

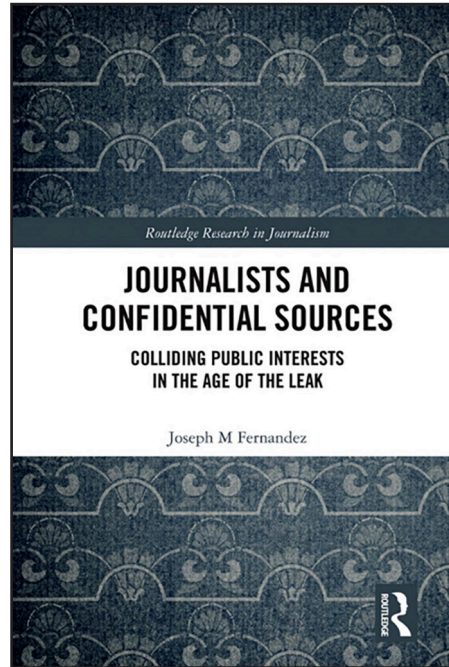
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Defending the right to confidential sources and whistleblowers

Journalists and Confidential Sources: Colliding Public Interests in the Age of the Leak, by Joseph M Fernandez. Routledge Research on Journalism Series. Abingdon, UK: Routledge, 2021. 287 pages. ISBN 9780367474126

IN 2015, media law professor Joseph M. Fernandez co-authored a comprehensive article for *Pacific Journalism Review* (Fernandez & Pearson, 2015) about the status of Australia's shield law regime, drawing on his research to see whether it met journalists' expectations and whistleblower needs in an era of unprecedented official capabilities. It didn't, as can be seen from growing concerns over court cases that, according to the peak journalists' organisation Media, Entertainment and Arts Alliance (MEAA), 'clearly demonstrate Australia's patchy and desperate journalist shields fail to do their job'.

Six years later, Fernandez's research trajectory led to this book, *Journalists and Confidential Sources*, which has impressively and meticulously drawn together all the complicated threads in what is a core field for all



public interest journalism, especially investigative journalism. It should be on hand in all newsrooms.

While it focuses particularly on Australia, it also draws comparisons with parallel jurisdictions in Aotearoa New Zealand, Canada, the United Kingdom and the United States in a remarkably timely contribution to global debate on the fraught and widespread reliance by journalists on anonymous sources, whistleblowers, and those owed an obligation of confidentiality.

Fernandez analyses the problems involved in such confidential relationships and freedom of expression frameworks and examines the deteriorating public 'right to know' mediascape and proposes solutions and reforms.

The book provides a comprehensive baseline for some high profile recent cases involving confidential

sources and a former wartime hero in Afghanistan and a whistleblower who has been sent to jail over leaks involving the development of Australia's neighbouring fledgling state of Timor-Leste. The verdict in this later case, which has been described as 'Australian politics' biggest scandal', was highly unpopular and has been widely condemned.

In January 2024, the ACT Court of Appeal published secret judgements to mark the end of the lawyer Bernard Collaery and 'Witness K' saga about Australian espionage against Timor-Leste in a bid to get a negotiating advantage over oil and gas deposits under the Timor Sea. The case underscored the need for the Albanese government to implement transparency and whistleblowing reforms (Feng, 2024).

In 2021, Witness K pleaded guilty and was given a suspended sentence. Collaery pleaded not guilty and in July 2022, following the election of the Albanese government, Attorney-General Mark Dreyfus, KC, discontinued the prosecution.

When delivering her ruling to allow parts of the initial judgement, which was then published, Chief Justice Lucy McCallum, said: 'There is no place for secret trials in Australia's democracy.'

However, the outcome in this whistleblowing case was markedly different from that of the continued pursuit of 'war crimes whistleblower' David McBride. He is an Australian and former British Army major and Australian Army lawyer.

In 2016, McBride provided the Australian Broadcasting Corporation with documents that contained information about war crimes committed by Australian soldiers in Afghanistan. He was jailed in May 2024 for five years and eight months for his principled actions and supporters claimed the Australian government was 'more interested in punishing him for revealing information about war crimes . . . than the alleged perpetrators' (Al Jazeera staff, 2024).

The defamation case of fallen Australian war hero Ben Roberts-Smith against the Nine Network, its three major titles, *The Sydney Morning Herald*, *The Age*, and the *Canberra Times*, plus three named high profile investigative journalists, opened up many questions and reflections related to the Fernandez book's findings.

In June 2023, a court found that reports published in 2018 by the Nine-owned newspapers were substantially true. The reporting claimed that the ex-SAS corporal, a Victoria Cross winner, had ordered a junior soldier to kill an elderly unarmed prisoner in Afghanistan to 'blood the rookie'. Roberts-Smith resigned from his media management job and he has appealed (AAP, 2024).

As the *Journalists and Confidential Sources* author himself outlined to me in a recent communication, 'The Ben-Roberts Smith defamation case is critical in any attempt to appreciate the role of confidential sources to journalists seeking to tell important stories that involve national security, influential personalities (as plaintiffs and as financiers) with abundant

resources and power to thwart the telling of such stories’ (J. Fernandez, personal communication with the author, 4 January 2024).

At the time of the book’s publication, recalls Fernandez, the case was going through the motions of a full court hearing and judgment. The final result which came well after publication saw a spectacular win by the media (Fairfax Media Publications and its journalists, including Chris Masters and Nick McKenzie) in what has been commonly described as the ‘trial of the century’ (*Roberts-Smith v Fairfax Media Publications Pty Limited (No 41)* [2023] FCA 555), and a ‘correspondingly stunning loss by the defendant and his backers’ (Fernandez, personal communication).

In a post-judgment article, political communication professor Andrea Carson (2023) noted: ‘In court, the pair relied on a defence of truth—a high bar when relying on confidential sources. Australia has among the toughest defamation laws of any liberal democracy.’ She argued that this added to an already difficult task of public interest investigative journalism, which ‘seeks to unearth truths that those with power wish to keep hidden’.

Fernandez has also pointed out the ‘graphic details’ that have emerged from the case on the ‘raw figures’ of the sheer amount of money involved in this case in defending investigative journalism—Seven West Media tycoon Kerry Stokes, Roberts-Smith’s former employer, is estimated to be spending A\$16 million on his legal

battle ‘against the media’ (Whitbourn & Hall, 2024).

Discussion of these two cases involving whistleblowers, the Timor-Leste espionage saga and the Roberts-Smith defamation trial, alone provide ample evidence of how essential *Journalists and Confidential Sources* is to contemporary public interest journalism. As Fernandez notes in his conclusion, ‘press freedom is not a privilege or a luxury for bestowal on an exclusive class but a right for journalists to serve citizens in accord with democratic ideals’ (p. 279).

Journalist-source confidentiality undertakings, argues Fernandez, are an important aid in the Fourth Estate ‘pursuit of openness, transparency, and accountability in governance’.

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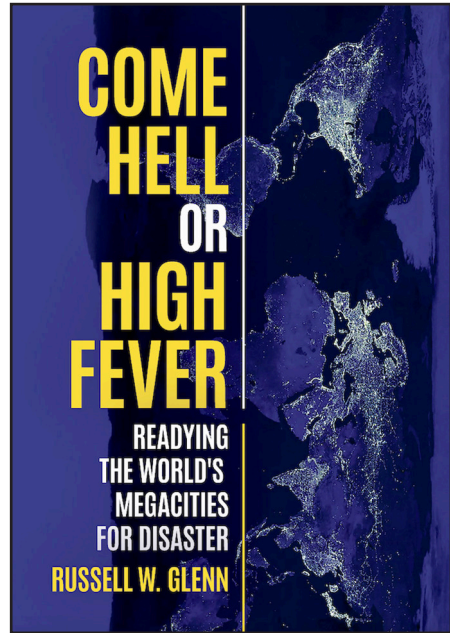
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Noted: Planning for the survival of megacities

Come Hell or High Fever: Readyng the World’s Megacities for Disaster, by Russell W. Glen. Canberra: ANU Press. 2023. 482 pages. ISBN 9781760465537.

WITH a title straight out a Tom Clancy novel and a writing style that manages to combine facts, analyses and deep understanding of his topic with the pace of a thriller, Russell Glen’s book is as entertaining and it is thought provoking.



Russell predicts that the world’s largest urban agglomerations, like Tokyo, are at risk from a variety of disasters and that it is vital for local and national leaders to think seriously about how to deal with them.

He believes that megacities will last. He does not share the view that they will be abandoned, rather, that there is a need to strengthen them by planning for major contingencies well ahead of time. He cites cities that have been afflicted in the past, such as today’s Istanbul which was ravaged by earthquakes, or modern Tokyo, which he said escaped by a whisker the catastrophe of radioactive contamination from the destruction of the Fukushima reactors in the great earthquake of 2010.

Earlier reviewers have noted that urban populations occupy three percent of the planet’s land area, but use 41