# LAW AS SOURCE

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*Abstract*: What determines the effectiveness of media scrutiny? This Article examines the role of one important-yet-understudied determinant: the legal system. It shows that the law not only regulates what the media can or cannot say, but also facilitates effective accountability journalism by producing information. Specifically, law enforcement actions, such as litigation or regulatory investigations, extract information on the behavior of powerful players in business or government. Journalists can then translate the information into biting investigative reports and diffuse them widely, thereby shaping players' reputations and norms. Levels of accountability in a given society are therefore not simply a function of the effectiveness of the courts as a watchdog or the media as a watchdog, but rather a function of the interactions between the two watchdogs.

This Article approaches, from multiple angles, the questions of how and how much the media relies on legal sources to hold the power to account. I interview forty veteran reporters; scour a reporters-only database of tip sheets and how-to manuals; go over syllabi of investigative reporting courses; and analyze the content of projects that won investigative reporting prizes in the past two decades. The triangulation of these different methods produces three sets of insights. First, this Article establishes that legal sources matter: in today's information environment, court documents, depositions, and regulatory reports are often the most instrumental sources of accountability journalism. Second, the Article identifies how and why legal sources matter: they extract quality information on the (mis)behavior of powerful players in a credible, libel-proof manner. Finally, recognizing the function of law as source opens up space for rethinking important legal and political institutions, according to how they contribute to information production. In the process, we get to reevaluate timely debates, such as the desirability of one-sided arbitration clauses, which have been at the center of recent Trump Administration orders and pending Supreme Court litigation. The upshot is that the key to holding powerful corporations to account lies in assuring that different systems control complement and feed off each other.

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## INTRODUCTION

*Spotlight* won the 2015 Oscar for best film by telling a compelling story about investigative reporters holding the Catholic Church to account over child sex abuse.[1] Yet the Boston Globe's Spotlight reporters could not have done it alone. The legal system helped them.[2] The Globe reporters spotted the pattern of abuse by looking at numbers of lawsuits filed against individual priests. They revealed the cover-up by getting internal Church documents from motions attached to court files. *Spotlight* is therefore not really a story about investigative journalism holding the powerful to account. It is rather a story about interactions between the media and the

[1] SPOTLIGHT (Participant Media 2015).

[2] *See* TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE (2008) (a book-length account of how litigation against individual priests and the Church played a key role in holding these players accountable).

courts. The interactions are what produced accountability. Without the legal system generating information in the process of individual lawsuits against priests, the reporters would not have had such a powerful story to tell. And without the reporters putting the pieces of the puzzle together, identifying the pattern, packaging it compellingly, and diffusing it widely, the Church would not have admitted its mistakes and changed its behavior. The legal system would probably have continued settling and sealing one individual case after another. It took media scrutiny to move the needle.

This Article is the first to fully develop a theory of the interactions between the media and the courts. It fleshes out how and why such interactions occur, and what outcomes they achieve.

While scholars and courts around the world have long recognized the role of the media as a watchdog,[3] and the role of the courts as a watchdog,[4] the interactions between the two purported watchdogs have been neglected. This is partly because the interactions between two complex systems such as the media and the courts follow fuzzy dynamics, and are thus hard to capture in neat models or statistical proofs. My strategy in tackling these questions is to *triangulate* multiple theoretical and empirical angles.[5] I synthesize theoretical insights from the communication science and information economics literatures; comb through a database of reporters' tip sheets and how-to manuals; compare course syllabi in leading journalism schools; gather insights from interviewing forty investigative reporters;[6] and conduct content analysis of prizewinning investigative reporting projects over the 1995–2015 period.[7] The triangulation of all these methods yields insights into how, why, when, and to what extent journalists rely on legal sources. This Article thereby makes three sets of contributions:

First, the Article establishes that legal sources matter. In today's information environment, court documents, depositions, and regulatory reports are often the most instrumental sources of accountability journalism.

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[3] *See, e.g.*, Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2443-44 (2014); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 751, n.9 (2009). *See also* DEAN STARKMAN, THE WATCHDOG THAT DID NOT BARK 121 (2014) (public opinion polls show that the public, and journalists themselves, share the view of media as watchdog).

[4] *See, e.g.*, Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1527 (1994); Law, *id*. at 745, 780.

[5] The idea behind triangulation is that combining multiple theoretical and empirical approaches can minimize the biases of any single theory/method. Triangulation is especially fitting when trying to develop a theory of law as facilitator of investigative journalism: this is a topic with little existing hard data on it, and one that does not lend itself easily to statistical proof. In inquiries of this kind, triangulation can bolster the prima facie plausibility of the theory at its initial stages, and produces avenues for future empirical work. *See* Paulette M. Rothbauer, *Triangulation*, *in* THE SAGE ENCYCLOPEDIA OF QUALITATIVE RESEARCH METHODS 893 (Lisa M. Given ed., 2008).

[6] *See infra* Appendix A, for a list of interviews and details about the methodology.

[7] *See infra* Appendix B, for a summary of the content analysis methodology and findings.

To illustrate, my content analysis of Pulitzer Prize winners reveals that legal documents played a crucial role in over half of these paradigmatic cases of investigative journalism.[8]

Second, the Article explains exactly how legal sources matter, and the circumstances under which they matter more or less. Here the evidence from interviews with reporters, reporters' tip sheets, and course syllabi is especially valuable for shedding light on why journalists rely so much on legal sources. The legal system constantly produces information on how people and entities behave. It produces information directly by requiring disclosure and incentivizing whistleblowers.[9] It also produces information indirectly as a by-product of law enforcement actions.[10] Think for example of internal emails made public during the discovery stage of a trial, or a detailed regulatory investigation report exposing a rotten organizational culture. Such pieces of information can become very valuable sources for journalists to follow up and be able to cover the behavior in question. Information coming from the legal system has several characteristics that make it especially valuable for journalists. It is relatively credible, cite-worthy, shielded from liability, detailed and nuanced, speaks to the pervasiveness of a problem, and allows reporters to spot patterns.

Overall, the evidence suggests that the Spotlight example is representative of a broader theme, namely, the importance of media-court interaction. To hold powerful players to account, one watchdog is seldom enough. The media without the legal system would have problems with sourcing, and many stories would not be told. The other direction also holds: the legal system without the media would have problems with spotting patterns, and the information would not be packaged and diffused widely. The "story" would be buried in court files, where it would not reach enough people to effect change. The combination of the media and the courts therefore produces a public good in the form of higher levels of accountability in society. Another way to think of the public good is as well-functioning reputation markets.[11]

Recognizing that law enforcement produces an informational public good (that is, accurate information that the media can use to hold the powerful to account) generates a wide array of implications. This is where the third set of contributions of this Article comes in. At a basic level, the law-as-source framework calls for a more cautious approach to scaling back

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[8] *See infra* Part III.

[9] Roy Shapira, *Reputation through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1212 (2016).

[10] *Id*. at 1213 et seq.

[11] *Cf.* David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 264, 293 (2010) (alluding to the notion of accurate reputation information as a public good). I elaborate on reputation markets and how the legal system can help make them function better in ROY SHAPIRA, LAW AND REPUTATION (forthcoming 2019) (book manuscript, on file with Cambridge University Press). *See also* Roy Shapira, *A Reputational Theory of Corporate Law*, 26 STAN. L. & POL'Y REV. 1, 10 (2015).

legal intervention. Reducing the level of law enforcement can have indirect negative effects on levels of accountability in society, because *lax law enforcement leads to lax media scrutiny*. More concretely, the law-as-source framework helps us reevaluate the age-old debate over secrecy versus openness in court proceedings. This Article injects into that debate much-needed evidence on the real-life implications of confidentiality, and rebuts some of the claims of the confidentiality proponents.[12] The evidence on how journalists use information from the legal system to promote accountability also allows us to unpack the different confidentiality doctrines that the literature has traditionally failed to distinguish.[13] There exist important differences, for example, between the desirability of keeping the amount of a settlement confidential and protecting all discovery-exchanged documents.

Perhaps the timeliest issue that the law-as-source framework sheds light on is the proliferation of one-sided arbitration clauses that effectively waive class actions. As of this writing, the Supreme Court is deciding the fate of such mandatory clauses in employment contracts, affecting employees in 80% of the biggest American companies,[14] and the Trump administration is moving to repeal efforts by regulators to ban them.[15] While the debate over such arbitration clauses has focused on justice and efficiency from the point of view of the disputants, this Article reveals that something else is at stake: the effectiveness of accountability journalism.

The Article proceeds in five parts. Part I provides background, showing why accountability journalism is beneficial to society yet costly to the reporter and the media outlet engaging in it. When left on its own, the media will therefore tend to underproduce accountability journalism. Part II explains how in reality the media is rarely left alone. The legal system provides *information subsidies* for accountability journalism by giving journalists access to background information, leads to other sources, inside information about what happened and how it happened, and an opportunity to quantify and identify patterns. Part III presents evidence on the scope and magnitude of the role of law as source. It particularly highlights the role of law enforcement actions such as litigation or regulatory investigations. Part IV sketches policy implications. Part V shows the other side of the coin, namely, how the media helps the legal system perform more effectively. Media scrutiny surfaces information, refocuses regulatory agendas, and allows the legal system to escape capture by special interests. I then conclude.

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[12] *See infra* Subsection IV.B.1.
[13] *See infra* Subsection IV.B.2.
[14] *See infra* note 310 and the accompanying text.
[15] *See infra* note 306 and the accompanying text.

## I. BACKGROUND: THE PROMISE AND PITFALLS OF ACCOUNTABILITY JOURNALISM

In order to understand how the law affects accountability journalism, we first need to understand how accountability journalism works. Legal scholars have traditionally understudied the role of the media.[16] We tend either to ignore it, or to assume that media plays a crucial role, without explaining what exactly this role is, or how effective the media is in playing it. This Part narrows that gap in the literature by synthesizing insights from the communication science and information economics literatures. Subsection A delineates the scope of our inquiry and clarifies the terminology of accountability journalism. Subsection B discusses the potential social benefits that effective media scrutiny brings. Subsection C details the various factors that limit the effectiveness of media scrutiny de facto. In particular, I emphasize the crisis of sourcing: how changes in media markets over the past couple of decades have created problems in sourcing investigative projects.

### *A. What Accountability Journalism Is*

This Article focuses mostly on a specific type of media work – accountability journalism – that is done by a specific type of media outlet – the traditional one, of newspapers. To understand what "accountability journalism" means we can juxtapose it with other types of media work such as "rebroadcasting" and "access reporting."[17] Rebroadcasting denotes basic gathering and diffusion of facts, such as reporting scores of sporting events or movements of stock prices.[18] Access reporting denotes obtaining inside information to tell the reader what powerful players intend to do before they do it, such as reporting an impending M&A deal.[19] Accountability journalism, by contrast, denotes shedding light on societal problems.[20] Think back to the Spotlight example, which exposed how the higher-ups in the Church were involved in a massive cover-up. The reason to focus on accountability journalism is straightforward: it is the type of media work

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[16] *See* Wendy Wagner, *When All Else Fails: Regulating Risky Products through Tort Litigation*, 95 GEO. L.J. 693, 695 (2007); Alexander Dyck & Luigi Zingales, *The Corporate Governance Role of the Media*, *in* THE RIGHT TO TELL: THE ROLE OF MASS MEDIA IN ECONOMIC DEVELOPMENT (World Bank Inst. ed., 2002); Stuart L. Gillan, *Recent Developments in Corporate Governance: An Overview*, 12 J. CORP. FIN. 381, 395 (2006).

[17] *See* Starkman, *supra* note 3, at 9–10 (2014) (elaborating on the terminology).

[18] *Id*.

[19] *Id*.

[20] Accountability journalism, in that sense, does not have to come from breaking new information. It can come from analyzing and revealing institutional breakdowns with existing information that was hiding in plain sight. *See* James Aucoin, THE EVOLUTION OF AMERICAN INVESTIGATIVE JOURNALISM 88–89 (2005) (building on the distinction offered by iconic Washington Post publisher, Katherine Graham).

most pertinent to our purposes, namely, understanding how the interactions between the media and the courts affect their respective watchdog functions.[21]

While accountability journalism may not be the only institution in society to generate accountability, it is the key to facilitating the work of all the other institutions.[22] Think of various fundamental systems of control that expose misbehavior and discipline powerful players: the legal system with threats of legal sanctions, social norms with threats of the disesteem of one's peers, and reputation markets with threats of loss of future business opportunities.[23] These systems – law, social norms, and reputation – can achieve deterrence only when certain conditions regarding diffusion of information hold.[24] To hold the powerful to account, information on how the powerful behaved has to be available, accessible, credible, widely diffused, and properly attributed.[25] In today's world, such diffusion of information happens mainly through mass media.[26]

Out of all the media that produce accountability journalism, this Article focuses on the most traditional one, namely, the printed press. We do not elaborate on broadcast media due to considerations of brevity and scope, but the principles described here apply to radio and television as well.[27] Nor do we elaborate on the brave new world of social media and crowdfunding journalism. While social media has radically changed many aspects of media work,[28] its relevance to the one aspect of media work most pertinent

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[21] On the watchdog functions of the media and the courts *see supra* notes 3 and 4, respectively.

[22] Another way to think about the link between media and accountability is through the connection between power and reputation. Power without reputation is meaningless (*see* DACHER KELTNER, THE POWER PARADOX 54–59 (2016)). As a result, powerful players in society view the threat of losing reputation as a strong deterrent. Yet the threat of losing reputation becomes credible only with wide diffusion of damning information. Accordingly, without media scrutiny there will be less meaningful reputational sanctioning, and hence fewer checks on power.

[23] *See* Shapira, *supra* note 9, at 1198, n. 12.

[24] Roy Shapira & Luigi Zingales, *What Deters Pollution? The DuPont Case* (NBER working paper no. 23866, 2017), http://www.nber.org/papers/w23866, in Part III.

[25] *Id*.

[26] *See* David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001) (media coverage is an essential ingredient for shaming of companies and businessmen); Law, *supra* note 3, at 751 (the courts' ability to affect change in government behavior depends on media coverage of judicial decisions).

[27] *See, e.g.*, RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 560, n. 7 (2011); JAMES T. HAMILTON, DEMOCRACY'S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE JOURNALISM 121 (2016) (describing an example of investigative reporting by KCBS TV, exposing sanitary problems in L.A. restaurants with the help of legal sources). *See infra* Appendix A: List of Interviews, interview with Sandy Bergo, director of the Fund for Investigative Journalism (Aug. 14, 2017) (throughout this Article I refer to interviews conducted with veteran reporters. Hereinafter and for brevity I refer only to the interviewee's name, while the reader who is interested in more details is referred to Appendix A *infra*).

[28] *See* Sarah Tran, *Cyber-Republicanism*, 55 WM. & MARRY L. REV. 383, 399 (2013).

for our purposes is still limited. Studies show that, at least in their current state, these new media mostly engage in disseminating information, rather than deeply investigating misconduct.[29] Traditional media outlets still perform the bulk of the work of accountability journalism.[30]

### *B. How Valuable Effective Accountability Journalism Can Be*

Courts, scholars and policymakers across the world have long recognized that the media plays an important role as the watchdog of democracy, holding the powerful to account.[31] In recent years economists have made strides in putting a number behind that intuition, quantifying the social benefits that stem from accountability journalism. Of particular note is the work of James Hamilton,[32] which examines the societal changes that the most successful investigative projects – those submitted to journalistic award competitions – bring about. To illustrate, consider one case: a 1998 Pulitzer-winning investigation by the Washington Post, which found that D.C. police officers were shooting and killing civilians at an alarming rate.[33] The Post's investigative series brought immediate changes in how D.C. police use force. As a result, fatal shootings by police officers dropped dramatically from 1999 onwards. Hamilton puts a number on the benefits from reduced fatalities, using "value of statistical life" measurements. His calculation suggests an estimated $70ml in net social benefits from the Post investigation.[34]

The evidence documenting the effects of media on business and political markets goes beyond specific case studies. Statistical evidence shows that in areas with wider diffusion of media, citizens get more involved in politics, and voter turnout increases.[35] As a result, heavier media scrutiny makes

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[29] Jones, *supra* note 27, at 569.

[30] *See* West, *supra* note 3, at 2450; Erin C. Carroll, *Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press*, 2016 UTAH L. REV. 193, 193 (2016).

[31] *See* Carroll, *id*. at 196–200 (compiling references); West, *id*. at 2445, n. 63 (compiling quotes from case law); Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L. J. 1361, 1366, n. 18 (2016) (detailing the origin of the "Fourth Estate" moniker that was attached to the media by Edmond Burke).

[32] Hamilton, *supra* note 27.

[33] *See* Jeff Linn et al., *D.C. Police Lead Nation in Shootings: Lack of Training, Supervision Implicated as Key Factors*, WASH. POST, Nov. 14, 1998.

[34] Hamilton, *supra* note 27, at 127-28.

[35] *See* Matthew Gentzkow et al., *The Effect of Newspaper Entry and Exit on Electoral Politics*, 101 AM. ECON. REV. 2980 (2011) (more competition in the newspaper market leads to more citizen participation in politics); Stefano DellaVigna & Ethan Kaplan, *The Fox News Effect: Media Bias and Voting*, 122 Q.J. ECON. 1187 (2007) (increased exposure to Fox News increases Republican vote share); David Stromberg & James M. Snyder, Jr., *The Media's Influence on Public Policy Decisions*, *in* INFORMATION AND PUBLIC CHOICE: FROM MEDIA MARKETS TO POLICY MAKING (Islam, ed., 2008) (in areas with heavier media coverage, citizens are more informed about their elected officials); Alexander Dyck et al., *Media versus Special Interests*, 56 J. L. & ECON. 521 (2013) (muckraking journalism in the early 20th century affected voting patterns).

politicians more responsive to voter preferences.[36] Media scrutiny also increases the responsiveness of corporate decision-makers to shareholders,[37] as well as to salient outside groups, such as environmentalists.[38]

Media scrutiny can have such an impact because, when done effectively, it mitigates the two root problems that plague modern societies: rational ignorance and collective action.[39] Powerful interest groups can often engage in misconduct without facing public backlash, simply because the public remains uninformed and unorganized.[40] If voters have no information about what politicians are doing, then politicians can cater to special interest groups.[41] If individual investors have no idea of how their company is run or no ability to affect it, then managers can channel profits to their own pockets.[42]

Effective media scrutiny reduces the costs to citizens of collecting information, processing information, and acting upon information.[43] The media reduces the costs of collecting information by aggregating and filtering new information. It reduces the costs of processing information by packaging the information in an entertaining manner. Think for example about late night shows, whose avid viewers tune in for the jokes and become informed as a by-product.[44] And the media reduces the costs of acting upon information by diffusing the information widely: many of one's fellow citizens may read the same report and feel similarly motivated to take action. The upshot is that effective media scrutiny dramatically increases the chances that citizens/stakeholders will become informed about

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[36] *See, e.g.,* James M. Snyder, Jr. & David Strömberg, *Press Coverage and Political Accountability*, 118 J. POLIT. ECON. 355 (2010) (politicians living in areas with less press coverage are less likely to work for their constituents); Stromberg & Snyder, *id* (in areas with heavier media coverage, politicians are more accountable to citizens' preferences).

[37] *See, e.g.,* Jennifer R. Joe et al., *Managers' and Investors' Responses to Media Exposure of Board Ineffectiveness*, 44 J. FINAN. QUANT. ANAL. 579 (2009) (media scrutiny of board effectiveness pushes the scrutinized company to adopt more shareholder-value-enhancing behaviors); Kobi Kastiel, *Against All Odds: Hedge Fund Activism in Controlled Companies*, 16 COLUM. BUS. L. REV. 101 (2016) (media coverage of shareholder activism in controlled companies increases the likelihood of accepting the advocated change).

[38] Dyck & Zingales, *supra* note 16.

[39] *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957) (the classic text on rational ignorance); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965) (the classic text on collective action problems); Alexander Dyck et al., *The Corporate Governance Role of the Media: Evidence from Russia*, 63 J. FIN. 1093, 1100 (2008) (the media can mitigate rational ignorance and collective action problems).

[40] *See* Hamilton , *supra* note 27, at 315.

[41] *See* Brian Caplan, *Rational Ignorance*, *in* THE ENCYCLOPEDIA OF PUBLIC CHOICE, Vol. II 468 (Rowley & Schneider, eds. 2004).

[42] *See* ROBERT C. CLARK, CORPORATE LAW 390–391 (9th ed. 1986); Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1745 (2006).

[43] *See* Dyck & Zingales, *supra* note 16.

[44] *See* Michael W. Wagner, *Review: Media Concentration and Democracy: Why Ownership Matters*, 7 PERSPECT. POLIT. 185, 187 (2009).

and engaged in an issue.[45] As a result, decision-makers in government or business are less likely to ignore the public interest on that issue.[46]

The upshot is clear: when done effectively, accountability journalism can increase levels of accountability and generate significant benefits to society. The question then becomes under what conditions the media will be able to produce effective accountability journalism. Here the economics of media literature strikes a more pessimistic tone. While accountability journalism can come with great benefits, it also comes with steep costs. And, importantly, there is a mismatch between the costs and the benefits. While the costs of accountability journalism are borne by the journalist and her media outlet, the benefits spill over to society, including to individuals who do not read the paper.[47] When manufacturers of auto tires fear the prospect of bad news and so optimally invest in quality and security, all those who drive cars benefit, regardless of whether they read the paper or not. This "public good" aspect of investigative journalism – the fact that the benefits from it are non-excludable – suggests that media outlets will tend to underproduce it, unless receiving some help from the outside, in the form of money or information. Yet, as the next Subsection elaborates, the outside conditions have become increasingly unfavorable.

### *C. What Determines the Effectiveness of Accountability Journalism*

> *"Never has there been a greater need for probing coverage of the multiple ways in which the public is victimized. But as corporations sprawl across continents and government grows more complex, media resources shrink."*[48]

The ability of the media to produce accountability journalism is anything but automatic. Media scrutiny suffers from several compromising factors that prevent it from fulfilling its watchdog function, such as dependence on sources and advertisers, or the need to cater to audiences' biases (detailed in Subsection 1). Some of these compromising vectors have only intensified in recent decades, making it even harder to achieve effective accountability journalism (Subsection 2).

#### 1. Media Slant

Media scrutiny matters. But it matters in a slanted way. Several factors combine to make media coverage inherently slanted. First, media coverage suffers due to *dependence on advertisers*.[49] The majority of media revenues

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[45] *See* Dyck et al., *supra* note 35.

[46] *See* Alexander Dyck & Luigi Zinglaes, *The Bubble and the Media*, *in* CORPORATE GOVERNANCE AND CAPITAL FLOWS IN A GLOBAL ECONOMY 90 (Cornelius & Kogut, eds., 2003).

[47] Hamilton, *supra* note 27.

[48] Mary Walton, *Investigative Shortfall*, 32 AM. JOURNALISM REV. (2010).

[49] *See* C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS (1994); Jonathan Reuter

do not come directly from subscriptions (readership) but rather from advertising.[50] A profit-minded media firm will therefore think twice before producing biting watchdog-type reporting on big advertisers.[51]

Second, media coverage suffers from *dependence on sources*.[52] Journalists need sources. They do not enjoy direct access to information about the inner workings of large businesses or government agencies. To bring stories, journalists therefore frequently rely on insiders in businesses/government.[53] To persuade the source to give them information, journalists – explicitly or implicitly – give something in return. Often, this "something" is a favorable slant.[54] Producing watchdog-type reporting on those who are who your main sources is akin to burning a bridge.[55]

Another reason that media coverage fails to bring accountability comes from the *journalists' own shortcomings*. Journalists may simply have too little experience and expertise to be able to report critically on complex topics. The communication science literature has made this point forcefully in the context of journalists who cover the financial sector.[56] These journalists tend to view their role as merely providing access to information, rather than ensuring accountability.[57]

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& Eric Zitzevitz, *Do Ads Influence Editors? Advertising and Bias in the Financial Media*, 121 Q.J. ECON. 197, 225 (2006) (certain financial media outlets bias their reporting in favor of big advertisers); Rafael Di Tella & Ignacio Franceschelli, *Government Advertising and Media Coverage of Corruption Scandals*, 3 AM. ECON. J. APPLIED ECON. 119 (2011) (media outlets bias their scrutiny of government as a function of government advertising). *But see* Gregory S. Miller, *The Press as a Watchdog for Accounting Fraud*, 44 J. ACCT. RES. 1001 (2006) (finding no link between advertising and media scrutiny of accounting scandals).

[50] *See* Jesse Holocomb & Amy Mitchell, *Revenue Sources: A Heavy Dependence on Advertising*, Mar. 26, 2014, PEW Research Ctr., http://www.journalism.org/2014/03/26/revenue-sources-a-heavy-dependence-on-advertising/; MICHAEL SCHUDSON, THE SOCIOLOGY OF NEWS 117 (2003) (typically around 80% of revenues come from advertising).

[51] Schudson, *id*. at 125 (citing a survey of television news directors, where over half of the respondents admitted that advertisers pressured them to kill negative stories or put a positive spin on them).

[52] *See* Joseph Stiglitz, *Fostering an Independent Media with a Diversity of Views*, *in* INFORMATION AND PUBLIC CHOICE: FROM MEDIA MARKETS TO POLICY MAKING (Islam, ed., 2008); Dyck & Zingales, *supra* note 46, at 84.

[53] *See, e.g.*, Lucig H. Danielian & Benjamin I. Page, *The Heavenly Chorus: Interest Group Voices on TV News*, 38 AM. J. POL. SCI. 1056 (1994) (finding that interest groups and government sources account for 65–85% of sources on political coverage in TV).

[54] *See* Dyck & Zinglaes, *supra* note 46, at 83 (presenting evidence based on Harvard Business School case studies); Hamilton, *supra* note 27, at 142-44 (memoirs of investigative reporters caution reporters from the dangers of relying too much on insiders as sources). *See also* HERBERT GANS, DECIDING WHAT'S NEWS (1979) (suggesting that over time, dependence on sources pushes journalists to absorb their sources' worldviews).

[55] *See, e.g.*, Dean Starkman, *Power Problem*, COLUM. JOURNALISM REV. (2009), http://archives.cjr.org/cover_story/power_problem.php.

[56] *See, e.g.*, Damian Tambini, *What Are Financial Journalists For?*, 11 JOURNALISM STUD. 158 (2010); Nikki Usher, *Review: The Watchdog that Didn't Bark*, 8 INT'L J. COMM. 1437, 1439 (2014).

[57] Tambini, *id*.

Even if journalists manage to overcome their own biases, they may still tilt their coverage to *cater to their audiences' biases*.[58] In other words, besides supply-side distortions, media coverage also suffers from demand-side distortions. Consumers of media content often have preferences for reporting that confirms their priors,[59] or prefer content with entertaining elements rather than content with societal significance.[60] Media outlets therefore have incentives to emphasize entertainment over significance.[61]

2. Dwindling Resources

*"Investigative reporting, which can be expensive, litigious, and politically fraught, has often been one of the first areas of journalism to feel the squeeze."*[62]

The past two decades have been especially challenging for accountability journalism. The newspaper industry as a whole has suffered from a financial drain.[63] Advertising revenues have fallen dramatically.[64] Newspapers have cut costs by shrinking their newsrooms: 40% of newspaper jobs have disappeared over a decade.[65]

Shrinking newspaper jobs and budgets has hit accountability journalism the hardest.[66] The reason is simple: accountability journalism is the costliest form of journalism.[67] It takes months of quality human labor to produce, in

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[58] *See* Stefano DellaVigna & Matthew Gentzkow, *Persuasion: Empirical Evidence*, ANN. REV. ECON. 643, 659–660 (2010).

[59] *See* Sendil Mullainathan & Andrei Shleifer, *The Market for News*, 95 AM. ECON. REV. 1031 (2005) (modeling how consumers of news prefer news that fits their priors because they want to hear things they believe in); Matthew Gentzkow & Jesse M. Shapiro, *Media Bias and Reputation*, 114 J. POL. ECON. 280 (2006) (modeling how consumers of news prefer news that fits their priors because they believe that such reporting is more accurate).

[60] *See, e.g.*, Michael C. Jensen, *Toward a Theory of the Press*, *in* ECONOMICS AND SOCIAL INSTITUTIONS (Brunner, ed., 1979) (modeling how the media caters to their readers' preference for entertainment over significance).

[61] *See* Brian J. Bushee et al., *The Role of the Business Press as an Information Intermediary*, 48 J. ACC. RES. 1, 11 (2010); Alexander Dyck & Luigi Zingales, *supra* note 16, at 111–112.

[62] House of Lords Report, *supra* note 60, at section 29.

[63] *Id*. at section 47.

[64] *See* Ryan Chittum, *Newspaper Industry Ad Revenue at 1965 Levels*, COLUM. JOURNALISM REV. (2009).

[65] *See* Mark Jurkowitz, *The Losses in Legacy*, Pew Research Ctr., Mar. 26, 2014, http://www.journalism.org/2014/03/26/the-losses-in-legacy/; Ken Doctor, *Newsonomics: The Halving of America's Daily Newsrooms*, Jul. 28, 2015, http://www.niemanlab.org/2015/07/newsonomics-the-halving-of-americas-daily-newsrooms/.

[66] Walton, *supra* note 49 ("The shrinking rosters represent a two-front assault on investigative reporting. Investigations take time, lots of time. With much smaller staffs doing much more work in a multimedia era, it becomes harder to spring reporters from their day jobs to tackle important but labor-intensive probes. And with fewer reporters to go around, news outlets are much more likely to abolish investigative slots than the City Hall and police beats").

[67] *See, e.g.*, Carroll, *supra* note 30, at 203.

an age when the media competes in speed.[68] And it comes with risks of legal and political fights, in an age when the media cannot finance lengthy battles.[69] It is therefore not surprising that membership in the Investigative Reporters and Editors (IRE) organization fell from 5,391 in 2003 to 3,695 in 2009, or that applications for investigative reporting prizes dropped dramatically.[70]

The dwindling resources dynamics greatly affect journalists' ability to source investigative stories. Newspapers with fewer resources are going to have fewer beat reporters with eyes on the street and connections.[71] Financially challenged newspapers will also lack the resources to fight against SLAPP suits, file Freedom of Information Act (FOIA) requests, or wage legal battles to unseal documents.[72]

Coupled with the increased competition to produce speedy content, the increased difficulty of sourcing investigative stories has led to a shift in the mix of stories that the media produces.[73] Strained newspapers are now producing fewer "enterprise" stories, that is, stories that originate in independent work done by the journalist.[74] They instead rely more heavily on "information subsidies," that is, stories provided to newsrooms by insiders, public relations departments, think tanks, NGOs, and the like.[75] When an agent of a celebrity feeds you gossipy stories about the celeb, or when a high-tech insider gives you details about the next exciting product in the pipeline, you can publish content even with few resources.[76] By contrast, digging through boxes of documents and developing ears on the

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[68] Sussanne Fengler & Stephen Ruβ-Mohl, *Journalists and the Information-Attention Markets: Towards an Economic Theory of Journalism*, 9 JOURNALISM 667, 675 (2008) (compiling references showing that the amount of time available for journalistic research has shrunk).

[69] *See* House of Lords Report, *supra* note 62, at section 29; Walton, *supra* note 49 (quoting the former head of investigations in the New York Times, lamenting that "[investigative reporting is] the kind of thing that people in the fat years did occasionally, and in the thin years they do even less occasionally"); LAURA FRANK, THE WITHERING WATCHDOG (2009).

[70] Walton, *id*.

[71] *See* Carroll, *supra* note 30, 205; Hamilton, *supra* note 27, at 16.

[72] *See, e.g.*, Jones, *supra* note 27, 594–96. This theme was raised by several of my interviewees independently. *See infra* Appendix A: Lipinsky interview; Graves interview; Carter interview; Mehren interview.

[73] *See, e.g.*, Starkman, *supra* note 3, at Chap. 5 (showing how the business media switched to more and more access reporting). To clarify, there is nothing inherently wrong with gaining access to what powerful actors think and do: it can actually be helpful to the journalist's audiences. The problem starts when prioritizing the access comes with trading off the ability/motivation to also ask tough questions about what powerful actors do not want to give you access to. *Id*. at 199.

[74] *See* Schudson, *supra* note 50, at 137 (defining "enterprise" work as one that emanates from the journalist's initiative).

[75] *See, e.g.*, Kaye D. Sweetser & Charles W. Brown, *Information Subsidies and Agenda-Building During the Israel–Lebanon Crisis*, 34 PUBL. RELAT. REV. 359, 360 (compiling references); OSCAR H. GANDY, BEYOND AGENDA SETTING: INFORMATION SUBSIDIES AND PUBLIC POLICY (1982) (coining the "information subsidies" term).

[76] Hamilton, *supra* note 27, at 16.

ground is labor-intensive and requires ample resources. A media industry that heavily relies on recycling stories instead of producing them will not be able to fulfill its purported watchdog function.

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The economics of media literature tells us that when done effectively, accountability journalism produces significant benefits to society. At the same time, that literature illustrates us how hard it is to produce accountability journalism. When left to its own resources, a financially strained media will have a hard time developing the type of sourcing needed to hold the powerful to account.[77] Yet the literature is missing one key element: in reality, journalists are rarely left to their own resources. They can rely on subsidies from the state. Not the monetary subsidies we normally talk about as in public broadcasting,[78] but rather information subsidies. A state-financed institution – the legal system – produces information that reduces the costs to journalists of sourcing investigative stories. To understand the conditions that make for effective accountability journalism, we therefore need to explore when and how the law provides sourcing.

## II. THEORY: WHY LAW IS A VALUABLE SOURCE

The previous Part started with Hamilton's analysis of the 1998 Washington Post story on shootings by police officers, which brought net social benefits of $70ml.[79] This Part asks how investigative stories like the Washington Post one come about. The answer has a lot to do with the legal system. The Post's investigation rested on information from "civil court records, criminal court records, depositions…," among other sources.[80] Without such court documents, the Post's investigation could probably not have made a $70ml-sized impact. The police-shooting project therefore illustrates not just the outputs of investigative reporting, but also the *inputs*. In particular, it illustrates that an important, understudied determinant of accountability journalism is legal sources.

This Part provides the framework for examining and appreciating the role of law as source. It explores how and why journalists rely on information coming from the legal system. Subsection A categorizes the different types of legal sources. It distinguishes between "direct sourcing" and "indirect sourcing" channels. The former denotes legal institutions that produce information as their primary function. Freedom of information laws

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[77] *Cf.* Michael K. Bednar, *Watchdog or Lapdog? A Behavioral View of the Media as a Corporate Governance Mechanism*, 55 ACAD. MGMT. J. 131, 135 (2012) (arguing that a financially strained media can only play a limited role in corporate governance).

[78] *See* Carroll, *supra* note 30, at 194 (most existing proposals to boost the media focus on monetary subsidies).

[79] *See supra* note 33.

[80] Hamilton, *supra* note 27, at 125.

and mandatory disclosure requirements are cases in point. The latter denotes legal institutions, such as law enforcement actions, that produce information as a by-product. Subsection B then identifies the attributes that make information coming from the legal system especially valuable for investigative reporters. Subsection C examines the various ways in which reporters use legal sources to enhance the impact of their investigative projects.

### *A. Where Do Legal Sources Come from?*

To better understand the various ways in which the legal system affects the media's work (and to be able to later translate this understanding into policy implications), it is useful to distinguish between two types of legal institutions. Most legal scholars focus on what I term here "direct source" channels such as FOIA. But if you listen to what journalists themselves are saying (in interviews, tip sheets, and how-to manuals), you quickly learn that "indirect source" channels, that is, law enforcement actions, are at least equally important.

#### 1. Direct Sourcing

Various legal institutions are primarily geared to make information about the behavior of powerful players available to the public. An obvious example is the *Freedom of Information Act* (FOIA),[81] which makes information about the work of the executive branch available.[82] Congress explicitly envisioned FOIA as contributing to the ability of journalists to hold government players to account.[83] Indeed, over the years many impactful investigative projects have rested on FOIA and state-level freedom of information (FOI) laws.[84] In Hamilton's study of stories submitted for investigative reporting prizes, 15% of the sample relied on FOI requests.[85]

Freedom of information laws do not directly apply to private entities.

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[81] 5 U.S.C. § 552 (2012).

[82] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed"). *See also* Fred H. Cate, *The Right to Privacy and the Public's Right to Know: The Central Purpose of the Freedom of Information Act*, 46 ADMIN. L. REV. 41 (1994).

[83] In fact, the media was very much the lobbying force behind the passing of FOIA to begin with. Jones, *supra* note 27.

[84] *See* Carroll, *supra* note 30, at 224, n. 221 (referring to a website that aggregates examples of stories based on successful use of FOIA); Kwoka, *supra* note 31, at 1375 (compiling examples); Jones, *id.* at 606–07, n. 263 (same). For lists of different open-records acts and state freedom of information laws see Jones, *id*. at 580, n. 115.

[85] Hamilton (2016, 153–160). Interestingly, Hamilton finds that the investigative projects that rest on FOI requests are more impactful: out of the stories that trigger policy reviews, 40% rely on FOI. *Id*.

For journalists who wish to investigate businesses, another type of direct-sourcing channel looms large: *mandatory disclosure requirements*. Disclosure requirements incentivize corporate decision-makers to publicly reveal information about their own misconduct.[86] The oft-used general channel of information production is SEC filings: investigative reporters' tip sheets and course syllabi routinely advise a reporter digging into the conduct of public companies to start by looking at them.[87] A narrower example comes from environmental regulation, namely, the Toxic Release Inventory (TRI) program.[88] The TRI program instructs companies that handle large amounts of toxic chemicals to report details about their emissions to a publicly available database. Early studies of the impact of the TRI program found that firms that reported damning figures were more heavily scrutinized by the media, and suffered abnormal stock returns following such disclosures.[89]

Another legal institution directly geared to producing information is *whistleblowing laws*. Whistleblowing laws protect the whistleblower from retaliation by her employer, and in some areas even offer substantive monetary rewards for blowing the whistle.[90] As a result, they incentivize employees to flush out information about the behavior of their employers, and the media can then pick up and follow through on such inside information.[91] A good illustration comes from the 1996 Pulitzer-winning project on unethical conduct by a fertility clinic at a research university hospital.[92] The story was ignited by employees of the clinic, who came forward with concerns about doctors transferring eggs and embryos without patients' consent.[93] These workers invoked whistleblower protection when their bosses allegedly retaliated.[94] Arguably, having the shadow of

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[86] *See, e.g.*, Troy A. Paredes, Sec. & Exch. Comm'r, *Statement at Open Meeting to Propose Amendments Regarding Facilitating Shareholder Director Nominations* (May 20, 2009), https://www.sec.gov/ news/speech/2009/spch052009tap.htm.

[87] Mark Skertic, *Corporate Documents* (IRE tip sheet, 2007); Jaimi Dowdell, *Backgrounding People and Businesses on the Web* (IRE tip sheet, 2010); Mark Maremont, *Basics of Investigating Big Business: Digging into Corporate Numbers and Reports* (IRE tip sheet, 2005); Berens interview.

[88] 42 U.S.C. § 11023, section 313.

[89] *See* James T. Hamilton, *Pollution as News: Media and Stock Market Reactions to the Toxic Release Inventory Data*, 28 J. ENVIRON. ECON. AND ENGAGEMENT 98 (1995).

[90] For example, the False Claims Act rewards those who blow the whistle on fraud in government procurement (31 U.S.C. § 3730(d) (2006)). For a quick summary on whistleblowing provisions that grant protection against retaliation *see Employment Law Guide: Whistleblower and Retaliation Protections*, U.S. Dep't of Labor, http://webapps.dol.gov/elaws/elg/whistle.htm (last visited Dec. 31, 2017).

[91] *See* Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213 (2010) (providing evidence that whistleblowing is a substantial source of breaking bad news).

[92] The full project is available at http://www.pulitzer.org/winners/staff-37. Throughout this Article I am referring to examples from Pulitzer winning projects. The full citation and link to each project appears in Appendix B *infra*.

[93] *See infra* Appendix A: Christensen interview.

[94] *Id.*

whistleblower protection laws empowered the clinic's employees to release the damning information to begin with.

On paper, FOIA and public records laws, disclosure requirements, and whistleblowing acts should combine to provide ample information for journalists to hold powerful players to account. Yet in reality, direct sourcing channels are severely lacking. The implementation of FOIA, for one, is fraught with delays and denials.[95] For journalists on a deadline, months-long delays mean that FOIA becomes almost useless; for media outlets with smaller budgets, getting into a lengthy legal battle to challenge denials is not an option.[96] As a result, many journalists give up on using FOIA to begin with.[97] While the government gets bombarded with FOIA requests, journalists make up only a tiny fraction of FOIA users.[98] Most requests are filed for commercial or individual purposes, and the requesters do not seek to widely disseminate the information they get or use it for its purported watchdog purposes.[99] All in all, academics and practitioners agree that FOIA is dysfunctional.[100]

Disclosure laws, similarly, look good on paper but suffer from enforcement issues.[101] Pertinently, the useful information – damning information about powerful players – either eludes disclosure altogether or gets buried under an avalanche of useless information.[102] Even the Toxic Release Inventory experiment, hailed by early studies as a success story in improving accountability, was heavily criticized by later studies.[103] When chemical companies stumble upon a very profitable yet potentially toxic chemical, they have the incentives and ability to camouflage damning information even in the face of regulatory disclosure requirements.[104]

A fundamental problem with direct sourcing channels is that they work well only when there are preexisting high levels of accountability in the system. A journalist submitting a FOIA request in an attempt to expose

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[95] Carroll, *supra* note 30, at 211–15 (compiling references).

[96] David Cuillier, *Pressed for Time: U.S. Journalists' Use of Public Records during Economic Crisis* (working paper, 2011) (presenting evidence from a survey of 442 journalists, indicating that news outlets increasingly shy away from litigating FOIA denials).

[97] *Id*. at 8–13.

[98] David Pozen, *Freedom of Information beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1103 (2017).

[99] *Id*. See also Kwoka, *supra* note 31 (documenting FOIA usage for commercial purposes); Margaret B. Kwoka, First-Person FOIA, 127 YALE L. J. (forthcoming, 2018) (documenting FOIA usage for individual purposes).

[100] *See, e.g.*, Carroll, *supra* note 30, at 195 (noting the consensus).

[101] See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011) (on the failure of mandatory disclosure to shape business behavior); Pozen, *supra* note 98, at 1108 (on the failure of affirmative disclosure to shape government behavior). For studies criticizing the effectiveness of the other direct sourcing channel – whistleblowing laws – see Pozen, *id*. at 1109, n. 67 (compiling references).

[102] Ben-Shahar & Schneider, *id*. at 650.

[103] *Compare* Hamilton, *supra* note 89, *with* Nathan Cortez, *Regulation by Database*, 89 COLO. L. REV. (forthcoming, 2018), manuscript at 35.

[104] Shapira & Zingales, *supra* note 24.

government misconduct has to hope that the same powerful players that broke substantive rules will somehow abide by the information-production rules, instead of ignoring, delaying, or watering them down.[105] Similarly, corporate decision-makers who engage in shady practices also tend not to be fully transparent when revealing information in their company's official documents. Put differently, transparency requirements cannot bypass asymmetries in power.[106] As long as those in power are the ones in charge of enforcing disclosure requirements, it will be hard to use disclosure requirements to hold them to account.

Because of the futility of direct sources, journalists often look elsewhere when attempting to hold the powerful to account.[107] Take for example the 1995 Pulitzer-winning project on abuse of disability pension funds by police officers.[108] When the reporters got an initial tip that the system was rigged, they filed a FOIA request for all the documents on how disability funds are allocated. Yet all the reporters got back were the names and social security numbers of the officers receiving the funds, without further details. Instead of relying on the direct sourcing channel, the reporters had to find indirect, creative ways to dig up information. They searched the court dockets for litigation involving individual officers, and managed to piece the puzzle together.[109] The 1995 story therefore illustrates not only that direct sourcing channels are inadequate, but also that reporters often turn to other "legal" channels of information, such as law enforcement actions.[110]

### 2. Indirect Sourcing

When government agencies or business companies misbehave and harm someone, the victim may enlist the help of the legal system. A plaintiff's lawyer may file a lawsuit or a regulator may initiate an investigation to examine whether the powerful entity broke some rules and needs to pay. In

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[105] *See* Law, *supra* note 3, at 753 ("For information about the government, the press must rely to a significant extent upon what the government itself chooses to disclose. The government can be expected to provide the media with a selective and self-serving account of its own activities, to reward sympathetic journalists with preferential access to information, and perhaps even to suppress or censor unfavorable coverage"); Graves interview (lamenting how when investigative reporters file FOIA requests, they often get "brushed off with all kinds of reasons").

[106] *See* Amitai Etzioni, *The Capture Theory of Regulations – Revisited*, 46 SOCIETY 319 (2009); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L. J. 1321, 1374 (2010).

[107] *See, e.g.*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, FEDERAL OPEN GOVERNMENT GUIDE 10 (10th Ed., 2009).

[108] The full project is available at http://www.pulitzer.org/winners/brian-donovan-and-stephanie-saul.

[109] *See infra* Appendix A: Saul interview.

[110] *See infra* Appendix A: Locy interview (a veteran reporter who currently is a professor of legal reporting, Locy shared that she has never used FOIA but rather preferred relying on court documents, because FOIA requests "take too long, and they can jerk you around").

the process of determining whether to impose legal sanctions, the law enforcement action produces information on how the parties to the dispute behaved.[111] The information produced during litigation as a by-product is another valuable channel of information for investigative reporters.

Litigation, especially in the U.S. system, generates strong monetary incentives for harmed parties to expose the misbehavior in court, such as damages and lawyers' fees. These strong incentives increase the chance that information about the alleged misconduct will spread more readily and credibly to the court of public opinion.[112] As soon as a dispute enters the legal system, the law vests powers in private litigants to probe and demand relevant information from their rivals.[113]

While direct sourcing channels often rely on players *volunteering* information, indirect sourcing channels often rely on *forcing* information out of them. This fundamental difference can make information extracted during litigation/regulatory investigation more conducive to the work of accountability journalists trying to understand how the powerful behaved, relative to information selectively released by the powerful themselves. Legal scholars have elaborated on the information-extracting advantages of litigation in other contexts.[114] My analysis of reporters' tip sheets and interviews with reporters themselves suggest that these informational advantages apply to our context a well.[115]

To use the words of one Pulitzer-winning reporter:[116] "Say I have a case of exploding tires on cars – I go to the courts, and [check for lawsuits against the tire manufacturer], and see tons of suits. Then I will do 'layers.' I will go to NTSHA [the traffic regulator – R.S.] and file FOIA requests, asking for a comprehensive list of all cases." When I asked him why he didn't file the FOIA request first and then go to the courts, the reporter answered, "I'm going to the courts first because I'm looking at the tapestry,

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[111] *See* Shapira, *supra* note 9, at Part II.

[112] *Id*. at 1212.

[113] *Id*. at 1214.

[114] *See, e.g.*, Wagner, *supra* note 16, at 700 (noting that information produced during discovery provides a more complete picture of manufacturers' information on product risks than "narrowly drafted self-reporting requirements do"); Law, *supra* note 3, at 753 (information from litigation may be better than information coming from the government itself, because of the "privileged means of gathering information" that courts enjoy); Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 973 (2001) ("The U.S. court system is able to make bad acts visible and subject to public discussion in ways that administrative FOIA requests sometimes cannot").

[115] *See infra* Appendix A: Possley interview (explaining that litigation helps investigative reporters by determining the animus involved in the behavior in question – something that the journalist would have a hard time verifying on her own); Coll interview (litigation is the single most useful source for reporters). Similarly, we can appreciate the importance of regulatory reports as a source of investigative reporting by looking at various reporters' tip sheets. *See, e.g.,* Neil Reisner, *Finding (almost) Anybody and Especially Licensed Professionals* (IRE tip sheet, 2001) (advising journalists to scour the OSHA inspections).

[116] *See infra* Appendix A: Berens interview.

not just the data. Data [in itself] doesn't make for very compelling stories. I look for people. I'm calling victims. I'm calling lawyers… They're a very valuable source of information. And then [only] once I have texture, I zero in and try to quantify it [with a FOIA request]." Reporters' tip sheets and other interviews echo the experience of this specific reporter. At the initial, scouting phase of investigation, reporters are advised to go to the courthouse or look for regulatory inspection reports to get a better grasp of the issue at hand.[117] Only when a potential story makes it to the second, research phase of investigation should reporters move to submit focused FOIA requests.[118]

Legal and communication scholars who tend to focus on FOIA and the like are therefore missing a key element of the interactions between the law and the media. In many respects, indirect legal sources are more important to the effectiveness of accountability journalism than direct legal sources. They are certainly more understudied and less understood. The rest of this Article accordingly dedicates more attention to information produced during law enforcement actions. The next Subsection starts by identifying the characteristics of information produced during law enforcement actions that make such information an especially valuable source for investigative reporters.

### *B. What Makes Legal Sources Valuable?*

Good investigative reporting is based on documentation. Investigative reporters live by the rule that it is not enough to know that your story is true; you have to be able to prove that it is true.[119] Documents help reporters convince their target audience that the story is true.[120] A simple reason for why journalists gravitate toward using legal sources is that the legal system provides access to many documents.[121]

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[117] *See* Reisner, *supra* note 115 ("Journalists' first stop often is the county clerk's office or the courthouse"); Dowdell, *supra* note 87 (looking at OSHA inspections often provide valuable background to a story); Blackledge interview (court records as the first place an investigator would go to learn about a subject); Coll interview (culling court cases helps the reporter "understand the landscape"); Jaquiss interview (legal documents are the "first place I go to when I work the story").

[118] *See infra* Appendix A: Berens interview; Nelson interview; Bererns tip sheet.

[119] As decorated journalist Pat Stilth mentions in his 10-point credo, "The final test is not whether the story is true, but can you prove it is true" (*accord* Hamilton, *supra* note 27, at 258).

[120] *See infra* Appendix A: Horvit interview ("Documents are safer, more reliable than human sources…. [they have a] definitive nature"); Mendoza interview; Lewis interview ("In investigative reporting, the main source you rely on is written documents. Sure, you can get an insider tip in a parking garage, but if you want to connect the dots, discovering patterns, you have to have documents"); Locy interview.

[121] *See, e.g.*, Mark Skertic, *Public Documents* (IRE tip sheet, 2004) (In a tip sheet about how to use public documents, the author starts right from "the courts," noting that the "legal system produces huge amount of paperwork"); McKim interview (reporters are in a "documents state of mind," and going to the courthouse helps them with documentation). *See also* Kish

Further, legal documents are not just any documents. Several factors combine to make legal documents especially valuable for investigative reporting.[122] Legal documents often contain information that is unique, libel-proof, and credible. They help reporters not just by providing access to new information, but also by processing existing information. Judicial opinions and regulatory reports can assist journalists in figuring out what happened, interpreting how it happened, and determining the intentionality of the behavior in question. Indeed, the mere filing of legal disputes creates a database that enables reporters to quantify problems and spot patterns, as well as providing a gateway to other sources.

First and most importantly, the legal system often produces *facts that journalists cannot get elsewhere*.[123] Litigation incentivizes victims to talk about how they were wronged, and that helps with spreading the story. Once a legal dispute is ongoing, the legal system provides disputants with fact-generating powers that produce as a by-product information to which journalists could not have been privy.[124] Take the classic example of internal e-mail communications exposed during the discovery stage, showing just how big the organizational cover-up was. As one veteran reporter told me: "getting [court documents] can be very, very important, because it provides us with the 'inside stuff' that we normally don't get our hands on. The e-mails, the memos produced during discovery, can be goldmines for journalists."[125]

Second, information coming from the legal system is virtually *libel-proof*.[126] As long as you accurately report what the public court documents say, you are shielded from liability.

Third, information coming from the legal system is usually more *credible* than other sources.[127] Information produced during litigation or

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Parella, *Reputational Regulation* 67 DUKE L. J. (forthcoming, 2018), manuscript at 57.

[122] *See* Lytton, *supra* note 2, at 94–95; Parella, *id.*

[123] *See infra* Appendix A: Starkman interview; Nelson interview; Smith interview (in the context of inspectors general investigations); Coll interview (documents you get from discovery are "not duplicative of any other information you can find"). *See also* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L. J. 1657, 1683 (2016).

[124] Many of my interviewees independently raised the theme of "as a journalist, I cannot subpoena someone." *See infra* Appendix A: Possley interview; Jaquiss interview; Smith interview ("journalists cannot force people to divulge information [unlike the legal system]; we need to extract it from them voluntarily"); Carter interview; Horvit interview. *See also* Shapira, *supra* note 9, at 1214.

[125] *See infra* Appendix A: Locy interview.

[126] The libel-proof reason was one of the most frequently cited by the reporters I interviewed. *See infra* Appendix A: Possley interview; Mendoza interview; Tulsky interview; Nelson interview; Blackledge interview; Daly interview; Coll interview. *See also* Lytton, *supra* note 2, at 94–95; Tamar Frankel, *Court of Law and Court of Public Opinion: Symbiotic Regulation of the Corporate Management Duty of Care*, 3 N.Y.U. J.L. & BUS. 353, 357 (2007).

[127] *See infra* Appendix A: Ureneck interview (adding that the added credibility does not necessarily mean added accuracy. It adds credibility "rightly or wrongly"); Mehren interview (repeating the same caveat); Carter interview (same); Daly interview (same). *See also* Law, *supra* note 3, at 752–53 (courts enjoy relatively high levels of public confidence).

investigation is given under oath, with the threat of legal sanction for perjury assuring more credibility than the journalist can find when tapping non-legal sources.[128] At the very least, information coming from the legal system is *perceived* as more credible by the journalist's target audiences. As one reporter told me, "The mere phrase 'according to court documents' is a rhetorical device to increase your story's credibility."[129] The added weight attached to court documents can be explained by a well-developed literature in psychology on source-credibility effects.[130] Not all sources of information are created equal. The same piece of information may be discounted when coming from a non-credible source, yet move the needle when coming from a credible one. Judicial opinions written by independent, respected judges, or testimonies given under oath and threat of perjury, make for a great start in the reporter's quest to move the needle.[131]

A fourth reason for why courts make for a valuable source is that they provide a *gateway to human sources*.[132] A journalist can search court dockets for the names of plaintiffs and plaintiff lawyers. These victims – and the people who help them – can then become valuable sources. As one journalism textbook puts it, losing lawyers are the perfect source for an investigative reporter, because they are so eager to explain what happened and why they should have won.[133] Reporters view lawyers as good at accumulating document-driven evidence. As one reporter shared, "Some of my best sources have been lawyers. [Why?] Because they believe, like us, in a methodical method of collecting information."[134] Further, the victims who bring a lawsuit are usually the ones that are not afraid to go public and on record with their claims.[135]

Relatedly, court records provide a gateway to the defendants' side of the story. Investigative reporters can cull depositions and other court documents to get quotes from parties to the lawsuit that often do not wish to talk to

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[128] Katy Stech, *Digging up Secrets and Story Ideas in Bankruptcy Court Records* (IRE tip sheet 2017); Weinberg interview; Horvit interview; Ureneck interview.

[129] *See infra* Appendix A: Ureneck interview.

[130] *See* DellaVigna & Gentzkow, *supra* note 58, at 657.

[131] Shapira, *supra* note 9, at 1224.

[132] *See infra* Appendix A: Bogdanich interview; Jaquiss interview; Possley interview; Weinberg interview; Berens interview; McKim interview; Nelson interview; Gary Cohn, *Investigating Business Journalism* (IRE tip sheet, 2010) (describing how court dockets served as a gateway to human sources in his 1998 Pulitzer-winning project).

[133] DAVID STARK, INVESTIGATIVE REPORTING: A STUDY IN TECHNIQUE (1999), at Chap. 4; Coll interview (describing how "unhappy plaintiffs" make for a great source for reporters).

[134] *See infra* Appendix A: Berens interview (adding that there exist "incredible parallels between what an investigative reporter does and what an attorney does. Both of us start with the premise of something wrong, and then build our case step by step, and then have to present it publically, convincingly [with documents]"); Mehren interview (noting similarly that both journalists and lawyers painstakingly look for the causes of misconduct).

[135] Berens interview, *id* ("trolling legal cases… allows you to find out the people who are OK to go public about their claims").

reporters.[136] To illustrate, consider the 2012 Pulitzer-winning project on questionable domestic intelligence tactics employed by the NYPD. The reporters there could not get the heads of the intelligence unit to talk with them. The reporters were nevertheless able to quote the heads of the program simply by culling depositions given by the latter in legal proceedings. Another example comes from the 2010 Pulitzer-winning project on the impossible decisions taken under duress at a Katerina-evacuated hospital in New Orleans. The reporter there could not get the doctors who took some questionable decisions to talk with her. Nevertheless, she was able to include extensive quotes from these doctors, because she culled a 50,000-page report prepared by state investigators. The state investigators had the powers to get the doctors to talk candidly, and the interviews they recorded turned into a valuable source for the journalistic story.

Fifth, the legal system sometimes helps journalists to get not just better facts but also better *interpretations*. For example, journalists normally have a hard time assessing the intentions of the individuals under their microscope. They are often able to gather information and report about the "what happened" question, but it is more difficult for them to assess questions of "how it happened" or "could it have been stopped."[137] Judicial opinions can make it easier for the reporter to evaluate and report on how intentional the actions in question were. After all, in many instances the legal doctrine requires a judge to determine the animus of the parties to the dispute.[138]

There is a broader point here: legal sourcing helps not only with accessing new information, but also with processing existing information. Judicial opinions or regulatory investigative reports, for example, are good at fleshing out patterns of misbehavior, organizing large chunks of information, and making it all less complex for the journalist.[139] Legal documents, in other words, help not just by drawing the reporter's attention to a misbehavior she was not aware of, but also by adding "color, detail, analysis and texture."[140]

All in all, the courts present a one-stop shopping spree for journalists looking for information.[141] Courts centralize many potential sources: documents, victims, and experts, thereby significantly reducing the costs of

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[136] *See infra* Appendix A: Horvit interview.

[137] For the distinction between what happened and how it happened, and the importance it carries for reputational sanctions and rewards, *see* Shapira, *supra* note 9, at 1213.

[138] *Id*. at 1214.

[139] *See infra* Appendix A: Lewis interview (noting that judicial rulings can be very insightful, by helping the reporter understand the issue even if the trial documents are sealed).

[140] *See infra* Appendix A: Eisinger interview.

[141] *See infra* Appendix A: Lehr interview ("[going to courts is like] a one-stop shopping spree. Getting all this information on one entity might take me months – but going to the court files [centralizes] that"); Locy interview.

sourcing deep-dive investigative projects.[142] Reporters, in turn, use legal sources in myriad ways in their investigative projects. The next Subsection elaborates.

### *C. How Are Legal Sources Used?*

Most investigative projects do not rely on a single source, but instead triangulate multiple sources.[143] Even when legal sources are tapped, they are rarely the only source enabling the story. If we wish to understand the impact of legal sources on investigative reporting, we therefore need first to map the varied roles that legal sources play in making the investigative report possible and impactful. Let us group the ways in which reporters use legal sources into five categories: originating a story, quantifying a problem, providing background on the persons in question, making the story more compelling, and corroborating existing information.

First and most basically, information coming from the legal system can *originate* a story. The filing of a lawsuit or an announcement of investigation by the SEC may be breaking news for the journalist – the first time she has heard about the misconduct in question.[144] Indeed, reporters' tip sheets contain advice to reporters to check the court docket periodically, looking for hints on new stories if someone sues the company they are covering.[145] In some investigative projects, the story begins and ends with finding legal sources. The court docket may contain a great story buried there, waiting for the journalist to uncover and diffuse widely.[146]

At other times, the reporter already has a tip about a potential story, and goes to the courthouse to examine whether there is really a story worth writing about. In such scenarios the legal system helps with *quantifying the problem and observing patterns*.[147] As one reporter put it, "a tip is key… but *a tip is an unproven assertion, and court records are the method by which you prove the assertion.*"[148] In fact, in my interviews with investigative reporters, pattern identification was the most frequently mentioned role of the legal system.[149] "Legal documents allow you to count

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[142] *See infra* Appendix A: Possley interview (a journalist trying on his own to generate the wealth of information contained in court documents would need months); Lehr interview; Carter interview. *See also* Kish Parella, *Public Relations Litigation* (working paper, 2017), manuscript at 51.

[143] *See, e.g.*, Kim Christensen, *Court Records: Mining for Gold* (IRE tip sheet, 2004); Tisha Thompson et al., *Unsung Documents* (IRE tip sheet, 2010).

[144] *Cf.* Frankel (2007, 367) (a judicial decision can "carv[e] out a process by which the media becomes aware of an issue").

[145] *See, e.g.*, Skertic, *supra* note 87.

[146] As one tip sheet observes, "Some stories can be almost written completely from deposition testimony" (see *Using Depositions* (IRE tip sheet, 1994)).

[147] William Heisel, *Investigating Doctors* (IRE tip sheet, 2004).

[148] *See infra* Appendix A: Jaquiss interview.

[149] *See infra* Appendix A: Berens interview; McKim interview (at the basic level, going to the courthouse helps you understand how many people sue, and this is how you get a general

things," said one reporter. His 2012 Pulitzer-winning project spotlighted the over-prescription of methadone. To figure out whether there really was *over*-prescription, the reporter started his investigation by "trolling the court cases looking for people who died of methadone." A 1987 Pulitzer winner shared a similar story of his experience covering police abuse:[150] he started with a few stories on individual abusive cops, but then wanted to check whether they were just bad apples, or representative of an institutional breakdown. The reporter then went to the courthouse to look for lawsuits against the particular officers and their department, and benchmarked the numbers he found to other departments across the country. A veteran editor shared the example of one of her reporters coming to her after hearing unsubstantiated allegations against a medical doctor.[151] To decide whether to follow the lead and sink resources into investigating the issue, the editor would then send the reporter to the courthouse in search of previous lawsuits against the doctor. Many reporters' tip sheets contain similar examples: someone contacting the reporter about a faulty product, and the reporter then going to the courthouse to look for all lawsuits filed against the manufacturing company.[152]

A third role that legal sources play is that of *backgrounding*.[153] Assume a scenario in which a reporter has already learned about the story and spotted a pattern of misbehavior using other, non-legal sources. Even in such scenarios, the reporter may still check court records to find further detail and background on the entity about which she is writing. Reporters view bankruptcy court records as especially valuable in this regard.[154] To illustrate, consider the 2006 Pulitzer-winning project on unholy coalitions between lobbyists and congressional representatives. To show just how shady the people with whom congressional representatives interacted were,

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idea of whether "there is a story" worth pursuing or not); Blackledge interview (court records "lay out a similar pattern of activity"); Daly interview (records allow you to understand quickly whether there is "a widespread, systematic problem here").

[150] *See infra* Appendix A: Tulsky interview.

[151] *See infra* Appendix A: Lipinsky interview; Heisel, *supra* note 147.

[152] *See* Sarah Okeson, *Researching Consumer Stories* (IRE tip sheet, 2008); Skertic, *supra* note 121; Mark Skertic, *Overcoming Secrecy* (IRE tip sheet, 2001) ("Companies that make faulty products get sued, and that means court records are generated"); Locy interview.

[153] *See* WILLIAM C. GAINES, INVESTIGATIVE JOURNALISM: PROVEN STRATEGIES FOR REPORTING THE STORY 55–56 (2008); Dowdell, *supra* note 87; Pat Stith, *Backgrounding Individuals* (IRE tip sheet, 2005); Christensen, *supra* note 143 ("Court records are an invaluable source of information on the people we write about every day… Whether you're profiling… backgrounding… much of the information you seek is in courts records"); Josh Meyer, *Court Records 101* (IRE tip sheet, 1997) (court records "can be a gold mine, a way to background a person in a hurry"); Bergo interview ("[legal documents are] a treasure trove of background information").

[154] *See* Stech, *supra* note 128 ("Why do we love bankruptcy records? They put a spotlight on drama, trends, and quirks; they unlock new details on stories that have already been heavily covered… the information is filed under penalty of perjury, so it's trustworthy"); Ronald Campbell, *Documents to Live by* (IRE tip sheet, 2014); David Wethe, *The Basics of Business Investigations* (IRE tip sheet, 2006); Skertic, *supra* note 121; Meyer, *id.*; McKim interview.

the Washington Post reporters tapped past lawsuits against these individuals. Similarly, in the 1998 project on the ship-breaking industry, the reporters pored through bankruptcy court records to gain a grasp of the financials of the business.[155] The records showed that one could not make a profit from breaking ships unless one cut corners and compromised worker safety and the environment.[156] Divorce court records similarly make for a great source of background information, as they "offer insight into the lives of business executives and public officials."[157]

Going to the courthouse can also improve the impact of the investigative story simply because it translates into *better storytelling*. Reporters view court documents as a potential goldmine for the components that make a good story: they contain good quotes,[158] identifiable victims (because "every good story needs victims"),[159] detail, and color.[160] Locating and approaching plaintiffs is a crucial part of making sure the story reverberates with target audiences. Many of the Pulitzer-winning projects I coded for this Article shared the same structure: the first parts of the project usually flesh out the problem. The last parts detail how the investigative project has already brought about an impact in the real world. And the parts in between personalize the story by focusing on individual victims, making the story more concrete and easy to identify with for the readers.[161] Take for instance the 2002 Pulitzer-winning project on the neglect of children placed in protective custody in the District of Columbia. Part 1 of the project quantifies the problem for the reader: 229 of the children put in protective custody from 1993 to 2000 died; one out of five of them died after government players failed to take preventive measures; and so forth. Then, in subsequent parts of the project, the reporters zoom in on particular stories of individual children who were neglected and died. It is in these parts that the story is heavily reliant on records from lawsuits filed on behalf of the deceased child against the protective custody unit or the state.

Finally, even when the journalist does not learn anything new from the legal source, she may still use legal documents to *corroborate* what she already knows.[162] To recast the example of the 1998 Pulitzer-winning

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[155] *See infra* Appendix A: Englund interview.

[156] *Id*; Cohn, *supra* note 132. To use the words of the reporter himself, court documents were not the ones delivering the "scoop," but they added "context, detail … [and] provided deep understanding and corroboration." *Id*.

[157] Wethe, *supra* note 154. *See also* Okeson, *supra* note 152; Diana Hunt, *Courts/Cops Records* (IRE tip sheet, 2001); Meyer, *supra* note 153; Reisner, *supra* note 115; Eisinger interview.

[158] *See infra* Appendix A: Bogdanich interview.

[159] *See infra* Appendix A: Berens interview.

[160] *See infra* Appendix A: Jaquiss interview.

[161] As one reporter put it, "if we cannot identify victims, [then there is] no point in doing the story." Sarah Cohen interview.

[162] A related corroborating effect comes from the ability to use legal documents to authenticate a tipster. *See* Duff Wilson, *Authenticity: Investigating Tipsters, Bloggers, and Web Sites* (IRE tip sheet, 2005).

project on the ship-breaking industry, the reporters there combed through individual lawsuits by employees to corroborate and find a second/third source for safety-issue allegations they were already aware of.[163] Here the added libel protection and credibility that come with legal sources can be especially valuable, not just because the reporter has to convince her readers, but also because she has to convince her editor. Editors face scarce resources, and have to decide which leads to pursue, and which to file in the drawer.[164] A journalist that gets a tip from a human source she trusts still needs to convince her editor that her hunch is worth pursuing. When the reporter scouts court files and comes back to her editor with legal documents that back up her initial lead, she significantly increases the chances that the editor will sink resources into a full-fledged investigation.[165]

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This Part provided a framework for understanding the roles legal sources play in accountability journalism. It answered the questions of *why* and *how* journalists heavily rely on information coming from the legal system. Yet it did not tell us how big of an impact legal sources really make. It did not answer the question of *how much* reporters rely on legal sources. Put differently, we discussed the possibility of law as source, but did not establish plausibility. The next Part presents evidence suggesting that legal sources indeed play a significant role in facilitating accountability journalism.

## III. EVIDENCE: JUST HOW IMPORTANT OF A SOURCE LAW REALLY IS

How frequently do reporters really use the law as source? How much of their stories' positive impact can be attributed to the ability to tap legal sources? These questions follow fuzzy dynamics, and do not lend themselves easily to quantification and neat statistical proofs. It is therefore not surprising that there are few to no existing studies on these questions.[166] To answer them I had to triangulate various methods. Subsection A presents the evidence gathered by listening to what journalists say about the role of law as source. As a first step, I interviewed forty veteran reporters, asking about their experience using legal sources. To mitigate the potential biases in an interview method, I evaluated not only what the journalists said when

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[163] Englund interview.

[164] *See* Hamilton, *supra* note 27, at 12.

[165] Lipinsky interview; Mehren interview; Lehr interview.

[166] The existing literature pays more attention to investigative reports' outputs (what impact they have), rather than to their origins (what sources they rely on). Schudson, *supra* note 50, at 135. The few studies that do focus on sources tend to focus on questions such as diversity of human sources and their credibility, rather than legal documents. Miglena Sternadori, *Use of Anonymous, Government-Affiliated and Other Types of Sources in Investigative Stories*, (M.A. thesis, University of Missouri, 2005). And the scant evidence that does exist on "legal sourcing" focuses on FOIA requests, rather than information coming from law enforcement actions.

they spoke with me, but also what they say when they talk among themselves and give advice to their colleagues in memoirs, how-to manuals, tip sheets. Relatedly, I compared basic Investigative Reporting course syllabi from leading journalism schools. Subsection B presents evidence about what journalists actually do. I analyzed the content of prizewinning investigative projects over the past twenty years, and coded the extent to which they relied on legal sources. All these different methods led to the same conclusion: legal sources play a significant role in facilitating accountability journalism. Subsection C then offers observations about the cross-sectional variation: areas where legal sourcing is more/less pronounced.

### *A. Findings from Tip Sheets, Course Syllabi, and Interviews*

One way to gauge the importance of law as source is to listen to what investigative reporters say about it. And the best place to pick up pointers on how journalists treat sources is investigative reporters' tip sheets and how-to manuals, whose target audiences are other journalists. The investigative reporters' organization (IRE) created a members-only database of tip sheets, containing advice from investigative reporters to their colleagues on a wide range of issues.[167] I accessed their database and found no less than 92 tip sheets under the tag of "court documents." All these tip sheets explicitly refer to the various roles of law as source, underscoring just how important legal sources are to the different phases of the investigative reporter's work.

To illustrate, one tip sheet, titled "finding the story," contains advice about the initial phase of investigative work.[168] The tip sheet makes it clear from the outset: whenever you investigate a powerful institution, the first thing you need to do is "pull every related suit," and "scour state agency disciplinary and regulatory reports."[169] This is because "lawsuits connect us to documents, exhibits, depositions and sources of every type," and "enforcement actions are rich repositories."[170] Further, the tip sheet explicitly recognizes the role of lawsuits as a gateway to other sources: "lawyers are great sources … they are document-based creatures – like us – and they often relish media contact."[171] Then, once lawsuits and regulatory investigations have allowed you to spot a pattern and realize that there is a story, the tip sheet tells you to start researching the story by using another "legal" channel, namely, filing FOIA requests.[172]

Such explicit references to law as source are not limited to the IRE's tip

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[167] The database is available at https://ire.org/resource-center/tipsheets/.
[168] *See* Michael Berens, *Finding the Story* (IRE tip sheet, 2012).
[169] *Id*.
[170] *Id*.
[171] *Id*.
[172] *Id*.

sheet database. I also found them in multiple how-to manuals, textbooks, and scholarly work on investigative reporting.[173] As one textbook puts it, "Whether in the form of affidavits, motions to sever or judges' opinions, court filings contain clues to solving a case's mysteries."[174]

As another method to gauge the importance of law as source, I interviewed forty investigative reporters. I started every interview with the same big-picture question: "What role does the legal system play in sourcing investigative reports?" Almost every interviewee suggested that the law plays an extremely important role as source. "Huge" and "invaluable" were the most frequently used descriptors.[175] In the reporters' own words: "Most serious investigative stories involve court records."[176] "Journalism rests heavily on legal sources."[177] "[The] relevancy of legal documents is huge … it is an essential part of investigative reporting."[178] "The court system is so integrated in investigative reporting – hard to imagine doing it without them."[179] "Going to the courts is ingrained in every investigative journalist. The minute I have an idea [for a story], first thing I do, to research the landscape, I go to the court and look for cases."[180] "[It is] unusual to have a major investigative project without legal documents to buttress some of the findings."[181] "[Legal sources are] more important than just about any other source of information. I don't know an investigative reporter that doesn't rely on documents they get from courts… Can't imagine doing an investigative piece without it."[182]

Several interviewees qualified their answer to the what-role-do-legal-sources-play question along the lines of "it depends."[183] They all shared the same theme, namely, that the legal system allows too much information to remain sealed, thereby limiting the actual role that the law plays.[184] In other words, they all agreed that the law can and often does play an important role in sourcing accountability journalism, but lamented that the law's information production does not reach its potential.

Several of the reporters I interviewed teach investigative reporting in universities. They all mentioned emphasizing the importance of legal sources to their students. In their words: "I currently tell my journalism

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[173] *See, e.g.*, Stark, *supra* note 133, at Chap. 4; Gaines, *supra* note 153, at 139–143; TONI LOCY, COVERING AMERICA'S COURTS 71 (2013) ("courthouses are goldmines, storing nuggets of information for reporters to unearth as they research people and companies").

[174] Locy, *id*. at 67.

[175] *See infra* Appendix A: Berens interview; Bogdanich interview; Nelson interview; McKim interview.

[176] McKim interview.

[177] Mehren interview.

[178] Lewis interview.

[179] Nelson interview.

[180] Berens interview.

[181] Englund interview.

[182] Bogdanich interview.

[183] *See, e.g.*, Smith interview; Eisinger interview; Daly interview; Graves interview.

[184] *Id*.; Locy interview; Bogdanich interview; Starkman interview.

students that court records are the most valuable tool a reporter can use."[185] "One of the cornerstones of journalism school is [to teach the importance of] going to the courthouse and pulling out relevant records."[186] To corroborate their argument, I looked at the basic Investigative Reporting course syllabi of leading journalism schools.[187]

In practically every course syllabus that provided detail on the content of the individual sessions, I observed specific sessions dedicated to learning how to use legal sources. In fact, many courses share a similar structure: in week 1 the students learn what investigative journalism is, and already in week 2 or 3 they are learning how to cull and use information from the legal system. The Boston College course dedicates week 2 to gathering information from criminal litigation and week 3 to the like from civil litigation. The Berkeley course syllabus not only earmarks week 2 for legal sources, but also includes knowing how to use legal sources in the one-paragraph course objectives description. The University of Texas-Austin course similarly includes finding information in court records in the "course aims" paragraph. The NYU course goes a step further: after students learn about conventional legal sources in week 2, they are introduced to advanced digging techniques in week 3, complete with a tour of the university's law library and a lesson on how to navigate archived dockets. Further examples abound.[188]

Taken together, the evidence gathered from tip sheets, textbooks, course syllabi, and interviews overwhelmingly points to the fact that journalists perceive the role of law as source as a crucial element in effective accountability journalism. Still, a skeptic might argue that journalists do not practice what they preach, namely, that in reality they do not rely on legal sources as much as they think they do. Could it be that, for some reason, journalists systematically overstate the role of law as source? To answer this question, we need to go beyond what journalists say and look at what they do: we need to go over the investigative reports and trace the extent to which they actually rely on legal sources.

As a first, smell-test step, I looked at illustrative case studies of the most famous and impactful investigative reports in history. The single most famous case of holding the government to account – Watergate – is billed in

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[185] Mehren interview.

[186] McKim interview.

[187] We sampled syllabi that are available online and detail the content of the course, from the top 10 journalism schools according to USA Today (*available at* http://college.usatoday.com/2016/09/30/best-journalism-schools/) and syllabi compiled by the Investigative Journalism Education Consortium (*available at* http://ijec.org/syllabi/).

[188] Northwestern University offers a "lab session" on how to search court records. Princeton offers a specific session on how to triangulate legal sources with other sources. The USC course syllabus details four assignments for the students: besides honing and testing their skills in interviewing, data mining, and ethics, students also have an assignment related to finding and writing a story with legal sources. The NYU course similarly details an assignment in which students need to find a lawsuit involving a company, and write a story based on it.

popular culture as a story about anonymous human sources meeting journalists in dark parking garages. Yet a closer look at the story behind the story reveals that Woodward and Bernstein based important parts of their investigative project on documents they received from law enforcement actions. At one point in their memoir, for instance, Woodward and Bernstein describe flying to a Miami courtroom because they wanted to copy the documents produced when the district attorney subpoenaed key bank and phone records.[189] The most famous case of holding big business to account – the investigative project that popularized the term muckraking journalism – is Ida Tarbell's exposé of the Standard Oil Company at the turn of the 20th century.[190] Here the role of law as source cannot be more pronounced: Tarbell's reporting rested heavily on court documents, regulatory investigation reports, and depositions.[191]

The list goes on. A study that documented the lack of watchdog journalism by the financial media leading to the 2008 financial crisis singled out four counterexamples of great investigative pieces.[192] A closer look reveals that all four success stories – the rare pieces that did spotlight the shady Wall Street practices that contributed to the crisis – rested heavily on court documents.[193] Interestingly, the same study suggests that one of the reasons for the lax media scrutiny that led to the crisis was lax regulatory scrutiny. Without regulators diligently doing their job, journalists had less information on bad practices on which they could base stories.[194]

Casual observations therefore support what journalists say, namely, that legal sources indeed play a key role in important work in accountability journalism. To further corroborate the law-as-source argument, we now turn to a more systematic examination of investigative reporting practices.

### *B. Findings from Content Analysis of Prizewinning Investigative Reports*

Aside from listening to what journalists say, we can read what

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[189] BOB WOODWARD & CARL BERNSTEIN, ALL THE PRESIDENT'S MEN 36–41 (1974).

[190] Tarbell's investigations were later collected in IDA M. TARBELL, THE HISTORY OF THE STANDARD OIL COMPANY (1925). For more on her work *see* STEVEN WEINBERG, TAKING ON THE TRUST (2008).

[191] *See* Starkman, *supra* note 3, at 27, 208; Daly interview (by collecting information from several state courts, Tarbell's investigation gained credibility); Hamilton, *supra* note 27, at 139 (reliance on court records made Tarbel's exposés libel-proof, and allowed extensive documentation that helped the reader understand the case).

[192] Starkman, *supra* note 55.

[193] *Id.* (a 2000 story that spotlighted the Wall-Street-subprime connection relied on litigation in California that found Lehman responsible for practices of lender clients; a 2005 story relied on court documents to show how financial companies pushed for bad loans; a 2007 story did the same by collecting information from 15 separate lawsuits against Lehman Brothers; and a 2009 post-mortem analysis relied on court documents to show how wholesalers bent the rules in every way).

[194] *Id.*

journalists produce, and then reverse engineer to find out how much of the journalistic output is based on legal-sourcing inputs. To this end, I coded prizewinning investigative projects between 1995 and 2015. I went over all the projects that won the Pulitzer for Investigative Reporting or the IRE medal,[195] and supplemented the sample with specific examples of investigative business journalism that won the Loeb award.[196] In contrast to how Hamilton's study quantified the *outputs* of these prizewinning investigative projects and showed that a single project could yield social benefits in the tens of millions of dollars,[197] I focused on the projects' *inputs*: I asked what legal sources (direct and indirect) allowed the production of such socially beneficial investigative reports.[198] Subsection 1 details the methodology. It explains why I purposively sampled prizewinning projects, as well as how I coded their reliance on legal sources. Subsection 2 reports key findings. The content analysis shows that legal sources play a strong "but-for" role in over half of the prizewinning investigative projects. Subsection 3 then deals with the potential limitations of the data.

### 1. Methodology[199]

The decision to sample only prizewinning investigative reports requires an explanation. Prizewinning projects are, by definition, outliers that do not represent the entire population of accountability journalism.[200] Yet, for this Article's purposes, there exist at least two good reasons to sample such outliers. First, looking at the stories that win journalistic awards can tell us something about industry norms.[201] Award-winning projects may not reflect the average investigative report, but they do reflect the industry's exemplary standards: what journalists think accountability journalism ought to look like. They also reflect the industry's reward system: winning a Pulitzer

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[195] The IRE medal is "the highest honor that can be bestowed" on investigative work. It is granted by the Investigative Reporters and Editors organization. *See* https://www.ire.org/awards/ire-awards/.

[196] The Gerald Loeb Award is billed as the most prestigious business journalism award. For the criteria for winning the award, *see* http://www.anderson.ucla.edu/gerald-loeb-awards-2017/judging-and-awards.

[197] *See supra* note 32 and the accompanying text.

[198] Academic work on the Pulitzers has traditionally focused on who wins and why, and less on how they win. *See, e.g.*, Charles Layton, *Pulitzer Domination*, AM. JOURNALISM REV. (Sept. 2010) (showing an increased concentration in Pulitzer winners: the big national outlets hoard most of the prizes).

[199] This Subsection provides a bare bones explanation of the methodological steps. For more details, *see infra* Appendix B.

[200] Hamilton, *supra* note 27, at 44.

[201] *Id*. *See also* Kathleen A. Hansen, *Information Richness and Newspaper Pulitzer Prizes* 67 JOURNALISM Q. 930, 931 (1990). On awards in general as exemplifying norms and goals *see* Bruno S. Frey & Jana Gallus, *Towards an Economics of Awards*, 31 J. ECON. SURV. 190, 190 (2017).

boosts a journalist's earning power and job mobility.[202] Secondly and relatedly, prizewinning projects reflect the investigative reports that had the most impact on society.[203] In other words, by sampling Pulitzers we get a good proxy for the kind of journalism that this Article focuses on: journalism that holds the powerful to account. If we wish to examine the indirect (informational) role of the law in facilitating media-driven accountability, then it makes sense to focus on the kind of media work that produces the most accountability.

Out of the relevant investigative reporting prizes, I sampled two: Pulitzers and IRE medals.[204] I went over all of the winning projects in the Investigative Reporting category of the Pulitzers, as well as all of the IRE medals given for print journalism between 1995 and 2015. The sample included 25 Pulitzers and 30 IRE medals (as in some years there were co-winners). Once we subtract the redundancies – investigative reports that won both the Pulitzer and the IRE medal in the same year – we have 48 unique projects in our sample.

After deciding on the sample, I had to settle on criteria for analyzing the content and deciphering the role that legal sources play. The first step was to identify all the sources a story relies on.[205] The next step was to determine what relative weight to assign to legal sources. Prizewinning projects, after all, rest on more than a single source.[206] They usually triangulate various human sources and documents. Deciphering the role of legal sources necessitated distinguishing between documents produced by other state agencies, such as death records, and documents produced by the legal system, such as regulatory investigation reports. Among documents produced by the legal system, I further distinguished between information received through direct sourcing channels, such as FOIA requests, and information received through indirect sourcing channels, such as depositions produced during litigation.

The most challenging and subjective task was assigning relative weight to legal sources. I assigned a "strong" role to legal sources whenever the legal sources seemed to play a "but-for" role, meaning that the story would

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[202] *See* Randal A. Beam et al., *The Relationship of Prize-winning to Prestige and Job Satisfaction*, JOURNALISM Q. 693 (1986) (prizewinners get higher occupational and organizational prestige); Hamilton, *supra* note 27, at 48 (prizewinners get more book publication contracts relative to finalists who did not win); Hansen, *id*.

[203] *See, e.g.*, the Goldsmith Award rules in https://shorensteincenter.org/goldsmith-awards/investigative-reporting-prize/rules-and-information/m (explicitly mentioning the project's societal impact as part of their judging criteria for the award). Similarly, the IRE prizes' entry forms require detailing the project's impact. While the Pulitzer prize committee does not explicitly name their judging criteria, a cursory look at the blurb-like descriptions of why the prize was awarded reveals, virtually every year, their emphasis on impact. *See also* St. John interview (a Pulitzer winner noting that "Pulitzer judges seek out entries that show a community impact").

[204] For reasons for focusing on these specific awards *see infra* Appendix B.

[205] For an explanation on how we identified sources *see infra* Appendix B.

[206] *See supra* note 143 and the accompanying text.

have been significantly different (or even not published) had it not been for legal sources. In the Spotlight example, without legal sources the Boston Globe may still have had a story to publish, but it would have been a story of individual abuse. With the legal sources, they were able to publish multiple stories on the cover-up and the institutional breakdowns. Legal sources therefore played a strong role in making the Globe's story what it is. I assigned a "medium" role to legal sources whenever the story would have stood on its own even without legal sources, but the legal sources provided an added layer of important detail and credibility. A "weak" role was assigned when the legal sources added detail and background that was of little consequence to the key points in the project. A couple of prizewinning projects did not seem to use legal sources at all, earning them a "nonexistent" role.

2. Findings

In 23 of the 25 (92%) Pulitzer-winning projects, legal sources played some role. In 13 of them, legal sources played a *strong* role, meaning that at least parts of the story could not have been written without them. Similarly, in 19 of the 23 IRE medal-winning projects, legal sources were explicitly mentioned in the one-paragraph description of how the story came about.[207] Roughly speaking, it appears that in the majority of paradigmatic cases of accountability journalism, the legal system plays a strong role.

Delving deeper into the stories where legal sources played a strong role, I looked at whether the information came from direct or indirect channels. In 4 of the 13 Pulitzers, the strong reliance on legal sources came from the direct channel of FOIA requests, with litigation and regulatory investigations playing smaller roles. A good example is the 2009 project on how the Pentagon used retired generals to influence public opinion. The reporters successfully sued the Defense Department to get 8,000 pages of e-mails, transcripts, and records. They then presented visuals of the internal e-mails in small boxes throughout the text, thus adding credibility and packing a punch. The 2015 project about special interest groups influencing state attorneys similarly relied heavily on FOIA requests and to a much lesser extent on law enforcement actions. The reporter in this case used open records laws to obtain 6,000 e-mails exchanged between corporate representatives and attorneys general. This allowed him to make "an airtight case by relying on the players' own words to show how the lobbying worked and how effectively."[208] A similar pattern emerges with IRE medals: in 4 of the 23 stories I sampled, the reporters mention FOIA

[207] As Appendix B *infra* details, with IRE medal projects our work was easier, as the IRE members-only database now includes the entry form of each winning project, and each entry form includes a list of the sources that the story relied on.

[208] To quote the entry letter for the prize, *available at* http://www.pulitzer.org/winners/eric-lipton.

requests but do not mention litigation when explaining how the story came about.

In 7 of the 13 Pulitzers with heavy reliance on legal sources, indirect sourcing – litigation or regulatory investigations – played a strong role, with direct sourcing channels playing smaller or nonexistent roles. An example of a story relying on regulatory investigations is the 2008 project on toxic ingredients imported from China. There, the reporters drew extensively from investigations of Chinese manufacturers conducted by regulators around the world. An example of a story relying on litigation comes from the 2005 story of an Oregonian governor's sexual misconduct with a teen. There, the story hinges upon information coming from once-sealed documents in a settled lawsuit between the 14-year-old and the governor.[209] The IRE sample offers a similar observation: in 9 of the 23 winning projects, the reporters explicitly mentioned getting information from law enforcement actions as key to the story.

Some prizewinning projects relied heavily on both direct and indirect legal sources. In 2 of the 13 Pulitzers in which legal sources played a strong role, the reporters needed a combination of FOIA legal battles and court documents to make the story impactful. In the 2008 co-winner – a project on lax regulation of baby products – the reporters started digging by filing a FOIA request to the product safety commission for information regarding unsafe cribs and toddler car seats.[210] The thousands of documents they received led them to specific lawsuits, and the court documents describing lack of care by the manufacturers and lack of diligence by the regulators allowed them to fully flesh out the story. Information coming from litigation was also instrumental in making the story more credible and readable, by allowing the reporters to quote depositions and show footage attained from lawsuits.[211] The 2015 project on healthcare providers milking Medicare money was jump-started by direct sourcing channels: the Wall Street Journal won a legal battle to get Medicare physician-payment data, and that data formed the basis for the project's earlier reports. In subsequent reports,[212] the journalists concretized and personalized the story by relying on specific regulatory investigation reports. For IRE medals, the results were similar: 6 of the 23 winning projects mention both FOIA requests and law enforcement actions as key to the development of the story.

Going beyond the stories where legal sources played a strong role, we observe 10 Pulitzers (out of 25, that is, 40%) where the legal system played a role that was not overly instrumental but helped make the story what it was. In other words, legal sources affected these 10 stories, but did not make or break them. In understanding the role of law as source in such

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[209] As the Pulitzer-winning reporter told me, "Without the court documents there would be no story." *See infra* Appendix A: Jaquiss interview.

[210] *See infra* Appendix A: Possley interview.

[211] *Id*.

[212] *See, e.g.*, entry number 5 here: http://www.pulitzer.org/winners/wall-street-journal-staff.

stories, it is useful to return to our discussion of the different ways in which investigative reporters use legal sources:[213] breaking a story, corroborating an initial lead, providing further detail to an already developed story, or keeping the saliency of an existing story high long after it breaks. To illustrate, recall our previously mentioned example of the 2012 Pulitzer-winning project on questionable domestic intelligence tactics employed by the NYPD. The reporters there built the story on fieldwork and interviews with current and former insiders who also provided them with internal police documents. However, legal sources also proved helpful to the story in enabling the reporters to quote the heads of the NYPD intelligence unit in question (who would not talk with the reporters directly) from information culled from depositions given by the latter in legal proceedings.

Finally, it is interesting to learn from counterexamples: in 3 of the 25 Pulitzers, the legal system played little or no role. These were the 2013 project on Walmart's bribing practices in Mexico, and the 2004 and 2000 projects on atrocities by the U.S. army in the Vietnam War and the Korean War, respectively. In the Walmart bribes story, the reporters relied on interviews with whistleblowers, internal company documents they somehow obtained, and independent work, meticulously matching zoning plans and approvals with corporate payment records. In the war atrocities stories, the reporters relied on declassified military documents and interviews with victims and military personnel. In all three projects, reporters had few legal documents to cull, simply because the victims had no recourse to the legal system.[214] Interestingly, all these stories focus on non-American victims, and so the American legal system was not invoked and did not produce information.

### 3. Limitations

Before we proceed to analyze the implications of the findings, let us address two valid criticisms against my empirical strategy. The first concerns the internal validity of my content analysis: how can we trust your coding of the sources? After all, assigning weight to legal sources is a subjective task, which requires a hefty amount of discretion. While it is true that content analysis done by human coders is always subject to limitations,[215] I took two steps to increase the findings' reliability. First, two coders (a research assistant and myself) went over all the Pulitzer articles, and the intercoder reliability was high.[216] Second, I approached the

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[213] Subsection II.C *supra*.

[214] As the 2000 Pulitzer winner explained it, "The victims would have been in big trouble if they [had] tried to make a big thing out of it" (Mendoza interview).

[215] *See, e.g.*, Leona Yi-Fan Su et al., *Analyzing Public Sentiments Online; Combining Human- and Computer-Based Content Analysis*, 3 INFORM. COMM. SOC. 406, 408 (2017).

[216] Intercoder reliability denotes the level of agreement between different coders. *Id*. at 408. *See infra* Appendix B for the intercoder reliability calculations.

prizewinners themselves, asking them to evaluate the role they assigned to legal sources in their own story. The majority of reporters assigned similar or stronger legal-sourcing weights to their stories than the ones I had originally assigned.[217] To the extent that my subjective coding misrepresents the true reliance on legal sources, it does so in ways that only understate my claim for heavy reliance.

Even if one is convinced that the prizewinning stories are soundly based on legal sources, one can still be skeptical of the external validity of my study. That is, one can claim that Pulitzers are not representative, and that for some reason they rely more heavily on legal sources than other investigative reports do. My rebuttal is twofold. First, even if we do not treat prizewinning reports as a sample meant to represent a larger "population" (of all investigative reports), but rather treat it as the entire relevant population (of prizewinning investigative reports), we still have a significant finding in our hands. That is, assume for the sake of argument that prizewinning investigative reports are the *only* reports that rely on legal sources. Still, each of these reports – as Hamilton convincingly showed[218] – makes on average an 8-digit-sized impact on society, and thus demonstrates that reliance on legal sources is in itself an important phenomenon worthy of further consideration. Second and more realistically, there is reason to believe that purposively sampling only the top investigative works is not likely to overstate the law-as-source claim – in fact, it may *understate* it. Investigative reporting textbooks, and the Pulitzer winners I interviewed, suggest that the likelihood of winning the Pulitzer category of investigative reporting goes up when the submitted story emanates from the reporter's original digging.[219] One's chances of winning are better when one's investigation uncovers hidden legalities than when one "merely" spotlights a misconduct that a regulator has already dealt with.[220] Relying on regulatory documents can become a double-edged sword in such contexts: "You win Pulitzers when [new] regulation follows your investigation, not when your investigation follows regulation."[221] When trying to win other Pulitzer categories, such as beat reporting or commentary, the fact that you made sense of legal documents that were hiding in plain sight can actually be a plus; when trying to win the investigative reporting category, it can be a minus.[222] The upshot is that if one can find legal sourcing in the investigative reporting awards, one can find it anywhere.[223]

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[217] *See infra* Appendix B for elaboration.

[218] Hamilton, *supra* note 27.

[219] *See, e.g.*, Gaines, *supra* note 153, at 2; Eisinger interview.

[220] Eisinger, *Id*.

[221] *Id*.

[222] *Id*.

[223] In qualitative methodology jargon, that suggests that Pulitzer-winning stories make a "crucial, least likely" case for our sampling. Given, *supra* note 5.

### *C. Variation: Where Is Legal Sourcing More/Less Likely?*

The previous sections argued that, in general, information coming from the legal system plays an important role in sourcing investigative reporting. This Section moves from the "on average" claims to the cross-sectional variation. Can the content analysis, interviews, tip sheets, and syllabi tell us something about the areas in which law-as-source dynamics are more/less pronounced? Two types of misbehavior stand out: Subsection 1 deals with misbehavior where the victims have little recourse to the legal system (for various reasons), and the law-as-source dynamics apply less forcefully. Subsection 2 suggests that when the misbehaving entity is not a government agency but rather a private company, certain law-as-source dynamics apply more forcefully.

#### 1. Victims without Recourse

Law-as-source dynamics do not apply when the misbehavior in question does not reach the legal system. Certain conditions make victims less likely to file lawsuits and regulators less likely to start investigations, thereby limiting the relevance of legal sourcing.

One subset of cases concerns *victims in foreign countries*, who do not enjoy the same right of access to courts (or power to extract information from the other side once in courts) as Americans do.[224] A second subset of cases concerns *victims who are poor* and do not have the resources needed to set the legal system in motion.[225] Substandard housing problems are a case in point.[226] A third, related type of cases concerns *victims who do not want to get the legal system involved* for fear of the social stigma they may incur once they go on record. For instance, when people were dying of methadone, the families' victims were either too poor or too ashamed to draw public attention to their plight.[227]

Finally, a big subset of cases concerns scenarios in which the costs of misconduct are *dispersed* among multiple victims, or are so *opaque* that the victims are unaware of the misconduct.[228] In such contexts, even if the

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[224] An open question for further research is the comparative angle, that is, how law-as-source dynamics apply differently in different countries. My initial conjecture is that law-as-source dynamics apply more forcefully in the U.S. system than elsewhere, partly because the rules of civil procedure in the U.S. litigation system are geared toward information production in ways unmatched in other countries. *See, e.g.*, Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI-KENT L. REV. 357, 363 (2006) (The U.S. discovery system is the most wide casting).

[225] Hamilton, *supra* note 27, at 60; Daly interview.

[226] *See, e.g.,* Kathryn A. Sabbeth, *Public and Private Lawyers for Public Good* (working paper, 2017) (on file with author) (explaining why tenants who suffer from substandard housing are less likely to enlist the help of the courts).

[227] *See infra* Appendix A: Berens interview.

[228] *See infra* Appendix A: Tulsky interview.

victims are not marginalized in society and can theoretically fight back, they lack the information needed to wage a legal battle, thereby making it less likely that the media will scrutinize the misconduct in question. Consider for example the case of DuPont's emissions of a toxic chemical used in the process of manufacturing Teflon at its plant in West Virginia.[229] Residents from neighboring communities had the toxic chemical in their drinking water and suffered increased incidences of various diseases, but could not file a lawsuit simply because they did not know that such a chemical existed in the first place.[230]

To be sure, the fact that victims do not have recourse to the legal system does not necessarily preclude the story from eventually being told. The 2000 and 2004 Pulitzers went to stories about war crimes against Vietnamese and Korean civilians. The above-mentioned 2012 Pulitzer went to a story about poor, stigmatized methadone users. And the 1997 Pulitzer went to a story about cronyism in Native Indian communities, where the victims did not enlist the help of the traditional legal system but rather stuck with their communal tribunals.[231] My argument is therefore not an absolute but a relative one: in contexts where law enforcement is less likely to work, accountability journalism is harder to generate. Put differently, investigative reporters' reliance on legal sources privileges certain types of societal issues at the expense of others.[232]

From a social planner perspective, areas where both watchdogs – the media and the courts – are likely to fail are ones that bear monitoring. Presumably, in contexts where victims lack recourse to the legal system, we would want another system of control – another watchdog – to step in and spotlight the victims' plight. Yet investigative reporters' reliance on law as source means that exactly in such contexts the media is less likely to perform its watchdog function.

### 2. Business Accountability

Many of my interviewees suggested that law-as-source dynamics play an especially important role in business investigative journalism.[233] The interviews corroborated a notion that reverberates in communication studies: holding big business accountable is actually much tougher than holding big government accountable.[234] The reason for this has a lot to do with sourcing: my interviewees mentioned three types of sources of damning information that are more available on government misconduct

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[229] Shapira & Zingales, *supra* note 24.

[230] *Id.*

[231] *See infra* Appendix A: Nelson interview.

[232] *See infra* Appendix A: Green-Barber interview.

[233] *See infra* Appendix A: Coll interview; Bogdanich interview; Blackledge interview; Daly interview.

[234] *See, e.g.*, Schudson, *supra* note 50, at 140; Hamilton, *supra* note 27, at 60, 151.

than they are on business misconduct: information from *rivals*, information from *insiders*, and publicly available *records*.

First, a journalist looking for information on misbehavior by politicians can usually count on the politician's rivals. Politics is often a zero-sum game, and politicians are quick to point out their rivals' flaws and misconducts to the media.[235] To illustrate, consider the 1999 Pulitzer-winning project on voter fraud in Miami. The Miami Herald reporters did not need to cull court dockets to originate the story: the side that lost the elections was eager to provide them with allegations and sources to back up those allegations. In other words, insiders often provide journalists with information subsidies on negative stories. Within the business world, by contrast, tips by rivals are much harder to come by.

Second, my interviewees suggested that government insiders are more likely to blow the whistle than their corporate counterparts are.[236] The reason, they conjecture, lies in the different organizational cultures: people in government have a greater sense of public duty, and so they are more likely to approach the media when observing misconduct by their superiors.[237] Insiders in private business, by contrast, tend to adopt a profit-maximizing mindset and "zealously guard documents."[238]

Finally, direct sourcing tools help with information on government more than with information on private business.[239] A journalist cannot file FOIA requests or rely on open records laws to get information on how companies behave, and the companies tend not to volunteer damning information.[240]

The added difficulty of getting information on big businesses figures to increase the demand for indirect sourcing channels, such as law enforcement actions.[241] And the supply tends to meet the high demand: big businesses are almost always involved in one legal dispute or another. As a 2017 study shows, more than half of all U.S. companies are managing at

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[235] As one reporter put it, "The two-party system is a blessing for journalists. When the government was Democratic, Republicans would leak. When the Democrats held primaries, one side would leak information on the other." Daly interview. *See also* Ureneck interview.

[236] *See infra* Appendix A: Tulsky interview; Mehren interview; Carter interview.

[237] *Id*.

[238] Tulsky interview. There exist other factors making it more difficult to hold business accountable that are not necessarily related to sourcing. The one most mentioned by my interviewees is that businesses are more likely to sue the newspaper and the reporter for libel, compared to politicians. Lewis interview; Bogdanich interview.

[239] *See infra* Appendix A: Horvit interview; Blackledge interview; Jaquiss interview.

[240] *See infra* Appendix A: Coll interview; Boardman interview; Bogdanich interview (big companies "have infinitely more power to hide things"); Daly interview (with private business "you have very few leverage points" to extract information).

[241] A tip sheet titled "Investigative Business Journalism" mentions the following as the first tip for dealing with private companies: "Check civil court files. Lawsuits are often a great source of information about a company. They often contain detailed information on a company's finances and practices" (Cohn, *supra* note 132). *See also* Tulsky interview; Bogdanich interview.

least one class action against them at any given point in time.[242] It is therefore not surprising that virtually every investigative journalism tip sheet or course syllabus mentions court documents as key for investigating business. In the words of the Dean of Columbia Journalism School: "I teach seminars on how to investigate closed corporations, and the first thing on the slides is: litigation … there's hardly a company in this world that is not being sued, and this is where you get a window [into what is going on in the company]."[243]

My content analysis of prizewinning investigative projects lends credence to the journalists' perspective I picked up from interviews, tip sheets, and syllabi. Six of the 25 Pulitzer-winning projects in my sample focus on holding private companies to account.[244] Five of them rely strongly on litigation or regulatory investigations. In an attempt to dig further into the specific context of business investigative journalism, I looked beyond Pulitzers to the Loeb awards, considered the premier prize for business journalism.[245] Among the Loeb awards, I looked at investigative projects that targeted a specific firm. Three examples stood out: the 2017 project on Allegiant Air, showing the alarming rate of airplane malfunctions in the low-cost carrier's fleet; the 2010 project on Toyota, investigating complaints of unintended sudden acceleration; and the 2004 project on Boeing, detailing corporate espionage against rival Lockheed Martin. Unsurprisingly, it turned out that all three projects rested heavily on legal sources.

When Boeing tried to attain proprietary Lockheed Martin documents, Lockheed sued, and the Justice Department and the U.S. Attorney's Office in Los Angeles got involved as well. The reporters could then rely on legal documents to include detail, and showed that the espionage was not merely the doing of rogue low-level employees, as Boeing claimed.[246] The reporters in the Toyota story reviewed thousands of regulatory investigation and incidence reports. These regulatory reports allowed the reporters to benchmark the gravity and frequency of sudden acceleration issues with Toyota against the industry: 19 fatalities in Toyotas, 11 in all other cars combined.[247] The legal documents were therefore crucial in establishing the storyline and clarifying that the accidents were not just one-off random mistakes, contrary to what the company and the regulators claimed. We observed a similar pattern of relying on regulatory reports at the Allegiant

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[242] *See Class Action Survey* (Carlton Fields, 2017), http://classactionsurvey.com/type-frequency/.

[243] *See infra* Appendix A: Coll interview.

[244] These are the 2015, 2014, 2013, 2008a, 2008b, and 1998 winners. *See infra* Appendix B for details.

[245] *See supra* note 196.

[246] *See* Andy Pasztor & Anne Marie Squeo, *Boeing Employees are Disciplined in Espionage Case*, WALL ST. J., Sept 12, 2003.

[247] *See* Ralph Vartabedian & Ken Bensinger, *Toyota's Woes May Not End at Floor Mats*, L.A. TIMES, Oct. 18, 2009.

Air story: the reporters there submitted a FOIA request to get the mechanical malfunction reports that were filed with the aviation regulator. They used the data to benchmark the company's midair malfunctions against the industry, thus establishing the impetus for the project, namely, "[a]ll major airlines break down once in a while. But none of them break down in midair more often than Allegiant."[248]

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All the methods I used to address the question asked at the beginning of this Part returned the same answer: law plays a very important role in sourcing investigative reporting. Thus far we have answered why, how, and how much do journalists rely on legal sources. The next questions to ask are "so what?" and "what can we do about it?" The "so what" question is relatively easy to answer, as one needs only to recall the evidence on the social benefits of investigative reporting.[249] If Hamilton's study convinced you that a major investigative project can produce net social benefits in the tens of millions, and Part III of this Article convinced you that legal documents play a strong role in many of these impactful investigative reports, then you must recognize that law-as-source dynamics have significant real-world implications. We therefore turn to the policy implications question: what can a social planner do (if anything) to facilitate better legal sourcing?

## IV. IMPLICATIONS

The previous Part looked at prizewinning journalistic stories that were told with the help of legal sources, but it did not (could not) look at stories that were *not* told. What about stories that were not told because the legal system held information back, stonewalling journalists? We usually get a peek at such counterfactuals in cases where the information eventually gets out, after being buried for a while. Such was the case with the cover-up of child abuse in the Catholic Church. We started this Article by using Spotlight as an example of a success story in which the interactions between the media and the courts helped hold the powerful to account. Yet one could also view the Spotlight example as illustrating a failure to warn.[250] The legal system had produced the damning information on the cover-up of child abuse many years before it became available to journalists. Only after a fortuitous turn of events – and a media outlet financially strong enough to fight a lengthy legal battle to unseal documents[251] – did the information turn into a journalistic source. Had the information become available earlier, one

[248] Nathaniel Lash et al., *Breakdown at 30,000 Feet*, TAMPA BAY TIMES, Nov. 2, 2016.

[249] Hamilton, *supra* note 27.

[250] Put differently, instead of using Spotlight as an example of the benefits of legal sourcing, we can use it as an example of the costs of confidentiality orders. *Cf.* Lahav, *supra* note 123, at 1688.

[251] Hamilton, *supra* note 27, at 83.

could argue, many cases of child abuse could have been avoided.[252]

The broader point here is not to take the law-as-source function as given. For law to serve a meaningful sourcing function, government agencies need to grant FOIA requests, judges need to resist the temptation to approve the sealing of court documents too easily, and regulators need to resist the temptation to quickly settle enforcement actions without releasing a detailed investigatory report.[253] If they do not, the law's role as source will be very limited and, in turn, the media's ability to be a watchdog will be limited as well. A social planner should therefore take into consideration the information-production function of the law when evaluating the desirability of legal institutions. This Part sketches several directions for such a reevaluation. Subsection A starts with big-picture observations on levels of legal intervention. Subsection B delves into the debate over openness (or publicness) of disputes, which encompasses issues such as secret settlement and arbitration clauses. Subsection C offers a fresh perspective on specific corporate and securities litigation doctrines. And Subsection D finishes with big-picture observations on the freedom of information literature.

### *A. A More Cautious Approach to Scaling Back Legal Intervention*

One basic policy implication stemming from recognizing the role of law as source is to adopt a more cautious approach to advocating for nonintervention. A strong strand of the economic analysis of law literature treats law and reputation as independent and substitutes to each other.[254] According to such an approach, when we recognize an area with strong reputational forces, we can scale back legal intervention. To illustrate, consider Polinsky and Shavell's proposal to abolish product liability for widely sold products.[255] Polinsky and Shavell reason that manufacturers already have incentives to invest optimally in the safety of their products, because they wish to avoid the risk of losing their reputation if bad news about their products breaks.[256] They argue that maintaining a costly system of litigation is superfluous in an already existing market system of control.[257] Yet this Article shows that the strong reputational forces that Polinsky and Shavell talk about are largely a *result* of product liability litigation and regulatory investigations. Virtually all investigative reporters' tip sheets on how to cover faulty products include explicit orders to look for information from litigation.[258] If we abolish litigation, we take away a large

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[252] ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 76 (2016).

[253] Shapira, *supra* note 11, at Part V.

[254] Shapira, *supra* note 9, at 1196.

[255] Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437 (2010). For a concise description of their argument, and a qualifier, *see* Shapira, *id*. at 1197.

[256] *Id*.

[257] *Id*.

[258] *See supra* note 152.

part of the media's ability to scrutinize faulty products. Journalists rely on court documents to spot patterns that enable them to differentiate between one-off mistakes and systematic breakdowns or between genuine incompetence and clear disregard of consumers' safety. The strength of market forces, at least in the area of product safety, is very much a function of the existing legal system.[259]

A related example comes from Jonathan Macey's claim that corporate reputation is dead because the legal system killed it.[260] Macey attributes the rise of misconduct in the financial sector to the decline in the deterrent power of reputation, and he attributes the decline in reputational deterrence to an increase in financial regulation. Heavier regulatory intervention crowded out reliance on reputation mechanisms, Macey argues, with the result being worse overall deterrence. The answer to scandals in financial markets, he claims, is not more regulation but rather less regulation. Yet such an argument misses the role of the business media in facilitating well-functioning reputation markets.[261] For reputation to act as a deterrent in today's atomistic global financial markets, there have to be information intermediaries that gather information, process it, and diffuse it widely. To get disciplined financial markets we need invigorated business media. And invigorated business journalism relies heavily on legal enforcement.[262] If we scale back legal intervention, we may get less media scrutiny and so less powerful market discipline.[263]

There is a broader point here. When we think of the design of legal institutions, we usually have in mind goals such as assuring compensation for victims or punishing wrongdoers to deter them. Yet in some contexts, we also need to take into account the indirect deterrence function of providing information that facilitates better accountability journalism. Those who allude to market forces need to be aware of the role that media scrutiny plays in market discipline, and the role that the law plays in media scrutiny.

### *B. The Case against Secrecy*

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[259] As one Pulitzer winner relayed, "To operate in a private world, without [legal intervention], would leave us [investigative reporters] with almost nothing. Would shut down a valuable source for us." St. John interview.

[260] JONATHAN R. MACEY, THE DEATH OF CORPORATE REPUTATION (2013).

[261] For additional reasons to doubt Macey's causal claim see Roy Shapira, *Who Killed Corporate Reputation?*, ProMarket Blog, 24 Jun 2016, https://promarket.org/killed-corporate-reputation/.

[262] Recall the studies by communication scientists, showing how the few examples of successful accountability journalism by the financial media rested on legal sources. Starkman, *supra* note 192.

[263] It should be noted that Macey seems to distinguish between regulatory requirements, and regulatory enforcement actions. His point concerns mainly the former, rather than the latter, and in that aspect it actually meshes well with our point here.

While the main recurring theme in my interviews with reporters was how instrumental legal sources are, a secondary recurring theme was how frustrated and disillusioned reporters are with a legal system that produces information yet keeps it away from them.[264] This frustration touches upon a long-standing debate in the legal literature over how publicly available law enforcement records should be.[265] The debate spans multiple applications: settlement vs. trial, openness of proceedings, secret settlements, and so on.

Our law-as-source framework allows us to contribute to the openness vs. secrecy debate along several key dimensions. First, we inject a real-life implications perspective into a too-often principled debate (Subsection 1). Second, the law-as-source framework disentangles the normally comingled facets of the openness vs. secrecy debate (Subsection 2).[266] Law-as-source dynamics play out differently in questions such as whether to keep the amount of a settlement secret or whether to seal documents already submitted to the court. Importantly, law-as-source considerations are most important – and law-as-source benefits significantly threatened – in the context of one-sided arbitration clauses, which are currently a hot topic of debate that implicates recent decisions by the Supreme Court and the Trump administration. Once we understand the issues at stake, we can roughly sketch a way forward: how to solve the problem of information underproduction without overburdening the judicial system (Subsection 3). One idea is to put information on disputes in escrow, such that it would become publicly available once a certain threshold, such as the number of complaints filed over the same issue, is reached.

### 1. Real-Life Implications of Secrecy

The argument for and against secrecy follows a similar formula across a wide array of applications. Those in favor of openness usually summon considerations of increased accountability and accuracy of judicial decision-making.[267] Those in favor of confidentiality cite the need to respect the parties' autonomy and to conserve public and private resources.[268] What

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[264] *See supra* note 183 and the accompanying text.

[265] *See* Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J. L. & POLICY 67, 67–68 (2000) (compiling references); Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 493 (2008) (same).

[266] Laurie K. Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 317 (1999) (showing that different facets of the debate are unjustifiably intertwined).

[267] *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976); Erik S. Knutsen, *Keeping Settlements Secret*, 37 Fla. St. U. L. Rev. 1, 13 (2010); Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT. L. REV. 463, 469 (2006).

[268] *See, e.g.*, Knutsen, *Id.*; Friedenthal, *supra* note 265. *Cf. also* Steven Shavell, *The Fundamental Divergence between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 606–07.

both camps agree on, however, is the need to inject some evidence into the debate.[269] Specifically, both camps agree that we do not know much about how openness vs. secrecy affects third parties. Take, for concreteness, the debate over secret settlements.[270] Those against secret settlements argue that keeping the details about underlying misbehavior secret endangers public safety, as it fails to warn third parties.[271] Those favoring secret settlements retort that the public-safety argument rests on shaky grounds.[272] Most of the time, they claim, settlements contain information already available to regulators or to anyone who reads the initial complaint.[273] If the public really wants to avoid a certain defendant, they can do so even without reading the settlement. Further, the public would not know what to do with information coming from open settlements. Settlement is not adjudication, and the public "cannot reliably evaluate what settlement information means."[274]

The law-as-source argument helps remove some of the skepticism over the ability of open settlements to warn the public. As a quick illustration, let us recall the Spotlight example. The Boston Globe had documented proof of the Church's cover-up because one plaintiff's lawyer (you might recall him from the movie as the eccentric Mitchell Garabedian) insisted on fighting the Church, one trial at a time, without signing secret settlements. While the evidence presented in Part III cannot be considered conclusive proof in a statistical sense, it does amount to a prima facie case to consider seriously the ability of the media to turn open settlements into watchdog journalism with teeth. And watchdog journalism, as we saw in Part I, is effective at warning the public and shaping the behavior of powerful players in society.

Relatedly, the law-as-source argument shows what is wrong with the argument that the public would not know what to do with open settlements. In reality, the public does not sift through court records and settlement agreements. Investigative reporters do. Investigative reporters test the reliability of raw data they get from court documents, and triangulate it with

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[269] *See, e.g.*, Lahav, *supra* note 123, at 1690 (calls for evidence from a public litigation supporter); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)* 83 GEO. L. J. 2663, 2671 (1995) (calls for evidence from a confidentiality supporter).

[270] A "secret settlement" is a settlement agreement that contains a provision whereby the parties promise to keep aspects of the dispute secret. *See* Knutsen, *supra* note 267, at 8.

[271] *See, e.g.*, David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L. REV. 2619, 2649–50 (1995); Jillian Smith, *Comment: Secret Settlements: What You Don't Know Can Kill You!*, 2004 MICH. ST. L. REV. (2004); David S. Sanson, *The Pervasive Problem of Court-Sanctioned Secrecy and the Exigency of National Reform*, 53 DUKE L. J. 807 (2003).

[272] *See* Knutsten, *supra* note 267, at 27, n. 60; Friedenthal, *supra* note 265; Doré, *supra* note 266, at 301 (a recognition by an openness proponent that the argument lacks empirical backing).

[273] Friedenthal, *id*. at 87.

[274] *See* Knutsen, *supra* note 267, at 27–8; Friedenthal, *id*. at 88 (maintaining that all the public learns from one settlement is that the defendant made a single mistake – but that in itself does not reveal a danger). In the context of discovery, *see* Doré, *supra* note 266, at 350, n. 273.

other sources. They use details from scattered settlements to identify and describe a pervasive pattern of institutional misconduct. Unlike beat reporters or news reporters, investigative reporters are less interested in the color and more interested in the pattern. That is, they do not read a single settlement in isolation, but rather view it as a lead that can help them find patterns of recurring misconduct. The upshot for our purposes is that information intermediaries – investigative reporters – will make it easier for the public to make sense of the limited information contained in a settlement and to react accordingly.[275] Confidentiality provisions that hide even the basic details of the dispute hurt the ability of the media to effectively inform the public.[276]

All else being equal, the more public the resolution of a dispute is, the better the chances that the media can hold the powerful to account with the help of legal sources. Openness therefore comes with an underappreciated, indirect benefit: better *reputational* deterrence.

2. Disentangling the Issues: Secret Settlements, Protective Orders and Arbitration Clauses

Arguments in the openness vs. secrecy debate are often unjustifiably rehashed in different contexts.[277] The law-as-source angle helps us distinguish and reassess three separate issues: documents filed with the court, such as depositions; documents exchanged among litigants but not filed with the court, such as discovery; and one-sided arbitration clauses with class waivers. The information-production angle plays out differently in each context.

Consider first the category of "judicial information," which encompasses information that has a direct connection to the process of judicial decision-making: trial transcripts, docket sheets, settlement agreements that are filed with the court, the right to attend trial, and so on.[278] On paper, this type of information can make a great source for investigative reporting, as the law presumes full public access to such documents.[279] Yet in reality, parties often stipulate to keep major aspects of judicial information private and judges are quick to approve.[280]

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[275] *Cf.* Green-Barber interview (noting that while journalists are not good at creating their own databases, when they stumble upon raw data from legal documents they are good at sifting through it and "packaging it beautifully").

[276] *Cf.* Jennifer LaFleur, *The Lost Stories* (IRE tip sheet, 2003).

[277] Doré, *supra* note 266, at 317.

[278] Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated through Litigation*, 81 CHI.-KENT. L. REV. 375, 385, n. 58 (2006).

[279] *See* Nixon v. Warner Commc'ns, 435 U.S. 589, 597 (1978).

[280] Starting in the 1990s there have been constant efforts by legislators to ban confidentiality agreements, yet the proposed sunshine-in-litigations reforms either do not get passed or get passed but do not pass muster. *See* Bauer, *supra* note 265, at 494; Goldstein,

The problem is that both parties have incentives to handle their disputes in ways that limit public access to judicial information.[281] Take again for concreteness the issue of secret settlements. While the fact that most cases settle has become a truism,[282] more relevant for our purposes is the fact that most cases settle secretly: the parties often stipulate to keep details of the dispute private.[283] Defendants are willing to pay more for a confidentiality provision, to save themselves the risk of adverse publicity. Plaintiffs anticipate defendants' willingness to pay for secrecy, and use it as a bargaining chip. A plaintiff who receives a generous offer may not care about the positive externality; that is, she may not care whether relevant information gets out to third parties.

Judges have discretion and can ignore the parties' will and keep judicial information open. Yet judges too face skewed incentives: they are measured by caseload management, and not by the amorphous (and hitherto understudied) concept of how they contributed to information production.[284] The framework developed here would urge judges to overcome pressures to clear the docket, and consider, among other factors, the law-as-source benefits emanating from openness. To be sure, not all cases implicate law-as-source considerations. Nominally speaking, the overwhelming majority of legal disputes do not interest third parties. Yet in disputes involving large manufacturers or employers, whose behavior affects many, information production should factor in.

When factoring in information production, judges should be wary of the context. Not all disputes are created equal from an information-production perspective, and certain types of information are more likely to facilitate accountability journalism than others. In the secret settlements context, for instance, the problem is less about settlements that keep the amount paid secret, and more about settlements that erase all evidence of the dispute (including the parties' names), or contain provisions requiring the destruction of information obtained during the dispute.[285] The amount agreed upon may be of interest to other potential legal claimants, or to a journalist on the beat looking for color, but it is less helpful to an investigative reporter looking for a pattern of recurring misbehavior or

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*supra* note 278, at 394–400; Doré, *supra* note 266, at part II.C.2.

[281] *See* Shavell, *supra* note 268, at 605; Wagner, *supra* note 3, at n. 71–74 and the accompanying text.

[282] *See* J. J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59, 61 n.2 (2016).

[283] See Knutsen, *supra* note 267, at 1, n. 1 (compiling references); Friedenthal, *supra* note 265, at 95, n. 106 (referring to a quote of a veteran trial lawyer, stating in congressional hearings that in forty years of practice he had never seen a settlement that did *not* include some confidentiality clause); Bauer, *supra* note 265, at 491, n. 16–19 (compiling anecdotal references). As Luban puts it, "The sticking point with settlements is not truth but openness." Luban, *supra* note 271, at 2648.

[284] Goldstein, *supra* note 278, at 388, 435.

[285] Bauer, *supra* note 265, at 492, n. 22 (compiling references for how common such provisions are).

trying to understand what and how things happened.[286] To establish a pattern and dig deeper into the behavior in question the media will need the basic details – the fact of the dispute and the names of the parties – to remain open to the public.

A second major category of openness vs. secrecy debates concerns litigant-centered information, such as pre-trial discovery documents, or settlement agreements that are not filed with the court.[287] The law regarding such information is different: the strong presumption of openness that applies to judicial information does not apply here.[288] The rationale behind the different legal treatment is the link to judicial accountability: since documents not filed with the court are not part of judicial decision-making, there is less of a need to keep them open to allow monitoring of judicial decision-making, or so the argument goes.[289] Yet from a pure law-as-source perspective, discovery materials can be just as valuable as judicial information in facilitating media-driven accountability. In today's world, trials are vanishing,[290] and the overwhelming majority of information being produced during legal disputes is not filed with the court. To ban openness of litigant-exchanged information is therefore to undermine the ability of the media to hold the powerful to account.[291]

From an investigative reporter's perspective, the main role of discovery materials is less about understanding what happened (you can tell that from the complaint) and more about understanding *how* things happened.[292] Think for example about internal company e-mails indicating what top management knew, when they knew it, and what they did or did not do to stop the misbehavior in question. Here, too, the Spotlight story is a case in point. The Boston Globe's investigative team sat on a child abuse story for many months, because they were searching for the bigger story on the cover-up of child abuse by higher-ups in the Church. The reporters got their proof – and caused an impact – only after getting access to internal Church documents produced during discovery, showing who knew what and when.

A third category of openness vs. secrecy issues concerns the timely debate over one-sided arbitration clauses. Two Supreme Court decisions in

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[286] Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in between*, 30 HOFSTRA L. REV. 783, 791, n. 41 (2002) (settlement amounts are "at best, ambiguous signals").

[287] *See* Goldstein, *supra* note 278 (clarifying the terminology).

[288] *Id*. at 376.

[289] *See, e.g.*, United States v. El-Sayegh, 131 F.3d 158, 163 (D.C. Cir. 1997).

[290] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (coining the "vanishing trials" moniker); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2804, 2935 (2015) (in 2010, trials began in about one case out of 100 filed).

[291] Loci interview; Lahav, *supra* note 123, at 1686; Goldstein, *supra* note 278, at 403.

[292] *Cf.* Goldstein, *id.* (noting that discovery materials are often more important than other court documents in verifying alleged wrongdoing).

2011 and 2013 – *AT&T v. Concepcion*[293] and *American Express v. Italian Colors Restaurant*[294] – expanded the scope of arbitration by enforcing unavoidable arbitration clauses that ban collective action.[295] The use of such arbitration clauses is constantly on the rise. As of 2017, 80% of the big 100 companies use mandatory arbitration clauses in employment contracts,[296] and over 60 million Americans have signed such arbitration clauses.[297] Such arbitration clauses represent the biggest threat to law-as-source benefits. When a judge seals documents or issues protective orders, the given legal dispute may nevertheless serve as a valuable source for investigative reporting, because journalists are able to cull the docket sheets, motions, and complaints.[298] By contrast, when disputes are increasingly "diffused"[299] – funneled to private arbitration or not pursued to begin with (because collective action is banned) – journalists are much less able to dig into the misbehavior in question.[300]

To illustrate, consider the case of misconduct in foster homes for kids or nursing homes for the elderly. Investigative reports revealing such misconduct historically relied heavily on information from litigation. Take for example the 2002 Pulitzer-winning investigative report detailing the neglect of children placed in foster homes in the District of Columbia. Following the journalistic report, the city overhauled its child welfare program.[301] It is unclear whether such an investigative report could be written in today's environment. Had the same type of misconduct occurred in the 2010s, it would probably have never reached the courts. A New York Times exposé found that over one hundred cases of wrongful death and other misconduct at nursing homes were pushed to private arbitration between 2010 and 2014.[302] When the federal regulator in charge of Medicare and Medicaid funding proposed a rule barring nursing homes from funneling all residents' claims to arbitration, the Trump administration

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[293] AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).

[294] Am. Express v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

[295] As the court held in *Italian Colors*, "Courts must 'rigorously enforce' arbitration agreements according to their terms." *Id*. at 2309.

[296] Imre S. Szalai, *The Widespread Use of Workplace Arbitration among America's Top 100 Companies* (The Employee Rights Advocacy Institute for Law and Policy paper, Sep. 27, 2017), http://employeerightsadvocacy.org/wp-content/uploads/2017/09/Insitute-2017-Report-Widespread-Use-Of-Workplace-Arbitration.pdf.

[297] Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration* (Economic Policy Institute report, Sep. 27, 2017), http://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/.

[298] *Cf*. Stephanie Brenowitz, *Deadly Secrecy: The Erosion of Public Information under Private Justice*, 19 OHIO ST. J. ON DISP. RESOL. 679, 699 (2004); Lahav, *supra* note 252, at 73 ("arbitrated disputes do not produce a public record and cannot… bring wrongdoing to light").

[299] *See* Resnik, *supra* note 290 (coining the terminology).

[300] Lahav, *supra* note 252, at 27; Brenowitz, *supra* note 298, at 696.

[301] See the Pulitzer Prize committee's explanation, at http://www.pulitzer.org/winners/sari-horwitz-scott-higham-and-sarah-cohen.

[302] Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, 'A Privatization of the Legal System,'* N.Y. TIMES, Nov. 1, 2015.

stepped in and scrapped it.[303] And because such disputes are not aired in the court anymore, information about the underlying misbehavior is more likely to remain out of the media's reach.

Those in favor of the ever-proliferating arbitration clauses refer to the cost-saving attributes of arbitration relative to litigation. As one spokesperson puts it, "Arbitration provides a way for people to hold companies accountable without spending a lot of money."[304] Even if we assume that such an assertion is empirically valid – that is, that individual consumers who are harmed get their money back effectively in arbitration[305] – the law-as-source perspective exposes two flaws in the spokesperson's argument. First, when we evaluate the efficacy of dispute resolution channels, we should consider not just the costs and benefits to the parties to a specific dispute, but also the costs and benefits to society. Arbitration clauses with class waivers come with a set of societal costs in the form of reducing the effectiveness of media scrutiny. Secondly and relatedly, even if we assume that companies pay full damages in individual arbitrations, such payments hardly translate into public accountability. They are more like the small costs of doing business. When a cellular company overcharges its customers on a monthly basis, and then is dragged into an individual arbitration and pays back the full amount, this $30-sized sanction does not qualify as deterrence. To hold large companies truly accountable for their misbehavior, we should expose and diffuse information on their misbehavior. Reputational deterrence is a necessary tool for achieving corporate accountability. Yet reputational deterrence only works when information on corporate misconduct is publicly available.

The stakes in one-sided arbitration clauses are therefore high. And they are at their peak at the time of this writing. The Trump administration has been consistently strengthening the trend of diffusion of disputes, for example, by overruling regulators that attempt to allow consumers to litigate claims. The Consumer Financial Protection Bureau issued a rule in July 2017 allowing consumers of major financial institutions to bypass class waivers. The agency's director reasoned at the time that ignoring class-action bans is key to assuring accountability in the financial sector.[306] Yet in November 2017, President Trump signed a resolution that canceled the CFPB rule.[307] Similarly and as mentioned above, the administration overruled attempts to bar such arbitration clauses in nursing homes.[308] As of this writing, the Supreme Court is about to hand down a decision (on which

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[303] Jessica Silver-Greenberg & Michael Corkery, *U.S. Agency Move to Allow Class Action Lawsuits against Financial Firms*, N.Y. TIMES, JUL. 10, 2017.

[304] Jessica Silver-Greenberg & Michael Corkery, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015.

[305] Such assertions are deeply contested. *See, e.g.*, Resnik, *supra* note 290.

[306] Silver-Greenberg & Corkery, *supra* note 303.

[307] See the CFPB's announcement removing part 1040 of 12 CFR chapter X at https://www.federalregister.gov/documents/2017/11/22/2017-25324/arbitration-agreements.

[308] *See supra* note 303.

it is apparently divided[309]) with immense implications for the enforceability of arbitration clauses with class waivers in employment contracts.[310] Under President Trump's new solicitor general, the Department of Justice reversed its previous stance on the ongoing case. The DOJ filed in June 2017 an amicus brief *supporting* such arbitration clauses.[311] While it is unclear whether the DOJ's about-faces will affect the court, the attack on litigation is clearly bad for the prospects of accountability journalism.

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There is a broader point here. Delving into the interconnections between law enforcement and media scrutiny sheds light on how flawed the traditional "enemy lines" are. Two binary camps have been dominating the debate over legal intervention in popular discourse: one camp advocates "leaving things to the market" while the other calls for "ramping up legal sanctioning." Yet those who oppose litigation (and are in favor of arbitration clauses, even ones that ban collective action) fail to recognize the importance of litigation for the functioning of market discipline. Without public dispute resolution, we may end up with less effective media scrutiny, and hence less effective market discipline, which in turn will increase the demand for regulatory intervention. On the other side, those who advocate for more legal sanctions fail to recognize the ability of the legal system to promote accountability *indirectly*, and regardless of the legal outcome of a given dispute. Sometimes the most effective and realistic way to promote deterrence is not to increase legal sanctions, but to increase the quantity and quality of information production.

### 3. How to Solve the Information Underproduction Problem?

Let us be clear on what we can or cannot infer from the law-as-source argument. The law-as-source argument does *not* call for an outright ban on secret settlements or for making all discovery materials and arbitrations public. Discovery is so far-reaching in scope, and settlements so prevalent, that they beg discretion to allow confidentiality under certain conditions. Further, banning confidentiality may come with unintended effects of reducing the available flow of information ex ante, for example, by pushing parties to settle out of court.[312] Nor can the law-as-source argument help us weigh considerations of privacy and proprietary or embarrassing

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[309] Adam Liptak, *Supreme Court Divided on Arbitration for Workplace Cases*, N.Y. TIMES, Oct. 2, 2017.

[310] The court consolidated three cases: Epic Systems Corporation v. Lewis, No. 16-285, Ernst & Young v. Morris, No. 16-300, and National Labor Relations Board v. Murphy Oil USA, No. 16-307.

[311] The new brief is available at http://www.scotusblog.com/wp-content/uploads/2017/06/16-285-16-300-16-307-Brief-for-the-United-States.pdf.

[312] *See generally* Scott Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867 (2007) (arguing that there is a lot of uncertainty regarding the consequences of tinkering with secret settlements).

information.

What the law-as-source argument does offer is a more informed background against which judges and policymakers can balance the costs and benefits of confidentiality. It reveals an underappreciated set of benefits – informational benefits – that facilitate accountability journalism, which in turn facilitates higher accountability in society. The law-as-source argument also removes the skepticism over the ability of open litigation to inform the public of widespread misconduct. And it lends credence to proposals to create databases of lawsuits that were filed but settled and databases of arbitrated disputes.[313]

Once databases of disputes are put in place, we can establish a mechanism or institution that will release further information about certain disputes. Think of it as analogous to an information escrow: a mechanism that is in charge of releasing information that should not remain private.[314] Say a toddler car-seat manufacturer is being sued for product defects. The victims and the manufacturer then reach a secret settlement and keep information about the dispute private. Then, a second family sues the manufacturer over the same issue. Then a third. And so on. Under existing laws, chances are that each family would be unaware of the others, and that a journalist digging into the issue would not be able to grasp the scope and details – simply because information from each separate lawsuit remains hidden. Such was the case in the sexual abuse cases in the Catholic Church. A way to mitigate the existing failure-to-warn problem without overburdening courts would be to pre-specify criteria under which the filing of additional disputes would trigger a mechanism that makes information about previous disputes publicly available. For the sake of illustration, assume that the fifth family filing a complaint over the same issue would trigger a release of the basic details of the previous four legal disputes involving the same defendant manufacturer over the same alleged product defect. That way, reporters or future victims would be able to search for a pattern of recurring misbehavior and expose it.[315] The increased threat of being exposed as a low-quality manufacturer would incentivize manufacturers to invest in the safety of their products ex ante.

### *C. Business Law Applications: Delaware's Dominance and SEC Settlements*

The fact that court documents and regulatory reports play an especially important role in business journalism[316] highlights the need to evaluate

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[313] Lahav, *supra* note 252, at 79.

[314] *Cf.* Ian Ayers & Cait Unkovich, *Information Escrows*, 111 MICH. L. REV. 145 (2012).

[315] As Ayers and Unkovich note, a somewhat similar mechanism is already in place in criminal law: a "commitment escrow" of sorts, whereby criminal records remain under seal, unless the defendant recidivates within a given period. *Id.* at 152.

[316] Subsection III.C.2 *supra*.

business law doctrines according to how they contribute to information production. While fully developing an information-production perspective on business law is beyond our scope,[317] this Section offers some brief observations on timely debates in corporate and securities litigation.

1. Corporate Litigation: Delaware's Informational Dominance

Regulatory competition has been a perennial topic of debate in corporate law literature. By now, we have reached a consensus on who the winner is: Delaware is the state that attracts more out-of-state incorporations, with up-and-coming Nevada a distant second.[318] But we are still debating over how they won: why is Delaware in first place? How did Nevada rise so quickly to second place? The law-as-source angle provides a fresh perspective on what Delaware does differently, and how it differs from the challenger, Nevada.

Delaware's decisional law is geared toward information production, much more so than the laws of rival states with established business courts.[319] For one, Delaware courts have developed a tapestry of doctrines that lead to flushing out disputes in the court: Delaware uses a lax standard of review when determining whether to impose legal sanctions but a more stringent standard of review in the pleading stage. In other words, Delaware courts let big cases proceed to discovery and trial even when the odds that these complaints will ultimately win are slim. Delaware's approach – as manifested in doctrines such as *Zapata*[320] (enhanced standard of review to the special litigation committee conduct) and *Kaplan*[321] (court discretion on how much discovery to accord to plaintiffs in early stages) – stands in contrast to that of other jurisdictions such as New York, which defer to special litigation committees.[322]

The information-production contrast is most evident when comparing Delaware to Nevada. Delaware's corporate law is much more permissive regarding the right to inspect the company's books relative to Nevada.[323] And while Delaware's judicial opinions serve important roles in providing the media with fact-based narratives and quotable censure,[324] Nevada's

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[317] For an initial attempt *see* Shapira, *supra* note 11.

[318] Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 716 (2002).

[319] Shapira, *supra* note 11, at 40-44.

[320] Zapata Corp. v. Maldanado, 430 A.2d 799 (Del. 1981).

[321] Kaplan v. Wyatt, 499 A.2d 1184 (Del. 1988).

[322] *See* WILLIAM T. ALLEN ET L., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 392 (4th ed. 2012).

[323] *Compare* Nevada's NRS 78.257 *with* Delaware's Section 220. *See also* Amalgamated Bank v. Yahoo!, Inc., C.A. No. 10774-VCL (Del. Ch. Feb. 2, 2016). I thank Keith Paul Bishop for a valuable discussion on the differences between Nevada and Delaware.

[324] *See* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997) (Delaware courts facilitate social sanctions); Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*,

business court *does not publish opinions*.[325]

The information-production angle helps us make sense of several puzzles the literature has grappled with. Take for example Michal Barzuza's theory on how Nevada started targeting a niche market for incorporations – companies with high agency costs – by offering them a lax-liability regime.[326] A Nevada-is-racing-to-the-bottom theory has to explain why companies that knowingly incorporate under laxer laws do not fear that their financiers will punish them by demanding higher rates, and why Nevada's legislators do not fear federal intervention if they offer too lax laws that do not protect investors enough. Barzuza's answers to these two puzzles follow similar lines: Nevada's lax-liability strategy has gone under the radar, unnoticed by investors and Washington.[327] Yet such an answer raises a separate puzzle, namely, how exactly has Nevada kept its strategy under the radar? The information-production angle provides a possible answer. By limiting the ability of outsiders to inspect the books or to gather information about corporate misconduct from judicial opinions, Nevada allows its companies to engage in shenanigans with a smaller risk of being exposed. In that sense, Barzuza is wrong to identify the lack of published opinions as a shortcoming in Nevada's marketing strategy.[328] The lack of published opinions is hardly a bug; it is rather a feature of Nevada's strategy. Blocking the main channels of journalistic information helps Nevada keep the visibility of its strategy low.

Interestingly, Delaware recently attempted to establish a closed-door arbitration program, which would have jeopardized its long-standing information-production benefits.[329] The Third Circuit brought the closed-door arbitration program to a halt,[330] and as of this writing, Delaware has not replaced it with another, leaving its information-production edge intact.

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149 U. PA. L. REV. 1735, 1791 (2001) (Delaware courts facilitate moral sanctions); Shapira, *supra* note 11 (2015) (Delaware courts facilitate reputational sanctions).

[325] *See* Anne Tucker Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 GA. ST. U. L. REV. 477, 520 (2007); Joshua Halen, *Transforming Nevada into the Judicial Delaware of the West: How to Fix Nevada's Business Courts*, 16(1) J. BUS. & SEC. L. 139, 165 (2016).

[326] Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935 (2012).

[327] *Id*. at 967, 981.

[328] *Id*. at 965, n. 84. More accurately, the law-as-source angle actually lends credence to Barzuza's big-picture observation about how Nevada competes. If a state wishes to lure incorporations by reducing the expected sanction for misbehavior, it makes sense for that state to reduce not just the risk of legal sanctions (through liability law), but also the risk of reputational sanctions (through rights to inspect the books and published judicial opinions).

[329] *See* David. W. Brown, *Let Me In: The Right of Access to Business Disputes Conducted in State Courts*, 2015 J. DISP. RESOL. 207, 218 (2015) (describing the intended program and the Third Circuit's ruling that shut it down); Myron T. Steele et al., *Delaware's Closed Door Arbitration: What the Future Holds for Large Business Disputes and How It Will Affect M&A Deals*, 6 J. BUS., ENTREPRENEURSHIP & L. 376 (2013) (describing what could have been).

[330] Del. Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510, 512 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

2. Securities Litigation: the SEC Admissions Policy

In the wake of the 2008 financial crisis, a lively debate emerged over the enforcement practices of the Securities and Exchange Commission (SEC). Judges, policymakers, and academics strongly criticized the SEC's prevalent practice of allowing defendants to get away with paying a fine without admitting that they had done something wrong.[331] I have previously evaluated the information-production aspects of SEC practices, claiming that neither-admit-nor-deny settlements trade money for information: companies pay more and quickly, and in return the SEC limits the release of damning information.[332] Since then the SEC has supposedly changed its ways. Under the leadership of previous Chairman Mary Jo White, the SEC established criteria under which it would require more admissions from defendants going forward.[333] As of this writing, a new debate has emerged regarding whether the SEC's new admissions policy is a success or a ruse.

The SEC touts its new policy as a great success, claiming that the increased number of admissions translates into greater corporate accountability.[334] Two recent empirical studies adopt a more skeptical view.[335] They agree that there has been an uptick in admissions, but question whether it translates into an uptick in accountability.[336] These studies go over the underlying settlements, and suggest that the admissions are largely nominal and the admitters are mostly small fish.[337] The law-as-source angle suggests a different way to measure the SEC policy's impact on accountability, namely, to examine whether it attracted media coverage of the underlying misbehavior. To paraphrase the saying about the tree falling in the forest, if a settlement contains an admission but nobody reads it, does it increase accountability?

### *D. Shoring up Direct Sourcing Channels*

In a paper dealing with the function of law as source, we would be remiss if we did not discuss the most obvious implication, namely, the revamping of the direct sourcing channels. A burgeoning literature has

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[331] *See, e.g.*, SEC v. Citigroup Global Mkts. Inc., F. Supp. 2d 328 (S.D.N.Y. 2011); *Examining the Settlement Practices of U.S. Financial Regulators: Hearing before the Comm. on Fin. Services*, 112th Cong. 2 (2012).

[332] Shapira, *supra* note 11, at 48–56.

[333] *See* Verity Winship & Jennifer K. Robbennolt, *An Empirical Study of Admissions in SEC Settlements*, 60 ARIZONA L. REV. (forthcoming, 2018), manuscript at 7; James B. Stewart, *S.E.C. Has a Message for Firms Not Used to Admitting Guilt*, N.Y. Times (Jun. 21, 2013).

[334] David Rosenfeld, *Admissions in SEC Enforcement Cases: The Revolution That Wasn't*, 103 IOWA L. REV. 113, 116 (2017); Winship & Robbennolt, *id*.

[335] *Id*.

[336] *Id*.

[337] *Id*.

examined the flaws of FOIA and potential remedies.[338] This Article, which has focused more on indirect sourcing channels, can only offer a couple of modest contributions to the FOIA literature. First, the work done here can corroborate the basic premise of the literature, namely, that FOIA is poorly executed.[339] Second, themes from this Article dovetail with David Pozen's deeper argument, namely, that FOIA, even when executed properly, is an inherently problematic tool for promoting accountability.[340] Proposals for remedies should therefore not limit themselves to FOIA, but rather should extend to bolstering other direct sourcing channels, such as whistleblowing laws,[341] or indirect sourcing channels, such as openness of litigation.[342] Relatedly and concretely, this Article suggests that the one FOIA exemption that should be reined if we are to promote accountability is the exemption for law enforcement records.[343]

There is a broader point here. Legal scholars have recently voiced concerns over the mounting attacks on the press and the cries of "fake news."[344] These concerns are slightly misplaced. The real challenge to the effectiveness of media scrutiny does not come from verbal assaults on the press. It rather comes from assaults on public dispute resolution. The under-the-radar maneuvers of the Trump administration described above[345] effectively block the indirect sourcing channels that have traditionally been the lifeline of investigative reporting. When disputes are funneled into private arbitration or not pursued at all, the media's ability to hold the powerful to account is significantly reduced.

## V. THE OTHER SIDE: HOW ACCOUNTABILITY JOURNALISM SHAPES LAW ENFORCEMENT

We have focused thus far on how law enforcement makes investigative reporting more effective. This short Part shifts the focus to the other side: how investigative reporting makes law enforcement more effective. Subsection A explains how the journalistic spotlight makes information more accessible to regulators, or propels regulators to act upon information that regulators already have. Subsection B then argues that the combination

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[338] *See, e.g.*, Kwoka, *supra* note 31; Kwoka, *supra* note 99; Pozen, *supra* note 98; Carroll, *supra* note 30.

[339] This theme resurfaced in multiple interviews. *See infra* Appendix A: Eisinger interview; Graves interview.

[340] Pozen, *supra* note 98.

[341] *Cf.* Shapira & Zingales, *supra* note 24.

[342] Subsection IV.B *supra*.

[343] *See* David E. McCraw, *The 'Freedom From Information' Act: A Look Back at Nader, FOIA, and What Went Wrong*, 126 YALE L.J. F. 232, 239–240 (2016), www.yalelawjournal.com/forum/the-freedom-from-information-act-a-look-back.

[344] *See, e.g.*, RonNell Anderson Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NORTHWESTERN U. L. REV. ONLINE 47 (2017).

[345] *See supra* notes 306-311.

of law enforcement and investigative reporting is akin to a diversified portfolio of accountability mechanisms: law and the media feed off each other because each system enjoys relative advantages. While each system is (very) imperfect, the imperfections are not correlated with each other. To generalize, while the legal system is better at generating new information, the media is often better at processing the information into a big picture and diffusing it. At the same time, Subsection B points out the problematic dynamics that may emerge when the two systems interact.

### *A. Surfacing Information and Resetting the Regulatory Agenda*

On the surface, the law-as-source dynamics described here may seem depressing or even circular. Some may find the dynamics depressing, arguing that if investigative reporters heavily rely on already existing law enforcement actions, then they are not truly doing the work of a watchdog, but merely piggybacking on the work of other watchdogs in society. Others may find the law-as-source argument circular: if investigative reporting relies on already existing law enforcement actions, how can it possibly help law enforcers? Such arguments overstate the efficacy of law enforcement and understate the role of the media. The fact that a lawsuit was filed, or that a regulator is investigating alleged misconduct, does not automatically translate to accountability. As Part IV explained, parties to litigation have private incentives that diverge from the public interest. They will tend to trade money for confidentiality, thereby severally limiting the ability to turn a private dispute into public accountability. When investigative reporters scour court documents, they therefore do not merely piggyback on litigants' efforts. They rather balance the disincentives of litigants to warn non-litigants about dangers.

Journalists also help regulatory enforcement in various ways. In some cases, journalistic investigation brings to the attention of the regulator information of which she was not previously fully aware.[346] An investigative report can surface new information when relying on non-legal sources (notably, human sources), but it can also help the regulator with information that was already produced by the legal system. Deborah Nelson's year-long investigation into how circuses were abusing elephants is a case in point.[347] Nelson's investigation relied on information revealed in a lawsuit filed by an animal-rights NGO. While the NGO lost, the legal battle "daylighted corporate documents that I never could have gotten my hands on," Nelson shared.[348] Unlike the animal-welfare regulator, Nelson

[346] *Cf.* Hamilton, *supra* note 27, at 250 (telling the story of renowned investigative reporter Pat Stith, whose "use of data and CAR allowed him to identify and sometimes quantify what state regulators did not know, what they did know but failed to act upon, and what they neglected to share with potentially affected households").

[347] Deborah Nelson, *The Cruelest Show on Earth*, MOTHER JONES, Nov./Dec. 2011.

[348] *See infra* Appendix A: Nelson interview.

pieced together the puzzle and processed and packaged the circuses' internal documents into a compelling story. Following her story, the regulator stepped in and acted on the information, levying the "largest civil penalty against an exhibitor in the history of the Animal Welfare Act."[349]

A related recurring phenomenon is journalists fleshing out the big-picture implications of a certain policy without generating new information, by using information that regulators already had access to but simply did not act on.[350] In the 2012 Pulitzer-winning project on over-prescription of methadone, for example, the journalists literally put each individual case of death from methadone on a map. Their perspective and visualization revealed a pattern of over-prescription in low-income neighborhoods.[351] Similarly, in the 2011 Pulitzer-winning project on the shaky insurance industry in Florida, the reporter built her own database (based on public records) showing the troubling risk exposures of each insurer. 2008 Pulitzer-winner Maurice Possley described it perfectly: "If they [the regulators] had taken time to put things together – they could have done things differently."[352] Possley submitted a FOIA request for regulatory reports on unsafe cribs. He received a massive document dump, but when his team put the time and effort into sifting through the reports, they located patterns that regulators had failed to notice.

At other times, the problem is not that regulators do not have information, but rather that they are too reluctant to act against, or are even captured by, powerful players.[353] The journalistic spotlight can reset the regulatory agenda, pushing regulators to start prioritizing certain neglected issues.[354] The media resets the regulatory agenda by making the costs of underlying misconduct and regulatory drift more salient to the regulators and, importantly, to the regulators' overseers – the public and Congress. Recall Ida Tarbell's famous project on the Standard Oil Company at the turn of the 20th century. Tarbell relied "to an enormous degree" on legal documents from separate law enforcement actions against Standard Oil, but it was only after her exposé that the attorney general mustered the courage to break the monopoly.[355]

Fully understanding how the media plays an agenda-setting role in regulation will require us to go into the determinants of regulatory capture/drift – a too ambitious effort for the scope of this already too

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[349] *Nelson Details Circus Elephant Investigation* (announcement by the Phillip Merrill College of Journalism, Mar. 2015), https://merrill.umd.edu/2015/03/nelson_circus_elephans/.

[350] *See infra* Appendix A: St. John interview.

[351] *See infra* Appendix A: Boardman interview; Berens interview.

[352] *See infra* Appendix A: Possley interview.

[353] To clarify, accountability journalism can help not just by digging out information that corrupt regulators hide, but also by nudging publicly spirited and well-informed regulators toward doing a better job.

[354] On regulatory agenda-setting *see* Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 865 (2016).

[355] Starkman, *supra* note 3, at 208.

ambitious Article. Suffice it for us to point to political science studies showing that not all regulatory issues are created equal.[356] Importantly, studies show that regulatory enforcement tends to drift out of the public interest in regard to issues of low saliency and high complexity.[357] When done effectively, investigative reporting affects saliency and complexity. It makes the costs of misbehavior obtrusive, thereby increasing their visibility and making them easier to understand even for non-experts. In turn, the change in saliency balances the regulatory drift toward narrow interests and pushes regulators to cater to normally neglected broader, dispersed interests.

### *B. Comparative Advantages and Black Holes*

The main message of this Article is that effective law enforcement and effective media scrutiny complement each other. To illustrate what makes these institutions complement each other, let us recall the Washington Post 1998 story on shootings by Washington police. When the Post's editor explained what makes the story a "classic case of journalism that matters," he gave a formula: "its thorough, air-tight reporting, powerful writing, and compelling presentation."[358] His answer reveals the two components necessary to make journalism that matters: first, the information has to be thorough and airtight. Second, the information has to be packaged powerfully and compellingly. Thus far, this Article has focused on the first component. We emphasized how the legal system helps the media achieve thorough, airtight reporting.

But the legal system cannot help the media with the second component. As we lawyers are painfully aware, legal writing is often not that powerful or compelling. This is where the comparative advantage of media kicks in: journalists are much better equipped to provide powerful writing, compelling presentation, and wide diffusion of information. The legal system produces mountains of information, and the journalist spots the patterns in them. The legal system creates data, and the journalist turns the data into a great story that can reach wider audiences.[359] In other words, interactions between the media and the courts can increase the levels of accountability in society because each institution's flaws are imperfectly

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[356] *See, e.g.*, JAMES Q. WILSON, THE POLITICS OF REGULATION 357–394 (1980) (providing a typology of regulatory issues according to the distribution of costs and benefits); William T. Gormley, Jr., *Regulatory Issue Networks in a Federal System*, 18 POLITY 595 (1986) (providing a typology according to saliency and complexity).

[357] Gormley, *id*. See also PEPPER D. CULPEPPER, QUIET POLITICS AND BUSINESS POWER (2011) (in the context of corporate governance rules); KARTHIK RAMANNA, POLITICAL STANDARDS (2015) (in the context of accounting rules); KAY L. SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 317 (1986) (early empirical studies show saliency to be a key determinant of special-interest influence).

[358] Hamilton, *supra* note 27, at 126.

[359] *See infra* Appendix A: Boardman interview; Green-Barber interview.

correlated with the other's.[360]

At the same time, we should not ignore the black holes: situations where both watchdogs – the media and the courts – jointly fail. As Subsection III.C.1 above illustrated, the more investigative reporters rely on legal sources, the more accountability journalism is prone to underreport issues that the legal system does not solve. Misbehavior that imposes costs that are either widely dispersed or opaque is less likely to be spotlighted in courts *and* in newspapers.[361]

## CONCLUSION

This Article developed a theory of the interactions between the law and the media. Specifically, it focused on the interactions between law enforcement and accountability journalism. The best way to clarify this Article's original contributions is to juxtapose it with the extant literature:

The first contribution concerns the determinants of media effectiveness. Legal scholars are often prone to a nirvana fallacy regarding the media whereby, when we take the role of the media into account, we tend to assume effective media scrutiny. That is, we assume that the media will widely diffuse relevant information about corporate and government misconduct and that the audiences – stakeholders or voters – will act accordingly and discipline the powerful. This Article tries to rid us of such simplifying assumptions by urging us to think about what determines the ability of the media to fulfill its watchdog function.

This is where the second contribution comes in: showing that the legal system is an important determinant of media effectiveness. While most of the law and media literature focuses on how the law affects the media directly, by regulating what can or cannot be said, this Article focuses on how the law affects the media indirectly, by producing information that facilitates accountability journalism.

Among the legal scholars who focus on how the law produces information that sheds light on misconduct by powerful players, most focus on FOIA. The third contribution of this Article is in showing why such focus is misplaced. The evidence collected from interviews, tip sheets, course syllabi, and content analyses suggests that law enforcement actions – litigation or regulatory investigations – often play a more valuable role in generating damning information and holding the powerful to account.

Recognizing the strong links between law enforcement and accountability journalism opens up space for this Article's fourth original

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[360] Shapira, *supra* note 9. *See also* Law, *supra* note 3, at 752 (discussing complementarities between the media and the courts, in the context of how media scrutiny increases the chances that judicial decisions will be obeyed).

[361] This makes the class action waivers discussed above even more alarming, as class actions are a rare tool that allow holding the powerful to account even when the costs imposed on the victims are dispersed.

contribution, namely, reevaluating legal institutions according to how they contribute to information production. The evidence gathered here allows us to revisit oft-principled debates over openness versus secrecy in civil litigation, as well as to understand what is at stake with timely issues such as neither-admit-nor-deny settlements and arbitration clauses with class waivers. At a time when popular and academic discourses are focusing on verbal assaults on the press, this Article suggests that the real battlefield lies elsewhere. Executive and court decisions that increasingly reduce the role of litigation and overly eliminate disputes or push them into private channels will end up hurting the media's ability to hold the powerful to account.

## APPENDIX A: INTERVIEWS

To capture the fuzzy dynamics of how law is used as a source, I conducted in-depth open conversational interviews with veteran journalists. In this type of interview, the researcher introduces a topic in broad strokes, the interviewee talks freely about the interviewee's experience and insights into the topic, and the researcher further probes specific experiences with follow-up questions.[362]

As a way to introduce the topic, I started all interviews with the same research question, namely, "What role do you think that legal sources play in investigative reporting?" I also included in almost every interview some questions about variation across issues and over time, such as "Is it harder as a reporter to hold big government to account than it is to hold big business to account, or vice versa?," and "How have the legal sourcing dynamics you just described changed over time?" When interviewing Pulitzer winners, I asked them specifically, "What role did legal sources play in your [winning project]?" and we went into detail and clarifications.

In compiling the sample of interviewees, I focused on two groups. For the first batch of interviews I approached journalists who served or are currently serving in big-picture-type positions: directors and founders of investigative reporting centers, heads of academic units of investigative reporting, veteran editors, and so on. I made a concerted effort to approach reporters with varied experiences – as reporters and editors, in broadcast and print media, covering the financial market beat and covering criminal cases, and so forth. The second batch of interviewees were winners of the Pulitzer Prize for investigative reporting in 1995–2015. In both groups, roughly two-thirds of the journalists I approached agreed to interview for this project. Beyond these two groups of interviewees, I also engaged in snowball sampling – approaching journalists who were recommended by my earlier interviewees.[363]

Table 1 below details the interviews. Unless noted otherwise, I conducted the interviews by phone.

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[362] *See* Given, *supra* note 5, at 127.

[363] *See generally* Patrick Biernacki & Dan Waldorf, *Snowball Sampling: Problems and Techniques of Chain Referral Sampling*, 10 SOCIO. METH. RES. 141 (1981). I intentionally limited snowball sampling to only a few interviewees, to reduce the risk of overstating my claim. The thinking was that once my (early) interviewees realize that I am looking for insight into how law is used as a source, they will connect me with colleagues who have a soft spot for such sourcing and reporting, and so I will end up interviewing only those who share certain priors.

Table 1: List of Interviews:

| No. | Name | Date | Position |
|---|---|---|---|
| 1 | Berens, Michael | 8/18/17 | 2012 Pulitzer winner |
| 2 | Bergo, Sandy | 8/14/17 | Director of The Fund for Investigative Journalism |
| 3 | Blackledge, Brett | 9/25/17 | 2007 Pulitzer winner |
| 4 | Boardman, David | 8/16/17 | Dean, Klein College of Media and Communication; Pulitzer-winning editor |
| 5 | Bogdanich, Walt | 9/6/17 | 2008 Pulitzer winner |
| 6 | Carter, T. Barton [364] | 8/15/17 | Media law professor at Boston University |
| 7 | Christensen, Kim | 11/20/17 | 1996 Pulitzer winner |
| 8 | Cohen, Sarah | 11/29/17 | 2002 Pulitzer winner |
| 9 | Coll, Steve | 8/31/17 | Dean of Columbia Journalism School; two-time Pulitzer winner |
| 10 | Daillak, Jonathan | 5/5/17 | Executive director of the Loeb awards |
| 11 | Daly, Chris | 9/25/17 | Journalism professor at Boston University |
| 12 | Eisinger, Jesse | 6/6/16 | 2011 Pulitzer winner, 2015 Loeb award winner |
| 13 | Englund, Will | 8/17/17 | 1998 Pulitzer winner |
| 14 | Grandestaff, Lauren | 8/16/17 | Research director at the IRE |
| 15 | Graves, Florence | 11/6/17 | Founding director, the Schuster Institute for Investigative Journalism |
| 16 | Green-Barber, Lindsay | 8/15/17 | Former Media Impact Analyst at the Center for Investigative Reporting |
| 17 | Horvit, Mark | 8/14/17 | Director of the IRE; journalism professor at the University of Missouri |
| 18 | Ilgenfritz, Stefanie | 12/14/17 | 2015 Pulitzer winner |
| 19 | Jaquiss, Nigel | 11/1/17 | 2005 Pulitzer winner |
| 20 | Lehr, Richard (Dick) | 8/16/17 | Communications professor at Boston University |
| 21 | Levy, Clifford[365] | 11/19/17 | 2003 Pulitzer winner |
| 22 | Lewis, Charles | 8/25/17 | Head of the Investigative Reporting Workshop; served on Harvard's Goldsmith award prize committee |
| 23 | Lipinski, Anne Marie | 8/24/17 | Curator of the Nieman Foundation for Journalism at Harvard; former co-chair of the Pulitzer Prize board |
| 24 | Locy, Toni | 8/15/17 | Professor of legal reporting at Washington & Lee university |
| 25 | MacClaren, Selina | 8/31/17 | Legal Fellow at the Reporters Committee |
| 26 | Mahr, Joe [366] | 10/3/17 | 2004 Pulitzer winner |
| 27 | McKim, Jenifer | 8/24/17 | Senior investigator, senior trainer at the New England Center for Investigative Reporting |
| 28 | Mehren, Elizabeth | 8/9/17 | Journalism professor at Boston University |
| 29 | Mendoza, Martha | 9/6/17 | 2000 Pulitzer winner |
| 30 | Nelson, Deborah | 9/6/17 | 1997 Pulitzer winner |
| 31 | Possley, Maurice | 10/6/17 | 2008 Pulitzer winner |

[364] In person.
[365] E-mail correspondence.
[366] E-mail correspondence.

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|---|---|---|---|
| 32 | Saul, Stephanie[367] | 10/18/17 | 1995 Pulitzer winner |
| 33 | Siconolfi, Michael | 12/14/17 | 2015 Pulitzer winner |
| 34 | Smith, Jeffrey | 9/8/17 | 2006 Pulitzer winner |
| 35 | St. John, Paige | 10/3/17 | 2011 Pulitzer winner |
| 36 | Starkman, Dean | 2/9/16 | 1994 Pulitzer winner |
| 37 | Tulsky, Rick | 8/24/17 | 1987 Pulitzer winner; former president of the IRE |
| 38 | Ureneck, Lou | 8/8/17 | Journalism professor at Boston University |
| 39 | Weinberg, Steve | 8/24/17 | Professor of journalism at the Missouri School of Journalism; former director of the IRE |

[367] Email correspondence.

## APPENDIX B: CONTENT ANALYSIS

*Sample*: The reason for focusing on Pulitzers and IRE medals is twofold: relevance and convenience. Pulitzers, considered the most prestigious journalistic award, are much respected by the general public. IRE medals, the highest award bestowed by the Investigative Reporters and Editors Association, are much respected by investigative reporters themselves. Sampling such awards gives us a window into standard-setting, impactful investigative reporting. Further, both awards make all relevant parts of a winning project publicly available online, and in many cases contain the entry letter submitted by the newspaper, thereby making it more convenient to figure out how the story came about.

*Identifying sources*: To identify the sources of Pulitzer-winning stories we read every entry for each project. A few entries made our task straightforward, explicitly mentioning from the outset how they came up with the story. Most entries, however, drop occasional, sometimes implicit references to sources throughout the project. After all, when journalists write a story, they normally do not start with deep confessions of where they found the information, but rather focus on the story itself.[368] Therefore, locating the sources necessitated careful reading of all the entries. In most cases, we found indications of sourcing incidentally: there would be a lengthy paragraph detailing who did what to whom, which ended in a "the depositions show" phrase. Identifying the sources of IRE-winning stories, by contrast, was straightforward: the IRE database contains not just the finished products (the investigative reports), but also the prize applications forms, where the applicants explicitly detail how their story came about.

We then had to pinpoint the sources that would be considered "legal documents," as opposed to any other public record. To be sure, the distinction is murky. It can best be illustrated by the famous Watergate story. In popular culture, Watergate is associated with human sources – tips from "deep throat" allowed Woodward and Bernstein to hold the Nixon administration to account, or so the story goes. Yet the investigative project actually started when a journalist that covered the police beat went over logs of overnight arrests, and stumbled upon a suspicion that started the digging.[369] For our purposes, going over police logs to find leads does *not* count as relying on a legal source. What happened later in the story, when Woodward and Bernstein used documents subpoenaed by law enforcement officers to show how the break-in was connected to higher-ups, does.

*Weighting sources*: Assigning weights to legal sources' contributions to a project is complicated by the fact that most winning projects have multiple parts, covering different angles of the topic. Each part can rely on varying mixes of sources. Part 1 of a project may rest on information attained by FOIA requests, while parts 2–4 may be based on interviews, and part 5 may

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[368] Lehr interview.

[369] Brenowitz, *supra* note 298, at 697.

draw from depositions. We judged the relative weight of legal sources based on each part's contribution to the overall story and its impact. In most cases, the judgment was made easier by the fact that the Pulitzer committee already narrows down the articles that are considered a part of the winning projects – listing only the most impactful ones. To illustrate, think back to the Spotlight team project on sexual abuse in the Catholic Church. The Boston Globe wrote hundreds of separate articles on the topic, yet "only" twenty-three articles (supposedly, the most impactful) were listed as part of the prize-worthy project. If the Pulitzer committee identified these parts as essential to the project, we could usually infer that indications of strong reliance on legal sources there mean that legal sources played a strong role in the project as a whole.

*Reliability*: My analysis of prizewinning investigative projects rested on human-based content analysis. Human analysis is generally considered to increase the validity of analysis, but to decrease the reliability (relative to computer-based content analysis).[370] In our case of having to code legal sources' roles, three factors combined to mitigate potential problems with reliability. First, unlike in projects with larger samples where coding is assigned to research assistants, in our smaller, exploratory-style sample I personally coded all entries. Second, I was not the only coder – at least one research assistant separately examined each prizewinning project, and the agreement among us (the intercoder reliability) was relatively high.[371] Third, with respect to Pulitzers, I managed to talk with the prizewinning journalist in 17 out of the 25 sampled projects, and directly asked them about the role legal sources played in their reports. Asking the journalists increased the reliability of the specific 17 projects and, more generally, put our coding to the test. We coded all stories before talking to the prizewinning reporters, and so when their answers confirmed that our coding was accurate in 13 of the 17 stories, and actually slightly understated the role of legal sources in 3 more of the stories, it provided another reason to believe that we did not overstate the role of law as source.[372]

Table 2 below details the Pulitzer-winning projects, and our coding of them. Table 3 follows, with details on the coding of the IRE medals.

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[370] *See generally* Su et al., *supra* note 215.

[371] Our intercoder reliability for Pulitzer stories was 0.82. Our intercoder reliability for IRE stories was 0.85. On the challenge in reaching high levels of agreement among coders. *Id*. at 108.

[372] Saul interview; Mahr interview; Smith interview; St. John interview.

Table 2: 1995–2015 Pulitzer winners for Investigative Reporting

| No. | Year | Title | Topic | Reporter/outlet | Legal Sources' Role | Legal Sources' Type |
|---|---|---|---|---|---|---|
| 1 | 2015A | Courting Favor | How lobbyists influence congressmen and state attorneys general | Eric Lipton / New York Times | Medium | FOIA strong; litigation weak |
| 2 | 2015B | Medicare Unmasked | How health care providers are milking Medicare money | The Wall Street Journal Staff | Strong-medium | FOIA strong; reg. investigations strong (parts) |
| 3 | 2014 | Series on black lung benefit cases of coal miners | How professionals (lawyers, doctors) help the industry deny benefits from coal miners stricken with black lung disease | Chris Hamby of The Center for Public Integrity | Strong | Litigation |
| 4 | 2013 | Wal-Mart Bribery Abroad Series | Wal-Mart's widespread bribery efforts in Mexico | David Barstow & Alejandra Xanic von Bertrab / New York Times | Nonexistent | - |
| 5 | 2012A | NYPD Intelligence Operations on Muslim communities series | NYPD's questionable domestic intelligence gathering practices (clandestine spying program) | Matt Apuzzo et al. /AP | Medium | Litigation; reg. investigations |

| | | | | | | |
|---|---|---|---|---|---|---|
| 6 | 2012B | Methadone and the Politics of Pain | How vulnerable patients were moved from safer pain-control medication to a cheaper, more dangerous alternative | Michael J. Berens & Ken Armstrong / Seattle Times | Medium-low | Litigation; reg. investigations |
| 7 | 2011 | Florida Insurance Market Investigation series | Fleshing out weaknesses (unreliable insurers) in the property-insurance system in Florida | Paige St. John / Sarasota Herald-Tribune | Strong | Reg. investigations strong; litigation (parts) |
| 8 | 2010A | Tainted Justice | Exposing a rogue police narcotics squad | Barbara Laker & Wendy Ruderman / Philadelphia Daily News | Medium | Litigation |
| 9 | 2010B | The Deadly Choices at Memorial | The urgent life-and-death decisions made by one hospital's exhausted doctors when they were cut off by the floodwaters of Hurricane Katrina | Sheri Fink / ProPublica | Strong | Reg. investigations; litigation |
| 10 | 2009 | Message Machine series | How the Pentagon uses retired generals to influence public opinion (and how many of these generals have undisclosed ties to companies that benefited from policies they defended) | David Barstow / New York Times | Strong | FOIA |
| 11 | 2008A | Faulty Governmental Regulation of Toys, Car Seats and Cribs | Lax regulation of baby products | Staff of Chicago Tribune | Strong | Litigation; reg. investigations; FOIA |

| | | | | | | |
|---|---|---|---|---|---|---|
| 12 | 2008B | Toxic Pipeline series | Toxic ingredients in products imported from China | Walt Bogdanich & Jake Hooker / New York Times | Strong | Reg. investigations strong; litigation (parts) |
| 13 | 2007 | Two-year College Corruption series | Cronyism and corruption in the state's college system | Brett Blackledge / The Birmingham (AL) News | Medium-weak | Investigations, litigation (in later parts) |
| 14 | 2006 | Investigating Abramoff: Special Report | The story of lobbyist Jack Abramoff, which exposed widespread congressional corruption | Susan Schmidt et al. / Washington Post | Strong | FOIA strong; reg. investigations medium |
| 15 | 2005 | The 30-year Secret | Exposing a former governor's long-concealed sexual misconduct with a 14-year-old girl | Nigel Jaquiss / Willamette Week, Portland, Oregon | Strong | Litigation |
| 16 | 2004 | Special: Tiger Force series | Atrocities by an elite U.S. Army platoon during the Vietnam War | Michael D. Sallah et al. / The Blade, Toledo, OH | Medium-weak | FOIA medium/weak; litigation weak |
| 17 | 2003 | Broken Homes | Abuse of mentally ill adults in state-regulated caring homes | Clifford J. Levy / New York Times | Medium | Litigation; reg. investigations |
| 18 | 2002 | The District's Lost Children | The neglect and death of children placed in protective care (and the District's role in it) | Sari Horwitz et al. / Washington Post | Strong | FOIA; litigation |
| 19 | 2001 | Seven Deadly Drugs | How regulatory reforms have reduced FDA's effectiveness and led to approval of unsafe prescription drugs | David Willman / Los Angeles Times | Medium | FOIA strong; litigation weak |
| 20 | 2000 | The Bridge at No Gun Ri | Killing of civilians during the Korean War | Sang-Hun Choe et al/AP | Nonexistent | - |
| 21 | 1999 | Pervasive Voter Fraud in a City Mayoral Election | Voter fraud in a Miami election | Staff of The Miami Herald | Medium-weak | Reg. Investigations |
| 22 | 1998 | Series on The International Ship-breaking | How the ship-breaking industry cuts corners in ways that endanger | Gary Cohn & Will Englund of The Baltimore Sun | Strong-medium | Litigation strong; reg. investigations |

| | | | | | | |
|---|---|---|---|---|---|---|
| | | Industry | workers' safety and the environment | | | (parts) |
| 23 | 1997 | Tribal Housing: From Deregulation to Disgrace | Cronyism in the federally sponsored housing program for Native Americans | Eric Nalder et al. / Seattle Times | Strong | FOIA strong; reg. investigations medium |
| 24 | 1996 | Baby Born after Doctor Took Eggs without Consent | Fraudulent and unethical fertility practices at a leading research university hospital | Staff of The Orange County Register, Santa Ana, CA | Medium-weak | Litigation; reg. investigations; FOIA |
| 25 | 1995 | For Some LI Cops… Lucrative Disability | Abuse of disability pension funds by cops | Brian Donovan & Stephanie Saul / Newsday | Strong | Litigation strong; FOIA weak |

Table 3: IRE Medal winners for 1995–2015:[373]

| No. | Year | Title | Topic | Reporter / Outlet | Legal Sources' Role | Legal Sources' Type |
|---|---|---|---|---|---|---|
| 1 | 2015 | Insult to Injury: America's Vanishing Worker Protections | How states dismantled their workers' compensation programs, ultimately sticking taxpayers with the growing bill for injured workers | Michael Grabell & Howard Berkes / ProPublica | Strong | Litigation; FOIA |
| 2 | 2013 | The NSA Files | How communications between US citizens are collected by surveillance programs | Glenn Greenwald & Ewen MacAskill / Guardian US | Medium | Litigation |
| 3 | 2011 | Assault on Learning | How school violence goes under-reported, and how government intervention programs amount to little more than paper-shuffling | Susan Snyder & Kristen A. Graham / Philadelphia Inquirer | Weak | Litigation (parts); FOIA |

[373] Excluding redundancies with Pulitzers: projects that won both prizes.

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| 4 | 2010 | Breach of Faith | Local government corruption in Bell, CA | Jeff Gottlieb & Ruben Vives / Los Angeles Times | Strong | FOIA |
| 5 | 2009 | Toxic Waters | The flaws in Clean Water Act regulation | Charles Duhigg & Matthew Bloch / New York Times | Strong | FOIA |
| 6 | 2008 A | Kwame Kilpatrick: A Mayor in Crisis | Corruption at the municipal level | Jim Schaefer & M. L. Elrick / Detroit Free Press | Strong | Litigation; FOIA |
| 7 | 2008 B | Guantanamo: Beyond the Law | Abuse and faulty imprisonment of Guantanamo bay detainees | Tom Lasseter & Matthew Schofield / McClatchy Washington Bureau | Strong | Litigation; reg. Investigations; FOIA |
| 8 | 2007 A | The Other Walter Reed | Mistreatment and neglect of America's war-wounded at Walter Reed Army Medical Center | Dana Priest & Anne Hull / Washington Post | Nonexistent | - |
| 9 | 2006 A | Beyond Sago: Coal Mine Safety in America | How coal companies' misconduct and lax regulation contributed to avoidable coal miners' deaths | Ken Ward, Jr. / Charleston Gazette | Strong | FOIA |
| 10 | 2006 B | A Tank of Gas, A World of Trouble | Tracking the supply chain of gasoline | Paul Salopek / Chicago Tribune | Nonexistent | - |
| 11 | 2005 A | The High Price of Homeland Security | How security systems contracts have run amok in the wake of a scare to prevent terrorist attacks | Scott Higham & Robert O'Harrow, Jr. / Washington Post | Weak-nonexistent | FOIA; reg. Investigations weak |
| 12 | 2005 B | Toxic Legacy | Pollution by Ford Motors | Jan Barry & Mary Jo Layton / The Record N.J. | Strong | Litigation; reg. Investigations; FOIA |

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| 13 | 2004 A | Death on the Tracks: How Railroads Sidestep Blame | The railroad industry's shirking of responsibility for fatal accidents through destroying evidence and neglecting to report accidents | Walt Bogdanich / New York Times | Strong-medium | Reg. Investigations; FOIA |
| 14 | 2004 B | Web of Deceit: The Fall of West Virginia House Education Committee Chairman Jerry Mezzatesta | Corruption, misconduct, and cover-up by a long-time powerful state legislator | Eric Eyre / Charleston Gazette | Strong-medium | Reg. Investigations; FOIA |
| 15 | 2003 A | Big Green | Unethical and illegal practices at the world's largest environmental group | Joe Stephens & David B. Ottaway / Washington Post | Weak | Litigation |
| 16 | 2002 | Crisis in the Catholic Church | Widespread abuse of minors by Catholic priests and the church's cover up efforts | Walter V. Robinson & Matt Carroll / Boston Globe | Strong | Litigation |
| 17 | 2000 | The Body Brokers | How private entities illegally profit from organ donations | Mark Katches & William Heisel / Orange County Register | Medium-weak | Litigation; FOIA |
| 18 | 1999 A | Invisible Lives: D.C.'s Troubled System for the Retarded | Cruelty, sexual assaults, and deaths in a multi-billion-dollar state program for the retarded | Katherine Boo / Washington Post | Strong-medium | Litigation; reg. Investigations; FOIA |
| 19 | 1999 B | Deadly Alliance | Workers' safety issues in beryllium manufacturing, fueled by the U.S. military's demand for the metal | Sam Roe / Toledo Blade | Strong | Litigation; FOIA |
| 20 | 1998 | Rezulin: A Billion-Dollar Killer | Regulatory failures in ignoring warnings and approving a dangerous diabetes pill | David Willman / Los Angeles Times | Medium | Reg. Investigations; FOIA |
| 21 | 1996 A | And Justice for Some | Mishandling of homicide investigations by L.A. police | Fredric N. Tulsky & Ted Rohrlich / Los Angeles Times | Strong | Litigation; reg. Investigations; FOIA |
| 22 | 1996 B | Money from Asia: The Democrats' | How the Democratic National Committee solicited improper donations | Alan C. Miller & Glenn F. Bunting / Los Angeles | Strong-medium | Litigation |

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| | | Controversial Campaign Contributions | from foreign-linked corporations and individuals | Times | | |
| 23 | 1995 B | Military Secrets | How the U.S. armed forces allowed accused sex offenders to escape prosecution or escape imprisonment after being convicted | Russell Carollo & Jeff Nesmith / Dayton Daily News | Strong | Litigation; reg. Investigations |