

1956

## The Journalist and His Confidential Source: Should a Testimonial Privilege Be Allowed

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### Recommended Citation

W. D. Lorensen, *The Journalist and His Confidential Source: Should a Testimonial Privilege Be Allowed*, 35 Neb. L. Rev. 562 (1956)

Available at: <https://digitalcommons.unl.edu/nlr/vol35/iss4/5>

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**THE JOURNALIST AND HIS CONFIDENTIAL SOURCE:  
SHOULD A TESTIMONIAL PRIVILEGE BE ALLOWED**

**INTRODUCTION**

A few centuries have slipped by since the ancestor of the modern-day journalist had his ears lopped off for publishing a libel.<sup>1</sup> But the press still claims its martyrs at the hands of the courts today—among them, the newsman faced with a choice of violating his profession's code of ethics or standing in contempt of court. This vexing situation arises when the newsman is questioned by proper authority as to the source of information which he has received in confidence. By the canons of the Fourth Estate, the journalist dares not reveal who gave him his information.<sup>2</sup> On the other hand, the law on the point is equally clear. In the view of the reported cases, no testimonial privilege exists, save in those twelve states where such a privilege is specifically set out by statute.<sup>3</sup> Cases in which the journalist's claim of privilege has been raised are not numerous, indicating perhaps that the journalist is usually cooperative with authorities seeking information.<sup>4</sup> However, when the claim does arise, neither the judicial nor the existing statutory rules represent the best answer in view of the policy questions involved.

**THE BASIS FOR A PRIVILEGE**

A testimonial privilege is a fly in the soup of the law of evidence. It is an exception to the general duty of every citizen to testify. Long perished from judicial recognition is the nicety of

<sup>1</sup> Thayer, *Legal Control of the Press* 9-10 (2d ed. 1950).

<sup>2</sup> See *Editor & Publisher* 9 (Sept. 1, 1934). For an excellent discussion of the newsman's privilege question, see Note, 36 *Va. L. Rev.* 61 (1950).

<sup>3</sup> *Clein v. State*, 52 So.2d 117 (Fla. 1950); *People ex rel. Mooney v. Sheriff*, 269 N.Y. 291, 199 N.E. 415 (1936). The states which have enacted such statutes are Alabama, Arizona, Arkansas, California, Indiana, Kentucky, Maryland, Michigan, Montana, New Jersey, Ohio and Pennsylvania. See note 10, *infra*.

<sup>4</sup> References to the cooperative attitude of newsmen were not infrequent during a public hearing on a proposed privilege statute in New York. See *New York Law Revision Commission. Legis. Doc. 65(A)* 104-46 (1949). At the time a privilege bill was before the New York Legislature, Governor Thomas E. Dewey issued the following statement:

The governor has had ten years experience as a prosecutor of crime. In all his experience, he has never found it necessary or desirable to attempt to compel any newspaperman to reveal the source of his information. He has a deep understanding of problems of the men of the press and the need to protect their sources of information.

*Editor & Publisher* 8 (March 6, 1948).

honoring a gentleman's word, or "point of honor."<sup>5</sup> Broader community interests are at stake when the search for truth is underway by proper authority. The commonly accepted personal privileges which are recognized today, e.g., lawyer-client, doctor-patient, husband-wife, are justified on the grounds that the public benefits more from protecting the confidentiality of these relationships than it is injured by the barriers such privileges raise in the path of legal proceedings.<sup>6</sup> Wigmore has reduced the policy considerations to four conditions, upon which he says the recognition of a privilege must be predicated. These conditions are:

1. The communications must originate in a *confidence* that they will not be disclosed;
2. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
3. The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and
4. The *injury* that would inure to the relation by the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.<sup>7</sup>

While it has been questioned whether currently recognized privileges meet these conditions, these propositions serve as the best available starting point for the consideration of whether a privilege should be granted in any given situation.<sup>8</sup>

### THE CURRENT LAW

The current rules which apply to a journalist's source privilege are too inflexible. The judicial view is that, absent statute, there is no such privilege.<sup>9</sup> The rule is broadly stated and apparently leaves no room for exception, no matter how greatly the policy factors would weigh in favor of the journalist.

<sup>5</sup> *Duchess of Kingston's Case*, 20 How. St. Tr. 856 (1776). Portions of the opinions in this case are set out at 8 Wigmore, *Evidence* § 2286 (3d ed. 1940).

<sup>6</sup> The statement in the text is essentially a paraphrase of Wigmore's four conditions set out above. Wigmore does not specifically refer to public benefits, but essentially that is the scale upon which points three and four of Wigmore's tests are measured.

<sup>7</sup> 8 Wigmore, *op. cit. supra* note 5, § 2285.

<sup>8</sup> Compare R Wigmore, *op. cit. supra* note 5, §§ 2291, 2332, 2380a, 2396 with Morgan, *Forward*, *Model Code of Evidence* 22-31 (1942).

<sup>9</sup> See note 3 *supra*; Annot., 102 A.L.R. 771 (1936).

The existing statutes, on the other hand, grant too broad a privilege, with perhaps the exception of the Arkansas confidence law.<sup>10</sup> Thus, if the journalist brings himself within the mechani-

<sup>10</sup> The statutes allowing the privilege have been criticized as being "excessive in scope." 8 Wigmore, *op. cit.* *supra* note 5. The Arkansas statute states that before a newsman can be "required" to disclose his source of information "it must be shown that such article was written . . . in bad faith, with malice and not in the interest of the public." For a discussion of the scope of the various privilege statutes, see Note, 36 Va. L. Rev. 61, 62-67 (1950). The following table, using the words of the statutes, illustrates the scope of the various privilege laws.

State	Who Is Protected		*See Below	**Date Adopted
	Personnel	Media		
Alabama Ala. Code tit. 7, § 370 (1940)	Persons engaged in, connected with, or employed on any newspaper while engaged in news gathering capacity.	Newspapers	Yes	1935
Arizona Ariz. Code Ann. § 23-103 (Supp. 1955)	Person engaged in newspaper or reportorial work, or connected with, or employed by any newspaper.	Newspapers	Yes	1937
				1936
Arkansas Ark Stat. Ann. § 42-917 (Supp. 1955)	Editors, reporters, writers for newspapers or periodicals, or owner of radio station.	Newspapers, periodicals, radio	Yes	(1949)
California Cal. Code Civ. Proc. Ann. § 1881 (6) (Deering 1946)	Publishers, editors reporters and other persons connected with or employed upon a newspaper	Newspapers	Yes	1935
Indiana Ind. Ann. Stat. § 2-1733 (Burns 1955)	Bona fide owner, editorial or reportorial employee of (printed media) and bona fide owner, or reportorial employee of (radio television) who receive principal official, or editorial income from legitimate writing, editing, interpretation, announcing or	Weekly, semi-weekly, tri-weekly and daily newspapers conforming to postal regulations and published for five consecutive in same city and having paid circulation of two	No	1941 (1949)

	broadcasting of news.	percent in county in which published; recognized press associations and commercially licensed radio and television stations.		
Kentucky Ky. Rev. Stat. § 421-100 (1953)	Persons engaged, employed or connected with newspaper, radio or television stations.	Newspapers, radio and television.	Yes	1952
Maryland Md. Code of Gen. Laws, art. 35, § 2 (1951)	Persons engaged in, connected with or employed on a (listed media).	Newspapers, Journals, radio and television	Yes	1896 (1949)
Michigan Mich. Stat. Ann. c. 287, § 28-945(1) (1954)	Reporters	Newspapers and "other publications."	No	1949
Montana Mont. Rev. Code Ann. § 93-601-2 (Supp. 1955)	Persons engaged in work of gathering, procuring, compiling, editing disseminating, publishing, broadcasting or televising news.	Newspapers, press associations, radio and television.	No	1943 (1951)
New Jersey N.J. Stat. Ann. § 2-97-11 (1939)	Persons engaged in, connected with, or employed on any newspaper.	Newspapers	Yes	1933
Ohio Ohio Rev. Code § 2739.12 (1953)	Persons engaged in the work on, or connected with, or employed by (listed media) for purpose of gathering, compiling, editing, disseminating or publishing news.	Newspapers and press associations.	No	1941

cal confines of the statute, he can refuse to disclose his source no matter how great a barrier he is raising in the path of important legal proceedings. The operation of the existing statutes is conditioned upon such matters as whether the reporter seeking to invoke it gets his primary income from reportorial endeavors,<sup>11</sup> or whether the publication by which the reporter is employed enjoys a certain percentage of circulation in the county where it is published.<sup>12</sup> Such elements have, at best, only remote connection with the essential policy questions involved.

#### WHEN IS THE PUBLIC BENEFITED?

If there is to be a journalist's source privilege, then there must be a benefit accruing to the public from the existence and protection of this relationship. The fact that the relationship is a common one is evidenced by the almost daily appearance in the press of news items quoting "informed sources," "usually reliable sources," and other such undisclosed sources of information. That the public is benefited by a free flow of news is a proposition which needs no argument. In general, it would seem that if the press must rely on undisclosed sources of information in certain instances, and these sources provide information otherwise unattainable to the press, then the public benefits from the newsman's relation with his confidential source. But more specifically, where such a relationship brings about the disclosure of a situation which requires litigation or investigation, and corrective

Pennsylvania Pa. Stat. Ann. tit. 28 § 330 (Supp. 1954)	Persons engaged on, connected with, or employed by (listed media) for the purpose of gathering, procur- ing, compiling, editing or publish- ing news.	Newspapers of general circulations as defined by Pennsylvania law, and press associations.	No	1937
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\*Some states require the information obtained from confidential sources must be published or disseminated before the source can be kept secret. This column of the table indicates where this is required by a "Yes" and where it is not required by a "No."

\*\*Dates shown in parenthesis show when the original statute was amended to include radio and television, where applicable.

<sup>11</sup> Ind. Ann. Stat. § 2-1733 (Burns 1955).

<sup>12</sup> Ibid. The limitation of the privilege on the basis of circulation is criticized in Note, 17 Ind. L.J. 162 (1941).

action can progress without resort to the journalist's source, then the public certainly benefits by the relationship. Such a fact situation has arisen in a journalist contempt case before the House of Representatives.

In one of the earliest journalist privilege cases to arise in this nation, James W. Simonton, a Washington correspondent for the *New York Daily Times*, (now the widely respected *New York Times*) was cited for contempt of the House for refusing to disclose his confidential sources.<sup>13</sup> Simonton was called to testify after his paper had published charges that bribes were being doled out to House members for votes on certain land grant measures.<sup>14</sup> The publication set off an investigation by a select committee, and Simonton was an early witness. The committee found the substance of Simonton's reports to be essentially true, and these conclusions were reached without resort to reporter's sources. The corrective action that resulted was the recommended expulsion of four members of the House.<sup>15</sup> Simonton, nevertheless, was placed in the custody of the Sergeant at Arms for the House for a time for his contempt in refusing to divulge certain sources.<sup>16</sup> It seems that here, where the unsavory situation brought to light by the journalist could be cleared up without resort to the reporter's confidential sources, a privilege should have been recognized.

A similar case arose some four decades later, this time in the Senate.<sup>17</sup> Two newspapers claimed bribes, and other improper influences, were being exerted to effect the passage of certain tariffs favorable to the Sugar Trust. Again, the newspaper charges prompted an investigation which found that the bribery

<sup>13</sup> Cong. Globe, 34th Cong., 3d Sess. 274-75, 411-12 (1857).

<sup>14</sup> The article which touched off the investigation is set out at Cong. Globe, note 13 supra at 274. There was some objection to launching an investigation on the basis of a newspaper article. Rep. A. K. Marshall of Kentucky said.

I am extreme unwilling, Mr. Speaker, to base the action of this House in reference to this matter upon any charges contained in any newspaper of the day. . . . I have no idea of giving to such contemptible things as appear in the newspapers of this country the sort of respectability they would obtain by receiving notice from this body.

Cong. Globe, note 13 supra at 275.

<sup>15</sup> H.R. Rep. No. 243, 34th Cong., 3d Sess. 169-79 (1857).

<sup>16</sup> Cong. Globe, 34th Cong., 3d Sess. 411-12, 426 (1857).

<sup>17</sup> The second case involved Elisha Edwards and John S. Shriver, correspondents for the *Philadelphia Press*, and the *New York Mail and Express*. See 26 Cong. Rec. 4796, 5451-52 (1894). This and other cases dealing with the privileges of the Senate are collected in S. Misc. Doc. No. 268, 53d Cong., 2d Sess. (1894).

charges were true.<sup>18</sup> The correspondents were questioned, and again were punished for refusing to reveal their sources of information.<sup>19</sup> Was the public in any way injured because the reporters caused an investigation which could be successfully concluded without disclosure of their sources?

In not every instance is a conclusive result reached in an investigation triggered by a journalist's charges. For example, the charges of corruption and graft raised by a Chicago newsman in 1934 and investigated by a grand jury apparently were left hanging.<sup>20</sup> A.L. Sloan, a reporter for the Chicago *American*, had written a series of stories for his paper charging graft in the Illinois Relief Commission, and the Cook County Criminal Court instructed the grand jury to investigate the matter on the basis of Sloan's articles. Sloan testified extensively, reportedly telling where evidence of graft could be found in the books of the commission and offering the names of twenty-six persons who could give further information. Sloan, however, refused to answer questions propounded by the jury's counsel as to who had led him to his information. For this he was brought before the court on the jury counsel's motion to cite for contempt. The court refused to cite Sloan on the grounds that *any* further testimony from him would be irrelevant.<sup>21</sup> While the identification of Sloan's confi-

<sup>18</sup> S. Rep. No. 435, 53d Cong., 2d Sess. (1894).

<sup>19</sup> 26 Cong. Rec. 5451-52 (1894). The newsmen were this time certified to the federal district attorney for prosecution under the contumacy statute adopted at the time of the earlier Simonton case. 11 Stat. 155 (1857), with minor revision, 52 Stat. 942 (1938), 2 U.S.C. § 192 (1952). The two reporters were not the only witnesses before the committee who refused to testify. See *Chapman v. United States*, 5 App. D.C. 122, *aff'd sub nom.* In re *Chapman*, 156 U.S. 211 (1895).

<sup>20</sup> A.L. Sloan (unreported) Editor & Publisher 10, (Aug. 11, 1934).

<sup>21</sup> A portion of the court's opinion was reported as being:

A reading of Sloan's testimony before the grand jury discloses that he has "discovered" no material proof beyond that already in the possession and knowledge of the state's attorney of Cook County in certain cases.

If the court were satisfied that Sloan had facts which might lead to the proof of graft, fraud, payroll padding or other criminal acts, the ends of justice could possibly be served a commitment order, the effect of which might tend to bring these facts to light, either from Sloan or from others with whom he may have had contact. The record indicates, however, that the state's attorney, the grand jury and the court can be more profitably employed than living in the hope or expectation of substantial proofs from Sloan in his present state of declamatory zeal."

Editor & Publisher 10 (Aug. 11, 1934).

Irrelevancy has been a defence in other cases. In *Rosenberg v.*



dential sources reasonably could be an irrelevant matter, it is difficult to see from the reported facts of this case that *all* further testimony would be *totally* irrelevant, especially in the light of the fact that the grand jury was instructed to investigate on the basis of Sloan's newspaper articles. If Sloan could direct the grand jury to evidence which would substantiate the charges without divulging his confidential sources, then the administration of justice would not be impaired by the recognition of a testimonial privilege.

The benefit accruing to the public can be found in situations other than those in which the active misconduct by public officials is involved, as in the cases above. There have been a number of situations in which the privilege question has arisen where the published charges intimated a failure to enforce the laws.<sup>22</sup> The obvious aim of the publication in such a case is to bring pressure to bear on responsible officials to enforce the law. Such a situation gave rise to the leading case in the field, *People ex rel. Mooney v. Sheriff*.<sup>23</sup>

Carroll in re Lyons, 99 F. Supp. 629 (S.D.N.Y. 1951) Leonard Lyons, a nationally syndicated columnist, wrote that Mrs. Ethel Rosenberg, under a death sentence for espionage, could save herself by "talking" as the court could alter her death penalty within 60 days. In a habeas corpus proceeding seeking to have Mrs. Rosenberg transferred from the death cell block at Sing Sing Prison, Lyons was asked the source of his information. The court held that since Lyons' statement was merely a paraphrase of Fed. R. Civ. P. 35, his source was irrelevant to the proceedings.

<sup>22</sup> *People ex rel. Mooney v. Sheriff*, 269 N.Y. 291, 199 N.E. 415 (1936) is the only reported case dealing with journalist contempt proceedings growing out of news items which intimated a failure to enforce the law. Other, unreported cases in which journalist contempt proceedings grew out of similar situations include: Charles L. Leonard and Douglas Clark (unreported) Editor & Publisher 7 (Mar. 6, 1948), discussed in the text above, pp. 9-10; E.B. Chapman (unreported) N.Y. Times, April 20, 1940, p. 8, col. 4; April 21, 1940, p. 12, col. 6, wherein Chapman, an editorial writer for the Topeka State Journal, was fined \$25 in police court for refusing to divulge the sources of his story on vice conditions in Topeka; Sherman Stambaugh (unreported) N.Y. Times, Sept. 13, 1939, p. 19, col. 4, wherein Stambaugh was cited for contempt for refusing to divulge to a grand jury the identity of his sources for a story concerning gambling in Toledo, Ohio; and Eddie Barr (unreported) N.Y. Times, March 13, 1931, p. 25, col. 8, wherein Barr was confined for refusing to divulge to a grand jury the source of his story concerning the kidnapping and beating of two men immediately after their release from jail in Dallas, Texas. Barr purged himself after one day's confinement by indentifying an assistant in the district attorney's office as his source.

<sup>23</sup> 279 N.Y. 291, 199 N.E. 415 (1936).

The case arose in New York City in 1934, when Martin Mooney wrote a series of articles describing gambling operations rampant in the city at that time. Mooney used fictitious names and addresses to identify the persons and places in his articles. He was called by a grand jury to testify and he did so. But he refused to reveal the true names and locations that lay behind the fictions in his articles. For this refusal, Mooney was cited to the Court of General Sessions for contempt, where he was fined \$250 and sentenced to thirty days in jail.<sup>24</sup> Mooney's citation was reviewed by the New York Court of Appeals which found such punishment to be valid, ruling squarely on the privilege issue. The court apparently felt that no public benefit resulted from Mooney's writings and settled the question on general considerations of testimonial privileges. The court said:

The policy of the law is to require the disclosure of all information by witnesses in order that justice may prevail. The granting of a privilege from such disclosure constitutes an exception to the general rule. In the administration of justice, the existence of the privilege from disclosure, as it now exists, often, in particular cases, works a hardship. The tendency is not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege.<sup>25</sup>

It may be true that had Mooney disclosed his sources of information, the grand jury might have found sufficient evidence to indict the gamblers of whom he had written. But it appears that Mooney and his newspaper, the *New York American*, as well as others, were more concerned about the general laxity of law enforcement than with a single gambling operation.<sup>26</sup> How much the publication of Mooney's articles helped to generate the public pressure which brought about the appointment of Thomas Dewey as a special prosecuting attorney cannot be determined accurately. However, in helping to bring such pressure to bear and thus encouraging better law enforcement, it should be recognized that

<sup>24</sup> Judge Koenig's oral opinion in the trial court, somewhat sympathetic to newsman Mooney, is set out at New York Law Revision Commission, Legis. Doc. 65(A), 19, 21 (1949). It may be that Mooney was as concerned with his personal safety as with "protecting" the identity of his sources. A statement by the foreman of the grand jury to the court indicated that Mooney, as well as other witnesses, had expressed fear of reexamination for giving all the information they had. *U.Y. Times*, May 8, 1934, p. 40, col. 2.

<sup>25</sup> 269 N.Y. at 295, 199 N.E. at 416.

<sup>26</sup> Within two weeks after Mooney appeared in the Court of General Sessions, a citizen's committee petitioned the governor of New York for the appointment of a special prosecutor to clean up the situation which Mooney's articles reflected.

the journalist actually is fostering the due administration of justice. This element of public benefit should be considered when the newsman seeks to keep his sources confidential. The burden should be placed first upon the responsible law enforcement officials. Not until it is shown that such officials cannot obtain needed information does the journalist's refusal to disclose his sources result in a serious public detriment. It is then that the privilege claim becomes unjustified.

The state of New York experienced another similar case in 1948, this time involving alleged gambling operations in the city of Newburgh.<sup>27</sup> The New York *World Telegram* set the stage for this case when it published a story describing Newburgh in typical journalese as "The Barbary Banks of the Hudson." The Orange County District Attorney's office replied that the allegations of vice conditions and gambling were "grossly exaggerated,"<sup>28</sup> This statement was rebutted within a few days by the local paper, the *Newburgh News*, when it published reproductions of numbers tickets used for gambling in the community. Two members of the *Newburgh News* staff were cited for contempt when they subsequently refused to divulge to a grand jury where they had procured the numbers tickets. (Their citation for contempt was later vacated on grounds of a procedural defect.)<sup>29</sup> The Newburgh incident gave rise to renewed efforts to enact a confidence statute in New York and brought about an extensive study of the

<sup>27</sup> Douglas Clarke and Charles L. Leonard (unreported) Editor & Publisher 7 (Mar. 6, 1948).

<sup>28</sup> *Ibid.*

<sup>29</sup> *People ex rel. Clark v. Truesdell* 79 N.Y.S.2d 413 (1948). The court held that as the contempt was not committed in the trial court's immediate view, the newsmen should have been given notice and reasonable opportunity to defend. The trial court had committed the newsmen summarily. However, while the newsmen were jailed following the contempt citation, they wrote an article for Editor & Publisher, in which they set out the following as their statement to the court at the time of their citation:

The code of ethics of the newspaper profession, without any statutory authority, stipulates without compromise, that violation of a confidence is the gravest ethical omission of which a newspaperman can stand. We feel that we are bound to comply with this principle and to make any sacrifice to perpetuate the lofty ideals of the newspaper profession.

Editor & Publisher 7 (Mar. 6, 1948).

problem by the New York Law Revision Commission.<sup>30</sup> Whether a privilege should have been granted in the *Newburgh* case again should have depended upon whether diligent law enforcement officials could have uncovered the gambling operations.

Charges bearing on subjects other than criminal conduct and corruption have come from the press and given rise to the privilege question. An example of this type is the most recent privilege case to arise before the national legislature.<sup>31</sup> Albert Deutsch, a reporter for the New York Newspaper *PM*, published a series of articles criticizing the administration of veterans hospitals. He was not the only critic on the subject.<sup>32</sup> The administration of veterans hospitals was being surveyed by the House Committee on World War Veterans Legislation and Deutsch was called upon to give testimony before the committee.<sup>33</sup> Deutsch did give testimony, but he refused to disclose the identity of certain hospital personnel who had given him information in confidence.<sup>34</sup> The committee first voted to cite Deutsch for contempt, but later reversed its position—apparently because of public pressure generated in the press.<sup>35</sup> If the committee's last resort was Deutsch's

<sup>30</sup> See New York Law Revision Commission, Leg. Doc. 65(A) (1949). The bill introduced at the time of the Leonard-Clarke incident in 1948 was commonly known as the Desmond-Mailer Bill. See, Desmond, *The Newsman's Privilege Bill*, 13 Albany L. Rev. 1 (1949). Prior attempts to enact journalist privilege bills in New York were made in 1930, 1935, 1936, 1937, 1938, 1939, 1946 and 1947.

<sup>31</sup> See Hearings before the House Committee on World War Veterans Legislation, Part I, 165-83, 856-662, 79th Cong. 1st Sess. (1945).

<sup>32</sup> Another journalist was questioned by the Committee on World War Veterans Legislation about the same time Deutsch appeared. The second journalist was Albert Q. Maisel, whose article, "Third-rate Medicine for First-rate Men," appeared in *Cosmopolitan Magazine*, March 1945, p. 35.

<sup>33</sup> Hearings, *supra* note 31, at 165.

<sup>34</sup> *Id.* at 172.

<sup>35</sup> *Id.* at 342. For newspaper protests leveled at the committee's decision to cite Deutsch for contempt, see 91 Cong. Rec. A2554 (1945). The more lenient attitude reflected by the committee in the *Deutsch* case also is reflected in another incident which arose during World War II. In January 1943, the Akron (Ohio) *Beacon-Journal* published claims that union seamen had refused to unload badly needed cargo at Guadalcanal on Sunday. The sources for the stories were returned veterans who had been interviewed by newspaper personnel. A subcommittee of the House Committee on Naval Affairs held hearings at which Charles C. Miller, city editor, and Mrs. Helen Waterhouse, a reporter, were questioned. House Committee on Naval Affairs, Hearings on Sundry Legislation, No. 29, 121-96, 78th Cong., 1st Sess. (1943). The subcommittee did not press for the names of the veterans who were the sources, and reported: "It would have been helpful had the paper seen fit to submit to us the names, which we assured the publisher would be kept in confidence so as to minimize

informants in order to make an accurate determination of what legislation was needed, then Deutsch should have been compelled to disclose his sources. If, on the other hand, the committee could obtain the needed information without forcing Deutsch to disclose his confidential sources, then it would seem a privilege could be allowed without detriment to the public.

These cases indicate that there are instances in which the employment of confidential sources by journalists results in a very real benefit to the public. Patently absent from the materials set out above are the many instances in which the journalist has published his information and has never been questioned about his source. With the point established that there are instances in which the public enjoys a benefit from the relationship, it would appear that there are times when a journalist-informant privilege could be allowed. The question then arises: How broad should such a privilege be?

#### WHEN SHOULD THE PRIVILEGE BE DENIED?

There are two conditions which should limit the application of the privilege. Both of these conditions are related to the element of public benefit. First, where there is an absence of public benefit in the disclosure of the information, there is no foundation upon which to build the claim for the privilege. Secondly where the public detriment which would be experienced by allowing the privilege is greater than the benefit gained from the protection of the relationship, then the privilege should not be allowed.

#### WHEN IS THERE NO PUBLIC BENEFIT?

There are two situations in which it is clear that no public benefit arises from the revelation of information through the employment of a confidential journalist-informant relationship.

the possibility of military recrimination. We are aware, however, of the customary practice of newspapers in not revealing the sources of such stories." Hearings, supra, No. 30 at 199. Rep. Magnuson of Washington said the newspaper charges were unfounded and praised the Merchant Marine. 89 Cong. Rec. A952 (1943).

In a state case in 1934, however, Vance L. Armentrout was held in contempt of the Kentucky House of Representatives when he refused to identify who had written a letter-to-the-editor signed "A Member of the House of Representatives." The letter was highly critical of the conduct of the President of the House in reference to rulings from the chair. Armentrout, acting editor of the Louisville *Courier*, was jailed by the investigating committee, released on bail, and the House as a body substituted a \$25 fine for incarceration. See Editor & Publisher 4 (March 24, 1934).

The first of these occurs where the revelation of the information itself violates public policy. Such situations occur when state secrets are revealed or the secret proceedings of grand juries are published. Journalist contempt cases have arisen upon both of these particular fact backgrounds, and the testimonial privilege was properly denied in every instance.<sup>36</sup> Clearly, where a privilege is based upon a theory that the newsman is benefiting the public by furnishing information which it ought to have, then the foundation for the privilege is destroyed when public policy demands that the substance of the information should not be disclosed.<sup>37</sup>

The second instance in which no public benefit accrues from the publication of the information arises when the information is in fact false.<sup>38</sup> Obviously, no public benefit results from the dissemination of erroneous information. This element has bothered some groups which have commented on the privilege question,<sup>39</sup> and probably explains some of the mechanical restrictions of the existing privilege statutes.<sup>40</sup> Of course, it is a mechanical impossibility to use the truth of the newsman's published information as an element in determining whether a privilege should be

<sup>36</sup> In the Matter of Wayne, 4 Hawaii Dst. Ct. 475 (1914); Ex parte Nugent, 18 Fed. Cas. 471, No. 10375 (C.C.D.C. 1848); Clein v. State, 52 So.2d 117 (Fla. 1950); Lester M. Hunt (unreported) N.Y. Times, May 20, 1939, p. 10, col. 4; May 23, 1939, p. 25, col. 7; John T. Morris (unreported) Editor & Publisher 9 (Sept. 1, 1934); Hiram J. Ramsdell and Zebb L. White, Cong. Globe, 42d Cong., 1st Sess. 846-88, 929 (1871). The Ramsdell and White case and the Nugent case involved the revelation of treaties which were under consideration by the Senate in executive session. The remainder deal with disclosure of grand jury proceedings and refusals by the newsmen to reveal who had given them their information about the secret proceedings.

<sup>37</sup> For discussions of the policy reasons underlying secrecy in grand jury proceedings see Schmidt v. United States, 115 F.2d 394 (6th Cir. 1940); United States v. Central Supply Ass'n, 34 F. Supp. 241 (N.D. Ohio 1940); United States v. Amazon Industrial Chemical Corp., 55 F.2d 254 (D. Md. 1931).

<sup>38</sup> In re Grunow, 84 N.J.L. 235, 85 Atl. 1011 (1913). Reporter Julius Grunow of the *Jersey Journal* wrote a news story stating that a trustee for the Village of Ridgefield Park had claimed the village surveyor had presented claims for grading which had previously been paid. The trustee's claim was allegedly made at a regular village board of trustees meeting, which Grunow did not attend personally. Grunow, called before a grand jury investigating the possibility of criminal libel in the publication, refused to reveal who was his source, and was fined \$25. His fine was held valid by the New Jersey Supreme Court.

<sup>39</sup> See Memorandum No. 40, Association of the Bar of the City of New York. New York Law Revision Commission, Legis. Doc. 65(A) 81 (1949).

<sup>40</sup> See note 10 supra.

allowed in a particular case. The accuracy of his news item is not determined until after the decision on the privilege question is rendered. However, it is essential to know whether the disclosure of the newsman's confidential sources is necessary to determine the truth of his published statements. This question can be resolved at the time the privilege question is raised. If the information is in fact false, then the privilege would undoubtedly be denied on conditions to be discussed below.

#### WHEN DOES DETRIMENT OUTWEIGH BENEFIT?

The prime argument leveled against any testimonial privilege is that it hampers the due administration of justice. The public is injured when litigation is stymied and the enforcement of the law is impeded. It should be noted that hamper is a word of degree, which could include anything from a mere inconvenience to an absolute bar to a particular proceeding. The degree to which the journalist's refusal to disclose his source hampers an investigation or legal proceeding should be a material consideration. If the refusal to disclose the sources causes nothing more than an inconvenience, the argument that the due administration of justice is impaired is not too overpowering. But, where the refusal effectively stifles the particular proceeding, the same argument would override any claim of public benefit which may support the privilege claim. Disclosure of information by a journalist is not an end in itself. If the newsman has disclosed a situation requiring investigation, and then stops the investigative process by his recalcitrance, he has destroyed the public benefit arising from his disclosure through the use of a confidential source. Where the proceeding is thus impaired, the privilege should not be allowed to operate and whatever force is necessary should be employed to bring about the disclosure of the source of information.

While this element of degree is not specifically discussed in the cases, it can be seen that the degree to which the non-disclosure has deterred the legal proceeding has varied considerably. In the *Simonton* case, *supra*, the non-disclosure of the source did not prove too great a barrier to the investigation of the specific charges Simonton had raised in his published news item. The same conclusion can be drawn from the *Shriver* case, *supra*. However, there are cases in which it can be seen that the journalist's refusal to disclose his source has effectively barred the accurate conclusion of the particular proceeding.

In the case of Nat Caldwell, a reporter for the Knoxville *Tennessean*, a grand jury was instructed to investigate possible liquor law violations after Caldwell had published a story charg-

ing such acts.<sup>41</sup> Caldwell's story intimated that a state highway patrolman had an interest in a local liquor store and was providing safe conduct for bootlegged liquor out of the county and into surrounding "dry" counties. Caldwell refused to disclose where he had obtained his information and the grand jury failed to return an indictment. The County Court of Anderson County refused to cite Caldwell for contempt, on the grounds that a privilege should be recognized.<sup>42</sup> It is an open question as to whether the grand jury would have found sufficient grounds for an indictment had it been availed of Caldwell's sources. In this situation, it appears that the grand jury certainly should have had the benefit of whatever information Caldwell possessed, and a privilege should not have been allowed.

Another example of the journalist's non-disclosure apparently materially hampering an investigation is the case of A.M. Lawrence and L.L. Levings.<sup>43</sup> These two San Francisco newsmen alleged in news items that bribes were being given to the state legislators and they were called to testify before a committee of the California Senate. They refused to divulge their sources of information and were jailed for contempt. The California Supreme Court held their commitment valid in habeas corpus proceedings, saying:

If the witnesses, first answering that they had no personal knowledge of the matter, were to be justified in refusing to give the names of their informant, the senatorial inquiry must necessarily come to an end. Upon the other hand, if they stated the names of their informants, and the nature of their information, the senate could summon those persons and so trace the charges to a conclusion. The evidence then was relevant and pertinent.<sup>44</sup>

The senatorial investigation was not stymied by the refusal of the newsmen to testify, and it proceeded to a conclusion that the

<sup>41</sup> Nat Caldwell (unreported) *N.Y. Times*, June 1, 1948, p. 25, col. 7; *Editor & Publisher* 59 (May 29, 1948); *Editor & Publisher* 64 (June 5, 1948).

<sup>42</sup> The opinion of the county court is set out in *New York Law Revision Commission*, Legis. Doc. 65 (A) 65 (1949):

The press must get its information thru others, of necessity much is given in confidence, and I am unable to hold the witness in contempt of this matter. It's true it is hard to have serious charges made against public officials on hearsay evidence, but at times much good has been done in that way. It puts us all on guard, and to ask ourselves: "Lord is it I"? Lincoln said: "If the end brings me out alright, what is said against me won't amount to anything."

<sup>43</sup> *Ex parte Lawrence*, 116 Cal. 298, 48 Pac. 124 (1897).

<sup>44</sup> *Id.* at 299, 48 Pac. at 125.



charges were false.<sup>45</sup> Lawrence later produced documents which tended to support the charges which had been made originally.<sup>46</sup> It would seem that in such a situation, where apparently all other sources of information tend to disprove the journalist's claim, a proper conclusion cannot be reached without resort to the journalist's sources and he should be compelled to reveal them.

An instance in which a privilege apparently was recognized and the proceeding not impaired is evidenced by the case of Frank L. Toughill.<sup>47</sup> Toughill, a reporter for the *Philadelphia Record*, wrote a story disclosing that the State Alcohol Permit Board had issued a license in a secret session and later rescinded their action. Toughill was called upon to disclose his source in county court proceedings brought to secure issuance of the license. The reporter refused to disclose his source, explaining that to do so might result in his dismissal as a news reporter, and the court did not force him to testify on the matter.<sup>48</sup> Here, where an accurate source of information was the Permit Board itself, the privilege was properly recognized. (The court, incidentally, got the needed information, and ordered the issuance of the license.)<sup>49</sup>

### CONCLUSION

Adequate grounds exist for the recognition of a journalist-informant privilege under certain conditions. Instances have been pointed out where the use of confidential sources has resulted in concrete benefits though the identity of the source has been denied to the court or committee seeking to discover it. There are undoubtedly countless other instances in which the public has benefited, in varying degrees, from the dissemination of information thus gained where the journalist was never called upon to disclose where he got his news.

<sup>45</sup> Letter from Mrs. Carma R. Zimmerman, California State Librarian, to Nebraska Law Review.

<sup>46</sup> *Ibid.* The letter states inter alia: "However, a later account of the life of Andrew M. Lawrence written by Mr. O'Day for the *San Francisco Recorder* and published on March 21 and 22, 1946, seems to indicate that Lawrence was successful in bringing telegrams out in public that tainted the names of forty-four members of the Legislature. Where O'Day got his facts for his article, we have been unable to determine. There have been no subsequent official reports on the matter. . . ."

<sup>47</sup> Frank L. Toughill (unreported) Editor & Publisher 16 (Dec. 9, 1933). Pennsylvania adopted a confidence statute in 1937, see note 10 *supra*.

<sup>48</sup> *Ibid.*

<sup>49</sup> After Toughill was excused from testifying, an attorney for the plaintiff-applicant divulged that a deputy attorney general had been the source of information.

In the main, the use of contempt proceedings has not proved a grand success at bringing forth disclosure of the source. Where the privilege has been denied, its place has been filled with the journalist's obstinacy.<sup>50</sup> In the public's eye, the Fourth Estate seems as capable at vindicating its silent brethren as are the courts and legislative bodies at preserving their dignity through contempt proceedings. The existence or non-existence of the privilege would seem to have little effect then on the due administration of justice. The actual result has been that the administration of certain proceedings has been inconvenienced or hampered in varying degrees, newsmen have been jailed for short periods, and the press emotionally has claimed another martyr. While theoretically this course may in part follow "the trend of best legal judgment"<sup>51</sup> in disallowing further occupational privileges, it fails to win measurable benefits for the public.

A more rational course to pursue would be one which does not settle the matter solely on the question of the witness' occupational pursuit. Looking to broader grounds of public benefit and detriment which would flow from allowance or denial of a privilege is preferable.<sup>52</sup> Such flexibility has been injected in other personal testimonial privileges. The widely recognized privilege of law enforcement officers not to reveal their confidential informants is limited and can be denied if the trial judge feels such revelation is necessary to protect the rights of the defendant.<sup>53</sup> And, in North Carolina, the physician-patient privilege is similarly

<sup>50</sup> Of the cases discussed in this note, only two have resulted in the newsman's identification after his citation for contempt. These are: In the Matter of Wayne, 4 Hawaii Dist. Ct. 475 (1914); Eddie Barr (unreported) N.Y. Times, March 13, 1931. p. 25, col. 8.

<sup>51</sup> II Chafee, Government and Mass Communications 496 (1947).

<sup>52</sup> The New York Law Revision Commission recommended such a middle course after its extensive study. The recommended statute, which has not been enacted, provided that "The body, officer, person or party seeking the information may apply to the supreme court for an order divesting the reporter of the privilege. . . . The order shall be granted only when the court, after hearing the parties, shall find that disclosure is essential to the protection of the public interest." New York Law Revision Commission Legis. Doc. 65(A) 6-7 (1949). The qualified privilege narrowly won the favor of the New York State Society of Newspaper Editors by an 18 to 13 vote. Editor & Publisher 9 (Feb. 5, 1949). The New York *Herald Tribune* complained editorially that the proposed bill was "a bumblng effort which allows the courts to say what is news. . ." Editor & Publisher 50 (Feb. 19, 1949).

<sup>53</sup> Scher v. United States, 305 U.S. 251 (1938). See Annot., 83 L. Ed. 155 (1939).

conditioned,<sup>54</sup> a limitation that has won favorable comment as putting needed flexibility into the rule.<sup>55</sup> Thus it should be with a journalist's claim of privilege. This general approach has been urged by Zachariah Chafee Jr., in his report on "Government and Mass Communications." Chafee urged:

. . . [J]udges should retain their present power to order a reporter to testify or else go to jail for contempt.

On the other hand, this power to make reporters disclose their confidential sources of information should be exercised with great caution. The power also applies to priests, as just stated, but few lawyers or judges would press a question to a priest after he had invoked his professional duty of silence. It is similarly desirable to respect the reporter's claim of confidence except in cases of great necessity where he clearly possesses knowledge which is otherwise unobtainable.<sup>56</sup>

Unfortunately, the restraint urged by Chafee finds little support from either the reported opinions or from the journalist privilege statutes. These sources would point to one of the two extremes, complete denial or blanket acceptance of a privilege, leaving no room for compromise.

The sympathetic attitudes frequently reflected by judges and law officers towards those newsmen who have been held in contempt perhaps reflects a latent recognition of merit in the journalist's position.<sup>57</sup> A review of the cases in this field could lead one to conclude that the contempt power is being exercised only as a matter of ritual much as a reluctant father administers a spanking in a this-will-hurt-me-as-much-as-you frame of mind. With policy lines clearly drawn in a qualified privilege so that the journalist and the responsible authority know where the public good does or does not demand disclosure of the journalist's source, it would seem the proper authority would be more free to use whatever

<sup>54</sup> The North Carolina privilege is concluded with the following provision: "Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." N.C. Gen. Stats. § 8-53 (Michie, 1953).

<sup>55</sup> § Wigmore, op. cit. supra note 5, § 2381.

<sup>56</sup> II Chafee, op. cit. supra note 51, at 496-97.

<sup>57</sup> E.g., Jack Durham and Wesley Carty (unreported) Editor & Publisher 3 (Aug. 4, 1934). These two reporters were subjected daily to incarceration or fines for refusing to disclose who had given them an advance tip on the hanging in effigy of a member of the Kentucky House of Representatives. But, the pair were allowed to work their normal hours and spend off-duty hours in jail. They were released when a college student volunteered evidence.

In the *Leonard* and *Clark* case, see notes 27-29 supra, the newsmen were allowed to receive calls and presents (including a cake with files protruding through the icing) and to write news stories from their cells.

force would be necessary to obtain the needed information. With reported authorities on the point as clearly and broadly stated as they are, recognition of a qualified privilege probably could not come about without legislation. Such a limited privilege could be spelled out in the following manner:

Subject to the following two exceptions, no person engaged in the work of gathering, writing, publishing or disseminating news for any newspaper, periodical, press association, or radio or television station, shall be held in contempt by any authority for refusing to divulge the source of information which such person has accepted in confidence and caused to be published or disseminated. Exception 1. This privilege shall not apply where the information gained by such person concerned the details of any proceeding which was required to be secret under the laws of this state or of the federal government. Exception 2. This privilege shall not apply where it shall be shown conclusively to the judge of the district court, in which district the proceeding is taking place, that (a) all plausible sources of information have been exhausted, and (b) the proceeding or inquiry cannot be concluded without taking testimony from the source or sources sought to be kept secret under this statute.

W. D. Lorensen, '57