1-1-1986

California's New Newsmen's Sheild Law and the Criminal Defendant's Right to a Fair Trial

Richard A. Sipos

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol26/iss1/6

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons
CALIFORNIA'S "NEW" NEWSMEN'S SHIELD LAW AND THE CRIMINAL DEFENDANT'S RIGHT TO A FAIR TRIAL

I. INTRODUCTION

In 1980, California voters passed Proposition 5 and thereby elevated Evidence Code section 1070, the so-called "newsmen's shield law," to constitutional status. This new constitutional amendment, article I, section 2(b), provides journalists with an absolute immunity from being adjudged in contempt for a refusal to disclose either unpublished information or the identity of a confidential source.2

Two factors prompted the legislature to propose the constitutional resolution. First, the 1972 United States Supreme Court deci-

---

1. Cal. Const. art. I, § 2(b) (West 1983) provides:
   (b) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

   Nor shall 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so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

   As used in this subdivision, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

Id.

2. Cal. Evid. Code § 1070 and Cal. Const. art. I, § 2(b) provide only an immunity against being adjudged in contempt; neither affords the newsman a privilege to withhold information.

sion, *Branzburg v. Hayes*, which rejected a first amendment journalist privilege in a criminal proceeding, invited state legislatures to fashion their own standards for a newsman’s privilege. Second, during the 1970s, California appellate courts created four distinct exceptions to Evidence Code section 1070. These exceptions were perceived as a threat to the free flow of information from the news media to the public. As a result, the California electorate amended article I, section 2(b) to the state constitution, and seemingly afforded newsmen the highest level of state law protection.

Unfortunately, the legislature submitted a proposal which was nearly identical to Evidence Code section 1070. The legislature did not explain how the new amendment would affect the rights of journalists, the four judicially-created exceptions, or the criminal defendant’s right to a fair trial.

Thus far, criminal proceedings have fostered an acute conflict between the journalist and the criminal defendant. The journalist will often refuse to testify and to produce evidence, relying on the newsman’s immunity against contempt orders. The criminal defendant will then assert his sixth amendment right to obtain witnesses and to a fair trial to justify the forced disclosure of the newsmen’s information. Between these adversaries lies the court, which has the duty to administer justice by balancing these two competing interests. By failing to clarify its intent, the California Legislature has in fact done very little to quell the conflict between the media and the defendant in a criminal proceeding.

This comment will provide a practical set of standards to evaluate the competing interests asserted in a criminal proceeding. A background to the amended article I, section 2(b) will be presented, including the legislative history of Evidence Code section 1070. Next, the comment will examine the development of a first amendment and federal common law privilege which culminated in the landmark case of *Branzburg v. Hayes*. The four judicially-created exceptions

---

5. Id. at 706.
7. See California Ballot Pamphlet, Primary Election 19 (June 3, 1980) [hereinafter cited as Pamphlet].
will then be discussed. In discussing both federal and state law, this comment will focus on the types of interests and concerns that have militated against recognition of an absolute newsman's immunity.

Following this legislative and judicial background, the new article I, section 2(b) will be scrutinized for legislative intent to determine what effect the new amendment should have. The four exceptions contained in *Farr v. Superior Court*, *Rosato v. Superior Court*, *CBS, Inc. v. Superior Court*, and *Hammarley v. Superior Court* will then be discussed with respect to whether they should apply to the newly enacted amendment. The rules of statutory construction, the Official Ballot Pamphlet for Proposition 5 and policy arguments will be utilized to determine the applicability of the exceptions to article I, section 2(b). To illustrate the typical scenario in which a newsman is adjudged in contempt, a recent hearing involving former *San Jose Mercury News* reporter Jeff Kaye will be discussed in detail. A general discussion of the press and the criminal defendant's interests will follow. Case law decided after the amendment of Evidence Code section 1070 to the constitution will be presented to assist in the analysis of article I, section 2(b). Finally, a practical test that is consistent with the legislature's intent and which balances the various competing interests will be set forth.

II. BACKGROUND: HISTORY TO 1980

A. Evidence Code Section 1070

In 1935, the California Legislature enacted the state's first shield law by amending former Code of Civil Procedure section 1881. This first shield law provided an immunity from contempt for newspaper employees who refused to disclose their sources to courts or legislative bodies. The only legislative history regarding this law is a brief introductory policy declaration stating, "[t]here are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate . . . ." However, five

10. See infra notes 147-54 and accompanying text.
11. The term "legislative intent" as used in this comment represents the will of both the legislature and the electorate.
highly-publicized cases, which involved newsmen who had based their silence on professional ethics and were consequently jailed for contempt, were most likely responsible for this enactment.\textsuperscript{14}

The scope of the immunity was broadened in 1961 to include the electronic media.\textsuperscript{16} When evidence laws were codified in 1965, this enlarged version became Evidence Code section 1070. The California Law Revision Commission, which was responsible for the initial drafting of the Evidence Code, suggested that the privilege be discretionary rather than absolute.\textsuperscript{16} However, the Assembly Judiciary Committee rejected this proposed revision and transferred the former law intact into the Evidence Code.\textsuperscript{17} The Committee’s decision was most likely the result of statewide journalists’ editorials and lobbying in Sacramento.\textsuperscript{18} The only legislative history for section 1070 was a brief Comment by the Assembly Judiciary Committee stating that section 1070 provides an immunity from being adjudged in contempt, but does not create a privilege.\textsuperscript{19}

Since 1965, section 1070 has been amended by statutes in 1971, 1972, and 1974.\textsuperscript{20} These amendments have broadened the scope of protection afforded newsmen.\textsuperscript{21} The current section 1070\textsuperscript{22} was incorporated almost verbatim into the California Constitution as article I, section 2(b).\textsuperscript{22} It provides protection to publishers, editors, reporters or other persons connected with, employed by, or formerly employed by newspapers, magazines or other periodicals, and press or wire associations.\textsuperscript{24} The newsmen holds the immunity; the actual

\textsuperscript{14} Note, \textit{The Right of a Newsmen to Refrain from Divulging the Sources of His Information}, 36 \textit{Va. L. Rev.} 61, 71-73 (1950).


\textsuperscript{17} \textit{Other Measures}, \textit{7 Cal. Law Revision Comm., Rep., Rec. & Studies} 913 (1965).


\textsuperscript{19} \textit{Cal. Evid. Code} § 1070 (West 1966) (Comment, Assembly Committee on Judiciary). “Privilege” as used in this context means a privilege not to testify.


\textsuperscript{21} For the effect of these amendments, see \textit{Cal. Evid. Code} § 1070 (West Supp. 1984). These amendments extended the protection to magazines, other publications, and to a wider range of news-disseminating processes.


\textsuperscript{23} See supra note 1.

source of the information may not invoke it. Section 1070’s protection, then, merely immunizes the newsman from being held in contempt by a judicial, legislative, or administrative body. The statute, as the Assembly Judiciary Committee pointed out, does not provide a privilege to remain silent, as do the attorney-client, physician-patient, or husband-wife privileges. Rather, the protection against being adjudged in contempt is provided only when the newsman refuses to disclose a confidential source or any unpublished information.

This protection was expanded in *Rosato v. Superior Court* to include the disclosure of any information, in whatever form, which might tend to reveal the newsman’s source. The *Rosato* interpretation was expanded even further in *Hammarley v. Superior Court*, which held that “unpublished information” encompasses all undisseminated information obtained by a newsman in the course of his professional activities. The practical effect of these decisions was to bring virtually all information collected by newsmen under the statute as long as the information was not disseminated to the public.

Typically, when a newsman was subpoenaed to appear and produce evidence which he deemed confidential, the newsman would base his claim of privilege on two grounds: Evidence Code section 1070 and the first amendment of the United States Constitution. Before addressing the protection of section 1070, it is essential to consider the protection afforded to newsmen under the Constitution, as similar criteria are frequently employed to analyze the newsman’s privilege under both claims.

---

25. See supra note 1.
26. Id.
27. Cal. Evid. Code § 1070 (West 1966) (Comment, Assembly Committee on Judiciary). This is a significant distinction, particularly when the newsman is a party to a civil proceeding. For example, a court may not hold the newsman in contempt for refusal to make discovery, but it may invoke various sanctions against the newsman (as authorized by Cal. Civ. Proc. Code § 2034(b)(2) (A)-(F) (West 1983)) such as striking claims or defenses, prohibiting the introduction of evidence, dismissing the action or entering a default judgment. Thus, in defamation actions, § 1070 offers little, if any, protection to the “silent” newsman. See, e.g., KSDO v. Superior Court, 136 Cal. App. 3d 375, 186 Cal. Rptr. 211 (1982).
31. Id. at 217-18, 124 Cal. Rptr. at 445.
33. Id. at 397-98, 153 Cal. Rptr. at 613.
34. The first amendment to the United States Constitution provides in pertinent part, “congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” U.S. Const. amend. I.
B. Federal Case Law

Garland v. Torre was the first civil case in which a newsman claimed a constitutional privilege. Newspaper columnist Marie Torre published certain statements attributed to unnamed CBS executives about actress Judy Garland. Garland sued CBS for breach of contract and libel and sought the executives' identities from both CBS and Torre. Torre refused to disclose her sources on first amendment grounds, asserting that such a forced disclosure of confidential sources would unduly impinge upon the flow of news to the public. The federal court held Torre in contempt.

In considering Torre's claim, the Second Circuit acknowledged that compelling Torre to disclose her source would abridge the freedom of the press, but it concluded that the freedom was not an absolute right. The court balanced Torre's first amendment rights against "a paramount public interest in the fair administration of justice." The court ultimately rejected Torre's first amendment argument; however, it did require that in order to compel disclosure, the requested confidential information must go to the "heart of the plaintiff's claim." This requirement is significant because the "heart of the claim" standard is more exacting than a requirement of mere relevancy. Under this standard, the party seeking the newsman's material must show that the material is essential to his case. The relevancy standard requires a showing of generalized need. Although Garland provided newsmen with some semblance of protection via the "heart of the claim" requirement, the crux of the case reiterated that the first amendment's freedom of the press protection was not absolute.

The seminal case in the criminal context, in which the newsmen's interest in protecting confidential sources and information clashed with the defendant's assertion of his sixth amendment right to a fair trial was Branzburg v. Hayes. The Branzburg case was a consolidation of four cases involving three reporters who had been

36. Id. at 547-48.
37. Id. at 548.
38. Id.
39. Id. at 549.
40. Id.
41. Id. at 550. In Garland, the identity of Torre's source was crucial to Judy Garland's libel action.
42. 408 U.S. 665 (1972).
43. Branzburg v. Pound, 461 S.W.2d 345 (Ky. Ct. App. 1970); Branzburg v. Meigs, 503 S.W.2d 748 (Ky. Ct. App. 1971); Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970),
called to testify before respective grand juries about information received in the course of their professional activities. Two of the reporters asserted a privilege to conceal confidential sources and information, while the third claimed a privilege not to appear before the grand jury. On appeal to the United States Supreme Court, all three claimed a qualified privilege to conceal confidential sources and information.

The *Branzburg* case contained four opinions. In the plurality opinion, Justice White characterized the heart of the newsmen's claim as "the burden on news gathering" resulting from compelled disclosure of confidential information. This consequential burden was not sufficient, however, to merit interference with the constitutionally-mandated grand jury proceeding. Justice White was also unwilling to afford newsmen any preferential treatment not available to other members of the public under the first amendment. Thus, he rejected a qualified newsmen's privilege and held that newsmen must appear before grand juries and answer all "relevant questions" during a criminal investigation. This decision rejected Garland's more stringent "heart of the claim" standard, opting instead for the criminal relevancy standard. Although the Supreme Court was reluctant to create a qualified privilege, Justice White discusses the possibility that Congress could enact a statutory newsmen's privilege, and he invited the states to fashion their own standards within first amendment limits. In addition, the plurality opinion indicated the


46. *Caldwell*, 434 F.2d at 1083.


48. *Id.* at 681-82.

49. *Id.* at 682-90. The fifth amendment to the U.S. Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V.


51. *Id.* at 682-90.

52. At the federal level, Congress has freedom to determine whether a statutory newsmen's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state
Court would not interfere with state court recognition of a qualified or absolute newsmen's privilege.\textsuperscript{53}

In a concurring opinion, Justice Powell did acknowledge a limited privilege for situations in which either the grand jury investigation was not being conducted in good faith, or the requested information was only remotely relevant to the investigation.\textsuperscript{54} Justice Powell advocated judicial discretion when necessary to strike a balance between the needs of the press and of the criminal justice system.\textsuperscript{55}

Three of the dissenting Justices, Stewart, Brennan and Marshall, supported a first amendment protection for newsmen.\textsuperscript{56} Justice Stewart's opinion pointed to the "broad societal interest in a full and free flow of information to the public" as the principal justification for preserving the confidential relationship between the reporter and his sources.\textsuperscript{57} He concluded that failure to recognize this protection would undermine the value of a newsmen's grant of confidentiality, and thereby dry up his sources and impede the news gathering process.\textsuperscript{58} To determine when a newsmen must divulge his confidential information, Justice Stewart proposed a tripartite test:

The government must (1) show that there is probable cause to believe that the newsmen has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.\textsuperscript{59}

Justice Stewart believed that this test would provide adequate safeguards for the newsmen, while ensuring the administration of justice.\textsuperscript{60}

Due to the numerous opinions in \textit{Branzburg}, courts have had
extreme difficulty ascertaining a true holding.\textsuperscript{61} Courts have applied three different interpretations of \textit{Branzburg}.\textsuperscript{62} Some courts have held that \textit{Branzburg} rejected any type of first amendment newsmen's privilege\textsuperscript{63} unless harassment of the press is involved.\textsuperscript{64} Other courts, and probably the majority, have interpreted \textit{Branzburg} as granting newsmen at least a qualified first amendment privilege.\textsuperscript{65} For example, the Ninth Circuit in \textit{Farr v. Pitchess}\textsuperscript{66} viewed \textit{Branzburg} as creating a "partial First Amendment shield."\textsuperscript{67} In addition, the \textit{Farr} court extended \textit{Branzburg}'s application beyond grand jury proceedings to include "other civil or criminal proceedings as well."\textsuperscript{68} Finally, some courts have recognized a qualified privilege by focusing on Federal Rule of Evidence 501, which authorizes federal courts to develop privileges in criminal cases "in the light of reason and experience."\textsuperscript{69} In \textit{Lewis v. United States},\textsuperscript{70} the


\textsuperscript{62} Id. at 841.


\textsuperscript{64} \textit{Branzburg}, 408 U.S. at 707-08.


\textsuperscript{66} 522 F.2d 464 (9th Cir. 1975), \textit{cert. denied}, 427 U.S. 912 (1976). For the details of \textit{Farr}, see infra notes 75-86 and accompanying text.

\textsuperscript{67} 522 F.2d at 467.

\textsuperscript{68} Id.

\textsuperscript{69} \textit{Fed. R. Evid.} 501 provides that,

\begin{quote}
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principals of the common law as they might be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.
\end{quote}

\textit{Id.} (emphasis added).

\textsuperscript{70} 517 F.2d 236 (9th Cir. 1975). In \textit{Lewis}, a radio station manager was held in civil contempt for failing to comply with a federal grand jury subpoena for production of a "communique," received from a group claiming responsibility for a bomb explosion. The court of appeals denied the manager a qualified first amendment privilege.
Ninth Circuit interpreted the congressional intent behind Rule 501 as encouraging the federal courts "to develop the federal common law of privilege on a case-by-case basis."\(^71\) In a criminal case, then, Rule 501 allows the federal courts to consider state privilege law, but the rule ultimately adopted will be federal common law.\(^72\)

After *Farr* and *Lewis*, the Ninth Circuit recognized either a federal common law qualified privilege or a first amendment qualified privilege for newsmen. As a result, California newsmen have and should continue to assert both a state statutory privilege\(^3\) and a constitutional or federal common law privilege when confronted with a demand for their confidential sources or information. These qualified privileges will then be balanced against competing interests, such as a defendant’s right to a fair trial, to determine whether an intrusion is justified.\(^74\)

**C. California Case Law**

During the 1970s, California appellate courts had four opportunities to address section 1070 immunity claims, and each time they created an exception. Because section 1070 was incorporated into the California Constitution almost verbatim, it is essential to consider how these judicially-created exceptions contribute to the emasculation of section 1070.

1. *Farr v. Superior Court*\(^78\)

In 1970, William T. Farr, a reporter for the *Los Angeles Herald Examiner*, was assigned to cover the trial of Charles Manson and his codefendants for two sets of multiple murders. Early in the proceedings, the superior court entered an Order re Publicity, which prohibited any attorney, court employee, attache, or witness from releasing any testimony or evidence to the public.\(^76\) During the course

---

71. *Id.* at 238 n.4.
72. *Id.* at 237.
73. Before 1980, newsmen would claim a privilege under Evidence Code § 1070. See cases cited, infra notes 75-123 and accompanying text. After 1980, newsmen usually will claim a § 1070 privilege and, more importantly, a California constitutional privilege under Article I, section 2(b). See, cases cited infra notes 186-99 and accompanying text.
of the trial, Farr published the statement of a potential witness which he had received from three sources who were subject to the protective order. After judgment in the Manson case, the trial court called Farr as a witness to determine whether its protective order had been violated, which in turn might possibly have jeopardized the right of Manson and his codefendants to a fair trial. Farr refused to divulge the identity of his sources pursuant to Evidence Code section 1070. The court held Farr in direct contempt and ordered him incarcerated until he answered the questions.

Employing a separation of powers analysis, the appellate court held that under the present facts, the application of section 1070 to shield Farr from contempt would constitute an unconstitutional legislative interference with the court's power to control its officers and proceedings. Citing In re San Francisco Chronicle, the court recognized that the legislature could impose "reasonable restrictions" upon the exercise of a court's contempt power, but emphasized that the legislature could not declare that certain acts will not constitute contempt. Thus, although the legislature had intended section 1070 to contain an absolute immunity, the immunity was now only discretionary. A court could deem section 1070 inapplicable and hold newsmen in contempt when the newsman's refusal to identify a source interfered with the court's ability to control its officers and proceedings. In addition to considering the separation of powers issue, the Farr court cited Sheppard v. Maxwell as a United States

77. Id. The statement was from Mrs. Virginia Graham. It recited that Susan Atkins, a codefendant in the murder prosecution, had confessed the crimes to Mrs. Graham in "lurid" detail. The statement also implicated Manson and described future plans to murder in a hideous fashion such entertainment personalities as Elizabeth Taylor, Richard Burton, Frank Sinatra, Tom Jones and Steve McQueen. Upon learning of the release, the trial court held an in-chambers hearing to discover the identities of Farr's sources. Farr refused to disclose his sources pursuant to CAL. EVID. CODE § 1070. At that time, the trial judge informed Farr that section 1070 would immunize him from contempt if he published an article based on the statement. In re Farr, 36 Cal. App. 3d 577, 582, 111 Cal. Rptr. 649, 652 (1974). Farr, after this discussion with the trial judge, published the article in the Los Angeles Herald Examiner on Oct. 9, 1970.

78. The court's purpose for holding Farr in contempt was to supplement the record of the Manson trial for appeal purposes and to prevent its officers and attaches from violating court orders. In re Farr, 36 Cal. App. 3d 577, 583, 111 Cal. Rptr. 649, 653 (1974).
79. Farr v. Superior Ct., 22 Cal. App. 3d at 65-66, 99 Cal. Rptr. at 345. The contempt order was stayed to permit Farr to pursue his writ of review to the appellate court.
80. Id. at 69, 99 Cal. Rptr. at 348.
81. 1 Cal. 2d 630, 36 P.2d 369 (1934).
83. See supra note 46 and accompanying text.
84. 384 U.S. 333 (1966). In Sheppard, a doctor was accused of murdering his wife. The pretrial publicity by the news media was deemed to be so pervasive and prejudicial that it
Supreme Court “mandate” to control prejudicial publicity. By controlling prejudicial publicity in *Farr*, the court felt it could protect and guarantee Manson and his codefendants a fair trial. As an alternative to the Evidence Code immunity argument, Farr also claimed that the first amendment protected him from divulging his sources. The appellate court balanced the potential inhibition upon the free flow of information and the defendant’s right to a fair trial, and concluded that there was an “undeniable need for disclosure.” Consequently, Farr was not protected by any first amendment privilege.

2. *Rosato v. Superior Court*

In *Rosato*, four *Fresno Bee* newsmen were held in contempt for refusing to answer questions about the possible violation of the court’s protective and seal orders regarding a transcript of grand jury testimony. The grand jury had indicted a city councilman, a land developer, and the former city planning commissioner on counts of bribery and conspiracy. After a change in venue was granted for the councilman and land developer, the *Fresno Bee* published stories about the investigation which quoted extensively from the sealed transcript. In response to the apparent violation of its order, the trial court held proceedings to determine who had violated its order sealing the grand jury transcript. Three of the newsmen denied receiving a copy of the transcript from a person subject to the order. Rosato, however, refused to answer questions as to how the *Fresno Bee* obtained the transcript. All four newsmen were held in contempt.

The appellate court in *Rosato*, like the *Farr* court, cited the *Sheppard* mandate that the defendant’s right to a fair trial, conducted free of pretrial and trial publicity, was a preferred right on the scale of constitutional values. Similarly, the appellate court sustained the trial court’s authority to investigate the possible violation.
of its orders to protect the integrity of the judicial process, to assure the proper administration of justice, and to perfect the trial record on issues likely to arise on appeal.  

In addressing the federal and state constitutional claims, the court discussed the Branzburg decision and concluded that "the fair trial guarantee to criminal defendants . . . is certainly entitled to equal, if not greater, protection than criminal investigations by grand juries . . . ." The defendant's right to a fair trial outweighed the conditional first amendment right to refuse to disclose sources. 

The pivotal issue involved addressed by the Rosato court involved the scope of section 1070 immunity. The court determined that the statute should be given a broad construction. Thereafter, the court discussed the two limitations on the immunity contained in section 1070. First, section 1070 was inapplicable if the newsman participated in or witnessed criminal activity. This was the primary exception created by the Rosato court. Second, section 1070 would not protect a newsman under circumstances similar to those in Farr. However, the court held that the scope of the investigating court's inquiry must be confined to questions which may tend to identify those subject to and in possible violation of the court order. The questions could not be so overbroad that they would reveal other sources. Likewise, the court could not ask questions to discover from where the information did not come.

92. Id. at 210, 124 Cal. Rptr. at 440.
93. CAL. CONST. art. I, § 2(a) provides, "[a] law may not restrain or abridge liberty of speech or press." When a state claim equivalent to the federal first amendment is raised, the same considerations used to construe the United States Constitution are applied to state constitutional equivalents. Rosato, 51 Cal. App. 3d at 215, 124 Cal. Rptr. at 443.
94. 51 Cal. App. 3d at 213, 124 Cal. Rptr. at 442.
95. Id. at 214-15, 124 Cal. Rptr. at 443. The court rejected Justice Stewart's three-prong test from his Branzburg dissent. In particular, the court spurned the requirement of exhausting alternative sources before seeking the confidential information from the newsman. Id. at 215-16, 124 Cal. Rptr. at 443-44.
96. Id. at 217, 124 Cal. Rptr. at 445. See supra notes 31-33 and accompanying text.
97. Rosato, 51 Cal. App. 3d at 219-22, 124 Cal. Rptr. at 446. In reaching this conclusion, the court drew an analogy to the other privileges, (for example, attorney-client, marital communications and physician-patient) which provide exceptions for witnessing or participating in criminal conduct. CAL. EVID. CODE §§ 956, 981, 997, 999 (West 1966 & Supp. 1984).
99. Rosato, 51 Cal. App 3d at 224-25, 124 Cal. Rptr. at 450. This test is to be applied on a question-by-question basis. Id. at 224-25 n.22, 124 Cal. Rptr. at 450 n.22.
3. CBS, Inc. v. Superior Court

On the evening of August 12, 1977, undercover agents of the Santa Clara County Narcotics Bureau, in conjunction with a film crew from CBS's "Sixty Minutes" program, attempted to film and record a sale of the narcotic, PCP or "angel dust." In exchange for allowing them to film the incident, CBS agreed that no film revealing the agents' identities would be shown unless the officers' undercover role had ended. The defendants served a subpoena duces tecum on CBS to produce certain video tapes, tape recordings and motion pictures. Because the agents testified that they could neither remember the words exchanged nor the sequence of such words, and that their recollections would be refreshed by these "outtakes," the defendants argued that the discovery of the outtakes was essential to their defense. CBS moved to quash the subpoena on several grounds: failure to show good cause, Evidence Code section 1070, and the federal and California constitution freedom of press provisions. The trial court denied CBS's motion, finding that the defendants had made the requisite showing of good cause and that their right to a fair trial outweighed CBS's asserted rights. Accordingly, CBS was ordered to produce "any and all video and audio tapes, photographs, transcriptions of any tapes, outtakes or any other films" from that evening.

The appellate court first addressed CBS's section 1070 privilege claim. CBS claimed a vicarious interest in maintaining the confidentiality of the agents pursuant to their agreement. However, all three officers had revealed their identities and roles at the motion hearing. Because the identity of the sources was no longer confidential, the court held that the underlying purpose of section 1070—protecting confidential sources—was lost and thus was inapplicable.

In considering CBS's constitutional pleas, the court held that the criminal defendant need only demonstrate a "reasonable possibil-

101. Id. at 248, 149 Cal. Rptr. at 424.
102. Id. at 246, 149 Cal. Rptr. at 423.
103. "Outtakes" are the audio and video (or film) tapes prepared for a news segment but which are ultimately not used and therefore, are unpublished. They are specifically included in the definition of "unpublished information" under CAL. CONST. art. I, § 2(b). See supra note 1.
105. Id. at 246-47, 149 Cal. Rptr. at 424.
106. Id. at 250, 149 Cal. Rptr. at 426.
ity that evidence sought to be discovered might result in his exoneration." The press, on the other hand, had a constitutionally protected right of news gathering. The court reached a laudable balance between these interests, requiring the trial court to examine the subpoenaed materials in camera and to determine which evidence would be necessary to the parties’ defense. After this determination, the trial court could limit the material to the audio tapes because only the discussions were at issue. Further, if the video tapes and films had to be shown, the agents’ faces could be blocked out to conceal their identities. Thus, although the CBS court created another exception to section 1070, that section 1070 was inapplicable when the confidential sources’ identities were revealed, the court did restore constitutional respect and protection for the news gathering process by requiring editing of the subpoenaed material.

4. *Hammarley v. Superior Court*

In 1977, John Hammarley, a reporter for the *Sacramento Union* newspaper, published four articles about the “Mexican Mafia,” implicating certain defendants in the murder of Ellen Delia. Hammarley made tape recordings, notes and summaries of various interviews with his primary source, Edward Gonzales, in addition to discussions with other confidential corroborating sources. At the criminal trial, the defendants subpoenaed Hammarley to appear as a witness and to produce any recordings, transcripts or notes from his interviews with Gonzales. The defendants claimed that the material was “necessary for the impeachment of [Gonzales] the prosecution’s primary witness.” Hammarley moved to quash the subpoena based on section 1070. The trial court ordered Hammarley to produce for in camera inspection all material concerning the Gonzales interviews. Hammarley refused to comply with the order; he was then cited for contempt and ordered committed to the county jail. This order, however, was stayed pending review by the appellate

107. *Id.* at 251, 149 Cal. Rptr. at 427 (citing People v. Borunda, 11 Cal. 3d 523, 522 P.2d 1, 113 Cal. Rptr. 825 (1974) and Honore v. Superior Court, 70 Cal. 2d 162, 449 P.2d 169, 74 Cal. Rptr. 233 (1969)).
109. *Id.* at 253, 149 Cal. Rptr. at 428.
111. *Id.* at 392-93, 153 Cal. Rptr. at 610. The trial court sustained Hammarley’s asserted privilege to avoid disclosure of his corroborating sources.
112. *Id.* Gonzales, a self-confessed former member of the Mexican Mafia, participated in Delia’s murder. He received immunity in exchange for his testimony. Gonzales assumed a new identity and left the state.
Evincing a genuine respect for section 1070 and its objectives, the appellate court fashioned additional standards for analyzing the conflict between a section 1070 claim and the defendant’s right to a fair trial. The Hammarley court held that the party seeking to invalidate section 1070’s immunity had the burden of demonstrating that the evidence sought was both relevant and necessary to his case, and that such evidence was not available from a less intrusive source. After analyzing the defendants’ need for information pertaining to the Hammarley-Gonzales interview, the court concluded that the defendants had satisfied their burden. The court then considered Hammarley’s claim. The court reasoned that because no pledge of confidentiality had been sought by or given to Gonzales, there was no concrete need for confidentiality. Also, Hammarley had made no effort to show a specific need for enforcing his section 1070 right, other than claiming that his information fell within the statute’s protective purview. Finding only a “speculative and uncertain” burden on the news gathering process, and no legislative objectives to be served, the court rejected Hammarley’s claim in favor of the defendant’s demonstrated need for the materials.

After Farr, Rosato, CBS and Hammarley there were four situations in which section 1070 would not shield newsmen. First, Farr held that if the effect of section 1070 was to interfere with a court’s control of its officers and proceedings, the court could disregard the immunity and hold the newsmen in contempt. Second, Rosato held that if the newsmen had participated in or had witnessed criminal activity, he would not be shielded. Third, CBS held that if the confidential source had voluntarily revealed his identity, the statute would not apply because its purpose was no longer served. Finally, Hammarley held that a defendant’s demonstrable need for a newsmen’s material to insure the sixth amendment’s guarantee of a fair trial superceded a vague, generalized assertion of a section 1070

113. Id. at 394, 153 Cal. Rptr. at 610-II.
114. Id. at 399, 153 Cal. Rptr. at 614. Thus, Justice Stewart’s three-pronged constitutional test from Branzburg appears to be fully incorporated into the § 1070 balancing process. See supra note 95.
116. Id. at 400-01, 153 Cal. Rptr. at 615-16.
117. Id.
118. Id. at 402, 153 Cal. Rptr. at 616.
120. Rosato, 51 Cal. App. 3d at 219-22, 124 Cal. Rptr. at 446.
121. CBS, 85 Cal. App. 3d at 250, 149 Cal. Rptr. at 426.
privilege.\textsuperscript{122} Ironically, the protection of the statute expanded as these exceptions were being carved out due to an increased judicial awareness of the news gathering process.\textsuperscript{123}

These cases, in addition to the federal constitutional case law, provide the background to the incorporation of Evidence Code section 1070 into the California Constitution as article I, section 2(b). The cases indicate judicial sensitivity to the newsmen and his professional responsibilities, along with judicial unwillingness to interfere with the dissemination of news. Yet, each time a conflict arose between the newsmen’s privilege and a significant competing interest, the privilege was set aside and the newsmen was compelled, on pain of contempt and incarceration, to divulge his information.

III. THE INCORPORATION: THE NEWSMEN’S “NEW” PROTECTION

A. California Constitution Article I, Section 2(b)

On June 3, 1980, the California voters passed Proposition 5,\textsuperscript{124} and thereby incorporated Evidence Code section 1070 into the California Constitution. The new amendment was nearly identical to its progenitor, section 1070. From those slight changes that did occur, it is not possible to infer any legislative intent.\textsuperscript{5} As does Evidence Code section 1070, article I, section 2(b) suffers from a lack of legislative history. There is no legislative comment explaining how the amendment alters or increases the degree of protection afforded newsmen in a civil or criminal proceeding.\textsuperscript{125} However, the Official Ballot Pamphlet, which is considered the “functional equivalent of the legislative history,” provides insight into the intent of the

\textsuperscript{122} Hammarley, 89 Cal. App. 3d at 400-02, 153 Cal. Rptr. at 614-16.

\textsuperscript{123} The immunity “encompasses all information acquired by the newsmen in the course of his professional activities which he has not disseminated to the public.” Id. at 397-98, 153 Cal. Rptr. at 613.

\textsuperscript{124} ASSEMBLY CONSTITUTIONAL AMEND. No. 4 (1978 Cal. Stat. 77).

\textsuperscript{125} The only significant change is that § 1070 reads “cannot be adjudged in contempt,” while art. I, §2(b) reads “shall not be adjudged in contempt.” For purposes of statutory construction, the two terms, “cannot” and “shall not,” are equivalent. Gleason v. Spray, 81 Cal. 217, 220, 22 P. 551, 552 (1889). Perhaps, “shall not” is even a weaker directive, sometimes being construed as permissive rather than mandatory. Carter v. Seaboard Finance Co., 33 Cal. 2d 564, 573, 203 P.2d 758, 764 (1949); Hogya v. Superior Court of San Diego County 75 Cal. App. 3d 122, 134, 142 Cal. Rptr. 325, 333 (1977). See generally 58 CAL. JUR. STATUTES § 147 (1980). In any event, slight changes in statutory phraseology incidental to the amendment or revision of a statute are usually construed as a clarification rather than a change in meaning. See Hammond v. McDonald, 49 Cal. App. 2d 671, 681, 112 P.2d 332, 338 (1942); County of Sacramento v. City of Sacramento, 75 Cal. App. 2d 436, 443, 171 P.2d 477, 481 (1946).

\textsuperscript{126} See CAL. CONST. art. I, § 2(b).
measure.\textsuperscript{127}

The published argument in favor of Proposition 5 presents an impassioned plea to assure “freedom in America” by protecting newsmen from incarceration, either real or threatened.\textsuperscript{128} According to the argument, Proposition 5 was intended to reverse the recent judicial trend of carving out exceptions to section 1070. The central concern espoused in the ballot argument is maintaining a “free flow of information to the public.”\textsuperscript{129} Sources would not come forward because the reporter's pledge of confidentiality would be suspect under the threat of imprisonment. Drying up these sources would impair the flow of information, thus jeopardizing “our democratic form of government.”\textsuperscript{130} Unfortunately, no argument opposing Proposition 5 was submitted. This can be explained by the fact that only an infinitesimal constituency opposed the policy of granting confidentiality to news sources. Generally, the conflict arises only when a criminal defendant or a defamation plaintiff needs a newsmen's information or the identity of his source. To determine whether the legislature intended the immunity in article I, section 2(b) to be absolute and, hence, not subject to competing interests,\textsuperscript{131} judges and lawyers should consider one particular sentence of the official argument in favor of Proposition 5: “By giving existing law constitutional status, judges will have to give the protection greater weight before attempting to compel reporters to breach their pledges of confidentiality.”\textsuperscript{132} The obvious inference is that the protection was not intended to be absolute. Judges should accord the newsmen's immunity “greater weight,” but the immunity can be outweighed by significant competing interests.

\textsuperscript{127} Schmitz v. Younger, 21 Cal. 3d 90, 97 n.2, 577 P.2d 652, 656 n.2, 145 Cal. Rptr. 517, 521 n.2 (1978) (Manuel, J., dissenting); White v. Davis, 13 Cal. 3d 757, 775 n.11, 533 P.2d 222, 234 n.11, 120 Cal. Rptr. 94, 106 n.11 (1975). However, these ballot arguments are not controlling. California Inst. of Technology v. Johnson, 55 Cal. App. 2d 856, 859, 132 P.2d 61, 63 (1942).

\textsuperscript{128} Pamphlet, supra note 7, at 19.

\textsuperscript{129} Id.

\textsuperscript{130} Id. One might speculate that these were legitimate concerns upon which post-Watergate voters relied when passing Proposition 5.

\textsuperscript{131} This was argued by Mr. Kaye's attorney, Edward P. Davis. See infra notes 147-54 and accompanying text. Petitioner’s Brief at 24, Kaye v. Superior Court (a pretrial hearing) (real parties in interest, People v. Hillestad, No. 88569 (Super. Ct. Santa Clara County, Cal. 1984)) [hereinafter cited as Brief].

\textsuperscript{132} Pamphlet, supra note 7, at 19 (emphasis added).
B. Applicability of the Farr, Rosato, CBS and Hammarley Exceptions

A significant issue surrounding the new constitutional shield law is the applicability of the Farr, Rosato, CBS and Hammarley exceptions.\(^{133}\) In terms of the general applicability of these four exceptions, it is usually presumed that when reenacting a statute or amendment, the Legislature is familiar with the related common law rules, previous acts and the existing judicial decisions which construe the original statute.\(^{134}\) In addition to this presumption, it would appear that the legislature in enacting article I, section 2(b) was in fact aware of the judicial exceptions because the legislative analyst’s statement and the argument in the Official Ballot referred to the exceptions. Moreover, members of the California Legislature authored the argument for Proposition 5.\(^{135}\) Thus, if the Legislature was aware of these exceptions and if they were so onerous as to merit alteration or repeal, why did not the Legislature, in proposing article I, section 2(b), expressly overrule these exceptions to Evidence Code section 1070? One possible answer is that the Legislature did not intend to alter or overrule the existing exceptions, but rather it wanted to halt the recent trend of court-created exceptions. For instance, the official argument in the ballot pamphlet stated that “judges will have to give the protection greater weight.”\(^{136}\) It would appear that after article I, section 2(b) was amended, the immunity was intended to be much stronger, though not absolute.

In addition, when legislation has been judicially construed and a similar subsequent statute is enacted, courts have consistently presumed that the legislature intended to adopt the prior judicial construction.\(^{137}\) The exception, of course, is when the legislature ex-

---

133. See supra note 6.
136. See Pamphlet, supra note 7, at 19.
presses a contrary intent. Once again however, analysis of article 1, section 2(b) will be fragmentary; the only form of legislative history is that embodied in the legislative analyst's statement and the ballot argument in favor of Proposition 5. The legislative analyst merely recognized that the exceptions existed. The argument in favor of Proposition 5 went a little further, citing the exceptions as a threat to the free flow of information to the public. One may conclude from those statements that Proposition 5 was a direct response to the Farr, Rosato, CBS and Hammarley exceptions. However, to conclude that these statements represent legislative intent to significantly alter or overrule the exceptions requires a considerable interpretive leap. Absent evidence of contrary intent, the rules of statutory construction would generally hold that the four exceptions should apply to article I, section 2(b).

In terms of the specific exceptions, Rosato, CBS and Hammarley should apply, not only because of the rules of statutory construction, but also because they are based on sound policy considerations. The Rosato exception, which held section 1070 inapplicable if the newsman had participated in or witnessed criminal activity, is based on those Evidence Code provisions which invalidate privileges if the confidential relationship was undertaken to plan or commit a crime. The CBS exception, which deemed section 1070 inapplicable when the newsman's confidential sources voluntarily revealed their identities, is justified because once the source's identity is revealed, the statute's purpose is no longer served by continued nondisclosure. The Hammarley exception, which held that a demonstrable need for a newsman's material to insure a fair trial would supercede a vague, generalized assertion of section 1070's privilege, is based on the fundamental right to a fair trial.

Conversely, the Farr exception and Rosato to the extent it is based on Farr, should not apply to article 1, section 2(b). Farr was decided on separation of powers grounds; the court would not tolerate an unconstitutional interference by the Legislature with the

139. Pamphlet, supra note 7, at 18.
140. Id. at 19.
141. See supra note 97 and accompanying text.
142. Id.
143. See supra note 106 and accompanying text.
144. See supra note 122 and accompanying text.
court's power to control its officers and proceedings. Article I, section 2(b), however, is now an amendment to the California Constitution. Constitutional amendments cannot violate the separation of powers doctrine because the constitution creates the executive, legislative and judicial powers. Thus, California courts can no longer invalidate the newsmen's privilege based on separation of powers grounds.

C. Kaye v. Superior Court

On October 22, 1982, the San Jose Mercury News reported an interview by Jeff Kaye with Los Altos Hills councilmember Lucile Hillestad and her husband, Donald. In the interview, the Hillestads admitted falsifying real estate documents and accepting money from an undercover agent to bribe town officials. The Hillestads were subsequently charged with attempted bribery and conspiracy. During the pretrial hearing, the prosecution subpoenaed Kaye, essentially to confirm the statements and conclusions expressed in his article. Kaye testified with respect to the published information only. The Hillestads' attorneys subjected Kaye to wide-ranging cross-examination. Kaye however, refused to answer questions that could have revealed his confidential sources or unpublished information. His refusal was based on section 1070, article I, section 2(b) and the first amendment. The Hillestads then claimed that they were being denied their right to a fair trial because they could not properly cross-examine Kaye. As a result, the judge ordered Kaye to supply his notes for an in camera inspection.

This scenario typifies the circumstances which lead to a conflict between the press and the criminal defendant. As in Kaye's case, it is

145. See supra notes 80-82 and accompanying text.
146. See Cal. Const. art. III, § 3 (West 1983). "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Id. (emphasis added).
147. When ordered to turn over his information, reporter Jeff Kaye immediately filed an appeal to the Court of Appeal for the First Appellate District under the case name Kaye v. Superior Court. Because the superior court resolved the dispute, which it did in a hearing, the case never received a case number. At this time the hearing transcript is unavailable. Thus, all references to the hearing and pre-trial hearing will be cited to an interview conducted on Jan. II, 1985 with Edward P. Davis, attorney for the San Jose Mercury News and Jeff Kaye [hereinafter cited as Interview].
149. Shepard, Ex-Mercury Reporter Won't have to Testify at Hillestad Bribery Trial, San Jose Mercury News, Oct. 31, 1984 at 2B, col. 1.
150. Interview, supra note 147.
often the prosecutor who subpoenas the reporter merely to "confirm" an article, or to "do the work that their investigators either have not [done] or cannot do." Next, the defense subjects the reporter to extensive cross-examination, delving into information that the reporter refuses to disclose. The defense then voices vigorous complaints; some of these are genuine but often the defense is creating a "strawman issue" that will provide grounds for an appeal. In evaluating the defendant's and newsman's interests, judges should be aware of such practices, ferreting out whether there is a genuine need for the newsman's information. In the Hillestads' case, it is difficult to envision a genuine need for Kaye's information regarding the interview because the Hillestads were present at the interview.

At the in camera hearing, which was convened solely to determine whether Kaye was required to turn over his notes, the judge was placed in the unenviable position of balancing the interests of the prosecution, the defense and Kaye. The judge ultimately ruled that Kaye's testimony and article and any reference to them were inadmissible evidence for several reasons. First, admission of Kaye's testimony into evidence would have consumed an undue amount of time. Second, at the pretrial hearing the judge had already sustained a number of Kaye's objections, and thus had curtailed the defense's ability to adequately cross-examine Kaye.

The judge's decision to exclude Kaye's testimony was laudable indeed because it evinced respect for both the reporter's rights under article I, section 2(b) and for the defendant's right to a fair trial. Excluding the reporter's testimony entirely is a solution that should be considered by judges in the future, although it is clear that different circumstances will not always permit such a resolution. The next section will set forth the various arguments asserted by the press and the criminal defendant when the two interests come in conflict.

151. Id. Davis has argued six cases involving newsmen being ordered to provide information. Davis said he is frustrated with prosecuting attorneys who use reporters to obtain information that is often unnecessary or is attainable elsewhere. Bob Ingle, executive editor of the Mercury News also voiced this complaint. "The district attorney's office ought to get the message that they will have to prove their own case without hauling our reporters into court." Shepard, supra note 149, at 2B.

152. Interview, supra note 147.

153. Id. Both the prosecution and the defense had to know if Kaye's testimony, article and notes could be used in order to structure their arguments. Considering the time consumed at the pretrial and in chamber hearing, it became apparent that Kaye's testimony would expend too much time.

154. Id.
D. The Competing Interests

1. The Press and the Free Flow of Information

The heart of any claim of privilege against compelled disclosure lies within the first amendment. The purpose of the first amendment is to maintain an uninhibited marketplace of ideas from which the truth may be ascertained. More important than the rights conferred to the press, however, are the rights of the public to have access to social, political, esthetic, and moral and other ideas and experiences. The press frequently asserts that interference with the newsman in the course of his profession is not only an infringement upon his right as a journalist, but also violates the public’s right to have facts and opinions bearing on public issues. Unfortunately, the intangible nature of this right tends to cause judges to mitigate its importance when they are confronted with a criminal defendant’s “imminent” need for information. Yet, interference with the dissemination of news does have a debilitating impact when one considers the important role of the press. As the United States Supreme Court stated: “The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings.”

The question then arises, how does compulsory disclosure of confidential news sources interfere with the reporter’s dissemination of news? The press has cited two ways: sources, vital to effective news gathering, are dried up because the reporter cannot adequately guarantee his pledge of confidentiality, and future investigation is generally deterred by loss of sources and threat of contempt citations. First, the press contends that absent a guarantee of anonymity, a source will not come forward with sensitive information because he fears that the subpoenaed newsman will reveal his identity. In the case, In re Caldwell, one of the four precursors to

156. Id.
161. Comment, supra note 159, at 340.
Branzburg, nineteen notable journalists\textsuperscript{163} submitted affidavits stating that sources would not provide information without such a promise of anonymity. However, Justice White in Branzburg rejected these affidavits and other studies as self-serving, viewing them as "widely divergent and to a great extent speculative."\textsuperscript{164} Justice Stewart, in response to this cursory rejection, maintained that even though the percentages may not be overwhelming, many people will undeniably be deterred from providing information to newsmen and the flow of news will "inevitably be impaired."\textsuperscript{165}

The second claim the press asserted was that future investigation is deterred by compulsory disclosure.\textsuperscript{166} The newsmen is undoubtedly deterred from seeking information that may later be requested by a court of law. Contempt citations, the cost of litigation and the threat of imprisonment intimidate and impede newsmen in the execution of their day-to-day responsibilities.\textsuperscript{167} If a newsmen is aware that certain sensitive information will be sought, he may forgo gathering or publishing the information to avoid three equally disconcerting possibilities: 1) breaching his pledge of confidentiality, and thereby breaching his journalistic code of ethics, 2) receiving a contempt citation, and thereby breaching his personal code of ethics or, 3) being incarcerated.\textsuperscript{168} The Second Circuit recognized the significance of this argument in Baker v. F. & F. Investment.\textsuperscript{169} "The deterrent effect such disclosure is likely to have upon future 'undercover' investigative reporting . . . threatens freedom of the press and the public's need to be informed."\textsuperscript{170} The Baker court accordingly refused to order discovery.\textsuperscript{171}

In sum, the press regards itself as both a purveyor of vital information and as the watchdog of society. It relies heavily on confidential sources to fulfill its duties. Interference with the reporter-source relationship infringes upon the rights of journalists and the public's right to have access to otherwise unavailable sensitive information.
2. Criminal Defendant's Right to a Fair Trial

A basic principle of our judicial system is that witnesses properly summoned before a court must testify unless they have a privilege. The reason for this requirement is that justice prevails if all information is revealed. The right to every man’s evidence is particularly acute in a criminal proceeding, when the consequences of an improper conviction could be devastating. When the defendant demonstrates a need for information held by the newsman, he will assert his sixth amendment right to obtain witnesses and to a fair trial and, in California, he would also assert his state constitutional right under article I, section 15. Both the United States Supreme Court and the California Supreme Court have recognized the importance of these rights. In *Chambers v. Mississippi* the United States Supreme Court observed that:

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

Similarly, the California Supreme Court has recognized that the criminal defendant is "entitled" to a fair trial, including all relevant and reasonably accessible information. The thrust of these decisions is obvious; but what showing must the criminal defendant make to rival or override a legitimate article I, section 2(b) privilege?

The most recent case addressing this conflict, *Hammarley v. Superior Court*, required a qualitative evaluation of the defendant’s claim. The standards set by the *Hammarley* court placed the burden of proof on the party seeking to avoid the privilege—the criminal defendant. The defendant was required to establish that the evidence was relevant and necessary to his case, and was not available

174. The sixth amendment to the Constitution provides that “the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses. . . .” U.S. CONST. amend. VI. Similarly, CAL. CONST. art. 1, §6 provides that “[t]he defendant in a criminal case has the right . . . to compel attendance of witnesses in the defendant’s behalf . . . .” CAL. CONST. art. 1, § 15.
176. Id. at 294.
179. Id. at 399, 153 Cal. Rptr. at 614.
from a less intrusive source. Further, the defendant was required to show a *reasonable possibility* that the information sought would result in his exoneration. Although more exacting than *Branzburg* or *Rosato*, which did not require exhaustion of less intrusive sources, the *Hammarley* standard is still relatively easy to satisfy. This probably reflects the importance of ensuring that the criminal defendant receives a fair trial. From the criminal defendant's perspective, a newsman must disclose any relevant evidence in order to effectuate the fair administration of justice. This concern was echoed by the Supreme Court in *U.S. v. Nixon*: "The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts."

E. Recent Case Law

1. California

Since the incorporation of Evidence Code section 1070 into the California Constitution, only three civil cases and the Kaye hearing have addressed the import of the newly enacted article I, section 2(b). These civil cases have limited applicability in the criminal context, but they provide helpful interpretation.

In the most recent case, *Mitchell v. Superior Court*, the California Supreme Court set forth a balancing test to be used in defamation suits against reporters who claim a first amendment qualified privilege. Before reaching this issue, the court noted that in a crimi-
nal proceeding, both the interest of the state in law enforcement and the defendant’s interest in discovering exonerating evidence outweigh any such interests asserted in ordinary civil litigation. Thus, the court’s discussion of what standards must be met in a civil action is wholly inapplicable to a criminal proceeding.

KSDO v. Superior Court, upon which the Mitchell decision was largely based, involved a libel action against a radio station, its owner, and an employee. The defendants opposed a motion to produce documents, asserting their rights under section 1070, article I, section 2(b), and the United States Constitution. In dismissing the defendant’s argument that article I, section 2(b) provided an absolute privilege against testifying, the court stated that the amendment “provides no more of a privilege than did section 1070 of the Evidence Code.” The import of this statement, however, was later diluted by the court as it explicitly refused to discuss the effects of the amendment. The defendants were ultimately granted relief based on the first amendment of the federal Constitution and were not required to produce the documents. The significance of the case, however, was the implication that a nonparty newsman could be compelled to testify in a civil suit, even though the public need for disclosure is much less compelling than in a criminal context. This demonstrates how the post-article I, section 2(b) judiciary is still unwilling to afford newsman an absolute immunity.

In contrast, the court in Playboy Enterprises v. Superior Court took serious objection to KSDO’s evisceration of article I, section 2(b). The Playboy court predicted that such a rule would reduce or wholly vitiate the protection afforded by article I, section

188. Mitchell, 37 Cal. 3d at 278, 690 P.2d at 631, 208 Cal. Rptr. at 158.
190. 136 Cal. App. 3d at 379, 186 Cal. Rptr. at 213.
191. 136 Cal. App. 3d at 379, 384, 186 Cal. Rptr. at 213, 216. In ruling on the matter, the appellate court echoed the Assembly Judiciary Committee’s caveat that § 1070 does not create a privilege against testifying. Section 1070 only provides an immunity against being adjudged in contempt. See CAL. EVID. CODE § 1070 (West 1966). Thus, § 1070 would not prevent a court from imposing other discovery sanctions against a newsman when he is a party to civil litigation and refuses to comply with discovery. KDSO, 136 Cal. App. 3d at 380, 186 Cal. Rptr. at 214.
192. KDSO, 136 Cal. App. 3d at 381-82, 186 Cal. Rptr. at 215.
193. 136 Cal. App. 3d at 383, 186 Cal. Rptr. at 216. In fact, the entire issue was rendered moot, as the court ultimately held § 1070 inapplicable because the defendants were neither threatened with, nor cited for contempt. Id. at 384, 186 Cal. Rptr. at 216.
194. Id. at 385-86, 186 Cal. Rptr. at 217-18.
195. Id.
197. Id. at 27, 201 Cal. Rptr. at 218.
Recognizing the significance of elevating the newsmen's protection to state constitutional status, the court equated article I, section 2(b)'s protection to other Evidence Code privileges. The court resoundingly declared that "the state has no interest and that civil litigants have no constitutional or other rights sufficient to overcome this constitutional protection." This affirmation of the newsmen's rights under article I, section 2(b) will certainly assuage journalistic fears of contempt orders in the civil context, but its effect will obviously be limited in the criminal context.

2. Federal and Other States' Laws

Since the amendment of California's shield law, no significant change has occurred in the federal law with respect to a first amendment privilege. It appears fairly entrenched that a qualified privilege exists. The only federal case addressing article I, section 2(b) is Los Angeles Memorial Coliseum Commission v. NFL, in which the court cited the Hammarley test with approval. This lends credence to the application of the Rosato, CBS and Hammarley exceptions to article I, section 2(b). Other than this however, the case provides little in terms of substantive interpretation of the new amendment.

At this time, twenty-six states have some form of newsmen's privilege. Only Montana and New York, however, have a statute similar to California's which provides an immunity from being ad-

198. Id.
199. Id. at 27-28, 201 Cal. Rptr. at 218-19.
200. See supra note 65.
202. Id. at 495. For the Hammarley test, see supra note 114 and accompanying text.
203. See supra notes 134-45 and accompanying text.
judged in contempt. New York’s highest court recently ruled on its state shield law in *Beach v. Shanley*.

In *Beach*, the New York Court of Appeals examined the legislative intent surrounding the enactment of New York’s shield law and the subsequent amendments that responded to “judicial circumscriptions of the statute.” One of these amendments expressly prohibited grand juries from pursuing contempt proceedings against reporters. The court, finding neither qualifying language in the statute nor a distinction between criminal and civil matters, determined that courts could not ignore the legislature’s mandate and substitute their own policies.

The New York Court of Appeals chose to interpret the shield law as affording newsmen an absolute immunity from contempt, unless exceptions existed. It is difficult, however, to determine to which “exceptions” the court referred. In any event, the court was undeniably motivated by the specific legislative responses to the “loopholes” and “gaps” created by the judiciary. The *Beach* case indicates that it is possible to provide newsmen an absolute immunity from contempt in the criminal context.

IV. THE APPROPRIATE STANDARDS

A. Absolute or . . .

When the California electorate amended the state constitution with article I, section 2(b), it manifested an unequivocal intent “to afford newsmen the highest level of protection under state law.” In terms of the nature of the immunity, California’s shield law is absolute rather than qualified. For example, the Illinois code states that the reporter need not disclose the information unless “all other available sources of information have been exhausted and disclosure of the information sought is essential to the protection of the public interest involved.” This language explicitly permits Illinois courts to weigh the interests involved. California’s shield law, however, contains no provision for judicial balancing, nor for distinguishing

205. Montana has no case law to provide guidance in the interpretation of CAL. CONST. art. I, § 2(b).
207. Id. at 250, 465 N.E.2d at 308, 476 N.Y.S.2d at 769.
208. Id.
209. Id. at 251-52, 465 N.E.2d at 310, 476 N.Y.S.2d at 771.
210. Id.
211. Playboy Enters., 154 Cal. App. 3d at 27, 201 Cal. Rptr. at 218.
212. ILL. ANN. STAT., ch. 110, § 8-907(2) (Smith-Hurd 1983).
between civil and criminal proceedings. A tenable conclusion, then, would be that under article I, section 2(b) the California news media has an absolute immunity from contempt orders for refusing discovery, whether or not a criminal defendant needs the newsman’s information for his defense.

However, numerous vexing questions, in addition to the rules of statutory construction, lead to the conclusion that the newsman is not guaranteed an absolute protection. Rather, he is entitled to a greater protection which can only be outweighed by substantial competing interests. Several reasons support this conclusion.

First, article I, section 2(b) was clearly enacted as a response to the Farr, Rosato, CBS and Hammarley exceptions. Yet, the text of article I, section 2(b) makes no reference to the exceptions or how the amendment affects them. If the legislature’s intent was to alter or repeal the exceptions, some comment in the official ballot pamphlet or accompanying the amendment should have been provided. Second, the official argument in favor of Proposition 5 states that the immunity would be given “greater weight” by the judiciary “before attempting to compel” disclosure. The inference is that under certain circumstances the reporter may be compelled to divulge sensitive information. Third, the rules of statutory construction hold that if legislation has been judicially construed and a similar statute or amendment is later enacted without reference to that construction, it will be presumed that the legislature intended to adopt the prior construction. If the legislature expresses intent contrary to the judicial construction however, that intent prevails. Yet, no evidence of intent exists other than the official argument, which supports the conclusion that the protection is not absolute. Finally, with respect to the specific judicial exceptions and their applicability, Farr (and Rosato to the extent that it supports Farr) is the only exception that should not apply. The Farr exception was based on a violation of the separation of powers doctrine. However, because the shield law is now a part of the constitution, this basis is no longer valid.

214. See supra note 6.
215. Conversely, the New York court in Beach could point to the legislature’s specific act of removing the grand jury’s power to cite reporters for contempt. Beach, 62 N.Y.2d at 250, 465 N.E.2d at 308, 476 N.Y.S.2d at 769.
216. Pamphlet, supra note 7, at 19.
217. See supra note 137 and accompanying text.
However, the Rosato, CBS$^{220}$ and Hammarley$^{221}$ exceptions are based on sound policy considerations, and therefore, should still apply. The only issue that remains is what standards should be used to determine when, if at all, the newsman should be compelled to disclose information.

B. The Balancing Test

To effectuate the will of the people, a balancing test that maximizes the reporter’s interests is necessary. The proposed test comes from Justice Franson’s concurrence and dissent in the Rosato case.$^{222}$ The factors which should be weighed are:

1. The existence of alternate sources for the information;
2. The relevance of the inquiry;
3. The public interest served by disclosure;
4. The potential chilling effect on future news stories; and
5. The impact of the inquiry on the rights of others.

The party attempting to invalidate the immunity would have the burden of satisfying the first three requirements; the newsman would then have to satisfy the fourth requirement. The court would conduct an independent investigation of the fifth element. Procedurally, the newsman should always raise his immunity at the beginning of a trial or hearing, otherwise the immunity will be considered waived.$^{223}$

1. Alternative Sources

As a threshold requirement, the party seeking the reporter’s information should be required to show that no alternative sources of information are available to him at a reasonable time prior to trial.$^{224}$ For example, when a defendant is seeking information all other persons who had access to such information should be questioned before requesting it from the newsman. In a case such as

---

223. Cal. Evid. Code § 911 (West 1966 & Supp. 1984) provides, generally, that a person has no privilege not to testify or to produce evidence, except as provided by statute. Thus, the newsman should raise statutory and now constitutional provisions to justify his immunity from contempt orders, and to prevent a court from construing his failure to raise the immunity as a waiver of his rights. See Cal. Evid. Code § 912 (West 1966 & Supp. 1984).
Kaye, the judge should sustain the reporter's objections pertaining to information regarding an interview between the reporter and the defendant, because the defendant is an alternate source. This requirement should be strictly enforced to engender the proper respect for the newsman and his pledge of confidentiality to sources.

2. Relevance

The information sought from the newsman must be relevant to the issues in the case. Too often reporters are the victims of "fishing expeditions," the purpose of which is either general discovery or to create appealable "strawman issues." The courts must not tolerate generalized claims that the information sought is necessary for a "fair trial." Rather, the information should bear on an actual claim or defense that may reasonably be raised at trial. If the court deems that inquiry into certain matters is proper, the questions should be strictly limited to those matters.

3. Necessity

In addition to relevance, the party seeking the reporter's information should also have to demonstrate a genuine need: the requested material must be essential to the disposition of the case. In Brown v. Commonwealth, a murder trial, the Virginia Supreme Court held that information essential to a fair trial must be "material to proof of any element of a criminal offense, or to proof of the defense asserted by the defendant, or to a reduction in the classification or gradation of the offense charged, or to a mitigation of the penalty attached." In a criminal proceeding, this requirement provides a more definitive and affirmative standard than that announced in the CBS case, which merely required a reasonable possibility of exoneration. In Kaye's hearing, the prosecutor had no need to call Kaye because the undercover investigator could provide the necessary information to bring and prove the charges against the Hillesstads. Another issue in Kaye was that the defense was denied effective cross-examination. The Brown court resolved this issue by requiring that proof of inconsistent statements be material to a fair trial.

225. See supra text accompanying notes 147-54.
227. Id. at 431.
228. See supra note 107 and accompanying text.
229. See supra text accompanying notes 147-54.
230. Brown, 204 S.E.2d at 431.
4. **Chilling Effect**

If the defendant satisfies the court that the requirements of no alternate sources, relevance and need are met, the burden should then shift to the newsman to demonstrate that the information falls within the immunity. The newsman should have to show that he in fact made a pledge of confidentiality to his source because this played a large role in the *Hammarley* court’s decision to compel disclosure. Also, *CBS* requires that the source remain confidential in order to justify the newsman’s protection. After the newsman shows that the information falls within the immunity, the court should consider the potential chilling effect upon future news gathering and dissemination. Specifically, a court should consider if its action might dry up news sources, interfere with the editorial process, or deter the reporter’s future investigations.

5. **Impact on Others**

Finally, the court should evaluate the impact that the inquiry may have on others. In *Rosato*, Justice Franson felt the majority should have considered the public’s right to know the substance of the grand jury transcript, because it dealt with the improprieties of certain public officials. This concern is particularly relevant if revealing a confidential source’s identity could result in retaliatory action against the source or undermine his role as a vital informant.

All five of these elements should be weighed by a court before compelling disclosure from the newsman. This will ensure the maximum protection for the press, while still allowing a safety valve for those instances in which justice demands disclosure. Should the court determine that disclosure is necessary, an *in camera* proceeding should be utilized to mitigate the effects of revealing either sensitive information or confidential sources.

V. **Conclusion**

As watchdogs of our nation, newsmen provide an invaluable public service. It is well recognized that freedom of the press is one of the central foundations of our democratic government. It has equally been recognized that contempt citations and imprisonment threaten the newsman’s ability to gather vital, sensitive information. Both the people and the legislature have responded to this perceived threat. The judiciary, previously responding to the newsman’s asser-

---

tions of immunity in a tepid manner, should now accord newsmen the utmost protection, unless a significant competing interest necessitates a different result. With these guidelines in mind, the courts can effectively balance the rights of the newsman and the criminal defendant, and arrive at a just conclusion consistent with the ideals of California's new shield law.

Richard A. Sipos