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CALIFORNIA'S NEWSGATHERER'S SHIELD: INCONSISTENT INTERPRETATION MEANS INADEQUATE PROTECTION

I. INTRODUCTION

California¹ is among the majority of states² that have statutorily provided for a shield law protecting newsgatherers from contempt for failure to disclose sources or unpublished information. In 1980, in an apparent attempt to add teeth to existing law, California voters elected to amend the state constitution's free speech clause³ to include virtually the same shield law provisions codified in the Evidence Code.⁴ The amendment passed by an overwhelming majority.⁵

The shield law as written is straightforward: no finding of contempt for failure to disclose a source, or to disclose unpublished information.⁶ Unfortunately, there has been a lack of uni-

1. CAL. EVID. CODE § 1070 (West Supp. 1988)

2. As of 1988, 26 states have enacted some sort of statutory protection for newsgatherers. See ALA. CODE § 12-21-142 (1975); ALASKA STAT. §§ 09.25.150-.220 (1983); ARIZ. REV. STAT. ANN. § 12-2237 (1982); ARK. STAT. ANN. § 16-85-510 (1987); CAL. EVID. CODE § 1070 (West Supp. 1988); DEL. CODE ANN. TIT. 10, §§ 4320-4326 (1974); ILL. ANN. STAT. ch. 110 para. 8-901-909 (Smith-Hurd 1985); IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1986); KY. REV. STAT. ANN. § 21.100 (Baldwin 1979); LA. REV. STAT. ANN. §§ 45:1451-1454 (West 1982); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (Supp.1988); MICH. STAT. ANN. § 28.945(1) (Callaghan 1988); MINN. STAT. ANN. §§ 595.021-.025 (West 1988); MONT. CODE ANN. §§ 26-1-901-903 (1987); NEB. REV. STAT. §§ 20-144-147 (1987); NEV. REV. STAT. § 49.275 (1987); N.J. STAT. ANN. § 2A:84A-2 (West Supp. 1988); N.M. STAT. ANN. JUD. PAN. 1, Rule 514C (1986); N.Y. CIV. RIGHTS LAW § 79-h (Consol. Supp. 1988); N.D. CENT. CODE § 31-01-06.2 (1976); OHIO REV. CODE ANN. § 2739.12 (Page 1981); OKLA. STAT. ANN. tit. 12 § 2506 (West 1980); ORE. REV. STAT. §§ 44.510-.540 (1988); PA. CONS. STAT. ANN. § 5942 (Purdon 1982); R.I. GEN. LAWS §§ 9-19.1-2-3 (1988); TENN. CODE ANN. § 24-11-208 (1980)

3. The clause originally read: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for abuse of the right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2.

4. The original clause is now designated as subdivision (a); the 1980 amendment is subdivision (b). CAL. CONST. art. I, § 2.

5. 73.3% of the voters were in favor of the proposition. March Fong Eu, Secretary of State, Supplement to Statement of Vote, Primary Election June 3, 1980 at 8.

6. CAL. EVID. CODE § 1070 (West Supp. 1988); CAL. CONST. art. I § 2.

formity in the judicial application of the shield laws to individual fact patterns.⁷

This may be due, in part, to the following factors: the lack of agreement as to the precise meaning of the California statutes, the absence of a detailed legislative history and the diverse factual patterns where newsgatherer's shield has been at issue. In addition, there is a lack of consensus as to the exact rights which the Evidence Code and the constitution seek to protect.

Cases have, to a large extent, been decided in a piecemeal fashion and appear result-oriented, based on the facts of the case at hand.⁸ Exceptions have been carved out on the basis of the "type" of material sought to be protected. Outcomes are difficult to predict, at best. As a consequence, newsgatherers have little guidance as to which materials may be safely thought of as protected.

Thus, the shield law, even with its insertion into the constitution, is not facilitating the free flow of information to the public as the drafters ostensibly intended. Shield law continues to be inconsistently applied and interpreted. This inconsistency has led at least one commentator to speculate on whether the constitutional amendment served any purpose at all.⁹

The major cases of the past fifteen years aptly illustrate the problems courts encounter in attempting to apply the newsgatherer's shield. Clearly, striking a proper balance between important constitutional rights, such as freedom of the press versus the right to a fair trial, is difficult. In addition, courts have had to grapple with a confusing array of "tests" to be applied in the balancing process. Worse yet, there has been a tendency on the part of the courts to apply tests created under one fact pattern to other facts which are markedly dissimilar. While all of the

7. See *infra* note 39 and accompanying text.

8. See *infra* notes 62, 70 and accompanying text.

9. See Note, *The Newsgatherer's Shield - Why Waste Space in the California Constitution?*, 15 Sw. U.L. Rev. 527 (1985). This note covers the judicial interpretation of the newsgatherer's shield. The author concludes that narrow construction of the law does little to shield reporters, and if the courts continue narrowly construing the law that article I, section 2(b) of the California Constitution should be repealed "in the name of trimming nonfunctional surplusage." Rather than "trimming" the constitution, this comment asserts that a clear statement is needed from the California Supreme Court Law.

tests articulated over the past fifteen years may be valid, it is not clear that they are interchangeable.

Whether the insertion of the newsgatherer's shield into the state constitution in fact strengthened the shield is unclear. The legislative history of the amendment provides little guidance as to the drafters' intent.¹⁰

Two recent California Court of Appeals decisions, *New York Times v. Santa Barbara*¹¹ and *Delaney v. Superior Court*¹² came to different conclusions about the scope of protection afforded by the newsgatherer's shield. These two cases are currently on review before the California Supreme Court. A third case, *Hallissy v. Superior Court*¹³ may be an indication that the courts are headed towards a more uniform interpretation of the shield law, provided *New York Times* is affirmed by the supreme court.

This Comment will initially discuss the history of the shield law in California and examine how it has been defined by the courts in the leading cases. It will also discuss *New York Times*, *Delaney* and *Hallissy* in terms of the courts' application of the shield law to those cases. The analyses of *New York Times* and *Hallissy* will be contrasted with that of *Delaney*. This Comment will attempt to show how the *New York Times/Hallissy* analysis could have been applied to the facts of *Delaney* and still have yielded the same result.

Emphasis will be placed on problems facing the courts in terms of statutory interpretation. The difficulty in applying a single test to diverse fact patterns will also be addressed. While all of the tests that the courts have applied may have validity, they are not interchangeable.

10. The Law Revision Commission was assigned the task of supervising the drafting of the Evidence Code. In discussing the privilege, the Commission noted that there was an "absence of reliable evidence in the form of legislative history or judicial interpretation." 6 Cal. L. Rev. Comm. Rep. Rec. and Studies 481, at 508. Cf. *KSDO v. Superior Court*, 136 Cal. App. 3d 375 at 383, 186 Cal. Rptr. 211 at 215 (1982) ("The judicial history and case interpretation of the newsperson's privilege as embodied in Evidence Code § 1070 are just as tortuous and confused as its legislative origins.")

11. 202 Cal. App. 3d 503, 248 Cal. Rptr. 426 (1988), rev. granted, Oct. 27, 1988)(S006709).

12. 202 Cal. App. 3d 1019, 249 Cal. Rptr. 60 (1988), rev. granted, Oct. 27, 1988)(S006866).

13. 200 Cal. App. 3d 1038, 248 Cal. Rptr. 635 (1988).

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Recommendations will be made with respect to tests which would aid the courts in their efforts to achieve a greater degree of uniformity. Uniformity would lead to more predictable outcomes and further the goal of settling on a precise interpretation of the shield law statutes.

This Comment proposes that despite the literal wording of the shield law, newsgatherers have at least a qualified privilege to not testify or disclose sources or unpublished information. The Supreme Court of California should recognize this qualified privilege in the interest of clarity and judicial economy.

The Legislature should excise a comment which immediately follows the statute.¹⁴ Whether California's shield law provides a "privilege" or "merely an immunity," or whether "they are the same thing" is an issue which must be decided. In addition, a clear statement regarding the exact scope of protection for "unpublished information" is necessary.

Finally, this Comment will argue that the more rational interpretation of the right conferred by the statute is one which views it as a qualified privilege. The particular facts of a case, as well as the newsgatherer's status as party or nonparty, should be the basis of the proper test to be applied where the shield is at issue.

If the reporter is a party, the case is likely a defamation action. It is suggested that the tests appropriate to defamation actions are not universally applicable. Where the reporter is not a party, the next inquiry should be whether the action is civil or criminal. In criminal actions, the burden is on the party seeking disclosure to overcome the newsgatherer's qualified privilege. The newsgatherer should not have the burden of showing that the material for which protection is sought is "deserving" of protection.

In a civil action, this comment suggests that the privilege should be absolute, following the holding of *New York Times*.¹⁵

14. See *infra* note 38 and accompanying text. The comment following the statute states that the shield provides an immunity, not a privilege. See also text accompanying note 42.

15. *New York Times*, 202 Cal. App. 3d at 510, 248 Cal. Rptr. at 430.

Labeling the right an absolute privilege in civil suits where the reporter is a nonparty would hopefully allow the courts to speedily dispense with those cases in which plaintiffs or defendants attempt to utilize newsgatherers as discovery resources.

II. A BRIEF HISTORY OF THE NEWSGATHERER'S SHIELD

A. ORIGINAL LEGISLATION

California enacted statutory protection for newsgatherers in 1935, which provided: "A publisher, editor, reporter, or 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."¹⁶

Protection was initially limited to those associated with newspapers. As time passed, news increasingly was transmitted via other media, for example television and radio. The Legislature broadened the scope of protection accordingly; employees of radio and television stations and wire services are now covered.¹⁷

B. EVIDENCE CODE SECTION 1070 AND "IMMUNITY FROM CONTEMPT"

In 1965, Subdivision 5 of section 1881 of the Code of Civil Procedure was transferred into the Evidence Code.¹⁸ In studying the proposed transfer, the California Law Revision Commission evaluated the issue of "[w]hether a newsman should have a privilege to prevent disclosure of his source of information."¹⁹ In its report, the Commission voiced its concern regarding the problem of "statutory deficiencies," and "ambiguity and definitions."²⁰ The Commission found the notion of a newsgatherer's privilege "entirely alien to the common law," and also that "there is no federal statute or independent body of federal law on this sub-

16. 1935 Cal. Stat. ch. 532 § 1 pp. 1608-10 (West 1935) (codified at CAL. CIV. PROC. CODE § 1881) (repealed 1965).

17. Cal. Stat. ch. 629, § 1 pp. 1797-98 (1961); *see also* note 9, at 536.

18. Former § 1881 of the Code of Civil Procedure became CAL. EVID. CODE § 1070.

19. 6 Cal. L. Revision Comm. Rep. Rec. and Studies 481 (1964).

20. *Id.* at 485.

ject.”²¹ Finally, the Commission concluded that “there is no legally recognized newsman’s privilege in the absence of statute.”²²

The Commission’s report also discussed the issue of whether any statutory privilege was desirable.²³ Policy arguments favoring²⁴ and opposing²⁵ a statutory privilege were put forth. The argument in favor was that without protection, newsmen would be unable to assure confidentiality to sources.²⁶ For example, if government employees seeking to expose corruption could not be assured of confidentiality, they would be less likely to come forward. Sources would dry up and the flow of information to the public would be curtailed.

The opposing argument was that the public interest was best served by full disclosure and rested upon “the established duty to testify. . . axiomatic in our system of justice.”²⁷ The thrust of this argument was, why should known evidence be kept secret?

Two countervailing arguments—the need to keep open the channels of information by assuring confidentiality versus “the right to everyman’s evidence”²⁸—had been balanced by the majority of states, in practice at least.²⁹ The policy of “divulging pertinent information to proper authorities”³⁰ was weighed against the value of legal protection for those who exposed “matters which require public attention.”³¹ Thus, the Commission concluded that newsmen should be afforded a privilege similar to that extended to “proper governmental authorities.”³²

21. *Id.* at 488.

22. *Id.* at 496.

23. *Id.*

24. *Id.*

25. *Id.* at 497.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 498.

30. *Id.* at 500.

31. *Id.*

32. Unfortunately, the report does not contain an example of what the Commission considered a “privilege extended to a proper governmental authority” to be. For that matter, the report does not indicate who the Commission thought the “proper governmental authorities” were. *Id.*

Having concluded that protection for newsgatherers was desirable, the Commission focused on defining the proper scope of protection. Apparently alarmed by the wording of the statute, the Commission noted that the statute appeared to grant "an absolute privilege to newsmen,"³³ which amounted to "a legislative determination that the public interest is best served by non-disclosure in every situation."³⁴ The Commission thus found that a qualified privilege should exist and proposed a "discretionary" rule which would adequately protect any interest requiring legal sanctity while exposing those matters that demanded revelation.³⁵

A statutory rule of privilege was proffered, one which would "protect the source of newsman's informants."³⁶ A newsgatherer could refuse to testify unless it was found that "(a) the source had been disclosed previously, or (b) disclosure of the source is required in the public interest."³⁷

The Commission then supplemented its proposed rule with a comment subsequently adopted by the Assembly Committee on the Judiciary, which states:

It should be noted that section 1070 provides an immunity from being judged in contempt; it does not create a privilege. Thus, the provision will not prevent the use of the sanctions provided by the discovery act when the newsman is a party to a civil proceeding. In this sense, section 1070 retains existing law.³⁸

The Commission did not specify the meaning of the term "immunity from contempt" with respect to non-party newsgatherers. The issue was created whether "immunity" provides more, less, or the same protection that a privilege does. This issue has been hotly debated,³⁹ and the "textual ambiguity"⁴⁰ has

33. *Id.* at 502.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 505.

38. 7 Cal. L. Revision Comm. Rep. Rec. and Studies 207 at 208 1965.

39. *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976). ("Labeling the protection an immunity rather than a privi-

been noted as the shield's main flaw.

The Legislature, in adopting the comment, stated that a privilege had not been created. It is unclear whether this issue has been resolved. When the shield is referred to as a "privilege," is it just shorthand for referring to a newsgatherer's right to refuse to disclose sources, or does a genuine legal privilege exist? In other words, does forbidding the imposition of the sanction of contempt amount to a privilege to not testify in court for all newsgatherers? In addition, does the fact that sanctions "other than contempt" may be imposed on party newsgatherers mean that in other situations contempt *may* be imposed on *nonparty* newsgatherers?

The "privilege or immunity" issue has meant that the protection afforded by the shield is reevaluated with every case. The lack of harmony among the reported decisions suggests that this approach is unsound. It is unclear why one standard regarding the scope of protection has not been enunciated. A clear statement regarding the exact breadth of the protection afforded by the shield is necessary. Such a statement should consider the proper scope of protection for the newsgatherer as party and as nonparty; and also whether the litigation is civil or criminal. The California Supreme Court should address the question of whether the insertion of the newsgatherer's shield into the State constitution elevated its scope of protection. It should also clarify the scope of protection for unpublished information.

Since 1965, three amendments have been made to Evidence Code section 1070 substantially broadening the scope of its protection.⁴¹ First, protection was extended to ex-newspersons.⁴² Next, the statute was broadened to apply to other governmental entities possessing subpoena power, such as legislatures and ad-

lege is of no importance.") *But cf.* *Delaney v. Superior Court*, 202 Cal. App. 3d 1019, 1025 n.8, 249 Cal. Rptr. 60, 64 n.8 (1988) ("The shield law has always been limited in scope. It has never contained a *privilege* against disclosure. Rather, it merely provides 'an immunity' from being adjudged in contempt.") *Contra*, *New York Times v. Superior Court*, 202 Cal. App. 3d at 508, 248 Cal. Rptr. at 429 (1988) (citing HOGAN, *MODERN CALIFORNIA DISCOVERY*, (3d ed. 1981) § 11.27 p. 350) ("In cases where the newsgatherer is not a party, this 'immunity' is the functional equivalent of a privilege.")

40. 15 Sw. U.L. REV. 527 at 538 (1985).

41. CAL. EVID. CODE § 1070 (West Supp. 1988).

42. 1972 Cal. Stat. ch. 1717, § 1 pp. 3658.

ministrative bodies.⁴³ Then, in order to ensure that all members of the media were protected, those newsmen not afforded protection by the literal wording of the statute were granted protection.⁴⁴ Finally, the category of unpublished information, such as notes and outtakes was included.⁴⁵ This includes information not disseminated, regardless of whether related information has been disseminated.⁴⁶

Today, the shield law protects virtually all those engaged in newsgathering. The threshold requirement is that the material must have been obtained during the course of newsgathering for communication to the public.⁴⁷ The fact that information related to the protected material may have been published should not lessen the scope of protection afforded. In addition, whether the material is protected should not depend on its contents, although the courts are still debating this point.⁴⁸

C. SHIELD LAW AND THE CALIFORNIA CONSTITUTION

In 1980, the free speech clause of the state constitution was amended to include language virtually identical to that found in Evidence Code section 1070.⁴⁹ The amendment may have been motivated in part by two cases, *Farr v. Superior Court*⁵⁰ and *Rosato v. Superior Court*,⁵¹ which did not apply the shield.

In *Farr*, a reporter covering the trial of Charles Manson and two codefendants was given a copy of the sealed statement of a witness containing testimony about the planning of other murders.⁵² Farr wrote an article based on this information.⁵³

43. 1974 Cal. Stat., ch. 1323 § 1 pp. 2877.

44. *Id.*

45. CAL. EVID. CODE § 1070(c) (West Supp. 1988).

46. The text concludes by including in its definition of "unpublished information" the following, "[w]hether or not published information based upon or related to such material has been disseminated." *Id.*

47. CAL. EVID. CODE § 1070(a) (West Supp. 1988).

48. *Delaney v. Superior Court*, 202 Cal. App. 3d 1019 at 1030, 249 Cal. Rptr. 60 at 67 ("Unpublished information provisions do not apply to compelled eyewitness testimony concerning a public event.") See *infra* text accompanying note 150.

49. CAL. CONST. art. I, § 2.

50.. 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971),

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

52. *Farr*, 22 Cal. App. 3d at 64, 99 Cal. Rptr. at 344.

53. *Id.* at 65, 99 Cal. Rptr. at 344.

The court was determined to identify the party who had given the information to Farr since the source had to have been one of the attorneys of record.⁵⁴

Farr was cited for contempt after refusing to disclose the source of the sealed statement.⁵⁵ In upholding the contempt citation, the court of appeals found that "in the matter at bench there is an undeniable need for disclosure if the court is not to be thwarted in its effort to enforce its order against pretrial publicity."⁵⁶ Control over the proceedings and the officers of the court were found to be paramount concerns.⁵⁷

In *Rosato*, a grand jury transcript indicting various individuals was ordered sealed until the conclusion of all of the defendants' trials.⁵⁸ Thereafter, quotations from the transcript appeared in the Fresno Bee, under Rosato's byline. Rosato, like Farr, refused to disclose from whom he had received the transcript.⁵⁹

The Court of Appeals upheld Rosato's citation of contempt.⁶⁰ In so holding, the court found that in the interest of maintaining the free flow of information to the public as intended by the Legislature, a "broad, rather than narrow construction" of the statute was appropriate.⁶¹ There were, however, certain "limitations on the exercise of the privilege," and therefore the shield law was not applicable in Rosato's case.⁶²

In explaining why Rosato was not to be protected by the shield, the court cited *Branzburg v. Hayes*⁶³ and noted that the

54. *Id.* at 66, 99 Cal. Rptr. at 345.

55. *Id.*

56. *Id.* at 73, 99 Cal. Rptr. 350.

57. The court concluded that after balancing "[t]he interest to be served by disclosure of source against its potential inhibition upon the free flow of information" that Farr had no privilege to refuse to answer questions put to him in the trial court. *Id.*

58. *Rosato v. Superior Court*, 51 Cal. App. 3d at 201, 124 Cal. Rptr. at 434 (1975).

59. *Id.*

60. *Id.* at 231, 124 Cal. Rptr. at 454.

61. *Id.* at 219, 124 Cal. Rptr. at 445.

62. Although the court conceded that § 1070 did arguably provide newsgatherers with a privilege against being held in contempt, the court stated that the party claiming the privilege had the burden of showing that the testimony "would lead to a source." *Id.* at 218, 124 Cal. Rptr. at 445. The court characterized this burden to be "not a heavy one." *Id.*

63. 408 U.S. 665, 706 (1972). (By a 5-4 vote, the court found that newsgatherers did

First Amendment does not confer “a license on either the reporter or his sources to violate valid criminal laws.”⁶⁴ Like the court in *Farr*, the *Rosato* court found a limitation on the First Amendment arising from “the inherent power of the judiciary as a separate and coequal branch of our tripartite governmental structure to control its own officers and proceedings.”⁶⁵

After the decisions in *Farr* and *Rosato*, the Legislature initiated legislation to amend the constitution to include a provision for the protection of newsgatherers.⁶⁶ The legislative intent is unclear. Since there was already a statutory source of protection for newsgatherers in Evidence Code section 1070, the Legislature may have believed that inserting a similar provision into the state constitution would somehow fortify the scope of its protection. Presumably, the shield would then be less susceptible to judicial tampering.

The fact that the amendment is worded in virtually the same fashion as the Evidence Code⁶⁷ may provide an argument that the intent was to elevate the shield simply by virtue of its insertion into the state constitution. On the other hand, had the amendment been worded differently the “elevation” might have been more clear. Significantly, the “immunity, not privilege” comment following the statute was not included.⁶⁸ However, had the constitutional amendment stated that newsgatherers have a privilege to not testify, all of the speculation concerning the effect of constitutionalization would be unnecessary. As a result, at least one commentator has concluded that the amendment did little or nothing to bolster Evidence Code Section 1070.⁶⁹

not have a constitutional privilege to refuse to testify at state or federal grand jury hearings, and encouraged state legislatures to provide for their own newsgatherer shields).

64. *Rosato*, 51 Cal. App. 3d at 219, 124 Cal. Rptr. at 446.

65. *Id.*

66. There are three ways in which the state constitution may be amended: by initiative; by legislative proposal; and by constitutional convention. CAL. CONST. art. XVIII §§ 1-4.

67. The only difference in the wording of the two statutes is that where the Evidence Code reads “cannot” be adjudged in contempt, the constitutional clause reads “shall not” be adjudged in contempt. There is no support for the proposition that this difference was intended to be of any significance.

68. CAL. EVID. CODE § 1070 Comment-Assembly Committee on the Judiciary. (West Supp. 1988).

69. See *supra* note 9, at 546.

III. PRIVILEGE OR IMMUNITY?

A. *KSDO v. SUPERIOR COURT*

*KSDO v. Superior Court*⁷⁰ involved a libel action against a radio station and a news reporter. The case was based on a news broadcast implicating members of a southern California police department in a drug smuggling operation.⁷¹ In *KSDO*, the court commented that while "the term 'shield law' conjures up visions of broad protection and sweeping privilege, [the law] is unique in that it affords only limited protection."⁷²

The court found that the inclusion of the law in the state constitution did little to broaden its scope of protection⁷³ and thus declared, "[i]n reality, California Constitution article I section 2 provides no more of a privilege than did section 1070 of the Evidence Code."⁷⁴ In the court's view, the shield law provided "[a]n immunity from contempt, not a privilege against disclosure."⁷⁵ A discussion of the effects of constitutionalization of that immunity is not necessary to resolution of the case before us.⁷⁶

The *KSDO* court shared the fears of the Law Revision Commission against "creating a privilege."⁷⁷ Noting the Commission's comment⁷⁸ that a privilege had not been created, the court

70. 136 Cal. App. 3d 375, 186 Cal. Rptr. 211 (1982).

71. *Id.* at 378, 186 Cal. Rptr. at 212.

72. The court found that there was a "rather basic distinction" between the terms 'immunity' and 'privilege.' *Id.* This distinction, according to the court, "has been misstated and apparently misunderstood by members of the news media and our courts as well." *Id.* at 379-80, 186 Cal. Rptr. at 213. The court did not, however, elaborate what the "basic distinction" to be made was. Instead, it was merely noted that in the jurisdictions which did provide newsgatherers with a privilege, the word "privilege" was used in the text of the statute. *See supra* note 81 and accompanying text.

73. In its recounting of the history of the shield law, the court may have indicated its opinion of the shield when it described the insertion of the statute into the constitution as a "curious step" in the evolution of the law. *Id.* at 381, 186 Cal. Rptr. at 214.

74. *Id.* at 381-82, 186 Cal. Rptr. at 213.

75. *Id.* at 383, 186 Cal. Rptr. at 215.

76. *Id.*

77. The court found that although the Evidence Code and constitution did not protect the petitioner, the first amendment did. *Id.* at 384, 186 Cal. Rptr. at 217. The court went on to outline the considerations which would be used in balancing "freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Id.*

78. *See supra* note 38 and accompanying text.

stated that in other states where a privilege *had* been created, the word "privilege" was a part of the text of the statute.⁷⁹

Emphasizing that the case was a libel action in which the reporter was a party, the *KSDO* court stated that "the shield law does not apply since petitioner has not been threatened with or cited for contempt."⁸⁰ However, the court did not elaborate on its reasons for finding that the accusation of libel renders a reporter ineligible for protection by the shield.

Implicitly, the court found that libel actions were unique situations and to uphold the shield would have unfairly prejudiced the plaintiff. This argument was grounded in the assumption that the material for which the privilege had been claimed contained "vital information directly related to the plaintiff's claim."⁸¹ Citing *Branzburg*⁸² and *Garland v. Torre*,⁸³ an earlier federal case, the *KSDO* court found that in libel cases, "the truth or falsity of the material published is the essential issue [and] therefore production of the reporter's notes for identification of his source can be essential to the plaintiff's successful prosecution."⁸⁴

Clearly, a reporter's notes would provide plaintiffs in libel actions with evidence in support of their claims that the reporter's state of mind was such that "actual malice"⁸⁵ could be

79. 136 Cal. App. 3d at 383 n.4, 186 Cal. Rptr. at 216 n.4. (The court referred to a New Jersey statute construed in *Maressa v. New Jersey Monthly*, 89 N.J. 176, 44 A.2d 376, *cert. denied*, 459 U.S. 907 (1982) which states in essence that newsgatherers have a privilege to refuse to disclose sources or unpublished information).

80. *KSDO*, 136 Cal. App. 3d at 384, 186 Cal. Rptr. at 216.

81. The court discussed the issue of whether the identity of the sources for whom protection was sought went to the "heart of the claim" and found that it did not, because the reporters had previously revealed their names. *Id.* The court also found that the status of the reporter as a party to the litigation would tip the scales "[i]n favor of disclosure of the material in question." *Id.* at 386, 186 Cal. Rptr. at 217. However, since the information was available to the plaintiff from sources other than those the reporter sought to protect, the court held that the "[q]ualified privilege under the First Amendment protected *KSDO* from having to reveal the reporter's notes." *Id.*

82. 408 U.S. 665.

83. *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958) (libel action brought by actress Judy Garland after an unflattering item had appeared in a local gossip column regarding Garland's weight).

84. *KSDO*, 136 Cal. App. 3d at 386, 186 Cal. Rptr. at 217.

85. See *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964) ("actual malice" defined as publication of false or defamatory material "with knowledge that it was false or with reckless disregard of whether it was false").

inferred by publication. The *KSDO* court neglected, however, to elaborate as to how the interest of aiding a libel plaintiff was to be balanced against the interest of protecting confidential sources. It is not clear why aiding a libel plaintiff validates limiting the scope of protection afforded by the shield law.

The issue is best framed in terms of the public interest. While aiding a libel plaintiff in the prosecution of a claim is of some interest to the public, is not a greater interest served by policies which increase, rather than impede, the flow of information to the public?

The *KSDO* court concluded that in determining the scope of protection, a balancing approach was appropriate, utilizing the following factors: 1) the nature of the proceeding; 2) the status of the newsperson as party or nonparty; 3) alternative sources of information; and 4) the relationship of the information to the "heart of the claim."⁸⁶

Ostensibly this approach is applicable to all shield law cases. However, a better approach would first ask whether the reporter was a party. If not, the other *KSDO* factors might not be as appropriate to consider as other factors, such as whether the proceeding was civil or criminal. Significantly, the court in *KSDO* concluded that the shield law provided no protection for the newsgatherers; instead, they were protected by virtue of a "[q]ualified privilege under the First Amendment."⁸⁷

The finding of the court was laudable in the sense that the reporter was not cited for contempt and did not have to reveal his source. However, since the court did not base its finding of privilege on the provisions of the shield, the finding is of little precedential value in determining the shield's scope of protection. In addition, the court chose not to discuss the effect of inserting the shield law provisions into the state constitution.⁸⁸ Thus, the *KSDO* holding provides little guidance on the question of whether the insertion of the shield into the constitution did in fact elevate its protection. It should also be noted that the test articulated in *KSDO* was grounded in a libel action. This

86. *KSDO*, 136 Cal. App. 3d at 386, 186 Cal. Rptr. at 217.

87. *Id.* at 386, 186 Cal. Rptr. at 218.

88. See *supra* text accompanying notes 76-78.

test is of limited value in evaluating cases where the reporter is *not* a party to the action. In those cases, contempt is generally the only sanction available. And, since the express terms of the statute preclude the finding of contempt, a privilege in effect exists. The California Supreme Court addressed this issue two years later in *Mitchell v. Superior Court*.⁸⁹

Mitchell, another libel case, involved a suit by the Synanon organization against *The Reader's Digest*, an author who had written about Synanon for the magazine, and David and Cathy Mitchell, who had written a series of articles criticizing the organization in their newspaper, *The Point Reyes Light*.⁹⁰ Synanon sought, through discovery, to obtain nearly all documents in the Mitchells' possession relating to the organization.⁹¹ Synanon asserted that the documents would support its claim that damaging evidence had been emphasized while more favorable evidence had been suppressed.⁹²

The California Supreme Court did not refer to the shield law as providing a privilege. The court did, however, note that "since contempt is generally the only effective remedy against a nonparty witness [and] the shield law prohibit[s] a finding of contempt, a privilege of nondisclosure had in fact been created."⁹³

The *Mitchell* court then added a qualification which has been widely quoted in succeeding years. "A party to civil litigation who disobeys an order to disclose evidence. . . may be subject to a variety of other sanctions, including the entry of judgment against him."⁹⁴ The problem is that later courts have quoted the passage in order to bolster findings that the reporter was not protected by the shield law—regardless of whether the reporter was a party to the action.⁹⁵ A close reading of *Mitchell*,

89. 37 Cal. 3d 268, 208 Cal. Rptr. 152, 690 P.2d 625 (1984).

90. *Id.*

91. *Id.* at 273, 208 Cal. Rptr. at 154, 690 P.2d at 627.

92. In its complaint, Synanon alleged that the Mitchells "conspired and acted in concert with each other to write, edit and publish to and among each other and to the readers of the article the false, malicious and defamatory words and language contained therein." *Id.* at 273, 208 Cal. Rptr. at 154, 690 P.2d at 627.

93. *Id.* at 274, 208 Cal. Rptr. at 155, 690 P.2d at 628.

94. *Id.* (emphasis in original).

95. See *Hallissy v. Superior Court*, 200 Cal. App. 3d 1038, 1045, 248 Cal. Rptr. 635,

however, leads to the conclusion that libel actions are unique. The tests which are useful in evaluating shield law cases based on libel are not universally applicable.

The *Mitchell* court found that the goal of protecting confidential sources and information could not be ignored.⁹⁶ A test was suggested which, in civil cases, would "weigh the assorted interests in light of the facts of the case before [the court]."⁹⁷ The court held that a "qualified privilege" existed vis-a-vis compelled disclosure, depending on the facts of the particular case.⁹⁸

According to the *Mitchell* court, the test for determining the scope of the privilege has four factors: 1) whether the reporter was a party; 2) the relevance of the information sought to the plaintiff's cause of action; 3) whether the plaintiff had exhausted all alternative sources of the information; and 4) the importance of protecting confidentiality in the case at hand.⁹⁹

The *Mitchell* test may prove to be the most effective in evaluating claims of newsgatherer's privilege in libel actions. However, the court did not provide a solution when the answer to the first question was negative. In other words, what is the scope of the privilege where the newsgatherer is a nonparty? Until recently, little attention has been paid to this question. A clear statement by the California Supreme Court about the scope of protection for nonparty newsgatherers in both civil and criminal actions is needed. It may be, as was suggested by the court in *New York Times*¹⁰⁰ that in civil actions, where the newsperson is a nonparty, the *Mitchell* balancing factors are not necessary.

639 (1988); *Delaney v. Superior Court*, 202 Cal. App. 3d 1019, 1025 n.8, 249 Cal. Rptr. 60, 64 n.8 (1988); see also WITKIN, CALIFORNIA EVIDENCE § 1291 at 1234 (3d ed. 1986).

96. *Mitchell*, 37 Cal. 3d at 276, 208 Cal. Rptr. at 156, 690 P. 2d at 629 ("We cannot ignore or subordinate the First Amendment values furthered by the protection of confidential sources and information; at the same time, we must recognize the parallel importance of the policy of favoring full disclosure of relevant evidence.")

97. *Id.*

98. *Id.*

99. *Id.* at 279-83, 208 Cal. Rptr. at 159-61, 690 P. 2d at 632-34.

100. 202 Cal. App. 3d at 509, 248 Cal. Rptr. at 429.

B. *HAMMARLEY v. SUPERIOR COURT*

*Hammarley v. Superior Court*¹⁰¹ illustrates the point that the nature of the litigation—civil or criminal—and the status of the newsgatherer—party or nonparty—is highly relevant to the type of analysis utilized in shield law cases. John Hammarley, a reporter for the *Sacramento Union*, wrote three articles in 1979 about the “Mexican Mafia.”¹⁰² The articles contained statements implicating certain “mafia members” in a murder.¹⁰³ Hammarley’s source was a former “member” who had “defected” and was a witness for the prosecution.¹⁰⁴

After receipt of subpoena as a witness in the criminal action, Hammarley moved to quash the subpoena on the grounds that it sought production of “unpublished information” protected by Evidence Code section 1070.¹⁰⁵ The superior court refused to quash the subpoena on the grounds that the “unpublished information” provision applied only to material leading to sources, not to unpublished information in general.¹⁰⁶ Hammarley was cited for contempt, which was stayed pending appeal.¹⁰⁷

The *Hammarley* opinion is noteworthy in at least two respects. First, the opinion established the principle that the “unpublished information” section of the Evidence Code was not limited to source disclosure. “[T]he statutory privilege protecting unpublished information is not limited to material which might [lead to source disclosure] but encompasses all information. . .not disseminated to the public.”¹⁰⁸

Second, the *Hammarley* test is well suited to the situation where the person claiming the privilege is a nonparty, especially where the party seeking disclosure is a criminal defendant.

101. 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979).

102. *Id.* at 392, 153 Cal. Rptr. at 610.

103. *Id.* at 393, 153 Cal. Rptr. at 610.

104. *Id.*

105. See text accompanying notes 10, 48.

106. *Hammarley*, 89 Cal. App. 3d at 394, 153 Cal. Rptr. at 611.

107. *Id.* at 395, 153 Cal. Rptr. at 611.

108. *Id.* at 398, 153 Cal. Rptr. at 613. The court characterized this view as an “expansive interpretation” in finding that protection was not limited to source disclosure. *Id.* at 397, 153 Cal. Rptr. at 613.

Hammarley set out a three-part test. First, the party seeking disclosure must show that the information is "relevant and necessary to his case."¹⁰⁹ Next, the party must show that the information is not available from a source "less intrusive on the privilege."¹¹⁰ Finally, he must show that the evidence sought might reasonably result in his exoneration.¹¹¹

The test is suitable for evaluating claims of privilege where the newsgatherer is not a party, as it provides for a balancing between the interest of a free press with the right to a fair trial. The problem is that this test seems best suited to criminal litigation. It is not clear that it is applicable in the situation of civil litigation where the reporter is not a party.

The better approach would be to apply the *Mitchell* test in the particularized situation of libel and the *Hammarley* test in *criminal* cases where the reporter is not a party. In *civil* cases where the reporter is a nonparty, there does not appear to be a compelling state interest in obtaining the newsgatherer's testimony. In that situation, no "test" is necessary and there is an absolute privilege to not testify. If an absolute privilege is not found desirable, there should be at least a qualified privilege. The qualified privilege would require a strong showing on the part of the party seeking disclosure before disclosure would be compelled.

IV. RECENT DEVELOPMENTS

*New York Times v. Superior Court*¹¹² and *Hallissy v. Superior Court*¹¹³ aptly illustrate the benefit which would be obtained by clarifying the scope of protection for nonparty newsgatherers. The approach taken by the courts in those two cases suggest that a rigorous classification scheme might simplify analysis of shield law cases, as well as to protect the interests of news-persons adequately.

109. 89 Cal. App. 3d at 399, 153 Cal. Rptr. at 614.

110. *Id.*

111. *Id.* (citing *People v. Borunda*, 11 Cal. 3d 523, 527, 113 Cal. Rptr. 825, 827, 522 P. 2d 1, 3 (1974)).

112. 202 Cal. App. 3d 503, 248 Cal. Rptr. 426 (1988).

113. 200 Cal. App. 3d 1038, 248 Cal. Rptr. 635 (1988).

The balance of this Comment suggests a proper scheme of classification of shield law cases which would aid the courts in evaluating claims of newsgatherer's privilege where the reporter is not a party. This Comment also suggests that if the California Supreme Court affirms *New York Times*, it may be considered proof that the insertion of section 1070 into the constitution did elevate its scope of protection.

A. THE *HALLISSY* CASE

Hallissy arose after reporter Erin Hallissy interviewed John Sapp¹¹⁴ in jail as he was awaiting trial. Sapp had been charged with three counts of murder, plus multiple murder, rendering him eligible to receive the death penalty.¹¹⁵ Hallissy wrote an article published in the *Contra Costa Times* entitled "I Killed Many for Pay." The prosecutor then amended the complaint to include murder for financial gain.¹¹⁶

Hallissy was subpoenaed by the defendant to appear at the preliminary examination with the notes of her interview.¹¹⁷ She successfully quashed the subpoena on the grounds that the unpublished material was protected by the First Amendment of the U.S. Constitution and by article 1, section 2b of the California Constitution.¹¹⁸

Sapp filed a motion in accordance with the Penal Code¹¹⁹ which stated, in essence, that Hallissy was a witness in his behalf whom he had a right to call.¹²⁰ The defense contended that Sapp's statements to Hallissy contradicted previous statements, and this contradiction cast doubt on his veracity.¹²¹ Casting doubt on his veracity, in turn, weakened the reliability of earlier statements confessing to the murders.¹²²

114. *Hallissy*, 200 Cal. App. 3d 1038, 248 Cal. Rptr. 635.

115. CAL. PENAL CODE § 190.2(a)(1) (West 1988).

116. *Hallissy*, 200 Cal. App. 3d at 1041, 248 Cal. Rptr. at 636.

117. *Id.*

118. *Id.*

119. CAL. PENAL CODE § 995 (West 1985).

120. *Hallissy*, 200 Cal. App. 3d at 1041, 248 Cal. Rptr. 636. (The appellate court stated that "one of several contentions raised was that the order quashing the subpoena denied Sapp his substantial right to call a witness in his behalf.")

121. *Id.*

122. Defendant contended that he had "confessed all over the place" and therefore

At the hearing, the superior court held it should balance the detriment to the reporter caused by forced disclosure with the harm the defendant would suffer were he not allowed to obtain the information.¹²³ The superior court ruled in Sapp's favor on the grounds that the criminal defendant's rights outweighed the value of protecting a newsgatherer.¹²⁴ The basis of the holding, however, was not that Sapp had made a showing that he would be denied his right to a fair trial; the court instead based its ruling on the fact that the party seeking disclosure was the source himself. "We have no confidential sources. We have no witnesses and names being sought to be protected."¹²⁵

The fact that the party seeking disclosure was the source himself was novel. But this did not justify neglect of the proper evaluation, which was whether the defendant had met the burden of defeating a claim of privilege under the shield law. The Evidence Code and the state constitution clearly protect against disclosure of sources and "unpublished information" regardless of whether such information has been disseminated to the public.¹²⁶ The code and the constitution do not state that the identity of the source is a relevant consideration.

Hallissy was held in contempt by the superior court for refusing to testify and the court of appeals granted review. The appellate court quoted *Mitchell* for the proposition that the shield law did not itself preclude the imposition of sanctions other than contempt; but noted that *Mitchell* had also found that contempt was "generally the only effective remedy against a nonparty witness."¹²⁷ The *Hallissy* court found that the shield law "confers the absolute immunity it appears to offer only

his confessions were unreliable. See Petitioner's Request for Stay, Petition for Writ of Mandate at 35.

123. *Hallissy*, 200 Cal. App. 3d at 1041, 248 Cal. Rptr. at 636 "Although the newspapers are entitled to the protection of their sources and the confidentiality of information, this is a case that doesn't involve that in any way." This typifies the tendency of some courts to diminish the scope of protection for "unpublished information."

124. *Id.*

125. The lower court had apparently presumed that since the "source" himself was also the party seeking disclosure, no confidentiality was at stake.

126. CAL. EVID. CODE § 1070 (West Supp. 1988).

127. *Hallissy*, 200 Cal. App. 3d at 1042, 248 Cal. Rptr. at 636. The court cited *Mitchell* for the proposition that "compelled disclosure might be appropriate in those cases in which are parties." 200 Cal. App. 3d at 1038, 248 Cal. Rptr. at 635, citing *Mitchell*, 37 Cal. 3d 268, 208 Cal. Rptr. 152, 690 p.2d 625.

when a nonparty witness refuses to disclose the covered information.”¹²⁸

The court in *Hallissy* did not clarify what was meant by the term “absolute immunity.” It did not hold, for example, that “absolute immunity” provides newsgatherers with more protection than “immunity” alone. Nor did the court discuss the difference, if any, between “privilege” and “absolute immunity.” However, the approach the court utilized could have been grounded in the assumption that at least a qualified privilege for newsgatherers exists.¹²⁹ The burden of overcoming the qualified privilege is on the party seeking disclosure, as had been found in *Hammarley*.¹³⁰ Although it was compelling in *Hallissy* that the source himself was the party seeking disclosure, nonetheless he still had to meet the burden of overcoming the newsgatherer’s privilege.

That burden, according to the *Hallissy* court, was meeting *Hammarley*’s three part test.¹³¹ The defendant had to show that the information was relevant and necessary to the case; that it was not available from a source “less intrusive on the privilege;” and that if the information was produced it might reasonably lead to his exoneration.¹³² In defendant Sapp’s case, the court found that only one of the three requirements had been close to being met: that of relevancy.¹³³

Even though the court described the newsgatherer’s shield as an “absolute immunity” and not as a “privilege,” it nevertheless treated the reporter as though she had at least a qualified privilege.¹³⁴ The court’s analysis is similar to that used in evaluating claims of privilege—focusing on the burden to be met by

128. *Id.* at 1045, 248 Cal. Rptr. at 638-39.

129. *See id.* at 1045-1046, 248 Cal. Rptr. at 639, (citing *Hammarley*, 89 Cal. App. 3d at 399, 153 Cal. Rptr. at 614) (the court discussed what a party “faced with a claim of privilege” had to show in order to overcome that privilege).

130. *Hallissy*, 200 Cal. App. 3d at 1046, 248 Cal. Rptr. at 639.

131. *Id.*

132. *Id.*

133. *Id.* (The court found that Sapp “arguably [approached] an adequate showing of relevancy: he wishes to attack his own credibility by using inconsistent statements that he may have made to the reporter during the interview.”)

134. *Id.* (The court viewed the shield as providing a qualified privilege by its use of the *Hammarley* test, which outlined the task *necessary* to overcome a qualified privilege).

the party seeking to overcome the privilege.¹³⁵

Although the court might easily have overcome Hallissy's claim of privilege by pointing out that there was no confidential source being protected, as had the lower court,¹³⁶ it did not. The *Hallissy* court focused on what was necessary to defeat a claim of privilege. *Hallissy* may be viewed as a reaffirmation of *Hammarley* in the sense that the shield protects against disclosure of sources *and* against disclosure of unpublished information, regardless of who the source is.

If this approach is uniformly adopted, a higher degree of consistency and predictability might result. The *Hallissy* opinion can be viewed as a tacit acknowledgement that the scope of the shield is broad and not to be narrowly applied. If the qualified privilege is to be overcome, it must not be on the basis of the contents of the material for which protection is sought, but instead because the party seeking disclosure has made a sufficient showing of the material's relevance and necessity to the case.

B. *NEW YORK TIMES*: ABSOLUTE PRIVILEGE FOR NONPARTY NEWSGATHERERS

Close on the heels of *Hallissy* came *New York Times v. Superior Court*.¹³⁷ This case contains the clearest, most sweeping affirmation of an absolute privilege for nonparty newsgatherers in civil actions.

In *New York Times*, a reporter working for the *Santa Barbara News-Press*¹³⁸ witnessed an auto accident and took photos at the accident scene.¹³⁹ A personal injury suit and products liability action was brought against Volkswagen of America, Inc.¹⁴⁰

135. The court's opinion consistently refers to what Sapp needed to prove to overcome the privilege. The opinion discusses the "nature" of the privilege in a cursory fashion, noting but briefly its origins. This approach is sound in the sense that it may be viewed as a tacit acknowledgement of at least a qualified privilege, despite calling it an "immunity."

136. See *supra* notes 123-125 and accompanying text.

137. 202 Cal. App. 3d 503, 248 Cal. Rptr. 426.

138. The *Santa Barbara News-Press* is owned by the *New York Times*.

139. *New York Times*, 202 Cal. App. 3d at 505, 248 Cal. Rptr. at 427.

140. *Id.* at 505, 248 Cal. Rptr. at 427.

Volkswagen sought production of "all photographs, negatives, notes and letters" in the possession of the *News-Press* to compare with photos taken by the California Highway Patrol.¹⁴¹

News-Press contended that the photos were of little additional value and refused to produce them.¹⁴² Volkswagen moved to compel production of the photographs.¹⁴³ Despite *News-Press'* contention that the photos were "absolutely privileged" under both the Evidence Code and the state constitution, the superior court found that only a qualified privilege existed.¹⁴⁴ The lower court attempted to view the photos *in camera* to determine whether Volkswagen's right to discovery outweighed the qualified privilege.¹⁴⁵ *News-Press* sought relief by way of extraordinary writ and a stay of the court's order.¹⁴⁶

The court of appeals noted that the lower court had viewed the issue as "a tempest in a teapot," as confidential sources were not involved.¹⁴⁷ The lower court in *New York Times* had attempted to analyze the issue in terms of the type of material for which protection was being sought,¹⁴⁸ just as the court in *Hallissy* had focused on the fact that the party seeking disclosure was the source himself.

Volkswagen contended that only a qualified privilege existed which was "outweighed by a public policy favoring disclosure of relevant evidence."¹⁴⁹ Apparently recognizing that helping

141. *Id.*

142. *Id.*

143. *New York Times*, 202 Cal. App. 3d at 505, 248 Cal. Rptr. at 427.

144. *Id.*

145. *Id.*

146. *Id.*

147. *New York Times*, 202 Cal. App. 3d at 507, 248 Cal. Rptr. at 428. The court said that it would not speculate on the manner in which the *News-Press* ran its paper. "We assume, however, that it is not with the same insouciance expressed by Charles Foster Kane." The court was referring to the film "Citizen Kane," where Kane states: "I don't know how to run a newspaper, Mr. Thatcher. I just try everything that works." (*Citizen Kane*, 1949).

148. The unpublished photos which Volkswagen sought were of little value in a newsmaking sense and did not concern a confidential source; the appellate court noted that the trial judge had concluded that the photos "would undoubtedly rest in some dusty repository until they are put in the wastebasket." 202 Cal. App. 3d at 507, 248 Cal. Rptr. at 428. While it is tempting to disregard such unimportant information, it is these innocent exceptions which may lead to later inconsistencies or more exceptions.

149. *New York Times*, 202 Cal. App. 3d at 507, 248 Cal. Rptr. at 428.

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an auto manufacturer defend a products liability action was of limited value to the public, the court of appeals found that Volkswagen's construction of the law "would substantially impair a newsgatherer's access to information."¹⁵⁰

The *New York Times* court apparently recognized the danger of overapplication of the "policy of disclosure" argument.¹⁵¹ It is true that public policy favors that which encourages rather than impedes the free flow of information. However, the principle behind the policy should not be overlooked. The "policy of disclosure" is based on the public's need to be informed about matters of general import; for example the exposure of corruption. The "policy of disclosure" argument should not be emphasized to the point where newsgatherers, who are the means by which the public receives its information, unwittingly and unwillingly become vast and potent resources of discovery. This is inconsistent with the basic notion of a free and unfettered press.

After noting briefly that the Evidence Code and state constitution did not literally create a privilege, the *New York Times* court found no difference between the terms "immunity" and "privilege."¹⁵² The court eloquently and emphatically discounted any difference in meaning. "But, as a rose is a rose by any other name, so too is a privilege. Nonparty newsgatherers receive absolute protection against compelled disclosure."¹⁵³

The court conceded that a qualified privilege may exist in criminal matters and in those situations "a balancing of competing interests may be appropriate."¹⁵⁴ The court correctly pointed out however, that the scope of protection was not limited to source disclosure.¹⁵⁵

The *New York Times* court also noted that the *Mitchell*

150. *Id.*

151. It is conceded that at least where the rights of a criminal defendant are at stake, there is a duty on the part of citizens to testify. See *supra* accompanying notes 27-29.

152. *New York Times*, 202 Cal. App. 3d at 508, 248 Cal. Rptr. at 429.

153. *Id.*

154. *Id.*

155. "The Constitution and the statute recognize that a newsgatherer's information must be protected whether or not that information comes from a confidential source." *Id.* at 510, 248 Cal. Rptr. at 430.

balancing of interest test¹⁵⁶ had been premised on a libel action and hence was not applicable in all cases involving the shield law.¹⁵⁷ Citing *Playboy Enterprises v. Superior Court*,¹⁵⁸ the court stated that in the *Playboy* case, also a civil action, discovery had been sought by a nonparty to the action.¹⁵⁹ The court construed *Playboy* as having found the shield law to be paramount as compared to a civil litigant's right to discovery.¹⁶⁰ The *New York Times* court pointed out, however, that the *Playboy* court had "engendered confusion by pausing to consider a threshold question" of whether to balance competing interests of newsgatherers with civil lawsuit defendants.¹⁶¹ According to the court in *New York Times*, the *Playboy* court was mistaken. The question "need not have been asked. In civil cases where the newsgatherer is not a party, the privilege is absolute."¹⁶²

For the appellate court in *New York Times*, the lower court's inquiry as to what use the photos were to be put was also inappropriate.¹⁶³ "Whether the photos are bound for oblivion in

156. See *Mitchell v. Superior Court*, 37 Cal. 3d 268, 208 Cal. Rptr. 152, 690 P. 2d 625 (1984).

157. *New York Times*, 202 Cal. App. 3d at 509, 248 Cal. Rptr. at 429. The court noted Volkswagen's contention that only a qualified privilege existed and cited *Mitchell* for support: "What this argument overlooks is that the newsgatherers in *Mitchell* who were seeking to resist the order for discovery were parties to the lawsuit. Our Supreme Court pointed out that compelled disclosure might be appropriate in those cases in which [newspersons] are parties." *Id.*

158. 154 Cal. App. 3d 14, 201 Cal. Rptr. 207 (1984) (libel action arising out of an interview by *Playboy* with the comedy team Cheech and Chong, in which Cheech and Chong made disparaging remarks about their former manager and his handling of their financial affairs).

159. *New York Times*, 202 Cal. App. 3d at 509, 248 Cal. Rptr. at 429.

160. *New York Times*, 202 Cal. App. 3d at 509 n.2, 248 Cal. Rptr. at 429 n.2: "The *Playboy* court ruled that all information acquired by a nonparty witness in the course of news gathering [came] within the protection of California's newsgathering shield law." With respect to the rights of the criminally accused, the court also quoted *Playboy's* finding that "[i]n cases involving a conflict between the criminal defendant's constitutional right to a fair trial and a newsperson's protection under the First Amendment and section 1070, the criminal defendant's constitutionally derived protection has resulted in the rule that 'where the criminal defendant has demonstrated a reasonable possibility that evidence sought . . . might result in his exoneration, he is entitled to its discovery.'" (citing *Playboy*, 154 Cal. App. 3d at 24-25, 201 Cal. Rptr. at 215).

161. *New York Times*, 202 Cal. App. 3d at 509, 248 Cal. Rptr. at 430.

162. *Id.* (the court wryly noted, "the term 'Playboy Court' does not reflect our view of the court, but only refers to the case decided by the court, *id.* at 509 n.3, 248 Cal. Rptr. at 430 n.3).

163. *Id.*

a wastebasket or have some special significance to the *News-Press* is not important. The newsgatherer on the beat does not have to worry about potential use of his or her material in third party actions."¹⁶⁴ Reiterating its position, the court stated that "the shield law is to be broadly applied. Its provisions afford absolute protection to nonparty journalists in civil litigation."¹⁶⁵

The court then concluded that a privilege of nondisclosure exists for newsgatherers.¹⁶⁶ Moreover, for nonparty newsgatherers, the privilege is absolute.¹⁶⁷ Unfortunately, the court did not elaborate as to how its holding was to be found consistent with the Assembly Committee on the Judiciary's comment that the shield provides an immunity, not a privilege, except its declaration that "they are the same thing."¹⁶⁸

New York Times is logically sound and simply stated. If, as is the case with all nonparty witnesses, contempt is the only sanction available, and contempt is prohibited by the statute, a privilege in substance, if not in form, must exist. The fact that it is labeled an immunity and not a privilege does not escape this conclusion. Naturally, if the wording of the statute was amended to reflect the existence of at least a qualified privilege, the courts would have less difficulty in interpreting the shield law uniformly. At a minimum, the courts will have an easier time with the shield law if the "immunity, not privilege" comment is excised.¹⁶⁹

New York Times articulates the idea that shield law cases should not be evaluated in terms of the content of the material for which protection is sought. It should be noted that the *Hallissy* court applied this principle to the situation where disclosure was urged on the basis of who the source was. Finally, the exact scope of protection for "unpublished material" should be clarified. Until it is made clear that under the express terms of the shield there is no difference between unpublished material

164. *Id.* at 510, 248 Cal. Rptr. at 430.

165. *Id.*

166. *Id.*

167. *Id.*

168. CAL. EVID. CODE § 1070, Comment, Assembly Committee on the Judiciary (West Supp. 1988).

169. *Id.*

and material which leads to sources, cases will remain inconsistent and "exceptions" will continue to be carved out.

C. AN EXAMPLE OF AN "EXCEPTION."

Another recent appellate case, *Delaney v. Superior Court*,¹⁷⁰ held that in the "narrow situation" of a newsgatherer as an "eyewitness to a public event," the shield law does not apply.¹⁷¹ In *Delaney*, a reporter and a photographer for the *Los Angeles Times* accompanied members of the Long Beach Police Department on special patrol for complaints regarding drugs.¹⁷² Two men, observed on a bench in a mall, were questioned about an apparent bag of narcotics sticking out of one of the men's pocket.¹⁷³ The officers testified that they asked defendant Delaney whether they could search his jacket for weapons and that he consented.¹⁷⁴ Subsequently, a set of brass knuckles was found and Delaney was arrested.¹⁷⁵

Reporter Roxana Kopetman wrote an article about the incident which did not mention whether Delaney had consented to a search.¹⁷⁶ Delaney moved to suppress the evidence of the brass knuckles on the grounds that he had not consented to the search.¹⁷⁷ He subpoenaed the reporter and the photographer to testify about the search at the suppression hearing.¹⁷⁸ The newsgatherers moved to quash the subpoena on the grounds that the facts surrounding the arrest were "unpublished information" under the shield law.¹⁷⁹ Their motion was denied.¹⁸⁰

At the suppression hearing, the reporters were called to testify on the issue of whether Delaney had consented to the search of his jacket.¹⁸¹ Although they testified about the events leading

170. 202 Cal. App. 3d 1019, 249 Cal. Rptr 60 (1988).

171. 202 Cal. App. 3d 1019, 249 Cal. Rptr 60 (1988).

172. *Id.* at 1023, 249 Cal. Rptr. at 62.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 1024, 249 Cal. Rptr. at 62.

179. *Id.*

180. *Id.*

181. *Id.*

up to the search, they refused to testify about whether Delaney had consented to the search of the jacket.¹⁸²

The lower court held that the need for the reporters's testimony outweighed any claim based on the shield law.¹⁸³ The lower court also found that the shield law "did not apply" because the reporters were "eyewitnesses."¹⁸⁴ The reporters were cited for contempt.¹⁸⁵ The matter was appealed.

After discussing the history of the shield law, the appellate court noted that the issue of whether an immunity existed when the reporter witnesses a public event was "an issue of first impression."¹⁸⁶ The court stated that its independent examination of the Evidence Code and the constitution "[confirmed] that the purpose of adding provisions regarding unpublished information was to strengthen the protection of sources."¹⁸⁷ The court distinguished *Hammarley* on the tenuous grounds that the *Hammarley* court had not determined whether "eyewitness observations of a public event constitute 'unpublished information' under the shield law."¹⁸⁸

This analysis is flawed in two respects. First, the so-called

182. *Id.*

183. The municipal court found that there was a need for the reporters' "neutral testimony on the consent issue." *Id.* The appellate court offered no opinion as to the basis of the finding of the lower court that the reporters were indeed "neutral."

184. *Id.*

185. *Delaney*, 202 Cal. App. 3d at 1024, 249 Cal. Rptr. at 62. The superior court granted a writ of habeas corpus, finding that the shield law provided immunity from contempt. Delaney sought to vacate the order of the superior court; the appellate court issued an alternative writ and reinstated the contempt citation. *Id.*

186. *Id.* at 1026, 249 Cal. Rptr. at 64.

187. *Id.* The court noted that because no confidential sources were involved, "if the shield law is applicable, it must be based on its provisions involving unpublished information." In support of its analysis, the court cited an analysis prepared for a 1974 amendment (SB 1858) which stated that the protection of unpublished information was necessary "in order to keep open the sources of that information." *Id.* at 1027, 249 Cal. Rptr. at 65. The court also quoted the argument which appeared on the ballot in favor of the amendment in 1980, emphasizing the passages dealing with the protection of news sources. *Id.*

188. *Id.* at 1029, 249 Cal. Rptr. at 66 (citing *Hammarley*, 89 Cal. App. 3d 388 at 396-398, 153 Cal. Rptr. 608 at 612-614) (court noted that in *Hammarley*, unpublished information "had broad reference" to material within the reporter's knowledge, "whether contained in source material or in memory"). The court found that neither *Hammarley* nor *Playboy* had "attempted to determine whether eyewitness observations of a public event constitute 'unpublished information' under the shield law." *Id.*

“eyewitness exception” could arguably be applied to every incident that a reporter observes. Ostensibly everything that a reporter observes and reports on happens in public. Thus, although the court called its exception “narrow,” the actual possibilities for application are endless.

Second, the court failed to explain how its holding could possibly be construed as consistent with *Hammarley* when that case clearly found “unpublished information. . . contained in source material or in memory”¹⁸⁹ to be protected under the shield law. The court in *Delaney*, apparently assuming that the only issue was the citizen’s duty to testify, did not address the issue of whether the defendant had met the burden which would justify the overcoming of the privilege. In other words, the *Delaney* court did not address the issue of whether the defendant had shown that without the testimony of the reporters that he would be denied his right to a fair trial. The opinion also did not discuss the issue that the cost of protecting a free press may be the occasional loss of relevant evidence at trial.

Instead, the majority in *Delaney* relied on the fact that “the subject matter of the testimony is not dependant upon anyone’s trust being placed in the newsperson.”¹⁹⁰ This meant that there was “no reason to differentiate the newsperson’s observation from that of any other citizen.”¹⁹¹ The court flatly asserted, “in short, the testimony is wholly unrelated to the shield law.”¹⁹² This is a remarkable pronouncement, for arguably any time a reporter is called to testify about an event that he or she has reported on, the shield law will be at issue.

The *Delaney* majority also dismissed the argument that the elevation of the shield law into the state constitution broadened the scope of its protection, finding that the elevation of the shield law into the constitution was primarily for the purpose of

189. *Id.* In creating its eyewitness exception, the court neglected to mention that neither *Hammarley* nor *Playboy* discussed the issue of “eyewitnesses” because they were both founded on libel actions. The opinion offers little else in the way of analysis as support for its facile “eyewitness” distinction.

190. *Id.* at 1029, 249 Cal. Rptr at 66.

191. *Id.* The court did not discuss the likelihood of the average citizen’s being invited along on a police operation, and offered nothing else in support of its contention that news reporters were no different from other citizens.

192. *Id.*

abrogating the holdings in *Farr* and *Rosato*.¹⁹³ The court neglected, however, to support this contention with solid evidence or reasoning. While it may be true that the holdings in *Farr* and *Rosato* provided the impetus for the constitutional amendment, it is more likely that the amendment was proposed in order to protect against judicial inroads on freedom of the press—inroads similar to those created by the court in *Delaney*.¹⁹⁴

The majority's misunderstanding of the shield law is highlighted by the consideration that the same result might have been reached had they used the *Hammarley/Hallissy* factors. This was pointed out in the dissent.¹⁹⁵ There was no reason for creating an "exception" and no rationale for the finding that the shield law was not at issue.

The dissent pointed out that using the *Hammarley/Hallissy* factors would have served both important interests at stake: the protection of the shield law and the criminal defendant's sixth amendment right to a fair trial.¹⁹⁶ Using this analysis, *Delaney* could have shown that the information was relevant and necessary to his case; that it was not available from a source less intrusive on the privilege and that it might reasonably have led to his exoneration. The court could then have avoided entirely its analysis of the "purpose" of the shield law and focused on whether the defendant had met the requisite burden for overcoming a privilege.

As noted by the dissent, the trial court could have held an *in camera* hearing "to examine the evidence and balance the competing interests. . . ."¹⁹⁷ Instead, the majority's "narrow exception" focused on the result. This "exception" actually has so broad a spectrum of application as to render it meaningless.

193. *Delaney*, 20 Cal. App. 3d at 1029, 249 Cal. Rptr. at 66.

194. The court characterized its holding as strictly limited when in fact, its possibilities for application are endless.

195. The dissent pointed out that defendant "may discover evidence protected by the shield laws where he demonstrates a *reasonable possibility* that the evidence might result in his exoneration. . . . Even with the broad protection offered by the shield law, the criminal defendant's Sixth Amendment constitutional right to a fair trial is still protected and of paramount importance." *Id.* at 1032 (emphasis in original).

196. *Id.* The dissent found that the express language of the shield laws protected newsgatherers from having to disclose *any* unpublished information obtained in the course of newsgathering.

197. *Id.*

Were newsgatherers compelled to testify about every event observed in public they would undoubtedly find themselves in courtrooms more often than newsrooms.

CONCLUSION

California's courts must achieve a degree of uniformity in their interpretation of the shield law. The California Supreme Court has a unique opportunity to clarify the state of the law with respect to the conflicting views held by the appellate courts in *New York Times* and *Delaney*. There also is an opportunity to resolve the conflict regarding the exact scope of protection afforded by the shield.

These issues need resolution. First, is there a difference between the terms "privilege" and "immunity," and what, if any, is the effect of the difference? Second, what is the exact scope of protection for unpublished information which does *not* lead to a source? Next, in evaluating cases involving the newsgatherers' shield, may the courts utilize more than one test? Finally, what are the appropriate tests to be employed? The result in *Delaney* could arguably have been reached by using the *Hammerley/Hallissy/New York Times* analyses. The better policy is to evaluate whether the party seeking disclosure has met the burden which would justify overcoming the privilege. The following is recommended:

1. In evaluating cases involving the shield law, the first inquiry should be whether the newsperson is a party to the action. Generally, where the newsgatherer is a party the action will be one for defamation. The *Mitchell* factors are well suited to evaluating claims based on the shield law in such cases. However, clarification is necessary with respect to the issue of sanctions against nonparty newsgatherers. The fact that parties to an action may be subject to sanctions other than contempt should not be used as a basis for finding that *nonparties* may be found in contempt.

2. If the reporter is not a party, the analysis should then focus on the type of action involved, civil or criminal. With respect to criminal actions, the *Hammarley/Hallissy* analysis is ideal. Emphasis should be placed on the party seeking disclosure

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and whether that party can show that the withheld information is relevant to his case, not available from a source less intrusive on the privilege, and reasonably likely to lead to his exoneration.

3. For nonparty newsgatherers in civil actions, the analysis of the court in *New York Times* is preferable. The policy of maintaining the free flow of information to the public should not be twisted out of proportion. The newsgatherer's obligation is to the public; to keep the public informed. The value of subsidizing civil litigants' claims by utilizing newsgatherers as discovery resources does little to benefit the general public. In fact, compelling newsgatherers to aid civil litigants in their cases may keep them from fully performing their duty of maintaining the free flow of information.

4. The Legislature should excise the Assembly Committee on the Judiciary's comment following section 1070 which states that the shield provides an immunity and not a privilege. The comment has only served as a source of confusion. Since it is not part of the actual text of the statute it is of questionable legal significance.

The above suggestions would provide the courts with a definite guide to aid them in deciding newsgatherer's shield cases. Hopefully, this would lead to more consistent and predictable outcomes. In addition, a classification as outlined above is well suited to balancing and protecting all of the important rights at stake. It places equal value on the right of the public to be informed and the press' duty to inform the public. This viewpoint also respects the right of all litigants, civil and criminal, to obtain evidence relevant and necessary to the full and fair litigation of a case.

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