

# PROTECTING LOCAL NEWS OUTLETS FROM FATAL LEGAL EXPENSES

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*As lawsuits targeting the press continue to rise in response to today’s political climate, local news outlets are more likely to find themselves facing unexpected legal expenses. Although the national news media can generally weather the costs of libel lawsuits and subpoena requests, smaller news outlets have gone bankrupt or barely escaped such a fate while paying off legal fees, even when these outlets have ultimately been successful in their legal battles. Because local news outlets serve a critical role in underserved communities and are powerful agents of positive social change, they ought to be protected against fatal legal expenses. This Article examines the important functions of local journalism, explains the recent legal challenges that local news outlets have been facing and their resulting impact, and exposes the problematic gaps of statutory frameworks that fail to adequately protect local news outlets from fatal legal expenses. In so doing, this Article argues that enacting strong state anti-SLAPP statutes and reporter’s shield laws is necessary to combat recent costly attacks against the press and to preserve the vitality of the local media.*

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## INTRODUCTION

Political and social tensions have led to recent attacks against the press. At the start of 2020, President Donald Trump’s campaign<sup>1</sup> and Harvard Law Professor Larry Lessig<sup>2</sup> each sued the *New York Times* for libel in

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<sup>1</sup> Michael M. Grynbaum & Marc Tracy, *Trump Campaign Sues New York Times over 2019 Opinion Article*, N.Y. TIMES (Feb. 26, 2020), <https://www.nytimes.com/2020/02/26/business/media/trump-new-york-times-lawsuit.html>.

<sup>2</sup> Matthew Kassel, *Harvard Law Prof Sues NYT over Epstein Story, but Legal Experts Say Suit Probably Won’t Hold up in Court*, MEDIAITE (Jan. 13, 2020, 4:51 PM), <https://www.mediaite.com/print/harvard-law-prof-sues-nyt-over-epstein-story-but-legal-experts-say-suit-probably-wont-hold-up-in-court>.

independent actions. A *New York Post* reporter faced an unreasonable subpoena request for his social media records from the New York Police Department in December 2019.<sup>3</sup> In March 2020, California Congressman Devin Nunes sued the *Washington Post*, claiming over \$250 million in damages for alleged defamation.<sup>4</sup> And the list goes on.<sup>5</sup>

While major national newspapers, like those above, have the resources to defend themselves in legal actions without much of a scrape, local news outlets thrust into unexpected legal battles endure bigger challenges. Smaller news outlets have, for instance, gone bankrupt or barely escaped such a fate while paying off legal fees,<sup>6</sup> even where they were ultimately successful in their cases.<sup>7</sup>

Because local news outlets serve a critical role to underserved communities, as these communities are especially likely to turn to and trust local news sources,<sup>8</sup> and because these outlets can act as powerful forces for

<sup>3</sup> See Craig McCarthy, *NYPD Tried to Subpoena NY Post Reporter's Twitter Account Citing Anti-Terror Law*, N.Y. POST (Feb. 13, 2020, 7:01 PM), <https://nypost.com/2020/02/13/nypd-tried-to-subpoena-ny-post-reporters-twitter-account-citing-anti-terror-law> (discussing the subpoena and expert characterizations of it as an “abuse of authority” and “George Orwell-level shocking”).

<sup>4</sup> Complaint at 1–4, 15–20, Nunes v. WP Co., No. 3:20-cv-146 (E.D. Va. Mar. 2, 2020) (claiming that a *Washington Post* “hit piece” intentionally misrepresented Nunes as having “lied to and deceived the President of the United States”).

<sup>5</sup> See, e.g., *Herring Networks, Inc. v. Maddow*, 445 F. Supp. 3d 1042, 1046 (S.D. Cal. 2020) (detailing a defamation action brought by conservative news outlet OAN against progressive talk show host Rachel Maddow dismissed under California’s anti-SLAPP statute); Sandy Hausman, *Journalist and Activist Celebrate as \$1.7 Million Lawsuit Is Thrown Out*, WVTF & RADIO IQ (Oct. 28, 2019), <https://www.wvtf.org/post/journalist-and-activist-celebrate-17-million-lawsuit-thrown-out#stream/0> (detailing a businessman’s failed defamation lawsuit against a local Charlottesville newspaper); Kate Irby, *Devin Nunes’ Lawsuit Against Trump Research Firm Dismissed by Virginia Judge*, FRESNO BEE (Feb. 22, 2020, 7:55 AM), <https://www.fresnobee.com/news/local/article240539771.html> (explaining that “The Fresno Bee . . . is among the three news organizations [Devin] Nunes is suing” for libel).

<sup>6</sup> See Lukas I. Alpert, *Gawker Files for Bankruptcy, Will Be Put up for Auction*, WALL ST. J. (June 10, 2016, 4:55 PM), <https://www.wsj.com/articles/gawker-declaring-bankruptcy-will-be-put-up-for-auction-1465578030> (describing how the \$140 million judgment against Gawker for its publication of an intimate video of a celebrity triggered the site’s bankruptcy).

<sup>7</sup> See Tim Cushing, *Cop’s Bogus Defamation Lawsuit Nearly Puts a Small Iowa Newspaper out of Business*, TECHDIRT (Oct. 22, 2019, 12:09 PM), <https://www.techdirt.com/articles/20191014/19474843191/cops-bogus-defamation-lawsuit-nearly-puts-small-iowa-newspaper-out-business.shtml> (explaining how over \$140,000 in post-insurance legal expenses for a defamation case that was dismissed because the facts were uncontested forced a small Iowa newspaper to start a GoFundMe in order to stay afloat).

<sup>8</sup> See Sara Atske, Michael Barthel, Galen Stocking & Christine Tamir, *7 Facts About Black Americans and the News Media*, PEW RES. CTR. (Aug. 7, 2019), <https://www.pewresearch.org/fact-tank/2019/08/07/facts-about-black-americans-and-the-news-media> (relaying findings that Black Americans are more likely than white people to trust local news, feel connected to their main news outlet, and place more weight on the role of media as a watchdog of political leaders); see also PEW RESEARCH CTR., *LOCAL NEWS IN A DIGITAL AGE* 7, 55–63 (2015), [https://www.pewresearch.org/wp-content/uploads/sites/8/2015/03/PJ\\_MediaEcology\\_complete](https://www.pewresearch.org/wp-content/uploads/sites/8/2015/03/PJ_MediaEcology_complete)

positive social change, it is vital to ensure their continued existence. News outlets across the board perform essential functions.<sup>9</sup> But local news outlets are more likely than national outlets to cover public interest stories pertaining to underserved communities and have been critical in exposing social injustices.<sup>10</sup> The topics that local news often covers—such as investigative reporting on criminal justice issues—make these outlets particularly susceptible to subpoenas, which often necessitate spending extensive resources to quash these requests.<sup>11</sup>

In light of recent litigation targeting the press,<sup>12</sup> strong press protections are needed to ensure that local news outlets can continue to thrive and engage in meaningful reporting. In Part I, this Article will explore the role of local media in society today. Finding local news outlets to be particularly valuable to the journalism landscape and to the public, Part II will identify two areas of legal regulation that need to be strengthened to protect local news's vitality: anti-SLAPP laws and shield laws. This Article will explain the shortcomings of these regulations as they relate to protecting local journalists with the aim of promoting potential legal reform in these areas.

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report.pdf (“Both Hispanics in Denver and blacks in Macon closely follow local and neighborhood news at higher rates than their white counterparts.”); Rick Edmonds, *A Myth Debunked: Minorities May Now Be Consuming More Local News than Whites, Not Less*, POYNTER (Mar. 5, 2015), <https://www.poynter.org/reporting-editing/2015/a-myth-debunked-minorities-may-now-be-consuming-more-local-news-than-whites-not-less> (quoting the lead author of the above 2015 Pew Research Center report as saying that local news answers “the questions of day-to-day life . . . [p]eople are looking for ‘what will impact me’”).

<sup>9</sup> See, e.g., Mich. Exec. Order No. 2020–21 (Mar. 23, 2020) (declaring “news media” workers to constitute “critical infrastructure workers” during the COVID-19 pandemic); City and County of San Francisco Department of Public Health, Order of the Health Officer No. C19-07g, at 16 (Aug. 14, 2020) (defining “[n]ewspapers, television, radio, and other media services” as essential businesses during the COVID-19 pandemic).

<sup>10</sup> See *infra* notes 15–17 and accompanying text; see also *The Impact and Influence of News Media Reporting on Crime and Victimization*, JUST. SOLUTIONS, [mediacrimevictimguide.com/introduction.html](http://mediacrimevictimguide.com/introduction.html) (last visited Aug. 28, 2020) (discussing how local news media have responsibility to explain the criminal and juvenile justice systems to their audiences).

<sup>11</sup> See Steven D. Zansberg, *The Empirical Case: Proving the Need for the Privilege*, MEDIA L. RESOURCE CTR. BULL., Aug. 2004, at 145, 151–55 (discussing the chilling effects of subpoenas on reporting in the context of the *Washington Post's* work on the Watergate scandal); see also Vince Blasi, *The Newsmen's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 271–73 (1971) (explaining the personal impacts from the threat of subpoenas on reporters and their work).

<sup>12</sup> Camille Fassett, *An Increasing Number of Journalists Have Recently Faced Subpoenas*, FREEDOM PRESS FOUND. (Mar. 8, 2018), <https://freedom.press/news/increasing-number-journalists-have-recently-faced-subpoenas> (noting a sudden uptick in subpoenas at the end of 2017 and into 2018); see also *All Incidents*, U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/all-incidents/?endpage=3> (last visited Sept. 23, 2020) (listing recent incidents against the press).

## I

## THE LOCAL NEWS LANDSCAPE

Historically, local journalism has served a vital role in providing citizens with fair coverage of localized issues. A cornerstone in society, local news is among the most trusted sources of information for the general public,<sup>13</sup> especially among people of color.<sup>14</sup> As discussed below, on numerous occasions, local journalism has been credited with bringing to light major issues of social injustice, environmental hazards, and health risks for underserved communities on both small and large scales. It has served as a watchdog for governmental accountability,<sup>15</sup> galvanized legislative action,<sup>16</sup> and provided the basis for overturning the wrongful convictions of innocent civilians.<sup>17</sup>

Numerous examples of the positive impact of local journalism abound. For instance, the Carolina Public Press—a watchdog news outlet in North Carolina—made headlines in 2019 when it organized a project among nearby local press organizations<sup>18</sup> to investigate the low conviction rates in sexual assault cases in North Carolina.<sup>19</sup> Though the Carolina Public Press has just “one investigative reporter, a managing editor, and about fourteen freelancers to cover all 100 North Carolina counties,”<sup>20</sup> the local news outlet

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<sup>13</sup> See PEN AM., LOSING THE NEWS: THE DECIMATION OF LOCAL JOURNALISM AND THE SEARCH FOR SOLUTIONS 8 (2019) [hereinafter LOSING THE NEWS], <https://pen.org/wp-content/uploads/2019/12/Losing-the-News-The-Decimation-of-Local-Journalism-and-the-Search-for-Solutions-Report.pdf> (“Seventy-six percent of Americans report trusting their local TV news, and 73 percent report trusting their local newspapers; by contrast, 55 percent of Americans trust national network news and 59 percent trust national newspapers.”).

<sup>14</sup> See Edmonds, *supra* note 8.

<sup>15</sup> LOSING THE NEWS, *supra* note 13, at 10 (recounting how the local coverage of the Flint water crisis garnered national attention and ultimately resulted in governmental accountability).

<sup>16</sup> See, e.g., *When Local News Dries Up*, WAYS & MEANS (Mar. 4, 2020), <https://sanford.duke.edu/articles/when-local-news-dries-podcast> (explaining that, by exposing how North Carolina state laws favoring rapists led to a mere one in four conviction rate, local news coverage “prompted North Carolina lawmakers to make changes in the state’s sexual consent laws”).

<sup>17</sup> See, e.g., *Four Cases*, PBS: FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/case/cases> (last visited Mar. 5, 2020) (explaining how a man convicted of rape and murder was exonerated after *Houston Press* reporting called attention to a negative DNA match of a piece of evidence).

<sup>18</sup> Other participating news outlets that collaborated with the Carolina Public Press included *The Fayetteville Observer*, *The Herald-Sun*, the *Hickory Daily Record*, *The News & Observer*, the *News & Record*, *North Carolina Health News*, the *Winston-Salem Journal*, WUNC North Carolina Public Radio, WLOS News 13, and WRAL. Seeking Conviction Investigative Collaboration, *Analysis: NC Convicts Fewer than 1 in 4 Sexual Assault Defendants*, CAROLINA PUB. PRESS (Mar. 18, 2019), <https://carolinapublicpress.org/28695/analysis-nc-convicts-fewer-than-1-in-4-sexual-assault-defendants>.

<sup>19</sup> *Report for America Supports Carolina Public Press Reporting on NC Election Integrity*, CAROLINA PUB. PRESS (Dec. 2, 2019), <https://carolinapublicpress.org/29597/report-for-america-supports-carolina-public-press-reporting-on-nc-election-integrity>.

<sup>20</sup> *When Local News Dries Up*, *supra* note 16.

successfully coordinated efforts to analyze more than four years of sexual assault cases across the state.<sup>21</sup> Based on that coordinated research, the Carolina Public Press published an investigative series, which found that fewer than one in four sexual assault suspects in North Carolina were convicted, in part due to biased laws that protected rapists and provided little redress for rape victims.<sup>22</sup> The series, which was viewed over 1.5 million times as of December 2019,<sup>23</sup> exposed loopholes for defendants in North Carolina rape prosecutions. One such loophole prevented a person from legally revoking consent to a sex act once begun; continuing to have sex after being asked to stop could not constitute a crime pursuant to North Carolina law.<sup>24</sup> The series also drew attention to a carveout in the state's law regarding incapacitation: In North Carolina, court precedent held that sex with a person incapacitated as a result of drinking or drug use could not constitute rape.<sup>25</sup> Following the Carolina Public Press's coverage of these issues, North Carolina legislators went on to unanimously approve legislation that updated the state's consent laws.<sup>26</sup>

Another example of impactful journalism by a local news outlet is the *Houston Press*'s investigative reporting on the conviction of Roy Criner for the rape and murder of a teenage girl.<sup>27</sup> After conducting a series of jailhouse interviews with Criner, a *Houston Press* reporter became convinced that the prosecution in Criner's case negligently disregarded a piece of evidence that could prove Criner's innocence. Relying on information learned from the interviews, the reporter published a widely publicized article suggesting that the case overlooked a cigarette butt that was smoked by the real perpetrator of the crime and contained testable DNA. The DNA evidence demonstrated that the cigarette-derived DNA and semen identified in the victim shared a

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<sup>21</sup> See *Seeking Conviction: Justice Elusive for NC Sexual Assault Survivors*, CAROLINA PUB. PRESS, <https://carolinapublicpress.org/seeking-conviction-justice-elusive-for-nc-sexual-assault-survivors> (last visited Aug. 28, 2020) (compiling articles about the series as well as the series itself).

<sup>22</sup> See Seeking Conviction Investigative Collaboration, *Questions of Consent Can Make NC Sexual Assault Cases Tough to Prosecute*, CAROLINA PUB. PRESS (Mar. 21, 2019), <https://carolinapublicpress.org/28772/questions-of-consent-can-make-nc-sexual-assault-cases-tough-to-prosecute> [hereinafter *Questions of Consent*].

<sup>23</sup> *Report for America Supports Carolina Public Press Reporting on NC Election Integrity*, *supra* note 19.

<sup>24</sup> *Questions of Consent*, *supra* note 22.

<sup>25</sup> *Id.*

<sup>26</sup> Kate Martin, *Breaking News: NC Sexual Assault Reforms Pass Unanimously*, CAROLINA PUB. PRESS (Oct. 31, 2019), <https://carolinapublicpress.org/29485/breaking-news-nc-sexual-assault-reforms-pass-unanimously> (“Two of the key measures, revocation of consent and sex with someone who was incapacitated due to alcohol or drugs, closed loopholes in North Carolina due to old court precedents, which were strongly featured in the Seeking Conviction [series].”).

<sup>27</sup> See Bob Burtman, *Hard Time*, HOUS. PRESS (Sept. 10, 1998, 4:00 AM), <http://www.houstonpress.com/news/hard-time-6567571>.

common source—someone other than Roy Criner.<sup>28</sup> Criner was subsequently pardoned by Governor George W. Bush after recommendation from the district attorney, a state district judge, the county sheriff, and the Texas Board of Pardons and Paroles.<sup>29</sup> Criner was released after serving ten years of a ninety-nine year sentence for a crime he did not commit,<sup>30</sup> and shortly thereafter law enforcement turned its attention to finding the real perpetrator of these heinous crimes.<sup>31</sup>

Local journalism has also been important in the education context.<sup>32</sup> In 2016, an investigation by the *Houston Chronicle* found that Texas state officials had arbitrarily capped special education enrollment in the state.<sup>33</sup> The investigation revealed that school districts were pressured to identify no more than 8.5% of all students as needing special services; districts that provided services to more children than the cap allowed were strictly audited.<sup>34</sup>

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<sup>28</sup> *Four Cases*, *supra* note 17; see also David G. Savage, *DNA Evidence Finally to Free Texas Inmate*, L.A. TIMES (July 30, 2000), <https://www.latimes.com/archives/la-xpm-2000-jul-30-mn-61518-story.html> (explaining how a DNA test showed Criner did not commit the crime).

<sup>29</sup> See Karen Christian, *And the DNA Shall Set You Free: Issues Surrounding Postconviction DNA Evidence and the Pursuit of Innocence*, 62 OHIO ST. L.J. 1195, 1198 (2001) (explaining how new DNA evidence led to Criner's pardon); see also Mary Lee Grant, *Man Freed Ahead of Pardon by Bush*, AP NEWS (Aug. 15, 2000), <https://apnews.com/39126230792412c7d226ffb9c0375638> (describing the days before Criner received his official pardon from Governor Bush); Jim Yardley, *DNA Test May Lead to Pardon in Texas*, N.Y. TIMES (July 25, 2000), <https://www.nytimes.com/2000/07/25/us/dna-test-may-lead-to-pardon-in-texas.html> (reporting on a possible pardon for Criner based on new DNA evidence).

<sup>30</sup> *Four Cases*, *supra* note 17.

<sup>31</sup> Stefanie Thomas, *Cold Case Detective Makes Ogg Case a Priority*, HOUS. CHRON. (Mar. 14, 2007, 7:00 PM), <https://www.chron.com/neighborhood/article/Cold-case-detective-makes-Ogg-case-a-priority-9545149.php> (reporting how the district attorney reopened the investigation and assigned a cold case detective to the case after Criner's pardon).

<sup>32</sup> Lawmakers for school safety have cited a *South Florida Sun Sentinel* report that compiled leaked education records, court documents, and district policies to describe the events and policies that contributed to a school shooting in Parkland, Florida. Other articles, like one written by a *Nevada Independent* journalist who spent a year observing elementary school students in the classroom, provide the public with an image of the struggles students and teachers face on a daily basis. See Evie Blad, *Local Journalism Is in Crisis. That's a Big Problem for Education*, EDUC. WK. (Jan. 7, 2020), <https://www.edweek.org/ew/articles/2020/01/08/local-journalism-is-in-crisis-thats-a.html>.

<sup>33</sup> Brian M. Rosenthal, *Denied: How Texas Keeps Tens of Thousands of Children out of Special Education*, HOUS. CHRON. (Sept. 10, 2016), <https://www.houstonchronicle.com/denied/1> [hereinafter Rosenthal, *Denied*]; see also Brian M. Rosenthal, *About This Series*, HOUS. CHRON. (2016), <https://www.houstonchronicle.com/denied/about> (summarizing the *Houston Chronicle* investigation and stating that the investigation had caused the Department of Education to begin review of the Texas policy); Brian M. Rosenthal, *Texas Illegally Excluded Thousands from Special Education, Federal Officials Say*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/texas-special-education.html> [hereinafter Rosenthal, *Texas*] (stating that a *Houston Chronicle* article prompted the Department of Education's review and eventual finding that the Texas policy violated federal law).

<sup>34</sup> See Rosenthal, *Denied*, *supra* note 33 (“[O]fficials arbitrarily decided what percentage of students should get special education services — 8.5 percent — and since then they have forced school districts to comply by strictly auditing those serving too many kids.”).

Indeed, the newspaper interviewed dozens of teachers for the report, many of whom expressed that they were forced to withhold services from students who needed them.<sup>35</sup> The newspaper reported that by covertly pressuring schools to limit vital supports for children with autism, attention deficit hyperactivity disorder, dyslexia, epilepsy, mental illnesses, speech impediments, traumatic brain injuries, and even blindness and deafness, the Texas Education Agency saved billions of dollars.<sup>36</sup> This reporting ultimately prompted intense outcry, leading Texas lawmakers to end the policy and pass several bills reforming the state's system.<sup>37</sup>

Local journalism has revealed red flags in other instances too. Take, for example, the water contamination crisis in the low-income and primarily Black city of Flint, Michigan. Led by reporters at the *Flint Journal*, local journalists began covering the story early and stayed with it, drawing attention to the contamination of Flint's water supply well before it became a national headline.<sup>38</sup> Indeed, Flint changed the source of its water supply to a then-unknowingly contaminated supply in April 2014, and by May 2014, the *Flint Journal* was already running pieces quoting residents calling their water "murky" and "foamy."<sup>39</sup> By August, evidence of contamination was reportedly "clear and quantifiable," and the *Flint Journal* broke the news that water samples taken from Flint's west side had tested positive for *E. coli*, suggesting contamination with fecal waste.<sup>40</sup> This story raised public awareness of the health issue and notified residents of the city's public health notice, which gave guidelines for safer water use.

The *Flint Journal* served as the primary outlet by which local residents could be kept abreast of the water crisis and be notified of emergency measures to take until the story was eventually picked up—no doubt in large part due to preexisting local reporting—in January 2015 by the *Detroit Free Press*.<sup>41</sup> Shortly thereafter, news of Flint's water crisis began to spread

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<sup>35</sup> *Id.* (reporting interviews where Texas teachers and administrators admitted to delaying or denying special education to students who needed it in order to meet the state threshold).

<sup>36</sup> *Id.*

<sup>37</sup> See Rosenthal, *Texas*, *supra* note 33 (describing the state and federal responses to the original *Houston Chronicle* article).

<sup>38</sup> See LOSING THE NEWS, *supra* note 13, at 9 (describing how local Flint news media started publishing articles nine months before news media outside the city picked up the story).

<sup>39</sup> *Id.* at 8; see also Ron Fonger, *State Says Flint River Water Meets All Standards but More than Twice the Hardness of Lake Water*, FLINT J. (May 23, 2014), [https://www.mlive.com/news/flint/2014/05/state\\_says\\_flint\\_river\\_water\\_m.html](https://www.mlive.com/news/flint/2014/05/state_says_flint_river_water_m.html) (reporting negative comments made by Flint residents about the water).

<sup>40</sup> LOSING THE NEWS, *supra* note 13, at 8 (describing an article that reported on Flint's *E. coli* contamination); Amanda Emery, *Flint Issues Boil Water Notice for Portion of West Side of City*, FLINT J. (Aug. 16, 2014), [https://www.mlive.com/news/flint/2014/08/flint\\_issues\\_boil\\_water\\_notice.html](https://www.mlive.com/news/flint/2014/08/flint_issues_boil_water_notice.html).

<sup>41</sup> See Robin Erb, *Who Wants to Drink Flint's Water?*, DETROIT FREE PRESS (Jan. 22, 2015),

throughout Michigan, and reports of lead contamination started surfacing. In March 2015, Flint's city council yielded to pressure from local media and residents' demands, voting 7–1 to “do all things necessary” to switch the water supply back to its original, safe supplier.<sup>42</sup> And when the city's state-appointed emergency manager overruled that vote, biting local news coverage of the reversal from Michigan outlets received national attention. In March 2015, the *New York Times*, piggybacking off of local news stories, published an article questioning the state's inaction toward the underlying crisis.<sup>43</sup> The *Times* quoted one resident as exclaiming, “[T]he govern[ment] is killing us. I think we need a federal intervention.”<sup>44</sup> Finally in the national spotlight, Flint started receiving coverage in NPR, CBS, and *The Guardian*.<sup>45</sup> Succumbing to public pressure, Michigan Governor Rick Snyder finally signed a bill to fund Flint's switch back to its previous water source in October 2015.<sup>46</sup>

As these examples illustrate, local journalism serves a vital function—especially as it relates to society's most vulnerable and underserved communities. Local news outlets are more likely to pick up on and follow localized issues of serious consequence with regard to communities' health, welfare, and commission of justice. But while local newspapers once flourished within their circulation areas and faced limited competition, competition from national outlets via the internet and other digital media today has

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11:46 PM), <https://www.freep.com/story/news/local/michigan/2015/01/22/water-woes-latest-hit-flint/22193291>; see also Denise Robbins, *Analysis: How Michigan and National Reporters Covered the Flint Water Crisis*, MEDIA MATTERS FOR AM. (Feb. 1, 2016, 12:09 PM), <https://www.mediamatters.org/new-york-times/analysis-how-michigan-and-national-reporters-covered-flint-water-crisis> (reviewing how and when the Flint water crisis was picked up by various local and national news organizations).

<sup>42</sup> LOSING THE NEWS, *supra* note 13, at 9.

<sup>43</sup> Mitch Smith, *A Water Dilemma in Michigan: Cloudy or Costly?*, N.Y. TIMES (Mar. 24, 2015), <https://www.nytimes.com/2015/03/25/us/a-water-dilemma-in-michigan-cheaper-or-clearer.html>.

<sup>44</sup> *Id.*

<sup>45</sup> See DERRICK Z. JACKSON, ENVIRONMENTAL JUSTICE?: UNJUST COVERAGE OF THE FLINT WATER CRISIS 22 (2017), <https://shorensteincenter.org/wp-content/uploads/2017/07/Flint-Water-Crisis-Derrick-Z-Jackson-1.pdf> (suggesting that the arrival of national news outlets brought new criticism of the Michigan state government).

<sup>46</sup> See LOSING THE NEWS, *supra* note 13, at 9 (describing the events surrounding the Governor's signing of the bill, including heavy news coverage); Kathleen Gray, *Senate Approves, Snyder Signs Cash for Flint Water Fix*, DETROIT FREE PRESS (Oct. 15, 2015, 11:36 AM), <https://www.freep.com/story/news/local/michigan/2015/10/15/senate-gives-quick-unanimous-approval-flint-water-fix/73979168> (reporting on the 2015 bill, which approved \$9.35 million in funding for Flint's water system). Residents of Flint understandably remain distrustful of their city's tap water, but recent reports do suggest that Flint's current water supply is now safe due to these changes. See Jim Malewitz, *In Flint, Trust Is Lost. And Bottled Water Supplies Are Running Low.*, BRIDGE MICH. (Jan. 30, 2019), <https://www.bridgemi.com/michigan-environment-watch/flint-trust-lost-and-bottled-water-supplies-are-running-low> (reporting that although state regulators claim Flint's water is safe to drink, many residents still do not trust it).



threatened the vitality of local news.<sup>47</sup> In recent years, thousands of local newspapers have closed due to lack of funding and revenue.<sup>48</sup> Their disappearance has left millions of Americans without a vital source of local news, depriving communities of an institution that has been essential in exposing wrongdoing and encouraging civic engagement. Many surviving news outlets have managed to endure only after cutting back their staff, coverage, and circulation.<sup>49</sup> Consequently, where local newspapers still remain, these outlets are ill-equipped to survive unexpected and costly legal actions taken against them. And, indeed, legal attacks against the press have been on the rise in recent years.<sup>50</sup>

## II

### LEGAL ACTIONS FACING THE PRESS TODAY

There are two types of legal battles that the press confronts today with some frequency: defamation actions and subpoena requests. For each of these battles, there are regulatory shields that, if effective, could protect local news outlets from crippling legal costs: anti-SLAPP statutes and shield laws, respectively. This Part will discuss the impact of defamation actions and subpoena requests on local journalism as well as evaluate the effectiveness of corresponding legislative protections. In so doing, this Part will discuss the gaps in the regulatory frameworks for each protective measure and consider the resulting effects of these frequently failed protections.<sup>51</sup>

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<sup>47</sup> Ryan M. Walters, *When Can You Shoot the Messenger? Understanding the Legal Protections for Entities Providing Information on Business Products and Services in the Digital Age*, 96 OR. L. REV. 185, 198–99 (2017).

<sup>48</sup> See Clara Hendrickson, *Local Journalism in Crisis: Why America Must Revive Its Local Newsrooms*, BROOKINGS (Nov. 12, 2019), <https://www.brookings.edu/research/local-journalism-in-crisis-why-america-must-revive-its-local-newsrooms/#footref-1>. Other local papers have only managed to survive by consolidating under distant owners who are potentially less interested in covering local news. Cf. Megan Brenan & Zacc Ritter, *When It Comes to Local News Mergers, Bias Top Concern*, GALLUP (Aug. 15, 2019), <https://news.gallup.com/opinion/gallup/264923/comes-local-news-mergers-bias-top-concern.aspx> (describing concerns that a merger between two national news companies may impact local news coverage by consolidating ownership of more than 260 local newspapers).

<sup>49</sup> Hendrickson, *supra* note 48.

<sup>50</sup> See Meghan Keneally, *From Verbal Taunts to Shots Fired: How Journalists Were Attacked in the US in 2018*, ABC NEWS (May 3, 2019, 11:00 AM), <https://abcnews.go.com/US/verbal-taunts-shots-fired-journalists-attacked-us-2018/story?id=62778248> (reporting a recent increase in subpoenas and legal orders against journalists); see also *Subpoena/Legal Order*, U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/subpoena> (last visited Aug. 28, 2020) (compiling a list of instances where journalist records have been subpoenaed or seized).

<sup>51</sup> In light of the polarized state of the federal government, and given that recent efforts to enact both a federal anti-SLAPP law and a federal reporter's shield law have failed, this Article focuses solely on the enactment of state statutes in each of these areas. See *Federal Shield Law Efforts*, REPORTERS COMMITTEE FOR FREEDOM PRESS (Sept. 12, 2013) (summarizing previous failed attempts at a federal reporter's shield law), <https://www.rcfp.org/federal-shield-law>; cf. Charles J.

### A. Defamation Actions and Anti-SLAPP Statutes

As a general rule, in order to successfully bring a defamation claim against a news outlet, a plaintiff must show that the news outlet published a false statement without privilege or authorization from the plaintiff and that the statement caused the plaintiff actual damages.<sup>52</sup> Where the plaintiff is a public figure,<sup>53</sup> a news outlet can only be held liable for defamation if it

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Glasser, *We Need a Federal Anti-SLAPP Law*, DAILY CALLER (Mar. 15, 2018, 12:49 AM), <https://dailycaller.com/2018/03/15/we-need-a-federal-anti-slapp-law> (reporting on a failed 2016 federal anti-SLAPP law); Jesse Rifkin, *Free Flow of Information Act Would Protect Journalists from Jail for Keeping Their Sources Confidential*, GOVTRACK INSIDER (Dec. 1, 2017), <https://govtrackinsider.com/free-flow-of-information-act-would-protect-journalists-from-jail-for-keeping-their-sources-531cda5cbe65> (describing Congress's failed attempts at passing a reporter's shield law in 2015). The difficulties and benefits of enacting federal anti-SLAPP and shield laws are outside the scope of this Article but have been discussed at length by other legal scholarship. See, e.g., RonNell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 WASH. L. REV. 317, 321 n.14 (2009) (listing scholarship discussing the potential enactment of a federal shield law); Colin Quinlan, Note, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court After Shady Grove*, 114 COLUM. L. REV. 367, 404 (2014) (arguing that a federal anti-SLAPP law would complement preexisting state anti-SLAPP laws); Katelyn E. Saner, *Getting SLAPP-ed in Federal Court: Applying State Anti-SLAPP Special Motions to Dismiss in Federal Court After Shady Grove*, 63 DUKE L.J. 781 (2013) (suggesting one framework in which federal courts might be able to hear state anti-SLAPP claims); Leslie Siegel, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 OHIO ST. L.J. 469, 524 (2006) (arguing that Congress should enact a reporter's shield law). The author generally supports efforts to enact federal laws in these areas and believes that federal legislation could similarly help to alleviate some of the financial hardships endured by local media outlets that have been confronted with frivolous litigation or unreasonably intrusive subpoena requests.

<sup>52</sup> See *Cardali v. Slater*, 57 N.Y.S.3d 342, 346 (Sup. Ct. 2017), *aff'd*, 167 A.D.3d 476, 477 (N.Y. App. Div. 2018) (stating elements of a defamation claim). However, in some states, if a statement imputes the commission of a crime, imputes infection with a loathsome communicable disease, imputes an inability to perform or want of integrity in performing employment duties, imputes a lack of ability or that otherwise prejudices a person in her profession or business, or imputes adultery or fornication, damages may be considered *per se* and need not be proved. *Tuite v. Corbitt*, 866 N.E.2d 114, 121 (Ill. 2006). Note, however, that states can retain old common-law presumptions under *Gertz v. Robert Welch, Inc.*, enabling malice to be presumed in certain circumstances. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46 (1974) (“[W]e conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.”); see also *Holtzscheiter v. Thomson Newspapers, Inc.*, 506 S.E.2d 497, 498 (S.C. 1998) (“If a defamation is actionable *per se*, then under common law principles the law presumes the defendant acted with common law malice and that the plaintiff suffered general damages.”).

<sup>53</sup> Whether a plaintiff is a public figure is a critical question in a defamation case. It is much more difficult for a public figure plaintiff to succeed on a defamation claim. A plaintiff can be a general or limited-purpose public figure. *Hatfill v. N.Y. Times Co.*, 532 F.3d 312, 318 (4th Cir. 2008) (“[S]ome public figures have assumed roles ‘of such persuasive power and influence that they are deemed public figures for all purposes’ . . . [while others] may be classed as public figures [for] ‘hav[ing] thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved,’ and they are public figures for only those limited

published a statement with knowledge or reckless disregard that the statement was false.<sup>54</sup> If the plaintiff is a private figure, however, the plaintiff generally need only show that the news outlet was negligent in making the defamatory statement—i.e., that the news outlet should have reasonably known that its statement was false when it published it.<sup>55</sup>

There are two types of defamation claims: libel and slander. Libel concerns written statements, while slander concerns oral statements.<sup>56</sup> Libel actions are of particular concern to newspapers while slander actions are of particular concern in the broadcast context. News outlets, reporting on matters of public interest, often publish information that reflects poorly on companies or individuals.<sup>57</sup> When well-resourced parties feel criticized by a news outlet, an all-too-common response is to retaliate by threatening a defamation lawsuit.<sup>58</sup>

The threat of a defamation action has frequently been used to suppress unwanted publicity even when the underlying information is true.<sup>59</sup> When powerful individuals or entities find themselves in the heart of a newsworthy controversy, initiating a lawsuit against one newspaper can intimidate others from reporting on the same scandals for fear of being similarly slapped with legal action. Indeed, according to *Poynter*, defamation or libel suits can cost

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*purposes.*” (quoting *Gertz*, 418 U.S. at 345)). General public figures “usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.” *Gertz*, 418 U.S. at 344. Typically, they “have assumed roles of special prominence in the affairs of society[,]” and therefore “they invite attention and comment.” *Id.* at 345. If a plaintiff is a limited-purpose public figure, then that plaintiff will have had access to channels of effective communication, assumed a role of special prominence in a public controversy that existed prior to the alleged defamation, sought to influence that controversy’s outcome, and retained public figure status at the time of the alleged defamation. *Fitzgerald v. Penthouse Int’l, Ltd.*, 691 F.2d 666, 668 (4th Cir. 1982). In determining whether a plaintiff is a public figure, a court “must look through the eyes of a reasonable person at the facts taken as a whole.” *Foretich v. Capital Cities, Inc.*, 37 F.3d 1541, 1551 (4th Cir. 1994) (quoting *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980)).

<sup>54</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

<sup>55</sup> 1 RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 3:30 (2d ed. 2020) (“The vast majority of states have chosen the ‘low option’ under *Gertz*, opting for some form of negligence standard in defamation actions brought by private figure plaintiffs.”). See *Straw v. Chase Revel, Inc.*, 813 F.2d 356, 361 (11th Cir. 1987); *Spreadbury v. Bitterroot Pub. Library*, 856 F. Supp. 2d 1195, 1200 (D. Mont. 2012); *Govito v. W. Jersey Health Sys., Inc.*, 753 A.2d 716, 722 (N.J. Super. Ct. App. Div. 2000).

<sup>56</sup> As noted above, for a statement to be deemed defamatory, it must be “published.” However, “publication” does not require physical printing as one might traditionally think in the journalism context. Slanderous statements, for example, are “published” when they are communicated to a third party. Similarly, writing an e-mail or text to a third party could be considered “publication” in a libel action. SMOLLA, *supra* note 55, § 1:10 n.1.

<sup>57</sup> Lesley Phippen, *Decoding Defamation: A Need-to-Know Guide for Journalists*, INDEX ON CENSORSHIP, Sept. 2014, at 96, 96–100.

<sup>58</sup> See *supra* notes 1–5 and accompanying text.

<sup>59</sup> See generally *supra* notes 1–5 and accompanying text.

defendant newspapers an average of \$500,000 to win dismissal.<sup>60</sup> Put differently, it costs as much for a newspaper to defend itself in a single defamation lawsuit as it does for it to pay the annual salary of ten full-time reporters.<sup>61</sup> Given the small staffs and low budgets of most local news outlets, the expense of a defamation lawsuit—no matter the ultimate outcome—can be enough to drive a local paper into extinction.<sup>62</sup>

Indeed, that is nearly what happened to a local newspaper in Iowa, the *Carroll Times Herald*, after it won a year-long defamation lawsuit in May 2018.<sup>63</sup> The *Carroll Times Herald* was sued for defamation by a former police officer over a story concerning that officer's relationships with multiple teenage girls.<sup>64</sup> After receiving a tip about the police officer, a *Carroll Times Herald* reporter investigated and learned that not only did the officer have ongoing relationships with minors at the time, but that he had a history of such relationships.<sup>65</sup> The article detailed the officer's past, including that he had been in a sexual relationship with a teenage girl he met while on duty, and that the girl later moved into his house before she graduated from high school.<sup>66</sup> The article discussed several of the officer's other similarly inappropriate relationships and noted that—according to a recording of a city council meeting obtained by the *Times Herald*—he had been fired from a prior police job due to his inappropriate contact with another teenage girl.<sup>67</sup>

In dismissing the officer's complaint, the Iowa District Court for Carroll County emphasized that “the news article . . . was based upon records obtained from the City of Carroll through an open records request and numerous interviews . . . . [The reporter] also reviewed public records from the City

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<sup>60</sup> Kelly McBride, *McClatchy Could Hire 10 Reporters for the Money It Will Spend to Get Devin Nunes Lawsuit Dismissed*, POYNTER (Apr. 11, 2019), <https://www.poynter.org/ethics-trust/2019/mcclatchy-could-hire-10-reporters-for-the-money-it-will-spend-to-get-devin-nunes-lawsuit-dismissed>.

<sup>61</sup> *Id.*

<sup>62</sup> *Cf.* Alpert, *supra* note 6 (“Gawker Media Group went on the auction block on Friday after filing for bankruptcy when a Florida judge upheld a \$140 million jury judgment against it in a costly legal battle with former professional wrestler Hulk Hogan.”).

<sup>63</sup> *See Judge Dismisses Former Officer's Lawsuit Against Daily Times Herald*, CARROLL TIMES HERALD (May 22, 2018), [https://www.carrollspaper.com/news/judge-dismisses-former-officer-s-lawsuit-against-daily-times-herald/article\\_133d2692-e93b-11e9-845b-63d6bc411edf.html](https://www.carrollspaper.com/news/judge-dismisses-former-officer-s-lawsuit-against-daily-times-herald/article_133d2692-e93b-11e9-845b-63d6bc411edf.html); *see also* Smith v. Strong, No. CVCV039797, 2018 Iowa Dist. LEXIS 1 (Dist. Ct. Carroll Cty. May 21, 2018).

<sup>64</sup> Jared Strong, *Carroll Cop Who Courted Teenage Girls Resigns*, CARROLL TIMES HERALD (July 18, 2017), [https://www.carrollspaper.com/news/carroll-cop-who-courted-teenage-girls-resigns/article\\_a34544ba-e939-11e9-83e2-67cfaa949c4e.html](https://www.carrollspaper.com/news/carroll-cop-who-courted-teenage-girls-resigns/article_a34544ba-e939-11e9-83e2-67cfaa949c4e.html).

<sup>65</sup> *See id.*; *see also* Gage Miskimen, *Iowa Newspaper that Exposed Police Officer's Relationship with Teenager Raises Money After Beating Libel Lawsuit*, DES MOINES REG. (Oct. 10, 2019, 6:59 PM), <https://www.desmoinesregister.com/story/news/2019/10/10/iowa-newspaper-gofundme-libel-lawsuit-police-sex-scandal-carroll-times-herald-jared-strong-burns/3932118002>.

<sup>66</sup> *See* Strong, *supra* note 64.

<sup>67</sup> *Id.*

of Sumner, City of Carroll, and Iowa Courts Online in preparation of the article in question.”<sup>68</sup> This research indicated that the reporter was not negligent in piecing together his story.<sup>69</sup> The opinion further explained that because “a review of the record presented [shows that] the article at issue is accurate and true and the underlying facts undisputed,” the officer could not satisfy even the basic elements required to show defamation.<sup>70</sup> Rather, the speech at issue was protected as truthful and a matter of public concern under the First Amendment. Consequently, the court granted summary judgment for the newspaper.

Although the *Carroll Times Herald* won the case, because Iowa law lacks a mechanism by which frivolous lawsuits aimed at chilling speech can be dismissed early, the local news outlet struggled financially in the wake of the lawsuit. Having spent nearly a year and approximately \$140,000 in out-of-pocket expenses defending itself in a libel action,<sup>71</sup> the newspaper had to turn to a GoFundMe fundraiser seeking donations to cover legal costs in order to keep the paper afloat.<sup>72</sup>

While many states have laws in place that would prevent local news outlets like the *Carroll Times Herald* from being forced to endure lengthy, frivolous lawsuits and pay attorney’s fees in such cases, a substantial minority of states—including Iowa—lack any such protective mechanisms. These laws, called anti-SLAPP statutes, have been enacted in thirty-one states.<sup>73</sup> Though the effectiveness of these laws varies by state, anti-SLAPP statutes have the potential to protect local news outlets from being overcome with fatal litigation expenses in the event they are confronted with a frivolous lawsuit.

“SLAPP” stands for “strategic lawsuit against public participation.” A SLAPP suit is brought to obstruct a person’s right to participate in public

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<sup>68</sup> *Smith*, 2018 Iowa Dist. LEXIS 1, at \*3.

<sup>69</sup> This means that, assuming the sources consulted were reasonably reliable, even if the article was not fully accurate, the reporter did not have the mental culpability to be held liable for defamation.

<sup>70</sup> *Smith*, 2018 Iowa Dist. LEXIS 1, at \*3.

<sup>71</sup> *A Small Newspaper in Iowa Wins a Libel Suit, but Legal Costs May Force It to Close*, FIRST AMEND. WATCH (Oct. 10, 2019), <https://firstamendmentwatch.org/a-small-newspaper-in-iowa-wins-a-libel-suit-but-legal-costs-may-force-it-to-close> [hereinafter FIRST AMEND. WATCH]; Meagan Flynn, *Libel Suit’s Expense Hits Paper in Iowa*, ARK. DEMOCRAT-GAZETTE (Oct. 13, 2019, 1:54 AM), <https://www.arkansasonline.com/news/2019/oct/13/libel-suit-s-expense-hits-paper-in-iowa> (“[T]he \$140,000 represents expenses not covered by libel insurance as well as lost advertising revenue and subscribers, who doubted the paper’s reporting on [the officer].”).

<sup>72</sup> See FIRST AMEND. WATCH, *supra* note 71; Flynn, *supra* note 71.

<sup>73</sup> These states are Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Vermont, and Washington. No attempts to enact a federal anti-SLAPP law have been successful yet.

discourse; plaintiffs file these suits not because they think they can win, but to intimidate or punish the speaker.<sup>74</sup> In other words, when someone brings a SLAPP suit against a news outlet, they do so to discourage the outlet from exercising its First Amendment rights—not because they believe they can win and rightfully recover. The purpose is to intimidate news outlets from covering newsworthy, but potentially embarrassing (for the plaintiff) stories. The lawsuit against the *Carroll Times Herald* is an example of a SLAPP suit.<sup>75</sup>

Not all anti-SLAPP statutes are as strong as others—some only apply in limited contexts, such as in cases where citizens are being sued for their comments at public meetings,<sup>76</sup> while others apply whenever the speech at the heart of the case is on a matter of public concern.<sup>77</sup> But a well-crafted and broad anti-SLAPP law can help local news outlets weather the recent litigious gale against journalists, particularly in the defamation context. Well-crafted anti-SLAPP statutes enable quick resolution: They permit news outlets faced with frivolous lawsuits to move quickly<sup>78</sup> to file a special motion to dismiss, and they require the court to rule on the motion within thirty days.<sup>79</sup> Under a strong statute, the special motion would be granted—and the case would be terminated—if: (1) the party (here, a news outlet) could show that the lawsuit “arises from an act in furtherance of the defendant’s right of

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<sup>74</sup> See James Tager, *SLAPPs: The Greatest Free Expression Threat You’ve Never Heard of?*, PEN AM. (Oct. 30, 2017), <https://pen.org/slapps-free-expression-threat>.

<sup>75</sup> The author’s opinion on this classification is derived from reading the motion for summary judgment order in the case as well as relevant news articles discussing the case.

<sup>76</sup> These statutes are not particularly helpful to news outlets. See, e.g., DEL. CODE ANN. tit. 10, § 8136(a)(1) (2020) (applying only to lawsuits related to licensing and government permits); 27 PA. CONS. STAT. §§ 7707, 8301–8305 (2020) (applying only to speakers that petition the government over the implementation and enforcement of environmental law and regulations).

<sup>77</sup> See, e.g., CAL. CIV. PROC. CODE § 425.16 (West 2020); D.C. CODE ANN. § 16-5501 (West 2020); FLA. STAT. § 768.295(3) (2019); 735 ILL. COMP. STAT. 110/20 (2020); OKLA. STAT. ANN. tit. 12, § 1432 (West 2020); see also Nicole J. Ligon, *SLAPP Slop: Fixing the Sloppy Anti-SLAPP Statutory Regimes*, 83 ALB. L. REV. (forthcoming 2020).

<sup>78</sup> Meaning within sixty days of the service of the complaint. See CAL. CIV. PROC. CODE § 425.16(f) (West 2020).

<sup>79</sup> See, e.g., ARIZ. REV. STAT. ANN. § 12-752(A) (2020); ARK. CODE ANN. § 16-63-507(a)(2) (West 2020); CAL. CIV. PROC. CODE § 425.16(f) (West 2020); CONN. GEN. STAT. ANN. § 52-196a(e) (West 2020); D.C. CODE ANN. § 16-5502(d) (West 2020); FLA. STAT. § 768.295(4) (2019); GA. CODE ANN. § 9-11-11.1(d) (West 2020); HAW. REV. STAT. ANN. § 634F-2(1) (West 2020); 735 ILL. COMP. STAT. 110/20(a) (2020); IND. CODE ANN. § 34-7-7-9(a)(2) (West 2020); KAN. STAT. ANN. § 60-5320(d), (f) (West 2020); LA. CODE CIV. PROC. ANN. art. 971(C)(3) (2019); ME. REV. STAT. ANN. tit. 14, § 556 (2019); MD. CODE ANN., CTS. & JUD. PROC. § 5-807(d)(1) (West 2020); MASS. GEN. LAWS ANN. ch. 231, § 59(H) (West 2020); MO. ANN. STAT. § 537.528(1) (West 2020); NEB. REV. STAT. ANN. § 25-21,245 (West 2020); NEV. REV. STAT. ANN. § 41.660(3)(f) (West 2020); N.M. STAT. ANN. § 38-2-9.1(A) (West 2020); OKLA. STAT. ANN. tit. 12, § 1433 (West 2020); OR. REV. STAT. § 31.152(1) (2020); TEX. CIV. PROC. & REM. CODE ANN. §§ 27.004(a), 27.007(b) (West 2019); UTAH CODE ANN. § 78B-6-1404(1)(b) (West 2020); VT. STAT. ANN. tit. 12, § 1041(d) (West 2020).

petition or free speech” and, (2) the plaintiff cannot demonstrate that the lawsuit is likely to succeed on the merits.<sup>80</sup> In keeping with the protective spirit of anti-SLAPP laws, a strong statute would also stay all discovery until after the court has ruled on the special motion.<sup>81</sup> This way, no newspaper would be forced to expend unnecessary time or money collecting documents, deposing parties, or otherwise conducting discovery on a frivolous lawsuit. Furthermore, if a news outlet successfully moves to dismiss under the statute, a strong statute would require the plaintiff to pay all of the newspaper’s legal fees in the case up through that point.<sup>82</sup> This would both serve as a deterrent for individuals considering whether to bring a SLAPP suit, as well as help to ensure that no newspaper goes out of business for doing the important work it has set out to do.

Adoption of strong anti-SLAPP statutes in states that lack them is an important step to protect local news outlets from fatal legal expenses. These laws are vital tools for combatting frivolous, but otherwise lengthy and costly, defamation lawsuits brought by parties that seek to impede the press’s First Amendment rights.

### B. Subpoena Requests and Shield Laws

Journalists frequently face subpoenas and court orders requiring them to turn over notes or testify about confidential sources and unpublished information.<sup>83</sup> According to the U.S. Press Freedom Tracker, in 2019 alone, at least twenty-seven news outlets and journalists were confronted with subpoena requests, forcing them to make the difficult decision of whether to challenge them.<sup>84</sup> This is up from just eight subpoena requests reported to the Tracker in 2017.<sup>85</sup> The increasing number of subpoenas over recent years suggests that parties may feel increasingly emboldened to harass or retaliate against journalists through legal proceedings.<sup>86</sup> Generally, anyone asked or ordered to testify at a legal proceeding, or to produce documents relevant to

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<sup>80</sup> See *Basile v. City of Poway*, No. 07CV1793 DMS JMA, 2008 WL 11509152, at \*1 (S.D. Cal. Jan. 29, 2008) (applying California’s particularly strong anti-SLAPP statute).

<sup>81</sup> See, e.g., CAL. CIV. PROC. CODE § 425.16(g) (West 2020); D.C. CODE ANN. § 16-5502(c)(1) (West 2020).

<sup>82</sup> See, e.g., ARIZ. REV. STAT. ANN. § 12-753(D) (2020); CAL. CIV. PROC. CODE § 425.16(c) (West 2020); VT. STAT. ANN. tit. 12, § 1041(f)(1) (West 2020).

<sup>83</sup> 5 *Takeaways from the Reporters Committee’s 2019 Press Freedom Tracker Report*, REPORTERS COMMITTEE FOR FREEDOM PRESS (Apr. 1, 2020), <https://www.rcfp.org/pressfreedom2019>; *Reporter’s Privilege/Shield Laws*, MEDIA L. RESOURCE CTR., <https://www.medialaw.org/topics-page/reporters-privilege-shield-laws> (last visited Aug. 28, 2020); SARAH MATTHEWS, REPORTERS COMM. FOR FREEDOM OF THE PRESS, PRESS FREEDOMS IN THE UNITED STATES 2019, at 1–5 (2020), <https://www.rcfp.org/wp-content/uploads/2020/03/2020-Press-Freedom-Tracker-Report.pdf>.

<sup>84</sup> MATTHEWS, *supra* note 83, at 14.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

one, is required to comply. If the person refuses, they are “subject to a contempt finding, which means a judge could put the person in jail, or fine [them], or both.”<sup>87</sup> The purpose of that penalty is not to punish, but to extract compliance.

For most individuals, the decision to comply with a subpoena or court order and avoid potential jail time is a no-brainer. For journalists, however, the decision is not so simple. When journalists can be forced to testify about sources or material collected in the course of investigative reporting, it deters sources from coming forward and speaking to journalists about important information in the future. It is in large part the independence and neutrality of journalists that engenders trust sufficient for sources to come forward. As I have previously argued,

If journalists become—or are perceived to be—investigative adjuncts of litigants, that trust will wither.<sup>88</sup> Moreover, forced disclosure of even nonconfidential material may discourage some reporters and news outlets with more limited resources from investigating and exposing critical issues that could wind up in litigation. Rather, those reporters and news outlets might opt to concentrate their efforts on other stories, where they will not be subjected to the expense and inconvenience of complying with subpoenas.<sup>89</sup>

Consider the following example.<sup>90</sup> In 2014, a local correspondent for *The New Yorker* conducted several interviews with Kalief Browder, a Black teenager who had been imprisoned—mostly in solitary confinement—for three years on Rikers Island without a trial for allegedly stealing a backpack.<sup>91</sup> The article drew widespread attention to Browder’s case and exposed systematic issues with speedy trial failures and solitary confinement policies.<sup>92</sup> Indeed, Browder’s story prompted rallies for prison reform<sup>93</sup> and led the mayor of New York City to advance an initiative to reduce the number

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<sup>87</sup> Jonathan Peters, *Shield Laws and Journalist’s Privilege: The Basics Every Reporter Should Know*, COLUM. JOURNALISM REV. (Aug. 22, 2016), [https://www.cjr.org/united\\_states\\_project/journalists\\_privilege\\_shield\\_law\\_primer.php](https://www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php).

<sup>88</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting) (“The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government.”).

<sup>89</sup> See Brief for Asian American Journalists Association et al. as Amici Curiae at 20, *People v. Juarez*, 107 N.E.3d 556 (N.Y. 2018) (No. 30222/15) (advocating against disclosure of nonconfidential information).

<sup>90</sup> This example has been incorporated from an amicus brief the author wrote in a matter supporting a journalist’s motion to quash a subpoena request on appeal. See *id.* at 21–23.

<sup>91</sup> Jennifer Gonnerman, *Before the Law*, NEW YORKER (Sept. 29, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law>.

<sup>92</sup> See *infra* notes 93–94.

<sup>93</sup> See, e.g., Ben Kochman, *Brother of Kalief Browder, Teen Who Killed Himself After Spending Three Years at Rikers Island, Rallies for Prison Reform in the Bronx*, N.Y. DAILY NEWS (May 25, 2016, 6:52 PM), <https://www.nydailynews.com/new-york/kalief-browder-brother-rallies-prison-reform-bronx-article-1.2650153> (reporting on protests following Kalief Browder’s suicide).



of people held in New York's jails.<sup>94</sup> So significant was the reaction to Browder's experience that Netflix ultimately produced a documentary series about it in 2017.<sup>95</sup> But Browder, who initially "was reluctant" to be interviewed, understandably felt a deep distrust toward the criminal justice system.<sup>96</sup> It is likely that he would have refused to participate in these valuable interviews if he had reason to see the reporter as merely a potential agent or discovery tool for the government. In other words, if the government is able to force reporters to testify about their investigative work (e.g., jailhouse interviews), society is likely to miss out on important information shared by people, like Browder, who have been wrongly treated by the government in the past and are understandably hesitant to come forward.<sup>97</sup>

While the local correspondent covering Browder's story was not subpoenaed about that article, journalists have increasingly faced subpoenas for similar investigative stories at alarming rates.<sup>98</sup> And the mere possibility of a subpoena may make both potential sources and journalists themselves leery of speaking or publishing. Since 2017, at least seventy-four journalists have been subpoenaed or had their records seized, with some receiving subpoenas multiple times.<sup>99</sup> In recent years, subpoenas have been issued seeking: a journalist's Twitter account information and internet history as part of a police

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<sup>94</sup> See Jennifer Gonnerman, *Kalief Browder and a Change at Rikers*, NEW YORKER (Apr. 14, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-and-a-change-at-rikers> (discussing Mayor de Blasio's promise to improve conditions at Rikers Island).

<sup>95</sup> See TIME: THE KALIEF BROWDER STORY (Netflix 2017).

<sup>96</sup> Gonnerman, *supra* note 91 ("When I first asked if I could interview him, he was reluctant, but eventually he agreed.")

<sup>97</sup> A subpoena concerning jailhouse interviews was recently considered in a 2018 New York state case. In that case, the New York Court of Appeals denied a *New York Times* reporter's motion to quash a subpoena that sought the reporter's testimony about and notes from the reporter's interview with a man who was charged with the murder of a four-year-old girl. See *People v. Juarez*, 107 N.E.3d 556 (N.Y. 2018). Punting the question on procedural grounds, the New York Court of Appeals ruled that the state's criminal procedure law does not allow people subpoenaed to testify in a criminal case to appeal a trial court's decision. *Id.* at 559. In so doing the court upheld the trial court's previous ruling requiring the reporter to testify and turn over her notes in that case. *Id.* at 557. Though the reporter never did testify in light of the fact that the accused died while awaiting trial, the decision in this case creates a precedent that many journalists find deeply concerning. See *Reporters Committee Statement on New York Court of Appeals Ruling that Journalist Frances Robles Has No Right to Appeal Subpoena in "Baby Hope" Murder Trial*, REPORTERS COMMITTEE FOR FREEDOM PRESS (June 27, 2018), <https://www.rcfp.org/reporters-committee-statement-new-york-court-appeals-ruling-journalist-frances-robles-has-no-right-a> (describing how journalist Frances Robles was unable to appeal a subpoena for her testimony); see also Jan Ransom, *Man Charged with Killing 'Baby Hope' Dies in Custody*, N.Y. TIMES (Nov. 19, 2018), <https://www.nytimes.com/2018/11/19/nyregion/baby-hope-suspect-dies-cancer.html> (detailing how Robles was subpoenaed to testify in the trial quickly after the murder of "Baby Hope").

<sup>98</sup> See MATTHEWS, *supra* note 83, at 1–5 (noting that in 2019, "[t]he number of subpoenas reported to the Tracker also continued to rise, suggesting that some may feel emboldened to harass or retaliate against journalists through the legal process"); see also *id.* at 14 (suggesting that the rate of subpoenas has more than tripled from 2017 to 2019).

<sup>99</sup> *Subpoena/Legal Order*, *supra* note 50.

department's leak investigation;<sup>100</sup> a watchdog blog writer's "notes, photographs and communications" about a county council meeting;<sup>101</sup> a journalist's communications (e-mail and otherwise) with other journalists for use in a defamation case;<sup>102</sup> a reporter's testimony about his sources for an article at a pre-trial hearing in the murder case of a former police officer;<sup>103</sup> and a newspaper's photos and video footage of protesters taken during demonstrations against police brutality in the wake of George Floyd's murder,<sup>104</sup> to name a few. The cost to challenge a subpoena request—something many reporters want to do to maintain their reputation as trusted journalists—can be steep, amounting to many thousands of dollars per subpoena.<sup>105</sup> And, depending on the relevant state's reporter's shield law, there is no guarantee that challenging a subpoena will be successful. Indeed, numerous journalists—the substantial majority of whom work for local news outlets—have been jailed and fined heavily for refusing to comply with a subpoena.<sup>106</sup>

Reporter's shield laws are state statutes<sup>107</sup> that protect journalists from compelled disclosure of sources or information obtained in the course of newsgathering.<sup>108</sup> These laws grant journalists an express privilege—known as the "reporter's privilege"—to opt out of testifying or revealing certain

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<sup>100</sup> *Using Obscure Legal Justification, NYPD Subpoenas Reporter's Records*, U.S. PRESS FREEDOM TRACKER (Feb. 24, 2020), <https://pressfreedomtracker.us/all-incidents/using-obscure-legal-justification-nypd-subpoenas-reporter>.

<sup>101</sup> *Subpoena Issued for Watchdog Blog's Documents, Communications*, U.S. PRESS FREEDOM TRACKER (Feb. 26, 2020), <https://pressfreedomtracker.us/all-incidents/subpoena-issued-for-watchdog-blogs-documents-communications>.

<sup>102</sup> *Journalist Subpoenaed for Communications in Ongoing Defamation Suit*, U.S. PRESS FREEDOM TRACKER (Mar. 3, 2020), <https://pressfreedomtracker.us/all-incidents/journalist-subpoenaed-communications-ongoing-defamation-suit>.

<sup>103</sup> *Journalist Jamie Kalven Subpoenaed to Testify in Laquan McDonald Murder Case*, U.S. PRESS FREEDOM TRACKER (Dec. 6, 2017), <https://pressfreedomtracker.us/all-incidents/journalist-jamie-kalven-subpoenaed-testify-laquan-mcdonald-murder-case>.

<sup>104</sup> *Ohio Prosecutor Subpoenas Outlet for Reporting Materials from Protest*, U.S. PRESS FREEDOM TRACKER (June 20, 2020), <https://pressfreedomtracker.us/all-incidents/ohio-prosecutor-subpoenas-outlet-reporting-materials-protest>.

<sup>105</sup> *See Massachusetts Newspaper Wins Legal Fees After Getting Reporter Subpoena Quashed*, REPORTERS COMMITTEE FOR FREEDOM PRESS (June 18, 2013), <https://www.rcfp.org/massachusetts-newspaper-wins-legal-fees-after-getting-reporter-subpo> (reporting that a local newspaper successfully quashed a subpoena and recovered the \$8200 in legal fees it cost to fend off the subpoena request).

<sup>106</sup> *See Journalists Jailed or Fined for Refusing to Identify Confidential Sources as of 2019*, REPORTERS COMMITTEE FOR FREEDOM PRESS, <https://www.rcfp.org/jailed-fined-journalists-confidential-sources> (last visited Aug. 28, 2020) (listing names and cases, including punishments of fines up to \$37,500).

<sup>107</sup> No attempts to pass a federal shield law have been successful yet. *See Peters, supra* note 87; *see also supra* note 51 and accompanying text (discussing the difficulties and unsuccessful attempts to enact federal shield laws).

<sup>108</sup> *See* Joshua A. Faucette, Note, *Your Secret's Safe with Me . . . or So You Think: How the States Have Cashed in on Branzburg's "Blank Check,"* 44 VAL. U. L. REV. 183, 183 (2009) (examining the laws enacted by states to protect journalists from nondisclosure of information).

information relevant to their newsgathering activities without facing contempt of court.<sup>109</sup> Though the level of protections provided to journalists varies among states—with some state shield laws protecting journalists only from disclosing the identity of confidential sources and others protecting against disclosure of even nonconfidential notes and materials obtained in the course of newsgathering<sup>110</sup>—the purpose of these statutes is the same. Shield laws aim to protect “the pivotal function of reporters to collect information for public dissemination,”<sup>111</sup> and strong shield laws can help local news outlets continue to do their important work without the unnecessary fear of subpoena threats and related expenses.

At present, about forty states and the District of Columbia have shield laws.<sup>112</sup> Weak shield laws in some jurisdictions, and the complete lack of such laws in others, have left local news outlets vulnerable to crippling legal expenses through combatting subpoena requests and facing contempt of court.<sup>113</sup> For example, despite the fact that Delaware technically has a shield

<sup>109</sup> See Peters, *supra* note 87 (identifying the variations of reporter’s privilege across states).

<sup>110</sup> *Id.*

<sup>111</sup> *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 8 (2d Cir. 1982); see also Bill Kensworthy, *State Shield Statutes & Leading Cases*, FREEDOM F. INST. (Apr. 2011), <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-the-press/state-shield-statutes-leading-cases> (detailing the different levels of protection that each state shield law provides).

<sup>112</sup> *Number of States with Shield Law Climbs to 40*, REPORTERS COMMITTEE FOR FREEDOM PRESS, <https://www.rcfp.org/journals/number-states-shield-law-climbs> (last visited Aug. 28, 2020); see also GEORGE B. DELTA & JEFFREY H. MATSUURA, LAW OF THE INTERNET § 14.03 (4th ed. Supp. 2020) (discussing important shield statutes and court decisions); Michael Pope, *Virginia May Soon Add Shield Law Protections for Journalists*, WVTF & RADIO IQ (Feb. 21, 2020), <https://www.wvtf.org/post/virginia-may-soon-add-shield-law-protections-journalists#stream/0> (“As of right now, 40 states and the District of Columbia have shield laws, and by upholding confidentiality with their sources in the face of legal adversity, journalists can face jail time, financial hardship and the loss of their job.” (quoting Danica Roem, a member of the Virginia House of Delegates)). States without a shield law include: Hawaii (due to the expiration of a prior shield law without renewal), Idaho, Iowa, Massachusetts, Mississippi, Missouri, New Hampshire, Virginia, and Wyoming. See *State-by-State Guide to the Reporter’s Privilege for Student Media*, STUDENT PRESS L. CTR. (Aug. 29, 2019), <https://splc.org/2019/08/state-by-state-guide-to-the-reporters-privilege-for-student-media> (follow links at bottom of page for state-specific information) (providing in-depth overview of statutory and common-law protections for reporters by state).

<sup>113</sup> Eight of the states that lack a shield law, however, do recognize some form of reporter’s privilege through their common laws or rules of evidence. See *Reporter’s Privilege Guide: Alabama–Illinois*, STUDENT PRESS L. CTR. (Aug. 29, 2019), [https://splc.org/2019/08/reporters-privilege-guide-1/?\\_h=97ebff0e-4462-4d05-9a11-18d3ce11b089](https://splc.org/2019/08/reporters-privilege-guide-1/?_h=97ebff0e-4462-4d05-9a11-18d3ce11b089) (noting that the Hawaii legislature has failed to re-enact any shield law, after the previous statute expired in 2013); *Reporter’s Privilege Guide: Rhode Island–Wyoming*, STUDENT PRESS L. CTR. (Aug. 29, 2019), [https://splc.org/2019/08/reporters-privilege-guide-4/?\\_h=73c5bf6b-4fe9-4c6d-ae51-516b21710ea3](https://splc.org/2019/08/reporters-privilege-guide-4/?_h=73c5bf6b-4fe9-4c6d-ae51-516b21710ea3) (explaining the absence of statutory protections or a court-recognized reporter’s privilege in Wyoming). See generally *Reporter’s Privilege Compendium*, REPORTERS COMMITTEE FOR FREEDOM PRESS, <https://www.rcfp.org/reporters-privilege> (last visited Sept. 8, 2020) (collecting general information on reporter’s privilege by state and federal circuit). This is not

law, the statute's narrow scope leaves many local journalists helpless against subpoenas. Freelance journalists and part-time reporters are rarely covered by Delaware's shield law, which only applies to journalists who earn their "principal livelihood" by reporting or who spent three or four of the preceding eight weeks working at least twenty hours per week "in the practice of . . . obtaining or preparing information for dissemination."<sup>114</sup> Because many local news outlets can only afford to staff freelance or part-time journalists,<sup>115</sup> such legislative gaps, like in Delaware's statute, leave local news outlets particularly vulnerable to subpoena requests.<sup>116</sup>

When state shield laws are strong, however, they can be incredibly effective. For instance, in *Tracy v. City of Missoula*, a Montana state court upheld a student-journalist's request to quash a subpoena seeking raw footage she had filmed for use in a documentary.<sup>117</sup> The footage was taken when the journalist observed a meeting of the Hells Angels Motorcycle Club.<sup>118</sup> The Hells Angels permitted the journalist to film several hours of video during their two-day visit to Missoula, a small town in Montana. The journalist edited that raw footage into a documentary about Missoula that was aired on public access television and distributed to a local video store.<sup>119</sup>

Aired portions of the documentary showed minor confrontations between police and citizens that occurred during the Angels' visit.<sup>120</sup> Indeed, after Missoula rolled out a large-scale police force to meet the motorcycle

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sufficient to supplant statutory guidance related to protecting journalists against subpoena compliance, however.

<sup>114</sup> DEL. CODE ANN. tit. 10, §§ 4320–4326 (2020).

<sup>115</sup> See BRUCE GARRISON, PROFESSIONAL FEATURE WRITING 226 (3d ed. 1999) ("[S]mall and medium daily newspapers cannot often afford full-time [writers] on staff. . . . Many use regular part-time writers to extend their staff coverage. Or, of course, these newspapers also turn to freelance writers."); ROBERT SICKELS, THE BUSINESS OF ENTERTAINMENT 130 (2008) (suggesting that "local broadcast stations hire freelancers on a regular basis" because they cannot always afford to immediately onboard journalists on a full-time basis).

<sup>116</sup> This concern arises in other states as well, and courts have noted that whether to extend protections to freelance journalists remains a contentious issue. See *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 979–80, 995 (D.C. Cir. 2005) (noting the difficulties of determining who qualifies as a reporter under shield laws and explaining that, as they relate to freelancers and internet bloggers, shield laws "may raise definitional conundrums down the road"); KENT R. MIDDLETON & WILLIAM E. LEE, THE LAW OF PUBLIC COMMUNICATION 519 (Routledge 9th ed. 2016) ("Most shield laws exclude book authors, freelance bloggers and writers, academic researchers, and others not working directly in news organizations.").

<sup>117</sup> 2001 MT 1171, 2001 Mont. Dist. LEXIS 3168 (Dist. Ct. Missoula Cty. Mar. 9, 2001).

<sup>118</sup> See *Tracy v. City of Missoula*, 2000 MT 3887, 2000 Mont. Dist. LEXIS 2134, at \*4 (Dist. Ct. Missoula Cty. Dec. 4, 2000).

<sup>119</sup> See Michael Moore, *Hells Angels Riot Investigation*, INDEP. REC. (Oct. 24, 2000), [https://helenair.com/news/state-and-regional/hells-angels-riot-investigation/article\\_d46f1226-d2fa-5139-b706-6e9e33429f81.html](https://helenair.com/news/state-and-regional/hells-angels-riot-investigation/article_d46f1226-d2fa-5139-b706-6e9e33429f81.html); *Student Journalist Wins Battle to Keep Motorcycle-Rally Footage Confidential*, STUDENT PRESS L. CTR. (May 1, 2001), <https://splc.org/2001/05/student-journalist-wins-battle-to-keep-motorcycle-rally-footage-confidential>.

<sup>120</sup> Moore, *supra* note 119.

group, confrontations and protests led to numerous arrests.<sup>121</sup> After viewing the documentary, city prosecutors sought to obtain the journalist's unused footage through an investigative subpoena. Prosecutors hoped to obtain the full raw footage for evidentiary use in ongoing investigations and pending trials against members and affiliates of the motorcycle club—dozens of whom were arrested by Missoula police during their visit.<sup>122</sup>

The journalist moved to quash the subpoena request under Montana's shield law.<sup>123</sup> Montana's shield law provides absolute protection of information and sources to "any person connected with or employed by" any agency responsible for "disseminating news."<sup>124</sup> Put differently, Montana's shield law is broad in applicability, scope, and coverage. It liberally defines protected individuals and also extends protections to both published and unpublished materials and sources obtained during the newsgathering process.

In its quest for the footage outtakes, the City of Missoula argued that the student-journalist should not be protected by the state's shield law because she was a student, as opposed to a professional journalist. The court disagreed. Because the footage was obtained for use in a journalism project, and the journalist was "connected with" the public television station that aired her documentary, the court found that Montana's shield law applied and, accordingly, quashed the subpoena request.<sup>125</sup> As a result, the student-journalist was never fined or jailed for refusing to turn over her outtakes—scenarios that would have been likely without the shield law since the journalist indicated that she never planned to comply with the subpoena.<sup>126</sup> Furthermore, because of Montana's clear and broad shield law, the student-journalist also did not get tied up in appeals regarding whether or not she or the outtakes fell under the statute; as a result of the definitive ruling, city prosecutors decided not to appeal the decision to quash the subpoena.<sup>127</sup> In

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<sup>121</sup> Frederick F. Sherwood & Anne E. Sherwood, *Montana: Reporter's Privilege Compendium*, REPORTERS COMMITTEE FOR FREEDOM PRESS, <https://www.rcfp.org/privilege-compendium/montana> (last updated Aug. 14, 2020) (noting the "heavy handed police tactics" and arrests at the event).

<sup>122</sup> *Montana Prosecutors Seek Student Videotape of Hells Angels Event*, STUDENT PRESS L. CTR. (Nov. 1, 2000), <https://splc.org/2000/11/montana-prosecutors-seek-student-videotape-of-hells-angels-event>; see also Rob Chaney, *Hells Angels' Visit: Police Present Their Side*, MISSOULIAN (Apr. 10, 2001), [https://missoulian.com/hells-angels-visit-police-present-their-side/article\\_59d9c1a6-0668-5f58-b96c-754e90759e99.html](https://missoulian.com/hells-angels-visit-police-present-their-side/article_59d9c1a6-0668-5f58-b96c-754e90759e99.html).

<sup>123</sup> See *Trial Judge Dismisses Subpoena of Student Journalist*, REPORTERS COMMITTEE FOR FREEDOM PRESS (Mar. 12, 2001), <https://www.rcfp.org/trial-judge-dismisses-subpoena-student-journalist>.

<sup>124</sup> MONT. CODE ANN. §§ 26-1-901 to -903 (West 2019).

<sup>125</sup> *Tracy v. City of Missoula*, 2001 MT 1171, 2001 Mont. Dist. LEXIS 3168, at \*21, \*23, \*36–40 (Dist. Ct. Missoula Cty. Mar. 9, 2001).

<sup>126</sup> Moore, *supra* note 119.

<sup>127</sup> See *Student Journalist Wins Battle to Keep Motorcycle-Rally Footage Confidential*, *supra* note 119.

explaining why she was “really, really pleased” by the court’s ruling, the student-journalist explained that she and her fellow journalists “are not arms of law enforcement—that’s not our job.”<sup>128</sup> The ruling in this case indicates precisely that—journalists cannot be substitutes for the government’s own investigative or detective work. The press depends on the public’s trust to operate properly, and Montana’s strong shield law embodies this understanding.

The adoption of strong shield laws in all states could help local news outlets stay solvent in spite of the recent wave of legal attacks against the press. More specifically, codifying a clear and broad reporter’s privilege will allow local news outlets to continue engaging in important investigative reporting without worry that they might be forced to decide between court-imposed sanctions—like fines and incarceration—and maintaining their status as trusted journalists.

A strong shield law would broadly apply to any person engaged in newsgathering, including a part-time reporter or freelancer, online news blogger, someone assisting a journalist in newsgathering activities, or a journalist’s supervisor or employer.<sup>129</sup> It would ideally allow for absolute protection of all information obtained or prepared in the course of newsgathering.<sup>130</sup> This would protect a journalist from needing to disclose the source of any published or unpublished report. It would also prevent forced disclosure of information gathered or prepared while engaged in gathering or obtaining news for publication, whether or not the information is ultimately published.<sup>131</sup> Such broad coverage would likely help sources with critical information to feel more comfortable about coming forward and sharing newsworthy insights with journalists—enabling the public to receive a more fulsome and clear sense of serious issues in their communities.

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<sup>128</sup> *Id.*

<sup>129</sup> *See, e.g.*, MODEL QUALIFIED SHIELD LAW § 7 (MEDIA L. RES. CTR. 2014), [http://medialaw.org/images/stories/Article\\_Reports/Committee\\_Reports/2014/Model\\_Shield\\_Law/modelshield2014.pdf](http://medialaw.org/images/stories/Article_Reports/Committee_Reports/2014/Model_Shield_Law/modelshield2014.pdf) (defining “covered persons” as any person in journalism or an affiliate or assistant thereof, as well as any person for whom protection would be “in the interest of justice” or would facilitate legitimate newsgathering).

<sup>130</sup> *See, e.g.*, ALA. CODE § 12-21-142 (2020) (covering all persons “engaged in, connected with or employed on any newspaper, radio broadcasting station or television station, while engaged in a news-gathering capacity”); MONT. CODE ANN. § 26-1-902 (West 2019) (covering “any person connected with or employed by” a media outlet for the purposes of disseminating news); NEB. REV. STAT. ANN. § 20-146 (West 2020) (protecting any person “engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public”).

<sup>131</sup> *See, e.g.*, NEB. REV. STAT. ANN. § 20-146 (West 2020) (extending explicit protection to “[a]ny unpublished or nonbroadcast information”). Although many states provide an absolute privilege only for confidential sources, *see* Kensworthy, *supra* note 111 (detailing statutes), a strong shield law that extends absolute protection beyond this and provides coverage of even nonconfidential information would better shield local news outlets from expensive legal costs and provide greater comfort to journalists considering taking on important investigative matters.

Where subpoena requests seek information covered by a strong shield law, courts are better able to quickly quash the requests and protect the targeted journalists from being compelled to testify or provide records. In the event that a motion to quash is denied, a strong statute would allow for an interlocutory appeal that can automatically serve as a stay of any order requiring disclosure.<sup>132</sup> Such an appeal should be able to be heard on an expedited basis by either party's request.<sup>133</sup> This would allow for journalists and the subpoenaing party alike to resolve questions regarding the extent to which journalists must testify or share information in a quick and cost-effective manner.

Shield laws are effective tools for protecting the reputation and financial viability of local journalism. With lessened risk of forced testimony, related fines, and time spent litigating over compelled disclosure, local news outlets will be better equipped to continue breaking important news stories and serving their communities.

#### CONCLUSION

Now more than ever, it is important to think about ways in which the law can be used to protect local news outlets against fatal legal expenses. Litigatory attacks against the press have risen at the same time that national competition in the media landscape has sprung new hardships on local news outlets. The unique coverage that the local media provides is vital to underserved communities and the advancement of positive social change. With this in mind, the public would be at a serious loss if local news outlets were forced to close due to an inability to remain solvent after paying unexpected legal expenses. In light of the increase in defamation lawsuits and subpoena requests that the press has faced in recent years, anti-SLAPP laws and reporter's shield laws should be enacted (where missing) and strengthened (where existing) in all states as a means to better protect the local media targeted by these attacks. Strong state statutes in these areas of law can help to preserve and protect the local media and ensure that the societal benefits provided by these outlets are not hampered by parties that aim to impede the freedom of the press and First Amendment rights.

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<sup>132</sup> See, e.g., N.J. STAT. ANN. § 2A:84A-21.6 (West 2020).

<sup>133</sup> See, e.g., TENN. CODE ANN. § 24-1-208(c)(3)(B) (West 2020) (establishing that an appeal of a judgment divesting protection of this section "shall be expedited upon the docket of the court of appeals upon application of either party").