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Newsman's Privilege: A Survey of the Law in California

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Recent incidents of newsmen being imprisoned for refusing to disclose confidential news sources before courts and grand juries have focused attention on the conflict between the public need for evidence and the public interest in a free press, unhampered by governmental interference. The "newsman's privilege," i.e., a privilege to refuse to disclose a confidential news source, is the means for resolving this conflict. This comment examines the arguments for and against the need for a testimonial privilege, the existence and limits of common law and constitutional privileges, and the California statutory privilege afforded by Evidence Code Section 1070. The author concludes that, although there is no common law privilege, the first amendment provides protection in limited circumstances, and Section 1070, while vague in several respects, appears to provide an unconditional privilege for certain newsmen.

In the summer of 1972, the United States Supreme Court in *Branzburg v. Hayes*[1] held that newsmen have no first amendment privilege to refuse to testify or disclose news sources to a grand jury. This decision was a setback to many newsmen, legal scholars, and judges who have argued that the first amendment provides, as a minimum, a qualified privilege for the protection of the newsman-source relationship.[2]

In response to this and other recent decisions and to public opinion over the recent jailing of disobedient newsmen, federal and state legislators have acted by proposing, adopting, and strengthening statutes which afford immunity to newsmen for refusing to disclose their sources in specified circumstances.[3] California initially enacted a

1. 408 U.S. 665 (1972).

2. *See, e.g.*, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *rev'd*, 408 U.S. 665 (1972); *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963); Blasi, *The Newsman's Privilege: An Empirical Study*, 70 U. MICH. L. REV. 229 (1971); Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 NW. U.L. REV. 18 (1969); *But see* Garland v. Torre, 259 F.2d 545 (2d Cir. 1958); *In re* Pappas, 266 N.E.2d 297 (Mass. 1971); Beaver, *The Newsman's Code, The Claim of Privilege and Everyman's Right to Evidence*, 47 ORE. L. REV. 243 (1968).

3. *See, e.g.*, Sacramento Bee, Jan. 16, 1973, §B, at 20, col. 1 (announcement of congressional hearings to consider federal legislation for protection of newsmen's confidential sources); Sacramento Bee, Jan. 11, 1973, §A, at 16, col. 1 (comment on the introduction of three newsmen protection bills during the first two days of the 1973 Session of the California Assembly). For a list of the proposed legislation in California, see note 146 *infra*.

newsman's protection statute in 1935,[4] but has broadened its coverage by statutory amendment in 1961, 1971, and again in 1972.[5] Since enactment of the statute, there have been only a few reported cases in which the privilege has been in issue, but when the issue has arisen, the courts have shown a tendency to narrowly construe it.[6] Court decisions in other states with similar statutes have also shown a tendency to limit the scope of protection.[7] Furthermore, in 1971 a California appellate court in *Farr v. Superior Court*[8] questioned the constitutionality of the statute.[9]

This comment will examine the claim that newsmen should be afforded testimonial privilege, review the relevant decisions bearing on the possible existence of a constitutional privilege, and determine the extent of California statutory protection afforded newsmen under the various circumstances in which they may be asked to testify.

CONTROVERSY OVER THE NEED FOR A NEWSMAN'S PRIVILEGE

Much has been written concerning the arguments for and against a newsman's privilege.[10] In order to understand the legal issues involved in the California statute, it is necessary to explore the basis and rationale of those arguments.

A. Need for Testimony

The acquisition of facts is essential to many governmental functions. Courts, in the performance of their judicial function, need the testimony of witnesses so that the judge or jury can make intelligent decisions.[11] Grand juries need testimony for the purpose of investigating criminal activity and for insuring that probable cause exists before issuing an indictment.[12] Legislative bodies, in order to be ef-

4. CAL. STATS. 1935, c. 532, at 1608.
5. CAL. STATS. 1961, c. 629, at 1797; CAL. STATS. 1971, c. 1717, at 3658; CAL. STATS. 1972, c. 1431.
6. *See* Application of Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964).
7. *See, e.g., In re* Bridge, 120 N.J. Super. 460, 295 A.2d 3 (1972); Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971); State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (Sup. Ct. 1943).
8. 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971).
9. See text accompanying notes 121-130 *infra*.
10. *See, e.g.*, Beaver, *supra* note 2; Guest & Stanzler, *supra* note 2; Blasi, *supra* note 2; Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970); Note, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198 (1970).
11. The use of witnesses has not always been considered essential to the administration of justice. At early common law, the witness, as he is known today, did not exist. For a discussion of the history of the development of the use of witnesses, see 8 WIGMORE, EVIDENCE §2190 (McNaughton rev. 1961) [hereinafter cited as WIGMORE].
12. *See generally* Note, *The California Grand Jury—Two Current Problems*, 52 CALIF. L. REV. 116 (1964).

fective, must obtain information concerning the need for legislation and the conditions the legislation is intended to effect.[13] In fact, it has long been recognized that wherever the public has a need for information, it has a right to "everyman's evidence,"[14] and to secure this right, governmental bodies have either inherent or statutory power to issue subpoenas and to hold a witness in contempt for failure to appear or refusal to testify.[15] Under this compulsion a witness must testify unless he has some recognized privilege to refuse to testify.[16]

Certain privileges exist as a matter of common law, others are derived from the Constitution, and many privileges are statutory.[17] Concerning the granting of testimonial privileges in general, Wigmore states:

> The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.[18]

Whether a particular privilege is sufficiently in the public interest to justify the obstacle it presents partially depends on the degree of need for the testimony. It is difficult to generalize about the degree of need in any particular proceeding.

Not only do the needs vary according to the type of proceeding but the need also varies within the same type of proceeding depending on whether there are alternate methods for obtaining the information, the particular purpose for obtaining the information, and the relevance between the information sought and the purpose of the proceeding. Nevertheless, some writers argue that proceedings with judicial functions such as grand jury and court proceedings have a greater need for testimony than legislative or administrative proceedings.[19] This proposition finds support in the fact that testimony is an essential and primary part of the judicial function but, though it may be considered essential, is only incidental to the legislative or administrative function. It is also argued that the need for testimony should be given

13. *See, e.g.*, McGrain v. Daugherty, 273 U.S. 135 (1927).
14. WIGMORE, §2192.
15. *See* WITKIN, CALIFORNIA EVIDENCE, *Witnesses* §748 (2d ed. 1966); WIGMORE, §2195.
16. *See, e.g.*, People v. Gonzales, 20 Cal. 2d 165, 124 P.2d 44 (1942).
17. For a detailed discussion of all forms of testimonial privileges, see WIGMORE, §2192.
18. WIGMORE, §2192.
19. *See generally* Guest & Stanzler, *supra* note 2, at 50-51; *Reporters and Their Sources, supra* note 10, at 356; *The Newsman's Privilege, supra* note 10, at 1236-1248.

less weight in civil trials than in criminal trials or grand jury proceedings.[20] The strong public interest in the prevention and punishment of crime provides support for this distinction.

B. The Effect of Compulsory Testimony on the Free Flow of News

Those who support the idea that newsmen should not have to reveal their source of news argue that a confidential relationship between a newsman and his source is essential to the free flow of news and that the public interest in this free flow outweighs any detrimental effect caused by granting a testimonial privilege to newsmen.[21] This argument is premised upon the assumptions that (1) newsmen rely on the use of informants to obtain news, (2) a confidential relationship between the newsman and his source is necessary to enable the newsman to secure and maintain informants, and (3) requiring newsmen to testify will destroy this confidential relationship.[22]

It is generally recognized that newsmen rely on the use of confidential informants for the gathering of news.[23] The extent to which informants are used depends on several factors such as type of media, experience of reporter, and type of assignment.[24] An extensive study of the newsman-source relationship points out that the average newsman relies on confidential sources for between 22 and 34 percent of his stories.[25] Approximately 12 percent of a newsman's stories come from first-time sources, which are often the most important, and approximately 22 percent are the result of information supplied by regular informants (a source who has supplied information more than twice).[26] It is also noteworthy that of the various media, newsweeklies rely the heaviest on confidential sources—by a factor of greater than 2 to 1 over local radio and television stations, the media which use confidential sources the least.[27]

Even though there is general agreement that newsmen do use and rely on confidential informants, there is no general agreement on the issue of whether the practice of requiring newsmen to testify and to

20. *See generally* Guest & Stanzler, *supra* note 2, at 51; *Reporters and Their Sources, supra* note 10, at 358-359; *The Newsman's Privilege, supra* note 10, at 1247-1248.

21. Caldwell v. United States, 434 F.2d 1081, 1085 (9th Cir. 1970); *In re* Taylor, 412 Pa. 32, 193 A.2d 181, 185 (1963). *See, e.g.*, Guest & Stanzler, *supra* note 2.

22. Branzburg v. Hayes, 408 U.S. 665, 728 (1972) (dissenting opinion).

23. Guest & Stanzler, *supra* note 2, at 57; Blasi, *supra* note 2, at 247. *See also* Branzburg v. Hayes, 408 U.S. 665, 693 (1972).

24. Blasi, *supra* note 2, at 245-253.

25. *Id.* at 247.

26. *Id.*

27. *Id.* at 249.

reveal their sources will have any significant effect on their ability to maintain present relationships and to secure future informants.[28] No doubt it is difficult to quantitatively measure this effect. However, it should be obvious that whenever a reporter is required to testify regarding the identity of a confidential informant his relationship with that particular informant with regard to that particular news item is destroyed. Therefore, the necessary inquiry should be directed to the determination of the deterrent effect that the destruction of this relationship will have on the *future* use of informants.

The relationship between a newsman and an informant is a tenuous one. The informant, if his anonymity is essential to him, is normally reluctant to reveal information until he feels that he can trust the reporter. His only security is the newsman's promise of confidentiality. The greater the informant's fear of disclosure, the more difficult is the task of the newsman in developing the required trust.[29] The potential informant may have fears that the newsman will voluntarily disclose his identity. He may also fear that the newsman will, as part of the news gathering and publishing process, be required to disclose to others who may not be as reluctant as the newsman to reveal the source's identity.[30] For example, publishers generally require newsmen to reveal the identity of their confidential sources as a condition to publishing the information.[31] The informant may fear that the publisher would respond differently to governmental pressure to testify than would the newsman.[32] Finally, in addition to all these fears, the potential informant also fears the possibility that the newsman may, under threat of contempt, be compelled to disclose his identity before a governmental body. If the possibility of compelled disclosure increases due to an *increased frequency* of issuing subpoenas, the fear of a potential informant may become too great for a newsman to overcome by a promise of confidence.[33]

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28. For arguments which discount the effect of compulsory testimony on the free flow of news, see Branzburg v. Hayes, 408 U.S. 665, 693-694 (1972); *In re* Pappas, 266 N.E.2d 297, 302-303 (Mass. 1971); Beaver, *supra* note 2, at 251. For arguments which contend that there is a significant effect see *In re* Taylor, 412 Pa. 32. 193 A.2d 181, 185 (1963); Guest & Stanzler, *supra* note 2, at 43; *Reporters and Their Sources, supra* note 10, at 330-333; *The Newsman's Privilege, supra* note 10, at 1204.

29. *See generally* Blasi, *supra* note 2.

30. *Id.* at 244.

31. *Id.*

32. *Id.* at 269-270.

33. Disclosure under threat of contempt has an effect on both potential informants and the particular informant whose identity is disclosed. As pointed out by Professor Blasi, over 20 percent of newsmen's stories are the result of information supplied by regular informants. Blasi, *supra* note 2, at 247. It is likely that once an informant has been disclosed, he would be very reluctant to act as an informant again. Even if he were willing to act as an informant in the future, the fact that he is now a known informant may prevent him from so acting.

The issuing of subpoenas may also have a deterrent effect on the seeking out of informants by newsmen. There is great pressure on the newsman to honor his promise of confidence. Not only does his code of ethics demand his silence,[34] but his effectiveness in news reporting requires it. Confidential relationships are essential and reporters fear that the consequence of their disclosure will detrimentally effect their careers.[35] It seems logical to conclude that under this pressure, a newsman may be reluctant to promise confidence if he felt there was a substantial risk that he would be called to testify. The greater the probability that he would be subpoenaed, the greater the risk that he would be forced to choose between disclosure and a contempt citation.

Until at least a few years ago, the burden on the news gathering process caused by the issuance of subpoenas to the press was apparently within acceptable limits. A 1971 study showed that although newsmen generally complained about the subpoenas and indicated that they burdened the news-gathering process in many ways, less than 10 percent of the newsmen queried thought that their news coverage had been adversely affected by the possibility of being subpoenaed.[36]

From the available evidence it seems that the press can operate as long as the *use of subpoenas remains within acceptable limits* but there may be serious burdens if it increases much beyond the frequency of a few years ago.[37]

C. *Balancing the Competing Interests*

Assuming that the press can tolerate some level of interference without unduly burdening the free flow of news, it becomes important to examine the various circumstances in which a newsman may be asked to testify so that the public's interest in obtaining testimony can be balanced against the potential detrimental effect on the free flow of news. It is beyond the scope of this comment to explore all of the types

34. The Code of Ethics of the American Newspaper Guild includes the following: "Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigative bodies." G. BIRD & F. MERVIN, THE NEWSPAPER AND SOCIETY 567 (1942).

35. *See* Blasi, *supra* note 2, at 262-263.

36. *Id.* at 270.

37. To argue that newsmen feel no pressure or restraint in the present situation is to obscure the critical point: if the power to enforce compulsory testimony were used to the full extent permissible there would be a serious effect on the free flow of news. Newsmen at present are not called with great frequency to testify to confidential sources because of "unwritten understandings" with court officers, knowledge by attorneys that reporters will not speak anyway and concern of public officials to maintain good relations with the press. (footnote omitted)
Guest & Stanzler, *supra* note 2, at 48.

of proceedings in which testimony may be compelled. However, three types of proceedings are frequently involved in this controversy: criminal trials, civil trials, and grand jury proceedings.[38]

1. Criminal Trials

Even those who favor an absolute privilege for newsmen would recognize an exception for criminal trials,[39] especially when a criminal defendant seeks the testimony.[40] Because of favorable evidentiary rules,[41] the narrow scope of inquiry,[42] and the small number of criminal trials in relation to civil litigation,[43] there is only a small possibility that a newsman will be asked to testify.[44] Hence, the balancing of this small potential deterrent effect on the news-gathering process against the strong public interest in the fair administration of justice and the regulation of crime should weigh in favor of the public's need for testimony.

2. Civil Trials

Because of broad and almost unlimited investigations which are permitted in discovery proceedings prior to civil trials,[45] there is an increased danger of compulsory disclosure of the newsman's source of information. Also, there are considerably more civil trials than criminal

38. The proceedings which have created the most publicity and which would appear to be the most significant for newsmen are court and grand jury proceedings. Nevertheless, even though there are few reported cases in which a newsman has been cited for contempt for refusing to testify before a legislative or administrative body, these proceedings have significance because of their broad scope of inquiry. *See* Note, *The Power of Congress to Investigate and to Compel Testimony*, 70 HARV. L. REV. 671 (1957).

39. *See Reporters and Their Sources, supra* note 10, at 346; *The Newsman's Privilege, supra* note 10, at 1245.

40. *See The Newsman's Privilege, supra* note 10, at 1245.

41. For example, the hearsay rule, to a large extent, would prevent the disclosure of information about a criminal defendant which was received by the newsman from a third party informant. *See generally* 5 WIGMORE, EVIDENCE §1361 *et seq.* (3d ed. 1940).

42. A newsman would not be required to reveal the source of his information unless it is relevant to the particular issues of the case. Rosenberg v. Carroll, 99 F. Supp. 629 (S.D.N.Y. 1951). Since the nature of inquiry is much narrower in a criminal trial than in grand jury proceedings the government would be unable to use the forum of the criminal trial to make "fishing expeditions" for information. *Reporters and Their Sources, supra* note 10, at 346.

43. For fiscal year 1969-70, the number of filings in California superior courts for civil litigation was 150,638 compared to 72,048 for criminal trials. CALIFORNIA JUDICIAL COUNCIL, ANNUAL REPORT at 102 (1971).

44. Since 1911 there have been 26 reported cases dealing with the issue of whether or not a newsman is required to reveal his source of information. Annot., 7 A.L.R.3d 591. Only two of these cases involved a criminal trial. Rosenberg v. Carroll, 99 F. Supp. 629 (S.D.N.Y. 1951); State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (Sup. Ct. 1943).

45. *See* FED. R. CIV. PROC. 26(b); CAL. CODE CIV. PROC. §§2016-2034. *See generally* Note, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940 (1961).

trials, which increases the probability that a newsman would be asked to testify.[46] The public interest in obtaining testimony in a civil trial is not as strong as the interest in a criminal trial.[47] When the interests in a civil trial, the fair administration of justice, and the judicial solution of private controversies are weighed against the potentially large deterrent effect on the news-gathering process, the public's interest in the free flow of news would appear to be favored.

3. Grand Jury Proceedings

Of the three, the grand jury proceedings are capable of having the most significant deterrent effect on the newsman's use of confidential sources due to the broad scope of inquiry inherent in the investigative function of the grand jury.[48] Furthermore, the rules of procedure and admissibility of evidence, which may serve to protect the newsman in court trials, are almost nonexistent in grand jury proceedings.[49] Finally, grand jury proceedings are conducted in secrecy and the mere fact that a newsman is subpoenaed and appears affects the relationship with all of his regular sources even if the grand jury investigation concerns none of them. On the other hand, the prevention and punishment of crime is a major concern of government and the general public. Because of the strong public interest associated with both of these competing interests, balancing is difficult at best. As a result, in the absence of a statute, the controversy over the need for a newsman's privilege has focused on grand jury proceedings.

PROTECTION OF THE NEWSMAN-SOURCE RELATIONSHIP IN THE ABSENCE OF STATUTE

American courts have consistently held that a newsman enjoys no common law privilege to refuse to disclose the source of his information before a court,[50] grand jury,[51] or legislature.[52] The first case in

46. See note 43 *supra.*
47. See text accompanying note 20 *supra.*
48. [The grand jury] is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.

Blair v. United States, 250 U.S. 273, 282 (1919).
49. WITKIN, CRIMINAL PROCEDURE §11 (1963).
50. *See, e.g.,* Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D.C. Mass. 1957); People v. Durrant, 116 Cal. 179, 48 P. 75 (1897).
51. *See, e.g.,* Clein v. State, 52 So. 2d 117 (Fla. 1950).
52. *See Ex parte* Lawrence, 116 Cal. 298, 48 P. 124 (1897).

which a newsman raised the issue that a privilege existed under the freedom of press clause of the first amendment was *Garland v. Torre.*[53] In *Garland,* the plaintiff attempted to obtain the identity of an employee of the defendant who had allegedly made a defamatory statement to reporter Torre. Torre refused to testify and was cited for contempt. On appeal, Mr. Justice Stewart, then sitting on the Second Circuit, held for the majority that even if the requiring of newsmen to testify did involve a first amendment right, this right must give way to the interest of the fair administration of justice. The court qualified this holding, however, by stating that the identity of the informant went "to the heart of plaintiff's case" and was essential to the fair administration of justice.[54] For several years after *Garland,* the courts consistently adhered to this holding.[55]

The issue of a first amendment privilege for newsmen did not reach the United States Supreme Court until 1972 when three cases were heard together; *Branzburg v. Hayes, In re Pappas,* and *United States v. Caldwell.*[56] In *Branzburg* a reporter had been subpoenaed by a Kentucky grand jury and asked to disclose the identity of drug users and persons he viewed and photographed synthesizing hashish from marijuana. In *Pappas* a reporter had been subpoenaed by a Massachusetts grand jury and asked to disclose the identity of persons and relate activities he observed while inside Black Panther Party headquarters during civil disorders in New Bedford in 1970. In *Caldwell* a reporter had been subpoenaed by a federal grand jury and asked to testify and turn over notes and tape recordings of interviews given him for publication by officers of the Black Panther Party concerning their aims, purposes and activities.

In *Branzburg* and *Pappas,* the state appellate courts had affirmed lower court refusals to quash the subpoenas.[57] However, in *Caldwell,* the federal court of appeals reversed the district court's refusal to quash, in what amounted to the first significant decision upholding the claim of a first amendment privilege.[58]

The argument presented to the Supreme Court was based on the freedom of the press clause of the first amendment. It was contended that requiring newsmen to reveal their confidential sources of informa-

53. 259 F.2d 545 (2d Cir. 1958).
54. *Id.* at 550.
55. *See, e.g.,* State v. Buchanan, 250 Ore. 244, 436 P.2d 729 (1968); *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963); *In re* Goodfader, 45 Hawaii 317, 367 F.2d 472 (1961).
56. 408 U.S. 665 (1972).
57. Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971); *In re* Pappas, 266 N.E.2d 297 (Mass. 1971).
58. Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970).

tion to a grand jury would have a chilling effect on the news-gathering process.[59] Further, it was argued that newsmen should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the newsman possesses information relevant to a crime the grand jury is investigating, the information the newsman has is unavailable from other sources, and the need for information is sufficiently compelling to override the invasion of first amendment rights.[60] In effect, the reporters were claiming a qualified privilege to refuse to testify unless a compelling need could be shown by the state.

In its decision, the Court distinguished between informants who themselves were engaged in criminal conduct and informers who were relating criminal conduct of others.[61] The claim of first amendment privilege for reporters who witnessed or had evidence of the informer's criminal conduct was held to present no substantial federal question.[62]

In the situation where informers have information concerning criminal conduct of others, the Court expressed doubt as to the extent of the burden on the news-gathering process which would result if reporters were required to testify.[63] In response to the arguments that the burden would be excessive, the Court stated:

> [W]e perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news-gathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put them in the course of a valid grand jury investigation or criminal trial.[64]

In a concurring opinion Justice Powell took a more moderate view than the majority and expressed the opinion that newsmen are not precluded from claiming a first amendment privilege:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balancing of these [interests] on a case-

59. Branzburg v. Hayes, 408 U.S. 665, 679-680 (1972).
60. *Id.* at 680.
61. *Id.* at 691.
62. *Id.* at 692. Concerning this holding the Court stated:
> The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection.

Id. at 691.
63. *Id.* at 693-695.
64. *Id.* at 690.

> by-case basis accords with the tried and traditional way of adjudicating such questions.[65]

In essence, Justice Powell indicates that a proper balance can only be obtained by weighing the competing interests under a particular set of facts.[66]

Limited to its facts, *Branzburg* stands for the proposition that newsmen have no special constitutional privilege to refuse to testify before grand juries. However, the Court continually discussed the overriding need for testimony relating to *criminal* conduct[67] and, as illustrated by the majority opinion, its holding applied to grand jury proceedings or criminal trials. There was no discussion of legislative or administrative proceedings or of civil trials, leaving unanswered the question of whether or not the Court would find a privilege in other types of proceedings.

After the decision in *Branzburg*, the United States Court of Appeals for the Second Circuit in *Baker v. F & F Investment*[68] had occasion to consider whether the need for testimony in civil trials overrode the potential deterrent effect on the news-gathering process. The case grew out of the following facts: In 1962 Alfred Balk wrote a story for the Saturday Evening Post entitled "Confessions of a Blockbuster".[69] The story, which exposed details of racially discriminatory real estate practices in the Chicago area, was based upon information supplied to Mr. Balk by a confidential informant. In 1971, the plaintiffs in the underlying case, a civil rights class action brought on behalf of all Negroes in the City of Chicago who had purchased homes from approximately sixty named defendants between 1952 and 1969, sought through discovery proceedings to obtain the identity of the informant from Balk. He refused to disclose the identity and the plaintiffs brought an action to compel disclosure, which was denied.[70] In affirming on appeal, the court held that the facts of *Garland v. Torre*,[71] in which

65. *Id.* at 710. Since *Branzburg* was a 5-4 decision, Justice Powell's concurring opinion, in those areas where it departs from the majority's opinion, is quite significant.

66. *See* 408 U.S. at 710 n.*; Baker v. F & F Investment, 470 F.2d 778, 784 (2d Cir. 1972) (decided after *Branzburg*) where in dicta the court referred to Justice Powell's concurring opinion and lent support to the proposition that even in criminal proceedings a balancing test is applicable. *But see In re* Bridge, 120 N.J. Super. 460, 295 A.2d 3 (1972) (decided after *Branzburg*) in which a reporter was asked to testify before a grand jury and refused to answer questions concerning the source of his information. On appeal of a contempt citation the court stated: "We do not read the majority opinion in *Branzburg* as requiring a balancing of the interests test to determine when a reporter should be compelled to testify." 295 A.2d at 6.

67. Branzburg v. Hayes, 408 U.S. 665, 687-688 (1972).

68. 470 F.2d 778 (2d Cir. 1972).

69. Saturday Evening Post, July 14, 1962.

70. Baker v. F & F Investment, 339 F. Supp. 942 (S.D.N.Y. 1972).

71. See text accompanying note 53 *supra*.

the identity of the informant was essential to the libel action and "went to the heart of plaintiff's case," could be distinguished since the plaintiffs had not demonstrated that the identity of the informant was necessary or critical.[72] The Court also distinguished *Branzburg* on the basis that it involved criminal activities, and the interest in the investigation of crime by a grand jury had an overriding effect on the consequential burden on news gathering. In *Baker* no such overriding interest was shown.[73]

Although this case provides authority that a first amendment privilege exists in a civil action, the privilege is conditional. If, in the words of *Garland* or *Baker*, the party asking for disclosure can demonstrate that the identity goes to the heart of the case, the newsman may be forced to disclose or risk a contempt citation.

Thus it would appear that newsmen have only a limited first amendment privilege to refuse to testify in civil trials, perhaps a limited privilege in grand jury proceedings depending on the significance of Justice Powell's concurring opinion, and likely no first amendment privilege in criminal trials. Therefore, the extent of protection for a newsman in California will depend, for the most part, upon the protection afforded by statute.

California's Protection Statute

Newsmen protection statutes, sometimes referred to as "shield" statutes, have been enacted in several states.[74] California's statute was enacted in 1935 and has been amended several times to broaden the description of persons covered and the circumstances in which they are protected.[75] The statute is codified as Section 1070 of the Evidence

72. Baker v. F & F Investment, 470 F.2d 778, 784 (2d Cir. 1972).

73. *Id.*

74. ALA. CODE tit. 7, §370 (1960); ALASKA STAT. §09.25.150 (Supp. 1971); ARIZ. REV. STAT. ANN. §12-2237 (Supp. 1971-1972); ARK. STAT. ANN. §43-917 (1964); CAL. EVID. CODE §1070 (1972); IND. ANN. STAT. §2-1733 (1968); KY. REV. STAT. §421.100 (1962); LA. REV. STAT. ANN. §§45:1451-45:1454 (Supp. 1972); MD. ANN. CODE art. 35, §2 (1971); MICH. STAT. ANN. §28.945(1) (1954); MONT. REV. CODES ANN. §93-601-2 (1964); NEV. REV. STAT. §49.275 (1971); N.J. REV. STAT. §§2A:84A-29 (Supp. 1972-1973); N.Y. CIV. RIGHTS LAW §79-h (Supp. 1971-1972); OHIO REV. CODE ANN. §2739.12 (1954); PA. STAT. ANN. tit. 28, §330 (Supp. 1972-1973).

75. California's statute was originally enacted by adding a provision to Section 1881 of the Code of Civil Procedure which, at that time, contained five other relationships which enjoyed a testimonial privilege. CAL. STATS. 1935, c. 532, at 1608. The statute was amended in 1961 to broaden its coverage to include radio and television news reporters. CAL. STATS. 1961, c. 629, at 1797. In 1965 the statute was repealed and re-enacted without change as Section 1070 of the Evidence Code. CAL. STATS. 1965, c. 299, at 1297, 1335. By amendment in 1971 the statute was again broadened to provide protection to newsmen so employed at the time the news was procured whereas before the statute applied only to newsmen so employed at the time the immunity was invoked. Also, the 1971 amendment deleted wording that required publication of the news obtained from the source before the statute was applicable.

Code and in its present form reads:

> A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper.
>
> Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television.[76]

Unlike statutes in several other states which provide only a conditional privilege, Section 1070 provides absolute immunity from contempt despite recommendations by the California Law Revision Commission that the newsman's privilege be amended to provide discretionary application by the courts.[77]

A. Construction of the Statute

Since the enactment of this statutory protection there have been several commentaries on problems construing the wording of the statute[78] and only three reported cases providing judicial interpretation.[79] Amendments to the statute have cleared up some of the wording but several interpretation problems still exist. In construing the wording of the statute it is important to keep in mind that the courts have a policy of strict and narrow construction of statutes which grant testimonial privileges.[80]

CAL. STATS. 1971, c. 1717, at 3658. In its most recent amendment the statute was changed to broaden the definition of "proceeding" in which the protection is given. CAL. STATS. 1972, c. 1431.

76. CAL. EVID. CODE §1070.

77. 6 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS, AND STUDIES 207, 271 (1965). In the background study upon which the Commission relied for its recommendation, it was pointed out that the statute, because it provided an absolute immunity from contempt, could produce inequitable results when the public interest in acquiring testimony outweighed the burden on the free flow of news. *Id.* at 508.

78. *See* Note, *Work of the 1935 Legislature*, 9 So. CAL. L. REV. 343 (1936); *Privilege of News Sources, Report of the Assembly Interim Committee on Governmental Efficiency and Economy*, Vol. 8, No. 6, at 23 (1959-1961); *A California Privilege Not Covered by the Uniform Rules Newsman's Privilege*, 6 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS, AND STUDIES 481 (1965); *Newsmen's Immunity Needs a Shot in the Arm*, 11 SANTA CLARA LAW. 56 (1971).

79. Application of Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964); Farr v. Superior Court, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971); *In re* Howard, 136 Cal. App. 2d 816, 289 P.2d 537 (1955).

80. Samish v. Superior Court, 28 Cal. App. 2d 685, 695, 83 P.2d 305, 310 (1938).

1. Who is Given Protection

The statute provides protection for persons connected with or employed by a newspaper, press association, wire service, and radio or television stations. This wording presents several interpretation problems primarily because of the indefiniteness of the word "newspaper".

In common terms, a newspaper is a daily chronicle of current events. As a legal term, however, the meaning can be quite different. In *In re Green*[81] the court agreed that a newspaper was "[a] printed publication issued in numbers at stated intervals conveying intelligence of passing events."[82] However, for the purpose of applying the California retraction statute for libel,[83] the court, in *Morris v. National Federation of the Blind*,[84] held that the word "newspaper" did not mean "magazine,"[85] the distinction being that news media which must publish "news while it is news" are pressed for time and do not always have the opportunity for ascertaining complete accuracy.[86] This decision was used as authority for the federal court interpretation of Section 1070 in *Application of Cepeda*[87] that "newspaper" does not include "magazine." The facts in *Cepeda* are similar to those in *Garland v. Torre*[88] and in *Baker v. F & F Investment*[89] in that the plaintiff in *Cepeda* was attempting to take the deposition of a reporter for evidence in a civil case. The court held that the newsman's status as a reporter for the bi-weekly *Look* was not protected under the statute. This decision ignores the underlying policy of providing protection to newsmen, *i.e.*, to promote the free flow of news.[90] With that policy in mind there is little reason to exclude magazine reporters from protection under the statute since they too are an important source of news. Furthermore, the newsweekly class of magazine is the greatest user of confidential sources of all the news media.[91]

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81. 21 Cal. App. 138, 131 P. 91 (1913).
82. *Id.* at 142, 131 P. at 93. The court derived this definition from Hanscom v. Meyer, 60 Neb. 68, 82 N.W. 114 (1900).
83. CAL. CIV. CODE §48a.
84. 192 Cal. App. 2d 162, 13 Cal. Rptr. 336 (1961).
85. *Id.* at 165, 13 Cal. Rptr. at 338.
86. *Id.*
87. 233 F. Supp. 465 (S.D.N.Y. 1964). *See also* Deltec v. Dun & Bradstreet, 187 F. Supp. 788 (N.D. Ohio 1960).
88. 259 F.2d 545 (2d Cir. 1958).
89. 470 F.2d 778 (2d Cir. 1972).
90. This decision also ignores the fact that the California statute only provides immunity from contempt. CAL. CODE CIV. PROC. §2034 provides that as a consequence of refusing to answer relevant questions in a discovery proceeding the court can issue an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or the court, in extreme cases, could enter a default judgment against the disobedient party. In *Cepeda*, the reporter refusing to testify was an agent of the defendant in the libel action and the court could have found that the immunity statute applied but still have compelled disclosure under threat of default judgment.
91. *See* Blasi, *supra* note 2, at 249.

On the other hand, the holding is consistent with the policy of strict construction which has been applied by California courts to these types of statutes. For example, in *Samish v. Superior Court*[92] the court stated: "Since the protection against privileged communications often leads to a suppression of the truth and the defeat of justice, the tendency of the courts is toward a strict construction of such statutes."[93] Also, in *Tatkin v. Superior Court*,[94] the court stated: "Unless the statute *expressly* extends the privilege to specific persons or classes, the law will not justify such individuals in refusing to disclose facts . . . which would otherwise be competent evidence in a particular proceeding."[95]

This holding appears consistent with the legislative intent. In 1959 the California Legislature passed a bill[96] that would have extended protection to almost all news media only to have it die by virtue of the Governor's pocket veto. In view of the fact that this bill was widely supported and had no apparent opposition,[97] an assembly committee conducted hearings and recommended that legislation be again introduced which would extend the privilege to all qualified news media.[98] Pursuant to this recommendation, the 1961 amendment, as introduced, would have extended coverage to magazines. However, in final form the protection for magazines was deleted.[99] In view of this evidence it seems clear that the legislative intent was to limit the protection to newspapers and the electronic media.[100]

Even though the court in *Cepeda* held that *Look* was a magazine and not covered by the statute and the legislature clearly intended that the statute only afford protection to newspapers, there is yet no clear definition of the term "newspaper" and how it is to be differentiated from printed publications of another class. For example, could publications such as *Time* or *Newsweek*, which in every day language are called magazines, be considered newspapers for the purpose of the statute? Unlike *Look*, these publications print current events on a week-to-week basis. Could this difference be sufficient to distinguish *Cepeda*? The courts, when faced with the task of interpreting words in a statute, look both to the legislative intent and to the

92. 28 Cal. App. 2d 685, 83 P.2d 305 (1938).
93. *Id.* at 695, 83 P.2d at 310.
94. 160 Cal. App. 2d 745, 326 P.2d 201 (1958).
95. *Id.* at 753, 326 P.2d at 206 (emphasis added).
96. S.B. 1126, 1959 Regular Session.
97. *Report of the Assembly Interim Committee, supra* note 78, at 23.
98. *Id.*
99. *Compare* CAL. STATS. 1961, c. 629, at 1797, *with* A.B. 65, 1961 Regular Session.
100. Two bills introduced in the 1973 Session of the California Assembly would provide protection to any person gathering news for the "communication media." A.B. 1, 1973 Regular Session; A.B. 4, 1973 Regular Session, *as amended*, Feb. 9, 1973.

purpose for the statute. There is nothing to indicate what the legislature intended by the word "newspaper," but to be consistent with the underlying purpose, it is suggested that "newspaper" should be interpreted as any periodically printed publication which disseminates news and intelligence of a general character, *i.e.*, of general interest to the public.[101] However, this does not mean that the classification should depend on circulation or upon the general theme of the publication. Unlike statutes in other states there are no words in the California statute which would be construed as a limitation as to type of newspaper or its circulation.[102] Furthermore, the small limited circulation newspaper may be more of an adversary of vested interests than the media of general circulation and therefore more willing to dethrone popular heroes.[103] As stated by one author:

> It must be axiomatic that hardly any of the publications which are deemed "successful" by commercial standards strike anything like an adversary stance towards business, toward higher education (except when students are rioting), toward big labor, toward the church, and all other pivotal institutions . . . . Like the Communists, who will not question the basic structures of their society, American journalists approach every institution gingerly, and with notable deference . . . . There is some hope for a wide-ranging adversary journalism, however. It is evident in the birth of the many little weeklies, bi-weeklies, and monthlies which have sprung up in several states. . . .[104]

If Section 1070 is construed to provide protection to distinguishable classes of newsmen such as newsmen employed by "newspapers of general circulation,"[105] then it might be argued that the statute is unconstitutional because it is a denial of equal protection of the law under the fifth and fourteenth amendments of the United States Constitution. If the classification infringes upon a fundamental right, the state is required to show a compelling interest for the classification.[106] However, since *Branzburg* held that there is no absolute first amendment right for a newsman to refuse to testify, the statutory immunity from con-

101. *See generally In re* David, 98 Cal. App. 69, 276 P. 419 (1929); *In re* Simpson, 62 Cal. App. 549, 217 P. 789 (1923).

102. *See, e.g.*, PA. STAT. ANN. tit. 28 §330, where the statute gives protection to "newspapers of general circulation as defined by the laws of this Commonwealth."

103. *See generally* W. RIVERS, THE ADVERSARIES 200-236 (1970).

104. *Id.* at 202-203.

105. CAL. GOV'T CODE §6000, defines a "newspaper of general circulation" as a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, which has a bona fide subscription list of paying subscribers, and has been established, printed and published at regular intervals in the State, county, or city where publication, notice by publication, or official advertising is to be given or made for at least one year preceding the date of the publication, notice or adverstisement.

106. Shapiro v. Thompson, 394 U.S. 618 (1969).

tempt is an extension of a right to newsmen and the denial of that protection to a class of persons does not, therefore, infringe on a fundamental right.[107] Consequently, the classification of newsmen would survive an equal protection argument as long as there is a valid legislative objective and the method used is reasonable for accomplishing that objective.[108] Since the objective of the statute is to promote the free flow of news, it may be argued that this objective is met by extending protection to a media which is traditionally responsible for the dissemination of day-to-day events, *i.e.*, "newspapers of general circulation".

On the other hand, any classification which on its face, or perhaps in effect, would discriminate in favor of a class on the basis of the news *content* would, according to the holding in *Chicago Police Department v. Mosley*,[109] require a showing of a compelling state interest. In *Mosley* a statute banned all picketing near a school building while the school was in session *except the peaceful picketing of any school involved in a labor dispute.*[110] Although the state may have constitutionally been able to regulate the picketing of a school under these circumstances, the Court struck down the statute as being in violation of the equal protection clause because the discrimination among picketers was based on the content of their expression and thus infringed on a fundamental right.[111] On the basis of this holding, Section 1070 may be unconstitutional unless protection is extended to all publications which disseminate intelligence because, arguably, the *inevitable effect* of any classification would be a discrimination on the basis of news content (news content being analogous to content of expression of picketers in *Mosley*). This is because different classes of publications are often designed for the tastes of different classes of persons and therefore often have different themes, *i.e.*, different types of news content. An extreme example would be a Hollywood gossip magazine. This type of publication often contains information which can be found in no other type of publication. If protection is denied them on the basis that they are magazines and not newspapers, the *inevitable effect* is a discrimination on the basis of news content.

2. Proceedings Where Protection is Given

Prior to the 1972 amendment, Section 1070 provided that newsmen could not be adjudged in contempt by a court, the legislature, or

107. *See* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969).
108. *Id.*
109. 408 U.S. 92 (1972).
110. *Id.* at 93.
111. *Id.* at 102.

any administrative body. The statute now provides immunity from contempt by a judicial, legislative, administrative body, *or any other body having the power to issue subpoenas*[112] where the refusal to disclose occurs *in any proceeding* in which testimony can be compelled as defined in Section 901 of the Evidence Code.[113]

3. Information Which May be Withheld

Section 1070 provides immunity from contempt for refusal to disclose *the source of any information* procurred for publication or news commentary purposes. The italicized phrase is identical or similar to the provisions in other state statutes[114] and has been interpreted differently by different courts.[115] The Pennsylvania statute was construed in *In re Taylor*[116] and the phrase was interpreted to include not only the identity of the person who disclosed information to the newsman, but the information itself.[117] In *State v. Donovan*,[118] a New Jersey case, and *Branzburg v. Pound*,[119] a Kentucky case, the courts gave the identical phrase a more limited interpretation and held that newsmen could only refuse to disclose the identity of the person who disclosed the information. In fact, in *Branzburg v. Pound* the court held that a newsman could not refuse to disclose criminal activity he observed when that criminal activity was conducted by the informant. It was termed a case where the informant was informing on himself.

If the statute is to be construed in a fashion that supports the underlying purpose for the immunity, it should be interpreted in a manner that would allow the newsman to refuse to answer any question which is involved in the confidential relationship, such as the identity of the informant, the method by which the informant obtained the information, or a portion of the information transferred if all of it was not intended for publication. Basically, the purpose is to maintain the confidential relationship and the newsman should be able to refuse to answer any question which would impair that relationship.[120] How-

112. A court has inherent power to compel the attendance of witnesses in an action or proceeding before it. By statute, the legislature and many administrative bodies and officers have power to subpoena witnesses. See WITKIN, CALIFORNIA EVIDENCE, *Witnesses* §748 (2d ed. 1966).

113. CAL. EVID. CODE §901 defines proceeding as any action authorized by law, pursuant to which testimony can be compelled.

114. D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307 (1969).

115. *Id.* at 332.

116. 412 Pa. 32, 193 A.2d 181 (1963).

117. 193 A.2d at 184; criticized in Note, 39 NOTRE DAME LAW. 489 (1964).

118. 129 N.J.L. 478, 30 A.2d 421 (1943).

119. 461 S.W.2d 345 (Ky. 1971).

120. *But cf.* Note, *An Act to Protect Confidential Sources of News Media*, 6 HARV. J. LEGIS. 341 (1969).

ever, again relying on the policy of strict construction, a court could sustain the argument that "the source of any information" refers only to the identity of the informant.

B. Circumstances in Which Protection May be Denied

1. Waiver of Immunity

As with other testimonial privileges, a newsman may expressly or impliedly waive his right to claim immunity. In general, one may be deemed to have waived his testimonial privilege when he has disclosed to others the privileged information or when he has introduced evidence which discloses the facts claimed to be privileged.[121] Also, the courts have shown a great reluctance to allow a newsman-defendant in a libel action to claim immunity from disclosure on the basis of a newsman's privilege; the newsman will be deemed to have waived his privilege if he raises any defense to the libel action which can be rebutted by disclosure of this source of information.[122] In California, a newsman-defendant in a libel action is not protected by Section 1070 because it only provides immunity from contempt, thus other methods of compelling testimony are available.[123]

A reporter often discloses his source to his editor or even to competing newsmen.[124] Disclosing to editors is generally required before publication will be allowed.[125] The disclosure to competitors is often done for the purpose of verification of the validity of the news.[126] This limited disclosure should not be considered a waiver under the general rule as it is an essential part of the news-gathering process.

One of the few California cases interpreting Section 1070 dealt with waiver.[127] It involved a newspaper story about a speech given by a named labor leader. Quotation marks were used within the article on certain phrases which were of importance in a labor dispute. One litigant claimed that the use of quotation marks constituted a waiver by identifying the person who gave the speech as the person quoted and thus identifying him as the source. The court held that someone other than the speech maker could have been the source of the information and therefore the reporter did not waive his protection un-

121. *See In re* Visaxis, 95 Cal. App. 617, 273 P. 165 (1929).
122. *See* Beecroft v. Point Pleasant Printing & Publishing Co., 82 N.J. Super. 269, 197 A.2d 416 (1964); Brogan v. Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1956).
123. See note 90 *supra*.
124. Blasi, *supra* note 2, at 244.
125. *Id.*
126. *Id.* at 246.
127. *In re* Howard, 136 Cal. App. 2d 816, 289 P.2d 537 (1955).

der the statute.[128]

2. *Denial of Immunity in Circumstances Where Information is Vital to a Criminal Defendant*

The sixth amendment of the United States Constitution grants the criminal defendant the right to subpoena witnesses in his favor. Wigmore points out that this right was established merely to give the defendant the same right that the prosecution had by common law and that as a consequence the right does not override testimonial privileges recognized by common law or statute.[129] However, as pointed out earlier, the potential deterrent effect on the use of confidential sources by requiring newsmen to testify in criminal trials is not great.[130] Also, public opinion, including that of newsmen,[131] would most likely be in favor of affording the criminal defendant an overriding need to show his innocence. However, the present wording of the statute is clear, and absent any constitutional infirmities it would appear that a reporter could invoke the privilege at a criminal trial.

3. *Denial of Immunity in Circumstances Where Testimony is Necessary to Conduct a Fair and Impartial Trial*

The holding in *Farr v. Superior Court*[132] indicates that under certain circumstances the application of Section 1070 would be an unconstitutional interference with the judiciary.[133] The facts and circumstances which led to *Farr* are as follows: Early in the proceedings of the Charles Manson murder case, the superior court issued an Order *re* Publicity. That order prohibited any attorney, court employee, attache, or witness from releasing for public dissemination the content or nature of any testimony that might be given at trial or any evidence the admissibility of which might have to be determined by the court. Subsequent to the issuance of this order and while the trial was in progress, reporter Farr obtained copies, which he admitted were supplied by attorneys who were under the publicity order, of a written statement of one of the defense witnesses containing information, highly inflam-

128. *Id.* at 819, 289 P.2d at 538.
129. WIGMORE §2191. *See In re* Baker Mutual Ins. Co., 301 N.Y. 21, 92 N.E.2d 49, 52 (1950) ("But persons subpoenaed may nevertheless assert against the compulsion of such process whatever privileges they may enjoy under the common law or by statute").
130. See text accompanying note 39 *supra.*
131. As pointed out by Blasi, *supra* note 2 at 258, a large percentage of newsmen would volunteer information in derogation of their code of ethics to help a criminal defendant.
132. 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971).
133. *Id.* at 69, 99 Cal. Rptr. at 348.

atory in nature,[134] and potentially damaging to the defendants in the trial. The written statements were subsequently published.

After the trial, the court convened a hearing to determine whether there had been a violation of the Order *re* Publicity. Farr was called as a witness to this hearing and asked to disclose the identity of the persons. Farr refused, claiming immunity under Section 1070. He was cited for contempt and ordered jailed until he answered the questions.[135] On appeal of this contempt citation, the court pointed out that the inquiry conducted by the trial court was necessary to perfect a record pertaining to an issue likely to arise on appeal of the Manson case; that is, if the members of the prosecution team leaked the information, the issue of the prejudicial nature of that information would merit serious consideration on appeal. If the defense leaked the information, then the issue is materially different.[136] The court also argued that the disclosure was necessary in order to comply with the United States Supreme Court's mandate that trial courts take affirmative action to control prejudicial publicity emanating from officers of the court.[137] The court pointed out that reporter Farr was the only person who could disclose the identity of the persons who violated the Order *re* Publicity and therefore disclosure by him was *necessary* to its duty to control its own officers appearing before it.[138] Further, since disclosure was necessary in order for control of the officers of the court, Farr could not be granted immunity from contempt for refusing to testify. Although the statute, by its broad terms, clearly applied, the court held that the legislature could not have intended it, for if they had it would have been an unconstitutional interference with the court's inherent and vital power to control its own proceedings.[139] If disclosure by Farr is the only method by which the court can enforce its order, then certainly Farr's refusal interferes with the court in the discharge of its duties. Under this reasoning, however, any refusal of a question posed by the court, unless constitution-

134. Among other things, the statement related plans by the Manson "family" to cross the country and murder people at random, including plans to murder a series of show business personalities; Elizabeth Taylor's eyes were to be removed and mailed to her ex-husband; Richard Burton was to be castrated; Frank Sinatra was to be skinned alive while hanging from a meathook; and Tom Jones was to have his throat cut while he was engaged in sexual intercourse with Susan Atkins, one of the defendants. *Id.* at 64, 99 Cal. Rptr. at 344.

135. *Id.* at 69, 99 Cal. Rptr. at 347.

136. *Id.* The court does not cite its reasons as to why this would make any difference. However, if the prosecution was responsible for the disclosure then the issue on appeal may concern the fairness of the trial as opposed to the issue of adequacy of council if the defense is responsible for disclosing the information.

137. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966).

138. 22 Cal. App. 3d at 69, 99 Cal. Rptr. at 347.

139. *Id.* at 70, 99 Cal. Rptr. at 348.

ally protected, would be considered an obstruction of the court in the discharge of its duties. This would be a ludicrous conclusion in light of many other accepted testimonial privileges unless it could be distinguished on the basis of the purpose for acquiring the information. The purpose in *Farr* was to obtain information which would allow the court to punish the persons who had violated the court order. Certainly those persons could not be immune from contempt because they were officers of the court. Although Farr was not under the publicity order, his conduct in publishing the information with knowledge of its inadmissibility into evidence, its inflamatory character, and with knowledge that a publicity order existed, might be considered contemptuous.[140] However, his refusal to disclose was based on a legislative act which granted him immunity and should not be considered an *unconstitutional* interference with the judiciary's right to control its own proceedings.

Conclusion

The California Evidence Code Section 1070 provides virtually an absolute privilege for newsmen to refuse to testify before any government body.[141] However, the statute is subject to several different interpretations and therefore is presently uncertain as to the kinds of questions which newsmen can refuse to answer,[142] the particular newsmen who are given protection,[143] and the acts which would constitute waiver.[144]

In view of the purpose of the statute, *i.e.*, to promote the free flow of news, it is suggested that the statute be amended to clarify these uncertainties and to provide broad protection for all bona fide newsmen, whether associated with newspapers or magazines, with general circulation or with limited circulation. It is also recommended that the statute be amended to more clearly define the information which is privileged and include protection for any information which would insure the confidentiality of the newsman-source relationship.

The legislature is also urged to recognize that the public interest may be better served if newsmen were denied the protection in criminal trials. As pointed out herein, the government cannot use the

140. *See generally* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).
141. It should be noted that a California newsman will not be protected by the statute when appearing before federal courts, grand juries, or before other federal bodies. An exception may occur in the case of diversity suits. See Application of Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964), where a federal district court in New York applied the California statute for a case which came to trial in California.
142. See text accompanying notes 114-120 *supra.*
143. See text accompanying notes 81-111 *supra.*
144. See text accompanying notes 121-128 *supra.*

forum of the criminal trial to take advantage of the investigative work of the newsman[145] and the burden on the news-gathering process would be slight compared to the public interest in the administration of justice in a criminal trial.[146]

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145. See text accompanying notes 39-44 *supra.*

146. At the time of this writing several bills have been introduced in the 1973 Regular Session of the California Assembly which would broaden the protection of the newsman-source relationship. A.B. Nos. 1, 4, 26, 75, and 84, 1973 Regular Session. In addition, two constitutional amendments have been proposed. A.C.A. 2, 1973 Regular Session; A.C.A. 9, 1973 Regular Session.