97).

Torre's attorneys argued that the First Amendment as well as common law allowed the columnist to keep her confidences protected. The judge in Torre's case, Potter Stewart, however, ruled she could not claim a testimonial privilege. "He accepted the hypothesis that forced disclosure might entail an encroachment on press freedom, but reasoned that since freedom of the press is not absolute, the question to be determined was 'whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of the First Amendment freedom'" (Van Gerpen, 88). Torre was eventually found guilty of contempt for refusing to name the source and

she was sentenced to 10 days in jail, suspended pending appeal (Bates, 105-106). Torre's refusal to identify her source, Stewart found, harmed Garland's ability to make her claim (*Garland v. Torre*).

Bates argued that the court introduced a sort of First Amendment balancing test that would be invoked by federal courts in future cases. It also seemed it was easier for the appellate court, particularly since Torre was regarded as a mere gossip columnist—she received little support from newspaper colleagues—to rule she had no constitutional privilege to withhold the name of her source, especially since the information she withheld was both material and relevant to Garland's defamation claim. But, Judge Stewart did allude to a potential situation where limits to a reporter's obligation to testify could be reached, especially in situations where prior restraint to publication or some wholesale compulsory forced disclosure foisted upon journalists became an issue (Bates, 109). The Supreme Court refused to hear Torre's appeal and New York's legislature as a result sought passage of a shield law for reporters afterward. Congress also saw bills introduced based on the outcome of *Garland v. Torre*, particularly since Torre's jail term incensed many of her fans (Bates, 112-113).

Scholars agree *Garland* was a turning point. But another case, this one a state court decision, may have sparked a much wider legal debate, even, according to Smith, leading to the creation of several state shield laws. This case was *State v. Buchanan* (1966), an Oregon case featuring a fight between press and government authority that, like Paul Branzburg's ordeal a few years later, involved reporting on drug abuse from the

perspective of unidentified drug users. This tale shares a kinship with the origins of Nevada's shield statute.

Annette Buchanan was a senior at the University of Oregon when she was named managing editor of the student newspaper, the *Oregon Daily Emerald*. On May 22, 1966, during a coffee run, Buchanan was approached by several students who were concerned with the lack of balance in several *Emerald* stories about the spread of drug use on American college campuses (Smith, 159). "They suggested that the *Emerald* was anti-marijuana and that we wouldn't print the other side of the story, even if we could get it" (quoted in Smith, 160). A few days later, the *Emerald* printed an article under the headline "Students Condone Marijuana Use." An editor's note revealed that "For obvious reasons, the names used here are not actually those of the students interviewed" (quoted in Smith, 160). Statements from students interviewed for the piece included opinions about the hazards of marijuana use. Some students said pot was not the same as harder drugs. Also expressed was the opinion that people using marijuana are generally less irresponsible than people under the influence of alcohol. One statement in particular caught the eye of the local district attorney. A student told the *Emerald* that he knew at least 200 people who regularly smoked marijuana.

Coincidentally, the *Emerald*, in an editorial published a day before Buchanan's story ran, endorsed Lane County district attorney William F. Frye's opponent for election to the state legislature. Frye was an avid reader of the *Emerald*; he had also attended the university and worked as a reporter and editor there before graduating in 1956 (Smith, 158). After reading Buchanan's story, he consulted with Eugene's police chief. By June

3, Buchanan was subpoenaed to appear before a grand jury empaneled by Frye specifically to investigate the *Emerald's* pot story. Having fretted over what she would say all night, the frazzled “girl editor” showed up to the grand jury room and was confronted by seven jurors and Frye. Asked if she would tell the jurors the names of any of the students she interviewed for her story, Buchanan refused, saying, “No, I will not” (quoted in Smith, 163).

Frye immediately went to a nearby judge’s chambers and requested a court order to compel disclosure, but Buchanan’s attorney successfully argued for a delay in the proceedings. “I’m not through with you yet,” Frye told the young college editor. By June 13, the plight of the *Emerald's* managing editor was national news. Reporters flocked to Eugene not just to cover the unfolding drama, but to support Buchanan. Many even testified on her behalf, arguing that she not only had a First Amendment right to protect her sources, she had a professional obligation to do so. Frye, for his part, argued that there was nothing in Oregon’s law providing a testimonial shield for reporters. “There is no common law, there is no historic right which makes it possible for a journalist to define under oath to testify” (quoted in Smith, 164).

Buchanan’s attorney argued that Frye had issued his subpoena in bad faith—the subpoena was characterized as retribution for the editorial endorsing Frye’s opponent; Frye had lost in the primary election. This argument did not sway the judge, however. “It will be the order of the court that this witness answer each of the questions put to her” (quoted in Smith, 164). Buchanan was brought back to the grand jury two days later and again refused to testify. A contempt charge was filed and she was ordered to appear

back before the judge. Leading up to the contempt trial, Buchanan was buoyed by an outpouring of support. Frye took the unusual step of responding to this by penning letters to the editor in multiple newspapers, explaining that “Sound law enforcement depends upon the willingness of every citizen who has knowledge of criminal activity to come forward and to testify if necessary.” Buchanan was held in contempt of court, but spared jail time. She was fined \$300.

The college editor’s attorney announced he would appeal the ruling, citing as one reason the fact no journalist in Oregon history had ever been held in contempt of court. Press advocates worried the ruling would embolden prosecutors across the state. Days after, a lobbying effort began in earnest to shape an Oregon state shield law. Newspapers and wire services from across the country covered the verdict, employing multiple rhetorical devices, Smith wrote, in order to sway public opinion and place First Amendment arguments in the forefront, just as occurred eight years earlier in *Garland* (168). Smith wrote that in calling for a state shield law, one editorial, published in the *Oregonian*, framed the argument in terms that would be made popular a decade later by noted constitutional scholar Vincent Blasi. “In a democratic society, the free press is the watchdog for the public and no such regime has long endured where this was not so” (cited in Smith, 173).

The Oregon Supreme Court heard arguments in Buchanan’s appeal in December 1967. Less than eight weeks later it issued its judgment: “Nothing in the state or federal constitution compels the courts, in the absence of a statute, to recognize such a privilege” (quoted in Smith, 175). The seven-member supreme court went to great

lengths to explain its decision, taking up both sides of the argument, the winning side noting arguments similar to those that would be expressed in the U.S. Supreme Court's decision four years later in *Branzburg*. Smith thoroughly documents the uncanny resemblance between the state supreme court's decision in *Buchanan* and Justice White's majority opinion in *Branzburg*.

It was after *Buchanan* that legal scholars began seriously examining the constitutional arguments for and against a testimonial privilege for journalists, building toward *Branzburg* in 1972 when the debate reached a crescendo. It should be noted that the decision in *Buchanan* coincides to the very year the *Reno Evening Gazette* decided to investigate pot smoking on the University of Nevada campus, the same year its editor, Warren Lerude, would also be threatened with jail if he didn't turn over the "names of those felons."

The U.S. Supreme Court's *Branzburg* Decision

Branzburg v. Hayes (1972) involves arguably one of the oddest rulings ever made by the U.S. Supreme Court concerning press freedoms. Its impact on the reporter's privilege debate is unquestionable; it sparked an avalanche of legal and media studies scholarship. It remains the only time in U.S. history that the nation's highest court has addressed the question of whether the First Amendment provides a testimonial privilege for journalists. Berger (2003) noted that almost 100 federal shield statutes were proposed within six years of the *Branzburg* decision (1391). Lee (2006) interpreted the decision in *Branzburg* as holding that journalists share "coextensive" constitutional protections with

the public, rejecting a testimonial privilege for reporters under the First Amendment and making news gathering an incidental, an even tangential issue (643-645). Easton (2009) called the *Branzburg* decision “devastating” to media professionals and the most influential decision on news gathering ever made by the Supreme Court (1294).

Branzburg was a conglomeration of four federal appellate cases involving three journalists, Paul Branzburg, Earl Caldwell and Paul Pappas. The case’s namesake was an investigative journalist for the *Louisville Courier-Journal* who in 1969, at age 27, earned the ire of local authorities by publicizing drug use and drug manufacturing in his community, but refused to divulge the identities of confidential sources who provided first-hand accounts of engaging in the illegal activity. Branzburg held a law degree from Harvard University and a masters degree from Columbia University’s journalism school. He investigated the abuse of narcotics among many other subjects (Easton, 1301). In November 1969, the *Courier-Journal* ran a story about two “hippies” making hashish out of marijuana. The hippies’ identities were withheld by the newspaper. A Jefferson County, Kentucky grand jury subpoenaed Branzburg, who promptly invoked the state’s shield law, which protects the “source of any information procured or obtained by him (journalist), and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected” (cited in Easton, 1301). Branzburg’s attorney also cited the First Amendment and the state constitution in arguing for a temporary restraining order from the state appeals court. The argument did not work in the end, though a temporary restraining order was granted. “Even before the revised opinion was issued, Branzburg had published two more controversial stories

based on observations and interviews with Kentucky drug users,” setting up a second criminal case against the young reporter (1302). Kentucky’s shield law was ruled inapplicable by the state appeals court because the court ruled the statute only protected “sources.” It did not apply to the reporter’s personal observations of criminal activity (Easton, 1319). Branzburg’s petition for review by the United States Supreme Court was granted on May 3, 1971.

Earl Caldwell became disillusioned by racism in the insurance industry before becoming a reporter for *The Progress* in Clearfield, Pennsylvania. That job eventually landed Caldwell at the *New York Times* in 1967, where he wrote about race issues (Easton, 1295). He developed confidential relationships with several members of the Black Panthers in Oakland and San Francisco. This brought about the scrutiny of federal authorities—a month of phone calls from the FBI seeking his assistance eventually turned into three subpoenas seeking his work product and orders to testify before a federal grand jury (1299). Caldwell kept appealing the subpoenas and orders to testify to the Ninth Circuit Court. The circuit court vacated a lower court contempt ruling against Caldwell in November 1970. The court ruled the public’s First Amendment right to be informed would be jeopardized by forcing a reporter to testify before a grand jury in secret. The federal government petitioned for Supreme Court certiorari and it was granted on May 3, 1971 (1300).

Paul Pappas was a television reporter and photographer for WTEV-TV in New Bedford, Massachusetts, working out of the station's office in East Providence, Rhode Island. On July 30, 1970, he covered a Black Panther leader’s speech. He stayed after

the speech for an extended period at the Panthers' local headquarters. Pappas was summoned to appear before a Bristol County grand jury two months later. He claimed a First Amendment privilege to decline to answer any questions about what he saw or any communications he may have had at Panther headquarters that night. When he was directed to appear before the grand jury again, he filed a motion to quash on First Amendment grounds because he feared "that any future possibilities of obtaining information to be used in my work would be definitely jeopardized, inasmuch as I wouldn't be trusted or couldn't gain anyone's confidence to acquire any information in reporting the news as it is" (1303). Pappas' motion was denied by a judge, who noted Massachusetts did not have a shield law. The Massachusetts Supreme Judicial Court on January 29, 1971 refused to follow arguments on Pappas' behalf, many of which centered around points also made in the Caldwell case. The court ruled that to follow Caldwell—who won an unprecedented qualified privilege in the Ninth Circuit—would be akin to judicial legislating. Petition for certiorari to the U.S. Supreme Court was granted on May 3, 1971. Oral arguments were made on February 22, 1972 for Caldwell and the next day for Pappas and Branzburg.

On June 29, 1972, the Court issued its decision, with Justice Byron R. White writing the majority opinion. The Ninth Circuit decision in *Caldwell* was reversed, while the court upheld the lower court rulings in *Branzburg* and *Pappas*. Chief Justice Burger along with justices Blackmun, Powell and Rehnquist joined White's opinion. Justice Powell, however, wrote a controversial concurring opinion that would later be cited by multiple circuit courts that eventually fashioned their own qualified privileges. Justice

Douglas and Justice Stewart wrote dissenting opinions, with justices Brennan and Marshall joining Stewart. The following quotation perhaps best illustrates Justice White's majority opinion:

We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request (White in *Branzburg*, 681-682).

Lee (2006) noted that in addition to their disagreement about the constitutional significance of news gathering, “Justices White and Stewart offered starkly differing views of the role of the press in society” (646). To Justice White, a special, constitutionally mandated position belonged to the grand jury, not the press. “If a journalist's privilege were to be created, Justice White observed, this was a task for Congress or state legislatures” (651).

In dissent, Justice Stewart called the majority opinion a “crabbed view of the First Amendment,” saying the decision “reflects a disturbing insensitivity to the critical role of an independent press in our society” (*Branzburg*).

The question whether a reporter has a constitutional right to a confidential relationship with his source is of first impression here, but the principles that should guide our decision are as basic as any to be found in the Constitution. While MR. JUSTICE POWELL'S enigmatic

concurring opinion gives some hope of a more flexible view in the future, the Court in these cases holds that a newsman has no First Amendment right to protect his sources when called before a grand jury. The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not only will this decision impair performance of the press' constitutionally protected functions, but it will, I am convinced, in the long run harm rather than help the administration of justice (Stewart in *Branzburg*, 725).

Powell's "enigmatic" concurring opinion was indeed an odd turn of events. Martin & Fargo 2013 as well as many other scholars have noted that Powell's argument created a doorway for lower circuit courts to entertain the possibility of a qualified reporter's privilege. "Through the few cases in which the appellate circuits have dealt directly with the issue, a loose definition of 'privileged journalist' has emerged" (50). In Powell's opinion the news gathering process was not "unprotected" by the First Amendment. "If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered" (Powell in *Branzburg*).

Docter (2010) also reported that numerous lower courts fashioned qualified privileges in the aftermath of *Branzburg*. The Tenth Circuit did so five years later in *Silkwood v. Kerr-McGee Corp.* (1977). The Second Circuit did so in *von Bulow v. von*

Bulow (1987). The First, Third, Ninth and Eleventh circuits all followed suit (Docter, 591, citing Alonzo, 2005; Durity, 2006; *In re Special Proceedings*, 2004, *In re Madden*, 1998; *Shoen v. Shoen*, 1993; *United States v. Caporale*, 1987). Siegel (2006), by contrast, chose to focus attention on the circuits that refused to acknowledge a privilege, even interpreting the same *Branzburg* decision to deny the existence of one. Siegel noted that the First Circuit appeared to reverse course *In re Special Proceedings*, a 2004 decision involving Jim Taricani, a Providence, Rhode Island television reporter who broadcast evidence being presented to a grand jury conducting a corruption probe. Taricani refused to tell prosecutors how he obtained the taped evidence, which was under a protective order, and he was placed on house arrest for six months (*In re Special Proceedings*, 2004). The D.C. Circuit also refused to recognize a privilege in the 2005 Valerie Plame affair that ensnared *New York Times* reporter Judith Miller and *Time Magazine*'s Matt Cooper. Miller went to jail for nearly three months for refusing to name her source. The Seventh Circuit in *McKevitt v. Pallasch* (2003) also cited *Branzburg* in dismissing the invocation of a reporter's privilege (Siegel, 494-495). Numerous scholars would later cite these developments as justification for a federal shield law, arguing that, just like the hodgepodge of protections offered by many state laws, federal circuits now represented a jumble of inconsistency as well.

Life (and Scholarship) After *Branzburg*

As noted earlier, in the six years immediately following the *Branzburg* decision, federal shield laws were proposed 100 times. The number of states passing

some form of shield statute also increased as a result of the decision—today every state has some semblance of a statutory or judicially created protection save perhaps Wyoming (Reporters Committee for Freedom of the Press). A noticeable shift, however, has taken place since 1972 with regard to the literature. The closer to *Branzburg* one gets, the more one sees a concentration by scholars on adjudging how states can best write and pass statutes that acknowledge a reporter’s privilege. Van Gerpen (1979) is one good example of this. Van Gerpen exerted considerable effort to outline how one could construct a workable shield law—choosing qualified versus absolute; defining protected persons, proceedings covered, materials protected, the circumstances in which a person can be denied the privilege and other steps (142). The central question Van Gerpen identified is the definition of protected person: Does the statute define the news person’s relationship to their employer? Is “news media” defined at all? Are degrees of protection offered based on the type of media dissemination? Is the status of former journalists defined? Van Gerpen broke down the three criteria best used to describe how disseminators of information are related to formal media: “1.) They use a noun such as ‘reporter’ or ‘cameraman.’ This can help exclude freelancers. 2.) They use the term ‘employed by.’ 3.) They list the functions of the reporter, such as ‘newsgathering’” (143). This structural method for crafting a shield law appears in many state statutes, including Nevada’s.

The further one moves away from *Branzburg*, however, a shift in the literature becomes evident. Scholars slowly embraced what many have come to believe is a solution to the age-old question at the heart of the reporter’s privilege debate: Just who is a journalist? In the years after *Branzburg*, scholars such as Van Gerpen sought out

structural methods for defining professional reporters so that only a certain group could attain protection, while others, such as anarchists working for a counterculture publication, or Black Panthers producing film of clashes with police, would not be defined as protected persons. This “structural” method, however, has proven so divisive that many scholars note that the failure to pass a federal shield law—Justice White invited Congress to do so in his *Branzburg* opinion—is directly the result of disagreement over who counts as a “real” journalist deserving protection and who does not. Smith (2013), Martin & Fargo (2013), Pieroni (2008), Siegel (2006), and others argued that for a federal shield to work it must be based not on the structural definitions of covered persons and covered media like those embraced in the 1970s, but on a more “functional” definition, where the practice of journalism is protected, not the practitioner based on his or her employment status.

The advent of Internet publishing as well as the rise of citizen journalism have been major drivers of this trend. Each represents emerging forms of journalism often unprotected by older shield laws. Model legislation introduced in Congress fails to address this issue as well. Pieroni (2008) noted the central problem with recent proposed federal shield statutes sought separately by Congress and the Media Law Resource Center was they each “endorsed a definition of ‘journalist’ that favors the big players in the industry, rather than protecting journalism as a process” (819). Amramowicz (2008) drew a similar conclusion. Amramowicz argued that courts should adopt a flexible, procedural approach to determining the weight given to a reporter’s request to invoke the testimonial privilege. Did the reporter follow industry guidelines in promising and

keeping confidentiality? Is the benefit to the public interest, on a case-by-case basis, in keeping the source confidential evident and supportive of maintaining the privilege?

These are questions Ambramowicz believes courts should weigh. Durity (2006) agreed, arguing that bloggers are left out even as the news media shifts further and further away from traditional platforms to increasingly digital methods of disseminating information to the public. Citing the First Circuit's decision in *Cusumano v. Microsoft Corp.* (1998), Durity agreed with the court, which held that "the medium an individual uses to provide his investigative reporting to the public does not make a dispositive difference in the degree of protection accorded to his work." The court held that as long as the reporter's intent was to disseminate information to the public at the outset of the news gathering process, then protection can be afforded. "These holdings support the theory that bloggers acting as journalists should not be excluded from protection under the reporter's privilege merely because they have selected to use an online-posting format or are not members of a traditional media outlet" (10). And yet, almost all except the latest state shield statutes leave bloggers and other types of digital journalists unprotected; this includes Nevada's statute. Durity noted that fighting subpoenas is expensive and time consuming for almost any media operation. Subpoenas threaten to chill independent journalists or those specialists who fall outside traditional reporter definitions. "The increasing use of the Internet by journalists to distribute information and by the public to receive information makes this ambiguity all the more worrisome" (13).

As shall be seen shortly, all of these issues arose in the course of Nevada's efforts to pass and then amend its state shield law. The question of who shall be covered by the

law was an important one for both legislators and news professionals. The debate surrounding revisions to the law in 1975 were imbued with the very First Amendment arguments that first surfaced in *Garland v. Torre*, in *State v. Buchanan* and later in *Branzburg*. And of course, the same concerns that have pushed scholars to focus more on “functional” aspects of defining protected persons in the law rather than antiquated “structural methods” led to consideration in 2014 of revisiting Nevada’s shield law.

CHAPTER 3

NEVADA'S FIRST SHIELD LAW

From Purist to Pragmatist

The front pages of the *Reno Evening Gazette* throughout 1968 screamed the social and political upheaval that was gripping Nevada and the nation. On the second day of that year, a page one headline informed Reno residents that 14 of its citizens had been arrested on marijuana charges (*REG*, Jan. 2, 1968, A1). Three days later, news hit the streets that local brothel owner Joe Conforte had been acquitted of “white slavery” charges (*REG*, Jan. 5, 1968, A1). By the end of the month, Washoe County District Attorney Bill Raggio, who would announce his candidacy for the Republican nomination for U.S. senator later that year, spoke about the dangers of marijuana and the substance’s contribution to local crime (*REG*, Jan. 31, 1968, A1). The *Gazette* noted the DA’s observations that criminals use the illicit weed to fortify their criminal courage, that its use lowers inhibitions, and that chronic users are eventually completely demoralized by its effects. A February 1, 1968 front page story noted that “Juvenile Narcotics Cases Go Way Up in Washoe.” By the following month, the *Gazette*’s Mimi LaPlante wrote about posing as a Reno High School student for stories about the state of the city’s youth.

While the big news was mostly local at the beginning of 1968, the pace of national and world events accelerated. By the end of March, President Lyndon Baines Johnson announced he would not seek a second term. In April, the nation was shocked when civil rights leader Martin Luther King, Jr. was gunned down in Memphis, leading to

widespread rioting that also captured the nation's attention. The shock and despair over King's murder had barely subsided when Robert F. Kennedy, the leading candidate to replace Johnson as president, was slaughtered inside a hotel kitchen in June after winning the California state primary. His death brought back memories of his brother, President John F. Kennedy, himself struck down in Dallas by an assassin's bullet five years earlier. The catastrophic war in Vietnam also made daily headlines; more than 400,000 had already been killed in the war, announced one front page story. Hanoi bombing runs and Paris peace talks joined presidential politics in dominating news as well.

Warren Lerude was a reporter for the Associated Press when he decided to apply for a reporter position open at the *Gazette* in 1963. In 1967, Lerude was elevated to the role of managing editor, virtually running the newspaper's newsroom. By the end of 1968, the young editor would be scrambling to defuse a threatening showdown with the local district attorney over a news story: A tip that pot was being smoked on campus led him to assign a reporter and photographer to get to the bottom of it. It was big news to him and to the community. The university, after all, was a beer-drinking school (Lerude, 2014).

Lerude told this author almost a half-century later that he always had considered himself a First Amendment purist—a devout believer that the Constitution's free press clause protected his ability to gather and disseminate news. State shield laws, he believed, forced journalists into potentially compromising positions vis a vis state legislatures (Lerude, 2014). Because politics is often measured by give and take, he believed journalists should not ask lawmakers for favors. By the end of 1968, however,

the new editor was contemplating a mad dash to get a state shield law pushed through the upcoming 1969 state legislature. Lerude said reality had forced his transformation from purist to pragmatist.

The district attorney, Bill Raggio, had taken notice of the story about pot-smoking college kids on the University of Nevada campus. Lerude remembered a photo accompanied the story; it silhouetted the students, who were not identified. Raggio told Lerude he wanted the identities “of those felons” captured in the photo. Lerude said he refused the DA’s request, telling Raggio in no uncertain terms that “those felons” happened to be the children of the same people who elected him to office. Raggio told the editor that a local district court judge might not agree with those sentiments. He further told Lerude that he and his reporters could face jail for refusing to identify the paper’s sources for the story.

Indeed, unlike today, where multiple states, including Nevada, have legalized the use of marijuana for medicinal purposes—Colorado and Washington legalized recreational pot use in 2014—and where metropolitan and rural areas alike are awash in street drugs of all sorts, drug abuse in 1968 was itself newsworthy. The use of illegal drugs was a national phenomenon. Actor Cary Grant’s LSD trips made the March 21 front page of the *Gazette*. In the September 18 issue, a story ran on the second page under the headline: “University No Sanctuary For Drug Users: Dean.” A slammer headline across the top of the front page in the October 4 *Gazette* quoted a local drug counselor: “Some young drug users are beyond my help.” The October 18 issue carried a story on A1 about John Lennon’s arrest in London on drug possession charges. The

November 6 issue carried a story on its front page reporting that 75 percent of narcotics cases prosecuted by Raggio's office were eventually dropped. Stories of drug use were as ubiquitous on the front pages of Reno's evening newspaper in 1968 as were tales of Vietnam skirmishes, political assassinations, hippies and protest marches.

Lerude did not like the thought of jail—or of revealing the names of college kids, who really could face felony-level criminal penalties at the time for possessing any amount of cannabis. After the threat from Raggio, Lerude contacted the California Newspaper Publishers Association in Sacramento for help. He sought to quickly copy California's state shield statute and have someone quietly introduce a bill during the 1969 Nevada State Legislature. Luckily, he had a fellow newsman in State Sen. Warren L. "Snowy" Monroe, a Democrat from Elko who served in the state senate from 1958 until 1976.

Monroe was not just a politician, he was also publisher of the *Elko Independent*, a newspaper he bought after graduating from the University of Nevada in 1929 (*Las Vegas Review-Journal*, April 3, 1987, online archive). Monroe was nicknamed "Snowy" because of his white hair. He was a long-serving figure in state politics, having first won election to the Nevada Assembly in 1940. He won reelection in 1942, but World War II forced him to leave his seat the following year. Monroe returned to the lower house in 1946 and was elected to the Nevada Senate in 1958. The senator died in 1987, one day after announcing in his "Hot Copy" column in the *Independent* that he had contracted pneumonia. In 1969, "Snowy" Monroe's help was sought in getting a state shield law introduced, getting it passed, and doing it all with as little fanfare as possible. Lerude did

not like asking for favors from legislators, first, and he believed publicity could hinder passage of a bill as well.

For The Record

According to its official legislative history, Senate Bill 299 was introduced by the Senate Judiciary Committee on February 28, 1969. Monroe was chairman of that committee. The official history notes that the bill originated as bill draft request 4-1630 (See Appendix B, *Senate History*, 55th Session, p. 102). When the Senate Judiciary Committee took up SB299 on March 4, Monroe called it the “Shield Bill.” Russ McDonald, a legislative counsel, explained “there were several like bills, California, Kansas, and several other states have it. This stresses the Right of Free Press rather than the theory of confidential relationship” (See Appendix C). Monroe stated the law would aid the press in “digging out information.” The minutes record a senator saying the language of the original was “too broad” regarding who would earn the protection. McDonald said he would change the language. The minutes record that “Senator Young felt the newspapers kept a lot people honest as they didn’t want to be publicly known they weren’t. He respects the powers of the press” (Appendix C).

McDonald promised to review the bill’s language—particularly with regard to covered persons—and was to get back to the committee. On March 7, the body reconvened and Monroe remarked that McDonald had fixed the “employed by” language, advising that “this would cover the publisher, editor, reporter or other employees of the newspaper.” The bill was passed out of committee. By design, according to Lerude, the

committee was also taking up SB290 at the same time. That bill required a demand for retraction in instances of libel or slander. Lerude said both bills were introduced at the same time on purpose; both mimicked existing California law.

The libel bill was introduced to replace an antiquated “right of reply” law on the books that most legislators did not even know existed (Lerude, 2014). Lerude believed both bills were risky endeavors—the politicians could seize upon the right of reply law and use it as a tool against the media and could also refuse to enact a shield law, thus officially depriving journalists of an important tool for investigative reporting (Lerude, 2014). According to the March 31, 1969 Assembly Judiciary Committee minutes, *Reno Evening Gazette* reporter Vicki Nash was at this meeting—she was covering the new libel bill, not the shield statute (Lerude, 2014). However, she managed to comment for the record on SB299, according to the meeting minutes. “The trend today is to train reporters to have positive statements based on fact and then there will be no grounds for trouble. Our newspapers and wire services have fits if you quote ‘undisclosed sources,’” she told the committee (See Appendix E). It should be noted that among the few to comment regarding SB299 was future U.S. Senate majority leader Harry Reid, who in 1969 was a young state assemblyman. The minutes note he said of the proposal: “This bill has merit.” Fellow legislator Torvinen, however, beyond expressing a concern over the broad protection being offered by the bill’s language, voiced another worry: “This kind of legislation encourages sloppy reporting. Just say an undisclosed source. If you are a public figure you don’t have a cause of action anyway” (See Appendix E).

This sparsely populated record confirms Lerude's assertions that the shield law was set to pass quietly. No mention of Raggio's threats or the *Gazette's* news item about pot-smoking college kids are to be found in any of the state records related to SB299. It would no doubt have been scandalous if the real reason a shield law was being sought was to protect the identities of kids smoking pot at the University of Nevada. The bill was successfully ushered through the state legislature, passing the senate 18-2 (*Journal of the Senate*, 1969, p. 338) and the assembly 30-4. Torvinen was among the nays, with six others absent (*Journal of the Assembly*, 1969, p. 798). The bill was delivered to the governor on April 14. Despite the success, a Saturday morning phone call to Lerude nearly derailed the effort (Lerude, 2014).

Governor Paul Laxalt was in the midst of signing legislation when he came across SB299. He must have known the bill originated somehow with Lerude. The governor perhaps even knew the whole story, though it is unclear if that is the case. Lerude recalled the morning phone call. He said the governor told him the bill would not be signed. Lerude could not recall why Laxalt was against the bill, but he remembered making a forceful case for it that morning over the telephone: "We have to have this," Lerude recalled telling the governor (Lerude, 2014). Finally, the governor relented, saying he would sign the bill against his better judgment. Lerude pulled it off. Nevada had a shield law, and an absolute one at that.

Laxalt left the governor's mansion in 1971. He would serve two terms as a U.S. senator. In 1975, Lerude returned to the state legislature to push for revisions to the shield statute. Unlike in 1969, Lerude arranged for a coterie of journalists to testify.

Publicity also attended the bill's introduction, with newspapers around the state printing editorials in favor of a revised law. It was also during legislative hearings in 1975 on the matter that Lerude briefly hinted at the origins of the state's shield law for the first time in public (See Appendix K). Lerude said he arranged for legislators to hear firsthand from reporters who had been jailed and whose work created legal entanglements for themselves (Lerude, 2014). Among the journalists who testified on behalf of revising Nevada's statute was a California journalist who at the time held the record for the most days spent in jail by a reporter for refusing to identify a confidential source.

CHAPTER 4

MAKING A CASE FOR REVISION

The *Branzburg* Decision Spurs Action

Assemblyman Steve Coulter introduced AB381 in the 58th session of the Nevada Assembly in the spring of 1975. A former TV journalist and university instructor, Coulter would serve four terms in the state Assembly. He would later spend 20 years with Pacific Bell in San Francisco, retiring as a vice president at the company (*Tahoe Daily Tribune*, May 9, 2006, online). In 1975, Coulter was the point person for guiding a revised shield bill through the state legislature. He urged his fellow legislators to pass the revision, particularly in light of the Supreme Court's 1972 decision in *Branzburg*. Coulter was first to speak when the Assembly Judiciary Committee convened on March 27. Reading from a prepared statement, he said, "Up until June of 1972, there would have been little need for ... something called a shield law. Until then, the First Amendment to the Constitution guaranteeing freedom of the press was generally considered inviolate" (See Appendix H).

Coulter was joined by eight others, mostly journalists, who advocated AB381's passage. Joining the assemblyman were Lerude, Dean Smith of the Reno Newspapers, Inc., Karen McDaniels of Sigma Delta Chi, John Huether, Reno Newspapers, Mark E. Oliva, Reno Newspapers, Bill Farr, of the *Los Angeles Times*, Ron Einstoss from the *Visalia Times-Delta*, and Tad Dunbar of KOLO-TV. Coulter began by passing around his legislation and told the committee that he had heard from many journalists around the

state who supported the bill (See Appendix H). He also commented that news people are sometimes the only link between politicians and the public. One initial question Coulter was asked by the committee was why a former newsperson needed protection. Farr and his experience earning the distinction of being the American journalist to serve more jail time than any for refusing to divulge a source's identity was the answer. Farr, whose record was broken in 2001, served 46 days in jail in 1972; as a reporter he was shielded by California law, but once he left the newspaper, he was not. According to the minutes, Lerude spoke next. He started by suggesting that reporters rely on confidential sources of information on which to base stories and that if those sources could not be protected, they would dry up. He then gave examples, including a prepared statement, which will be explored later. Lerude also passed out to the committee a booklet titled "Freedom of the Press—the Threats and the *Washington Post*." Lerude noted that seven states had so far passed shield laws, though there were more than that on the books. He also said the shield was not so much a privilege as it was a protection of the public's right to know (See Appendix H).

Mark Oliva, a reporter with the *Reno Evening Gazette* and *Nevada State Journal*, spoke next, followed by Farr. Farr told the committee of his numerous confrontations with authorities during his coverage of the Charles Manson trial. Farr told the committee that AB381 closed loopholes and that reporters should not face jail for simply doing their job. Ron Einstoss, who was managing editor of the *Visalia Times-Delta* at the time, was instrumental in bringing Farr up to testify. Einstoss was also an alumnus of the University of Nevada's journalism school. He was a member of a team of *Los Angeles*

Times reporters awarded a Pulitzer Prize for coverage of the 1966 Watts riots. Einstoss was also Farr's successor at the *Times*. Tad Dunbar, a newsman for KOLO-TV, also spoke. Dunbar said he wanted to provide the committee the television reporter's perspective. He said a revised shield law was not just needed to protect the "high-level, national attention-getting" stories, but that the protection is necessary for smaller, local newsmen as well. He said the broader the bill the better (See Appendix H). The Assembly committee meeting minutes do not reflect any other testimony. However, attached to the minutes are multiple written statements that reveal even deeper feelings about the need for a revised statute.

Coulter's written statement opened with a statement about how the public is concerned with honesty in government (See Appendix J). He wrote that without reporters doing their jobs, perhaps more politicians would be more concerned with conducting their own business instead of the public's. "And no one would probably ever know" (See Appendix J). "Throughout much of this nation's history, the news media has been exposing wrongdoing in government, labor and business. The exposure that results often leads to criminal prosecutions or reforms to prevent future abuses. But the source of this information is often the disgruntled employee who passes on information—confidentially—to journalists. If the source feels the journalist might be forced to reveal his sources, he won't talk. Certainly on occasion the press has abused its authority. But overall, I think it has served the country well," he wrote (See Appendix J).

Coulter's letter reiterates his feeling that had it not been for the decision in *Branzburg*, there would be little need for a state shield law. "Then the U.S. Supreme

Court, in a 5-4 vote, did its own editing job on the First Amendment and ruled that a newsman had no right to refuse to reveal his confidential sources to a grand jury. But at the same time, the high court virtually invited Congress to enact newsmen's shield legislation. Congress is still debating the question, but over half the states have taken up the challenge. Nevada has been one of them, he wrote. Coulter argued that the current law in Nevada was similar to other states'. He said the changes he proposed were similar to what California did to "meet obvious shortcomings in the law." He wrote that AB381 proposes two major changes: 1.) Extend protection to former newsmen. 2.) Protect the newsman's tools, such as notes, photos, tape recordings and similar items. "To force a reporter to reveal his notes from an interview is often about the same thing as forcing him to name his source," he wrote.

Coulter shared some responses to his effort from newsmen around the state. Cal Sunderland, editor of the *Humboldt Sun* in Winnemucca, wrote, "Your AB381 bill to amend Nevada's shield law has my wholehearted support and I trust the legislature will enact it without delay." The *Nevada State Journal* published an editorial in support: "Such strengthening is important to newsmen and public alike. The mere act of resigning from a news position should certainly not strip former newsmen of their shield rights for stories covered by newsmen. And photographs, films and tape recordings are often as much a part of the reporter's trade as his notebooks." The editorial also stated, "The law is vital to the public because newsmen are frequently the only window on hidden or illicit people and situations. It's a window that could be shut on the public if shield laws do not remain strong." A.D. Hopkins Jr., a former investigative reporter with the *Las Vegas*

Review-Journal, was managing editor of the *Valley Times* in North Las Vegas in 1975. He wrote to Coulter about the potential issues faced by former Las Vegas journalists: “The need . . . is great in Las Vegas because of the large number of newsmen who enter other businesses, such as hotel public relations, and who may then be subject to subpoenas, perhaps politically inspired subpoenas. It should be noted that in a state as small as Nevada, with small circulation newspapers, even cub reporters may handle blockbuster stories.” John Howe, KOLO-TV news director, is recorded in Coulter’s written statement saying, “Often, when the public needs protection (as from its own government) the best sources are often afraid to be identified. If such people think the reporter is legally unable to protect them, they won’t talk.” Coulter also shared a portion of a *Review-Journal* editorial, which stated, “This kind of law is essential so the public can read accurate, in-depth articles about sensitive topics. Newsmen often are the only link the public has with situations that politicians wish would remain hidden. Newsmen must be protected from vindictive officials or juries. And photographs, tape recordings and films must be kept confidential, all in the line of protecting sources who provide so many inside stories.” The editorial continued, “In order to gather news, reporters must feel they won’t be harassed later by grand juries and courts. Even when they quit news jobs, their shield rights should remain with them. We urge passage of AB381 for all the people.”

Lerude also submitted a written statement (See Appendix K). He introduced it with a description of a recent story that relied on confidential sources—a right-to-work state initiative—that could have serious implications for Nevada. “So, there you have the

need for Assembly Bill 381—the reporters either get certain kinds of information on a confidential basis or the public doesn't get the news. Confidentiality is, simply put, a working tool of the news reporter and the news source who, together, get information to the public.” Lerude then listed a series of other news stories that depended upon confidential sources. A Reno councilman's firm obtained \$40,000 in real estate commission from vice figure Joe Conforte in a controversial land deal, for instance. The City of Reno planned secret negotiations with airlines on landing fees, already among the lowest in the United States, was the focus of another. There were also news stories involving serious problems with a highway overpass under construction in Reno. Also, “alien movements” toward Las Vegas and their connection with Mafia activities were the focus of other stories that utilized confidential sources. Stories about Reno's city government being unable to account for thousands of dollars in parking tickets and pieces highlighting the lack of security at the Nevada State Hospital were also mentioned as being impossible news items without the assistance of confidential sources. “These major stories are but a few of the thousands printed by newspapermen in the state as a result of confidential sources coming forward with information. These stories can be obtained only by an independent press,” Lerude wrote.

Lerude's written statement also cited the Watergate scandal and subsequent resignation of President Nixon as an example of potential threats to press independence. “But imagine for one moment the disruption in that public service—journalism—if President Nixon and/or the Committee to Re-elect the President had been successful in obtaining the notes and background information being used by the probing reporters of

the Washington Post. All the President's men could have stayed one step ahead of the pursuing reporters and the coverup might never have been uncovered." Buried deep in his written statement, Lerude then relayed the unknown history of the original Nevada shield law. The *Reno Evening Gazette* had grappled with how to expose drug use among younger people to the public. Young people were smoking pot and then some were getting into heavier drugs, such as speed, heroin and LSD. The newspaper interviewed all the stakeholders in the community, Lerude wrote, including legal, medical and education professionals as well as parents and young people. "Including pot smokers, who told us their story on a confidential basis." He wrote that he knew that if the story were to be the most truthful "we would have to go to the offenders and get their views." "The district attorney at that time quickly reminded me that the marijuana smoking sources of ours were criminals, felons. And the district attorney told me he could seek out the names of those criminal/sources of ours. And should we, as newspapermen, refuse to reveal our sources, we could end up in jail." Without mentioning the role he played in helping get the original shield bill introduced, Lerude also quoted Sen. Warren "Snowy" Monroe. "This makes it possible for newspaper people to obtain information more readily and under the protection that they don't have to place their sources in jeopardy."

Oliva provided the committee with a written statement as well (See Appendix M). "In passing Nevada Revised Statute 49.275 as it now exists, the state legislature affirmed its belief that the public is entitled to an unimpeded flow of information," he wrote. He argued in his statement that a shield law that protects a journalist from providing

compelled testimony, but still allows police or prosecutors to rifle through his files in search of information, “isn’t much of a shield law at all.” Oliva also argued that the press acts as a buffer between officials and the public and that “to keep channels open” a strong shield law was necessary. The reporter also urged lawmakers to view the shield law’s protections as not conveying a special privilege upon the press, but as a needed protection of the public’s right to be informed. “God help us if we ever pass laws to protect the press or any other special interest group,” he wrote. Oliva told legislators that during his 12-year career, he’d been subpoenaed nine times—seven before trial courts and twice by grand juries. In his written statement, he listed a number of stories he has written that he could only complete with the help of confidential sources. Among these were a 1961 story that exposed postal bribery attempts by the aide of a Wisconsin governor. In 1970 he was able to demonstrate that the developer of a controversial land project had given money to three county supervisors, one of whom was later indicted. In 1971 he demonstrated how a grand juror had used a phony investigative report to convince other grand jurors that an upstanding public official was guilty of dereliction of duty. In 1974 he pieced together a fraud orchestrated in Switzerland and the Bahamas that was selling worthless desert land to duped European investors. “More recently and more specifically, in Nevada, I was able to tell how members of the Santo Trafficante organized crime family are attempting to set up a cocaine distribution system in the Las Vegas area, and how initial attempts are being made to infiltrate the Culinary Workers Union,” he wrote.

Einstoss also provided a written statement to lawmakers (See Appendix L). He wrote that prior to joining this newspaper, he spent more than 10 years covering the Los

Angeles County criminal courts, district attorney's office and grand jury for the *Los Angeles Times*. A University of Nevada, Reno alumnus, Einstoss made a number of similar arguments for revising Nevada's shield law as other witnesses. "The right of confidentiality," he wrote, "cannot be denied to the unpublished portion of a reporter's notes or the unused portion of a cameraman's film without violating the basis of confidentiality which underlies Nevada's existing shield law." He noted to legislators a common practice among journalists, of promising confidentiality in order to gain information and insight, even if not all of the information makes its way into a news story. "When a source of information is not able to feel that his trust in the reporter is complete, there can only be a chilling effect on the flow of vital information to the public." Einstoss also told lawmakers that he did not know how journalists could maintain confidential sources if the state's shield law didn't also protect a reporter's notes and work product, unless the journalist simply destroyed the information after use, which would deprive him of important reference material for future articles. Einstoss also made an argument for how smaller newspapers can be most negatively affected when reporters find themselves engaged in court battles with authorities. "Fighting these threats can jeopardize the economic health of small newspapers—like the *Times-Delta* and many of those you have in Nevada," he wrote. If a lengthy legal "donnybrook" awaits the pursuit of certain stories, then legislators can bet no small newspaper will risk its financial survival to pursue them, he wrote. "Just as you, legislators, must retain the confidence of your constituents, newspapers—large and small—must keep the confidence of their readers."

The Nevada Assembly Judiciary Committee passed AB381 with minor amendments on April 9, 1975 (See Appendix H). A second reading of the bill was done on April 14. A roll call vote commenced and the bill passed out of the Assembly 27 yeas to seven nays. Two legislators were absent and four did not cast votes. The bill was introduced in the Senate on April 17. The next day it moved to the Committee on Judiciary.

The Senate Judiciary Committee met on May 1. The meeting minutes show that, “Assemblyman Steve Coulter appeared on behalf of this bill. He informed the Committee that this will (sic) extends the newsmen’s shield law to former newsmen for stories they were involved in before the law was in effect and it will also cover the newsman’s tools, such as notes, tape recordings, photographs, etc” (See Appendix I). Coulter told the committee of the Assembly Judiciary Committee’s extensive hearings on the revised law. The Senate committee immediately passed the bill with little discussion. The bill was read a second time in the full Senate on the same day and ordered for third reading. On May 2, the bill was read for third time, with remarks by Sen. Warren Monroe and another senator. A roll call vote was held. The bill passed 17-1, with two senators absent (64). On the 106th day of the 58th Nevada Legislature, AB381 returned to the Assembly after passage in the Senate. It was formally passed on May 7, 1975. It was signed by the governor shortly thereafter.

The law sits on the books unchanged after almost four decades, unchallenged in the courts, but dusty and antiquated compared to efforts in other states where legislators have updated their statutes to reflect a much different media landscape than existed just

after *Branzburg*. Nevada policymakers flirted briefly with modernization in 2014, to no avail.

CHAPTER 5

AN ATTEMPT AT MODERNIZATION

A Road Less Travelled

Like many public policies on the books across the country, Nevada's shield law is more representative of a bygone era. It is antiquated and in need of reform, if merely to reconfirm the state's commitment to a free and independent press, and to update the statute's protections to include more modern forms of information dissemination.

Scholarly work regarding the reporter's privilege always appears alongside major events involving the news media. In the 1970s, the U.S. Supreme Court's decision in *Branzburg* led to an avalanche of legal scholars studying the meaning of the decision as well as its consequences. Then in the mid-2000s, particularly with the jailing of *New York Times* reporter Judith Miller, another spate of high-level thinking surrounding the reporter's privilege took place. And in this latter era, scholars came to believe that previous work on the subject was all wrong—many have now concluded that a misguided adherence to defining protections based on the employment status of journalists, where traditional big media trump all, has actually hindered efforts to formulate a national policy. This has repeatedly been the case for 80 years. Durity (2006), Ugland & Henderson (2007), Docter (2010), Robben (2012), Martin & Fargo (2013), and Smith (2013) are all examples from the literature that reflect this growing sentiment among legal scholars. All embraced the idea that many state statutes are simply outdated and in need of revision to reflect a more modern media landscape.

Nevada policymakers are not ignorant of this trend. In April 2014, a subcommittee of the Nevada Attorney General’s Technological Crime Advisory Board examined updating the Nevada shield law in order to make it more inclusive for online-only media professionals as well as updating the law’s language, bringing it in line with recommendations by such groups as the Electronic Frontier Foundation (EFF) (See Appendix O). The goal of the project was to deliver to legislators a revised version of the state’s shield law that did what modern legal scholars agree should be done—enact language that protects journalism as a function, instead of protecting traditional structures at the peril of journalists working outside traditional media. This next installment of shield law history, unfortunately, may turn out to be just a footnote.

The Technical Privacy Subcommittee was formed on Sept. 5, 2013. Nevada Attorney General Catherine Cortez Masto named her appointments to the committee on Oct. 18. The mission of this group was to make recommendations as well as monitor changes in international, federal, and state policy and legislation involving privacy protections. The group also was to serve as advisors relating to technology in Nevada, including how medical, financial, location, and communication data were being utilized (See Appendix N). The members of this group were University of Nevada Las Vegas computer science professor Hal Berghel, chair of the group; Stephen Bates, a University of Nevada Las Vegas journalism professor; Dennis Cobb, consultant and former deputy chief of the Las Vegas Metro Police Department; James Earl, Cyber Counsel for the State of Nevada; James Elste, CEO of Cognitive Extension, Inc.; Allen Lichtenstein, then general counsel for the American Civil Liberties Union of Nevada; and Ira Victor, a

digital forensic examiner at Data Clone Labs. Bates and Lichtenstein collaborated on the proposal to refashion Nevada's shield law.

New Language for a New Era

According to the April 17, 2014 meeting minutes of the privacy subgroup, Bates and Lichtenstein had already made some headway in crafting new language for a revised shield statute. However, it also appeared the pair had already encountered some push back, even if only slight at that point. "There is kind of a 'if it ain't broke, don't break it' feeling," Lichtenstein remarked during the meeting (See Appendix O). Member Elste is recorded in the minutes as showing the proposed revised shield law to an Electronic Frontier Foundation (EFF) representative. They called the language one of the more "rock solid" laws that they had seen. Elste also shared that the EFF consultant approved of the more functional language in the proposed revisions: "One of probably the most important pieces of feedback and one that I think will bear some discussion for our group is that they look at the type of information that is covered and who does that apply to. From EFF's perspective, it is the functional definition of journalism that's more important than a status definition of journalism. I believe what we have in the current language, is you have to be a certain type of journalist to be covered as opposed to looking strictly speaking at the act of journalism" (See Appendix O).

Elste described the language in Nevada's current shield law as a "series of labels," dictating protection for certain people. Upon hearing how some state statutes do not

provide protections for book authors—recall in 2001 author Vanessa Leggett surpassed the record set by Bill Farr in 1972 for number of days spent in jail for refusing to divulge a source’s identity—Elste said he understood the conceptual rationale for Nevada to revise its statute. “I think that one really resonated for me because an unpublished author who is doing investigative journalism or producing a book that is using investigative techniques may well need the same sort of protection,” he said. The group adjourned the meeting with an agreement that Bates would rework the language in the revision and also provide the group with some examples of successful, if not more modern, shield statutes on the books in other states.

The privacy subcommittee next met on May 30. Another version of a revised Nevada statute was handed out (See Appendices Q and R). Bates opened the discussion by reminding the group that a functional approach was being made in the wording, “rather than an employment-based approach” (See Appendix P). He also mentioned adding language that would penalize abuse of process by authorities who may leverage legal costs in order to force compliance. Also, language was proposed that would require notice be served on journalists prior to law enforcement serving subpoenas on a reporter’s phone records or other third-party information. The group discussed a 2010 National Security Agency whistleblower case, the Thomas Drake affair. Drake leaked sensitive information about the NSA’s domestic spying to a *Baltimore Sun* reporter. After the brief detour, the subcommittee members discussed whether a revised shield statute would be ready by Sept. 2, when the attorney general would need to send her office’s bill draft

requests to the legislature. Berghel wondered aloud if “this shield law is potentially ready for prime time.”

From the audience, Barry Smith, president of the Nevada Press Association, chimed in on the discussion. Far from Lerude’s passion in 1968, Smith informed the group that his clients—the state’s newspaper industry—were “nervous to be touching the Shield Law at all” (See Appendix P). “I’m contradicting myself (Smith basically agreed with the group’s conceptual analysis) and I would advise them that this is (the) way we ought to be going but I’m just telling you that I won’t have a unanimous response to that,” he warned the group. Berghel asked Smith what he thought the group should do to assuage the industry’s fears. “We are, after all, trying to do this for the journalists in the state,” the chair said.

Smith explained how the law already covers the majority of members of the state’s press association. Since they were already covered, most would not want to risk the protections already available to them, he warned. Berghel finally asked: “Barry, are you more nervous about touching the statute than you are about the substance of the draft?” “Yes, definitely,” Smith answered. Berghel confided that he saw Smith’s point: “OK, that’s an important consideration because once the legislature decides to deal with something, they can decide that (they) don’t believe in shield laws and just revoke the whole thing.” The conversation continued among the group. Earl said he believed that if the issue were recast as economic opportunity for the state to attract bloggers who enjoy the protections of Nevada’s better shield protections, then legislators would be more apt to listen. Elste said he would reject language penalizing process abuse and simply stick

with First Amendment arguments. Responding to Smith, Elste said the proposed revised shield statute goes far in advancing journalism in the state. “It would be a shame not to have the press association shoulder to shoulder with us at the table,” he said.

The Industry Balks

The May draft of Bates and Lichtenstein’s revised shield law was approved by vote of the privacy subcommittee to be taken up by the next meeting of the attorney general’s Technological Crime Advisory Board. That meeting occurred on June 5 (See Appendix S). Berghel opened the discussion by explaining the issues to the board. “Modern journalism is no longer restricted to the traditional journalistic employers,” he told the board. He also cited the *Branzburg* decision and said that without a federal shield law, “It’s left to the states to protect journalism . . . We propose that the already excellent Nevada statute be further enhanced.” Berghel went on to explain the functional approach to the language: “It’s worded in such a way that we don’t have to be technology focused because by the time we get the new statute passed, the technology will have changed again. We’ve endeavored in this proposed statute revision to expand the coverage on the basis of the function of the journalist not the particular manner or means by which they apply their journalistic skills.” James Owens, a Las Vegas Metro Police deputy chief, asked whether a blogger or anyone who posts online, would be shielded and Berghel answered, perhaps too hastily, in the affirmative. Owens quickly said he could not support any legislation that allowed that. The press association’s Smith was then

asked his opinion, and he dutifully repeated that 90 percent of his association's membership was already covered by the existing law and so "our point of view is that we are kind of hesitant to touch it."

After considering the shield law revisions as well as a number of other privacy and technology related issues, the board's chairwoman, Attorney General Masto, described her feelings about the board dealing with proposed legislation. She believed that legislators on the board who believed strongly in a proposal should take up those causes on their own. Traditionally, she said, "if they are interested in moving forward with any legislation or any issue that comes before this Board, they usually will handle it and move it forward at their own direction and discretion." The shield law revisions as well as two other items—proposed legislation to include a privacy rights clause in Nevada's constitution and a proposal asking Nevada's congressional delegation to support better online privacy rights under federal law—were put on hold. Law enforcement concerns and lackluster support from the Nevada Press Association appear to have played an outsized role in this outcome.

When the privacy subcommittee next met on Aug. 29, the members were disappointed that three of their four recommendations to the Technological Crime Advisory Board had been abandoned (See Appendix T). Elste told the other members that he was concerned that the subcommittee had spent the better part of a year on proposals and had pulled together a group with expertise in the field. The minutes record him stating that with three of the proposals tabled, he was worried that the group may feel their efforts were not appreciated and their time better spent elsewhere. The group then

entered into a long discussion into its statutory duties and whether it should even be associated with the technological crime board. Other subjects were addressed, and the new shield law the group had worked so diligently on faded from conversation. Modernization would have to wait.

CHAPTER 6

DISCUSSION & CONCLUSION

A Profound Policy Statement

“No reporter or editorial employee of any newspaper, periodical, press association or radio or television station may be required to disclose the source of any information procured or obtained by such person, in any legal proceedings, trial or investigation.” This is a profound policy statement, crafted and ushered through the Nevada state legislature in 1969 with little fanfare and no publicity. The telling of the history behind this particular policy has never been done before, and according to one recently published study, Smith (2013), such histories are noticeably absent from the privilege literature, including over the span of the entire 113-year existence of state efforts to enact shield statutes (43). Smith called this material important in order to shed light on the development of such statutory policy. “The little scholarship there hints at the role that journalists, press advocates and the public have played in helping to shape the direction of the law” (43). Smith and others have advocated the types of statutory shield laws that advance First Amendment values, just as Nevada’s clearly does. Smith concluded that statutory law should be placed in an elevated role, “not merely as a second-best work-around, but as a valuable outlet for the people to express what their Constitution means to them.”

For Lerude, he was a First Amendment purist up until 1968; his deep-rooted belief was that the Constitution protected his ability to gather news without government

interference. When that appeared untenable, he did what Smith predicts has happened in many state legislatures—he took it upon himself, with the help of others, to shape public policy in a way that enshrined his belief in the importance of an independent press to the proper functioning of a democratic society. Of course, public input on this policy statement was non-existent in 1969, which does raise questions about whether the lack of transparency in the process jibes with any assertion that fundamental democratic values were at play.

The lack of transparency in 1969 was certainly made up for in 1975. Repeatedly throughout their testimony in that year, Lerude, Oliva, Einstoss, Farr and others invoked traditional First Amendment principles—the free flow of information, the public’s right to be informed, self-governance, the press’ checking function—to buttress their arguments. They also cited the inability of Congress to pass its own shield law, and, of course, the decision in *Branzburg*, which left many states scrambling to pass shield statutes in response. It certainly weighed heavily in Assemblyman Coulter’s rationale for revising the Nevada shield law. It was the 1970s, as well, with Watergate intrigues mixing with Church Committee revelations and Rockefeller Commission horrors, all lifting the veil on American political machinations that bore slight resemblance to the America most people thought they knew, loved and understood. The strengthening of Nevada’s shield law, one could argue, is reflective, perhaps reactive, to the shocking state of affairs that marked the 1960s and 1970s. This time it unquestionably was an open and honest exercise in democratic processes.

But what a difference 39 years makes. In 2014, when a small group, representing academia, the business community and law enforcement met to propose a more modern, more fair revised shield statute, the effort was stymied from the start, and startlingly by the very industry the group sought to protect. The Nevada Press Association essentially reported that while most of its membership is covered by Nevada's already strong shield statute, the industry would be loathe to tinker with what is not broken. That thinking, perhaps, is sadly a missed opportunity to prepare the foundations today for the practice of journalism tomorrow. It is also patently unfair to the men and woman who perform the same functions as television and newspaper reporters but do so for an online audience, through blogs and podcasts. Asked what he thought about including bloggers in protections extended to traditional media outlets, Lerude said, "Of course bloggers should be protected." But, alas, they are not. It is as if Nevada's shield law has come full circle, marked by an opaque process in the beginning, revised vibrantly in 1975, and yet left to the erosion of time by policymakers in 2014, almost guaranteeing a scenario in some future date when a person performing the functions of a journalist will do so unprotected simply because they do not work for a large corporation, or in a format specifically cited by the law.

It was disappointing to see nowhere in the privacy subcommittee meeting minutes of the group proposing a revised shield statute in 2014 any mention of the fact that Nevada's information apparatus—the traditional news media—teeters on the brink of irrelevance, thanks to endless cost-cutting and lay offs. Such shrinkage marks most traditional U.S. media markets. Consolidation and layoffs are as much a part of the

industry as good journalism anymore. Most people's newspapers are shells of their former selves. More than 20 people were laid off at the *Las Vegas Review-Journal* in 2011 and 13 more in 2013. In 2009, its only local competitor, the *Las Vegas Sun*, laid off 40 people. In 2011, the *Sun* cut an additional dozen more staffers (Friess, 2011, Stutz, 2011, Mitchell, 2014). And as the industry's footing further deteriorates, the public no doubt will shift farther and farther away from traditional outlets to other platforms.

The Pew Research Journalism Project noted in 2014 that while traditional news outlets continue to trim staffs and shrink page counts, online-only media brands such as BuzzFeed, ProPublica, Mashable and Vox Media—the kinds of digital news outlets that will populate the media landscape when the death knell sounds on the traditional media—were adding journalists to their tech-heavy staffs (Mitchell, 2014). Meanwhile, Moody's Investors Service issued a negative Sept. 22, 2014 report on the outlook of the U.S. newspaper industry in which it predicted continued revenue losses through 2015. The report also predicted further consolidation in the industry as a result. Noting the industry's feverish attempt to develop new digital products to replace dying traditional ones, the investor service noted that, for the most part, newspapers are simply not keeping up, and in fact, gains from online revenue are mostly short term and very small (Moody's, 2014).

Enormous gaps in news coverage exist already thanks to corporate media's focus on profits—or lack thereof—over public service. Luckily, this invites new competition from emerging media. It is too bad Nevada policymakers appear to lack the forward thinking needed to prepare the groundwork today for the inevitable collapse of traditional

media tomorrow. Nevada's shield law will certainly be near useless when that happens. Nevada journalists, too, share some of this blame. In 1969 and 1975, efforts to first gain and then improve the state's shield law were led by journalists. But in 2014, journalists, under the auspices of the state's press association, actively thwarted efforts to revise the law. What does that portend for the future of journalism in Nevada? As online ventures replace traditional, will Nevada's press association be forced to endorse changing the shield law to be more inclusive? Or will old media fight new media to protect its turf? Policymakers and journalists both should reflect on these questions and do what is right for the profession and the public it serves.

Conclusion

This history of the Nevada shield law is the only one of its kind, but by no means is it complete. For instance, a diligent search of the *Reno Evening Gazette's* archives at the University of Nevada Las Vegas, did not yield a copy of the original story that led to Raggio threatening to put Lerude in jail if he did not give him the names "of those felons" smoking pot on the University of Nevada campus in 1968. Many front page stories detailed pot arrests and the scourge of drugs in Reno, but the story Lerude cites as the spark that led to the creation of Nevada's first shield law remains elusive. Inevitably, lost to this history are comments from Raggio and Warren "Snowy" Monroe, key players in this historical drama who are now deceased.

Smith (2013) noted the near total absence from the literature of state shield law histories such as this one. Future research in this regard then could endeavor to piece

together similar histories, perhaps providing a compendium of “on-the-ground” facts about how states across the country managed to wrangle shield laws—weak or strong, qualified or absolute—from their legislatures. This could prove valuable in developing a better understanding of the ways the public and local elected officials express their commitment to sustaining a free and independent press outside of how courts have adjudged the matter. Indeed, if it is up to the states to decide the fate of American journalism, then it may be critically important to the viability of this nation’s democratic society to compile, compare and analyze this data. The media landscape has changed dramatically from founding fathers to Internet revolution. While the information structures in America have evolved, prospered, perished and been replaced, journalism and the profoundly important role it plays in protecting democratic institutions has changed little. Reporters protecting the identities of confidential sources from government overreach, a fundamental necessity of the journalism practice, has changed not at all. Comfort can be taken in this fact. Clearly, most Americans agree, since some form of protection allowing journalists to keep their confidences has been legislatively or judicially embraced by virtually every state in the nation.

APPENDICES

The following documents are copies of originals cited throughout the preceding thesis. These are compiled here for historical reference. They reflect the available public records regarding Nevada's shield law, its origins, revisions to as well as later attempts to craft a more modern version. The information contained in these documents offers a unique window into Nevada's past. They also represent a unique, state-level glimpse at how a shield statute is created.

APPENDIX A

NEVADA'S ORIGINAL 1969 SHIELD LAW

(REPRINTED WITH ADOPTED AMENDMENTS)

FIRST REPRINT

S. B. 299

SENATE BILL NO. 299—COMMITTEE ON JUDICIARY

FEBRUARY 28, 1969

Referred to Committee on Judiciary

SUMMARY—Provides that news media need not disclose source of information. (BDR 4-1630)



EXPLANATION—Matter in *italics* is new; matter in brackets [] is material to be omitted.

AN ACT relating to witnesses; providing that certain personnel of news media need not disclose sources of information; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter 48 of NRS is hereby amended by adding thereto a new section which shall read as follows:

No reporter or editorial employee of any newspaper, periodical, press association or radio or television station may be required to disclose the source of any information procured or obtained by such person, in any legal proceedings, trial or investigation:

- 1. Before any court, grand jury, coroner's inquest, jury or any officer thereof.*
- 2. Before the legislature or any committee thereof.*
- 3. Before any department, agency or commission of the state.*
- 4. Before any local governing body or committee thereof, or any officer of a local government.*

SEC. 2. This act shall become effective upon passage and approval.

APPENDIX B

SB299 OFFICIAL LEGISLATIVE HISTORY

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Senate History, Fifty-fifth Session

S. B. 299—Committee on Judiciary, Feb. 28.

Summary—Provides that news media need not disclose source of information. (BDR 4-1630)

Feb. 28—Read first time. Referred to Committee on Judiciary. To printer.

Mar. 3—From printer. To committee.

Mar. 10—From committee: Do pass. Read second time. To engrossment. Engrossed.

Mar. 11—Read third time. Passed. Title approved. To Assembly.

Mar. 12—In Assembly. Read first time. Referred to Committee on Judiciary. To committee.

Apr. 2—From committee: Amend, and do pass as amended.

Apr. 3—Read second time. Amended. To printer.

Apr. 4—From printer. To re-engrossment. Re-engrossed.

Apr. 7—Taken from General File. Placed on General File for next legislative day.

Apr. 8—Read third time. Passed, as amended. Title approved, as amended. To Senate.

Apr. 9—In Senate.

Apr. 11—Assembly amendment concurred in. To enrollment.

Apr. 14—Enrolled and delivered to Governor.

Apr. 19—Approved by the Governor. Chapter 476.

Effective April 19, 1969.

S. B. 300—Monroe, Feb. 28.

Summary—Provides for community training centers for retarded persons. (BDR 39-1007)

Feb. 28—Read first time. Referred to Committee on Finance. To printer.

Mar. 3—From printer. To committee.

Mar. 12—From committee: Amend, and do pass as amended. Read second time. Amended. To printer.

Mar. 13—From printer. To engrossment. Engrossed.

APPENDIX C

SB299 SENATE JUDICIARY COMMITTEE MINUTES (3/4/69)

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Judiciary Committee Minutes
March 4, 1969

-5-

Chairman Monroe said this might be passed as a temporary measure and after intensive study they could consider a general bill at the next session.

It was decided a hearing would be held on this.

SB 290 - Requires demand for retraction in certain actions for libel or slander.

Russ McDonald explained this gets rid of an old and unique law. This was unique in that Nevada was the only State to still have it.

Senator Young moved "do pass".
Senator Swobe seconded the motion.
Motion carried.

SB 299 - Provides that news media need not disclose source of information

Chairman Monroe remarked this was called the "Shield Bill".

Russ McDonald explained there were several like bills, California, Kansas, and several other states have it. This stresses the Right of Free Press rather than the theory of confidential relationship.

Chairman Monroe stated this would aid the press in digging out information on employees as a person would ordinarily keep quiet rather than disclose something confidential, even when it was for the good that he did disclose information.

Senator Swobe questioned the language in line 3, "No person employed - - - in any way" as being too broad.

Russ McDonald would change the language if the committee felt this was too broad.

Senator Young felt the newspapers kept a lot of people honest as they didn't want to be publicly known they weren't. He respects the powers of the press.

Mr. McDonald will review line 3 and it will be discussed further.

SB 304 - Requires consideration of certain facts in fixing bail.

Russ McDonald would like to check this to see if it was constitutional.

APPENDIX D

SB299 SENATE JUDICIARY COMMITTEE MINUTES (3/7/69)

SENATE JUDICIARY COMMITTEE
MINUTES

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Meeting was called to order at 9:35 a. m. on March 7, 1969 by Chairman Monroe.

Committee members present: Chairman Monroe
Senator Bunker
Senator Dodge
Senator Swobe
Senator Christensen
Senator Hug
Senator Young (In at 10:00 a.m.)

SB 85 - Provides for Court Administrator and improvement of justices and municipal courts.

Chairman Monroe read the amendments received on SB 85 as were previously suggested, however the Chief Justice was to come out of all sections.

Senator Swobe moved to amend and refer to Finance.
Senator Christensen seconded the motion.
Motion carried.

Senator Dodge remarked he felt the Finance Committee would be receptive to this bill.

SB #299 - Provides that news media need not disclose source of information.

Chairman Monroe advised Russ McDonald was to have checked on this and he now had his reply. This was to be on "employed by". He stated Mr. McDonald advised this would cover the publisher, editor, reporter or other employee of the newspaper. In the larger papers that employed a number of employees was very different than a small operation. He felt the bill was good as it was.

Senator Christensen moved "do pass".
Senator Young seconded the motion.
Motion carried.

SB #304 - Requires consideration of certain facts in fixing bail.

Mr. McDonald was to check on this to see if it was constitutional.

Mr. Daykin advised that it was and the change strengthened.

Senator Dodge moved "do pass."
Senator Christensen seconded the motion.
Motion carried.

Chairman Monroe announced a hearing to be held Tuesday at 9:30 a. m. in the Ways and Means Committee Room on the Corporate Gaming Law.

He stated he did not think there was need for an extensive

APPENDIX E

SB299 ASSEMBLY JUDICIARY COMMITTEE MINUTES (3/31/69)

AB 753: Prescribes procedure for eviction of tenant for nonpayment of rent.

MR. REID: This gives a guy five days free rent before you can get him out.

MR. SWACKHAMER: I move we Indefinitely Postpone AB 753.

MR. PRINCE: I second the motion.

MOTION CARRIED WITH MR. REID VOTING NO.

SB 299: Provides that news media need not disclose source of information

MR. REID: This bill has merit.

MR. TORVINEN: It needs to be amended. How about "no reporter or editorial employee employed by any newspaper, periodical, etc.?"

This kind of legislation encourages sloppy reporting. Just say an undisclosed source. If you are a public figure you don't have a cause of action anyway.

VICKI NASH: The trend today is to train reporters to have positive statements based on fact and then there will be no grounds for trouble. Our newspapers and wire services have fits if you quote "undisclosed sources."

MR. REID: I move to Do Pass SB 299 with the amendment suggested by Mr. Torvinen.

MR. BRYAN: I second the motion.
MOTION CARRIED UNANIMOUSLY.

MR. REID said he would take care of getting the amendment.

AB 349: Provides certain exemptions from execution.

MR. REID: They finally did the amendments on this execution and it is good. Let's get this out.

MR. TORVINEN: Let's have a discussion on them first.

MR. BRYAN: These are exemptions and executions. Let's go through them one by one.

Page 1, section 1, line 4 : Insert open bracket after "(a)".

Page 1, section 1, line 5: Insert after "debtors" a close bracket and: "Private libraries not to exceed \$500 in value, and all family pictures and keepsakes."

Page 1, section 1, line 6: Insert open bracket after "(6)".

Page 1, section 1, line 14: Insert after "rifle" a close bracket and "Household goods, appliances, furniture, home and yard equipment not to exceed \$1,000 in value belong to the judgment debtor to be selected by him."

Page 1, section 1, line 15: Insert open bracket after "(c)".

APPENDIX F

1975 AB381 OFFICIAL VERSION



EXPLANATION—Matter in *italics* is new; matter in brackets [] is material to be omitted.

AN ACT relating to privileges; extending the news media's privilege of nondisclosure to certain documentary materials acquired or prepared in their professional capacity.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

- 1 SECTION 1. NRS 49.275 is hereby amended to read as follows:
2 49.275 No reporter [or], *former reporter or editorial employee of*
3 *any newspaper, periodical [,] or press association or employee of any*
4 *radio or television station may be required to disclose any note, photo-*
5 *graph, film, tape recording or other document acquired or prepared by*
6 *him in his professional capacity or the source of any information procured*
7 *or obtained by [such person,] him, in any legal proceedings, trial or*
8 *investigation:*
9 1. Before any court, grand jury, coroner's inquest, jury or any officer
10 thereof.
11 2. Before the legislature or any committee thereof.
12 3. Before any department, agency or commission of the state.
13 4. Before any local governing body or committee thereof, or any
14 officer of a local government.



APPENDIX G

1975 AB381 OFFICIAL LEGISLATIVE HISTORY

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Assembly History, Fifty-eighth Session

A. B. 381—Coulter, Mar. 10.

Summary—Extends news media's privilege of nondisclosure to certain documentary materials. Fiscal Note: No. (BDR 4-422)

Mar. 10—Read first time. Referred to Committee on Judiciary. To printer.

Mar. 11—From printer. To committee.

Apr. 11—From committee: Amend, and do pass as amended.

Apr. 14—Read second time. Amended. To printer.

Apr. 15—From printer. To engrossment. Engrossed.

Apr. 16—Taken from General File. Placed on Chief Clerk's desk. Taken from Chief Clerk's desk. Placed on General File. Read third time. Passed, as amended. Title approved, as amended. Notice of reconsideration on next legislative day.

Apr. 17—To Senate.

Apr. 18—In Senate. Read first time. Referred to Committee on Judiciary. To committee.

May 1—From committee: Do pass. Read second time.

May 2—Read third time. Passed. Title approved. To Assembly.

May 5—In Assembly. To enrollment.

May 6—Enrolled and delivered to Governor.

May 7—Approved by the Governor. Chapter 355.

Effective July 1, 1975.

APPENDIX H

AB381 ASSEMBLY JUDICIARY COMMITTEE MINUTES (3/27/75)—page 1

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ASSEMBLY JUDICIARY COMMITTEE
58th NEVADA ASSEMBLY SESSION

MINUTES

March 27, 1975

This meeting of the Assembly Judiciary Committee was called to order by Chairman Barengo at 8:05 a.m. on Thursday, March 27, 1975.

MEMBERS PRESENT: Messrs. BARENGO, BANNER, HEANEY, HICKEY, LOWMAN, POLISH, SENA, Mrs. HAYES and Mrs. WAGNER.

MEMBERS ABSENT: NONE.

Guests present for this meeting included Assemblyman Steve Coulter; Dean Smith, Reno Newspapers, Inc.; Karen McDaniels, Sigma Delta Chi; Warren Lerude, Reno Newspapers; John Huether, Reno Newspapers; Mark E. Oliva, Reno Newspapers; Bill Farr, Los Angeles Times; Ron Einstoss, Visalia Times-Delta; Tad Dunbar, KOLO-TV; Jim Thompson, Chief Deputy Attorney General; and Grant Bastian, State of Nevada Highway Engineer. A Guest Register is attached to these Minutes.

First to be considered by this Committee was A.B.381, and first to testify regarding it was Assemblyman Steve Coulter, the introducer of the bill. Mr. Coulter read from a prepared statement, which is attached to these Minutes. Mr. Coulter stated that "Up until June of 1972, there would have been little need for . . . something called a shield law. Until then, the First Amendment to the Constitution guaranteeing freedom of the press was generally considered inviolate." After that, the Supreme Court ruled that a newsman had no right to refuse to reveal his confidential sources to a grand jury. Mr. Coulter went on to inform the Committee of the problems newsmen and journalists face at the present time.

Mr. Coulter distributed to this Committee a copy of current legislation in regard to newsmen, which copy is attached hereto. Mr. Coulter received many responses to this proposed legislation from newspapers throughout the state. Mr. Coulter stated that often newsmen are the only link between politicians and the public. Mr. Coulter was questioned by this Committee and was asked why a "former" newsman would need protection as proposed by A.B.381. Mr. Coulter explained why this was necessary.

APPENDIX H

AB381 ASSEMBLY JUDICIARY COMMITTEE MINUTES (3/27/75)—page 2

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March 27, 1975

Next to testify regarding A.B.381 was Mr. Warren Lerude, Executive Editor of the Reno Evening Gazette and Nevada State Journal. He explained why he supported the bill. Many stories the public reads were given to the reporter on a confidential basis, and if the reporter does not respect this confidentiality, the people who furnish these stories will not do so in the future. Then, the public's knowledge as to news stories would be very limited. He then gave some examples of stories which related to the Reno area and which came out and were brought to the attention of the newsman by confidential sources. These sources can be obtained only by an independent press, and this situation is not without threat in this country. Attached is a written statement from Mr. Lerude, as well as a copy of an article entitled "Confidentiality of News Media Sources". Mr. Lerude also presented this Committee with a booklet entitled "Freedom of the Press--The Threats and The Washington Post". Because of the length of the booklet it will be attached only to the original Minutes. Mr. Lerude said that passage of A.B.381 would not become a special privilege for journalists--it is the public's right to know what is going on. This Committee then questioned Mr. Lerude. Mr. Lerude pointed out that 7 states have adopted shield laws, and out of them 4 have gone to the protection of all records.

Next to testify in favor of A.B.381 was Mark Oliva, who is a newsman with the Reno Evening Gazette and Nevada State Journal. Attached to these Minutes is his statement. Mr. Oliva stated that he is particularly concerned with the language " . . . any note, photograph, film, tape recording or other document acquired or prepared by him in his professional capacity . . . etc. . . . ". Mr. Oliva stated that the bill as it now stands does not fully protect. Mr. Oliva gave the Committee his background as a journalist and told of the times he received subpoenas for his written work. He then presented these subpoenas to this Committee, and they are attached only to the original Minutes. Mr. Oliva then gave examples of the types of stories which came from confidential sources. He also stated in response to a question from Mr. Hickey that none of the subpoenas he received came from Nevada.

Next to testify was Bill Farr, a reporter with the Los Angeles Times, who is in support of A.B.381. Mr. Farr was formerly with Los Angeles Herald Examiner, and experienced numerous problems when he refused to reveal confidential sources which arose in connection with the Charles Manson murders. In regards to this particular matter, he stated that it was true that he was the only

APPENDIX H

AB381 ASSEMBLY JUDICIARY COMMITTEE MINUTES (3/27/75)—page 3

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journalist in the United States who was confronted with prosecution for not revealing sources after he had left his job as a journalist with the Herald Examiner. After the case began, the law did not request any information from Mr. Farr as to his confidential sources; however, about 7 months after he left his job, his confidential sources were again requested and when he did not cooperate by revealing them, he was prosecuted. This is why request is made for A.B.381 to include all former newsmen. He then gave an example of a recently released story which originally came to him through confidential sources. He detailed the circumstances of his meeting with the source and the precautions that were taken so his meeting with Mr. Farr would not be discovered.

Mr. Farr told this Committee that this bill is an extension of what is already on the books--this bill broadens it so that there are no loopholes. A reporter should not have to worry about going to jail in order to do his job. The Committee proceeded to question Mr. Farr at length. Presently there are multiple bills for Congressional study and approval in regards to what A.B.381 is concerned with, but the Senate Subcommittee which studies this is headed by Senator Sam Ervin, and he and other senators have been preoccupied by other national crises for the last few years.

Next, Mr. Ron Einstoss, who has been for 3 years the Managing Editor of the Visalia Times-Delta. He is in support of legislation covered by A.B.381. He submitted to this Committee a prepared statement, which statement is attached to these Minutes. He stated that he previously held Mr. Farr's present position with the Los Angeles Times. He then gave statistics regarding his present newspaper. Mr. Einstoss has appeared before Congress and other states in support of passage of legislation such as A.B.381. He urged the Committee to consider amending A.B.381 to include unpublished information, tape and film. He stated that California's laws in regard to this subject are among the best in the nation. He told the Committee of the necessity of taking notes on various information presented to the newsmen, even pertaining to information which is not to be published. He stated, "It is very difficult, . . . for a reporter . . . under the pressure of deadline or several weeks or months later, to remember exactly which information can be used without attribution. The notes of most reporters . . . clearly reflect this."

Mr. Einstoss said he feels that Congress is not acting immediately on this type of legislation because the

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AB381 ASSEMBLY JUDICIARY COMMITTEE MINUTES (3/27/75)—page 4

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March 27, 1975

newspapers, radio, television, wire services, etc. cannot get together on just what should be passed. They are, however, unanimous on one thing--they shouldn't have to disclose sources. Chairman Barengo pointed out that he felt the wording "work product" should be used in A.B.381 when referring to the tapes, film, photograph, notes, etc. This term would be "all encompassing". Mr. Einstoss said that he believes 26 or 27 states have passed shield laws. In their intent and premise, they are basically the same, but some states did not include unpublished information.

Mr. Banner was excused from the meeting at this point to chair a meeting of the Assembly Labor Committee.

Next to testify regarding A.B.381 was Tad Dunbar, a newsman with KOLO-TV, Reno. He stated that he wanted to give this Committee the television point of view on the bill. He asked the Committee not to go away with the impression that laws like this are needed to protect only "high-level, national attention-getting" stories. This is necessary to protect the smaller, local area newsmen, also. Mr. Dunbar then cited examples of local Reno-area stories which came out and were controversial. He gave the Committee an idea of how a small, unimportant fact may be jotted down by one newsman on a piece of paper or recorded on tape. Then, the file grows and two full-time newsmen may be working constantly on the story. Mr. Barengo questioned Mr. Dunbar about using the term "work product" in A.B.381. Mr. Dunbar replied that the broader the bill was made, the better. He said he could not think of anything which was not covered, but sometime someone will. This Committee questioned Mr. Dunbar.

Next, A.B.382 was considered. Jim Thompson, Chief Deputy Attorney General for the State of Nevada, reviewed the basic history on a bill such as this. His first thought after seeing the bill was that it was a rather innocuous bill. He noted that there was no fiscal note on it. He then told the Committee of the financial effect this bill would have on a state treasury. He said the State of Nevada at present is party to 435 civil law suits, 233 of which total the sum of \$116,000,000. Many of these suits involve land. He gave some further statistics. He said the State's liability is growing daily. He believes that this State will win most of these law suits. This bill encourages litigation, particularly in land areas. It is difficult to forecast what the attorneys' fees will be. And, if you are talking about \$116,000,000, you are

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ASSEMBLY JUDICIARY COMMITTEE

GUEST REGISTER

DATE: March 27, 1975

NAME	BILL NO.	SPEAKING	REPRESENTING
Steve Couiter	381	✓	Assembly
Dean Smith	381		Reno Newspapers Inc.
KAREN McDaniels	381		Sigma Delta Om
Navarro, Levado	381	✓	Reno Newspapers
John Huether	381		Reno Newspapers
Mark E. Oliva	381	✓	Reno Newspapers
Bill Farr	381	✓	Los Angeles Times
Row Einstos	381	✓	Visalia Times-Delta
TAD DOWBAR			
Jim Thompson	382	x	AG
Grant Bastian			State of Nevada Highway Engineer

APPENDIX I

AB381 SENATE JUDICIARY COMMITTEE MINUTES (5/1/75)

SENATE JUDICIARY COMMITTEE

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MINUTES OF MEETING

May 1, 1975

The meeting was called to order at 8:05 a.m. Senator Close was in the Chair.

Present: Senator Close, Chairman
Senator Wilson
Senator Bryan
Senator Sheerin
Senator Dodge
Senator Foote

Absent: Senator Hilbrecht, Excused

AJR 16 of the 57th Session Proposes to amend judicial article of Nevada Constitution to provide for discipline of judges.

Judge Roy Torvinan appeared in favor of this resolution. Following a brief discussion, Senator Bryan moved a do pass; seconded by Senator Dodge; motion carried unanimously. Senators Wilson and Hilbrecht were absent from the vote.

AJR 18 of the 57th Session Proposes to amend Nevada Constitution by providing for central administration of court system.

Judge Roy Torvinan and Assemblyman Zel Lowman testified in support of this measure. Following a brief discussion, Senator Dodge moved a do pass; seconded by Senator Foote; motion carried unanimously. Senators Wilson and Hilbrecht were absent from the vote.

AB 381 Extends news media's privilege of nondisclosure to certain documentary materials.

Assemblyman Steve Coulter appeared on behalf of this bill. He informed the Committee that this will extends the newsmen's shield law to former newsmen for stories they were involved in before the law was in effect and it will also cover the newsman's tools, such as notes, tape recordings, photographs, etc.

Mr. Coulter stated that the Assembly had held extensive hearings on this matter and cited for the Committee some of the more important findings.

Senator Sheerin moved a do pass; seconded by Senator Wilson; motion carried unanimously. Senator Hilbrecht was absent from the vote.

APPENDIX J

ASSEMBLYMAN STEVE COULTER WRITTEN STATEMENT (3/27/75)—page 1

Statement of ASSEMBLYMAN STEVE COULTER
Assembly Judiciary Committee
March 27, 1975

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FEW ISSUES IN RECENT TIMES HAVE SO ATTRACTED PUBLIC ATTENTION AS THE QUESTION OF HONESTY IN GOVERNMENT. MUCH OF THE REASON FOR THAT INTEREST AND THE PUBLIC CONCERN, HAS BEEN THE NEWS MEDIA, REPORTING WHAT THE GOVERNMENT DOES OUT IN THE PUBLIC AND ~~SOMETIMES~~ SOMETIMES BEHIND CLOSED DOORS. THESE NEWS MEN AND WOMEN ARE IN ~~THE~~ BUSINESS OF PRESENTING INFORMATION, NOT HIDING IT.

YET TODAY, WE ARE HERE TALKING ABOUT THOSE FEW TIMES WHEN IT IS NECESSARY FOR THE REPORTER NOT TO TELL EVERYTHING HE KNOWS. IF HE WERE FORCED TO, SOME GOVERNMENT LEADERS MIGHT START CONDUCTING MORE OF THEIR ^{own} BUSINESS THAN THE PUBLIC'S, AND NO ONE WOULD PROBABLY EVER KNOW. FOR THE INVESTIGATIVE

REPORTER, MUCH OF WHAT HE DOES DEPENDS ON WHAT OTHER PEOPLE TELL HIM. THROUGHOUT MUCH OF THIS NATION'S HISTORY, THE NEWS MEDIA HAS BEEN EXPOSING WRONGDOING IN GOVERNMENT, LABOR AND BUSINESS. THE EXPOSURE THAT RESULTS OFTEN LEADS TO CRIMINAL PROSECUTIONS OR REFORMS TO PREVENT FUTURE ABUSES. BUT THE SOURCE OF THE INFORMATION IS OFTEN THE DISGRUNTLED EMPLOYEE WHO PASSES ON INFORMATION--CONFIDENTIALLY-- TO JOURNALISTS. IF THE SOURCE FEELS THE JOURNALIST MIGHT BE FORCED TO REVEAL HIS SOURCES, HE WON'T TALK. CERTAINLY ON OCCASSION THE PRESS HAS ABUSED ITS AUTHORITY, BUT OVERALL, I THINK IT HAS SERVED THE COUNTRY WELL.

UP UNTIL ~~THE~~ JUNE OF 1972, THERE WOULD HAVE BEEN LITTLE NEED FOR A HEARING SUCH AS THIS OR OF SOMETHING CALLED A SHIELD LAW. UNTIL THEN, THE FIRST AMENDMENT TO THE CONSTITUTION GUARANTEEING FREEDOM OF THE PRESS WAS GENERALLY CONSIDERED INVIOATE. THEN THE US SUPREME COURT, IN A 5-4 VOTE, DID ITS OWN EDITING JOB ON THE FIRST AMENDMENT AND RULED THAT A NEWSMAN HAD NO RIGHT TO REFUSE TO REVEAL HIS CONFIDENTIAL SOURCES TO A GRAND JURY. BUT AT THE SAME TIME, THE HIGH COURT VIRTUALLY INVITED CONGRESS TO ENACT NEWSMEN'S SHIELD LEGISLATION. CONGRESS IS STILL DEBATING THE QUESTION, BUT OVER HALF THE STATES HAVE TAKEN UP THE CHALLENGE. NEVADA HAS BEEN ONE OF THEM.

more----

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ASSEMBLYMAN STEVE COULTER WRITTEN STATEMENT (3/27/75)—page 2

Coulter
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OUR CURRENT LAW IS SIMILAR TO THAT IN MANY STATES. THE CHANGES I AM PROPOSING HERE ARE SIMILAR TO WHAT CALIFORNIA HAS DONE TO MEET OBVIOUS SHORTCOMINGS IN THE LAW.

AB 381 PROPOSES TWO MAJOR CHANGES:

- 1). TO EXTEND THE PROTECTION OF NON-DISCLOSURE TO FORMER NEWSMEN FOR STORIES THEY WERE INVOLVED IN WHILE ACTIVELY EMPLOYED IN THE MEDIA.
- 2). TO PROTECT THE NEWSMAN'S TOOLS SUCH AS NOTES, PHOTOS, TAPE RECORDINGS AND LIKE ITEMS. TO FORCE A REPORTER TO REVEAL HIS NOTES FROM AN INTERVIEW IS OFTEN ABOUT THE SAME THING AS FORCING HIM TO NAME HIS SOURCE.

BOTH OF THESE PROVISIONS ARE COVERED IN THE CALIFORNIA LAW.

IN THE PAST COUPLE OF WEEKS, I HAVE RECEIVED RESPONSES FROM NEWSMEN THROUGHOUT NEVADA. I WOULD LIKE TO LOOK AT SOME OF THEM BRIEFLY.

CAL SUNDERLAND, EDITOR OF THE HUMBOLDT SUN IN WINNEMUCCA, WROTE ME:
"YOUR AB 381 BILL TO AMEND NEVADA'S SHIELD LAW HAS MY WHOLEHEARTED SUPPORT AND I TRUST THE LEGISLATURE WILL ENACT IT WITHOUT DELAY."

THE NEVADA STATE JOURNAL SAID IN AN EDITORIAL: "SUCH STRENGTHENING IS IMPORTANT TO NEWSMEN AND PUBLIC ALIKE. THE MERE ACT OF RESIGNING FROM A NEWS POSITION SHOULD CERTAINLY NOT STRIP FORMER NEWSMEN OF THEIR SHIELD RIGHTS FOR STORIES COVERED BY NEWSMEN. AND PHOTOGRAPHS, FILMS AND TAPE RECORDINGS ARE OFTEN AS MUCH A PART OF THE REPORTER'S TRADE AS HIS NOTEBOOKS.

THE EDITORIAL CONTINUES: "THE LAW IS VITAL TO THE PUBLIC BECAUSE NEWSMEN ARE FREQUENTLY THE ONLY WINDOW ON HIDDEN OR ILLICIT PEOPLE AND SITUATIONS. IT'S A WINDOW THAT COULD BE SHUT ON THE PUBLIC IF SHIELD LAWS DO NOT REMAIN STRONG."

A.D. HOPKINS, JUNIOR, MANAGING EDITOR OF THE ~~YAH~~ VALLEY TIMES IN NORTH LAS VEGAS WROTE: "THE NEED...IS GREAT IN LAS VEGAS BECAUSE OF THE LARGE NUMBER OF NEWSMEN WHO ENTER OTHER BUSINESSES, SUCH AS HOTEL PUBLIC RELATIONS, AND WHO MAY THEN BE SUBJECT TO SUBPOENAS, PERHAPS POLITICALLY INSPIRED SUBPOENAS. IT SHOULD BE NOTED THAT IN A STATE AS SMALL AS NEVADA, WITH SMALL CIRCULATION NEWSPAPERS, EVEN CUB REPORTERS MAY HANDLE BLOCKBUSTER STORIES."

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ASSEMBLYMAN STEVE COULTER WRITTEN STATEMENT (3/27/75)—page 3

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Coulter
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GERALD ROBERTS, EDITOR OF THE TONOPAH TIMES BONANZA, TOLD ME IN A PHONE CONVERSATION: " I KNOW THE KINDS OF PROBLEMS NEWSMEN FACE, PARTICULARLY IN THE LARGER CITIES. I FAVOR THESE KIND OF CHANGES."

THE NEWS DIRECTOR OF KOLO TV, JOHN HOWE, WROTE ME: "OFTEN, WHEN THE PUBLIC NEEDS PROTECTION (AS FROM IT'S OWN GOVERNMENT) THE BEST SOURCES ARE OFTEN AFFRAID TO BE IDENTIFIED. IF SUCH PEOPLE THINK THE REPORTER IS LEGALLY UNABLE TO PROTECT THEM, THEY WON'T TALK."

IN AN EDITORIAL, THE LAS VEGAS REVIEW JOURNAL SAID OF AB381: "THIS KIND OF LAW IS ESSENTIAL SO THE PUBLIC CAN READ ACCURATE, IN-DEPTH ARTICLES ABOUT SENSITIVE TOPICS. NEWSMEN OFTEN ARE THE ONLY LINK THE PUBLIC HAS WITH SITUATIONS THAT POLITICIANS WISH WOULD REMAIN HIDDEN. NEWSMEN MUST BE PROTECTED FROM VINDICTIVE OFFICIALS OR JURIES. AND PHOTOGRAPHS, TAPE RECORDINGS AND FILMS MUST BE KEPT CONFIDENTIAL, ALL IN THE LINE OF PROTECTING SOURCES WHO PROVIDE SO MANY INSIDE STORIES."

THE EDITORIAL CONTINUES: "IN ORDER TO GATHER NEWS, REPORTERS MUST FEEL THEY WON'T BE HARASSED LATER BY GRAND JURIES AND COURTS. EVEN WHEN THEY QUIT NEWS JOBS, THEIR SHIELD RIGHTS SHOULD REMAIN WITH THEM. WE URGE PASSAGE OF AB381 FOR ALL THE PEOPLE."

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APPENDIX K

WARREN LERUDE WRITTEN STATEMENT (3/27/75)—page 1

Reno Newspapers, Inc.

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Publishers of RENO EVENING GAZETTE and NEVADA STATE JOURNAL (Morning and Sunday)

Reno, Nevada
89504

March 27, 1975

Members of the Judiciary Committees--Nevada State Legislature
--and Guests.

My name is Warren Lerude. I am Executive Editor of the Reno Evening Gazette and the Nevada State Journal.

I wish to testify in support of Assembly Bill 381.

Two days ago, we at the Gazette and Journal had placed in our hands on a confidential basis a bill prepared to be introduced into this very legislature which would gut Nevada's right-to-work law and create a union shop.

The person who gave us this document did so on one provision --that we never identify the source.

I gave my word.

I took notes during the confidential conversation with this person to learn more about how this bill might be brought before the legislature.

Then I called in three editors and the four of us studied the confidential document and my notes of a confidential conversation.

This helped our reporters pose questions for legislators and labor officials.

All this enabled us to ferret out for the public and the legislature alike this latest raising of the right-to-work issue, which affects every Nevadan.

So, there you have the need for Assembly Bill 381--the reporters either get certain kinds of information on a confidential basis or the public doesn't get the news.

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WARREN LERUDE WRITTEN STATEMENT (3/27/75)—page 2

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Confidentiality is, simply put, a working tool of the news reporter and the news source who, together, get information to the public.

Assembly Bill 381 is needed to strengthen this tool, Nevada's present shield law, by including within the privilege of confidentiality the journalist's notes, tape recordings, unpublished film and other background information.

This is vital if the public is to be served by an independent press.

And it is this independence we focus on today.

For if a reporter can be forced by the state to turn over such information, the news sources will not trust the reporters and will cease to provide the bits and pieces of information that eventually make for news stories.

News stories such as the following--all obtained through use of confidential news sources putting background materials into the hands of reporters:

--The fact a Reno councilman's firm obtained \$40,000 in real estate commission from vice figure Joe Conforte in a controversial land deal.

--The fact that the City of Reno planned secret negotiations with airlines on landing fees, already among the lowest in the United States.

--The facts involving serious problems in the Wells Avenue Overpass in Reno.

--Circumstances leading to the Sparks city government being investigated by the Washoe County Grand Jury.

--Alien movements toward Las Vegas being connected with Mafia activities.

--The fact that Reno's city government could not account for thousands of dollars' worth of parking tickets.

--The fact that security had been notoriously lacking at the Nevada State Hospital.

These major stories are but a few of the thousands printed by newspapermen in this state as a result of confidential sources coming forward with information.

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WARREN LERUDE WRITTEN STATEMENT (3/27/75)—page 3

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These stories can be obtained only by an independent press.

And that independence is not without threat in this country. I need remind no one of the episode we have just witnessed between the presidency and the press in the matter of Watergate.

But imagine for one moment the disruption in that public service--journalism--if President Nixon and/or the Committee to Re-elect the President had been successful in obtaining the notes and background information being used by the probing reporters of The Washington Post.

All the President's men could have stayed one step ahead of the pursuing reporters and the coverup might never have been uncovered.

Let me, however, give you an example of the need for this press independence closer to our own homes here in Nevada.

This is the story, in way of background, of how Nevada's basic shield legislation was enacted into law.

We at the Reno Evening Gazette knew in 1969 that a good number of young people were smoking pot and that some were going on to the dangerous drugs such as speed, LSD and heroin.

But we had never really informed the community in depth on the subject.

So we set out to do so--by interviewing everyone concerned, including doctors, judges, attorneys, psychologists, psychiatrists, policemen, young people, their parents, everyone.

Including pot smokers, who told us their story on a confidential basis.

We knew if the story were to truthfully inform the public of this problem, we would have to go to the offenders and get their views.

The district attorney at that time quickly reminded me that the marijuana smoking sources of ours were criminals, felons.

And the district attorney told me he could seek out the names of those criminal/sources of ours. And should we, as newspapermen, refuse to reveal our sources, we could end up in jail.

The reason: Nevada had no shield law.

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WARREN LERUDE WRITTEN STATEMENT (3/27/75)—page 4

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This moved us to obtain California's shield law and have it introduced in the Nevada State Senate.

Addressing himself to the subject at that time, and I quote from a Carson City-dated story moved on the wires of The Associated Press, Senator Warren Monroe of Elko County stated:

"This makes it possible for newspaper people to obtain information more readily and under the protection that they don't have to place their sources in jeopardy."

The bill, of course, was enacted into Nevada law.

But such law is never free from assault. Honorable men disagree and some find flaws in this privilege.

To them, I refer the remarks in 1973 of then Washoe County District Attorney, now Nevada Lieutenant Governor, Bob Rose.

To quote Lieutenant Governor Rose:

"A newsman gets a great deal of his information from tips or leads from people in all walks of life. Often these tips are given by city or county employes and involve activities of government agencies and the employe is willing to give this information only to a newsman who is independent from the government system."

Again, the point being made, this time by the lieutenant governor of Nevada, that we must have an independent press.

This is the role of the press in our country--a heritage of public service reaching back to the John Peter Zenger case in 1734--some 42 years before the very birth of our nation.

And just as we in journalism police ourselves to guard against our own jeopardizing of this independence, we need shield legislation such as Assembly Bill 381 to guard against encroachments by the state.

And we in the profession do police ourselves.

During the conflict at Wounded Knee, a photographer for The Associated Press was identified as having given information to the FBI about the Indians and to the Indians about the FBI.

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WARREN LERUDE WRITTEN STATEMENT (3/27/75)—page 5

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Such action, of course, could put a journalist in a position of compromising the independence of the news gatherer.

The photographer was fired for it.

Here is the view of the news executive doing the firing.

I give you the words of Wes Gallagher, president and general manager of The Associated Press:

Quote:

"My primary concern is, of course, for the integrity of the news report but even more than that in this case (the photographer) acting as an informant for the FBI placed in jeopardy not only other Associated Press men covering Wounded Knee.

Gallagher continued in an April 30, 1974 memo to the world wide news staff of The Associated Press:

"There is a definite line a journalist must follow in the pursuit of his profession and he cannot act as an agent either for the police or any side in the controversy."

In closing, let me address a couple of points raised by opponents who argue against this confidentiality.

Ernest Newton, who writes a column, incidentally, for our newspaper, the Gazette, as well as many others in Nevada, has argued in a Nevada Taxpayers Association newsletter that an exemption is needed in the shield law to require disclosure of sources of information received as the result of theft or embezzlement of information by a reporter or ex-reporter.

The laws against theft in this country are well established. We need zero in on no profession as being more vulnerable to thievery than another--lest we have such special burglary legislation for lawyers, doctors, priests and perhaps even people who publish taxpayers association newsletters.

My colleague at the typewriter also talks of inaccurate information and damages it can do.

I think this is an important point.

Confidentiality of news sources and background information do not change the laws of libel one whit.

A newspaper is responsible for what it prints, whether it names its sources or not. Truth and/or malice are still the determinants of libel, not shield laws.

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WARREN LERUDE WRITTEN STATEMENT (3/27/75)—page 6

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And I can assure you as a newspaper editor that newspaper editors are very cognizant of the risks of libel should they tread errant paths.

I leave you with the reminder that Assembly Bill 381 is not a special privilege for newspapermen.

This is the public's protection of its right to get at certain information, through its independent press, that otherwise would never surface.

We simply need such legislation if the press is to fully serve the public.

Thank you.

Attached exhibits:

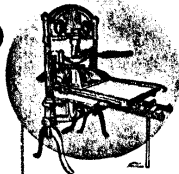
Examination by Ben Bradlee, executive editor, The Washington Post, of the trends in the United States today toward greater governmental interference with the independence of the press.

Eighteen specific examples of such conflict, cited in the December-January Newsletter of the Reporters Committee for Freedom of the Press, Washington, D.C.

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RON EINSTOSS WRITTEN STATEMENT (3/27/75)—page 1

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VISALIA TIMES - DELTA
Oldest Newspaper in the San Joaquin Valley - Founded 1859

Times Delta Square - West and Oak Streets - Phone 734-5821 - P. O. Box 31 - VISALIA, CALIFORNIA 93277
Publisher

March 27, 1975

Mr. Chairman and members of the committee:

My name is Ron Einstoss.

For the last three years I have served as managing editor, and since January 1 of this year as editor and publisher of the Visalia Times-Delta.

Prior to that I spent 10½ years covering the criminal courts, district attorney's office and grand jury for the Los Angeles Times.

I am proud of my newspaper career, but no more proud than I am to say that I was graduated from the University of Nevada, Reno -- a school which boasts one of the most distinguished journalism departments in the nation.

The Times-Delta is a daily newspaper of 17,200 circulation published in Central California. Like the Nevada State Journal and Reno Evening Gazette, it is a

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RON EINSTOSS WRITTEN STATEMENT (3/27/75)—page 2

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member of the Speidel Newspapers group, headquartered in Reno.

I appreciate the opportunity to testify here today -- as I have previously before a committee of the U. S. House of Representatives in Washington, and a committee of the California State Legislature -- in behalf of legislation designed to guarantee the public the right to receive that portion of news and information procured for its general benefit through the use of pledges of confidentiality to sources of information.

I am familiar with the Nevada shield law as it now stands and urge that it be amended to extend the newsmen's privilege to all unpublished information, photographs, tape and film -- a protection vitally needed if Nevada journalists are to properly perform their function of providing a free flow of information to their reading, viewing and listening public.

I can tell you that California's laws protecting newsmen in the area of confidential information are among

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RON EINSTOSS WRITTEN STATEMENT (3/27/75)—page 3

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the best in the nation -- and it is partly because of these laws that the citizens of our state have such a high regard for the integrity of their public officials.

Nevada, too, has a strong law, except in the aforementioned area of unpublished information. And this troubles and exposes those engaged in this state in the general newsgathering processes.

The right of confidentiality cannot be denied to the unpublished portion of a reporter's notes or the unused portion of a cameraman's film without violating the basis of confidentiality which underlies Nevada's existing shield law.

Unpublished notes are as much a part of a confidential conversation or an off-the-record interview as are the published portions. To shield one and not the other is like installing a costly security lock on the front door, but leaving the back door wide open.

News sources can and do express the same sentiment in many different ways at different points in the same

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RON EINSTOSS WRITTEN STATEMENT (3/27/75)—page 4

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conversation or interview.

The journalist, whatever his medium of communication, will select the passage or portion which he believes makes the pertinent point most effectively.

He will not select other passages, not because they are not important, or not confidential, but because they may be repetitive or duplicatory.

Now, as far as a news source or interviewee is concerned, the stipulation of confidentiality applies to the entire conversation, not only to portions selected by the reporter for publication.

It is difficult for us to understand why information obtained from a single source should be handled so differently -- why that information published should be protected while the information not published, which remains in note form, is not protected.

The existing situation has the obvious effect of discouraging frankness and candor and, in fact, of destroying the basis of a reporter's confidential relationship.

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RON EINSTOSS WRITTEN STATEMENT (3/27/75)—page 5

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When a source of information is not able to feel that his trust in the reporter is complete, there can only be a chilling effect on the flow of vital information to the public.

And that is what happens when a reporter, while not required to disclose the source of information published, could be compelled to identify the source of unused material.

Aside from the fact that this situation makes it more difficult for the reporter to obtain information, this is another way it actually effects his ability to perform his function on a day-to-day basis:

During the course of an interview, a news source quite frequently will use the expressions "this is off the record" -- which means it is not to be used, but is for background purposes only -- or "you can use this information, but don't identify me as the source." To me, this means just what it says -- and don't those expressions sound familiar to you?

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RON EINSTOSS WRITTEN STATEMENT (3/27/75)—page 6

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In either case -- with the "off-the-record" or "don't identify me as the source" information -- the information imparted in this manner usually is that which often finds its way into a reporter's notes.

Why? Because it is vitally important to a reporter that he not violate the confidence of news sources if he is to continue to perform his job in an effective and responsible manner.

This can be done only if he accurately records that information which is off-the-record, or which is not to be attributed to its source.

It is very difficult, as you can imagine, for a reporter, when sitting down to write a story, particularly under the pressure of deadline or several weeks or months later, to remember exactly which information was cleared for use and which information can be used without attribution. The notes of most reporters -- the good, responsible ones -- clearly reflect this.

For that reason it is important that his notes -- his

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RON EINSTOSS WRITTEN STATEMENT (3/27/75)—page 7

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reference material -- be protected from forced disclosure.

I am not sure that it is possible for a responsible reporter to guarantee confidentiality if his notes are not protected -- unless he disposes of them after use, and that deprives him of an important source of reference material for use in the preparation of future articles.

To the editor, this causes some problem. Many of our young reporters, in an effort to protect the integrity of their notes, say -- and I suppose I would have said the same thing when I embarked on my career fresh off the Nevada campus -- "let's make them take us to court to get our notes."

This presents a dilemma which is difficult to explain to these fledgling journalists who believe the Founding Fathers meant what they said about a free press.

Fighting these threats can jeopardize the economic health of small newspapers -- like the Times-Delta and many of those you have in Nevada.

For the press to remain free, it also must remain

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financially strong. Prolonged and frequent defenses in court weaken the ability of newspapers, small ones in particular, to do their job -- providing a free flow of information to their readers.

What happens when in deciding whether to cover a story we face the possibility of a real legal donnybrook which could cost several thousands of dollars?

Should we pursue the story and fight the possible court battle which might ensue, or should we lie down and play dead -- not cover the story?

As attractive as the latter course would be, it also could be disastrous. Just as you, as legislators, must retain the confidence of your constituents, newspapers -- large and small -- must keep the confidence of their readers.

If we duck every potentially dangerous issue, that confidence soon would dissipate and with it would go the need for our existence.

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RON EINSTOSS WRITTEN STATEMENT (3/27/75)—page 9

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As it was stated by Associate Justice Potter Stewart
of the U. S. Supreme Court:

"The right to publish is basic to the existence of
a constitutional democracy...but it depends on the right
to gather news. Anything which would curtail the free
flow of information dangerously curtails the right to publish."

The current situation, which finds Nevada journalists
without protections for their unpublished information,
curtails that free flow of information. I'm sure you
don't want that.

Thank you, ladies and gentlemen, for permitting me
to testify today before your august body.

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Reno Newspapers, Inc.

Publishers of RENO EVENING GAZETTE and NEVADA STATE JOURNAL (Morning and Sunday)

Reno, Nevada
89504

Gentlemen:

I am here today to testify in support of Assembly Bill 381 and, in particular, to that portion of the bill which states in part that no reporter may be required to disclose:

"...any note, photograph, film, tape recording or other document acquired or prepared by him in his professional capacity...etc..."

In passing Nevada Revised Statute 49.275 as it now exists, the state legislature affirmed its belief that the public is entitled to an unimpeded flow of information.

Unfortunately, the statute, as it now stands, does not fully protect that entitlement.

A shield law that says, in effect, a reporter doesn't have to take the stand and reveal his confidential news sources, but a police officer or district attorney can obtain a search warrant to rifle his files and, perhaps, find that confidential source's name, really isn't much of a shield law at all.

If the Nevada legislature truly believes--and I certainly hope it does--that the public is entitled to know as much as possible about what is happening in this state, then the legislature must make this bill law, to keep the channels open.

People who have information vital to the public well-being, but who do not want to be publicly identified with that information, simply will not make it available if they know their identities may be readily available to any district attorney with a search warrant in hand or grand jury that decides to issue a subpoena duces tecum.

Some of you may erroneously view this as a press protection law. It is not. God help us if we ever pass laws to protect the press or any other special interest group.

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This is a law to protect only the public, to give a shield not to me or the other newsmen here today or working throughout this state, but to the public's right to know. Newspaper, radio and television people are involved in this only to the extent that they are the primary agents who make information available to the public.

Jack McCloskey, in a recent issue of the Hawthorne Independent, wrote:

"We prefer to let our public officials set their own ground rules--then beat them at their own game."

This is a troubling statement.

It's selfish. It talks about newspapers against government, a situation which shouldn't exist, and when it does, we are looking at a newspaper that serves itself, not the public.

It's an easy statement, for a newspaper that's never had to beat public officials at their own game, because it never has investigated anything to determine whether a given agency or program is serving the public as it should.

Most of all, it's troublesome because it's morally delinquent and so workable...and so much a growing practice today.

It's easy to beat a search warrant for notes, films or almost any kind of material.

If a newsman wants to be a little bit immoral, he can destroy such material as soon as it's done being used. He can keep all his confidential documents where bearers of search warrants aren't likely to look.

Most of us in this profession don't think such methods should be necessary. More than that, even when it is necessary, we don't think it's completely moral. It's sort of like destroying or concealing evidence in advance.

It may not be against the letter of the law, because the material isn't evidence at that point yet. But it is against the spirit of the law.

If a newsman wants to be a little more immoral, he can destroy the material after the subpoena duces tecum arrives, and say he destroyed it earlier. In this case, he's violating the letter of the law--destroying evidence--and he becomes a potential perjurer. Probably no one will be able to prove it, though.

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If he really wants to be immoral, he can hide the material and say he destroyed it earlier.

All of this will really beat 'em at their own game. But why should any of it be?

Unfortunately, this type of thing is happening more and more and all too frequently these days, as newsmen decide their principal duty is to protect their news sources, the public's source of information.

Too many times, already, I have seen negatives and notes go into a wastebasket and be put to flame.

If this legislature wants to preserve the public's sources of information, it will pass Assembly Bill 381 and outlaw not the press, but these ludicrous situations.

I entered the newspaper business in 1962, in Appleton, Wisconsin. After two and a half years there, and four and a half years in the Army, I moved to Southern California, where I again worked as an investigative reporter for five years, before joining the Reno newspapers in September, 1974.

In these eight years of journalism, I have produced countless stories that I believe have served the public good demonstrably, based on information originally provided by confidential sources who would have said nothing had they not trusted in me to preserve their anonymity.

And in these eight years of journalism, my person, and in some cases my notes, have been subpoenaed a total of nine times, in seven cases before trial courts and in two cases before grand juries.

I still have copies of five of these subpoenas. I have been seeking some way to make good use of them. I can think of nothing more fit than to donate them now to this committee.

When questions of press responsibility in relation to shield laws arise, I think the track record established by my employing newspapers in these nine cases is exemplary of the American media standard.

In six of these cases, based primarily on shield laws, I did not testify, because the subpoenaing parties were in pursuit of information which would identify confidential sources of public information.

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In two trials and in one grand jury hearing, however, I did testify, despite the prosecutor's acknowledgment that I could refuse legally under the California shield law.

Both my publisher and I agreed that there was no need to preserve any confidentiality in terms of the information elicited. Most of the information sought already had been published, and the remainder was deemed publishable, even though it was not used. In these cases, we felt it was our responsibility as citizens to accept subpoena service, appear and answer.

I want to give you an example of the type of stories I've been able to produce, because shield laws have given the initial news sources the assurance that they could make their information available to the public without having their own welfare jeopardized.

--In 1961, I was able to expose attempts at postal bribery by an aide to a Wisconsin governor.

--In 1970, I was able to demonstrate, with published reproductions of the checks used, that three county supervisors had accepted money from the developer of a controversial land project. One of the three subsequently was indicted by the local grand jury, and none of the three is in office today.

--In 1971, I was able to show how a dishonest grand juror had convinced his fellow jurors to accept a phony investigative report accusing a public official of dereliction of duty. As a result, the grand jury rescinded its findings, and an honest and dedicated public servant maintained his job.

--In 1974, I was able to outline in detail a broad operation out of Switzerland and the Bahamas, fraudulently selling thousands of square miles of worthless desert to suckered European investors. The first prosecutions were filed last month in Los Angeles.

More recently and more specifically, in Nevada, I was able to tell how members of the Santo Trafficante organized crime family are attempting to set up a cocaine distribution system in the Las Vegas area, and how initial attempts are being made to infiltrate the Culinary Workers Union.

Your own state agencies can verify the information included in my reports.

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My primary sources for these reports, law enforcement agents, must be kept confidential. Even to explain in any detail why would tend to identify them.

One of these sources, who generally is wary of speaking to newsmen, voluntarily explained to me one day why he has confided in me over the past five years:

"I can trust you. I know you're the kind of guy who'd go to jail before he'd shaft me."

He's right. I would. But I don't want to.

My one and only reason for doing my job is to give the public information to which it is entitled. To do that job, I have to be able to obtain that information. I've never understood why that should be an offense meriting imprisonment.

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2014 PRIVACY SUBCOMMITTEE MEMBERS & MISSION

Report to the Nevada Technological Crimes Advisory Board (TCAB)
From
the Technical Privacy Subcommittee
By
Hal Berghel, Subcommittee Chair

1. Background: The Technical Privacy Subcommittee was created by TCAB on September 5, 2013, and the members were appointed by Attorney General Cortez Masto on October 18, 2013. The mission of the Subcommittee is “to (1) make recommendations to the Nevada Attorney General and Technological Crime Advisory Board; (2) to monitor changes in international, federal, and state policy and legislation regarding technical privacy protections; and (3) serve an advisory function to the Nevada Attorney General and Technological Crime Advisory Board regarding the protection of personal privacy as it relates to technology in Nevada including, but not limited to, medical data, financial information, location information, and communication.” The initial Subcommittee members were: Hal Berghel, Prof. of Computer Science, UNLV (chair); Stephen Bates, Assoc. Prof of Journalism, UNLV; Dennis Cobb, consultant and former Deputy Chief of LVMPD; James Earl, Cyber Counsel for the State of Nevada; James Elste, CEO Cognitive Extension, Inc.; Allen Leichtenstein, General Counsel, ACLU of Nevada; Ira Victor, Digital Forensic Examiner, Data Clone Labs. The assigned legal counsel is Brett Kandt, Special Deputy Attorney General and Executive Director of TCAB.
2. The first “organizational” meeting was convened by conference call December 6, 2013. At that time several strategic and tactical topics were brought before the Subcommittee for consideration including:
 - a. The latitude of states to expand constitutional privacy protections to citizens
 - b. Possible legislation that might expand the news shield privilege under NRS 49.275
 - c. Possible legislation to expand state racketeering statutes NRS 207.360-.400] to include (possibly amended versions of) NRS 205A.040 and/or NRS 205.473-513.
 - d. Possible revisions to the State of Nevada Online Privacy Policy
 - e. Possible legislation to expand the State encryption Policy
 - f. Possible legislation to prohibit Internet Service Providers from lowering the level of security/privacy without explicit customer notification
 - g. Possible legislation to prohibit sale of security/privacy software that has been hobbled to lower protections below the level advertised
 - h. Possible legislation to prohibit sale of software that has (a) known security limitations, or (b) back doors without complete disclosure in the end user license agreement (EULA)
 - i. Possible legislation to prohibit the operation of updating services (aka “drizzlers) for any purpose other than those disclosed to the end user
3. The second meeting was convened in-person via telecom facilities provided by the Attorney General’s office on February 21, 2014.
 - a. Of the initial topics considered at the December 6 meeting, the Subcommittee moved on items b. and parts of c. first.
 - i. Stephen Bates and Allen Leichtenstein proposed a revision of the Nevada Shield Law that was positively received by the Subcommittee. Bates and Leichtenstein will discuss their revision with the Nevada Press Association and report back to the Subcommittee at the next meeting April 17, 2014.

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might be the best way. All of that leads me to this conclusion, Dennis, great work, good security practices, let's put this on the Office of Information Security to take up as a responsibility and try to move that forward. Then focus specifically on the sort of what we think privacy-wise needs to be protected.

Maybe that's what we need ultimately is the kind of Rosetta stone classification schemes. It will translate classification schemes from one agency to the next.

Mr. Berghel:
It makes good sense to me.

12. Discussion and possible action on proposed legislation to expand the news shield privilege under NRS 49.275 to address gaps created by technology.

Mr. Berghel:
Next is the proposed revision of the News Shield Law that was handled by Allen and Stephen.

Mr. Bates:
In some points, it is like the license plate reader issue in that it seems to be really timely and maybe more than I expected in the case of this. The Media Law Resource Center has a model shield law they had a lot of suggestions for this but have said we should work together in the weeks to come and try to come up with something that everyone could benefit from. I talked with Barry Smith from the Nevada Press Association. We exchanged emails. He had some good suggestions.

Mr. Berghel:
Allen, do you have anything to add to that?

Mr. Lichtenstein:
I kind of agree. We have one of the stronger News Shield Laws of any place that I'm aware. There is kind of "if it ain't broke, don't break it" feeling.

Mr. ??
I would like to add some language that speaks of through any medium now in existence or exists in the future, to address when you have this new media that pop up so that way it kind of covers it. The other question I have is on number 5 and I think that people do have this question of if a subpoena is issued.

Mr. Berghel:
In the interest of time, it's obvious we are going to carry this over. Does anyone in the North have any input for Allen and Stephen on the Shield Law?

Mr. Elste:
I wanted to share some of the feedback Jim Earl and I got from David and the folks at EFF this morning because we had some time on the call to have a discussion about the

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Shield Law. I found their comments rather informative. The first thing that they said and I think you should take this to heart was that this is one of the “more rock solid” laws that they have seen. They have been looking at news shield laws across the country so I think that speaks very well the language that Stephen and Allen have developed. They told us that they looked for certain things in Shield Laws and three of the things they looked for were really protection of the journalistic sources, like the identity of sources, the documentary information that they use to produce a journalistic output, like notes, photos, etc., so making sure that our language is expansive enough to cover not just the product that they produce but also all of the material that goes into producing that product. The third thing was the eye-witness observations that they collected in the form of developing that journalistic output.

One of probably the most important pieces of feedback and one that I think will bear some discussion for our group is that they look at the type of information that is covered and who does that apply to. From EFF’s perspective, it is the functional definition of journalism that’s more important than a status definition of journalism. I believe what we have in the current language is you have to be a certain type of journalist to be covered as opposed to looking strictly speaking at the act of journalism, the function of creating or otherwise producing journalistic output. We may want to consider looking at a way to functionally define journalism as opposed to what is currently a series of labels as if you are one of these, then you’re a journalist. Part of that is encompassing non sort of news-related journalist and folks who are for instance, a book author who may be doing investigative journalism of a sort to produce a book that will not be regularly published or meet that regularity requirement. I think that one really resonated for me because an unpublished author who is doing investigative journalism or producing a book that is using investigative techniques may well need the same sort of protection. Those were the primary elements of feedback received.

Mr. Earl:

Essentially, the position we took after EFF laid out its functionality preference was to say, OK, I can kind of understand what you mean conceptually where you would like to define the scope of application based on function rather than on definitions and this extends to a protected class which is described this way for this list of protected things. We went on to say that’s fine, if we understand that conceptually, can you give us some examples of the type of functional definitions that you think we might want to consider substituting for the ones that exist right now. My recollection is that they were going to provide Jim Elste with some examples. As soon as that happens, my suggestion would be Jim automatically shares with the Chair and the Chair considers disseminating it to Committee Members.

Mr. Elste:

Happy to do so.

Barry Smith:

I am Director of the Nevada Press Association and would like it on the record that I am here and willing to help and answer any questions and be of assistance however I can.

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Mr. Berghel:

Thank you. You are in contact with him I take it, Stephen? Do you have enough to proceed with your next revision? I'm interested in looking at how different states address it. We'll carry this over for the next meeting.

13. Discussion and possible action on proposed amendments to NRS 205.473-513, inclusive, "Unlawful Acts Regarding Computers and Information Services".

Mr. Berghel:

We'll carry this over for the next meeting as well.

14. Discussion and possible action on request for Nevada Legislature to pass joint resolution calling on Nevada congressional delegation to expand online privacy rights under federal law.

Mr. Earl:

Nothing additional but my recollection of in terms of how a legislator would move forward with a change to the Nevada Constitution under Item 10 is pretty much the same way that any joint resolution would be handled. If we are moving forward drafting one joint resolution which would have the effect putting forward an amendment to the Constitution, we might view this other as simply yet another joint resolution to be formulated. Is that fair?

Mr. Kandt:

I think what Jim is saying and I would agree is that with both the proposals under Item 10 and 14 – they are pretty straightforward. You've already taken action on Item 10. I think you could take action on Item 14 without any specific language because that would actually be drafted by LCB upon the legislator's request. If you wanted to take action on 14 today, and then those are ready to go to the Tech Crime Advisory Board for their consideration, and then, possibly being picked up by one or more legislators.

Mr. Elste:

Should we develop a draft of what that request should look like so that it's more formalized in terms of what we're asking them to produce without necessarily producing the actual resolution that they are going to use? Is that the next logical step for us?

Mr. Kandt:

I don't think it's a necessary step, that's up to you whether you want to do that or not but just in terms of presenting it to a legislator, I don't think you even need that much specificity.

Mr. Elste:

I would tend to advocate for us providing some specificity so that it was clear what we're asking that legislator or the Tech Crime Advisory Board to agree to and take forward or what we're asking the legislature to do. I think if we put it out there as a request for

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Mr. Elste:

Just a comment on the list of statutes and Supreme Court decisions – the attorney general's office in California recently published a similar type of compendium of California statutes, decisions and made that available publicly on their website. We may well want to consider trying to take the work that Allen has done and see if we can assist in developing something similar because it's great that we've been able to identify certain statutes that are relevant, it would be even better to socialize those broadly to the public at large.

Mr. Berghel:

Good point. Any other comments? Brett, I would like two action items to come out of this – one, that as time permits, Allen will get to me the report in advance of our next meeting which I will then send to Brett for distribution; and secondly, since Jim Elste has already seen the California document, if you could kindly send me the URL, I will put it in my little notebook which of course, is available to all of you online.

Mr. Lichtenstein:

Just as an aside, as an attorney who also is licensed in and does practice in California, I think it's fairly safe to say that California has a much more detailed statutory scheme for things like this which tends to have a much shorter list of statutes.

Mr. Berghel:

I think that would be a useful point of departure for us when we take up this topic at that next meeting that is what the difference is between what we hear from Allen concerning the Nevada statutes and what Jim is telling us about the California statutes. We might be able to extract from the difference some areas that need direction for us. I'd like to see us discuss that at the next meeting.

9. Discussion and possible action on proposed legislation to expand the news shield privilege under NRS 49.275 to address gaps created by technology.

Mr. Berghel:

As per the request of our guest, we will take Item 9 next. Discussion and possible action on the proposed legislation to expand the Nevada Shield Law. It's my understanding that you have taken the lead on this Stephen, so please do so.

Mr. Bates:

As mentioned at the last meeting we are recommending a functional approach so that we talk about a person that does journalism rather than an employment-based approach. I have some statutes and I would think the strongest argument for a penalty is the third party provision. If a subpoena is issued to you, you file a motion to quash that's the end but you find a subpoena is issued for your telephone records, as a reporter, and they didn't give you the requisite notice and the chance to object, then I wonder if should be penalty of some sort.

Mr. Lichtenstein:

I'm trying to get a vision of how that would work in a practical sense. I just can't sit here and issue a subpoena, there needs to be a party and I guess you would talk about a third party subpoena; it would be up to the court to provide that notice. Certainly, we are going to run into a particular problem in terms of any penalty is that there is a court involved. You don't get to penalize the court. This is something that we were talking about before we came in. That doesn't prevent filing anti-SLAPP suit in terms of abuse of process and the like.

Mr. Berghel:

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Stephen is referring to the conversation I had with him and then later with Allen about my digital security patent that I am putting on now. I wouldn't make a distinction between de facto and de jure penalties. The de jure penalties are the ones that our lawyer colleagues are familiar with. The de facto penalties are the ones that accrue by what Allen refers to as nuisance actions on the part of attorneys that have the effect, in the case of journalists, primarily, potentially forcing them into bankruptcy trying to defend themselves. I had an example in mind, the journalist that this happened to but I can't think of the name right now, however, I can come up with the name and that is the prosecution of Drake who was accused of leaking classified information to a newspaper and that prosecution went on for 6 years and bankrupted Drake. At the end of 6 years, the judge said I don't understand why we are dealing with this. There's no substance here, dismissed. From the government's point of view, according to Drake, there's some argument for that. The government got what they wanted. He's in terrible financial shape and anybody that saw that case is well aware of the fact that they don't need to find you guilty in a court of law to silence you. They can simply ruin you. Now, the thing is which was where I was headed with this, Drake, as I understand, has no recourse.

Mr. Lichtenstein:

I'm not familiar with the case. Is this a criminal prosecution?

Mr. Berghel:

Under the 1917 Espionage Act.

Mr. Lichtenstein:

Unfortunately, criminal prosecutions from places like the NSA are very hard to fight. NSA, itself, if very hard to fight because they don't want to disclose much of anything

In a civil matter, however, one might say if a defendant can always pursue under a civil rights violation where you can get attorneys' fees.

Mr. Berghel:

We've got a few attorneys on our committee. Are we trying to take an action on this, Brett, so we can give this to the Attorney General as a recommendation?

Mr. Kandt:

Timing is somewhat key here. You've got a number of items listed as action items. I have actually listed all of these as potential action items on the agenda for the Tech Crime Advisory Board when it meets next Thursday and that is I realize you may not take action on all of these items but to the extent you did, I wanted the Tech Crime Advisory Board to be able to consider them next week because time is of the essence in terms of any proposal for legislation is going to have to find a sponsor. That process is already taking place right now and is already in full swing. For legislators, they have to submit their bill draft requests, they start in August, they have a timeframe between August and December 10th, I think. The Attorney General's bill draft package has to be submitted by September 2nd. Executive Branch state agencies are already submitting their requests to the governor's office because they have to have theirs submitted by August 1st so that process is already in full swing so to the extent you wanted to get anything before the Tech Crime Advisory Board, I put it all here and put it all on their agenda so that could take place.

Mr. Berghel:

We are all thinking about whether this shield law is potentially ready for prime time. Could we ask our guest to identify himself and chime in with whatever comment he might care to make.

Mr. Smith:

I'm Director of the Nevada Press Association. I think I didn't really have a lot to comment on because I do think this is a good approach. This is the right approach, the way this ought to be addressed. I would just

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reiterate that I expect that it still will make members of my association and others nervous to be touching the Shield Law at all. I'm contradicting myself and I would advise them that this is way we ought to be going but I'm just telling you that that I won't have a unanimous response to that.

Mr. Berghel:

Barry, what might this committee do to assuage their fears? We are, after all, trying to do this for the journalists in the state.

Mr. Smith:

Exactly, I think it's a good policy discussion that ought to be taking place in front of the legislature so I would discourage you from presenting this or similar language to try to this approach and have that discussion. I just would say that I can envision not only members of my association but others not being in unanimous support of it and being nervous about opening that up at all. I would discourage you from preparing what you think is the best approach because I do think it is beneficial in the long run.

Mr. Bates:

I wonder if members of your association might be not as keenly interested in the definition

Mr. Smith:

I think that's beneficial, yes. And, again, I don't have, as you say, for the most part, my members are protected because they are defined under the law. They work for an organization where this is headed is this definition of the practice instead of the job. I don't have a few of my member who aren't covered by the current shield law. That's why I say, it's the right approach, in my opinion, and that it's a good policy discussion to place before the legislature.

Mr. Berghel:

Barry, are you more nervous about touching the statute than you are about the substance of the draft.

Mr. Smith:

Yes, definitely.

Mr. Berghel:

OK, that's an important consideration because once the legislature decides to deal with something, they can decide that don't believe in shield laws and just revoke the whole thing. Certainly, it's a legitimate point. Brett, Jim Earl, you know about how the legislative process works. Is the way to deal with this to try to enfranchise some senators and assembly persons to prepare them to support this, is that the way this is done?

Mr. Kandt:

In terms of my approach to a bill, building consensus but then you stakeholders beforehand, there's a process whereby the bill gets assigned to a committee and then reaching out to the committee chair and those members to explain the purpose of the bill and answer any questions even before it gets heard in a committee, is an important step. Reaching out to leadership so the speaker, the majority leader, and even the leadership in the minority parties would also be a part of the process as well. It differs depending upon whether it's a bill that's being carried by a legislator versus a bill that's coming out of the executive branch but that's generally the approach I take.

Mr. Earl:

Let me add to that in terms of trying to address some of the practicalities that face us as a subcommittee. The way which this might work is the following, or at least the way I would envision it:

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If we were to recommend this for consideration by the Tech Crime Advisory Board, assuming that there is complete board membership at that next meeting next week, then you would have the following potential sponsors exposed to the text. You would have the Attorney General, and you would have the senator and assembly person who are members of the Tech Crime Advisory Board exposed to the text. The way which I would approach this, given the discussion that has taken place so far, and I can certainly understand the reason why any constituent who or any constituency that feels it has been favored in some way by existing legislation, is very reluctant to that legislation opened for what might be to them, a marginal benefit given that the risks of some type of renegade legislative response. I think that there is a different way to cast this in terms of economic development and that is there's a growing blogging community if you are a successful blogger, you don't have to be located in New York or San Francisco or Los Angeles, you might as well be located in Las Vegas or Douglas County or Incline Village. If you somewhat attracted to any of those areas anywhere, the existence of a shield law that would cover you might, in fact, be sufficient to get you to come to Nevada and write from here. In addition to those legislators who we would normally think of having some type of interest and membership of the Tech Crime Advisory Board, there may be others that other members of this particular body may know who would see this from an economic development perspective. I'd just as soon have as many smart writers in the state as we can possibly get, frankly.

Mr. Victor:

I think that's an outstanding idea by Mr. Earl. Now, full disclosure, I am somewhat involved in blogs and podcasts so I am biased but those biases acknowledged, I think it's a great idea and to that end, the comments that you made, Mr. Chairman, about requiring payments of attorney fees for harassing subpoenas and also penalty for anyone who issues a third party subpoena without the requisite five days, I think some language that helps shield independent bloggers and podcasters and such from that sort of litigation would also encourage them to come here. I'm thinking about subpoenas that require voluminous electronic information can be a burden to an independent writer who may have data on cloud systems, on servers in an office, may have data backup or located in other places and backup tapes and subpoenas that require that are often written to say ALL information are a huge burden to third parties that receive those subpoenas. By carving out some safe harbor and some provisions to protect bloggers and independent journalists would again go to Mr. Earl's point that this becomes a great place to be a writer entrepreneur and build it up. And, I would remind for the record, some very successful what are considered now as establishment news sites were started as blogs, Tech Crunch, for example, Huffington Post, these were independent bloggers basically that then became so popular that we now consider them the media but they really were the seedlings, they were bloggers. This is a significant area of public good because it disseminates more and more information and a source of economic growth to those communities where these once bloggers but now real legitimate larger businesses locate.

Mr. Elste:

Two thoughts: one just to build on this question of protecting against legal costs – I would advocate against putting that into the shield law. This is a law that is directed at fundamentally First Amendment privileges. Let's not muddy the waters by trying to solve the problem of the cost of litigation. That is a completely separate issue that is something that should probably be handled as a separate piece of statutory language and keep the focus of the shield law on what we define as journalism; what sort of protections we're going to afford those people that are journalists or by practicing journalism. We need to try to keep this as focused as possible on the act of providing that shield.

The second observation I had was for Barry which is I can certainly understand the concerns of even touching the existing language; however, would it be helpful if the members of your organization have the opportunity to have discussions with folks on our committee or otherwise have some dialogue around this to see both the rationale behind the language that's been put together and some of the genesis of that in terms of conversations with EFF and try to conquer their support. I think this is a piece of potential legislation that really does advance the cause for protecting journalists and journalism in affording those

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First Amendment Rights. It would be a shame not to have the press association shoulder to shoulder with us at the table.

Mr. Smith:

I absolutely agree that the dilemma I'm in is very well summarized. My constituency is 90% protected by the existing but my future constituency is not so that's what I am trying to balance myself and that's why I say, it's the right approach, it's the right thing to do and I absolutely agree. I think intellectually, they would agree with me that this would be groundbreaking in some respects. It's absolute, again, that it is the correct approach and the right way to do things; it doesn't mean they wouldn't be nervous about it.

Mr. Elste:

One other thought, a lot of the sources of information for your 90% that are covered as professional journalists are the bloggers, are the people that are out there gathering this information. There's an economic incentive for your protected members or professional journalist members.

Mr. Smith:

If I might, when you talk about legislation and you talk about how its approach to be brought into the legislature and you start talking about anything that kind of expands the scope, you start to bring in other potential parties that have an interest in it, stakeholders, that will for one reason or another, object to anything else you put in there. Just to bring that up from my experience and pretty obvious but I thought I'd throw that out. Thank you.

Mr. Berghel:

Do I sense that we are in agreement that we'll go with what we have, we're not going to try to embellish it? It's my sense of the discussion that this is a winning proposition for the journalists if legislators see this as an opportunity to strengthen our already strong shield law. I think we should assume that the legislators will see the benefit, think of the big picture and be inclined to support it. We should proceed on that basis.

As a practical consideration, this subcommittee is going to have to decide whether to recommend it to the TCAB and secondly, we should know from Barry what we can do to help his constituency recognize the value of enlarging the statute.

Let's take the latter first: Barry, what can we do to help get the word out with your constituency?

Mr. Smith:

It's kind of up to me to get it out to them but to certainly be open to the questions and provide the information and I think if they had been at this meeting today and heard what was said in the discussion that would be far more comfortable if this same discussion was what happened before a legislative committee, I'd have no problem but again, you never know what's going to happen so it will be up to me to explain to them and any help I can get as far as to what the language is from Stephen he certainly has lots of contacts in the south. We have some time to make to make them comfortable. I appreciate any help we can get.

Mr. Earl:

At an appropriate time, I'm prepared to move that we recommend the current text to the Tech Crime Advisory Board for consideration and possible adoption by either the Attorney General or one of the participating legislators into a BDR. Part of the reason that I say that in addition to what you've already heard me say is that I think that there needs to be something around which to distill and discuss, and I don't want to speak for Barry, but if I were in his position, it would be easier for me to gather my constituents and say, look, there's something you really need to pay attention to because this potential piece of legislation took a baby step on the last day of May when the subcommittee of the Tech Crime Advisory Board voted to recommend it. I don't know who that could be, to put before the EFF or for the blogger communities in addition to what the various positions are. At the appropriate time, I'd be willing to make that motion.

Mr. Berghel:

APPENDIX P

2014 PRIVACY SUBCOMMITTEE MEETING MINUTES (5/30/14)—page 6

I think that it's quite the appropriate time. Do I hear a second?

Mr. Bates:
Second.

Mr. Berghel:
All in favor, say Aye. Opposed? Failing to hear any opposition, we will report that the unanimous recommendation of the quorum to recommend this to the TCAB.

Mr. Kandt:
Just for clarification, since there are the current, we've got a couple of different drafts, and some discussion at the bottom about some definitions under the functional approach, could I ask Mr. Bates just to maybe over the weekend, could you clean it up into the final and email it to me and I will make sure that is what the board has so they don't get confused as to what you recommended and what they are looking at. Thank you.

Mr. Bates:
I will assume we are talking about the May 2014 draft and not the April or any other functional approach definitions, correct?

Mr. Kandt:
I don't want to give them this. I don't want to give them these two pages because it won't be clear to them and I don't feel it's my place to cut and paste them. I think it's appropriate for you, if you just send me what you want presented to the board, I'll make sure it gets to them.

Mr. Berghel:
Barry, thank you for participating and would it be possible for you and select members of your organization to come to the next TCAB meeting?

Mr. Smith:
I plan to be there. I'll probably get the word out tomorrow morning that this is some recommended language and we'll see what kind of reaction I get. I will let them know that meeting is going to happen and they won't have any excuse for not paying attention. Thank you, again, for letting me interrupt your agenda.

6. Report from James Elste on request for assistance from Electronic Frontier Foundation to develop legislation to expand online privacy rights. (Discussion Only) Action may not be taken on any matter brought up under this agenda item until scheduled on an agenda for action at a later meeting.

Mr. Elste:
I don't have very much to report other than after our last meeting's discussion on the engagement of the EFF, I did pass along both Allen and Stephen's contact information and, if I'm judging correctly, you, gentleman, has a subsequent conversation with EFF and it was fruitful and helped influence the language in the Shield Law. I would say, in many respects, we've opened up the dialogue with EFF and they are strong supporters of work we are doing here. I hope we will continue to move forward on that.

Mr. Berghel:
Thank you. Any discussion on Item 6? Brett, I think we can take that off the next agenda.

7. Discussion and possible action on proposed amendment to the Nevada Constitution establishing a right to privacy.

APPENDIX Q

APRIL 2014 BATES-LICHTENSTEIN SHIELD DRAFT

Nevada Shield Law—Revised

Stephen Bates and Allen Lichtenstein 4/14/14

current:

NRS 49.275 News media. No reporter, former reporter or editorial employee of any newspaper, periodical or press association or employee of any radio or television station may be required to disclose any published or unpublished information obtained or prepared by such person in such person's professional capacity in gathering, receiving or processing information for communication to the public, or the source of any information procured or obtained by such person, in any legal proceedings, trial or investigation:

1. Before any court, grand jury, coroner's inquest, jury or any officer thereof.
2. Before the Legislature or any committee thereof.
3. Before any department, agency or commission of the State.
4. Before any local governing body or committee thereof, or any officer of a local government.

proposed:

1. "News organization" means a newspaper, periodical, press association, radio station, television station, online source of information about current events, or book publisher.

2. "Journalist" means a reporter, editor, writer, researcher, photographer, videographer, or editorial worker, currently or formerly employed by or under contract to a news organization, or whose work appears in one or more news organizations.

3. "Legal proceeding" means any hearing, trial, or investigation:

- (a) Before any court, grand jury, coroner's inquest, jury, or any officer thereof.
- (b) Before the Legislature or any committee thereof.
- (c) Before any department, agency, or commission of the State.
- (d) Before any local governing body or committee thereof, or any officer of a local government.

4. No journalist may be required to disclose any published or unpublished information obtained, related to, or prepared by such person in such person's professional capacity in gathering, receiving, or processing information for communication to the public, or the source of any information procured or obtained by such person, in any legal proceeding.

5. A party issuing a subpoena in any legal proceeding to a third party that seeks the records of a journalist or a news organization shall provide notice of the subpoena to both the journalist and the news organization at least five days before issuing the subpoena. The notice shall include, at a minimum, an explanation of why the requested records will be of material assistance to the party seeking them and why alternate sources of information are not sufficient to avoid the need for the subpoena.

APPENDIX R

MAY 2014 BATES-LICHTENSTEIN SHIELD DRAFT—page 1

Nevada Shield Law—Revised

Stephen Bates and Allen Lichtenstein 5/28/14

current:

NRS 49.275 News media. No reporter, former reporter or editorial employee of any newspaper, periodical or press association or employee of any radio or television station may be required to disclose any published or unpublished information obtained or prepared by such person in such person's professional capacity in gathering, receiving or processing information for communication to the public, or the source of any information procured or obtained by such person, in any legal proceedings, trial or investigation:

1. Before any court, grand jury, coroner's inquest, jury or any officer thereof.
2. Before the Legislature or any committee thereof.
3. Before any department, agency or commission of the State.
4. Before any local governing body or committee thereof, or any officer of a local government.

May 2014 draft:

1. "Journalism" means gathering, preparing, collecting, photographing, filming, recording, writing, editing, reporting, or publishing information concerning matters of potential interest for dissemination to a segment of the public, in any medium of expression that currently exists or shall exist in the future.

2. "Legal proceeding" means any hearing, trial, or investigation:

- (a) before any court, grand jury, coroner's inquest, jury, or any officer thereof;
- (b) before the Legislature or any committee thereof;
- (c) before any department, agency, or commission of the State; or
- (d) before any local governing body or committee thereof, or any officer of a local government.

3. In any legal proceeding, no person or entity engaged in activities of journalism may be required to disclose any published or unpublished information related in any way to activities of journalism engaged in by any person or entity.

4. A party issuing a subpoena in any legal proceeding to a third party that seeks the records of a person or entity engaged in activities of journalism shall provide notice of the subpoena to the person or entity at least five days before issuing the subpoena. The notice shall include, at a minimum, an explanation of why the requested records will be of material assistance to the party seeking them and why alternate sources of information are not sufficient to avoid the need for the subpoena.

5. In the case of a person or entity whose activities do not fall within the definition of "journalism" set forth in subsection (1), a judge may exercise discretion to apply the provisions of subsections (3) and (4) if the judge determines that doing so would serve the interest of justice by aiding or protecting activities related in any way to the dissemination of information.

APPENDIX R

MAY 2014 BATES-LICHTENSTEIN SHIELD DRAFT—page 2

April 2014 draft:

1. “News organization” means a newspaper, periodical, press association, radio station, television station, online source of information about current events, or book publisher.

2. “Journalist” means a reporter, editor, writer, researcher, photographer, videographer, or editorial worker, currently or formerly employed by or under contract to a news organization, or whose work appears in one or more news organizations.

3. “Legal proceeding” means any hearing, trial, or investigation:

(a) Before any court, grand jury, coroner’s inquest, jury, or any officer thereof.

(b) Before the Legislature or any committee thereof.

(c) Before any department, agency, or commission of the State.

(d) Before any local governing body or committee thereof, or any officer of a local government.

4. No journalist may be required to disclose any published or unpublished information obtained, related to, or prepared by such person in such person’s professional capacity in gathering, receiving, or processing information for communication to the public, or the source of any information procured or obtained by such person, in any legal proceeding.

5. A party issuing a subpoena in any legal proceeding to a third party that seeks the records of a journalist or a news organization shall provide notice of the subpoena to both the journalist and the news organization at least five days before issuing the subpoena. The notice shall include, at a minimum, an explanation of why the requested records will be of material assistance to the party seeking them and why alternate sources of information are not sufficient to avoid the need for the subpoena.

EFF recommends the functional definition in (1) and the safety net in (5), though the language may need tweaking.

I assume that we needn’t define “public,” i.e., audience.

Hal wonders if there’s a way to require payment of attorney’s fees or some such for harassing subpoenas. Helpful?

Is it feasible and worthwhile to include some sort of penalty for anyone who issues a third-party subpoena without the requisite five days’ notice?

I guess that might be possible for the third-party subpoenas

functional approach

1. The term ‘journalism’ means the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.

(House shield law bill)

the term “a representative of the news media” means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

APPENDIX S

TECHNOLOGICAL CRIME ADVISORY BOARD MINUTES (6/5/14)—page 1

D. Legislation to expand the news shield privilege under NRS 49.275 to address gaps created by technology

The Shield Law is in your back up. A lot of these have back up items but they're not fully gestated at this point. The point of the Shield Law modification revision was this: Modern journalism is no longer restricted to the traditional journalistic employers, by that I mean, publishers, newspapers, electronic media outlets like television news rooms and the like. Now, we are seeing blogospheres delivering fairly high quality and in some cases, accurate reporting and the Subcommittee would like to remind the Board that many of the accepted online venues for news coverage, such as the Huffington Post and the blogospheres such as that are considered to be fairly reliable and useful. But they are not protected under the Nevada Statute as it now stands so we've proposed a revision to that statute that seeks to incorporate coverage to those who act as journalists not based on the nature of the employment relationship. I'm not a lawyer so I'm going to have to leave it to Madame Chair's discretion whether this is something that she would feel comfortable in supporting. It is our feeling that is, the Privacy Subcommittee's feeling, that in the absence of a federal Shield Law, we are still, I would remind all of us that are non-lawyers, we are still operating under Brandsburg which means there is no federal protection at all. It's left to the states to protect journalism. We see cases all of the time these days where the federal government has decided to suppress a journalist for covering some piece of newsworthy information or other. To the extent that it is possible to protect the journalists, it has to be done at the state level. We propose that the already excellent Nevada statute be further enhanced. Since that is a recommendation to the Board, I'll pause here if any of you have questions or comments.

General Masto:

So, the way I am looking at Agenda Item Number D in the actual proposal is the law already exists and the enhancement is to include or broaden it to include technology and the journalism that occurs through blogging in the new technology and the new medium, is that correct?

Mr. Berghel:

Yes, it's worded in such a way that we don't have to be technology focused because by the time we get the new statute passed, the technology will have changed again. We've endeavored in this proposed statute revision to expand the coverage on the basis of the function of the journalist not the particular manner or means by which they apply their journalistic skills.

Mr. Owens:

I have one question. I am certainly not an attorney but as a law enforcement representative, I would just have a concern – would this then give any blogger the right to be shielded pretty much anybody that posts anything for others to see that we would not be able to require them to give up sources or specific information.

Mr. Berghel:

Yes, the intent is that if a person is engaged in journalism and the definition here is provided in that first paragraph, so to the extent that a person is doing that, yes, they would be covered. Whether the activity is represented by some kind of newsprint or an online source.

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TECHNOLOGICAL CRIME ADVISORY BOARD MINUTES (6/5/14)—page 2

Mr. Owens:

At face value, that isn't something that I'd be wanting to support from the law enforcement aspect of it.

General Masto:

I have a follow-up – did you reach out or talk with the press association regarding this.

Mr. Berghel:

Yes, Madame Chair, we did engage them. Brett, what was Brian's last name?

Mr. Kandt:

Barry Smith with the Nevada Press Association.

Mr. Berghel:

Please let Barry address the question that was just raised.

Mr. Smith:

I am Barry Smith, Director of the Nevada Press Association. I was fortunate enough and appreciate the Privacy Subcommittee letting me talk to them a couple of times. This is an issue very near and dear to the Press Association where this came from originally. We do have, in Nevada, one of the best Shield Laws in the nation. It does, as I told them, for 90 percent of my members, we're covered and we're covered very well so our point of view is that we are kind of hesitant to touch it.

On the other hand, I did express to the Subcommittee that this is a good way to go about looking at this issue. Not so much who is covered but what their intent is, what activity that they are actually doing. As you see in the language, it really changes it from covering a journalist to covering acts of journalism. I think it's a good approach from the Press Association's point of view, for the most part, as I say, most of our members are newspapers covered explicitly by the statute. I do have members though and I expect I will more members in the future who are not specifically defined in that statute as being covered by the Shield Law. So far, there have been a couple of instances in the state and district court level where the issue has come up and the judges have pretty liberally construed that if it looks like a newspaper, the quote I used is just because you are reading a book on a Kindle doesn't mean it's not a book. So just because you are reading a newspaper online, doesn't mean it's not a newspaper. But, that's not the way the statute reads. That's my point of view on it and I'll be glad to answer any questions you have about it.

General Masto:

Thank you. I guess let me ask you a question that relates to what Jim Owens just brought up. I guess the question I would have for the press association is do you see a distinction when we define journalism between your membership and maybe, somebody who is blogging online their journal or topical information but they are not related to per say a news organization. Is there a distinction in your mind or with respect to your association?

APPENDIX S

TECHNOLOGICAL CRIME ADVISORY BOARD MINUTES (6/5/14)—page 3

Mr. Smith:

Yes, I do think there is a distinction. It's becoming more blurred all the time and this was pointed out some of the most popular, best read, news sources in the country. It would not qualify as a newspaper or TV or broadcast, radio broadcast organization. So, it does get into a very tricky question of defining what is journalism and that's why, on the federal level, so far, and there have been several attempts, it has not been defined, it is difficult to say what a person is doing. Once you get into when you are hired, there is a presumption of some level of education, training, skill, responsibility, those kinds of things. That's why the shorthand has generally been you work for a media organization. Is that helpful at all?

General Masto:

Yes, thank you. Any further comments or questions?

Mr. Owens:

Just for some clarification for me so according to this, if a blogger or a person who posts on their Facebook to his fellow criminal his particular gang, these are the crimes, they take pictures of some of the things they've done because it has interest to a particular segment of the public, his fellow gang members, so that's now protected and we can't bring him or require him to provide any additional information other than what he has posted?

Mr. Berghel:

Jim, I'm not an attorney. My guess is that that is the kind of thing that would be resolved by a court. That's part of the process. The intent here, I think, is, as Barry has pointed out, is pretty clear. The future of journalism for especially the younger set does not involve traditional means. That is many of us no longer subscribe to a newspapers or magazines for that matter but we are voracious consumers of online content and if for no other reason than economic incentives, the spoils will go to the aggressive in attracting businesses to the states that provide these kinds of Shield Laws. That is, if you want a Huffington Post to start up in your midst, this kind of Shield Law that we proposed would be an incentive over a state that doesn't have this secure Shield Law. Now, when it comes to the details of how the laws are sorted out and how the prosecutors handle it, that's something, an issue that really should be left to an attorney. I'm not one.

General Masto:

Any other comments?

E. Legislation to amend NRS 205.473-.513, *inclusive*, "Unlawful Acts Regarding Computers and Information Service".

Mr. Berghel:

Legislation to amend the statute on computer abuse. I am actually drafting that. I'll give you a little background because I have nothing to propose at this time. The law itself was well intentioned but I presume written a very long time ago. The language is dated and I think it has serious issues. From a prosecutorial point of view, I would imagine it would be very difficult to enforce this law. I've taken the initiative to re-write it and it's probably, Brett, did you include a draft of my notes?

Mr. Kandt:

Draft Minutes
June 5, 2014
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2014 PRIVACY SUBCOMMITTEE MEETING MINUTES (8/29/14)—page 1

TECHNOLOGICAL CRIME ADVISORY BOARD Technical Privacy Subcommittee

MINUTES OF THE MEETING August 29, 2014 at 1:30 PM

The meeting took place at the following locations:
Office of the Attorney General, Mock Courtroom
100 N. Carson Street, Carson City, NV 89701-4717
and
Office of the Attorney General, Grant Sawyer Building
555 East Washington Avenue, Suite 3315, Las Vegas, NV 89101

1. Call to Order and Roll Call.

Hal Berghel, Chair; James Elste; Ira Victor; Stephen Bates Dennis Cobb.
Not Present: James Earl; Allen Lichtenstein. A quorum was established.

2. Public Comment. (Discussion Only) Action may not be taken on any matter brought up under this agenda item until scheduled on an agenda for action at a later meeting.

There was no public comment.

3. Chair's Welcome. (Chair)

Mr. Berghel welcomed the members to the fifth meeting of the Subcommittee.

4. Report on Technological Crime Advisory Board meeting of June 5, 2014, and status of approved resolutions for Technical Privacy Subcommittee.

Mr. Berghel stated that the Subcommittee's resolutions were discussed at the Board meeting. There was some opposition to the proposals from the representative for the Clark County Sheriff and from Senator Ford. The Sheriff's representative was uneasy with any proposal increasing the protection of privacy without studying the full ramifications in regards to police investigations. Mr. Berghel asked for Mr. Kandt's assessment.

Mr. Kandt reviewed the four proposals made by the Committee:

- 1) To amend the news shield law.
- 2) To add the word "privacy" to the Nevada Constitution.
- 3) To seek a joint resolution from the Nevada Legislature to call upon the federal congressional delegation to look at expanding privacy protections at the Federal level.
- 4) The proposal to amend NRS 179.045 to permit the application for and issuance of search warrants by electronic transmission.

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2014 PRIVACY SUBCOMMITTEE MEETING MINUTES (8/29/14)—page 2

He reported that the Board did not endorse the first three proposals. With regards to the news shield privilege, the representative from the Nevada Press Association was there and indicated that 90% of his people are already covered and he was reticent to opening up the statute to try to cover the other 10%.

With regard to all three of the proposals not endorsed by the Board, the biggest concern was whether these proposals were outside the Board's statutory scope. The fourth item, they believed, did fall within their scope and they did endorse it. They will support amending the search warrant statute provided there are appropriate protections and precautions. The proposal has been included in a bill draft request in the Attorney General's legislative package that was submitted to the legislature.

Given the concerns that the other proposals were outside the statutory authority of the Board, Mr. Kandt suggested that, because the work of this Subcommittee is so important, perhaps it should be created as a stand-alone advisory board to look at all issues regarding digital and technological privacy. Mr. Kandt stated he had spoken to Assemblyman David Bobzien, and they had discussed the idea of having the legislature create a separate advisory board to look at technological and digital privacy. Assemblyman Bobzien was very receptive to the idea and said he would be willing to put in a bill draft request to create an advisory board. Mr. Kandt stated that digital privacy is the major civil rights issue moving forward and it would be appropriate to have an advisory commission to study issues and make recommendations to the legislature.

Mr. Berghel stated that the original proposal he had made to the Attorney General two years ago was for a board to make recommendations to the Attorney General and somehow it got changed so that the Subcommittee reported to the Board.

In regards to the first three proposals, Mr. Berghel stated that the Board never took action on them; rather, the Attorney General as chair tabled them. He clarified that it was Senator Ford—not the entire Board—who stated his concern that the privacy resolutions fell outside the Board's statutory authority. Otherwise he agreed with Mr. Kandt's assessment.

Mr. Elste thought the results of the Board meeting were disappointing. He was concerned that the Subcommittee has spent the better part of a year on the proposals and had pulled together a group with expertise in the field who are able to give good counsel. With three of the proposals tabled, it concerns him that the group may feel that their efforts are not appreciated and that their time is better spent elsewhere. It is important for Nevada to have a body whose responsibility is to look at privacy issues. He agrees that this is the civil rights issue of our age. The issues are complicated and it takes people who are focused on privacy issues in the digital age to unravel them. He stated that perhaps the question is about the future of the group and expressed hope that it can find a better structure or attachment point so it can advance its agenda and continue with its mandate to examine privacy issues.

Mr. Victor agreed that this Board needs to exist separately, and that the issue is an important. Nevada needs to be on the cutting edge for the sake of the public, businesses and technology in Nevada.

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2014 PRIVACY SUBCOMMITTEE MEETING MINUTES (8/29/14)—page 3

Mr. Kandt added that Mr. Berghel is correct in his clarification of Mr. Kandt's summary of the meeting. It's not that the entire Board was reticent to take action, but Senator Ford expressed the greatest concern about the Board acting outside its statutory authority. The Board was created in 1999 and the current implications of digital privacy and developments in technology were not yet envisioned.

Mr. Elste observed that under NRS Chapter 205A setting forth the Board's duties, duty #5 is to "Evaluate and recommend changes to existing civil and criminal laws relating to technological crimes in response to current and projected changes in technology and law enforcement techniques." He argued that under that part of the statute, the Board is not acting outside of the bounds of its statutory authority.

Mr. Kandt stated that as the Board's Executive Director/General Counsel and by extension, the Subcommittee's General Counsel, he had never voiced any concern regarding the topics the Subcommittee considered and the recommendations they made because he also interpreted the statutory scope in the broadest way possible. But there were Board members with that concern and that is why he wanted to look at creating a separate advisory board dedicated just to the issue of technological and digital privacy. He suspected that there will be many legislators in addition to Assemblyman Bobzien who will be interested in it.

Mr. Victor added that in the last few months the Nevada Supreme Court has adopted new rules of civil procedure related to electronic information. They are using standards from the Sedona Conference which is a standards body that has created specific guidelines regarding information governance and privacy. He noted that this Subcommittee is not swimming up against the stream. It is the direction things are going and the Nevada Supreme Court's action has acknowledged that.

Mr. Bates stated that things are moving fast, technology outpaces the law. There is an advantage to having people at this stage anticipate tech privacy issues and advise others.

Mr. Berghel asked Mr. Kandt about the mechanics of how to formalize the BDR process to create the Technical Privacy Subcommittee into a statutorily defined advisory board.

Mr. Kandt stated that he thought there were three things that would have to be flushed out in a bill:

- 1) Who sits on the advisory board;
- 2) How to define the scope of what the advisory board can study and make recommendations on; and
- 3) How to pay for the advisory board.

He advised the Subcommittee to send him any thoughts on the first two parts and he would share them with Assemblyman Bobzien. He has already given Mr. Bobzien a broad outline but did not address advisory board membership. Legislative attorneys will actually draft the bill.

The Subcommittee discussed alternative avenues for creating a stand-alone advisory board such as finding an existing public body more properly aligned with the work of the Subcommittee or creation of a new advisory board by executive order of the Governor. Mr. Kandt stated that there is no prohibition on the Subcommittee members for exploring other

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2014 PRIVACY SUBCOMMITTEE MEETING MINUTES (8/29/14)—page 4

options, but to please let him know if anyone talked to a legislator other than Mr. Bobzien about it since Mr. Bobzien was already working on a BDR. It was noted that Mr. Bobzien's bill may be the best option since statutorily defined boards are more difficult to get rid of. Mr. Berghel stated that there are other legislators who are aware of, and supportive of, the work of the Subcommittee. It was suggested that the Subcommittee compile a list of interested legislators and share it with Assemblyman Bobzien so that he can rally support around it.

Mr. Kandt stated he was also monitoring BDRs to identify any potential bill that may be of interest to the Board or this Subcommittee.

Mr. Cobb asked if the recommendations of the Subcommittee were public information. Since both the Board and the Subcommittee are open meetings, any information presented is public.

5. Discussion and possible action on approval of May 30, 2014, meeting minutes.

Mr. Bates stated that he had sent Mr. Kandt some revisions to his remarks. Mr. Cobb made a motion to approve the minutes with his corrections. Mr. Bates seconded the motion. The minutes were unanimously approved.

6. Discussion with representatives of Nevada Institute for Autonomous Systems Unmanned Aircraft Systems (UAS) Program Management Office regarding Nevada UAS Test Site Privacy Policy (available at <http://www.nias-uas.com/content/nevada-uas-test-site-privacy-policy>).

Don Cunningham, the Business Operations Manager for Nevada Institute for Autonomous Systems Unmanned Aircraft Systems (UAS) Program Management Office, was in attendance. Mr. Cunningham was one of the original proponents for a UAS test site and was part of the team who wrote the response to the FAA's request for comment in the competition for Nevada to be designated as a test site. Upon designation, Mr. Cunningham went to work as the Business Operations Manager. He is also a test coordinator and speaks on behalf of the program to various interested parties.

Mr. Berghel stated that he had attended the first few UAS committee meetings when Ms. Laxalt chaired the committee. He faced resistance when he suggested that they take the time to develop a privacy policy so that they could direct the development if it were funded. Since he had never seen a clearly articulated privacy policy, he asked Mr. Kandt to arrange for Mr. Cunningham's appearance to talk about it.

Mr. Cunningham explained that he wrote the privacy policy and that there are several people in his office that handle interface with the privacy issue, but his office does not have a Chief Privacy Officer. He directed committee members to the website where the public can view the privacy policy (<http://www.nias-uas.com/content/nevada-uas-test-site-privacy-policy>). Copies were provided for the Subcommittee members.

Mr. Cunningham stated that the Test Site wants to get out in front, and try to solve some of the issues with privacy. He went over the highlights of the privacy policy. He said that 90% of the UAS missions will have no issues with privacy since they will be for research and development purposes carried out in areas with very little population. Currently, there are no projects

REFERENCES

Primary Sources

1969 vol. 1 V (1969) 55th Legislature

1975 vol. 12 (1975) 58th Legislature

Coulter, S. (1975, March 27). Written statement submitted at hearings of Nevada

Assembly Judiciary Committee: Review of proposed Assembly Bill 381.

Einstoss, R. (1975, March 27). Written statement submitted at hearings of Nevada

Assembly Judiciary Committee: Review of proposed Assembly Bill 381.

Lerude, W. (1975, March 27). Written statement submitted at hearings of Nevada

Assembly Judiciary Committee: Review of proposed Assembly Bill 381.

Nevada Assembly Judiciary Committee. (1969, March 31). Meeting of the Nevada

Assembly Judiciary Committee: Review of proposed Senate Bill 299.

Nevada Assembly Judiciary Committee. (1975, March 27). Meeting of the Nevada

Assembly Judiciary Committee: Review of proposed Assembly Bill 381.

Nevada Attorney General's Technological Crime Advisory Board, Technical Privacy

Subcommittee. (2014, April 17). Meeting of the Technical Privacy Subcommittee:

Review of proposed revisions to Nevada Revised Statute 49.275. Retrieved from

<http://ag.nv.gov/uploadedFiles/agnv.gov/Content/About/Administration/>

2014-04-17_Draft_Minutes.pdf

Nevada Attorney General's Technological Crime Advisory Board, Technical Privacy Subcommittee. (2014, May 30). Meeting of the Technical Privacy Subcommittee: Review of proposed revisions to Nevada Revised Statute 49.275. Retrieved from http://ag.nv.gov/uploadedFiles/agnv.gov/Content/About/Administration/2014-05-30_Approved_Tech_Privacy_Subcommittee_Minutes.pdf

Nevada Attorney General's Technological Crime Advisory Board. (2014, June 5). Meeting of the Technological Crime Advisory Board: Review of proposed revisions to Nevada Revised Statute 49.275. Retrieved from http://ag.nv.gov/uploadedFiles/agnv.gov/Content/About/Administration/014-06-05_Draft_Tech_Crime_Advisory_Board_Minutes.pdf

Nevada Attorney General's Technological Crime Advisory Board, Technical Privacy Subcommittee. (2014, August 29). Meeting of the Technical Privacy Subcommittee: Review of proposed revisions to Nevada Revised Statute 49.275. Retrieved from http://ag.nv.gov/uploadedFiles/agnv.gov/Content/About/Administration/2014-08-29_Draft_Minutes.pdf

Nev. Rev. Stat. Ann. § 49.275

Nevada Senate Judiciary Committee. (1969, March 4). Meeting of the Nevada Senate Judiciary Committee: Review of proposed Senate Bill 299.

Nevada Senate Judiciary Committee. (1969, March 7). Meeting of the Nevada Senate Judiciary Committee: Review of proposed Senate Bill 299.

Nevada Senate Judiciary Committee. (1975, May 1). Meeting of the Nevada Senate Judiciary Committee: Review of proposed Assembly Bill 381.

New Media's Privilege of Nondisclosure (1975). Nevada Assembly Bill 381. *Assembly History, Fifty-Eighth Session*, p. 124.

Oliva, M. (1975, March 27). Written statement submitted at hearings of Nevada Assembly Judiciary Committee: Review of proposed Assembly Bill 381.

Secondary Sources (Books and journal articles)

Abramowicz, D. (2008). Calculating the public interest in protecting journalists' confidential sources. *Columbia Law Review*, 108(8), 1949-1990.

Bates, S. (2010). Garland v. Torre and the birth of reporter's privilege. *Communication Law and Policy*, 15(2), 91-128.

Baum, L. E. (1959) Symposium—Evidentiary privileges of non disclosure: Attorney-client privilege. *Connecticut Bar Journal*, 33(2), 170-182.

Beatman, L. E. P. (1959) Symposium—Evidentiary privileges of non disclosure: Accountant-client privilege. *Connecticut Bar Journal*, 33(2), 220-223.

Berger, L. L. (2003). Shielding the unmedia: Using the process of journalism to protect the journalist's privilege in an infinite universe of publication. *Houston Law Review*, (39)5, 1371-1416.

Docter, S. (2010). Blogging and journalism: Extending shield law protection to new media forms. *Journal of Broadcasting & Electronic Media*, 54(4), 588-602.

Durity, L. (2006). Shielding journalist-"bloggers": The need to protect newsgathering despite the distribution medium. *Duke Law and Technology Review*, 2006, 11-39.

- Easton, E. B. (2009) A house divided: Earl Caldwell, The New York Times, and the quest for a testimonial privilege. *Utah Law Review*, 2009(4), 1293-1334.
- Fargo, A. (2003). Evidence mixed on erosion of journalists' privilege. *Newspaper Research Journal*, 24(2), 50-62.
- Fargo, A. (2010). What they meant to say: The courts try to explain *Branzburg v. Hayes*. *Journalism & Communication Monographs*, 12(64), 65-137.
- Greene, B. D. (1959) Symposium—Evidentiary privileges of non disclosure: Husband-wife privilege. *Connecticut Bar Journal*, 33(2), 182-190.
- Hampton, C. (2011) Confirmation of a Catch-22: Glik v. Cunniffe and the paradox of citizen recording. *Florida Law Review*, 63(6), 1549-1559.
- Lee, W. E. (2006) The priestly class: Reflections on a journalist's privilege. *Cardozo Arts & Entertainment Law Journal*, 23(3), 635-686.
- Martin, J. A. & Fargo, A. L. (2013). Rebooting shield laws: Updating journalist's privilege to reflect the realities of digital newsgathering. *University of Florida Journal of Law and Public Policy*, 24, 47-94.
- Pieroni, C. L. (2008). Staying out of jail . . . sometimes: Maintaining a free press through journalist shield laws requires changes not only at the federal level, but also among the states. *University of Louisville Law Review*, 47(4), 803-824.
- Pracene, U. C. (2005). Journalists, shield laws and the First Amendment: Is the fourth estate under attack? Novinka Books: New York. 104.
- Robben, J. (2012). Poster child—How Oregon's blogging defamation case attracted national attention. *Oregon State Bar Bulletin*, 72(6), 21-32.

- Semeta, R. R. (1960). Journalist's testimonial privilege. *Cleveland-Marshall Law Review*, 9(2), 311-323.
- Sherwood, M. (1970). The newsman's privilege: Government investigations, criminal prosecutions and private litigation. *California Law Review*, 58(5), 1198-1250.
- Siegel, L. (2006). Trampling on the fourth estate: The need for a federal reporter shield law poring absolute protection against compelled disclosure of news sources and information. *Ohio State Law Journal*, 67(2), 469-524.
- Smith, D. (2013). A theory of shield laws: Journalists, their sources, and popular constitutionalism. LFB Scholarly Publishing LLC. El Paso. 297.
- Ugland, E. & Henderson, J. (2007). Who is a journalist and why does it matter? Disentangling the legal and ethical arguments. *Journal of Mass Media Ethics*, 22(4), 241-261.
- Van Gerpen, M. (1979). Privileged communication and the press: The citizen's right to know versus the law's right to confidential news source evidence. Westport, Conn.: Greenwood Press. 239.
- Whalen. C. W. (1973). Your right to know. Random House. New York. 207.

Court Cases/Government Publications

Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court, 129 Nev. Adv. Op. No. 93 (2013).

Blackmer v. United States, 284 U.S. 421 (1932)

Blair v. United States, 250 U.S. 273 (1919)

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

Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972).

Cohen v. Cowles Media Co., 501 U.S. 663 (1991)

Garland v. Torre, 259 F. 2d 545 (2d Cir. 1958).

In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2005).

In re Grunow, 84 NJ.L. 235, 236, 85 A. 1011, 1012 (1913).

Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911).

Silkwood v. Kerr-McGee Corp., 563 F. 2d 433 (10th Cir. 1977).

Shoen v. Shoen, 5 F. 3d 1289 (9th Cir. 1993).

State v. Buchanan, 436 P. 2d 729, 732 (Or. 1968).

The Council of State Governments. (1973). Shield laws: A report on freedom of the press, protection of news sources, and the obligation to testify.

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

Online sources

Allen, L. E. (2006, May 9). Eight alumni are saluted on wall of honor. Tahoe Daily Tribune. Retrieved from <http://www.tahodailytribune.com/article/20060511/COMMUNITY/105110029>

Belt, G. T. (2010). Jailed & subpoenaed journalists—A historical timeline. First Amendment Center. Retrieved from <http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/05/Jailed-subpoenaed-timeline1.pdf>

Friess, S. (2011, August 18). Massive layoffs strike the R-J today. Retrieved from <http://thetrippedcast.blogspot.com/2011/08/massive-layoffs-strike-r-j-today.html>

- Garcia, G. X. (2002). The Vanessa Leggett saga. AJR online. Retrieved from <http://ajrarchive.org/article.asp?id=2461>
- Hinueber, M. (2002-2010). Reporter's privilege compendium: Nevada. *The Reporters Committee for Freedom of the Press*. Accessed from <http://www.rcfp.org/rcfp/orders/docs/privilege/NV.pdf>.
- Las Vegas Review-Journal*. (1987, April 3). Longtime legislator 'Snowy' Monroe dies. Retrieved from <http://files.usgwarchives.net/nv/elko/obits/monroe.txt>
- Mitchell, T. (2014, January 16). Local newspaper promises more while laying off experienced editors. Retrieved from <http://4thst8.wordpress.com/2014/01/16/local-newspaper-promises-more-while-laying-off-experienced-editors/>
- Mitchell, A. (2014, March 26). State of the news media 2014. Pew Research Journalism Project. Retrieved from <http://www.journalism.org/2014/03/26/state-of-the-news-media-2014-overview/>
- Moody's Investors Service. (2014, September 2014). Digital revenue provides only partial relief for beleaguered print media. Retrieved from <https://drive.google.com/file/d/0B8WLqx5US2mYbkVzQmFXaFBTc3N5U0RtVktyeEhhMF96cUg4/edit?pli=1>
- Northwestern University Archives. Guide to the John Henry Wigmore (1863-1943) papers. Retrieved from <http://findingaids.library.northwestern.edu/catalog/inu-ead-nua-archon-1119#bio>

Society of Professional Journalists. (2014). SPJ code of ethics. Retrieved from <http://www.spj.org/ethicscode.asp>

Stutz, H. (2011, September 15). Layoffs hit Las Vegas Sun newsroom; publisher points finger at agreement with Review-Journal. *Las Vegas Review-Journal*. Retrieved from <http://www.reviewjournal.com/business/casinos-gaming/layoffs-hit-las-vegas-sun-newsroom-publisher-points-finger-agreement-review>

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