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## The California Approach to the Yielding of the Newsman's Shield Law

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## Comments

### The California Approach to the Yielding of the Newsman's Shield Law

Recently, two California District Courts of Appeal<sup>1</sup> have been faced with the task of reconciling the First Amendment rights of newsmen with the Sixth Amendment rights of a criminal defendant to a fair trial. In response to the newsmen's claim that the California Newsmen's Shield Law<sup>2</sup> and the First Amendment of the United States Constitution<sup>3</sup> entitled members of the press to refuse to reveal their sources of information, the Court issued citations for contempt on the ground that the press is not guaranteed an absolute right to publish information not available to the general public and that therefore the newsmen could be compelled to disclose confidential sources.

This comment will examine the standards applied by the California judiciary in balancing the basic interests involved in the confrontation between free press and fair trial: the First Amendment protection to newsmen, the scope of the privilege afforded by the California Newsmen's Shield Law, the Sixth Amendment right to a fair trial in criminal cases and the inherent power of

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1. *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975); *Farr v. Superior Court*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971) (*hearing denied* March 20, 1972; *cert. denied* 409 U.S. 1011 (1972)).

2. CAL. EVID. CODE § 1070 (West Supp. 1976); see notes 16 and 37 *infra*.

3. See *Sheppard v. Maxwell*, 384 U.S. 333, 377 (1966).

the judiciary to control its proceedings and officers in order to prevent prejudicial publicity from emanating from court officers.

In striking a balance between the interests of members of the press and criminal defendants several relevant factors must be considered: (1) whether judicial history requires actual harm to be done before restrictions of the press are valid; (2) whether the trial in issue involves the drastic situation of *Sheppard*,<sup>4</sup> *Estes*<sup>5</sup> or *Rideau*<sup>6</sup>; (3) whether the trial court's application of a protective ('gag') order attempts to control parties not subject to it; (4) whether the existence of alternative sources for the information sought have been explored and exhausted; and (5) whether the existence of alternative methods which would have the least effect on the dissemination of information has been determined.

In attempting to balance the interests involved when the possibility exists that the press may have jeopardized the right of a criminal defendant to a fair trial, the Supreme Court of the United States has handed down a number of decisions discussing and weighing these factors.<sup>7</sup> Although it has been repeatedly recognized that the freedom exists to insure the unimpeded dissemination of information,<sup>8</sup> newspapers in the enjoyment of their constitutional rights may not deprive accused persons of their right to a fair trial<sup>9</sup> nor obstruct the administration of justice by preventing the impartiality of the judiciary.<sup>10</sup> As a result of too many instances of pre-trial publicity corrupting the fairness of the trial, protective orders were implemented.<sup>11</sup>

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4. *Id.* The massive pretrial and trial publicity turned the courtroom into a 'Roman Holiday' for the news media.

5. *Estes v. Texas*, 381 U.S. 532 (1965).

6. *Rideau v. Louisiana*, 373 U.S. 723 (1963).

7. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Beck v. Washington*, 369 U.S. 541 (1962); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Marshall v. United States*, 360 U.S. 310 (1959); *Stroble v. California*, 343 U.S. 181 (1952).

8. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

9. *Sheppard v. State of Florida*, 341 U.S. 50, 53 (1951); see also *Marshall v. United States*, 360 U.S. 310 (1959).

10. See *Moore v. Dempsey*, 261 U.S. 86 (1923); *Frank v. Mangum*, 237 U.S. 309 (1915) (outlaw of mob domination of a courtroom); *Chambers v. Florida*, 309 U.S. 227 (1940) (prohibition against manual coercion of defendant); *Tumey v. Ohio*, 273 U.S. 510 (1927) (protection of the impartiality of the presiding judge); *Pierre v. Louisiana*, 306 U.S. 354 (1939) (prohibition against discriminatory selection of jurors); see also *People v. Fain*, 18 Cal. App. 3d 137, 95 Cal. Rptr. 562 (1971); *People v. Byers*, 10 Cal. App. 3d 410, 88 Cal. Rptr. 886 (1970).

11. *Sheppard v. Maxwell*, 384 U.S. 333 (1966). See text *infra* at —.

The California cases of *Farr v. Superior Court*<sup>12</sup> and *Rosato v. Superior Court*<sup>13</sup> serve as appropriate vehicles to examine the California approach to the free press—fair trial controversy and specifically to demonstrate how the application of protective orders has encroached upon the freedom of the press in California to publish before and during a criminal trial.

In 1970, William T. Farr, a reporter for the Los Angeles Herald Examiner, was sent 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.<sup>14</sup> During the course of the trial Farr obtained copies of the statement of a potential witness from several unidentified sources who were all allegedly subject to the protective order.<sup>15</sup> Subsequently an

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12. 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971) (*hearing denied* March 20, 1972; *cert. denied* 409 U.S. 1011 (1972)); *In re Farr*, 36 Cal. App. 3d 577, 111 Cal. Rptr. 649 (1974); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975).

13. 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975).

14. The protective order prohibited any attorney, court employee, attache, or witness from releasing for public dissemination the content or nature of any testimony that might be given at trial or any evidence the admissibility of which might have to be determined by the court. The order became effective on December 10, 1969 and remained in effect until the termination of the trial, April, 1970. As an additional precaution against prejudicial publicity, the jury was sequestered for the length of the trial.

The trial court felt that the brutal nature of the crimes and the intense pretrial coverage by the press created a climate that extrajudicial statements would constitute a *clear and present danger* to the administration of justice and therefore necessitated the Order in Re Publicity.

Although the scope of this paper does not include an in-depth analysis of the appropriate standards to be considered in issuing a protective ('gag') order nor of the validity of the orders issued in the cases discussed, it should be noted that the American Bar Association's Legal Advisory Committee on Fair Trial and Free Press is revamping its guidelines on the issuance of gag orders in order to include notice and hearing to the news media before a gag order is issued. See "Proposed Court Procedure for Fair Trial-Free Press Judicial Restrictive Orders" (July 1975).

For the California approach see Warren & Abell, *Free Press-Fair Trial: 'The Gag Order', A California Aberration*, 45 S. CAL. L. REV. 51 (1972).

15. The Graham statement purported to report a confession made to Graham by Susan Atkins, a Manson co-defendant. The confession implicated Manson and revealed plans to murder several show business personalities in a bizarre manner. Farr contacted each of the attorneys involved in the trial and received copies of the statement from three persons subject to the protective order. Although Farr was aware of the Order re Publicity, he felt he knew all of the information in the Graham statement as a result of his conversations with Ms. Graham and others, and, therefore, only

in-chambers hearing was held by the trial court to ascertain the identity of the persons who had given copies to Farr. Farr refused to disclose his sources pursuant to Section 1070 of the California Evidence Code.<sup>16</sup> After the judgment in the Manson case,<sup>17</sup> Farr was again called as a witness in a hearing convened by the trial court to determine whether there had been a violation of its protective order which might have jeopardized the right to a fair trial for Manson and his codefendants. Farr again remained silent pursuant to Section 1070.<sup>18</sup> This time the Court held Farr to be in direct contempt, ordering him incarcerated until he answered the questions.<sup>19</sup>

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wanted to corroborate the information he had obtained prior to publishing it (a customary procedure of the news media). Bill Farr, "The First Amendment Behind Bars", Northrup University Law School Lecture Series, Oct. 20, 1975 (Hereinafter cited as Northrup Lecture).

16. CAL. EVID. CODE § 1070 (West 1966) provided in pertinent part:

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.

See note 37 *infra* for § 1070 as amended by Stats. 1974, c. 1456, p. 3184, § 2.

In response to Farr's argument, the trial judge's legal advice was that § 1070 provided a shield to newsmen, and therefore, any disclosure would be on a voluntary basis. See *In Chambers Transcript*: p. 8, lines 7-28. The trial judge commented that under § 1070 of CAL. EVID. CODE

[T]hat while I could not order you, that is effectively, order you to disclose the source, there is nothing to prevent you in the interests of justice and an aid in the administration of justice from voluntarily revealing it without waiving any right in the future to assert that immunity or privilege.

Farr published the statement one day before the witness took the stand. The trial court made no attempt to enjoin the publication or to inquire of the persons subject to the order the trial judge's initial interest was in seeing that those who violated the Order re Publicity be dealt with.

17. Manson and his codefendants were found guilty of murder and were sentenced to death. An automatic appeal to the Supreme Court is now pending.

18. See CAL. EVID. CODE § 1070 (West 1966).

19. CAL. CODE CIV. PRO. § 1209, subds. 5, 8, 9 (West 1972). The purpose of holding Farr in contempt was to maintain the dignity and authority of the court and to compel compliance by members of the press. See *In re Farr*, 36 Cal. App. 3d 577, 583-84, 111 Cal. Rptr. 649, 653 (1974); *In re Lifschutz*, 2 Cal. 3d 415, 439 n. 27, 467 P.2d 557, 573, n. 27 85 Cal. Rptr. 829, 845, n. 27 (1970); *Bridges v. Superior Court*, 14 Cal. 2d 464, 484, 94 P.2d 983-993-94 (1939).

See CAL. CODE CIV. PRO. § 1219 (West 1972) which provides:

When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he (has) performed it, and in that case the act must be specified in the warrant of commitment.

Farr subsequently petitioned the Federal District Court and the Ninth Circuit Court of Appeals for federal habeas corpus. See *Farr v. Pitchess*,

In *Rosato*, four Fresno Bee newsmen were held in contempt upon refusing to answer questions. These questions were propounded by the trial court during a proceeding held to investigate possible violations of protective and seal orders issued by the court with respect to the transcript of grand jury testimony.<sup>20</sup>

The underlying purpose for protective orders in California is to protect the defendant's right to a fair trial.<sup>21</sup> Although in both

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522 F.2d 464 (9th Cir. 1975). In the meantime he was released on personal recognizance by the former Mr. Justice Douglas; see *Farr v. Pitchess*, 409 U.S. 1245 (1973). He is currently appealing to the U.S. Supreme Court.

In a subsequent hearing by the Superior Court of Los Angeles County any future incarceration was limited to five days; the Court found that there was an absence of a substantial likelihood that continued commitment would accomplish the purpose of the order upon which the commitment was based. See *In re McKinney*, 70 Cal. 2d 8, 10-11, 447 P.2d 972, 973-74, 73 Cal. Rptr. 580, 582-83 (1968).

CAL. CODE CIV. PRO. § 1218 (West 1972) provides in pertinent part:

Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred (\$500), or he may be imprisoned not exceeding five days, or both. . . .

20. Pursuant to CAL. PENAL CODE § 938.1 subd. (b) (West Supp. 1976) the trial court ordered the grand jury transcripts to be sealed until the completion of the defendant's trial as well as issuing an Order re Publicity similar to the one in the Manson trial. CAL. PENAL CODE § 938.1, subd. (b), provides in pertinent part:

If the court determines that there is a reasonable likelihood that making all or any part of the transcript public may prejudice a defendant's right to a fair and impartial trial, that part of the transcript shall be sealed until the defendant's trial has been completed.

It is also interesting to note that the protective order was issued on the basis of the "reasonable likelihood test"; see note 14, *supra* and note 64, *infra*.

In *Craemer v. Superior Court*, 265 Cal. App. 2d 216, 225, 71 Cal. Rptr. 193, 201 (1968), the court noted that the trial judge did not base his order sealing the transcript of grand jury proceedings on the "reasonable likelihood" that prejudicial publicity would endanger defendant's right to a fair trial but on the "probability" of such prejudice. And in *People v. Tidwell*, 3 Cal. 3d 62, 69, 473 P.2d 748, 753, 89 Cal. Rptr. 44, 49 (1970), the court stated that "reasonable likelihood" does not mean that prejudice must be more probable than not.

The "reasonable likelihood" standard has basically been used with regards to motions for change of venue in criminal cases. See, *Maine v. Superior Court*, 68 Cal. 2d 375, 383, 438 P.2d 372, 377, 66 Cal. Rptr. 724, 729 (1968); *Frazier v. Superior Court*, 5 Cal. 3d, 287, 486 P.2d 694, 95 Cal. Rptr. 798 (1971).

21. See WARREN & ABELL, *supra* note 14.

*Farr* and *Rosato* the orders were disobeyed, there was no definitive finding that the publications ever reached the Manson jury,<sup>22</sup> that there was any particular difficulty in impaneling an impartial jury in the Stefano trial,<sup>23</sup> or any determination that any of the defendants were denied a fair trial as a direct result of these publications. The Second District Court of Appeal of California refers only to the "likely possibility" that the question of prejudicial publicity would be an issue on appeal in the Manson trial,<sup>24</sup> and the Fifth District Court of Appeal's basic concern was to prohibit any public dissemination of out-of-court statements that "may" interfere with a defendant's constitutional right to a fair trial.<sup>25</sup> The most recent California decisions seem to address themselves more to the importance of the courts not being thwarted in their efforts to enforce protective orders rather than to the findings of any actual interference with the defendants' right to a fair trial, a standard that federal<sup>26</sup> as well as California<sup>27</sup> courts have previously and consistently used in determining whether or not to reverse criminal convictions in light of prejudicial publicity.

Although the violation of a protective order demonstrates disregard for judicial authority, this should not automatically suggest that the defendant has been denied due process or that the fairness

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22. California evinces a policy of permitting acceptance of jurors who, after contact with pretrial news reports, commit themselves to impartiality and fairness. See CAL. PENAL CODE § 1076 (West 1970); see also *People v. Duncan*, 53 Cal. 2d 803, 812-16, 350 P.2d 103, 108-10, 3 Cal. Rptr. 351, 356-58 (1960); *People v. Daugherty*, 40 Cal. 2d 876, 889-90, 256 P.2d 911, 918-19 (1953); *People v. Miller*, 245 Cal. App. 2d 112, 53 Cal. Rptr. 720 (1966); *People v. Parker*, 235 Cal. App. 2d 100, 44 Cal. Rptr. 909 (1965).

23. 51 Cal. App. 3d at 207-08, 124 Cal. Rptr. 427, 438-39. Since the Fresno Bee publications occurred prior to trial, the court was concerned with the "reasonable likelihood" of prejudicial news which would make difficult the impaneling of an impartial jury and 'tend' to prevent a fair trial.

24. *Farr v. Superior Court*, 22 Cal. App. 3d at 66, 99 Cal. Rptr. at 346.

25. 51 Cal. App. 3d at 200, 124 Cal. Rptr. 427, 433.

26. *Murphy v. Florida*, 421 U.S. 794 (1975); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961); *Marshall v. United States*, 360 U.S. 310 (1959); *Stroble v. California*, 343 U.S. 181 (1952); *Calley v. Callaway*, 519 F.2d 184, 204 (5th Cir. 1975). It should be noted that other United States Supreme Court cases have reversed convictions without actual prejudice in the jury box in extreme situations where there has been inherently prejudicial publicity to make the possibility of prejudice highly likely. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963).

27. *People v. Sirhan*, 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972); *People v. Santo*, 43 Cal. 2d 319, 273 P.2d 249 (1954); *People v. Gomez*, 41 Cal. 2d 150, 258 P.2d 825 (1953); *People v. Byers*, 10 Cal. App. 3d 410, 88 Cal. Rptr. 886 (1970); *People v. Richardson*, 258 Cal. App. 2d 23, 65 Cal. Rptr. 487 (1968); *Los Angeles v. Superior Court*, 253 Cal. App. 2d 670, 62 Cal. Rptr. 435 (1967).

of a trial is fatally infected.<sup>28</sup> As the United States Supreme Court has held in the past:

Due process of law requires that the proceedings shall be fair but fairness is a relative, not an absolute concept . . . what is fair in one set of circumstances may be an act of tyranny in others.<sup>29</sup>

Although in some circumstances a violation of a protective order will directly affect the fairness of a criminal trial, a careful examination of the facts in each case is necessary before coming to that conclusion. Therefore, before a court concludes that pretrial or pending trial publications are prejudicial, it should find an actual interference and not merely a tendency to interfere with a defendant's right to a fair trial. The protection given to First Amendment rights should be at least equal to that given to Sixth Amendment rights.

Although under the common law there was no privilege to conceal confidential sources of information<sup>30</sup> and the prevailing view among members of the bench and bar has been generally opposed to a journalist's privilege,<sup>31</sup> newsmen have refused to disclose sources and information through the years on several grounds including self incrimination,<sup>32</sup> forfeiture of estate,<sup>33</sup> newsman's ethic code,<sup>34</sup> and the First Amendment right to a confidential rela-

28. *Lisenba v. California*, 314 U.S. 219, 236 (1941).

29. *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 116-17 (1934); see also *Murphy v. Florida*, 421 U.S. 794, 799 (1975).

30. 8 J. WIGMORE, *EVIDENCE* § 2286 at 537 nn. 13 & 14 (McNaughton rev. 1961). However this was not always the rule at common law. In 17th century England, the obligations of honor among gentlemen were occasionally recognized as privileged from compulsory disclosure information obtained in exchange for a promise of confidence. But see *Duchess of Kingston's Case*, 12 Coke 94 (1913) which required disclosure and answers to all questions to avoid being held in contempt.

31. ABA REPORT ON THE COMMITTEE ON THE IMPROVEMENT OF THE LAW OF EVIDENCE (1937-38).

32. *Burdick v. United States*, 236 U.S. 79 (1915); A.L. Sloan (unreported), see *Editor & Publisher*, Aug. 11, 1934 at 10; *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911); *Pledger v. State*, 77 Ga. 242, 3 S.E. 320 (1887); *Joslyn v. People*, 67 Colo. 297, 184 P. 375 (1919).

33. *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911); *Frank v. Toughill* (unreported), see *Editor & Publisher*, Dec. 9, 1933, at 16.

34. *In re Grunow*, 84 N.J.L. 235, 85 A. 1011 (Supp. Ct. 1913); *People ex rel. Mooney v. Sheriff*, 199 N.E. 415 (1936); *Joslyn v. People*, 67 Colo. 297, 184 P. 375 (1919); *Matter of Wayne*, 4 Haw. 475 (D. Haw. 1914); *Clinton v. Commercial Tribune Co.*, 11 Ohio Dec. 603 (1901); *Ex Parte Lawrence & Levings*, 116 Cal. 298, 48 P. 124 (1897); *People v. Durrant*, 116 Cal. 179,



tionship with sources.<sup>35</sup> In addition, notice should also be taken of the newer trend toward extending a testimonial privilege to newsmen through legislation.<sup>36</sup>

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48 P. 75 (1897); *People ex rel. Phelps v. Fancher*, 2 Hun. 226 (N.Y. Sup. Ct. 1874); *Burkett, Hendricks & Nevin* (unreported), N.Y. Times, Oct. 31, 1929, p. 14, Col. 3. Noted in 36 VA. L. REV. 61, 71 (1950). The American Newspaper Guild has adopted the following rule as part of the newsman's code of ethics: "Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies." See G. BIRD & F. MERWIN, *THE PRESS AND SOCIETY* 592 (1971).

35. *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958); *cert. denied* 358 U.S. 910 (1958). Although the testimonial privilege was denied, the court did recognize a newsman's First Amendment right to a confidential relationship with his source and concluded:

It is to be noted that we are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality. . . . The question asked . . . went to the heart of the plaintiff's claim.

*Garland v. Torre*, *supra* at 549-50. Other courts have recently recognized the First Amendment privilege. See *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972); *Democratic National Committee v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973); *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (1974); *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974).

36. Thus far seventeen states have provided some type of statutory protection to a newsman's confidential sources: ALA. CODE, Tit. 7 § 370 (1960); ALASKA STAT. § 09.25.150 (1973); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1975); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE § 1070 (West Supp. 1976); IND. ANN. STAT. § 2-1733 (1968); KY. REV. STAT. § 421.100 (1972); LA. REV. STAT. ANN. §§ 45:1451-1454 (Supp. 1976); MD. ANN. CODE, Art. 35, § 2 (1971); MICH. COMP. LAWS § 767.5a (Supp. 1956); MICH. STAT. ANN. § 28.945 (1972); MONT. REV. CODES ANN. § 93-601-2 (1964); NEV. REV. STAT. § 49.275 (1973); N.J. REV. STAT. §§ 2A:84A-21, 2A:84A-29 (1976); N.M. STAT. ANN. § 20-1-12.1 (1970); N.Y. CIV. RIGHTS LAW § 79-h (Supp. 1975); OHIO REV. CODE ANN. § 2739.12 (1954); PA. STAT. ANN. Tit. 28, § 330 (Supp. 1975). See D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307 (1969) for an in depth analysis of the statutes.

Although none has been provided by federal statute, such legislation has been introduced. See, e.g., S. 1311, 92d Cong. 1st Sess. (1971); S. 3552, 91st Cong. 2d Sess. (1970); H.R. 16328, H.R. 16704, 91st Cong., 2d Sess. (1970); S. 1851, 88th Cong. 1st Sess. (1963); H.R. 8519, H.R. 7787, 89th Cong., 1st Sess. (1963); S. 965, 86th Cong. 1st Sess. (1959); H.R. 355, 86th Cong., 1st Sess. (1959). An example of the legislation being introduced:

A witness who is employed by a newspaper, news service, newspaper syndicate, periodical or radio or TV station or network, as a writer, reporter, correspondent, or commentator or in any other capacity directly involved in the gathering or presentation of news, shall not be required in any court of the United States to disclose the source of any information obtained in such capacity *unless in the opinion of the court such disclosure is necessary in the interests of national security.* (emphasis added)

See Staff of Senate Committee on the Judiciary, 89th Cong. 2d, *The Newsman's Privilege* (Comm. Print 1966).

A set of guidelines for federal officials in connection with subpoenaing members of the press to testify before grand juries or at criminal trials has

The California legislature has responded affirmatively to the 'newer trend' by enacting Section 1070 of the Evidence Code.<sup>37</sup> Although there is no legislative history available and minimal judicial interpretation<sup>38</sup> to provide a definitive statement as to the pur-

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been designed by Attorney General Edward H. Levi. In addressing a joint national conference of U.S. attorneys and U.S. marshals (November 1975) Levi warned that they must get his prior approval before sending subpoenas to news reporters to reveal their confidential sources in trials and before grand juries. In his speech Levi gave U.S. attorneys personal orders that have been spelled out in Justice Department guidelines. The Guidelines for Subpoenas to the News Media were first announced on August 10, 1970 in a speech by the Attorney General, and then were expressed in Department of Justice Memo. No. 692 (Sept. 2, 1970), which was sent to all United States Attorneys. The guidelines state:

The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh that limiting effect against the public interest to be served in the fair administration of justice. . . . The Department of Justice does not consider the press an investigative arm of the government. Therefore, all reasonable attempt should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press.

37. The first shield law was enacted by an amendment, in 1935, to former Code of Civil Procedure § 1881 which listed certain privileges against giving testimony. In 1965, the provisions of subdivision 6 of the Code of Civil Procedure § 1881 became Evidence Code § 1070. Since 1965, section 1070 has been amended by Stats. 1971, c. 1717, p. 3658, § ; Stats. 1972, c. 1431, p. 3126, § ; Stats. 1974, c. 323, p. 2877, § 1; Stats. 1974, c. 1456, p. 3184, § 2. Subdivision (a) of section 1070 of CAL. EVID. CODE provides:

(a) 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, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper, 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.

See *supra*, note 16 for text of § 1070 (West 1970) when Farr initially refused to disclose his sources.

38. See CAL. EVID. CODE § 1070 (West 1966), Comment-Assembly Committee on Judiciary notes that § 1070 provides an immunity from being adjudged in contempt; that it does not create a privilege; thus, it does not prevent the use of other sanctions for refusal of a newsman to make discovery when he is a party to a civil proceeding. See *Application of Cepeda*, 233 F. Supp. 465 (S.D.N.Y. 1964) (guided by rule of strict statutory construction; therefore, did not extend the 'immunity' to magazines); *Ex parte*

pose behind the statute, there are enough guidelines present to ascertain the intent of the Legislature so as to effectuate the purpose of the law.<sup>39</sup>

California newsmen have contended that they are granted immunity from punishment for contempt by Evidence Code § 1070 and that their sources are protected from disclosure by a First Amendment privilege.<sup>40</sup> When the Court of Appeal of California was presented with this argument their response was:

To construe the statute as granting immunity to petitioner, Farr, in the face of the facts here present would be to countenance an unconstitutional interference by legislative branch with an inherent and vital power of the court to control its own proceedings and officers.<sup>41</sup>

An objective reading of the unqualified language of Section 1070 suggests that the purpose and policy behind the statute is to maintain a free flow of information by enabling newsmen to obtain information, not otherwise available, from sources who are interested in preserving the confidentiality of their disclosure. The language of the statute, which is broad enough to provide immunity in any proceeding in which testimony can be compelled, suggests that it be construed in conjunction with the First Amendment to the United States Constitution<sup>42</sup> and with Article I, section 2 of

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Lawrence and Levings, 116 Cal. 298, 48 P. 124 (1897) (news editor and reporter were held in contempt for refusing to disclose information in front of state senate investigatory committee); *People v. Durrant*, 116 Cal. 179, 48 P. 75 (1897) (a criminal defendant's application for contempt proceedings against certain newspaper editors because of their publications relative to the trial was denied since there was no finding of jury influence); *In re Howard*, 136 Cal. App. 2d 816, 289 P.2d 537 (1955) (waiver of privilege by disclosing source of information).

39. A fundamental rule of statutory construction is that a reasonable interpretation which comports with the objects and purposes of an act will prevail over an interpretation which would defeat those purposes. *Silver v. Brown*, 63 Cal. 2d 841, 845, 409 P.2d 689, 692, 48 Cal. Rptr. 609, 612 (1966); see also *Select Base Materials v. Bd. of Equalization*, 51 Cal. 2d 640, 335 P.2d 672 (1959).

40. *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975); *Farr v. Superior Court*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971) (*hearing denied* March 20, 1972; *cert. denied* 409 U.S. 1011 (1972)); *Lewis v. Superior Court*, — Cal. App. 3d —, — Cal. Rptr. — (1976). (Lewis has been cited with contempt for refusing to honor a grand jury subpoena directing him to hand over a 'communique' written by the Symbionese Liberation Army. Lewis's refusal was based on the First Amendment and § 1070 of California Evidence Code.

41. 22 Cal. App. 3d at 69, 99 Cal. Rptr. at 348. The Fifth District Court of Appeal in *Rosato v. Superior Court*, 51 Cal. App. 3d at 223, 124 Cal. Rptr. 427, 448, cites *Farr* with approval.

42. The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech or of the press."

the California Constitution.<sup>43</sup> Nevertheless, in confronting the clash between the newsman's need for immunity and the court's power to compel disclosure, the judicial construction of the statute has rested upon the necessity of disclosure as the means of enforcement of a court's obligation to protect a defendant's right to a fair trial. In refusing to recognize that newsmen have an absolute privilege to refuse to answer certain questions posited by a trial court, the court explained:

If Evidence Code section 1070 were to be applied to the matter at bench to immunize petitioner from liability, that application would violate the principle of separation of powers established by our Supreme Court. That application would severely impair the trial court's discharge of a constitutionally compelled duty to control its own officers. The trial court was enjoined by controlling precedent of the United States Supreme Court to take reasonable action to protect the defendants in the Manson case from the effects of prejudicial publicity. (*Sheppard v. Maxwell*, 384 U.S. 333, 16 L.Ed. 2d 600, 86 S.Ct. 1507.)<sup>44</sup>

At the present time the California courts will not construe Evidence Code § 1070 to shield newsmen from contempt for failure to reveal sources of information where an 'Order re Publicity' has been issued and possibly violated.

In issuing and enforcing protective orders, the California courts have relied heavily on the 'mandate of the United States Supreme Court in *Sheppard v. Maxwell*' that the trial court control prejudicial publicity to prevent a "circus-type atmosphere" at trial. Since *Sheppard*<sup>45</sup> is emphasized by the courts, it is relevant to set out the holding of the Supreme Court at some length:

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . The courts must take such steps by rule and regu-

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43. Article I, section 2 of the California Constitution provides that "no law shall be passed to restrain or abridge the liberty of speech or of the press."

44. *Farr v. Superior Court*, 22 Cal. App. 3d at 70, 99 Cal. Rptr. 342, 348; *Rosato v. Superior Court*, 51 Cal. App. 3d at 221, 124 Cal. Rptr. 427, 447-48.

45. 384 U.S. 333 (1966).

lation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.<sup>46</sup>

In recognizing that "reversals are but mere palliatives"<sup>47</sup> and that "the cure lies in those remedial measures that will prevent the prejudice at its inception,"<sup>48</sup> the holding in *Sheppard* sanctions the utilization of 'protective orders' as an additional means to ensure a trial free from prejudicial publicity. In brushing aside any consideration of the issue of sanctions against a 'recalcitrant press', the Supreme Court concluded that less drastic measures would have been sufficient to guarantee *Sheppard* a fair trial.<sup>49</sup> The Court also reaffirmed its unwillingness to impose any direct limitations on the freedom traditionally exercised by the news media,<sup>50</sup> since the Court has consistently required that the press have a free hand, even though deploring its sensationalism.<sup>51</sup>

It is indisputable that a trial judge has the responsibility to exercise the control necessary to assure a fair trial and is bound to explore the violations of its order by its own officers.<sup>52</sup> What is an unresolved issue is whether a court overextends the holding in *Sheppard* in denying to a newsman the immunity of Evidence

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46. *Id.* at 362-63.

47. *Id.* at 363.

48. *Id.*

49. *Id.* at 358-63. The Court suggested the following measures to reduce any prejudicial influences on the jury: (1) controls on use of courtroom and the courthouse by the press; (2) insulation of the witnesses from the press; (3) controls over the release of leads, information, and gossip to the press by police officers, witnesses, and counsel; (4) warnings to the press of the impropriety of publishing prejudicial material; (5) continuance of the case until the threat to a fair trial because of prejudicial news debates or changing the venue to another jurisdiction; and (6) sequestration of the jury.

50. *Craig v. Harney*, 334 U.S. 367, 374 (1947); reviewed in *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

51. 384 U.S. at 377.

52. CAL. CODE CIV. PRO. § 128, subds. (3)-(5) (West Supp. 1976) provide in pertinent part:

3. To provide for the orderly conduct of proceedings, before it, or its officers;
4. To compel obedience to its judgments, orders and process, and to the orders of a Judge out of Court, in an action of proceeding pending therein;
5. To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto;

Code § 1070, since the Supreme Court has not as yet promulgated any rules directly regulating the activity of the news media. The determination that the statute is/will be unconstitutional under some circumstances might have the effect of completely defeating the concept of a newsman's privilege. The placing of limitations and restrictions on section 1070 without establishing definitive guidelines undermines a newsman's right to gather news in that it creates a degree of uncertainty as to the actual scope of the privilege. This could potentially influence the press to avoid any direct confrontation with the judiciary and to discourage the assertion of their 'privilege' within factual circumstances where it might be recognized. Dicta in *Farr* exemplifies this possibility where the court pointed out:

We express no opinion on the quantum of proof required to establish that inquiry into a newsman's source is necessary to permit the court to carry out its duty to control its own officers and to restrict persons subject to its control from disseminating prejudicial trial publicity. Here petitioner has admitted the necessary facts.<sup>53</sup>

On the other hand, the *Rosato* court suggested that the section remains as a protection against the revelation of all sources other than court officers subject to orders issued by the court.<sup>54</sup>

The limitations placed upon § 1070 seem to spring from the inherent power of the judiciary to control its own proceedings and officers. As the Supreme Court noted in *Wood v. Georgia*: "Courts necessarily must possess the means of punishing for contempt when conduct tends directly to prevent the discharge of their functions including the authority and power . . . to assure litigants a fair trial."<sup>55</sup> By emasculating the newsman's privilege and by issuing orders of contempt, the California Courts definitely possess the 'means of punishment', but prior to any invasion of freedom of the press by the demand for the revelation of news sources. A direct interference with a litigant's right to a fair trial should be demonstrated.

Basic to the judicial system is the premise that courts have the right to conduct their business in an untrammelled way with the

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53. 22 Cal. App. 3d at 71 n. 5, 99 Cal. Rptr. 342, 349 n. 5.

54. *Rosato v. Superior Court*, 51 Cal. App. 3d at 224, 124 Cal. Rptr. 427, 450.

55. 370 U.S. 375, 383 (1972).

means of punishing for contempt to maintain order and to assure litigants a fair trial.<sup>56</sup> Nevertheless, it remains to be determined what exactly constitutes the proper circumstances which mandate the court to exercise such power.

The California legislature has not provided a statute that directly applies to punishment of publications outside the court room which comment upon a pending case, although there is a line of judicial decisions resting on the assumption that the right to hold one guilty of contempt is inherently necessary to judicial administration and that the legislature should not interfere with the determination of what constitutes direct or constructive contempt.<sup>57</sup>

In determining the appropriate circumstances for the exercise of this inherent power, federal and state courts have alternated between two standards: a reasonable likelihood of interference with the administration of justice<sup>58</sup> and the clear and present danger test.<sup>59</sup>

In assessing whether the refusal to reveal the sources of information of an editorial or an article commenting upon a pending action rendered the author guilty of contempt of court, the test that had been applied by the California courts was whether it had a 'reasonable tendency' to interfere with the orderly administration of justice in the action which was the subject of the comment.<sup>60</sup>

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56. *Id.*; *Craemer v. Superior Court*, 265 Cal. App. 2d 216, 225, 71 Cal. Rptr. 193, 201 (1968); *People v. Sidener*, 58 Cal. 2d 645, 375 P.2d 641, 75 Cal. Rptr. 697 (1962); *Millholen v. Riley*, 211 Cal. 29, 293 P. 69 (1930); see cases cited note 57 *infra*.

57. *Times Mirror Company v. Superior Court*, 15 Cal. 2d 99, 98 P.2d 1029 (1940); *Bridges v. Superior Court*, 14 Cal. 2d 464, 94 P.2d 983 (1939); *Blodgett v. Superior Court*, 210 Cal. 1, 290 P. 293 (1930); *In re Shuler*, 210 Cal. 377, 292 P. 481 (1930); *Lamberson v. Superior Court*, 151 Cal. 458, 91 P. 100 (1907); *McClatchy v. Superior Court*, 119 Cal. 413, 51 P. 696 (1897); *In re Lindsley*, 75 Cal. App. 122, 241 P. 934 (1915). All of these cases held that CAL. CODE CIV. PRO. § 1209, subd. 13 was unconstitutional as an invalid legislative effort to abridge the inherent power of the court.

58. See notes 60 and 62 *infra*.

59. See notes 60 and 62 *infra*.

60. *Times Mirror Company v. Superior Court*, 15 Cal. 2d 99, 118, 98 P.2d 1029, 1039 (1940); *Bridges v. Superior Court*, 14 Cal. 2d 464, 484, 94 P.2d 983, 989 (1939); *In re San Francisco Chronicle*, 1 Cal. 2d 630, 637, 36 P.2d 369, 371 (1934). The California courts found support for the reasonable tendency test in *Sinclair v. United States*, 279 U.S. 749, 764 (1929) and in *Patterson v. Colorado*, 205 U.S. 454, 462-63 (1907). The *Sinclair* court stated:

... [H]aving regard to the powers conferred, to the protection of society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case.

In reviewing the California approach, the United States Supreme Court in *Bridges v. California*<sup>61</sup> severely limited the judicial power to punish by holding that the appropriate test was 'clear and present danger' and by explaining that before such danger can be termed 'clear and present', the substantive evil must be extremely serious and the degree of imminence extremely high.<sup>62</sup>

The recent trend in California seems to depart from the standard advocated in *Bridges*. In reaffirming a judgment of contempt, both the Ninth Circuit Court of Appeals<sup>63</sup> and the California Court of

And in *Patterson*, Justice Holmes stated:

Judges generally, perhaps, are less apprehensive that publications impugning their own reasoning or motives will interfere with their administration of the law. But if a court regards, as it may, a publication concerning a matter of law before it, as tendency toward such an interference, it may punish it.

61. 314 U.S. 252, 263 (1941).

62. Although the clear and present danger test is not void of ambiguities and criticisms, it does provide a higher standard than that of the reasonable likelihood test.

In subsequent decisions, the Supreme Court of the United States has consistently ruled that unless such proceedings are justified by a showing of clear and present danger to the administration of justice, attempts to punish such representations of the press are violative of the First Amendment rights. See *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946). The court in *Pennekamp*, in balancing the two interests (free press-fair trial) explained: "The essential right of the courts to be free of intimidation and coercion . . . is consonant with a recognition that freedom of the press must be allowed in the broadest scope compatible with the supremacy of order." *Pennekamp v. Florida*, *supra* at 334.

It should also be noted that the United States Supreme Court has suggested that another test might apply when the representations of the press are directed toward a trial by jury rather than toward a grand jury investigation or a non-jury trial. See *Wood v. Georgia*, 370 U.S. 375, 390 (1962). (*Bridges*, *Pennekamp*, and *Craig* did not involve trials by jury and were prior to the issuance of protective orders; all three cases involved the possibility of coercion and intimidation through criticism of the presiding trial judge.)

In a recent decision by the Seventh Circuit Court of Appeals, the clear and present danger test and its application to pretrial publicity have been called into question; see *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969).

In light of the Supreme Court's decisions, the California courts have reversed contempt convictions when the evidence failed to establish that the publication actually influenced and disrupted the trial. See *Crosswhite v. Municipal Court*, 260 Cal. App. 2d 428, 67 Cal. Rptr. 216 (1968); compare *Hamilton v. Municipal Court*, 270 Cal. App. 2d 797, 76 Cal. Rptr. 168 (1969).

63. *Farr v. Pitchess*, 527 F.2d at 469. The Court held:

[U]nder the facts presented by this record, the paramount inter-



Appeal<sup>64</sup> contended that the 'conditional' newsman's privilege not to disclose sources must yield to the more important and compelling need for disclosure; neither court articulated whether it relied on the clear and present danger test or the reasonable tendency test. The language of the opinions implies the use of the compelling state interest test. The compelling need for disclosure was founded on the public interest in fair trial and on the need to prevent the court from being thwarted in its efforts to enforce its order against prejudicial publicity. In *Rosato*, the Court relied on the "reasonable likelihood" that publication of grand jury transcripts would endanger the defendant's right to a fair trial.<sup>65</sup>

A frequent flaw in the recent California approach is two-fold. First, the protective orders issued by the trial courts are designed to protect the defendant's right to a fair trial, and yet the courts do not specifically find that the news releases prejudiced or interfered with the defendant's trial.<sup>66</sup> Although the protective orders were technically violated, their fundamental purpose was still accomplished. Second, in punishing newsmen for the violation without a determination that the particular publication actually prejudiced the criminal trial, the courts are inappropriately extending the protective order beyond its original scope; it has become a prior restraint on news publications. Before instituting such a restraint, the courts must carry the "heavy burden of showing justification for the imposition of a prior restraint."<sup>67</sup>

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est to be protected was that of the power of the court to enforce its duty and obligation relative to the guarantee of due process to the defendants in the on-going trial.

64. *Farr v. Superior Court*, 22 Cal. App. 3d at 73, 99 Cal. Rptr. at 350.

The Court found:

Balancing as we are required to do, the interest to be served by disclosure of sources against its potential inhibition upon the free flow of information, we conclude that petitioner is not privileged by the First Amendment to refuse to answer the questions put to him in the trial court.

65. *Rosato v. Superior Court*, 51 Cal. App. 3d at 208, 124 Cal. Rptr. 427, 438-39. The Court held that since the protective order did not operate as a direct restraint on newsmen, the "clear and present danger test" was not applicable.

66. In *Younger v. Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973), a contempt judgment against a district attorney for violation of a publicity protection order issued in a criminal trial was reversed. The court found that the releases had in no way prejudiced the accused's right to a fair trial. The Court did point out: "A sterile press release simply is not a good vehicle with which to make law to the effect that the courts are powerless to prevent harmful or potentially harmful publications by prior restraints." *Younger v. Smith*, *supra* at 153, 106 Cal. Rptr. at 235.

67. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); see *Near v. Minnesota*, 283 U.S. 697, 707-09 (1931); *Younger v. Smith* (Times Mirror v. Superior Court), 30 Cal. App. 3d at 154, 106 Cal. Rptr. at 236.

Furthermore, the courts have not been successful in applying protective orders directly against the press,<sup>68</sup> and three reports on the free press-fair trial dilemma have stated that courts should avoid direct influence over newsmen.<sup>69</sup>

The California courts claim that they are balancing the interest to be served by disclosure of sources against the potential inhibition upon the free flow of information, but the decisions seem to hinge on a judicial obsession with the power to enforce an Order re Publicity. Consideration and weight should be given to the possibility that no actual interference or prejudice to defendant's right to a fair trial occurred; it is not enough that

If disclosure of the source of a violation *may* inhibit future violations, the inhibition serves the public purpose . . . and deprives the public of only that information which that court has

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The Court remarked that

[T]he direct restraint against the media was impermissible. . . where the record did not justify that portion of the trial court's protective order restraining the news media from publication of any matters with respect to the case except those occurring in open court.

68. *United States v. Dickinson and Adams*, 465 F.2d 496 (5th Cir. 1972) *cert. denied* 414 U.S. 979 (1973); *Younger v. Smith* (Times Mirror v. Superior Court), 30 Cal. 3d 138, 106 Cal. Rptr. 225 (1973). Further, a split in opinion exists whether the clear and present danger test or the reasonable likelihood test is the proper standard to apply to the issuance of protective orders. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), 44 LW 2073 (Aug. 19, 1975) (reasonable likelihood test); *In re Oliver*, 452 F.2d 111 (7th Cir. 1971) (clear and present danger test); *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970) (serious and imminent threat); *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969); *Younger v. Smith* (Times Mirror Co. v. Superior Court), 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973) (reasonable likelihood test); compare *Sun Company of San Bernadino v. Superior Court*, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873 (1973) (clear and present danger test); see also *United States v. Schiavo*, 504 F.2d 1 (3d Cir. 1974); *cert. denied*, 419 U.S. 1096 (1974); (oral protective order, prohibiting the press from publishing during perjury trial information regarding indictments pending related matter, was vacated due to procedural deficiency and failure to specify the terms of the order); *Dorfman v. Meiszner*, 430 F.2d 558 (7th Cir. 1970) (protective order proscribing photographs, television and radio during pending trial upheld).

69. The Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue (Kaufman Committee), 45 F.R.D. 391 (1968); The Report of the Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, *Freedom of the Press and Fair Trial* (the Medina Report) (1967); The American Bar Association Standards Relating to Fair Trial and Free Press (the Reardon Report) (1968).

declared must be kept from it temporarily if the constitutional right to a fair trial is to be preserved.<sup>70</sup>

The proposal that future violations may be inhibited is too speculative and vague to permit an intrusion of First Amendment rights. Furthermore, in many instances the jury has been sequestered and there is little or no danger of their being influenced by any "inflammatory" publications; therefore, no legitimate reason exists to keep the news from the public. California seems to treat too lightly the inhibition upon the free flow of information and the curtailment of newsmen's First Amendment rights and of the public's right to know.

A court, in protecting the integrity of its proceedings from those interferences which may accompany the exercise of certain activities otherwise protected by the First Amendment,<sup>71</sup> should apply any restraint as narrowly as possible to be consistent with the protection of both the integrity of the judicial proceedings and the exercise of individual constitutional rights.<sup>72</sup> In *Younger v. Smith*, the California Court of Appeal, Second District, noted:

The jurisdiction of courts to make pre-trial protective orders rests squarely on their implied and inherent powers. The necessity for such powers is well recognized. We do not deny it. Indeed our decision in the third consolidated matter, the Busch petition, rests on the application of such powers. At the same time, we must recognize that the concept of implied and inherent powers poses great dangers when, of necessity, their definition and application is in the hands of those who wield them. Judicial supremacy must rest on respect, not fear. Materially courts are the most impotent branch of government. If, through lack of restraint and by attempting to increase their powers unnecessarily they lose the respect which makes them effective, they may soon find that, as a practical matter, even powers that are now conceded to them, are unenforceable.<sup>73</sup>

In emphasizing their own implied and inherent powers, the California Courts' recent decisions overlook many of the relevant factors that must be taken into account prior to 'striking' a balance between the interests involved.<sup>74</sup> The decisions<sup>75</sup> are broader than necessary if they are to suggest that the mere publishing of

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70. 22 Cal. App. 3d at 73, 99 Cal. Rptr. 342, 350.

71. *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963).

72. *United States v. Robel*, 389 U.S. 258 (1967); *NAACP v. Button*, 371 U.S. 415 (1963); *Chases v. Robson*, 435 F.2d 1059 (7th Cir. 1970).

73. 30 Cal. App. 3d at 156, 106 Cal. Rptr. at 237.

74. See *infra* at —.

75. *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975); *Farr v. Superior Court*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1972).

a news release constitutes contempt without a finding of actual interference with a criminal defendant's right to a fair trial.

To date, there is no United States Supreme Court decision dispositive of the issues litigated in the California courts. In *Branzburg v. Hayes*,<sup>76</sup> the Supreme Court did face a closely related issue in dealing with the obligation of newspaper reporters to identify their sources in response to relevant questions during grand jury investigations. In that situation the Court held:

On the record now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.<sup>77</sup>

Thus, the Court clearly held that the First Amendment right of newsmen to gather news and to refuse disclosure of sources is outweighed by the state interest in the grand jury's duty to ferret out criminal activity. And in reference to issues similar to those recently litigated in the California courts, the Court noted in dictum:

. . . the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally<sup>78</sup>. . . . Newsmen have no constitutional right of access to scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.<sup>79</sup>

Although it is still uncertain whether this statement is indicative of the constitutional future of newsmen's First Amendment rights, California seems to be fully supportive of this view.<sup>80</sup> Mr. Justice

76. 408 U.S. 665 (1972) (5-4 decision).

77. *Id.* at 690-91.

78. It has been generally held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. *Pell v. Procunier*, 417 U.S. 817, 830-31 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972); *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965); *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883, 885 (3d Cir. 1958).

79. 408 U.S. at 684-85.

80. In *Allegrezza v. Superior Court*, 47 Cal. App. 3d 948, 951, 121 Cal. Rptr. 245, 247 (1975) (*hearing denied* July 3, 1975), the Court denied the press access to a hearing on the issue of the voluntariness of defendant's

Powell, in his concurring opinion suggests the limited nature of the holding in *Branzburg* and assures us that the "courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."<sup>81</sup> In *Times-Picayune Publishing Corp. v. Schalingkamp*,<sup>82</sup> Mr. Justice Powell, as Circuit Judge, granted an application for a stay of a Louisiana trial court's order restricting media coverage of trials of defendants accused of committing a highly publicized rape by holding:

The task of reconciling First Amendment rights with the defendant's right to a fair trial before an impartial jury is not an easy one. The Court has observed in dictum that newsmen might be prohibited from publishing information about trials if such restrictions were necessary to assure defendant a fair trial. (*Branzburg v. Hayes*, 408 U.S. 885). There was no indication in that opinion, however, that the standards for determining the propriety of resort to such action would materially differ from those applied in other decisions involving prior restraint of speech and publication.<sup>83</sup>

The basic principle distilled from the opinions expressed by the Justices of the Supreme Court is that a court can and should protect its processes from prejudicial outside interference; however, the Court has not at this time promulgated any rules directly regulating the activity of the news media.<sup>84</sup>

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confession on the basis that defendant would "likely" be denied a fair trial by pretrial publication of defendant's alleged confession. *See also Craemer v. Superior Court*, 265 Cal. App. 2d 216, 71 Cal. Rptr. 193 (1968).

81. 408 U.S. at 709-10.

82. 419 U.S. 1301 (1974).

83. *Id.* at 1307. *See supra* note 64.

84. The United States Supreme Court has agreed to consider this spring (1976) the constitutional validity of a pre-trial gag order which was issued on the basis of the clear and present danger test in the multiple-murder trial of Erwin Charles Simants. The order prohibited the press from reporting the defendant's confession and other matters potentially damaging to the defense. (Simants was found guilty on Jan. 17, 1976 and sentenced to die in the electric chair.)

Justice Blackmun, as Circuit Judge, stayed portions of the order but upheld those portions which barred disclosure of any confession or other statement that could harm the accused. In partially lifting the trial court's order restricting press coverage of pretrial proceedings, Mr. Justice Blackmun explained:

No persuasive justification has been advanced for those parts of the restrictive order that prohibit the reporting of the details of the crimes, of the identities of the victims, or of the testimony of the pathologist at the preliminary hearing that was open to the public.

The governing principle is that the press, in general, is to be free and unrestrained and that the facts are presumed to be in public domain. The accused, and the prosecution if it joins him, bears the burden of showing that publicizing particular facts will irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt.

The five justices (Chief Justice Warren E. Burger and Justices Blackmun,

Dicta in previous Supreme Court rulings suggest that the press's asserted claim to the newsmen's privilege will be judged on the facts of each case by the 'striking' of a delicate balance between the freedom of the press and the right of a defendant to a fair trial. Dicta in several cases indicate that the defendant's right to a fair trial outweighs the First Amendment rights of a newsmen;<sup>85</sup> but, prior to such a holding, past decisions would require that official action with adverse impact on First Amendment rights be justified by a public interest that is compelling or paramount.<sup>86</sup> Furthermore, the most recent opinions outlined above suggest the application of the clear and present danger test where First Amendment rights are concerned and a showing of irreparable harm if there is a prior restraint.

It still remains unclear whether California newsmen are being 'punished' for their publications or for their failure to comply with a court order and alleged interference with the administration of justice. If it is for the latter reasons, the finding of a prior restraint would be eliminated, and therefore, the necessity of showing irreparable harm. On the other hand, the accepted standard could become that a refusal to disclose confidential sources does not automatically interfere with the administration of justice but actual interference must be decided on the facts of each case. If the California approach actually constitutes a prior restraint, then the striking of a balance in favor of fair trial is insufficient without finding irreparable harm to the State's compelling interest in

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Powell, Rehnquist and White) who formed the majority in *Branzburg v. Hayes* all voted to reject the Nebraska press's request to ban the 'gag' order. *Nebraska Press Assoc. v. Stuart*, 96 S. Ct. 251 (1975) (Docket No. 75-817), 88 *Los Angeles Daily Journal* No. 239 at 1 (November 21, 1975); subsequently the Nebraska Supreme Court in *State of Nebraska v. Simants*, — Neb. —, 236 N.W.2d 794 (1975) (Charles Simants case) modified and reinstated the trial court's order limiting the ban to confessions and statements against interest.

85. *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969); *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958); *cert. denied* 358 U.S. 910 (1958); *Allegrezza v. Superior Court*, 47 Cal. App. 3d 948, 126 Cal. Rptr. 245 (1975); *People v. Sirhan*, 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972).

86. *Branzburg v. Hayes*, 408 U.S. at 700; *De Gregory v. Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966); *NAACP v. Button*, 371 U.S. at 439; *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *NAACP v. Alabama*, 357 U.S. 449, 464 (1958); *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

protecting a criminal defendant's right to a fair trial and the court's power to control its proceedings and officers.

### CONCLUSION

A fair resolution of the issues involved is of tantamount importance to the press, the public, the criminal defendant, and the courts. The high value placed on freedom of expression necessitates that any restriction be closely examined and that no restraints not justified by a clear necessity be suffered to develop. There should be actual evidence as opposed to speculation of a nexus between the alleged contemptuous conduct and any interference with a defendant's right to a fair trial and the court's power to maintain order in its proceedings.

The California courts suggest that the importance of the fair trial guarantee to criminal defendants is greater than the First Amendment rights of the press. *Farr* and *Rosato* are the only two California cases on point. The result in both cases is unacceptable in that there was no finding of actual interference with the administration of justice.

A comparison of the standard applied in California's recent treatment in citing newsmen with contempt for refusing to disclose confidential sources and its previous approach to publicity and its effect on the issuance of protective orders, contempt citations, and reversals of criminal convictions demonstrates an inconsistency.<sup>87</sup> Instead of relying on the clear and present danger test and a finding of actual interference, California resorts to a lesser standard: whether the publication creates a reasonable likelihood that the defendant will be denied a fair trial. A more precise standard should be applied before First Amendment rights are restricted.

Although it is difficult to measure the extent to which informers will be deterred from furnishing information and the extent to which the flow of news will be impaired when newsmen are required to disclose their sources, available data indicates that substantial reliance is placed by newsmen on confidential sources.<sup>88</sup>

It is not denied that the news media has the potential ability to interfere with a defendant's right to a fair trial, but under the

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87. See *infra*.

88. See affidavits filed by nationally known newsmen in Brief for Appellant, *In re Caldwell appeal docketed*, No. 26025, 9th Cir. April 17, 1970; *Branzburg v. Hayes*, 408 U.S. 665 (1972) *rev'g* *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970). *Farr* already claims that as a result of his honoring the confidentiality of his sources, his professional functioning has increased. Northrup Lecture *supra* note 15.

circumstances presented in the recent California cases this right was not in issue. In balancing the critical interests involved, newsmen should not be forced to disclose their sources or be held in contempt for refusing to do so until an actual nexus has been demonstrated between prejudicial publicity and the denial of a fair trial.

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