'Examining the Case for a Journalist-Source Privilege'

A Comparative Analysis of the Level of Protection Afforded to Journalistic Sources in the UK, the US and Canada

by

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A thesis submitted in conformity with the requirements
for the degree of Master of Laws
Graduate Department of Law
University of Toronto

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Your file Votre référence
ISBN: 978-0-494-40245-0
Our file Notre référence
ISBN: 978-0-494-40245-0

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Abstract

'Examining the Case for a Journalist-Source Privilege' - A Comparative Analysis of the Level of Protection Afforded to Journalistic Sources in the UK, the US, and Canada.

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The vexed question of the appropriate level of legal protection for journalistic sources is currently the subject of global debate. There are various ways to afford protection to sources, but this thesis is concerned particularly with a proposed journalist-source privilege. This paper contends that such a journalist-source privilege is fundamentally desirable, whether qualified or absolute. It analyses the costs of a privilege and balances them against the disadvantages of having little or no protection for sources. The thesis examines the differing levels of protection offered by three different jurisdictions. It discusses the situation in the United Kingdom, in the United States and finally in Canada. It is suggested that the law relating to journalist-source privilege (or source protection) remains unsettled in each of these major jurisdictions.

In recent years journalists in the United Kingdom, the United States, and Canada have come under increasing pressure to reveal their sources, and this thesis argues that a journalist-source privilege is necessary to ensure that freedom of the press does not become an empty ideal.

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Introduction

This paper will consider the issue of the protection afforded to journalistic sources. This extremely controversial topic can be broken down into two key questions:

a) Should journalists who use anonymous sources ever be entitled to refuse to reveal the name of their source to a court of law?

b) If there is a right to protect one's sources, in what situations will it be triggered and when will it be overridden?

The vexed question of the appropriate level of legal protection for journalistic sources is currently the subject of global debate. There are many different ways to afford protection to sources, but this paper is concerned particularly with a proposed journalist-source privilege. The first section of the thesis discusses the rationale behind such a privilege, including the costs of such protection, and the merits of a qualified privilege as compared to an absolute privilege. The second section deals with the prior question of who is to be considered a journalist for the purposes of the privilege. The next section considers the difficult issue of whether legal protection for freedom of expression necessarily assumes a guarantee of protection for journalistic sources. The answer to this question is bound up with debates over the formulation and content of freedom of expression, and the three different jurisdictions considered in this paper take different approaches, which all merit consideration. It will also be suggested that just because constitutional guarantees of freedom of expression may not necessarily envisage a journalist-source privilege, this does not mean that the legislature should be wary of enshrining such a privilege in the law.

My thesis will examine the differing levels of protection afforded to journalistic sources in three different jurisdictions. It will discuss the situation in the United Kingdom, in the United States and finally in Canada. It will be suggested that the law relating to journalist-source privilege or source protection, remains unsettled in each of these major jurisdictions. One cannot simply state the law and proceed to analyse it, because the law itself is uncertain. Many of the judgments which will be examined are either contradictory or open to a variety of interpretation. In an attempt to clarify the situation, this paper will explore and analyse the legal framework for protection in each jurisdiction.

The Rationale Behind a Journalist-Source Privilege

The concept of privileging communications which arise within certain relationships has existed for hundreds of years. Even the United Kingdom, which, as we shall see, has a very strict approach to legal privilege, has long recognised the special and confidential nature of certain relationships:

> In common with other professional men, for instance a priest, and there are of course others, the doctor is under a duty not to disclose, (voluntarily) without the consent of his patient, that which he, the doctor, has gained in his professional capacity, save... in very exceptional circumstances.[1]

However this section of the paper is concerned with a journalist-source privilege, and legal privilege is different from any common law duty of confidentiality:

> Privilege is the name given to a rule of law that permits a lawful demand for information to be refused. Unlike an obligation of confidentiality, it operates exclusively as a shield. Traditionally the rule has been applied to the right to keep back confidential communications that are relevant to litigation.[2]

Legal Privilege is a term which means different things in different jurisdictions. The United Kingdom, for example, restricts privilege to legal and quasi-legal professionals.[3] Rosemary Pattenden has pointed out that in this respect, England is "out of step"[4] with

[1] per Boreham J, in *Hunter v Mann* [1974] 1 Q.B. 767, p.772
[2] Rosemary Pattenden. The Law of Professional-Client Confidentiality: Regulating the Disclosure of Confidential Personal Information (New York: Oxford University Press, 2003) at 14 [Pattenden]
[3] Legislation has bestowed the privilege on patent agents, trade mark agents, licensed conveyancers and authorised advocates, litigators and probate practitioners.
[4] Pattenden, supra note 2 at 564

much of the common law world. Australia, New Zealand and parts of Canada[5] all have legislation which bestows privileged status in litigation on communications between clergy and penitent.[6] In addition, much of Australasia recognises a limited doctor-patient privilege.[7] Pattenden has also noted[8] that communications to marriage guidance counsellors are protected in both Canada and New Zealand[9]. In the United States, individual states have legislated to recognise many legal privileges.[10] In his testimony to the Senate Committee on the Judiciary, Geoffrey Stone listed the attorney-client privilege, the doctor-patient privilege, the psychotherapist-patient privilege, the privilege for confidential spousal communications, the priest-penitent privilege, the executive privilege, and the 'Speech or Debate Clause' privilege for members of Congress.[11]

The goal of most legal privileges is to encourage free and open communication in circumstances where it is in society's interest to promote such communication.[12] In his testimony to the Senate Committee, Stone stated that three factors implicitly support recognition of the privilege in such cases:

(1) the relationship is one in which open communication is important to society;

(2) in the absence of a privilege, such communication will be inhibited; and

[5] *Quebec Charter of Rights and Freedoms*, s. 14 and *Newfoundland's Evidence Act 1970*, s. 6.
[6] Pattenden, supra note 2 at 564
[7] *National Mutual Life Association of Australia Ltd v Godrich* (1909) 10 CLR 1.
[8] Pattenden, supra note 2 at 564
[9] *Divorce Act 1986* (Canada), s. 10(5); *Family Proceedings Act 1980* (New Zealand), s. 18(1)(a)
[10] Scott Stone & Ronald Liebman, *Testimonial Privileges* (New York:1983)
[11] Testimony of Geoffrey R. Stone to the Senate Committee on the Judiciary, on the issue of a Proposed Journalist-Source Privilege [Stone Testimony]
[12] Ibid

(3) the cost to the legal system of losing access to the privileged information is outweighed by the benefit to society of open communication in the protected relationship.

It is submitted that a journalist-source privilege can be equally justifiable if this same logic is applied. Existing public policy certainly supports the notion that individuals who possess information of significant public value should usually be encouraged to convey that information to the public. Stone finds evidence for this contention in the existence of copyright protection.[13] Sometimes individuals who possess important information want to reveal it to the public, but are fearful of revealing their identity. Reasons for seeking anonymity range from fear of retaliation, to dislike of losing their privacy, to a general aversion to becoming publicly embroiled in a scandal. In modern society, the revealing of information to the press is often the quickest and easiest way to disseminate knowledge to the public as a whole. If there is no journalist-source privilege, however, the source may decide not to come forward. Of course, there are also sources who would attempt to abuse a journalist-source privilege, and this problematic category will be considered later.

As is customary when dealing with legal privileges, the privilege in the journalist-source relationship would belong to the person whose communication society wants to encourage, namely the source.[14] If the source elects to waive the privilege, the journalist would have no authority to assert it. The journalist is merely the agent of the source.[15]

[13] Ibid
[14] Ibid
[15] Pattenden, supra note 2 at 555

Before a determination is made as to the desirability of a journalist-source privilege, the costs of such a privilege must be carefully considered. The main argument against legal privileges is that they deprive a court or other investigative authority of relevant evidence, or as Pattenden puts it, "privilege is a fetter on the discovery of truth".[16] This is clearly a weighty objection to privileges in general. However, Stone's discussion has put this fact into context:

> Almost all rules of evidence deprive the fact-finder of relevant evidence... This is so because the law of evidence inherently involves trade-offs between the needs of the judicial process and competing societal interests.[17]

The rules of evidence mentioned as examples include; rules against hearsay and opinion evidence, rules excluding proof of repairs and compromises, the exclusionary rule, the privilege against compelled self-incrimination, and rules protecting trade secrets and the identity of confidential government agents.[18] Emson has articulated this tension which lies at the heart of the law of evidence; the practical outcome of a conflict between the 'principle of free proof' and countervailing considerations of public policy is that logically relevant evidence can quite properly be excluded.[19]

A key question then, is what quantity of evidence will be sacrificed if a journalist-source privilege is established? This is not an easy question to answer. However, privileges do have a distinctive feature which is important here. If we focus on the moment the privilege is invoked (e.g. when the reporter refuses to name his source in court), the cost

[16] Pattenden, supra note 2 at 537
[17] Stone Testimony, supra note 11
[18] Ibid
[19] Raymond Emson, *Evidence*, 3rd Edition (Ebbw Vale: Palgrave Macmillan, 2006) at 2

of the privilege appears to be high.[20] Something tangible is being lost because of the existence of the journalist-source privilege. However, we obtain an entirely different perspective on the situation if we instead turn our attention to the moment when the source speaks to the reporter. We can imagine a situation where a source will not reveal important information in the absence of a journalist-source privilege. The reporter will never know the information and therefore cannot print it. The reporter will never be required to testify in court and the court will never learn the identity of the source. This chain of events demonstrates that without the privilege, the court is denied the same information as it would be denied if the privilege did exist. Except that without the privilege, the public and the court will never even have access to the underlying information via the newspaper article. This kind of analysis has led Stone to the conclusion that in such a situation the privilege is "costless" to the legal system.[21]

Of course, this analysis rests on the assumption that the source would not have revealed the information to the journalist if a journalist-source privilege did not exist. The true cost of the journalist-source privilege is the loss of evidence that results from the privilege, in situations where the source would have revealed even without a privilege. It should be noted, though, that a source can always waive the privilege if he or she so desires.

The issue of waiver can, however, become a little problematic. Put bluntly, it seems that there is no mechanism (aside from accepting the reporter's word at face value) for knowing what a source agreed to, or whether the source has offered or refused to waive

[20] Stone Testimony, supra note 11
[21] Ibid

the privilege. This concern materialised during the Judith Miller litigation. After Miller had been held in contempt for refusing to testify about a source, and had spent 85 days in jail, she claimed that she had finally been given permission to reveal the identity of her source. The source and his lawyer, however, claim that they had communicated such approval to her attorney a year earlier.[22] Miller and her lawyer dispute this, arguing that there had been no written waiver, and Miller felt it was unethical to reveal the source in the absence of such a document.[23] In any event, the case highlights the problems with source waiver. In his testimony to the Senate Committee on the Judiciary, Clymer also mentions the case of the reporter Jim Taricani, who refused to divulge the identity of a source who had given him an FBI videotape of a government official taking a bribe. After Taricani was convicted of criminal contempt, the source revealed himself and stated that he had never asked Taricani to protect his identity. Whether this is true or not, the Taricani case emphasises that if a source wants to reveal himself, that option is always open to him. We should perhaps not be overly concerned about the journalist doing what the source wants in respect of waiver, because if the source wants to reveal his identity, he can go public with that information.

What if the converse situation occurs, and the journalist identifies the source in the absence of the waiver? Firstly, this cannot be viewed as a 'cost' of the journalist-source privilege in the sense that the existence of the privilege is not resulting in the legal system being deprived of evidence. The name of the source has been revealed and law

[22] Testimony of Steven D. Clymer to the Senate Committee on the Judiciary, On the Proposed Journalists' Privilege Legislation [Clymer Testimony]
[23] Testimony of Floyd Abrams to the Senate Committee on the Judiciary, on a Proposed Federal Journalist-Source Shield Law [Abrams Testimony]

enforcement can act accordingly. Secondly, in the case of *Cohen v Cowles Media Co.*[24], the US Supreme Court ruled that reporters can be sued for breaking a promise to protect a source's identity. This case involved a Republican campaign advisor (Cohen), who offered a number of reporters damaging information (regarding a shoplifting conviction that was subsequently vacated) about a Democratic candidate for lieutenant governor. Some of the editors ran stories identifying Cohen and he was fired. Although the Court decided this was not a First Amendment case, Cohen was awarded substantial damages for the breach of a confidentiality contract. Thankfully, only a few later cases have been decided on the basis of this judgment, and not all of those have been decided in favour of the source.[25] It seems perverse that a politically motivated source, (who should never have been granted anonymity in the first place under most journalistic codes of ethics), should be able to sue for damages in this situation. Journalists should not break promises of anonymity lightly, and they should usually seek editorial approval before promising to protect a source, but the sanctions should be professional rather than legal. A journalist who 'burns' a source suffers a loss of professional credibility and risks the disapproval of his editor. In addition, a self-regulatory body for journalists (comparable to the General Medical Council or Law Society in the UK) could also investigate cases of alleged misconduct towards sources, and instigate professional sanctions if necessary.

Another possible cost of a journalist-source privilege would be the impact of the privilege in the situation where it is used by a confidential source to harm the target of their alleged whistle-blowing, where the confidentially-sourced news is in fact pure concoction. A

[24] *Cohen v Cowles Media Co.* Sup. Ct. C8-88-2631 1992
[25] Elliott D. Cohen & Deni Elliott, *Issues in Journalism Ethics* (Santa Barbara, CA: ABC-Clio Inc, 1998) at 118 [Cohen & Elliott]

similar concern arises if one imagines a situation when a journalist invokes the privilege in court, but in fact there is no source at all. The journalist has simply invented the story and attempted to cover his tracks by fabricating a confidential source and relying on the journalist-source privilege. It would not be entirely unprecedented for a journalist to invent a story. Stephen Glass and Jayson Blair, who wrote for The New York Times and The New Republic, respectively, have both admitted to creating characters, quotations and fabricating entire articles.

However, the truth is that with proper editorial control and adherence to basic ethical standards for journalists, this simply should not be able to happen. Common practice is typified by the CBC's 'Journalistic Standards and Practices', which insists that the reliability of sources be checked and information corroborated elsewhere.[26] The Canadian Association of Journalists has Ethics Guidelines that include the following:

> We will independently corroborate facts if we get them from a source we do not name. We will not allow anonymous sources to take cheap shots at individuals or organisations.[27]

Credible newspapers and magazines employ fact-checkers, and indeed Glass has admitted that the reason he was able to subvert the process was that he himself had once been employed as a fact-checker.[28] As Glass has stated:

> I knew how the system worked. And I made it so that my stories could get through. I invented fake notes. I later would invent a series of voice mailboxes

[26] Nick Russell, *Morals and the Media - Ethics in Canadian Journalism* 2nd ed. (Vancouver: UBC Press, 2006) at 104 [Russell]
[27] Russell, ibid at 111
[28] Steve Kroft's interview with Stephen Glass for '60 Minutes' by CBS, on 17th August 2003

> and business cards. I invented newsletters. I invented a website... For every lie I told in the magazine, there was a series of lies behind that lie that I told-- in order to get it to be published.[29]

This kind of committed and deliberate large-scale deceit is thankfully rare, but it does highlight the vital importance of rigorous ethical standards in the journalistic profession, as in all other professions. Independent verification of fact is essential to ensure that both the source and the journalist remain honest.

In addition to the existing ethical guidelines for journalists, which state that caution must be exercised in granting anonymity to sources, many newspapers have issued their own stringent guidelines. The Los Angeles Times emphasises that anonymous sources can only be used as a last resort, and even then they should be identified as precisely as possible, to reveal potential bias (e.g. Democrat congressional source or Republican congressional source).[30] A significant number of newspapers do not ever permit journalists to use anonymous sources in their articles.[31] One suggestion is that reporters who are over-eager in granting anonymity should not be able to benefit from the privilege, which should be reserved for ethical journalists. However, this would place the courts an impossible position. It should not be the courts responsibility to investigate and attempt to police journalists' decisions to grant confidentiality to sources. Journalists who dole out anonymity too liberally should instead be subject to professional sanction. Self-regulation is essential if journalism is to live up to its role as an ethical profession.

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[29] Ibid
[30] Helen Thomas, *Watchdogs of Democracy? The Waning Washington Press Corps and How it has Failed the Public* (New York: Scribner, 2006) at 89 [Thomas]
[31] 103 out of 419 respondents to an Associated Press survey of June 2005, cited by Thomas, ibid at 89 (Most of the 103 papers were in small or mid-size markets)

Doctors and lawyers have been enforcing professional sanctions for years, and there is no reason why journalists should not do the same.

A potential danger of allowing a journalist-source privilege is that if the source's identity is shielded, there will inevitably be gossip and debate on the question of who has leaked the information. This could become problematic if individuals are falsely accused of being the source of the leak. The Watergate scandal spawned decades of speculation over the identity of Deep Throat. There is little that can be done to prevent such speculation, beyond journalists ensuring that they weigh up the balance of such false accusations against the importance of the source's information to the public, before they agree to grant anonymity. Even if journalists do get the balance wrong sometimes, the overall benefit to the public in having access to important information will surely outweigh the risk that speculation over the leak might adversely affect particular individuals.

Finally, it is necessary to address the argument that in countries like Canada, where there is no source privilege, confidential news sources still feed the media plenty of information, and whistle-blowers come forward despite the absence of legal protection. This is a difficult argument to refute because there is no way of knowing how many sources choose not to speak to journalists because they know their identity can be revealed in court. We have no way of measuring how much important information a country misses out on by not having a journalist-source privilege. It is, however, worth reflecting on the fact that it is probably the case that the most important confidential communications, those of greatest value to the public, are probably the ones that risk the

most trouble for the source. The absence of a privilege is therefore most likely to chill the most valuable disclosures of information.[32] Any chilling effect will disproportionately affect the most important communications, because the less valuable disclosures tend to represent less of a risk to the source who decides to make them.

The next major question is whether the privilege should be qualified or absolute? There are many potential formulations of a qualified journalist-source privilege. Thirty-six states within the US have opted for the qualified privilege option. The aim of the qualified privilege is usually to ensure that the government is not denied any vital information because of the privilege. Typically, the qualification is that if the government shows that it has attempted unsuccessfully to obtain the information through different channels, and the information is needed to serve an important government interest, the journalist must reveal his source. The concept of a qualified journalist-source privilege is somewhat problematic:

> Although the qualified privilege has a superficial appeal, it is deeply misguided. It purports to achieve the best of both worlds, but probably achieves the opposite.[33]

The superficial appeal of qualified privilege is that it appears to offer a level of protection to the source, and yet still ensure that the government is not deprived of vital information. However, it is misguided because Stone argues that the qualified privilege is premised on the idea that the costs and benefits of the privilege can be correctly assessed at the

[32] Stone Testimony, supra note 11
[33] Ibid

moment in time when the privilege is asserted.[34] It therefore ignores the disclosures that sources do not make, because they are dissuaded by the uncertainty of the qualified privilege. Qualified privilege in this context will always be open to uncertainty, because at the point of disclosure to a journalist, neither journalist nor source can accurately predict whether a future prosecutor will be able to convince a court to put aside the privilege. A qualified privilege probably cannot yield the level of protection that many confidential sources require before they will speak to a journalist. Thirteen states and the District of Columbia have opted for an absolute privilege.

Nonetheless, it is not difficult to imagine circumstances in which it would seem irresponsible to maintain the journalist-source privilege. A common example is the hypothetical situation where a source informs a journalist that a terrorist bomb has been placed in a public area, and law enforcement authorities want the name of the source so they can interrogate him as to the exact location of the bomb. Should the journalist-source privilege be overridden in such a case? If so, it would be analogous to the exception recognised in *Tarasoff v Regents of the University of California*[35], in the context of the psychologist-patient relationship. In that case, P told his psychologist, Dr M, that he intended to kill T. Dr M asked the campus police to detain P, which they did for a short time, and then released him. A short time later, P killed T, and T's parents then sued Dr M's employers successfully. Under those circumstances, the public's interest in disclosure was held to be so strong as to become a duty.

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[34] Ibid

[35] *Tarasoff v Regents of the University of California* 529 P. 2d 55 (Cal, 1974); on appeal 551 P 2d 334 (Cal, 1976)

However, even in the case of the source who has called in the bomb alert, Stone warns that the situation is less than straight-forward.[36] It is possible that without an absolute privilege, the source may not disclose the information at all, and law enforcement officials are better off if they at least know that a bomb exists.

A final consideration involves the situation where the source's disclosure is unlawful. Logically, if the purpose of the privilege is to encourage open communication when it is in society's best interest, the journalist should not be allowed to protect the source's identity if the law has already decided that disclosure is against society's interests.[37] However, it cannot be denied that some unlawful disclosures reveal information of major public importance. Levine stresses the importance of the Pentagon Papers case, concerning America's involvement in Vietnam.[38] Justice Black stated:

> In revealing the workings of the government that lead to the Vietnam war, the newspapers nobly did precisely that which the Founders had hoped and trusted they would do.[39]

He said this despite the acknowledgment by several members of the Supreme Court that the journalists' sources may well have broken the law. There are therefore significant problems with any journalist-source privilege which automatically excludes unlawful disclosures made by sources. Perhaps the best solution may be that proposed by Stone in his testimony to the Senate Committee on the Judiciary, namely:

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[36] Stone Testimony, supra note 11
[37] Ibid
[38] Testimony of Lee Levine to the Senate Committee on the Judiciary, on the Issues and Implications of Reporter's Shield Legislation [Levine Testimony]
[39] per Justice Black in *New York Times Co. v United States* 403 U.S. 715 (1971) (the *Pentagon Papers* case)

> To uphold the privilege in this situation if the unlawful leak discloses information of substantial public value.[40]

It is not difficult to foresee that such a rule will create uncertainty in marginal cases. However, as it would only apply if the source's disclosure was unlawful, it should affect a relatively small number of cases and thus there is no need to fear an influx of litigation.

[40] Stone Testimony, supra note 11

Who Is A Journalist?

It is important to recall at the outset that the privilege belongs to the source, not to the reporter. Although the journalist can invoke the privilege, he does so as the agent of the source. There has been much debate, particularly during discussions of the proposed Free Flow of Information Act 2007, over who is to be considered a journalist for the purposes of a federal shield law, or a federal journalist-source privilege. The term 'journalist' is ambiguous, and the question of 'who is a journalist', is becoming increasingly controversial. Does it simply mean those who are members of a journalists' union or can it include others, such as bloggers, often described as the modern day equivalent of pamphleteers? Many bloggers reach audiences wider than the nineteenth century pamphleteers could ever have dreamed of, and frequently have more readers than the average local newspaper.[41] Modern communications technologies mean that there are no longer clear-cut lines, and concentration of the ownership of traditional media outlets in the hands of a few powerful men can underscore the importance of truly independent news-gatherers.

Opinion is deeply divided on whether bloggers should be considered journalists. On the one hand, Scott Gant has argued that journalism should be considered an "activity", rather than a profession.[42] The very title of Gant's book, "We're All Journalists Now", emphasises his belief that it is not possible to distinguish between internet news-gatherers and those who work for major printed news organisations. His theory is that the public

41 Scott Gant, *We're All Journalists Now: The Transformation of the Press and Reshaping of the Law in the Internet Age* (New York: Free Press, 2007) [Gant]
[42] Ibid

will benefit if they have access to many news sources, rather than being wholly dependent on traditional media outlets. If Gant's view is accepted, it is suggested that no journalistic privilege would realistically be possible, because any source protection afforded to newspaper reporters would have to be extended to any blogger who wished to keep the identity of his sources secret. It is submitted that a right to protect sources would be both logistically unworkable and denuded of its purpose if it extends to protecting everyone who writes. Almost all those who advocate journalistic privilege agree that the right or privilege must be carefully contained, so that it fulfils its intended purpose of preventing ethical journalists from being sent to jail in the execution of their work.

Gant's analysis of bloggers as journalists is not, however, undisputed. In a recent newspaper article, Todd Oppenheimer has criticised Gant's characterisation of journalism as an 'activity' rather than a profession.[43] He points out that carpentry is an activity too, but would you want a house built by your doctor cousin who loves wood-working? Oppenheimer believes that while it is a good idea to use citizen journalists for material from the field, such as soldier's diaries form Iraq, it is an entirely different matter,

> To expect amateurs to figure out who is telling the truth about Iraq, or which priests have committed pedophilia. Stories in this latter category obviously require skill in a host of exacting tasks, such as interviewing evasive sources, understanding how and where bureaucracies hide evidence and writing a narrative that is compelling yet properly sourced.[44]

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[43] Todd Oppenheimer, "Read All About It – But Where Exactly?" *San Francisco Chronicle*, Sunday June 17th 2007
[44] Ibid

For Oppenheimer, the chief problem with online bloggers is that they have no meaningful credentialing system. He believes that the solution is for online news bosses adopt a modern and effective system of self-regulation.[45] This would certainly make it easier to afford the privilege of source protection to some online bloggers. There would then be a group of dedicated, fully credentialed, online journalists.

Litigation in California has also explored the issue of whether bloggers can avail of the same protection afforded to journalists under US law.[46] Three blogs which published sensitive information about upcoming Apple products were originally ordered to disclose where the leaks came from. The Civil Liberties group EFF[47] argued that those writing for blogs should have access to the same First Amendment and California Shield Law protection as journalists for traditional media outlets. A California State Appeals Court subsequently overturned the lower court's decision. The judgment stated:

> We can think of no workable test or principle that would distinguish 'legitimate' from 'illegitimate' news. Any attempt by courts to draw such a distinction would imperil a fundamental purpose of the First Amendment, which is to identify the best, most important, and most valuable ideas not by any sociological or economic formula, rule of law, or process of government, but through the rough and tumble competition of the memetic marketplace.[48]

Apple declined to appeal the decision, but the litigation has left many unanswered

[45] Ibid
[46] *Apple Computer v. Doe et al.* Case No. 1-04-CV-032178 (Superior Ct., Ca., March 11, 2005)
[47] Electronic Frontier Foundation
[48] *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 44 Cal.Rptr.3rd 72 2006 WL 1452685

questions about the position of future bloggers. As it currently stands the Free Flow of Information Act 2007 states that if you enjoy "financial gain or livelihood" from journalism, you are to be considered a journalist for the purposes of the Act. This definition will cover some bloggers but not all.

In his testimony to the Senate Committee on the Judiciary, Stone proposed an alternative way to decide whether a reporter can invoke the privilege.[49] Rather than focusing upon whether the journalist fits into an approved category, we should be concerned about the reasonable expectations of the source. This source-centered approach has the advantage of echoing the salient fact that the privilege belongs to the source, not the journalist. Stone suggests:

> The source should be protected whenever he makes a confidential disclosure to an individual, reasonably believing that that individual regularly disseminates information to the general public, when the source's purpose is to enable that individual to disseminate the information to the general public.[50]

This kind of definition will undoubtedly raise its own issues of interpretation, but it still seems preferable to drawing ad hoc lines, and categorizing journalists based on credentials or affiliation.

Does Legal Protection for Freedom of Expression Necessarily Include Confidential Source Protection?

[49] Stone Testimony, supra note 11
[50] Ibid

Before this important question of principle can be addressed, it is necessary to explore what freedom of expression actually means, and what relationship it has to the concept of freedom of the press. This section of the paper makes reference to four related but separate concepts: freedom of speech, freedom of expression, freedom of the press and freedom of information. Each of these notions must be examined in turn. Firstly, freedom of speech is protected by the First Amendment to the US Constitution. It is a venerable concept, which has always been thought to cover more than what is literally speech – it encompasses more than spoken language alone.[51] Martin writes:

> Freedom of speech has typically meant the freedom to publish – publish being used here in its widest possible meaning, as writing, speaking, printing, or broadcasting ideas and information – without prior restraint imposed by the state.[52]

Freedom of the press is a similar, but not identical concept. The First Amendment lists both freedom of speech and freedom of the press, individually. Like freedom of speech, freedom of expression involves the absence of prior restraint. The two can sometimes be used synonymously. However, it is possible to imagine situations where freedom of speech and freedom of the press can conflict. Martin cites a case heard by the Canadian Supreme Court, *Gay Alliance Toward Equality v. Vancouver Sun*[53], as evidence of this

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51 Larry Alexander, *Is There a Right of Freedom of Expression?* (New York: Cambridge University Press, 2005) at 7 [Alexander]
[52] Robert Martin, *Media Law* (Concord: Irwin Law, 1997) at 2 [Martin]
[53] *Sub nom. British Columbia (Human Rights Commission) v. Vancouver Sun* [1979] 2 S.C.R. 435

phenomenon.[54] The Vancouver Sun declined to print an advertisement for the Alliance's gay liberation paper. A situation arose where the freedom of speech of the Gay Alliance Towards Equality conflicted with the freedom of the press of the Vancouver newspaper.

Freedom of expression is the term used in the Canadian Charter of Rights and Freedoms and in Article 10 of the European Convention of Human Rights. Freedom of expression appears to be a more expansive notion, encompassing but going beyond free speech. Alexander believes that because freedom of speech protects more than the spoken word, and in the US has been held to cover even abstract art and musical performances, freedom of speech really refers to (and is frequently referred to as) freedom of expression or freedom of communication.[55] However, Martin draws a distinction between the two. He holds that unlike freedom of speech:

> Freedom of expression may also protect the communication of ideas or opinions through purely physical acts.[56]

The Supreme Court of Canada has indeed determined that picketing during a dispute over labour can be viewed as a form of expression.[57]

The final concept, freedom of information, is entirely distinct from the other three. Freedom of information involves the ability of individuals to gain access to information which is under the control, or in the possession of, the state.[58] Freedom of information statutes are common in the UK, the US and Canada. The Canadian legislation is perhaps

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[54] Martin, supra note 52 at 3
[55] Alexander, supra note 51 at 8
[56] Martin, supra note 52 at 4
[57] *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573
[58] Martin, supra note 52 at 4

the most appropriately titled, as the Access to Information Act.[59] This paper will also discuss the proposed US Free Flow of Information Act 2007, which is not a freedom of information statute in the traditional sense, but which instead imposes conditions on when a journalist can be federally compelled to reveal his source.[60]

The next step is to consider legal protection of freedom of expression, and then to determine whether it necessarily includes protection for confidential sources. The most obvious point to make at this juncture is that the legal framework protecting freedom of expression varies within the three jurisdictions considered in this paper. In the United Kingdom, freedom of expression is formulated as a human right.[61] Although interestingly, Alexander has argued that there is no theoretical grounding which justifies the claim that freedom of expression is a human right.[62] He maintains that legal protection of freedom of expression should vary with historical and cultural circumstances rather than being entrenched as a human right.[63] In the US and Canada, freedom of expression is constitutionally protected, by the First Amendment and the Charter, respectively. Even in the UK, where there is no written constitution, freedom of expression attains the highest possible level of protection, as it is contained in one of the most important statutes, almost a quasi-constitutional document.

The constitutional status of freedom of expression, at least in the US and Canada, has implications for whether the guarantee necessarily includes protection for confidential

[59] *Access to Information Act*, R.S.C 1985, c. A-1
[60] See p.40 of this paper
[61] *European Convention on Human Rights*, Art. 10 [ECHR]; *Human Rights Act 1998* (UK), s.12(3)
[62] Alexander, supra note 51 at 185
[63] Alexander, supra note 51 at 186

sources.[64] As a general principle, constitutional law is intended to set a minimum level of protection, a baseline rather than a ceiling, for the protection of individual freedoms.[65] There is a persuasive argument that the core of freedom of expression is about communication, and that part of news-gathering is constitutionally protected, whereas facilitated access to news should properly be considered to be beyond the scope of the minimum baseline of protection. This line of reasoning would assert that the state is under no obligation to create the ideal climate for a journalist to obtain his story, i.e. by constitutionally privileging his communications with his source. It should be emphasised that just because constitutional protection for freedom of expression may not necessarily encompass some notion of a journalist-source privilege, this should in no way prejudice the legislature's authority to create such a protection. Nor should it be taken as any indication that protection for confidential sources is in some way undesirable. It simply means that a journalist-source privilege is too far removed from the core content of a constitutional guarantee of freedom of expression.

There is, of course, a counter-argument to the suggestion that legal protection for freedom of expression need not necessarily include protection for confidential sources. The press often claims that without guaranteed respect for the confidentiality of sources, it would be unable to fully report on matters of public significance and so fulfil its public watchdog role.[66] As Barendt puts it:

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[64] See further discussion in the section of this paper which deals with constitutional protection in the US, p.41

[65] Stone Testimony, supra note 11

[66] Cohen & Elliott, supra note 25 at 120

> Respect for such confidentiality is, on this view, an integral aspect of freedom of speech and press freedom, as well as a moral obligation.[67]

A major underlying issue is whether freedom of expression, and/or freedom of the press, includes a right to get access to news. This question is linked to the debate over whether journalists merit broader constitutional rights than others. The best place to start this discussion is probably with a recognition that freedom of speech is generally not considered to confer on individuals rights of access to information.[68] Rather, individuals have a right to communicate information which they already possess. Most jurisdictions have statutes which deal with freedom of information, and courts have traditionally been unwilling to derive a constitutional right from either freedom of speech or freedom of expression.[69] However, Barendt believes that the situation may be different in respect of freedom of the press.[70] It is at least arguable that an explicit provision of freedom of the press bestows upon journalists positive rights of access to information. These rights of access would be linked to the journalist's role as a news-gatherer, and would apply when the journalist's role distinguishes his position from that of the general public.[71]

However, courts have generally been reluctant to hold that there are special press rights to acquire information which privilege journalists above ordinary members of the public. In the 1970s, the US Supreme Court dealt with two cases in which journalists challenged California and federal rules, which prevented the press from interviewing certain

[67] Eric Barendt, *Freedom of Speech*, 2nd ed. (Oxford: Oxford University Press, 2005) at 436 [Barendt]
[68] Ibid, at 434
[69] Ibid
[70] Ibid
[71] Ibid

prisoners.[72] Stewart J. delivered the majority judgment, which rejected the notion that the US Constitution imposes a positive duty upon the government to grant journalists access to sources of information, which would be unavailable to ordinary members of the public.[73] In later case, *Houchins v. KQED*[74], the Supreme Court considered the issue of whether journalists were entitled to more effective and regular access to parts of a penitentiary. In each of these cases, the dissenting minority favoured access rights for journalists, on the basis that journalists need to be able to inform the public about prison conditions.[75] The minority therefore premised their dissent on the importance of the public's right to know.

This potential privileging of journalists on the basis of the public's right to know feeds in to the debate over whether journalists deserve broader constitutional rights than ordinary citizens. Proponents of greater constitutional rights for journalists often argue that the media acts as the agent of the public.[76] John Miller believes that the mission of Canadian newspapers should be:

> To act as a check against arbitrary power and to serve the public in the interests of democracy.[77]

This idea of the press as a 'watchdog' could be used to justify broader constitutional rights for journalists. However, any characterisation of the journalist as the surrogate or agent of the public is inherently problematic. The journalist cannot be considered a true

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[72] *Pell v. Procunier* 417 US 817 (1974); and *Saxabe v. Washington Post* 417 US 843 (1974)
[73] *Pell v. Procunier* 417 US 817 (1974)
[74] *Houchins v. KQED* 438 US 1 (1978)
[75] Barendt, supra note 67 at 435
[76] Russell, supra note 26 at 30
[77] John Miller, *Yesterday's News: Why Canada's Daily Newspapers Are Failing Us* (Halifax: Fernwood, 1998) at 22

surrogate because a member of the public cannot simply call a news-desk and expect a journalist to go view or investigate a matter on his behalf. Instead of looking at a journalist as a surrogate, it is at least possible to view the media as manufacturing a product which we consume.

A second problem which arises if the press seek special constitutional status, because of their public watchdog role, is that courts will have to define which organisations are entitled to claim these rights.[78] This definitional problem is a genuine constitutional concern. The section of this paper which deals specifically with the US will contend that a sweeping statement of who is to be considered a journalist under the US Constitution should not be embarked upon lightly.[79] The foregoing analysis demonstrates why courts are justifiably concerned about the problems of recognising special constitutional rights of access or news-gathering for the press. However these concerns are not equally applicable to potential statutory rights of access to information for the press.[80] It is one thing for the legislature to decide who, as a matter of sound public policy, is to be viewed as a journalist for the purposes of a specific statute, and quite another for the courts to pronounce who will be considered to have constitutional status as a journalist.

[78] Barendt, supra note 67 at 435
[79] See p.49 of this paper
[80] Barendt, supra note 67 at 435

The United Kingdom

When discussing the situation in the United States and Canada, this paper will adopt a two-step approach. The first question to be considered is whether there is any non-Constitutional protection for sources. If it is determined that the non-Constitutional protection is non-existent or weak, it will then be necessary to consider whether there is Constitutional protection. However, the United Kingdom cannot be easily subjected to this kind of analysis because, unlike the US or Canada, the UK has no single, written constitutional document. The Constitution of the United Kingdom is simply the uncodified body of law which regulates how the country functions. The Constitution draws from a variety of sources, including Acts of Parliament, EU law, caselaw and international treaties. These are all written sources, but the UK constitution also has unwritten elements, notably Constitutional conventions. Although some of these guidelines have now been committed to paper, the writing is usually intended to enhance understanding rather than to supersede the original convention. The European Convention on Human Rights, brought into UK law by the Human Rights Act 1998, is probably the closest thing the UK has to a single Constitutional document, in that it attempts to codify certain rights of citizens. This is not the place for an in-depth analysis of the UK Constitution, however, it is important to at least recognise the different legal framework of this jurisdiction, as it will have implications for the analysis of source protection measures.

Instead of considering non-Constitutional protection, and then Constitutional protection, this section on the United Kingdom will look at the position before and after the major statute (The Contempt of Court Act 1981). It will then consider the impact of the European Convention on Human Rights and will analyse the relevant caselaw.

1. The position before the 1981 Contempt of Court Act

In the section of this paper which examined the rationale behind a journalist-source privilege, it was stated that privilege in the UK is restricted to legal and quasi-legal professionals.[81] Journalism is one of a number of professions (including medicine, banking and the clergy), which has been expressly singled out by English courts as not attracting privilege in relation to communications with their clients.[82] There was therefore very little capacity for journalists to shield their sources before the limited protection afforded by the 1981 Contempt of Court Act.

The common law did not enable journalists to protect sources in all circumstances. The consequences for refusing to reveal the name of a source included imprisonment and fines. However, there was still long-standing recognition that it was not always desirable to require a journalist to reveal his sources. The last major pre-1981 case was *British Steel Corporation v Granada Television Ltd*[83]. In this case the House of Lords confirmed that there was no journalistic immunity in circumstances where disclosure was necessary "in the interests of justice", but accepted that there might be cases where it would be

[81] See p.3 of this paper
[82] *A.G. v Mulholland* [1963] 2 Q.B. 477
[83] *British Steel Corporation v Granada Television Limited* [1981] A.C. 1096

better not to insist on disclosure. The Courts had a degree of discretion and would undertake a balancing of interests exercise.

2. The Contempt of Court Act 1981

Section 10 of the Act states:

> No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

The Act was heralded by some civil liberties groups as evidence of a shift in the balance of public interest in favour of freedom of speech. In *Secretary of State for Defence v Guardian Newspapers Ltd*[84], the protection afforded to journalists was capable of prevailing even against the assertion of clear proprietary rights. The importance of the balancing exercise continued to be emphasised by the courts in the years after the Act came into force. In *X Ltd v Morgan Grampian (Publishers) Ltd*[85], Lord Bridge explained:

> The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand.

These are reassuring statements of principle, but the question as to whether Section 10 actually produced any better protection for journalists' sources remains unanswered. It can be said that the tide seemed to be turning in favour of freedom of expression, albeit

[84] *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] A.C. 339
[85] *X v Morgan Grampian (Publishers) Ltd* [1991] 1 A.C. 1

slowly, as the incorporation of Convention rights began to emerge as a possibility. By 1993, Lord Keith in the House of Lords[86] spoke of the "chilling effect" upon the free flown of information. However there was still disagreement over the correct weight to be given to the importance of freedom of speech. Lord Justice Thorpe in *Camelot Group plc v Centaur Communications*[87] stated bluntly:

> There is no material difference of principle underlying Section 10 of the Contempt of Court Act 1981 as applied by the courts of this jurisdiction and Article 10 of the European Convention of Human Rights.

3. Article 10

Article 10 of the European Convention on Human Rights stipulates:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

This right is not absolute, and Article 10 (2) states that it is subject to restrictions, including; the interests of national security and public safety, the prevention and detection of crime, the protection of health or morals, the rights of others and the prevention of disclosure of confidential information.

In *Goodwin v UK*[88], Goodwin, a trainee reporter on *The Engineer* magazine, was given information by a source from a confidential plan apparently stolen from the plaintiffs. The House of Lords applied a balancing test between the company's right to take action

[86] *Derbyshire County Council v Times Newspapers Ltd* [1993] A.C. 534
[87] *Camelot Group Limited v Centaur Communications* (1998) E.M.L.R. 1
[88] *Goodwin v United Kingdom* (1996) 22 E.H.R.R. 123

against the source and the journalist's interest in maintaining the promise of confidentiality he had made. The House of Lords agreed that the company's right outweighed the journalist's interest. Goodwin appealed to the European Court of Human Rights. Their decision that Goodwin's Article 10 right to freedom of expression had been violated suggested that Article 10 was going to significantly enhance the protection of sources. The judgment included the following statement:

> Having regard to the importance of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order for source disclosure has on the exercise of that freedom, such a measure cannot be compatible with the European Convention on Human Rights, unless it is justified by an overriding requirement in the public interest.

The response of the Court of Appeal in *Camelot Group plc v Centaur Communications*[89] was to say that there was no material difference of principle between Section 10 and Article 10, and this approach resulted in an order for disclosure.

The first major case concerning the protection of journalistic sources which arose after incorporation was *Interbrew v Financial Times Ltd.*[90] The Court used the language of *Goodwin*[91], but decided that the purpose of the leak was critical as to whether disclosure should be ordered. The public interest in protecting such a source was held not to be sufficient to override Interbrew's public interest in seeking justice against the source. Similar reasoning was followed in the *Ashworth v MGN*[92] case. "The interests of justice"

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[89] *Camelot Group Limited v Centaur Communications*, supra not 87
[90] *Interbrew S.A. v Financial Times* (2002) 2 Lloyd's L.R. 229
[91] *Goodwin v United Kingdom*, supra note 88
[92] *Ashworth Hospital v MGN* (2001) 1 W.L.R. 515; (2002) U.K.H.L. 29, HL

were held to outweigh the public interest in the protection of sources. Ashworth involved a leakage of confidential medical information, and since the confidentiality of medical records was considered by the Court to be of paramount importance, the balancing act favoured disclosure of the source's identity. The House of Lords agreed that only an exceptional situation would justify disclosure, but yet again it was found:

> The situation here is exceptional, as it was in *Financial Times Ltd v Interbrew*[93].

A final interesting case involves questions of journalistic source protection in the context of a major public inquiry, namely the Bloody Sunday Inquiry in Northern Ireland[94]. One of the controversial issues which arose during the course of this long-running Inquiry (into the killing of civilians by British Army Troops) was the right of journalists to protect their sources. Two journalists interviewed a number of former British Soldiers who provided them with important information on the killings, but who insisted on retaining their anonymity. The journalists refused to reveal the identities of their sources to the Inquiry. The Tribunal wanted the names of the sources so that it could call the soldiers as witnesses. The journalists relied on Section 10 and particularly the 'new landscape' against curtailment of freedom of expression ushered in by Article 10. However in a Ruling on 2nd May 2002, Lord Saville rejected the idea that the landscape has changed (at most "only perhaps the brightness of the sun"). The journalists were to be referred to the High Court of Northern Ireland for contempt of court.

4. Summary of the Legal Protections for Sources in the United Kingdom

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[93] *Interbrew S.A. v Financial Times*, supra note 90
[94] The Saville Inquiry, http://www.bloody-sunday-inquiry.org/

In conclusion, journalists have never had an absolute right to protect their sources and it is perhaps undesirable that protection should be absolute. At common law there was a degree of protection but it seemed this would be greatly strengthened by Section 10 of the 1981 Contempt of Court Act. Section 10 certainly introduced a framework more favourable to the journalist and whistle-blower, but in practice the courts were still perhaps overly receptive to arguments that the public interest in the protection of sources was outweighed by other public interests. The existence of the growing Strasbourg jurisprudence and particularly the actual incorporation of Article 10 into domestic law might have been expected to make disclosure orders more difficult to obtain. However the foregoing analysis of the case law suggests that while domestic courts have adopted the Convention 'language' and set out the right principles, they are still too ready to find the "exceptional" situation which allows disclosure to be ordered.

To an extent, the problems with the United Kingdom approach - based on balancing the public interest in the protection of sources against other public interest – echo the problems raised by a qualified journalist-source privilege.[95] After the incorporation of Article 10, UK courts should be approaching the question of disclosure from the starting point that there is value to society (or 'public interest') in allowing a journalist to shield his source's identity. However, this is qualified by the fact that other public interests (e.g. national security or "the interests of justice"[96]) can be held to override the journalist's entitlement (whether one frames it as a 'right' or a 'privilege') to protect his source. If we view these other public interests as qualifications of the journalist's privilege of

[95] See p.13 of this paper
[96] *Ashworth Hospital v MGN*, supra note 92

protecting his source, it seems that the journalist's privilege is subject to so many potential exceptions that it risks being denuded of content. Stone's fears about qualified privilege ignoring the disclosures that sources do not make, because they are dissuaded by the uncertainty of the qualified privilege[97], must be relevant in the context of the UK. In this respect, whether we label it qualified privilege or a right subject to exceptions is largely immaterial. Either way, the guarantee of source protection will always be open to uncertainty, because at the point of disclosure to a journalist, neither journalist nor source can accurately predict whether a future prosecutor will be able to convince a court to order the source's identity to be revealed.

[97] Stone Testimony, supra note 11

The United States

Many people argue that the U.S. has the broadest jurisprudence and scholarly literature on freedom of expression, compared to any other country. In the last twenty-five years, richer international and European jurisprudence on the topic has developed. The Canadian Charter project has also added much literature to the freedom of expression debate over the last quarter century. However, the U.S. experience remains an important resource for other countries. It illustrates what paths are open to other legal systems, and demonstrates where the adoption of particular doctrines can lead.

1. Non-Constitutional Protection

Forty-nine US states[98] and the District of Columbia recognize some version of journalist-source privilege, either by statute or common law.[99] There is, however, currently no recognition of any such privilege at the federal level. The absence of a federal privilege creates difficulties and uncertainty for both journalists and sources. Consider, for example, the situation if a reporter in California promises anonymity to a corporate whistle-blowing source. As California has a shield law, if the source's employer is involved in litigation and tries to discover the identity of the source, the reporter will still be able to protect his source. However, if the litigation is in federal court, the journalist cannot invoke the privilege on behalf of his source. This dichotomy has lead Geoffrey Stone, in his testimony to the Senate Committee on the Judiciary, to comment that:

[98] Wyoming is the only exception
[99] According to the Reporters Committee on Freedom of the Press, http://www.rcfp.org

> The absence of a federal privilege directly undermines the policies of forty-nine states and the District of Columbia, and wreaks havoc on the legitimate and good faith understandings and expectations of sources and reporters throughout the nation. This is an unnecessary, intolerable, and, indeed, irresponsible state of affairs.[100]

It could be suggested that federal intervention in the context of journalist-source privilege is unnecessary because the issue can be dealt with as part of First Amendment jurisprudence. The next section of this paper will cover the question of constitutional protection for sources within the US, but this thesis will submit that legislation is the more appropriate avenue for creating a meaningful journalist-source privilege in the US.

Of the fifty US jurisdictions that recognise some form of journalist-source privilege, thirty-two have enacted 'shield laws'. These statutes offer varying levels of protection to journalists who wish to maintain the confidentiality of an unnamed source. The California shield law, for example, protects a journalist from being adjudged in contempt for failing to comply with a subpoena. It does not protect the journalist from other legal sanctions.[101] However, the key point is that behind all these shield laws, there lies a recognition that compelling journalists to disclose confidential information usually runs counter to the public interest.[102] Opponents of a federal shield law often contend that it would prevent law enforcement officials from collecting evidence and solving crimes.[103]

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[100] Stone Testimony, supra note 11

[101] *Pocket Guide to Protecting Unpublished Information and Confidential Sources*, issued by 'The First Amendment Project', http://www.thefirstamendment.org

[102] Levine Testimony, supra note 36

[103] This is the belief of Justice Department spokesman Erik Ablin, as quoted in *USA Today* - http://www.usatoday.com/news/washington/2007-03-10-shieldlaw_N.htm

However, in his testimony to the Senate Committee on the Judiciary, Lee Levine pointed out that:

> The Attorneys' General of thirty-four states and the District of Columbia – each of whom is, by definition, ultimately accountable for the enforcement of the criminal law in their respective states – also recently filed a 'friend-of-the-court' brief urging the Supreme Court to recognise a federal reporters' privilege.[104]

Justice Department spokesman Erik Ablin insists that a shield law is unnecessary because,

> In criminal cases, we only ask the press to reveal confidential source information via subpoena when needed to solve serious crimes, and when we cannot get the evidence elsewhere.[105]

He added that such requests were "extremely rare".[106] However, proponents of shield laws feel that the number of journalists facing possible jail sentences, for refusing to divulge the name of their source, is on the increase. Marv Johnson, legislative counsel for the American Civil Liberties Union has stated:

> We're just seeing more and more instances of reporters being subpoenaed.[107]

Johnson's concern has been echoed by John Sturm, president and CEO of the Newspaper

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[104] Levine Testimony, supra note 36
[105] Article from *ContraCosta Times* – Reprinted on American Society of Newspaper Editors Page 05/04/2007 - http://www.asne.org/index.cfm?ID=6587
[106] Ibid
[107] As quoted in *USA Today* - http://www.usatoday.com/news/washington/2007-03-10-shieldlaw_N.htm

Association of America. Strum believes that journalists are "increasingly becoming the first stop rather than the last resort", for prosecutors seeking information.[108]

There has been significant support in both Congress and the Senate for some kind of federal journalist-source privilege. Although the Free Flow of Information Acts of 2005 and 2006 were unsuccessful, there is optimism[109] about the new Free Flow of Information Act, which was passed out of the House Judiciary Committee on August 1st 2007. The stated purpose of the Free Flow of Information Act 2007 is:

> To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

While the Bill does introduce at least some protection for journalists at the federal level, it is far from perfect. The Bill lists a raft of exceptions, detailing situations in which journalists can be compelled to reveal their sources. These exceptions include: cases where there is imminent harm to national security, risk of imminent death or significant bodily harm, a trade secret "of significant value in violation of State or Federal law", individually identifiable health information and finally, if "non-disclosure of the information would be contrary to the public interest". The European experience of 'public interest' exceptions in this context teaches us that it can be difficult to strike a balance between the public interest in disclosure and the public interest in the protection

[108] Article from *ContraCosta Times*, supra note 105
[109] Christine Tatum, President of the Society of Professional Journalists

of sources.[110] In addition, the phrase "contrary to the public interest" is open to interpretation, and can be construed either narrowly or broadly. The trade secret exception could also hinder the kind of whistle-blowing communication which is actually in the public interest, despite being illegal.[111] This paper has already explored the question of whether any privilege should be qualified or absolute. The Free Flow of Information Act 2007 proposes a qualified privilege and attracts all the previously discussed problems which attach to partial protection for sources.

2. Constitutional Protection

It has already been suggested in this paper[112] that one way to solve the problem of the absence of federal legislation would be to rely on the First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

However, there are a few problems with depending on constitutional protection for journalistic sources. Geoffrey Stone rejects the idea that the First Amendment can be used as a panacea in this context, and has pointed out that:

> Constitutional law sets a minimum baseline for the protection of individual

[110] See pp.32-36 of this paper, dealing with the situation in the UK
[111] This dilemma is discussed earlier in this paper, see p.15 on legal privilege
[112] See p.38 of this paper

> liberties. It does not define the ceiling of such liberties. That a particular practice or policy does not violate the Constitution does not mean it is good policy.[113]

In addition, Stone believes that discussion of a journalist-source privilege cannot be limited to a discussion of individual liberties, because it is also a vital public policy question about the best way to promote and encourage the marketplace of ideas. As Stone puts it:

> Just as the non-constitutional attorney-client privilege is about promoting a healthy legal system, the non-constitutional journalist-source privilege is about fostering a healthy political system. [114]

In 1972 the US Supreme Court addressed the question of whether the First Amendment embodies protection for sources. The Supreme Court in *Branzburg v Hayes*[115] concluded that the journalists involved in that case could be compelled to disclose the identities of their confidential sources to federal grand juries. This decision caused dismay among some First Amendment supporters. The case caused controversy even among the judges who decided it. The ruling written by Justice Byron White dismissed the sweeping arguments made by press supporters that the important public-watchdog role of the press would be hamstrung by the lack of First Amendment protection. Floyd Abrams, counsel in the Judith Miller case, has written of the *Branzburg*[116] judgment:

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[113] Stone Testimony, supra note 11
[114] Ibid
[115] *Branzburg v Hayes* 408 U.S. 665 (1972)
[116] Ibid

> While White's opinion did not close off every opportunity that the press might seek to obtain some level of legal protection, the icy music of the opinion seemed to leave little ground for optimism.[117]

White was disdainful of arguments that reporters needed First Amendment protection for confidential sources. He felt that such suggestions ignored the crucial fact that:

> Agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy.[118]

The dissenters in *Branzburg*[119] were unhappy with the views on the First Amendment expressed in the majority opinion. Justice Stewart wrote for three of the four dissenters, and, when discussing the majority opinion, highlighted:

> A disturbing insensitivity to the critical role of an independent press in our society.[120]

Justice Stewart's sentiments on this matter were echoed in the separate dissenting opinion of Justice William O. Douglas. However, it seems that the dissenting judgments were ultimately less important for free press advocates than the opinion of Justice Lewis Powell. Although Powell joined in the majority opinion, he also wrote a brief concurring opinion of his own. Abrams describes this opinion as one which:

> Could be read as leaving open just about every door that the White decision had seemed to close.[121]

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[117] Floyd Abrams, *Speaking Freely - Trials of the First Amendment* (New York: Penguin Books, 2006) at 293 [Abrams]
[118] *Branzburg v Hayes*, supra note 116
[119] Ibid
[120] Ibid
[121] Abrams, supra note 117 at 293

It is therefore unsurprising that there was debate from the outset about how the *Branzburg*[122] ruling should be read. In the years that followed, some courts relied on Powell's opinion, whereas others ignored it as merely ancillary to the majority opinion written by White. It appears that a dichotomy has arisen between the civil and criminal jurisdictions in this respect. A majority of federal courts, following the Powell opinion, have concluded that journalists do have first Amendment protection to preserve the anonymity of their sources in civil cases. The practical effect of this privilege is that before any order for disclosure is made the party seeking the disclosure must prove both that the information sought is central to a claim or defence, and that he has exhausted all other means of obtaining the information. By contrast, in criminal cases, a majority of courts have denied the existence of a First Amendment privilege. Another layer is added to this complex situation when we consider Abrams' comments on the disagreement between the courts which hold that there can be no First Amendment privilege in criminal cases and a minimum of four courts of appeal which have held to the contrary:

> At least four courts of appeal have disagreed, arguing that in criminal as well as civil cases, *Branzburg*[123] (read through the prism of Powell's concurring opinion) provides qualified protection for the press.[124]

In their testimony to the Senate Committee on the Judiciary, Abrams[125], Stone[126] and

[122] *Branzburg v Hayes*, supra note 116
[123] Ibid
[124] Abrams, supra note 117 at 294-295
[125] Abrams Testimony, supra note 23
[126] Stone Testimony, supra note 11

Levine[127] all devoted a substantial part of their comments to the unacceptable uncertainty (Stone describes it as "chaos")[128], which has prevailed since *Branzburg*[129]. There has been a raft of litigation dealing with the issue of confidential sources, perhaps the most notorious of which is the Miller litigation. Although the media tended to report on 'the Miller case', there are in fact two separate decisions to be reviewed. Both cases involved the possibility of a First Amendment privilege to protect confidential sources, and were heard in two different federal circuits. Analysing the two cases together reveals the tensions within the current U.S. regime of journalistic source protection. The more widely discussed case took place in Washington D.C. The outcome of that trial was that Miller was held to be in contempt of court for refusing to appear before a federal grand jury, which was investigating who had leaked to reporters the fact that Valerie Plame was a covert CIA operative. Miller did not write an article about the subject at the time of the leak, but others did (most notably, Robert Novak). Judge Hogan sentenced Miller to 18 months in jail, but stayed the sentence while her appeal proceeded. The District of Columbia Court of Appeal unanimously upheld Judge Hogan's ruling. The Court concluded that if a journalist is subpoenaed by a federal grand jury acting in good faith, he or she cannot rely on the First Amendment to avoid disclosing the identity of a confidential source.

The second case was heard by a federal district court in New York. Judge Robert Sweet reached an entirely different conclusion, and openly disagreed with the Washington D.C.

[127] Levine Testimony, supra note 36
[128] Stone Testimony, supra note 11
[129] *Branzburg v Hayes*, supra note 116

decision. He held that, under the First Amendment, the press was protected from revealing sources to federal grand juries unless there was proof of a clear need for the information to be disclosed in this way. The judge refused to order that the telephone records of the New York Times be handed over to the grand jury. He argued that such action would only be appropriate if it had been proved that the records were necessary, relevant and material, and that they were unable to be obtained from any other source. On the facts of the Miller case, he determined that this burden had not been discharged.

The Miller case is controversial because while some view her as a hero, she has also come under huge criticism from journalists and readers alike. Abrams describes her as "an iconic figure"[130] and writes:

> No journalist has paid so high a price in seeking to protect her sources or done more to persuade Congress to contemplate passing, at long last, federal legislation protecting journalists who have promised confidentiality to their sources.[131]

Newspapers and other media sources including Slate, The Nation, Editor & Publisher, the American Journalism Review, and the Columbia Journalism Review have all included articles criticising Miller's reliance on official sources in the period prior to the Iraq war, and her (now largely discredited) reports on the finding of banned weapons after the war was commenced. Michael Massing's article in the New York Review of Books[132] is a detailed and lengthy criticism of Miller's methods. He quotes her as stating:

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[130] Abrams, supra note 117 at 301
[131] Abrams, supra/ibid note 117 at 301-302
[132] Michael Massing, "Now They Tell Us?" (2004) The New York Review of Books Vol. 51, No. 3 [Massing]

> My job isn't to assess the government's information and be an independent intelligence analyst myself. My job is to tell readers of *The New York Times* what the government thought about Iraq's arsenal.[133]

Massing makes the point that many journalists would disagree with Miller's conception of their role. Anyone who subscribes to the idea that the role of the press is to seek the truth on behalf of the public, and who sees the journalist as an objective reporter of events might be concerned with Miller's description of her job. Those who argue for shield laws, and protection for journalists who uphold the confidentiality of their sources, often rely upon the fundamentally altruistic nature of the truth-seeking endeavour which journalists are said to be engaged in. If Miller is correct, and journalists are increasingly acting as little more than spokespeople or public relations officers, part of the justification for journalistic source protection is undermined.

If one concedes that a strong journalist-source privilege is not required by the First Amendment, why should Congress formulate protection for sources that goes beyond whatever the Supreme Court decided on in *Branzburg*[134]? The importance of legal certainty and a degree of uniformity has already been explained, but there are other reasons why the legislature can, and should, go beyond the *Branzburg*[135] approach. As Stone has testified:

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[133] Judith Miller, cited by Massing, ibid
[134] *Branzburg v Hayes*, supra note 116
[135] Ibid

> Beyond the point made earlier that the Constitution by no means exhausts sound public policy, the Court in *Branzburg*[136] relied heavily on two important First Amendment doctrines to justify its decision, neither of which is relevant to the issue of federal legislation. Indeed, that is why, despite *Branzburg*[137], forty-nine states and the District of Columbia have felt comfortable recognizing some form of the journalist-source privilege.[138]

The first doctrine on which the Court in *Branzburg*[139] relied is that, as a matter of interpretation, the First Amendment is primarily concerned with laws that directly regulate expression. Laws that only affect free expression incidentally will rarely, if ever, be held to violate the First Amendment. Instead, the Court usually assumes that laws of general application are constitutionally valid, even in so far as they affect journalists and speakers. The Court in *Branzburg*[140] held that the First Amendment does not protect journalists from every incidental burdening that results from the enforcement of the law. It is an inevitable side-effect of working on the basis of precedent, that courts worry about 'slippery slopes' and opening the floodgates to litigation. Yet, as Stone points out, this potentially valid constitutional concern carries little weight in the context of legislation. The legislature has the luxury of considering each problem individually, and can craft discrete laws to deal with separate issues.

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[136] Ibid
[137] Ibid
[138] Stone Testimony, supra note 11
[139] *Branzburg v Hayes*, supra note 116
[140] Ibid

The second problem raised by invoking the First Amendment in *Branzburg*[141] is that any elucidation of a journalist-source privilege requires a definition of who is to be considered a 'journalist'. This question has already been debated in an earlier section of this paper, but it is particularly relevant here, because defining the press for the purposes of the First Amendment would be considered to be very problematic by many constitutional scholars. The Supreme Court in *Branzburg*[142] recognised this problem with finding a journalist-source privilege under the First Amendment:

> It would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer as much as of the large metropolitan publisher.[143]

This definitional problem is a genuine constitutional concern. A sweeping assertion of who is to be considered a journalist under the US Constitution should not be embarked upon lightly. However, a legislative definition of 'journalist', for the purposes of availing of a journalist-source privilege, is less problematic. The legislature is surely entitled to define who, as a matter of good public policy, should be protected by a journalist-source privilege. Stone has rightly pointed out that both the Government and current legislation already draw distinctions[144] between different types of speakers, journalists and media[145].

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[141] Ibid
[142] Ibid
[143] Ibid
[144] Stone gives the example of which reporters are eligible to be embedded with the military, which can attend a White House Press Briefing, and the fact that legislation treats cable media differently to either broadcasting or print journalism.
[145] Stone Testimony, supra note 11

It is therefore submitted that the key concerns, which prevented the Supreme Court from recognising a strong journalist-source privilege under the First Amendment, are not equally applicable to potential legislative measures.

Canada

The Canadian Association of Journalists has issued 'Ethics Guidelines' on protecting sources[146]. They state that while for reasons of accountability and credibility it will usually be important to fully identify sources, on occasion use of anonymous sources will be essential to ensure the free flow of information. The Guidelines provide that protection should only be offered to individuals when the source is at risk of harm or personal hardship. In addition, more than one source should be used to verify a story. Finally, the Guidelines hold that:

> We will not allow anonymous sources to take cheap shots at individuals or organizations. We will independently corroborate facts, if we get them from a source we do not name.

It is clear from the above that the Canadian Association of Journalists is aware of the problems caused by reliance on anonymous sources, and that it has issued these Guidelines in an attempt to avoid situations where a journalist is placed in a difficult situation by the promise of confidentiality to a source.

1. Non-Constitutional Protection

Canadian courts used to adopt the category approach to privilege. The residual traces of this approach can also be found in the English common law (although not so much in relation to journalistic sources). The approach involves constructing a list of approved relationships, within which communications are said to be 'privileged'. A classic

[146] These Guidelines are available on the CAJ website - http://www.caj.ca

example of this would be the solicitor-client relationship. The category approach offered no aid to journalists, as the journalist-source relationship was not one of the approved categories.

Robert Martin[147] notes that in more recent years the Canadian courts have opted to move away from the category approach in favour of a more flexible method. The new approach involves analysing the relationship in question (for our purposes the journalist-source relationship) in a step-by-step process. Martin writes:

> This analysis is borrowed from an American writer called Wigmore, who wrote an eleven-volume treatise on the law of evidence[148]. Wigmore laid out four criteria which he said should be applied, and which the Canadian Courts have adopted[149], in order to determine whether a particular relation gives rise to privilege.[150]

Martin then proceeds to analyse each of the four criteria in the context of the journalist-source relationship. The relationship fits within the first and second criteria, the communication originates in confidence and the confidence is essential to the continuation of the relationship. The third criterion stipulates that the relationship must be socially valuable and legitimate; this too will usually be satisfied in the case of the journalist-source relationship. The real problems arise in the context of Wigmore's fourth criterion. This basically involves the court undertaking a balancing exercise between the benefit of resolving the issue in court by disclosing the information, and the harming of

[147] Martin, supra note 52 at 107
[148] John H Wigmore, *Evidence in Trials at Common Law* vol. 8, 3rd ed. rev. by McNaughton, J.T. (Boston: Little, Brown, 1961)
[149] *Slavutych v Baker* [1976] 1 S.C.R. 254
[150] Martin, supra note 52 at 107

the relationship which would be caused by ordering disclosure. Canadian courts have traditionally taken the position that the benefit of gaining the information and resolving the case is greater than any potential injury to the journalist-source relationship.

The Canadian Courts have adopted the 1963 English decision of *A.G. v Mulholland*[151]. Two reporters wrote a story about Soviet spies in the British forces and the journalists were called in front of a tribunal. They declined to tell the Tribunal the identity of their sources and were held to be in contempt of court. The journalists appealed to the Court of Appeal on the basis on journalistic privilege. The Court found that while there was no express privilege at law, journalists could not be called as witnesses without reason. Martin comments that it was held to be unacceptable to call a journalist as a witness and then 'fish' for answers[152]. The Court concluded that journalist witnesses should be compelled to disclose their sources or confidential source information only if it is shown that the information sought is both relevant to the case before the court and that the information is necessary for the resolution of the case. Even if it is determined that the information is both relevant and necessary, the lawyer can still ask the judge to 'use the moral authority of the court' to avoid pressing the question.

As discussed in the section on the United Kingdom, English law has moved on significantly since *A.G. v Mulholland*[153]. The Contempt of Court Act and the advent of the ECHR have improved the situation for a journalist seeking to protect a confidential source. The situation in Canada, at least in terms of non-constitutional protection, appears

[151] *A.G. v Mulholland*, supra note 82
[152] Martin, supra note 52 at 110
[153] *A.G. v Mulholland*, supra note 82

to be less favourable for the journalist.

While the law of defamation is generally outside the scope of this paper, it is worth mentioning here that if the allegations are claimed by the subject of the article to be false and as a result injurious to their reputation, then they are likely to pursue an action in defamation in order to rebut the accusations and receive damages for the harm inflicted upon their good name. However, demonstrating that allegations published by a journalist are true becomes harder when the journalist has guaranteed to a source that their identity will be protected, due to the rules of hearsay which hold that the only person who is able to testify in Court about the veracity of certain alleged factual circumstances is a person who came to have direct knowledge of said circumstances via their own senses – usually either having seen or heard the facts at firsthand.

For Martin, as a consequence of the limited protection afforded to journalists by Canadian law, if a reporter is unwilling to divulge the identity of the source to the editor or the newspaper's lawyers or there are serious doubts as to being able to prove the truth of the story in Court, then the story ought not to be run.[154] However, some assistance might be afforded by the alternative defence of qualified privilege, which holds that if publication is sufficiently important and justified in the public interest, then some leeway ought to be afforded to the media if their facts were not true. Whilst Canada offers less protection to the media than the extensive defence available in the United States[155], it is still available, and if publication appears untainted by malice and the subject matter is in

[154] Martin, supra note 52 at 137
[155] Following *New York Times Co. v Sullivan* (1964) 376 U.S. 254

the public interest, then this defence could render any discussion of the source's identity moot, as the truth of the allegations is viewed as being secondary to the importance of prompting a public debate.

2.Constitutional Protection

For over one hundred years after Confederation, Canada's written Constitution consisted primarily of the 1867 British North America Act.[156] There is no reference in that document to freedom of the press, freedom of speech or even freedom of expression more generally. The main purpose of the Act was to set up institutions of government for Canada, not to enshrine formal protection for human rights. When deciding the *Reference Re Alberta Legislation*[157], the Supreme Court of Canada was, however, able to create some degree of constitutional protection for freedom of expression.[158]

The Canadian Constitution was overhauled in 1982, and the British North America Act was renamed the Constitution Act 1867. The Act's content remained largely unchanged - instead a crucial new element was added to the Canadian Constitution. The most important part of the Constitution Act 1982, was the ambitious Canadian Charter of Rights and Freedoms.[159] The Charter gave formal constitutional recognition to freedom of expression. Section 2(b) of the Charter provides that everyone has the right to:

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[156] British North America Act 1867 (U.K.), 30 & 31 Vict., c.3
[157] *Reference Re Alberta Legislation* [1938] S.C.R.100
[158] Martin, supra note 52 at 14
[159] Ibid at 27

> Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.[160]

The Charter is structured in such a way that all Charter litigation involves two separate stages.[161] Firstly, it must be determined whether the Charter plaintiff has had one of his or her Charter rights infringed or denied. In order to make such a determination, the court has to ascertain the scope of the Charter guarantee which is in question. The Charter simply asserts that freedom of expression is guaranteed, it is the task of the courts to define its specifics.[162] So, in the context of source protection, the plaintiff will have to actively demonstrate that the right to freedom of expression will be infringed if the source's name is revealed. If no infringement is found at the first stage of the process, the case is over. If, however, it is determined that there has been infringement or denial of a Charter right, the plaintiff progresses to the second stage of Charter litigation.

The second stage involves applying Section 1 of the Charter. Section 1 states:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This section articulates the principle that Charter rights are not absolute, and the state has the power to impose limits on those rights. As Dickson CJ has emphasised:

> It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of

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[160] *Canadian Charter of Rights and Freedoms* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 2(b) [the Charter]

[161] Three, if a remedy is required. The third stage consists of determining which remedy should be granted to rectify the Charter wrong.

[162] Martin, supra note 52 at 28

> fundamental importance. For this reason, s.1 provides criteria for limits on the rights and freedoms guaranteed by the Charter.[163]

If the infringement of the Charter right can be justified under s. 1, the plaintiff loses the case. If the infringement cannot be justified, any state act which created the limit will be deemed unconstitutional and the court will consider the appropriate remedy. The Supreme Court in *R. v Oakes*[164] established a detailed methodology for applying section 1.

The next step in the discussion of the constitutional protection of a journalist-source privilege is to subject the case to s. 2(b) and s.1 analysis. It is interesting at this juncture to consider a few hypothetical situations, because not all sources may be equally worthy of protection.

> (a) In any debate about a journalist-source privilege, is tempting to imagine the source as a whistle-blower, motivated solely by conscience and striving to impart important information to the public, fearing that if his identity is revealed he could lose his job or even his life. Such sources do exist, and they can be considered as the first hypothetical group.
>
> (b) Cases like the Judith Miller litigation have demonstrated that sometimes sources can be politically motivated and highly placed. While a law might want to protect a corporate source blowing the whistle on an unsafe product made by his employer, it might recoil from shielding a Vice-President trying to cover his

[163] per Dickson CJ *in R. v Oakes* [1986] 1 S.C.R. 103
[164] *R. v Oakes* [1986], ibid

government's tracks. No one wants to empower government to make itself unaccountable.

(c) There is also a middle ground between these two extremes. Many sources occupy this ethically grey area. 'Deep Throat', the source continuously cited in discussions concerning journalist-source privilege, has actually transpired to have had motivation for leaking the important information over the Watergate scandal. Recent revelations indicate that he was passed over for promotion. However, to what extent, if at all, should this personal motivation make him less worthy of protection?

The first question to consider is whether forcing a journalist to reveal his source violates the s. 2(b) Charter right to freedom of expression.[165] At this juncture, the courts (including the Supreme Court in *Butler*[166]) usually apply the test which was developed in the *Irwin Toy*[167] case. However the courts rarely explain why they think the *Irwin Toy* test is a valuable tool. There are problems with the *Irwin Toy* test which should not be ignored, and these defects have lead some commentators to dispute whether the *Irwin Toy* test is really a test at all. If the Court does decide to adopt the *Irwin Toy* test, it should only do so after a considered discussion of its merits and its disadvantages.

The Court in *Irwin Toy* rejected the US jurisprudence (which distinguishes between protected and unprotected speech), preferring to carve out a commitment to protect all speech. It is questionable whether this was a wise decision. The advantage of this

[165] *Canadian Charter of Rights and Freedoms*, s. 2(b)
[166] *R v Butler* [1992] 1 S.C.R. 452 [*Butler*]
[167] *Irwin Toy Ltd v Quebec (AG)* [1989] 1 S.C.R. 927

approach is that in the US obscenity cases, the state does not have to explain why this speech is harmful for women or children. In Canada, the court has to explain why a restriction is justified to prevent such harm and to show what harm could be caused. However the disadvantage of electing to protect all speech is that hidden balancing may occur, and arguably this is even worse than the open balancing or 'defining' undertaken by the US courts. At least the US is transparent about its actions. It is difficult to draw the line between defining what we do at s. 2(b) and limiting what we do at s. 1. As Cameron puts it:

> Ironically, however, a generous reading of section 2(b) expanded the role of section 1's concept of justification and set a certain dynamic in motion.[168]

There is also the question of the violence exception. S. 2(b) protects all content, but not all forms of expression are protected. The court in *Irwin Toy* did not elucidate a distinction between form and content. We know that where the medium becomes the message, form is protected, for example language will be protected. Equally, we know that violence is not protected. We have very little information about anything in between these two extremes. The court also neglected to articulate the reasons why violence is not protected. The court seems to simply assume that this is a reasonable course of action and move on. Yet violence can convey a message. Terrorism shows us that sometimes violence conveys a message more clearly and more memorably than any other form of action. It is not difficult to understand the policy reason behind excluding violence from the definition of protected expression – violence is harmful. The court seems to be

[168] Jamie Cameron, "The Past, Present and Future of Expressive Freedom Under The Charter", 35 Osgoode Hall L. J. (1997) [Cameron]

balancing the risk of harm against expressive concerns. However, this balancing surely falls within the purview of s. 1 rather than s. 2(b)? There is another explanation – perhaps the violence exception is not about balancing but rather about the need for the Charter to be an internally consistent document. In any event, there is a degree of confusion in this area that would benefit from illumination by the court.

While there may be substantial declaratory value in the decision to protect all speech rather than to carve out blocks of unprotected speech at the outset, this review of the merits of the *Irwin Toy* test has revealed some significant flaws. In addition, there are serious problems with deploying the *Irwin Toy* test in the context of journalist-source protection. There is a tendency for courts to act as if the *Irwin Toy* test is black-letter law. In reality, *Irwin Toy* simply set out a methodology, and if it appears problematic in a particular context, there is no reason why an alternative test or methodology should not be suggested. Firstly, this analysis will proceed to follow the pattern laid out by *Irwin Toy*, in order to demonstrate the problems with applying the test in the context of questions about journalist-source privilege.

The first step of the *Irwin Toy* test requires the court to determine whether the activity in question can be properly considered to be "expression". The Supreme Court in *Irwin Toy* said that if the activity at issue had expressive content, if it attempts to convey a meaning, then it constitutes expression and attracts constitutional protection. This is a broad definition, which excludes little from expression, and even includes purely physical

acts.[169] The only exception is that acts of violence would not qualify as expression. Besides the previously discussed concerns over the doctrinal soundness of such a broad definition, there are no particular problems with applying this limb of the *Irwin Toy* test to questions of journalistic privilege. In the context of questions about journalist-source privilege, the activity at issue will almost always have expressive content. Each of the three hypothetical sources detailed above[170] would pass this first phase of the *Irwin Toy* test.

Part two of the test elucidated in *Irwin Toy* involves considering the purpose and effect of the government action or legislation. When considering the purpose requirement, the court seems to have taken the analysis in *R v Big M Drug Mart*[171] and applied it in the freedom of expression context. This creates two odd results. Firstly, even if the measure has no adverse effects on people's constitutional rights, if Parliament has an improper purpose, it is necessary to move to s.1 justification. Secondly, only things covered by the purpose test violate s. 2(b) (e.g. all content-based censorship). In terms of the effect element of the test, the court imposes a pre-condition on a plaintiff before he can bring an effect claim. The plaintiff has to demonstrate that his protected activity advances one of s. 2(b)'s purposes. There is no coherent intellectual reasoning to explain why this requirement exists in effect cases but not in purpose cases. The requirement also creates a dilemma. Either every message serves one of s. 2(b)'s purposes, or some do not. If the former, why impose an additional burden that every plaintiff will meet? If the latter, some messages will be screened out because they do not fulfil the requirement. Having chosen

[169] Martin, supra note 52 at 31
[170] See pp.57-58 of this paper
[171] *R v Big M Drug Mart* [1985] 1 S.C.R. 295

to adopt the approach of protecting all expression, why would the court screen the messages at the effect stage?

In addition to these concerns, there are particular problems with attempting to apply this limb of the *Irwin Toy* test to the issue of journalist-source privilege. As discussed above, this phase of the test involves analysing whether the purpose or effect of the government action was to restrict freedom of expression. In the context of journalist-source privilege, it is difficult to ascertain what relevant 'government action' can be subjected to this analysis. There is no statute or government pronouncement, which specifically states that the Charter guarantee of freedom of expression does not encompass source protection, and therefore journalists are prohibited from shielding their sources. The courts seem to have adopted a negative position towards a journalist-source privilege as a matter of Charter interpretation. So while a journalist might have a legitimate claim that his s. 2(b) rights are being infringed, it is difficult to see how he could bring his situation within this limb of *Irwin Toy*.

It was noted at the outset of this section that all Charter litigation involves two separate stages. If it is determined that the Charter plaintiff has had one of his or her Charter rights infringed or denied, the next question is whether that limitation can be justified under section 1. The purpose of s. 1 is to maintain equilibrium between Charter rights and limits which are necessary in a free and democratic society.[172] These limits must be reasonable and prescribed by law.[173] A journalist seeking recognition of a journalist-source privilege

[172] Cameron, supra note 168 at 7
[173] The Charter, supra note 160, s. 1

as part of the Charter guarantee of freedom of expression will argue that limits prescribed by caselaw should be treated in the same way as limits prescribed by legislation. Freedom of expression is best protected when s. 1 works in harmony with s. 2(b). However, Cameron has suggested that this balance has been put at risk:

> "*Irwin Toy's* unqualified definition of the right created a further complication: the suggestion that all expressive activity is inherently valuable conferred a kind of absoluteness of section 2(b) that made weighing other values against it potentially awkward. Rather than solve those problems, the majority upheld the prohibition on children's advertising by lowering the standard of review under section 1".[174]

The *Oakes*[175] test establishes two central criteria, which must be satisfied if one is to establish that a limit is reasonable and demonstrably justified in a free and democratic society. The first criterion is that the measure which limits a Charter freedom must be designed to serve a pressing and substantial objective.[176] The second requirement is that the means used must be proportional. This requirement may be split into three components:

- There must exist a rational connection between the means used and the objective sought
-There must be a minimal impairment of the rights or freedoms at issue
- There must be proportionality between the effects of the measure causing the infringement of Charter rights and the objective which has been identified. The more serious the deleterious effects of a measure, the more important the objective must be.

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[174] Cameron, supra note 168 at 11
[175] *R v Oakes*, supra note 163
[176] *R v. Big M Drug Mart Ltd*, supra note 171 at 69

Those opposed to a journalist-source privilege will allege that the courts' reluctance to find source protection to be a necessary component of freedom of the press, serves a pressing and substantial objective. That objective is the maximisation of evidence - the idea that the public has a right to every man's evidence. The law seeks the truth, and it requires access to evidence in order to do so. It is difficult to dispute that the health of the legal system and the interests of justice are important objectives. However, there is scope for debate over whether the courts' reluctance to allow any kind of journalist-source privilege is a proportional response to this objective.

Martin has stated that the 'rational connection' element operates as a test of efficacy, with judges attempting to forecast whether the means chosen will actually achieve the desired objective.[177] The question, therefore, is whether refusing to recognise a journalist-source privilege will increase the amount of evidence available to prosecutors. There are two points to make in this regard. Firstly, Stone has emphasised that:

> Even though there may be a difference in the outcomes of a few idiosyncratic cases, the existence of even an absolute privilege probably has no discernible effect on the legal system as a whole.[178]

This is because the percentage of cases in which the issue actually arises is "vanishingly small" and, in serious cases, prosecutors can almost always obtain the evidence from alternative sources, or use other methods to investigate the crime.[179] Secondly, the section of this paper which deals with the costs of a journalist-source privilege, explains Stone's contention that the evidential cost of the privilege is often miscalculated because people

[177] Martin, supra note 52 at 35
[178] Testimony of Stone, supra note 11
[179] Ibid

often focus on the moment the privilege is invoked.[180] Viewed at the moment when the reporter refuses to disclose a source to a grand jury, the cost of the privilege appears high. However, if we focus on the moment the source talks to the journalist, the situation looks different. If a source decides not to speak to a journalist because there is no privilege and he fears repercussions, the reporter cannot then publish the information, which means he will not be called before the grand jury, and the grand jury will not learn the source's identity. In this situation the privilege is costless to the legal system. The true evidentiary cost of the privilege is the evidentiary loss of the disclosures that would have been made even without the privilege.[181] It seems that there is little rational connection between the courts' negative position on the issue of a journalist-source privilege and the objective of ensuring access to evidence.

Normally, the next step is to ascertain whether the means which the state has chosen to obtain its objective, minimally impair the right in question. This is a difficult determination to make in the context of journalist-source privilege because we are not dealing with a clear legislative prohibition. Instead, it becomes a question of determining whether the courts' reluctance[182] to recognise a journalist-source privilege minimally impairs the right to freedom of expression, which s. 2(b) tells us includes freedom of the press. The appellant in *Moysa*[183] argued for a qualified journalistic privilege rather than an absolute privilege. As we will see in the following section, the court in *Moysa* found that no privilege arose on the facts, so the key constitutional questions were left

[180] See pp.6-7 of this paper
[181] Testimony of Stone, supra note 11
[182] In cases such as *Moysa v Alberta (Labour Relations Board)* [1989] 1 S.C.R. 1572 [*Moysa*], and *Canadian Broadcasting Corp. v. New Brunswick (A.G.)* [1991] 3 S.C.R. 459
[183] *Moysa*, ibid

unanswered. However, logically, a ban on an absolute privilege will inevitably be less minimally impairing than a ban on a qualified privilege.[184]

The third and final question with respect to the means adopted involves analysing the deleterious effects of the limitation and balancing them against the salutary effects. In this case, the deleterious effects of refusing to recognise a journalist-source privilege are that sources may be reluctant to come forward and impart information of public interest. However Sopinka J. in *Moysa* was sceptical about any chilling effect, arguing that there were no facts to support the notion that newsgathering would suffer in the absence of Charter protection.[185] It is very difficult to prove how many sources are prevented from coming forward by the absence of journalist-source protection, and this issue is addressed earlier in the paper.[186] However, as Stone points out, it is probably the confidential communications which are of greatest value to the public that would get the source in the most trouble if he disclosed them.[187] Therefore, the absence of a privilege is likely to chill the most valuable disclosures.

This third limb, balancing deleterious and salutary effects, may render different outcomes depending on what kind of source is considered. The three hypotheticals considered earlier[188] demonstrate that the deleterious effects of refusing to recognise a journalist-source privilege where the source is a concerned whistle-blower imparting information of public significance, will be greater than the deleterious effects of denying a privilege

[184] See pp.13-14 for the implications of opting for qualified rather than absolute privilege
[185] per Sopinka J. at 20 and 22
[186] See pp.12-13
[187] Testimony of Stone, supra note 11
[188] see pp.57-58

where the source is politically motivated and leaking information in order to further the agenda of his party. Of course, it will not always be easy, or even possible, for the court to ascertain the source's motivations.

Cameron has convincingly stated the flaws with the current section 1 analysis. He points out the conflict between *Irwin Toy*'s principle of freedom of expression, which considered the content or value of the expressive activity to be irrelevant, and the section 1 methodology of *Butler*[189], which held that the status of expressive activity is contingent on its value, with expression outside the core of s. 2(b) receiving little or no Charter protection.[190] Cameron's solution is to introduce two presumptions into section 1, one against content-based limits and another against absolute bans on expression. He would also adjust the Oakes test, so as to set a higher threshold under the elements of the test than the currently popular standard of reasonableness.[191] Cameron's suggestions may help avoid some of the inconsistencies in s. 2(b) jurisprudence, and his idea of introducing a presumption against absolute bans on expression would be relevant if the court rejected the idea of even a qualified journalist-source privilege.

3. Canadian Cases

In *Moysa v Alberta (Labour Relations Board)*[192], the Supreme Court of Canada considered the issue of whether the guarantee of freedom of expression in section 2(b)

[189] *Butler*, supra note 166
[190] Cameron, supra note 168 at 26
[191] Ibid at 72
[192] *Moysa*, supra note 182

should be interpreted as creating some degree of journalistic privilege. Moysa was a journalist who wrote a story about some employees of Hudson's Bay Company outlets trying to create a union. Although the exact facts are unclear, it seems that Moysa spoke to some of the Hudson's Bay workers who were trying to organise a union, and also talked to management. It appears that, whether accidentally or by design, Moysa communicated the names of the employees to a manager. Management then sacked six employees, presumably those named by Moysa. When the fired employees filed complaints before the Alberta Labour Relations Board, stating that they had been sacked for trying to unionise, Hudson's Bay denied the allegations. The former employees called Moysa as a witness and she was asked whether she had spoken with management. Moysa declined to answer the question, claiming journalistic privilege.

It is evident from the above that *Moysa* was an unusual fact situation. It seems intuitively wrong that a journalist who may have broken a promise of confidentiality to one group of sources should be able to avoid the consequences of her action by claiming that her communications with another group of sources should be legally privileged. It is difficult to obtain a clear ratio from the judgment on the issue of journalist-source protection, perhaps because of the unique factual circumstances of the case. Martin has stated:

> In this case the issue was backwards. Moysa was not claiming a privilege in respect of information she had received from a source. She was trying to claim a privilege in respect of information that, in so far as I understand the facts, she gave to a source. It was not the case to take to the Supreme Court to argue in favour of journalistic privilege. The issue of privilege did not even arise on these

facts.[193]

Moysa should not, therefore, be considered to be a definitive disposition of the issue of a journalist-source privilege by the Supreme Court of Canada. The judges themselves suggested that the Court could only properly rule on the constitutional questions raised by the issue of journalistic privilege when a more apposite case presented itself.[194] However Martin cautions against holding out much hope that the Court would find the existence of a journalist-source privilege, even if a more suitable test case arose.[195] Sopinka J. was openly sceptical about the alleged relationship between testimonial compulsion and a chilling effect on news sources.[196]

The Supreme Court of Canada has also heard cases which indirectly impact upon questions of journalistic privilege. In 1991 the Supreme Court considered the issue of searches of newsrooms, in *Canadian Broadcasting Corp. v. New Brunswick (A.G.)*[197]. CBC used section 2(b) of the Charter to argue for strong constitutional protection for newsrooms, on the basis that a guarantee of freedom of expression necessitates respect for newsrooms. CBC's first argument was that newsrooms should be constitutionally inviolable – basically immune from police searches. Unsurprisingly, this extreme position did not find favour with the Court. CBC's second contention was that two principles about newsroom searches, which were articulated by the British Columbia Supreme Court in *Pacific Press v. R*[198], should be made general law for all of Canada. The two

[193] Martin, supra note 52 at 109
[194] Per Sopinka J. in Moysa, supra note 182 at 14 and 15
[195] Martin, supra note 52 at 109
[196] Per Sopinka J. in Moysa, supra note 182 at 20 and 22
[197] *Canadian Broadcasting Corp. v. New Brunswick (A.G.)*, supra note ?
[198] *Pacific Press v. R* [1977] 5 W.W.R. 507 (B.C.S.C.)

principles were that the justice of the peace issuing the search warrant should be satisfied that the newsroom is the only place the evidence can be found, and that if an alternative source was available, an attempt to obtain the information from there must already have failed. The effect of these principles was that a warrant to search a newsroom could only be obtained as a last resort.[199] However, the Supreme Court of Canada declined to grant special protection for newsrooms in this way. Despite noting that newsrooms searches raise special concerns, the Court then held that every workplace or residence in Canada, including a newsroom, was subject to lawful search if necessary. Although this decision is not concerned with the core issues of journalist-source privilege, it is worthy of note because it is indicative of the Court's reluctance to constitutionally privilege journalists in any way. The constitutional problems with privileging journalists are explored earlier in this paper.[200]

The issue of journalistic privilege in Canada arose again in the cases of journalists Andrew McIntosh and Juliet O'Neill. The experience of renowned lawyer Marlys Edwardh in these two cases highlights the tensions in the debate over whether there should be a journalistic privilege. In the McIntosh case, the media was ultimately successful. On January 21, 2004, Senior Justice Benotto of the Ontario Superior Court held that in this case, preserving source confidentiality took precedence even over a police investigation. The Judge issued a strong statement that:

> Confidential sources are essential to the effective functioning of the media in a

[199] Martin, supra note 52 at 117
[200] See pp.17-20

free and democratic society.[201]

Marlys Edwardh worked with McIntosh during the case, attempting to craft a privilege for journalists which would stop the police, as she put it, "at the investigative reporter's door[202]". However, her experiences during the *Arar*[203] case convinced her that there is a need for journalists to improve their ethical standards and professionalism. For Edwardh, "how we calibrate the promise"[204], is crucial. She believes that if a source gives a journalist information, which the journalist uses and prints, and it later becomes clear that the journalist was lied to, that should void the promise of confidentiality and the journalist should reveal his source. Edwardh put the situation concerning Juliet O'Neill during the *Arar* case into this category. While suggesting that she would not have necessarily have supported the Public Inquiry pressing O'Neill to reveal her source, Edwardh believes that O'Neill should now reveal her source. Edwardh highlights one of the dangers of allowing a journalistic privilege when she states that if the information O'Neill received came from highly placed sources, the public have a right to know, especially if the media was deliberately manipulated.

3. Summary of the Situation in Canada

The situation in Canada concerning a journalistic privilege appears to have changed somewhat in recent years. However, although the signs for increased source protection are promising, the backbone of the Canadian law remains opposed to the idea of an

[201] *R v National Post* (Ont. SCJ) ONSC M86/02 (January 21, 2004) [*Arar* case]
[202] Remarks made during a recent talk at Massey College, Toronto (November 21st 2006) [Edwardh]
[203] *Arar*, supra note 201
[204] Edwardh, supra note 202

express journalistic privilege. There may be an increasing recognition of the idea that journalists deserve some special protection, but it is as yet unclear exactly how that development will translate in the difficult cases.

Conclusion

Each of the three jurisdictions discussed in this paper have encountered problems when a journalist-source privilege has been sought as part of a wider constitutional (or in the case of the United Kingdom, quasi-constitutional) guarantee of freedom of expression. This thesis demonstrates that some jurisdictions have had more success than others in dealing with the questions raised by source protection within their freedom of expression jurisprudence. However, it is submitted that the only way to carve out a clear, coherent and robust journalist-source privilege is to legislate for it, in the style of the proposed journalist-source federal shield law in the United States.

This thesis also contends that such a journalist-source privilege is fundamentally desirable, whether qualified or absolute. It analyses the costs of a privilege and balances them against the disadvantages of having no protection for sources. It is submitted that in recent years journalists in the United Kingdom, the United States, and Canada have come under increasing pressure to reveal their sources, and that a journalist-source privilege is necessary to ensure that freedom of the press does not become an empty ideal.

BIBLIOGRAPHY

LEGISLATION

Canadian

1867 British North America Act (U.K.), 30 & 31 Vict., c.3

Canadian Charter of Rights and Freedoms Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 2(b)

Quebec Charter of Rights and Freedoms

Newfoundland's Evidence Act 1970

Divorce Act 1986

European

European Convention on Human Rights (1950)

New Zealand

Family Proceedings Act 1980

United Kingdom

Contempt of Court Act 1981

Defamation Act 1996

Human Rights Act 1998

United States

1st Amendment to the Constitution of the United States

Restatement (Second) of Torts §§ 652 A-E ((1977) St. Paul, Minn.: American Law Institute)

JURISPRUDENCE

Australia

National Mutual Life Association of Australia Ltd v Godrich (1909) 10 CLR 1.

Canada

R v National Post (Ont. SCJ) ONSC M86/02 (January 21, 2004)

R v Butler [1992] 1 S.C.R. 452

Canadian Broadcasting Corp. v. New Brunswick (A.G.) [1991] 3 S.C.R. 459

Irwin Toy Ltd v Quebec (AG) [1989] 1 S.C.R. 927

Moysa v Alberta (Labour Relations Board) [1989] 1 S.C.R. 1572

Pacific Press v. R [1977] 5 W.W.R. 507 (B.C.S.C.)

Reference Re Alberta Legislation [1938] S.C.R.100

R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573

R v Big M Drug Mart [1985] 1 S.C.R. 295

R. v Oakes [19860 1 S.C.R. 103

Slavutych v Baker [1976] 1 S.C.R. 254

Sub nom. British Columbia (Human Rights Commission) v. Vancouver Sun [1979] 2 S.C.R. 435

European

Goodwin v United Kingdom (1996) 22 E.H.R.R. 123

United Kingdom

A.G. v Mulholland [1963] 2 Q.B. 477

Ashworth Hospital v MGN (2001) 1 W.L.R. 515; (2002) U.K.H.L. 29, HL

British Steel Corporation v Granada Television Limited [1981] A.C. 1096

Camelot Group Limited v Centaur Communications (1998) E.M.L.R. 1

Derbyshire County Council v Times Newspapers Ltd [1993] A.C. 534

Hunter v Mann [1974] 1 Q.B. 767

Interbrew S.A. v Financial Times (2002) 2 Lloyd's L.R. 229

Secretary of State for Defence v Guardian Newspapers Ltd [1985] A.C. 339

X v Morgan Grampian (Publishers) Ltd [1991] 1 A.C. 1

United States

Apple Computer v. Doe et al. Case No. 1-04-CV-032178 (Superior Ct., Ca., March 11, 2005)

Branzburg v Hayes 408 U.S. 665 (1972)

Cohen v Cowles Media Co. Sup. Ct. C8-88-2631 1992

Houchins v. KQED 438 US 1 (1978)

New York Times Co. v Sullivan (1964) 376 U.S. 254

New York Times Co. v United States 403 U.S. 715 (1971) (the *Pentagon Papers* case)

O'Grady v. Superior Court (2006) 139 Cal.App.4th 1423, 44 Cal.Rptr.3rd 72 2006 WL 1452685

Pell v. Procunier 417 US 817 (1974)

Saxabe v. Washington Post 417 US 843 (1974)

Tarasoff v Regents of the University of California 529 P. 2d 55 (Cal, 1974); on appeal 551 P 2d 334 (Cal, 1976)

SECONDARY MATERIAL: MONOGRAPHS AND BOOKS

Abrams, Floyd. *Speaking Freely - Trials of the First Amendment* (New York: Penguin Books, 2006)

Alexander, Larry. *Is There a Right of Freedom of Expression?* (New York: Cambridge University Press, 2005)

Auburn, Jonathan. *Legal Professional Privilege: Law and Theory* (Oxford and Portland, Oregon: Hart Publishing, 2000)

Barendt, Eric. *Freedom of Speech*, 2nd ed. (Oxford: Oxford University Press, 2005)

Brown, Raymond. *Defamation Law: A Primer* (Toronto: Thomson-Carswell, 2003)

Braun, Stefan. *Democracy Off Balance* (Toronto, Buffalo, London: University of Toronto Press, 2004)

Cohen, Elliott D. & Deni Elliott. *Journalism Ethics* (Santa Barbara, CA: ABC-Clio Inc, 1998)

Emson, Raymond. *Evidence*, 3rd Edition (Ebbw Vale: Palgrave Macmillan, 2006)

Freedman, Samuel G. *Letters to a Young Journalist* (Cambridge: Basic Books, 2006)

Gant, Scott. *We're All Journalists Now: The Transformation of the Press and Reshaping of the Law in the Internet Age* (New York: Free Press, 2007)

Harcup, Tony. *The Ethical Journalist* (London: SAGE Publications Ltd, 2007)

Knowlton, Steven R. *Moral Reasoning for Journalists: Cases and Commentary*, (Westport, CT: Praeger,1997)

Krotosynski, Ronald J. Jr. *The First Amendment in Cross-cultural Perspective – A Comparative Legal Analysis of the Freedom of Speech* (New York and London: New York University Press, 2006)

Martin, Robert. *Media Law* (Concord: Irwin Law, 1997)

Miller, John. *Yesterday's News: Why Canada's Daily Newspapers Are Failing Us* (Halifax: Fernwood, 1998)

Pattenden, Rosemary. *The Law of Professional-Client Confidentiality: Regulating the Disclosure of Confidential Personal Information* (New York: Oxford University Press, 2003)

Pennock, J. Roland & John W. Chapman, eds. *Privacy* (New York: Atherton Press, 1971)

Richards, David A.J. *Free Speech as Toleration* in Waluchow, Wilfrid J. ed. *Free Expression* (Oxford: Clarendon Press, 1994)

Russell, Nick. *Morals and the Media - Ethics in Canadian Journalism*, 2nd ed. (Vancouver: UBC Press, 2006)

Stone, Scott. & Liebman, Ronald. *Testimonial Privileges* (Colorado Springs: Shepard's/McGraw-Hill, 1983)

Smith, Ron F. *Groping for Ethics in Journalism*, 4th ed. (Ames: Iowa State University Press, 1999)

Thomas, Helen. *Watchdogs of Democracy? The Waning Washington Press Corps and How it has Failed the Public* (New York: Scribner, 2006)

Toulson, Roger G. and Phipps, Charles M. *Confidentiality* (London: Sweet and Maxwell, 1996)

Weaver, Russell; Kenyon, Andrew; Partlett, David; & Walker, Clive. *The Right To Speak Ill: Defamation, Reputation and Free Speech* (Durham, NC: Carolina Academic Press, 2006)

Welsh, Tom; Greenwood, Walter; Banks, David. *McNae's Essential Law For Journalists*, 19th Edition (New York: Oxford University Press, 2007)

Wigmore, John H. *Evidence in Trials at Common Law* vol. 8, 3rd ed. rev. by McNaughton, J.T. (Boston: Little, Brown, 1961)

Woodward, Bob & Bernstein, Carl. *All The President's Men*, 2nd ed. (New York: Simon and Schuster, 1994)

SECONDARY MATERIAL: ARTICLES

Addy, Caroline. "Should Bloggers be Civil in Cyberspace?" The Lawyer, 30th April 2007 (http://www.thelawyer.com)

Allan, Trevor R.S. "Disclosure of Journalists' Sources, Civil Disobedience and the Rule of Law" [1991] Camb. L.J. 131

"Breach of Confidence, Privacy and the Public Interest in England and Ireland" (2004) 55

NILQ 118, Belfast: SLS Legal Publications (N.I.)

Cameron, Jamie. "The Past, Present and Future of Expressive Freedom Under The Charter", 35 Osgoode Hall L. J. (1997)

Massing, Michael. "Now They Tell Us?" (2004) The New York Review of Books Vol. 51, No. 3

Meyers, Jessica. "The Confidentiality Crisis" (2006), American Journalism Review, Maryland: Philip Merrill College of Journalism at the University of Maryland

Palmer, S. "Protecting Journalists: Section 10, Contempt of Court 1981" [1992] P.L. 61

Sedley, Stephen. "The Rocks or the Open Sea: Where is the Human Rights Act Heading?" (2005), 32 Journal of Law and Society 3, Oxford: Blackwell

Zarek, Elysse. "The Wrong Arm of the Law" (2005), Ryerson Review of Journalism 557, Toronto: Ryerson University

Zampa, Julie M. "Journalists Privilege: When Deprivation is a Benefit", 108 Yale L.J. 1449

SECONDARY MATERIALS: OTHER MATERIAL

Abrams, Floyd. Testimony on a Proposed Federal Journalist-Source Shield Law, United States Senate Committee on the Judiciary, July 20th 2005

Clymer, Steven D. Testimony of to the Senate Committee on the Judiciary, On the Proposed Journalists' Privilege Legislation

Coile, Zachary. "Senator Leads Drive for Federal Media Shield Law", *San Francisco Chronicle*, Thursday 21st September 2006

Kroft, Steve. Interview with Stephen Glass for '60 Minutes' by CBS, on August 17th 2003

Levine, Lee. Testimony to the Senate Committee on the Judiciary, on the Issues and Implications of Reporter's Shield Legislation

Lystad, Robert D. "Anatomy of a Federal Shield Law: The Legislative and Lobbying Process" (taken from the Shield Law website: http://www.spj.org/shieldlaw.asp)

Miller, Judith. Testimony before the Senate Judiciary Committee, October 19th 2005

Mitrovica, Andrew. "Hear No Evil, Write No Lies" The Walrus Dec-Jan 2007

Oppenheimer, Todd. "Read All About It – But Where Exactly?" *San Francisco Chronicle*, Sunday 17th June 2007

Pocket Guide to Protecting Unpublished Information and Confidential Sources, issued by 'The First Amendment Project'.

Stone, Geoffrey R. Testimony to the Senate Committee on the Judiciary, on the issue of a Proposed Journalist-Source Privilege

Walker, Duncan. "Journalists 'Must Protect Whistleblowers'" (2003), London: BBC News Online, http://news.bbc.co.uk/1/hi/uk_politics/3076813.stm

The Saville Inquiry, http://www.bloody-sunday-inquiry.org/

Article from *ContraCosta Times* – Reprinted on American Society of Newspaper Editors Page 05/04/2007 - http://www.asne.org/index.cfm?ID=6587

http://www.usatoday.com/news/washington/2007-03-10-shieldlaw_N.htm

CAJ website - http://www.caj.ca

The First Amendment Project – http://www.thefirstamendment.org

Reporters Committee on Freedom of the Press – http://www.rcfp.org