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Absolutism and the Confidentiality Debate: Confidentiality and Journalists Sources, Ethical Space: the International Journal of Communications Ethics, Vol 1 Number 2, 2004

By Michael Foley

There is hardly a code of conduct, code of professionalism, or code of ethics anywhere in the world that does not call in the strongest terms for a journalist always to maintain the anonymity of a confidential source. For instance, the National Union of Journalists of Britain and Ireland's code of conduct states categorically: "A journalist shall protect confidential sources of information." Contrast that with other clauses that contain qualifying statements such as "subject to the justification by overriding considerations of the public interest". Similarly, the International Federation of Journalists' code, which is often used as a model for journalists' codes in emerging democracies, states: "The journalist shall observe professional secrecy regarding the source of information obtained in confidence."

There are a number of reasons for the importance of protecting confidential sources. In a profession with so few rules, if any, it can be comforting to have at the centre such a strong statement of principle. Another reason might be the increasing difficulty journalists have in defending objectivity, that notion which more or less defined journalism for so long. Objectivity can be seen as a theory to get to the truth, the epistemology of journalism, which states that if you separate facts from opinion or news from views this will permit you to know the truth. Defending the anonymity of a source thus becomes a central position that sets journalists apart from other professions and gives substance to an ideology of objectivity within a practice that still has difficulties in defining itself as a profession or not.

There is legislation in a number US states giving journalists a legal protection and Sweden has had similar legislation for years. The European Court of Human Rights has ruled, in the case of a British journalist, Bill Goodwin, that protection of confidential sources is an essential means of enabling the press to perform its important function of public watchdog and should not be interfered with unless in exceptional circumstances where vital public or individual interests are at stake.
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Journalists are taking an increasingly absolutist view of this position, despite the European Court of Human Rights' qualifying phrase of "unless in exceptional circumstances where vital public or individual interests are at stake". For instance, John Toner, the official who serves the NUJ's ethics council, commenting on a case of a former temporary member of the union who had given evidence against a man accused of murder based on evidence given to him in confidence, said:

> Some have argued that Nick Martin-Clark (the journalist who gave evidence) was acting in the public interest by informing on a notorious killer. We must take a broader view of the public interest than this. Sources must believe that a promise of confidentiality is as binding on a journalist as it is on a doctor, a lawyer or a priest, Any weakening in that belief will result in sources drying up and countess issues of public interest may never see the light of day.

There are problems with this absolutist position. If we ignore priests, whose justifications for upholding confidentiality are theologically based, then we are left with lawyers and doctors. Both professions are highly regulated and licensed. The bodies that run both professions have the powers of the courts devolved to them, allowing them to grant and take away the right to practice. Such a scheme would be anathema to most journalists. It would have grave implications for press freedom, with the possibility of licensing and legal definitions of what and who is a journalist.

Doctors, lawyers and priests offer anonymity to ensure privacy, so that what is said can remain private. Nothing said to the practitioner will be put into the public domain. For the journalist the opposite is true. Not only will the journalist report all that is said, but will try, with all the skills as his or her disposal, to get the source to talk more and get more information, which again will be made public. As Klaidman and Beauchamp (1987: 163) say in their work, The Virtuous Journalist, there is a real difference between the relationship between a journalist and source compared to that between a doctor and patient or lawyer and client:

> Confidentiality is at the heart of trust in regular reporter-source relationships. But relationships of confidentiality between reporters and sources are different from those found in other professional settings such as between lawyer and client, physicians and patients, clergy and parishioners, In these relationships, the right of confidentiality exists to protect privacy and to encourage the openness that is required to guarantee the client, patient or parishioner the full benefit of the professional's services. In the case of reporters and source, by contrast, there are non-fiduciary and even adversarial elements in the relationship, with the reporter angling to learn more than the source want to tell and the source trying to promote a particular views, and, of course, from the standpoint of the journalist, the public's interest, not the source's, should be paramount.

One of the problems for the absolutist case is that the use of anonymous sources appears to be increasing. Day after day the media, especially newspapers, are full of quotes from "sources close to the prime minister", "industry sources" or "intelligence sources" (particularly in the reporting of the Iraq crisis) and so-called "friends" who tell all. No names are given, often only one source is quoted. Is the public to believe that the journalist is to risk imprisonment to keep the anonymity of the ubiquitous friend in celebrity news? And if they do are they to be admired as doing something central to democracy and journalism?

How can the public, those who are to be informed by journalism so that they can make the decision necessary in a democracy, trust journalists who offer so much information without any meaningful indication where it came from? In many, possibly most, cases the anonymous source is not a fearless whistleblower, but a manipulating spin doctor, working for the rich and powerful and hiding behind a journalist's promise of anonymity. And if that is the case, who gains most by the journalists' willingness to go to prison rather than reveal a source, the source or the public? As the philosopher, Onora O'Neill (2002: 98), commented in her BBC Reith Lecture: "I am still looking for ways to ensure

that journalists do not publish stories for which there is no source at all, while pretending that there is a source to be protected."

The absolutist position, does, of course, place the journalist above the ordinary citizen. With a demand for the legal right to withhold the identity of sources of information, journalists are seeking, and in some cases getting, a right denied to others. In that case the journalist has ceased to be a citizen using the right to free expression granted to all in a professional way, but a special sort of citizen, one with rights granted by parliament or the courts, who might, of course, one day, have a view as to who can operate that right. Such a position has profound implications to what might be called alternative media. Will a citizen with a camcorder or a website be granted the same rights as a journalists if they decide to publish information from an anonymous source? Who will decide who is a journalist?

With anonymity the source holds all the cards. A decision to give anonymity has to be agreed before the information is given, so that before the journalist has heard what the source has to say, he or she has given a binding undertaking never to reveal the name, whatever the outcome. If that outcome leads to a miscarriage of justice, for instance, is that going to instil confidence into another person whose information is of great public interest, but now fears giving it to a person who would rather see a guilty person go free rather than give a name to a court?

This is not an argument for abandoning the principle of defending the right of anonymity. It is right and proper that codes of conduct state clearly and unequivocally, as the NUJ's does, that a journalist shall protect confidential sources. Codes lay down guiding imperatives and all journalists must have a strong duty to follow such codes. Such a duty ensures professionalism among journalists and also helps the public to know what journalists themselves believe are the principles of the profession. The events in Britain surrounding the death of Dr David Kelly and the ensuing inquiry of Lord Justice Hutton raised another and quite intriguing question. Does a guarantee to maintain the anonymity of a source mean you do not try and find out who another journalist's source is? In the many issues raised by the events surrounding the Hutton inquiry the question of a sources' anonymity, Dr Kelly's, was only addressed in terms of who authorized the release of his name. An another question was not addressed which is: If protecting the identity of an anonymous source is so central to the collective professionalism of journalists, is not the obverse of that principle that a journalist shall do everything possible to ensure a colleague's source is protected? In the case of David Kelly, that was not the case as journalists quizzed the British Ministry of Defence officials as to the identity of Dr Kelly.
So now a journalist will only be able to promise that a sources' identity will be protected by an individual journalist, even though his colleagues might decide to hunt for his or her name and out the source. Some might think that is not much protection.

The problem for journalists, however, is that for the most part they are condemned to live without hard and fast rules and that all they have to guide them are ethical principles. They can adopt a legalistic Kantian allegiance to rules, that tells them to follow the codes out of duty to the rules, and for no other reason, or they can adopt a more reasonable approach, that insists that they consider the consequences of their actions. As John Merrill (1989: 198) says:

> Journalists must be flexible, or willing to moderate a basic ethical tenet in order to reach a higher ethical objective dictated by a reasoned analysis of the situation. A significant point, and it should be emphasised, is that the journalist should never capriciously or unthinkingly break an ethical rule or maxim. An exception to a principle because of a specific situation must be made only after serious thought.

Maybe it is now time for journalists to adopt a new imperative to judge and guide their actions, trustworthiness. Are my actions, or decisions likely to increase the trust between me and my readers, viewers or listeners? Such an approach would have journalists seriously question the use of anonymous sources and ensure that they are used rarely and when used a full explanation is given as to why. With trust placed central to journalist practice fewer anonymous sources would be used and so the problem of anonymity would arise less often.

Onora O'Neill suggests that good public debate "must not only be accessible to but also assessable by its audiences" (op cit: 95). If she is right that the public's trust of the press demands that it be assessable it would mean a major change in the way journalists use sources.

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