

Law as Source: How the Legal System Facilitates Investigative Journalism

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Legal scholars have long recognized that the media plays a key role in assuring the proper functioning of political and business markets. Yet we have understudied the role of law in assuring effective media scrutiny. This Article develops a theory of law as source. The basic premise is that the law not only regulates what the media can or cannot say, but also facilitates media scrutiny 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 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. I analyze the content of projects that won investigative reporting prizes in the past two decades; interview forty veteran reporters; scour a reporters-only database of tip sheets and how-to manuals; go over

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syllabi of investigative reporting courses; and synthesize insights from the communication science and economics of information literatures. 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 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 Supreme Court decisions.

INTRODUCTION.....	155
I. BACKGROUND: THE PROMISE AND PITFALLS OF ACCOUNTABILITY JOURNALISM	159
A. <i>What Accountability Journalism Is</i>	159
B. <i>How Valuable Effective Accountability Journalism Can Be</i>	161
C. <i>What Determines the Effectiveness of Accountability Journalism</i>	164
II. THEORY: WHY LAW IS A VALUABLE SOURCE.....	167
A. <i>Where Do Legal Sources Come from?</i>	168
1. Direct Sourcing	168
2. Indirect Sourcing.....	171
B. <i>What Makes Legal Sources Valuable?</i>	173
C. <i>How Are Legal Sources Used?</i>	177
III. EVIDENCE: JUST HOW IMPORTANT OF A SOURCE LAW REALLY IS.....	180
A. <i>Findings from Tip Sheets, Course Syllabi, and Interviews</i>	181
B. <i>Findings from Content Analysis of Prizewinning Investigative Reports</i>	186
1. Methodology	186
2. Findings.....	189
C. <i>Variation: Where Is Legal Sourcing More/Less Likely?</i>	192
1. Victims Without Recourse	192
2. Business Accountability	194
D. <i>The Other Side: How Accountability Journalism Shapes Law Enforcement</i>	197

LAW AS SOURCE

IV. IMPLICATIONS 199
 A. *A More Cautious Approach to Scaling Back Legal Intervention*... 200
 B. *The Case Against Secrecy*..... 201
 1. Real-Life Implications of Secrecy 201
 2. Disentangling the Issues: Secret Settlements, Protective
 Orders and Arbitration Clauses 203
 C. *How to Solve the Information Underproduction Problem?*..... 210

CONCLUSION 212

APPENDIX A: INTERVIEWS 213
 Table 1: List of Interviews..... 214

APPENDIX B: CONTENT ANALYSIS..... 216
 Table 2: 1995–2015 Pulitzer winners for Investigative Reporting.... 218

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 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.

1. SPOTLIGHT (Participant Media 2015).
2. See TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE (2008) (noting, in a book-length account, how litigation against individual priests and the Church played a key role in holding these players accountable).

This Article is the first to 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. To illustrate, my content analysis of Pulitzer Prize winners

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3. See, e.g., DEAN STARKMAN, *THE WATCHDOG THAT DID NOT BARK* 121 (2014); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 751 n.9 (2009); Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2443-44 (2014).
 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, *supra* note 3, 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. 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. For a list of interviews and details about the methodology, see Appendix A.
 7. For a summary of the content analysis methodology and findings, see Appendix B.

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. 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 valuable sources for journalists. 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 about this public good is as increasing the efficiency of 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

8. See Part III, *infra*.

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

10. See *id.* at 1213–50.

11. See Roy Shapira, *A Reputational Theory of Corporate Law*, 26 STAN. L. & POL'Y REV. 1, 10 (2015). I elaborate on reputation markets and how the legal system can help make them function better in ROY SHAPIRA, *LAW AND REPUTATION* (forthcoming 2019).

the third set of contributions of this Article enters the picture. At a basic level, the law-as-source framework calls for a more cautious approach to scaling back 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 secret settlements, protective orders, and so on. In the process, we can rebut 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. An especially timely issue that the law-as-source framework sheds light on is the proliferation of one-sided arbitration clauses that effectively waive class actions.¹⁴ As this Article reveals, such arbitration clauses affect not just justice and efficiency from the point of view of given parties, but also the effectiveness of accountability journalism.¹⁵

The Article proceeds in four 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

12. See *infra* Subsection IV.B.1.

13. See *infra* Subsection IV.B.2.

14. Recent Supreme Court decisions regarding such mandatory clauses are discussed *infra* note 282 and the accompanying text. For recent Trump administration decisions protecting such clauses, see *infra* note 279 and the accompanying text.

15. I develop the mandatory-arbitration implication at length in Roy Shapira, *Mandatory Arbitration and the Market for Reputation*, 99 B.U. L. REV. (forthcoming 2019).

regulatory investigations. Part IV sketches policy implications. I then conclude.

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. Section A delineates the scope of our inquiry and clarifies the terminology of accountability journalism. Section B discusses the potential social benefits that effective media scrutiny brings. Section C details the various factors that limit the effectiveness of media scrutiny in practice. Specifically, 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 traditional media outlets, mainly 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

16. See Alexander Dyck & Luigi Zingales, *The Corporate Governance Role of the Media*, in *THE RIGHT TO TELL: THE ROLE OF MASS MEDIA IN ECONOMIC DEVELOPMENT* 107 (World Bank Inst. ed., 2002); Stuart L. Gillan, *Recent Developments in Corporate Governance: An Overview*, 12 J. CORP. FIN. 381, 395 (2006); Wendy Wagner, *When All Else Fails: Regulating Risky Products through Tort Litigation*, 95 GEO. L.J. 693, 695 (2007).

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

18. *Id.*

19. *Id.*

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 most pertinent to 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 other institutions.²² Various fundamental systems of control 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

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 L. AUCCOIN, *THE EVOLUTION OF AMERICAN INVESTIGATIVE JOURNALISM* 88–89 (2006).

21. *See supra* notes 3–4.

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, *Is Pollution Value-Maximizing? The DuPont Case* 20-29 (Nat'l Bureau of Econ. Research, Working Paper No. 23866, 2017), <http://www.nber.org/papers/w23866> [<https://perma.cc/VUD9-8NDY>].

25. *Id.*

26. *See* Law, *supra* note 3, at 751 (observing that the courts' ability to affect change in government behavior depends on media coverage of judicial decisions); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV.

Although other media sources produce accountability journalism, this Article focuses on the printed press. However, many of the principles described here apply to radio and television as well.²⁷ I also do not elaborate on social media or crowdfunding journalism. While social media has radically changed many aspects of media work,²⁸ its relevance to accountability journalism is limited. Studies show that, at least in their current state, these new media mostly engage in disseminating, rather than generating, information.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

1811 (2001) (arguing that media coverage is an essential ingredient for shaming of companies and businessmen).

27. See, e.g., 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); RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 560 n.7 (2011); see also Table 1: List of Interviews, Telephone Interview with Sandy Bergo, Director, The Fund for Investigative Journalism (Aug. 14, 2017). Throughout this Article, I refer to interviews conducted with veteran reporters. Hereinafter I refer only to the interviewee's last name, but there are more details in Table 1.

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

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

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

31. See Carroll, *supra* note 30, at 196–200 (compiling references); West, *supra* note 3, at 2445, n. 63 (compiling quotes from case law); see also Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1366 n.18 (2016) (detailing the origin of the "Fourth Estate" moniker).

32. HAMILTON, *supra* note 27.

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 \$70 million 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 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

33. See Jeff Linn et al., *D.C. Police Lead Nation in Shootings: Lack of Training, Supervision Implicated as Key Factors*, WASH. POST (Nov. 15, 1998), http://www.washingtonpost.com/wp-srv/local/longterm/dcpolice/deadly_force/police1page1.htm [<https://perma.cc/2LK6-LM3D>].

34. HAMILTON, *supra* note 27, at 127-28.

35. See Alexander Dyck et al., *Media versus Special Interests*, 56 J. L. & ECON. 521 (2013) (noting that muckraking journalism in the early twentieth century affected voting patterns); Matthew Gentzkow et al., *The Effect of Newspaper Entry and Exit on Electoral Politics*, 101 AM. ECON. REV. 2980 (2011) (finding that more competition in the newspaper market leads to more citizen participation in politics); David Strömberg & James M. Snyder, Jr., *The Media’s Influence on Public Policy Decisions*, in INFORMATION AND PUBLIC CHOICE: FROM MEDIA MARKETS TO POLICY MAKING 17 (Roumeen Islam ed., 2008) (observing that in areas with heavier media coverage, citizens are more informed about their elected officials).

36. See, e.g., James M. Snyder, Jr. & David Strömberg, *Press Coverage and Political Accountability*, 118 J. POL. ECON. 355 (2010) (finding that politicians living in areas with less press coverage are less likely to be responsive to their constituents).

37. See, e.g., Jennifer R. Joe et al., *Managers’ and Investors’ Responses to Media Exposure of Board Ineffectiveness*, 44 J. FIN. & QUANTITATIVE ANALYSIS 579 (2009) (reporting that 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) (finding that media

LAW AS SOURCE

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. With late night shows, for example, 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 when done effectively, media scrutiny dramatically increases the chances that citizens/stakeholders will become informed about 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

coverage of shareholder activism in controlled companies increases the likelihood of accepting the advocated change).

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

39. See, e.g., Alexander Dyck et al., *The Corporate Governance Role of the Media: Evidence from Russia*, 63 J. FIN. 1093, 1100 (2008).

40. See HAMILTON, *supra* note 27, at 315.

41. See Brian Caplan, *Rational Ignorance*, in 2 THE ENCYCLOPEDIA OF PUBLIC CHOICE 468 (Charles K. Rowley & Friedrich Schneider eds., 2004).

42. See ROBERT C. CLARK, CORPORATE LAW 390–391 (9th ed. 1986).

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

44. See Michael W. Wagner, *Review: Media Concentration and Democracy: Why Ownership Matters*, 7 PERSP. ON POL. 185, 187 (2009).

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

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

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. 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 Section 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. For example, the media suffers from dependence on advertisers.⁴⁹ A profit-minded media firm will think twice before producing biting watchdog-type

47. See HAMILTON, *supra* note 27.

48. Mary Walton, *Investigative Shortfall*, AM. JOURNALISM REV. (Sept. 2010), <http://ajrarchive.org/article.asp?id=4904> [<https://perma.cc/BY8B-V6KX>].

49. See Jonathan Reuter & Eric Zitzewitz, *Do Ads Influence Editors? Advertising and Bias in the Financial Media*, 121 Q.J. ECON. 197, 225 (2006) (noting that 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) (reporting that media outlets bias their scrutiny of government as a function of government advertising); see also MICHAEL SCHUDSON, *THE SOCIOLOGY OF NEWS* 117 (2003); Jesse Holcomb & Amy Mitchell, *Revenue Sources: A Heavy Dependence on Advertising*, PEW RES. CTR. (Mar. 26, 2014), <http://www.journalism.org/2014/03/26/revenue-sources-a-heavy-dependence-on-advertising> [<https://perma.cc/2ZUB-5Q4S>].

reporting on big advertisers, so as not to risk losing much-needed advertising revenues.⁵⁰ Other compromising factors include journalists' own shortcomings,⁵¹ or their need to cater to their audiences' biases.⁵²

Of particular interest to our topic is the media's *dependence on sources*.⁵³ To bring stories about the inner workings of large businesses or government agencies, journalists frequently rely on insiders in businesses/government.⁵⁴ Yet these insiders have little incentives to provide damning information about breakdowns in their own institutions. And producing watchdog-type reporting on those who are who your main sources is akin to burning a bridge.⁵⁵ Deep-dive investigative projects are not being handed to journalists on a plate. Media outlets must commit significant resources to investigate in the face of likely opposition by the subjects of investigation. Yet in the past two decades, the resources of the newspaper industry have been dwindling.⁵⁶ Advertising revenues have

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50. SCHUDSON, *supra* note 49, at 125 (citing a survey of television news directors in which over half of the respondents admitted that advertisers pressured them to kill negative stories or put a positive spin on them).
51. *See, e.g.*, Damian Tambini, *What Are Financial Journalists For?*, 11 JOURNALISM STUD. 158, 159 (2010) (noting that journalists often have too little experience and expertise to be able to report critically on complex topics).
52. *See* Stefano DellaVigna & Matthew Gentzkow, *Persuasion: Empirical Evidence*, 2 ANN. REV. ECON. 643, 659–60 (2010).
53. Dyck & Zingales, *supra* note 46, at 84.
54. *See, e.g.*, Lucig H. Danielian & Benjamin I. Page, *The Heavenly Chorus: Interest Group Voices on TV News*, 38 AM. J. POL. SCI. 1056, 1063–66 (1994) (finding that interest groups and government sources account for 65–85% of sources on political coverage in TV).
55. *See, e.g.*, Dean Starkman, *Power Problem*, COLUM. JOURNALISM REV. (2009), http://archives.cjr.org/cover_story/power_problem.php [<https://perma.cc/K4VW-TMTT>]. For evidence on how reliance on sources slants media coverage, see HAMILTON, *supra* note 27, at 142–44 (relying on memoirs of investigative reporters) and Dyck & Zingales, *supra* note 46, at 83 (presenting evidence based on Harvard Business School case studies).
56. House of Lords' Communication Committee Report, *The Future of Investigative Journalism* § 29 (2012), <http://publications.parliament.uk/pa/ld201012/ldselect/ldcomuni/256/25605.htm> [<https://perma.cc/9SK7-T4HP>] [hereinafter House of Lords Report] (“Investigative reporting, which can be expensive, litigious, and politically fraught, has often been one of the first areas of journalism to feel the squeeze.”); *id.* at § 47.

fallen dramatically.⁵⁷ Newspapers have cut costs by shrinking their newsrooms: 40% of newspaper jobs have disappeared over a decade.⁵⁸ Shrinking newspaper jobs and budgets has hit accountability journalism the hardest.⁵⁹ The reason is simple: accountability journalism is the costliest form of journalism.⁶⁰ It takes months of quality human labor to produce, in an age when the media competes in speed.⁶¹ And it comes with risks of legal and political fights, in an age when the media cannot finance lengthy battles.⁶²

Dwindling resources 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.⁶³ 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.⁶⁴

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.⁶⁵ Strained newspapers are now producing fewer "enterprise" stories, that is, stories that originate in independent work done by the journalist.⁶⁶ They instead rely more heavily on "information subsidies," that is, stories provided to newsrooms by

57. See Ryan Chittum, *Newspaper Industry Ad Revenue at 1965 Levels*, COLUM. JOURNALISM REV. (Aug. 19, 2009), http://archives.cjr.org/the_audit/newspaper_industry_ad_revenue.php [<https://perma.cc/TAU4-NT2P>].

58. See Mark Jurkowitz, *The Losses in Legacy*, PEW RES. CTR. (Mar. 26, 2014), <http://www.journalism.org/2014/03/26/the-losses-in-legacy> [<http://perma.cc/EEG2-7C53>].

59. See Walton, *supra* note 48.

60. See, e.g., Carroll, *supra* note 30, at 203.

61. Susanne Fengler & Stephen Ruß-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).

62. See House of Lords Report, *supra* note 56, at § 29.

63. See Carroll, *supra* note 30, at 205; HAMILTON, *supra* note 27, at 16.

64. See, e.g., Jones, *supra* note 27, at 594–96. This theme was raised by several of my interviewees independently. See *infra* Table 1, Lipinsky interview; Graves interview; Carter interview; Mehren interview.

65. See, e.g., STARKMAN, *supra* note 3, at ch. 5.

66. See SCHUDSON, *supra* note 49, at 137 (defining "enterprise" work as one that emanates from the journalist's initiative).

LAW AS SOURCE

insiders, public relations departments, think tanks, NGOs, and the like.⁶⁷ When an agent of a celebrity feeds you gossipy stories about the celebrity, 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.⁶⁸ By contrast, digging through boxes of documents is labor-intensive and requires resources. In other words, 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.⁶⁹

Yet in reality, journalists are rarely left to their own resources. They can rely on subsidies from the state. Not the monetary subsidies as in public broadcasting,⁷⁰ 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

Part I started with Hamilton's analysis of the 1998 *Washington Post* story on shootings by police officers, which brought net social benefits of \$70 million.⁷¹ This Part asks how investigative stories like the *Post's* 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.⁷² Without such court documents, the *Post's* investigation could probably not have made a \$70 million-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.

67. See OSCAR H. GANDY, JR., *BEYOND AGENDA SETTING: INFORMATION SUBSIDIES AND PUBLIC POLICY* (1982) (coining the "information subsidies" term).

68. HAMILTON, *supra* note 27, at 16.

69. 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).

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

71. See Linn et al., *supra* note 33.

72. HAMILTON, *supra* note 27, at 125.

This Part explores how and why journalists rely on information coming from the legal system. Section A categorizes the different types of legal sources. Section B identifies the attributes that make information coming from the legal system especially valuable for investigative reporters. Section 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 understand how 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).⁷³ Congress explicitly envisioned FOIA as contributing to the ability of journalists to hold government players to account.⁷⁴ Indeed, over the years many impactful investigative projects have rested on FOIA and state-level freedom of information (FOI) laws.⁷⁵ Another classic example is *mandatory disclosure requirements*. Disclosure requirements incentivize corporate decision-makers to publicly reveal information about their own misconduct.⁷⁶ Yet

73. 5 U.S.C. § 552 (2018). *See* 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.").

74. In fact, the media was a lobbying force behind the passing of FOIA. *See* Jones, *supra* note 27, at 582.

75. *See* HAMILTON, *supra* note 27, at 153–160 (15% of stories submitted for investigative reporting prizes relied on FOI requests. Interestingly, these stories were more impactful than ones that did not); Kwoka, *supra* note 31, at 1378 (compiling examples).

76. *See, e.g.*, Troy A. Paredes, *Statement at Open Meeting to Propose Amendments Regarding Facilitating Shareholder Director Nominations*, SEC. & EXCH. COMM'N (May 20, 2009), <http://www.sec.gov/news/speech/2009/spch052009tap.htm> [<https://perma.cc/DM4F-2X3K>]. Indeed, investigative

LAW AS SOURCE

another example 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.⁷⁷ 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.⁷⁸

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. Academics and practitioners agree that the implementation of FOIA is dysfunctional, fraught with delays and denials.⁷⁹ As a result, many journalists give up on using FOIA at the outset.⁸⁰ While the government gets bombarded with FOIA requests, journalists make up only a tiny fraction of FOIA users.⁸¹ Disclosure laws, similarly, look good on paper but suffer from enforcement issues.⁸² Pertinently, the useful information—damning information about powerful

reporters' tip sheets and course syllabi routinely advise a reporter digging into the conduct of public companies to start by looking at companies' SEC filings. *See, e.g.*, Jaimi Dowdell, *Backgrounding People and Businesses on the Web*, (Investigative Rep. & Editors (IRE), Tipsheet No. 3358, 2010) (on file with author); Mark Skertic, *Corporate Documents*, (IRE, Tipsheet No. 2386, 2007) (on file with author).

77. *See, e.g.*, 31 U.S.C. § 3730(d) (2018). 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 LAB. (2016), <http://webapps.dol.gov/elaws/elg/whistle.htm> [<https://perma.cc/47PU-BZ> TM].
78. *See* Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2214 (2010) (providing evidence that whistleblowing is a substantial source of breaking bad news).
79. *See, e.g.*, Carroll, *supra* note 30, at 195, 211–15 (noting the consensus).
80. David Cuillier, *Pressed for Time: U.S. Journalists' Use of Public Records During Economic Crisis 13-16* (May 2011) (unpublished manuscript) (on file with author) (presenting evidence from a survey of 442 journalists).
81. David Pozen, *Freedom of Information beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1103 (2017).
82. *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 81, at 1108 (on the failure of affirmative disclosure to shape government behavior). For studies criticizing whistleblowing laws, see *id.* at 1109 n.67 (compiling references).

players—either eludes disclosure altogether or gets buried under an avalanche of useless information.⁸³

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 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.⁸⁴ 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.⁸⁵ 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.⁸⁶ Take, for example, the 1995 Pulitzer-winning project on abuse of disability pension funds by police officers.⁸⁷ When the reporters got an initial tip that the system was rigged, they filed a FOIA request for all the documents related to how disability funds were allocated.⁸⁸ 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. The 1995 story therefore illustrates not only that direct sourcing channels are

83. Ben-Shahar & Schneider, *supra* note 82, at 737.

84. 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.”).

85. See Amitai Etzioni, *The Capture Theory of Regulations – Revisited*, 46 SOCIETY 319, 321 (2009).

86. See, e.g., REPORTERS COMM. FOR FREEDOM OF THE PRESS, FEDERAL OPEN GOVERNMENT GUIDE 10 (10th ed. 2009).

87. The full project is available at <http://www.pulitzer.org/winners/brian-donovan-and-stephanie-saul> [<https://perma.cc/MZ2D-E34G>].

88. See Table 1, Saul interview.

inadequate, but also that reporters often turn to other “legal” channels of information, such as law enforcement actions.⁸⁹

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 the process of determining whether to impose legal sanctions, the law enforcement action produces information on how the parties to the dispute behaved.⁹⁰ The information, produced as a by-product of litigation, is another valuable channel for investigative reporters.

Litigation, especially in the U.S. system, provides strong monetary incentives, such as damages and lawyers’ fees, for harmed parties to expose misbehavior in court. These strong incentives increase the chance that information about the alleged misconduct will spread readily and credibly to the court of public opinion.⁹¹ 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.⁹²

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 investigative journalists trying to understand how the powerful behaved, relative to information selectively released by the powerful themselves.⁹³ Legal scholars have elaborated on the information-extracting advantages

89. 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.”

90. *See* Shapira, *supra* note 9, at 1213–14.

91. *Id.* at 1212.

92. *Id.* at 1214.

93. To be sure, FOIA and litigation are not mutually exclusive. Public interest litigators can employ FOIA requests as a way to meet pleading standards and reach the discovery stage and then extract new information that the initial FOIA request did not reveal.

of litigation in other contexts.⁹⁴ My analysis of reporters' tip sheets and interviews with reporters themselves suggest that these informational advantages apply to our context as well.⁹⁵

To use the words of one Pulitzer-winning reporter⁹⁶: "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] 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, 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.⁹⁷ Only when a potential story makes it to the second,

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94. See Law, *supra* note 3, at 753 (suggesting that information from litigation may be better than information coming from the government itself, because of the "privileged means of gathering information" that courts enjoy); 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"); 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").
95. See *infra* Table 1, 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); see also Neil Reisner, *Finding (Almost) Anybody and Especially Licensed Professionals* (IRE, Tipsheet No. 1345, 2001) (on file with author) (focusing on regulatory reports, rather than litigation, as source).
96. See *infra* Table 1, Berens interview.
97. See Reisner, *supra* note 95, at 1 ("Journalists' first stop often is the county clerk's office or the courthouse"); Blackledge interview (stating that court records are 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 (confirming that legal documents are the "first place I go to when I work the story").

LAW AS SOURCE

research phase of investigation should reporters move to submit focused FOIA requests.⁹⁸

Legal and communication scholars who tend to focus on FOIA and similar disclosure tools 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 less studied and less understood. The rest of this Article accordingly dedicates more attention to information produced during law enforcement actions. The next Section 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.⁹⁹ Documents help reporters convince their target audience that the story is true.¹⁰⁰ A simple reason for why journalists gravitate toward using legal sources is that the legal system provides access to many documents.¹⁰¹

Further, legal documents are not just any documents. Several factors combine to make legal documents especially valuable for investigative reporting.¹⁰² Legal documents often contain information that is unique, libel-proof, and credible. They help reporters not just by providing access

98. See *infra* Table 1, Berens interview; Nelson interview; Michael Berens, *Finding the Story* 1 (IRE, Tipsheet No. 3764, 2012) (on file with author).

99. HAMILTON, *supra* note 27, at 258.

100. See *infra* Table 1, Horvit interview (“Documents are safer, more reliable than human sources . . . [they have a] definitive nature”); 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 [sic] patterns, you have to have documents.”); Locy interview; Mendoza interview.

101. See, e.g., Mark Skertic, *Public Documents* 1 (IRE, Tipsheet No. 2252, 2004) (on file with author) (suggesting, in a tip sheet about how to use public documents, to start right from “the courts,” noting that the “legal system produces huge amount of paperwork”); *infra* Table 1, McKim interview (stating that reporters are in a “documents state of mind,” and going to the courthouse helps them with documentation); see also Kish Parella, *Reputational Regulation*, 67 DUKE L. J. 907, 965 (2018)

102. See LYTTON, *supra* note 2, at 94–95; Parella, *supra* note 101.

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*.¹⁰³ 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 would not otherwise have been privy.¹⁰⁴ 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.”¹⁰⁵

Second, information coming from the legal system is virtually *libel-proof*.¹⁰⁶ 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.¹⁰⁷ Information produced during litigation or

103. See *infra* Table 1, Coll interview (claiming that documents you get from discovery are “not duplicative of any other information you can find”); Nelson interview; Smith interview (in the context of inspectors general investigations); Starkman interview; see also Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1683 (2016).

104. Many of my interviewees independently emphasized that “as a journalist, I cannot subpoena someone.” See *infra* Table 1, Carter interview; Horvit interview; 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”); see also Shapira, *supra* note 9, at 1214.

105. See *infra* Table 1, Locy interview.

106. The libel-proof reason was one of the most frequently cited by the reporters I interviewed. See *infra* Table 1, Blackledge interview; Daly interview; Coll interview; Mendoza interview; Nelson interview; Possley interview; Tulsy 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).

107. See *infra* Table 1, Carter interview; Daly interview; Mehren interview; Ureneck interview (adding that the added credibility does not necessarily

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.¹⁰⁸ 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."¹⁰⁹

A fourth reason why courts are a valuable source is that they provide a *gateway to human sources*.¹¹⁰ 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. The victims who bring a lawsuit are usually the ones that are not afraid to go public and on record with their claims.¹¹¹ And the lawyers of these victims are working hard at accumulating document-driven evidence.¹¹²

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 reporters.¹¹³ To illustrate, consider the 2012 Pulitzer-winning project on questionable domestic intelligence tactics employed by the NYPD.¹¹⁴ The reporters there could not get the heads of the intelligence

mean added accuracy; it adds credibility "rightly or wrongly"); *see also* Law, *supra* note 3, at 752–53 (claiming that courts enjoy a relatively high levels of public confidence).

108. *See* Katy Stech, *Digging up Secrets and Story Ideas in Bankruptcy Court Records* (IRE, Tipsheet No. 4930, 2017) (on file with author); Horvit interview; Ureneck interview; Weinberg interview.

109. *See infra* Table 1, Ureneck interview. The added weight attached to court documents can be explained by a well-developed literature in psychology on source-credibility effects. *See* Shapira, *supra* note 9, at 1224.

110. *See infra* Table 1, Berens interview; Bogdanich interview; Jaquiss interview; McKim interview; Nelson interview; Possley interview; Weinberg interview; *see also* Gary Cohn, *Investigative Business Journalism* (IRE, Tipsheet No. 3390, 2010) (on file with author).

111. *See infra* Table 1, Berens interview ("trolling legal cases . . . allows you to find out the people who are OK to go public about their claims").

112. DAVID SPARK, *INVESTIGATIVE REPORTING: A STUDY IN TECHNIQUE* 32-40 (1999) (on lawyers as source); Berens interview; Coll interview (describing how "unhappy plaintiffs" make for a great source for reporters); Mehren interview.

113. *See infra* Table 1, Horvit interview.

114. For the full project, see <http://www.pulitzer.org/winners/matt-apuzzo-adam-goldman-eileen-sullivan-and-chris-hawley> [<https://perma.cc/4YX8-8HU2>].

unit to talk with them. The reporters were nevertheless able to quote the heads of the program by culling depositions they gave in the legal proceedings.

Fifth, the legal system sometimes helps journalists 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 what happened, but it is more difficult for them to assess how it happened or could it have been stopped.¹¹⁵ 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.¹¹⁶

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.¹¹⁷ 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."¹¹⁸

All in all, the courts present a one-stop shopping spree for journalists looking for information.¹¹⁹ Courts centralize many potential sources: documents, victims, and experts, thereby significantly reducing the costs of sourcing deep-dive investigative projects.¹²⁰ Reporters, in turn, use legal sources in myriad ways in their investigative projects. The next Section elaborates.

115. 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.

116. *Id.* at 1214.

117. *See infra* Table 1, Lewis interview (noting that judicial rulings can be very insightful, by helping the reporter understand the issue even if the trial documents are sealed).

118. *See infra* Table 1, Eisinger interview.

119. *See infra* Table 1, 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.

120. *See infra* Table 1, Carter interview; Lehr interview; Possley interview (a journalist trying on his own to generate the wealth of information contained in court documents would need months); *see also* Kish Parella, *Public Relations Litigation* (working paper, 2017) (on file with author).

C. *How Are Legal Sources Used?*

Most investigative projects do not rely on a single source, but instead triangulate multiple sources.¹²¹ 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 must 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.¹²² 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.¹²³ 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.¹²⁴

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*.¹²⁵ 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.”¹²⁶ In fact, in my interviews with investigative reporters, pattern identification was the most

121. See, e.g., Kim Christensen, *Court Records: Mining for Gold* (IRE, Tipsheet No. 1979, 2004) (on file with author); Tisha Thompson et al., *Unsung Documents* (IRE, Tipsheet No. 3424, 2010) (on file with author).

122. Cf. Frankel, *supra* note 106, at 367 (stating that a judicial decision can “carv[e] out a process by which the media becomes aware of an issue”).

123. See, e.g., Skertic, *supra* note 76.

124. As one tip sheet observes, “Some stories can be almost written completely from deposition testimony.” *Using Depositions in Reporting* (IRE, Tipsheet No., 1994) (on file with author).

125. William Heisel, *Investigating Doctors* (IRE, Tipsheet No. 2181, 2004) (on file with author).

126. See *infra* Table 1, Jaquiss interview.

frequently mentioned role of the legal system.¹²⁷ “Legal documents allow you to count 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 abuse¹²⁸: 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. 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.¹²⁹

A third role that legal sources play is that of *backgrounding*.¹³⁰ 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

127. See *infra* Table 1, Berens interview; Blackledge interview (saying that 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”); McKim interview (emphasizing that, at the basic level, going to the courthouse helps you understand how many people sue, and this is how you get a general idea of whether “there is a story” worth pursuing or not).

128. See *infra* Table 1, Tulsy interview.

129. See Sarah Okeson, *Researching Consumer Stories* (IRE, Tipsheet No. 3043, 2008) (on file with author); Skertic, *supra* note 101; Mark Skertic, *Overcoming Secrecy* (IRE, Tipsheet No. 1434, 2001) (on file with author) (“Companies that make faulty products get sued, and that means court records are generated”); Locy interview.

130. See WILLIAM C. GAINES, *INVESTIGATIVE JOURNALISM: PROVEN STRATEGIES FOR REPORTING THE STORY* 55–56 (2008); Christensen, *supra* note 121, at 1 (“Court records are an invaluable source of information on the people we write about every day.... Whether you’re profiling... [or] backgrounding... much of the information you seek is in courts records.”); Dowdell, *supra* note 76; Josh Meyer, *Court Records 101*, at 1 (IRE, Tipsheet No. 736, 1997) (on file with author) (writing that court records “can be a gold mine, a way to background a person in a hurry”); Pat Stith, *Backgrounding Individuals* (IRE, Tipsheet No. 2529, 2005) (on file with author); *infra* Table 1 Bergo interview (“[legal documents are] a treasure trove of background information”).

detail and background on the entity about which she is writing.¹³¹ To illustrate, consider the 2006 Pulitzer-winning project on coalitions between lobbyists and congressional representatives. To show just how shady the people with whom congressional representatives interacted were, the *Washington Post* reporters tapped past lawsuits against these individuals. Similarly, for 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.¹³² The records showed that one could not make a profit from breaking ships unless one cut corners and compromised worker safety and the environment.¹³³

But 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. To recast the example of the ship-breaking industry, the reporters there combed through individual lawsuits by employees to corroborate and find a second or third source for safety-issue allegations they were already aware of.¹³⁴ 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.¹³⁵ 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.¹³⁶

131. See Stech, *supra* note 108 (explaining why bankruptcy court records are especially valuable for investigative reporting); David Wethe, *The Basics of Business Investigations* (IRE, Tipsheet No. 2736, 2006) (on file with author) (suggesting that divorce court records similarly make for a great source of background information); *infra* Table 1, McKim interview; see also Dianna Hunt, *Courts/Cops Records* (IRE, Tipsheet No. 1357, 2001) (on file with author); Okeson, *supra* note 129; Reisner, *supra* note 95; *infra* Table 1, Eisinger interview.

132. See *infra* Table 1, Englund interview.

133. *Id.*; Cohn, *supra* note 110. 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.*

134. See *infra* Table 1, Englund interview.

135. See HAMILTON, *supra* note 27, at 12.

136. See *infra* Table 1, Lehr interview; Lipinsky interview; Mehren interview.

Finally, 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,¹³⁷ identifiable victims (because “every good story needs victims”),¹³⁸ detail, and color.¹³⁹ Locating and approaching plaintiffs is a crucial part of making sure the story reverberates with target audiences.¹⁴⁰

* * *

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 or *how much* reporters rely on legal sources. 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 existing studies on these questions.¹⁴¹ To answer them I had to triangulate various methods. Section A presents the evidence gathered by listening to what journalists say about

137. See *infra* Table 1, Bogdanich interview.

138. See *infra* Table 1, Berens interview.

139. Jaquiss interview.

140. As one reporter put it, “if we cannot identify victims, [then there is] no point in doing the story.” See *infra* Table 1, Cohen interview.

141. 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 49, 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* (2005) (unpublished M.A. thesis, University of Missouri) (on file with author). And the scant evidence that does exist on “legal sourcing” focuses on FOIA requests, rather than information coming from law enforcement actions.

LAW AS SOURCE

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 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, and tip sheets. Relatedly, I compared basic Investigative Reporting course syllabi from leading journalism schools. Section 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. Section C offers observations about the cross-sectional variation: areas where legal sourcing is more/less pronounced. Section D then presents the other side of the equation, namely, circumstances under which the media coverage facilitates effective law enforcement.

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) has created a members-only database of tip sheets, containing advice from investigative reporters to their colleagues on a wide range of issues.¹⁴² 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.¹⁴³ 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."¹⁴⁴ This is because "lawsuits connect us to documents, exhibits, depositions and sources of every type," and

142. The database is available at <http://ire.org/resource-center/tipsheets> [<https://perma.cc/G8SK-M6A6>].

143. See Berens, *Finding the Story*, *supra* note 98, at 1.

144. *Id.*

“[e]nforcement actions are rich repositories.”¹⁴⁵ Further, the tip sheet explicitly recognizes the role of lawsuits as a gateway to other sources: “[l]awyers are great sources . . . they are document-based creatures—like us—and they often relish media contact.”¹⁴⁶ 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.¹⁴⁷

Such explicit references to law as source are not limited to the IRE’s tip sheet database. I also found them in multiple how-to manuals, textbooks, and scholarly work on investigative reporting.¹⁴⁸ 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.”¹⁴⁹

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.¹⁵⁰ In the reporters’ own words: “Most serious investigative stories involve court records.”¹⁵¹ “Journalism rests heavily on legal sources.”¹⁵² “[The] relevancy of legal documents is huge . . . it is an essential part of investigative reporting.”¹⁵³ “The court system is so integrated in investigative reporting—hard to imagine doing it without them.”¹⁵⁴ “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.”¹⁵⁵ “[It is] unusual to have a major investigative project

145. *Id.*

146. *Id.*

147. *Id.* at 2.

148. *See, e.g.,* GAINES, *supra* note 130, at 139–143; TONI LOCY, *COVERING AMERICA’S COURTS: A CLASH OF RIGHTS* 71 (2013); SPARK, *supra* note 112.

149. LOCY, *supra* note 148, at 67.

150. *See infra* Table 1, Berens interview; Bogdanich interview; McKim interview; Nelson interview.

151. *See infra* Table 1, McKim interview.

152. *See infra* Table 1, Mehren interview.

153. *See infra* Table 1, Lewis interview.

154. *See infra* Table 1, Nelson interview.

155. *See infra* Table 1, Berens interview.

LAW AS SOURCE

without legal documents to buttress some of the findings.”¹⁵⁶ “[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.”¹⁵⁷

Importantly, several interviewees qualified their answer to the what-role-do-legal-sources-play question along the lines of “it depends.”¹⁵⁸ 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.¹⁵⁹ 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. We will revisit this theme in Part IV below when discussing policy implications.

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 students that court records are the most valuable tool a reporter can use.”¹⁶⁰ “One of the cornerstones of journalism school is [to teach the importance of] going to the courthouse and pulling out relevant records.”¹⁶¹ To corroborate their argument, I looked at the basic Investigative Reporting course syllabi of leading journalism schools.¹⁶²

In all but one course syllabus that provided detail on the content of the individual sessions, the class had specific sessions dedicated to learning how to use legal sources.¹⁶³ In fact, many courses share a similar structure:

156. *See infra* Table 1, Englund interview.

157. *See infra* Table 1, Bogdanich interview.

158. *See, e.g., infra* Table 1, Daly interview; Eisinger interview; Graves interview; Smith interview.

159. *Id.*; Bogdanich interview; Locy interview; Starkman interview.

160. *See infra* Table 1, Mehren interview.

161. *See infra* Table 1, McKim interview.

162. 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> [<https://perma.cc/FJC8-WBMK>]) and syllabi compiled by the Investigative Journalism Education Consortium. *Syllabi*, INVESTIGATIVE JOURNALISM EDUC. CONSORTIUM, <http://ijec.org/syllabi> [<https://perma.cc/3QCS-T3V9>].

163. The one syllabus that did not explicitly mention using legal sources in the sessions’ descriptions was Deborah Nelson’s course at the University of Maryland. Yet, even there, Deborah Nelson is one of the Pulitzer-winners

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 University course dedicates week 2 to gathering information from criminal litigation and week 3 to doing the same from civil litigation. The Berkeley course syllabus not only earmarks week 2 for legal sources, but also highlights 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.¹⁶⁴

Taken together, the evidence gathered from tip sheets, 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 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

that I interviewed for this project, and she mentioned unprompted that using court documents is a topic that she hammers to her students.

164. 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. *See supra* note 162.

LAW AS SOURCE

they wanted to copy the documents produced when the district attorney subpoenaed key bank and phone records.¹⁶⁵ 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.¹⁶⁶ Here the role of law as source cannot be more pronounced: Tarbell’s reporting rested heavily on court documents, regulatory investigation reports, and depositions.¹⁶⁷

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.¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰

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.

165. BOB WOODWARD & CARL BERNSTEIN, *ALL THE PRESIDENT’S MEN* 36–41 (1974).

166. Tarbell’s investigations were later collected in IDA M. TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* (1904). For more on her work see STEVEN WEINBERG, *TAKING ON THE TRUST* (2008).

167. See STARKMAN, *supra* note 3, at 27, 208; *infra* Table 1, Daly interview (by collecting information from several state courts, Tarbell’s investigation gained credibility); HAMILTON, *supra* note 27, at 139 (relying on court records made Tarbell’s exposés libel-proof, and allowed extensive documentation that helped the reader understand the case).

168. Starkman, *supra* note 55.

169. *Id.* A 2000 story that spotlighted the Wall Street-subprime connection relied on litigation in California that found Lehman Brothers 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.

170. *Id.*

B. Findings from Content Analysis of Prizewinning Investigative Reports

Aside from listening to what journalists say, we can read what 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 Prize for Investigative Reporting or the IRE medal,¹⁷¹ and supplemented the sample with specific examples of investigative business journalism that won the Loeb award.¹⁷² 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,¹⁷³ I focused on the projects' *inputs*: I asked what legal sources (direct and indirect) allowed the production of such socially beneficial investigative reports. 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. Methodology¹⁷⁴

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.¹⁷⁵ 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

171. The IRE medal, granted by the Investigative Reporters and Editors organization, is "the highest honor that can be bestowed" on investigative work. *IRE Awards*, INVESTIGATIVE REPORTERS & EDITORS, <http://www.ire.org/awards/ire-awards> [https://perma.cc/W966-JYKF].

172. The Gerald Loeb Award is billed as the most prestigious business journalism award. *About the Loeb Award*, UCLA ANDERSON, <http://www.anderson.ucla.edu/gerald-loeb-awards> [https://perma.cc/2G76-T5LL] (describing the criteria for winning the award).

173. See *supra* note 32 and the accompanying text.

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

175. HAMILTON, *supra* note 27, at 44.

awards can tell us something about industry norms.¹⁷⁶ 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 boosts a journalist's earning power and job mobility.¹⁷⁷ Secondly and relatedly, prizewinning projects reflect the investigative reports that had the most impact on society.¹⁷⁸ 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.

In fact, 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 showed¹⁷⁹—makes on average an eight-digit-sized impact on society, and thus demonstrates that reliance on legal sources is in itself an important phenomenon worthy of further consideration. Moreover, there is reason to believe that purposively sampling only the top investigative works is likely to *understate* the law-as-source claims. 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.¹⁸⁰ Relying on regulatory documents can become a double-

176. *Id.* 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).

177. *See* Randal A. Beam et al., *The Relationship of Prize-winning to Prestige and Job Satisfaction*, 63 JOURNALISM Q. 693 (1986) (prizewinners get higher occupational and organizational prestige); HAMILTON, *supra* note 27, at 49; Kathleen A. Hansen, *Information Richness and Newspaper Pulitzer Prizes* 67 JOURNALISM Q. 930, 931 (1990).

178. *See, e.g.*, Shorenstein Center, *Investigative Reporting Prize Rules*, HARV. KENNEDY SCHOOL, <http://shorensteincenter.org/goldsmith-awards/investigative-reporting-prize/rules-and-information> [<https://perma.cc/89EV-88V2>] (explicitly mentioning the Goldsmith Awards' societal impact as part of their judging criteria for the award).

179. *See* HAMILTON, *supra* note 27.

180. *See, e.g.*, GAINES, *supra* note 130, at 2; *infra* Table 1, Eisinger interview.

edged sword in such contexts: “You win Pulitzers when [new] regulation follows your investigation, not when your investigation follows regulation.”¹⁸¹ The upshot is that if one can find legal sourcing in the investigative reporting awards, one can find it anywhere.¹⁸²

Out of the relevant investigative reporting prizes, I sampled two: Pulitzers and IRE medals. 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 twenty-five Pulitzers and thirty 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 forty-eight unique projects in our sample.

After deciding on the sample, I had to settle on criteria for deciphering the role that legal sources play: first identifying all the sources a story relies on, and then determining what relative weight to assign to legal sources. Prizewinning projects, after all, rest on more than a single source.¹⁸³ 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 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

181. *Infra* Table 1, Eisinger interview.

182. In qualitative methodology jargon, that suggests that Pulitzer-winning stories make a “crucial, least likely” case for our sampling. *See supra* note 5.

183. *See supra* note 121 and the accompanying text.

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.

While it is true that content analysis done by human coders is always subject to limitations,¹⁸⁴ 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.¹⁸⁵ Second, I approached the 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.¹⁸⁶ 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.

2. Findings

In twenty-three of the twenty-five (92%) Pulitzer-winning projects, legal sources played some role. In thirteen 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 twenty of the twenty-three IRE medal-winning projects, legal sources were explicitly mentioned in the one-paragraph description of how the story came about.¹⁸⁷ 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 four of the thirteen 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

184. 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 (2016).

185. Intercoder reliability denotes the level of agreement between different coders. *Id.* at 408. For the intercoder reliability calculations, see *infra* Appendix B.

186. See *infra* Appendix B for elaboration.

187. See *infra* Appendix B. 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.

public opinion. The reporters successfully sued the Defense Department to get 8000 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 6000 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.”¹⁸⁸ A similar pattern emerges with IRE medals: in three of the twenty-three stories I sampled, the reporters mention FOIA requests but do not mention litigation when explaining how the story came about.

In seven of the thirteen 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.¹⁸⁹ 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 fourteen-year-old and the governor.¹⁹⁰ The IRE sample offers a similar observation: in nine of the twenty-three 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 two of the thirteen 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. The reporters behind the 2008 co-winner—a project on lax regulation of baby products—started digging by filing a FOIA request to the product safety commission for information regarding unsafe cribs and toddler car seats.¹⁹¹ The thousands

188. *Eric Lipton of The New York Times*, PULITZER PRIZE (2018), <http://www.pulitzer.org/winners/eric-lipton> [<https://perma.cc/K44Z-2UJE>].

189. *Walt Bogdanich & Jake Hooker of the New York Times*, PULITZER PRIZE (2008), <http://www.pulitzer.org/winners/walt-bogdanich-and-jake-hooker> [<https://perma.cc/YS7X-MMVR>].

190. As the Pulitzer-winning reporter told me, “[w]ithout the court documents there would be no story.” *See infra* Table 1, Jaquiss interview.

191. *Bogdanich & Hooker, supra* note 189.

LAW AS SOURCE

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.¹⁹² 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,¹⁹³ the journalists concretized and personalized the story by relying on specific regulatory investigation reports. For IRE medals, the results were more pronounced: eight of the twenty-three winning projects mention both FOIA requests and law enforcement actions as key to the development of the story.

Going beyond the stories in which legal sources played a strong role, we observe ten Pulitzers (out of twenty-five, 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 ten stories, but did not make or break them. In understanding the role of law as source in such stories, it is useful to return to our discussion of the different ways in which investigative reporters use legal sources: 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.¹⁹⁴ 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 three of the twenty-five 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

192. *Id.*

193. *See, e.g.*, Christopher S. Stewart, *How Agents Hunt for Fraud in Trove of Medicare Data*, WALL ST. J. (Aug. 14, 2014), <http://www.wsj.com/articles/how-agents-hunt-for-fraud-in-trove-of-medicare-data-1408069802> [<https://perma.cc/6GNC-KXHH>].

194. *See supra* Section II.C.

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.¹⁹⁵ Interestingly, all these stories focus on non-American victims, and so the American legal system was not invoked and did not produce information.

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 or 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.¹⁹⁶ A second subset of

195. As the 2000 Pulitzer winner, Martha Mendoza, explained, “the victims would have been in big trouble if they [had] tried to make a big thing out of it.” See *infra* Table 1, Mendoza interview.

196. 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*

LAW AS SOURCE

cases concerns *victims who are poor* and do not have the resources needed to set the legal system in motion.¹⁹⁷ Substandard housing problems are a case in point.¹⁹⁸ A third, related type of case 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 victim's families were either too poor or too ashamed to draw public attention to their plight.¹⁹⁹

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.²⁰⁰ In such contexts, even if the 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.²⁰¹ 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.²⁰²

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.²⁰³ My argument is therefore not an absolute but a relative one: in contexts where law enforcement is

Confidentiality in Discovery, 81 CHI-KENT L. REV. 357, 363 (2006) (noting that the U.S. discovery system is the most wide casting).

197. HAMILTON, *supra* note 27, at 60; *see infra* Table 1, Daly interview.

198. *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).

199. *See infra* Table 1, Berens interview.

200. *See infra* Table 1, Tulsy interview.

201. Shapira & Zingales, *supra* note 24.

202. *Id.*

203. *See infra* Table 1, Nelson interview.

less likely to work, accountability journalism is harder to generate.²⁰⁴ Put differently, investigative reporters' reliance on legal sources privileges certain types of societal issues at the expense of others.²⁰⁵

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.²⁰⁶ The interviews corroborated a notion that reverberates in communication studies: holding big business accountable is actually much tougher than holding big government accountable.²⁰⁷ 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 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 misconduct to the media.²⁰⁸ Within the business world, by contrast, tips by rivals are much harder to come by.²⁰⁹

204. For example, an editor I interview juxtaposed two stories she worked on that had similar subject matter and societal importance: combat jet accidents and chemical weapons' impact. With combat jet accidents, the harms and victims were identifiable. As a result, there were relevant court documents and the story went on to win prizes. With chemical weapons' impact, by contrast, harms were less actual and more disperse. As a result, there was no identifiable victim who took the issue to court, and the story reverberated less. *See infra* Table 1, Nelson interview.

205. *See infra* Table 1, Green-Barber interview.

206. *See infra* Table 1, Blackledge interview; Bogdanich interview; Coll interview; Daly interview.

207. *See, e.g.*, HAMILTON, *supra* note 27, at 60, 151; SCHUDSON, *supra* note 49, at 140.

208. As one reporter put it, "The two-party system is a blessing for journalists. When the government was Democratic, Republicans would leak. When the

Second, my interviewees suggested that government insiders are more likely to blow the whistle than their corporate counterparts are.²¹⁰ 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.²¹¹ Insiders in private business, by contrast, tend to adopt a profit-maximizing mindset and “zealously guard documents.”²¹²

Finally, direct sourcing tools help with information on government more than with information on private business.²¹³ 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.²¹⁴

The added difficulty of getting information on big businesses figures to increase the demand for indirect sourcing channels, such as law enforcement actions.²¹⁵ 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

Democrats held primaries, one side would leak information on the other.”
Daly interview. *See infra* Table 1 Ureneck interview.

209. One potential explanation is that the business world can be less adversarial, less zero-sum than politics: Company X’s shenanigans may benefit company X at the expense of, say, consumers/the environment, rather than at the expense of their rivals from company Y.
210. *See infra* Table 1, Carter interview; Mehren interview; Tulsy interview.
211. Tulsy interview.
212. *See infra* Table 1, Tulsy interview. There exist other factors making it more difficult to hold businesses 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. *See infra* Table 1, Bogdanich interview; Lewis interview.
213. *See infra* Table 1, Blackledge interview; Horvit interview; Jaquiss interview.
214. *See infra* Table 1, Boardman interview; Bogdanich interview (big companies “have infinitely more power to hide things”); Coll interview; Daly interview (with private business “you have very few leverage points” to extract information).
215. 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 110; *see also infra* Table 1, Tulsy interview; Bogdanich interview.

least one class action against them at any given point in time.²¹⁶ 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: “[when I teach students] 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].”²¹⁷

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 twenty-five Pulitzer-winning projects in my sample focus on holding private companies to account.²¹⁸ 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.²¹⁹ 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.²²⁰ 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: nineteen fatalities in Toyotas,

216. See *Class Action Survey* (Carlton Fields, 2017), <http://classactionsurvey.com/2017-survey> [<https://perma.cc/4D57-SXPG>].

217. See *infra* Table 1, Coll interview.

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

219. See *supra* note 172.

220. See Andy Pasztor & Anne Marie Squeo, *Boeing Employees Are Disciplined in Espionage Case*, WALL ST. J. (Sept. 12, 2003), <https://www.wsj.com/articles/SB106331826554625400> [<https://perma.cc/Z8LT-K6HX>].

eleven in all other cars combined.²²¹ 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 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."²²²

D. The Other Side: How Accountability Journalism Shapes Law Enforcement

This Article has focused thus far on how law enforcement makes investigative reporting more effective. Yet it should be noted that the other side also holds: investigative reporting can make law enforcement more effective. Fully developing the other side of the equation—how media affects law—is beyond the scope of this paper. For now, suffice to note that the combination 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.

Think first about how journalism complements litigation. The prizewinning stories I analyzed illustrate how the fact that a lawsuit was filed does not automatically translate to accountability. As Part IV below explains in detail, parties to litigation have private incentives that diverge from the public interest. They will tend to trade money for confidentiality, thereby severely limiting the ability to turn a private dispute into public accountability. When investigative reporters scour court documents, they

221. See Ralph Vartabedian & Ken Bensinger, *Toyota's Runaway-Car Worries May Not Stop at Floor Mats*, L.A. TIMES (Oct. 18, 2009), <https://www.latimes.com/business/la-fi-toyota-recall18-2009oct18-story.html> [<https://perma.cc/XNQ5-HXXR>].

222. Nathaniel Lash et al., *Breakdown at 30,000 Feet*, TAMPA BAY TIMES (Nov. 2, 2016), <http://www.tampabay.com/projects/2016/investigations/allegiant-air/mechanical-breakdowns> [<https://perma.cc/HQW7-RPL4>].

therefore do not merely piggyback on litigants' efforts. Rather, they balance litigants' disincentives to warn non-litigants about dangers.

Investigative reporters can also make *regulatory* enforcement better. As the prizewinning stories illustrate, there exist important cases where the journalistic investigation brings to the attention of the regulator information of which she was not previously fully aware. 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.²²³ The journalistic spotlight can reset the regulatory agenda,²²⁴ by making the costs of misbehavior obtrusive and more salient to the regulators and, importantly, to the regulators' overseers—the public and Congress. In turn, the change in saliency counteracts the regulatory drift toward narrow interests and pushes regulators to cater to normally neglected broader, dispersed interests.²²⁵ 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.²²⁶

* * *

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. If Hamilton's study convinced you that a major investigative project can produce net social benefits in the tens of millions of dollars, 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?

223. 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.

224. On regulatory agenda-setting, see Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93 (2016).

225. Political science studies show that not all regulatory issues are created equal. Regulatory enforcement tends to drift out of the public interest in regard to issues of low saliency and high complexity. *See, e.g.*, William T. Gormley, Jr., *Regulatory Issue Networks in a Federal System*, 18 POLITY 595 (1986).

226. STARKMAN, *supra* note 3, at 208.

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.²²⁷ 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 documents²²⁸—did the information turn into a journalistic source. Had the information become available earlier, one could argue, many cases of child abuse could have been avoided.²²⁹

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.²³⁰ 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. Section A starts with big-picture observations on levels of legal intervention. Section B delves into the debate over openness (or publicness) of disputes, which encompasses issues such as secret settlement and arbitration clauses. And Section C sketches directions to facilitate more law-as-source benefits.

227. 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 103, at 1688.

228. HAMILTON, *supra* note 27, at 83.

229. ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 76 (2016).

230. Shapira, *supra* note 11, at 51–53.

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.²³¹ 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.²³² 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.²³³ They argue that maintaining a costly system of litigation is superfluous in an already existing market system of control.²³⁴ 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.²³⁵ If we abolish litigation, we take away a large 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 for consumers' safety. The strength of market forces, at least in the area of product safety, is very much a result of the existing legal system.²³⁶

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.

231. Shapira, *supra* note 9, at 1196.

232. 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, *supra* note 9, at 1197.

233. See Polinsky & Shavell, *supra* note 232.

234. See *id.*

235. See *supra* note 129.

236. 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." See *infra* Table 1, St. John interview.

LAW AS SOURCE

Those who allude to market forces when recommending policy solutions 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

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.²³⁷ This frustration touches upon a long-standing debate in the legal literature over how publicly available law enforcement records should be.²³⁸ The debate spans multiple applications: settlement versus trial, openness of proceedings, and so on.

Our law-as-source framework allows us to contribute to the openness versus secrecy debate along several key dimensions. First, we inject a real-life implications perspective into a too-often abstracted debate (Subsection 1). Second, the law-as-source framework disentangles the normally comingled facets of the openness versus secrecy debate (Subsection 2).²³⁹ 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.

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.²⁴⁰ Those in favor of confidentiality cite the need to respect the parties' autonomy and to conserve public and private

237. See *supra* note 159 and the accompanying text.

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

239. 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).

240. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976).

resources.²⁴¹ What both camps agree on, however, is the need to inject some evidence into the debate.²⁴² Specifically, both camps agree that we do not know much about how openness versus secrecy affects third parties. Take, for concreteness, the debate over secret settlements.²⁴³ Those against secret settlements argue that keeping the details about underlying misbehavior secret endangers public safety, as it fails to warn third parties.²⁴⁴ Those favoring secret settlements retort that the public-safety argument rests on shaky grounds.²⁴⁵ Most of the time, they claim, settlements contain information already available to regulators or to anyone who reads the initial complaint.²⁴⁶ 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.”²⁴⁷

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 only because one plaintiff’s lawyer (you might recall him from the movie as the eccentric Mitchell

241. See, e.g., Friedenthal, *supra* note 238; cf. Steven Shavell, *The Fundamental Divergence between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 606–07 (1997).

242. See, e.g., Lahav, *supra* note 103, at 1690 (calling for evidence while supporting public litigation); 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) (calling for evidence while supporting confidentiality).

243. A “secret settlement” is a settlement agreement that contains a provision whereby the parties promise to keep aspects of the dispute secret. See Erik S. Knutsen, *Keeping Settlements Secret*, 37 FLA. ST. U. L. REV. 1, 8 (2010).

244. See, e.g., David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L. REV. 2619, 2649–50 (1995); Jillian Smith, *Secret Settlements: What You Don’t Know Can Kill You!*, 2004 MICH. ST. L. REV. 237 (2004).

245. See Doré, *supra* note 239, at 301 (recognizing that the argument lacks empirical backing while arguing for openness); Friedenthal, *supra* note 238; Knutsen, *supra* note 243, at 27 n.60.

246. Friedenthal, *supra* note 238, at 87.

247. See *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); Knutsen, *supra* note 243, at 27–28. In the context of discovery, see Doré, *supra* note 239, at 350 n.273.

LAW AS SOURCE

Garabedian) insisted on fighting the Church, one trial at a time, without signing secret settlements. The evidence presented in Part III amounts to a *prima facie* case to consider seriously the ability of the media to turn open settlements into watchdog journalism with teeth.

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 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.²⁴⁸ Confidentiality provisions that hide even the basic details of the dispute hurt the ability of the media to effectively inform the public.²⁴⁹

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

The law-as-source angle helps us distinguish and reassess three separate issues²⁵⁰: 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.

248. *Cf. infra* Table 1, 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”).

249. *Cf.* Jennifer LaFleur, *The Lost Stories*, REP. COMMITTEE FOR FREEDOM PRESS (Nov. 2003), <http://www.rcfp.org/rcfp/orders/docs/LOSTSTORIES.pdf> [<https://perma.cc/7F5B-7S4Q>].

250. Doré, *supra* note 239, at 317 (explaining how arguments in the openness versus secrecy debate are often unjustifiably rehashed in different contexts).

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.²⁵¹ On paper, this type of information can make a great source for investigative reporting, as the law presumes full public access to such documents.²⁵² Yet in reality, parties often stipulate to keep major aspects of judicial information private and judges are quick to approve.²⁵³

The problem is that both parties have incentives to handle their disputes in ways that limit public access to judicial information.²⁵⁴ Take the issue of secret settlements. While the fact that most cases settle has become a truism,²⁵⁵ more relevant for our purposes is the fact that most cases settle secretly: the parties often stipulate to keep details of the dispute private.²⁵⁶ 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 contribute to information production.²⁵⁷ The framework developed here would urge judges to overcome pressures to clear the docket and consider, among other factors,

251. 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).

252. *See* Nixon v. Warner Commc’ns, 435 U.S. 589, 597 (1978).

253. Starting in the 1990s, there have been constant efforts by legislators to ban confidentiality agreements, yet the proposed sunshine-in-litigation reforms either do not get passed or get passed but do not pass muster. *See* Bauer, *supra* note 238, at 494; Doré, *supra* note 239, at section II.C.2; Goldstein, *supra* note 251, at 394–400.

254. *See* Shavell, *supra* note 241, at 605; Wagner, *supra* note 16, at nn.71–74 and the accompanying text.

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

256. *See* Bauer, *supra* note 238, at 491 nn.16–19 (compiling references); Knutsen, *supra* note 243, at 945, 946 n.1 (same).

257. Goldstein, *supra* note 251, at 388, 435.

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.²⁵⁸ 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 trying to understand what happened.²⁵⁹ 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 versus secrecy debates concerns litigant-centered information, such as pre-trial discovery documents, or settlement agreements that are not filed with the court.²⁶⁰ The law regarding such information is different: the strong presumption of openness that applies to judicial information does not apply here.²⁶¹ 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.²⁶² Yet from a pure law-as-source perspective, discovery materials can be just as valuable as judicial information in facilitating media-driven accountability.

258. Bauer, *supra* note 238, at 492 n.22 (compiling references for how common such provisions are).

259. 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) (“[S]ettlement amounts are, at best, ambiguous signals.”).

260. *See* Goldstein, *supra* note 251 (clarifying the terminology).

261. *Id.* at 376.

262. *See, e.g.*, *United States v. El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997). For an illustration of how blanket protective orders are normally given by the courts, even against public safety concerns, see Goldstein, *supra* note 251, at 375–78.

In today's world, trials are vanishing,²⁶³ 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.²⁶⁴

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.²⁶⁵ 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 made an impact—only after getting access to internal Church documents produced during discovery, showing who knew what and when.

A third category of openness versus secrecy issues concerns the timely debate over one-sided arbitration clauses. Two Supreme Court decisions in 2011 and 2013—*AT&T Mobility LLC v. Concepcion*²⁶⁶ and *American Express Co. v. Italian Colors Restaurant*²⁶⁷—expanded the scope of arbitration by enforcing unavoidable arbitration clauses that ban collective action.²⁶⁸ The use of such arbitration clauses is constantly on the rise. As of 2017, 80% of the 100 largest companies use mandatory arbitration clauses in employment contracts,²⁶⁹ and over sixty million Americans have

263. 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) (stating that in 2010, civil trials began in about one case out of 100 filed in federal courts).

264. See *infra* Table 1, Locy interview; see also Goldstein, *supra* note 251, at 403; Lahav, *supra* note 103, at 1686.

265. Cf. Goldstein, *supra* note 251, at 403 (noting that discovery materials are often more important than other court documents in verifying alleged wrongdoing).

266. 563 U.S. 333 (2011).

267. 570 U.S. 228 (2013).

268. As the court held in *Italian Colors*, “Courts must ‘rigorously enforce’ arbitration agreements according to their terms.” *Id.* at 233.

269. Imre S. Szalai, *The Widespread Use of Workplace Arbitration among America's Top 100 Companies*, EMP. RTS. ADVOC. INST. FOR L. & POL'Y, (Sept. 27, 2017), <http://employeeightsadvocacy.org/wp-content/uploads/2018/03/>

signed such arbitration clauses.²⁷⁰ 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.²⁷¹ By contrast, when disputes are increasingly “diffused”²⁷²—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.²⁷³

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.²⁷⁴ 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 2014.²⁷⁵ 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

NELA-Institute-Report-Widespread-Use-of-Workplace-Arbitration-March-2018.pdf [https://perma.cc/L99Z-ML49].

270. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL’Y INST. (Sept. 27, 2017), <http://www.epi.org/publication/the-growing-use-of-mandatory-arbitration> [https://perma.cc/8VC9-YKS6].
271. Cf. LAHAV, *supra* note 229, at 73 (“arbitrated disputes do not produce a public record and cannot . . . bring wrongdoing to light”); Stephanie Brenowitz, *Deadly Secrecy: The Erosion of Public Information under Private Justice*, 19 OHIO ST. J. ON DISP. RESOL. 679, 699 (2004).
272. See Resnik, *supra* note 263, at 2807 (coining the terminology).
273. LAHAV, *supra* note 229, at 27; Brenowitz, *supra* note 271, at 696.
274. For the Pulitzer Prize committee’s explanation, see *Sari Horwitz, Scott Higham and Sarah Cohen of The Washington Post*, THE PULITZER PRIZES (2002), <http://www.pulitzer.org/winners/sari-horwitz-scott-higham-and-sarah-cohen> [https://perma.cc/6G2V-WZWJ].
275. Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, ‘A Privatization of the Justice System’*, N.Y. TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [https://perma.cc/7FU4-JMLF].

administration stepped in and scrapped it.²⁷⁶ 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."²⁷⁷ 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 arbitration²⁷⁸—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. Second, 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

276. Jessica Silver-Greenberg & Michael Corkery, *U.S. Agency Moves to Allow Class-Action Lawsuits Against Financial Firms*, N.Y. TIMES, (Jul. 10, 2017), <https://www.nytimes.com/2017/07/10/business/dealbook/class-action-lawsuits-finance-banks.html> [<https://perma.cc/C9WW-9NHT>].

277. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/K7ZK-J6K4>].

278. Such assertions are deeply contested. *See, e.g.*, Resnik, *supra* note 263.

LAW AS SOURCE

time that ignoring class-action bans is key to assuring accountability in the financial sector.²⁷⁹ Yet in November 2017, President Trump signed a resolution that canceled the CFPB rule.²⁸⁰ Similarly and as mentioned above, the administration overruled attempts to bar such arbitration clauses in nursing homes.²⁸¹ And in May 2018, the Supreme Court handed down another decision with immense implications, this time enforcing arbitration clauses with class waivers in employment contracts.²⁸² While the majority opinion emphasized that the ruling is strictly based on binding precedent rather than policy concerns, the outcome is nevertheless another brick in the attack on litigation. An attack that is bad for the prospects of accountability journalism.

* * *

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*, 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.

279. Silver-Greenberg & Corkery, *supra* note 276.

280. For the CFPB’s announcement removing part 1040 of 12 C.F.R. chapter X, see *Arbitration Agreements*, 82 Fed. Reg. 55500 (Nov. 22, 2017) (to be codified at 12 C.F.R. 1040) NAT’L ARCHIVES (Nov. 22 2017), <http://www.federalregister.gov/documents/2017/11/22/2017-25324/arbitration-agreements> [<https://perma.cc/J6EV-E845>].

281. See Silver-Greenberg & Corkery, *supra* note 276.

282. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

C. 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.²⁸³ Nor can the law-as-source argument help us weigh considerations of privacy and proprietary or embarrassing 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. First and most basically, it invites judges' attention to an underappreciated set of benefits—informational benefits. Open dispute resolution facilitates accountability journalism, which in turn facilitates higher accountability in society. The sealing of documents is usually governed by judicial doctrine, and in many states the doctrine includes weighing in the public interest in access to information versus considerations such as privacy and caseload management.²⁸⁴ The law-as-source argument may tilt the scale in favor of the public interest in access, at least in cases that involve large manufacturers or employers whose behavior affect many third parties. Furthermore, the law-as-source argument removes the skepticism over the ability of open litigation to inform the public of widespread misconduct.

Beyond inviting judges' attention and providing them with a roadmap to weigh law-as-source benefits, the framework developed here can also inform policymaking efforts. For example, the law-as-source framework lends credence to, and underlines the importance of, existing proposals to create databases of lawsuits that were filed but settled and databases of arbitrated disputes.²⁸⁵ We learned from interviews, tip sheets, and successful investigative projects, that pattern-identifying is perhaps the most important way in which the legal system helps investigative reporters. Accordingly, if we allow large companies to use mandatory

283. 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).

284. See, e.g., Goldstein, *supra* note 251, at 387.

285. LAHAV, *supra* note 229, at 79.

arbitration clauses, we should at least assure the documentation of the type and number of issues that were funneled to arbitration. Having a public record of the dispute would allow watchdogs to identify behavior that goes against the norms. 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.²⁸⁶ 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. Without getting into specific design details, the criteria for releasing information should be specified according to industry benchmarks: how many lawsuits are being filed on average against a physician in a given practice; how many lawsuits are usually filed against a manufacturer of a given product; and so on.²⁸⁷ That way, reporters or future victims would be able to search for a pattern of recurring misbehavior and expose it.²⁸⁸ The increased threat of being exposed as a low-quality manufacturer would incentivize manufacturers to invest in the safety of their products *ex ante*.

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: make FOIA great again. Yet,

286. *Cf.* Ian Ayres & Cait Unkovich, *Information Escrows*, 111 MICH. L. REV. 145 (2012).

287. For relevant data, see, for example, Anupam B. Jena, *Malpractice Risk According to Physician Specialty*, 365 NEW ENG. J. MED. 629 (2011).

288. As Ayres 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. Ayres & Unkovich, *supra* note 286, at 152.

themes from this Article dovetail with David Pozen's observation, namely, that FOIA, even when executed properly, is an inherently problematic tool for promoting accountability.²⁸⁹ Proposals for remedies should therefore not limit themselves to FOIA, but rather should extend to bolstering other direct sourcing channels, such as whistleblowing laws,²⁹⁰ or indirect sourcing channels, such as openness of litigation.²⁹¹ 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.²⁹²

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

289. Pozen, *supra* note 81.

290. *Cf.* Shapira & Zingales, *supra* note 24.

291. *See supra* Subsection IV.B.

292. *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), <http://www.yalelawjournal.org/forum/the-freedom-from-information-act-a-look-back> [<https://perma.cc/62PY-ZXGZ>].

LAW AS SOURCE

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. Overly focusing on FOIA has also led legal scholars to discuss the role of the media only in the context of holding big government to account. But once we factor in litigation and regulatory investigations, it becomes clear that a large part of the story is holding big business to account.

Recognizing the strong links between law enforcement and accountability journalism opens up space for this Article's fourth original 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 arbitration clauses with class waivers. It also allows us to think creatively about solutions to the information underproduction problem. One potential solution is to design an information escrow or safety valve: a mechanism that will release information about past sealed disputes, once a pattern of reoccurring misbehavior has been identified. 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.²⁹³

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.

293. *See* Given, *supra* note 5, at 127.

The interviewing is of course subject to biases. Your interviewees may tell you what they think you want to hear or distort their responses to boost their image. Two factors alleviate such concerns here. First, as noted, the insights presented here are based on triangulation: not just what journalists say about legal sources when they talk with me, but also what they say when they talk with themselves (tip sheets/syllabi), and what they actually do (content analysis). Second, overstating the role of legal sources is actually the opposite of what a journalist who wishes to boost her image would do. If a journalist tilts her answers in a self-serving way, why would she suggest that she merely piggybacked existing public documents? She is better off claiming more credit to her hard-working, developing-ears-on-the-streets efforts.

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.

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

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 ²⁹⁴	8/15/17	Media law professor at Boston University

294. In-person.

LAW AS SOURCE

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 ²⁹⁵	11/19/17	2003 Pulitzer winner
22	Lewis, Charles	8/25/17	Head of the Investigative Reporting Workshop
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 and Head of the Department of Journalism and Mass Communications at

295. E-mail correspondence.

			Washington & Lee university
25	MacLaren, Selina	8/31/17	Legal Fellow at the Reporters Committee
26	Mahr, Joe ²⁹⁶	10/3/17	2004 Pulitzer winner
27	McKim, Jenifer	8/24/17	Senior investigator 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
32	Saul, Stephanie ²⁹⁷	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

APPENDIX B: CONTENT ANALYSIS

Sample. The reason for focusing on Pulitzers and IRE medals is twofold: relevance and convenience. Pulitzers and IRE medals are considered extremely prestigious by the general public and investigative reporters themselves. Sampling such awards gives us a window into standard-setting and 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

296. E-mail correspondence.

297. E-mail correspondence.

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.²⁹⁸ 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 is best illustrated by the famous Watergate story. In popular culture, Watergate is associated with human sources—tips from “deep throat”. 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.²⁹⁹ 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 (i.e. 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 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 narrowed down the articles that are considered a part of the winning projects, listing only the most impactful ones. If the Pulitzer committee identified these parts as essential to the project, we could usually infer that indications of strong reliance on legal

298. Lehr interview.

299. Brenowitz, *supra* note 271, at 697.

sources there meant 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 decrease the reliability (relative to computer-based content analysis).³⁰⁰ In our case of having to code legal sources' roles, three factors 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.³⁰¹ 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.³⁰²

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.

Table 2: 1995–2015 Pulitzer winners for Investigative Reporting

No.	Year	Title	Topic	Reporter/outlet	Legal Sources' Role	Legal Sources' Type
1	2015 A	Courting Favor	How lobbyists influence congressmen and state attorneys general	Eric Lipton / New York Times	Medium	FOIA strong; litigation weak

300. *See generally* Su et al., *supra* note 184

301. Our intercoder reliability for Pulitzer stories was 0.81. On the challenge in reaching high levels of agreement among coders see *id.* at 108.

302. *See infra* Table 1, Mahr interview; Saul interview; Smith interview; St. John interview.

LAW AS SOURCE

2	2015 B	Medicare Unmasked	How health care providers are milking Medicare money	The Wall Street Journal Staff	Strong- medium	FOIA strong; reg. investigat- ions 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/ 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	Nonexis- tent	-
5	2012 A	NYPD Intelligence Operations on Muslim communiti- es series	NYPD's questionable domestic intelligence gathering practices (clandestine spying program)	Matt Apuzzo et al. /Associated Press (AP)	Medium	Litigation; reg. investigat- ions
6	2012 B	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- weak	Litigation; reg. investigat- ions
7	2011	Florida Insurance Market Investigati- on series	Fleshing out weaknesses (unreliable insurers) in the property- insurance system in Florida	Paige St. John / Sarasota Herald- Tribune	Strong	Reg. investigat- ions strong; litigation (parts)
8	2010 A	Tainted Justice	Exposing a rogue police narcotics squad	Barbara Laker & Wendy Ruderman / Philadelphia Daily News	Medium	Litigation

9	2010 B	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	2008 A	Faulty Governmental Regulation of Toys, Car Seats and Cribs	Lax regulation of baby products	Staff of Chicago Tribune	Strong	Litigation; reg. investigations; FOIA
12	2008 B	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

LAW AS SOURCE

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 Industry	How the ship-breaking industry cuts corners in ways that endanger workers' safety and the environment	Gary Cohn & Will Englund of The Baltimore Sun	Strong-medium	Litigation strong; reg. investigations (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 / <i>Newsday</i>	Strong	Litigation strong; FOIA weak
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Table 3: IRE Medal winners for 1995–2015³⁰³

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 / <i>Guardian US</i>	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 / <i>Philadelphia Inquirer</i>	Weak-medium	Litigation (human sources); FOIA (weak)
4	2010	Breach of Faith	Local government corruption in Bell, CA	Jeff Gottlieb & Ruben Vives / <i>Los Angeles Times</i>	Strong	FOIA
5	2009	Toxic Waters	The flaws in Clean Water Act regulation	Charles Duhigg & Matthew Bloch / <i>New York Times</i>	Strong	FOIA
6	2008A	Kwame Kilpatrick: A Mayor	Corruption at the municipal level	Jim Schaefer & M. L. Elrick / <i>Detroit Free Press</i>	Strong	Litigation; FOIA

303. Excluding redundancies with Pulitzers: projects that won both prizes.

LAW AS SOURCE

		in Crisis				
7	2008B	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	2007A	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	2006A	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	2006B	A Tank of Gas, A World of Trouble	Tracking the supply chain of gasoline	Paul Salopek / Chicago Tribune	Nonexistent	-
11	2005A	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	Medium	FOIA (weak); reg. Investigations; court records
12	2005B	Toxic Legacy	Pollution by Ford Motors	Jan Barry & Mary Jo Layton / The Record N.J.	Strong	Litigation; reg. Investigations; FOIA
13	2004A	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	2004B	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	2003A	Big Green	Unethical and illegal practices at the world's largest environmental group	Joe Stephens & David B. Ottaway / Washington Post	Strong-medium	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	1999A	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	1999B	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	1996A	And	Mishandling of	Fredric N. Tulsky	Strong	Litigation;

LAW AS SOURCE

		Justice for Some	homicide investigations by L.A. police	& Ted Rohrlich / Los Angeles Times		reg. Investigations; FOIA
22	1996B	Money from Asia: The Democrats' Controversial Campaign Contributions	How the Democratic National Committee solicited improper donations from foreign-linked corporations and individuals	Alan C. Miller & Glenn F. Bunting / Los Angeles Times	Strong-medium	Litigation
23	1995B	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