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INFORMANTS AND INFORMATION: JOURNALISTS AND CONFIDENTIALITY

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FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION (LAWS 520)

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ABSTRACT

Freedom of expression and especially freedom of the press are essential elements of a democratic society. Should this freedom extend to giving journalists a privilege against revealing their sources?

The premise of this paper is that it is important that journalists are able to foster relationships of confidence with their sources and that compelling disclosure by journalists should be avoided if possible. However, the central claim of the paper is that specific statutory protections have not proven to be particularly effective or reliable forms of protection.

This paper first looks at the principles behind a journalist's privilege and its correlation to the New Zealand Bill of Rights Act 1990 (BORA).

This paper then looks at the development of the idea that journalists should be able to protect the identities of their sources and the arguments both for and against allowing journalists a privilege against disclosure. It looks at some of the situations in which the issue has been considered, touching on the different approaches taken in New Zealand and in other jurisdictions and the factors considered in deciding whether to compel a journalist to disclose his or her source. The paper then looks at the problems of scope and definition that must be resolved to establish a workable statutory journalist's privilege.

The paper concludes that, in the long run, a statutory qualified privilege may not be the best option. While there should be a fundamental presumption that a journalist should not have to reveal his or her source, the courts should have a broad discretion, balancing all relevant considerations pertaining to whether it is in the interests of justice to excuse a journalist from revealing a source.

Word length

The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 14,920 words.

Journalism – Confidential Sources – Privilege

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I INTRODUCTION

It came as no surprise to journalists in New Zealand when it was announced in 2000 that former Police Commissioner Peter Doone was commencing defamation proceedings against the Sunday Star Times. Commissioner Doone had been a passenger in a vehicle stopped at night by a young police officer. The paper reported that when the officer approached the car with a breath-test 'sniffer', Commissioner Doone allegedly said, "That won't be necessary". Media eyebrows were raised, however, when the newspaper's publisher, Fairfax New Zealand, revealed that one of its sources for the story was Prime Minister Rt Hon Helen Clark.[1] Many saw this as a transgression of a cardinal rule of journalism that a journalist never reveals his or her sources.

While the unimaginatively-named "Doonegate" saga was making headlines in New Zealand,[2] United States journalist Judith Miller was unsuccessfully fighting contempt charges for refusing to reveal to a Grand Jury her confidential sources for a story she had never actually written.[3]

Protection of journalists' sources is one of the most fundamental tenets of the journalists' code of ethics.[4] However, at law, when a source gives information to a journalist, to what extent can he or she rely on that journalist to keep any confidences revealed? And what is the legal force of a journalist's refusal to disclose information about a source?

New Zealand courts have seldom had to deal with the issue, but when they have, it has been done with considerable regard to the importance of free speech and freedom of the press. Furthermore, statutory provisions in other jurisdictions affording

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[1] "Ethical Issues For Politicians And The Press" (21 May 2005), The *Dominion Post* Wellington 9.

[2] Andrew Geddis "Why Doonegate isn't Watergate" (16 May 2005) *New Zealand Herald* Auckland A6.

[3] *Miller v United States* (2005) 125 S Ct 2977. In 2003 journalist Robert Novak published a column exposing Valerie Plame as a covert CIA operative. Judith Miller refused to disclose to a Grand Jury the names of administration sources she had talked to while researching the same story. The prosecution team was trying to establish whether Novak's source had violated the Intelligence Identities Protection Act of 1982. One judge denied the existence of any common law privilege, the second saw no need to consider it in the circumstances and the third said privilege was relevant but the prosecution case overrode it. All three voted for her to be jailed for contempt. Miller spent 85 days in jail before her release on 29 September 2005.

[4] In New Zealand, the principle is found in the Rules of the New Zealand Amalgamated Engineering Printing & Manufacturing Union Part VI : Finance And Administration R42 Journalist Code of Ethics (c) [EPMU Rules].

a privilege to journalists to protect their sources have been interpreted inconsistently and have proved to have a limited effect. Despite moves to enact such a privilege in New Zealand, journalists are unlikely ever to be able to guarantee to their sources the same degree of confidentiality as that between lawyers and their clients.

II SCOPE OF THE PAPER

A Issues

This paper looks at common law, equitable and statutory forms of protection for journalists' sources in New Zealand and in other jurisdictions. It looks at forms of protection such as the newspaper rule, qualified privilege and absolute privilege. It does not deal specifically with protection for whistleblowers,[5] or with the sources themselves, but focuses on the protection afforded to the press on their behalf.

At the start, this paper looks at the principles behind a journalist's privilege and its correlation to the New Zealand Bill of Rights Act 1990 (BORA).

This paper then looks at the development of the idea that journalists should be able to protect the identities of their sources and the arguments both for and against allowing journalists a privilege against disclosure. It looks at some of the situations in which the issue has been considered, touching on the different approaches taken in New Zealand and in other jurisdictions and the factors considered in deciding whether to compel a journalist to disclose his or her source.

In New Zealand, a new Evidence Bill which contains a clause giving journalists a qualified form of privilege is currently at the select committee stage.[6] This paper looks at the problems of scope and definition that would have to be resolved to create a workable statutory journalist's privilege.

B Terminology

The terms journalist's privilege, reporter's privilege, newsman's or newsgatherer's privilege are used more or less interchangeably in the literature on this subject. This paper refers to the common law or statutory principle that a journalist will not be required to reveal his or her confidential sources as "journalist's

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[5] Legitimate whistleblowers (employees who disclose wrongdoing within an organisation) are protected under the Protected Disclosures Act 2000.
[6] Evidence Bill 2005 no 256-1.

privilege". Journalist's privilege has been described as the right to refuse to disclose admissible evidence including oral answers and the production of documents.[7]

However, where it exists, the journalist's privilege is usually a qualified one, unlike other privileges such as legal professional privilege. It is essentially a 'default' rule, and other countervailing issues are taken into consideration.

The term 'absolute journalist's privilege' is used when referring to an absolute privilege.

III FREEDOM OF EXPRESSION

A Fundamental Democratic Principle

Protection of journalists' sources is a basic component of press freedom. Freedom of expression and especially freedom of the press are essential elements of a democratic society. The press is the 'Fourth Estate', playing a unique and pivotal role in a democratic society. It is the public watchdog, keeping guard over citizens' right to be informed and seeking always to uncover the truth.

Some commentators believe that the need for journalists to have firm protection against forced disclosure of information is more urgent today than ever before. In an international climate of fear about terrorism, governments are eager to tighten security but should not erode civil liberties at the same time.[8] Any curb on press freedom and independence leaves open the possibility for the state to exert control over the information that its citizens are delivered.

B Access to Information

Sources enable journalists to acquire information they would not otherwise be able to access and disseminate. Thus they enable more thorough enquiries into issues of public debate. For example, confidential sources were used in the investigations into ill-treatment of prisoners at Abu Ghraib and into the Enron scandal in the United

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[7] Sally Walker "Compelling Journalists to Identify Their Sources: 'The Newspaper Rule' and 'Necessity' (1991) 14 UNSWLJ 302,304 (footnote in original).

[8] Jennifer Elrod "Protecting Journalists from Compelled Disclosure: A Proposal for a Federal Statute" (2003-2004) 7 NYU J Legis & Pub Pol'y 115, 122.

States.[9] Withholding information about the identity of a source is seen as a small price to pay alongside the wider benefits to the free flow of information.[10]

Oliver Wendell Holmes believed in the value and power of information to benefit a democracy: [11]

> The ultimate good desired is better reached by free trade in ideas ... the best test of truth is the power of the thought to get itself accepted in the competition of the market ... truth is the only ground upon which [people's] wishes safely can be carried out.

In order to achieve that truth-seeking aim, "debate on public issues should be uninhibited, robust and wide open."[12]

Often a source is in a position where, if his or her identity is revealed, he or she will likely suffer some form of retribution, or even be put in physical danger. Traditionally, arguments for protection in law enabling a journalist to keep secret the identity of a confidential source have been based on the principle that if journalists cannot keep promises of confidentiality, sources would dry up. This would result not only in less news overall, but also the quality of the news that journalists are able to deliver would be diminished.

The House of Lords has recognised the concern that sources may dry up and that important information may never be disseminated if journalists cannot keep promises of confidentiality to their sources.[13] Lord Woolf explained: [14]

> Any disclosure of journalists' sources does have a chilling effect on freedom of the press ... the fact is that information which should be placed in the public domain is frequently made available to the press by individuals who would lack the courage to provide the information if they thought there was a risk of their identity being disclosed. The fact that journalists' sources can be reasonably confident that their identity will not be disclosed makes a significant contribution to the ability of the press to perform their role in society of making information available to the public.

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[9] Laura J Handman "Protection of Confidential Sources: A Moral, Legal and Civic Duty" (2005) 19 Notre Dame J L Ethics and Pub Pol'y 573, 576.
[10] This policy argument is similar to the policy behind s9(2)(ba) of the Official Information Act 1982 regarding sources of official information.
[11] *Abrams v United States* (1919) 250 US 616, 630.
[12] *New York Times v Sullivan* (1964) 376 US 254, 270.
[13] *Ashworth Security Hospital v MGN Ltd* [2002] 4 All ER 193.
[14] *Ashworth Security Hospital v MGN Ltd*, above n 13, 210.

Along with the House of Lords, the New Zealand Court of Appeal has acknowledged that compelling journalists to deliver up material to authorities might pose a threat to their continued access to confidential information. In relation to the issuing of warrants against news media organisations, it said "warrants should rarely be granted if doing so would result in a 'substantial risk' that confidential sources would dry up."[15]

C New Zealand Bill of Rights Act 1990

1 Section 14

Section 14 of the BORA affirms that "everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."[16] The Court of Appeal has given the section 14 freedom a broad interpretation: it is "as wide as human thought and imagination."[17] Cooke P affirmed that the freedom of the press "is an important adjunct of the rights concerning freedom of expression affirmed in [section] 14 of the New Zealand Bill of Rights Act".[18] Confidential information clearly fits under the description of information "of any kind" and the identity of a source can be seen as information "in any form".

Conflicting BORA rights come into play when looking at a journalist's ability to maintain confidentiality. The first is the right of the journalist both to receive and impart the information acquired from a confidential source (since forcing disclosure may restrict the journalist's ability to receive similar information in the future). Secondly, there are the rights of others (such as a litigant seeking evidence) to receive information about that confidential source. In addition, the source has a right to express himself or herself in confidence.

However, the New Zealand Law Commission (Law Commission) has long believed that there is a good case for according a journalist's privilege to confidential

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[15] *Television New Zealand Ltd v Attorney-General* [1995] 2 NZLR 641, 647-8.
[16] New Zealand Bill of Rights Act 1990 s 14.
[17] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 15.
[18] *Television New Zealand Ltd v Attorney-General*, above n 15, 646.

sources of information based on the specific protection given to freedom of expression in section 14.[19]

2 *Section 5*

Under section 5 of the BORA, section 14 rights are made subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[20] The breadth of the interpretation of freedom of expression in section 14 is matched by a generosity of interpretation regarding what can be considered a justified limitation on those rights:[21]

> The protection afforded by the right will vary in different contexts along with the nature of the expression ... In general, the further that expression is from what are considered the 'core' values of the right, the greater will be the ability to justify the establishment of limits upon it.

Press freedom is generally regarded as a core democratic value. Cooke P has stressed the need for "restraint and careful scrutiny" where press freedom is involved.[22] Moreover, the New Zealand Court of Appeal has also recognised that there is "a legitimate public interest in protecting media sources from unnecessary revelation."[23]

However, the principle that no-one is immune when information is demanded in the interests of the efficient administration of justice dates back a long time:[24]

> Are men of the first rank and consideration – are men in high office – men whose time is not less valuable to the public than to themselves – are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody ... Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the

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[19] New Zealand Law Commission *Evidence Law: A Discussion Paper* (NZLC PP23, Wellington, 1994) 111 [*"Evidence Law: A Discussion Paper"*] .
[20] New Zealand Bill of Rights Act 1990 s 5.
[21] Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 312.
[22] *Television New Zealand Ltd v Attorney-General*, above n 15, 646.
[23] *European Pacific Banking Corporation Ltd v Television New Zealand* [1994] 3 NZLR 43, 48.
[24] J Bowring (ed) *4 The Works of Jeremy Bentham* (Tait, Edinburgh, 1843) 320-321.

> barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly.

3 Section 25

The balancing of section 14 rights against another's BORA rights is especially noticeable in the case of criminal investigations or litigation, where a party may believe the information held by a journalist is necessary or useful for its case.[25] The public interest in permitting non-disclosure by the journalist will then be stacked up against a defendant's section 25 rights to a fair trial and it is generally held that "litigants cannot be restrained by the private codes of strangers."[26] Despite the press's unique position in society, when an individual's liberty is at stake, compelled disclosure is more likely to be considered a justifiable limitation on press freedom.

4 Sections 6 and 7

Parliament retains the power under the BORA, however, to pass legislation that overrides a BORA right. Inevitably, unless there is a clear statutory privilege against disclosure, if a judge determines that information about a confidential source is admissible and sufficiently relevant to a case, he or she will find compelled disclosure to be a reasonable limit on a journalist's right to maintain confidentiality.

IV EVOLUTION OF THE THEORY OF PROTECTION FOR JOURNALISTS' SOURCES

An early form of privilege was recognised as far back as 17th century England, when obligations of honour sometimes protected gentlemen against having to disclose information obtained in exchange for a promise of confidence.[27]

It appears that the first reported case where journalist's privilege was claimed in the United States was *Ex parte Nugent*, a case involving a secret Mexican war treaty. [28] Information was passed to Nugent who was subpoenaed and subsequently jailed for contempt after refusing to disclose his source.

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[25] For example, see *R v Cara and Kelman* (2004) 21 CRNZ 283, para 34 Potter J.
[26] *Re Buchanan* [1964-1965] NSWR 1379, 1381.
[27] *Bulstrod v Letchmere* (1676) 22 ER 1019; *Lord Grey's Trial* (1682) 9 How Str 127.
[28] *Ex parte Nugent* (1848) 18 F Cas 471 (DC Cir).

Calls for a journalist's privilege in United States law arose during the Great Depression, as stories about government corruption and labour unrest increased. There were already a few states which had enacted "shield laws" by this time. The wording of these laws and the degree of protection afforded varied from state to state, but they all gave some statutory protection to journalists not to have to reveal their sources in the course of legal proceedings.[29]

However shield laws largely proved to be insufficient in the scope of their protection. Most of the statutes were hastily drafted and had been passed *ad hoc* to deal with a local dispute. Consequently, courts generally construed them very narrowly. This led to journalists relying more on First Amendment claims, to varying degrees of success.[30]

Current trends in privacy law recognise that there is a value in protecting privacy in some circumstances.[31] The relationship between the journalist and the source is a private one notwithstanding the assumption that the information conveyed may be intended for publication.

V JOURNALIST'S PRIVILEGE

A Absolute Privilege

An absolute journalist's privilege enables a journalist to maintain confidentiality in all circumstances in the same way that legal professional privilege operates to prevent disclosure of communications between a solicitor and his or her client. The Evidence Amendment Act (No 2) 1980 provides that doctors, lawyers, patent attorneys and ministers of religion do not have to answer questions without the source's consent.[32] Very few jurisdictions have enacted such a sweeping protection

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[29] A typical example of a shield law is that in Kentucky State law. Ky Rev Stat § 421.100 (1962) provides that: "No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand jury or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected."

[30] Robert T Sherwin "'Source' of Protection: The Status of the Reporter's Privilege in Texas and a Call to Arms for the State's Legislators and Journalists" (2000-2001) 32 Tex Tech L Rev 137, 143.

[31] For example, the confirmation by the Court of Appeal that a tort of invasion of privacy exists in New Zealand in *Hosking v Runting* [2005] 1 NZLR 1.

[32] Evidence Amendment Act (No 2) 1980 ss 31-34.

for journalists.[33] The Law Commission believes that an absolute privilege against disclosure is "not an attractive solution",[34] and that "there appears to be no room for any 'absolute' privilege which would prevent the courts from looking into individual cases to see whether privilege is justified."[35]

B Qualified Privilege

A qualified privilege stems from the principle that a journalist should have a fundamental right to keep the identity of a source confidential. However, that right may be outweighed by a countervailing right that makes disclosure necessary. Possible reasons for overriding confidentiality include wrongdoing by the journalist, to prevent a crime being perpetrated or because it is in the interests of justice generally. The information demanded can go beyond merely identifying the source. For example, a journalist who receives information about the commission of a crime may be required to give evidence in court even if it means exposing the identity of the informant.

If a New Zealand court or tribunal requires a journalist to answer a question, the journalist must do so or risk being held in contempt.[36] In New Zealand, there is no specific statutory or common law protection for a journalist's confidential source when a court requests information.[37] However the court may use its discretion and decide not to make a journalist answer a question regarding his or her sources of information.

C Arguments For a Journalist's Privilege

1 Future relationships

Parallels can be drawn between the journalist-source relationship and the government-informer relationship. In both cases, the source is likely to be seeking protection from retaliation for disclosing the information. The confidant has an obvious interest in retaining the source's usefulness for the future. A firm promise of confidentiality can give comfort and assurance to fearful sources.

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[33] The press have an absolute privilege against disclosure of confidential sources in Austria. States in the United States with shield laws affording an absolute privilege include Alabama and Pennsylvania.
[34] *"Evidence Law: A Discussion Paper"*, above n 19, 113.
[35] *"Evidence Law: A Discussion Paper"*, above n 19, 111.
[36] John F Burrows and Ursula Cheer *Media Law in New Zealand* (5ed, Oxford University Press, Auckland, 2005) 426.
[37] Although see High Court Rules, r 285, which relates to the newspaper rule.

There is a danger that without an assurance that confidentiality will be maintained, others will be discouraged from informing. Journalists rely on informants to report important and ground-breaking stories and many sources wish to remain confidential. It follows that if confidentiality is not honoured, those sources are likely to dry up. As Lord Denning put it; "Wrongdoing would not be disclosed. Charlatans would not be exposed. Unfairness would go unremedied. Misdeeds in the corridors of power, in companies or in government departments would never be known."[38]

2 Independence

Compelling journalists to give evidence about their sources threatens journalistic independence. It undermines the media's democratic function and threatens people's democratic right to receive information. Litigants may use subpoenas strategically to harass journalists or to prevent further investigation into an issue. The time journalists spend complying with or fighting subpoenas is time taken away from doing valuable press work.[39]

Journalists frequently rely on confidential sources for stories that are controversial, dangerous or that expose wrongdoing in high places; "Deep Throat" and the Watergate scandal is the most noted example of this. But journalists' work should not be exploited as an investigatory tool for the criminal justice system. There is a danger that if litigants are routinely allowed access to information held by journalists, they will be encouraged to embark on "fishing expeditions" – looking for suable parties or seeking information with which to bolster a case.[40]

3 Chilling effect

Journalists make compelling witnesses; they are knowledgeable and articulate, and they keep meticulous records. However, it is unfair for investigators and litigants to take advantage of the journalist's knowledge and labour rather than do the hard work themselves. Indeed, this phenomenon may contribute to a chilling effect through journalists not covering stories that are likely to lead to court orders for information.

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[38] *British Steel Corporation v Granada Television Ltd* [1981] A.C. 1096, 1129 (HL).
[39] Lucy A Dalglish "Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media in 2001" (Reporters Committee for Freedom of the Press, Virginia, 2003) 13.
[40] Dalglish, above n 39, 14.

Many news organisations in the United States now discourage reporters from producing articles based on material provided by uncited sources.[41]

It can be argued that without immunity against compelled disclosure, journalists would either be severely limited in the information they were able to provide or they would be forced to rely on information from sources anonymous even to them.[42] In the latter case, it would then become very difficult for the journalist to guarantee the authenticity of any information received in this way and may lead to a proliferation of false or inaccurate information.[43]

Exacerbating this chilling effect is the inevitable corollary that journalists who are fair game for any party seeking information will start to self-censor their work so as to avoid being called on. Not only press freedom, but also the level of information disseminated would be severely compromised.

4 Checks and balances

A major argument for granting a privilege is the press's democratic responsibility for providing a check on official use of power.[44] Journalists often rely on confidential sources in situations where the source is revealing criminal activity or corruption, such as the Watergate scandal. Yet "if employee confidentiality were to trump conscience, there would be a licence for corporations, governments and other employers to operate without accountability."[45]

D Arguments Against a Journalist's Privilege

1 Civic duty

Some believe that the public interest in the administration of justice is of primary importance and outweighs the rights of individual citizens. It is every citizen's duty to give evidence when called upon and this should take precedence over any journalist's privilege. A privilege attaching to media sources would advance different interests, and might ultimately *hinder* effective law enforcement, by barring disclosure of information which is required for full police or judicial inquiry into

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[41] Dalglish, above n 39, 12.
[42] Handman, above n 9, 587-588.
[43] Vincent Blasi *The Newsman's Privilege: An Empirical Study"* (1971) 70 Mich L Rev 229, 246.
[44] Julie M Zampa "Journalist's Privilege: When Deprivation is a Benefit" (1999) 108 Yale LJ 1449, 1449.
[45] *R v National Post* [2004] 69 OR (3d) 427, 441.

alleged crimes. Furthermore, the statutory protections recently enacted for legitimate whistleblowers may have diminished the need for a journalist's privilege.

2 *Competing rights*

Granting a privilege to journalists may in turn deprive an accused of information relevant to proving innocence. If it is the journalist's work that has brought the accused to court in the first place, that accused surely has the right to confront his or her accuser.[46] In this situation, it is argued, freedom of expression is enhanced more by compelling the journalist to disclose. And by accepting a fine for deliberate contempt, journalists could be seen as placing themselves above the law.[47]

The United States Supreme Court has remarked that the press has flourished without such a sweeping protection, with no signs of a chilling effect on the amount of information imparted.[48]

3 *Lack of regulation*

Should journalists be entitled to the same protection as lawyers and doctors, who are trained and certified professionals with fiduciary duties? Journalists may or may not receive training and they are not part of a regulated profession, nor are they licensed.

Indeed, journalists are largely opposed to such regulation on the grounds that it impinges on their independence. The confidentiality privilege afforded to other professions is a reflection of the high standards of conduct imposed by that regulation. By contrasts, there is a view that: "journalists make a fetish of anonymous sources. They do so for reasons ethical, psychological, and anthropological, including genuine principle, the lure of heroism, and … a culture of status based on access to inside information."[49]

4 *Responsibility*

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[46] Robert Zelnick "Journalists and Confidential Sources" (2005) 19 Notre Dame JL Ethics and Pub Pol'y 541, 551.

[47] TRS Allan "Disclosure of Journalists' Sources, Civil Disobedience and the Rule of Law (1991) 50 CLJ 131, 138.

[48] *Branzburg v Hayes* (1972) 408 US 665, 698-699.

[49] Jacob Weisberg "The Anonymity Trap: Norm Pearlstine Didn't Go Far Enough" (2005) <http://www.slate.com/id/2122509/> (last accessed 30 September 2005).

Some argue that the possibility of compulsory disclosure of sources acts as an important check on the power of the media and journalists.[50] A privilege against disclosure would give journalists carte blanche to sensationalise stories, conceal transgressions by their sources and aggrandise criminals. Furthermore, when politicians speak to journalists confidentially simply to avoid being held responsible for their statements, then this is arguably subverting the accountability of government.[51]

Journalists may simply become reckless in their reporting because they are not held responsible – granting a privilege may open the floodgates for abuse by both sources and journalists on the basis that if protection is guaranteed, a journalist may be less than scrupulous in his or her endeavours to verify the authenticity of information received.[52]

The unidentified source has been likened to a ticking "time-bomb."[53] For example, former United States Army scientist Steven Hatfill is currently suing government officials over public statements and private leaks that pointed to Hatfill as a "person of interest" in the 2001 investigation of anthrax-laced letters that killed five people and injured seventeen. Hatfill's reputation and career were ruined because false information was leaked to the press and there was strong suspicion that the reporters were "willing accomplices of government agents with axes to grind."[54] Also in the United States, government sources gave erroneous information to journalists falsely accusing scientist Wen Ho Lee of passing nuclear secrets to China in 1999. The New York Times did an extensive review of his case, conceding that Lee had been the victim of some "unduly incredulous reporting."[55]

Inevitably, some journalists will betray or at least fall short of the ethical standards demanded of them, collude with criminals or shelter terrorists. Ultimately this behaviour could cause public distrust in the administration of justice.

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[50] Georgia Price "Pack Your Toothbrush! Journalists, Confidential Sources and Contempt Of Court" (2003) 8(4) MALR 259.
[51] Chris Nash "Freedom of the Press in Australia" <http://democratic.audit.anu.edu.au/Nashpaper.pdf> (last accessed 3 October 2005).
[52] *"Evidence Law: A Discussion Paper"*, above n 19, 110-111.
[53] *Goodwin v UK* (1996) 22 EHRR 123, 127.
[54] Cliff Kincaid "No Media Shield Law" (2005) <http://www.aim.org/media_monitor/3658_0_2_0_C> (last accessed 30 September 2005).
[55] Zelnick, above n 46, 543.

E Form of the Privilege

Some journalists themselves believe that, since freedom of the press is so crucial to the existence of a free nation, a journalist's privilege should be recognised as a constitutional right. Consequently, they object to a statutory privilege, believing that enacting laws to codify protection would only water down the right and make it subject to political whim and manipulation.[56]

VI PROTECTION OF SOURCES AT LAW

A court or tribunal may be interested in the identity of a journalist's informant in various circumstances: in the course of pre-trial, interlocutory and discovery process in a defamation suit against a media organisation; when the journalist is called to give evidence in court; or when there are specific legal rules establishing a procedure for uncovering the identity of a wrongdoer.[57]

A Pre-trial: The Newspaper Rule

The common law newspaper rule shields a defendant who is part of the news media from being required at the interlocutory stage of proceedings to reveal the sources of its information.

The scope of the rule is wide and the principle behind it suggests it should be generously construed.[58] However, there are several limitations on the newspaper rule, and as the House of Lords has stated it is subject to exceptions that are themselves uncertain.[59]

The rule pertains only to the pre-trial stage, not to the trial itself, being applied as matter of course except in exceptional circumstances. However, the Court of Appeal has expressed some difficulty in imagining a circumstance in which it might not be found to apply.[60] It is not entirely clear what publications come under the newspaper rule, although it has been held to include newspapers and television,[61] and

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[56] Sherwin, above n 30, 182.
[57] Walker, above n 7, 303-4.
[58] *European Pacific Banking Corporation v Fourth Estate Publications Ltd* (1992) 6 PRNZ 129, 136.
[59] *British Steel Corporation v Granada Television Ltd*, above n 38. See also *John Fairfax & Sons Ltd v Cojuangco* (1988) 82 ALR 1.
[60] *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* [1980] 1 NZLR 163, 165.
[61] See for example, *Isbey v Broadcasting Corporation of New Zealand (No 2)* [1975] 2 NZLR 237, *Brill v Television Service One* [1976] 1 NZLR 683(includes television and radio); *Broadcasting*

notes and documents as well as names of sources are covered by the rule.[62] Arguably, as a common law rule able to reflect new developments in society, it should also extend to forms of communication such as the Internet. There is also some doubt as to which proceedings it covers, and as to the kind of relationship the defendant must have to the publication to take advantage of the rule.[63]

Rationales for the rule are uncertain too. For example, although the discovery process should not be used for fishing expeditions, the rule has been held to apply even when a plaintiff undertakes not to sue the source.[64] And if it is so important not to make newspapers reveal sources, it seems illogical to limit it to the interlocutory stage.

The New Zealand courts have considered the limitations of the newspaper rule. It has so far been extended from defamation to include slander of goods and malicious falsehood cases. [65] The basis of the rule is more than merely to stop a plaintiff from embarking on fishing expeditions; its starting point is the public interest in protecting the media's sources of information to encourage the free flow of information to them.[66]

Problems may arise if a media defendant wishes to claim both a qualified privilege for reporting about public figures under *Lange* and use the newspaper rule as well.[67] Under *Lange* a plaintiff has the difficult task of proving misuse by the media defendant of the qualifying occasion, but if the defendant can avoid having to reveal information under the newspaper rule, then the plaintiff is doubly disadvantaged.[68]

In such cases, the press might have to sacrifice some privilege for the sake of not revealing sources:[69]

Corporation of New Zealand v Alex Harvey Industries Ltd, above n 60 (not confined to news items). In Australia, see *Sims v Wran* [1984] 1 NSWLR 87 (includes television).

[62] *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd*, above n 60.

[63] Walker, above n 7, 308.

[64] *Lyle-Samuels v Odhams Ltd* [1920] 1 KB 135.

[65] *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd*, above n 60. Note also *Isbey v Broadcasting Corporation of New Zealand (No 2),* above n 61; *Brill v Television Service One,* above n 61.

[66] *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd*, above n 60.

[67] Tipping J "Journalistic Responsibility, Freedom of Speech and Protection of Reputation" (2002) 10 Waikato LR 1.

[68] *Lange v Atkinson* [2000] 3 NZLR 385, 404.

[69] Tipping J, above n 67, 11.

> The court could decide whether disclosure of sources was necessary to do justice in the particular case. If disclosure was ordered and the media defendant still remained unwilling to disclose, it could always avoid the need by withdrawing the plea of qualified privilege.

The newspaper rule in New Zealand is arguably more generous than overseas equivalents. For example, the High Court of Australia has ruled that the administration of justice interest in securing a trial on the basis of relevant and admissible evidence is paramount and the role of the media cannot outweigh that.[70]

The newspaper rule is supplemented by Rule 285 of the High Court Rules: if the defendant pleads a defence of honest opinion or qualified privilege, then "no interrogatories as to the defendant's sources of information or grounds of belief will be allowed."[71] This is not seen, however, as a codification of the newspaper rule,[72] nor does it limit further development of the rule at common law. Understandably, the Law Commission view the newspaper rule as a rather messy and fragmented legal doctrine in need of clarification.[73]

B At Trial

There is a general rule of evidence law in New Zealand that all relevant evidence is admissible and all witnesses who are able to give evidence are compellable.[74]

The questioning of journalists in court proceedings was discussed in *Attorney-General v Mulholland*, where various conditions were specified: apart from the essential element that the question must be relevant, Lord Denning also required that any question should be "a proper and, indeed, necessary question in the course of justice to be put and answered."[75]

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[70] *John Fairfax & Sons Ltd v Cojuangco*, above n 59.
[71] High Court Rules, r 285. Compare, in England, RSC O 82, R6.
[72] *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd*, above n 60..
[73] *"Evidence Law: A Discussion Paper"*, above n 19, 112.
[74] There are a few exceptions to this rule. For example; under the Evidence Amendment Act (No 2) 1980 section 29, a spouse is not currently compellable to give evidence against his or her spouse (although this provision will be repealed under the Evidence Bill). Legal professional privilege prevents a solicitor being able to reveal information conveyed to him or her by a client without the client's consent *R v Derby Magistrates Court ex parte B* [1996] AC 487.
[75] *Attorney-General v Mulholland* [1963] 2 QB 477, 489.

The New Zealand courts have recognised a common law discretion to excuse any witness from answering a question if the public interest in having the information withheld is greater than the public interest in disclosing it.[76]

Statutory developments such as section 35 of the Evidence Amendment Act (No 2) 1980 (section 35) have led to a more flexible approach to privilege in New Zealand than existed previously.[77] However the Court of Appeal has affirmed the approach which should be taken at common law to a request for a new class privilege, particularly in a case involving journalistic confidences:[78]

> The law was faced at a comparatively early stage of the growth of the rules of evidence with the question how to resolve the inevitable conflict between the necessity of discovering the truth in the interests of justice on the one hand and on the other the obligation of secrecy or confidence which an individual called upon to testify may in good faith have undertaken to a party or other person. Except in a few relations where paramount considerations of general policy appeared to require that there should be a special privilege, such as husband and wife, attorney and client, communications between jurors, the counsels of the Crown and State secrets, and, by statute, physician and patient and priest and penitent, an inflexible rule was established that no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box.

C Evidence Amendment Act (No 2) 1980 section 35[79]

Section 35 gives the court a statutory discretion similar to the common law rule. The court may use its discretion to excuse any witness from answering a question or producing a document on the grounds that to do so would be a breach of confidence that, having regard to the special relationship between the witness and the source, the witness should not be compelled to breach. Each case should be considered on its own facts:[80]

> The legislature has conferred a discretion on the Court to weigh the competing public interest bearing on each particular case, having regard to broad criteria. The section enables a witness to be excused (on his own

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[76] *M v L* [1999] 1 NZLR 747, 760 (CA) Tipping J.
[77] *M v L*, above n 76.
[78] *McGuinness v Attorney-General* (1940) 63 CLR 73, 102, cited in *M v L*, above n 77, 758.
[79] See Appendix for full text of s 35.
[80] *R v Howse* [1983] NZLR 246, 251 (CA) Cooke P.

application or that of a party) from disclosing confidences. It does not authorise a direction that he refrain from disclosure.

In each case, the court must consider whether or not the public interest in having the evidence disclosed is outweighed by the public interest in the preservation of confidences between the confidant and the witness and the encouragement of free communication between such persons. As part of that balancing exercise, the court is to consider three factors:

(a) the likely significance of the evidence to the resolution of the issues to be decided;

(b) the nature of the confidence and of the special relationship between the confidant and the witness; and

(c) the likely effect of the disclosure on the confidant or any other person.

The "special relationship" between a confidant and a witness referred to in section 35 has been interpreted as being of a kind that would encourage the imparting of confidences and that has a public interest element in it.[81] The relationship may arise out of a duty reposed in the confidant or even merely by the imparting of the confidence itself.

The Law Commission has long believed that the protection provided by section 35 is no longer adequate and needs reform.[82]

VII NON-LEGAL PROTECTION OF JOURNALISTS' SOURCES

A Restraint

There are several reasons why journalists are not often put in the position of being tested on their willingness to disclose the identity of sources: often the information may not be sufficiently relevant to litigation or investigations, the parties themselves may not press the matter, or if a government is involved it may not want to appear to be hounding the press.[83]

One United States media survey found that judges generally dislike suits against the media because such cases are high profile, expensive and time-

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[81] *R v Secord* [1992] 3 NZLR 570, 574 (CA). The relationship in this case was between a probation officer and client.
[82] *"Evidecne Law: A Discussion Paper"*, above n 19, 114.
[83] Walker, above n 7, 305.

consuming.[84] Nearly half of the survey respondents in states with shield laws said that they could usually avoid a subpoena simply by invoking the shield law and even casual reminders about the laws had prevented the issuance of some subpoenas.[85] One lawyer claimed that up until the Judith Miller case, media lawyers could make at least 90 per cent of subpoenas seeking information about confidential sources "go away" with a simple letter asserting journalist's privilege.[86] Many journalists find the mere existence of a shield law to be "immensely useful in prompting lawyers to withdraw subpoenas without a fight."[87] Oddly, though, a 2001 survey showed that news organisations in states with shield laws are almost twice as likely to be subpoenaed for information as those in states without.[88]

The public are generally aware of the principle that journalists will do their utmost to protect their sources and a former head of Australian Broadcasting Company legal department believes courts are generally reluctant to find journalists in contempt because of the public dissension it creates.[89]

B Industry Codes of Conduct

1 Press Council

The New Zealand Press Council's Statement of Principles contains the following confidentiality clause:[90]

> Editors have a strong obligation to protect against disclosure of the identity of confidential sources. They also have a duty to take reasonable steps to satisfy themselves that such sources are well informed and that the information they provide is reliable.

2 Engineering, Printing and Manufacturing Union (EPMU)

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[84] Eileen M. Wirth "Shield Laws Deflect Subpoenas; Journalism Professors Study Finds They Protect Against the Increasing Barrage of Subpoenas" (1995) 128(22) E & P 16.
[85] Wirth, above n 84.
[86] Bill Kirtz "Reporter's Privilege: Could a Federal Shield Law be a Real Possibility?" (2005) <http://www.poynter.org/content/content_view.asp?id=80951> (last accessed 3 October 2005).
[87] Dalglish, above n 39, 11.
[88] Dalglish, above n 39, 11.
[89] Vincent Morello "Australia's Bill of Writes" (2003) <http://www.reportage.uts.edu.au> (last accessed 19 September 2005).
[90] New Zealand Press Council "Statement of Principles No 4: Confidentiality" <http://www.presscouncil.org.nz/> (last accessed 3 October 2005).

Unionised journalists in New Zealand are covered by the EPMU Code of Ethics:[91]

> Respect for truth and the public's right to information are overriding principles for all journalists... All members of the Union engaged in gathering, transmitting, disseminating and commenting on news and information shall observe the following Code of Ethics in their professional activities:
>
> ...
>
> (c) in all circumstances they shall respect all confidences received in the course of their occupation.

VIII LIMITATIONS ON PROTECTION OF SOURCES

A Equity

The House of Lords has on occasion invoked an equitable procedure designed to obtain information from a person not a party to the current litigation.[92] This procedure will sometimes trump the newspaper rule because all the plaintiff seeks is sufficient information to be able to fire the leaker. Thus it is different from an ordinary defamation case (where success against the newspaper is as effective a remedy as success against the source).[93]

B Rule 307 of the High Court Rule

Under Rule 307 of the High Court Rules, if the court believes that any person has a document relevant to the proceedings, the Court may, unless the document is privileged from production, order that person to produce the document for inspection.

C Crimes Act 1961 Section 389

Section 389(a) of the Crimes Act 1961 empowers an appellate court, if it thinks it necessary or expedient in the interest of justice, to order the production of any document, exhibit, or other thing connected with the proceedings, if its production appears to the court to be necessary for the determination of the case.[94] This is a wide power, particularly since the information need only be "expedient" in the interest of justice and its production merely to "appear" to be necessary.

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[91] EPMU Rules, above n 4.
[92] *British Steel Corporation v Granada Television*, above n 38.
[93] *"Evidence Law: A Discussion Paper"*, above n 19, 113. Compare the application of the newspaper rule in Australia; see XI Journalist's Privilege in Australia.
[94] See Appendix for full text of s 389.

In general the evidence must be new or fresh in the sense that it was not available at the trial, relevantly credible and of a nature that, if given with the other evidence adduced, might reasonably have led the jury to return a different verdict.[95]

D Contempt

A journalist who refuses to disclose a source of information when required to do so by a court in the course of litigation is in contempt, and may be fined or imprisoned.

Some say that by accepting a penalty for deliberate contempt, journalists are placing themselves above the law.[96] Should Judith Miller be given credit for accepting a penalty which is the inevitable outcome of her deliberate disobedience? It is difficult to argue that this would have no impact on the authority of the courts:[97]

> Any widespread refusal to obey the orders of the court is a threat to the authority of the courts which is not any less such a threat, because it is coupled with an acceptance that there will be a penalty to be paid.

A journalist who refuses to divulge sources will usually maintain that there is a wider public interest and benefit to society as a whole in withholding that information. However, it is arguable that Parliament is the proper forum for determining where the public interest lies.

While it is true that deliberate flouting of the law should not be applauded, it should also be remembered that journalists usually have a moral as well as legal dilemma in this situation.[98]

Civil disobedience can sometimes be justified on moral grounds rather than on the policy grounds of activating to change legislation.[99] A journalist may have a stronger argument that because professional ethics require him or her to keep the secret, to reveal a source would be a breach of confidence.[100] This then gives rise to a much more complex balancing process for the court: the source in question must be considered as part of the balancing exercise but without being identified.

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[95] *Crime Appeal CA60/88* (1988) 3 CRNZ 512, 513 Richardson J.
[96] Allan, above n 47, 142.
[97] *X Ltd v Morgan Grampian (Publishers) Ltd* [1990] 2 WLR 421,432 (CA). Lord Donaldson
[98] A journalist may also be held liable by the source for breach of confidence. See *Cohen v Cowles Media Company* (1991) 501 US 663.
[99] Ronald Dworkin *A Matter of Principle* (Harvard University Press, Cambridge, Mass., 1985) 106-113.
[100] Allan, above n 47, 139.

IX JOURNALIST'S PRIVILEGE IN THE UNITED STATES

A *The Principal Case* – Branzburg v Hayes[101]

1 *Background*

Society in the United States in the late 1960s and early 1970s was in a state of considerable upheaval. Freedom, individual rights, liberation, autonomy were all catch-cries of a liberal youth-focused socio-political movement. It was the time of the hippie movement, the Manson Family, black civil rights, the Vietnam War and a growing distrust of the government. The issue of journalist's privilege arose particularly in the context of media investigating anti-war & social activist groups.[102]

By the start of the 1970s, fewer than twenty states had enacted shield laws providing statutory protection for journalists from being compelled to testify in court as to their sources. At the same time, more subpoenas were being issued by courts.[103] Journalists began claiming constitutional protection under the First Amendment.

The Nixon administration's extensive use of media subpoenas led to open hostility between Nixon and the press and journalists fought more strongly for protection.[104] The conflict came to a head in the Supreme Court in 1972 with the case of *Branzburg v Hayes (Branzburg).*

2 *The facts*

Branzburg was actually four cases consolidated together. Two of the charges were against Paul Branzburg, a staff reporter for Louisville Kentucky's Courier-Journal. In 1969, the paper published Branzburg's story about two individuals who earned up to $5,000 per week synthesising hashish from marijuana. The story mentioned their desire to remain anonymous and Branzburg promised to keep their identities confidential. A similar story was published in 1971.

Branzburg was subsequently subpoenaed by a grand jury, at which he refused to disclose the sources' identities, disobeying a court order to divulge them. The Kentucky Court of Appeals held that while Kentucky's shield law might afford

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[101] *Branzburg v Hayes*, above n 48.

[102] Karl H Schmid "Journalists' Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals' Decisions from 1973 to 1999" (2002) 39Am Crim L Rev 1441,1449.

[103] Sherwin, above n 30, 144.

[104] Sherwin, above n 30, 144.

Branzburg a privilege of withholding the identity of an informant who had supplied him with information, he could not claim a privilege to avoid giving evidence about events he had witnessed himself.[105]

Paul Pappas was a television reporter and photographer from Massachusetts who went to the militant civil rights group the Black Panthers' headquarters during a period of civil disruption to report on an expected raid. He was allowed in only on the condition that everything else he saw or heard would remain strictly confidential. The raid never happened, but Pappas wrote an article on his experiences anyway. He was called before a Grand Jury but refused to answer questions about what he had seen and heard at the headquarters. Massachusetts had no statutory shield law at the time.

The Supreme Judicial Court of Massachusetts said that any adverse effect on Pappas' ability to disseminate information by making him testify was only "indirect, theoretical, and uncertain."[106]

Earl Caldwell was a New York Times reporter covering the Black Panthers and other black militant groups. He was subpoenaed to hand over to the Grand Jury his notes and tapes of interviews with the Black Panthers. Caldwell claimed that forcing him to testify would drive a "wedge of distrust and silence between the news media and the militants."[107]

Caldwell refused to appear in court and was ordered committed for contempt. He appealed to the Court of Appeals which reversed the order. The Court said the First Amendment afforded a qualified testimonial privilege to newsmen, which stood unless there were compelling reasons for requiring his testimony.[108]

3 The Supreme Court decision

In a 5-4 majority decision, the Supreme Court upheld the Branzburg and Pappas decisions and reversed the Caldwell decision. The Court said that journalists had the same duty to testify before a grand jury as other citizens. Any First Amendment interest they may have is outweighed by every citizen's general obligation to appear before a Grand Jury or at trial to give what information he or she possesses.

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[105] *Branzburg v Hayes*, above n 48, 669.
[106] *Branzburg v Hayes*, above n 48, 674.
[107] *Branzburg v Hayes*, above n 48, 676.
[108] *Branzburg v Hayes*, above n 48, 679.

The Court said its conclusion involved no restraint on what newspapers may publish, the quality of information journalists may seek to acquire, nor did it threaten the bulk of relationships between journalists and their sources.

The different *Branzburg* judgments are interesting because they reflect at least four different approaches to the issue of journalist's privilege:

White J gave the opinion of the Court:[109]

- There is no First Amendment privilege enabling a journalist to decline to appear and testify before a grand jury;
- However, there is no obligation to disclose information when a Grand Jury is not acting good faith, or when a subpoena is used to harass a journalist or to interfere with a journalist's relationship with his or her source.

Powell J concurred with the majority but produced a separate judgment:[110]

- Each case should be judged on its own merits using a balancing of interests approach.

Stewart J recommended a 3-pronged approach, recognising a journalist's privilege subject to:[111]

- Whether there is probable cause the journalist has information relevant to a violation of the law;
- There is no other means of obtaining the information; and
- There is a compelling and overriding interest in the information

Douglas J believed:[112]

- The First Amendment justifies an absolute journalist's privilege, the only exception being when the journalist is criminally liable.

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[109] *Branzburg v Hayes*, above n 48, 707-708.
[110] *Branzburg v Hayes*, above n 48, 710.
[111] *Branzburg v Hayes*, above n 48, 743.
[112] *Branzburg v Hayes*, above n 48, 712.

Some commentators see the White majority opinion as an expression of "insensitivity to the critical role of an independent press in our society," and believe that it is unfair to make a journalist choose between contempt and violating the ethics of the profession.[113]

The majority argument maintained that there was no evidence that sources will dry up without recognition of a journalist's privilege.[114] Nor was there any reason why journalists should be treated any differently from other members of society in this context.[115]

4 The aftermath

Not long after the *Branzburg* decision, 3 federal appellate courts recognised a constitutional privilege allowing reporters to keep their sources' identities confidential.[116]

The Supreme Court having said that individual states remained free to enact their own protections for journalists as they saw fit, many legislatures sprang to enact their own shield laws. This was partly because of ongoing confusion about how to interpret *Branzburg* and concern about proliferation of subpoenas. However, it also stemmed from a general belief in the need to protect a democratic interest in the free flow of information as a matter of public policy.[117] Rather than seeing it as a matter of assisting law enforcement by requiring disclosure, the state legislatures' focus was on protecting journalists from forced disclosure.[118]

Yet despite the apparent blanket refusal of the majority to condone any special treatment for journalists, Powell's concurring opinion left open the possibility to use a case-by-case approach which, some argue, "robbed the majority opinion of much of

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[113] Erik W Laursen "Putting Journalists on Thin Ice: McKevitt v Pallasch" (2004) 73 U Cin L Rev 293, 300-1.

[114] *Branzburg v Hayes*, above n 48, 693. Douglas J, on the other hand believed the opposite: *Branzburg v Hayes*, above n 48, 722.

[115] *Branzburg v Hayes* , above n 48, 702.

[116] *Baker v F & F Inv Co* (1973) 411 US 966; Bursey *v United States* (1972) 466 F 2d 1090; and *Cervantes v Time Inc* (1973)409 US 1125.

[117] Laurence B Alexander "Looking out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information" (2002) 20 Yale L & Pol'y Rev 97, 111.

[118] Alexander, above n 117, 113.

its persuasive force."[119] At the very least, it has led to great inconsistency in court decisions both between and within state jurisdictions.

X JOURNALIST'S PRIVILEGE IN THE UNITED KINGDOM AND EUROPE

A Contempt of Court Act 1981 Section 10

In the United Kingdom, "confidentiality of itself has never been recognised as a ground for a valid claim of immunity."[120]

However, journalist's privilege is dealt with under section 10 of the Contempt of Court Act 1981 (section 10). It provides that no court may require the media to disclose a source of information unless disclosure is necessary in the interests of justice, of national security or for prevention of disorder or crime. This rule is ostensibly quite generous – the default position is a rule of non-disclosure with limited exceptions based on necessity. However, courts in the United Kingdom have applied the exceptions strictly against media despite the influence of the European Court of Human Rights (ECHR) judgments.

The national security exception is relatively straightforward (although the effects of growing terrorism fears may have some impact on the application of this exception). So too is the exception to prevent disorder or crime, although sometimes it is questionable whose crime should be the focus here – the informant's, the journalist's or another person's. However, interpretations of what is in the interests of justice are unpredictable, and unlike the others, this exception is not also found in article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).[121]

Once disclosure is found to be necessary within one of statutory exceptions, the journalist is at the mercy of the court's discretion.[122] Despite the lack of a public interest element, it is argued that the courts still tend to use a discretionary approach

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[119] Sherwin, above n 30, 144.
[120] *Attorney-General v Clough* [1963] 1 QB 773, 787.
[121] Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) ETS 5, art 10(1) states that "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."
[122] *X Ltd v Morgan Grampian (Publishers) Ltd* , above n 97, 52.

overall.[123] In effect, section 10 may not have altered the balance in favour of non-disclosure at all.[124] Furthermore, section 10 has not provided more certainty for any of the interested parties – even now, "different people may come to different conclusions on the same facts."[125] This is illustrated by the case of William Goodwin.

B The Goodwin *Case*[126]

William Goodwin was a trainee journalist who was contacted by an anonymous source and told about a company raising a multi-million pound loan despite being in financial difficulty. The company obtained an injunction against publication after Goodwin telephoned them for comment. The company said that if the plan was made public, there would be a complete loss of confidence in them and they may go into liquidation, causing hundreds of redundancies. Furthermore, they wanted to track down the source of the highly confidential information.

In 1996, the House of Lords found that the importance of protecting Goodwin's source was diminished by the source's complicity in a gross breach of confidence. This was not counter-balanced by any legitimate interest in publication of the information.

Goodwin refused to name the source and was fined £5000. He appealed to the ECHR.

C European Union

In its judgment, the ECHR emphasised that an order for disclosure is only lawful if it is justified by an overriding public interest.[127] It was undisputed that the disclosure order on Goodwin constituted an interference with Goodwin's right to freedom of expression as guaranteed by the Convention. The issue for the Court was whether this interference was justified – any interference should be in pursuance of a legitimate aim, be prescribed by law and be necessary in a democratic society.[128]

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[123] Allan, above n 47, 142.
[124] Allan, above n 47, 143.
[125] *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660, 704.
[126] *X Ltd v Morgan-Grampian (Publishers) Ltd* , above n 97.
[127] *Goodwin v UK*, above n 53.
[128] European Convention for the Protection of Human Rights and Fundamental Freedoms, above n 121, art 10(2).

In deciding whether or not the interference with freedom of expression was proportionate to the aim to be achieved, the Court relied on fact that there had already been an injunction granted against publication of the information. The ECHR said that the main purpose of disclosing the source's identity was to prevent dissemination of damaging information. But these aims were not sufficient to outweigh the vital public interest in the protection of Goodwin's source so disclosure was not necessary in this case. Eleven of the eighteen judges decided that the United Kingdom had violated Goodwin's right to freedom of expression:[129]

> Protection of journalists' sources is one of the basic conditions for press freedom... Having regard to the importance of protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.

The ECHR accepted that wanting to identify the source in order to dismiss him or her was a relevant reason for interference with Goodwin's rights but it did not consider it a "sufficient" reason in itself. The ECHR jurisprudence indicates that any interference with freedom of expression must be proportionate to the aim sought to be achieved and there must be a pressing need to interfere.[130]

D *Post*-Goodwin *Cases*

In *Interbrew SA v Financial Times Ltd* [131] a Belgian brewer was preparing highly confidential and market-sensitive documents for a possible takeover bid of another brewery. An unknown source allegedly doctored copies of the document and couriered copies to several newspapers who published the story.[132] The share prices of both breweries dropped alarmingly.

Interbrew obtained an order from the High Court forcing the newspapers to deliver up the documents so as to identify the source and stop any further damage. The newspapers appealed.

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[129] *Goodwin v UK*, above n 53, 143.
[130] Timothy Pinto "How Sacred is the Rule Against Disclosure of Journalists' Sources" (2003) 14(7) Ent L R 170.
[131] *Interbrew SA v Financial Times Ltd* [2002] 2 Lloyd's Rep 229.
[132] The Times, the Guardian and Reuters were involved as well as the Financial Times.

The Court of Appeal held that, although it is always prima facie contrary to the public interest for press sources to be disclosed, it needed to ask whether there was an overriding public interest amounting to a pressing social need to reveal the identity of the source. In determining this, the purpose of leak was a crucial consideration. Here the leaker had a malicious purpose, and the leak was calculated to harm the investing public, Interbrew or both. Therefore the public interest in protecting the source did not outweigh Interbrew's public interest in attaining justice against the source. The court also said that if the source had doctored information, then this added weight to reasons for ordering disclosure as there is no public interest in protecting sources who falsify information.[133]

The newspapers refused to deliver up the documents. While they prepared an appeal to the House of Lords the case of *Ashworth Hospital Authority v MGN Ltd* came before their Lordships.[134] The Daily Mirror published a verbatim extract of infamous Moors murderer and Ashworth Security Hospital (ASH) inpatient Ian Brady's medical records. The records had been taken from the hospital's computer database.

MGN did not know the original source – it got the information from a paid intermediary. The parties agreed that such leaks were potentially damaging to ASH staff and patients alike.

The High Court had ordered MGN to identify the intermediary on evidence that if that person was identified, then the original source would be too. MGN lost its appeal and went to the House of Lords.

Lord Woolf acknowledged that there would be a chilling effect on freedom of the press if sources were scared off, and also noted the significant contribution confidential sources of information make to the ability of the press to perform their role in society. His Lordship also said that it is well established now that the courts will normally protect journalists' sources from identification.[135]

Nevertheless, Lord Woolf held that the facts here were exceptional (as he also found in *Interbrew*) and justified disclosure of the intermediary's identity. Confidentiality of medical records, especially at ASH were of fundamental

[133] *Interbrew SA v Financial Times Ltd*, above n 131, 240.
[134] *Ashworth Hospital Authority v MGN Ltd*, above n 13.
[135] *Ashworth Hospital Authority v MGN Ltd*, above n 13, 210.

importance and disclosure of ASH patients' records was fraught with difficulty and danger. The source should be identified to deter others.

MGN disclosed the identity of the intermediary as freelance investigative journalist Robin Ackroyd, but this did not expose the original source. ASH (now called Mersey Care NHS Trust) applied for an order to make Ackroyd reveal *his* source. The order was granted but overturned by the Court of Appeal on the basis that Ackroyd had a right to his own trial and that the passage of time may have removing any pressing social need for disclosure.[136]

The circumstances of these cases were seen as extraordinary althuogh it is certainly not unusual for the original source to have breached a confidence.[137]

Despite section 10 and the strong endorsement of privilege from the ECHR, it is clear from these cases that protection of sources in the United Kingdom is far from an absolute right.[138] More significantly, some commentators believe that "the law relating to disclosure of the identity of sources of information is no more satisfactory now than it was before the enactment of the Contempt of Court Act."[139]

XI JOURNALIST'S PRIVILEGE IN CANADA

Canadian courts recognise a common law journalist's privilege which stands against the background of the Canadian Charter,[140] although the courts also consider it to predate the Charter.[141]

It is based on Wigmore's criteria for an evidential privilege:[142]

(a) the communication must originate in a confidence

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[136] *Mersey Care NHS Trust v Ackroyd* [2003] EMLR 36 (CA).

[137] Floyd Abrams and Peter Hawkes "Protection of Journalists' Sources Under Foreign and International Law" Media Law Resource Center Bulletin August 2004 Issue 2 190, 203.

[138] Pinto, above n 130, 172.

[139] Yvonne Cripps, "Judicial Proceedings and Refusals to Disclose the Identity of Sources of Information" (1984) 43(2) CLJ 266, 267.

[140] Canadian Charter of Rights and Freedoms Constitution Act 1982 Schedule B. Section 2(b) guarantees: "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

[141] *R v Hughes(A) et al (*14 July 1988) British Columbia Sup Ct Vancouver CC971180 para 54 Romilly J.

[142] John Henry Wigmore Evidence in Trials at Common Law (McNaughton rev ed, Little Brown & Co, Boston, 1961) vol 8 §527.

(b) the confidence must be essential to the relationship in which the communication arose; and

(c) the relationship must be one which should be 'sedulously fostered' in the public good.

The journalist-source relationship is recognised as one that should be fostered.[143] The courts must then consider whether the interests served by protecting the communications from disclosure outweigh the interests in getting at the truth and disposing correctly of the litigation.[144]

The Supreme Court of Canada has held that this privilege applies to journalists and that "it is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression... a democracy cannot exist without that freedom to express new ideas".[145] Canadian courts generally accept that a chilling effect would occur if these rights are not upheld.[146] However, they also understand that the rules of privilege work at cross-purposes to the quest for truth, so they must be very strictly construed and recognised only where there are important social values implicated.[147]

While "it is essential that flexibility in the balancing process be preserved so that all factors relevant to the individual case may be taken into consideration and properly weighed",[148] the requisite standard of proof is a relatively high one and it is based on privacy concerns as much as freedom of expression.[149]

XII JOURNALIST'S PRIVILEGE IN AUSTRALIA

Australia has no federal statutory protection for journalists and protection at common law is minimal.[150] Australian parliaments, unlike most other liberal democracies, operate without a Bill of Rights that enshrines press freedoms.

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[143] *R v National Post*, above n 45, 444.
[144] *M(A) v Ryan* (1997) 143 DLR (4th) 1,8 (SCC) McLachlin CJ.
[145] *Edmonton Journal v Alberta (Attorney-General)* [1989] 103 AR 321, 327-328. See also *Canadian Broadcasting Corp v New Brunswick (Attorney-General)* [1996] 3 SCR 480, 494 and *Canadian Newspapers Co v Canada,* [1988] 2 SCR 122, 129 .
[146] *R v National Post*, above n 45, 441.
[147] *R v National Post*, above n 45, 443.
[148] *R v National Post*, above n 45,, 428.
[149] Abrams and Hawkes, above n 137.
[150] *Nicholls v Director of Public Prosecutions* [1991] 61 SASR 31, 37.

The government's feeling of vulnerability to terrorist attacks has also potentially impacted on press freedom. The Australian Security Intelligence Organisation (ASIO) has a statutory power to detain and demand information from journalists if it relates to terrorism.[151]

New South Wales is the only Australian state with legislation providing a confidential relationships privilege.[152] A protected confidence is a communication made in the course of a relationship in which the confidant was acting in a professional capacity and was under an express or implied obligation not to disclose its contents. The court must balance matters such as the probative value of the evidence in the proceeding, the nature of the offence and the likelihood of harm ensuing to the confider in deciding whether to exercise its discretion to excuse the witness. The privilege applies to a journalist and source relationship.[153]

The High Court of Australia has said that "freedom of communication" regarding public affairs can be inferred from the concept of representative democratic government.[154] Nonetheless, Australian courts have long held that there are no pressing policy reasons for a special privilege being granted to journalists entitling them to refuse to disclose evidence in court simply on the ground that it would reveal information imparted to the journalist in confidence or because it would reveal the identity of an informant.[155]

The High Court of Australia applies the newspaper rule narrowly. In *John Fairfax & Sons v Cojuango*, the Court declared that "inroads into the newspaper rule can be justified in the interests of achieving justice between plaintiff and defendant when qualified privilege is in issue."[156] A judge has discretion under the newspaper rule to require disclosure of sources if a media defendant has a defence to a defamation claim and the plaintiff is seeking another defendant.[157] It is not sufficient

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[151] Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth) 1st sch. The ASIO Act provides for jail terms of up to 3 years for refusing to answer questions about certain matters including a source's identity (exceeding the powers given in United States by the Patriot Act 2001 or similar United Kingdom legislation).
[152] Evidence Act 1995 (NSW) Division 1A. See Appendix for full text.
[153] *NRMA v John Fairfax Publications Pty Ltd* [2002] NSWSC 563
[154] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106,142.
[155] *McGuinness v Attorney-General of Victoria*, above n 78, 85-86.
[156] Tipping J, above n 67.
[157] *Kerrisk v North Queensland Newspaper Co Ltd* [1992] 2 Qd R 398. Compare *Hodder v Queensland Newspapers Pty Ltd* [1994] 1 Qd R 49.

that the organisation is a media organisation; it is the taking of responsibility for the publication that makes the disclosure unnecessary.

The Court said that the newspaper rule is merely one of practice, not of evidence – the rule "guides or informs the exercise of the judicial discretion".[158] Moreover, the role of the media in collecting and disseminating information does not override the "paramount interest in the administration of justice which requires that cases be tried by the courts on the relevant and admissible evidence."[159]

The Court also showed a distinct reluctance to interpret the rule widely in the interests of press freedom. It noted that the newspaper rule was originally based on the relevance of the information but later began to be justified on freedom of expression grounds.[160] However, the Court rejected this justification largely because it could not logically be confined to defamation actions and interlocutory applications.[161]

Australian courts are generally guided by a principle of necessity (that is, whether disclosure is necessary in the interests of justice) in determining whether a journalist should be ordered to reveal the identity of a source.[162]

In 1989, Australian Sunday Times journalist Tony Barrass wrote an article highlighting breaches of security in the Taxation Office. He was then subpoenaed as a witness in a preliminary hearing against a taxation clerk accused of unauthorised disclosure of information. Barrass refused to answer questions about how he got his information. The Court held that he had no just excuse under West Australian law to refuse.[163] Barrass was jailed for 7 days and was both imprisoned and fined.

In the mid-1990s three journalists received confidential information from former New South Wales Judge Jim McClelland that he had perjured himself during a parliamentary inquiry into a former High Court judge in 1985. The Commission of

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[158] *John Fairfax & Sons Ltd v Cojuango*, above n 59, 356. However, this comment is obiter since the case was not about interlocutory proceedings.
[159] *John Fairfax & Sons Ltd v Cojuango*, above n 59, 354.
[160] *John Fairfax & Sons Ltd v Cojuango*, above n 59, 351-353.
[161] *John Fairfax & Sons Ltd v Cojuango*, above n 59,, 353-354.
[162] *John Fairfax & Sons Ltd v Cojuango*, above n 59, 357. See also Walker, above n 7, 303.
[163] *DPP v Luders* (unreported) Court of Petty Sessions (WA), 27 November 1989, No 27602 of 1989 (committal proceedings); *DPP v Luders* (unreported) District Court of Western Australia, 7–8 August 1990, No 177 of 1990.

Inquiry told one of the journalists that McClelland had told another judge the same thing and wanted to question her; she refused to talk.

The inquiry was terminated when McClelland died in 1999. The journalists subsequently released the information and were criticised for keeping it secret because of the severity of the wrongdoing.[164] The Media Arts and Entertainment Alliance changed its code after this to read:[165]

> Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.

Australian and New Zealand courts alike have yet to establish a truly coherent policy on how to deal with protection of sources.[166]

XIII JOURNALIST'S PRIVILEGE IN NEW ZEALAND

A Early Cases

The issue of a journalist's power to protect his or her sources has seldom arisen in New Zealand, but the courts have long regarded the use of the discretion whether to require a journalists to reveal a confidential source as requiring a balancing exercise:[167]

> The ordering of disclosure of the source of information is the exercise of the Court's discretionary jurisdiction, and requires a balancing of competing claims. It will never lightly be made.

The courts have also noted "the desirability of protecting those who contribute [to the press] from the consequences of unnecessary disclosure of their identity."[168]

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[164] Morello, above n 89.
[165] Media Arts and Entertainment Alliance "Australian Journalists' Association Code of Ethics" (Redfern NSW 2003) 3.
[166] Kelly Buchanan "Freedom of Expression and International Criminal Law: An Analysis of the Decision to Create a Testimonial Privilege for Journalists" (2004) 35 VUWLR 609,631.
[167] *European Pacific Banking Corporation v Fourth Estate Publications Ltd*, above n 58, 136. See also *European Pacific Banking Corporation Ltd v Television New Zealand*, above n 23, 48.
[168] *McGuinness v Attorney-General of Victoria*, above n 78, 104, cited in *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd*, above n 60, 165.

B Cara and Kelman

Two Israeli men, Cara and Kelman, were arrested and charged after attempting to obtain a passport in name of a wheelchair-bound, cerebral palsy-suffering New Zealander.[169] They were also charged with participating in an organised criminal group.

The New Zealand Herald then published an article describing the men as "Israeli secret service agents."[170] The defendants claimed that this affected their right to a fair trial and issued subpoenas to three New Zealand Herald journalists who had quoted information from "senior government figures".[171] Potter J excused the journalists from giving evidence which would involve the provision of information in breach of confidence, saying that, in the exercise of its discretion under section 35:[172]

> The Court must weigh the competing public interests in freedom of expression, pursuant to which the Courts have long recognised that sources of information accessed by the media may require protection otherwise the flow of information on which freedom of speech relies may well be curtailed or may cease; and the interest of an accused person and of society generally in ensuring a fair trial for those charged under the law.

Potter J concluded that the information sought was not relevant or essential to ensuring a fair trial for the accused but could place at risk press freedom and that intervention by the Court to enforce disclosure would be a disproportionate response to the competing rights in the circumstances of this case.[173]

C *The* Ellis *Case*

There appears to have been only one instance where section 389 of the Crimes Act 1961 has been used to gain access to the confidential information held by a writer. In 1998, Lynley Hood was conducting research for a book on the Christchurch Civic Creche child sex abuse case.

Gay childcare worker Peter Ellis had been convicted in 1993 of sexual offences against several of the crèche children. The case was controversial because

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[169] *R v Cara and Kelman* , above n 25.
[170] Bridget Carter, Tony Stickley and Eugene Bingham "Foreign Spy Charges Whip Up Top-Level Security Storm" (17 April 2004) *New Zealand Herald* Auckland.
[171] Carter, Stickley and Bingham , above n 170.
[172] *R v Cara and Kelman*, above n 25, para 35.
[173] *R v Cara and Kelman*, above n 25, para 43.

much of the evidence came from the children themselves and there were many, including Lynley Hood, who doubted their reliability as witnesses.

Hood interviewed several of the jurors in the course of her research for the book and also kept in touch with Ellis's lawyers. By September 1998, there had already been several appeals and Ellis's lawyer, Judith Ablett-Kerr was looking for some compelling new evidence in order to try to persuade the court to grant another appeal. Junior counsel Simon Barr met with Hood and they "traded gossip" about the jury on the understanding that the conversation was confidential.[174]

Ablett-Kerr later told Hood she wanted access to records of an interview with a juror mentioned in that conversation. Hood refused. However, in November 1998, Ablett-Kerr presented a further petition to the Governor-General which included a statement by Simon Barr referring to the conversation and comments made by Hood about the interview. Juror C was said to have told Hood that he was sexually attracted to one of child complainants and that he had had counselling as a consequence.[175]

The Court of Appeal made an order pursuant to section 389(a) for Hood to deliver up the tapes and any transcript. Hood's lawyers argued that the court had no good justification to believe that the evidence existed or if it did, that it was relevant. Furthermore, they argued, the Court had disregarded any privilege Hood might have. The Crown agreed but the Court of Appeal did not.

In exercising its discretion under section 389, the Court of Appeal has said it "will normally require the establishment by an appellant of the likelihood of the existence of information which is cogent to the inquiry whether a miscarriage of justice has occurred."[176] Such discretion "is not lightly to be exercised."[177] Yet here, on the basis of one "gossip" session, the Court was prepared to infer that a miscarriage of justice may have occurred. It is difficult to see these as qualifying as the "rare" and "exceptional circumstances" the Court envisaged section 389(a) as being limited to.[178]

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[174] Lynley Hood *A City Possessed* (Longacre Press Dunedin 2001) 592.
[175] "Reference to the Court of Appeal of the Questions of the Convictions of Peter Hugh McGregor Ellis for Sexual Offences Against Children (No. 2)" MO No 54/99 (13 May 1999) *New Zealand Gazette* Wellington 1296.
[176] *R v D* (17 April 1994) AK CA 371/95, 4.
[177] *R v D*, above n 176, 4.
[178] *R v D*, above n 176, 4.

Hood handed over the tapes. The Court viewed them in camera and determined that there was nothing in them to provide an evidential foundation for the claims made about Juror C.

Perhaps the court would have viewed the order differently if Hood had been a press journalist rather than an author. The confidentiality of either the interview or the conversation with Simon Barr appear not to have been major considerations. The rights of a criminal defendant here to gain access to information that was of dubious credibility and relevance to his appeal comprehensively overrode them.

On the other hand, this was very controversial case, which garnered a great deal of publicity. It is arguable that the Court was under some pressure to show that it was giving the defence every opportunity to prove a miscarriage of justice had occurred, while still showing restraint towards the breach of confidentiality by viewing the information in camera.

XIV PROPOSED LAW REFORM

A Other Jurisdictions

Thirty-one states of the United States plus the District of Columbia have enacted shield laws and a further seven states have recognised some form of privilege as a matter of state constitutional law or state common law.[179] Despite an estimated 500 cases on journalist's privilege in the 30 years since *Branzburg*, there is still no federal shield law in the United States.[180] However, there are currently at least two federal shield bills before Congress, which essentially follow Douglas J's 3-pronged approach from *Branzburg*.[181]

The Australian Law Reform Commission (ALRC) has recommended that courts should have a general discretion to protect confidential communications made to a journalist, with the onus of proof on the person wanting the protection of the

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[179] Sager, Kellie L, Carolyn Killeen Foley, Andrew M Mar, John D Kostrey and Trinh C Tran "The Road Less Taken: the Path to Recognition of a Qualified Reporter's Privilege Through the Law of Evidentiary Privileges" (2004) 2 Media Law Resource Centre Bulletin 1, 21.

[180] Rachel Smolkin "Under Fire: Journalists Have Been Barraged by a Spate of Subpoenas to Identify Confidential Sources and Court Decisions Ordering Them to Comply. Investigative Reporting Could Suffer if More Ensue. Can the Media Fight Back? Does The Public Care?" (2005) 27 American Journalism Review 18.

[181] For example, the Free Speech Protection Act of 2004 S-3020, 108th Cong (2004) and the Free Flow of Information Act of 2005 S-340, 109th Cong (2005) and HR 581, 109th Cong (2005).

clause.[182] The ALRC is currently contemplating a federal journalist's privilege as part of a review of evidence law in Australia.[183]

B Evidence Bill Clauses 64 and 65

The new Evidence Bill is currently at the Select Committee stage. Clause 64 permits a journalist who has promised confidentiality to an informant to refuse to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered. [184] However, under clause 64(2), a judge may determine that the public interest in the disclosure of evidence of the identity of the informant outweighs not only any likely adverse effect on the informant but also the inherent public interest in dissemination of information by the media and the media's ability to access those sources. This seems to enable a judge to take into account whether sources are likely to dry up as a result of disclosure.

An informant is defined as a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium. A news medium is a medium for the dissemination to the public or a section of the public of news and observations on news. Public interest in the disclosure of evidence includes, in a criminal proceeding, the defendant's right to present an effective defence.

Clause 65 confers a general discretion on the Judge to protect confidential communications or information from disclosure in a proceeding if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in preventing harm to a person, in preventing harm to the special relationship between the journalist and the source or in

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[182] Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), xxi.

[183] Australian Law Reform Commission, *Review of the Uniform Evidence Acts*, DP 69 (2005). The Australian Press Council has made a submission to the joint Australian Law Reform Commission, Victorian Law Reform Commission and NSW Law Reform Commission Review of the Uniform Evidence Acts that a provision which would be the equivalent of Division 1A of the NSW Evidence Act 1995 and similar to that in the New Zealand Evidence Bill 2005 No 256-1 be included in the Uniform Evidence Acts. See <http://www.presscouncil.org.au/pcsite/fop/fop_subs/evidence05.html> (last accessed 15 September 2005).

[184] Evidence Bill 2005 no 256-1, cl 64. See Appendix for full text.

encouraging the free flow of information.[185] In deciding this, the judge must have regard to a wide range of considerations. These include:[186]

(a) the sensitivity of the evidence;

(b) the nature of the information and its importance to the proceeding;

(c) whether there is a less freedom-impinging way of dealing with information than full disclosure (such as in camera inspection by the court or name suppression);

(d) whether alternative means of obtaining the information have been exhausted by the applicant for disclosure;

(e) whether the proceedings are civil or criminal;

(f) the ability to limit any disclosure;

(g) the time elapsed since the information was given; and

(h) the extent to which it has already been disclosed.

C Relevant Factors For Law Reform in New Zealand

1 Necessity

In 1994 the Law Commission suggested that, in considering legislation to protect journalists' sources, the starting point should be that information should not be disclosed unless there is "good reason" to do so.[187] The basis of most statutory provisions protecting journalists' sources is a presumption against disclosure unless an applicant can satisfy the court that it is necessary to do so – a considerably higher threshold. After receiving submissions, the Law Commission revised its opinion that a general discretion should be retained in favour of a specific qualified privilege for journalists' confidential sources.[188]

The necessity requirement is a useful test, since the power to convict for contempt is aimed at ensuring the effective administration of justice, in the interests of which it is appropriate that a witness should only be required to answer questions when justice demands it. A necessity test also conforms with other aspects of law to

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[185] Evidence Bill 2005 no 256-1, cl 65. See Appendix for full text.
[186] New Zealand Law Commission *Evidence Report 55 – Volume 1 Reform of the Law* (NZLC R55, Wellington, 1999) 84 [*"Evidence Report 55"*].
[187] *Evidence Law: A Discussion Paper*, above n 19, 111.
[188] *Evidence Report 55*, above n 186, 83.

do with conducting judicial proceedings (for example the court only allows video evidence when it is necessary). In addition, the necessity test provides a justifiable balance between the public interest in the proper administration of justice and the public interest in the free flow of information which revealing a source would facilitate.[189]

2 *Codification*

There is some concern that locking the protection into a statutory framework may not only restrict any future development of the protection, but may also artificially limit the protection in unexpected ways.[190] Furthermore, any legislation must be concise and clearly defined, so that courts can focus on the underlying policies and their application to the case at hand, instead of being obliged to "engage in considerable semantic analysis to determine what the definition means."[191]

A complex and wordy provision is of dubious value, since "free speech rights repose more securely in clear standards, and press-source relationships are strengthened when the results of external interference with those relationships are less arbitrary."[192]

3 *Content*

Since doubts have been expressed as to whether section 35 applies at the discovery stage, the Law Commission recommended clarification of the section's scope.[193] While not limiting the application of the newspaper rule, it aimed to clarify that the general discretion applies to interlocutory proceedings as well as court proceedings, thus effectively subsuming the newspaper rule.[194] However, this may also have the unintended effect of watering down the newspaper rule, since it too would then become subject to the qualifications in clause 64(2).

Although section 35(1) allows for the withholding of information received by a journalist and does not specify that a journalist may withhold the identity of informants, the Law Commission noted that this is probably not a serious omission,

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[189] Walker, above n 7, 307.
[190] See Part X A Contempt of Court Act 1981 Section 10 for an analysis of the application of the way section 10 of the Contempt of Court Act has been applied in the United Kingdom.
[191] *Evidence Law: A Discussion Paper*, above n 19, 114. See also Cripps, above n 139.
[192] Zampa, above n 44, 1456.
[193] *Sutton v New Zealand Guardian Trust* (23 June 1986) HC AK A835/84, 8-9 Barker J.
[194] *Evidence Law: A Discussion Paper*, above n 19, 115.

since the identity of a source is arguably "information" for the purposes of the provision.[195] Nonetheless, the Law Commission recommended that the ambiguity should be eliminated.[196]

Whereas the emphasis in section 35 was on the special relationship between the witness and the informant, the new clauses are not confined to that relationship. Clause 64 would extend the protection of information so that in some cases, a "relationship" of confidence between the recipient of the information and the confider was not necessary for protection to be granted.[197]

4 Balancing Exercise

Although its starting point is that neither journalists nor their employers will be compellable without the direction of the court, the Evidence Bill does not create an absolute privilege for journalists. Section 35(2) set out guidelines to be followed by the court in the exercise of its discretion. The Law Commission recommended adding additional matters to be considered, in view of the fact that: [198]

> It is important to society that information about matters of public concern be disseminated, even if the price which must be paid is that full information may not be available to the court. A privilege serves the wider interest of society better than if no privilege were accorded.

5 Burden of Proof

The onus under the current legislation is for the party seeking to withhold the information to prove to the court on the balance of probabilities that it is necessary to do so.[199] The Law Commission has recommended that it should not be necessary in each case to have to establish that freedom of the press and confidentiality of sources are matters of public interest which deserve protection. Rather, the free flow of information and press freedom should be agreed to be matters of public interest.

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[195] *Evidence Law: A Discussion Paper*, above n 19, 114.
[196] *Evidence Law: A Discussion Paper*, above n 19, 114.
[197] *Evidence Report 55*, above n 186, 84.
[198] *Evidence Law: A Discussion Paper*, above n 19, 110.
[199] *Evidence Law: A Discussion Paper*, above n 19, 115.

XV DEFINITIONAL ISSUES

A Who is a Journalist?

If a privilege is granted to the press, why should it not extend to others who perform a similar function, for example; lecturers, political pollsters, novelists, academic researchers or dramatists?

The laws and policies that flow from both common law and statute protection for journalists tend to define them in terms of the social institution in which they operate and the democratic function they provide for society.[200] The Evidence Bill defines a journalist as a person who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium. Shield laws in the United States tend to favour the large established organs of the press – most include a wide definition of media organisation but none specifically mentions the Internet.[201] The Internet would fit under the Evidence Bill definition of a news medium, which is wide enough to cover new types of media, although it might exclude non-commercial journalists.

Does this mean someone who runs a web log is covered? Should a student reporter on a student newspaper be eligible for the privilege? What about a writer of non-fiction?

1 Bloggers

"If newspapers are symphonies, bloggers are jazz. The American press is returning to its pre-professionalized past; more jazz and less symphony."[202] Even the *Branzburg* majority spared a sympathetic thought for the "lonely pamphleteer",[203] of which the blogger is arguably the 21st century equivalent. However, there is a danger that the broader the class of people claiming protection, the more likely the courts will be to back off from granting special privileges. One current Senate bill for a federal shield law includes bloggers under the definition of journalist while another one doesn't.[204] Commentators believe the latter is more likely to go ahead.[205]

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[200] Alexander, above n 117, 101.
[201] Alexander, above n 117, 116-118.
[202] Kirtz, above n 86.
[203] *Branzburg v Hayes* , above n 48, 704.
[204] Free Speech Protection Act of 2004 and Freedom of Information Act of 2005, above n 181. The Free Speech Protection Act of 2004 would protect anyone gathering news, while the Freedom of Information Act of 2005 excludes those who publish solely on the Web.

Alternatively, judges may simply seek ways to avoid dealing with issue altogether. In 2004 Apple fan chat rooms leaked information about an upcoming Apple device. Apple subpoenaed the bloggers, who claimed privilege under California's shield law. The judge sidestepped the issue of deciding whether bloggers were in fact journalists by saying that the leaks involved trade secrets so they could not be protected.[206]

The question also arose in *Blumenthal v Drudge*.[207] Blogger Matt Drudge claimed in his blog that White House Special Assistant Sidney Blumenthal had abused his wife. Although Drudge retracted the story the next day, Blumenthal sued him. Drudge claimed journalist's privilege under the First Amendment, but the court said that: "Drudge is not a reporter, journalist or a newsgatherer. He is, as he himself admits, simply a purveyor of gossip."[208] Oddly, however, the matter was finally settled on the basis that Blumenthal did not raise any grounds to nullify a privilege.[209]

2 *Students*

United States shield laws usually do not distinguish between types of writers but focus on the activities performed, so unpaid volunteers would often be covered.[210] Some states limit the scope of the law by strictly defining the range of publications that are included; for example, by requiring a paid circulation or by excluding publications which have been running for less than one year.[211]

While student journalists could arguably be covered under the Evidence Bill, there seems no justification to extend the scope to students in general. The same would no doubt be true in the United States where a graduate student unsuccessfully tried to claim "scholar's privilege" against divulging research obtained from confidential sources regarding vandalism at a university animal testing laboratory.[212]

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[205] Kirtz, above n 86.
[206] *Apple Computer Inc v Doe 1* (2005) 33 Media L Rep 1449.
[207] *Blumenthal v Drudge* (1998) 992 F Supp 44.
[208] *Blumenthal v Drudge*, above n 207, 57.
[209] *Blumenthal v Drudge* (1999) 186 FRD 236.
[210] Alexander, above n 117, 116.
[211] Alexander, above n 117, 117.
[212] *In re Grand Jury Proceedings* (1993) 5 F 3d 397, 400 (9th Cir).

3 *Authors*

Many journalists also write books and many authors write in a journalistic style about topical issues. The Evidence Bill would cover these writers as long as the information is obtained in confidence and produced in the expectation of publication.

In *von Bulow by Auersperg v von Bulow*,[213] a writer was subpoenaed as a third party in a civil lawsuit for investigative reports commissioned by her, notes taken during a trial and the manuscript of her unpublished book. The court held that all the information could have been covered by privilege, but she did not qualify because at the time she obtained the information she was not intending to disseminate it to the public.[214]

Author and lecturer Vanessa Leggett was jailed for contempt in Texas in 2001 after refusing to hand over her notes from an interview with a convicted murderer who committed suicide. Leggett was writing a book about the murder. The court was disinclined to extend privilege to a "virtually unpublished freelance writer, operating without an employer or a contract for publication", and in any case the privilege could not defeat a grand jury subpoena.[215]

An author such as Lynley Hood in her role as author of the Peter Ellis book would probably come under the scope of Clause 64, since she was acting in the normal course of her work and it was a topical issue. However, the impact of the journalist's privilege on section 389 of the Crimes Act may be negligible. A judge in a criminal proceeding may well conclude that if section 389 is applicable, in that the information is relevant, then the privilege has already been outweighed, especially since the information need only be "expedient in the interests of justice."[216]

A more useful definition of journalists might focus on what they do, which is to foster democratic dialogue, rather than by what they are (the people's watchdog).[217] After all, "what makes journalism journalism is not its format but its content,"[218] and,

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[213] *Von Bulow by Auersperg v von Bulow* (1987) 811 F 2d 136 (2nd Cir).
[214] Compare *Shoen v Shoen* (1995) 48 F 3d 412 (9th Cir) where "an investigative author of books on topical and controversial subjects" was able to claim privilege because he began collecting information with the intention of producing a book.
[215] Alexander, above n 117, 119 (footnote in original).
[216] Crimes Act 1961 s389.
[217] Alexander, above n 117, 105.
[218] Heather Stamp "McKevitt v Pallasch: How the Ghosts of the Branzburg Decision are Haunting Journalists in the 7th Circuit" (2004) 14 De Paul LCA J Art & Ent Law 363, 390 (footnote in original).

as one commentator has pointed out, it would be absurd if Bob Woodward were protected in his capacity as a Washington producer but not as the author of "All the President's Men."[219] In any case, it is important to clarify the boundaries of the definition, since:[220]

> The advent of inexpensive desktop and online publishing have contributed to the creation of classes of persons who do not earn their livings as journalists, but who participate in many of the same information gathering functions as … traditional journalists.

There is a real danger, moreover, that broadening the scope of the protection too much would devalue it: [221]

> So many divergent groups of persons could be called journalists that the protection of the privilege would be dissolved … Such expansion runs counter to the fundamental notion of a privilege, which should be maintained for a select, well-defined group to the exclusion of all others.

It will eventually be up to the courts to determine how far the definition extends, but "the smaller and more identifiable the class of persons able to assert the privilege, the easier it will be to sustain this protection for journalists."[222]

B What is a Source?

Journalist's privilege under the Evidence Bill applies only to confidential communications between a journalist and an informant.

The privilege belongs to the journalist; it cannot be asserted independently by an informant.[223] Arguably, then, the lack of a promise of confidentiality should not make any difference to the application of the privilege, since "people cannot waive privileges that are not theirs to claim".[224] At any rate, an informant's control over what is done with any information he or she imparts is strictly limited.

Under the section 35 discretion, a confidence could be said to exist independently of any specific agreement of confidentiality, because of the special

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[219] Kraig L Baker "Are Oliver Stone and Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist's Privilege" (1994) 69 Washington Law Review 739, 753.
[220] Alexander, above n 117, 99.
[221] Alexander, above n 117, 101.
[222] Alexander, above n 117, 101.
[223] *Branzburg v Hayes*, above n 48, 693; *United States v Cuthbertson* (1980) 630 F 2d 139, 147 (3rd Cir).
[224] Laursen, above n 113, 316.

relationship that is created. A confidence arises whether there has been a promise made or not. There is perhaps more scope under this discretion for non-confidential information to be protected from disclosure.

At international criminal law, a privilege exists for war correspondents which does not distinguish between confidential and non-confidential information.[225] This is understandable, due to the particular dangers and difficulties related to war reporting and the importance of encouraging the free flow of information about events that occur during conflicts. The arguments are not so clear-cut regarding domestic law.

Most subpoenas issued against the press in the United States are for non-confidential information.[226] The United States jurisprudence is mixed on the matter of whether a journalist's privilege ought to apply to non-confidential communications. All subpoenas compromise the autonomy of the media, if not the free flow of information, so the amount of protection that non-confidential information should have is an important issue. In *United States v Smith* the court said that there was "little reason to fear that on-the-record sources will avoid the press simply because the media might turn over non-confidential statements to the government" and presumed that sources "expect beforehand that the government, along with the rest of the public, will view their non-confidential statements when they are aired by the media."[227] Some cases do not differentiate between confidential & non-confidential sources,[228] while some give a lesser degree of protection to non-confidential sources.[229]

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[225] *The Prosecutor v Brdjanin and Talic* (Judgment) (7 June 2002) IT-99-36-T (Trial Chamber II, ICTY); *TheProsecutor v Brdjanin and Talic* (Judgment) (11 December 2002) IT-99-36-AR73.9 (Appeals Chamber, ICTY).

[226] Dalglish, above n 39, 8.

[227] *United States v Smith* (1998) 135 F 3d 963, 970 (5th Cir) (arson suspect volunteered television interview).

[228] *Lewis v United States* (1974) 501 F 2d 418 (9th Cir); *Lewis v United States* (1975) 517 F 2d 236(9th Cir) (anonymous packages delivered to a radio station); *United States v Criden* (1980) 633 F 2d 346 (3rd Cir) (government sources gave information to the media regarding fraud charges against an attorney);*United States v Cuthbertson*, above n 223 (fast-food franchise owners indicted for fraud and conspiracy wanted tapes and notes from 60 Minutes report); *von Bulow by Auersperg v von Bulow* (1987) 811 F 2d 136, 145 (2nd Cir) (civil litigant wanted investigation reports, notes from a trial and a book manuscript from a writer not a party in the case).

[229] *United States v LaRouche Campaign* (1988) 841 F 2d 1176, 1181 (1st Cir) (presidential campaign employee gave television interview about the candidate) ; *Shoen v Shoen*, above n 214 (two sons suing father for libel relating to non-confidential statements made to the author of a book about them being involved in murder of a third son); *Gonzales v National Broadcasting Company* (1999) 194 F 3d 29 (2nd Cir) (Gonzales had a federal civil rights action against a deputy sheriff for uncalled-for traffic stops and wanted outtakes from a Dateline programme to show racial bias).

On the face of it, non-confidential information seems less deserving of protection than confidential information: it is difficult to see how failing to protect non-confidential information might impact upon the free flow of information.[230] Furthermore, extending the scope of the privilege may have the unintended effect of watering down its strength; courts may be reluctant to enforce a sweeping privilege leading to unpredictable outcomes.[231] On the other hand, the press should not be coerced into acting as an investigative arm for civil litigants or criminal prosecutors and defendants.[232] There may indeed be:[233]

> A lurking and subtle threat to journalists and their employers of disclosure if outtakes, notes and other unused information, even if non-confidential, becomes routinely and casually, if not cavalierly, compelled.

If non-confidential materials are always compellable, there could be a "ripple effect" which means that they are always compelled without examining the circumstances of the case.[234] This could lead to journalists adopting new practices to avoid being compelled, such as limiting investigative work or avoiding controversial stories.

It makes sense, therefore, to treat each case on its own merits, rather than to implement a strict rule; a lack of confidentiality should be relevant in the balance but not determinative. After all, "If the same [press freedom] interests are implicated when both confidential and non-confidential information is subpoenaed, then why does the same test not apply?"[235]

C How Much is Covered?

New Zealand courts have defined sources as more than just names of informants – sources can include interviews, notes of interviews and more.[236] Arguably, "everything from gossip or rumour to hard news is part of the information flow that people rely on in order to create a bridge between themselves and society."[237] Even seemingly frivolous information can have important political

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[230] Anthony L Fargo "The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws" (2002) 7 Comm L & Pol'y 241, 253.
[231] Zampa, above n 44, 1453.
[232] Fargo, above n 230, 272.
[233] *United States v LaRouche Campaign*, above n 229.
[234] Elrod, above n 8, 163.
[235] Anthony L Fargo "Reconsidering The Federal Journalist's Privilege For Non-Confidential Information: Gonzales v NBC" (2001) 19 Cardozo Arts & Ent LJ 355, 386-387.
[236] *Brill v Television Service One*, above n 61, 688.
[237] Elrod, above n 8, 161.

ramifications; for example, the Clinton-Lewinsky saga began as mere gossip but escalated into a presidential impeachment issue. Since it is virtually impossible to predict the potential impact of information, a broad range of communications deserves protection: "the liberty of the press is not confined to newspapers and periodicals. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[238]

The Evidence Bill grants journalists the power to refuse to answer questions or produce documents that would identify a confidential informant.[239] Therefore it would not generally include a journalist's visual observations during a confidential interview or notes about an interview that may be sensitive but would not identify the informant.

D What Standard Should be Applied?

Protection under the Evidence Bill applies to both criminal and civil proceedings and extends to both the identity of the informant and any information that would identify the informant or enable the informant to be identified. This is a high threshold; a determination must be made that disclosure would in fact identify the informant. A strict rule may be appropriate in criminal cases, where the information may, for example, affect an accused's defence. However, in civil cases, it seems more fitting to estimate whether, on the balance of probabilities, the information is likely to identify the source.

On the other hand, a privilege is not granted lightly. It may be more practical for the same standard to apply in both civil and criminal proceedings in the interests of regularity and predictability.

Changing the rule from one of a general discretion to excuse a journalist witness under section 35 to a fundamental one of non-compellability certainly clarifies and tidies up the law. Parties in both civil and criminal actions will know where they stand, and there will be less incentive for litigants to embark on fishing expeditions for evidence. However, whether it is the best way to protect journalists' confidential sources remains to be seen.

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[238] *Lovell v City of Griffin* (1938) 303 US 323, 331.
[239] Evidence Bill 2005, above n 6, cl 64(1).

XVI WHICH WAY FOR NEW ZEALAND?

Do shield laws really work and are they necessary to ensure protection of confidentiality? It is not easy to assess the degree to which the protection of sources promotes the free flow of information nor to determine how much limiting that protection might impact on the availability of information.[240] However, the threat of subpoenas has caused many United States news organisations to institute policies of non-retention of information.[241]

The Reporters Committee for Freedom of the Press have conducted regular surveys on subpoenaing of the news media since 1997. In the United States in 2001, the average news organisation received 2.6 subpoenas (compared with 3 in 1999 and 4.6 in 1997).[242] Whereas in shield law states 22 per cent of subpoenas are quashed, elsewhere the rate is 5 per cent.[243] A 1995 nationwide United States study found that newspapers in states with shield laws publish more investigative reports and win more national and regional awards for their reporting than their counterparts in non-shield-law states.[244] One hundred editors in forty-eight states were surveyed and the evidence pointed to the conclusion that shield laws do indeed have a positive impact on investigative reporting.[245]

Judges in states with shield laws are four times more likely to quash a subpoena against a media representative than those in states without them.[246] The mere existence of such a law can give judges a tool to discourage lawsuits against the press. But it is likely that the more journalists who face jail for refusing to disclose their sources, the more aggressive will be legal demands that they reveal them. The issue is a topical one in the United States, but it has arisen so rarely in New Zealand that it is too difficult to predict the impact of a statutory journalist's privilege on demands on journalists for confidential information.

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[240] *Moysa v Albert (Labour Relations Board)* [1989] 1 SCR 1572, 1581.
[241] Dalglish, above n 39, 12.
[242] Dalglish, above n 39, 6.
[243] Dalglish, above n 39, 11.
[244] Eileen Wirth "Impact of State Shield Laws on Investigative Reporting" (1995) 16(3) Newspaper Res J 64 ["Impact of State Shield Laws on Investigative Reporting"].
[245] Wirth "Impact of State Shield Laws on Investigative Reporting", above n 244.
[246] Zelnick, above n 46, 549.

XVII CONCLUSION

Journalists act as watchdogs against abuses of official power and as a check on all branches of government. They are the conduit of the people to information about all the things that affect daily life – from national politics to neighbourhood news. In the course of accessing information, journalists will inevitably be put in the position of receiving sensitive information from sources who wish their identities to be kept secret. The essential dichotomy of the journalist's job is that, in the interest of disseminating important information, he or she must agree to withhold a part of that information. Our common law already recognises that this is sometimes in the public interest; it is the essence of the newspaper rule. Journalist witnesses are not in the same position as any other citizen called to give evidence; like lawyers, doctors and priests, journalists will lose the ability to function effectively if people cannot trust them to keep their promises of confidentiality.

New Zealand courts have not yet had to deal with a Judith Miller-type contempt case, but if a journalist here refused to obey a similar order, the result would probably be the same. In making the order in the first place, however, the courts here already recognise the value of protecting journalist's sources and they have a wide discretion under current law to consider a broad range of factors.

As stated in *Branzburg,* anything less than an absolute privilege cannot be completely relied on for protection. Enacting a complex and significantly qualified form of privilege that will rarely be invoked may not be worth the uncertainties of definition and application that will inevitably arise. The broadly interpreted exceptions to section 10 in the United Kingdom have largely diffused the effectiveness of the privilege. Journalist's privilege is "a complicated myriad of theories, arguments, statutes and judicial decisions, varying from jurisdiction to jurisdiction and fact situation to fact situation."[247]

Although it should be acknowledged that there is a strong public interest in permitting journalists to withhold information about their sources, a balanced approach which looks at all the relevant factors in each case should, in the end, bring about the most equitable result.

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[247] Sherwin above n 30, 138.

APPENDIX

Evidence Amendment Act (No 2) 1980 Section 35:

(1) In any proceeding before any Court, the Court may, in its discretion, excuse any witness (including a party) from answering any question or producing any document that he would otherwise be compellable to answer or produce, on the ground that to supply the information or produce the document would be a breach by the witness of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document and to the matters specified in subsection (2) of this section, the witness should not be compelled to breach.

(2) In deciding any application for the exercise of its discretion under subsection (1) of this section, the Court shall consider whether or not the public interest in having the evidence disclosed to the Court is outweighed, in the particular case, by the public interest in the preservation of confidences between persons in the relative positions of the confidant and the witness and the encouragement of free communication between such persons, having regard to the following matters:

(a) The likely significance of the evidence to the resolution of the issues to be decided in the proceeding;

(b) The nature of the confidence and of the special relationship between the confidant and the witness; and

(c) The likely effect of the disclosure on the confidant or any other person.

(3) An application to the Court for the exercise of its discretion under subsection (1) of this section may be made by any party to the proceeding, or by the witness concerned, at any time before the commencement of the hearing of the proceeding or at the hearing.

(4) Nothing in subsection (1) of this section shall derogate from any other privilege or from any discretion vested in the Court by any other provision of this Act or of any other enactment or rule of law.

(5) In this section "Court" includes —

(a) Any tribunal or authority constituted by or under any Act and having power to compel the attendance of witnesses; and

(b) Any other person acting judicially.

Crimes Act 1961 Section 389

For the purposes of any appeal or application for leave to appeal against conviction or sentence the Court of Appeal or the Supreme Court may, if it thinks it necessary or expedient in the interests of justice,—

(a)Order the production of any document, exhibit, or other thing connected with the proceedings the production of which appears to the Court to be necessary for the determination of the case;

(b)If it thinks fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of Court before any Judge of the Court or before any officer

of the Court or District Court Judge or other person appointed by the Court of Appeal or the Supreme Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court;

(c)If it thinks fit, receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such application;

(d)Where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the Court conveniently be conducted before the Court, order the reference of the question in manner provided by rules of Court for inquiry and report to a special commissioner appointed by the Court, and act upon the report of any such commissioner so far as the Court thinks fit to adopt it;

(e)Appoint any person with special expert knowledge to act as assessor to the Court in any case where it appears to the Court that such special knowledge is required for the proper determination of the case—

and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of Appeal or the Supreme Court on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the Court

Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial.

Evidence Act 1995 (NSW) Division 1A Section 126A

In this Division, protected confidence means:

(a) a communication made by a person in confidence to another person (in this section called the confidant) acting in a professional capacity and who, when the communication was made, was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant, or

(b) the contents of a document relating to a communication of a kind referred to in paragraph (a), or

(c) information about, or enabling a person to ascertain, the identity of the person who made a communication of a kind referred to in paragraph (a) known by the confidant.

Evidence Act 1995 (NSW) Division 1A Section 126B

Exclusion of evidence of protected confidences:

(1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose a protected confidence.

(2) The court may give such a direction:

(a) on its own initiative, or

(b) on the application of the protected confider or confidant concerned (whether or not either is a party).

(3) The court must give such a direction if it is satisfied that:

(a) if the evidence is adduced it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider, and

(b) the nature and extent of the harm outweighs the desirability of the evidence being given.

(4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:
(a) the importance of the evidence in the proceeding,
(b) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding,
(c) the availability of any other evidence concerning the matters to which the protected confidence relates,
(d) the likely effect of adducing evidence of the protected confidence, including the likelihood of harm, and the nature and extent of harm, that would be caused to the protected confider,
(e) the means available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence is disclosed,
(f) if the proceeding is a criminal proceeding--whether the party seeking to adduce evidence of the protected confidence is a defendant or the prosecutor,
(g) whether the substance of the protected confidence has already been disclosed by the protected confider or any other person.

(5) The court must state its reasons for refusing to give a direction under this section.

Evidence Bill 2005 Clause 64
(1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered.

(2) A Judge of the High Court may order that subsection (1) is not to apply if satisfied by a party to a civil or criminal proceeding that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs–
(a) any likely adverse effect of the disclosure on the informant or any other person; and
(b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

(3) The Judge may make the order subject to any terms and conditions that the Judge thinks appropriate.

(4) This section does not affect the power or authority of the House of Representatives.

Evidence Bill 2005 Clause 65
(1) A direction under this section is a direction that any 1 or more of the following not be disclosed in a proceeding:
(a) a confidential communication:
(b) any confidential information:

(c) any information that would or might reveal a confidential source of information.

(2) A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in–
(a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or
(b) preventing harm to–
(i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or
(ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or
(c) maintaining activities that contribute to or rely on the free flow of information.

(3) When considering whether to give a direction under this section, the Judge must have regard to–
(a) the likely extent of harm that may result from the disclosure of the communication or information; and
(b) the nature of the communication or information and its likely importance in the proceeding; and
(c) the nature of the proceeding; and
(d) the availability or possible availability of other means of obtaining evidence of the communication or information; and
(e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and
(f) the sensitivity of the evidence, having regard to–
(i) the time that has elapsed since the communication was made or the information was compiled or prepared; and
(ii) the extent to which the information has already been disclosed to other persons; and
(g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.

(4) The Judge may, in addition to the matters stated in subsection (3), have regard to any other matters that the Judge considers relevant.

(5) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.

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