Comments

NEWSMAN'S IMMUNITY STATUTE—A COMPARISON OF LEGISLATIVE INTENT TO STATUTORY FORM

In May, 1970, the Indiana Supreme Court[1] affirmed a lower court's decision which included in it a commentary on the scope and application of an Indiana statute granting newsmen immunity from being forced to disclose their sources of information before a judicial body.[2] The relevant facts of the case are that Buford Lipps and two others were charged with the robbery of a cocktail lounge in Marion County, Indiana, during which two police officers and the bartender were wounded and a fourth hold-up man was killed. While Lipps was awaiting trial, the wife of one of the gunmen contacted a newspaper reporter. She told the reporter, Richard Johnson, that her husband and Lipps wished to speak with him. At their request, Johnson arranged for an interview to be held in a jury room of the criminal court. During this interview Lipps confessed to shooting the bartender.

The police were aware of the interview and during the trial the

1. Lipps v. State, — Ind. App. —, 258 N.E.2d 622 (1970).
2. BURNS IND. STAT. § 2-1733 (1968 Repl.).

2-1733. *Newspapers, television and radio stations-Press Associations-Employees and representatives-Immunity.*

Any person connected with a weekly, semi-weekly, triweekly or daily newspaper . . . shall not be compelled to disclose in any legal proceedings or elsewhere the source of any information procured or obtained in the course of his employment . . . whether published or not published in a newspaper . . . by which he is employed.

prosecution called Johnson to testify as to what had transpired. Defense counsel objected, claiming among other grounds, that the Indiana statute granted Johnson immunity from contempt charges in refusing to disclose his sources of information. The court held that Lipps did not have standing to object under the statute as it created a right personal to the newsman which only he could invoke. Lipps was convicted on the basis of the admission. *Lipps v. State*, — *Ind. App.* —, *258 N.E. 2d 622 (1970)*.

This decision raises complex evidentiary and constitutional problems. There exists an evidentiary right to everyman's testimony. This right must be sustained to effectuate the administration of justice for all persons. Counterbalancing the evidentiary need is the first amendment guarantee that Congress shall pass no laws abridging the freedom of the press. Inherent in freedom of the press lies the public concern for safeguarding the right to be well informed during periods of social and political turmoil. To help insure a well informed public, California has enacted an immunity statute similar to that involved in *Lipps*.[3] Its scope also limits the protection of news sources by placing the ability to invoke the immunity exclusively in the hands of newsmen. The purpose of this discussion will be to evaluate the need to protect the identity of sources of information from disclosure by extending the immunity statute to both newsmen *and* their sources.[4] Also to be considered

3. CAL. EVID. CODE § 1070 (West 1966).
Newsman's refusal to disclose news source.
A publisher, editor, reporter, or other person connected with or employed upon a newspaper . . . cannot be adjudged in contempt by a court, the Legislature, or any administrative body for refusing to disclose the source of any information procured for publication and published in a newspaper.
Nor can a radio or television reporter . . . be so adjudged in contempt. . . .

4. It is not pertinent to the discussion to deal with arguments for or against the adoption of a privilege except where these arguments are necessary in unearthing legislative intent. For some excellent discussions of rationales both supporting and opposing the creation of a newsman's immunity statute see: Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18 (1969-1970); Note, *The Right of a Newsman To Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61 (1950); Note, *Privilege of Newspapermen to Withhold Sources of Information from the Court*, 45 YALE L.J. 357 (1935).
In investigating California's statute and the possible need for its amendment, other questions arise that will not be dealt with but should be acknowledged. The most striking is whether the immunity should be

is the equally basic need to protect society from abuse of the immunity by unknown libelers and the infringements placed on the interests of justice by such an extension of the statute.

California Legislative Intent in Enacting the Newsman's Immunity Statute

California originally enacted its first newsman's immunity statute in 1935.[5] A 1961 amendment expanded the statute to include radio and television reporters.[6]

The first statement of legislative intent was made in a California Senate Joint Resolution in 1961. Its purpose was to urge the United States Congress to establish a federal statute granting an immunity to newsmen. In reference to the free exchange of information as being a bulwark of democracy, the Resolution stated:

> . . . [I]t is safe to say that there have been countless misdeeds by public officials brought to light only because someone with knowledge of wrongdoing passed the information on to such a reporter of the news, secure in the knowledge that his confidence would be respected . . . [w]ithout the privilege of keeping secret his sources of information, such a reporter of the news would soon find that his sources of information had dried up, thus severely limiting his effectiveness . . . .[7]

The Resolution points to the need for making informants feel secure by insuring that their identities will remain confidential when they come forward with information in the public interest. This, in turn, would encourage continued disclosures to the press and ultimately produce a more informed public.

In 1964 the California Law Revision Commission undertook a study[8] of the three arguments that journalists most often expound in support of the newsman's immunity. First, the newsmen argued

---

absolute. To be consonant with its avowed purpose, should there not be limitations as to cases involving either hiding the identities of suspected criminals or in cases of "overriding national interest"?

The California statute limits protection to newsmen only if the information is published. Should not the immunity extend to news gathering as well to be compatible with its purpose? Who qualifies as a newsman and what is the scope of newspaper? Does this include underground newspapers or newspapers of extremely limited circulation?

5. Cal. Code Civ. Proc. § 1881(6) (West 1955).

6. Cal. Evid. Code § 1070 (West 1966).

7. S.J. Res. 41, Stats. & Amends. to the Codes, 1961 Reg. Sess., chap. 211, p. 5004.

8. *A California Privilege Not Covered By The Uniform Rules-Newsmen's Privilege*, 6 Cal. Law Revision Comm'n., 481-508 (1964) (herein after cited as Cal. Comm'n.). The Proposal as submitted was rejected by the state congress and Cal. Evid. Code § 1070 remained substantially intact.

that immunity protection was required for the maintenance of a free press. Secondly, it was submitted that legal recognition of the immunity was in the public interest for in the absence of a statutory privilege unprotected sources would disappear, vitally curtailing the flow of news to the public.[9] Lastly, the journalists argued that their code of ethics required them to remain silent in order to protect their sources of information.[10] The Commission impliedly rejected the argument based on the journalists' code of ethics.[11]

The first amendment argument that statutory protection was necessary for the maintenance of a free press was also rejected.

> The attempted tying-in of newsmen's confidence statutes to a First Amendment free press argument is wholly without merit because there is no restraint, actual or implied, imposed by denial of a statutory privilege.
>
> In the newsmen's favor is the fact that they frequently do perform a substantial public service . . . . Thus, in a particular case it may be in the public interest to protect the source of a newsman's information.[12]

The Commission recognized only the public policy argument as being valid.

> [T]he primary purpose of the proposed rule is to protect the identity of informants so as to maintain confidential sources of information considered of interest to the public.[13]

Thus, the only valid justification the Commission found in support

---

9. *Id.* at 496. Newsmen also point to the public service they perform by exposing graft and corruption discovered through these confidential sources. They emphasize that the threat of exposure works as a powerful deterrent to such abuses of public office, and this deterrent would be missing absent protection.

10. Note, *Privilege of Newspapermen to Withhold Sources of Information from the Court*, 45 YALE L.J. 357, at 360 n.24 (1935).

11. Although extension to newsmen of a privilege of confidentiality appears to provide protection for persons in that occupation, in reality it is the informants who are actually protected. . . . CAL. COMM'N., *supra* note 8, at 499.

The question of privilege based on the code of ethics has been dealt with in several jurisdictions having no statute, and all have soundly rejected the principle. *In re* Wayne, 4 Haw. 475 (D. Haw. 1914) (holding that such a contention is untenable and must yield when in conflict with the interests of justice); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911) (such a rule is substantially a promise not to obey the law); State v. Buchanan, 250 Or. 244, 436 P.2d 729 (1969) (granting the privilege is a violation of equal-protection under the 14th amendment).

12. CAL. COMM'N., *supra* note 8, at 499.

13. *Id.* at 506.

of the immunity was that the public interest would be enhanced by protecting the identity of informers, as the informer would thereby be encouraged to come forward with information the public might not otherwise receive. The resulting full disclosure would produce a more informed public on matters of public interest.[14] The proposition remains that the statute has been enacted for the purpose of insuring the confidential status of an informant's identity.

CASE LAW AND OTHER MATERIAL REFLECTING ON POSSIBLE JUSTIFICATION FOR EXTENDING THE IMMUNITY STATUTE TO THE INFORMER AS WELL

California case law is extremely limited in the area of the newsmen's immunity. Only three reported cases deal with the question, the earliest being *People v. Durrant*[15] in 1897. The facts in *Durrant* are similar to those in *Lipps*. The defendant tried to halt the testimony of a reporter that included incriminating statements made by the defendant to the reporter. The ruling, being pre-statute, held that such a claim "scarcely merits comment."[16]

A second 1897 case, *Ex Parte Lawrence*,[17] involved a refusal by two news reporters to testify before a state senate investigating committee as to the sources of information that led to a series of articles charging state senators with bribery. Their claim of privilege based on their promise of confidentiality to the source was refused by the California Supreme Court.

In re Howard[18] is the only case that deals with the interpretation

---

14. The Commission's conclusion that first amendment guarantees were not involved is tenuous. Admittedly, forced disclosure may not be a *per se* violation of first amendment rights. However, the accepted argument that compelling disclosure has a detrimental effect on the public right to have full information on public affairs, is inextricably bound up in first amendment rights, as the following investigation into available case law will prove.

The Commission further claimed that reason dictated against the granting of any special privilege for newsmen, but presumed a congressional desire for some protection based on the 1961 Senate Joint Resolution cited herein note 7. It was therefore, with reluctance that the proposal was submitted.

15. 116 Cal. 179, 48 P. 75 (1897).

16. *Id.* at 220, 48 P. at 86.

17. 116 Cal. 298, 48 P. 124 (1897). After the court ruled that the information sought was relevant to the committee's investigation, the reporters were adjudged in contempt, the court saying:

> It cannot be successfully contended and had not been seriously argued, that the witnesses were justified in refusing to give these names upon the ground that the communications were privileged. [Cal.] Code Civil Proc. § 1881.

Id. at 300, 48 P. at 125.

18. 136 Cal. App. 2d 816, 189 P.2d 537 (1955). The reporter was called upon to testify at a hearing to determine whether a preliminary in-

of California's immunity statute. However, the question in *Howard* was whether a newsman's act of quoting statements attributed to the defendant acted as a waiver of the newsman's immunity from forced disclosure. The court adopted a liberal interpretation of the statutory wording and held no waiver. The importance of this decision lies in the fact that the court, by interpreting the statute liberally, at least impliedly recognized the importance of protecting the confidential relationship whenever possible. Indeed, the holding is especially noteworthy in light of authority demanding that statutes granting privileges in derogation of the common law be strictly construed.[19]

Decisions in sister states interpreting their immunity statutes are limited in number and relevancy to the issue here.[20] A 1963 Pennsylvania decision, dealing with the interpretation of the scope of the word "sources" in that state's immunity statute did, however, touch upon the question of what was the Pennsylvania legislative intent in enacting the statute. The court held that public policy interests demanded that the statute be liberally construed so as to provide the greatest latitude in protecting newsmen's sources.[21] While claiming that the first amendment does not include the right to refuse disclosure, the court did recognize that news from these sources would cease if newsmen could not fully and completely protect the sources of information, and that it was vitally important that this public shield be preserved. The court continued by saying that

---

junction should be issued against a striking union. The statements in question were allegedly made by a union official in direct defiance of a temporary restraining order that had been obtained.

19. State v. Donovan, 129 N.J.L. 478, 30 A.2d 421, 426 (Sup. Ct. 1943) (Statutes in derogation of the common law must be strictly construed, and that courts are not to infer legislative intentions that alter the common law principles further than expressed or absolutely required); Brogan v. Passaic Daily News, 22 N.J.L. 139, 123 A.2d 473, 479 (Sup. Ct. 1956) (When consequences to a third party appear serious, the statute ought not to be applied unless the facts are clearly within the purview of the statute.); Beecroft v. Point Pleasant Printing & Publishing Co., 82 N.J. Super. 269, 197 A.2d 416, 420 (L. Div. 1964) (acknowledges nearly universal recognition that statutory privilege, in derogation of the right to obtain information directly in issue, be strictly construed). *See* State v. Packard-Bamberger & Co., Inc., 123 N.J.L. 180, 8 A.2d 291, 293 (Sup. Ct. 1939).

20. Cases cited note 19 *supra*. These cases did deal with the interpretation of New Jersey's immunity statute. However, the opinions did little to expose the rationale for enacting the statutes and dealt primarily with the question of what acts constitute a waiver of the immunity.

21. *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963).

even if the information was of a crime, such information should be protected because the potential for concealing crimes was negligible compared to the need for protecting all sources of information.[22] A dissenting opinion disagreed with the majority's position that "sources" included the news material itself rather than just the identity of informers. The dissenter rebutted the majority's argument but said that the purpose of the statute was to protect the free flow of news to the public by protecting informers who would not otherwise come forward with the information.[23]

The case of *In re Goodfader's Appeal*[24] presented the question of whether or not the United States District Court of Hawaii would adopt a newsman's privilege for the first time. Pursuant to the defendant's urging of adoption on the basis of first amendment rights, the court spoke of the scope and effect of that amendment citing Justice Black's opinion in *Associated Press v. United States*:

> That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.[25]

The court went on to say that the primary purpose of the first amendment is to preserve the rights of the American people to full information concerning the doings and misdoings of public officials.[26] The majority was not convinced that the privilege was protected by the first amendment. It stated, however, that in the absence of a ruling by the United States Supreme Court, forced disclosure might constitute an impairment of freedom of the press, but that such an impairment was subservient to the public interest of compelling the testimony of witnesses.[27]

Closely paralleling the rationale employed in *Goodfader*, was that used in deciding *Garland v. Torre*.[28] There the court acknowledged that by diminishing the public's source of information, forced dis-

---

22. *Id.* at 185.
23. *Id.*
24. 45 Haw. 317, 367 P.2d 472 (1961).
25. 326 U.S. 1, 20 (1945), as cited in *In re* Goodfader, *id.* at 323, 367 P.2d at 477.
26. *In re* Goodfader, 45 Haw. 317, 322, 367 P.2d 472, 477 (1961).
27. *Id.* at 329, 367 P.2d at 480. It appears that it was on the basis of this rationale denying first amendment protection *per se*, that the California Law Revision Commission concluded that there was no merit to the first amendment argument.
28. 259 F.2d 545 (2d Cir. 1958) *cert. denied*, 358 U.S. 910 (1958). A New York columnist printed allegedly libelous remarks about celebrity Judy Garland, attributing these statements to a television station executive. In an action by Miss Garland against the columnist, the defendant was held in contempt for failure to disclose the identity of the executive.

closure would entail an abridgement of freedom of the press to some degree, but that such an infringement could not outweigh the duty to testify.

> If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice.[29]

Although involved in first amendment issues distinct from our discussion here, *New York Times Company v. Sullivan*[30] nevertheless serves as a judicial barometer of the Supreme Court's attitude toward the protection of first amendment liberties. The Court, in quoting from their decision upholding an Illinois group libel statute, stated: ". . . [D]iscussion cannot be denied and the right, as well as the duty, of criticism must not be stifled."[31] A concurring Justice Black was more emphatic in his interpretation of the extent to which first amendment protection should be carried when he stated flatly: "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment."[32]

The dissent in *In re Goodfader* claimed that the majority, by refusing to find for an immunity, was not supplying the informer with the assurances he needs and that the *pro tanto* knowledge of the public was being diminished.[33] A refusal to grant to informants this protection would lead to an incomplete safeguarding of the first amendment guarantee, for:

> No information would be given if the informant did not have faith in the integrity of the reporter in the manner of withholding his name. The newspaperman would find his channels of news closed.[34]

Absent a statute, the common law demands that journalists testify as to the identity of their sources of information. But without

29. *Id.* at 549.
30. 376 U.S. 254 (1964). Rather than dealing with newsmen's privilege, the issue here was the extent fair comment and criticism, under the first amendment, acted as a defense to a public official's charge of libel.
31. Beauharnais v. Ill., 343 U.S. 250, 264 (1951), as cited in New York Times Company v. Sullivan, 376 U.S. 254, 268 (1964).
32. New York Times Company v. Sullivan, 376 U.S. 254, 297 (1964).
33. 45 Haw. 317, 360, 367 P.2d 472, 495 (1961), the court citing, Garland v. Torre, 259 F.2d 545, 547 (2d Cir. 1958).
34. Siebert & Ryniker, *Press Winning Fight to Guard Sources,* EDITOR & PUBLISHER, Sept. 1, 1934, at 9, 36-7.

a statute it can be argued that the first amendment requires such protection to prevent infringement of freedom of the press. The proposition has been best presented in a letter written by the District Attorney of Richmond County, New York to the chairman of the New York Law Revision Commission's study dealing with the newsman's immunity:

> [F]reedom from censorship of any kind imposed by an external source—is a peculiarly American concept . . . .
>
> . . . .
>
> If press and radio are to continue to be an important factor in the growth of democracy, they must be as free to gather as to distribute news . . . . If the newspapermen can be compelled to reveal the sources of information from which they obtain facts, then those sources can be shut off, news becomes subject to censorship . . . .
>
> It is more important to the United States . . . that the radio and press of the United States be free and uncensored . . . than it is for a public official to make even the most important decision correctly.[35]

In his opening comments at a hearing of legislators, members of the New York Bar, and journalists discussing the issue, Chairman Smith of the New York Law Revision Commission summarily stated:

> [I]t is obvious to me that those in favor of privilege place it upon public interest, freedom of the press, giving the public a chance to find out what is going on, and that unless information given in confidence can be kept in confidence, it would be difficult for reporters to get the information, and, therefore, the public would not get the news. That is what is back [sic] of this argument.[36]

An investigation of California legislative intent and the available case law has repeatedly unearthed the proposition that the purpose of the statute is to insure the free flow of news to the public. This goal is insured by an immunity statute which bolsters the security of the informer in keeping his identity protected. This, in turn, will encourage the informer to approach the news media with information which only he holds. Based on the preceding analysis, it would be more consistent with this goal than the present statute provides if the informer himself was an additional holder of the immunity.

---

35. *Report and Study relating to Problems Involved in Conferring upon Newspapermen a Privilege which would Legally Protect Them from Divulging Sources of Information Given to Them,* NEW YORK LAW REVISION COMM'N., 109-10 (1949) (hereinafter cited as NEW YORK COMM'N).

36. *Id.* at 112. At the same hearing, J.H. MacDonald, Executive Secretary of the Commission added:

> If the source of news cannot be kept confidential, much information of value to the public will never see public print. Papers will have to print merely all the news a prosecutor sees fit to print.

Id. at 144.

Speaking for the Committee on State Legislation of the New York State Bar Association, Mr. H. J. Kennedy opposed proposed legislation[37] granting an immunity to newsmen saying:

> . . . [W]e think that the bill, by extending the privilege to the person informed, in this case the news writer or anyone connected with the newspaper, is not on a parity at all with the present statutes in the Civil Practice Act which applies to doctors, lawyers, and priests . . . . In this case we turn it all around and we give the privilege to the man informed. Certainly it is not justified or in line with precedent.[38]

Admittedly, *Lipps* remains weak on its facts to support the proposition of placing the immunity in the hands of the informer as well as the newsman. The fact persists that there will arise instances, as in *Lipps*, where the newsman will not protect his source's identity.[39] If it is the informer's security that we wish to assure in order to encourage him to divulge information to the press, then the only proper instrument consistent with this purpose is to vest the immunity in the hands of the informer. Hence, the informer will enjoy total protection and would not have to fear a possible breach of confidence. Statutory amendment is in order, absent good reason for continuing the deficiency.

Arguments Against Extending the Immunity to the Informer

The conclusion reached by the California Law Revision Commission is that newsmen alone should hold the privilege of immunity. First, the Commission points to differences between the reporter-source relation and those relations (*e.g.* husband-wife, attorney-client) that have been granted privileged status either through the common law or by statute. Among these differences is the fact that in other privileged relationships it is the context of the communication that is sought to be protected where both parties are known.

---

37. After this extensive study and research, a proposal was finally submitted to the New York State Congress for enactment. The bill stood an excellent chance of becoming law but was defeated due to opposition by a number of powerful newspapers who lobbied against it because it offered only limited protection. Steigleman, The Newspaperman and the Law, 201 (1950).

38. New York Comm'n., *supra* note 35, at 137.

39. *See In re* Wayne, 4 Haw. 475, 478 (D. Haw. 1914). After the court had reached its decision not to grant the privilege to the defendant-reporter, the defendant immediately revealed the name of his informant to escape the contempt charge imposed on him.

In the newsman's case it is the communication that is public while the identity of one of the parties is the subject of the immunity. Furthermore, whereas the common law privileges deal with a confidential communication based on a confidential relationship, here the relationship is based solely on the communication. It is also pointed out that while these other occupational privileges involve professions providing a service for the person making the disclosure, no such service is performed by the journalist to the informer. Lastly, the Commission urges, there is a lack of professional responsibility and no occupational safeguards to prevent abuses of the privilege. Other groups granted a privilege are subject to license through governmental or professional control or, as in the case of the clergy, the profession is such that none is deemed necessary. The Commission does not claim that these differences are decisive to the issue of granting the immunity to informers or of resting control of the immunity exclusively in the hands of the reporter. The Commission asserts that these dissimilarities are, in fact "unimportant."[40]

The New York Law Revision Commission concludes that any dissimilarity between the newsmen-informer privilege and the common law privileges is inconsequential:

> It has been argued that the ancient and recognized privileges differ from the one proposed to be granted to newsmen in this respect: that in the case of the physician, lawyer, clergyman or spouse, all information disclosed must be kept in confidence, whereas in the newsman's case the information is published to the world. This difference is more ostensible than real.[41]

This comment apparently echoes the conclusion drawn by the California Law Revision Commission: these differences are of little importance. However, an argument is posed within the text of the New York Commission's study that indeed makes the differences significant.

In 1930, the Association of the Bar of the City of New York, Committee on State Legislation, made this comment in reporting on several bills designed to establish a privilege:

> Moreover, the bills do not prevent the disclosure of the communication, which is the purpose of the present statutes, but merely prevent the disclosure of the *source* of the information. Their effect, as a matter of fact, is directly contrary to the effect of the present statutes, in that they encourage the disclosure of the communication instead of preventing it. They open the way to reckless publication and abuse, and while on their face they seem to protect the editor and reporter, in reality they protect the informant. It seems

40. CAL. COMM'N., *supra* note 8, at 499.
41. NEW YORK COMM'N., *supra* note 35, at 3-4.

> to us that the informant, who furnishes information to a reporter for the express purpose of having it published, should have no immunity as these bills propose.[42]

The substance of this attack is that by protecting the identity of the source rather than the content of the communication, a shield is erected that paves the way for abuse. An informer, knowing his identity is safe from disclosure, may provide information that is not entirely factual or, motivated by a personal vendetta, could purposely make authoritative statements to the press that are untrue in an attempt to damage the reputation of a third person. This, of course, could not happen where the other statutory privileges are concerned as the abusive information would not be disclosed. This argument militates against the granting of any privilege to the newsman. If, however, one still wishes to press for granting of the immunity, the scope and extent of that privilege must be strictly limited and restricted so as to preclude any abuse. A spokesman for the New York County Lawyer's Association addressed himself to the question of extending the immunity to the informer claiming:

> The proposed exemption seems to open the way to reckless publication and abuse, and while on the face it seems to protect the editor and reporter, in reality it protects the informant. It is questionable that the informant who furnishes information to a reporter for the express purpose of having it published should have the immunity that is proposed.[43]

In analogizing the newsman-source relationship to the government-informer relationship, a difference exists that is the very crux for not extending the immunity to the informer as well.

> The portion of this study on the government-informer privilege indicates that Rule 36[44] also extends the privilege to the informant

---

42. *Id.* at 97. Senator Desmond, the author of the bill that sparked the New York Commission's study, commented on this claim stating:

> The argument that physicians, lawyers and clergymen are licensed or ordained and therefore are subject to some control, seems irrelevant, as does the contention that physicians, lawyers and clergymen cannot publish information and therefore cannot do as much harm as a reporter, since the issue is whether such privilege is needed and in the public interest.

Desmond, *The Newsmen's Privilege Bill*, 13 ALBANY L. REV. 1, 9 (June 1949).

43. NEW YORK COMM'N., *supra* note 35, at 141.

44. *Rule 36—Identity of Informer*, CAL. LAW REVISION COMM'N., 474 (1964).

RULE 36. *Identity of Informer.*

A witness has a privilege to refuse to disclose the identity of a

> and effectively protects against eavesdroppers by making evidence as to the informant's identity inadmissible. Unlike that rule, the proposed rule vests the privilege solely in the newsmen. This is because of the different considerations applicable to this rule in that the recipient is a private party not publicly charged with responsibility. Moreover, the maintenance of some difference between these two rules in this regard is thought to encourage divulging information to proper public authorities.[45]

While this contention is not without merit, it is doubtful that by maintaining such a difference in the two rules, disclosure to governmental agencies will appear more frequently than those made to the news media. It also raises the question of whether encouragement of disclosure to government agents is more essential than achieving the intent of the statute, namely the bolstering of source security so as to in effect aid in the dissemination of news to the public.

The Commission also reasons that by granting the privilege to the informer as well, the privilege would be emasculated since the informant's identity would be revealed at the time that he or his representative raised the objection. This contention seems to have been raised merely to prevent a situation from arising that could become cumbersome in a court of law, and which would hinder the ease and fluidity that is desired by the courts when handling evidentiary objections. The question of possible emasculation is limited to those fact patterns similar to *Lipps* where the informer or source is present in the courtroom. Since the grounds for objecting to the testimony may be stated to the judge outside the hearing of the jurors, and since appellate courts read court records objectively and without drawing inferences from objections, emasculation will not necessarily have to follow. Although it might create some difficult judicial maneuvers to insure the informer will not make prejudicial statements to the court openly, the law of evidence is not without many such instances demanding tact and delicacy in manipulation.

The Commission continues by saying that, following the form of other states' immunity statutes, and based upon the similarity to the government-informer privilege, the aim of the statutes is to protect the identity of the informer who will be encouraged to disclose his information: "[I]t is *probable* that this privilege should be granted in terms to newsmen only."[46]

---

person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States . . . and evidence thereof is inadmissible. . . .

45. CAL. COMM'N., *supra* note 8, at 506.

46. *Id.* at 503 (emphasis added).

THE CURRENT APPROACH CONCERNING NEWSMEN'S IMMUNITY

While no case authority exists for the proposition of extending the immunity to the informant, an argument has been made in support of the extension, stating that the theory behind immunity statutes indicates that the informer should hold the privilege.[47] A study investigating the amount of news stories that are precipitated by confidential sources indicates that a significant amount of public information is obtained through these means.[48]

Today, more than at any other time in our history, there exist voices of dissent within our society that attack the very foundation of our established order. The need for the people to know the extent and reasons supporting this disenchantment is of the greatest importance counterbalanced, though, by society's need to eliminate criminals. The importance of the need to know becomes evident if we are to decide for ourselves the validity of these claims and the possible changes that might be enacted if their soundness is proved.

The contemporary mood has initiated at least one decision that breaks with federal precedent of refusing to recognize a privilege absent a statute. This decision was precipitated by a federal grand jury investigation of the Black Panther Party held in San Francisco. In an unreported opinion,[49] the Federal District Court for Northern California issued an order on April 3, 1970 limiting a subpoenaed journalist's testimony to matters other than information received from the Black Panthers. The court's rationale was that an infringement on the right to gather and disseminate news under the first amendment should not be exercised without a showing of "overriding national interest"; such rights being "indispensable to the survival of a free society."[50] While the issue involved con-

47. Carter, *Journalist, his informant, and testimonial privileges*, 35 N.Y.U.L. REV. 1111, 1125 (1960). Another article raised the point but went on to say that statutory construction indicated that the immunity was personal to the newsman. *See* Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61, 65 (1950).

48. Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing their Sources*, 64 NW. U.L. REV. 18, app. (1969-1970).

49. New York Times, April 4, 1970, § 1, at 1, col. 3.

50. *Id.* This month the Ninth Circuit Court of Appeals held a hearing on appeal from the district court. Judge Merrill of the Ninth Circuit commented that it is important that lines of communication be maintained between the Black Panthers and similar groups, and the public, so that

cerned itself with content of information rather than source identification, the policy considerations underlying the decision reflect the increasing need to protect political and social minorities in their quest to reach the public and air their views and complaints.

The judiciary has demonstrated the limit it will reach in the protection of political ideologies. Recently, a county judge sentenced the editor of a Madison, Wisconsin underground newspaper to six months in jail for refusing to disclose the sources of information which led to an article about a dormitory fire at Whitewater State University in Elkhorn, Wisconsin. Commenting on his decision, the judge recognized a conflict between the freedom of the press and the needs of the grand jury to proceed in the interest of public safety: "If something has to give in this particular instance it has to be the First Amendment privilege."[51]

On August 10, 1970 United States Attorney General John Mitchell issued public guidelines to the Department of Justice for subpoenaing members of the news media. In this directive, the Attorney General acknowledged the first amendment implications in compelling newsmen to appear before federal judicial and investigative bodies by using subpoena:

> The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights.[52]

During the New York Law Revision Commission's hearing on the newsmen's privilege, the question arose whether a newsman should be permitted to invoke the immunity at the initial stages of a libel suit, and then waive it for purposes of mitigating damages. Questions posed by New York Senator Pliny Williamson then expanded the issue to include the possibility of changing the wording of the proposed bill from "shall not be compelled" to "shall not be permitted, except with the consent of the informant."[53] Without giving reasons for his decision, Mr. H. W. Sanford, chairman of the Legislative Committee of New York State Society of Newspaper Editors replied:

> If you ask whether the law should read that he should not be per-

---

their philosophies can be known and assessed. San Diego Union, Sept. 10, 1970, § A, at 16, col. 5.

51. NEWSWEEK, Sept. 14, 1970, at 74. Because of the editor's incarceration, he was unable to respond to another subpoena he received requesting his presence at a grand jury investigation into the recent bombings at the University of Wisconsin at Madison. Editor Knop's newspaper had apparently published several articles that included interviews with persons allegedly responsible for the bombings.

52. New York Times, August 11, 1970, § 1, at 24, col. 1.

53. NEW YORK COMM'N., *supra* note 35, at 121.

> mitted to disclose the confidence except with the consent of persons giving information—well, I can't see any objection to that.[54]

CONCLUSION

It appears that the question of placing the immunity in the hands of the source of information himself rarely emerges when the newsman's privilege is being discussed. While several valid arguments point to restricting any privilege in this area, the reasoning appears more academic than practical.

This writer is not convinced that the current statute granting newsmen exclusive control warrants perpetuation. To completely insure the public interest in obtaining information from confidential sources, the immunity statute needs to be legislatively expanded to provide a privilege for the informer as well. The ideals of a free press and a free people are paramount to any argument against such an extension.

IGNAZIO J. RUVOLO

54. *Id.*