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Informer's Privilege: Should it be Recognized in Grand Jury Proceedings; Should it be Extended to Civic Anti-Crime Organizations, The

CRIMINAL LAW CASE NOTES AND COMMENTS

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THE INFORMER'S PRIVILEGE: SHOULD IT BE RECOGNIZED IN GRAND JURY PROCEEDINGS; SHOULD IT BE EXTENDED TO CIVIC ANTI-CRIME ORGANIZATIONS?

Law enforcement agencies often rely upon informer's reports as a basis for investigation or the arrest of a person accused of a crime.[1] Although it is a citizen's moral duty to report violations of the law, the informer demands the assurance of some protection, for he fears that disclosure of his identity may expose him or his family to retaliatory action for what he has made known.[2] As a result the courts have long recognized, as an evidentiary rule, the privilege of government officials to withhold the identity of their informers.[3] It is not clear, however, whether the informer's privilege extends to grand jury proceedings, and, of equal importance, whether courts (or legislatures) should extend this privilege to investigating officers of private civic anti-crime groups appearing in grand jury *or* court proceedings.

Both of these novel problems were raised in the cases of *In re Kohn*[4] and *People v. Keating*.[5] In each case a member of a civic crime committee was cited for contempt of court for refusing to disclose the source of his information before a grand jury conducting a parallel investigation. However, neither court *specifically* passed upon the question of the availability of this privilege before the grand jury.[6]

[1] See HOPKINS, OUR LAWLESS POLICE (1931); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951); Hoover, *A Comment on the Article "Loyalty Among Government Employees,"* 58 YALE L.J. 401 (1949).

[2] See Comments, *Some Aspects of Competency and Privileged Communications in The Federal Criminal Courts*, 98 U. PA. L. REV. 719, 730 (1950); *An Informer's Tale: Its Use in Judicial and Administrative Proceedings*, 63 YALE L.J. 206 (1953). The dangers involved are best illustrated by the death of Arnold Schuster. Shortly after New York police disclosed that his information led to the arrest of bank robber Willie Sutton, Schuster, the informant, was mysteriously slain. N. Y. Times, Feb. 21, 1952, p. 1, col. two; *id.*, March 9, 1952, p. 1, col. 8.

[3] 8 WIGMORE, EVIDENCE § 2374 (3d ed. 1940). "This privilege is well established, and its soundness cannot be questioned."

[4] 277 La. 245, 79 S. 2d 81 (1955).

[5] 286 App. Div. 150, 141 N.Y.S.2d 562 (1st Dep't 1955).

[6] In the *Keating* case, the court recognized the existence of the informer's privilege, but refused to extend it to the counsel of a private organization, in the absence of any statute specifically allowing the court to do so.

The prevailing members of the court in the *Kohn* case did not meet the issue of whether the privilege was available in grand jury hearings—instead, they apparently refused to acknowledge this evidentiary rule *even* in courts of law. On the other hand the decision may be grounded upon an interpretation of the ordinance which authorized the creation of the investigating committee. However, the concurring opinion recognized the validity of the privilege in the courts, but specifically held that it could not be invoked before grand juries. A dissenting judge argued that this privilege was firmly established. Furthermore, because the language of the municipal ordinance which created this quasi-public committee was not antagonistic to the privilege, the dissenting judge felt Kohn had sufficient official status to remain silent before the grand jury.

Yet both legal and policy reasons support the argument that if the informer's privilege is worthy of recognition in courts of law, it should also be extended to grand jury proceedings.

The Privilege Before the Courts

Courts which recognize the informer's privilege afford it a varying breadth of application; some safeguard only the informer's identity,[7] while others will, in addition, protect the communication itself.[8] However, even under the view which advocates shielding only the informer's identity, the contents of the communication are generally also held to be privileged if their disclosure would reveal the informer's identity.[9] Under neither view is it considered to be an absolute privilege: if the informer's identity is already known the privilege is not available,[10] and if the identity of the informer is necessary to the accused's defense in a criminal proceeding the court will require disclosure,[11] since the public interest in acquitting the innocent is deemed to override the public benefit derived from shielding the informer's identity. A further basis for the latter qualification is found in the accused's constitutional rights of confrontation and due process in courts of law.[12]

The Privilege Before the Grand Jury

Apparently the only privileges presently recognized before both courts and grand juries are the privileges against self-incrimination,[13] against revealing state secrets[14] and against disclosure of communications between attorney and client.[15] In addition to the constitu-

[7] *E.g.*, Scher v. United States, 305 U.S. 251 (1938). *Accord*, 8 Wigmore, Evidence § 2374 (3d ed. 1940). Uniform Rules of Evidence rule 36 (1942).

[8] *E.g.*, Wells v. Toogood, 165 Mich. 677, 131 N.W. 124 (1911); Michael v. Matson, 81 Kan. 360, 105 Pac. 537 (1909).

[9] *E.g.*, People v. Laird, 102 Mich. 135, 60 N.W. 457 (1894); McCormick, Evidence § 148 (1954).

[10] McCormick, Evidence § 148 (1954): "[It is obvious] that when the identity has already become known to those who would have cause to resent the communication, the privilege ceases." *E.g.*, Commonwealth v. Congdon, 265 Mass. 166, 175, 165 N.E. 467, 470 (1928) (voluntary confession of a crime).

[11] *E.g.*, Wilson v. United States, 59 F.2d 390 (3d Cir. 1932); United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937). For criminal cases sustaining the nondisclosure of the informer's identity on the theory that it was not essential to the accused's defense, see Scher v. United States, 305 U.S. 251 (1938) and United States v. Li Fat Tong, 152 F.2d 650 (2d Cir. 1945).

[12] See Sanford, *Evidentiary Privileges Against The Production of Data Within The Control of Executive Departments*, 3 Vand. L. Rev. 73, 77 (1949) and Comment, *An Informer's Tale: Its Use in Judicial and Administrative Proceedings*, 63 Yale L.J. 206, 212–13 (1953). The Sixth Amendment guarantees the accused's right to be confronted with the witnesses against him and reserves to him the right of cross-examination. Moreover, the Fifth Amendment restricts the national government from depriving any person of his due process rights while the Fourteenth Amendment protects any person from state interference with these rights.

[13] Counselman v. Hitchcock, 142 U.S. 547, 562 (1892) and State v. Kemp, 126 Conn. 60, 72, 9 A.2d 63, 69 (1939) hold that the privilege to refuse to answer incriminating questions exists before grand juries. A minority of courts also recognize a second aspect of the privilege against self-incrimination—the right of the accused to refuse to take the stand in criminal prosecutions, as existing before grand juries. State *ex rel.* Poach v. Sly, 63 S.D. 162, 257 N.W. 113 (1934), People v. Gillette, 126 App. Div. 665, 111 N.Y. Supp. 133 (1st Dep't 1908). However, a majority of the courts, under the theory that a grand jury hearing is not a "criminal prosecution" and that there is no "accused," have held that this second aspect of the self-incrimination privilege does not exist before investigatory hearings of grand juries. *In re* Lemon, 15 Cal. App.2d 82, 59 P.2d 231 (1936); O'Connel v. United States, 40 F.2d 201 (2d Cir. 1930); *Ex parte* Barnes, 73 Tex. Crim. 583, 166 S.W. 728 (1914).

[14] Appeal of Hartranft, 85 Pa. 433 (1877).

[15] *Ex parte* McDonough, 170 Cal. 230, 149 Pac. 566 (1915) (an attorney is privileged to refuse to disclose the identity of his client to the grand jury). People *ex rel.* Vogelstein v. Warden of County Jail of New York County, 150 Misc. 714, 270 N.Y. Supp. 363 (Sup. Ct. 1934), which recognized the availability of the attorney-client privilege before the grand

tional mandate, a strong emotional feeling against inquisitional tactics appears to be a factor which gives support to the extention of the self-incrimination privilege to *all* official hearings where persons are called upon to give testimony.[16] Furthermore, the importance of national security would seem to be a controlling factor, not present when considering the informer's privilege, in justifying extention of the state secret privilege to grand juries.[17] But although there is greater justification for extending the self-incrimination and state secret privileges to grand juries, there does not seem to be any compelling reason why the informer's privilege should not be given recognition at least coextensive with that afforded the attorney-client privilege. Public policy considerations underlying the latter are no more forceful than those underlying the former, for both privileges are primarily grounded upon a desire to foster a full disclosure between the parties.[18]

In addition to the foregoing consideration of analogous privileges,[19] important policy arguments are persuasive bases for extension of the informer's privilege to be invoked in grand

jury as to communications. However, the identity of the client was held not to be privileged and was required to be divulged. *Cf. In re* Selser, 15 N.J. 393, 105 A.2d 395 (1954). Although the court apparently acknowledged the existence of the attorney-client privilege before the grand jury, the communication was made in furtherance of a crime and was not privileged.

In addition, on a motion to quash an indictment it was held to be error for the grand jury to admit testimony shielded by the marital privilege. State v. Marshall, 140 Minn. 363, 168 N.W. 174 (1918).

[16] Counselman v. Hitchcock, 142 U.S. 547, 562 (1892); MCCORMICK, EVIDENCE §§ 120, 122 and 123 (1954).

[17] It has been held that communications from an informer to a government official may also be protected by the state secret privilege. Worthington v. Scribner, 109 Mass. 487 (1872); *cf.* King v. United States, 112 Fed. 988, 996 (5th Cir. 1902); Krumin v. Bruknes, 255 Ill. App. 503, 509 (1930). But the state secret privilege should apply only when national security would otherwise be jeopardized; it appears improper to classify the ordinary informer's identity or his communication as a state secret.

[18] It should be noted that if the government official to whom the informer communicated his message is an attorney, the attorney-client privilege may provide a basis for an alternate theory that can be relied upon to protect the informer's identity. Vogel v. Gruas, 110 U.S. 311 (1884); Ratzlaff v. State, 122 Okla. 263, 249 Pac. 934 (1926); Gabriel v. McMullin, 127 Iowa 426, 103 N.W. 355 (1905). *Contra*, Vernon v. State, 49 Ga. App. 187, 174 S.E. 548 (1934). *Cf.* Granger v. Warrington, 8 Ill. 299 (1846) (the privilege was denied, however, as the identity of the informer was already known). The approach that recognizes nondisclosure based upon the attorney-client theory would seem to be unsound, for the latter privilege is sustained in order to protect a private relationship. This interest is not present when the lawyer is acting in the role of a public official. Also, the attorney-client privilege traditionally protects the contents of the communication and not the identity of the client, so again, the analogy fails to be compelling. For cases holding that the identity of the client is not privileged see Chirac v. Reinicker, 11 Wheat. 280, 284 (U.S. 1826); People *ex rel.* Vogelstein v. Warden of County Jail of New York County, 150 Misc. 714, 270 N.Y. Supp. 363 (Sup. Ct. 1934). *Contra*, Elliot v. United States, 23 D.C. App. 456, 467 (1904); *Ex parte* McDonough, 170 Cal. 230, 149 Pac. 566 (1915). 8 WIGMORE, EVIDENCE § 2313 (3d ed. 1940) suggests there are exceptional circumstances where the identity of the client will be considered part of the confidental communication, *i.e.*, the facts of each case control.

[19] A further analogy may be drawn from a typical state "official communication" statute. *E.g.*, IOWA CODE ANN. § 622.11 (1950): "A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."

In addition, California, Idaho, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota and Washington have enacted these statutes. Georgia has a similar provision. Upon the basis of such a statute the informer's communication was protected in State v. McClendon, 172 Minn. 106, 214 N.W. 782 (1927) and Anderson v. State, 72 Ga. App. 487, 34 S.E. 2d 110 (1945). However, it may be doubtful that government officials could withhold the *identity* of informers, since the statutes only refer to "communications." *Quaere:* Could the disclosure of his identity, by an informer to a government official, be a "communication" within the spirit and language of the statute?

jury proceedings to the same degree as before courts of law. Even though the secrecy of grand jury hearings is guarded by statute,[20] it is unfortunate that as a practical matter, the proceedings are often far from secret.[21] Thus, if the informer has reason to believe that his identity *may* be disclosed it will have a deterrent effect upon his willingness to inform. And discouraging the informer will necessarily have a prejudicial effect upon effective police investigation of criminal violations, the basic consideration underlying the ancient informer's privilege.[22]

Just as in courts of law, to the extent that the shielding of an informer encroaches upon the fundamental rights of an accused, a persuasive argument is made for denying any informer's privilege before grand jury proceedings.[23] However, since an accused's rights are not guarded before the grand jury to the extent that they are in courts of law, he would gain little benefit, if any, by disclosure of the informer's identity before the grand jury. At the present time a person has no right of cross-examination or of confrontation when being investigated or indicted by a grand jury.[24] The denial of these rights, the denial of right to counsel and the use of normally inadmissible evidence in grand jury proceedings are held not to violate the accused's constitutional right of due process.[25]

The foregoing considerations favor allowing government officials to withhold the identity of their informers from the grand jury, both in investigatory and indictment proceedings, inasmuch as this privilege is firmly established in courts of law.[26]

The Privilege and Civic Anti-crime Organizations

To invoke the privilege of nondisclosure in courts of law, the person in whom the confidence is placed is required to be a public official, acting in the performance of his duties.[27] If an anti-crime group is created by state statute to be the investigating arm of the legislature, then, as public officers, they would be entitled

The analogy is weakened, however, by the indication that these statutes merely codify the existing state secret and informer's privileges. State v. Hoben, 36 Utah 186, 102 Pac. 1000 (1909). See also Comment, *An Informer's Tale: Its Use in Judicial and Administrative Proceedings*, 63 YALE L.J. 206, 219 (1953) and 8 WIGMORE, EVIDENCE § 2374 (3d ed. 1940).

[20] *E.g.*, ILL. REV. STAT. c. 38 § 720 (1955): "No grand juror . . . or other person shall disclose . . . nor shall any grand juror during his term of service communicate with any person concerning any matter which the jury has considered, is considering or is about to consider. . . . Whoever violates this section shall be imprisoned for not more than one year."

[21] Miller, *Informations or Indictments in Felony Cases*, 8 MINN. L. REV. 379, 389 (1924); Comment, *The Grand Jury (Specific Reference To Illinois)*, 44 J. CRIM. L., C. & P.S. 49 (1953).

[22] The first reported case which recognized the informer's privilege was Rex v. Akers, 6 Esp. 127, 170 Eng. Rep. 850 (1790). For an exhaustive historical development see WIGMORE, *op. cit. supra* note 3 and Comment, *An Informer's Tale: Its Use in Judicial and Administrative Proceedings*, 63 YALE L.J. 206, 209 (1953).

[23] Wilson v. United States, 59 F.2d 390 (3d Cir. 1932); United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937). *Accord*, Scher v. United States, 305 U.S. 251 (1938); United States v. Li Fat Tong, 152 F.2d 650 (2d Cir. 1945).

[21] Gilmore v. United States, 129 F.2d 199 (10th Cir. 1942). The court held that the inquiry made by the grand jury was not a criminal prosecution within the purview of the Sixth Amendment. See note 12 *supra*.

[25] U.S. v. Costello, 221 F.2d 668, 677 (2d Cir. 1955) (hearsay evidence held sufficient to support an indictment); *In re* Black, 47 F.2d 542 (2d Cir. 1931) (witness before grand jury is not entitled to aid of counsel); People v. Barbour, 152 Misc. 39, 273 N.Y. Supp. 788 (Ct. of Gen. Sess. 1934) (since a grand jury serves merely an accusatory function it was held unwise to invoke technical rules of evidence).

[26] For a thorough analysis of the powers of a grand jury see Comment, *The Grand Jury-Its Investigatory Powers and Limitations*, 37 MINN. L. REV. 586 (1953); *The Grand Jury (Special Reference To Illinois)*, 44 J. CRIM. L., C. & P.S. 49 (1953); Kaufman, *The Grand Jury—Its Role and Its Powers*, 17 F.R.D. 331 (1955).

[27] See note 3 *supra*.

to remain silent. A group whose creation is authorized by municipal ordinance to investigate corruption in a given community is farther removed from the necessary degree of official status required to sustain a reliance upon the informer's privilege. However, depending upon how broadly the ordinance delegated governmental functions, this quasi-public organization could logically be permitted to shield the identity of its informers behind the privilege.[28] But if the crime commission has a wholly private status, without any governmental authorization or control over its membership, activities, or the selection of its staff, it seems clear that special investigators hired by this private group would not have the requisite official status to invoke the common law privilege.

Since privately financed and operated civic organizations (and in addition, some quasi-public groups) do not fall within the traditional scope of the privilege, a recent congressional inquiry has sought to determine the need for legislation to extend this rule of nondisclosure to officers and directors of civic groups.[29] Legislatures, in evaluating whether there is any need for another statutory privilege, must ascertain whether the work of citizen organizations will be more effective with such legislation or whether the alleged need for this privilege is only illusory.

Civic crime commissions are not organized to duplicate the work of any department of the government; nor are they formed to apprehend or prosecute criminals. Instead, they seek by observation and investigation to determine why crime flourishes and prosecutions lag.[30] Some merely gather statistics and data, but the majority report to the public when there are indications of lax and inefficient law enforcement. From their nature and function it is reasonable to propose that civic anti-crime groups should, when possible, limit their use of informers to obtaining leads for investigating unlawful activity. Because of their notoriously untrustworthy character, information from informants should be painstakingly checked for accuracy. If each crime committee is able to verify this data before publishing it, there would be no need for a privilege of nondisclosure. Facts independently corroborated by resourceful investigation could then be presented to the public, to local police or to the grand jury, as the organization's own.[31]

However, these considerations are not relevant in determining whether or not the civic groups should also be required to disclose the identity of undercover agents who either initially discover the information or verify the informer's disclosure. These investigators, many of them formerly with the FBI, would be of no use in further investigations after their identity was disclosed.[32] Contrasted to an in-

[28] *E.g.*, the majority and dissent in the *Kolm* case differed on this very point. Ordinance No. 18,531, section 5, of the City of New Orleans, in describing the reporting duty of the investigative committee, reads: "... Such reports shall first be delivered to the ... Grand Jury ... for such action as that body shall consider proper."

The majority of the court did not feel that this language permitted the invocation of this privilege before the grand jury.

[29] Senator Estes Kefauver, who has urged the formation of citizens crime commissions, recently introduced a resolution in Congress to study the extent to which officers of anti-crime civic organizations may be required to divulge confidential sources of information. S. RES. 91, 84th Cong., 1st Sess., 101 CONG. REC. 3826 (daily ed. April 18, 1955). This resolution was referred to the Senate Judiciary Committee "to conduct an immediate study and report promptly to the Senate body."

[30] The Chicago Crime Commission was the first effective organization of its kind. For a discussion of its creation and aims see Sims, *Fighting Crime in Chicago: The Crime Commission*, 11 J. CRIM. L., C. & P.S. 21 (1920). For an exhaustive analysis of these citizen's groups see Peterson, *Citizens Crime Commissions*, 17 FED. PROB. 9 (1953).

[31] Boudin v. Dulles, N.Y. Times, Nov. 23, 1955, p. 12, col. 3 (D. D.C. 1955) (memorandum opinion, Youngdahl, J.). "Confidential information is of unquestionable importance to executive officers in performing their duties, but it should be confined for use in obtaining factual data which may itself be used of record." *Id.* col. 5.

[32] The FBI itself is often faced with this very problem. BARTH, THE LOYALTY OF FREE MEN 164 (1951) comments: "[In the Judith Coplon 1949 espionage trial] it embarrassed the government ...

former, an undercover agent usually does not fear retaliation. Instead, his fear is grounded primarily upon a destruction of his livelihood. For this reason grand juries, as a practical matter, often yield in their quest for the agent's identity, and instead, settle for the testimony of officers and directors of these groups.

Possible Statutory Treatment

Some of the problems involved in extending the informer's privilege to private persons were examined by states which considered statutes that would grant a similar immunity to newsmen.[33] Such statutes were necessary if a newsman's privilege was warranted, since traditional concepts of privileged communications unquestionably demanded that newsmen disclose the identity of the source of their information. These statutes have been criticized on the ground that the public interest in guaranteeing better news reporting is not *better* served by fostering a confidential relationship between reporters and their informants.[34] The effect of the newsmen statutes is to raise the newsman to the level of a public official. *Quaere:* Whether the interest of the community has really thereby been subordinated to the interest of a relatively small professional class. Prior litigation has demonstrated that because of a rigid canon of the journalistic code of ethics, even without a statute, the newsman will accept the penalty of contempt rather than disclose his source of information.[35] *If* his efforts to report *all* the news does benefit the general public a strong argument can be made for the position that he should not be subject to contempt for such a refusal.[36] However, it would seem that the newsman's primary interest in obtaining a statutory privilege is to gain a personal advantage, *e.g.*, the obtaining of an exclusive story by nondisclosure of his informant to public officials, which seems to lead to the conclusion that the newsman benefits from these statutes rather than the general public.

The scope of newsmen confidence statutes varies from state to state. A proposed New York statute qualified the privilege to the ex-

because publication of the FBI files may have revealed the identity of certain confidential and stratgically placed informants—a high price to pay for the punishment of a young woman who had ceased to be a danger as soon as her espionage activities had been discovered. . . ."

[33] Alabama, Arizonia, Arkansas, California, Indiana, Kentucky, Maryland, Montana, Ohio, Pennsylvania, and New Jersey have adopted statutes extending some sort of privilege to newsmen. However, Connecticut, Illinois, Massachusetts, Michigan, Missouri, New Hampshire, New York, Oklahoma, Rhode Island, Texas, Virginia, Washington and Wisconsin have rejected similar statutes. It should also be noted that other statutes have extended privileges to communications to some private professional groups. *E.g.*, Georgia protects accountants, a Virginia statute applies to brokers and Oregon has enacted a statute to protect communications to stenographers.

[34] Wigmore, in his earlier treatise, commenting on the 1896 Maryland statute—the first newsman confidence statute—said: "The following enactment, as detestable in substance as it is crude in form, will probably remain unique." 5 Wigmore, Evidence § 2286. n.7 (2d ed. 1923). See Notes, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 Va. L. Rev. 61 (1950); Gallup, *Further Consideration of a Privilege for Newsmen*, 14 Albany L. Rev. 16 (1950). *Contra.* Desmond, *The Newsmen's Privilege Bill*, 13 Albany L. Rev. 1 (1949).

[35] Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911); People *ex rel.* Mooney v. Sherrif, 269 N.Y. 291, 199 N.E. 415 (1936). See note 34 *supra.*

[36] Newsmen contend that the public interest in better news reporting will be fostered by these statutes, *i.e.*, the newsman will be free to expose corruption without fear of citation for contempt. Motivations for abuse of such statutes are admittedly present. For example, a reporter may withhold information (which law enforcement officials should have) in order to keep 'open' an exclusive story, or for some personal reasons not consistent with the public interest. Manifestly, however, it cannot be contended that all newsmen who have suffered imprisonment in lieu of disclosing a confidential source of information have been motivated by considerations inconsistent with furtherance of the public interest. This being so, there is no public policy which would support penalizing a newsman for promoting the public interest, recognizing that his actions incidently also benefit his occupational position.

tent that the reporter *could* disclose the source of his information in his discretion, yet he could not be compelled to do so *unless* the court found the disclosure was essential to the public interest.[37] The latter qualification would seem to be the only way in which a legislature would be justified in extending a privilege of nondisclosure to civic anti-crime organizations. Such a flexible and contingent limitation probably would not deter informers; nor would it discourage the use of undercover agents by the organization. However, this discretionary qualification would seem to be burdensome upon the trial courts, inasmuch as "public interest" is not susceptible of precise definition.

Moreover, there are other overriding considerations. It is conceivable that an informer's privilege statute could be used by an unscrupulous investigator to operate a purportedly reputable anti-crime endeavor and in this way threaten officials with public disclosure of fictitious informer's information, always under the shield of a statute which would compel disclosure only after the exercise of a value judgment by a trial court judge of what is "in the public interest." By contrast, however, those public officials who warrant attack often criticize the source of such an attack to harass and thus negate the effectiveness of the civic organizations, and have the additional purpose of forcing disclosure of the identity of the informer in order to retaliate against him.

The public interest would not be benefited greatly by statutory protection of these civic groups. In those *few* instances where informer's leads could not be verified by the organization, a statute would protect a private anti-crime group from harassment;[38] but the work of these citizen organizations would not be *far* more effective with such legislation. Furthermore, it also would be impractical for legislatures to extend the informer's privilege so that civic anti-crime groups could refuse to reveal the identity of their undercover agents. There would be no way for a court to ascertain whether the civic group's information was from an undercover agent or an informer. Therefore, unscrupulous anti-crime organizations, who are not subject to the control of a responsible superior, could gain the benefits of such a statute merely by telling the court that the informer's information was the product of capable undercover work. Therefore, in balancing the considerations previously set forth, a statute would not seem justified.

[37] Law Revision Commission Report, Leg. Doc. No. 65(A) (1949). See also People v. Keating, 286 App. Div. 150, 141 N.Y.S.2d 562 (1st Dep't 1955).

[38] *E.g.*, an informer may be a witness to, or participant in, the bribing of a civic official. The informer's observation could be the only evidence of that illegal transaction. By contrast, the report of the existence of a gambling establishment could easily be verified for authenticity.

Conclusion

In summary, the courts should allow an extension of the informer's privilege in grand jury proceedings to the same extent that it is recognized when *government* officials appear as witnesses before courts of law. On the other hand, full consideration compels the conclusion that neither the courts nor the legislatures should allow *private* anti-crime groups to refuse to disclose the identity of their informers. The results of such a conclusion may appear harsh at first, since private investigators and officers of these anti-crime commissions *must* reveal the source of their information or face punishment for contempt. However, the interest of the public will be better served without any statutory protection inasmuch as civic anti-crime commissions will then be compelled to gather a sufficient amount of probative evidence, independent of the informer's disclosure, before making their charges. In those few instances where this would not be possible it would devolve upon the civic group to balance the severity of the crime against the possible loss of undercover agents or the discouragement of informers. In doing so, the organizations, which through previous work have established a good reputation in the community, will know that they will often be successful in convincing a grand jury, as a practical matter,