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Shielding the Public Interest: What Canada Can Learn from the United States in the Wake of *National Post and Globe & Mail*

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SHIELDING THE PUBLIC INTEREST: WHAT CANADA CAN LEARN FROM THE UNITED STATES IN THE WAKE OF *NATIONAL POST* AND *GLOBE & MAIL*

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Abstract: In Canada and the United States, freedom of the press is among the most fundamental rights of citizens; yet, the exact contours of this freedom are still hotly debated. One contested question concerns the right of a journalist to protect the identity of his or her confidential sources. In Canada, two recent Supreme Court decisions established that a journalist may have a privilege to protect the identity of his or her confidential sources. This Note argues that the case-by-case determination with a presumption in favor of disclosure that these two cases establish is insufficient to protect the strong interest in a free press, which is bolstered by the ability to use confidential sources. Rather, Canada should legislatively enact a shield law based on those of many U.S. states in which the privilege is extended broadly and is nearly absolute, with only limited circumstances in which the state can compel disclosure.

INTRODUCTION

For years, Canada has been one of the countries leading the world in freedom of the press.[1] In 2010, Reporters Without Borders ranked Canada twenty-first out of 178 nations in its annual survey, the Press Freedom Index.[2] Indeed, in the years between 2002 and 2010, Canada never fell below the twenty-first position on this survey.[3]

Despite its highly developed freedom of the press, Canadian journalists have experienced certain setbacks in their quest for full freedom

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[1] *See, e.g.*, Press Freedom Index 2010, REPORTERS WITHOUT BORDERS, http://en.rsf.org/press-freedom-index-2010,1034.html (last visited Jan. 11, 2012); Press Freedom Index 2009, REPORTERS WITHOUT BORDERS, http://en.rsf.org/press-freedom-index-2009,1001.html (last visited Jan. 11, 2012).

[2] *See* Press Freedom Index 2010, *supra* note 1.

[3] *See id.* To view Canada's rank in any year from 2002 to 2009, choose the appropriate year from the drop-down menu titled "Look up other years," *available at* http://en.rsf.org/press-freedom-index-2010,1034.html.

of the press.[4] For example, in 2010, the Supreme Court of Canada upheld a broad ban against the publication of information arising out of bail hearings.[5] In 2009, a federal court in Canada limited public access to information when it denied a professor-journalist's request to review government information about human rights in Afghanistan.[6] Further, after a 2004 provision of the Criminal Code allowed journalists to be a source of evidence in certain criminal investigations, several journalists had to fight to keep their notes and photographs private.[7]

Part I of this Note lays out the facts of several key cases from the highest courts in Canada and the United States regarding the journalist-source privilege. Part II discusses the importance of confidential sources and the current state of the law with regard to a privilege for journalists to protect the identity of their confidential sources under Canadian and U.S. law. Part III shows how the *National Post* standard is insufficient to protect the journalist-source relationship and then proposes that the Parliament of Canada (Parliament) legislatively enact a shield law to address these issues. It goes on to use the large body of work about the journalist-source privilege in the United States to discuss how Parliament should address two of the biggest issues regarding shield laws: the extent of the privilege and to whom the privilege is extended.

I. Background

A. *The Tenuousness of Confidential Sources in Canada*

One particular aspect of freedom of the press has recently seen a great deal of legal flux: the privilege of journalists to maintain the confidentiality of their sources.[8] Over the past several years, various Canadian journalists have been compelled to turn over their confidential

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[4] *See infra* text accompanying notes 5–7.

[5] *CJFE Disappointed in Outcome of Publication Bans Case at Supreme Court*, Canadian Journalists for Free Expression (June 10, 2010), http://www.cjfe.org/resources/media_releases/cjfe-disappointed-outcome-publication-bans-case-supreme-court.

[6] *CJFE Disappointed by Decision in Access to Information Case*, Canadian Journalists for Free Expression (Apr. 5, 2009), http://www.cjfe.org/node/272.

[7] *CJFE Distressed by Court Approval of Seizure of Photographs*, Canadian Journalists for Free Expression (June 29, 2008), http://www.cjfe.org/node/246.

[8] *Compare* R. v. Nat'l Post, 2010 SCC 16, [2010] 1 S.C.R. 477, ¶ 77 (Can.) (holding that a defendant journalist must turn over a piece of physical evidence that may have revealed the identity of his confidential source), *with* Globe & Mail v. Canada (Attorney Gen.), 2010 SCC 41, [2010] 2 S.C.R. 592, ¶ 102 (Can.) (holding that a defendant journalist may be able to keep the identity of his source confidential, pending review by a lower court).

sources.[9] Two recent cases on this issue that found their way to the Canadian Supreme Court are *R. v. National Post*[10] and *Globe & Mail v. Canada.*[11] In the first case, the Canadian Supreme Court decided that the privilege of journalists to keep their sources confidential is not an essential part of the right to freedom of the press guaranteed by the Canadian Charter of Rights and Freedoms (Charter).[12] Instead, the Canadian Supreme Court held that there must be a case-by-case inquiry that balances the interest of a free press with the state's interest in the disclosure of information at trial.[13] The second case on this issue handed down in 2010 followed *National Post* and found that the correct procedure for analyzing whether a source should remain confidential is a case-by-case balancing test.[14] Nevertheless, in that case, the Canadian Supreme Court used the same balancing test to come out to a starkly different result; namely, that the source may be able to remain confidential, pending further analysis by a lower court.[15]

1. The Facts of *R. v. National Post*

The facts of this case arise out of the possession of an envelope and document purported to be from the Business Development Bank of Canada (BDBC) showing that Prime Minister of Canada Jean Chrétien was engaged in a serious financial conflict of interest.[16] The appellant in this case, Andrew McIntosh, was a reporter with the Canadian newspaper, the *National Post,* for over six years between August 1998 and February 2005.[17] During his time with the *National Post,* McIntosh deeply investigated Chrétien's involvement with the Grand-Mère Golf Club, located in Chrétien's home riding in Quebec.[18] During the course of this investigation, McIntosh came to suspect that Chrétien had been involved in questionable activities with the Auberge Grand-Mère, a hotel located next to the golf club.[19] Over the course of his investigation, McIntosh contacted a person, known as Confidential Source X (X), but

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[9] *See, e.g.*, *Nat'l Post*, [2010] 1 S.C.R. at ¶ 77.
[10] *See* [2010] 1 S.C.R. 477.
[11] *See generally* [2010] 2 S.C.R. 592.
[12] *See Nat'l Post*, [2010] 1 S.C.R. ¶ 41.
[13] *See id.* ¶ 55.
[14] *See Globe & Mail*, [2010] 2 S.C.R. ¶ 65.
[15] *Compare id.* at ¶ 102, *with Nat'l Post*, [2010] 1 S.C.R. ¶ 77.
[16] *Nat'l Post*, [2010] 1 S.C.R. ¶ 4.
[17] *Id.* ¶ 8.
[18] *Id.*
[19] *Id.*

X was not willing to communicate with him.[20] Thereafter, Confidential Source Y (Y) contacted McIntosh with important information that he or she would disclose in return for a blanket, unconditional promise of confidentiality.[21] Y indicated that he or she was acting on behalf of X, who had important information about the Auberge Grand-Mère loan.[22] McIntosh, as part of his job, was authorized to give such promises of confidentiality, and this particular promise was made with the approval of his editor-in-chief.[23] With these materials, which appeared to be legitimate, McIntosh wrote that Chrétien had contacted the BDBC and lobbied for the approval of a loan to the Auberge Grand-Mère, an allegation that Chrétien confirmed.[24]

Months later, McIntosh received a document that purported to be the internal authorization for a BDBC loan to the Auberge Grand-Mère.[25] This document also allegedly showed that the Auberge Grand-Mère owed a debt to JAC Consultants, a company owned by the Chrétien family.[26] If true, these allegations would be a major scandal implicating the Prime Minister.[27] A week after McIntosh received the document, X requested a meeting with him.[28] X requested that McIntosh dispose of the document for fear that the police may obtain it in order to try to ascertain its source.[29] McIntosh stated that he would not dispose of the document, but would keep his promise of absolute confidentiality, so long as he believed X had not intentionally misled him.[30] McIntosh testified that he believed X to be a reliable source, and that if the document were forged, he did not think that X knew it.[31] Thereafter, the Royal Canadian Mounted Police (RCMP) met with McIntosh and several *National Post* editors; *National Post* counsel refused to comply with the RCMP's request to produce the document and envelope, and McIntosh refused to identify the source.[32]

In 2002, the RCMP applied for an order to produce the document and envelope, because it could not get the necessary information else-

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[20] *Id.*
[21] *Id.* ¶ 9.
[22] *Nat'l Post*, [2010] 1 S.C.R. ¶ 11.
[23] *Id.* ¶ 9.
[24] *Id.* ¶ 11.
[25] *Id.* ¶ 12.
[26] *Id.*
[27] *Id.*
[28] *Nat'l Post*, [2010] 1 S.C.R. ¶ 16.
[29] *Id.*
[30] *Id.* ¶ 17.
[31] *Id.* ¶ 18.
[32] *Id.* ¶ 19.

where.[33] The judge ordered that McIntosh produce the letter and envelope because they were the substance of the crime and may have contained physical evidence such as DNA.[34] The appellants applied to quash the orders and the reviewing judge set them aside, stating that the damage to freedom of expression did not outweigh the remote possibility that the production of the requested evidence would lead to a conviction.[35] This decision was later reversed by the Ontario Court of Appeal.[36] It is with this factual and procedural background that the case proceeded to the Canadian Supreme Court.[37]

2. The Facts of *Globe & Mail v. Canada* (Attorney General)

The *Globe & Mail* case followed just months after *National Post* and addressed the same general question of what privilege journalists have to keep their sources confidential.[38] This case arose out of the litigation surrounding the so-called Sponsorship Scandal.[39] After the failed attempt by Quebec to secede from Canada in 1995, the federal government came up with the Sponsorship Program to increase the federal government's visibility in Quebec.[40] At this time, Daniel Leblanc was a journalist with the *Globe & Mail*, and wrote a series of articles about the Sponsorship Program.[41] Notably, he leveled the serious allegation that public funds had been misused throughout the Sponsorship Program.[42] Leblanc obtained his information from a confidential source known only as MaChouette.[43] Through their correspondence, he pledged to protect her confidentiality.[44]

The articles written by Leblanc generated significant media attention and a Royal Commission known as the Gomery Inquiry (Inquiry) was struck to investigate this scandal.[45] As a result of the Inquiry, in 2005, the Attorney General of Canada filed a motion in a Quebec court in an attempt to recoup the losses that the federal government had suf-

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[33] *Id.* ¶ 21.
[34] *Nat'l Post*, [2010] 1 S.C.R. ¶¶ 21–22.
[35] *Id.* ¶ 24.
[36] *Id.*
[37] *See id.*
[38] *Globe & Mail*, [2010] 2 S.C.R. ¶¶ 1–3; *see Nat'l Post*, [2010] 1 S.C.R. ¶¶ 1–3.
[39] *Globe & Mail*, [2010] 2 S.C.R. ¶ 2.
[40] *Id.* ¶ 4.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Globe & Mail*, [2010] 2 S.C.R. ¶ 5.

fered as a result of corruption in the Sponsorship Scandal.[46] Based on its contention that the government knew about the Sponsorship Scandal at an early date, Groupe Polygone, one defendant, raised a defense allowed by Quebec law.[47] In order to support its defense, Groupe Polygone requested an order forcing several people to give testimony in the hopes that it would help to out Leblanc's confidential source, MaChouette.[48] The *Globe & Mail* brought a motion attempting to revoke these orders, arguing that their effect was to breach the privilege of a journalist to keep his sources confidential.[49] Leblanc testified in support of the *Globe & Mail*'s motion and was cross-examined by counsel for Groupe Polygone.[50] At several points during the cross-examination, counsel for the *Globe & Mail* objected, stating that if Leblanc were to answer the questions, the effect would be to force him to disclose the true identity of MaChouette, in violation of the oath of confidentiality given by Leblanc to his informant.[51] The judge at the trial refused to grant these objections as he did not recognize a journalist-source privilege.[52] After a Court of Appeal refused to hear the appeal on this issue, the *Globe & Mail* sought to discontinue hearings on its motion to revoke the earlier orders to protect Leblanc from disclosing his source.[53] The trial judge did not grant this discontinuance and the Quebec Court of Appeals proceeded to dismiss the appeal.[54] It is in this context that the issue of journalist-source privilege came to the Canadian Supreme Court in this case.[55]

B. *The U.S. Experience with Journalists and Confidential Sources*

1. From *Branzburg* to Judith Miller: A Troubling Pattern of Forced Disclosure of Confidential Sources in the United States

Branzburg v. Hayes was the consolidation of three different cases all concerning whether compelling journalists to appear before grand juries violates the First Amendment's guarantees of free speech and free

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[46] *Id.* ¶ 7.

[47] *Id.* ¶ 8. The defendant "sought to advance a defence of prescription under the Civil Code of Québec." *Id.*

[48] *Id.*

[49] *Id.* ¶ 9.

[50] *Id.*

[51] *See Globe & Mail*, [2010] 2 S.C.R. ¶ 9.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *See id.* ¶¶ 9, 14.

press.[56] The first of the component cases came before the Supreme Court of the United States (U.S. Supreme Court) from two different judgments by the Kentucky Court of Appeals.[57] Branzburg was a journalist for the *Courier-Journal* in Louisville, Kentucky, who wrote a piece about creating hashish from marijuana.[58] He was subpoenaed to appear before a grand jury and reveal his sources, but he refused.[59] The trial court judge ordered him to answer, stating, *inter alia,* that the First Amendment of the U.S. Constitution (Constitution) did not afford him immunity from answering.[60] The second case involving Branzburg arose from an article that he had written about drug use in Frankfort, Kentucky, in which he had interviewed several drug users.[61] He once again protested being brought before a grand jury and once again, the Kentucky Court of Appeals rejected his arguments, which included a First Amendment argument.[62] The U.S. Supreme Court granted Branzburg's writ of certiorari to adjudicate the First Amendment issue.[63]

The second component case involved a judgment from the Supreme Judicial Court of Massachusetts.[64] Pappas, a journalist and photographer, gained entrance to the inside of a restricted-entry Black Panther meeting.[65] The condition of his entrance was that he would neither photograph nor discuss anything seen inside of the building, except as related to a possible police raid.[66] Such a raid never happened and Pappas never published any story; however, he was summoned before a grand jury but refused to answer questions about the meeting, claiming First Amendment immunity from answering such questions.[67] The trial judge and later the Supreme Judicial Court of Massachusetts rejected this contention, and the U.S. Supreme Court granted certiorari.[68]

The third component case involved Caldwell, a *New York Times* reporter in California who was also covering the Black Panther Party.[69] He

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[56] *See* 407 U.S. 665, 667, 671, 675, 679 (1972).
[57] *Id.* at 667.
[58] *Id.*
[59] *Id.* at 668.
[60] *Id.*
[61] *Id.* at 669.
[62] *Branzburg*, 407 U.S. at 670.
[63] *Id.* at 671.
[64] *Id.* at 673.
[65] *Id.* at 672.
[66] *Id.*
[67] *Id.* at 672–73.
[68] *Branzburg*, 407 U.S. at 673–75.
[69] *Id.* at 675.

was summoned before a grand jury to testify and filed a motion to quash on First Amendment grounds.[70] The District Court denied this motion but nevertheless held that Caldwell had a qualified privilege, which included the right not to reveal confidential sources, associations, and information.[71] The Court of Appeals reversed and held that, in this case, requiring the reporter to testify at all would deter his confidential sources from associating with him, thus abridging his First Amendment rights.[72] As in the other two cases, the U.S. Supreme Court granted certiorari to consider this issue.[73] Eventually, the U.S. Supreme Court ruled that the First Amendment included no protection for confidential sources, effectively mandating that these three journalists comply with the orders to reveal the identities of their confidential sources.[74]

Decades later, the issue of protecting journalists' confidential sources is still a pressing topic that generates much scholarly debate in the United States.[75] In the first decade of the twenty-first century, U.S. courts attempted to force journalists to disclose their sources in numerous high-profile cases.[76] One of the most high-profile of all of these cases, however, was that of Judith Miller of the *New York Times*.[77] The action against Miller arose out of journalist Robert Novak's disclosure of the identity of Valerie Plame, a Central Intelligence Agency operative.[78] Such unauthorized disclosure to unauthorized sources is a federal crime, and thus an investigation ensued.[79] As part of this investigation, numerous journalists who had received this information from a number of confidential sources were subpoenaed to testify; among these reporters was Judith Miller.[80] On August 12, 2004, Miller was subpoenaed to

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[70] *Id.* at 675–76.

[71] *Id.* at 677–78 (citing Application of Caldwell, 311 F. Supp. 358, 362 (N.D. Cal. 1970)).

[72] *Id.* at 679.

[73] *Id.* at 671, 673–75, 679.

[74] *See Branzburg*, 407 U.S. at 708.

[75] *See, e.g.*, Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information,* 20 Yale L. & Pol'y Rev. 97, 102–03 (2002); Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege,* 14 Wm. & Mary Bill Rts. J. 1063, 1068–72 (2006).

[76] *See* Alexander, *supra* note 75, at 1094–102 (discussing several recent press subpoena cases).

[77] *See* Daniel Joyce, *The Judith Miller Case and the Relationship Between Reporter and Source: Competing Visions of the Media's Role and Function,* 17 Fordham Intell. Prop. Media & Ent. L.J. 555, 557 (2007).

[78] *See id.* at 559–60.

[79] *Id.* at 560.

[80] *See id.* at 560–61.

testify in front of a grand jury to identify the identity of her source.[81] She refused and was held in contempt of court; however, she was spared from jail pending an appeal.[82] The U.S. Supreme Court denied certiorari on Miller's case on June 27, 2005, and on July 6, Miller was jailed for her continued refusal to disclose the identity of her source.[83] She was held until September 29, when she received a waiver from her source and subsequently agreed to testify.[84]

2. Protecting Journalists Through State Shield Laws

Many states have granted protection to the relationship between journalists and their confidential sources by passing shield laws.[85] In fact, in March 2011, West Virginia's legislature passed a shield law.[86] After being signed in April 2011, West Virginia became the fortieth state to pass a shield law; the District of Columbia also has a shield law.[87]

A shield law is a legislative enactment that lays out the rights of journalists and protects them from being forced to disclose, among other things, the identity of their confidential sources.[88] The protections offered by these statutes vary greatly in nature, with some being incredibly protective of journalists and forbidding compelled disclosure of confidential sources in any circumstances, while others grant far narrower protections.[89] The journalist-source privilege codified by these shield laws incentivizes sources that would otherwise stay silent for fear of reprisals to come forward with information of great import to the public.[90]

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[81] *Id.*

[82] *Id.* at 561.

[83] Joyce, *supra* note 77, at 561.

[84] *See id.*

[85] Kristen Rasmussen, W. Va. Shield Bill Passed, Awaits Acting Governor's Signature, Reporters Committee for Freedom Press (Mar. 14, 2011), http://www.rcfp.org/newsitems/index.php?i=11756.

[86] *Id.*

[87] Kristen Rasmussen, West Virginia Acting Governor Signs Reporter Shield Law, Reporters Committee for Freedom Press (Apr. 6, 2011), http://www.rcfp.org/newsitems/index.php?i=11810.

[88] *See* Jaime M. Porter, Note, *Not Just "Every Man": Revisiting the Journalist's Privilege Against Compelled Disclosure of Confidential Sources*, 82 Ind. L.J. 550, 561–62 (2007).

[89] *Compare* Mont. Code Ann. § 26-1-902 (2009) (granting absolute immunity to journalists seeking to protect the identity of their confidential sources), *with* Ga. Code Ann. § 24-9-30 (2010) (providing several factors that can overcome the privilege).

[90] *See* Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege,* 34 Hofstra L. Rev. 39, 41 (2005).

II. Discussion

A. *The Benefits and Costs of a Privilege Protecting Confidential Sources*

The importance of using confidential sources has been well-documented in numerous studies.[91] At the most basic level, the goal of any privilege is "to promote open communication in circumstances in which society wants to encourage such communication."[92] In the context of journalists and confidential sources, there are often people with valuable information—information about political corruption, for example—who may nevertheless withhold this information for fear of retaliation or simply for fear of getting involved in an explosive situation.[93] Although the press is often a reliable disseminator of information of value to the public, such trepidation in a source may dissuade him from going public with important information if he has legitimate fears that his correspondence with a journalist may not be kept private.[94]

The number of journalists who have used confidential sources in their work is quite high; indeed, scholars have noted that the use of confidential sources provides a wide variety of benefits to journalists.[95] First, the use of confidential sources allows journalists to get their hands on information that they might not otherwise be able to obtain.[96] Second, it better allows journalists to develop relationships with sources.[97] Third, the promise of confidentiality facilitates the building of trust between confidential sources and journalists.[98] Fourth, confidentiality aids journalists by "giving comfort, confidence, and protection to fearful sources."[99]

A 1971 empirical study on the use of confidential sources by journalists documented the potential detrimental effects of subpoenaing journalists.[100] According to this study, one negative effect of forcing

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[91] *See, e.g.*, Vince Blasi, *The Newsman's Privilege: An Empirical Study,* 70 Mich. L. Rev. 229, 245–46 (1971); John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas,* 17 Colum. Hum. Rts. L. Rev. 57, 63–67 (1985); Stone, *supra* note 90, at 41–43.

[92] Stone, *supra* note 90, at 39.

[93] *Id.* at 41.

[94] *See id.* at 42.

[95] Alexander, *supra* note 75, at 102 n.19 (citing Byron St. Dizier, *Reporters' Use of Confidential Sources, 1974 and 1984: A Comparative Study,* 6 Newspaper Res. J. 44, 46 (1985)); *see infra* text accompanying notes 96–99.

[96] *Id.* at 102.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] Blasi, *supra* note 91, at 265–68.

journalists to disclose confidential sources rests with the journalist.[101] This effect is the "professionally incapacitating worry and hassle to which the reporter is subjected."[102] This translates into both a lack of time to do his job and cover his stories because the reporter is spending time dealing with myriad legal issues.[103] The journalist must spend a great amount of time dealing with ethical worries, and may ultimately face jail time for refusing to comply with a subpoena.[104] Another negative, yet intangible, effect is the drying up of sources that fear the subpoena threat.[105] Although it is unclear whether sources that refuse to give information are uncooperative because of the fear that their confidentiality may be violated, the study identified two tangible effects—based on the experience of reporters—of the subpoena threat.[106] Some sources stopped allowing reporters to record conversations that could later be used as evidence.[107] Further, the "cajoling and elaborate promises" necessary to ease the fears of some confidential sources could significantly delay a key story.[108] Finally, and perhaps most importantly, the ultimate negative effect of under-protecting source confidentiality is a complete refusal of a prospective source to give crucial information.[109]

Another empirical study published fourteen years later confirmed the previous study's claims about the deleterious effects of subpoenaing journalists to force them to reveal their confidential sources.[110] Importantly, this study found that every reporter interviewed had used a confidential source at some point within the preceding ten years.[111] Moreover, over half of the respondents indicated that they used such sources often.[112] By a two-to-one margin, respondents stated that confidential sources were particularly important to their biggest stories—those nominated for a Pulitzer Prize.[113] This appears to be because the biggest stories are often those about corrupt public officials and confiden-

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[101] *Id.* at 265.

[102] *Id.*

[103] *See id.* at 265–66.

[104] *Id.*

[105] *See id.* at 266.

[106] Blasi, *supra* note 91, at 267–68.

[107] *Id.* at 267.

[108] *Id.* at 268.

[109] *Id.*

[110] *See* Osborn, *supra* note 91, at 72–77 (analyzing the empirical data regarding the effects of press subpoenas on journalists and their work).

[111] *Id.* at 72.

[112] *Id.* at 72–73.

[113] *Id.* at 74.

tiality in this kind of investigative journalism is almost a necessity.[114] Many reporters said that the lack of protection provided by U.S. law to promises of confidentiality did not affect them because they were willing to go to jail rather than disclose source identities.[115] However, the author concluded that "[t]he confidential relationship, so crucial a tool in gathering the news, cannot flourish indefinitely if supported solely by reporters' willingness to go to jail."[116] Unsurprisingly, another even more recent empirical study generated extremely similar results.[117]

In contrast, allowing reporters not to disclose the identities of their confidential sources imposes various costs on society.[118] Paramount among these is the violation of the legal maxim that in a fair system of justice, the public has the right to "every man's evidence."[119] Allowing a journalist to abstain from testimony about the identity of a confidential source could deprive the public of valuable information that would allow justice to be done.[120]

However, there are strong counterpoints to the argument against recognizing a legal protection for confidential sources.[121] First, if a would-be confidential source chooses not to come forward with his valuable information because of the threat of forced disclosure, the public will not have this valuable evidence.[122] This means that the public ends up with the same amount of evidence with or without the privilege.[123] Second, it is likely that the most important confidential disclosures concern the kind of information that would place the source in serious

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[114] *See id.*

[115] *Id.* at 74–75.

[116] Osborn, *supra* note 91, at 77.

[117] RonNell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism,* 84 Wash. L. Rev. 317, 353–74 (2008). In this study, the author found that subpoenas attempting to force journalists to reveal confidential sources both negatively affected newsroom time and cost media outlets money. *Id.* at 354, 361. Further, many newspapers have changed their material retention policies to avoid subpoenas, which forces journalists to give up invaluable sources; many reporters have also had to abandon cases due to a subpoena threat. *Id.* at 364, 366. Journalists also believed that subpoena cases that received great amounts of publicity made their confidential sources uneasy, negatively affecting the number of potential informants willing to step forward with information. *Id.* at 368–69. Finally, and more intangibly, journalists reported concern about the media's neutral role, and fear that media outlets would be used as tools for discovery. *Id.* at 373.

[118] *See* Stone, *supra* note 90, at 48.

[119] *See* 8 John Henry Wigmore, Evidence § 2285 (McNaughton rev. 1961).

[120] *See* David Abramowicz, Note, *Calculating the Public Interest in Protecting Journalists' Confidential Sources,* 108 Colum. L. Rev. 1949, 1952 (2008).

[121] *See* Stone, *supra* note 90, at 49–50.

[122] *Id.* at 49.

[123] *See id.*

jeopardy were the leak to be traced back to him.[124] This would seem to indicate that the absence of a privilege is most likely to chill the very communications in which the public has the greatest interest.[125] Third, there is little noticeable difference between law enforcement in states with an absolute privilege where a journalist can never be compelled to disclose his confidential source's identity and in states with only a qualified privilege where a journalist can be forced to disclose a source's identity under certain circumstances.[126] In this light, "it seems clear that the benefits we derive from the privilege significantly outweigh its negative effects on law enforcement."[127]

B. *Three Legal Bases for a Reporter's Privilege in Canada and the Adoption of a Case-by-Case Approach in* National Post

National Post stands as a major case addressing the ability of journalists to keep their sources confidential.[128] In beginning its analysis, the Canadian Supreme Court emphasized the competing interests that are at stake when deciding whether a journalist should be compelled to disclose the identity of a confidential source.[129] Specifically, the Canadian Supreme Court stated that "[t]he investigation and punishment of crime is vital in a society based on the rule of law but so is the freedom of the press and other media of communication."[130] The general rule referenced by the Court is that the public has the right to every person's evidence.[131] Nevertheless, the Canadian Supreme Court pointedly noted that this right is not absolute and proceeded to list myriad instances in which "narrow exceptions have been recognized as necessary to further precisely defined and overriding public interests."[132] The Canadian Supreme Court noted, without information from confidential sources, "[i]mportant stories will be left untold, and the transparency and accountability of our public institutions will be lessened to the public detriment."[133] Therefore, the Canadian Supreme Court ulti-

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[124] *See id.*

[125] *See id.*

[126] *See id.* at 49–50.

[127] Stone, *supra* note 90, at 50. *But see* Alexander, *supra* note 75, at 102 ("[N]ewspapers in states with journalist-protecting shield laws do more investigative reporting and win more awards for their reporting than their counterparts in non-shield-law states.").

[128] *See* R. v. Nat'l Post, 2010 SCC 16, [2010] 1 S.C.R. 477, ¶¶ 1–3 (Can.)

[129] *See id.* ¶ 26.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.* ¶ 33.

mately determined that the law accepts that in some instances, the public's interest in being informed by journalistic work will outweigh the state's interest in effectively prosecuting crime.[134] It is in these instances, the Canadian Supreme Court reasoned, that a court should grant immunity to a journalist against the compelled disclosure of his or her confidential sources.[135]

Although the Canadian Supreme Court recognized that some sort of privilege did exist for journalists to maintain the confidentiality of sources, the question as to the source from which that immunity sprang still needed to be answered.[136] Ultimately, after weighing the competing interests involved in granting journalists a privilege against compelled disclosure of confidential sources' identities, the Canadian Supreme Court held that a journalist's privilege to protect the confidentiality of secret sources should be analyzed on a case-by-case basis.[137] However, in coming to this holding, the Canadian Supreme Court also analyzed and rejected two other possible sources for the journalist-source privilege under the laws of Canada based on a variety of policy considerations.[138]

1. The Constitutional Approach

The broadest source of the journalist's privilege considered by the Court was the Charter.[139] The relevant starting point for such a legal proposition is found in Section 2(b) of the Charter, which reads "[e]veryone has the following fundamental freedoms: . . . freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[140] The interveners Canadian Civil Liberties Association (CCLA) and British Columbia Civil Liberties Association claimed that the use of confidential sources was so pivotal to newsgathering that it should be treated as if it were a right expressly included in the Charter.[141]

CCLA put forth a test for determining when a journalist could invoke the protections of the Charter against a compelled disclosure of

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[134] *Nat'l Post*, [2010] 1 S.C.R. ¶ 34.

[135] *See id.*

[136] *Id.* ¶ 35.

[137] *Id.* ¶¶ 51–52.

[138] *Id.* ¶¶ 41–42.

[139] *Id.* ¶ 37.

[140] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c.11, § 2(b) (U.K.) [hereinafter Canadian Charter]; *see Nat'l Post*, [2010] 1 S.C.R. ¶ 37.

[141] *Nat'l Post*, [2010] 1 S.C.R. ¶¶ 37–38.

confidential sources.[142] Namely, they proposed that "immunity is established by a claimant showing (i) that he or she is a journalist; (ii) engaged in news gathering activity; (iii) who has acquired information under a promise of confidentiality."[143] The interveners pushing this position did not claim that this immunity was absolute.[144] Section 1 of the Charter states that it "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[145] Therefore, the government could override the protections of Section 2 of the Charter by offering an acceptable justification under Section 1 of the Charter; however, the government, according to CCLA, would have to prove a "countervailing and fact-specific overriding public interest."[146] Overall, this scheme would include a presumption of immunity that can be overridden only in extreme cases.[147]

The Canadian Supreme Court, however, rejected the Charter as the legal source of a journalist's privilege against compelled disclosure of confidential sources.[148] Its first objection to such a basis for the journalist's privilege was that it viewed the claim that because the use of confidential sources was an important newsgathering technique, it was protected under the Charter as too farfetched.[149] The Canadian Supreme Court took note of several different methods utilized by journalists to gather news—some of them ethically questionable—and stated that it does not follow that each and every newsgathering technique considered important by journalists received protection from the Charter.[150] Secondly, the Canadian Supreme Court stated that Canadian courts have generally opposed grounding testimonial immunities in the constitution.[151] Indeed, even the solicitor-client privilege that is "one of the most ancient and powerful privileges" is generally not given constitutional status.[152] Finally, the Canadian Supreme Court noted the difficulty in defining to whom such a constitutional immunity would be ex-

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[142] *Id.* ¶ 37.
[143] *Id.*
[144] *See id.*
[145] Canadian Charter, *supra* note 140, § 1.
[146] *Nat'l Post*, [2010] 1 S.C.R. ¶ 37.
[147] *See id.*
[148] *See id.* ¶ 41.
[149] *Id.* ¶ 38.
[150] *See id.*
[151] *Id.* ¶ 39.
[152] *Nat'l Post*, [2010] 1 S.C.R. ¶ 39 (citing R. v. McClure, 2001 SCC 14, [2001] 1 S.C.R. 445, ¶ 17 (Can.)).

tended.[153] Recent jurisprudence made it clear that Section 2(b) protections belong to "everyone" and not merely to the traditional media.[154] The implication of the Charter's words and the Canadian Supreme Court's recent precedent is that a constitutional immunity would have to be extended to all citizens, not merely members of traditional media, like the appellant in *National Post.*[155] The Court fully elucidates its fear, stating that allowing anybody to promise confidentiality to any source on any terms would be a huge impediment to effective law enforcement.[156] Ultimately, the Canadian Supreme Court concluded that history has proven that Section 2(b)'s aims could be accomplished without constitutionalizing the journalist's privilege and thus rejected using the Charter as the basis for this privilege.[157]

2. The Class Privilege Model

After rejecting the Charter as the basis of the journalist's privilege, the Canadian Supreme Court began to examine the common law as a source.[158] At common law, there are two different kinds of privileges: class-based or case-by-case.[159] The Court notes that the distinguishing factor of a class privilege is that the particular relationship being protected—the seminal example being the solicitor-client privilege—is so important that communications therein must be protected, even at the risk of interference with the judicial process.[160] The Canadian Supreme Court, referencing *R. v. Gruenke,*[161] noted that very few class privileges exist in Canada.[162] Thus, the Court in *National Post* observed "[i]t is

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[153] *See id.* ¶ 40.

[154] *Id.*; *see* Grant v. Torstar, 2009 SCC 61, [2009] 3 S.C.R. 640, ¶ 96 (Can.).

[155] *See Nat'l Post*, [2010] 1 S.C.R. ¶ 40.

[156] *Id.* ("To throw a constitutional immunity around the interactions of such a heterogeneous and ill-defined group of writers and speakers and whichever 'sources' they deem worthy of a promise of confidentiality . . . would blow a giant hole in law enforcement and other constitutionally recognized values such as privacy.").

[157] *See id.* ¶ 41.

[158] *Id.* ¶ 42.

[159] *Id.*

[160] *Id.* ("Once the relevant relationship is established between the confiding party and the party in whom confidence is placed, privilege presumptively cloaks in confidentiality matters properly within its scope without regard to the particulars of the situation. Class privilege necessarily operates in derogation of the judicial search for truth and is insensitive to the facts of the particular case.").

[161] [1991] 3 S.C.R. 263 (Can.).

[162] *Nat'l Post*, [2010] 1 S.C.R. ¶ 42.

likely that in future (sic) such 'class' privileges will be created, if at all, only by legislative action."[163]

The Canadian Supreme Court also offered several compelling reasons not to adopt a class-based privilege for journalists and their confidential sources.[164] First, unlike the case of the solicitor, in which the profession is highly regulated to maintain professional standards, the journalism profession is unregulated and professionalism is often subpar, if not completely lacking.[165] Furthermore, the decision in *Grant* broadly defined the scope of journalism, thus further complicating the idea of extending a broad class based privilege to "journalists."[166] Second, the Canadian Supreme Court pointed out the extreme difficulty in determining to whom the privilege belongs and thus the rights of the journalist and the confidential source if a class privilege were created.[167] Third, the Canadian Supreme Court noted that no set of criteria had been proposed to determine when the privilege was created or lost.[168] Among newspapers, practices concerning when a journalist could even promise confidentiality—a necessary precondition for the privilege to attach—varied considerably.[169] Various media codes of ethics also diverged on this question and thus offered no help or guidance.[170] Finally, the search for truth is of the utmost importance and that search is seriously limited by the granting of a class privilege.[171] A case-by-case privilege is far more suited to adaptation when the circumstances warrant it than a class privilege.[172]

3. The Case-by-Case Model of Privilege

The final option that the Canadian Supreme Court considered was to approach the question of a journalist's privilege on a case-by-case basis.[173] Numerous cases handed down by the Canadian Supreme Court before *National Post* had laid out an ad hoc inquiry involving the

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[163] *Id.*
[164] *See id.* ¶¶ 43–46.
[165] *Id.* ¶ 43.
[166] *Id.*; *see Grant*, [2009] 3 S.C.R. ¶ 96.
[167] *Nat'l Post*, [2010] 1 S.C.R. ¶ 44.
[168] *Id.* ¶ 45.
[169] *Id.*
[170] *See id.*
[171] *Id.* ¶ 46.
[172] *See id.*
[173] *Nat'l Post*, [2010] 1 S.C.R. ¶ 50.

balancing of interests through a multi-part test.[174] This inquiry could be guided by the values enshrined in the Charter.[175] The Canadian Supreme Court had previously established that it was appropriate that common law principles such as the case-by-case model of privilege could be adapted to take into account these Charter values.[176] For example, in *Gruenke,* the original claim was that Section 2(a) of the Charter that protects freedom of religion also conferred a constitutional immunity for priests and penitents.[177] While the Canadian Supreme Court in that case found religious liberty is an important value to be fostered, it ultimately rejected this broad claim.[178] Instead, all of the interests at stake could be more adequately protected by the weighing of these factors against one another in a case-by-case analysis that frees courts to consider the totality of the circumstances and the strengths of the various rights implicated in any case.[179]

The four factors that should be considered in any case-by-case analysis of privilege are taken from John Henry Wigmore's seminal text on common law evidence, and are thus referred to by the Canadian Supreme Court as the "Wigmore criteria."[180] Reiterating its earlier conclusions about the indispensability of investigative journalism in keeping public institutions accountable to the public, the Canadian Supreme Court stated that this balancing test was a good way to allow courts the necessary flexibility to balance "the sometimes-competing interest of free expression and the administration of justice and other values that promote the public interest."[181] Ultimately, this is the approach adopted by the Canadian Supreme Court.[182]

The first criterion that must be established in a Wigmore analysis is that the communication originated "in a confidence that the identity of the informant will not be disclosed."[183] Second, "the confidence must be essential to the relationship in which the communication arises."[184] Combined, these two factors mean that the privilege can only be in-

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[174] *See id.* The Canadian Supreme Court cites to A. M. v. Ryan, [1997] 1 S.C.R. 157, ¶¶ 29–32 (Can.); *Gruenke,* [1991] 3 S.C.R. at 289–90; and Slavutych v. Baker, [1976] 1 S.C.R. 254, 261 (Can.), as support for this balancing test.

[175] *Nat'l Post,* [2010] 1 S.C.R. ¶ 50.

[176] *Id.* (citing RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, 603 (Can.)).

[177] *Id.* ¶ 51 (citing *Gruenke,* [1991] 3 S.C.R. at 290–91).

[178] *Id.*

[179] *Id.*

[180] *Id.* ¶ 53; *see* WIGMORE, *supra* note 119, § 2285.

[181] *Nat'l Post,* [2010] 1 S.C.R. ¶ 55.

[182] *Id.*

[183] *Id.* ¶ 53.

[184] *Id.*

voked where the information given by the secret source was unambiguously conditioned upon the promise of confidentiality regarding the identity of the source.[185] Third, "the relationship must be one which should be 'sedulously fostered' in the public good."[186] This requirement allows a court to consider different types of sources and journalists.[187] Fourth, if all of the first three criteria have been met, "the court must consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth."[188] Stating that this criterion "does most of the work," the Canadian Supreme Court noted that after the first three factors have been met, thereby establishing the public's interest in the particular journalist-source relationship, a court must weigh that value against countervailing interests.[189] Critically, the Canadian Supreme Court held that, throughout the entire process, the burden of proof rests with the journalists seeking to establish a privilege.[190] Until all four Wigmore criteria are satisfactorily established, "[t]he evidence is presumptively compellable and admissible."[191]

C. *The Legal Situation in the United States*

1. *Branzburg* and a Lack of a Federal Guidance

In *Branzburg,* the U.S. Supreme Court held that journalists could not refuse to testify before a grand jury based on the First Amendment.[192] The Court emphasized its respect for the importance of a free press and explicitly protected newsgathering under the First Amendment because "without some protection for seeking out the news, free-

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[185] *Id.* ¶ 56.

[186] *Id.* ¶ 53 (citing WIGMORE, *supra* note 119, § 2285).

[187] *Nat'l Post*, [2010] 1 S.C.R. ¶ 57. The Court gave important guidance on this point, noting that "[t]he relationship between the source and a blogger might be weighed differently than in the case of a professional journalist . . . who is subject to much greater institutional accountability within his or her own news organization." *Id.*

[188] *Id.* ¶ 53.

[189] *Id.* ¶ 58. Listing some countervailing interests, the Court stated that a court should consider "public interest[s] such as the investigation of a particular crime (or national security, or public safety or some other public good)." *Id.*

[190] *Id.* ¶ 60.

[191] *Id.*

[192] Branzburg v. Hayes, 408 U.S. 665, 665, 690 (1971). The U.S. Supreme Court stated that "until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy." *Id.* at 689–90.

dom of the press could be eviscerated."[193] However, it found no direct incursions upon the freedom of the press in requiring a journalist to testify before a grand jury.[194] Instead, the Court noted that every burden placed upon the press does not violate the First Amendment, and proceeded to catalog numerous other instances in which governmental restrictions burdened the newsgathering function of the press but nevertheless passed constitutional muster.[195] After reviewing such evidence, it noted that it was unsurprising that "the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation."[196] Ultimately, the U.S. Supreme Court dismissed the notion that its refusal to create First Amendment immunity for journalists would undermine the freedom of the press; indeed, it noted that this issue has not even been raised until 1958 and prior to that date, the press flourished.[197]

Interestingly, the majority addressed the contention that an infringement upon First Amendment rights must be "no broader than necessary to achieve a permissible government purpose."[198] The U.S. Supreme Court found that the government had not abused its function and impacted protected First Amendment rights.[199] Despite this holding, however, the majority stated that even tests that mandate the government provide a "'compelling' or 'paramount'" state interest were satisfied in this case.[200] It stated that "[i]f the test is that the government 'convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest,'" such a test was met.[201] However, the majority did not state that this was indeed the test.[202] Further, it noted that grand jury investigations without a legitimate purpose, instituted solely or primarily to harass the press, would raise different First Amendment issues and thus be unacceptable

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[193] *Id.* at 681.

[194] *See id.* at 681–82. The U.S. Supreme Court gives a detailed list of actions that it would consider to encroach upon the freedom of the press guaranteed by the First Amendment. *See id.* at 681. For example, the Court expressed concern about such activities as the assessment of a tax or the imposition of a penalty related to the publication of specific content and a ban on the use of confidential sources. *Id.*

[195] *See id.* at 682–86.

[196] *Id.* at 685.

[197] *Id.* at 698–99.

[198] *Branzburg*, 408 U.S. at 699.

[199] *Id.* at 699–700.

[200] *Id.* at 700.

[201] *Id.* at 700–01.

[202] *See id.* at 699–701.

as they "would have no justification."[203] Although the majority seemed to repudiate the need for a balancing test, such a statement raises the possibility that the justifications of the government should be balanced against the alleged violations of the First Amendment.[204]

Further complicating this analysis is the short, but poignant, concurrence by Justice Powell.[205] Justice Powell wrote separately to emphasize that he viewed the U.S. Supreme Court's holding as limited in nature.[206] Indeed, he emphasizes the majority's respect for First Amendment freedoms and reiterates that the majority's opinion assures that "no harassment of newsmen will be tolerated."[207] Most importantly, however, he emphasizes that

> the asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.[208]

Apparently, therefore, Justice Powell viewed the majority's holding as affirmatively leaving open the possibility of a case-by-case model of privilege, similar to the holding of the Canadian Supreme Court in *National Post*.[209] The lack of clarity about the journalist's privilege in this ruling has created a great deal of uncertainty among federal courts trying to apply it to other cases about the journalist's privilege.[210]

2. State Laws: A National Trend Toward Shield Laws

Despite the lack of consensus in the federal courts about the existence of a reporter's privilege, many states have established such a privi-

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[203] *Id.* at 707–08.

[204] *See Branzburg*, 408 U.S. at 708.

[205] *See id.* at 709–10 (Powell, J., concurring).

[206] *Id.* at 709.

[207] *Id.* at 709–10.

[208] *Id.* at 710.

[209] *Compare id.* at 710, *with Nat'l Post*, [2010] 1 S.C.R. ¶¶ 50–51.

[210] *Compare* Riley v. City of Chester, 612 F.2d 708, 716–17 (3d Cir. 1979) (establishing a reporter's privilege with a presumption of non-disclosure and a balancing test that a party seeking to overcome the privilege must satisfy), *with In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 918 n.8 (8th Cir. 1997) ("[W]e believe th[e] question [of whether a reporter's privilege exists] is an open one in this Circuit.").

lege.[211] As of the time of this writing, forty states and the District of Columbia have enacted some form of shield law that establishes the privilege of a journalist against being compelled to reveal the identity of confidential sources.[212]

States have written their shield laws in a variety of ways.[213] The extent of the protections offered by these shield laws varies among the states, with some states offering complete immunity to journalists against the disclosure of confidential sources and others creating a qualified privilege.[214] Further affecting the protection of journalists is how the acts define who qualifies for the privilege.[215] Therefore, people who would be protected by a shield law in one state would not be afforded protection in some other states merely because of a more restrictive definition of who is a journalist.[216]

a. *Definition of Journalist*

One major issue that arises in the construction of shield laws is how to define who can invoke the privilege guaranteed by the statute.[217] There is a wide variety of ways in which the states with shield laws have sought to define who is a journalist or reporter for the purposes of the statute's protection.[218] Such a variance reflects the ongoing debate

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[211] *See, e.g.*, Ala. Code § 12-21-142 (2006); Alaska Stat. § 09.25.310–.390 (2010); Ariz. Rev. Stat. Ann. § 12–2237 (2003).

[212] Rasmussen, *supra* note 87 ("West Virginia . . . became the 40th state, along with the District of Columbia, to provide statutory protection for subpoenaed reporters.").

[213] *Compare* Okla. Stat. tit. 12, § 2506 (2009) ("'Journalist' means any person who is a reporter, photographer, editor, commentator, journalist, correspondent, announcer, or other individual regularly engaged in obtaining, writing, reviewing, editing, or otherwise preparing news for any newspaper, periodical, press association, newspaper syndicate, wire service, radio or television station, or other news service. Any individual employed by any such news service in the performance of any of the above-mentioned activities shall be deemed to be regularly engaged in such activities. However, journalist shall not include any governmental entity or individual employed thereby engaged in official governmental information activities."), *with* Ariz. Rev. Stat. Ann. § 12-2237 (2003) ("[The privilege applies to a] person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station . . . .").

[214] *Compare* Ala. Code § 12-21-142 (2006) ("*No person* engaged in, connected with or employed on any newspaper, . . . while engaged in a news-gathering capacity, shall be compelled to disclose . . . the sources of any information procured or obtained by him and published in the newspaper . . . .") (emphasis added), *with* Colo. Rev. Stat. Ann. § 13-90-119(3)(a) to (c) (West 2011) (establishing a three-part test to overcome the presumptive reporter's privilege).

[215] *See supra* text accompanying note 213.

[216] *See supra* text accompanying note 213.

[217] *See* Stone, *supra* note 90, at 50–51.

[218] *See supra* text accompanying note 213.

in scholarly circles regarding exactly who should qualify to invoke the privilege.[219]

On one end of the spectrum are the extremely specific definitions of "journalist" that limit the extent of the privilege to traditional media.[220] For example, the Alabama state shield law specifically limits its protections to a "person engaged in, connected with or employed on any *newspaper, radio broadcasting station or television station,* while engaged in a news-gathering capacity."[221] Thus, a person working outside the confines of these three traditional media outlets is not protected under Alabama's shield law.[222]

On the other end of the spectrum are very broad definitions of who is a journalist.[223] Such a definition is found in New York's shield law, which provides protection to a "professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public."[224] Further, New York's shield law gives specific guidance in defining such terms as newspaper, magazine, and news agency.[225] Some states impose specific employment requirements in order for a person to qualify as a journalist.[226] In other states, the shield law grants protection to a "journalist" but provides no definition of who qualifies as a journalist for the purposes of the statute.[227]

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[219] *See* discussion *infra* Part III.B.1.

[220] *See, e.g.*, ALA. CODE § 12-21-142 (2006).

[221] *Id.* (emphasis added).

[222] *See* L. Michael Higgins, Jr., Comment, *Rusty Shields for Those Who Wield the Pen: The State of Alabama's Reporter Shield Law in the Aftermath of* Price v. Time, 37 CUMB. L. REV. 263, 275 (2007).

[223] *See, e.g.*, OKLA. STAT. tit. 12, § 2506 (2009).

[224] N.Y. CIV. RIGHTS LAW § 79-h(b) (McKinney 2009).

[225] *See id.* § 79-h(a).

[226] *See, e.g.*, DEL. CODE ANN. tit. 10, § 4320 (1999) ("'Reporter' means any journalist, scholar, educator, polemicist, or other individual who either: a. At the time he or she obtained the information that is sought was earning his or her principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks had spent at least 20 hours engaged in the practice of, obtaining or preparing information for dissemination with the aid of facilities for the mass reproduction of words, sounds, or images in a form available to the general public; or b. Obtained the information that is sought while serving in the capacity of an agent, assistant, employee, or supervisor of an individual who qualifies as a reporter under subparagraph a.").

[227] *See, e.g.*, ME. REV. STAT. ANN. tit. 16, § 61 (2010).

b. *Absolute or Qualified Privilege*

Another of the central issues in the construction of shield laws is whether the privilege granted to reporters can be overcome.[228] An absolute privilege provides firm protection against compelled disclosure of source identities, whereas a qualified privilege allows the state to overcome the presumptive privilege and force disclosure of source identities in certain situations.[229] This divergence reflects a great deal of debate over the balancing of the public's right to all relevant evidence with the importance of confidential sources.[230]

Several jurisdictions that have some form of shield law protection grant a reporter an absolute privilege against mandatory disclosure of the identity of confidential sources.[231] It should be noted that in Alabama and Kentucky, in order for a journalist to invoke this privilege, the statutes mandate that the information obtained from the confidential source must be published, broadcast, or televised.[232] In many other statutes, however, there is a marked absence of language mandating that the information obtained from a confidential source is published in order to invoke the protections of the statute.[233] In still others, the statute states specifically that a reporter can invoke the privilege against mandatory disclosure of confidential sources regardless of whether the information obtained from such a source is ever published.[234] Finally, it is notable that the District of Columbia, which grants absolute protection against the disclosure of the identity of a confidential source actually permits the government to compel the disclosure of other information from the journalist, such as notes and outtakes.[235] This seems to

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[228] *See* Stone, *supra* note 90, at 51–54.

[229] *See id.* at 51–53. In states with a qualified privilege, "[t]he government can require the journalist to reveal the confidential information if the government can show that it has exhausted alternative ways of obtaining the information and that the information is necessary to serve a substantial government interest. There are many different variations of this formulation, but this is the essence of it." *Id.* at 51–52.

[230] *See* discussion *infra* Part III.B.2.

[231] *See, e.g.*, Ala. Code § 12-21-142 (2006); D.C. Code Ann. § 16-4701 (LexisNexis 2008); Ind. Code Ann. § 34-46-4-1 (LexisNexis 2008); Ky. Rev. Stat. Ann. § 421.100 (LexisNexis 1992).

[232] *See* Ala. Code § 12-21-142 (2006); Ky. Rev. Stat. Ann. § 421.100 (LexisNexis 1992).

[233] *See, e.g.*, Cal. Evid. Code § 1070(a) (West 2009) ("[A protected person] cannot be adjudged in contempt . . . for refusing to disclose any *unpublished* information obtained or prepared in the gathering, receiving, or processing of information for communication to the public.") (emphasis added).

[234] *See, e.g.*, Ind. Code Ann. § 34-46-4-1 (LexisNexis 2008).

[235] *See* D.C. Code Ann. § 16-4701 (LexisNexis 2008).

reflect a judgment that the protection of source confidentiality is of the utmost importance.[236]

In the other jurisdictions with some form of shield law, the privilege against mandatory disclosure of the identity of confidential sources is qualified.[237] It is notable that, in contrast to all of the other shield laws, those in Georgia, North Carolina, and South Carolina do not specifically mention a privilege to protect the "source" of confidential information.[238] Nevertheless, these three statutes include a qualified privilege protecting against compelled disclosure of "information" obtained while acting as a journalist; the identity of a source would presumably be information.[239] In the other jurisdictions with a qualified privilege, the statutes explicitly indicate that the identity of a confidential source is within the scope of the statutory protections.[240] The statutes vary widely in the way they express the criteria that must be established by the party seeking disclosure of the source's identity in order to override the statutory privilege.[241]

III. Analysis

A. *The Impetus for a National Shield Law in Canada: The* National Post *Standard Does Not Adequately Protect Confidential Sources*

The use of confidential sources in the process of investigative journalism is extremely important.[242] The scholarship examined earlier in this Note demonstrates theoretically and empirically that people with important information of public concern may not come forward with-

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[236] *See id.*

[237] *See, e.g.*, R.I. Gen. Laws § 9-19.1-1 to -3 (1997); Tenn. Code Ann. § 24-1-208 (2000).

[238] *See* Ga. Code Ann. § 24-9-30 (2010); N.C. Gen. Stat. Ann. § 8-53.11 (West 2009); S.C. Code Ann. § 19-11-100 (2010).

[239] *See* sources cited *supra* note 238.

[240] *See, e.g.*, R.I. Gen. Laws § 9-19.1-1 to -3 (1997); Tenn. Code Ann. § 24-1-208 (2000).

[241] *Compare* Alaska Stat. § 09-25-310 (2010) ("The court may deny the privilege . . . if it finds the withholding of the testimony would (1) result in a miscarriage of justice or the denial of a fair trial to those who challenge the privilege; or (2) be contrary to the public interest."), *with* Colo. Rev. Stat. Ann. § 13-90-119(3) (West 2011) ("Notwithstanding the privilege of nondisclosure granted in subsection (2) of this section, any party [may overcome the privilege] by establishing . . . (a) That the news information is directly relevant to a substantial issue involved in the proceeding; (b) That the news information cannot be obtained by other reasonable means; and (c) That a strong interest of the party seeking to subpoena the newsperson outweighs the interests under the first amendment to the United States constitution of such newsperson in not responding to a subpoena and of the general public in receiving news information.").

[242] R. v. Nat'l Post, 2010 SCC 16, [2010] 1 S.C.R.477, ¶ 33 (Can.).

out a guarantee of confidentiality.[243] What is sought from a shield law, therefore, is a level of certainty at the time that a journalist makes a promise of confidentiality that this promise will ultimately be kept.[244] Thus, the effectiveness of the protection afforded by the standard elucidated in *National Post* should be judged based upon whether it creates the necessary certainty at the time the promise is made.[245]

1. Extent of the Privilege: The Burden of Proof

The most glaring flaw in the *National Post* decision is that it essentially creates a rebuttable presumption in favor of disclosure.[246] The Canadian Supreme Court in that decision stated that analysis of whether a privilege is afforded to a journalist to protect the confidentiality of sources will proceed on a case-by-case basis.[247] Further, in order for the privilege to attach, the onus is on the journalist to establish that all four Wigmore criteria are met.[248]

In several of the U.S. states that have shield laws, the privilege is absolute and cannot be overcome in any circumstances.[249] Many other U.S. states, however, grant to journalists a qualified privilege that can be overcome when certain statutorily specified factors are met.[250] However, even in these jurisdictions, the presumption is in favor of nondisclosure of the identity of the confidential source and the burden of proof remains with the party seeking disclosure.[251]

In criticizing U.S. state shield laws that provide only a qualified privilege to reporters, one scholar stated that a major flaw with such a construction of the privilege is that "[a]t the moment you speak with the reporter, it is impossible for you to know whether, four months hence, some prosecutor will or will not be able to make the requisite showing to pierce the privilege."[252] This criticism has even more force when the *National Post* standard is examined against it.[253] In the U.S. states that use a qualified privilege model, at least the burden of showing that the

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[243] *See supra* text accompanying note 91.
[244] *See* Stone, *supra* note 90, at 53.
[245] *See id.*
[246] *Nat'l Post*, [2010] 1 S.C.R. ¶ 60; *see* Stone, *supra* note 90, at 53.
[247] *Nat'l Post*, [2010] 1 S.C.R. ¶¶ 53, 60.
[248] *Id.* ¶ 60.
[249] *See supra* text accompanying note 231.
[250] *See supra* text accompanying note 237.
[251] *See, e.g.*, COLO. REV. STAT. ANN. § 13-90-119(3) (West 2011).
[252] *See* Stone, *supra* note 90, at 52.
[253] *See Nat'l Post*, [2010] 1 S.C.R. ¶ 60; Stone, *supra* note 90, at 52.

privilege should be overcome rests with the prosecutor.[254] Under the Canadian Supreme Court's standard, a source should assume that his communication is not privileged.[255] Such a prosecution-friendly standard creates the very type of uncertainty that discourages confidential sources from disclosing important information of public concern.[256]

2. Definition of "Journalist"

Another major flaw in the *National Post* standard is it fails to define who is a journalist for the purposes of establishing the privilege.[257] Indeed, one of the difficulties that the Canadian Supreme Court had in this case was determining who was a journalist.[258] The potential breadth of the term "journalist" is a key reason cited by the Canadian Supreme Court for refusing to establish either a constitutional or a class-based immunity.[259]

In contrast, in states with shield laws the vast majority of statutes define the term journalist.[260] Of course, Maine's statute makes no effort to narrow the scope of the term journalist, presumably leaving such a determination up to the reviewing court; however, this complete lack of a definition is an outlier.[261]

The third of the four Wigmore criteria allows courts applying *National Post* to distinguish between different types of journalists.[262] The Canadian Supreme Court itself noted that "[t]he relationship between the source and a blogger might be weighed differently than in the case of a professional journalist."[263] While this statement has intuitive appeal, it provides relatively little guidance on exactly which types of journalists might be more protected under the *National Post* standard.[264] Forcing a potential source with valuable information to assess beforehand whether

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[254] *See* COLO. REV. STAT. ANN. § 13-90-119(3) (West 2011).

[255] *See Nat'l Post*, [2010] 1 S.C.R. ¶ 60.

[256] *See id.*; Stone, *supra* note 90, at 53.

[257] *Nat'l Post*, [2010] 1 S.C.R. ¶¶ 53, 57.

[258] *See supra* text accompanying notes 153–156.

[259] *See supra* text accompanying notes 153–156, 166.

[260] *See, e.g.*, COLO. REV. STAT. ANN. § 13-90-119(1)(e) (West 2011).

[261] *Compare* ME. REV. STAT. ANN. tit. 16, § 61 (2010) (stating that a "journalist" cannot be compelled to disclose certain information but not defining the term "journalist"), *with* CAL. EVID. CODE § 1070(a) (West 2009) ("[The privilege extends to a] publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed . . . .").

[262] *Nat'l Post*, [2010] 1 S.C.R. ¶ 57.

[263] *Id.*

[264] *See id.* ¶¶ 53, 57.

his relationship with a particular journalist is one that ought to be "'sedulously fostered' in the public good" creates the very type of uncertainty that discourages important disclosures.[265] While some state shield laws have arguably been written or interpreted too narrowly,[266] these shield laws at least have the virtue of creating some level of certainty as to the types of journalists to whom the privilege will apply.[267]

3. Overall Arbitrariness

A third, less specific—but no less major—flaw with the *National Post* standard is the arbitrariness that it creates in deciding exactly which reporters in which circumstances are deserving of a privilege.[268] This is highlighted by the divergent outcomes that the Canadian Supreme Court arrived at in *National Post* and *Globe & Mail*.[269] In *National Post,* the Canadian Supreme Court allowed compelled disclosure of evidence that may serve to identify a journalist's confidential source.[270] In contrast, in *Globe and Mail,* the Canadian Supreme Court temporarily allowed a journalist to keep the identity of his source confidential, pending review by a lower court.[271] The major difference leading to these two divergent outcomes was that the Canadian Supreme Court in *Globe and Mail* wanted the lower court to conduct a more thorough analysis under the fourth Wigmore criterion, whereas the *National Post* court was confident that the interests balanced in favor of disclosure.[272] Despite evidence that the lower court judge had found in favor of disclosure on the first three Wigmore criteria, the Canadian Supreme Court reasoned that the public interest in dissemination of the information might be so strong that it could outweigh the other three criteria.[273] Yet the fourth Wigmore criterion is incredibly subjective.[274] Si-

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[265] *See id.* ¶ 57; Stone, *supra* note 90, at 53.

[266] *See infra* text accompanying note 296.

[267] *See* Stone, *supra* note 90, at 53.

[268] *See id.*

[269] *Compare Nat'l Post*, [2010] 1 S.C.R. ¶ 77 ("[T]he identity of the individual who shipped Mr. McIntosh the forged document has no continuing claim to the protection of the law."), *with* Globe & Mail v. Canada (Attorney Gen.), 2010 SCC 41, [2010] 2 S.C.R. 592, ¶ 70 (Can.) (holding that a lower court must review the evidence and pay particular attention to the fourth Wigmore criterion).

[270] *See Nat'l Post*, [2010] 1 S.C.R. ¶ 77.

[271] *See Globe & Mail*, [2010] 2 S.C.R. ¶ 70.

[272] *Compare id.*, *with Nat'l Post*, [2010] 1 S.C.R. ¶ 77.

[273] *See Globe & Mail*, [2010] 2 S.C.R. ¶¶ 68–70.

[274] *See Nat'l Post*, [2010] 1 S.C.R. ¶ 61 ("The weighing up will include (but of course is not restricted to) the nature and seriousness of the offence under investigation, and the

multaneously, however, it is the most powerful factor in the analysis.[275] Leaving a court with such wide discretion makes the potential application of the privilege questionable and discourages confidential sources from coming forward with important information.[276]

B. *The Need for Legislative Action: Moving Toward a Shield Law*

To adequately protect the relationship between journalists and their confidential sources, many questions must be specifically addressed to avoid creating uncertainty about the protection that will be afforded to confidential communications.[277] Many scholars writing about this topic examine specific concepts like the definition of a journalist and the extent of the protection afforded to confidential sources.[278] However, as it considered whether to create a class privilege, the Canadian Supreme Court in *National Post* noted a number of problems.[279] Among the issues cited were the varying degrees of professionalism and the Canadian Supreme Court's own broad definition of journalism, determinations of whether the privilege would belong to the source or the journalist, a lack of workable criteria regarding the creation or loss of the privilege, and the inflexibility of a class privilege.[280] As important questions remained unanswered, the Canadian Supreme Court thus decided that a judicially created class privilege for journalists and their sources would be inappropriate.[281]

Importantly, the Canadian Supreme Court stated that "[i]t is likely that in future (sic) such 'class' privileges will be created, if at all, only by legislative action."[282] To address the myriad questions that prevented the Canadian Supreme Court from finding a class privilege for journalists and their confidential sources and thus address the underprotective nature of the *National Post* standard, this Note proposes that

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probative value of the evidence sought to be obtained, measured against the public interest in respecting the journalist's promise of confidentiality.").

[275] *See id.* ¶ 58 ("The fourth Wigmore criterion does most of the work.").

[276] *See* Stone, *supra* note 90, at 53 ("[T]he very purpose of the privilege is to encourage sources to disclose useful information to the public. The uncertainty surrounding the application of the qualified privilege directly undercuts this purpose and is grossly unfair to sources, whose disclosures we are attempting to induce.").

[277] *See* Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States,* 11 Comm. L. & Pol'y 35, 68–74 (2006) (discussing various pieces that must be included in a good shield law).

[278] *See id.* at 71–74.

[279] *See supra* text accompanying notes 164–172.

[280] *Nat'l Post*, [2010] 1 S.C.R. ¶¶ 43–46.

[281] *See id.* ¶ 42.

[282] *Id.*

the Parliament should do just what the Canadian Supreme Court has stated: create a class privilege that more adequately details and protects the important journalist-source relationship.[283]

In crafting a shield law that better protects the interests of confidential sources, many issues must be addressed.[284] This section will investigate two major topics that arise frequently in scholarship examining shield laws.[285] First, the Parliament should adopt a relatively broad definition of when the privilege applies.[286] Second, the Parliament should create a nearly absolute privilege for journalists to protect their confidential sources, as this type of privilege most fully protects confidential sources and therefore most fully incentivizes the types of disclosure that any privilege seeks to encourage.[287]

1. Defining Who Is a Journalist

One scholar notes that defining who can invoke the privilege might prove to be the toughest part of drafting a shield law.[288] Coming up with a consistent definition of who qualifies as a journalist for the purposes of invoking the privilege may be the most important task facing a legislature.[289] The importance of this definitional section is illustrated by a 2005 case from the U.S. Court of Appeals for the Eleventh Circuit interpreting Alabama's shield law.[290] That case concerned a *Sports Illustrated* magazine article about the coach of the University of Alabama's football team.[291] The coach sued the magazine for libel, slander, and outrageous conduct.[292] A major issue in the case was whether Alabama's shield law statute, worded in absolute terms, provided protection to magazine reporters.[293] The statute states that the privilege is extended to a "person engaged in, connected with or employed on any newspaper, radio broadcasting station or television station, while engaged in a news-

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[283] *See* Stone, *supra* note 90, at 53.

[284] *See* Fargo, *supra* note 277, at 71–74.

[285] *See* Stone, *supra* note 90, at 50–56 (examining the definition of the term journalist and whether the privilege granted should be absolute or qualified).

[286] *See infra* text accompanying notes 288–315.

[287] *See infra* text accompanying notes 316–328.

[288] Fargo, *supra* note 277, at 71.

[289] Laura Durity, *Shielding Journalist-"Bloggers": The Need to Protect Newsgathering Despite the Distribution Medium,* Duke L. & Tech. Rev., 2006, ¶ 28, http://www.law.duke.edu/journals/dltr/articles/2006DLTR0011.pdf.

[290] *See* Price v. Time, Inc., 416 F.3d 1327, 1343 (11th Cir. 2005).

[291] *See id.* at 1330.

[292] *Id.* at 1332.

[293] *See id.* at 1335.

gathering capacity."[294] The court in this case decided, based on the literal language of the statute, that magazine reporters were not covered by Alabama's law.[295] Due to this antiquated definition of the news media, it appears that many people who in modern parlance would be considered journalists are not protected by this statute.[296]

However, exactly who should receive the benefit of this privilege is still an open question, and the subject of much debate.[297] At the outset, it must be clear exactly to whom the privilege belongs.[298] Relying on the law of privilege, it is clear that the privilege against compelled disclosure of a source's identity belongs to the source.[299] Thus, one scholar properly rephrases the question as "to whom may a source properly disclose information in reasonable reliance on the belief that the disclosure will be protected by the journalist-source privilege?"[300]

Although it is necessary to have the correct question in mind, it does not help in defining to whom a source might reasonably disclose confidential information.[301] This lack of clarity is most notable in the ongoing debate about whether to extend the privilege to include bloggers and other non-traditional media.[302] Many state shield laws err on the side of caution in their definition of who is a journalist and subsequently extend the privilege only to mostly traditional media.[303] However, the exclusion of non-traditional media such as blogs overlooks the fact that such non-traditional media can often be media through which information of substantial public value is disclosed.[304] For example, in the United States, bloggers contributed substantially to public discourse when they noted inaccuracies in a CBS News story about President

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[294] ALA. CODE § 12-21-142 (2006).

[295] *Price,* 416 F.3d at 1342–43. "It is not plausible to interpret the term 'newspaper' in the Alabama shield statute to include Sports Illustrated magazine. The term is not ambiguous." *Id.* at 1342.

[296] *See* Higgins, *supra* note 222, at 275.

[297] *Compare* Alexander, *supra* note 75, at 129–30 (proposing that the protections of a shield law be limited to those people engaged with traditional news media), *with* Durity, *supra* note 289, ¶ 39 (arguing that bloggers and other journalists engaged in non-traditional media must be protected).

[298] *See* Stone, *supra* note 90, at 50–51.

[299] *See id.*

[300] *Id.* at 51.

[301] *See id.*

[302] *See supra* text accompanying note 297.

[303] *See, e.g.*, ALA. CODE § 12-21-142 (2006).

[304] *See* Fargo, *supra* note 277, at 71.

Bush's stint in the military.[305] The network eventually rescinded its story.[306]

Therefore, the question of to whom a source can properly disclose confidential information while being assured that the shield law will apply should be answered by returning to the very purpose of crafting a privilege.[307] The impetus for a shield law establishing a journalist-source privilege is to encourage a source to come forward with information important to the public.[308] Looking at it in this light, it is clear that in some cases, bloggers may be conduits to the public who can disclose important information.[309] Therefore, excluding non-traditional media fully from statutory protections may create an underinclusive shield law.[310]

Thus, in defining the scope of the privilege, the answer must rest in functional considerations, while keeping in mind the very purpose of the journalist-source privilege.[311] In line with this method of thinking, one scholar proposes that the source must make a disclosure to a "journalist" reasonably believing that this "journalist" regularly distributes information to the public and with the intention that the information divulged to the "journalist" will be distributed to the public.[312] Although this definition has intuitive appeal as it is in line with the interests that a privilege seeks to protect, it may be too broad.[313] As the goal of a privilege is to encourage disclosure of the information in which the public has an interest, it makes sense to limit this definition further by imposing a condition that the "journalist" to whom the source makes a disclosure must report "on issues of public concern."[314] The shield laws of several states are already tailored to protect only confidential disclosures on issues of public concern.[315]

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[305] *Id.*
[306] *Id.*
[307] *See* Stone, *supra* note 90, at 41–42.
[308] *See* Fargo, *supra* note 277, at 71.
[309] *See id.*
[310] *See id.*; Stone, *supra* note 90, at 41–42.
[311] *See* Stone, *supra* note 90, at 51.
[312] *Id.*
[313] *See* Fargo, *supra* note 277, at 72.
[314] *See id.*
[315] *See, e.g.*, FLA. STAT. ANN. § 90.5015 (West 2011).

2. The Need for a Nearly Absolute Privilege

Another central question any legislature must address when creating a shield law is whether the privilege is to be absolute or qualified.[316] Absolute privileges have been less popular politically and with the courts in the United States than qualified privileges.[317] However, an absolute privilege has the virtue of bringing "greater consistency to the law."[318] One scholar notes that the purpose of a privilege is to incentivize the disclosure of important information in which the public has an interest; however, "the uncertainty surrounding the application of the qualified privilege directly undercuts this purpose and is grossly unfair to sources, whose disclosures we are attempting to induce."[319]

Exceptions should be crafted only to account for very narrow circumstances in which the public's interest in evidence substantially outweighs the journalist's interest in keeping his source's identity confidential.[320] One such exception is when the source has information about a "grave crime or serious breach of national security that is likely to be committed imminently."[321] This parallels the U.S. jurisprudence around the psychotherapist-patient privilege when the psychotherapist learns that the patient intends to commit harm to himself or another.[322] In these narrow circumstances, the public's interest in evidence so clearly outweighs the journalist-source privilege that it would be "irresponsible" to privilege the disclosure.[323] However, it is necessary for the Parliament, in crafting a shield law, to define exact and narrow circumstances in which these exceptions would apply; any less would create the type of uncertainty that discourages the disclosure of information of value to the public.[324]

The other necessary exception involves the case when a source's disclosure is unlawful in and of itself.[325] Keeping in mind that the purpose of a shield law is to foster the disclosure of information in which the public has a substantial interest, the fact that a disclosure has already been declared unlawful means that such a disclosure has already

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[316] *See* Fargo, *supra* note 277, at 72–74.
[317] *Id.* at 73.
[318] *Id.*
[319] Stone, *supra* note 90, at 53.
[320] *See id.*
[321] *Id.*
[322] *Id.*
[323] *Id.*
[324] *See id.*
[325] Stone, *supra* note 90, at 54–56.

been found not to be in the public interest.[326] Therefore, most illegal disclosures should not be privileged.[327] Such a disclosure should only be privileged when it involves a leak of governmental information which has "'substantial public value.'"[328]

Conclusion

Canada and the United States are consistently two of the world's leading nations when it comes to overall freedom of the press. These two nations, however, share a troubling history of subpoenaing journalists in order to ascertain the identities of their confidential sources when such information will aid in criminal prosecutions or civil litigation. The Canadian Supreme Court recently handed down two decisions that affirmatively established a reporter's privilege under common law. This privilege is decided on a case-by-case basis and only attaches after the journalist has proven several specified factors. The United States has a longer history with the journalist-source privilege. In 1972, the U.S. Supreme Court decided a case which did not establish a reporter's privilege but left the door open for one. Seizing on this opportunity, different circuits have developed different iterations of this privilege. Individual states, however, have created the strongest protections for the journalist-confidential source relationship: forty states have enacted a statutory reporter's privilege. These statutes, called shield laws, firmly establish the rights granted to journalists and their confidential sources. Upon close inspection, it becomes clear that the Canadian Supreme Court's case-by-case model of privilege is simply insufficient. The uncertainty created by this ad hoc analysis discourages the very types of confidential disclosures that a privilege seeks to incentivize. Canada's Parliament should craft a shield law that clearly establishes a reporter's privilege and avoids the type of uncertainty created by the current standard. In doing so, the Parliament could learn much from U.S. states, which already have a great deal of experience in this area. Ultimately, a better shield law will include a fairly broad and functional definition of who is a journalist and thus who qualifies for the privilege and will be nearly absolute, with very few exceptions for only the most pressing circumstances.

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[326] *Id.* at 54.

[327] *See id.*

[328] *Id.* at 56 (offering the Pentagon Papers and the leak of the Abu Ghraib scandal as two examples of unlawful leaks with "substantial public value").