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ACCREDITATION FOR “PROBONO PUBLICO”
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ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2022.872
<http://lawreview.law.pitt.edu>



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BREACH OF TRUST: PROPOSING A BUSINESS ACCREDITATION FOR “PROBONO PUBLICO”¹ MEDIA

Angela Mauroni*

INTRODUCTION

The press² is the watchdog of democracy, and many believe it is an essential function of a healthy society.³ However, the United States is currently experiencing historic levels of mistrust in the media⁴ and emerging issues relating to the press as technology develops.⁵ This Note aims to address the country’s current struggles between the intersections of the declining power and trust of the press, the appearance of news deserts,⁶ access to and identification of legitimate sources,⁷ and the decades-long failure to create a national shield law.⁸ To better support the press,

¹ A characterization made in *In re Taylor*, 193 A.2d 181, 185 (Pa. 1963).

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² For purposes of this note, “press,” “news,” and “media” will be largely used interchangeably. The accreditation system I propose is available for anyone who can legally be considered a journalist and for any media organization that meets my proposed parameters for accreditation. For a deeper discussion of who is legally considered a journalist, see Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411 (1999).

³ See, e.g., Linda A. Klein, *A Free Press is Necessary for a Strong Democracy*, ABA J., May 2017.

⁴ See Jeffrey Gottfried, Mason Walker & Amy Mitchell, *Americans See Skepticism of News Media as Healthy, Say Public Trust in the Institution Can Improve*, PEW RSCH. CTR. (Aug. 31, 2020), <https://www.pewresearch.org/journalism/2020/08/31/americans-see-skepticism-of-news-media-as-healthy-say-public-trust-in-the-institution-can-improve/>.

⁵ See *infra* Section II.C.

⁶ Erin C. Carroll, *Platforms and the Fall of the Fourth Estate: Looking Beyond the First Amendment to Protect Watchdog Journalism*, 79 MD. L. REV. 529, 531 (2020).

⁷ See *infra* Part II.

⁸ See *infra* Section I.A.

this Note proposes the creation of a business accreditation for media that meets certain criteria illustrating that it is a trustworthy news source.⁹ Media sources that are awarded this proposed designation would then be afforded the protection of a national shield law.¹⁰ If entities have an objective record of being trustworthy, they receive the accreditation and benefit of a national shield law that facilitates investigative reporting.

I. THE NEED TO SUPPORT THE PRESS AND INCREASE THE PUBLIC'S TRUST IN IT

It must first be understood that the public's opinion of the press matters, as it influences the efficacy of watchdog journalism and the likelihood that the press obtains legal protections such as shield laws.

A. *A Basic Background of Modern Shield Laws Throughout States and Courts*

The idea of a national shield law is not a new one.¹¹ There have been efforts for nearly fifty years to either have one recognized as a part of the First Amendment or to have one passed statutorily, giving journalists some kind of reporters' privilege and protection against forced disclosure.¹² The extent of protections from shield laws varies. Some states offer absolute immunity for journalists seeking to protect their confidential sources, which protects them from being compelled to disclose their sources with the threat of criminal charges.¹³ This often includes protection before grand juries or to any public entities.¹⁴ The protections include covering the identity of confidential sources, the sources themselves, and/or any unpublished notes or materials that a journalist possesses.¹⁵ Occasionally, shield laws only apply to "full-

⁹ See *infra* Part II.

¹⁰ See *infra* Section II.C.

¹¹ *The History of Shield Legislation*, NEWS MEDIA & L. (REP. COMM. FOR FREEDOM OF THE PRESS, D.C.), Winter 2007, at 8, <https://www.rcfp.org/journals/the-news-media-and-the-law-winter-2007/history-shield-legislation/#:~:text=September%201972%3A%20In%20the%20wake,introduced%20in%20the%20next%20year> [<https://perma.cc/6GJH-R7FF>].

¹² *Id.*

¹³ Jonathan Peters, *Shield Laws and Journalist's Privilege: The Basics Every Reporter Should Know*, COLUM. JOURNALISM REV. (Aug. 22, 2016), https://www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php [<https://perma.cc/P2W4-Q9TQ>].

¹⁴ *Id.*

¹⁵ *Id.*

time employees of professional news outlets,” while others extend to filmmakers, students, and more.¹⁶ Judges who evaluate reporters’ privilege under a state constitution, statute, or common law often construe exceptions to the protections or apply a balancing test to weigh whether the disclosure is more valuable than protecting the source.¹⁷ For instance, prosecutors in places with reporters’ privilege can sometimes still compel disclosure in cases where national security may be threatened.¹⁸

Currently, journalists are subject to search warrants like any other citizen, and subpoenas can still be issued to obtain their work products, though some federal protections are available.¹⁹ Legislative efforts to create a national shield law have varied in terms of protecting reporters from compelled testimony,²⁰ search warrants, subpoenas,²¹ and seizure of work product—and in what extent these protections apply.²² While journalists are generally always subject to search warrants and subpoenas, a national shield law may give them the right to limit the disclosure of their work product when subpoenaed and curtail the breadth of search warrants. For instance, a national shield law could expand the Privacy Protection Act, which “limit[s] the authority of law enforcement officials to search for, or seize, a journalist’s documentary materials and/or work product.”²³ The Act also requires that officials “obtain a subpoena rather than a search warrant.”²⁴ The basis of a national shield law, however, is to create a kind of privilege that allows journalists to better protect sensitive sources.²⁵ In modern society, the need for basic protection for journalists across the country is essential, particularly since the Supreme Court is

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See H.R. 2015, 93d Cong. (1973).

²¹ See H.R. 13918, 95th Cong. (1978).

²² First Amendment Privacy Protection Act of 1979, S. 855, 96th Cong. (1979).

²³ *Id.*

²⁴ *Id.*

²⁵ See *id.* For instance, a shield law could expand the Privacy Protection Act. See *id.*

unlikely to change its mind and hold that there are protections built into the First Amendment.²⁶

B. *Public Perception of the Press*

While courts and legislatures have continued to debate shield laws, public perception of news media has continued to change, particularly as more and more people have begun using social media to access news.²⁷ People have grown increasingly skeptical of the accuracy of various sources, with over half of the respondents in one 2018 poll stating that “they have changed the way they use social media because of the issue of made-up news.”²⁸ In the same poll, fifty-seven percent of those respondents accessing news on social media stated that “they expect the news they see on these platforms to be largely inaccurate.”²⁹ Considering one in five adults often get their news on social media in 2018³⁰ and more than one-third said they prefer getting news online generally,³¹ the public is facing what is in many ways a new and growing problem with distinguishing between real news and misinformation.

C. *The State of the News Industry and Public Consumption of News*

As the news industry currently stands, local papers are at a distinct disadvantage.³² Most of the advertising revenue that once fueled the news industry now goes to Google and Facebook.³³ This has decimated the news industry, particularly local papers.³⁴ Between 2001 and 2016, “more than half of the news

²⁶ The Court has thus far made no indication of its intent to revisit *Branzburg v. Hayes*, 408 U.S. 665 (1972), the case in which it held that the First Amendment does not grant a reporters’ privilege. It has not heard any cases since revisiting the issue. For more discussion of this case, see *infra* Part III.

²⁷ A.W. Geiger, *Key Findings About the Online News Landscape in America*, PEW RSCH. CTR. (Sept. 11, 2019), <https://www.pewresearch.org/fact-tank/2019/09/11/key-findings-about-the-online-news-landscape-in-america/> [<https://perma.cc/6JRT-3CC9>].

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Carroll, *supra* note 6, at 549–50.

³³ *Id.* at 531, 549–50.

³⁴ *Id.* at 550–51.

industry jobs in the United States disappeared,” leading to what has been called “news deserts,” or areas with no local journalism.³⁵ These areas thus have no historic “watchdog” serving as a check on local government.³⁶ Furthermore, a study by the Knight Foundation found that:

Lack of exposure to or interest in local news has also consistently been linked to lower levels of local political participation. In the current study, those who follow local news “very closely” are more than twice as likely as those who do not follow local news closely at all to say they “always” or “nearly always” participate in local elections—75% versus 33%, respectively.³⁷

Thus, in addition to missing their government “watchdog,” news deserts have an immediate harm on the facilitation of a politically active society.

Those organizations that have survived during this period of decline have still been substantially weakened; “[n]ews organizations have scaled back lobbying and are less likely to sue to protect their right to gather information, protect sources, and publish.”³⁸

While struggling to adjust to the digital age and the vast decline in the number of journalists, the news media was faced with the challenge of dealing with former President Donald Trump. While Trump is certainly not the first U.S. president to weaponize distrust or even hatred of the press for political reasons,³⁹ his attacks have come when the press is at its weakest. As stated previously, the press does not have the financial resources it once did to protect its rights.⁴⁰ This provided the climate Trump needed to succeed in ways other politicians have not.⁴¹

³⁵ *Id.* at 531.

³⁶ See generally Carroll, *supra* note 6.

³⁷ GALLUP & KNIGHT FOUND., AMERICAN VIEWS 2020: TRUST, MEDIA AND DEMOCRACY 44 (2020), <https://knightfoundation.org/wp-content/uploads/2020/08/American-Views-2020-Trust-Media-and-Democracy.pdf> [https://perma.cc/K8GW-8QFL] [hereinafter 2020 TRUST SURVEY].

³⁸ Carroll, *supra* note 6, at 531.

³⁹ Nancy Benac, *Remember Nixon? There's History Behind Trump's Press Attacks*, AP NEWS (Feb. 17, 2017), <https://apnews.com/article/8b29195631f44033ad94d8b2b74048c0> [https://perma.cc/46D7-4D66].

⁴⁰ See Carroll, *supra* note 6.

⁴¹ The public's record-low levels of trust in mass media illustrate how Trump has succeeded where other politicians and presidents have not. See Megan Brenan, *Americans' Trust in Mass Media Edges Down to*

Trust in the mass media hit its lowest point in 2016—during Trump’s election year.⁴² That year, only thirty-two percent of Americans reported having either “a great deal” or a “fair amount” of trust in media sources such as newspapers, television, and radio to report the news “fully, accurately and fairly.”⁴³ By 2019, that number rose to forty-one percent.⁴⁴ Despite this showing some increased trust, a majority of Americans still distrust the press, even while seventy-three percent of Americans agree that the media’s watchdog role is valuable to the country.⁴⁵ Part of that is due to the doubt instilled in the public by Trump and his allies, who expressly called the media “the enemy of the people.”⁴⁶ The impact of his rhetoric is evidenced by the partisan divide in trust. Among those identifying as Democrats, sixty-nine percent had a great deal or fair amount of trust in the media, while only thirty-six percent of Independents and fifteen percent of Republicans had that kind of trust.⁴⁷

There is also a partisan divide with regard to the sources Americans trust.⁴⁸ For example, “Fox News is the only national news source with majority-level trust from Republicans while majorities of Democrats trust six national news sources.”⁴⁹ Furthermore, Republicans had a significantly higher likelihood to “perceive bias, inaccuracy and misinformation in newspapers, on television and on radio.”⁵⁰

Local news outlets are also competing with widely proliferated misinformation sites masquerading as local news.⁵¹ The public trusts local news sources more than

41%, GALLUP (Sept. 26, 2019), <https://news.gallup.com/poll/267047/americans-trust-mass-media-edges-down.aspx> [<https://perma.cc/L2QW-826W>].

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Mark Jurkowitz & Amy Mitchell, *Most Say Journalists Should Be Watchdogs, But Views of How Well They Fill This Role Vary By Party, Media Diet*, PEW RSCH. CTR. (Feb. 26, 2020), <https://www.journalism.org/2020/02/26/most-say-journalists-should-be-watchdogs-but-views-of-how-well-they-fill-this-role-vary-by-party-media-diet/> [<https://perma.cc/LSX7-CJGG>].

⁴⁶ Brennan, *supra* note 41.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Brendan Nyhan, *Americans Trust Local News. That Belief Is Being Exploited*, N.Y. TIMES (Oct. 31, 2019), <https://www.nytimes.com/2019/10/31/upshot/fake-local-news.html>.

national ones, and that trust is being utilized by misinformation sites.⁵² Republicans especially express skepticism of national media, and this leads to a greater reliance by Republicans on local media.⁵³ Because false sites are also more often portrayed as local sources, Republicans are left particularly susceptible to misinformation.⁵⁴

D. *The Proposed Solution*

In response to the public's trouble distinguishing between legitimate and fake news sources—as well as the regularly failed attempts to create a national shield law—this Note proposes that legislators consider creating a system of awarding “business accreditations” to reputable news sources.⁵⁵ The general premise of my proposed business accreditation is that a government agency would review applications for such business accreditation and award the distinction to those news sources that meet the following criteria: those that are majority news versus commentary/opinion, those that clearly label news versus opinion, those that have a reliable system for retractions and corrections, and those that have not been found liable for defamation in the last year. The accreditation would require yearly renewal.

The accreditation would allow individuals to view the source and understand the parameters to which the source conforms, thus verifying that it is generally considered “reliable” and real—not an outlet dedicated to misinformation. To ensure that the system remains reliable, there would have to be sanctions for organizations that falsely portray themselves as having this accreditation. The incentive for news outlets to seek this accreditation, besides adding to their own credibility, is that it would come with the protections of a national shield law.

If an organization has been vetted and recognized by objective standards to be a valid and reliable news outlet, it is reasonable to entrust them with the responsibility of using anonymous sources productively. This allows for the facilitation of investigative reporting and thus promotes a healthier, informed democracy.

There are several areas that would have to be navigated for such an accreditation to be successful: the grounds for accreditation, the individual who grants the accreditation, and the First Amendment.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See *infra* Part III for a more detailed description of the business accreditation proposal.

II. ESTABLISHING A SYSTEM OF ACCREDITATION TO SUPPORT NEWS MEDIA

The benefit of having a national accreditation for news sources is that it is awarded based on objective criteria, which could help individuals identify more trustworthy news sources.⁵⁶ It is also a simple benefit for those who already enjoy multiple news sources since, regardless of their political party, fifty-nine percent of Americans say they find it difficult to identify false information on social media.⁵⁷ And they have good reason to be concerned. False information travels faster than the truth on social media, and Twitter users “trafficked inaccurate stories more frequently than bots or computer-operated social media accounts” between 2006 and 2017.⁵⁸

As the press currently stands in the United States, news media has lost much of its advocating power—local news is in desperate need of support,⁵⁹ and the public cannot distinguish between legitimate and illegitimate sources.⁶⁰ Although Democrats tend to refer to multiple sources, Republicans trust in mass media are much lower.⁶¹ Offering a clear signal for readers that a local source is legitimate may help draw in more Americans to trust in local and national news. Furthermore, an accreditation system allows Americans to identify legitimate news sources with ease and better combat the fake sites that are rampant among local sources.⁶²

A. *What is Accreditation? Does It Violate the First Amendment?*

To accredit is “to give official authorization to or approval of [by] provid[ing] with credentials [or] recogniz[ing] or vouch[ing] for as conforming with a

⁵⁶ It should be noted that the idea of a national accreditation system is somewhat problematic because it places the burden on news sources to convince people that they are trustworthy when they are already practicing ethically. However, in light of failed efforts to create the national shield law and polarizing sentiment around trust in news media, this could be helpful.

⁵⁷ Laura Santhanam, *American Voters Worry They Can’t Spot Misleading Information, Poll Finds*, PBS (Jan. 21, 2020, 5:00 AM), <https://www.pbs.org/newshour/politics/social-media-disinformation-leads-election-security-concerns-poll-finds> [<https://perma.cc/96AV-9F7Y>].

⁵⁸ *Id.*

⁵⁹ Carroll, *supra* note 6.

⁶⁰ Santhanam, *supra* note 57.

⁶¹ See Brenan, *supra* note 41.

⁶² Nyhan, *supra* note 51.

standard.”⁶³ One of the most familiar forms of accreditation in the United States is for higher education institutions. The higher education criteria for accreditation is assessed by “accreditors,” or a team of individuals selected by accrediting agencies who conduct peer evaluations to assess whether or not the necessary criteria are met.⁶⁴ The accreditation for education is “[t]o ensure a basic level of quality, the practice of accreditation arose in the United States as a means of conducting nongovernmental, peer evaluation of educational institutions and programs.”⁶⁵ Accredited institutions qualify for federal student aid funds, but ultimately, “agencies have no legal control over educational institutions or programs.”⁶⁶

This is an analogous system to what I am proposing. Individuals are still able to create educational institutions without being accredited, though they do not qualify for the same federal benefits. Similarly, media can still operate without the proposed accreditation—they would just not enjoy the protections of the national shield law without it. Because no publication is being restrained with such a system, the First Amendment is not threatened. Instead, the system allows the press access to the long-sought-after legal protections and allows readers to more easily identify legitimate and trustworthy news sources.

B. Criteria for Achieving This Designation

1. The Predominant Publication of News Over Commentary and the Clear Distinction Between the Two

The accreditation system is meant to support traditional journalistic sources that provide the public with news rather than commentary. While opinion pieces have long been a staple of the press—and in fact, the public still finds opinion pieces and

⁶³ *Accredit*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/accredit> [https://perma.cc/B22B-YRM9].

⁶⁴ *Accreditation in the United States: History and Context of Accreditation in the United States*, U.S. DEP’T OF EDUC., https://www2.ed.gov/admins/finaid/accred/accreditation_pg2.html [https://perma.cc/7FU6-KN5H] (last modified Sept. 14, 2022) [hereinafter *Education Accreditation*].

⁶⁵ *Id.*

⁶⁶ *Id.*

commentary useful⁶⁷—the accreditation system is meant to bolster sources that focus on providing facts, analysis, and investigative stories over those engaging in debate.

This Note proposes that one of the criteria for the accreditation system is the publication of predominantly news rather than commentary and that each section be clearly labeled. News sources can gain credibility with readers if readers know that the source is publishing more news rather than commentary, as study participants have stated that they find it useful when journalists publish mostly facts and some analysis.⁶⁸ Currently, however, many readers struggle to distinguish between news and opinion.⁶⁹ According to a study by the American Press Institute, seventy-three percent of respondents find it “very or somewhat easy to distinguish news from commentary in their favorite news outlet.”⁷⁰ But this number drops substantially when Americans are not interacting with their favorite news source.⁷¹ “[F]or all other media types, only about half or less [of respondents] say they can fairly easily make that distinction.”⁷²

It is particularly challenging for respondents to interact with outlets on social media platforms or online-only sources, with only forty-three percent saying they can easily make the distinction between news and commentary.⁷³ This is the case even though twenty percent of adults often get their news on social media, and more than one-third prefer accessing news online generally.⁷⁴

If readers are accessing a source and believe that they are reading the news but are actually reading what is clearly weighted with a writer’s opinion, they cannot as easily then trust the source as providing unbiased reporting. Americans trust an

⁶⁷ *Americans and the News Media: What They Do—And Don’t—Understand About Each Other*, THE MEDIA INSIGHT PROJECT 6 (June 2018), <https://www.americanpressinstitute.org/wp-content/uploads/2018/06/Americans-and-the-News-Media-2018.pdf> [<https://perma.cc/2GG9-7UL7>].

⁶⁸ *Id.* at 2.

⁶⁹ *Id.*

⁷⁰ *Id.* at 7.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 8.

⁷⁴ Geiger, *supra* note 27.

objective press to be successful,⁷⁵ and if what they are seeing is a clearly biased article, their trust may erode. In fact, a poll by the Knight Foundation and Gallup found that sixty-four percent of respondents “rate a news organization clearly distinguishing news stories from commentary, analysis or advertiser-paid content as being very important to their trust in it.”⁷⁶

The ultimate goal of the accreditation system is to help garner the public’s trust in the press and support the press legally and economically. Thus, creating an accreditation system that allows readers to know that most of the source’s publications are news and not commentary—and to be able to easily distinguish between the two—promotes this goal by increasing the public’s ability to identify sources they believe are providing useful, factual content. As such, to receive the accreditation, I propose requiring that predominantly news be published and for clear labeling of opinion pieces when more commentary by the author is included.

2. A System for Verifying or Corroborating Information

A major goal of the accreditation system is to allow the public to feel confident in trusting the press. I have already discussed the public’s desire for an unbiased press; the next objective of accreditation is for an accurate press. People find prevalent issues with misinformation to be an even more pressing problem than bias in the news, though they disagree on what precisely “fake news”⁷⁷ is.⁷⁸

I ascribe to the ideology expressed in the National Public Radio (“NPR”) Ethics Handbook:

⁷⁵ 2020 TRUST SURVEY, *supra* note 37, at 1 (“Many Americans feel the media’s critical roles of informing and holding those in power accountable are compromised by increasing bias.”).

⁷⁶ GALLUP & KNIGHT FOUND., INDICATORS OF NEWS MEDIA TRUST 13 (Sept. 11, 2018), https://kf-site-production.s3.amazonaws.com/media_elements/files/000/000/216/original/KnightFoundation_Panel4_Trust_Indicators_FINAL.pdf [hereinafter TRUST INDICATORS].

⁷⁷ For an argument on why the phrase “fake news” should be abandoned or avoided, see Claire Wardle & Hossein Derakhshan, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making*, COUNCIL OF EUR. (Sept. 27, 2017), <https://rm.coe.int/information-disorder-toward-an-interdisciplinary-framework-for-research/168076277c> [<https://perma.cc/3BYV-27AZ>].

⁷⁸ GALLUP & KNIGHT FOUND., AMERICAN VIEWS: TRUST, MEDIA AND DEMOCRACY 27 (Jan. 16, 2018), https://knightfoundation.org/wp-content/uploads/2018/01/KnightFoundation_AmericansViews_Client_Report_010917_Final_Updated-2.pdf [<https://perma.cc/NP8N-U7XJ>] (“Seventy-three percent of Americans say the spread of inaccurate information on the internet is a major problem with news coverage today; this percentage is higher than for any other potential type of news bias.”).

Accuracy is at the core of what we do. We do our best to ensure that everything we report faithfully depicts reality—from the tiniest detail to the big-picture context that helps put the news into perspective. Facts are incredibly slippery. Studies of press accuracy routinely find mistakes—sometimes many of them—in news media reports. This means that when journalists—even the best ones—think they’re getting it right, they’re all too often wrong. Errors are inevitable. But our best defense against them is constant vigilance. This is why we systematically and rigorously review our facts before we make our reporting public.⁷⁹

While it is inevitable that errors will occur—a fact that people accept⁸⁰—a rigorous system of fact-checking and corroborating helps prevent the biggest and most damaging errors from slipping through. Many prominent sources already have guidelines for their journalists to ensure accuracy. NPR, for instance, describes guidelines such as “edit[ing] like a prosecutor” and protecting against errors that come as a result of subjective interpretation.⁸¹ *The Washington Post* describes “a multilevel structure for the review and editing of stories that may include fact-checking,”⁸² and *The New York Times* has released “Guidelines on Integrity.”⁸³

Recognizing that some errors will occur and is acceptable so long as they do not actually damage another individual are reflected in defamation law. To satisfy a prima facie defamation claim, a plaintiff must show “1) a false statement purporting to be fact; 2) publication or communication of that statement to a third person; 3) fault amounting to at least negligence; and 4) damages, or some harm caused to the person or entity who is the subject of the statement.”⁸⁴ In *New York Times, Co. v. Sullivan*, for instance, the defendant New York Times had published an advertisement with numerous inaccuracies about a public figure.⁸⁵ The Supreme

⁷⁹ *NPR Ethics Handbook*, NPR, <https://www.npr.org/templates/story/story.php?storyId=688139552> [<https://perma.cc/B2ME-UFWK>].

⁸⁰ CRAIG SILVERMAN, REGRET THE ERROR: HOW MEDIA MISTAKES POLLUTE THE PRESS AND IMPERIL FREE SPEECH 81 (2009).

⁸¹ *NPR Ethics Handbook*, *supra* note 79.

⁸² *Policies and Standards*, WASH. POST, <https://www.washingtonpost.com/policies-and-standards/> [<https://perma.cc/X36Q-EMK4>] [hereinafter *Washington Post Practices*].

⁸³ *Guidelines on Integrity*, N.Y. TIMES, <https://www.nytimes.com/editorial-standards/guidelines-on-integrity.html> [<https://perma.cc/R3QG-N5TC>] (last updated Sept. 25, 2008).

⁸⁴ *Defamation*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/defamation> [<https://perma.cc/FGZ9-5SP9>].

⁸⁵ *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

Court held in favor of the New York Times, however, stating that the correct standard for stories about public figures is that “any one claiming to be defamed by the communication must show actual malice or go remediless.”⁸⁶ Actual malice is defined as “with knowledge that it was false or with reckless disregard of whether it was false or not.”⁸⁷ In other words, the Supreme Court held that mistakes relating to a public figure are permissible by media as long as they are not defamatory and/or made with actual malice.⁸⁸ While actual malice is not required in many jurisdictions for private figures, private figure plaintiffs generally must prove that the defamatory action caused actual injury to their reputation to succeed in suing a news organization.⁸⁹

Media scholar Craig Silverman also reflects the idea that some mistakes can and will occur and that having a system of error-prevention is essential in establishing a trustworthy press:

An acceptable level of error would be one that does not erode trust and credibility in the news outlet without hamstringing journalists who want to engage in challenging reporting that may result in errors. To achieve this acceptable level, error prevention must be introduced, and all resulting errors must be corrected.⁹⁰

In a Knight Foundation/Gallup poll, eighty-nine percent of respondents stated that the most important attribute that can “engender trust in news organizations” is a “commitment to accuracy.”⁹¹ Avoiding the major mistakes that would cause someone actual damage and would constitute a reckless disregard for the truth is achieved with a verification system. Those who are recognized as actively seeking to avoid damaging others and conduct truthful reporting by using a verification system are those that should receive this proposed accreditation.

⁸⁶ *Id.* at 281.

⁸⁷ *Id.* at 280.

⁸⁸ *Id.*

⁸⁹ *E.g.*, *Joseph v. Scranton Times L.P.*, 129 A.3d 404, 433 (Pa. 2015).

⁹⁰ SILVERMAN, *supra* note 80.

⁹¹ TRUST INDICATORS, *supra* note 76, at 13.

3. A System for Reviewing Alleged Inaccuracies and Addressing Corrections

Since we have accepted this basic idea that errors are inevitably going to occur, it is critical that agencies receiving the accreditation take steps to remedy these errors, even if they would not rise to the level of actually damaging another person or organization. This, too, is commonplace for news organizations.⁹² To use NPR as an example again, they have a policy of correcting “significant errors in broadcast and online reports,” and they have a form publicly available for readers to submit should they believe they see an error.⁹³ *The New York Times* states that, “[w]hether an error occurs in a print article, a digital graphic, a video, a tweet or a news alert, readers should expect us to correct it. There is no five-second rule. It does not matter if it was online for seconds or minutes or hours.”⁹⁴ They, too, have an email and phone number publicly available for “complaints about errors that warrant correction.”⁹⁵ *The Washington Post* has a system for both corrections and clarifications.⁹⁶

Corrections are a necessary part of a trustworthy press.⁹⁷ As Silverman stated, an acceptable level of error is only achieved when a source engages in both error prevention and correction.⁹⁸ Charles D. Whitney, another press scholar, reiterated the importance of corrections in establishing a trustworthy press: “Nothing is more crucial to a news organization than its reputation for accuracy, and nothing is more crucial to establishing this reputation than the honest, timely, and public admission of errors.”⁹⁹

In response to a Knight Foundation/Gallup poll, eighty-six percent of the sampled public said that a news organization’s practice of “quickly and openly

⁹² *Corrections*, ONLINE NEWS ASS’N ETHICS, <https://ethics.journalists.org/topics/corrections/> [<https://perma.cc/89QX-3WEP>].

⁹³ *NPR Corrections*, NPR, <https://www.npr.org/corrections/> [<https://perma.cc/89QX-3WEP>].

⁹⁴ Rogene Jacquette, *We Stand Corrected: How the Times Handles Errors*, N.Y. TIMES (June 7, 2018), <https://www.nytimes.com/2018/06/07/reader-center/corrections-how-the-times-handles-errors.html>.

⁹⁵ *Corrections*, N.Y. TIMES (May 29, 2017), <https://www.nytimes.com/section/corrections> (containing a generic message encouraging reports about errors).

⁹⁶ *Washington Post Practices*, *supra* note 82.

⁹⁷ SILVERMAN, *supra* note 80.

⁹⁸ *Id.*

⁹⁹ *Id.*

correcting mistakes” was among the most important attributes the source could have, second only to a commitment to accuracy as described in the previous section.¹⁰⁰

Because this commonplace practice of running corrections is imperative to providing the public with sources they trust, and because accuracy must be the greatest tenant for an organization that is being provided extra legal protections to keep sensitive sources secret, I propose that having a system for corrections be a criterion for accreditation.

4. Applying for Accreditation from an Independent Government Agency

The final criterion this Note proposes for an organization to receive accreditation is that it applies for said accreditation from an independent government agency. As discussed previously, this accreditation would be analogous to that received by higher education institutions.

This agency would operate somewhat similarly to the National Science Foundation (“NSF”). The NSF operates to “support basic research and people to create knowledge that transforms the future.”¹⁰¹ It accepts applications for funding and selects projects that “promote the progress of science,” “advance the national health, prosperity, and welfare,” and “secure the national defense.”¹⁰² Most importantly, the NSF is an independent agency rather than an executive one.¹⁰³ Independent agencies are created to “supervise an area that is too complex and dynamic to be regulated by the passage of a statute,” and they are “not subject to direct control by the president or the executive branch, unlike executive agencies.”¹⁰⁴ Independent agencies are created through a congressional statute that controls exactly what the agencies’ goals are and the extent of rulemaking authority given to the agency.¹⁰⁵ Such agencies are also “subject to statutory bipartisan requirements,

¹⁰⁰ TRUST INDICATORS, *supra* note 76, at 13.

¹⁰¹ *About the National Science Foundation*, NAT’L SCI. FOUND., <https://www.nsf.gov/about/> [<https://perma.cc/7GK6-495P>].

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Independent Agencies*, JUSTIA, <https://www.justia.com/administrative-law/independent-agencies/#:~:text=The%20leaders%20of%20independent%20agencies,a%20specific%20area%20or%20industry> [<https://perma.cc/5ZTU-QQSS>].

¹⁰⁵ *Id.*

which means the president cannot fill vacancies only with members of his political party.”¹⁰⁶

In essence, the agency would function as a bipartisan, independent actor that evaluates sources for objective criteria, and if the source meets this criterion, it can receive the accreditation and protection of a national shield law for five years. At the end of this period, the accreditation would then be renewed. Similar to certain education accreditation programs, the organization would be required to provide “annual reports for review to assure sustained compliance with all accreditation standards.”¹⁰⁷ Having a longer accreditation term helps to prevent the agency or organization from constant filing and reviewing, but the annual reports allow for an assurance of compliance.

The fact that the organizations would be reviewed by a government agency may also raise concerns about governmental influence over the press. I think it is helpful to note again that this accreditation serves only to provide additional legal protections to organizations that receive the optional accreditation, and it does not prevent any other organizations from operating and publishing as a news media source.

III. NEWS MEDIA THAT HAS BEEN GRANTED THIS ACCREDITATION HAS THE PROTECTION OF A NATIONAL SHIELD LAW

Congress and the federal courts have debated implementing a national shield law and a broader reporter’s privilege in earnest since at least the 1970s.¹⁰⁸ Courts first had to determine if some kind of reporter’s privilege was already guaranteed in some way under the First Amendment, and in *Branzburg v. Hayes*, the Supreme Court decided there was not.¹⁰⁹ The Supreme Court had to determine whether journalists were required to appear and testify before grand juries or whether such a requirement was a violation of the First Amendment. Five judges joined in the judgment, one concurred, and three dissented, making the decision a divided one.¹¹⁰

¹⁰⁶ *Id.*

¹⁰⁷ *Process Overview: Accreditation or Renewal of Accreditation*, N.Y. STATE EDUC. DEP’T, <http://www.nysed.gov/college-university-evaluation/process-overview-accreditation-or-renewal-accreditation> [https://perma.cc/U4VQ-JRQK].

¹⁰⁸ *See Branzburg v. Hayes*, 408 U.S. 665 (1972).

¹⁰⁹ *Id.* at 667.

¹¹⁰ *Id.* at 665.

A. *Branzburg v. Hayes: There Is No Reporters' Privilege from the First Amendment*

This 1972 case is a consolidation of four cases, two against Branzburg for his refusal to disclose the identity of sources about whom he published stories.¹¹¹ The first was a story on residents in Jefferson County, Kentucky, who possessed marijuana and synthesized it into hashish.¹¹² Branzburg had promised not to reveal the identity of the two residents, so when he was subpoenaed by the County grand jury, he refused to identify them.¹¹³ Branzburg claimed that he was protected under the Kentucky reporters' privilege statute, the First Amendment, and/or the Kentucky Constitution.¹¹⁴ When the Kentucky Court of Appeals issued a writ of mandamus on this case, it held that the plaintiff did not have First Amendment protections because he had tacitly abandoned the argument by arguing that the Kentucky Constitution protected him.¹¹⁵ It also held that the Kentucky reporters' privilege statute provided journalists the right to refuse to reveal the identity of sources who have given information but not to refuse to testify to events he personally observed, including the identities of the people he observed.¹¹⁶

The second story Branzburg published detailed drug use in Frankfort, Kentucky, including interviews with drug users.¹¹⁷ During these interviews, Branzburg reported that he had seen some of them smoking marijuana.¹¹⁸ He was again called to testify before a grand jury regarding a subsequent drug investigation and asked to identify the individuals in his story.¹¹⁹ He argued that his effectiveness as a reporter would be greatly harmed if he was required to disclose his sources, but the Kentucky Court of Appeals used the same reasoning as it did in the first case

¹¹¹ *Id.* at 667–78.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 669.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

against him to require that he testify to any criminal acts he had seen firsthand, including the identity of those performing criminal acts.¹²⁰

This case also consolidated *In re Pappas*, in which a Massachusetts reporter was permitted to observe Black Panther meetings and conferences, parts of which he promised not to disclose.¹²¹ The reporter also refused to answer questions regarding information he had promised not to disclose when he was called before a grand jury.¹²² Another subpoena was similarly issued to a New York Times reporter covering Black Panther Party activities in the case of *U.S. v. Caldwell*, and the reporter objected to having to testify to all of the information given to him by the group for purposes of publication.¹²³ The court required him to testify but not to disclose anything that was revealing of confidential associations, sources “or information received, developed or maintained by him” as a reporter.¹²⁴ After refusing to testify, Caldwell was committed for contempt.¹²⁵

The reporters argued that there are times during journalistic pursuits when it is necessary to use anonymous sources or only publish portions of the facts, and when the reporter is forced to reveal “these confidences,” reporters will be unable to effectively furnish publishable information.¹²⁶ They argue this harms the “free flow of information protected by the First Amendment.”¹²⁷ The reporters proposed that they should not be forced to appear or testify in court unless (1) there are sufficient grounds to establish that a reporter has information relevant to a crime the grand jury is investigating; (2) the reporter’s information cannot be attained from other sources; and (3) the need for the information is “sufficiently compelling to override the claimed invasion of First Amendment interests.”¹²⁸

The majority noted that, under the common law, the Court regularly refused to recognize a reporter’s privilege that would exempt them from revealing confidential

¹²⁰ *Id.* at 670.

¹²¹ *Id.* at 672.

¹²² *Id.* at 673.

¹²³ *Id.* at 675.

¹²⁴ *Id.* at 678.

¹²⁵ *Id.*

¹²⁶ *Id.* at 679–80.

¹²⁷ *Id.* at 680.

¹²⁸ *Id.*

information before a grand jury.¹²⁹ It agreed with the common law thought that the First Amendment interests asserted by reporters were outweighed by the “general obligation of a citizen” to offer their information to a grand jury.¹³⁰ The majority also held that anonymous sources impacted by the lack of a reporters’ privilege before grand juries are largely motivated to stay confidential because they are avoiding criminal prosecution, and the majority does not find this worthy of constitutional protection.¹³¹ They stated that reporters are only relevant if they have implicated themselves in a crime or possess criminal information.¹³² However, the Supreme Court fails to address the fact that there may not have ever been a story providing insight into how drug use is impacting the community in the case or the kinds of practices of drug users and dealers without the use of those confidential sources despite mentioning that this issue was argued by the plaintiff.¹³³ While law enforcement may not be able to immediately target the people included in the stories, they and health officials are better able to understand and target their efforts to address the broader drug use problem. Instead, the Court settled by holding that states can pass shield laws if they so desire.¹³⁴

B. *The Legislative Response*

It was following this case that efforts to create a national shield law began in earnest. Through the remainder of the 1970s, several bills were introduced in Congress that aimed to add protections for journalists. They included proposals to: prohibit governmental authorities from issuing search warrants and subpoenas of journalistic property;¹³⁵ grant journalists the right to withhold both the identities of their confidential sources and the information collected from the sources;¹³⁶ and grant journalists absolute privilege against disclosing any information related to their news-gathering and publishing, even when placed before a grand jury.¹³⁷ These bills

¹²⁹ *Id.* at 685.

¹³⁰ *Id.* at 686.

¹³¹ *Id.* at 691.

¹³² *Id.*

¹³³ *Id.* at 669 n.5.

¹³⁴ *Id.* at 706.

¹³⁵ H.R. 1293, 96th Cong. (1979).

¹³⁶ *Id.*

¹³⁷ Media and Individual Privacy Protection Act of 1979, H.R. 368, 96th Cong. (1979).

did not pass, although further efforts continued in the 1980s, 2000s, and 2010s.¹³⁸ Furthermore, in 2005 Indiana Representative Mike Pence introduced the Free Flow of Information Act which provided an absolute privilege to reporters to protect them from being forced to disclose their sources.¹³⁹

With efforts to create a national shield law regularly failing, many states have enacted their own statutes providing some kind of reporters' privilege.¹⁴⁰ As of 2022, forty states have a statutory shield law and the other states instead rely on court interpretations of constitutional protections to receive some form of immunity or privilege.¹⁴¹ Some states include a lighter type of reporters' privilege built into their constitutions.¹⁴² Forty-nine states offer at least some form of qualified immunity, though the extent of privilege in many states is still unclear.¹⁴³ Some have a kind of reporters' privilege built into their constitutions, such as New Hampshire.¹⁴⁴ Mississippi, for instance, has no shield law but recognizes a qualified privilege.¹⁴⁵ However, because not all state courts have reported cases related to the extent of reporter's privilege, media outlets cannot be sure how far their protections extend.¹⁴⁶ Of those locations that do have a shield law, the following have not had any reported state cases addressing the extent of protection from the statute: Alabama, Alaska, the District of Columbia, Hawaii, Nebraska, North Carolina, Texas, and Utah.¹⁴⁷

¹³⁸ *The History of Shield Legislation*, *supra* note 11.

¹³⁹ Free Flow of Information Act of 2005, H.R. 3323, 109th Cong. (2005). Mike Pence served as the vice president under Former President Donald Trump, who had an infamously poor relationship with the press and media. *See* Benac, *supra* note 39; Brenan, *supra* note 41.

¹⁴⁰ Bill Kensworthy, *Shield Statutes & Leading Cases*, FREEDOM F. INST., <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-the-press/state-shield-statutes-leading-cases/> (last updated Apr. 2011).

¹⁴¹ *Number of States with Shield Law Climbs to 40*, REPS. COMM. FOR FREEDOM PRESS, <https://www.rcfp.org/journals/number-states-shield-law-climbs/> [<https://perma.cc/N7P6-93UB>].

¹⁴² Jane E. Kirtley, *Shield Laws*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1241/shield-laws> [<https://perma.cc/2JG4-CBG5>] (last updated 2020).

¹⁴³ Kensworthy, *supra* note 140.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Kensworthy, *supra* note 140.

Although efforts to create a national shield law have failed, the majority of states recognize the need for some reporter's privilege, which is reflected in their own passage of shield laws. It appears that Congress has simply been unable to garner enough support at the right time to pass such a law. In light of so many states having shield laws, the question may seem to be why we need a national shield law rather than allowing states to pass varying degrees of protection for reporters as they see fit. One reason may be to elevate journalistic quality nationwide. It is helpful to note that all prior winners of the Investigative Reporting Pulitzer Prize in the last twenty years were outlets based in states with statutory protections or shield laws.¹⁴⁸ While most states have a shield law, and it is thus logical that most of the winners and finalists would correlate, there is no doubt that papers located in states without shield laws have still done exceptional investigative work.¹⁴⁹

Journalists are often called watchdogs of democracy.¹⁵⁰ There should be a basic, consistent level of protection for journalists across the country so that regardless of where they are reporting, they are able to fully serve as watchdogs. If entities have an established foundation and track record as a trustworthy source sufficient to qualify for the accreditation, a national shield law would serve to encourage and enable investigative reporting. This reporting would be bolstered by the ability to responsibly use anonymous sources in a protected manner.

C. *The Benefits of a National Shield Law Today*

This proposal for a national shield law would face a myriad of developing societal circumstances. For example, former President Donald Trump is infamous for his disdain for the press—he regularly called the press the “enemy of the people,” targeted certain reporters and companies he did not like, and insisted any unflattering coverage of him was “fake news.”¹⁵¹ Trump's attacks on the press are not the first

¹⁴⁸ See *Investigative Reporting*, THE PULITZER PRIZES, <https://www.pulitzer.org/prize-winners-by-category/206> [<https://perma.cc/36QR-2S8C>].

¹⁴⁹ The Boston Globe, for instance, was the first major outlet to uncover the extent of the Catholic Church's child abuse enabling and cover-ups. *The Boston Globe*, THE PULITZER PRIZES, <https://www.pulitzer.org/winners/boston-globe-1> [<https://perma.cc/G7JZ-PGSY>]. Massachusetts does not have a shield law but does provide reporters with qualified privilege. *Massachusetts: Reporter's Privilege Compendium*, REP. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/privilege-compendium/massachusetts/#a-shield-law-statute> [<https://perma.cc/K9W9-ND2A>] (last updated May 2018).

¹⁵⁰ Jurkowitz & Mitchell, *supra* note 45.

¹⁵¹ Margaret Sullivan, *Trump Has Sown Hatred of the Press for Years. Now Journalists Are Under Assault from Police and Protesters Alike*, WASH. POST (May 30, 2020), <https://www.washingtonpost.com/lifestyle/media/trump-has-sown-hatred-of-the-press-for-years-now-journalists-are-under-assault-from->

instance of a president disparaging the media, but he is unique in the frequency and extent of his attempts to discredit journalists.¹⁵² He has been highly effective at sowing contempt and distrust in swaths of the U.S. population, leading to many journalists getting harassed by both police and protestors.¹⁵³ With the expansion of social media and access to technology in recent years, Trump essentially secured access to a megaphone that he used to disparage reporters. Thus, although Trump's presidency has ended—notwithstanding his potential to win another term—the effects of his actions are lasting.¹⁵⁴

A national shield law's primary value may no longer be protecting anonymous sources from government retaliation but instead protecting sources from *public* retaliation. The public's growing contempt for journalists has led to frequent attacks.¹⁵⁵ A shield law allowing sources to remain confidential could, therefore, actually protect sources from public attacks as well. For instance, sources have come forward in the past confidentially to speak on a stigmatizing topic, for instance, that they believed would hurt their reputations or safety within their communities.¹⁵⁶

Presidential feuds with the media are not a new occurrence. There is no doubt that some individuals who speak on the condition of anonymity are staying confidential simply for personal gain, but many others with valuable insights and information are doing so to protect themselves.¹⁵⁷ The government's permissiveness and even encouragement for the public to attack media in recent years is on an exceptionally broad scale.¹⁵⁸ Sources no longer only worry about their safety and

police-and-protesters-alike/2020/05/30/1e6b81ae-a2a3-11ea-81bb-c2f70f01034b_story.html [https://perma.cc/3BG6-QQT3].

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ For a deeper discussion of the long-term consequences of Trump's rhetoric toward the press, see RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and The Press*, 49 ARIZ. ST. L.J. 1301 (2017).

¹⁵⁵ Sullivan, *supra* note 151.

¹⁵⁶ For example, LGBTQ+ individuals may speak anonymously to a newspaper because they are so frequently targeted for hate crimes. See, e.g., *New FBI Statistics Show Alarming Increase in Number of Reported Hate Crimes*, HUM. RTS. COMM'N (Nov. 13, 2018), <https://www.hrc.org/news/new-fbi-statistics-show-alarming-increase-in-number-of-reported-hate-crimes> [https://perma.cc/9NCP-AP5L].

¹⁵⁷ Roy S. Gutterman, *Whistleblowers and Reporters: Trust*, SOC'Y OF PRO. JOURNALISTS, <https://www.spj.org/whistleblower/whistleblowers-and-reporters-trust.asp> [https://perma.cc/MMZ8-X4YF].

¹⁵⁸ Sullivan, *supra* note 151.

reputations within their own communities but within the entire country, perhaps the entire world, because of the connectivity the public now possesses via technology. Stakes are even higher for confidential sources in this era, and a national shield law allows reporters to keep such sensitive sources absolutely confidential.

D. Legal Questions in the Era of Wikileaks

Another development with the considerable advancements in technology in the last few decades is the creation of platforms like Wikileaks. Wikileaks is an international organization with servers all over the world, making it an outlet that does not really belong to any specific state system.¹⁵⁹ It protects sources from everyone, keeping identities confidential even when collaborating with news outlets that are releasing its documents.¹⁶⁰ Organizations like Wikileaks present the legal field with a number of new questions, including what qualifies as a journalist, what is a source, and how far can a shield law extend.¹⁶¹ Wikileaks has actually published U.S. war logs, and many journalists believe that this move set back efforts to create a national shield law by presenting an instance in which issues of national security were exposed.¹⁶²

What is important to remember about Wikileaks, however, is that it is a “stateless news organization,” and because it is not U.S.-based, a national shield law would not apply to it anyway.¹⁶³ As such, national security is no more threatened with the shield law than without it when dealing with such an organization. With matters of national security, courts have historically been less lenient with the extent of journalistic protections, and the publication of war logs that were recent or in any way a threat to the safety of military forces may not even be protected under the First Amendment.¹⁶⁴

In *New York Times Co. v. United States*, the Supreme Court was divided on how to legally handle such an issue.¹⁶⁵ Justices Black and Douglas suggested that

¹⁵⁹ Sandra Davidson & David Herrera, *Needed: More Than a Paper Shield*, 20 WM. & MARY BILL OF RTS. J. 1277, 1278–79 (2012).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1278.

¹⁶² *Id.* at 1280.

¹⁶³ *Id.* at 1279.

¹⁶⁴ *See, e.g.*, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

¹⁶⁵ *Id.* at 713.

protecting military secrets “at the expense of informed representative government” is not justified.¹⁶⁶ They also suggested that the government could not restrict the press at all under the First Amendment, at least given any facts similar to those presented in that case.¹⁶⁷ Justices White and Stewart proposed a standard of only permitting document disclosure when it could not be said that such disclosure would “surely result in direct, immediate, and irreparable damage to the nation or its people.”¹⁶⁸ Chief Justice Burger dissented because he determined that publishing such documents presented a threat to national security and military and diplomatic efforts.¹⁶⁹ Although there was not a strong consensus by the Justices in this case, there was a general hesitance by the majority of Justices to forbid prior restraint in cases that posed an actual and immediate danger to national security. As such, a national shield law would not apply to organizations like Wikileaks, and for those that are U.S.-based to which it does apply, the First Amendment would allow prior restraint if a publication could pose an immediate danger to national security. Actual threats to national security as a result of a national shield law are thus highly unlikely, even with organizations like Wikileaks around.

The other questions that modern outlets like Wikileaks raise, such as who constitutes a journalist and who constitutes a source, are still present. The significance of these questions may seem to be growing with the emergence of prominent bloggers, social media, and other sites. Would Julian Assange, the creator of Wikileaks, be protected as a source? Do bloggers count as journalists? In truth, however, these platforms do not pose entirely novel problems for the legal field. Magazines, tabloids, and television channels have all been commonplace for decades. Anyone with the proper resources can use one of these platforms, and the Supreme Court has thus far declined to distinguish between media producers and their sources. There is no legal distinction between a New York Times reporter and a writer for a tabloid in terms of journalistic protections. The creation of a shield law would require either Congress to make this kind of distinction and hope the law passes the scrutiny of the courts or leave the media without such distinction. Defamation law generally protects private individuals from the publication of any information that is untrue and actually damaging to them,¹⁷⁰ so the national shield

¹⁶⁶ *Id.* at 719 (Black, J., concurring).

¹⁶⁷ *Id.* at 714.

¹⁶⁸ *Id.* at 730 (Brennan, J., concurring).

¹⁶⁹ *Id.* at 748 (Marshall, J., concurring).

¹⁷⁰ *E.g.*, *Joseph v. Scranton Times L.P.*, 129 A.3d 404 (Pa. 2015).

law likely would not pose more dangers for individuals from tabloid-like media or sources with a personal or negative motive. Defamation law similarly protects public figures as long as they can make the same showing as private individuals and establish that actual malice was present,¹⁷¹ so once more, the dangers would likely not change with a national shield law.

E. The Need for a National Shield Law Is Greater Now than Ever

The creation of a national shield law is more important in today's society than it has ever been. Since the landmark case *Branzburg v. Hayes*, in which the Supreme Court determined that there was no reporters' privilege to be found within the First Amendment,¹⁷² the public and legislators overall have agreed that there is a benefit in shield laws; however, this has not culminated in a national shield law's actual passage.¹⁷³ Although a number of states have some type of privilege, the country's protection for journalists is disjointed and inconsistent.¹⁷⁴ A national shield law brings a more structured framework for reporters to rely upon and provides the breathing room to do more exceptional investigative reporting. The growing reach of media platforms increases the danger for many anonymous sources that wish to remain confidential for their own safety. These expanding platforms do not present new legal questions about how the court handles the distinction of members of different media outlets—they only increase potential dangers and the importance of sources being able to maintain anonymity in sensitive situations. There is no question that a national shield law would benefit the media and the public without posing any real threats to national security, and in today's connected world, such a law is essential.

F. The Way We Treat Nonprofits Should Inform Our View of This Proposed Accreditation

News sources that are serving as the watchdogs of society and that are dedicated to publishing accurate news are the ones for which this accreditation is meant. We have an informative precedent for creating a special business designation for organizations that have a clear and vested community benefit—nonprofits.

¹⁷¹ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁷² *Branzburg v. Hayes*, 408 U.S. 665 (1972).

¹⁷³ See *supra* Section I.A.

¹⁷⁴ *Id.*

For example, the Internal Revenue Service (“IRS”) has what is called a “Community Benefit Standard” for hospitals.¹⁷⁵ Those hospitals that are “organized and operated for the charitable purpose of promoting health” often qualify as a 501(c)(3) or a nonprofit.¹⁷⁶ A hospital seeking to qualify for nonprofit tax exemptions must “[d]emonstrate that it provides benefits to a class of persons that is broad enough to benefit the community, and [o]perate to serve a public rather than a private interest.”¹⁷⁷ When hospitals are able to meet this criterion, they are afforded an exemption from federal income taxes.¹⁷⁸

Having a business accreditation that provides an extra-legal benefit is analogous. The press that are awarded this designation are providing a community benefit, and they thus qualify for some kind of government benefit. In the case of my proposed system, the press that qualifies for accreditation would gain the benefits of shield law protections rather than tax exemption.

IV. CONCLUSION

The novel issues facing the press today and the historic levels of distrust in media call for a method of restoring trust and providing legal protections. Despite the efforts for years to create a national shield law, the media is still without one. With the creation of a novel accreditation system, the unprecedented levels of mistrust in the media can be addressed, local news can be bolstered economically, and media on a broad scale can receive invaluable legal protection. With these measures, it is possible to again more fully enjoy the important benefits of the press described most aptly by the Pennsylvania Supreme Court in *In re Taylor*:

Newspapers are owned by individuals or private corporations; they are run, operated and managed by human beings, and consequently are sometimes biased, sometimes unfair, sometimes inaccurate, and sometimes wrong. Nevertheless, independent newspapers are today the principal watch-dogs and protectors of honest, as well as good, Government. They are, more than anyone else, the

¹⁷⁵ *Charitable Hospitals—General Requirements for Tax-Exemption Under Section 501(c)(3)*, IRS, <https://www.irs.gov/charities-non-profits/charitable-hospitals-general-requirements-for-tax-exemption-under-section-501c3#:~:text=Therefore%2C%20to%20qualify%20as%20an,rather%20than%20a%20private%20interest> [https://perma.cc/7MKF-KVTP].

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

principal guardians of the general welfare of the Community and, with few exceptions, they serve their City, State or Nation with high principles, zeal and fearlessness. They are, in the best sense of the maxim, “probono publico.”¹⁷⁹

¹⁷⁹ *In re* Taylor, 193 A.2d 181, 185 (Pa. 1963).