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Abstract
In many common law liberal democracies today, news gatherers are resisting efforts to use the powers of the courts to compel the news gatherers to identify their confidential sources. Often the struggles are epic. Often the public interest in effective news gathering fuelling the vitality of a modern liberal democracy is insufficiently recognized. The author uses recent cases to spotlight the shortfalls in the approach and legacy of the common law in dealing with news gatherer/ confidential source relationships. Post HRA English decisions, especially that of Tugendhat J in *Ackroyd*, combining European style commitment to the public interest in vigorous newsgathering with common law style analysis of evidence, point the way to a more effective approach. US and Hong Kong cases remind news gatherers of their public interest responsibilities.

Protection Against Judicially Compelled Disclosure of the Identity of News Gatherers’ Confidential Sources in Common Law Jurisdictions.

By Janice Brabyn*

I INTRODUCTION

The professional codes of journalists’[1] associations in liberal democratic[2] common law jurisdictions[3] typically contain a statement to the effect that a journalist must protect the identity of a confidential source.[4] Clearly, these codes create a

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[1] Narrowly defined as ‘a person employed to write for, edit, or report for a newspaper, journal or news cast’, Della Thompson (ed), *Concise Oxford Dictionary of Current English* (Oxford: Clarendon Press, 9th ed, 1995), commonly used to include freelance contributors of articles as well.
[2] Referring to jurisdictions committed to self governance by a free people.
[3] Referring to those jurisdictions that recognize judge made law within the English tradition and in contrast to code jurisdictions.
[4] See for example, The American Society of Newspaper Editors ‘…pledges of confidentiality to news

professional obligation not to disclose source information in response to questions not backed by judicial orders or freestanding statutory obligations to answer.[5] Although not members of a professional body, other news gatherers frequently acknowledge similar obligations. Uncompelled disclosure might also amount to a breach of contract or, in the US, found an action for promissory estoppel.[6] But what if a judge issues a subpoena, witness order or search warrant, or orders discovery, the administration of interrogatories or the production of documents, in each case with the object of identifying a news gatherer's confidential source? What if a statute requires anyone with certain information to disclose that information and its source, and a news gatherer receives such information from a source in confidence?[7] What are the news gatherer's obligations then?

If the judicial order or legislation withstands procedural, substantive and constitutional challenge, their legal obligation must be to comply with the order or law. The health of a liberal democracy requires that the rule of law apply to news gatherer citizens as much as any other. But under what circumstances do judges in liberal democratic common law jurisdictions make orders like these? Have judges found such orders to be constitutionally valid according to the freedom of expression or free press guarantees in such jurisdictions? Should liberal democracies provide special protection against judicially compelled disclosure of the identities of news gatherers' confidential sources? This article addresses each of these three questions.

They are questions that are currently being debated in legislatures and the media, and fought over in courtrooms and commissions of inquiry in many parts of the common law world.[8] Five illustrative cases provide a useful focus.

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sources must be honored at all costs…'; Press Complaints Commission Code of Practice, clause 14 "Journalists have a moral obligation to protect confidential sources of information", quoted in *Ackroyd (2)* (n 24 below); Code of British National Union of Journalists (1994), 'A journalist shall protect confidential sources of information', reproduced as Item 7 of the Code of Ethics of the Hong Kong Journalists Association; Australian Journalists Association and the MEAA/ AJA Standard 19, 'Keep confidences in good faith.' The Canadian Association of Journalists: Guidelines for Investigative Journals, approved 2004, http://www.caj.ca/principles/principles-statement-investigative-2004 (Last visited 25 October 2005), is more detailed and sophisticated.

[5] Absent such professional obligations, news gatherers would have the same right as everyone else to choose whether to answer other people's questions, see Viscount Dilhorne in *British Steel Corporation* v *Granada Television Ltd.* [1981] AC 1096, 1181H – 1182A .

[6] *Cohen* v *Cowles Media Co.* 501 US 663 (1991), *Ruzicka* v *Conde Nast Publications In.*, 999 F. 2d 1319 (8th Cir 1993). Surely, disclosure in obedience to a court order would not be actionable, *George G. Ventura* v *The Cincinnati Enquirer and Ganett Company Inc* 396 F.3d 784.

[7] For example, the Terrorism Act 2000, s 19 (UK).

[8] In addition to the more than 25 post 2000 cases otherwise mentioned herein see: ITN, 'Legal Landmark', at http://www.channel4.com/news/2004/02/week_2/13_ruling (Last visited 25 October 2005), describing the conflict between Lord Saville, Chairman of the UK Bloody Sunday Inquiry and Independent Television News, reporter Alex Thomson and then producer Lena Ferguson; *Canada (Attorney General)* v *Juliett O'Neill* [2004] O.J. No. 4649, 2004 On.C LEXIS 5106 continued in

In re Grand Jury Subpoena, Judith Miller/ Matthew Cooper[9]
US Court of Appeals for the District of Columbia.
Early in 2004, a special prosecutor and a federal grand jury began investigating the possibly illegal[10] naming of a covert CIA operative to several journalists, including reporters Matthew Cooper (Time magazine) and Judith Miller (New York Times) by sources described as 'top White House officials'.[11] The sources may have intended to discredit or punish the operative's husband,[12] whose public revelations about his CIA sanctioned investigation into alleged Iraqi attempts to obtain uranium in Africa had undermined part of President Bush's 2003 State of the Union Address.[13] The special prosecutor subpoenaed Cooper, Miller and Time Inc, Cooper's employer, demanding disclosure of the identity of the sources. All refused to comply.[14] On 15 February 2005, the US Court of Appeals for the District of Columbia dismissed their consolidated appeals against consequential findings of civil contempt.[15] An application for a rehearing *en banc* was rejected.[16] The US Supreme Court denied certiorari on 27 June 2005.[17] Time Inc then produced Cooper's 'notes, tape recordings, e-mails and other documents' as ordered.[18] Cooper later testified when released from confidentiality commitments by his source.[19] Miller was sent to jail for civil contempt on 6 July 2005.[20]

Canada (Attorney General) v *O'Neill* 2005 CarswellOnt 2115 198 C.C.C. (3d) 143; *R* v *Canadian Broadcasting Corp*. 2006 CarswellOnt 1119; *Kennedy* v *Lovell* [2002] WASCA 217 (a Royal Commission/ contempt case); *In re Special Proceedings* 373 F. 3d 37 (1st Cir 2004) (Tim Taricani's case); cases noted by Bill Kenworthy in 'Ongoing confidential-sources cases' (08.04.05) at http://www.firstamendmentcenter.org/analysis.aspx?id=15634 (Last visited 23 March 2006).

[9] Strictly cited as *In re Grand Jury Subpoena (Miller)* 397 F 3d 964.

[10] See, for example, Intelligence Protection Act of 1982, 96 Stat. 122.

[11] A term used in media accounts and quoted in *In re Grand Jury Subpoena* n 9 above, 966 per Circuit Judge Sentelle.

[12] Cooper suggested this, *ibid*, 1003 *per* Circuit Judge Tatel. The sources implied that the husband had been given the investigative task through some inappropriate influence from the operative.

[13] *ibid*, 966 *per* Judge Sentelle.

[14] Historically, for Miller see *In re: Special Counsel Investigation Misc No 04-407(TFH)* 338 F. Supp. 2d 16 (rejection of motion to quash subpoenas); *In Re Special Counsel Investigation* 2004 U.S. Dist. LEXIS 1842 (D.D.C., Sept. 15, 2004) (contempt holding). For Cooper see *In re: Special Counsel Investigation* 346 F. Supp. 2d 54; 2004 U.S. Dist LEXIS 23241 (Nov. 10, 2004) and *ibid*, 966-967 for other dates.

[15] *In re Grand Jury Subpoena* n 9 above.

[16] See *In re Grand Jury Subpoena Judith Miller No. 04-3138 consolidated with 04-3139, 04-3140 2005* US App LEXIS 6608; *Matthew Cooper* v *US* 04-1508 2005 U.S. LEXIS 5191.

[17] Supreme Court of the United States Order List 545 US for Monday, 27 June 2005, p10; *Judith Miller* v *US* 04-1507, 2005 US LEXIS.

[18] B. Saporito, 'When to Give Up a Source', 11 July 2005 *Time* at http://www.time.com/time/archive/preview/0,10987,1079501,00 (Last visited 25 October 2005).

[19] M. Cooper, 'What I told the Grand Jury' 25 July 2005 Time Archive at http://www.time.com/time/archive/preview/0,10987,1083899,00 (Last visited 25 October 2005).

[20] Editorial, 'Judith Miller Goes to Jail' 7 July 2005 NY Times, Section A, p 22. Miller was released on 29 September 2005, after agreeing to testify and handover notes about her relevant conversations with I. Lewis Libby, chief of staff for Vice President Cheney on the following day. Miller claimed she agreed

Ashworth Hospital Authority v *Mirror Group Newspapers Ltd*[21] House of Lords
An English newspaper published an article critical of a secure mental health hospital run by Ashworth Hospital Authority (AHA). The article included quotes from hospital PACIS records about a controversial patient.[22] On the basis that the records were highly confidential medical records probably leaked by an AHA employee, AHA obtained a *Norwich Pharmacal* discovery order[23] requiring the newspaper's owners, MGN Ltd, to identify the paper's source, thereby enabling AHA to take disciplinary action. MGN Ltd appealed the order all the way to the House of Lords, relying upon section 10 of the Contempt Act 1981, a section that provides some protection against judicially compelled disclosure of news gatherers' confidential sources. The case was heard after the Human Rights Act 1998 (HRA) had come into force. The House of Lords upheld the order.

Mersey Care NHS Trust v *Ackroyd*[24] Queen's Bench, Tugendhat J
Robin Ackroyd, a freelance journalist who had investigated and written about Ashworth Hospital for many years, came forward as the newspaper's paid intermediary source for the *Ashworth* articles. The AHA's successor, the Mersey Care NHS Trust, sought a *Norwich Pharmacal* order compelling Ackroyd to disclose the identity of his source. Ackroyd resisted, again citing section 10 of the Contempt

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after receiving a voluntary waiver from her source, S. Schmidt, J.VandeHei, 'N.Y. Times Reporter Released From Jail: Miller to Testify in CIA Leak Probe' 30 September 2005 *Washington Post*, A01. Libby was subsequently charged with obstruction of justice and perjury offences. He also subpoenaed Cooper and Miller, amongst others, requesting a wide range of documentary material – but was only permitted to obtain certain article drafts from Cooper, 'In re Special Counsel Investigation (Valerie Plame investigation)' at http://www.rcfp.org/shields_and_subpoenas.html.

[21] [2002] UKHL 29; [2002] 1 WLR 2033.

[22] PACIS refers to a computer database known as 'Patient Administrative and Clinical Information Service, *Ackroyd 2* n 24 below at [23]. Ackroyd denied the PACIS records were 'medical records', describing them as a 'diary' in his articles, otherwise as a hospital administrative log, M. Holderness, 'Sources in Peril' January 2003 Freelance at http://media.gn.apc.org/fl/o301whis. (Last visited 10 October 2005). However, the HL in *Ashworth* n 21 above, the CA in *Ackroyd (1)* n 26 below and Tugendhat J in *Ackroyd (2)* n 24 below, the latter two after having seen the full records, all accepted them as medical records.

[23] An order derived from the old bill of discovery, given new life in *Norwich Pharmacal Co* v *Customs and Excise Commissioners* [1974] AC 133, available to a plaintiff as the sole remedy sought in an action against a person who, 'albeit innocently, and without incurring any personal liability, becomes involved in a wrongful act of another [thereby coming] … under a duty to assist the person injured by those acts by giving him any information which he is able to give by way of discovery that discloses the identity of the wrong doer.' See *Ashworth* n 21 above at [26]. *Norwich Pharmacal* discovery was first applied to news gatherers in *British Steel* (n 5 above). Australia, Canada, New Zealand and colonies like Hong Kong have all followed *Norwich Pharmacal.* As to the US see R. Barron, 'Existence and Nature of Cause of Action for Equitable Bill of Discovery' (1996-2005) 37 A.L.R. 5th 645. For an illustration of pre-action discovery used against news gatherers, see *In the matter of Harold Dack, Petitioner. Beni Broadcasting of Rochester, Inc., et al., Respondents* 1979 N.Y. Misc. LEXIS 2709.

[24] [2006] EWHC 107 (7 February 2006) (QB), hereafter *Ackroyd (2).* The Trust was given leave to appeal.

Act 1981. The Trust obtained summary judgment on the ground that the issues had already been determined in *Ashworth*.[25] Ackroyd successfully appealed,[26] winning the right to a full hearing at which Tugendhat J finally held that Ackroyd need not disclose his source.

So Wing Keung[27] v *Sing Tao Ltd and Hsu Hiu Yee*[28] Hong Kong SAR CA
A woman involved in a corruption trial became a protected witness. Lawyers involved in the case brought a habeas corpus application claiming she was being held unlawfully by the HKSAR Independent Commission Against Corruption (ICAC). The application was dismissed as totally unfounded. The judge suspected an attempt to intimidate the witness. The proceedings were closed and yet seven HK newspapers published articles about them, including the witness's details, thereby probably committing a serious criminal offence.[29] There may have been a leak, perhaps also with the object of intimidation. Using sections 83-89 of the Interpretation and General Clauses Ordinance (IGCO), the ICAC obtained and executed search warrants against the business premises of the seven newspapers, including the Sing Tao Daily, and the homes of some reporters, including Hsu Hiu Yee, a Sing Tao reporter, with the object of identifying the culprit. On application by Sing Tao Ltd and Hsu, a judge quashed the warrants relating to them.[30] The Hong Kong SAR Court of Appeal rejected the ICAC's appeal on jurisdictional grounds but made it very clear they believed the original decision to grant the warrants was justified. Neither side appealed.[31]

R v *McManus, R* v *Harvey* 2005 Victoria County Court Australia[32]
In February, 2004, Gerard McManus and Michael Harvey of the Herald Sun newspaper published an article based on information in a confidential government

[25] *Ackroyd* v *Mersey Care NHS Trust* [2002] EWHC 2115 (QB).
[26] *Ackroyd* v *Mersey Care NHS Trust* [2003] EWCA Civ 663 (16 May 2003); [2003] All ER (D) 235, [2003] EMLR 36 hereafter *Ackroyd (1)*.
[27] HSU was the ICAC investigator who applied for the warrants.
[28] [2005] 2 HKLRD 11.
[29] Witness Protection Ordinance (Cap 564), section 17. A solicitor and others were subsequently convicted of conspiracy to pervert the course of justice in relation to the habeas corpus application. A barrister was convicted of attempting to commit a Witness Protection Ordinance offence. A journalist who co-wrote one of the articles in the South China Morning Post but was granted immunity by the prosecution, identified the barrister as the 'legal source' mentioned in her article, P. Hui, '3 guilty of ICAC plot, Egan of leak attempts' 13 June 2006 SCMP A1.
[30] *So Wing Keung* v *Sing Tao Limited and Hsu Hiu Yee* HCMP 1833/2004; 2004 HKCU LEXIS 1121.
[31] Gary Cheung, "ICAC drops appeal over ruling on media raid" 31 October 2004 *South China Morning Post*, News Section, 5 (Last visited 25 October 2005). ICAC access to the sealed material had already been agreed by Sing Tao by the time of the appeal.
[32] See J. Madden, 'Journalists facing jail for contempt' 24 August 2005 at http://www.news.com.au (Last visited 29 August 2005); G. Ansley, 'Australia gets tough on journalists' 27 August 2005 at http://nzherald.co.nz (Last visited 29 August 2005).

document about Australian Federal Government plans to break a promise about war veterans' pensions. Embarrassed, the Government backed down but the civil servant suspected of leaking the document was prosecuted. At a pre-trial hearing in August 2005, the prosecution called McManus and Harvey and asked for the name of their source. They refused, citing professional responsibilities, and were charged with criminal contempt.[33] The civil servant was subsequently convicted without the journalists' evidence.[34]

Together, these cases provide windows into the current substantive law and practice relating to judicially compelled disclosure of news gatherers' sources in their respective jurisdictions. They also provide much of the framework for the discussion of the main themes of this article.

First, the cases indicate that the concept of special protection from judicially compelled disclosure of news gatherers' confidential sources is not precise and needs to be defined and explained. This is done in Part II of this article.

Second, the cases demonstrate the limited protection the majority of judges in the four jurisdictions have been willing to give to news gatherer/ confidential source relationships. This is evident both in standard common law analysis in this area – and in the interpretation and application of relevant legislation – even legislation intended to provide special protection to news gatherer/ confidential source relationships. *In re Grand Jury Subpoena, Sing Tao* and Australian and Canadian case law suggest that the common law judges' skepticism towards news gatherers' confidential sources has also permeated constitutional analysis of freedom of the press and freedom of expression guarantees in those jurisdictions. The judges' approaches to claims for special protection for news gatherer/ confidential source relationships – including claims based upon constitutional provisions – are discussed in Parts III and IV of this article.

In Parts V and VI attention is turned to the third question noted above: should liberal democracies provide special protection against judicially compelled disclosure of the identities of news gatherers' confidential sources? The illustrative cases also make a valuable contribution to the discussion of this question.

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[33] N. Robinson, 'Reporters Charged over Leaks' 14 October 2005 *The Australian* at http://www.theaustralian.news.com.au/printpage/0,5942,16913878,00 (Last visited 14 October 2005). As of 1 July 2006, their contempt hearing was postponed pending an appeal.

[34] 'Public servant guilty of document leak' at http://www.theage.som.au/news/National/Public-servant-guilty-of-document-leak/2006/ (Last visited 1 February 2006).

First, the cases show that special protection of news gatherer/ confidential source relationships, if granted, would come with significant public and private costs. For example, the public interest in ensuring the due administration of justice in the courts[35] is also fundamental in a liberal democracy – and often requires court and party access to relevant factual material. Special protection from judicially compelled disclosure of the identity of a news gatherer's source would deny courts access to some relevant material. That would be a significant public cost in any proceedings, a devastating public/private cost if the litigant could not then obtain redress, here including a criminal conviction, for an admitted legal wrong. Public interests in the protection of national security or personal privacy, or the prevention of crime might also be affected. Therefore, before special protection from judicially compelled disclosure of the identity of news gatherer sources can be demanded it must first be established that in most cases, the public interest in news gatherers' source protection outweighs the costs of nondisclosure. The case for special protection of news gatherers' confidential sources from judicially compelled disclosure is set out in Part V.

Second, the cases demonstrate that uncertainties in the law and approaches to protection for news gatherers' sources that rely upon case by case ad hoc judicial assessments encourage confrontation and litigation between those seeking the identity of the source and the news gatherers. The consequential court battles in which neither side is willing to be seen to have given way, are personally, institutionally and publicly resource expensive.[36] Ad hoc approaches also mean the level of real protection may vary with the level of a presiding judge's commitment. Assuming acceptance of the argument in Part V, Part VI considers how efficient and effective protection for news gatherer/ confidential source relationships might best be achieved.

But first specialized terminology used in this article and the precise parameters of the discussion must be clarified. As to terminology, three terms require explanation. First 'news gatherer' is here used to include any legal person who, using any medium, personally or by means of full or part time employees, agents, or freelance contributors, gathers[37] or researches information with the intention of communicating, or whilst seriously considering communicating, to the public, or any section thereof,

[35] Likewise the public interest in the proper and effective functioning of grand juries and commissions of inquiry.
[36] J. Nestler, 'The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege' (2005) 154 U.Pa. L. Rev. 201, 243-246.
[37] Including passive receipt of information from a volunteer source.

information they believe to be accurate, or work product derived from such information. The words, 'with the intention of communicating … information they believe to be accurate' are crucial. News gatherers are not infallible but a person who has no care for the truth of content to be published is a creator or disseminator of fiction or gossip, not a news gatherer.[38] Otherwise the definition is deliberately broad, including media corporations, journalists, pamphleteers, authors of books, 'bloggers',[39] even some website hosts,[40] thereby avoiding arbitrary distinctions, counterbalancing some of the worst effects of modern media conglomerates and focusing attention on what is really significant – the news gathering character of a person's activity, not her medium, title, corporate structure or power base.[41]

Second, 'confidential sources' refers to people, including news gatherers like Ackroyd, who provide information to a news gatherer pursuant to an express or implicit undertaking or understanding that, although the information provided may be published, the identity of the source will not be disclosed. Sources who merely prefer not to be identified if possible, or whose identities the news gatherer wishes to protect for commercial reasons only, are not confidential sources for the purposes of this article.

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[38] *In re Mark Madden; Titan Sports Inc., A Delaware Corporation* v *Turner Broadcasting Systems, Inc. and Others* 151 F.3d 125, 128-129 (3rd Cir 1998).

[39] A blogger is someone who posts a 'web log' or on line diary, using material of the blogger's choosing, open to comment by others.

[40] *Totalise plc* v *Motley Fool Ltd and Ors* [2001] E.M.L.R. 29. See also the Court of Appeal decision at [2001] EWCA Civ 1897; [2002] 1 WLR 1233 reversing Owen J's decision to award costs against second defendant, Interactive Investor Limited. Denying internet service providers (ISPs) the status of 'journalist' or 'news gatherer' does not necessarily leave the ISP without freedom of expression protection, J. O'Brien, 'Putting A Face To A (Screen) Name: The First Amendment Implications Of Compelling ISPs to Reveal The Identities of Anonymous Internet Speakers In Online Defamation Cases' (2002) 70 Fordham L. Rev. 2745.

[41] See L. Berger, 'Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication' (2003) 39 Houston L. Rev. 1371; J. Elrod, 'Protecting Journalists from Compelled Disclosure: A Proposal for a Federal Statute' (2003) 7 N.Y.U. Legis. & Pub. Pol'y 115. Cf. L. 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' (2000) 20 Yale L. & Pol'y Rev. 97. As to the special circumstances of those reporting on armed conflicts see A. Heeger, "Securing a Journalist's Testimonial Privilege in the International Criminal Court" (2005) 6 San Diego Int'l L.J. 209. As to bloggers see R. O'Neil, 'Protection of the Pen: The Hazards of Online Journalism' Spring 2005 Cyberlaw at http://www.itc.virginia.edu/virginia.edu/spring05/cyberlaw (Last visited 25 October 2005) For relevant judicial comment see *Branzburg* v *Hayes* 408 US 665, 703-705 (1972) *per* Justice White; *In re Grand Jury Subpoena* n 9 above, 979-980 *per* Judge Sentelle, cf 995 *per* Judge Tatel; *In re Grand Jury Subpoenas, No. 01-20745 (unreported)* (the 'Leggett' case); *In re Mark Madden* n 38 above, 128-129 applying *von Bulow* v *von Bulow* 811 F 2d 136 (2nd Cir 1987); *Shoen* v *Shoen* 5 F. 3d 1289 (9th Cir 1993); *Jason O'Grady et al* v *The Superior Court of Santa Clara Count (Respondent); Apple Computer , Inc. (Real Party in Interest)*, H028579/ 2006, Court of Appeal of the State of California (6th Appellate District) at http://www.eff.org/Censorship/Apple_Does/H028579.pdf (Last visited 6 July 2006).

Third, the phrase, 'judicially compelled disclosure' is used to include disclosure obtained by any form of judicial order, whether in connection with court proceedings or otherwise, disclosure commanded by legislation and related enforcement proceedings. Effective protection against judicially compelled disclosure of news gatherer/ confidential sources requires that protection to extend across the whole range of possible processes and types of proceedings.[42]

As to the parameters of the discussion, this article is not concerned with (i) the existence of, or need for, protection for news gatherers' personal observations or work product not connected to the identity of a confidential source,[43] (ii) criminal liability of news gatherers for receipt of stolen documents from sources[44] or (iii) proper professional conduct when faced with valid judicial orders demanding disclosure,[45] all issues worthy of in depth consideration on their own.

II THE NATURE OF SPECIAL PROTECTION AGAINST JUDICIALLY COMPELLED DISCLOSURE OF NEWS GATHERERS' CONFIDENTIAL SOURCE IDENTITIES

Qualified or absolute protection.

A jurisdiction has special protection against judicially compelled disclosure of the identity of news gatherers' confidential sources only when at least in some circumstances, notwithstanding satisfaction of all standard prerequisites for the granting of the relevant judicial order, including in particular relevance, good faith and reasonableness,[46] news gatherers cannot be judicially compelled to disclose their

[42] This does not require courts to ignore the more intrusive character of search warrants relative to other discovery processes.

[43] As to the need to distinguish between the special protection for news gatherer/ confidential source relationships and news gatherers' work product see J. Randall, 'Freeing Newsgathering from the Reporter's Privilege' 2005 *The Yale Law Journal* 1827; K. Larsen, 'The Demise of the First Amendment-Based Reporter's Privilege: Why This Current Trend Should Not Surprise the Media' 37 Connecticut Law Review 1235 at http://www.connecticutlawreview.org/archive/vol37/summer/Larsen.pdf. (Last visited 5 April 2006) For recent discussions of protection for news gatherers' work product specifically see A. Fargo, 'The Journalists' Privilege for Nonconfidential Information in States Without Shields' (2002) 7 Comm. L. and Pol'y 241; A. Heeger n 41 above.

[44] For an example of a news gatherer claiming the privilege against self incrimination as a ground for not disclosing the identity of a source see *British Steel* n 5. For recent discussion of issues in this area see M. Feldstein, 'The Jailing of a Journalist: Prosecuting the Press for Receiving Stolen Documents' (2005) 10 Comm. L. & Pol'y 137; W. Lee, 'The Unusual Suspects: Journalists as Thieves' 8 Wm. & Mary Bill of Rts. J. 53 (1999).

[45] The possible alternatives are nicely illustrated by the differing conduct of the three appellants after *In re Grand Jury Subpoena* n 9 above.

[46] That is, reasonable in terms of both breadth and compliance costs, as assessed for any other working individual or commercial premises. All common law jurisdictions permit any affected person to resist orders or warrants on these grounds.

confidential sources' identities. Insisting upon a showing of (i) certain relevance, (ii) that all [reasonable] alternative means of learning the source's identity have been attempted and failed and (iii) crucial significance of the identity of the source to the applicant/ party's case amounts to special protection within this definition, at least where no onus of persuasion is placed upon the news gatherer,[47] (no alternative protection) since requirements (ii) and (iii) are not normally prerequisites for subpoena, discovery or even search warrants, but such protection is of limited practical effect.

In *In re Grand Jury Subpoena*, Judge Tatel recognized that real protection for news gatherers' confidential sources required the courts to consider, **separately** and in **addition** to the above criteria, "the two competing public interests … the public interest in compelling disclosure …the public interest in news gathering…."[48] This could be done by simply taking the public interest in news gatherer/ source relationships into account as one relevant factor when exercising a judicial discretion (one relevant factor protection) but that would provide practical protection so weak it would hardly justify the epithet 'special'.[49] Judge Tatel, and many others, spoke of a balancing exercise between the competing public interests with individual judges to assign relative weights to each of these public interests largely unguided (at large balancing protection). At large balancing protection could be enhanced by express stipulation of a short exhaustive list of precisely defined public interests that may be balanced against the public interest in protecting news gatherer/ confidential source relationships. Alternatively, protection could be in the form of legal or constitutional commands that all relevant decision makers must give (very) heavy weight to, or begin their assessment with a (very) strong presumption in favour of, the public interest in the protection of news gatherer/ confidential source relationships so that disclosure is possible only on a clear showing of a truly exceptional overriding public need for disclosure in the particular case (constitutional imperative or weighted balancing protection). Constitutional imperative or weighted balancing protection could be further strengthened by stipulations of tightly defined circumstances in

[47] For use or advocacy of this formulation for confidential sources see, for example, the shield laws of Georgia and the Carolinas re non parties, the cases *Zerilli* v *Smith* 656 F. 2d 705 (D.C. Cir. 1981); *The NYT Company* v *Alberto Gonzales, in his official capacity as Attorney General of the United States and The United States of America* (unreported) USDC for SDNY, 2005 U.S. Dist. LEXIS 2642 and the minority test in *Branzburg* n 41 above. The formulation is commonly used for work product and non confidential source material, for example, Louisiana Rev. Stat. Ann. S 1459; *Wen Ho Lee* v *United States Department of Justice*, et al. *2005 U.S. App. LEXIS 12758* (DC App 2005); International Criminal Tribunal for the Former Yugoslavia in *Prosecutor* v *Radoslav Brdjanin and Momir Talic* Case No. IT-99-36-AR73.9 (ICTY Appeals Chamber 11th Dec. 2002).

[48] *In re Grand Jury Subpoena* n 9 above, 997-998.

[49] See, for example, *National Roads and Motorists Association [NRMA]* v *John Fairfax Publications PTY Ltd* [2002] NSWSC 563 (26 June 2002).

which an exceptional overriding public need for disclosure might (not must) be found, as where disclosure is necessary to prevent real risks of imminent physical harm (limited exception protection).[50]

Finally, protection could be in the form of an absolute prohibition on compelled or any disclosure (absolute protection).

Can the protection be 'waived'?

Advocates of special protection speak fairly indiscriminately of a news gatherer's right or privilege not to be compelled to disclose, or immunity against compelled disclosure of, the identity of the news gatherer's confidential sources, prefaced by 'absolute' or 'qualified', as appropriate. Some refer to a source's privilege or immunity. This loose use of terminology is unfortunate. In the context of the law of evidence, that is, in the context of judicially compelled testimony or discovery, whether a right not to adduce evidence is classified as a privilege or an immunity matters. The term 'privilege' refers to a right not to be compelled to disclose certain evidence. The person to whom the privilege belongs, such as a criminal defendant or a lawyer's client, may invoke the privilege and refrain from testifying or disclosing the evidence or waive the privilege at their choice. In modern times, 'immunity' is used for 'public interest immunity', the term adopted to replace 'Crown privilege' precisely because it was said that what was involved was not a privilege that belonged to the government but the public interest in nondisclosure of certain evidence and that the public interest, once established, can not be waived.[51]

If the special protection against judicially compelled disclosure of the identity of a news gatherer's confidential source is a privilege, whose privilege is it, the news gatherer's or the source's? However described, specific claims for special protection are almost always made by news gatherers – but do the news gatherers make the claim on their own or upon their sources' behalf? Where the claim is restricted to protection from judicially compelled disclosure of the identity of confidential sources only, the recent practice of seeking waivers from the source and then complying with the disclosure order if, but only if, the source agrees indicates a news gatherer's belief that the power of waiver is with the source – a source's privilege.[52] This is consistent

[50] W. E. Lee, 'The Priestly Class: Reflections on a Journalist's Privilege' (2006) 23 Cardozo Arts & Ent. LJ 635, 684.

[51] *Rogers* v *Home Secretary* [1973] AC 388, 407. See discussion in P. Murphy, *Murphy on Evidence* (Oxford: Oxford University Press 9th ed. 2005), 399-401.

[52] For a detailed comparison between attorney-client privilege (as distinct from litigation or attorney work product privilege) and confidential source privilege and the power of the client/ source to waive that privilege see J. Randall n 43 above and see also Alaska Stat. ss 09.25.340, Oregon Rev. Stat. s

with a confidential source having a cause of action against the news gatherer for unauthorised disclosure,[53] much as a client may sue a lawyer who breaches the client's privilege. Of course, the news gatherer would be obligated to continue to refuse to disclose until bona fide satisfied that any waiver reportedly made by the source was both informed and truly voluntary. Both Cooper and Miller rejected as totally insufficient standard waivers from all White House administrative staff, signed under implicit threat of termination. Waivers signed as a precondition to employment would be equally suspect.

But recognition of this is a very different matter from saying that a news gatherer who is satisfied that a source wishes the news gatherer to testify can nevertheless invoke a news gatherers' privilege against compelled disclosure and refuse to do so. Do news gatherers make such a claim?[54] Does any existing law recognize such a claim?

In *In re Grand Jury Subpoena*, Judge Tatel said that '…numerous cases … indicate that only reporters, not sources, may waive the privilege... [A] source's waiver is irrelevant to the reasons for the privilege….the privilege belongs to the reporter.'[55] This was because the purpose of the privilege is the protection of news gathering, journalists understand the 'imperatives of news gathering' better than sources and journalists have an interest in promoting and protecting 'news gatherer/ confidential source' relationships generally, not merely the relationship with a particular source.[56]

However, Judge Tatel made these comments in the context of the special prosecutor's reliance upon the signed waivers previously noted as 'additional factors' favouring compelling the news gatherers to testify. Judge Tatel's statements should be read in that context. It is submitted that Judge Tatel did not mean to say that a person who was once a confidential source cannot choose to 'out' herself if she wishes – as Robin Ackroyd did – nor that a source's genuine and voluntary wish that the news gatherer

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44.540, both shield laws that specifically provide for informant waiver only.

[53] *Cohen* v *Cowles Media Co* n 6 above.

[54] See Rachael Smolkin, 'Waivering' Feb/March 2006 Preview AJR at http://www.arj.org/article_printable.asp?id=4038 (Last visited 1 February 2006). Some of the news gatherers whose views are reported in the article did seem to go that far. Their concern is for public confidence in news gatherer/ confidential source relationships generally. The public would only see the news gatherer giving in – whether a waiver was coerced or genuine would not matter.

[55] *In re Grand Jury Subpoena* n 9 above, 999-1000. US state shield laws Ark. Code Ann. s16-85-510; Del. Code Ann. Tit. 10 s 4325; Montana Code Ann. Section 26-1-903; Nevada Rev. Stat. s 49.385 do seem more consistent with a news gatherer's privilege. Other shield laws refer to a 'reporter's privilege' but not in terms inconsistent with a source consent prerequisite for disclosure of identity. As to the protection of the English Police and Criminal Evidence Act 1984, similar to the HKSAR IGCO, Part XII discussed below, see *R* v *Wayne Singleton* [1995] 1 Cr App R 431, recognizing the news gatherer as the privilege holder.

[56] *In re Grand Jury Subpoena* note 9 above, 1000.

testify as to his identity and as to the content of their communications would be irrelevant in the context of even weighted balancing protection. Did Judge Tatel mean that the news gatherer might choose (i) to invoke the privilege notwithstanding the source had made a less than totally satisfactory waiver or (ii) not to invoke the privilege in the face of a court order notwithstanding the source objected, in either case, provided the news gatherer considered the public interest so required? This would make sense. Then, in the former case, except where the privilege was seen as an absolute privilege – an option Judge Tatel rejected – it would be for the court to finally determine where the public interest truly lay. The latter proposition would recognize the reality that no court would permit a source to obtain an injunction or damages against a news gatherer who chose to comply with a court order, irrespective of what the news gatherer's professional body might say.

This analysis suggests that the most appropriate analogy for protection against judicially compelled disclosure of the identity of a news gatherer's confidential source is the form of public interest immunity that protects the identity of law enforcement/ public security informants. In *Branzburg*,[57] Justice White rejected the analogy. He noted that, if the authorities discovered the identity of a news gatherer's source independently, neither the source's reluctance nor the news gatherer's objection would shield the source from a grand jury as it might shield the identity of a law enforcement informant or government agent – but a recent federal court decision has protected a news gatherer's source from just such independent discovery, strongly supporting the analogy.[58] White J also saw differences unfavourable to the news gatherers in the relative degree of public accountability, directly or through the courts, for the operation of the respective informant systems. But in reality, both informant systems would be publicly accountable only when an appropriate case reaches the courts, although the fact that a news gatherer has used a confidential informant may be apparent well before that.[59] There is also nothing in the point that police informants may be required to testify before a grand jury or in a criminal trial. In the absence of absolute protection, an overriding public need for disclosure could prevail with respect to news gatherer sources as well. In contrast, in *Ashworth*, Lord Woolf CJ

[57] n 41 above, 695 – 698. See also *R* v *National Post et al* (2005) 236 D.L.R. (4th) 551 at [69] per Benotto SJ, approving *Branzburg* and R. Pomerance, 'Compelling the Message from the Medium: Media Search Warrants, Subpoenas and Production Orders' (1997), 2 Can. Crim. L. Rev. 5, 24-26 to the same effect.

[58] *NYT* v *Gonzales* note 47 above but see the Patriot Act and P Scheer, '*FBI Now Has Access To Journalists Phone Records'* June 2006 Coastal Post Online' at http://www.coastalpost.com/o6/06/08.html, (Last visited 4 July 2006).

[59] In some cases, even before the news gatherer has published anything, as in *Goodwin* v *UK* (1996) 22 EHRR 123 and *In re Grand Jury Subpoena* n 9 above with respect to Miller.

noted substantial similarities between the two systems.[60]

III AT COMMON LAW: THE JUDGES ALONE

'The newspaper rule'

In the late 19th century, the common law courts in England and elsewhere developed a rule of practice that, in defamation proceedings, pretrial discovery of documents or interrogatories would not be ordered against a newspaper so as to force it to disclose the name of a writer or a writer's source(s) of information,[61] at least if not partially disclosed in the article.[62] The rule was extended to the broadcasting media,[63] then to all defendants in defamation cases.[64] It provides some practical protection to news gatherer/ confidential source relationships since many defamation cases do not come to trial.[65] It has been applied in contempt proceedings to justify nondisclosure in disobedience of a court order.[66] It has been used to defeat applications for *Norwich Pharmacal* type discovery orders in defamation cases.[67] However attempts to extend the rule beyond defamation or pre trial procedures have invariably failed.[68] The rule may be in decline.[69]

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[60] *Ashworth* n 21 above at [61]. See also *British Steel* n 5 above, 1138-1139, *per* Watkins LJ in the CA.

[61] *Hennessy v Wright (No 2)* (1888) 24 QBD 445n ; *Plymouth Mutual Co-operative and Industrial Society Limited* v *Traders' Publishing Association Limited* [1906] 1 KB 403, *Re Bahamas Islands Reference* [1893] AC 138, *Lyle – Samuel* v *Odhams Ltd* [1920] 1 KB 135; *British Steel*, n 5 above, *John Fairfax and Sons* v *Cojuangco* (1988) 165 CLR 346 (HC); *Hodder* v *Queensland Newspapers Pty Limited* (1994) 1 Qd R 49 (QCA); *Broadcasting Corporation of New Zealand* v *Alex Harvey Industries Ltd* [1980] 1 NZLR 163; *Shum* v *Eastweek Publisher Ltd* [1994] 2 HKLR 381; cases referred to in *Wasylyshen* v *Canadian Broadcasting Corporation et al* 1989 CarswellSask 87 at 15] (Saskatchewan).

[62] See *Cojuangco ibid* at [25-26] in which the Australian High Court doubted the application to a publication in which sources had been partially identified as "senior American bank official and prominent local businessmen" and "one of the leading local US banks", thereby deriving the benefit of a source's status without incurring the risk of challenge but cf *Hodder* v *Queensland Newspapers ibid*.

[63] *Cojuangco ibid* at [10]; *BCNZ v A.H. Industries* n 61 above.

[64] *British Steel* n 5 above, 1199E *per* Lord Fraser of Tullybelton.

[65] G. Robertson QC, A. Nicol, *Media Law* (London: Penguin Books, 4th ed, 2002), 258.

[66] *Re Bahamas Islands Reference* n 61 above.

[67] *BCNZ* v *A.H. Industries*, n 61 above; *Shum* v *Eastweek Publisher Ltd* n 61 above. In Australia, it is said that the policy behind the rule can be taken into account in pre-trial discovery decisions, *Cojuangco* n 61 above, *Nagle v Chulov and Others* [2001] NSWSC 9 and see D. Butler and S. Rodrick, *Australian Media Law* (Sydney: LBC Information Services, 1999), 251 para 6.315.

[68] *British Steel* n 5 above, 1197; *Cojuangco* n 61 above, para 10; cf *BCNZ* v *A.H. Industries* n 61 above, in which the rule was extended by analogy to slander of title.

[69] *Cojuangco* n 61 above at [26-27]; *Langley* v *The Age Company Ltd* [2001] VSC 370; *NRMA* v *John Fairfax* n 49 above but cf *Hodder* v *Queensland Newspapers* n 61 above. As to New Zealand, see High Court Rule 285 as amended in 2004, following recommendations in the New Zealand Law Commission Report 64 'Defaming Politicians – a Response to *Lange* v *Atkinson'*. As to the Canadian decisions, see *Wasylyshen*, n 61 above and *Rocca Enterprises Ltd* v *University Press of New Brunswick Ltd* 103 N.B.R. (2d) 224 (New Brunswick). Ouellette J.C.Q.B.A. sets out the history of the rule in *Wasylyshen* v *Canadian Broadcasting Corp.* 2005 CarswellAlta 1820 at [19 – 22] [39] concluding that while the 'underlying rational [of the Newspaper Rule] remains relevant, in light of the clear applicability of the Wigmore principles and s. 2(b) of the Charter, the strict application of the

Is there a common law rule that news gatherers can not be judicially compelled to disclose their confidential sources?

English and Australian courts have consistently denied the existence of a common law rule prohibiting judges from compelling news gatherers to disclose their sources,[70] but have accepted the public interest in the protection of news gatherer/ confidential sources as a factor to be taken into account when exercising search warrant, subpoena, and discovery discretions – the relevant factor approach noted above but without a formal proof of exhaustion of alternative sources prerequisite.[71]

At US federal level, in *In re Grand Jury Subpoena*, Judge Sentelle said that the Supreme Court decided in *Branzburg*,[72] a decision he found binding on his court,[73] that there was no federal common law privilege protecting reporters from judicial compulsion to reveal their confidential sources before a grand jury. Nor would Judge Sentelle have chosen to create such a privilege under Rule 501[74] of the Federal Rules of Evidence had he felt free to do so, which he did not.[75] A news gatherer would always have access to a court on a motion to quash any process on grounds of bad faith or irrelevance – but so would all citizens.

Judge Tatel said that *Branzburg* had not decided the point.[76] Applying the standard in

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Newspaper Rule becomes less important.'

[70] *British Steel* n 5 above; *A-G* v *Clough* [1963] 1 QB 773 (CA); *AG* v *Mullholland* [1963] 2 QB 477 (CA); *Attorney General* v *Jack Lundin* (1982) 75 Cr App R 90; *McGuinness* v *Attorney-General of Victoria* (1940) 63 CLR 73 (HCt Aust). This position is also accepted as the common law in Hong Kong; see *Shum* v *Eastweek Publisher Limited*, n 61 above.

[71] *British Steel* n 5 above, 1174F-1175C per Lord Wilberforce; *Lundin ibid* and Y. Cripps, *The Legal Implications of Disclosure in the Public Interest: An Analysis of Prohibitions and Protections with Particular Reference to Employers and Employees* (London: Sweet and Maxell, 2nd ed, 1994) 280-281; *Cojuangco* n 61 above at [22]. As to the rejection of a 'no alternative' precondition but recognition of failure to attempt to use alternatives as a significant – even decisive - factor in deciding whether disclosure is necessary in the interests of justice, see *John & Others* v *Express Newspapers Limited and Others* [2000] E.M.L.R. 606, 616; S*pecialist Hospital Service Authority* v *Hyde* (1994) 20 B.M.L.R. 75; *Hodder* v *Queensland Newspapers* n 61 above. Cf NSW S Ct Rules Part 3 r 1 which requires proof of reasonable enquiries as a threshold condition for a source disclosure order under that provision, see *NRMA* v *John Fairfax* n 49 above at [24-36]; *Nagle* v *Chulov* n 67 above at [39-42].

[72] n 41 above.

[73] *In re Grand Jury Subpoena* n 9 above, 977.

[74] Rule 501: 'Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience ….' Effective 1 July 1975. See T. Campagnolo, 'The Conflict between State Press Shield Laws and Federal Criminal Proceedings: The Rule 501 Blues' (2003) 38 Gonzaga L. Rev. 445.

[75] *In re Grand Jury Subpoena* n 9 above, 978.

[76] Judge Henderson agreed, *ibid*, 983 but declined to consider the merits since on any form of privilege acceptable to the court, all agreed the Special Counsel's evidence defeated it, *ibid*, 982.

Rule 501, Judge Tatel was confident that 'reason and experience' 'dictate a privilege for reporters' confidential sources – albeit a qualified one.'[77] He reasoned that compelling news gatherers to identify a source might 'significantly interfere' with a method of news gathering crucial to the generation of important stories, thereby weakening a vital source of information, leaving citizens 'far less able to make informed political, social and economic choices' but yielding minimal evidentiary benefit since, in the absence of a privilege, much of the evidence desired by litigants or the state was unlikely to be forthcoming.[78] What the context of grand jury investigations required then was a balancing of the public interest in the free flow of information and the public interest in law enforcement in each case.

In the Miller/ Cooper case, having examined the record, Judge Tatel was satisfied that the information released by the news gatherers' sources was more harmful than newsworthy,[79] and hence the public interest in law enforcement was the stronger. No privilege barred the subpoenas in that case.[80] The Judge was also satisfied that the special counsel had established the standard necessity and exhaustion of alternative source prerequisites,[81] so the orders to testify ought to be affirmed.

At state level, in *In re Grand Jury subpoena* Judge Tatel said that eighteen states had common law based protection for news gatherers' sources.[82] In *NYT* v *Gonzales*, Sweet DJ listed seventeen states in which judges had recognized such protection.[83] Some judges, whilst denying the existence of a privilege, have nevertheless spoken of a balancing of interests but with the news gatherer bearing the burden of establishing the need to protect the confidence notwithstanding established relevance.[84]

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[77] *In re Grand Jury Subpoena* n 9 above, 989. As to the legislative intent of Rule 501 see also C. Wright & K. Graham 23 *Fed. Prac. & Proc. Evid.* ch 6 'Privileges: Rule 501' at nn 198-199.
[78] A summary of Judge Tatel's arguments at n 9 above, 991-992. Sweet DJ in *NYT* v *Gonzales* n 47 above follows a similar path.
[79] *In re Grand Jury Subpoena* n 9 above, 1001-1002. Part of the judge's analysis of the record dealing with disclosures made by the Special Prosecutor was redacted in the published report.
[80] *In re Grand Jury Subpoena* n 9 above, 1003.
[81] *In re Grand Jury Subpoena* n 9 above, 1002, 1004.
[82] n 9 above, 994.
[83] n 47 above, 133-135. The states listed were Idaho, Iowa, Kansas, Maine, Massachusetts, Missouri, New Hampshire, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin at appellate level, Connecticut, Mississippi and Utah at lower court level. Note that these are all non-shield states. As to state shield laws, see below. For general discussions as to how the states have applied both common law and shield based privileges see R. Eclavea, 'Privilege of News Gatherer Against Disclosure of Confidential Sources or Information' 99 ALR 3d 37 s 3; R. Holsinger & J. P. Dilts, *Media Law* (New York: McGraw Hill Companies Inc, 4th ed, 1997), 341-356.
[84] *Matter of Roche* 381 Mass. 624, 636 quoting *Herbert* v *Lando* 441 U.S. 153, Powell J concurring, in turn cited with approval in *Edward Wojcik and another* v *Boston Herald Inc and others* 60 Mass App Ct. 510; Mass. App LEXIS 213; *In re Grand Jury Proceedings* 810 F 2d 580, 585-586 (6th Circuit 1987), recently followed in *In re Daimler Chrysler AG Securities Litigation* 216 F.R.D. 395.

Canadian common law discourse in this area is increasingly intertwined with Charter discourse. Both are considered together below.

IV INTERPRETING LEGISLATION, CONSTITUTIONS, INTERNATIONAL CONVENTIONS

Australia

In the absence of a bill of rights, the High Court has found an implied constitutional 'freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors…' but no Australian court has yet accepted this as requiring special protection for news gatherers' sources.[85] In NSW, sections 126A and 126B of the Evidence Act provide a form of 'one relevant factor' protection for confidential sources, including those of professional journalists. The test is whether disclosure is necessary in the [paramount] interests of justice, the *British Steel* test at common law.[86]

Canada

Canadian courts have rejected general protection from judicially compelled disclosure for news gatherers' sources but accept the constitutional role of the press as a factor to be considered when exercising any necessary discretion.[87] Some Canadian courts have recently accepted a case-by-case approach in this context with a starting point of no special protection for news gatherers' confidential sources but permitting the need for protection in the form of a privilege to be established for a particular source in a particular case – that is, a form of at large balancing protection but with the onus of proof on the news gatherer.[88] A modified version of Wigmore's criteria for the development of a privilege is being used.[89] Recent case law suggests the practical

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[85] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560; *NRMA* v *John Fairfax* n 49 above, [119 – 144]; *Nagle v Chulov* n 67 above [74-104].

[86] *NRMA* v *John Fairfax* n 49 above, [168]. The court accepted this approach to protection was more restrictive than that in *Ashworth* n 21 above. See also *Nagle* v *Chulov ibid.*

[87] *Canadian Broadcasting Corporation v New Brunswick Attorney General* [1991] 3 S.C.R 459*;* *Canadian Broadcasting Corporation* v *Lessard* [1991] 3 SCR 421, paras 14 -15 *per* Cory J; Pomerance n 57 above; C. McNeill, 'Search and Seizure of the Press' (1996) 34 *Osgoode Law Journal* 175.

[88] *Slavutch* v *Baker* [1976] 1 S.C. R. 254, 260; *Moysa* v *Labour Relations Board et al* [1989] 1 S.C.R. 1572, para 5; *R* v *McClure* [2001] 1 S.C.R. 445.

[89] Wigmore's four criteria were summarized by McLachlin CJ in *M. (A.) v. Ryan* (1996), 143 D.L.R. (4th) 1 (S.C.C.) [para 20], quoted in *National Post* n 57 above, [56], as follows: 'First, the communication must originate in a confidence [that the identity of the informant will not be disclosed]. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.' The words in brackets are modifications necessary to accommodate disclosure of sources. Note also L'Heureux-dube J's observation in *R v Gruenke* [1991] 3 SCR 263 that Professor Wigmore intended these criteria to be used to identify new category or class privileges, not

implications of this are still being worked out.[90]

USA

The First Amendment[91] of the Constitution of the United States of America

The court in *In re Grand Jury Subpoena* rejected Miller's and Cooper's claims of First Amendment protection against judicially compelled disclosure of news gatherers' confidential sources to a grand jury, holding that in *Branzburg*,[92] the US Supreme Court specifically denied the existence of such a privilege on facts 'materially indistinguishable' from those in the present cases.[93] In reaching this decision, Judges Sentelle and Henderson emphatically rejected oft repeated arguments that Justice Powell, in his concurring *Branzburg* opinion, intended to hold otherwise.[94] Judge Tatel was 'uncertain that *Branzburg* offers "no support" for a constitutional reporter privilege in the grand jury context'[95] but concluded that the Court's own previous decisions applying *Branzburg* in the context of good faith criminal investigations were binding and determinative.[96]

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case-by-case ones.

[90] Compare *Bouaziz* v *Ouston* 2002 Carswell BC 2041, a standard discovery application, in which the judge said that on the basis of BC precedent he was bound to conclude that "[i]n weighing the competing interests, it is the public interest in correctly decided litigation which prevails…" and *R* v *National Post, ibid* in which the judge adopted a pro protection of sources approach in reaching a decision to quash a search warrant and assistance order. Like *Bouaziz, Emmet Reidy* v *Leader Star News Services and others* 2003 CarswellSask 540 and *St Elizabeth Home Security (Hamilton, Ont)* v City of Hamilton et al., (unreported, decision of Justice Crane dated December 1 and 2, 2004), the latter noted in Paul Schabas, Ryder Gilliland 'The Media, Open Courts and Sealing Orders: Recent Developments' (2005) 17 Nat'l J. Const. Law 105 give very little weight to news gathering protection. In contrast, *R* v *National Post* was cited in *Wasylyshen 2005* n 69 above and *In the Matter of Ernst Zundel* 2004 CarswellNat 1904 as having affirmed the existence of a common law privilege although the actual approach adopted by the judge in the latter case followed *R* v *Hughes* [1998] B.C. J. No 1694, suggesting a form of relevant factor protection.

[91] "Congress shall make no law … abridging the freedom of speech, of the press …."

[92] n 41 above.

[93] *In re Grand Jury Subpoena* n 9 above, 968 – 972, 988. For a reading of *Branzburg* similar to that of Sentelle CJ see *United States v Smith* 135 F. 3d 963 (5th Cir. 1998) and *In re Grand Jury Proceedings* n 84 above, 584-85, the latter noted by Judge Tatel at *ibid*, 988. The 'indistinguishable material facts' included: news gatherers had witnessed the confidential source committing crimes or had received knowledge from the source of the [possible] commission of crimes by the source or others; the demand was made for appearance before a grand jury investigating the possible commission of these or related criminal offences.

[94] *In re Grand Jury Subpoena* n 9 above, 970-972. As to the oft repeated argument, see Holsinger & Dilts n 83 above, 319-325; Larsen, 'The Demise of the First Amendment-Based Reporter's Privilege' n 43 above; *NYT* v *Gonzales* n 47 above, 73 – 100 and see *McKevitt* v *Pallasch* 339 F 3d 530 (7th Cir. 2003) and *Michael B. Price* v *Time Inc., Don Yaeger* 2005 U.S. App LEXIS 14331 (11 Cir 2005), finding no privilege for non confidential material and First Amendment based 'no alternative protection' for confidential sources respectively.

[95] *In re Grand Jury Subpoena* n 9 above, 987. News gatherers do tend to lose even confidential source cases in grand jury investigations at state and federal level, although there have been some successes: Holsinger & Dilts n 83 above, 341-343; D. Pember, *Mass Media Law* (Boston: McGraw-Hill Higher Education, 2000), 372-373; D. Scardino, 'Vanessa Leggett Serves Maximum Jail Time' (2002) 19 Comm. Law. 1.

[96] *In re Grand Jury Subpoena* n 9 above, 988 citing *Reporters Committee for Freedom of the Press* v *AT & T* 192 U.S. App. D.C. 593 F. 2d. 1030 (D.C. Cir. 1978), *In re Possible Violations of 18 USC 371,*

Away from grand jury investigations, Judge Tatel noted with approval four federal appellate decisions that had found First Amendment protection against compelled disclosure of news gatherers' confidential sources in civil cases[97] and three finding a qualified constitutional protection in a criminal case.[98] Judge Sentelle was unenthusiastic.[99]

This divergence of views as to the meaning and breadth of *Branzburg* is of long standing and widespread.[100] The Supreme Court's refusal of certiorari in the Miller case may indicate the conservative interpretation is gaining ground.[101]

US shield legislation

The term 'shield legislation' refers to laws purporting to provide special protection for news gatherers against judicially compelled disclosure. As of September 30, 2005, 31 US state legislatures and the District of Columbia had shield laws,[102] 18 of which give

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641, *1503*, 184 U.S. App. D.C. 82, 564 F. 2d 567 (D.C. Cir. 1977).

[97] *Carey* v *Hume* 169 U.S. App. D.C. 365, 492 F.2d 631 (D.C. Cir. 1974), *Zerilli* v *Smith* n 47 above; *Bruno & Stillman, Inc* v *Globe Newspaper Co.*, 633 F. 2d 583 (1st Cir. 1980); *Silkwood* v *Kerr-McGee Corp.*, 563 F. 2d 433 (10th Cir. 1977).

[98] *United States* v *LaRouche Campaign* 841 F. 2d 1176 (1st Cir. 1980); *United States* v *Burke* 700 F 2d 70 (2d Cir. 1983); *United States* v *Ahn* 343 U.S. App. D.C. 392, 231 F.3d 26 (D.C. Cir. 2000). For a general discussion of First Amendment based protection cases see Holsinger & Dilts n 83 above, 325 – 331; Pember n 95 above, 365-373 and see *NYT* v *Gonzales* n 47 above, 131 in which Sweet DJ notes that California's Constitution included specific protection for news gatherer sources and courts in Florida, Louisiana, Michigan, New York and Oklahoma have interpreted federal or state constitutions as providing news gatherer source protection.

[99] *In re Grand Jury Subpoena* n 9 above, 972. See also Judge Sentelle's comments about *Zerilli v Smith* n 47 above in *Wen Ho Lee* n 47 above, 11-12.

[100] D. Scardino, n 95 above; H. Stamp, 'McKevitt v Pallasch: How the Ghosts of the *Branzburg* Decision are Haunting Journalists in the Seventh Circuit' (2004) 14 DePaul-LCA J Art & Ent. L 363. Even *McKevitt* has been variously interpreted; see *Madison Hobley* v *Chicago Police Commissioner Jon Burge* et al 223 F.R.D. 499 (2004).

[101] A. Liptak, 'Courts Grow Increasingly Skeptical of Any Special Protections for the Press' 28 June 2005, *New York Times*, accessed http://www.nytimes.com. (Last visited 25 October 2005); Larsen, 'The Demise of the First Amendment' n 43 above. The US Supreme Court has also declined to hear reporters' appeals in the *Wen Ho Lee* case, n 47 above, see W. Richey, 'No relief for reporters seeking to shield sources' 6 June 2006 *The Christian Science Monitor* at http://www.csmonitor.com/2006/0606/p02s01-usju.html.

[102] Details of all these provisions are conveniently assembled in C. Lening & H. Cohen, *Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes* (8 March 2005), a Congressional Research Service Report, and 'The Reporter's Privilege' (Dec 2002) posted by The Reporters Committee for Freedom of the Press at www.rcfp.org. (Last visited 25 October 2005). See also *NYT* v *Gonzales* n 47 above, 130-131; Holsinger & Dilts n 83 above, 331-334. The states without shield legislation are Connecticut, Hawaii, Idaho, Iowa, Kansas, Maine, Massachusetts, Mississippi, Missouri, New Hampshire, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. Of these, only Hawaii and Wyoming do not recognize a common law or First Amendment based journalist's privilege of any kind. There are currently at least two bills attempting to enact a federal shield law, The Free Flow of Information Act of 2006 (S.B. 2831), in effect superseding Lugar (S 340) (reintroduced as S. 1419) and the Dodd bill (S. 369), and H.R. 3323 (the Pence bill), the latter of which would provide an absolute privilege for confidential sources, see Special Report: 'Reporters and Federal Subpoenas' at The Reporters Committee for

absolute[103] or near absolute protection to a variable range of confidential sources.[104] The qualified shields generally restrict disclosure unless found to be in the public interest[105] or if certain types of criminal offence or defamation are involved[106] or provide no alternative protection.[107] Most apply only to professionals working in the media.[108]

The Guidelines

These are non binding guidelines issued by the then US Attorney General's Office in 1973, requiring officials to exercise restraint in seeking subpoenas against the media.[109]

Privacy Protection Act of 1980

The Federal Privacy Protection Act of 1980,[110] passed in response to *Zurcher* v *The Stanford Daily*[111] and applicable to law enforcement authorities throughout the United States, limits the use of search warrants to obtain news gatherers' work product or confidential documents to a narrowly defined range of circumstances, including 'suspicion news gatherer has committed a criminal offense',[112] 'reason to believe immediate seizure is necessary to prevent death or serious injury to a human being' or non compliance with a subpoena. Some states have additional provisions.[113]

Hong Kong, the Basic Law and IGCO ss 83-89 (Part XIII)

Freedom of the Press at www.rcfp.org (Last visited 4 July 2006).

[103] But as to Pennsylvania, see *Castellani* v *The Scranton Times*, noted in 'Judge creates exception to state's absolute shield law' http://www.rcfp.org/news/2005/0609-con-judgec.html (Last visited 4 July 2006). The decision is being appealed.

[104] Alabama, Arkansas, DC, Delaware, California, Indiana, Kentucky, Maryland, Michigan, Montana, Minnesota, Nebraska, Nevada, New Jersey (not grand juries), New York, Ohio, Oregon, Pennsylvania.

[105] Alaska, Illinois for libel and slander, Louisiana, New Mexico (necessary to prevent injustice), North Dakota (miscarriage of justice).

[106] Colorado, Illinois (subject to secrecy laws), Minnesota for defamation if actual malice is alleged; Rhode Island (not grand jury and not re specific felony, threat to human life, defamation if source based defence).

[107] Colorado, Florida Georgia, Illinois, Michigan re crime punishable by imprisonment for life, Minnesota for felonies and misdemeanors, North and South Carolina, New Jersey for criminal defendants, Oklahoma and Tennessee except defamation where source based defence.

[108] Neb. Rev. Stat paras 20-144 to 147, Del Code Ann. Tit. 10, paras 4320-4326 are exceptions. In *Price* v *Yaeger* n 94 above, the court held that the Alabama absolute shield law stipulated 'newspaper, radio broadcasting station or television station' and so did not apply to a magazine.

[109] 28 CFR 50.10. These are quoted by Judge Sentelle in *In re Grand Jury Application* n 9 above, 975. See A. Liptak, 'Panel Two: Media and Law Enforcement: The Hidden Federal Shield Law: On the Justice Department's Regulations Governing Subpoenas to the Press' 1999 Ann. Surv. Am. L. 227.

[110] 42 USC para 2000aa.

[111] 436 US 547 (1978).

[112] Not an offence that consists of 'the receipt, possession, communication, or withholding of' the materials sought or the information contained in those materials. The Hong Kong warrants would appear to be within this restriction.

[113] New Jersey Stat. Ann. paras 2A:84A-21.9; Or. Rev. Stat. paras 44.520(2).

Article 23 of the HKSAR Basic Law provides that 'Hong Kong residents shall have freedom of speech, of the press and of publication….'[114] It was referred to at all levels in the *Sing Tao* litigation. Part XII of IGCO[115], enacted in 1995, was at the centre of that litigation. Part XII is a modified form of Part II of the English Police and Criminal Evidence Act 1984 (PACE). There are four significant differences. First, Part XII applies equally to all journalistic material,[116] PACE Part II puts excluded journalistic material (confidential documents and records)[117] outside the scope of a PACE search warrant.[118] Second, only Part XII provides for automatic three day sealing of journalistic material obtained using a search warrant.[119] Under section 87, a news gatherer or owner who applies will get the material back unopened 'unless the judge is satisfied' the use of the journalistic material 'in the investigation' would be in the public interest.[120] Third, Part XII, section 89(2) provides that 'nothing in this Part shall be construed as requiring a judge to make an order under this Part where he considers that, in all the circumstances of the case, it would not be in the public interest to make that order.' PACE has no comparable provision.[121] Finally, Part XII provides that a production order/[122] warrant may be issued where there are reasonable grounds for believing that the material sought is likely to be (A) of substantial value to the investigation of the arrestable offence OR (B) relevant evidence in proceedings for the arrestable offence. In PACE, these conditions are cumulative.[123]

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[114] Article 39 of the HKSAR Basic Law provides that the ICCPR, as applied to Hong Kong, shall apply in the HKSAR and that rights and freedoms shall not be restricted in any way that contravenes the ICCPR. The terms of the ICCPR are substantially reproduced in the HKSAR Bill of Rights.

[115] See also Rules of the High Court Order 118.

[116] 'Journalistic material' is defined in section 82 as 'any material acquired or created for the purposes of journalism', provided it remains 'in the possession of a person who acquired or created it' for those purposes. A person who 'receives material from someone who intends that the recipient shall use it for the purposes of journalism' has 'acquired it for those purposes.'

[117] PACE s 11(1)(c).

[118] Unless a production order issued under some other legislation, such as terrorist legislation, had not been complied with, see PACE ss. 8, 9 and Schedule 1 ss 4, 12. Hence, the Hong Kong warrants could not have been issued in England.

[119] S 85(6) but subject to s 85(7), that is, 'where the judge is satisfied that there may be serious prejudice to the investigation if the applicant is not permitted to have immediate access to the material.' The material seized from Sing Tao and the other papers was sealed in this way.

[120] Ss 85(6) and 87 but only for sealed material.

[121] cf *R* v *Central Criminal Court, ex parte Bright* [2001] 1 WLR 662 in which the English Court of Appeal said that deciding whether to make a disclosure order under s 9 and Sch 1 of PACE required the judge to consider, amongst other things, fundamental principles relating to the position of the press in a liberal democracy. The same reasoning might apply to search warrants.

[122] Part XII s 84 provides an *inter partes* procedure for production orders. Failure to comply with such orders is an offence punishable by a level 6 fine and imprisonment for 1 year, s 84(5) and is also a separate ground for issuing a search warrant. The PACE equivalent is the preferred procedure in England but the production order procedure has not been used in HK, see M. N. Yan., 'Search Warrant Versus Production Order – the Hong Kong Experience in Protection of Journalists' Material' (2005) 10 Media and Arts L. Rev. 117, 121, 125-126.

[123] IGCO Sections 84(2)(iii), 85(3)(a)(i); PACE sections 8(1), 9(1) and schedule 1, section 2

Part XII Section 85 provides an *ex parte* procedure for the issuing of search warrants[124] by a Court of First Instance judge[125] where conditions similar to those required for a production order are fulfilled[126] and one of 3 additional limiting conditions apply, namely: (a) it is not practicable to communicate with anyone entitled to grant entry; (b) it is not practicable to communicate with anyone entitled to grant access to the material; (c) service of notice of the application might seriously prejudice the investigation.[127]

In the court below, Hartman J said that the scheme contained in Part XII ss 83-89 of IGCO had to be 'viewed through the prism' of Article 27 of the HKSAR Basic Law.[128] In the Court of Appeal, Ma CJHC criticized this position, saying:[129]

> This is apt to confuse…. If … what was meant was that in approaching Part XII applications, there should be a bias in favour of this basic freedom [of the press] and to regard that as some sort of paramount consideration, I would disagree. As I have earlier said, Part XII at the same time emphasizes the freedom of the press as well as fixes the limits to it. Part XII itself contains important safeguards to protect the basic freedom, safeguards which journalists alone enjoy in Hong Kong…. There are, however, limits to it. If there is any paramount consideration at all, it is the public interest…. The public interest referred to in sections 87(2) and 89(2) … requires the Court to consider all aspects of any given case, with no bias or predisposition towards any particular factor. Often, a balancing exercise between competing interests is involved…The balancing exercise that Part XII focuses on is the freedom of the press seen against the need effectively to investigate and deal with crime.

This is at best 'at large balancing' protection. In that balancing, Ma CJHC

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[124] The warrant issuing powers, rather than the procedure, are created by common law or other legislation.
[125] The judges who preside over the highest level trial court in Hong Kong.
[126] The omission of condition (vi)(b) is explained by the inclusion of 'The circumstances under which the material was being held at the time of its seizure' as one of the factors a judge must have regard to in deciding whether disclosure of sealed material is in the public interest under s 87(2).
[127] This was the condition relied on by the ICAC, who feared the journalists might inadvertently tip off their real targets.
[128] *Sing Tao (Hartmann J)* n 30 above at [46].
[129] *Sing Tao* n 28 above at [43]. Ma CJCH quoted the extremely conservative decision of the Canadian Supreme Court in *Canadian Broadcasting Corporation* v *Att Gen for New Brunswick* n 87 above, 556-557 in support of this position. As to the revealing character of the court's choice of foreign jurisprudence, see A.Li & A. Lui, 'Search and Seizure of Journalistic Material: The *Sing Tao* Daily Case' (2005) 35 H.K.L.J. 69.

emphasized the limitations on the freedom of the press[130] before concluding that the freedom of the press in that case had to be seen against the fact that 'serious crimes may well have been committed, one in which the [news gatherers] … have been caught up; the other in respect of which there is prima facie evidence against the [news gatherers] themselves.'[131]

England and the European Convention on Human Rights

As to subpoenas and discovery,[132] it is necessary to discuss section 10 of the Contempt Act 1981[133]

Section 10:

> No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.[134]

Enacted in response to the House of Lords decision in *British Steel*,[135] judicial interpretation of this section deserves careful attention. Discussion is in three parts: before the European Court of Human Rights (ECHR) decision in *Goodwin*, *Goodwin* itself, and after the HRA.

Before *Goodwin*

Lord Scarman said that section 10 replaced the common law's judicial discretion not

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[130] See Yan n 122 above for a strong critique of this aspect of the judgment.
[131] *Sing Tao* n 28 above at [49]. Yan *ibid* puts the journalists' point of view.
[132] For search warrants, see the discussion of the IGCO Part XII above.
[133] See generally Cripps note 71 above, 281 – 293; Robertson & Nicol n 66 above, 260 – 268; M. Tugendhat QC and I. Christie, *The Law of Privacy and the Media* (Oxford: Oxford University Press 2002), 571 – 591; S. Spilsbury, *Media Law* (London: Cavendish Publishing, 2000), 397.
[134] Cases applying this section directly or by analogy include: *Ackroyd (2)* n 24 above*; *Ackroyd (1)* n 26 above*; *Ashworth* n 21 above; *Financial Times Ltd. & Ors* v *Interbrew SA* [2002] EWCA Civ 274; *Reavey & Ors* v *Century Newspapers Ltd & Anor* [2001] NIQB 17*; *Totalise Plc* v *The Motley Fool Ltd* n 40 above*; *John and Others* v *Express Newspapers Limited and Others* n 71 above*; *Gaddafi* v *Daily Telegraph* [2000] E.M.L.R. 431*; *Camelot Group Plc v Centaur Communications Ltd* [1999] QB 124 (CA); *Saunders* v *Punch Limited* [1998] E.M.L.R.18*; *Michael O'Mara Books Ltd* v *Express Newspapers* [1998] E.M.L.R 383; *Chief Constable of Leicestershire Constabulary and Another* v *Garavelli* [1997] E.M.L.R. 543 (DC)*; *Goodwin* n 59 above;* *Essex C.C.* v *Mirror Group Newspaper Limited* [1996] 1 F.L.R. 585*; *Special Hospital Services Authority* v *Hyde* n 71 above*; *Maastricht Referendum Campaign* v *Hounam* May 28 1993 (unreported)*; *X Ltd* v *Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1; *In re An Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660; *X Health Authority* v *Y* [1988] R.P.C. 379 (QB); *Maxwell* v *Pressdram Ltd and Another* [1987] 1 WLR 298; *Handmade Films (Productions) Limited* v *Express Newspapers Plc* [1986] F.S.R. 463 (Ch D); *Secretary of State for Defence and Another (Respondents)* v *Guardian Newspapers Ltd* [1985] AC 339. (* indicates the decision was in favour of the news gatherer.)
[135] See *Financial Times Ltd* v *Interbrew S.A, ibid*, [7] *per* Lord Justice Sedley; Cripps n 71 above, 295-296; Tugendhat & Christie n 133 above, 571-572.

to compel disclosure of a news gatherer's confidential source (relevant factor protection) with a rule of law prohibiting such disclosure unless the applicant for disclosure could prove one of the stipulated exceptions (weighted balance plus limited exception protection). He thought the change to be 'of profound significance'.[136]

Once the prerequisites for some existing disclosure process have been established,[137] the section provides special protection against the making of, or punishment for non compliance with, any form of court order for disclosure of a relevant source, whether pre trial or in trial, civil or criminal.[138] Application to search warrants is limited.[139] The section applies to orders to disclose material that will, or reasonably might, directly or indirectly identify a source or which is sought for that purpose[140] and notwithstanding the requesting party's proprietary interest or other right of return in that material.[141] It extends protection to 'any person responsible for a publication'[142] and sources of information 'communicated and received for the purposes of publication', published or not.[143]

If the section applies, a court has no power to order disclosure, or punish for nondisclosure, unless the party seeking disclosure satisfies the court that it is 'necessary' for one of the listed interests. '[N]ecessary' means "really needed".[144] In *Morgan-Grampian*, Lords Bridge and Oliver said a balancing process is required between the public interest in the free flow of information and consequential protection of news gatherers' sources on the one hand and the stipulated competing interests on the other, with full weight given to the statutory privilege – perhaps a weak form of weighted balancing.[145]

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[136] *Secretary of State for Defence* v *Guardian Newspapers* n 134 above, 361. See to the same effect Lord Oliver of Aylmerton in *Morgan-Grampian* n 134 above, 51-53.
[137] *Secretary of State for Defence* v *Guardian Newspapers ibid*, 347 *per* Lord Diplock; *Ashworth* n 21 above at [41] *per* Lord Woolf.
[138] *Secretary of State for Defence* v *Guardian Newspapers ibid*, 349 *per* Lord Diplock.
[139] Tugendhat & Christie n 133 above, 597 at [14.67].
[140] *Secretary of State for Defence* v *Guardian Newspapers* n 134 above, 349 *per* Lord Diplock, 363 *per* Lord Scarman. The UK government enacted s 8 of the Official Secrets Act 1989, creating specific offences of failing to comply with an official direction to return specified government documentary property in response to this argument, see Cripps n 71 above, 285.
[141] *Secretary of State for Defence* v *Guardian Newspapers ibid*. All members of the HL agreed on this point.
[142] Cripps n 71 above, 281-282. A 'publication', defined in s 2, includes 'any speech, writing, programme included in a service or other communication in whatever form, which is addressed to the public at large or any section of the public'.
[143] *Morgan Grampian* n 134 above, 40 *per* Lord Bridge.
[144] *ibid*, 42 *per* Lord Bridge quoting Lord Griffiths in *In re An Inquiry under the Company Securities (Insider Dealing) Act 1985* n 134 above, 704; 53 *per* Lord Oliver. Cf Murphy n 51 above, 465 at which he said, 'With respect, it may be doubted whether this definition does any more than reduce somewhat the standard enacted by Parliament.'
[145] *ibid*, 41-43 *per* Lord Bridge; 53 *per* Lord Oliver. Lord Oliver suggested that if the applicant was

The exceptions in Section 10 have been expansively interpreted.[146] Of the 'interests of justice', the phrase used in the determinative tests in *British Steel* and Australian cases, Lord Oliver stated in *Morgan-Grampian*, "[t]he interest of the public in the administration of justice must…embrace its interest in the maintenance of a system of law, within the framework of which every citizen has the ability and the freedom to exercise his legal right to remedy a wrong done to him or to prevent it being done, whether or not through the medium of legal proceedings."[147] The example given was an employer who seeks the identity of a disloyal employee in order to terminate the employee's contract only.[148] But an applicant who could not take effective action to protect her rights without knowing the identity of the source still might not win. What was at stake for the party seeking disclosure, the degree of legitimate public interest in the information provided by the source and the legitimacy or otherwise of the means used by the source to obtain the information would also be relevant.[149] As Cripps observed, this was 'very reminiscent' of *British Steel* reasoning as well as language.[150] It is 'at large balancing' at best. As interpreted by the HL alone, section 10 would make very little difference.

Not surprisingly, the House of Lords unanimously upheld a judicial order that Morgan-Grampian's employee, journalist Goodwin, deliver up his notes concerning his conversation with an anonymous source.[151] The source had disclosed a draft business/financial plan of X Co, the premature release of which could have caused serious economic damage to X Co had it not been prevented by a timely injunction.

Goodwin v *United Kingdom*[152]

At the ECHR, the issue was whether the admitted interference with Goodwin's article 10(1) right of freedom of expression by reason of the disclosure order and subsequent

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successful in displacing the prohibition, the court would still have to decide, as a matter of discretion, whether to issue the relevant process, as it does with respect to every applicant, *ibid*, 51-52.

[146] As to the prevention of crime, see *In re an Inquiry under the Company Securities (Insider Dealing) Act 1985* n 134 above.

[147] *Morgan Grampian* n 134 above, 54 and see 43 *per* Lord Bridge to like effect.

[148] *ibid,* 43 *per* Lord Bridge; 54 *per* Lord Oliver.

[149] *ibid*, 44 *per* Lord Bridge.

[150] Cripps n 71 above, 291 and see argument at 297 - 299. Lord Templeman's judgment in *Morgan Grampian ibid*, 49-50 reads exactly like a restrictive common law judgment, just as if section 10 had not been enacted at all and see S. Palmer, 'Protecting Journalists' Sources: Section 10, Contempt of Court Act 1981' [1992] P.L. 61, 70-71.

[151] n 134 above, 44-45 *per* Lord Bridge emphasizing the source's complicity in a 'gross breach of confidentiality.' See also Lord Oliver n 134 above, 54 but without any mention of the source's probable wrongdoing.

[152] n 59 above.

conviction for contempt[153] was justified under article 10(2) of the European Convention.[154] Section 10 of the Contempt Act 1981, as interpreted by the House of Lords in *X Ltd v Morgan-Grampian Ltd*, was found to be sufficiently certain within the meaning of 'prescribed by law'.[155] The protection of X Co's legal rights was a legitimate aim of the legislation.[156] As to whether the specific interference was necessary in a democratic society, the ECHR reasoned as follows:

(i) '[F]reedom of expression constitutes one of the essential foundations of a democratic society … the safeguards to be afforded to the press are of particular importance.'[157]

(ii) 'Protection of journalistic sources is one of the basic conditions for press freedom…. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest… [possibly undermining the] vital public-watchdog role of the press … [and adversely affecting] the ability of the press to provide accurate and reliable information.'[158]

(iii) An order compelling disclosure or punishing journalists for disobedience to such an order could not, therefore, be compatible with article 10 'unless [the order] is justified by an overriding requirement in the public interest.'

(iv) '[T]he "necessity" for any restriction on freedom of expression in a democratic society must be convincingly established….' There must be 'a pressing social need for the restriction' and the restriction must be 'proportionate to the legitimate aim pursued'. The states' normal margin of appreciation is here 'circumscribed by the interest of democratic society in ensuring and maintaining a free press.' '[L]imitations on the confidentiality of journalistic sources call for the most careful scrutiny by the court.' The reasons for the restriction must be 'relevant and sufficient'.[159]

(v) The balancing approach and the 'interests of justice' exception did not

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[153] i*bid* at [28]. Article 10(1) in relevant part provides: 'Everyone has the right to freedom of expression. This right shall include freedom … to receive and impart information and ideas without interference by public authority….'

[154] Article 10(2) provides: 'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

[155] *Goodwin* n 59 above at [29 – 34].

[156] *ibid* at [35].

[157] *ibid* at [39].

[158] *ibid* at [39]. These propositions were accepted without the need for empirical proof.

[159] *ibid* at [40].

make the law arbitrary.[160]

(vi) On the facts, since the Court of Appeal had found the injunction against publication that had been granted to X Ltd 'was effective in stopping dissemination of the confidential information by the press', thereby largely neutralizing the threat of economic harm, heavily relied upon by Lord Bridge, the interference could not be supported by the House of Lords' reasons.[161]

(vii) Given that Article 10 'tip[s] the balance of competing interests in favour of the interest of democratic society in securing a free press…', other stated purposes including enabling X Co to unmask a disloyal employee, though legitimate, did not, even cumulatively, amount to an overriding requirement for disclosure in the public interest.[162]

This was strong constitutional imperative/ weighted balancing protection. The ECHR mentioned *Goodwin* with approval in *In the case of Fressoz and Roire* v *France*[163] and applied it in *Roemen and Schmit* v *Luxembourg.*[164] Similar principles are in the Committee of Ministers' recommendation entitled *On the right of journalists not to disclose their sources of information.*[165]

<u>After HRA</u>

Before 2000, the English CA judges' appreciation of the implications of *Goodwin* was variable.[166] However, the HRA reproduces the terms of Article 10. Section 3 of the HRA provides that, so far as possible, '…legislation must be read and given effect in a way which is compatible with…' rights within the European Convention. Section 2 requires the English courts to take account of relevant Strasbourg jurisprudence.

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[160] *ibid* at [32 – 33].
[161] *ibid* at [42].
[162] *ibid* at [44 – 45].
[163] (2001) 31 E.H.R.R. 2; (1999) 5 B.H.R.C. 654.
[164] Application N. 51772/99, judgment 25 February 2003 and see *Ernst and Others* v *Belgium* (App No. 33400/96)(Chamber Judgment of 15 July 2003), finding a violation of article 10 in a police warrant authorised the search of 8 news gathering premises and reporters homes for the purpose of identifying sources of leaks in certain criminal cases.
[165] Recommendation No. R (2000) 7 of the Committee of Ministers to Member States (Adopted by the Committee of Ministers on 8 March 2000 at 701st meeting of the Ministers' Deputies) – followed in *Brdjanin & Talic* n 47 above. For other European cases see H. Thorgeirdottir, 'Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the European Covention on Human Rights' (Leiden: Martinus Nijhoff Publishers, 2005) 249-253; A. Burns, 'Access to Media Sources in Defamation Litigation in the United States and Germany' 10 Duke J. Comp. & Int'l L. 283; C. Brants, 'Journalists and the Protection of Sources of Information in the Netherlands' in S. Field and C. Pelser (eds) *Invading the Private: State accountability and new investigative methods in Europe* (Aldershot: Ashgate, 1998).
[166] Compare *Gaddafi* v *Daily Telegraph* n 134 above; *Camelot Group plc* v *Centaur Communications Ltd* n 134 above; *John* v *Express Newspapers* n 71 above and commentary in Robertson & Nicol n 65 above, 264-265; Spilsbury n 133 above, 390 – 392, 396.

Ashworth and *Ackroyd(1)* were the second and third important news gatherer/ confidential source cases decided after the HRA.[167] To these may now be added the judgment of Tugendhat J in *Ackroyd (2)*. With regard to *Ashworth*, the following points should be noted:

(a) Lord Woolf CJ accepted all aspects of the letter and spirit of *Goodwin*, including the application of the ECHR article 10 approach to section 10, without qualification, that is, he accepted constitutional imperative/ weighted balancing protection.[168]
(b) The *Morgan-Grampian* interpretation of the 'interests of justice' exception in section 10 noted above was also accepted,[169] an interpretation so broad the section does not really provide limited exception protection.
(c) Protecting the confidentiality of private health data is both a legitimate aim and an obligation under the article 8 guarantee of respect for private life.[170]
(d) 'Any disclosure of a journalist's source does have a chilling effect on the freedom of the press…. 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.'[171]
(e) The situation must be exceptional if disclosure of the source is to be justified.[172]

All the Law Lords agreed that the circumstances were exceptional. The safety of patients and staff at Ashworth required that all persons having responsibility for the patients be able to have complete faith in the integrity of the PACIS records. The patient's disclosure of his own medical history was irrelevant to that pressing need. There was no public interest in the content of the records. The source's disclosure of the records was wholly inconsistent with the security of the records – a breach of confidence and contract made worse by the fact it was (assumed to have been) purchased by a cash payment. The only way that security could be protected was to find and punish the source – hence disclosure in that case was an overriding public interest.[173]

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[167] The first was *Financial Times Ltd* v *Interbrew SA* n 134 above, a case involving malicious disclosure of partly falsified confidential material. Selby LJ's judgment was extensively quoted in *Ackroyd (2)*. For comment on the case see D. Sandy, 'False Sources and the Freedom of the Press' (2002) N.L.J. 152.7034 (856); M. Stockdale, R. Mitchell, 'Company Confidentiality and the Freedom of the Press: Striking the Balance' (2003) 24 Comp. Law. 170-177.
[168] See in particular n 21 above at [61- 62].
[169] *ibid* at [39-40] read with[49] and see [71] *per* Lord Hobhouse of Woodborough.
[170] *ibid* at [62 - 63], applying *Z* v *Finland* (1998) 25 E.H.R.R. 37, noted in *Ackroyd (2)* n 24 above at [98].
[171] n 21 above at [61].
[172] *ibid* at [66].
[173] *ibid* at [66].

Ackroyd(1) was the first time Ackroyd's long term investigations concerning serious mismanagement at the hospital, a consequential public inquiry highly critical of the hospital, his use of many sources in the hospital and the absence of payment or reward for the sources was in evidence. This evidence convinced May and Ward LJJ that the pressing social need for Ackroyd to identify his source should be considered in a full hearing.[174] Carnworth LJ said that *Ashworth* meant that, subject only to rare exceptions, there was an over-riding interest in the confidentiality of medical records.[175] Since the leaked records contained no evidence of mismanagement or misbehaviour on the part of hospital staff, no rare exception had been established.[176] However, three years having passed with no evidence of any recurrence or a persisting cloud of suspicion over the employees, establishing the 'pressing need' for disclosure of the source at that time required a hearing.[177]

Tugendhat J presided over the hearing. He analysed the importance of news gathering in the context of freedom of expression in depth, drawing upon post HRA HL case law[178] and beyond. His judgment contains a valuable illustration of an exceptionally rigorous and sensitive common law style examination of the evidential issues. On the nature of the decision to be made under section 10 after the HRA, his extensive quotes from Sedley LJ in *Interbrew*[179] included the following:[180]

> [T]he central exercise is not in any true sense one of discretion. Deciding whether disclosure is necessary for one of the listed purposes is a matter of hard-edged judgment, albeit one of both fact and law, and none the less so for having to respect the principles of proportionality….[T]he effect of ss 2 and 3 of the [HRA] has been to move the evaluation of necessity further towards the status of a question of law…. [Even if the s 10 bar is lifted] other, discretionary, bars may still operate…"

On the approach that must be adopted when two Convention rights such as privacy and freedom of expression conflict, Tugendhat J[181] followed the guidance of Lord

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[174] *Ackroyd (1)* n 26 above at [67-70], [88].
[175] *ibid* at [75].
[176] *ibid* at [76-83].
[177] *ibid* at [84-85].
[178] *R* v *Shayler* [2003] 1 AC 247; *Campbell* v *MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 and also the earlier cases of *Reynolds* v *Times Newspapers Ltd* [2001] 2 AC 127 and *McCartan Turkington Breen* v *Times News Papers Ltd* [2001] 2 AC 277.
[179] n 134 above.
[180] n 24 above at [83], taken from *Interbrew* at [45-48].
[181] *ibid* at [103-104].

Steyn in *In re S (A Child)(Identification: Restrictions on Publication).*[182]

> First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.

Tugendhat J said that, since there was no public interest in the particular disclosure, the source had breached a duty of confidentiality owed to the hospital, thus establishing the threshold condition for a *Norwich Pharmacal* order. Analysing the comparative importance of the specific rights claimed in the case, Tugendhat J noted in particular that the expression Ackroyd was defending was 'of a kind that attracts the highest protection'[183] and that Ackroyd's 'record of investigative journalism which has been authoritatively recognised, so that it would not be in the public interest that his sources should be discouraged from speaking to him where it is appropriate that they do so….'[184] Consequently, on the facts as now known, the pressing social need to disclose the source, and hence the proportionality of disclosure to the hospital's legitimate aim to seek redress against the source, had not been convincingly established.

Tugendhat J stressed that he had not considered that 'medical records are less private or confidential, or less deserving of protection'[185] than the earlier courts. His result was different because, in light of new evidence and the passage of time, his findings of fact were different, with consequential effects on his reasoning. He summarized the changes:[186]

> [T]he hospital no longer contends that the source acted for money, with the result that I have had to find afresh what the purpose of the source was, [misguided pursuit of public interest] and to re-assess the risk of further disclosure now, in the light of that fact, and in the light of the absence of any similar disclosures since 1999. The extent of disclosure by the source was more limited than was previously understood… I have not found that the source was one of a number of people limited to 200, but that it is impossible to say how large the

[182] [2004] UKHL 47 at [17]; [2005] 1 AC 593 at [17].
[183] n 24 above at [193].
[184] *ibid.*
[185] *ibid* at [196].
[186] *ibid* at [197].

> group is. I have not found that the source was probably an employee … and even if it was an employee, the numbers who have left the hospital since 1999 represent about a third of those who worked there in 1999. So the likelihood of the hospital being able to obtain the redress it seeks against the source is correspondingly diminished. In addition, the stance of [the patient] has changed [he now supported Ackroyd], and I have not found the disclosure was made without his consent. Finally, unlike the courts in the MGN action, I have heard the evidence of Mr Ackroyd and have concluded that he was a responsible journalist whose purpose was to act in the public interest.

V. THE CASE FOR SPECIAL PROTECTION[187]

The essentials of any case for special protection against compulsory disclosure of the identities of news gatherers' confidential sources are as follows. News gathering is an essential activity for the maintenance of a modern vibrant liberal democracy. News gatherers need to cultivate and use confidential sources in order to be able to carry out that activity most effectively. But news gatherer/ confidential source relationships are an exceptionally vulnerable and fragile aspect of news gathering. Therefore it is in the public interest that news gatherer/ confidential source relationships are promoted and protected. Most news gatherers' confidential sources will cease to be able, and many, if able, cease to be willing, to continue as sources if their identities are revealed. General or specific knowledge amongst potential sources that news gatherers can be compelled to disclose their identities in court or to their employers or a grand jury or commission of inquiry, or have their premises searched to like effect, will have a strong chilling effect upon some people who might otherwise be willing or persuaded to be confidential sources in the future. Co-opted as an intelligence gathering arm of government or private parties, news gatherers would lose the vital credibility of independence. News gatherers will also be less willing to approach sources at risk if they cannot promise effective confidentiality. Forcing news gatherers to disclose confidential sources may even put the physical safety of some news gatherers at risk – having a further chilling effect on the willingness of news gatherers to investigate news connected to violent/ ruthless people or environments. Conversely, the public costs of nondisclosure in terms of lost information, evidence, opportunities to suppress or punish wrongdoing are often relatively minimal or illusory. Many private costs can be minimized by other means. Hence protecting

[187] For eloquent advocacy of special protection against disclosure of news gatherers sources see Robertson & Nicol n 65 above, 253-256; Nestler n 36 above.

news gatherers' confidential sources from disclosure is very much in the public interest.

This does not mean that the public interest in the protection and promotion of news gathering must invariably prevail over all other public interests.[188] It does mean that in this narrow area of identification of news gatherers' confidential sources, the public interest in protecting such sources should nearly always prevail and giving priority to **any** other public interest should **never** be automatic. Identification of a confidential source always causes some harm to the news gathering process, which harm should never be ignored.[189]

It is the underlying premise of this article that the argument for special protection of news gatherer/ confidential source relationships is valid and should be accepted. Four aspects of that argument outlined above merit brief exploration so as to substantiate that position: the extent and character of the public interest in promoting and protecting news gathering activity in a liberal democracy; the news gatherers' need for confidential sources; the chilling effect; the public and private costs of nondisclosure.

The extent and character of the public interest in protecting and promoting news gathering in a liberal democracy

Acceptance as empirical and political fact that news gathering is an essential activity in a modern liberal democracy that is both worthy and in need of special promotion and protection by the law is the bedrock of any claim for special protection from judicially compelled disclosure of the identity of news gatherers' sources and is now widespread.[190] What must be emphasized here is that the need for news gathering in

[188] For recognition that special protection for news gatherers' sources need not be absolute see: Pember n 95 above, 359-360; Robertson & Nicol *ibid*, 255; L. Powe, Jr, *The Fourth Estate and the Constitution: Freedom of the Press in America* (Berkley: University of California Press 1991), 181-188.

[189] See *Ashworth Hospital* v *MGN Ltd* [2001] 1 WLR 515 (CA) at [101] *per* Laws LJ: 'The public interest in the non-disclosure of press sources is constant, whatever the merits of the particular publication, and the particular source…[I]t is always prima facie … contrary to the public interest that press sources should be disclosed….', cited with approval in *Interbrew SA* n 134 above at [11][32] *per* Sedley LJ and *Ashworth* n 21 above at [66], the latter noted in *Ackroyd 2* n 24 above at [86].

[190] Academic and judicial expositions of the importance of a free press in the traditional sense of a press free to publish without censorship as described in *British Steel* n 5 above, 1168 A-B *per* Lord Wilberforce and *Branzburg* n 41 above, 681-682 *per* Justice White, are legion. Understanding of the importance of news gathering as a step towards such publishing was largely confined to the strong dissenting judgments in *Branzburg* n 41 above *per* Justices Douglas and Stewart (with whom Justices Brennan and Marshall agreed) dissenting; *British Steel* n 5 above, 1184 *per* Lord Salmon dissenting; *CBC v Lessard* n 87 above at [61-69] *per* McLachlin J. dissenting but see also the preambles to the Guidelines n 109 above, and, the Privacy Protection Act 1980 and the almost universal recognition of some form of journalist's privilege in all but two US jurisdictions noted above. As to the UK,

a liberal democracy extends well beyond the strictly political. A brief examination of news gathering as a source of unofficial news, a watchdog with respect to all sources of power and an essential part of effective public debates will make this clear.[191]

(i) As a source of unofficial news

A self-governing people cannot afford to have their knowledge of public, commercial and social affairs confined to news chosen for them by official, commercial or social power centres. A self-governing people also needs unofficial, independent, non-establishment news gatherers investigating and reporting on their various elites, current events, events of historical significance and the nature and extent of unofficial, peripheral, underground, criminal, subversive, even terrorist activities actually or possibly going on within that people's society, environs or the larger world. Unofficial news is an essential counterweight to official/ commercial/ social propaganda, myopia, bias and ignorance.

(ii) A prerequisite for the performance of the watchdog function

One of the most widely recognized functions of news gatherers, the 'Fourth/ Fifth Estate', 'representative of the people', 'public watchdog', 'government critic', is to uncover and reveal official policies and actions for the people.[192] It is certainly not possible to rely only upon official sources for this purpose. But democracy in the sense of self governance is not only, or even primarily, about elections and the actually or potentially elected. It is about the distribution, monitoring and constraint of all forms of real power within a society – economic, military, social and antisocial, as well as the strictly political. A free people needs news gatherers to uncover and reveal the policies and actions of economic, social and military powers as much as of

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Ashworth and *Ackroyd (2)* both contain clear affirmations of the importance of news gathering. Tugendhat & Christie n 133 above, 451 describe the importance of news gathering by the media as 'axiomatic'. As to Canada, see the strong recognition of the importance of newsgathering in *National Post* n 57 above and *Wasylyshen 2005* n 69 above, also the higher court cases cited in the latter case. Australian judges have remained less enthusiastic, *NRMA* v *John Fairfax* n 49 above at [166] quoting *Cojuangco* n 61 above, but the intervention of the Attorney General in *McManus/ Harvey* n 32 above and current moves to introduce a federal shield law indicate some appreciation of the significance of news gathering.

[191] See Nestler n 36 above, 210 – 212 and E. Barendt, *Freedom of Speech* (Oxford: Oxford University Press, 2nd ed, 2005), Chapter 1 in which Barendt explores the question, 'Why Protect Free Speech'. Barendt's first, third and fourth 'Arguments for a Free Speech Principle' are closely related to the following arguments for the importance of news gathering. As to Barendt's 'Free Speech Interests', the audience and bystander/ public interest are appropriate here. See also Chapter 12, 'Free Speech in the Media' in which the vital role of the press as a 'public watchdog' is recognized and the implications for press freedom analyzed.

[192] J. Street, *Mass Media, Politics and Democracy* (Hampshire: Palgrave, 2001) 253; V. Blasi, 'The Checking Value in First Amendment Theory' 1977 AM. B. Found. Res. J. 521; Alexander, n 41 above, 104-107.

political powers. Recognition of this is crucial to the protection of news gatherers' sources at work in these other spheres.[193]

(iii) A prerequisite to effective public debate

News gatherers are indispensable to any credible public debate about ideas in societies on the scale and with the degree of fragmentation of the present day. News gatherers generate, collect and disseminate ideas, information, perceptions and interpretations. Through the media and the internet, some provide forums for feedback on their own output and disseminate the output of others. A modern liberal democracy would be greatly impoverished without these forums. This is true notwithstanding the modern public forum is significantly distorted and individual creativity suppressed by the size, commercial/ state ownership and character of modern media.[194] Denial of protection to news gatherers' confidential sources is not a remedy for these ills. In fact, denying protection to bloggers' sources might make the situation worse.

News gatherers' need for confidential sources

Some judges have voiced skepticism about news gatherers' needs for confidential sources and argued that naming of sources keeps both news gatherer and source honest.[195] In response, news gatherers have attempted to prove that many important past news stories depended upon confidential sources.[196] There is substance and weakness in both positions. The benefits of knowing the source of information are obvious. If the value of news gathering as described in the previous section is accepted, the need for some news gatherers to use confidential sources at least some of the time is obvious too.[197] Quite simply, some valuable news gatherer/ source

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[193] Contrast the relatively narrow view of what it was in the public interest for people to know in *British Steel* n 5 above and *Branzburg* n 41 above, 690-697 *per* Justice White; *Morgan-Grampian* n 134 above 42-43 *per* Lord Bridge as to national security and the prevention of crime.

[194] L. Powe Jr. n 188 above, chs 7 and 9 makes the relevant arguments. For a sophisticated treatment of the democratic functions and obligations of news gatherers and the internal threats to the performance of those functions see H. Thorgeirdottir n 165 above.

[195] See *Cojuangco* n 61 above, quoted in *NRMA* v *John Fairfax* n 49 above at [166]. The Canadian Supreme Court in *Moysa* n 88 above, confirmed in *Lessard* n 87 above, and the majority of the US Supreme Court in *Branzburg* n 41 above, found the case unproven. Some journalists are likewise skeptical, see G. Price, '"Pack your toothbrush!" Journalists, confidential sources and contempt of court' (2003) 8(1) *Media & Arts Law Review* 259; P. Garry, 'Anonymous Sources, Libel Law, and the First Amendment' (2005) 78 Temp. L. R. 579.

[196] *Branzburg* n 41 above, 693-695 and nn 32, 33 *per* Justice White; *NYT* v *Gonzales* n 47 above, 28-31; *National Post* n 57 above, 565-566. As to academic research on the use of sources see the on going studies of the Reporters Committee for Freedom of the Press n 102 above, specifically intended to provide news gatherers with the required evidence; D Sheddon, 'Anonymous Sources' at 'Links to the News, Poynterline' at http://poynter.org/column.asp?id=49&aid=64013 (Last visited 23 March 2006); Nestler n 36 above, 249-250; Robertson & Nicol n 65 above, 254-255.

[197] But if proof were needed, it is submitted that amongst the five illustrative cases, *Ackroyd* and *McManus/ Harvey* are cases in point.

relationships cannot withstand exposure to the light – even the partial light of grand juries or the protective screens and suppression of names in some public inquiries. Outed sources often lose access to the relevant information. They may also be exposed to significant risks: dismissal,[198] civil actions for breach of contract or breach of confidence, hostility, criminal prosecution[199] or violent retaliation, even death. A guarantee of confidentiality is necessary in order to secure these sources in the first place. Continued confidentiality is necessary for continued access to the information and physical safety for the source. Surely it cannot be right for society to take the benefit of a source's information but leave the source exposed to harmful consequences, even if these are to a considerable extent of the source's own making, unless identification of this particular source would give rise to some exceptional public benefit.[200] The public interest defence to breach of confidence,[201] the qualified privilege defence in defamation,[202] whistleblower statutes,[203] even common law judicial statements about protection of sources who disclose iniquity, arise from some recognition of this but all are only, as yet, partial solutions.

News gatherers may also suffer from exposure of a source. At best the news gatherer will lose any credibility as an independent observer and may not be able to continue their work. They may also face violent or economic retaliation or preventive action from sources or those about whom the sources made disclosures. A liberal democracy needs news gatherers to be willing to investigate the high risk stories about the powerful, the ruthless and the desperate.[204] Like undercover law enforcement and secret service personnel, these at risk news gatherers also deserve – and reward – our protection. That includes protection from being used by law enforcement or public/ private security as a cheap investigative arm.

The chilling effect

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[198] This was the whole object of the *Ashworth/ Ackroyd* cases.
[199] Sometimes in connection with the unauthorized disclosure, as in the *In re Grand Jury Subpoena* and *McManus/ Harvey* cases, sometimes in connection with crimes they disclose, as in *Branzburg n 41 above*, sometimes for crimes unconnected with the disclosure.
[200] Not merely prosecution of petty criminals such as the drug users in *Branzburg*, perhaps the unmasking of senior officials willing to put CIA operatives at risk in order to silence political critics.
[201] For the modern growth of this defence, see Cripps n 71 above; Tugendhat & Christie n 133 above, ch 9.
[202] *New York Times Co. v Sullivan* 376 U.S. 254 (1964); *Lange v Australian Broadcasting Corp.* n 85 above; *Lange v Atkinson* [2000] 1 N.Z.L.R. 257; *Reynolds* n 178 above.
[203] G. Gunasekara, 'Whistle-blowing: New Zealand and UK Solutions to a Common Problem' (2003) 24 Statute L. Rev. 39; L. Vickers, 'Whistleblowing in the public sector and the ECHR' [1997] PL 594, cited in *Haydon* v *Canada (T.D.)* [2001] 2 F.C. 82.
[204] This was a primary concern of the Appeal Chamber in *Brdjanin & Talic* n 47 above and see in another context, *R v Lord Saville of Newdigate, ex parte A* [2000] 1 WLR 1885, 1857 *per* Lord Woolf as to the right to life.

The 'chilling effect' refers to the effect of disclosure upon present or potential sources other than the targeted source. Again, some judges have objected that news gatherers have failed to prove any, or any undesirable,[205] chilling effect from common law or constitutional denial of special protection for news gatherers' confidential sources. A few have asserted a currently vigorous media as evidence of the contrary.[206] With respect, this is at best speculative.[207] Any past or present flourishing of news gatherer/ confidential source relationships is as likely to be due to the discouraging effects of real or perceived high resource costs for litigants seeking to compel source disclosure, the modern practice of prompt destruction of documents, e-mails and other evidence of source identity by news gatherers,[208] a widespread (mistaken) belief in the existence of a journalists' privilege[209] and the largely untested asserted willingness of news gatherers to go to jail rather than give up a source, as to the absence of a chilling effect from incidents of forced disclosure. Furthermore, the proof demanded is practically impossible to obtain.[210] How could a news gatherer set about finding people who might have been willing to come forward as a source if the law had been different? It is also unnecessary since common human experience tells us that learning of unpleasant things happening to a disclosed source will have a chilling effect upon the willingness of some potential sources to come forward. There is no way of ensuring that the chill is only felt by sources it is not in the interests of a liberal democracy to hear.[211]

So the real issues with respect to news gatherers' need for confidential sources are not 'if they are needed' or 'whether not protecting such sources will make obtaining them and keeping them more difficult' but 'when and how such sources should be used' and 'when and how such sources should be protected'. Answers to these 'when and how' questions require an examination of what interests besides news gathering are at stake.

The public and private costs of nondisclosure of news gatherers' sources

[205] *British Steel* n 5 above, 1184 B-C *per* Viscount Dilhorne; *Moysa* v *Labour Relations Board* n 88 above at [20]; *CBC* v *Lessard* n 87 above at [45] *per* L'Heureux-Dube J, quoting from *Zurcher* v *Stanford Daily* n 111 above; *Branzburg* n 41 above, 693-695 and see *Ashworth* n 21 above at [65-66] *per* Lord Woolf as to the Master of the Rolls' comment, "If the [source disclosure] order … discourages press sources from disclosing similar information in the future, this will be no bad thing." Also Judge Tatel in *In re Grand Jury Subpoena* n 9 above, 999-1000.
[206] *Branzburg* n 41 above, 698-699 *per* Justice White.
[207] Lee, 'The Priestly Class: Reflections on a Journalist's Privilege' n 50 above, 643.
[208] Robertson & Nicol n 65 above, 268; Spilsbury n 133 above, 397.
[209] *In re Grand Jury Subpoena* n 9 above, 993 *per* Judge Tatel.
[210] E. Cherminsky, 'Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering' (2000) 33 U. Rich. L. R. 1143, 1145-1146.
[211] See *Branzburg* n 41 above, 733-736 *per* Justice Stewart; *In re Grand Jury Subpoena* n 9 above, 992-993 *per* Judge Tatel; Nestler n 36 above, 248-249.

The content of leaked information may cause economic, emotional and social damage. The act of leaking will often involve a breach of confidence or invasion of privacy damaging in itself. Sometimes the victim of a leak may be able to get some compensation from the news gatherers but attacking the news gatherer is often a second best option, if an option at all. Allowing a news gatherer to refuse to disclose a source may deny a victim of a leak their most desired remedies: damages from or prosecution/ punishment/ neutralization of the source, both as an end in itself and to deter others. Sometimes, not being able to sue or sanction the source will mean no remedy for leak victims at all. These are real costs, as are the resources spent in developing, acquiring and implementing high level security systems and practices designed to make unauthorized leaking more difficult, costs that might not be incurred if news gatherers did not protect their sources.

Protecting news gatherers from compelled disclosure of their sources may also mean no access to valuable information an unidentified source may have. That information might be relevant to a grand jury or commission of inquiry investigation, a criminal trial or, in rare cases, the prevention of serious crime, terrorism or damage to public security.

Can these individual and public costs be accepted as the unfortunate but unavoidable price a liberal democracy should be willing to pay for the benefits of good quality independent news gathering, at least in most cases, so that special protection of news gatherer/ confidential source relationships can be justified?

It is submitted that they can. If the arguments as to the breadth of the knowledge required by a self governing people set out above are accepted, the protection of many leakers, even those guilty of 'wrongdoing',[212] can be justified simply by the truth and relevance of the information they disclose. It is important to remember the following. First, the government itself is by far the largest leaker of official information, and hence the largest beneficiary of source protection.[213] But officials –

[212] Such as theft of documents, breaches of laws prohibiting disclosure, breach of contract, breach of confidence, conversion. Cf Bryan, 'Gerard McManus and Michael Harvey' at 'The Oz Politics Blog' at http://www.ozpolitics.info/blog/?p=182 in which Bryan argues the important political neutrality of the civil service is violated by leaks like that to these journalists. The article and consequential discussion make interesting points about leaks by officials as well.

[213] *Interbrew SA* n 134 above at [7], quoted by Justice Tugendhat in *Ackroyd (2)* n 24 above at [71]: L. Manly, 'Big News Media Join in Push to Limit Use of Unidentified Sources' 23 May 2005 NY Times at http://www.globalpolicy.org/empire/media/2005/0523mediasources.htm (Last visited 14 Oct 2005), reported that in early 2005 'the Washington bureau chiefs for seven major news organizations' met with the White House Press Secretary about 'off the record' background briefings frequently held by officials. Subsequent briefings about Presidential activities were 'on the record', perhaps setting a new tone for Washington.

or law enforcement - are hardly disinterested selectors of what should be leaked or with what spin.[214] Second, after the 'knee jerk' attack on the news gatherer, in many cases, the leak victim is able to identify and punish the leaker without any help from the news gatherers.[215] Third, exposing sources who provide reliable proof of contentious policy, errors of judgment or wrong doing, does not save the leak victim from the costs that must be incurred in dealing with the issues raised by what was revealed, including preventing a recurrence where that is relevant.[216] These responses may generate real social and individual benefits that are relevant to the true costs. Fourth, the reported cases indicate the 'loss' of information in investigation cases is seldom crucial to the investigation. 'Loss' may in any case be an inappropriate term since, absent the source's belief in the news gatherer's promise of protection, the public would often not have had that information or evidence anyway.[217] Fifth, some private costs can be recouped from the news gatherer. Finally, except where the protection offered is absolute, the truly exceptional case where the private or public cost is unacceptably high can be accommodated by (controlled) disclosure if and when it arises.

VI A WAY FORWARD

Accepting that news gatherer/ confidential source relationships should have special protection, how can such protection be effectively and efficiently achieved?

Absolute protection in the form of a rule forbidding any form of compelled disclosure in any circumstances is one option. It has the real attractions of simplicity, certainty and efficiency, but also the weakness of inflexibility. It does not allow for the exceptional hard cases.[218] The facts behind the *In re Grand Jury Subpoena* and *Sing Tao* cases show this is not a merely hypothetical concern.

But then, anything less than absolute protection requires the participation, co-operation and commitment of the judges. This is true even for commissions of inquiry or administrative tribunals. A court will always make the ultimate determination of whether a source should be protected. Even when a court is not the

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[214] The quote in *Ackroyd (2)* from Lord Bingham of Cornhill's speech in *Shayler* n 178 above is very apt.
[215] *McManus/ Harvey* is on point. With respect to Cooper/ Miller, the Special Prosecutor knew the identity of their sources before he subpoenaed them. He was seeking confirmation of content.
[216] The *Ashworth/ Ackroyd* leak provides an illustration. The Hospital needed to review its practices re transfer of prisoners for example.
[217] *In re Grand Jury Subpoena* n 9 above, 991 *per* Judge Tatel; *NYT v Gonzales* n 47 above, 124-127 *per* Sweet DJ.
[218] Thereby placing the shield under intolerable pressure, see *Castellani* v *The Scranton Times* n 103 above.

source of the initial order, only a court has the power to punish for contempt. But many common law judges have proved to be unreliable protectors of news gatherers' sources. Certainly the common law's 'one relevant factor' protection has been and remains ineffective. 'No alternative' protection also has serious weaknesses. First, as noted by the majority in *Branzburg*,[219] it invites ad hoc adjudication of almost every request for disclosure. Second, news gatherers and sources need to make confidentiality decisions when the relationship is first formed – the crucial factor in the protection, exhaustion of alternatives by the applicant, cannot be determined at that time.[220] Furthermore, the protection is ineffectual in the not unusual case where the whole point of the inquiry or action is discovering the source.[221]

'At large balancing' is problematic because it is extremely vulnerable to the common law's legacy of '…almost invariably [treating freedom of speech and hence of the press] … as a *defence* or as an *exception* or *qualification* to other well-established rights, such as the right to reputation or fair trial rights.'[222] Or, it might be added, to commercial, government, national security and crime prevention needs for confidentiality, all of which many common law judges see much more clearly and with greater favour than they do the confidentiality needs of news gatherers.[223]

The best option would seem to be constitutional imperative/ weighted balancing protection in the style of *Ackroyd (2)*. It seems that many common law judges need the permission and the discipline of a constitutional imperative or strong presumption in favour of news gatherer/ confidential source protection to overcome or at least counterbalance their professional commitments to an evidence/ remedies based system of justice and their personal commitments to commercial/ official confidentiality and crime prevention. The history of judicial interpretation of section 10 of the Contempt Act illustrates the point. Of course, as the history of judicial interpretation of the US First Amendment, the Hong Kong decision in *Sing Tao* and

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[219] Lee, 'The Priestly Class: Reflections on a Journalist's Privilege' n 50 above, 649-651.
[220] *ibid,* 664-670.
[221] See *In re Grand Jury Subpoena* n 9 above, 997-998 *per* Judge Tatel but cf Pember, *Mass Media Law* n 95 above, 369 in which Pember claims that where confidential information is sought from a nonparty news gatherer 'a [US] judge typically applies the test very vigorously and normally the journalist will not be required to testify'. See, for example, *Carolyn Condit* v *National Enquirer Inc et al* 289 F. Supp. 2d 1175 (Eastern District of California 2003); *Price* v *Time Inc., Don Yaeger* n 94 above, both defamation cases, and *NYT v Gonzales* n 47 above, 154-160.
[222] Barendt n 191 above, 41 (emphasis in the original).
[223] Ma CJHC's judgment in *Sing Tao* n 28 above, Carnworth LJ's judgment in *Ackroyd (1)* n 26 above, most of the pre HRA judgments in England, the majority judgments in *Lessard* n 87 above and most other Canadian cases cited herein, most of the Australian cases including NRMA v *John Fairfax* n 49 above, the majority judgments in *Branzburg* n 41 above and post 2000 cases rejecting creative interpretations of *Branzburg* such as Judge Posner's judgment in *McKevitt* v *Pallasch* n 94 above are illustrations.

Canadian constitutional jurisprudence clearly show, the mere inclusion of appropriate words in a constitutional document is not enough. A strong and sensitive commitment to protecting news gatherer / confidential source relationships on the part of the judges is also essential. In fact, such a commitment could deliver substantial real protection for news gatherer/ confidential source relationships even where constitutional or legislative provisions are lacking or weak.[224] *Ackroyd (2)* provides an encouraging indication of what a judgment written by a common law judge with a strong and sensitive commitment to the protection of news gatherer/ confidential source relationships and a common law lawyer's approach to the analysis of evidence would look like.

Still, a word of warning. But for the injunction preventing publication of the source's information, the result in *Goodwin* might have been very different, a position many may find unsatisfactory.[225] Although Lord Woolf CJ's and May LJ's unreserved acceptance of the core positions in *Goodwin* and genuine efforts to address the merits from that perspective are encouraging, the judgments in *Ashworth* and *Ackroyd (1)* still retain some of the weaknesses of the standard common law approach.[226] Like the majority in *British Steel*,[227] the Lords in *Ashworth* too readily accepted AHA's limited evidence as to access to the information, the unfortunate speculation that the source must have been an employee and the character of that employee as a paid and disloyal person, not an unpaid public spirited informant. The Lords placed great weight on the need to deter future disclosures from the records – but apparently none on the fact that a person's attitude towards leaking records relating to a man who had already publicized much of the same information and records concerning

[224] See Pnina Lahav, 'Conclusion: An Outline for a General Theory of Press Law in Democracy' in *Press Law in Modern Democracies: A Comparative Study* (New York: Longman Inc., 1985), 343.
[225] Ruth Castigan, 'Journalistic material in the UK criminal process' in S. Field & C. Pelser (eds), *Invading the Private: State accountability and new investigative methods in Europe* (Aldershot: Ashgate, 1998), 245.
[226] The concurring judgments in *Ashworth* are particularly news gatherer unfriendly. Writing after the first two s 10 cases arising after the HRA 1998, one author observed, "Bearing in mind the history of litigation in this area [footnote omitted] it is difficult to avoid the impression that outside the world of celebrities and show business the [English] courts are still not naturally disposed to be sympathetic towards leaks of indisputably confidential information to the media." P. Milmo, 'Courting the Media' 2003 EHRLR (Special issue: privacy 2003) 1, 9. See also Murphy n 51 above, 466 at n 87 in which Murphy observes, '[I]t is hard to resist the conclusion that English Courts have much less regard for journalistic privilege than do European Courts, including the European Court of Human Rights.' Certainly Lord Woolf has not always shown such understanding of the press, see *DPP* v *Channel Four Television Co. Ltd. and another* [1993] 2 All ER 517.
[227] See n 5 above, 1166B *per* Lord Wilberforce who said the source must have been '…an employee or former employee of B.S.C. …whose work entitled him or her to have access to highly confidential documents….and may have been guilty of an act of theft.' In fact, the source was a rubbish collector. Goodwin has claimed that the courts were wrong in their assumptions about his source too, M. Holderness, 'Sources of anxiety: LFB debate at the House of Commons', noted by Freelance at http://www.londonfreelance.org/fl/0403hoc.html (Last visited 5 September 2005).

someone who had maintained his privacy might be very different.[228] Assuming the worst devalues the source and news gathering. Furthermore, the court approved Lord Bridge's very wide interpretation of the 'interests of justice' exception in section 10 and continued the expansion of *Norwich Pharmacal* discovery in this context.[229] In *Ackroyd (1),* Carnworth LJ first accepted the strong presumption in favour of the protection of news gatherers' sources and then reversed it with respect to medical records. There is also the disturbing fact that in both *Ackroyd* decisions, the substantial passage of time since the initial leak was a very significant factor. It is not that the appreciation of the effects of time is unwelcome, on the contrary, but it is worrying that a news gatherer's success might be dependent upon her ability and resources to stretch out the judicial process sufficiently.

Our illustrative cases strongly suggest that the practices and attitudes of some government officials/ prosecutors and news gatherers also need to change. In less turbulent times, though the common law's denial of special protection for news gatherer/ confidential source relationships meant they could, prosecutors seldom asked the source question.[230] Today, prosecutors are asking fairly frequently for news gatherers' work product – especially photographs and outtakes – and getting it. Perhaps these successes have influenced prosecutors' views of what is appropriate or at least possible. Perhaps it is merely the politics of prosecutors that has changed. For whatever reason, in North America and Australia in particular, prosecutors and officials are, increasingly, also asking the source question.[231] With respect, from the perspective of true public and personal costs and benefits, the aggressive pursuit of news gatherers is almost always unjustified and unwise.[232]

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[228] Compare the very different approach (not merely the result) on these points of Justice Tugendhat in *Ackroyd (2).* Justice Tugendhat was very careful not to make assumptions for or against any one.

[229] Lord Woolf CJ n 21 above at [53] rejected Sedley LJ's position in *Interbrew SA* n 134 above at [20] that the detection of crime was not a proper object of *Norwich Pharmacal* discovery., even to the point of leaving open the possibility of an application by the Attorney General on behalf of the public!

[230] The histories of official attempts to obtain source identities from news gatherers set out in *British Steel* n 5 above and *Branzburg* n 41 above show relatively little activity in the relevant jurisdiction before those cases. Significantly, both decisions prompted limiting legislation, though in the case of *Branzburg* not in the relevant jurisdiction!

[231] Nestler n 36 above, 234-237 documents increased activity in the US. Other commentators have noted recent increases in grand jury subpoenas for news gatherers, D. Eggan , 'White House Trains Efforts on Media Links' 5 Mar 2006 at http://www.washingtonpost,com/wp-dyn/content/article/2006/03/04/AR2006030400867.html. In Australia, as to a sudden flurry of cases in the 1990's, see Law Reform Commission of Western Australia, (1993) Project No 90 'Professional Privilege for Confidential Communications' at [4.15 - 4.16]; R. Ackland 'Bring Unto Me Your Sources for Sacrifice' 1993 Issue 11 *City Ethics*. This has continued into the 21st century.

[232] The Australian Federal Attorney General informed the Chief Judge of the Victorian Court of the likely adoption of a qualified privilege for news gatherers' sources in the near future, a fact he said "might be relevant to whether imprisonment is an appropriate penalty" for McManus and Harvey. The NRMA eventually dropped its case against news gatherers, 'Turning Up The Heat: The decline of press

As for the news gatherers, the circumstances of the original publications that eventually led to *In re Grand Jury Subpoena* and *Sing Tao* give cause for real concern. Many journalist codes urge news gatherers to regard a confidentiality agreement as a last resort[233] and then only if the news gatherer honestly believes the source and the information are credible.[234] Some media organizations additionally require that the identity of any confidential informant be known to at least one editor.[235] In the US, it is said that at least since 2004 these requirements are being more vigorously enforced.[236] One certainly hopes that this is so. The point is all news gatherers who argue for special protection for news gatherer/ confidential source relationships need to take their public interest responsibilities very seriously. They need to be vigilant to ensure that news gathering serves rather than threatens liberal democracy, that is, that the public benefits of publishing on confidentiality terms clearly outweigh the public and private costs of both the publication of the material and any subsequent disclosure or nondisclosure of sources. Such disinterested vigilance is both the justification for and the price of special protection for news gatherer/ confidential source relationships.[237]

Unfortunately disinterested vigilance was lacking in the circumstances that gave rise to *In re Grand Jury Subpoena* and *Sing Tao.* All the Hong Kong and some of the US news gatherers[238] made very poor public interest judgments. They failed to

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freedom in Australia 2001-2005' at [2.6], in PDF on Alliance on Line at www.alliance.org.au/content/view/32/52/ (Last visited 8 July 2006). Lord Saville decided not to proceed against Alex Thompson and Lena Ferguson n 8 above. Even the defendants in *Branzburg* were not ultimately pursued for their sources!

[233] Media Entertainment and Arts Alliance Code of Ethics, Clause 3 (Australia); Pember n 95 above, 360; Holsinger & Dilts n 83 above, 358-360. Interestingly, the Code of Ethics of the Hong Kong Journalists Association and the Press Complaints Commission Code of Practice n 4 above do not. Such agreements need not be absolute, being subject to judicial command to the contrary as in *Totalise* v *Motley Fool Limited* n 40 above or findings of falsehood on the part of the source, 'Statement of Journalistic Ethics for The Daily Press, Inc. News Department' at http://www.dailypress.com/services/site/dp-confidentiality,0,7979614.htmlstory (Last visited 25 October 2005).

[234] Preferably after crosschecking with other sources – even at the risk of inviting an injunction in some common law jurisdictions.

[235] See The New York Times Company, 'Confidential News Sources' at http://www.nytco.com/company-properties-times-sources.html (Last visited 26 Mar 2006 (effective March 2004); L. Downie Jr, 'The Guidelines We Use to Report the News' 7 Mar 2004 at http://www.washingtonpost.com/ac2/wp-dyn/A35470-2004Mar6?language=printer (Last visited 23 Mar 2006); D. Offer, 'It is rare that we don't identify a source', 21 August 2005 Kennebec Journal online at http://kennebecjournal.mainetoday.com/view/columns/1880207.shtml (Last visited 25 October 2005); 'Statement of Journalistic Ethics for The Daily Press, Inc. News Department' n 237 above.

[236] Manly, 'Big News Media Join in Push to Limit Use of Unidentified Sources' n 213 above.

[237] Barendt n 191 above, 421-424, in which Barendt describes his third perspective on the relationship between freedom of the press and freedom of speech.

[238] Paradoxically, Cooper and Miller were two of the least blameworthy of the news gatherers in this

appreciate that the story the people in their respective liberal democracies needed to know was not that supplied by the source but the fact that the particular source had supplied it, and they published and/or republished information about an individual that increased the chances of personal injury to that individual or her associates, with minimal or no compensating public benefit. There was also the real possibility that the source(s) had manipulated the news gatherers and abused news gatherer/ source protection in ways damaging to liberal democracy without any compensating benefit. In *In re Grand Jury Subpoena* the source may have been attempting to stifle or at least discredit another person's inconvenient, politically significant speech – the antithesis of freedom of expression. In HK the effectiveness and integrity of criminal process were threatened. So, the news gatherers wrote the wrong stories and they protected the wrong people.[239]

How should constitutional imperative/ weighted balancing protection for news gatherers' confidential sources be applied in such circumstances? Robertson and Nicol suggest that a promise of confidentiality to a source obtained by a trick or where 'it turns out the source has tried to involve the journalist in a serious criminal conspiracy' might give way to a higher morality.[240] Using a strong constitutional imperative approach, including taking full account of the Hong Kong ICAC's use of a warrant rather than a subpoena, and given the absence of any showing of real public interest in the identities of the CIA agent or protected witness, a judge would be justified in concluding that the public interest in protecting the physical safety of people assisting in law enforcement and national security requires news gatherers and possible sources to be fully aware there would be no special protection from judicially compelled disclosure of source identity in such circumstances. The possible sources would then choose other strategies.

What of the other illustrative cases? How would they fare in a common law jurisdiction in which there is constitutional imperative protection against judicially compelled disclosure for news gatherers' sources? It is submitted that *Ackroyd (1) and (2)* and *McManus/Harvey* would never reach a judge. Those who would wish to compel disclosure in such circumstances would surely be advised they would not get

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respect. Miller had not published anything and Cooper was the first to question why top White House officials were releasing this information, see E. Eun, 'Journalists Caught in the Crossfire: Robert Novak, the First Amendment, Journalist's Duty of Confidentiality' (2005) 42 Am. Crim.L.Rev. 1073, 1088.

[239] See also E. Wasserman, 'Essay on Source Confidentiality: A Critique of Source Confidentiality' (2005) 19 ND J.L. Ethics & Pub Pol'y 553; P. Sussman, 'A Response: Journalists have another option --- report the misinformation effort' 23 Nov 2005 at http://www.gradethenews.org/commentaries/leakspv.htm.

[240] n 64 above, 255.

the orders they seek.[241] *Ashworth* might still proceed. The case for protection of medical records generally is very strong though substantially weakened by the patient's own disclosures in this case, stronger still if the physical security of staff and patients really was at risk, but the case for public exposure of further problems with the particular institution was also very strong. At least a constitutional imperative analysis should mean the issues could be more speedily resolved, in the unusual combination of circumstances in that case probably in the source's favour.

As to other types of case, absent physical safety or truly compelling law enforcement/ national security concerns, constitutional imperative source protection would normally prevail in criminal cases arising out of the disclosure or publication only.[242] In criminal cases unconnected with the disclosure, no news gatherer should wish or be permitted to remain silent about information that has a real chance of preventing a person suffering physical harm[243] or wrongful conviction.[244] Sometimes, swearing that the defendant was not the news gatherer's source may be sufficient. Sometimes, and subject to taking all possible steps to ensure the news gatherer's and the source's safety, identification of a source may be strictly necessary. Most credible sources will understand this. Otherwise, the public interest in protecting news gatherer/ confidential source relationships would still prevail.

As to breach of confidence and defamation, for defamation cases, the newspaper rule should be retained as a straightforward, cost effective proxy for constitutional imperative protection at the pre-trial stage.[245] More generally, constitutional

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[241] Likewise for *NRMA* v *John Fairfax* n 49 above and *R* v *National Post* n 57 above.

[242] So, a constitutional imperative analysis would produce a different result in *Secretary of State for Defence* v *Guardian Newspapers Ltd* n 134 above, at least on the evidence then advanced by the government and notwithstanding the HL's primary fear of more damaging leaks from the politically motivated source in the future.

[243] Robertson & Nicol n 65 above, 255. Protection of the arsonist source as described by J. White, 'Smoke Screen: Are State Shield Laws Really Protecting Speech or Simply Providing Cover for Criminals like the Serial Arsonist?' (2001) 33 Ariz. St. L.J, 909 does seem the wrong call. Cf N. Martin-Clark who, in breach of a promise of confidentiality, voluntarily testified against a source who admitted to a brutal murder, noted in Jyotika Oberoi, 'The Source of All Trouble … Revelations and Reservations' in global village at http://vega.soi.city.ac.uk/-abbc281/global_village/2006/01/the_source_of_all_troubler...(Last visited on 28 January 2006). He was, however, strongly criticized by his professional colleagues. See also 'Newspaper reporter to testify at capital murder trial' posted on News Media Update on 31 May 2006 at http://www.rcfp.org/news/2006/0531-con-newspa.html (Last visited 7 July 2006). The reporter's testimony would be restricted to published statements about a jailhouse interview with the defendant.

[244] L. Powe, Jr. n 188 above, 187 – 188 makes the point very forcefully. There is a parallel with law enforcement informants, see *Keane* [1994] 1 WLR 764, although the government also has the option of offering no evidence, choosing protection of the informant over a conviction. A news gatherer can only make that choice before publication, Miller not even then.

[245] There is evidence that English defamation laws inhibit the use of confidential sources so that the apparent effectiveness of this law in protecting confidential sources may be misleading, R. Weaver, A. Kenyon, D. Partlett, C. Walker, 'Defamation Law and Free Speech: Reynolds v. Times Newspapers and

imperative protection would ensure that breach of confidence and defamation actions could not be used to intimidate news gatherers and actual or potential sources in genuine public interest cases,[246] whilst leaving room for the exceptional case where the value of the source's information in terms of even the widest vision of self governance is minimal but the risk of significant economic harm or privacy invasion element is very high. However, many of these cases – especially those in the private sector – should be settled on the basis of financial decisions. Celebrity stories that have only gossip value will normally be selected for their perceived commercial or perhaps status value for the publisher. So, it is not unreasonable to adopt rules that compel news gatherers to consider potential costs as well as benefits when granting confidentiality and again at the time of publication. Such rules might reduce the source issue to a matter of evidence. Quite simply, no source means no evidence – which in turn may mean no defence. Some courts in the US have developed such rules.[247] Some news gatherers might take out insurance. All would need to consider very carefully before publishing low public interest value but damaging information relying only on a protected confidential source – but that is as it should be.

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the English Media' (2004) 37 Vand. J. Transnat'l L. 1255 but that alone is no reason to remove it.

[246] As may have occurred in Ken Peter's case, a Canadian news gatherer punished for refusal to disclose his source in a defamation action arising out of an article disclosing serious problems in a local retirement home, reported 8 December 2004 by IFEX at http://www.ifex.org/en/content/view/full/63083 (Last visited 6 June 2005)

[247] R. Berger, 'The "No-Source" Presumption: The Harshest Remedy' 36 Am. U.L. Rev. 603 (1987); *Lois Ayash, M.D.* v *Dana Farber Cancer Institute et al* 13 Mass. L. Rep. 1 (default judgment entered against newspaper defendants who refused to disclose sources); R. McDonald, 'Sports Illustrated Libel Case Raises Troublesome Issues' 13 October 2005 Fulton County Daily Report at http://www.law.com (Last visited 14 October 2005), explaining why Time Inc settled the *Price v Time Inc* litigation noted at n 94 above, rather than have their lawyer inform the court which if any of four women knew the original source lied in her deposition for the plaintiff's lawyer; W. Richey n 101 above, noting the news gatherers' $750,000 share of the financial settlement of Wen Ho Lee's privacy action, noted at n * above. For an argument in support of this solution in defamation cases see Garry 'Anonymous Sources, Libel Law, and the First Amendment' n 195 above.