



SUMMER 2014

# The News Media **AND THE LAW**

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

## **Criminal Secrecy**

Will concerns over sensitivities  
in some criminal records trump  
public access concerns?

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# Criminal justice & secrecy

## Limits on access to court and police records are not in the public interest

This issue examines a few different ways that the criminal justice system limits access to records, often in the name of the public good. But in the end, the limits end up hurting the public understanding of how the process works, and some of these tough calls on secrecy really need to be made in the direction of greater openness.

The movement to expunge criminal records - sometimes just in cases where the defendant won an acquittal, but other times for a much larger class of records - is one such example. While there are very real examples of a person's criminal past being used to discriminate against that person in housing and employment, the solution should not be to throw that information down an Orwellian "memory hole," but to better enforce those laws that keep such discrimination from occurring. The easy answer - hiding those records - is the most problematic, as information that was once the day's news is placed in a strange limbo where we must act like it never happened.

Mug shots also present privacy concerns, and the web sites that have sprung up only to demand a hefty fee for removal of a person's picture from the site do need to be reigned in. But there is still public value to making mug shots available. Access helps confirm the identity of suspects and avoid misidentifying innocent people with the same name, and it often shows how a person was treated during an arrest, which is often part of the newsworthy controversy. Additional witnesses also often come forward when they see someone who is accused of a crime.

Switching gears a little, we also look at access issues in the military justice arena. The system, clearly, is broken; base commanders have too much power over who does or doesn't get prosecuted, victims are often treated unfairly, and no one keeps an open public record of the proceedings. Greater access is necessary here, and the first thing Congress should do is require the military courts to maintain a public docket, like the federal courts do with the PACER system.

Each of these areas involve tough choices and distinctions, and call for careful deliberation of where to draw the line. Instead, officials all too often want to legislate with sledgehammers, denying the public the right to know about important actions in the name of protecting privacy interests. Obtaining a workable balance requires hard work, not a quick fix.

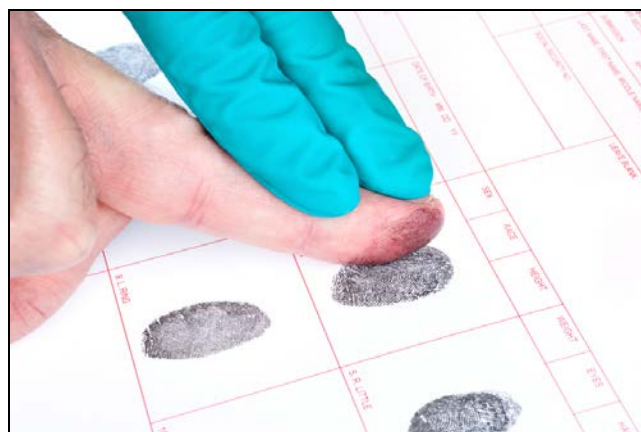
# Expunging criminal records

## Journalists worry laws make criminal record sealing too easy

By Bradleigh Chance

The Alaska legislature passed a [bill](#) this spring that would have denied access to criminal case documents if the accused is acquitted or the case is dismissed, but Gov. Sean Parnell vetoed the proposed law in late August.

Alaska is not alone in trying to restrict public access to records of defendants who are not convicted. Some other states either seal materials from certain cases that resulted in an acquittal or dismissal, or remove that listing from a person's public "rap sheet" altogether. With the latter process, known as expungement, people have no way of knowing that a person was arrested.



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Proponents of sealing or expungement warn that prospective employers, landlords and others may unfairly stigmatize people who are arrested but not convicted. But journalists and media lawyers say this information can provide useful context for stories and help the public understand how the criminal justice system works.

While the proposed Alaskan statute would not have destroyed the records completely, it would have made it nearly impossible for people to get them.

"It's not clear what you'd have to do to get access to these records if the bill passes. Maybe you'd need to file a case, which can be really expensive," John McKay, a media lawyer in Alaska, said while the bill sat on the governor's desk. "Anytime you remove information from the public record, it makes it harder for journalists to do their jobs."

The Alaska bill, SB 108, would have automatically sealed certain court documents 120 days after the acquittal or dismissal date. It would also have sealed acquittals and dismissals for cases that took place before the October 2014 effective date.

Sen. Fred Dyson, the sponsor of SB 108, had said the bill would "strengthen privacy and due process rights for Alaskans by keeping certain court records confidential when criminal charges are dismissed or the accused is acquitted."



But First Amendment advocates in the state fought the bill.

McKay wrote a [letter](#) to Sen. Dyson on behalf of the Alaska Dispatch News, arguing that the state legislature overstepped its bounds with the bill. “The courts have recognized the public’s right of access to the courts,” McKay said. “That’s not something the legislature can just change as it will unless they show there aren’t any reasonable alternatives.”

McKay also said that unlike public records laws, which can be determined by state statutes, the U.S. Supreme Court has ruled that the press and public have a First Amendment right of access to court proceedings.

“The legislature should have to pass a higher bar here,” he said.

A similar proposal failed in New Mexico. In 2012, the state’s governor, Susana Martinez, [vetoed](#) a [bill](#) that would have removed arrest records from public view completely. She said in a statement the legislation would place a “significant impediment on the public’s and media’s right to know about information relating to convictions, arrests and other criminal proceedings.”

## Policies around the country

Policies for expunging or sealing information about non-convictions vary by state. Some states seal certain records and keep a second copy on file, while others destroy certain records completely, giving defendants clean slates. Many courts even permit individuals to deny their arrests completely post-expungement.

States also have differing policies on the types of offenses that are eligible for expungement, with some just allowing it for non-violent or “minor” crimes. In a few states, expungement or sealing can be automatic, but, more commonly, courts have discretion on whether or not to grant it.

Margaret Love, a defense attorney and former pardon attorney at the Justice Department, keeps track of these state laws.

She says there seems to be a trend toward limiting the use of those records, States are telling employers they can only get fairly recent documents, for example, rather than access records deep in a defendant’s past.

Sealing and expungement is designed to help those who are accused of crimes get jobs and successfully participate in society, without the fear of public judgment.

“There’s a desire to let people get on with their lives,” Love said.

But media law attorney McKay says bills like SB 108 – which makes sealing automatic – make finding the right balance between cleaning criminal records and maintaining transparency in the courthouse more difficult.

More than a decade ago, the 76th Texas Legislature followed McKay’s logic by rejecting a [bill](#) that would have granted automatic expungement in the cases of

acquittal, pardoning, or dismissal. Texas didn't allow expungement relief for those convicted but later deemed innocent until 2011 when the 82nd Texas Legislature passed [changes](#) to the existing code.

McKay says that, if anything, access to court documents should be decided on a case-by-case basis rather than automatically by category. On July 1, 2013, Indiana enacted a sealing and expungement [law](#) that does just that. The new expungement process does not close the records, but instead puts limits on the use to which people, like employers, can access them.

### Journalists say record access is essential to reporting practices

Julia O'Malley, an Alaskan journalist and board member of the Alaska Press Club, says reporters need access to the court records at issue in the proposed bill so they can do their jobs. The media works to deliver information, she says, not to protect the public from itself.

"If we're going to spend public money to have a public hearing, the record of that hearing should be available to the public," O'Malley said. "We don't have secret courts in this country."

She also says the records are the most reliable source for fact checking.

O'Malley also warned that the provisions of SB 108 would keep journalists from comprehensively covering important court cases.

For instance, the Alaskan media reported on a [man charged](#) with murdering his girlfriend last June, only to find that he had similar charges existing on his criminal record from November 2013. The man was acquitted of the 2013 charges, but O'Malley says the story on the June case would have been incomplete without facts about the previous charge.

"We need to be able to ask the question, 'What happened here?' If we didn't know that had previously happened we wouldn't be able to go to the system and ask, 'Why wasn't he charged before?'" she said.

The Fairbanks Daily News-Miner published an [editorial](#) in February that highlights many of O'Malley's concerns. The piece explains that, with SB 108, a reporter wouldn't be able to dig up a public official's old allegations and the public would have no way of knowing whether or not prosecutors had a strong case that was inexplicably dropped.

"An acquittal or dismissal doesn't always mean the accused didn't commit the crime," the News-Miner wrote. "An acquittal can also mean that prosecutors didn't do a good job presenting their case."

McKay says making records confidential in cases of complete acquittals and full dismissals could potentially cover up errors and abuses.

"The whole idea is that these are still significant records. Just because someone's

acquitted doesn't mean the public isn't interested," McKay said. "It's exactly these types of records that are more likely to show that there was a mistake made somewhere in the court system. Either someone was wrongfully accused, wrongly prosecuted or there was some type of error that made it so the case didn't result in a conviction."

### Arguments against access

Despite journalists' wishes, defendants want a second chance. The public posting of a person's name and charges can affect employment prospects and an individual's ability to find housing, Dyson said in his statement.

"All of us took an oath to protect both of our state and federal constitutions," Dyson said. "Given our oath, I believe that our default position must be to protect privacy and the concept that we are all considered innocent until proven guilty. There will always be good sounding reasons to trample on civil rights, but we must default to the Bill of Rights when issues are in doubt."

Love said, "The jury is the one who decides if he did or didn't do it. That's the system we've got. Period."

Love believes the public has no legitimate interest in accessing dated criminal records in "an overwhelming number of cases" and says most stories turn out to be "sensational and ugly."

"If the media would do more to encourage proper use of records, like be more responsible when talking about people who have a criminal record, then people might be more comfortable granting public access," Love said.

But O'Malley said restrictions on access keep journalists from doing a good job.

"I'm not here to defend bad journalism. It's the job for every journalist to treat defendants fairly," O'Malley said. "But there are bad journalists, just like there are bad cops, bad attorneys, and bad judges. We shouldn't handicap the public because there are journalists who are sensational."

O'Malley says people are "misunderstanding what journalism does."

"It's our job is to explain what happened. Of course we can note if the charge was acquitted, but we cannot erase the record," she said. "Our job is not to protect someone's reputation."

### Finding the right balance

The Alaskan legislature, and the United States as a whole, is still trying to figure out how to develop a compromise for the journalists who want access and the defendants who want a fresh start.

Love noted the dual interests here, but emphasized the burden on those who have faced arrest. "There are a host of burdens that we put on people that drive people out

of society," she said. "We're creating a permanent second-class citizenship. That's the social problem the press has to recognize when they request public access."

McKay says the societal judgments are a problem, but there are other ways to protect people who have been charged of crimes but not convicted.

"It'd be better to pass laws that say, you can't discriminate based on whether or not someone's been arrested or convicted of something," McKay said. "Don't just remove a whole box of certain records from public access."

# Access to mug shots gets close look across the country

By Emily Grannis

In response to the increased posting of mug shots online, particularly on websites that charge individuals to remove the photos from the site, state and federal officials have been working to limit public access to mug shots. Some of these efforts have come through legislation introduced at the state level, while others have been agency decisions at the federal level.

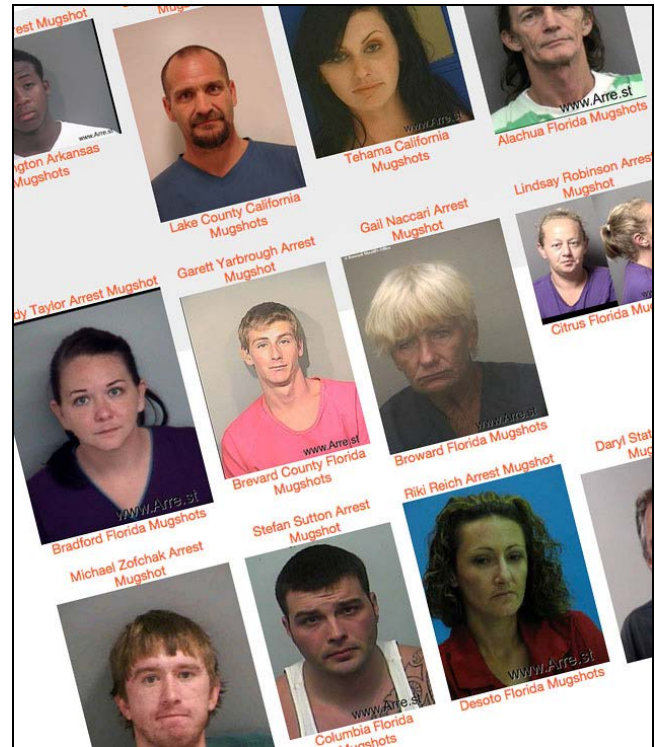
Federal and state officials have argued that publishing a person's mug shot before they are convicted of a crime, or continuing to publish it once their record has been expunged, creates a lasting and unfair impression of them.

"The unique and embarrassing nature of mug shots makes their disclosure at least as invasive as the disclosure of routine law enforcement records," the U.S. Department of Justice argued to a court last month. "Moreover, the dramatic technological changes over the last 20 years have heightened the privacy interest at stake."

Journalists, however, have continued to fight for access to mug shots, even in the face of changes to state laws and police department policies at the local, state and federal levels.

Mark Caramanica, a lawyer with Thomas & LoCicero who has done extensive freedom of information work, said FOI laws should cover mug shots in order to present the public with a full picture of the criminal justice system.

"The push to restrict public access to mug shots frustrates the ability of the public to exercise oversight over the entire criminal process and remain informed about who the government takes into custody, and under what conditions," he said. "An arrest is a public event and people should be extremely skeptical of government attempts to argue that certain aspects of our criminal justice system are essentially private matters."



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Sites that sell mugshots are under fire nationwide.

## State changes

Most of the changes to mug shot FOI policies have come at the state level as legislatures try to combat websites that charge people to take down their mug shots. Some states have approached the issue from the narrow perspective of punishing that particular practice, while others have attempted sweeping changes to their FOI laws.

In the past two years, 21 states and the District of Columbia have considered [legislation adjusting access to mug shots](#). Of the more than 30 bills that have been introduced, 18 would have specifically amended state FOI laws. (Only four of those amendments would have increased access to mug shots.)

The most common provision in these proposed bills has been a prohibition on charging a fee for the removal of a mug shot from a website. Twenty-three of the bills introduced since 2012 would have banned that practice. Many would have required the requester to sign a statement saying they would not try to profit from the mug shot before receiving the records.

Seven states have actually passed laws changing the rules about accessing and publishing mug shots. Generally, there are three provisions states have worked with to restrict mug shot publication: who may get access, whether a site can charge fees to take a mug shot down, and whether an individual has the right to require a site to take a mug shot down.

[Oregon](#) and [Wyoming](#) both give individuals the right to ask a website to remove their mug shots if they were acquitted, had their charges reduced, or had their record expunged. Websites must take those photos down for free.

[Texas](#) allows sites to charge up to \$150 to take down a mug shot, but sites cannot publish mug shots if the publisher knows the record has been sealed or expunged.

[Georgia](#), similarly, allows individuals to request that their mug shots be removed from websites for free. The statute has one very important exemption, though: traditional media outlets engaged in the “publication or dissemination” of news do not have to remove mug shots from their sites.

In [Illinois](#), it is now illegal to ask for or accept payment to “remove, correct or modify” information about a person’s criminal record, but there is no requirement in Illinois that a site take a mug shot down. [Missouri](#) has a similar law.

[Colorado](#) and [Utah](#) both take the approach of requiring a requester to promise not to publish the mug shot anywhere that would charge someone to take it down.

In a recent article in the ABA publication *Communications Lawyer*, Caramanica and Deanna Shullman argued that several versions of these mug shot laws could present real problems for journalists.

“Any law that absolutely mandates removal of criminal record information simply because an arrestee was acquitted or otherwise not convicted of the crime for which

he or she was arrested certainly invades an editor's prerogative to determine what information is newsworthy and worthy of publication," they wrote. "Further, these laws can present an undue burden on publishers to continually monitor criminal prosecutions for all persons for whom they have published a mug shot."

## Federal developments

At the federal level, the U.S. Marshals Service is responsible for maintaining mug shot records. It was the Marshals Service's long-standing policy to deny requests for mug shots under the Freedom of Information Act on the theory that they were [law enforcement records](#) the release of which would be an unwarranted invasion of personal privacy.

Then, in 1995, the U.S. Court of Appeals for the Sixth Circuit, which rules on federal cases from Kentucky, Michigan, Ohio and Tennessee, issued a decision requiring the Marshals Service to release mug shots. The decision, called Free Press I because it was the first in a series of mug shot FOIA cases the Detroit Free Press has brought, held that mug shots are releasable under FOIA when there are ongoing proceedings against someone who has been indicted, named publicly and appeared publicly in court.

After Free Press I, the Marshals Service announced it would release mug shots held by the Service's Sixth Circuit offices, but not mug shots held in other circuits. In 2005, the Marshals Service again refused to release mug shots, claiming a Supreme Court case that restricted access to autopsy photos also applied to mug shots. In what has come to be known as Free Press II, a court in the Sixth Circuit said the Service had to continue releasing mug shots.

Between 2005 and 2012, two other circuit courts held that the Marshals Service did not have to release mug shots in their states. Then at the end of 2012, the Marshals Service announced that it would no longer follow the Free Press line of cases and has since refused to release any mug shots from any office in the country. The Detroit Free Press is again suing the department, and is heading back to the Sixth Circuit.

Herschel Fink, who has represented the Free Press in the mug shot battle since it began in 1993, said the Marshals Service's has "consistently exhibited a contemptuous attitude toward the Sixth Circuit and Free Press I." Fink said he thinks the proliferation of profit-aimed mug shot websites is part of what is driving the Marshals Service to challenge Free Press I again now.

"The gnashing of teeth or whatever over these sites that extort money for taking down your mug shot, that should not be a reason to re-examine the Sixth Circuit's finding that there is just absolutely no privacy interest at all in current mug shots," he said. "The abuse of the FOIA . . . is just not an appropriate consideration when deciding whether there's a privacy interest here."

The Marshals Service has asked the full Sixth Circuit to hear the case, arguing the nature of the Internet should change the privacy calculation.

“The error of [Free Press I] is more evident now than ever before, given the way the Internet permanently preserves visual reminders of past actions,” the department wrote in its latest brief. “Properly recognizing that individuals have some ‘non-trivial’ privacy interest in mug shots and that there is no cognizable public interest in compelling disclosure, DFP I should be overturned.”

The Detroit Free Press has opposed a hearing before the full circuit court, and, Fink said, “enough is enough.”

“The criminal justice process is quintessentially public,” he said. “This is just one element, and frankly a very important element, of a defendant’s identity: Who has been charged with a crime . . . It’s just not private information. What your identity is as a defendant in the criminal justice system is not private.”

Other resources:

Federal Open Government Guide: [Federal Open Government Guide](#)

Open Government Guide: [Open Government Guide](#)



# Sexual assault and military secrecy

## Reporters reveal scandals despite challenges to public access

By Jamie Schuman

Chicago Tribune investigative reporter Karisa King called the military the most closed institution that she has ever covered.

Getting information from the armed forces is “like trying to squeeze blood out of a rock,” she said at a panel on covering sexual assault at an Investigative Reporters and Editors conference this summer. “It doesn’t happen. It’s incredibly difficult.”



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But after months of digging, King wrote an award-winning [series](#) for her previous employer, the San Antonio Express-News, on how the military treats soldiers who report being sexually assaulted. Her articles revealed that victims often are discharged on false claims that they are mentally ill, while offenders are rarely punished.

The military’s handling of sexual assault has sparked reform efforts in Congress, and many journalists in addition to King have written about the topic. These reporters have done so even though the military court system is, by most accounts, harder to navigate and less open than its civilian counterpart.

Journalists on the beat say they are kept out of some public hearings and have difficulty getting military sources to talk or give them records. They say the key to their success is dogged persistence and, oftentimes, the ability to find veterans who are willing to share their stories.

“We didn’t get these stories, on the whole, because we got a ton of support from the military,” said Express-News reporter Sig Christenson, who has written extensively on a [sex scandal](#) at Joint Base San Antonio-Lackland and who contributed to King’s series, “Twice Betrayed.”

“We did a lot of this work because victims in particular were willing to come forward and share their stories,” Christenson said. “We owe a lot to them.”

## The pretense of public trials

King began her series, which won the American Bar Association's Silver Gavel Award, by telling of an Army private who reported being sexually assaulted, and was then diagnosed with a personality disorder and removed from service. King used interviews with experts and assault survivors from other branches, as well as thousands of pages of military and medical documents, to help show that such problems are not isolated incidents.

An estimated 26,000 cases of sexual assault occurred in the military in fiscal year 2012, according to a [Department of Defense report](#). Only about 11 percent of these assaults were reported, and less than a tenth of them went to trial. About 60 percent of people who did report incidents said they felt some form of retaliation, according to the study.

Journalists say a key reason it is difficult to get the story behind these numbers is that the military justice system operates separately from the civilian one. It is bound by the Uniform Code of Military Justice and the Manual for Courts-Martial, and does not have the same tradition of access as civilian courts do.

A key feature of the military system is that cases stay within the "chain of command." The accused is first brought before his or her immediate commander, who decides whether to dismiss the case or move it forward.

Even though two main types of military judicial proceedings – the Article 32 hearing and the court-martial – are presumptively open under the law, reporters are sometimes shut out.

"We have the pretense of public trials, but not the reality," said Eugene R. Fidell, who teaches military justice at Yale Law School.

Article 32 hearings are common preliminary hearings that are similar to grand jury proceedings. King called them "goldmines for reporters" because victims and witnesses often give lengthy testimony. If there is enough evidence for the case to proceed, the next step is court-martial, which is the military's version of a civilian criminal trial.

A separate type of hearing, called a non-judicial or administrative proceeding, is not public. (The Reporters Committee for Freedom of the Press has guides with additional [background](#) on the military justice system and [tips](#) on how to access dockets.)

Bases and branches do not have uniform policies on how they share scheduling details for hearings. Some post calendars online, and others require people to contact a public affairs office. A 2008 [white paper](#) by the Reporters Committee revealed that nearly half of the 75 officials reached in a 2007-08 study refused to provide information on upcoming Article 32 hearings. Close to 40 percent did not disclose courts-martial schedules.

Christenson described times when he only heard of Article 32 hearings after the fact, and said the base he covers does not provide charge sheets for these hearings.

Fidell said it is also common for officials to provide scant details about the subject of an upcoming case, or to close parts of proceedings for no good reason. Hearings also can be held in inconvenient locations, such as in tents or aboard ships, or in spots that the public cannot reach due to security.

Moreover, the military does not have a comprehensive database like [PACER](#), which federal civilian courts use. In addition to scheduling information, PACER contains briefs, rulings and other files for current and closed cases.

While people can get records through FOIA, that process can be especially slow in the military as bases do not have standardized procedures for documenting information, said Miranda Petersen, programs and policy director at Protect Our Defenders Foundation, which lobbies for reform on how the military handles sexual assault.

The culture of the military also can present barriers for reporters, Petersen said. Potential sources often keep silent for fear of repercussion.

“It’s not easy to get someone in the military to talk about things that aren’t going very well or to give a personal opinion about how things can be better,” she said.

### [Going to the source for the story](#)

Still, Petersen said, investigative reporting is crucial so that people can hold the military accountable and push for reform.

Reporters said they often have the best results when they can go to hearings or interview veterans, who can be more willing to talk than current service members.

King recommended that reporters new to the beat sit in on courts-martial and Article 32 hearings to learn the difference between military and civilian systems.

Christenson said he went to about two dozen courts-martial for his stories on the Lackland scandal, in which more than 30 instructors were investigated for sexual misconduct with more than 60 Air Force recruits.

The work was grueling but revealing, he said. The hearings exposed structural problems on the base, such as that training instructors had very little supervision.

Christenson said his attendance was especially important because Lackland did not provide transcripts of proceedings or distribute copies of documents that were entered into evidence.

“Even though these are considered public documents everywhere else, the military acts as if it is a law unto itself, and that’s something that ought to change,” said Christenson, who has covered the military for 17 years.

Reporters also recommended getting story ideas and documents directly from survivors of sexual assault.

King said she would network with potential sources on online support groups for assault survivors.

Advocacy groups, such as Protect Our Defenders, the Service Women's Action Network, Vet Wow or the Military Rape Crisis Center, can sometimes put journalists in touch with veterans who want to share their stories, she said.

But Washington Post reporter Stephanie McCrummen, who wrote a feature in April on procedures for reporting sexual assault, said she prefers to find sources without an intermediary when possible.

In [“The Choice,”](#) McCrummen wrote about restricted reporting, which occurs when a person who alleges assault signs a waiver not to tell certain people. The military, in turn, does not investigate the matter or inform commanders. (In contrast, with unrestricted reporting, the military launches an investigation and notifies commanders of the names of the accused and the victim.)

McCrummen said she had wanted to write about restricted reporting for a while, but had little success getting materials from the military. Instead, she told the story through the experiences of a Navy veteran who has struggled with the weight of her secret after choosing the restricted option.

McCrummen found this source after interviewing about three dozen veterans, many of whom had taken a Washington Post poll about a variety of military-related topics and who said they would be willing to speak with reporters. Initial conversations with the women were off the record, which McCrummen said helped them open up about sensitive topics.

The woman who was featured did not want to be identified in the story, so McCrummen used her middle name, and did not mention the state where she lived and certain other identifying details.

### Fighting for records

McCrummen used some medical records that she got directly from her source in her story.

Reporters said getting records through FOIA can be more challenging. They advised people to submit requests as early as possible and to push back if their applications are denied or ignored.

“Expect to play the long game and be very aggressive about it,” King said.

Christenson said journalists must be relentless on FOIA requests and not take no for an answer.

“If somebody says you’re going to have to FOIA that issue, write a FOIA. Send it in,”

he said. “While you’re sitting there thinking about that FOIA, think about five other things you can FOIA too.”

“Don’t let up,” Christenson continued. “This is about accountability. They use our money to defend the nation, and they have an obligation to be transparent.”

### Pushing for change

Amidst coverage of Lackland and other sexual assault scandals, some politicians have been calling for reform. Sen. Kristen Gillibrand, a Democrat from New York, has been trying to remove the decision on whether to prosecute many crimes from the chain of command. In her bill, the [Military Justice Improvement Act](#), independent military prosecutors would decide if cases moved to trial. The Senate blocked the proposal in March, but reform efforts continue.

Christenson said he wants Congress to pass legislation that would require the military to provide relevant documents, such as charge sheets, quickly and upon request.

And Fidell said the military should get a PACER-like system, so that people can easily see the status of cases and search for records.

Fidell also encouraged reporters to sue if they are denied access to records or proceedings. He said many journalists call him to complain, but do not take their grievance to court.

“It has to be done. Otherwise, the train leaves, the bus leaves without you,” Fidell said. “That’s a good story gone.”

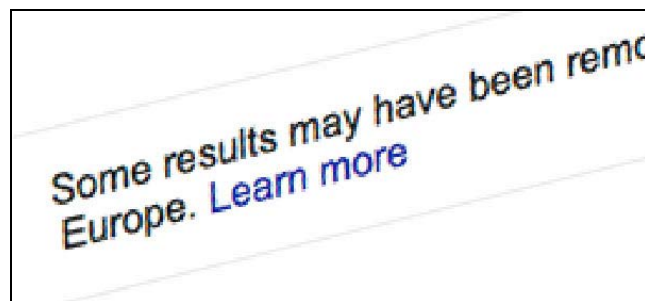
# Clearing the Past

## E.U.'s "Right To Be Forgotten" gives Google increased editorial obligations

By Danielle Keeton-Olsen

One of the most powerful and prominent Internet companies must shoulder a new responsibility: increased editorial control.

Within the European Union, Google and other search engines now must make thousands of decisions to remove links that would appear in searches of individuals' names.



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Google's E.U. sites warn users that their searches might be missing results.

The mandate upon search engines comes from an E.U. Court of Justice decision that enforces a "right to be forgotten" for its citizens.

The right allows citizens' the ability to request the removal of links to information that is inadequate, irrelevant or excessive pertaining to searches of citizens' name. That right, however, will force search engine employees to make decisions on whether those requests should be fulfilled.

The ruling, which cannot be appealed, highlights how seriously the E.U. asserts a right to privacy for individuals. Because the U.S. does not have a right to privacy written into its constitution, privacy experts claim that U.S. citizens and journalists are not likely to see a "right to be forgotten" in the near future.

### The task of forgetting

Individuals within the E.U. can now ask a search engine to remove links that "appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed," according to the May 13 [ruling](#).

In response, Google set up a [web form](#) to process individuals' requests, requiring those who submit forms to verify their identity in order to prevent fraudulent requests. Google then alerts individuals when their request is being processed, as well as the original website when one of its links is removed from a Google search.

On its European sites, Google now includes a message explaining that search results

for individuals' names might be filtered by removal requests.

The original links still exist on their parent sites, but the ruling makes them difficult to find from a European Internet connection. Websites that originally created the link most likely will not have to expunge their stories under this ruling, said Steven Bennett, a partner at the boutique law firm Park Jensen Bennett LLP, who has been following progress of the E.U.'s privacy legislation.

“That is a pretty unique way of splitting the baby,” Bennett said. “That may not have been the most predictable result, but it is consistent with the directive.”

By July 11, Google announced that it received a total of 70,000 removal requests covering 250,000 websites. The company established a legal team to individually review each take-down request in order to grant or deny it, said David Drummond, Google's senior vice president of corporate development and chief legal officer, [in an op-ed](#) published in several European publications and Google's blog.

“Only two months in, our process is still very much a work in progress,” Drummond wrote.

Following the flood of requests for content removal and a few accidental content take-downs, Google announced that it created an [advisory council](#) to oversee the requests and the progression of the ruling.

The council -- comprised of two Google executives and eight leaders in journalism, technology and law from throughout the E.U. -- will hold a livestreamed consultation in the fall to gather input on Google's “right to be forgotten” policy going forward.

“A robust debate is both welcome and necessary, as, on this issue at least, no search engine has an instant or perfect answer,” Drummond said in his op-ed.

Current U.S. privacy laws would make it difficult to implement a “right to be forgotten” like that of the E.U. In order to claim an [invasion of privacy](#) in the U.S., a plaintiff must show that the defendant either published a private fact or intruded upon seclusion. To make either of those claims, the plaintiff also must show that there was an [element of offensiveness](#).

The invasion of privacy is considered offensive if it is “so unwarranted” as to shock or “outrage the community's notions of decency” or “a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern,” according to Reporters Committee guides.

Franz Werro, a professor of law at Fribourg University and Georgetown University Law Center, said because of current U.S. legal precedent, journalists should not be concerned about the possibility of a “right to be forgotten” when crossing the Atlantic.

Google only considers removing individual information from its American services

when it could [cause individuals' specific harm](#), such as published social security numbers, bank account numbers or credit card numbers.

The search engine's U.S. division is not likely to remove offensive material unless it involves child sexual abuse or is a graphic image, but users can turn on Google's SafeSearch filter, which primarily prevents pornographic images from appearing on a search feed.

### The precedent for a privacy right in Europe

In contrast, the E.U. includes a right to respect for private and family life and a right to protection of personal data within its [Charter of Fundamental Rights of the European Union](#). The two privacy rights precede the E.U.'s right to freedom of expression and information.

“Next to a constitutional entitlement to a free press, to a freedom to speak, there is a constitutional entitlement to private life under European law,” Werro said. “What the courts [in the E.U.] have to do by law is balance these entitlements against one another.”

Many European countries inside and outside the E.U. have similar protections for personal privacy written into their constitutions, so the case, which originated in Spanish courts, in theory could have emerged from other countries, Werro said.

The ruling originated after Spanish lawyer and citizen Mario Costeja González filed a complaint in 2010 against Google Spain and La Vanguardia Ediciones SL, a Spanish newspaper publisher, to take down links that came up when searching Costeja González's name.

Spanish courts dismissed Costeja González's complaints against La Vanguardia, but he appealed the decision to the E.U. Court of Justice.

The court found that because operators of search engines serve as “controllers” of data, they should hide links that individuals request removed from searches of their names, putting search engines such as Google in the difficult role of content regulators.

### European journalism under the ruling

Because the ruling is an interpretation of existing legislation, Werro said journalists in the E.U. should know how to navigate the right to be forgotten because they have been previously subjected to the right of individual privacy in the E.U.

“I think that journalists [in the E.U.] are not confronted with something new, that they didn't know of,” Werro said. “I don't think that this decision will surprise them or inhibit them or have a chilling effect.”

However, news publishers and other internet users have responded to Google's removals by describing the deleted articles, speculating on why articles have been deleted, and [providing links to the articles in question](#) within news updates on the



right to be forgotten.

Journalists from publications within the E.U., such as BBC's economics editor Eric Preston, [have questioned why Google "killed this example of my journalism."](#) His article only mentioned one person, the former head of Merrill Lynch, but he suspects that the take-down request that Google honored was from one of the commenters on the article, because a Google search for the Merrill Lynch executive still shows the BBC article.

Google has not blocked the E.U.'s access to a U.S. publication's link, but Kurt Wimmer, a partner at Covington & Burling LLP who specializes in privacy and data security, said he and other lawyers at the firm are considering what the impact of E.U.'s right to be forgotten might be.

While the ruling should be limited to those within the E.U., it is possible that U.S. publications which have written about Europeans could cross into the right to be forgotten's boundaries, Wimmer said.

Regardless of a publications' jurisdiction, Wimmer, whose clients include CBS, The Washington Post and Gannett, Co. Inc., said he thinks media organizations should be given more opportunity to comment on the links Google removes from its feed, considering the decisions to eliminate Google content are based on human decisions rather than algorithms.

"Any time you have these decisions being made without input, they tend to be less reliable decisions," Wimmer said.

Werro said he thinks the entity that faces the largest struggle under the new ruling is Google.

"In Europe they're governed by European law," Werro said. "Google cannot be above the law."

Werro said he believes Google has done a good job in acting quickly upon individuals' requests to be forgotten, but he believes Google is not happy about the decision based on the amount they've worked with the E.U.'s Court of Justice in order to prevent such a ruling.

"If they really don't like it, they have to go do their business elsewhere," Werro said.

Internet users in the E.U. should be able to get around the filtered results by forcing a connection through U.S. Google or using a proxy connection such as [Tor](#), said Parker Higgins, an activist for the Electronic Frontier Foundation.

Although journalists will likely have an easy time getting around it, Higgins said [EFF is not happy](#) with the E.U.'s ruling.

"I think that there are ways in which the ruling is not terribly workable," Higgins said. "It sets up this split where truthful information can be legal online but a little harder to find, and that's not how the Internet really works."

The ruling essentially increases Google's control over editorial content in many western nations, Higgins said. This is especially concerning because Google already creates a "prism," or an editorial filter through which researchers view the Internet based on popularity and advertising, Higgins said.

"There's something not quite right about Google being given tens of thousands of cases and being told to decide on each," Higgins said. "The end result is that we don't really know what goes into their decision-making process, and that diminishes people's trust in the resources that they're getting and that's not good for Google either."

### Ever-increasing European privacy legislation

The E.U.'s new requirement for search engines is a step toward passing legislation on individual data protection, said Bennett, a lawyer with an interest in confidentiality matters in international relations.

The governing body is working to interpret the E.U.'s right to protection of personal data as it applies to any companies that collect data of users. Under the proposed law, those who hold user data deemed unnecessary to their operations could be severely fined, Bennett said in [a blog post about the recent ruling](#).

Based on the legislative history of the E.U. regarding privacy issues, Bennett said he was not surprised by the ruling, but he thought it was a little odd that the court interpreted an existing directive to define the right to be forgotten, rather than creating it as part of a new directive.

Because the incident leading to the ruling occurred entirely within E.U. boundaries, the Court of Justice was able to pass its interpretation relatively smoothly, Bennett said. However, he said he is interested to see how this ruling will play out on a global scale.

The Internet operates on a global scale but has no treaty or body to dictate or enforce rulings such as the right to be forgotten, so, hypothetically, Google's decision on a widely-published takedown may not have a clear-cut answer.

"[The recent ruling] was an easy case from a jurisdiction perspective," Bennett said. "When the facts change, it's anybody's guess."

# "We need to be ready to fight"

## Ted Boutrous on free speech, reporter's privilege and legal challenges ahead for journalists

By Tony Mauro

Mauro is a member of the Reporters Committee Steering Committee and U.S. Supreme Court correspondent for The National Law Journal.

Lawyer Theodore Boutrous Jr. may be best known these days for his winning ways in headline-making cases on issues ranging from same-sex marriage to class actions and teacher tenure.

But Boutrous – a partner at Gibson, Dunn & Crutcher – is also one of the nation's top media lawyers, representing television networks, The Wall Street Journal, The Associated Press and many others in cases involving court access, subpoenas and confidential sources. He shot down the biggest libel verdict in history in 1997. He also assisted the Reporters Committee for Freedom of the Press in a cutting-edge 2006 case involving blogger Joshua Wolf.



Media lawyer Ted Boutrous.

“My media practice helps me be a better lawyer in my other practice,” Boutrous once said. “It gives me better insight into both sides of the equation.”

In May, Boutrous wrote a forceful column in The Wall Street Journal urging the U.S. Supreme Court to take up the case of journalist James Risen, who was challenging a Justice Department subpoena ordering him to reveal confidential sources he cited in a 2006 book on the Central Intelligence Agency. Ultimately, the court denied review.

In an interview with The News Media & the Law, Boutrous discussed the Risen case and the state of press freedom before the Supreme Court and in general. The transcript follows, edited for length and clarity.

Mauro: You wanted the Supreme Court to take up the James Risen reporter's privilege case. Were you confident that the current court would recognize such a privilege?

Boutros: James Risen's case really exemplifies the need for uniform recognition of a reporter's privilege at the federal level, and I was confident that if the court granted [cert in] the case it would recognize some sort of reporter's privilege.

This should not be a difficult call for a Supreme Court that has been a strong guardian of First Amendment freedoms over the last decade. Journalists routinely and necessarily rely on confidential sources to gather information and report on matters of substantial public concern, which is precisely what Risen did in his book, *State of War*, when he informed the American people of a bungled CIA operation involving Iran's nuclear program, based on information from a confidential source.

If the court had taken up Risen's case, it would have been hard-pressed to deny the existence of a reporter's privilege afforded by the First Amendment or common law. There is now an overwhelming consensus pointing in that direction. Forty-nine states and the District of Columbia, and scores of other democratic countries, recognize some form of privilege for journalists against the compelled disclosure of confidential source information. On top of that, the court's First Amendment jurisprudence in a wide array of other areas has strongly reinforced free speech protections.

Mauro: Why do you think the Supreme Court declined to take up Risen's case?

Boutros: I think the court denied review because the Justice Department did a good job of muddying the waters in opposing the cert petition, arguing that the facts made this a bad vehicle for review and that its new guidelines for subpoenas to journalists made review unnecessary.

And then, right before the court's conference to decide whether to grant the petition, in what was perceived to be a clear reference to the Risen case, the attorney general told news organizations that he would never put a reporter in jail for doing his job. That seemed to me to be a rather blatant "supplemental brief" in opposition to certiorari.

Mauro: It has been 13 years since the Supreme Court has ruled on a press freedom case involving a journalist. Why do you think that is, and would you recommend to press clients that they bring such cases to the Supreme Court?

Boutros: It is a striking statistic, particularly given the number of other First Amendment cases that the current Supreme Court has taken up. The court in recent years has appeared to have what I've called a First Amendment "blind spot" when it comes to cases involving freedom of the press. That being said, major media organizations used to be much more willing to spend time and money to fight major First Amendment battles than they have been in the last 13 years, so fewer major cases have made their way to the court.

Moreover, there is a sense among some that the current court is hostile to freedom of the press and that it is too risky to ask the court to weigh in on important issues. I just don't buy that. Journalists should not be discouraged from continuing to pursue press freedom cases in the Supreme Court where warranted. In fact, given that it has been so long since the court weighed in on a First Amendment case involving a journalist, the time might be right for just such a case (or cases) to be heard. And even if the court declines review, cert petitions can help educate the court and elevate issues on the court's radar screen so the next time around the Justices will be sensitized to the issues and perhaps more likely to grant review.

Mauro: The Supreme Court has ruled favorably in other First Amendment cases to protect controversial speech, ranging from violent video games to protests at military funerals. Do you think the court would regard press cases similarly or differently?

Boutros: I don't think the court would view freedom of the press cases any differently except to the extent they present issues that are special to the journalism context. But that should make the arguments in favor of broad First Amendment protection even stronger.

The First Amendment singles out freedom of the press because the framers understood that a robust, independent press – and an informed public – are crucial elements of a thriving democracy. Fifty years ago, the court decided *New York Times v. Sullivan* and then a string of other pro-press decisions (*Branzburg* aside). Then that caused a certain amount of backlash, so you started to see the court go out of its way to say that the press is not entitled to special protection. But now the pendulum has swung too far. The court is protecting everyone but journalists, which makes no sense.

Mauro: What do you see as the biggest legal threat journalists face now, and into the future?

Boutros: Being deemed to have violated the law for obtaining and disseminating illegally leaked information.

I found it astounding – and frightening – when the Justice Department secured a search warrant by labeling Fox News reporter James Rosen “at the very least ... an aider, abettor or co-conspirator” under the Espionage Act when he obtained information from a confidential source in connection with a story, and was thus able to rummage through Rosen's email without his (or anyone else's) knowledge.

Neither he nor his news organization had any opportunity to object to the search on First Amendment or any other grounds. That the Justice Department would take the position that a reporter may be guilty of an Espionage Act violation simply for doing his job, and that journalists' work product and possible communications with confidential sources are vulnerable to secret government searches is deeply troubling and poses a very real threat to press freedom.

While the Justice Department did revamp its voluntary internal guidelines for

issuing subpoenas and warrants to members of the news media in the wake of this controversy, only time will tell how they and other prosecutors will deal with similar circumstances going forward. In the aftermath of the Snowden leak, some government officials accused the reporters who received the information of committing crimes, so this is not just some abstract concern, especially as the government grapples with the difficulties of keeping information secret in the digitized world we live in today.

**Mauro:** Should journalists really be concerned about being prosecuted for violating the Espionage Act for obtaining and publishing potentially classified information from government sources? Is there any legal basis for such a prosecution?

**Boutros:** No U.S. court has ever enforced the Espionage Act against a journalist, and with good reason. The First Amendment's protections for the press are not limited to just publication of newsworthy information, they extend to routine newsgathering techniques (like questioning government sources and urging them to leak) as well. The Supreme Court has repeatedly made clear that the First Amendment prohibits the government from punishing a reporter who lawfully obtains and publishes information of public concern – even if he or she knows that the source of that information may have committed a crime by, for example, leaking it, intercepting it or stealing it.

But as we saw in the Fox News/Rosen case, aggressive prosecutors are willing to push the boundaries of the law to deter leaks of classified and other sensitive information and some are remarkably insensitive to First Amendment values.

The Supreme Court has never squarely addressed the issue, so I would not be shocked if we see federal and state prosecutors threatening criminal charges against reporters in the future, even if they are baseless. We need to be ready to fight.

# Defending James Risen: Circuits Split

## Many federal circuit courts offer journalists little protection from testifying in criminal trials

By Cindy Gierhart

When the Supreme Court in June denied reporter James Risen's request for an appeal of his contempt order for refusing to name a source, it left a bleak outlook for the reporter's privilege in criminal cases in the Fourth Circuit. Unfortunately, many of the other federal circuits do not paint a bright picture when it comes to reporters testifying in criminal cases.

While there is no federal shield law (supporters hope the latest version of such a bill will go to the Senate floor for a vote [soon](#)), most federal circuit courts have recognized some type of reporter's privilege. A reporter's privilege protects journalists in some instances from having to testify about their reporting or reveal their confidential sources.

That privilege varies across the circuits, with journalists generally receiving the least protection in criminal cases, thanks in part to the 1972 Supreme Court case *Branzburg v. Hayes*. In *Branzburg*, various reporters were called to testify in grand jury proceedings regarding their observation of either drug use or Black Panther activity.

The Court said the First Amendment does not protect reporters from having to testify in grand jury proceedings when the reporter is a witness to the crime being investigated.

Since 1972, circuit courts have chosen to read *Branzburg* either narrowly or broadly. Most courts believe *Branzburg* only applies to criminal cases, so they are much more willing to find a reporter's privilege in civil cases. But the courts vary even as to how much privilege they're willing to grant – if any – in criminal and grand jury proceedings.

### Fourth Circuit finds no privilege where reporter witnesses criminal conduct

In 2006, New York Times reporter James Risen published a book, *State of War*, in which he revealed details of a classified CIA operation that tried and failed to have a former Russian scientist supply Iran with fake weapon blueprints. He credited the information to an anonymous source.

Jeffrey Sterling is a former CIA agent who has been criminally charged under the

Espionage Act for allegedly disclosing classified information to Risen. After Sterling's grand jury indictment and in preparation for trial, the government subpoenaed Risen to testify about who his anonymous source was.

The district court initially found that Risen did not have to testify, recognizing a reporter's privilege. The circuit court, however, reversed this decision on appeal. By denying Risen's petition for appeal, the Supreme Court effectively left intact the circuit court's decision.

The circuit court ruled that there is no reporter's privilege "in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in." There is only one small exception, which comes straight out of *Branzburg*: only if the request to testify was made in bad faith, as an attempt to harass the reporter, or for some other "non-legitimate motive" will the reporter not have to testify.

Some other courts have interpreted the *Branzburg* ruling to apply only to grand jury proceedings and not criminal trials, but here Risen was subpoenaed to testify in Risen's trial, after he had already been indicted. (Risen was also subpoenaed in the earlier grand jury indictment, but that subpoena expired before it could be resolved.)

Therefore, the Fourth Circuit did not take the most limiting interpretation of *Branzburg*, instead finding that there is essentially no reporter's privilege in any criminal trial where the reporter is a witness.

In criminal cases prosecuting government employees for leaking classified documents, the reporter will always be a witness to the crime of disclosing documents. However, there could be some breathing room in the court's opinion for reporters asked to testify in criminal cases in which they are not witnesses.

For example, if a journalist was asked to testify in a murder trial about who disclosed a confidential police report (as was recently the case in Illinois for reporter [Joe Hoseney](#)), the journalist is not a witness to the murder. If a law enforcement officer were charged with a crime regarding the disclosure of the police report, then perhaps the reporter could be forced to testify in the officer's grand jury proceedings. But at the murder trial, the journalist would not be a witness to the crime of murder, and there is at least an argument that a reporter's privilege would apply in that case in the Fourth Circuit.

There is also some breathing room in how a future court might interpret that small exception that a journalist will be protected, even in criminal cases, when the subpoena was issued in bad faith or for the purpose of harassment.

Justice Powell in his concurring opinion in *Branzburg* defined harassment as being "called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if . . . his testimony implicates confidential source relationships without a legitimate need of law enforcement."

The Fourth Circuit did not explicitly adopt this as its test for harassment, but it did



seem to endorse it by applying it to Risen. The court found that Risen was not being harassed with a subpoena because the information he holds is not tenuous or remote but rather central to the case. He is the only witness who can offer direct evidence in Sterling's case, the court wrote.

Therefore, in criminal cases going forward, the argument could be made that courts in the Fourth Circuit must review whether prosecutors have a "legitimate need" for the information and whether the journalist's information has more than a "remote and tenuous relationship to the subject of the investigation" before enforcing subpoenas against journalists.

### No better in the Fifth or Seventh Circuits

The Fourth Circuit is not alone in showing its hesitancy to shield reporters from testifying in criminal trials. The Fifth and Seventh Circuits do not distinguish between grand jury investigations and other criminal proceedings when determining whether to force a journalist to testify, which means they tend to apply the more restrictive view from *Branzburg* to all criminal proceedings.

**Fifth Circuit:** The Fifth Circuit is not particularly favorable to reporters testifying in criminal cases. In the 1998 case *United States v. Smith*, the court wrote, "Branzburg will protect the press if the government attempts to harass it. Short of such harassment, the media must bear the same burden of producing evidence of criminal wrongdoing as any other citizen."

That statement would not bode well for Risen, were he in the Fifth Circuit. Even if harassment is interpreted to mean the information is "remote and tenuous" or does not serve a "legitimate need," the Fourth Circuit already found that Risen was not being "harassed" according to this definition.

**Seventh Circuit:** The Seventh Circuit paints the bleakest picture for reporter's privilege of any of the circuits. Most of the circuit courts recognize some kind of reporter's privilege in civil contexts, but the Seventh Circuit is skeptical that any privilege exists for journalists in any context. The cases where the court has decided this have involved non-confidential sources, which means a future court could find a privilege to protect confidential sources. But at the moment, that future is uncertain.

Risen certainly would not have found better protection in the Seventh Circuit than in the Fourth.

### Stronger protections

In no circuit would Risen have been easily assured protection from testifying. However, in circuits that treat grand jury proceedings differently from other criminal trials, there tends to be greater protections – though slight – for non-grand jury proceedings.

**First and Second Circuits:** In non-grand jury criminal cases, the test is somewhat undefined in the First Circuit, but there seems to be some leeway for journalists. In *In re Special Proceedings*, the First Circuit looked at whether the information was

“highly relevant to a good faith criminal investigation” and whether “reasonable efforts were made to obtain the information elsewhere.”

The Second Circuit also places grand jury proceedings on a higher tier than other criminal proceedings, though a “grand jury” test is not clearly articulated.

In the Second Circuit, the test for journalists in non-grand jury criminal trials is better than in most circuits: Before a journalist is required to divulge confidential information – in a civil or criminal case – the subpoenaing party must make “a clear and specific showing that the information is: (1) highly material and relevant, (2) necessary or critical to the maintenance of the claim, and (3) not obtainable from other available sources.” This rule, also articulated in the dissent in the *Branzburg* case, applies in the circuit through *United States v. Burke*, a 1983 case.

Risen might have actually found protection under either of these standards. The government has collected a substantial amount of evidence indicating that Sterling was Risen’s source, including records of phone calls and emails sent between the two. Many argue that Risen’s testimony is not at all necessary to Sterling’s trial and might therefore fail both circuits’ requirements that the information be highly relevant and not available from other sources. There would also be an argument in the Second Circuit that Risen’s testimony is not necessary or critical to convict Sterling.

**Third and Ninth Circuits:** The Third and Ninth Circuits conduct a balancing test to determine whether a journalist will be forced to testify in a criminal proceeding. The judge will weigh the First Amendment newsgathering interests of journalists against the need for relevant evidence of criminal conduct to be given at trial.

That is an obviously broad standard with considerable discretion left to the judge. Whether a journalist will be forced to testify will likely rely heavily on the facts of the case and the particular court’s prior decisions regarding reporter’s privilege.

Therefore, it is hard to say whether Risen would have been protected under this standard. Given that the need for the information is arguable low, because the government has collected a significant amount of circumstantial evidence against Sterling, it is certainly plausible a judge would have protected Risen under this standard.

**D.C. Circuit:** The standard is not well defined in D.C. for criminal cases not involving grand juries, but at least one case, *United States v. Ahn*, upheld a reporter’s privilege when the journalists’ testimony was “not essential or crucial” to the case and not relevant to determining the defendant’s guilt or innocence.

If the test is based solely on relevancy, Risen likely would not be protected because his testimony is certainly relevant to Sterling’s trial. But if the test looks at whether the information is “essential or crucial” to the case, then Risen would have a very good argument for being protected.

[An unclear standard elsewhere](#)

A few circuits have never articulated a standard for protecting journalists in criminal proceedings, which would leave Risen's fate unclear, were he to appear in these courts.

**Sixth Circuit:** In a grand jury proceeding, a reporter will be forced to testify unless the reporter is being harassed, the investigation is conducted in bad faith, the information is remote or tenuous to the case, or there is no legitimate law enforcement need for the information, according to the court in *Storer Communications, Inc. v. Giovan*.

It is not clear in the Sixth Circuit whether criminal trials outside of grand jury proceedings would be held to the same standard.

**Eighth Circuit:** At the appellate level, no standard has been articulated. However, a district court in Arkansas has rejected a reporter's privilege in criminal cases.

**Tenth Circuit:** The Tenth Circuit also has not defined the standard at the appellate level for criminal cases, but the District Court in Kansas held that the same standard should apply in civil and criminal cases. Under the civil standard, the court will look at whether (1) the information can be obtained elsewhere, (2) "the information goes to the heart of the matter," (3) "the information is of certain relevance," and (4) "the type of controversy."

However, that precedent is limited to Kansas, and a circuit court might very well decide differently.

# Smart recordings

## Apps that record phone calls are convenient, but can present confidentiality risks

By Jamie Schuman

Reporters frequently cite mobile apps that record phone calls as among their favorites, according to [David Ho](#), The Wall Street Journal's editor for Mobile, Tablets & Emerging Technology, who has trained some 1,500 journalists on how to use tech tools in their work.



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But reporters might not realize that these apps often store the recordings of calls on their own servers or the cloud – and then send a copy to the user's cell phone. This means third parties can access the information, which raises questions about who owns the recording and whether communications with sources are confidential.

“Once information gets into a third party's hands, there is a risk that your protections could be minimized as a result,” said Bruce Johnson, a media attorney at Davis Wright Tremaine in Seattle.

Despite the risks, call-recording apps have benefits. They're convenient, as people normally have their phone with them. They also offer easy ways to label, catalogue and share recordings.

Still, Ho recommends that reporters become aware of how these apps work before they use them.

“Journalists should be making informed decisions when they choose to use this kind of technology,” Ho said in an email. “They may not realize someone else is on the call with them.”

One way reporters can familiarize themselves with the ins-and-outs of call-recording apps is to read the terms of service, which are normally on companies' websites.

Journalists should pay special attention to ownership clauses, and may want to avoid products that claim redistribution rights of recordings, NPR Associate General Counsel [Ashley Messenger](#) said.

Reporters also should learn the apps' policies on subpoenas and confidentiality.

If the government or a private party wants to use the recording in a court case, it could try to get the information from the third-party provider. Journalists may want to find out whether the company will promise to always challenge subpoenas or whether it will reserve the ability to turn over the materials. They also may want to learn whether the third party will inform them if it is hit with a subpoena.

These concerns are not limited to call-recording apps. Any time reporters use technology that involves a third party – such as [Google Docs](#) or [SoundCloud](#) – it is wise to look at the company's policies on confidentiality.

Messenger said it's common for third-party apps to reserve the right to comply with subpoenas. Consequently, national security reporters or people writing about other sensitive topics might want to avoid these products.

“You do lose control unless you have actual contractual provisions or some other kind of certainty that they are going to fight a subpoena for you,” Messenger said.

One popular recording app, TapeACall, has a [policy](#) that it “may respond to subpoenas” by sharing customer information. But people can avoid this risk by using the app to record the call, immediately saving the interview to another device, and deleting the original from the app's server, said Meir Cohen, president of TelTech, the parent company of TapeACall.

“If someone were to delete the call, it wouldn't be an issue,” said Cohen, who added that TapeACall has had more than one million users in its first year.

Another curveball with third-party apps is that the law is “muddled” as to what shield law applies if interviews are subpoenaed, said Johnson of Davis Wright Tremaine.

About 40 states have shield laws that offer journalists varying degrees of protections against subpoenas. When a third party stores the information, it is unclear which law controls – where the recording is stored, where the reporter is based, or where the source is located.

Even if their interviews are not subpoenaed, journalists who are promising confidentiality to their sources need to make sure that call-recording apps are keeping their information confidential. Reporters should consider what protections third-party companies have to prevent hacking or eavesdropping, Messenger said.

On top of these digital-age concerns, reporters must remember that consent laws apply to phone apps, just as they do to standard tape recorders. People must get consent of all parties before recording in some states, but not in others. The Reporters Committee for Freedom of the Press has a [guide](#) that lists the laws for all states.

Messenger encouraged reporters to weigh all of these factors when deciding whether to use recording apps. Sometimes, she said, it could be better to tape interviews the

“old-fashioned way.”

“There are always trade-offs that have to be made between security, convenience and available technologies,” she said.

This Reporters Committee article first appeared on [Poynter.org](http://Poynter.org).

# Mining for data

## Searching government agencies for industrial resources

By Danielle Keeton-Olsen

Two miners died in a sudden expulsion of coal and rock during a mining operation at a West Virginia coal mine in May, and the reporter covering the event still does not have the inspection records of the previously-cited mine.

The Charleston Gazette's coal mine reporter Ken Ward Jr. interviewed mine operators, government officials and miners about [the disaster that struck Brody Coal Mine No. 1 on the evening of May 12](#), but he is still waiting for a response from the Mine Safety and Health Administration in the form of mine inspection reports.

"I don't have much hope of seeing those [documents] for many more months after this," Ward said.

Shortly after the fatalities, Ward filed a records request under the Freedom of Information Act with the Mine Safety and Health Administration, asking for recent inspection reports from Brody Coal Mine No. 1, a subsidiary of Patriot Coal.

Ward said this mine's inspection records are particularly important; MSHA, an agency of the U.S. Department of Labor, placed Brody No. 1 on its pattern of violation list, which means it had been cited by inspectors enough times that MSHA made monitoring the mine a priority.

"It was certainly a mine that had been identified by federal regulators as one they were concerned about," Ward said.

The mine's inspection reports would be able to show if the mine had been cited by an inspector for other safety concerns, such as a previous explosion or a buildup of



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coal dust. Such signs could have served as a warning to the impending fatalities, Ward said.

“What we want to see is what sort of inspections were taking place prior to this incident,” Ward said. “Time and again, what happens [when] miners were killed on the job is there were plenty of warnings, and the company didn’t do enough to prevent these major disasters.”

Reporters need access to updated inspection reports and explanations for citations and rule-violations to accurately cover any mine site -- from small, local salt mines and river dredging projects to mountaintop removal sites.

The Mine Safety and Health Administration holds the documents overseeing a variety of mining projects within every state, including gravel mine sites, sidewalk slate quarries, river dredging operations and salt mines, said Ellen Smith, owner and managing editor of [Mine Safety and Health News](#), a bi-weekly newsletter covering federal mine safety and health law and regulations.

“Everyone has mining near them, so every reporter should know how to get this information,” Smith said.

Because the documents shared between mine operators and government agencies can ensure accountability of mine sites and provide warnings of impending accidents, there are many avenues to access information on mines.

However, several of those access points to information are slow-moving, if not blocked altogether, according to reporters who cover mining.

### Online databases

Before making a formal records request to MSHA, Smith said she suggests that reporters first investigate MSHA’s [Mine Data Retrieval System](#), an online resource that provides a spreadsheet of inspections, violations, fines, injuries and fatalities accrued by a mine site, sorted by year.

Reporters and citizens can access the data retrieval system from the “Data Transparency” section of MSHA’s home page, and from there they can search for a specific mine, operator or contractor, or they can search by state and county under the “Other Search Options” section.

Once a reporter has targeted a mine, Smith said a reporter can look for inspections, fatalities, extensive injuries, or high fines and request documents related to the incident, such as inspector or mine operator reports that would include more details on a situation.

### Freedom of Information Act

MSHA, like the rest of the Department of Labor, must comply with the Freedom of Information Act and supply documents such as mine inspection reports, citations issued, injury reports and financial information.



MSHA files are still subject to the nine exemptions built into FOIA, and reporters should be particularly aware that complaint information documents and interviews of miners may be withheld under Exemption 3, which means an exemption to FOIA created by another federal law.

Smith said she gives MSHA credit for maintaining the online database of each mine's inspections, citations, orders and violations, but she does not believe MSHA complies with FOIA.

Smith tries not to file FOIA requests because MSHA generally takes more than a year to send documents, and when she does receive documents, they're heavily redacted.

The greatest struggle Smith encountered with FOIA followed a coal waste -- called coal slurry -- leak from a Martin County Coal Corporation waste containment pond in October 2000, clogging rivers in Kentucky and West Virginia with thick, gray goop.

In 2002, Smith said filed a records request to the Department of Labor's Office of the Inspector General for citations and orders for the corporation after a whistleblower accused political appointees of changing information on citations.

OIG's response to her FOIA request was as choked as the rivers, requiring more than seven years to gain access to the documents Smith needed, she said.

Smith received documents from OIG about a year after her initial request, but more than 50 percent of the content was redacted.

"There was so much information redacted that you couldn't tell what was going on," Smith said.

Smith said she refiled the request in 2004, but she again received heavily redacted documents.

She began to work with lawyers from the D.C. law firm Holland & Knight to appeal the response. The Department of Labor [passed her the documents](#) -- mostly unredacted -- in 2010, as she prepared to file suit.

"What does that tell you: it was releasable, and that's the kind of games that we're seeing with FOIA in this country," Smith said. "It's not just MSHA, and it's not just me."

By the time she received the documents, Smith said the information was not relevant to readers.

"Even if you brought up issues that may be suspected, the case was closed," Smith said. "It doesn't matter anymore because who could anyone go to."

Ward said he's recently experienced similar delays from MSHA, when in the past he could call an agent from MSHA and get a quick answer.

“We complain to MSHA and the Labor Department in the hopes of convincing them that they should start acting in a way that lives up to the transparency promises that the president made,” Ward said.

MSHA processed 1,816 FOIA requests, but only 30 percent of those requests were granted in full, according to the Department of Labor’s FY13 FOIA annual report.

The Department of Labor did not respond to requests for interview, and MSHA said its FOIA representatives do not sit for interviews with the press.

In her 27 years of experience covering mines throughout the nation, Smith said she’s had better luck receiving responses from the Federal Mine Safety and Health Review Commission.

When a mine operator challenges a citation by an inspector, it goes before the commission, and the agency will list the citation and inspection notes in its docket. In this way, a reporter can file a FOIA request to the commission for some of the same documents that should be available with a FOIA request to MSHA, Smith said.

Smith said she generally receives responses from the commission within the 20 days the federal government has to respond to FOIA requests, and she’s received responses in as few as two or three days.

### [Mine Safety and Health Act](#)

Many of the records a reporter could request from FOIA, and even some that are exempt under FOIA, are mandated to be made publicly available under the Federal Mine Safety and Health Act of 1977, commonly known as the [Mine Act](#).

Smith said she cites sections 103(h) and 109(b) of the Mine Act, which open all information, reports, findings, citations, orders, decisions, and records to public inspection, in order to receive faster responses to her requests for information.

“The legislative history [of the Mine Act] points to a very strong belief that openness would lead to safer operating conditions,” Smith said.

Recently, Smith has had some difficulty in asking MSHA to comply with the Mine Act. MSHA will redact information relevant to mine accidents, such as miner witness interviews, the number of miners involved in an accident, and the job titles of those involved, stating that releasing that information will violate individual miners’ privacy.

“[Miners are] working in a highly regulated industry, and you don’t have the typical rights of privacy because we want everything out in the open,” Smith said. “Yeah, you’re going to get questioned.”

Smith said she had previously been able to receive these documents under the Mine Act.

She first began to notice the change in MSHA’s responses after the Sept. 11 terrorist

attacks, Smith said.

Twelve days after 9/11, two explosions hit an Alabama mine, Jim Walters Resources No. 5 mine, killing 13 workers. Smith requested miner witness interviews from the event under the Mine Act, but she said she lost track of the requests in the wake of 9/11 coverage.

Smith realized the impact of the Jim Walters accident five years later, when three major mine disasters occurred in the same year -- Sago and Aracoma mines in West Virginia and Darby Mine in Kentucky.

Smith said she requested miner witness interviews for all three disasters under the Mine Act, but MSHA denied her requests, saying that they had not provided witness interviews after the Jim Walter Resources disaster, so they would not now.

Smith said she can understand why miners and operators would not want their names publicly available, but because mining is an inherently dangerous profession, family and community members should be able to check documents and question the nature of mines' and workers' operations.

"It might create a conflict in the community, but that [openness] was the whole point of the Mine Act," Smith said. "[This information] is supposed to be out there and on the table, and that's what keeps you honest."

# Anatomy of a Brief: Berger v. New York City Department of Health and Mental Hygiene

A detailed look at a recent Reporters Committee amicus brief

By Emily Grannis

In late June, the Reporters Committee filed a [friend-of-the-court brief](#) in an intermediate appellate court in New York addressing the difficult balancing of public interests and personal privacy in freedom of information cases.

## Public interest vs. privacy

Most freedom of information laws in this country have some form of exemption that protects from release information that is acutely personal (Social Security numbers, for example, or the contents of an individual's medical file). These privacy exemptions, though, are not absolute. There are times when the public interest in a piece of information is so high (or the personal privacy interest is so low) that the government will have to release that information.

In New York, the Freedom of Information Law includes a pretty standard privacy exemption that specifically protects six categories of information and imposes a balancing test on other information. Information is only exempt under the privacy clause in FOIL if its release would cause an "unwarranted invasion of personal privacy." The question, of course, then becomes, "Which invasions of privacy are unwarranted?" The answer is based on how much the public will benefit from having the information and how important the individual's privacy concerns in the information are.

Berger v. New York City Department of Health and Mental Hygiene involved just such a balancing test.

## The facts of the case

Segments of the Orthodox Jewish community in New York perform a type of circumcision ritual that carries a high risk of transmission of herpes to the infant. Because herpes can be deadly or cause serious brain damage in infants, the New York City Department of Health and Mental Hygiene requires anyone performing this type of circumcision to get the informed consent of the boy's parents. Mohels, the ritual circumcisers, have been openly defying that requirement, and there have

been several infant deaths tied to this practice.

Paul Berger, a reporter at the Jewish Daily Forward, requested from the Health Department the name of the mohel tied to a particular case of infant herpes. Although the department had released a mohel's name several years earlier (and, in fact, had banned the man from continuing to perform these types of circumcisions), the department denied Berger's FOIL request, citing the mohel's personal privacy rights.

The trial court (which in New York is called the Supreme Court) agreed with the Health Department that the public interest did not outweigh the privacy interests at stake for several reasons. First, the judge was concerned that releasing the mohel's name would discourage people from reporting cases of infant herpes in the future. Additionally, the judge found that it would do the public no good to know the mohel's name.

### The law on privacy vs. public interest

FOIL exempts from disclosure any information that, if released, would amount to an "unwarranted invasion of personal privacy."

New York enacted its FOIL to facilitate public access to government information. "FOIL is based on a presumption of access to [government] records, and an agency . . . carries the burden of demonstrating that the exemption applies to the FOIL request." *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462, 849 N.Y.S.2d 489, 880 N.E.2d 10 (N.Y. Ct. App. 2007) (internal citations omitted). Importantly, exemptions to FOIL are to be narrowly construed. *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566, 505 N.Y.S.2d 576, 496 N.E.2d 665 (N.Y. Ct. App. 1986).

...

FOIL exempts from public disclosure information that, "if disclosed would constitute an unwarranted invasion of personal privacy." Public Officers Law § 87(2)(b). The law goes on to partially define an "unwarranted invasion of personal privacy" by laying out six categories of information that would qualify [ . . . ] That list is not comprehensive, however, and where none of the six enumerated examples apply, a court "must decide whether any invasion of privacy [ . . . ] is 'unwarranted' by balancing the privacy interests at stake against the public interest in disclosure of the information." *Matter of New York Times Co. v. City of N.Y. Fire Dept.*, 4 N.Y.3d 477, 485 (N.Y. Ct. App. 2005).

When it comes to applying the public interest/privacy balancing test, courts look to what stake the public has in knowing the information and how the information will

contribute to public understanding of an important issue.

In general, there is a strong public interest in enforcing all valid laws and codes. See, e.g., *Sheinberg v. Fluor Corp.*, 514 F.Supp. 133 (S.D.N.Y. 1981) (discussing the public interest in compliance with the federal security laws); *Sierra Club v. Alexander*, 484 F.Supp. 455 (N.D.N.Y. 1980) (discussing the public interest in compliance with the National Environmental Policy Act); and *Verizon New York, Inc. v. Optical Commc'ns Grp., Inc.*, 91 A.D.3d 176, 936 N.Y.S.2d 86 (App. Div. 1st Dept. 2011) (acknowledging the public's interest in compliance with statutory and regulatory schemes). It is in the best interest of all members of the public if everyone complies with valid statutes.

...

Distinct from any general interest in ensuring laws are enforced, the public also has a well-recognized interest in "protecting children from injury or mistreatment and in safeguarding their physical, mental and emotional well-being." *In re Stephen F.*, 118 Misc.2d 655, 657, 460 N.Y.S.2d 856, 858 (N.Y. Fam. Ct. 1982). See also *In re Maximom*, 186 Misc.2d 266, 710 N.Y.S.2d 864 (N.Y. Fam. Ct. 2000); *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997).

### Analysis of the case

The Reporters Committee argued in its brief that the mohel's privacy interests here were outweighed by the public interest in having complete information about this issue.

The Supreme Court failed to acknowledge the high public interest in both ensuring compliance with duly enacted regulations and protecting the health and welfare of children. Both interests are critical to society's functioning, and both are implicated in this case.

Additionally, privacy rights are not absolute, and there are different degrees of privacy rights when dealing with private activity verses professional activities. Because the mohel in this case was acting in his professional capacity when he allegedly infected the infant with herpes simplex virus, he has reduced privacy rights in the information related to how he performed his job.

It was also important that the records the reporter sought here were not medical

treatment records, which are exempt under FOIL.

[D]isclosure of “medical histories” would involve disclosing “ongoing treatment for [ . . . ] medical conditions.” Id. No such treatment is involved here, and the disclosure of the mohel’s name would not make a record of such treatment public [ . . . ] The mohel’s name is not a client or patient record in this case, because the mohel was not a client or patient of the Health Department.

...

While the release of someone’s health status, especially their status as it relates to a sexually transmitted disease, may in many circumstances be “offensive and objectionable” to a reasonable person, these are no ordinary circumstances. In these cases, adults are knowingly putting infants at risk for death or serious injury, and are openly violating New York City law in the process of doing so. Releasing relevant information about this public health hazard is not likely to offend a reasonable person.

The Reporters Committee brief also emphasized that given the mohels’ open disregard for the Health Department’s informed consent rules, and the risk to the public of spreading communicable diseases, the public interest should win out in this case.

The lower court held that “the disclosure of the names of the reported persons would likely subject the named individuals . . . to possible sanctions for violations of the NYC Health Code if they infected others.” Berger, R-015. It is unclear why the Supreme Court believed that the possibility that an individual who has violated a duly enacted law should be protected under a privacy exemption because he may face sanctions for violating the law [ . . . ] The Supreme Court’s conclusion that privacy interests protect an individual from sanctions or prosecution for violating valid laws has no foundation.

...

[T]he Supreme Court specifically found that the Forward had failed to show a “further or particularized public interest” in obtaining the mohel’s name, rather than a redacted copy of the Health Department record. Berger, R-015. By acknowledging that there may be further ramifications for the mohel if his identity were released, the lower court identified just such a “further or particularized” interest. The public has an interest in the fact that this infection was spread, certainly, but New Yorkers also have a “further” interest in knowing who is spreading this infection to infants and

in ensuring that person is appropriately sanctioned for violating 24 RCNY § 181.21.

### Why the public should be able to access this record

Berger and the Forward are trying to educate and warn their readers about a real threat to infants in New York City. There is no substitute in that effort for having the mohel's name. Because his privacy rights are diminished when he acts in his professional capacity, and because the public has a strong interest in universal enforcement of laws and the protection of children, journalists should be able to access the mohel's name to compile an accurate and complete report of the situation.



# Republication in the Internet age

## How Section 230 of the CDA protects news sites from legal action

By Kevin Delaney

One question that has troubled members of the legal community for decades is how the law should treat one who does not create, but rather repeats, a defamatory falsehood?

In most jurisdictions, one who repeats a defamatory falsehood is treated as the publisher of that falsehood and can be held liable to the same extent as the original speaker. This principle, called [republiation liability](#), subjects newspapers, magazines, and broadcast news stations to liability when they publish defamatory letters to the editor and advertisements. Republication liability also makes it possible for a journalist to be sued for libel over a defamatory quote he includes in a story, even if the quote is accurate and attributed to a source.

Republication liability, however, works differently on the Internet. In 1996, Congress passed Section 230 of the Communications Decency Act, a law that limits the extent to which Internet service providers and websites can be held liable for republishing content created by third parties.

According to Eric David, a First Amendment attorney with the law firm Brooks Pierce, Section 230 “is the most important statutory development to protect . . . [mass communicators] in a long time.”

### Understanding Section 230

Section 230 states, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

Section 230 becomes easier to understand when two terms are explained.

The first is “interactive computer service.” Courts have said this term is broad enough to include Internet service providers, news sites, blogs, social networking sites, and electronic newsletters.

The second term is “information content provider.” According to Section 230, this term includes anyone who “in whole or in part” creates or develops “information provided through the Internet . . . .” An individual who posts a user comment on a Web site would be classified as an “information content provider” because he was

responsible for the post’s “creation or development” and used the Internet to provide the post.

So, in basic terms, Section 230 protects the providers and users of “interactive computer service[s],” a term that includes ISPs and news sites, from being considered publishers of content provided by third parties.

Section 230’s protections are often invoked in lawsuits for libel, which require a plaintiff to show (among other things) that a defamatory statement made about him or her was published. For example, if a third-party user posts a defamatory comment on a news site, the news site will not be treated as the publisher of that comment and will be protected by Section 230 in a subsequent libel suit. Section 230, however, will not protect the third party who posted the defamatory comment.

The protections offered by Section 230 are not absolute, however. Section 230’s protections will not apply to content an interactive computer service creates on its own. If a reporter for a news site writes a defamatory sentence in an article, the news site will be treated as the “information content provider” of the defamatory sentence and be unable to invoke Section 230’s protections. Many jurisdictions also hold that an interactive computer service can lose Section 230’s protections by materially contributing to the alleged unlawfulness of third-party content.

### Examples of How Section 230 Can Protect Your News Site

Although not a complete list, what follows are examples of how Section 230 can protect the providers and users of your news site.

#### User Comments

Under Section 230, a provider or user of an interactive computer service will not be treated as the publisher of user comments posted by third parties. *Collins v. Purdue University*, a district court case from the U.S. District Court for the Northern District of Indiana, displays this principle.

In *Collins*, the plaintiff sued the publisher of a news site, Federated Publications, Inc., for libel over comments third-party users posted on the news site. Concluding Federated was an interactive computer service, the court ruled Section 230 shielded Federated from liability. The court wrote, “Federated can be held liable for defamatory statements in its own material published on the website — such as the article if the article was defamatory — but cannot be held liable for the publication of remarks or postings by third parties.”

Section 230 also permits interactive computer services to remove and make minor editorial changes to user comments. As the Court of Appeals for the Ninth Circuit wrote in [Fair Council of San Fernando Valley v. Roommates.com](#), “A website operator who edits user-created content—such as by correcting spelling, removing obscenity or trimming for length—retains his immunity for any illegality in the user-created content,” provided that the edits do not materially contribute to the content’s alleged unlawfulness.

According to Patrick J. Carome, a partner at WilmerHale, “editing third-party content . . . in a way that makes the third-party content defamatory” would be one way to materially contribute to the content’s alleged unlawfulness and lose the protections offered by Section 230. The Roommates.com court gave this example:

[A] website operator who edits in a manner that contributes to the alleged illegality—such as by removing the word “not” from a user’s message reading “[Name] did not steal the artwork” in order to transform an innocent message into a libelous one—is directly involved in the alleged illegality and thus not immune.

### Retweeting or Sharing on Social Media

Although no court has directly addressed the issue, Chip Stewart, a media law professor at Texas Christian University, expects Section 230’s protections to extend to those who retweet or share content created by third parties on social media.

“From looking at parallel cases, it looks like Section 230 will protect the users [of Facebook and Twitter],” Stewart said.

According to Stewart, social media account holders would most likely be classified as “user[s] of an interactive computer service” under Section 230 and thus entitled to the statute’s protections when retweeting and sharing third-party content.

As with user comments, Section 230 should permit users of social media to make minor editorial changes when retweeting or sharing, but users should keep alterations to a minimum.

“[I]f you were to summarize another’s tweet [instead of simply retweeting it],” Stewart said, “you may start to assume liability.”

### Selecting User Comments for Publication in a News Story

It has become common for news sites to republish user comments and social media posts (especially tweets) in stories discussing reactions to newsworthy events. But it is not clear whether Section 230 would protect such a use.

Although no court has decided such a case, Eric David and Chip Stewart expect Section 230’s protections to extend to the practice of republishing user comments and social media posts in stories. As David put it, “Taking a comment from below the story and putting it in the story . . . deserves to be and would be protected under Section 230.”

If such a case were ever heard, [Jones v. Dirty World Entertainment Recordings LLC](#), a case from the U.S. Court of Appeals for the Sixth Circuit, and [Batzel v. Smith](#), a case from the U.S. Court of Appeals for the Ninth Circuit, would likely play prominent roles.

In Jones, decided this June, the Sixth Circuit ruled that Section 230 immunized a gossip Web site, TheDirty.com, from a defamation suit after the site selected and

then published defamatory posts regarding the plaintiff that were uploaded to the site by anonymous third parties.

The court held that TheDirty.com's decision to "select the statements for publication" "did not materially contribute to the illegality of those statements." Quoting from the opinion of the Fourth Circuit in [Zeran v. American Online, Inc.](#), the court in Jones wrote, "The CDA expressly bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content.'"

In Batzel, the defendant received an allegedly defamatory email from a third party, which he then published to a listserv. Before publishing the email to the listserv, however, the defendant made minor wording changes to the email and included a short "moderator's message."

The Ninth Circuit wrote that Section 230 should protect those who decide to publish and make minor editorial changes to third-party content. The court added, however, that Section 230's immunities will only apply in situations where the third-party content was provided for "publication on the Internet."

Because user comments and social media posts are provided for "publication on the Internet," under the holdings from Jones and Batzel, a news site's decision to republish those comments and posts in news stories should receive protection under Section 230. As noted, however, when republishing material created or developed by third parties, one should be careful not to materially alter the content's underlying meaning.

#### Including a Defamatory Quote Obtained by a Reporter in a News Story

A more difficult question is whether Section 230 would immunize a news site that published an interview conducted by one of its reporters in which the reporter's source made a defamatory statement.

Carome described the question as "an open issue" and said "there is at least a plausible argument" that Section 230's protections would apply.

According to Carome, such a case may turn on whether, under Batzel, the source knew he was providing the quotes for publication on the Internet.

Also relevant would be whether, in the court's opinion, asking a question that leads to a defamatory response constitutes "the creation or development of information." If it does, the news site would be deemed an information content provider under Section 230 and thus be afforded the statute's protections.

Not everyone believes Section 230's protections will extend this far. As David put it, "Section 230 is not meant to immunize a reporter who goes out and gets and then republishes someone else's defamation."

# Tweeters Beware

## Use of Twitter and other communications is allowed in some courtrooms but not others

By Jamie Schuman

At George Zimmerman's trial last summer, Orlando Sentinel reporter [Rene Stutzman](#) wrote traditional stories but also tweeted courtroom highlights, sometimes more than 50 times a day.

"It provided pieces of information to followers of Twitter who wouldn't otherwise be looking at more conventional news sources, like reading the newspaper or watching an evening newscast," Stutzman said.

While the circuit court in Seminole County, Florida, let reporters use Twitter to cover the Trayvon Martin murder trial, many judges ban courtroom tweets. They say the practice can distract people at hearings or impede the defendant's right to a fair trial. But as tweeting becomes more routine across newsrooms, many crime reporters want to use the technology in courtrooms, too.

"Gone are the days when we had the luxury of waiting until 9 p.m. to provide a single story for the print product," said [Henry Lee](#), crime reporter for the San Francisco Chronicle. "Now we have deadlines that are around the clock."

Many judges do not agree that courtroom tweets should be permitted. Federal courts, many of which do not allow laptops and cell phones in courtrooms, have been especially slow to let reporters tweet from hearings. Some state judges do not allow it, either.

Courts normally have policies that govern electronic devices, but those rules do not often provide definitive answers on whether use of communications services is permitted. Each judge usually has the power to decide if and when social media is allowed in his or her courtroom.

At the state courthouse in Chicago, it's a given that reporters can tweet from hearings except in high-profile cases, where judges sometimes place limits, said Chicago Sun-Times reporter [Rummana Hussain](#). But Lee said in the nine Bay Area counties that he covers, most courtrooms frown on the practice.

Eric P. Robinson, co-director of the Press Law and Democracy Project at Louisiana State University, advises journalists to get permission before tweeting from the courtroom unless the judge has a clear policy on the matter.

“They should never just assume they can do it because that could just lead to trouble,” Robinson said. “You don’t want to be held in contempt.”

Robinson, who has written on [courtroom tweeting](#) for the Digital Media Law Project at Harvard University, recommends that journalists first ask the court’s public information officer for permission. If no one is in that job, reporters should contact the clerk for the entire court or for the individual judge on the case, he said.

Journalists should only reach out to the judge directly if they know him or her and if that practice is accepted in their community, Robinson said.

“The courts are all about procedure and protocol,” he said. “It increases your chances of getting what you want when you follow their way of doing things.”

If reporters get pushback, they should argue that courts have long been open to the public, and Twitter is the next step in that tradition, Robinson said. They also could stress that tweets will not distract others in the courtroom, and they could show “strength in numbers” by advocating with other journalists, he added.

A lawsuit, he said, is a last resort.

### Stories from the field

Courts reporters say Twitter helps them beat the competition, provide snippets of color, and connect with audience members who live far away but have an interest in the case.

“It’s a marketing tool,” Stutzman said. “I’m trying to drive traffic to our website.”

Stutzman’s Zimmerman case tweets included descriptions of trial participants’ expressions, excerpts from closing remarks, updates on scheduling and pictures of protesters outside the court.

Court officials at the trial were initially hesitant to allow tweeting, but reached a compromise that let people do so on touch screens only, said Michelle Kennedy, public information officer at the 18th Judicial Circuit. That avoided the problem of noisy keyboards.

Hussain said it is sometimes helpful for reporters to go directly to the judge – especially if they know him – and explain what they want to do.

“Some judges are over 60 or over 70,” she said. “They might not necessarily know what Twitter is.”

For the trial in the murder of actress Jennifer Hudson’s family members, Hussain asked the judge about four times to lift his Twitter ban. He ultimately let reporters use the media from an overflow room only, but Hussain said she would sometimes tweet from inside the courtroom during recess.

Lee, of The Chronicle, can be even more brazen. If he sees competitors

surreptitiously tweeting, he said he will put his iPhone under a folder and do the same. He also sometimes tries to sit in a “blind spot” where the sheriff’s deputy won’t see him, or hides behind a large person and tweets away.

“It’s like you’re angling for a good movie seat,” Lee said. “In my case, I’m maximizing my ability to tweet even if there is an official rule against that.”

Lee’s strategy seems to be working. In 2010, he published a book based largely on his live blog of an Oakland murder trial. The book, *Presumed Dead: A True-Life Murder Mystery*, uses many of the colorful tidbits that he captured in his posts a couple years earlier.

“A good reason I was able to write the book was because I was able to live blog from the courtroom in real time,” Lee said.

This Reporters Committee article first appeared on [Poynter.org](http://Poynter.org).

