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COMMENTS

NEWSMEN'S IMMUNITY NEEDS A SHOT IN THE ARM

"Newspaper reporter Mary Crawford was ordered jailed for five days for contempt of court for refusing to testify yesterday at the Los Siete murder trial." *San Francisco Chronicle*, Oct. 20, 1970.

These 25 starkly graphic words, written quickly to capture a reader's even quicker eye, dramatize a current legal conflict far broader than the choice of a 53-year-old newswoman to face imprisonment rather than violate her profession's code of ethics.¹ Significantly, Mrs. Crawford, as of this writing, has served no jail sentence despite being adjudged in contempt. She was released immediately, pending a hearing on her claim that she is protected by law from being forced to testify. The court apparently was unable to resolve the issue after "a day and a half of vigorous legal argument."²

Mrs. Crawford's defiant stand and the court's curious inability to rule quickly and decisively³ have a common origin—a California "reporters' privilege" statute which each side interprets differently.

This comment analyzes that statute, Section 1070 of the California Evidence Code,⁴ without attempting to suggest whether Mrs. Crawford is right about her claim. The more significant issue obviously concerns the efficacy of the statute itself. A corollary issue is the consequence to the news media, the courts, and to the reading

¹ "Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court, or before other judicial or investigative bodies. . . ." Note, 45 *YALE L.J.* 357, 360 & n.24 (1935).

² *San Francisco Chronicle*, Oct. 20, 1970, at 5, col. 5.

³ Telephone interview with Mr. James Brewer, reporter for the *San Francisco Chronicle*, Oct. 21, 1970. Mr. Brewer said the issue concerning Mrs. Crawford went unresolved for five days. She was excused once by the court, subpoenaed again, and finally cited for contempt when she refused to testify as to whether she had spoken about the case earlier to the district attorney. Mr. Brewer said no one involved in the controversy appeared confident that the matter was being handled correctly.

⁴ "A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, cannot be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper.

"Nor can a radio or television news reporter or other person connected with or employed by a radio or television station be so adjudged in contempt for refusing to disclose the source of any information procured for and used for news or news commentary purposes on radio or television." *CAL. EVID. CODE* § 1070 (West 1968).

public when a test of the statute is given wide publicity.⁵ Part One of this comment suggests that the language of Section 1070 provides newsmen with less protection than they think, and predicts that growing social tensions will result in increasing challenges to the statute. Part Two discusses the logical inconsistencies and ambiguities in several of the statute's provisions, while Part Three deals with the procedural difficulties in applying the law. A suggested revision to Section 1070, one which widens and clarifies its scope, is offered in the conclusion.

PART ONE

The Statute's Pedestal May Be Shaky

Newsmen in California, believing they already were guaranteed the right not to disclose sources, fought hard five years ago to prevent any changes when the Evidence Code was enacted.⁶ The journalists won the war—the newsmen's immunity section of the Code of Civil Procedure was transferred intact into the Evidence Code⁷—but apparently they never looked into their bag of spoils to see if their treasure was genuine or merely gold-plated.

If what newsmen wanted was a statute which prohibits a judge from issuing a contempt citation to a specific class of persons, representing a specific class of media, under a restrictive set of circumstances, the newsmen got what they were after. But if they sought a statute which encourages the free flow of news by assuring that confidences between a journalist and his source are respected, the victors may have carried home a Trojan horse. But newsmen, of course, are not the only persons affected if the statute actually delivers less than popularly believed.

Attorneys, both public and private, have a substantial stake in the manner in which the provision is interpreted. Cases can be won

⁵ For example, such publicity was drawn magnetically to Mrs. Crawford's dilemma due to the sensational aspects of the trial. Six Latin American youths had been charged with killing a white undercover police detective in a street brawl. They were acquitted.

⁶ "Legislators were told by a newspaper representative Tuesday that news media will fight to keep their right to withhold sources of information.

"It's our way of life," said Ben Martin, general manager of the California Newspaper Publishers Association.

"Martin said that newspaper people would not give in, and that the existing statute must be preserved." San Jose Mercury, Feb. 17, 1965, at 5, col. 8.

"Representatives of Los Angeles news media protested Monday proposed legislation which would require newsmen to disclose their source of information." San Jose News, Feb. 23, 1965, at 13, col. 3.

⁷ See Cal. Stats., 1961, ch. 692, § 1, at 1797-98 (1961) CAL. CODE CIV. PROC. § 1881(6), (*repealed* and *reenacted* at CAL. EVID. CODE § 1070 (West 1968).

or lost on the basis of information held by newsmen. Whether an attorney can require a reporter to reveal information vital to an action is a question the attorney must be able to answer.

Mrs. Crawford's plight, historically, presents an exception to what appears to have been a "hands-off" attitude concerning newsmen. Reporters' secrets apparently have not been worth the wrath a sensitively-situated public official might expect to incur by forcing answers.⁸ Only one reported California case involves the attempted forced disclosure of a reporter as a witness.⁹ With this tradition firmly established, the lack of probing the statute's underbelly is understandable. Because reporters in the past have been virtually exempt from annoying inquiries, does not mean the press might not become a favorite target for flying subpoenas under different circumstances. Such circumstances apparently exist at federal levels of inquiry.

Federal agents, faced with the task of combating what they believe is a nationwide network of protesters, and stopping increasing violence and destruction of property, are demanding information from newsmen, who often have contacts far beyond the reaches of government operations.¹⁰ Unhampered by a statute granting protection to newsmen, the United States Department of Justice has devised guidelines endorsed by Attorney General John Mitchell, for

⁸ An anonymous jingle describes what happened to a district attorney who, after forcing two reporters to testify, was vilified in the press. He was beaten soundly when he next stood for election.

Two newsmen upset a D.A.
With a scandalous expose;
They lost on the First
And were jailed, unreversed,
But the press put the D.A. away.

Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. L. Rev. 18, 48 & n.148 (1969).

⁹ *In re Howard*, 136 Cal. App. 2d 816, 289 P.2d 537 (1955).

¹⁰ "Federal judges have issued a number of subpoenas to the press for information which is deemed useful in the investigation of possible violations of federal criminal statutes.

.....
"The subpoenas have been served on newspapers, magazines, and television networks and individual newsmen. They have asked for verbal, printed and pictorial information; for information published and unpublished, received under promises of confidentiality, and received under no promises of confidentiality.

.....
"[O]ccasionally, we have newsmen and photographers who are experts in a case we are investigating and who may have more information than the government has—factual information and photographs which the government finds difficult, if not impossible, to obtain through its own investigatory agencies." Address by United States Attorney General John N. Mitchell, American Bar Association House of Delegates Annual Meeting, Aug. 10, 1970.

issuing subpoenas to newsmen.¹¹ Mr. Mitchell has admitted, however, that the federal government is "involved in a number of major legal confrontations which could seriously mutate fundamental relationships among the government, the press, the bar, and the courts."¹² He said that in light of this resistance, the government will use "self-restraint" in requesting information and will depend greatly on attempts at negotiating the release of useful information.¹³

The federal government's approach is supported uniformly by case law,¹⁴ and has been followed in states which have no newsmen privilege statutes¹⁵ since no right to conceal sources is recognized at common law in the absence of a statute.¹⁶ The pressure from the Justice Department and other branches of the federal government¹⁷ spotlights nationwide the uncertainty concerning the journalists' ability to protect their sources. The announcement that the Government is "negotiating" with newsmen for release of information, and the notoriety created by legal actions challenging the subpoena trend,¹⁸ will further confuse those who are asked to rely on a reporter's word that his informant's name will not be disclosed.

¹¹ Government agents issuing subpoenas must, according to the guidelines, first try to obtain the information from non-press sources, attempt to negotiate with the newsmen for their information, and, if the negotiations fail, receive authorization for a subpoena from the Attorney General. Without the authorization, the Justice Department will move to quash the summons. Under *unusual situations*, however, subpoena requests may be submitted without conforming to the guidelines. *Id.* [Emphasis added].

¹² *Id.*

¹³ *Id.*

¹⁴ See Annot., 7 A.L.R.3d 591 (1966).

¹⁵ See, e.g., *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958); *In re Goodfader's Appeal*, 45 Hawaii 317, 367 P.2d 472 (1961); *Adams v. Associated Press*, 46 F.R.D. 439 (S.D. Tex. 1969); *State v. Buchanan*, 250 Ore. 244, 436 P.2d 729 (1968), *cert. denied*, 392 U.S. 905 (1969).

¹⁶ *People v. Durrant*, 116 Cal. 179, 48 P. 75 (1897); *People ex rel Mooney v. Sheriff of N.Y.*, 269 N.Y. 291, 199 N.E. 415 (1936).

¹⁷ "[Vice President Spiro Agnew] has graciously assumed the role of editor-in-chief of the country's newspapers. He has sustained a long attack on the news media strengthened by the known hostility of the President toward the media, the subpoena power of the Department of Justice and the licensing discretion of the Federal Communications Commission." Address by Ben Bagdikian, national news editor of the Washington Post, Association for Education in Journalism Annual Meeting, as reported in *EDITOR & PUBLISHER*, Aug. 22, 1970, at 11.

¹⁸ See *Application of Caldwell*, 311 F. Supp. 358 (N.D. Cal. 1970). Caldwell, a black reporter for the New York Times, was adjudged in contempt for refusing to appear before a federal grand jury to testify about the Black Panthers. *Rev'd*, *Caldwell v. United States*, No. 26025 (9th Cir., Nov. 16, 1970). Seven uncertain months passed before the appellate court issued its opinion. The government, the court said, could subpoena Caldwell, but only after showing a "compelling need" for the reporter's testimony.

The resulting confusion may become as contagious as the subpoena has become popular. An informant, like a laboratory white rat on an electric grid, may not be able to decide if he should trust the reporter. And the newsman may not be able to decide if he should publish what he does hear, for fear he may be jolted by a subpoena from a reader in the Attorney General's office. Government investigators seeking to extract information from newsmen may become confused themselves as court battles ensue.

States which allow newsmen to refuse to disclose their sources of information can escape the confusion.¹⁹ However, the statutes must clearly indicate those persons protected, the media included, and the scope of their protection. If they do not, the problems are not solved, only camouflaged. Section 1070, with its borrowed 35-year-old language, may not be able to withstand an onslaught by suddenly intrepid public prosecutors and enterprising private counsel, both searching for weaknesses.

PART TWO

What the Statute Says

California adopted its newsmen's shield section in 1935 as an addition to privileges granted by the Code of Civil Procedure.²⁰ Newsmen's relations with their sources became a combination "in which it is the policy of the law to encourage confidence and to preserve it inviolate . . ." ²¹Newsmen joined the privileged ranks of attorneys, physicians, spouses, clergymen and public officials. The enactment came during a widely-publicized New York case in which a reporter was jailed for refusing to reveal his sources of information concerning a series of stories he wrote on gambling.²² This incident provided the impetus for five other states to adopt similar legislation.²³

The scope of California's protection was broadened in 1961 to

¹⁹ States, in addition to California, with newsmen's protection statutes include: Alabama, Arizona, Arkansas, Indiana, Kentucky, Louisiana, Maryland, Michigan, Montana, New Jersey, New Mexico, Ohio and Pennsylvania. See D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307, 324 & n.80 (1968).

²⁰ Cal. Stats., 1935, ch. 532, § 1, at 1610 (1935), amending Cal. Stats., 1927, ch. 683, § 1, at 1154 (1927) (Codified at CAL. CODE CIV. PROC. § 1881(6) (West 1955). (Repealed and reenacted at CAL. EVID. CODE § 1070 (West 1968)).

²¹ Cal. Stats., 1935, ch. 532, § 1, at 1609 (1935) CAL. CODE CIV. PROC. § 1881 (West 1955). (Repealed by CAL. EVID. CODE § 1070 (West 1968)).

²² *People ex rel Mooney v. Sheriff of N.Y.*, 269 N.Y. 291, 199 N.E. 415 (1936).

²³ Alabama in 1935, Arkansas and Kentucky in 1936, Arizona and Pennsylvania in 1937. See 6 CAL. LAW REVISION COMM. REP., REC. & STUDIES 486 (1964) [hereinafter cited as *Privilege Study*].

include the electronic media²⁴ and the enlarged version became the body of law the legislature transferred into the Evidence Code.²⁵ Simply transferring the former law into the new code was contrary to the recommendations of the California Law Revision Commission,²⁶ which had suggested discretionary application by the courts.²⁷ Newsmen, recognizing that a discretionary right is less than an absolute one, fought the change with statewide editorials as well as with lobbyists in Sacramento.²⁸ The Assembly Judiciary Committee struck the proposed revision and inserted the former law into the Evidence Code.²⁹

Only three reported cases have dealt at any length with attempting to interpret the newsmen's immunity section, none of them occurring since 1965.³⁰ The courts' adherence to the strict construction precept has resulted in an ungainly assortment of precedents. For example, a bona fide newsman may be excluded from the statute's protection because his publication is printed on slick paper once a week instead of on newspaper once a day.³¹ Similarly, a reporter can be denied his immunity if a subpoena is served while he continues his research instead of after his story is published.³²

"Or Other Person"

Section 1070 presently extends protection to "[a] publisher, editor, reporter, or other person connected with or employed upon a newspaper . . ."³³ However, no court has interpreted the meaning of the "or other person" clause. While the phrase might be construed on a case by case basis, the language offers no guidelines. The phrase permits non-disclosure by a publisher, who in day-to-day practice seldom develops information sources beyond tips on low-cost newsprint. His job is running the newspaper; he buys typewriters, but

²⁴ Cal. Stats., 1961, ch. 629, § 1, at 1798 (1961), *amending* Cal. Stats. 1935, ch. 532, § 1, at 1610 (1935).

²⁵ CAL. EVID. CODE § 1070 (West 1968).

²⁶ B. WITKIN, CALIFORNIA EVIDENCE § 891, at 827 (2d. ed. 1966).

²⁷ "A newsman may not be adjudged in contempt . . . unless the source has been disclosed previously or the disclosure of the source is required in the public interest or otherwise required to prevent injustice." 7 CAL. LAW REVISION COMM. REP., REC. & STUDIES 207 (1965).

²⁸ See note 6, *supra*.

²⁹ 7 CAL. LAW REVISION COMM. REP., REC. & STUDIES 913 (1965).

³⁰ *Application of Cepeda*, 233 F. Supp. 465 (S.D.N.Y. 1964); *In re Howard*, 136 Cal. App. 2d 816, 289 P.2d 537 (1955); *Bramson v. Wilkerson*, Civil No. 760973 (L.A. Super. Ct., January 4, 1962) as reported in 3 Cal. Disc. Proc. 72 (Metropolitan News Review Section, Jan. 30, 1962) (memorandum opinion by Judge Philbrick McCoy).

³¹ *Application of Cepeda*, 233 F. Supp. 465 (S.D.N.Y. 1964).

³² *In re Howard*, 136 Cal. App. 2d 816, 289 P.2d 537 (1955).

³³ CAL. EVID. CODE § 1070 (West 1968) [emphasis added].

seldom uses one. The editor also is protected, although on most newspapers, editors are removed from on-the-street contact with sources. An editor is responsible for judging the newsworthiness of an event, but usually is not responsible for gathering it. When the statute names the reporter in the protected class, it finally reaches the person most intimately concerned with such protection. Reporters develop news; they collect rumors, check facts, and then write their stories. They deal with public officials, law enforcement personnel, and businessmen. They talk to civil rights leaders, student radicals, and criminals. They talk to the man in the middle of it all. The reporter is the funnel. Pour the angry shouts of a black militant in one end, and at the other the white suburban father of four begins to receive the "signal of maladjustment."³⁴

The inquiring body³⁵ which must determine if the newsman is protected by the statute, surely will find it difficult to visualize a protected class using statutory language which includes persons far removed from the news gathering function as well as those obviously doing that job. A printer arguably is as closely connected to the paper as a publisher. So is the delivery boy. And the housewife who calls in information about her Friday bingo club meeting could, with equal footing, claim immunity if that club meeting suddenly becomes of interest to a government agent. All three could be the "other person" protected by Section 1070.

"Newspaper"

Perplexing as that problem is, a judge faces even greater semantic gymnastics when he tries to apply the terms "newspaper," "source," and "published." And, the Law Revision Commission noted,³⁶ it is unclear what happens to the newspaper reporter who turns his sources' information over to a television station, and the information is "used" instead of "published." The judge also must decide if he is to allow a newspaper reporter to conceal the source of information procured simply for "publication" and yet limit the

³⁴ "Complaints and grievances are the only reliable signals of maladjustments, but there is no automatic way to hear them. And these complaints mean nothing unless they get into the media.

.....
"Tampering with the reporting of protest and dissent is tampering with the self-righting mechanism in society." Address by Ben Bagdikian, national news editor of the Washington Post, Association for Education in Journalism Annual Meeting, as reported in *EDITOR & PUBLISHER*, Aug. 22, 1970, at 11.

³⁵ More than 100 separate statutes authorize a variety of agencies, commissions and persons to compel attendance and testimony by subpoena. *Privilege Study*, *supra* note 23, at 309.

³⁶ *Id.* at 485.

electronic media newsmen to concealing only sources of information procured for "news and news commentary."

"Newspaper," one court has found, means newspaper and nothing else.³⁷ *Application of Cepeda*³⁸ involved a libel action by professional baseball player Orlando Cepeda against *Look* magazine. Cepeda sought to force *Look's* reporter to reveal who made certain remarks about his playing ability, which the reporter used in a story. The federal district court ruled that, although California law applied, its statute did not expressly provide immunity to magazine personnel. The court also implemented the rationale which restricts magazines from utilizing California's liberal retraction avenue in libel actions. Magazines the court said, are unlike newspapers in that no daily deadline pressure exists. Magazines thus have a better chance to catch mistakes and substantiate potentially libelous statements before publication. This appears to be an application of the rule without the reason because the question of anonymity does not have any relation to frequency of publication. The court noted that its holding was supported by the legislative history of the 1961 expansion of the immunity clause. The Assembly bill included protection for news magazines. The coverage was deleted in the final form of the bill enacted into law.³⁹ Subsequent to *Application of Cepeda*,⁴⁰ the statute can be interpreted as covering newsmen connected with newspapers, wire services and press associations, but only if they are procuring information for publication in newspapers. Since magazine writers are free of the newspaperman's daily deadline pressure, and thus have the opportunity to develop in-depth news stories, their exclusion from statutory protection seems arbitrary and illogical.

"Source"

Once a newsman qualifies for protection under the statute, the next question is what can he protect. Once again, the ambiguity of a term creates uncertainty. Is a *source* "who," or is it "where"? Can an attorney insist on answers to questions involving the subject matter of the communications? What happens if this information must inevitably lead to the newsman's informant? Few attorneys could fail to find questions which fit snugly within the statute, but choke unwilling answers from a newsman depending on the immunity clause.⁴¹ If the examiner is careless, however, his indirect method

³⁷ *Application of Cepeda*, 233 F. Supp. 465 (S.D.N.Y. 1964).

³⁸ *Id.*

³⁹ *Privilege Study*, *supra* note 23, at 502-03.

⁴⁰ 233 F. Supp. 465 (S.D.N.Y. 1964).

⁴¹ This is the situation Mrs. Crawford faced on October 19. Having refused

of interrogation may be noticed. One court has apparently recognized the true thrust of such questions even though they were phrased to be answered without disclosing any names.⁴²

"Published"

The statute requires that information received from a confidential source be "published" before the newsman can invoke the protection provisions. If a newsman is particularly cautious and delays publication of the information while he double-checks the source's tip, the delay may destroy the protection. The newsman is vulnerable to subpoena until his story goes to press or perhaps until it is distributed to the public. Whether the statute requires actual dissemination of the information to give rise to the immunity is not certain. Less is required to constitute publication in libel actions.⁴³ The informant, in effect, cannot be certain his name is safe from disclosure until he sees his communications in print. How much the newsman must print in order to protect his informant has not been decided, and was another point of concern for the Law Revision Commission in 1964.⁴⁴

Ordinarily, persons likely to force disclosure by a newsman become interested after seeing a published article. Reporters who have become experts in a specific field, however, or those who have developed strong contacts with controversial figures, are particularly susceptible to pre-publication subpoenas. Their very success in opening channels to information the public has no other way of obtaining makes them prime subjects for judicial, legislative, and administrative agency probing. Thus, the legislative purpose for protecting newsmen's sources—keeping avenues of information uncluttered by casually-tossed subpoena papers—may be frustrated.

to answer whether she had interviewed one of the defendants in the murder trial, she was asked if she had spoken to the district attorney about the case. Her subsequent refusal to answer, the court apparently ruled, was not protected by the statute since she was not being asked to reveal a source of information published in the newspaper. *See* San Francisco Chronicle, Oct. 20, at 5, col. 5.

⁴² *Bramson v. Wilkerson*, Civil No. 760973 (L.A. Super. Ct., January 4, 1962) as reported in 3 Cal. Disc. Proc. 72 (Metropolitan News Review Section, January 30, 1962) (memorandum opinion by Judge Philbrick McCoy). *See also In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963); *But cf.* *State v. Donovan*, 129 N.J.L. 478, 30 A.2d 421 (1943).

⁴³ *See* *Field Research Corp. v. Superior Court*, 71 Cal. 2d 110, 453 P.2d 747, 77 Cal. Rptr. 243 (1969) (communication is publication); *Farr v. Bramblett*, 132 Cal. App. 2d 36, 281 P.2d 372 (1955) (displaying libelous advertising matrixes to editor was publication).

⁴⁴ *Privilege Study*, *supra* note 23, at 485.

This requirement for publication before protection has been criticized in the past⁴⁵ and has never before been so subject to misuse.

A bona fide reporter who uncovers a news story which will be dead for his own publication, loses his statutory protection if he passes his information to a radio or television station. He has not "published" as required; he has, instead, "used" his information. Again, the free flow of news is blocked by the very instrument enacted to preserve the public's right to know. This inter-play between printed and electronic media surfaces again when the statute is read literally to decide which information qualifies the newsman for immunity. The newspaper reporter apparently can protect the source of any information he procures for publication and subsequently publishes. The radio or television newsman, on the other hand, can only protect the sources of information he gathers for "news and news commentary."

"News"

Besides this disparity in protection, the statute gives little aid in directing a judge who must decide what is "news." Some journalists spend years on the job without ever discovering the meaning of the term. Craftsmen in the news business finally develop a feel for what types of events will interest readers, viewers and listeners. The types chosen vary for each medium. There is hard news, and soft news, amusing anecdotes, and exclusive features. An old journalism adage insists that a fire raging in a forest is not news unless someone sees it and tells it to someone else.

So how is a judge to tell? The answer is he probably cannot and will have to seek advice from the newsmen themselves. If they offered it for public consumption, it is news. Because a particular bit of information did not make its way into the news pages or into a broadcast does not mean it is not news, despite the old adage. Each day, stories are rated in relation to each other. What is news on Monday probably is not news on Tuesday. If a local high school football hero is killed in an auto accident, that is news; unless on the same day, the President of the United States is assassinated. If a judge thinks material does not qualify as "news," it is possible, under the statute, to have no protection although the information is broadcast. And, if it is news, but for some other reason is not used over the air, the protection is likewise denied. The clause "news or

⁴⁵ See Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. L. REV. 18, 55 (1969); 46 ORE. L. REV. 99, 105-06 (1966).

news commentary" is extraneous and confusing, and easily introduces unmanageable complications.

"Procured For"

Regardless of how it is classified, or what it is used for, information to be protected must have been "procured for" publication or use. Newsmen apparently must intend, as they gather the information, to use it. This requirement indicates that the authors of the section lacked a basic understanding of the news operation. The drafters of the statute failed to see that a reporter often does not know beforehand whether he is going to use any particular information he receives.

The information may come to him because, in the past, a person has learned to trust him. The information may be—and usually is—just a small portion of a much bigger story. Standing alone, the information may be worthless, either because the newsman does not trust the source, or because the information is unsubstantiated. The information may be intrinsically meaningless and become significant only after further research by the reporter or by the occurrence of another event, months or years later. In these cases, a judge following the letter of the statute could decide that, although the information was published, it initially was not procured for publication.

PART THREE

How the Statute Works

Can a newsman waive his statutory protection after having once relied on it to conceal a source? Has the reporter inadvertently done something which constitutes a waiver? Before what bodies can the newsman invoke the statute? And, most importantly, does Section 1070 grant—as newsmen generally believe and most legal writers assume⁴⁶—an absolute privilege to conceal the source of information?

Waiver

The protection belongs to the newsman, not to his source.⁴⁷ The newsman can, at any time, choose to reveal his source, although his code of ethics forbids it.⁴⁸ Newsmen who once refuse to reveal

⁴⁶ See, e.g., 46 ORE. L. REV. 99 (1966).

⁴⁷ Section 1070 expressly limits its application to newsmen, making no mention of a source's choice in the matter. Of course, a source always has the right to reveal his activities. A reporter could not then rely on the statute to continue concealing the person's identity.

⁴⁸ See note 1, *supra*.

their source when questioned as witnesses, are free in all states to change their minds in a subsequent libel suit, for example, in order to prove their source and mitigate damages.⁴⁹ A law revision commission in New York once urged a prohibition against such tardy cooperation in the event the legislature enacted a privilege statute.⁵⁰ California views the problem differently, penalizing the reporter if, as a party to an action, he insists on concealing his sources of information.⁵¹

Whether a reporter has waived his protection, as illustrated by the controversy surrounding Mary Crawford's refusal to testify, depends on whether the source's identity has previously been made known, even inadvertently. The reporter's use of quotation marks around statements he attributed to a labor official did not constitute a waiver in the case of *In Re Howard*.⁵² The court noted that, despite the quotation marks, the news story did not specifically say the quoted passages were spoken directly to the reporter rather than obtained by him through other means. Such reporting techniques are avoided by most newsmen as sloppy, and even dishonest, practice.

When Invoked

Newsmen who justifiably rely on the statute are safe from being adjudged in contempt by courts, as well as legislative and administrative bodies.⁵³ Otherwise, punishment for contempt includes imprisonment or a fine; perhaps both.⁵⁴ In states without an immunity statute, reporters almost always choose the penalty rather than reveal their sources.⁵⁵ And, in states such as California where the language of the statute does not blunt the thrust of probing questions, reporters like Mary Crawford apparently will choose the same path. This fact has led some writers to conclude that a privilege statute is not necessary.⁵⁶ Such a conclusion merely assumes that the burden for assuring the statute's purpose—facilitating the dissemination of news to the public—should rest on the reporters' shoulders.

No court has decided if the prohibition of Section 1070 reaches to the sub-organs of the state, county and city legislative and administrative bodies.⁵⁷ A reasoned interpretation, however, would

⁴⁹ See 46 ORE. L. REV. 99, 110 (1966).

⁵⁰ Once having claimed the privilege, a reporter would not be permitted to prove the sources of his information unless the informant consented in writing. *Id.*

⁵¹ See note 59 and accompanying text, *infra*.

⁵² 136 Cal. App. 2d 816, 289 P.2d 537 (1955).

⁵³ CAL. EVID. CODE § 1070 (West 1968).

⁵⁴ CAL. CODE CIV. PROC. § 1218 (West 1967).

⁵⁵ See 36 VA. L. REV. 61, 82 (1950); 61 MICH. L. REV. 184, 189 & n.25 (1962).

⁵⁶ See 11 STAN. L. REV. 541, 546 (1959).

⁵⁷ See *Privilege Study*, *supra* note 23, at 503.

likely find no less rationale for protecting confidences at low levels than at high ones.

Privilege or Immunity?

The scope of the statute's protection is not apparent on a casual reading. A second look, however, reveals that the general confidence newsmen place on it may be unfounded. In addition to the problems of fitting any one person into the statutory mold at a particular time, there are considerations which might force disclosure of a source in spite of the immunity from contempt. Under Section 2034 of the California Code of Civil Procedure, a party to an action who refuses to make discovery is subject to a varying range of sanctions.⁵⁸ Thus, although a judge cannot find a reporter in contempt for concealing sources, he may strike whatever defenses the reporter might have offered in a libel action, or even award a plaintiff a default judgment.⁵⁹ The reporter cannot look to Section 1070 to bail him out of this trouble. All the statute grants is immunity from contempt. It is not a privilege,⁶⁰ such as is provided in the other 13 states with newsmen statutes.⁶¹

Newsmen's statutes of those states provide that no qualifying newsmen may be compelled to reveal his sources.⁶² Reporters are protecting privileged information, without having to be fearful of any repercussions. California treats "privileged" matter similarly.⁶³ So while legal writers, including the California Law Revision Commission authors, have often referred to Section 1070 as the "re-

⁵⁸ CAL. CODE CIV. PROC. § 2034 (West 1967).

⁵⁹ Upon a reporter's refusal to make discovery as a party to the action, the court may make, *inter alia*:

"(i) An order that the matter regarding which the questions were asked . . . or any other designated facts *shall be taken to be established* for the purposes of the action. . . .

"(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses. . . .

"(iii) An order *striking out* pleading or parts thereof . . . or *dismissing* the action or proceeding or any part thereof, or rendering a judgment by *default* against the disobedient party. . . ." *Id.* [emphasis added].

⁶⁰ "[The statute] does not create an evidentiary privilege justifying the refusal of the defendant Connolly to answer the questions put to him on the taking of his deposition either as to the source or the substance of the information upon which he based his published statements concerning the plaintiff. To hold otherwise would be to ignore the express terms of the statute, which we may not do." *Bramson v. Wilkerson*, Civil No. 760973 (L.A. Super. Ct. January 4, 1962) as reported in 3 Cal. Disc. Proc. 72, 73 Metropolitan News Review Section, January 30, 1962) (memorandum opinion by Judge Philbrick McCoy).

⁶¹ See note 19, *supra*.

⁶² *Id.*

⁶³ "[T]he deponent may be examined regarding any matter, not privileged. . . ." CAL. CODE CIV. PROC. § 2016 (West 1967).

porters' privilege" statute, it does not live up to its billing.⁶⁴ Discovery sanctions not prevented by the statute, clearly qualify the so-called absolute protection ostensibly granted in 1935 by the Legislature.

Bramson v. Wilkerson,⁶⁵ decided in 1962 as Evidence Code proposals were being studied, appears to be the case which originated the view that Section 1070 is not a privilege statute. In *Bramson*, a newspaper reporter who was a defendant in a libel action had refused to reveal the source of his published information. The court unequivocally ruled that, while the reporter could not be adjudged in contempt for refusing to answer, his refusal would make him liable under discovery rules. No mention of this case or its constraining view of the statute is found in the 1964 study by the Law Revision Commission.⁶⁶ The case and the thrust of its holding were attached to the old Code of Civil Procedure section, as Commission Comments, after the legislature substituted the former law for the Commission's discretionary immunity proposal. The legislature endorsed the *Bramson* holding by adopting the Commission Comment as its own for the annotated versions of the Evidence Code.⁶⁷

The statute the newsmen wanted to preserve, of course, did not have the *Bramson* interpretation attached to it. Nor could the newsmen be expected to recognize the significant shuffling which occurred with the adoption of the Evidence Code. The newsmen's immunity section no longer was included in the privilege chapter with those of attorneys, spouses, physicians, clergymen and public officials. These now appear in Chapter Four of Division Eight; the newsmen's section is Chapter Five. It stands stripped of the preamble afforded its predecessor, Section 1881(6) of the Code of Civil Procedure,⁶⁸ and sports, instead, the restrictive *Bramson* construction.

CONCLUSION

Section 1070's defects nullify any encouragement to news gathering it was intended to create. The defects cannot be resolved by judicial interpretation alone. Possibilities for construction seem unlimited when determining which persons and what media fit

⁶⁴ See *Privilege Study*, *supra* note 23, at 481. But see CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA TRIAL OBJECTIONS 367-68 (1967).

⁶⁵ Civil No. 760973 (L.A. Super. Ct., January 4, 1962).

⁶⁶ *Privilege Study*, *supra* note 23, at 481.

⁶⁷ See JOURNAL OF THE ASSEMBLY, April 6, 1965, at 1753; JOURNAL OF THE SENATE, April 21, 1965, at 1573.

⁶⁸ See note 21 and accompanying text, *supra*.

statutory requirements. The arbitrary exclusion of a major segment of the journalism field—magazines—from the statute's protection, and the requirement of publication serve to frustrate news gathering efforts rather than enhance them. A restricted view of the statute's use of the term "source" could create greater uncertainty and provide avenues for extracting otherwise protected information out of newsmen under subpoena.

The California legislature should devise a new section covering the newsman's relations with a confidential source. The new section should provide, at the very least, more explicit guidelines for interpretation in the cases when statutory exactness is impossible. The statute should not require publication prior to protection, and no legitimate news medium should be excluded. Judges should not have the discretion to revoke the statute's protection for reasons of "proper administration of justice or the public interest."⁶⁹ The Law Revision Commission assumed such a determination would be by an "unbiased authority," a judge.⁷⁰ But in times of social upheaval, with a society divided, expediency may prevail over legal impartiality. The protection vital to preserving the respect for reporter-informant communications comes only with a uniformity in application. Variables muddy the trail between the holder of significant information and the reading, listening, and viewing public.

A statute which grants an absolute privilege, as was the apparent original intent of the 1935 legislature,⁷¹ still can retain language which allows consistent application. The basic defect of the present statute is that its confusing language makes it impotent. More effective language for such a statute might read:

A person regularly engaged in gathering or disseminating information for legitimate news media has the privilege to refuse to disclose the source and substance of such information.

The ambiguity concerning the persons covered in the statute is corrected by describing the actual duties, rather than listing job titles. Those who gather and disseminate information—through whatever medium—are protected. They are the ones who actually contact the sources. Incidentally-connected persons are eliminated from the statute's coverage by reserving the privilege for those "regularly engaged" in the news business. A more refined definition does not seem practicable, given the nature of the journalism field. The suggested designation would deny protection to writers who

⁶⁹ *Privilege Study*, *supra* note 23, at 502.

⁷⁰ *Id.*

⁷¹ See CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA TRIAL OBJECTIONS 367 (1967).

submit unsolicited articles to publications. On the other hand, even a part-time writer, if authorized to gather news on a continuing basis by a news medium, would be privileged to conceal his confidential sources. The person covered must conduct his efforts for a "legitimate" news enterprise, a term which allows a judge to reflect public policy considerations without confining his application to specific types of publications or broadcasters. The proposed statute does not require publication prior to protection, eliminating the problem caused by publication delays. Skillful interrogators will be unable to reap benefits from indirect questioning since both "source" and "substance" are protected.

Finally, the granting of a privilege places the newsman's protection on equal standing with other privileges in the Evidence Code. A reporter loses no other rights by standing on his privilege.

The revisions suggested do no more than express the intent of the 1935 legislature. It is doubtful that many state legislators realized the negative effect the adoption of Section 1070 would have on the well-established "reporters' privilege." Surely the newsmen who fought for its adoption were unaware of it.

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