NEWSPERSON'S PRIVILEGE IN CALIFORNIA: A VIEW FROM THE SWEDISH PERSPECTIVE

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Journalists William Farr, Peter Bratt, and Jan Guillou, though separated by 7,000 miles and an ocean, share a common experience. Each staked physical and professional freedom on what was apparently a clear guarantee of the confidentiality of news sources, and each lost. This result triggered surprise and disappointment in both the California and Swedish press.

The courts of the United States may be unique in their expansive interpretation of freedom of expression,[1] and in the deference given to the American press, by according them such a preferred position in the law.[2] Thus, in the United States, it frequently has been the press which has stimulated debate over the relationship between the first amendment[3] and other constitutional rights and responsibilities.

The press assumes a similar role in Sweden; however, their constitutional guarantee of free press[4] predates the first amend-

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1. *See generally* Gitlow v. New York, 268 U.S. 625 (1925), in which the United States Supreme Court unanimously rebuffed an attempt to control expression by state law. The Court asserted that freedom of speech and press are among those fundamental rights protected against state interference by the Due Process clause of the 14th amendment. *See also* the concurring opinion of Justice Brandeis in Whitney v. California, 247 U.S. 375 (1927). The courts frequently have displayed great concern for the preservation of a free press. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967); Freedman v. Maryland, 380 U.S. 51, 56-57 (1965); Talley v. California, 362 U.S. 60, 64-65 (1960); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

2. The position of the press in constitutional law can be traced to Near v. Minnesota, 283 U.S. 697 (1931). *See also* Douglas, *Free Press and First Amendment Rights*, 7 IDAHO L. REV. 1 (1970), and Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533 (1950).

3. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

4. The Freedom of the Press Act of 1766 followed the development of the printing press and is the first written constitutional prohibition against government censorship. FREE-

ment. Conflicts over press freedom in Sweden may be neither so frequent nor heated as those in the United States; but any nation that offers a broad free press guarantee on the one hand, and a successful government prosecution in a "Pentagon Papers" type case[5] on the other, beckons examination.

Admittedly, there is a risk when suggesting a parallel between bodies of law that are products and functions of different societies. However, in the case of Sweden and California, where the areas of similarity in size, population, material wealth, and the vigorousness of the news media is substantial, the risk is justified.[6] Assuming that a need exists for a more precise definition of the newsperson's privi-

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DOM OF THE PRESS ACT (1766) (amended 1810, 1812, 1949, 1977) (Swed.). The Swedish Constitution includes four basic sections: the Instrument of Government, the Parliamentary Act, the Act of Succession, and the Freedom of the Press Act. *See* SWEDISH MINISTRY OF FOREIGN AFFAIRS, THE CONSTITUTION OF SWEDEN (1954). For a legislative history of the Press Act, *see* 46 H. EEK, 1766 ARS TRYCFRIHETSFORORDNING, DESS TILLKOMSTOCH BETYDELSE I RATTSUTVECKLINGEN (1943).

5. The IB Affair, Judgment of Mar. 14, 1974, Cir. Ct. App., Stockholm, [1974] Svea Hovrätt 3 [S.H.] DB37.

6. This suggestion of apparent similarity may offend those who abide by the usual distinction between common law and civil law systems, and who would hasten to categorize the Swedish system as a member of the civil law family. In fact, however, not only Swedish law, but all Scandinavian law defies easy classification. Legal scholars have invested much effort asking whether or not Scandinavian law belongs more to the common or civil law system. *See, e.g.*, ECKHOFF, RETTSVESEN OG RETTSVITENSKAP I USA 34ff (1953). The answers have been less than compatible. Some scholars find Swedish law not a part of the civil family. *See, e.g.*, Pontoppidian, *A Mature Experiment: The Scandinavian Experience*, 9 AM. J. COMP. L. 344, 345 (1960). Some find it a member of both families. *See, e.g.*, Schmidt, *Preface*, 1 SCANDINAVIAN STUD. L. 5 (1957). Some find it a member of the civil law family. *See, e.g.*, Sundberg, *Civil Law, Common Law and the Scandinavians*, 13 SCANDINAVIAN STUD. L. 219 (1969). Still others conclude that, while the question is "not meaningful," the answer is that there is no great difference between the Scandinavian and common law systems. *See* Gromard, *Civil Law, Common Law and Scandinavian Law*, 5 SCANDINAVIAN STUD. L. 27, 33, 38 (1961). The issue is further clouded by the fact that the private law of one system may properly belong to one family, and the constitutional law to another. For example, one can identify a family consisting of legal systems which possess the institution of judicial control and give the United States, Germany, and Sweden, but not England, a place in that family. *See, e.g.*, Malmström, *The System of Legal Systems*, 13 SCANDINAVIAN STUD. L. 127 (1969). In any event, five major criteria typically are employed in the categorization of legal systems: 1) the inspiration; 2) the degree of codification; 3) statutory interpretation; 4) the impact of precedent; and 5) the profession of persons prominent in the evolution of the system. It is on the basis of the foregoing criteria that the majority of scholars seem to have placed Scandinavian law somewhere between the common and civil law families, albeit closer to the civil. Indeed, many have been emphatic in rejecting the heritage required of a civil law system. *See, e.g.*, Lodrup, *Norwegian Law: A Comparison with Common Law*, 6 ST. LOUIS U.L.J. 520 (1961); Munch-Peterson, *Main Features of Scandinavian Law*, 43 L.Q.R. 366 (1927). From this confusion, the authors conclude that the distinctions between United States and Swedish law are not as great as a superficial common law and civil law comparison might suggest.

lege in California law, and that such definition must serve competing and compelling interests,[7] the purpose of this article is to compare the general pattern of relevant law in the United States, Sweden, and California as a prelude to the more narrow consideration of the California and Swedish journalist's abilities to protect their confidential news sources.

That Farr, Bratt, and Guillou suffered similar fates in their attempts to claim protection under the law does not diminish the importance of distinguishing their circumstances. On the contrary, as shall be discussed *infra*, their experiences sharpen the contrasts. Were Farr to be confronted in 1978 as he was in 1971, his fate would remain doubtful. Were Bratt and Guillou to face now the same test that defeated them in 1973, their prospects for success would be enhanced. In light of these projections, the broader purpose of this article is to ask how it is that a Farr remains in jeopardy, while a Bratt and a Guillou have gained security in the law. Answering that, an inquiry shall be posed as to what, if anything, California might learn from the Swedish example to give clarity and balance to the resolution of the controversy over the newsperson's privilege.

I. THE SWEDISH PRESS

Freedom of the press in Sweden is traced to the Freedom of the Press Act[8] (Press Act) that was enacted more than 200 years ago, abrogated during a brief authoritarian period,[9] and renewed in 1812 as a constitutional principle.[10] The Press Act, a "statute" of

7. The choice is often defined as one between the public interest in preventing and punishing crime, and the public interest in the free flow of information. The issue is further complicated because there is no agreement that requiring newspersons to reveal confidential sources has a negative impact on the flow of information. *See, e.g.*, Beaver, *The Newsman's Code, the Claim of Privilege, and Everyman's Right to Evidence*, 47 ORE. L. REV. 243, 251-52 (1968), and Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18, 43 (1969).

8. FREEDOM OF THE PRESS ACT (1766) (amended 1810, 1812, 1949, 1977) (Swed.). The Instrument of Government of 1809 includes the following references to press freedom:

> By freedom of the press is understood the right of every Swedish citizen to publish his writings without any previous interference on the part of public authorities, and not to be prosecuted afterwards on account of contents of his publication except before a regular court, and to be punished only if the contents are in conflict with a law enacted to preserve public peace without restricting public enlightenment . . . .

THE INSTRUMENT OF GOVERNMENT (1809) art. 86 (Swed.).

9. *See generally* BRUUN, PRESS LAWS AND PRESS CODES IN THE NORDIC COUNTRIES (undated).

10. *Id.* Because it is included in the constitution, the law can be modified only by con-

constitutional character, established the concept that freedom to publish is a civil right.

> In order to ensure free interchange of opinion and general enlightenment, every Swedish citizen shall have the right to express his thoughts and opinions in print, to publish official documents and to make statements and communicate information on any subject whatever, subject to the regulations set forth in this Act for the protection of individual rights and public security.[11]

The Press Act of 1766 consisted of only fourteen sections, proclaiming not merely that "the Press is free" but attempting to regulate in detail the relationship between press and government. Subsequent amendments[12] have produced an Act whose 123 sections comprise a complex scheme of press freedoms and liabilities,[13] allowing scant opportunity for judicial interpretation.[14] As a result, this combination of detail and constitutional status has served effectively to immunize the Press Act from tinkering by simple legislation, court decree, or administrative ruling.[15]It is this framework that elevates the Swedish press to its favored position in the law[16] and provides the source from which the protection of

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secutive votes of the Riksdag (Parliament) whose sessions have been interspersed by a general election.

11. This wording initially appeared in the Freedom of the Press Act of 1810. It has remained unchanged although the Act was altered in other aspects in 1812, 1949, and 1977. FREEDOM OF THE PRESS ACT (1810) (amended 1812, 1949, 1977) (Swed.).

12. The Act of 1812 adopted in substance the same pattern as the original Press Act, but with more provisions. FREEDOM OF THE PRESS ACT (1812) (amended 1949) (Swed.). However, the language of the Act of 1812 was ambiguous; as a result, its interpretation became increasingly complicated. This stimulated the preparation of the Act of 1949. *See* Eek, *Protection of News Sources by the Constitution*, 5 SCANDINAVIAN STUD. L. 16 (1961).

13. The Press Act provides not only press freedoms, but also detailed restraints that may be placed thereon. For example, in a case involving a publication entitled SCHOOL IS LYING, distributed at a public school by a communist youth organization, the Parliamentary Ombudsman upheld the authority of school officials to regulate its circulation, noting that the distributors failed to obtain the required permit to distribute, that the Press Act does not prohibit a permit system, and that school officials were motivated not by an objection to the publication's content, but by a desire to maintain order on the school grounds. *See* [1973] REP. JUSTITIEOMBUDSMAN 491 (Swed.).

14. Unlike the British and United States legal systems, the Continental countries have a tradition of codification with relatively little reliance on case law. Sweden is closer to that traditional Continental model than to the Anglo-American. In addition, the great detail of the Press Act precludes much judicial interpretation. *See* Eek, *supra* note 12, at 17, 18.

15. The Freedom of the Press Act, therefore, is comparable in its effects to a 'declaration of rights,' but one that goes into detail to an unusual extent. The declaration is binding upon the legislature as well as upon the executive power.

Id.

16. Press Act offenses are tried by jury. The jury system is not otherwise known in Sweden.

confidential news sources is derived.

It should be emphasized, however, that the Press Act is a double edged sword that serves not only to buffer the press from infringement,[17] but also establishes a rather specific checklist for press accountability.[18] The balancing of these dual functions often has proved a delicate task.

> Difficult problems of legislative technique and of statutory construction occur when the borderline is to be drawn between those actions of public authorities, which are permissible and must be defined in and based upon the Act, and the rights and freedoms of the press which the Act is meant to protect. The difficulties became particularly apparent when during the drafting of the Freedom of the Press Act of 1949 efforts were made to enhance the protection of news sources of the press.[19]

That the 1949 amendment to the Press Act failed to sufficiently enhance the protection of confidential sources is obvious from the 1973 imprisonment of journalists Bratt and Guillou. The move to amend and strengthen pertinent sections of the Swedish Constitution also attests to the Press Act's weakness in this area.[20]

Until the prosecution of Bratt and Guillou, many commentators believed Sweden's umbrella of press protections, particularly those aspects relating to confidential sources, to be "watertight."[21] The constitution, in fact, nurtured the freedom to give information by granting to the authors of newspaper and magazine articles, and to their sources of information, a right of anonymity.[22] Moreover,

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17. The Press Act includes an expression of presumption of innocence more comprehensive than that applied in ordinary criminal law. The judge is directed to

> remember that the freedom of the press is the basis of a free society, always consider the unlawfulness of topics and ideas rather than that of the expressions actually used, and acquit rather than condemn whenever there is any doubt.

FREEDOM OF THE PRESS ACT (1949) ch. 1, § 4 (Swed.). The rule often has been invoked by Swedish courts.

18. The types of unlawful printed communications are set forth in the Press Act, and include high treason, rebellion, insults against the King, dissemination of false rumors, imperilling national security, blasphemy, public immorality, and defamation. *Id.* ch. 7, § 4.

19. *See* Eek, *supra* note 12, at 18.

20. A Royal Commission was established in 1970 to develop a proposal that would include radio and television media in the Press Act.

21. *See* Eek, *supra* note 12, at 25. *See also* GROLL, PRESS LAW AND PRESS ETHICS IN SWEDEN 5 (1975); BRUUN, *supra* note 9, at 1.

22. *See* Eek, *supra* note 12, at 21. In a government report series, a report entitled BETANKANDE AV MASSMEDIEUTREDNINGEN, the reasons justifying recognition of a right to anonymity were enumerated:

> Regard for the social environment, family, superiors, friends, business acquaintances and the fear of moral or financial harassment from their side has exerted a tremendous pressure on the individual's freedom of speech. The right to anonymity represents a security outlet against this pressure and in many cases

the constitution provides further encouragement by shielding writers and informants from personal liability in libel actions and criminal investigations.[23]

The Press Act asserts that no printer, publisher or other person involved in the printing or publishing of printed material may disclose the identity of the author or of any person who may have provided information for publication, except with the permission of the author or the informant, unless required to do so by law.[24] Thus, there is an affirmative responsibility to respect anonymity. An improper disclosure of the identity of an informant or correspondent is a criminal offense.[25] The journalist's importance as a source of information may be limited, but it is obvious that his claim of anonymity will create a useful protection for his informants. That indirect buffering was the primary source of comfort for informants until 1949, when the Press Act was amended to provide that:

> Every person shall . . . have the right in all cases not otherwise provided for in this Act to make statements and communicate information on any subject whatever to the author or editor or to the editorial office, if any, of a publication with a view to have the matter published therein.[26]

The breadth of the protection was clarified in 1957 with another amendment. This amendment added to the 1949 passage the words: "or to any enterprise gainfully engaged in supplying news to a printed periodical."[27]

The right of confidential communication creates an immunity from legal responsibility for the informant. However, the information must be given with the intention that it be published. The immunity is not without its limitations, since there exist three major exceptions.

First, an informant may be prosecuted under criminal law if defamatory information is provided to a private person and has not

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makes it possible to express thoughts that deserve expression and to present facts that deserve presentation.

49 Statens Offentliga Utredningar 107 (1975) [hereinafter cited as SOU].

23. *See* Eek, *supra* note 12, at 20.

24. FREEDOM OF THE PRESS ACT (1949) ch. 3, art. 1 (Swed.). For a discussion of this right, *see* [1959] REP. JUSTIEOMBUDSMAN 75 [1959] (Swed.). *See also* SOU, *supra* note 22, at 26-28 (1975).

25. *See* Eek, *supra* note 12, at 21.

26. FREEDOM OF THE PRESS ACT (1949) ch. 1, art. 1 (Swed.).

27. *See* Eek, *supra* note 12, at 21.

been published.[28] If the defamatory material has been published, an action lies against the responsible editor and not the informant.

Secondly, an informant can be prosecuted if the information provided endangers national security. Such security is defined as the state's interest in preventing rebellion, treason, and espionage.[29] This rule was introduced in 1967 after a study by the Government's Commission for Criminal Jurisdiction, which concluded that the public interest in national security superceded the interest in informant protection.[30] Prior to the 1967 amendment, only a public official or civil servant could be prosecuted for communicating to the press information that jeopardized national security.

Third, persons holding public office or performing services for the state[31] are protected in the communication of information acquired by virtue of their official position, but only to the extent that the communication does not violate the Law on the Curtailment of the Right to Demand Official Documents, commonly known as the Secrecy Act.[32] The Secrecy Act provides for thirty-five closely defined exceptions to the general presumption in Swedish law that all government documents are subject to public scrutiny. If the duty of silence is imposed only by ordinance or agency regulation, the right of anonymity and the resultant immunity apply:

> A police officer . . . is prohibited from revealing information which he has obtained owing to his position. But this duty is imposed upon him by an ordinance (not a statute which has been approved by Parliament). Therefore, if a police officer passes information concerning the results of a criminal investiga-

28. FREEDOM OF THE PRESS ACT (1949) ch. 7, art. 3 (Swed.). *See also* SOU, *supra* note 22, at 107-11.

29. FREEDOM OF THE PRESS ACT (1949) ch. 7, art. 3 (Swed.); SOU, *supra* note 28.

30. *Id.*

31. For example, members of the armed forces.

32. Law on the Curtailment of the Right to Demand Official Documents, FREEDOM OF THE PRESS ACT (1949) ch. 2, art. 1 (Swed.). "[A]ll public documents may be published without any restriction whatever, unless otherwise provided by the Freedom of the Press Act." THE INSTRUMENT OF GOVERNMENT (1809) art. 86.

> To further free interchange of opinion and general enlightenment, every Swedish citizen shall have free access to official documents . . . . This right shall be subject only to such restrictions as are demanded out of consideration for security of the Realm . . . and for the prevention and prosecution of crime, or to protect the legitimate economic interest of the State . . . or out of consideration for the maintenance of privacy, security of the person, decency and morality. The specific cases in which official documents are to be kept secret, according to the aforementioned principles, shall be closely defined in special legislation enacted by the King and the Parliament.

FREEDOM OF THE PRESS ACT (1949) ch. 2, art. 1 (Swed.). "The term 'official documents' refers to all documents kept by a State or local government authority, whether received or prepared by such authority." *Id.* ch. 2, art. 2.

> tion in progress to a newspaper, with a view to publication, this action is privileged and the police officer cannot be prosecuted for neglect of duty, even if he admits the information came from him.[33]

While this immunity may be useful to those who provide information to the press, of equal vitality is the affirmative duty imposed on journalists to maintain the confidentiality of their sources. The right of anonymity provides the journalist not only with the opportunity to protect his informants, but also with a legal duty to do so.[34]

The legal obligation of the journalist not to reveal his sources does not fade during inquiry and interrogation by government officers. A government officer has no authority to question a journalist about news sources,[35] for the question would be an invitation to violate the anonymity requirement, subjecting the journalist to prosecution. Moreover, the officer who successfully elicites the identification of an informant by such inquiry might incur criminal liability for breach of duty.

The journalist's obligation to protect his sources can be altered only by the initiation of a formal proceeding during which the court determines that the journalist's presence as a witness is germane.[36]Because neither administrative officials nor the Parliament have the authority to cross-examine witnesses,[37] the witness-journalist may waive his obligation to shield confidential sources only in a court of law. Even in those circumstances, the journalist's obligation is modified only by carefully proscribed methods. When a freedom of the press offense[38] is at stake, no query can be raised regarding the identity of an article's author and the witness-journalist cannot be interrogated concerning an informant's identity.[39] When other than freedom-of-the-press issues are before the court, the judge may demand that the witness-journalist reveal confidential sources of information. However, before the judge can make

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33. *See* Eek, *supra* note 12, at 23.

34. It is a crime for journalists to reveal the identity of confidential informants, except in those circumstances specified by law. *See* K. MICHANEK, FREEDOM OF THE SWEDISH PRESS 3 (Current Sweden No. 20, 1974).

35. *Id.*

36. *See* the Swedish Court Procedure Act for the general requirement of citizens to appear as witnesses in court. THE SWEDISH CODE OF JUDICIAL PROCEDURE (1968) ch. 36, art. 1 (Swed.).

37. *Id.*

38. *See* note 18 *supra.*

39. *See* Eek, *supra* note 12, at 24.

such a demand, the rules of court procedure require that he make an in camera determination as to whether the journalist's answer will be vital to the conclusion of the litigation.[40] Such determinations have been infrequent in Sweden in both criminal and civil litigation.[41]

The journalist does not have the same precise testimonial privileges as do certain public officers, lawyers, doctors, clergymen, and others.[42] Therefore, in certain cases he may be called upon to name his sources, and in such circumstances his only legal basis for refusing to comply would be to maintain that his reply would amount to self-incrimination.[43] However, the restraint exercised by the courts in piercing the right of anonymity has made such confrontations between the court and Swedish journalists infrequent.

The concept of confidentiality also finds protection in a system of designated editorial responsibility[44] whereby writers and informants gain immunity from personal liability in libel actions and criminal investigations. In that system, only the editor designated to the Ministry of Justice can be held accountable for the content of his newspaper. The flow of information is thought to be enhanced by removing writers and informants from the immediate sphere of inquiry in many criminal and civil matters.[45]

> In press cases, therefore, no criminal investigation is necessary in order to find the culprit; a telephone call to the Ministry of Justice is generally enough. This rule relating to responsibility in itself excludes any inquiry into the news sources. The police have no business in the newspaper office or the printing works. This is also underlined by the rule according to which the editor is legally responsible even if he had nothing to do with the punishable article. Its content "shall be deemed to have been inserted with the knowledge and consent of" the editor. The presence or degree of his criminal intent becomes immaterial.[46]

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40. *See* THE SWEDISH CODE OF JUDICIAL PROCEDURE (1968) ch. 36, art. 1 (Swed.).

41. Michanek, a Stockholm journalist and chairman in 1974 of the International Federation of Journalists, states that "[i]n this respect, Swedish courts have applied an extremely restrictive notion of what is 'good practice'." *See* MICHANEK, *supra* note 34, at 4.

42. THE SWEDISH CODE OF JUDICIAL PROCEDURE (1968) ch. 36, art. 5 (Swed.).

43. *Id.* ch. 36, art. 6.

44. *See* GROLL, *supra* note 21, at 4, 7.

45. In instances where no responsible editor is registered with the Ministry of Justice, responsibility rests with the owner of the publication. If the owner's identity cannot be ascertained, the printer is liable. If the printing firm cannot be determined, the distributor is liable. This issue of responsibility is resolved at a preliminary stage of the trial. *See* Eek, *supra* note 12, at 20 n.7.

46. *See* Eek, *supra* note 12, at 20, 21.

II. THE UNITED STATES PRESS

Freedom of the press in the United States, as in Sweden, is founded upon the need for an informed public.[47] Unlike Sweden, however, the parameters of press freedom cannot be established by simple reference to a constitution and statutes.[48] In the United States, the inquiry must include the interpretation judges have given to the United States Constitution and applicable statutes. That interpretation has recognized that the flow of information is a prime objective of the first amendment.[49] Yet, such recognition has developed primarily from the perspective of disseminating rather than gathering information.[50]

In *Branzburg v. Hayes*[51] the United States Supreme Court identified the right of the press to gather information,[52] but the scope of that right remains unclear. There have been several rulings in which the United States Supreme Court has recognized a first amendment right to receive information.[53] However, the public's right to receive information has little meaning, absent a coexisting guarantee permitting the free flow of information. If the press has a constitutionally implied role[54] in the flow of information,[55]

47. *See* THE INSTRUMENT OF GOVERNMENT (1809), and the FREEDOM OF THE PRESS ACT (1949) (Swed.). "Nowhere in the world do the newspapers and the public have better opportunities of following in detail what the authorities are doing or not doing." BRUUN, *supra* note 9, at 1. *See also* the free speech opinions of Justice Holmes and Justice Douglas (Justices on the United States Supreme Court). The United States rationale was established not long after the American Revolution. "A popular Government, without popular information or the means of acquiring it, is but a prologue to a Farce or Tragedy; or, perhaps both." Letter from James Madison to W.T. Barry (Aug. 4, 1822) *reprinted in* 9 THE WRITINGS OF JAMES MADISON, 103 (Hunt ed. 1910).

48. *See* U.S. CONST. amend. I. "[No State shall] deprive any person of life, liberty, or property, without due process of law . . . ." *Id.* amend. XIV. The United States Supreme Court, in 1925, declared freedom of the press to be among those fundamental rights incorporated in the term "liberty" and thus, through the 14th amendment, protected from state interference. *See* Gitlow v. New York, 268 U.S. 625 (1925). *See also* ZAFREN, TESTIMONIAL PRIVILEGE FOR REPRESENTATIVES OF THE NEWS MEDIA: A SURVEY OF RECENT COURT DECISIONS, PROPOSED FEDERAL LEGISLATION AND STATE LAWS (Congressional Research Service, 1972).

49. *See, e.g.*, Rosembloom v. Metromedia, 403 U.S. 29 (1971). *See also* EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 7-15 (1966) and MEIKELJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 88, 89 (1948).

50. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946) and Near v. Minnesota, 283 U.S. 697 (1931); *see also* Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971).

51. 408 U.S. 665 (1972).

52. *Id.* at 681.

53. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753 (1972) and Martin v. City of Struthers, 319 U.S. 141 (1943).

54. *See, e.g.*, Associated Press v. United States, 326 U.S. 1 (1945).

55. The Supreme Court has placed particular emphasis on the free flow of information

one could conceivably detect a conjunctively implied first amendment right of the press to serve the public as information gatherer and communicator. Thus, the effectiveness of the United States press in its role of exchanging information depends upon the freedom to *give* information. From the press's viewpoint, the breadth of that freedom is measured by the anonymity it can assure to its sources of information.

Lacking the precise constitutional protection that is afforded news sources in Sweden, and ignoring state legislative safeguards,[56] the United States press must depend upon the broad language of the first amendment. That language was found to be insufficient when the Court in *Branzburg* held that the right to gather information does not carry with it the corresponding right to keep secret one's sources of news information.[57] Nor does it include the right to remain silent before a grand jury, regardless of the press's claim that the protection of the identity of its informants is necessary to guarantee the reporter's access to newsworthy information. The Court has taken the position that the press has no constitutional right of access to information superior to that of the general public.[58] This ruling, in effect, destroyed the mystique of a newsperson's privilege. The result is a tightening of first amendment rights, under the rationale that compelling state interest supercedes any incidental and indirect infringement that accompanies the disclosure of news sources.

Branzburg was a consolidation of three cases involving journalists that were called to testify before grand juries.[59] In each instance, the journalists argued for a form of qualified privilege. Earl Caldwell of the *New York Times* contended that his testimony could be required only by showing a compelling state interest;[60]

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in support of democractic ideals. *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64 (1964) and Stromberg v. California, 283 U.S. 359 (1931).

56. *See, e.g.*, CAL. EVID. CODE § 1070 (West Supp. 1976). Newsperson protection statutes also have been enacted in Alabama, Alaska, Arizona, Arkansas, Indiana, Kentucky, Louisiana, Maryland, Michigan, Montana, Nevada, New Jersey, New York, Ohio, and Pennsylvania.

57. Branzburg v. Hayes, 408 U.S. 665, 691-92 (1972).

58. *Id.* at 684. *See also* Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958) and United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954).

59. Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970); Branzburg v. Pound, 461 S.W.2d 345 (Ky. App. 1971); *In re* Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971).

60. Applying the test proposed in Caldwell, the finding of a compelling state interest required that:

(1) The 'information sought' must be demonstrably relevant to a clearly defined

Paul Pappas, a reporter for a Providence, Rhode Island, television station, espoused a similar argument.[61] Paul Branzburg of the *Louisville Courier-Journal* offered the most demanding proposal for a qualified privilege, claiming that he could not be required to disclose his sources unless the state first proved that such disclosure was necessary to avoid a direct, immediate, and irreparable harm to national security, life and liberty.[62]

The Court rejected all three claims of privilege and discounted the press's argument that denial of immunity would have a severe and negative impact upon freedom of the press. It was concluded that the argument was too "speculative"[63] to serve as a basis for interfering with the right of the grand jury to hear "every man's evidence."[64] The issue raised in *Branzburg* has stimulated much litigation and literature[65] reflecting the press's argument that compelled testimony threatens the journalist's ability to obtain and retain informants to provide newsworthy but sensitive information.[66] That chilling effect on the exercise of its first amendment rights, the press contends, is intolerable. The Court, however, was

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> legitimate subject of governmental inquiry . . . . (2) It must affirmatively appear that the inquiry is likely to turn up material information, that is (a) that there is some factual basis for pursuing the investigation, and (b) that there is reasonable ground to conclude that the particular witness subpoenaed has information material to it . . . . (3) The information sought must be unobtainable by means less destructive of First Amendment freedoms.

Brief for Respondent Caldwell at 82-84, Branzburg v. Hayes, 408 U.S. 665 (1972).

61. *Id.* Brief for Petitioner Pappas at 46.

62. *See* Brief for Petitioner The New York Times Co. at 58-63, New York Times Co. v. United States, 403 U.S. 713 (1971), *reprinted in* 2 THE NEW YORK TIMES COMPANY V. UNITED STATES, A DOCUMENTARY HISTORY 1146-51 (J. Goodale ed. 1971). *See also* Brief for Petitioner Branzburg at 44, Branzburg v. Hayes, 408 U.S. 665 (1972). Some form of a qualified privilege test has been adopted by lower courts. *See* State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974); Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974); Democratic National Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973); Baker v. F. & F. Investment, 470 F.2d 778 (2d Cir. 1972). Three of those cases, however, involved a journalist's refusal to reveal a source in a civil discovery proceeding. Brown v. Commonwealth involved a journalist who refused to disclose sources of an article about the crime that was published while testifying in a criminal trial. His refusal was upheld on the express ground that the inquiry was not material to the case.

63. Branzburg v. Hayes, 408 U.S. 665, 694 (1972).

64. *Id.* at 688.

65. *See, e.g.*, ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, THE FIRST AMENDMENT AND THE NEWS MEDIA, 9-20, 41-53 (Final report 1973); Note, *The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198 (1970); 64 J. CRIM. L. 218 (1973); Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970).

66. *See* Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1970); 6 HARV. C.R.-C.L.L. REV. 119, 126-27 n.35 (1970).

unmoved by "overwhelming evidence to support the claim that the use of confidential informants is vital to newsgathering,"[67] asserting that:

> On the records 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.[68]

Thus, in finding that an absolute privilege does not dwell within the language of the first amendment, the Court has left us with a right of ill-defined proportions. A qualified privilege was rejected by the majority opinion. In their dissents, Justices Stewart, Marshall, and Brennan favored a qualified privilege, while Justice Douglas ascribed to an absolute privilege. Justice Powell joined the majority, but allowed that "[t]he Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to gathering news or in safeguarding their sources."[69] The argument has been posited that Justice Powell did, in fact, adopt the concept of qualified privilege.[70] In a later case, Justice Powell found the opportunity to strengthen that contention by explaining that

> a fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not impaired.[71]

"[I]f Justice Powell adopts a qualified privilege for newsmen, what are its limits? This is, of course, the heart of the enigma."[72] The limits, as suggested by Justice Powell, are ascertained by reference to competing societal interests, which is a balancing process. By its nature, such a process of definition is afflicted with inherent risks of subjectivity. Thus, in *Branzburg*, the Court found that the right of the press to protect its sources is subservient to the state interest in preventing and punishing crime. Since *Branzburg*, some

67. Gunther, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 147 n.43 (1972).

68. Branzburg v. Hayes, 408 U.S. 665, 690-91 (1972).

69. *Id.* at 709 (Powell, J., concurring).

70. *See, e.g.*, Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 716-18 (1975).

71. Saxbe v. Washington Post Co., 417 U.S. 843, 859-60 (1974) (Powell, J., Brennan, J., and Marshall, J., dissenting).

72. *See* Goodale, *supra* note 70, at 717.

courts have applied all or parts of the qualified privilege test articulated by the *Branzburg* minority, and some courts have sought to test for no privilege at all.

> The cases cannot all be rationalized; indeed it would be foolish to try to do so. But they seem to be developing a qualified privilege similar to the one newsmen themselves proposed to the Supreme Court in *Branzburg*, a test substantially adopted by Stewart in his dissent. While Justice Powell declined to adopt this test, analysis indicates that his position is not far from Stewart's.[73]

It is interesting to note that what the Swedish journalist has achieved rather painlessly and with little constitutional limitation, the United States journalist is groping toward along the rocky road of case law. However, that is an accurate interpretation only upon the superficial comparison of Swedish and United States press law. While the "privilege" in Sweden is constitutionally compelled, it is only constitutionally implied in the United States, and even then only in a limited fashion. Nevertheless, the Swedish "privilege" is hardly absolute. Swedish press law also compels the balancing of one constitutional interest against another in an effort to determine which societal interests are superior to the press's ability to protect confidential sources. As in *Branzburg*, the superior interests in Swedish society are those of preventing and punishing crime.

Appearances, then, indicate that the *Branzburg* decision leaves the United States press in a similar situation to that of the Swedish media. The *Branzburg* majority did warn that "[o]fficial harassment of the Press undertaken not for the purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification,"[74] and Justice Powell's separate opinion asserted that testimony may be compelled only to serve the legitimate requirements of justice.[75] That qualification, however, is vague at best, and it is the precision of the Swedish law that is the key servant of their press. The Swedish journalist can be required to testify concerning his informants only in specified circumstances, and the burden of establishing the propriety of such compulsion is on the prosecutor.[76] The United States journalist discovers little specificity in *Branzburg*. Post-*Branzburg* courts, in fact, have resorted to a case-by-case balancing in an attempt to sort out the interests of the

73. *Id.* at 743.
74. Branzburg v. Hayes, 408 U.S. 665, 707 (1972).
75. *Id.* at 710 (Powell, J., concurring).
76. *See* text accompanying notes 34-55 *supra*.

press and the state. Those courts generally have construed immunity statutes narrowly, but have ignored the *Branzburg* suggestion to find a privilege in state constitutions and have rejected testimonial immunity in criminal cases.[77] Nevertheless, the results for the press have not been without some encouragement, for some courts have granted testimonial privilege when they find the state interest insufficient to support interference with the press,[78] and confidentiality has been less scathed in civil litigation.[79]

A ledger of winners and losers in the court does not measure the total interference with the role of the press. While the law in Sweden functions with a presumption against compelled testimony, many have suggested that *Branzburg*, in effect, stands for a presumption favoring compelled testimony. Such a presumption may be challenged only in the courts. This is a burden the Swedish journalist does not share with his United States counterpart.

III. THE CALIFORNIA JOURNALIST

It is contended that *Branzburg*, in fact, recognized a qualified privilege for journalists[80] and that subsequent courts have merely misread that decision. That analysis has won mixed acceptance in the spate of post-*Branzburg* cases, and there is, as one commentator conceded, "hardly unanimity on the point."[81] Absent any consistent recognition of even a constitutionally rooted qualified privilege,[82] the California journalist must turn to statutory immunity in

77. *See* Branzburg v. Hayes, 408 U.S. 665, 706 (1972); *see, e.g.*, Lightman v. State, 15 Md. App. 713, 294 A.2d 149 (Ct. Spec. App. 1972), *cert. denied*, 411 U.S. 951 (1973); People *ex rel.* Fischer v. Dan, 41 App. Div. 2d 687, 342 N.Y.S.2d 731 (*mem.*), *appeal dismissed*, 32 N.Y.2d 764, 298 N.E.2d 118, 344 N.Y.S.2d 955 (1973); United States v. Liddy, 354 F. Supp. 208 (D.D.C.), *motion for stay pending appeal denied*, 478 F.2d 596 (D.C. Cir. 1972).

78. *See, e.g.*, Standard Daily Review v. Zurcher, 355 F. Supp. 124, 134-35 (N.D. Cal. 1972).

79. *See generally* Comment, *Newsman's Privilege Against Compulsory Disclosure in Civil Suits—Toward an Absolute Privilege?*, 45 U. COLO. L. REV. 173 (1973).

80. It seems clear that five of the nine justices in *Branzburg* would not require a reporter's testimony in every instance; thus they granted a 'qualified newsman's privilege.' The standard varies from Justice Powell's apparent minimal requirement to the absolute position expressed by Justice Douglas.

Goodale, *supra* note 70, at 741.

81. *Id.* at 720.

82. Proponents of a qualified privilege suggest a three-point test for requiring disclosure of confidential sources: 1) relevancy; 2) compelling state interest; and 3) exhaustion of alternate sources of information. *See* note 60 *supra*. However,

> [t]his was the position urged . . . in *Branzburg* . . . while the court recognized a conditional First Amendment right not to disclose sources and while factually the requirements of relevancy and compelling state interest were met in that case . . . the court in *Branzburg* imposed no requirement that alternate sources for obtaining the information be exhausted.

order to shield confidential news sources from disclosure.

The statute, codified as section 1070 of the Evidence Code, emerged in 1935. Frequent amendments to that section attest to the difficulty of defining and solving the issue of confidentiality.[83] The most recent version of the statute declares that:

> (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.
>
> (b) Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.
>
> (c) As used in this section, "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

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Rosato v. Superior Court, 51 Cal. App. 3d 190, 216, 124 Cal. Rptr. 427, 445 (Ct. App. 1975), *cert. denied*, 427 U.S. 912 (1976).

83. The California statute initially was enacted as an addition to section 1881 of the Code of Civil Procedure which dealt with five other privileged relationships. CAL. CODE OF CIV. PRO. § 1881, 1935 Cal. Stats., ch. 532, § 1(6) (1935) (current version at CAL. EVID. CODE § 1070 (West Supp. 1978)). The statute was amended in 1961 to include television and radio reporters. 1961 Cal. Stats., ch. 629, § 1(6) (1961). The statute was repealed and re-enacted in 1965 as section 1070 of the Evidence Code. CAL. EVID. CODE § 1070 (West 1966) (amended 1971, 1972). The statute was amended in 1971 to protect newspersons employed at the time the information was obtained. Previously, the statute protected only newsperson's employed at the time the immunity was invoked. The 1971 amendment also deleted the requirement that the information have been published before the immunity could be invoked. CAL. EVID. CODE § 1070 (West Supp. 1978). In 1972, the statute was amended to expand the definition of "proceeding" in which the protection is applicable, CAL. EVID. CODE § 1070 (West Supp. 1978).

> 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.[84]

The core of protection offered by the present statute is the essence of the original form, for amendments have attempted merely to extend and clarify the initial immunity.[85] The language of section 1070 seems clear enough, but that apparent clarity has been misleading in its application by the courts. The statute provides an absolute immunity from contempt; this absolutism was recognized by the California Law Revision Commission which produced the original draft of the Evidence Code:

> Despite the absence of reliable evidence in the form of legislative history or judicial interpretation, the effect of the statutory privilege in California appears to be a *carte blanche* grant of an absolute and unqualified privilege to newsmen to refuse to disclose the source of any information procured for and used in the protected news media.[86]

Indeed, this expansive view of section 1070 has had a recent and forceful confirmation in the courts:

> [W]e believe the Legislature in enacting Evidence Code section 1070 recognized the importance of maintaining a free flow of information and intended that the statute be given a broad rather than a narrow construction. Accordingly, absent any constitutional or other limitation on the exercise of the privilege . . . we believe it extends not only to the identity of the source but to the disclosure of any information, in whatever form, which may tend to reveal the source of the information, and, as in the case of the privilege against self-incrimination, the burden is upon the person claiming the privilege to show that the testimony may tend to lead to that source. Though the burden is on the person claiming the privilege, it is not a heavy one.[87]

Yet, the courts have recognized that the immunity is subject to limitations, the most important one being constitutional in origin. The Supreme Court's decision in *Branzburg* suggests that section 1070

84. CAL. EVID. CODE § 1070(a)-(c) (West Supp. 1975).

85. *See, e.g.*, Cepeda v. Cohane, 233 F. Supp. 465 (S.D.N.Y. 1964) for a ruling to which section 1070 amendments subsequently responded.

86. *See* 6 CAL. LAW REVISION COMM'N REPORTS, A CALIFORNIA PRIVILEGE NOT COVERED BY THE UNIFORM RULES—NEWSMEN'S PRIVILEGE 481, 484 (1964).

87. *See* Rosato v. Superior Court, 51 Cal. App. 3d 190, 217-18, 124 Cal. Rptr. 427, 445 (Ct. App. 1975), *cert. denied*, 427 U.S. 912 (1976).

would not benefit the journalist who participated in or observed a criminal act, the Court asserting that:

> It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news source to violate valid criminal laws. . . . Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.[88]

The Court concluded:

> Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.[89]

Section 1070 was further restricted when the courts determined that its application would be an unconstitutional interference with the power of the judiciary to control its affairs.[90] Perhaps the most noteworthy collision between the immunity of the California journalist and the inherent power of the judiciary has occurred in *Farr v. Superior Court*.[91]

A reporter for the *Los Angeles Times*, Farr was covering the Manson murder case when he, on his own initiative, acquired a statement about one of the defendants. The statement was confirmed by two defense lawyers, to whom Farr pledged confidentiality. After publication of the story and conclusion of the trial, Farr was asked by the trial judge to reveal his source. Farr refused and

88. Branzburg v. Hayes, 408 U.S. 665, 691-92 (1972).

89. *Id.* The limitation has also been applied to the executive privilege of the President of the United States as exemplified by United States v. Nixon, 418 U.S. 683 (1974), and to legislative privilege according to Gravel v. United States, 408 U.S. 606, 628 (1972). The Swedish Press Act and supporting statutes recognize similar limitations on the ability of newspersons to protect the identity of news sources.

90. *See, e.g.*, Wood v. Georgia, 370 U.S. 375, 383 (1962).

91. 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (Ct. App. 1971).

was cited for contempt.[92] Not only was Farr's citation upheld by the court of appeal, but the California Supreme Court denied Farr's petition for hearing, and the United States Supreme Court denied *certiorari*.[93] Thereafter, Farr failed in a federal district court *habeas corpus* proceeding.[94] Farr was released from jail by Justice Douglas while his appeal of the *habeas corpus* denial was pending before the Court of Appeals for the Ninth Circuit.[95] Soon, Farr's state petition for *habeas corpus* was denied by the California court of appeal, but the court granted a hearing to ascertain whether "disobedience of the order is based upon an established articulated moral principle."[96] The hearing was conducted, and Farr was released. Los Angeles County Superior Court Judge William Levit determined that, because there was no strong likelihood that Farr would reveal his informants,[97] there was no basis for a continuing contempt citation.

Thus, Farr found eventual freedom, but there was no real resolution of the issues which originally placed him in jeopardy. In support of Farr's contempt citation, the superior court argued that disclosure of the identities of those court officers who had violated its *order re publicity* was necessary because of the compliance requirements with the Supreme Court mandate that trial courts must act affirmatively to assure a fair trial.[98] The superior court explained that:

> If Evidence Code section 1070 were to be applied to the matter at bench to immunize petititoner 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 . . . . It performed its duty by issuing the *order re publicity*. By peti-

92. *Id.* at 63, 99 Cal. Rptr. at 343.

93. 409 U.S. 1011 (1972).

94. Farr v. Pitchess, 409 U.S. 1243, 1244 (Circuit Justice Douglas, 1973).

95. *Id.* at 1243, 1245, 1246.

96. *In re* Farr, 36 Cal. App. 3d 577, 585, 111 Cal. Rptr. 649, 653 (Ct. App. 1974).

97. By reason of his commitment to the principle of confidentiality and to the promises he has made, there is no substantial likelihood that further incarceration of Farr will result in his compliance with the court's order to reveal the identities of his sources or otherwise serve the purposes of said order.

In re Farr, No. A 253 1561 (L.A. County, Cal. Super. Ct., June 20, 1974).

98. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966) (emphasis added).

> tioner's own statement that order was violated by two attorneys of record, of a list of six counsel in the case. Those attorneys were officers of respondent court. By petitioner's own statement the violations occurred because of his solicitation. Respondent court was both bound and empowered to explore the violations of its order by its own officers.[99]

The trial court concluded

> that section 1070 if applied to immunize petitioner from contempt would unconstitutionally interfere with the power and duty of the court . . . . The mandate of the United States Supreme Court . . . can be discharged only if that (trial) court can compel disclosure . . . .[100]

That conclusion has been the subject of much critical comment,[101] but the impact of *Farr* remains, its rationale recently confirmed in *Rosato v. Superior Court.*[102] Joe Rosato and others employed by the *Fresno Bee*[103] were involved in the publication of a news story which quoted extensively from a sealed grand jury transcript. The Superior Court of Fresno County had sealed the transcript and had issued an *order re publicity* which prohibited court officers from releasing or authorizing the release of any documents or evidence concerning the trials of a city councilman, a land developer, and a former planning commissioner, on counts of bribery and conspiracy.[104] When the trial court questioned Rosato and the others in an attempt to determine who had violated its orders, the journalists invoked section 1070 and refused to answer. Each was found in contempt and committed to jail, with execution of the sentence stayed pending appeal. The court of appeal affirmed in part and reversed in part.[105] While the appellate court agreed with the *Farr* rationale as a valid limitation on the application of section

99. Rosato v. Superior Court, 51 Cal. App. 3d 190, 221, 124 Cal. Rptr. 427, 447 (1975), *cert. denied*, 427 U.S. 912 (1976) (emphasis added).

100. *Id.* at 222, 124 Cal. Rptr. at 448.

101. *See, e.g.*, Goodale, *supra* note 70, at 733-34. The reliance on Sheppard v. Maxwell, 384 U.S. 333 (1966), to support the compelling of disclosure of sources in the interest of a fair trial is common, but misplaced. The decision in *Sheppard* was directed not against the press, but against the officers of the court, and provides no authority for direct restraints on the press. *See* 384 U.S. at 363.

102. Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976).

103. Ultimately cited by the superior court for contempt were reporters Rosato, William K. Patterson, managing editor George F. Gruner, and city editor Jim Bort.

104. Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976) (emphasis added).

105. *Id.* at 191, 124 Cal. Rptr. at 427.

1070, it also attempted to narrow the circumstances under which the limitation is invoked. The court stated that:

> While we cannot accept the view of petitioners that a court is totally impotent to proceed further once there has been a denial of implication by the court officers and by the press personnel, neither can we accept the view of respondent court that the protection afforded to the press by the privilege is totally emasculated by the necessity of the court to determine which of its officers violated the protective and seal orders. Consequently, we view the second limitation on the otherwise absolute protection afforded by the shield law . . . as being applicable only when the questions asked may tend to identify who, if anyone, *among those subject to a court's order*, may have violated it. The shield law still remains as a protection against the revelation of all sources other than court officers, and a reporter cannot be required to divulge information which would tend to reveal any source other than those court officers subject to the orders issued by the court.[106]

Accordingly, the majority, Presiding Justice Brown and Justice Gargano, affirmed certain of the contempt orders and reversed others, utilizing a question-by-question application of its test. Justice Franson concurred in the majority's broad view of section 1070 and its position that the court had a right of inquiry, but he found the majority's test misapplied in its question-by-question analysis. Such an analysis, he reasoned, was violative of "a qualified First Amendment and California constitutional privilege of nondisclosure which gives added weight to section 1070 and required respondent to engage in a delicate balancing process before it could question petitioners as to the source of their information."[107]

The *Rosato* decision, although hardly revolutionary in the debate over the newsperson's privilege, may be significant in an evolutionary sense as symbolic of movement away from the more primitive language of *Farr*. However, like many a halfway house, *Rosato* provides no real solution to the problem, and offers no lasting comfort to the press. Its essential contribution may be that it demonstrates that neither the courts nor the press are equipped with a clear understanding of the intent and meaning of *Branzburg*, and the status and impact of section 1070.

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106. *Id.* at 224, 124 Cal. Rptr. at 450.
107. *Id.* at 232, 124 Cal. Rptr. at 460. (Franson, J., concurring and dissenting).

IV. THE IB AFFAIR

In 1973, Swedish journalists discovered that their array of safeguards against the infringment of the flow of information and the revelation of confidential news sources was capable of penetration. The incident became known as the IB Affair.[108]

Journalists Peter Bratt and Jan Guillou embarked with caution upon a series of articles concerning the existence and activities of a previously secret Swedish intelligence agency, first weighing the legal risks they might incur.[109] The Press Act and the counsel of a penal law expert[110] reassured them of protection in this area; consequently, they proceeded with their series. The articles,[111] and a book,[112] asserted that the agency (IB) had gathered files on left wing organizations in Sweden and had ignored Swedish neutrality by assisting the United States Central Intelligence Agency. Assistance was given by focusing efforts in Eastern Europe and by aiding Israeli agents to break into the Egyptian embassy in Stockholm.[113] The publications also disclosed the names of IB agents and the locations of IB offices.[114] Bratt and Guillou expected that the articles and the book might subject them to charges under the Press Act,[115] but they did not anticipate criminal prosecution. Nevertheless, criminal prosecution was brought and the government alleged that the journalists had, by their publications, communicated national security information to foreign powers.[116]

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108. IB Affair, Judgment of Mar. 14, 1974, Cir. Ct. App., Stockholm, [1974] S.H. 3 D 337.

109. *Id.* at 4-9 and Judgment of Jan. 4, 1974, Stockholm Dist. Ct., [1974] Stockholms Tingsratt 8-23 [S.T.] B653/73.

110. Bratt and Guillou conferred with Professor Goran Elwin, whom the trial court identified as a penal law expert. *Id.* at 4-9 and Judgment of Jan. 4, 1974, Stockholm Dist. Ct., [1974] Stockholms Tingsratt 8-23 [S.T.] B653/73.

111. The articles, co-authored by Bratt and Guillou, were published in three issues of the *FIB-Kulturfront*, a weekly magazine.

112. P. BRATT & J. GUILLOU, IB AND THE THREAT AGAINST OUR SECURITY (1973). *See* SOU, *supra* note 22, at 113.

113. Judgment of Jan. 4, 1974, Stockholm Dist. Ct., [1974] S.T. 8-23, B653/73.

114. *Id.*

115. Professor Elwin told Bratt and Guillou that it might become necessary for them to face a libel action.

116. The charges were filed under Penal Code §§ 19:5 and 23:4. Section 19:5 states:

> A person who, with the intent of aiding a foreign power without authorization, obtains, transmits, gives or otherwise reveals information concerning a defense facility, arms, supplies, imports or other conditions, the disclosure of which to a foreign power can bring harm to the defense of the Realm, to the provisioning of the people during war or during extraordinary conditions caused by war, or otherwise to the security of the Realm, shall be sentenced, whether the information is correct or not, for espionage to imprisonment for at most six years. The same shall apply, if a person, with the intent just mentioned, without authoriza-

Bratt, Guillou, and an informant[117] were found guilty of espionage and the journalists received one year sentences.[118] Guillou brought his case to the court of appeal, which upheld the conviction but reduced the sentence to ten months.[119] The incident created controversy over a number of issues, among them the decisions of the trial and appellate courts finding that an implied rather than an actual intent to aid foreign powers is sufficient to meet the requirements of the espionage laws.[120]

Two issues, however, served to raise the IB Affair to a test of press-government interests. The first issue was the government strategy to prosecute under the Penal Code rather than the Press Act.[121]The second issue was the statement by the court of appeal that Guillou's criminality rested not in the publication of the information, but in the gathering of the information.[122] These two actions denied Bratt and Guillou the protections that they anticipated would be available to them as defendants under the Press Act.

There is no doubt that the journalists could have been charged under the Press Act:

> The Freedom of the Press Act specifically prescribes what are offenses under this law and some of the more common of

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> tion produces or is concerned with a writing, drawing or other object containing such information.

THE PENAL CODE OF SWEDEN (1972) ch. 19, § 5 (Swed.). The Code further provides:

> Punishment provided in this Code for an act shall be inflicted not only on the one who committed the act, but also on anyone who furthered it by advice or deed. A person who is not regarded as the actor shall, if he induced another to commit the act, be punished for instigation of the crime or for being an accessory to the crime . . . . Each accomplice shall be judged according to the intent or carelessness attributable to him. . . .

Id. ch. 23, § 4.

117. The informant was Hakan Isaksson, once on the payroll of the intelligence organization.

118. Judgment of Jan. 4, 1974, Stockholm Dist. Ct., [1974] S.T. 8-23, B653/73.

119. Judgment of Mar. 14, 1974, Cir. Ct. App., Stockholm, [1974] S.H. 4-9 DB37.

120. Judgment of Jan. 4, 1974, Stockholm Dist. Ct., [1974] S.T. 8-23, B653/73. It has been suggested by Justice Gistaf Petren of the Swedish Supreme Administrative Court that the IB Affair provided evidence that existing espionage statutes were too vague. *See* Petrén, *IB Affaren: De Viktiga Fragorna*, Svenska Dagbladet, Dec. 3, 1973, at 1, col. 3.

> 121. As to the information contained in the book . . . the Svea Hovratt ruled that Bratt's case should be tried in accordance with the press laws. As a consequence Bratt cannot be tried by the circuit court (Svea Hovratt) and cannot be kept in confinement by order of the Attorney General. As to the procurement of the information later to be published in FIB-Kulturfront this constitutes cause for prosecution and Bratt should be tried in accordance with the criminal law.

See SOU, *supra* note 22, at 112-16.

122. Judgment of Mar. 14, 1974, Cir. Ct. App., Stockholm, [1974] S.H. 4-9 DB37. "The alleged illegal procurement of information forwarded to the magazine does not fall under the regulations of the press law." *Id.*

> these are mentioned here. One category includes various forms of libel and defamation, racial prejudice, treasonable writing and the spreading of false rumors which may harm the country. Another category embraces the publication of secret documents or the disclosure of information which may threaten national security . . . .[123]

By utilizing the Penal Code for its charges, the prosecution avoided certain procedures which would have accompanied a Press Act trial, such as a determination of guilt by jury.[124] The prosecution also restricted the application of aids that might otherwise have been available to Bratt and Guillou. Examples of such aids are the right of anonymity and the system of designated editorial responsibility.[125] By limiting Guillou's criminality to his role as information gatherer, the court of appeal ignored the fact that Guillou was a staff member of the magazine which published the offending articles and characterized him as an informant rather than an author. This subjected him to a Press Act exception by which espionage case informants may be tried under the Penal Code.[126]

The impact of the IB Affair was immediate. Not only did the incident result in a piercing of the once secure confidentiality of news sources and right of anonymity, but the investigation also prompted a police search of the magazine's editorial offices. Press Ombudsman Lennart Groll stated that this was "something which you thought was impossible according to the rules of anonymity."[127] Groll further stated:

> We are dealing with a very difficult subject of striking a balance between the state and the interest of free flow of informa-

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123. THE SWEDISH INSTITUTE, FREEDOM OF THE PRESS IN SWEDEN (1973).

124. *See* note 16 *supra*.

125. *See* text accompanying notes 33-46 *supra*.

> According to the press law, only the publisher is generally responsible for the contents of a periodical . . . . Prosecution of the informant is not supposed to be in lieu of prosecution of the publisher in a press law suit, but should be carried out simultaneously . . . . As to the newspaper articles in question, there have been no charges brought against the publisher. The lack of such charges does not effect Guillou's grade of responsibility.

SOU, *supra* note 22, at 112-16.

126. FREEDOM OF THE PRESS ACT (1949) ch. 7, art. 3 (Swed.). *See also* Judgment of Mar. 14, 1974, Cir. Ct. App., Stockholm, [1974] S.H. 4-9 DB37.

> A person giving information to a publisher or a news agency for publication is generally exempt from responsibility. According to the exception listed in Ch. 7, Art. 3:2 of the Press Law, a person who informs another person of information constituting espionage or other crime against the national security can be prosecuted in accordance with the general criminal law.

SOU, *supra* note 22, at 112-16.

127. GROLL, *supra* note 21, at 5.

> tion . . . . One and a half years ago, I was emphatically stating that news sources in Sweden were very well protected and that, in fact, the prosecutors and the police never tried to investigate who had given information which was printed in a newspaper . . . . [The IB Affair] called that contention into question.[128]

To the credit of the government, resolution of those questions has not been left to future prosecutorial forays. A Royal Commission at work on a revision of the Press Act was given the task of resolving questions raised by examining the issues in the IB Affair and proposing strengthened protection for news sources. The Commission completed its work in mid-1975 and produced a 346 page report.[129] This report examined all aspects of press law in Sweden and proposed extensive amendments to the constitution regarding mass media, its protection, and its regulation. The amended law was effective in January of 1978.[130] The IB Affair, the rules pertaining to informant protection, and the right of anonymity consumed much of the Commission's attention.[131] The Commission determined that informant protection and the right of anonymity are the most vital aspects of Sweden's Freedom of the Press Act,[132] and directed much of its effort toward strengthening those aspects through clarification. The new Press Law more precisely defines those persons to whom the informant protection and the right of anonymity accrue:

> [T]hat is, everyone who somehow contributed to material which has been distributed or is to be distributed via one of the media. The above applies regardless of which role they played and regardless of whether the material was distributed or not.[133]

Perhaps the most significant step taken by the Commission—and this is clearly in response to the IB Affair—is the application of the right of anonymity to the routine procurement of information, re-

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128. *Id.*

129. SOU, *supra* note 22.

130. Because the proposals are in the nature of constitutional amendments, the votes of two Parliaments, separated by Parliamentary elections, are required to make them effective. A first affirmative vote was concluded in late Spring 1976. Parliamentary elections were scheduled in September 1976, and a second affirmative vote followed soon thereafter. Although significant, the amendments leave much of the press law unchanged, and a second commission has been appointed to draft a complete and comprehensive substitue for the amended press law. That commission will report to the Parliament in 1981. Correspondence with Justice Gustaf Petrén of the Swedish Supreme Administrative Court (Sept. 7, 1976) and with Lennart Groll, Swedish Press Ombudsman (Oct. 20, 1977).

131. *See, e.g.*, SOU, *supra* note 22, at 26-28, 37-40, 107-20.

132. *Id.* at 107-20.

133. *Id.* at 37-40.

moving that activity from the sphere of criminal law prosecution.[134]

The Commission responded to the IB Affair in two other instances. First, the Commission proposed that espionage prosecutions be limited to those circumstances in which the act was clearly deliberate. Acts unintentional or not clearly deliberate would be prosecuted as a lesser crime defined as the unauthorized distribution of secret material.[135] The second proposal by the Commission would limit prosecution of these lesser crimes to special press courts which would assess the intent of the informant in determining guilt.[136]

Had these propositions been the law in 1973, it is unlikely that Bratt and Guillou could have been similarly prosecuted. Although it may be of little comfort to a journalist who has spent time in jail, at least Bratt and Guillou may be secure in the knowledge that their misfortune triggered a movement resulting in affirmative changes in Sweden's press law.[137]

V. CONCLUSIONS

As much as the Swedish and American press are remarkably similar in their public roles, their energy, and their high positions in their respective constitutions, a major advantage does inure to the Swedish journalist. That most persistent gadfly of the newsperson's privilege in the United States, the grand jury subpoena,[138] is unknown in Sweden.[139] The absence of that process simplifies the task of the Swedish journalist who seeks to shield a confidential source, and simplifies legislative drafting of such laws under which a shield might be claimed.

There are other obvious dissimilarities that could possibly lead an observer to query whether a Farr or Rosato would find a more comfortable fate under the laws of Sweden. However, the better question would be whether there could exist the circumstances in Sweden which gave rise to the *Farr* and *Rosato* cases; such circumstances arising not so much from differences in the respective legal systems, but rather from a difference in the "rules" by which Swed-

134. *Id.*
135. *Id.*
136. *Id.*
137. Correspondence with Swedish Press Ombudsman Lennart Groll (Oct. 27, 1975).
138. *See, e.g.*, Tinling, *Newsman's Privilege: A Survey of the Law in California*, 4 PAC. L.J. 880, 887 (1973).
139. The issue of prejudicial publicity seldom arises in Sweden because the press voluntarily, and often faithfully, adheres to a code that limits reporting of criminal trials.

ish journalists conduct their business.[140] And are there sufficient parallels to be drawn from the *Farr* and *Rosato* cases, which subjected newspersons to coercive penalties, and the *Bratt* and *Guillou* cases which subjected the newsperson to punitive actions? To that last inquiry, one can only respond that, in its impact on freedom of the press and the flow of information, the coercive and the punitive penalty leaves little room for choice. Indeed, the distinctions that arise due to the presence or absence of the grand jury, the manner in which journalists pursue their trade, and the intricacies of the respective legal systems are, for the issue of newsperson's privilege, only those of degree. Each system begins with the premise that news sources are worthy of protection. Each system balances societal interests in defining the scope of that protection, and, ultimately, subjects the privilege in some manner to the requirements of the administration of criminal justice. The result in Sweden is an affirmative protection for the informant, qualified only by precisely drawn exceptions imposed upon the journalist as well as the government. By contrast, the result in California is a privilege or immunity to be claimed not by the informant, but by the journalist, absolute on its face, but, in actuality, awash with qualification and confusion. To compound the uncertainty, the limits of California's section 1070 have been determinable only on a case-by-case or, as in *Rosato*, on a question-by-question analysis.[141] Therein lies the primary flaw of section 1070. Like the Swedish press, which finds its news source protection rooted in the constitution, the California press must seek final resolution of the confidentiality debate in the recognition of a qualified privilege in the United States and/or California Constitutions. However, notwithstanding the contentions of some commentators and jurists,[142] even a qualified privilege has fallen short of acceptance in either *Farr* or *Rosato*.[143] The California journalist, therefore, finds it difficult, if not impossible, to anticipate the circumstances under which the immunity of section 1070 will be available. The absence of such clarity, as well as the absence

140. The grand jury system is not in use in civil law countries.

141. Rosato v. Superior Court, 51 Cal. App. 3d 190, 242-47, 124 Cal. Rptr. 427, 454-59 (1975), *cert. denied*, 427 U.S. 912 (1976).

142. *See, e.g.*, Goodale, *supra* note 80, and *id.* at 231-41, 124 Cal. Rptr. at 459-66. (Franson, J., concurring and dissenting).

143. "Essentially, our colleague in his dissent is arguing petitioner's position that this court should adopt a test which has already been rejected by the United States Supreme Court . . . ." Rosato v. Superior Court, 51 Cal. App. 3d 190, 216, 124 Cal. Rptr. 427, 444 (1975), *cert. denied*, 427 U.S. 912 (1976).

of the recognition of a constitutionally rooted qualified privilege, reduces the position of the California journalist to a level less than that of their Swedish counterpart.

The Swedish example does not suggest that its laws would be kinder to a Farr or a Rosato, nor does it suggest that close parallels must be found in the *Farr, Rosato*, and IB Affair cases in order to profit from their recounting. The essence of these cases is neither in the similarity or dissimilarity of their circumstances, nor in the procedures by which they were decided. The essence rests in the fact that each case is indicative of the legal environment within which the journalists of the respective systems now function. *Farr* and *Rosato* are indicative of uncertainty. The IB Affair and its aftermath are indicative of more positive attributes. What the Swedish example should suggest to the California legislature, therefore, is not to borrow the words of Swedish law, but rather to borrow the specificity of its structure and the uniqueness of its approach. What is suggested is not the mere amendment of section 1070, but the enactment of a comprehensive statute which specifically details the exceptions to the newsperson's privilege. The gain for the press in California would be a better notice of its rights, duties, and liabilities regarding the protection and disclosure of confidential news sources. The codification of a qualified privilege has operated to the advantage of the Swedish journalist. A similar precision in the California law would be of no less a benefit to the California journalist.