

COLUMN

Reader Rep: Hawaii Should Reinstate Shield Law Immediately

More and more reporters are being dragged into court under false pretenses in an attempt to throttle journalistic freedom.

NOVEMBER 7, 2016 · By Brett Oppegaard 

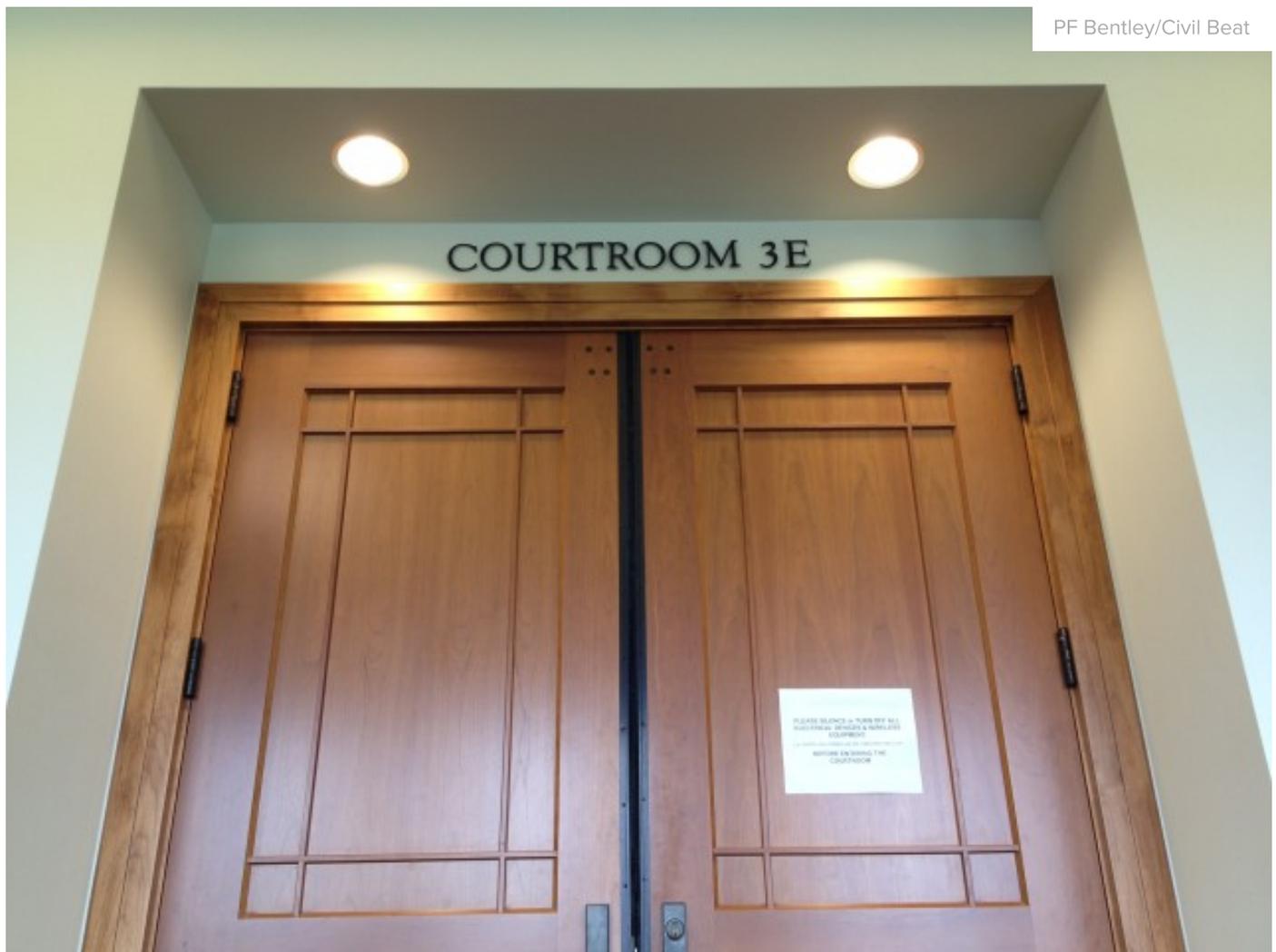
Share 6

Share 7

Two local journalists recently were called to testify in [the Billy Kenoi case](#), doing [both of them \(and Hawaii journalism\) professional harm](#).

Another local reporter, Mileka Lincoln of Hawaii News Now, also was dragged into court this fall in a legal ploy that asked her to [“authenticate her transcript”](#) of an interview she conducted with murder suspect Steven Capobianco. This was similar to the strategy that lured West Hawaii Today’s [Nancy Cook Lauer](#) into the Kenoi trial.

Once on the stand, Lincoln reportedly was badgered by the defense attorney to the point where she finally invoked reporter’s privilege under the First Amendment of the U.S. Constitution to avoid further questioning about what she knew and how she knew it.



More reporters are getting subpoenaed to testify about their work.

Similar to the Lincoln case, and almost on the same day, a New York Times reporter (Frances Robles) was called to the stand [about a jailhouse interview](#) she conducted.

[Jonathan Peters](#), Columbia Journalism Review's press freedom correspondent, [wrote](#) that he has noticed a recent surge of cases across the country involving such "compelled disclosure," broadly attacking the reporter's privilege to confidentially gather information.

This trend to throttle journalistic freedoms should alarm media institutions and legislators enough to compel them to immediately reinstate the [model Shield Law that Hawaii had](#) not that long ago.

Journalists already have a tough enough job, with [industry contraction](#), [low public trust in their work](#) and former colleagues turning into lobbyists who harangue them for being "[very aggressive](#)" with the public officials they cover.

“(Lincoln) ended up being put in a very difficult situation. I’m not inclined to let any reporter go on the stand again.” — Bruce Voss, attorney for Hawaii News Now

As [Peters of CJR explains](#), in a reporter’s case, the public generally considers news gathering as independent from official governmental inquiries. Sometimes, like in the case of a whistleblower, a source requests anonymity in exchange for revealing sensitive information of public interest. But almost all of the time, sources

expect journalists to treat their thoughts and words with discretion and care.

Without that inherent trust between them, and without clear protection from unintended intrusion, sources would be even less likely to divulge information to journalists, leaving you, dear readers, in the dark, too.

An easy first step to address this issue, before it gets out of control and legally weighted to the point of no return, is to reinstitute the state’s robust Shield Law.

Colleagues of mine at the University of Hawaii — including [Gerald Kato](#), the chair of the School of Communications, and UH Board of Regents member [Jeff Portnoy](#) — were architects of the original legislation, which protected journalists of all types, including bloggers, alternative media authors and all sorts of social media producers.

Kato said Hawaii has been the only state in American history to repeal its Shield Law. That happened when a sunset clause in the original legislation was allowed to expire due to [squabbles over who was — and who wasn’t — a journalist](#) as well as an insistence on the protection of nonconfidential materials gathered in the reporting process, such as notes and outtakes.

While the First Amendment [generally protects journalists from unwarranted litigious harassment](#), it also has some loopholes in it that allow journalists to be called to the stand, like Lincoln and Lauer were.

Once on the stand, and in an adversarial position to either the prosecution or the defense, journalists are vulnerable to various attacks on their character and process, usually intended to root out the original sources of information but also used to fish for how and where journalists get sensitive material.

A search of its website found that Hawaii News Now apparently did not cover Lincoln's participation in the trial (why not?). From reviewing her testimony and HNN's coverage of the Capobianco murder trial online, though, it appears that Lincoln sporadically worked on the story, but so did others [after her original piece ran, which included a transcript](#) of her conversation with [the murder suspect](#).

Lincoln declined to discuss her participation in this active case. But media law attorney Bruce Voss, who represents Hawaii News Now and KHON, said he has seen an increase in subpoenas of his media clients in the state, mirroring the national trend of compelling journalists to testify more often.

He said Lincoln only was advised to testify in this case because both the prosecution and defense had a verbal pretrial agreement to limit the questions put to the journalist to what appeared on air or on the HNN website. Once the case began, though, the defense attorney veered and decided to probe the news-gathering process, which Voss said crossed the line into a reporter's privilege.

Because of this negative experience with Lincoln in this case, Voss said, he is going to recommend moving to quash any future subpoenas to his journalist clients that might have anything to do with their confidential news-gathering processes.

"(Lincoln) ended up being put in a very difficult situation," he said. "I'm not inclined to let any reporter go on the stand again."

Voss also said he supports reinstatement of the Shield Law.

Even though Lincoln's piece included the full transcript, and she agreed only to testify that it was, in fact, what she heard in the conversation, Lincoln had to spend a couple of hours in court [just to establish that she had talked to the person she claimed she had talked to](#).

Lincoln also had to explain the television station's policy of only keeping interviews in the company computer system for a week. And how she had recognized the importance of the interview and saved the file to another computer to preserve it, but that computer crashed, and the interview was lost in the rebooting process. She explained to the jury that she had transcribed the interview in its entirety and didn't note "the tone" of the responses, even though she was asked to interpret them. And so on.

The more into the weeds this type of questioning led, the more threatening this legal approach became for the editorial independence of HNN (and other local media). While this sort of testimony by either Lauer and Lincoln, on its own, could be considered inconsequential, when journalists start being called to testify on a regular basis, we should be concerned.

As shown by both of these cases, court testimony will never be just a simple act of authentication. Authentication easily can be handled by archivists. What really is at stake here is the constitutional protection of journalists to gather and publish information as they see fit, without governmental interference or threat of frivolous litigation.

A simple question about a quote quickly can lead to questions about why one particular source was chosen over another, and then to which other sources were contacted that were not a part of the coverage. It can lead into what questions were asked, why they were asked, and why a reporter did this and not that.

The reporting and editing process is not under the jurisdiction of lawyers and government officials. What American journalists decide to publish is — and always should be — entirely up to them.

Follow Civil Beat on [Facebook](#) and [Twitter](#). You can also sign up for Civil Beat's free [daily newsletter](#).

About the Author



COLUMNIST

Brett Oppegaard ↗

Brett Oppegaard has a doctorate degree in technical communication and rhetoric. He studies journalism and media forms as an assistant professor at University of Hawaii Manoa, in the School of Communications. He also has worked for many years in the journalism industry. Email Brett at brett.oppegaard@gmail.com or follow him on

Twitter at [@Brett Oppegaard](#).

Use the [RSS feed](#) to subscribe to Brett Oppegaard's posts today



Show Comments

 COMMENTS (15)

LOG IN

Post your comment...

SUBMIT

Sort comments by

Highest rated



Evan Tector 2 days ago

Yes indeed, reinstate the shield law. But lets actually practice good journalism within each article. The author's opening assertion doubles down on his questionable conclusions draw from his previous article on journalists and public relations activity. "Two local journalists recently were called to testify in the Billy Kenoi case, doing both of them (and Hawaii journalism) professional harm." This assertion and rehash at the outset of a different article on a different topic is unnecessary and undermines the analysis and conclusions presented here on the topic of the shield law. Argue one point at a time please. This spurious rehash at the opening will prevent me from sharing this article with confidence to promulgate the needed shield law discussion. Perhaps tightening up this practice is a good subject for general and editorial policy at CivilBeat? Live and learn.

1



Evan Tector 2 days ago

The last article was panned by qualified others on Facebook and in other notable places, namely Ian Lind's 11.5 blog.

'Is crossing the line between politics and journalism an unforgivable sin?'

<http://www.ilind.net/2016/11/05/is-crossing-the-line-between-politics-and-journalism-an-unforgivable-sin/>



Black Coffee 2 days ago

The headline of this article currently reads "Reinsate."

I think you mean "REINSTATE."

Adult supervision please.



Editor@CivilBeat STAFF 2 days ago

Thanks, Black Coffee! Adults are now awake and present this morning ...

2



Black Coffee 2 days ago

Much better!



Joseppi 2 days ago

Just since the days of Nixon when there was still independent robust journalism - Since then journalism has been in a steady decline, accelerated by the war on terrorism, whereby if you aren't with us - you must be a sympathizer mentality, now culminating with journalists blatantly cheerleading for one status quo candidate while ignoring the obvious flaws.

Journalism can be intimidated by the judiciary and also can be manipulated as this article illustrates how the political class, which is owned by the monied class, wines and dines journalists, giving them access to power and influencing what they write.

http://www.cjr.org/first_person/podesta_emails_journalists_dinner.php

2



slu 1 day ago

While I agree with the necessity for a free press in any society, there needs to be some kind of self-policing by the profession to keep obvious scumbags (plenty of them to go around in journalism) from publishing any garbage they choose to run their "other" mouth about. There is too much "peeping tom" stuff, too much blatant character assassination and too much opinion being masqueraded as fact. While you folks demand total freedom to publish any kind of trash you choose, you reject any control as censorship and unconstitutional. With freedom comes responsibility. How are you going to insure that, Brett? There needs to be limits to the shield law. Maybe your profession should be the ones to lay down the law. Where are you going to draw the lines? Are you going to protect journalists from irresponsible activity just like the Catholic Church or the Honolulu Police have done?



Michael Krijnen 24 hours ago

"Currently, 49 states and the District of Columbia have some form of a shield law. Supporters say the laws help journalists to do their job without fearing a backlash from public officials."



Brett Oppegaard 24 hours ago

In reply to:

While I agree with the necessity for a free press in any society, there needs to be some kind of self-policing by the profession to keep obvious scumbags (plenty of them to go around in journalism)...

— slu

Slu, That's why we have a professional Code of Ethics, <http://www.spj.org/ethicscode.asp>; good journalists stick to that, and I recommend you only support and subscribe to journalism organizations that follow it; the rest is just social-media noise. ... There is not many (if any) benefits to a democracy that puts ethical journalists, just doing their jobs, on the stand.



slu 19 hours ago

I fear quite a few of your colleagues don't read. I recently saw a posting by one of your Civil Beat colleagues that went after a person with no prior record of wrongdoing cited simply because of her association with a company that was on the reporter's fecal roster. Evidently, guilt by association in advance of any actual foul deed was enough. Well, I admittedly haven't read your Code of Ethics but if it allows this kind of attack journalism, it doesn't mean much. Civil Beat publishes some good articles but it also put out it's fair share of "social media noise" under the guise of "investigative journalism". "Caveat Emptor" applies here too and the term "ethical journalist" has an oxymoronic air about it much like "ethical presidential candidate". There needs to be limits to the shield for those who simply call themselves journalists and work for organisations that purport to be news outlets. Libel, slander and damned lies smell just as bad regardless of the source.



Michael Krijnen 24 hours ago

"Currently, 49 states and the District of Columbia have some form of a shield law. Supporters say the laws help journalists to do their job without fearing a backlash from

public officials."

We are the last place in the US, that government wants to make America great again.

I am not a Trump supporter.

1



Black Coffee 2 days ago

"Hawaii News Now apparently did not cover Lincoln's participation in the trial (why not?)."

"Why not" is a good question but there's no indication that it was asked of anyone who could answer.

"Lincoln also had to explain the television station's policy of only keeping interviews in the company computer system for a week. And how she had recognized the importance of the interview and saved the file to another computer to preserve it, but that computer crashed, and the interview was lost in the rebooting process."

That seems like a strange policy and a strange computer glitch.

1



Michael Krijnen 24 hours ago

"Currently, 49 states and the District of Columbia have some form of a shield law. Supporters say the laws help journalists to do their job without fearing a backlash from public officials."

ANY QUESTIONS ? WHY NOT HAWAII ? IS that too challenging, after what we have seen Trump get away with you, would think saner minds would prevail and have a law in place in Hawaii that followed 49 other states.



Choon James 2 days ago

TOTALLY AGREE!

Some things we absolutely must protect and preserve.



Frank DeGiacomo 2 days ago

Here's a plan! When subpoenaed call a press conference on the steps of the court house the day you are to appear saying why it's an infringement on the 1st Amendment and announce that you will not comply. Then you'll probably just go home or back to work. Worst case scenario, you're held in contempt, you get hauled in (not a good visual), you announce you're going on hunger strike, and then have your attorney keep filing grumbles motions until you are eventually sprung - throw in a jail protest and a lobbying campaign if it lasts more than a week. Contempt is to get you to comply. When there is no possibility that you'll comply they'll let you out. In the meantime you'll get to write a killer series on all the miscarriages of justice and deplorable jail conditions, etc. . You get out healthy, rested, and with a Pulitzer for your award winning jail series. Then it'll be a long time before another reporter is ever called in.

[PRIVACY](#) [TERMS](#)

SUPPORT NONPROFIT, INVESTIGATIVE JOURNALISM TODAY!

I would like to donate

One-Time Monthly Yearly

DONATE NOW

 Secured by **stripe**

If your organization would like to make a donation, please contact us at business@civilbeat.org.

Prefer to mail a check? Our mailing address is 3465 Waialae Avenue, Suite 200, Honolulu, HI 96816.