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## Journalist's Testimonial Privilege

Ramutis R. Semeta\*

*A strong society of free men must be kept fully informed. Liberty can flourish only in the climate of truth. When Americans know the truth, they are strong and free to act for the best interest of the nation and the world.*<sup>1</sup>  
—Dwight D. Eisenhower

### Freedom of the Press

ON NUMEROUS OCCASIONS, newsmen have pleaded for protection against testimonial compulsion as a necessary safeguard for the preservation of the freedom of the press.<sup>2</sup> Due to this constant assertion, one is compelled to take a brief look at the press, before indulging in the specific study of the journalist's testimonial privilege.

It must be admitted that the seed of the freedom of the press was in the hearts of men long before it was planted in the minds of English-speaking peoples by Lord Mansfield in 1784, when he pronounced that "The liberty of the press consists in printing without any previous license, subject to the consequence of law."<sup>3</sup> This liberty was a plant of slow growth in England, but in due time it won unquestionable acceptance and support. By 1900, Lord Russell had to reiterate the judicial position on this subject by stating that "the liberty of the press is no greater and no less than the liberty of every subject of the Queen."<sup>4</sup> The rationale of the above decisions discloses the fact that the people of England wanted not only a free but also an unprivileged and responsible press.

The dangerous voyage and the treacherous waters of the Atlantic failed to affect the genes of this seed, and it was grimly planted on the shores of the newly discovered American continent by the people who left behind the experience of Star Chamber techniques of censorship. With these experiences still vivid in their minds, those forefathers of America thought that all they

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<sup>1</sup> This Week Magazine, Nov. 8, 1959, p. 2. These words were presented by President Eisenhower as a prelude to this week's nationwide celebration of the freedom of the press. The occasion was the fiftieth anniversary of Sigma Delta Chi, professional journalistic fraternity.

<sup>2</sup> *Torre v. Garland*, 259 F. 2d 545 (2d Cir. 1958), cert. denied, 358 U. S. 910 (1958). The reporter claimed that compulsory disclosure of such information would amount to a prior restraint upon publication and would encroach upon the freedom of the press as guaranteed by the First Amendm. of the Federal Const. See, Recent Decisions, 34 Notre Dame Lawyer 259 (1959).

<sup>3</sup> *R. v. Dean of St. Asaph*, 3 T. R. 431n, 100 English Reports 657n, 661 (1784).

<sup>4</sup> *R. v. Gray*, 2 Q. B. 36, 40 (1900).

would have to do is "to leave the press free and everyone would live in light."<sup>5</sup> Still, the original concepts pronounced in the mother country were adopted and even today the general rule, independent of statute, is that:

a newspaper has no more right than a private individual has to trifle with the reputation of any citizen, or by carelessness or recklessness to injure his good name or business without answering thereof in damages. Publishers of newspapers have the right to publish the truth, but they have no right to publish falsehood to the injury of others.<sup>6</sup>

The scope of this article forbids the piercing of the cobwebs of history and the tracing of the development of the American press. It is sufficient to observe that by the turn of the century, the American press became completely transformed and re-created. The evolution and transition from the personal organ to the modern daily is attributable to a number of factors and circumstances,<sup>7</sup> such as the scientific and economic revolution, the passing of the personal element in journalism, the material growth of the nation, the growth of advertising, governmental cooperation in low postal rates, and such processes as consolidation, standardization, and capitalization, all of which completely changed the nature of American journalism.

This rapid evolutionary process and ultimate emergence of the modern press at first received very little judicial consideration. A deep devotion by the American people to the liberty of the press encouraged judicial insistence upon a broad and liberal construction of the constitutional provision. Due to this climate, not until the decision of *Near v. Minnesota*<sup>8</sup> was there any serious challenge to the principle that there should be no previous restraint upon any publication. Today, however, this immunity is not absolute, and the courts and legislatures have imposed, in exceptional cases, some restrictions, which are basically designed to serve three purposes: (1) To protect governments and their processes;<sup>9</sup> (2) To protect individuals in good name, business reputation and right of privacy;<sup>10</sup> (3) To protect the morals of the public and its right not to be defrauded or de-

<sup>5</sup> Wells, *The Outline of History* 888 (1949).

<sup>6</sup> 17 R. C. L. 349. See cases collected in footnote therein.

<sup>7</sup> 2 Morison and Commager, *The Growth of the American Republic* 288-294 (4th ed. 1954).

<sup>8</sup> *Near v. Minnesota*, 283 U. S. 697, 51 Sup. Ct. 625 (1931).

<sup>9</sup> *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247 (1919). The concept of "clear and present danger" announced in this case received its most recent interpretation in *Dennis v. United States*, 341 U. S. 494, 71 Sup. Ct. 91 (1951); *Bridges v. California*, 314 U. S. 252, 62 Sup. Ct. 190 (1941); *Pennekamp v. Florida*, 328 U. S. 331, 66 Sup. Ct. 1029 (1946); *Craig v. Harney*, 331 U. S. 367, 67 Sup. Ct. 1249 (1947).

<sup>10</sup> *Kovacs v. Cooper*, 336 U. S. 77, 69 Sup. Ct. 448 (1949).

ceived.<sup>11</sup> At the same time, some of the protective laws concerning the press and journalists began to appear on the horizon.

**Privilege and Confidence Statutes**

Recent history has witnessed the emergence of these protective laws, in the form of new privileges for secrecy of communications, on the statute books of several legislatures.

Already sixty-five years have elapsed since the enactment of the first confidence statute<sup>12</sup> which extended to newsmen the privilege to withhold the source of information obtained by them in confidence. Today newsmen are protected by confidence statutes in twelve states.<sup>13</sup> Seven of these states extended this privilege to radio,<sup>14</sup> six to television,<sup>15</sup> and four to press associations.<sup>16</sup> Also, recently, attempts have been made to enact such legislation in thirteen other jurisdictions.<sup>17</sup> This trend, if permitted to continue, subsequently will extinguish the traditional concept that the press and journalists should not be singled out for special legal favors or restrictions.

Privilege, in law, is an immunity or exemption conferred by special grant to an individual or a certain class in derogation of common right.<sup>18</sup> Its presence is felt in the law of evidence. Privilege, as it relates to the law of evidence, "concerns confidential communications between persons holding confidential relationships to each other, such as husband and wife, attorney and client, and fellow jurors, plus privileges questioned at Common Law, of priest and penitent and physician and patient, and

<sup>11</sup> Roth v. United States, 354 U. S. 476, 77 Sup. Ct. 1304 (1957).

<sup>12</sup> State of Maryland enacted such a statute in 1896.

<sup>13</sup> Ala. Code Ann. tit. 7, § 370 (1940); Ariz. Rev. Stat. Ann. § 12.2237 (1956); Ark. Stat. Ann. tit. 43, § 917 (1947); Cal. Code Civ. Proc. Ann. § 1881(6) (1946); Ind. Ann. Stat. § 2-1733 (Burns Supp. 1957); Ky. Rev. Stat. § 421.100 (1955); Md. Ann. Code Gen. Laws art. 35, § 2 (1957); Mich. Stat. Ann. § 28,945(1) (1954); Mont. Rev. Codes Ann. § 93.601-2 (Supp. 1957); N. J. Stat. Ann. 2a:81-10 (1952); Ohio Rev. Code Ann. § 2739.12 (1953); Pa. Stat. Ann. tit. 28, § 330 (1958).

The chronological order of adoption of these statutes is as follows:

Maryland	1896	Arizona	1937
New Jersey	1933	Pennsylvania	1937
Alabama	1935	Indiana	1941
California	1935	Ohio	1941
Arkansas	1936	Montana	1943
Kentucky	1936	Michigan	1949

<sup>14</sup> Alabama, Arkansas, Indiana, Kentucky, Maryland, Montana, Ohio (R. C. § 2739.04, effective May 27, 1959).

<sup>15</sup> Alabama, Indiana, Kentucky, Maryland, Montana, Ohio (R. C. § 2739.04).

<sup>16</sup> Indiana, Montana, Ohio (R. C. § 2739.12), Pennsylvania.

<sup>17</sup> Connecticut, Florida, Illinois, Kansas, Massachusetts, Missouri, New Hampshire, New York, Rhode Island, Texas, Virginia, Washington, and Wisconsin.

<sup>18</sup> Webster's New World Dictionary 1160 (1955).

public policy requires that these confidences shall not, without consent, be revealed to third parties at any time, in or out of court."<sup>19</sup> The obvious effect of these privileges is that they shut out probative evidence and thus hamper judicial search for truth. Since the general policy of the law of evidence is to compel disclosure of all relevant information as an aid in the ascertainment of truth and ultimately the due administration of law, privileged communications are the exception to the general rule<sup>20</sup> which holds that "the public has a right to every man's evidence."<sup>21</sup>

Wigmore<sup>22</sup> states that there are four recognized fundamental conditions necessary to the establishment of a privilege against disclosure of communications, and he enumerates them as follows:

1. The communications must originate in confidence that they will not be disclosed.
2. The 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 fostered.
4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation.<sup>23</sup>

The journalist's statutory privilege which protects him against testimonial compulsion fails to satisfy these fundamental conditions. The appearance of this statutory privilege is probably due to a misconception which was promoted by invocation of a false analogy to the existing privileges. These privileges extending the protection to physician-patient,<sup>24</sup> lawyer-client, clergyman-penitent, and husband-wife<sup>25</sup> relations, have been justified on public policy grounds, i.e., that the public good is better served by encouraging the confidential relationship rather than

<sup>19</sup> *Lindner v. First Nat. Bank and Trust Co. of Montclair*, 9 N. J. Super. 569, 76 A. 2d 49, 51 (1950); 8 Wigmore, *Evidence* § 2197, at 106 (3rd ed. 1940).

<sup>20</sup> *People ex rel. Mooney v. Sheriff*, 269 N. Y. 291, 199 N. E. 415, 416 (1936).

<sup>21</sup> *In re Investigation of World Arrangements with Relation to the Production etc.*, 13 F. R. D. 280, 281 (D. C. D. C. 1952); *United States v. Bryan*, 339 U. S. 323, 331, 70 Sup. Ct. 724, 730 (1950).

<sup>22</sup> 8 Wigmore, *Evidence*, § 2286 (3rd ed. 1940).

<sup>23</sup> *In re Herrnstein*, 6 Ohio Supp. 260, 20 Ohio O. 405, 410 (1941). It is interesting to note that this court, just a few months before the passage of the confidence statute, stated that a privilege should not be recognized unless it satisfies all these conditions.

<sup>24</sup> Stewart, *Physician-Patient Privilege in Ohio*, 8 Clev.-Mar. L. R. 444 (1959).

<sup>25</sup> Guarneri, *Husband-Wife Privileged Communications, Summarized*, 8 Clev.-Mar. L. R. 531 (1959).

by disclosing the facts.<sup>26</sup> It is very doubtful, indeed, whether the creation and preservation of a confidential relationship between newsmen and their informants could be justified upon these grounds. The New York Bar Association Committee on State Legislation made the following observation on a journalist's privilege:

The proposed new class of privileged communications does not meet any of these four fundamental conditions. Moreover, the bills do not prevent the disclosure of the communications, which is the purpose of the present statutes, but merely prevent the disclosure of the source of the information. Their effect, as a matter of fact, is directly contrary to the effect of the present statutes in that they encourage the disclosure of the communication instead of preventing it. They open the way to reckless publication and abuse, and while on their face they seem to protect the editor and reporter, in reality they protect the informant. It seems to us that the informant, who furnishes information to a reporter for the express purpose of having it published, should have no such immunity as these bills propose.<sup>27</sup>

At Common Law there was no recognition of this privilege, and if a newsman was summoned before a court of competent jurisdiction and was asked to disclose the source of information which had come into his hands, such evidence being relevant and material to the issue at trial, he could not claim exemption as a witness from answering a question on the ground that he had received the same under a promise that he would not divulge the name of his informant.<sup>28</sup> Therefore, generally, the mere fact that a communication is made in express or implied confidence does not create a privilege, because "No pledge of privacy, nor oath of secrecy, can avail against a man for truth in a court of justice."<sup>29</sup>

The reasons given by the courts for the above stated rule vary, but the one most frequently relied upon is "the superior

<sup>26</sup> McCormick, Evidence § 90, at 179 (1954).

<sup>27</sup> N. Y. City Association of the Bar, Committee on State Legislation (1930), reprinted in 8 Wigmore, Evidence § 2286, at 538 (3rd ed. 1940).

<sup>28</sup> Leading cases: *In re Grunov*, 84 N. J. L. 235, 85 A. 1011 (1913); *People v. Durrant*, 116 Cal. 179, 48 P. 75 (1897); *Ex parte Lawrence and Levings*, 116 Cal. 299, 48 P. 124 (1897); *Joslyn v. People*, 67 Colo. 297, 185 P. 375 (1919); *Pledger v. State*, 77 Ga. 242, 3 S. E. 320 (1886); *Plunkett v. Hamilton*, 136 Ga. 72, 70 S. E. 781 (1911); *People ex rel. Mooney v. Sheriff*, 269 N. Y. 291, 199 N. E. 415 (1935); *State v. Donovan*, 129 N. J. L. 478, 30 A. 2d 421 (1943); *Brogan v. Passaic Daily News*, 22 N. J. 139, 123 A. 2d 473 (1956); *Clinton v. Commercial Tribune Co.*, 11 Ohio Dec. 603 (1901). U. S.: *Brewster v. Boston Herald-Traveler Corp.*, 20 F. R. D. 416 (D. Mass. 1957); *Rosenberg v. Carrol*, 99 F. Supp. 629 (So. D. N. Y. 1951) (dicta); *Ex parte Sparrow*, 14 F. R. D. 351 (N. D. Ala. 1953). Also see 97 C. J. S. 743, and annot., 102 A. L. R. 771 (1936).

<sup>29</sup> *People ex rel.*, supra note 20.

interest of the public in the due administration of the law over any private consideration that may exist as between journalists and their informants."<sup>30</sup>

Perhaps, this constant judicial denial of the privilege inspired the newsmen in their search for greener pastures. As a result, the newsmen embarked on a major campaign to woo the state legislatures and, as we have seen, they were successful in a few states.

### Position of the Opponents

This legislative extension of the privilege of non-disclosure to newspapermen created from the very beginning a controversy which has not as yet subsided, but on the contrary its flames continue to glow as brightly as ever. In fact, it has been the subject of considerable specific study and criticism: state<sup>31</sup> and federal<sup>32</sup> courts, textbook writers,<sup>33</sup> legal commentators,<sup>34</sup> and governmental commissions<sup>35</sup> consistently deplored this type of statute.

Many policy considerations have been stated in opposition to this privilege, the foremost being that the practice of the courts has been to limit rather than extend the classes to whom evidentiary privilege is granted.<sup>36</sup>

A recent fifteen month study conducted by the American Civil Liberties Union announced the belief that "the legislative approach in this field is neither necessary nor at the present time

<sup>30</sup> Annot., 102 A. L. R. 771, 772 (1936).

<sup>31</sup> *State v. Donovan*, 129 N. J. L. 478, 30 A. 2d 421 (1943); *Brogan v. Passaic Daily News*, 22 N. J. 139, 123 A. 2d 473 (1956).

<sup>32</sup> *Brewster v. Boston Herald-Traveler Corp.*, 20 F. R. D. 416 (D. Mass. 1957); *Rosenberg v. Carrol*, 99 F. Supp. 629 (So. D. N. Y. 1951) (dicta); *Ex parte Sparrow*, 14 F. R. D. 351 (N. D. Ala. 1953).

<sup>33</sup> Wigmore, *op. cit. supra* note 22; 2 Conrad, *Modern Trial Evidence* 256 (1956); McCormick, *Evidence* § 81, at 166 (1954). The author expresses hope that perhaps in the future the rule of privilege will take the path from rule to discretion.

<sup>34</sup> 2 Chafee, *Government and Mass Communications* 496 (1947). The author observed that "The trend of the best legal judgment is away from all occupational privileges . . .;" Note, 36 Va. L. R. 61 (1950); Gallup, *Further Consideration of a Privilege for Newsmen*, 14 Albany L. R. 16 (1950).

<sup>35</sup> New York Law Revision Commission, Report 1949, pp. 23-168. In 1937-1938, this subject was placed on the program of the American Bar Association Committee on the Improvement of the Law of Evidence. The committee recommended that the Legislatures refuse to create any new privileges for secrecy of communications. This report is reprinted in 8 Wigmore, *Evidence* § 2286, at 539 (3rd ed. 1940).

<sup>36</sup> McCormick, *op. cit. supra* note 33, at 165, states that "The manifest destiny of evidence law is a progressive lowering of the barriers to truth. Seeing this tendency, the commentators who take a wide view, whether from the bench, the bar, or the schools, seem generally to advocate a narrowing of the field of privilege."

desirable."<sup>37</sup> This indictment against legislative sanction of the privilege seems to be well founded. Since the rule of privilege prevents probative evidence from coming in, it obstructs the judicial investigation of truth or falsity of facts in issue presented for the court's determination. Another reason given by the opposition is the fact that newsmen are not screened as to character nor licensed by any supervisory authority,<sup>38</sup> and they are not subject to as strict sanctions as other classes to whom existing privileges apply, and which tend to restrict abuses of these privileges. The only restriction upon a journalist is the limit of his own zeal or that of his employer. In the opinion of Gallup:

The protection of an innocent person from slander and libel by unscrupulous newsmen seems more compelling in the public interest than the protection of equally unscrupulous informants.<sup>39</sup>

The scope and meaning of the present statutes cannot be defined with accuracy, because only a few cases arising under them received judicial interpretation. But the hostility of the courts to this extension of the privilege can be detected from these decisions.

In *State v. Donovan*,<sup>40</sup> the court held that the statutory privilege did not permit a correspondent to refuse to divulge the physical means of transmitting the information from the source to the newsman. The court justified this narrow construction on the ground that this statute being in derogation of common law must be strictly construed. Therefore, where the inquiry is not as to the source but as to the means of acquiring the information, the statutory privilege does not apply. Under this construction, if information was delivered by a messenger, whom the newsman must name, then the source can be easily ascertained by merely putting the messenger on the stand and compelling him to divulge the source.<sup>41</sup>

In *Brogan v. Passaic Daily News*,<sup>42</sup> a newspaper editor pleaded "fair comment" and "good faith" as affirmative defenses

<sup>37</sup> New York Times, March 18, 1959, p. 75. The report continued that "Most of the proposed or enacted statutes seem dangerously loose (in their definition); none of the statutes has yet been tested for constitutionality, and their survival of such a test may be doubtful."

<sup>38</sup> 4 Negl. and Compens. Service, No. 14, p. 111 (Oleck, ed., Apr. 15, 1959); Gallup, op. cit. supra note 34.

<sup>39</sup> Gallup, op. cit. supra note 34.

<sup>40</sup> 129 N. J. L. 478, 30 A. 2d 421 (1943); In view of the holding in *Weis v. Weis*, 147 Ohio St. 416, 72 N. E. 2d 245 (1947), the newsman's privilege statute, if it ever comes before the Ohio courts, might be similarly construed.

<sup>41</sup> Steigleman, Newspaper Confidence Laws, 20 Journalism Quarterly 231-232 (September, 1943). This decision is severely criticized as emasculating the New Jersey privilege statute.

<sup>42</sup> 22 N. J. 139, 123 A. 2d 473 (1956).



and further testified that the article was based upon "a reliable source" and disclosed the information received from that source. The court held that a newsman's privilege, like any other personal privilege, constitutional or statutory, can be waived and is so waived by voluntary testimony of the person upon whom the privilege is conferred. The court continued that "If a newspaper may libel, and then defend stating that the information came from a 'reliable source,' and then bar further inquiry into the source by pleading the statutory privilege, recovery would be denied in most cases if not all.<sup>43</sup> . . . We agree that this would amount to using the statute as a sword rather than as a shield as was intended when the statute was enacted."<sup>44</sup>

The above decisions fairly suggest that in the future, the strict construction of confidence statutes by the courts can be anticipated.

In the recent case of *Torre v. Garland*,<sup>45</sup> the reporter claimed that compulsory disclosure of the "source" would encroach upon the freedom of the press as guaranteed by the First Amendment of the Federal Constitution and would also violate a confidence protected under an evidentiary privilege.<sup>46</sup> The court held that the First Amendment of the Federal Constitution guaranteeing freedom of the press conferred no right on a columnist to refuse to answer questions concerning the identity of the "network executive." The reason given for the above ruling was stated in terms of necessity to balance both "vital" interests, i.e., free press and justice, and that in the present case the freedom of the press "must give place to a paramount public interest in the fair administration of justice."<sup>47</sup>

### Position of the Press

Despite these clear and firm expressions by our courts that, in the absence of a specific statute, newsmen have no legal authority to keep the sources of their information confidential, newspapermen apparently intend to defy the law.<sup>48</sup> At a February, 1959 convention, the New York State Society of Newspaper Editors reaffirmed "the traditional principle that the identity of a news source be held confidential."<sup>49</sup> Also, currently the Amer-

<sup>43</sup> 123 id. at 480.

<sup>44</sup> Ibid. at 480.

<sup>45</sup> 259 F. 2d 545 (2d Cir. 1958), cert. denied, 358 U. S. 910 (1958). District Court ordered the witness to state the name of her informant. Upon her refusal to do so, she was held in criminal contempt and ultimately jailed.

<sup>46</sup> Id. at pp. 549-50. The court emphasized the duty of a witness to testify in a court of law and indicated certain limitations to this duty in keeping with the concept of free press. If the judicial process were used to "force a wholesale disclosure of a newspaper's confidential sources of news" or if the "news source (were) of doubtful relevancy and materiality," there might be an abridgment of the free press.

<sup>47</sup> Ibid. at p. 549.

<sup>48</sup> New York Times, Feb. 4, 1959, p. 17.

<sup>49</sup> Ibid. at p. 17.

ican Society of Newspaper Editors, the Associated Press Managing Editors, and Sigma Delta Chi, professional journalism fraternity, joined in efforts to protect freedom of information.<sup>50</sup>

It is difficult to perceive any lawful means by which any given individual or group could resist court decisions altogether. Lawful disobedience of the law is pure nonsense. Therefore, the present position of the press indirectly challenges the supremacy of law, the principle which still signifies the glory of the American political system. In *Plunkett v. Hamilton*,<sup>51</sup> the court held that the citizen or inhabitant owes to the state the duty of testifying, when lawfully called upon to do so, in order that the truth may be ascertained and impartial and complete justice done. The court concluded that "A promise not to testify when so required is substantially a promise not to obey the law."<sup>52</sup> Perhaps this unified storming of the legislative halls by the press is a sophisticated attempt to circumvent this proposition, but it reveals that the behavior of pressure groups is seldom colored by any genuine concern for the common welfare, although they often claim to carry the burden of the general good.<sup>53</sup>

At this time it is impossible even to volunteer a guess how far this unified effort will succeed. But already a major victory has been won by the press in the passage of the Moss-Hennings Bill,<sup>54</sup> ending the use of the 1789 federal "housekeeping" statute as an excuse to withhold news from governmental agencies.<sup>55</sup> As a result of this extra-curricular activity on the part of the

<sup>50</sup> 1959 Encyc. Britannica Book of the Year, 490.

<sup>51</sup> *Plunkett v. Hamilton*, 136 Ga. 72, 70 S. E. 781 (1911). One of the ablest decisions on the journalist's privilege.

<sup>52</sup> 70 *id.* at 786.

<sup>53</sup> Pressure groups are most conspicuous in their activities in support of and in opposition to legislative proposals. It is important to note that a large proportion of legislation originates outside the legislature itself. The staff members of the pressure groups draft bills for introduction into legislative body, bills that, of course, reflect the policies of the group. See, Burns, *Congress on Trial* (1949); also Lane, *Notes on the Theory of the Lobby*, 2 *Western Political Quarterly*, pp. 153-161 (1949).

<sup>54</sup> 5 U. S. C. 22 #R. C. 161. (Signed by President Eisenhower on Aug. 12, 1958.) Original sec. 161: "The head of each department is authorized to prescribe regulations, not inconsistent with the law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

**MOSS-HENNINGS BILL:** "Sec. 161 of the R. C. is amended with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records, by adding at the end thereof the following sentence: THIS SECTION DOES NOT AUTHORIZE WITHHOLDING INFORMATION FROM THE PUBLIC OR LIMITING THE AVAILABILITY OF RECORDS TO THE PUBLIC." See, *Congressional and Adm. News*, 85th Congress 2d Session p. 3354 (1958).

<sup>55</sup> 1959 Encyc. op. cit. supra note 50.

press, even the American Bar Association was put on defense of its Canon 35, barring courtroom photography.<sup>56</sup>

In view of our judicial decisions and a general trend of legal minds toward narrowing of the field of privileges, is this vigorous campaign on the part of the press justified? Is a testimonial privilege necessary to preserve the constitutional freedom of the press?

It should be noted that "public interest" argument is used to deny the privilege at Common Law and in the majority of jurisdictions, and to grant it by statute in the small minority. The exponents of newspaper confidence laws urge that the privilege should be granted because it would result in better news reporting and, therefore, would benefit the public. Thus, the basic query is, whether the absence of the privilege causes inferior news reporting? This argument by confidence exponents is not very convincing. In fact it is rebutted by practical experience. No one will disagree that only few daily newspapers can approach the superiority of the news reporting found in *The New York Times*, though the State of New York does not have a confidence statute. Once the public-benefit argument is removed, the very foundation for the existence of such privilege disappears. The only remaining logical reason for the claim of the privilege by journalists and other pressure groups is an attempt to secure their business interests behind a legal barrier of secrecy. It has been suggested that this claim "is motivated not by altruism but rather by the inescapable fact that the economic survival of the news-gathering industry depends largely on the preservation of confidential sources of information."<sup>57</sup> Therefore the public interest in the search for truth should not be subordinated to the personal interests of a relatively small class.

Today, newspaper industries are highly concentrated business enterprises which have a general tendency to follow the point of view of the dominant economic groups in respective communities. The effect of this concentration of power and money is the control of centers for the diffusion of ideas, and, ultimately, for opinion manipulation.<sup>58</sup> Such conduct on the part of the press, in effect, amounts to a betrayal of a public trust. It also indicates the fact that the threat to the freedom of the press lies within

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<sup>56</sup> Note, *Media Groups Join ABA in Canon 35 Study*, 5 *The Student Lawyer* 30 (1959). The ABA's special Committee to Study Proposed Revision of Judicial Canon 35—the 21-year-old canon prohibiting photography in courtrooms—met recently in Washington with representatives of the eight media organizations to discuss the new ABA plan. Its objective is to throw "fresh light" on the Canon 35 controversy. A recent Ohio decision permitted news photography through courtroom-door windows. In *re Greenfield*, 163 N. E. 2d 910 (Ohio App., decided Feb. 1959, reported Feb. 1960).

<sup>57</sup> Note, 36 *Va. L. R.* 61, 83 (1950).

<sup>58</sup> Wells, *op. cit. supra* note 5. "They [the people] did not realize that a free press could develop a sort of constitutional venality due to its relations with advertisers, and that large newspaper proprietors could become buccaners of opinion and insensate wreckers of good beginnings."

the press itself. An opinion<sup>59</sup> was voiced on a number of occasions that the dependency of the newspapers upon advertising for revenue presents a real threat to the free press in the form of prior economic restraint on publication. Newspaper owners who are chiefly interested in how space is sold and not how it is filled are probably responsible for the inferior news reporting rather than the absence of the privilege statute. President Grayson Kirk of Columbia University hinted a conviction that "outside of a few great papers the majority of dailies have become as much amusement carrousel as information vehicles."<sup>60</sup> Whatever the reason, a great part of our newspaper media fails in its duty to inform and educate the public but instead turns to a world of make-believe. A number of dailies and journals contain loosely researched stories, with a stress on crime, sex and society news in order to sell newspapers. Sometimes the press in fact misinforms the public in creating false images. Recently this admission was made by a member of the journalistic profession when he stated:

The truth is in this Golden Age of Communications, whenever the press participates massively in history it changes history, and thereby abdicates its role of reporting the news in favor of actually making the news.<sup>61</sup>

The recent Khrushchev tour "was but the latest eruption of this potentially fatal sickness."<sup>62</sup> Such practices hardly comply with the tenor of the statement issued by President Eisenhower as a prelude to a week's nationwide celebration of the freedom of the press.<sup>63</sup>

### Conclusion

In a democratic society all rights and freedoms are necessarily limited and interdependent. Therefore, in our case, the existing evidentiary privileges were granted for certain professional communications, not as a matter of whim, but in order to reconcile conflicting interests and policies. They were given in the belief that the benefits derived therefrom justified the risk

<sup>59</sup> White, *How Free is Our Press?*, 146 *The Nation* pp. 693-95 (June 18, 1938). "The advertising agencies undertake to protect their clients from what the clients and agents may regard as real danger from inimical social, political, or industrial influences. As advisers the advertising agencies may exercise unbelievably powerful pressure upon newspapers. There is grave danger that in the coming decade, as social, industrial, and economic problems become more and more acute, this capacity for organized control of newspaper opinion by the political advisers of national advertisers may constitute a major threat to a free press."

<sup>60</sup> Severeid, *The Press in a Rose-Colored Mirror*, 14 *Reporter Mag.* 25 (May 17, 1956).

<sup>61</sup> Bradlee, *Saturation Coverage*, 21 *Reporter Mag.* 32 (Oct. 29, 1959).

<sup>62</sup> *Ibid.* at p. 32.

<sup>63</sup> Dwight D. Eisenhower, *op. cit. supra* note 1.

that unjust decisions may sometimes result from the suppression of material and relevant evidence. The journalist's cause for such a grant is inadequate and the legislative branches of the state governments should carefully reconsider the factors involved before extending it. Since the rule of privilege is an obstacle placed in the path of judicial search for truth, it cannot be extended too far before a point might be reached at which the exercise of that right will become inordinately expensive for the rest of the society. Besides, the judicial tribunals are the zealous guardians of our rights and freedoms; thus it should be left in their sound discretion to determine whether a non-disclosure of a "source" would prevent access to facts necessary for the correct disposal of the case.