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The California Supreme Court Sets the Stage for Destruction of the Newsperson's Shield Law in Delaney v. Superior Court

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I. INTRODUCTION

Imagine you are a reporter. You and a photographer, as part of your research on a story, accompany a special police department task force on their "beat." The task force was formed to help "clean up" the city, and you have been assigned to watch them in action. During the day, the police officers you are observing stop and question a young man sitting on a bench. They search him and find that he is carrying a weapon. The police arrest him. At his trial you and your photographer are called to testify as to whether he consented to the police officers' search. The question is: do you testify?

As a reporter, your code of ethics states that you "shall refuse to reveal confidences or disclose sources of information in court or before other judicial or investigatory bodies..." A reporter's exercise of this code is protected from contempt citations in California, which had a shield law in its Code of Civil Procedure as early as 1935. Following the transfer of the shield law from the California Code of Civil Procedure to the California Evidence Code, and a series of legislative changes, the newsperson's shield law, in substantially the same language, was added as one of the California Constitution's provisions.

In 1980, following the transfer of the shield law from the California Code of Civil Procedure to the California Evidence Code, and a series of legislative changes, the newsperson's shield law, in substantially the same language, was added as one of the California Constitution's provisions.

Theoretically, as a reporter, you therefore have no problem in deciding whether to testify: you simply refuse, on the basis of your code of ethics and the California Constitution.

In practice, however, the decision of whether or not to testify is far from simple. Despite a shield law which is "clear and unambiguous," courts in California have repeatedly refused to give it effect, and they

4. CAL. CONST., art. I, § 2(b).
continue to enforce contempt citations against newpsersons, even after the law was elevated to constitutional status.\textsuperscript{7} The cases cite interests of civil litigants and criminal defendants as justifications for overcoming the immunity afforded newpsersons by the shield law. In the face of such wide recognition of countervailing interests, is the shield law a "shield" at all? Or is the protection it affords merely illusory, because of the courts' continuing repudiation of it?

The California Supreme Court recently had the opportunity to mitigate these concerns by either upholding the shield law itself, or formulating a standard for weighing interests so that at least in some cases, the reporters' interest would prevail. The court unfortunately did not seize this opportunity. In \textit{Delaney v. Superior Court}\textsuperscript{8} ("Delaney") the issue was whether a criminal defendant's right to a fair trial can outweigh a newpserson's shield law protection.\textsuperscript{9} The court held that the defendant's rights can, and will, overcome the newpserson's protection, if the defendant can show a \textit{reasonable possibility} the information will materially assist his defense.\textsuperscript{10} The court's result once again knocks down shield law immunity in favor of another interest, in this case a criminal defendant's right to a fair trial.\textsuperscript{11} Further, the court used a conglomerate of the various tests posited by the California Courts of Appeal in shield law cases, none of which formulated a standard which would help preserve shield law immunity.

This Note will analyze the \textit{Delaney} decision in detail. It will de-


\textsuperscript{9} \textit{Delaney}, 50 Cal. 3d at 792, 789 P.2d at 936-37, 268 Cal. Rptr. at 755-56.

\textsuperscript{10} Id. at 808, 789 P.2d at 948, 268 Cal. Rptr. at 767 (emphasis in original).

\textsuperscript{11} This phenomenon of favoring criminal defendants' and civil litigants' interests over shield law immunity is also noted, with reference to California appellate decisions between 1971 and 1979, in Note, \textit{Pressing California Shield Law on Criminal Defendants: A Weighting Game}, 11 \textit{HASTINGS COMM/ENT L.J.} 461 (Spr. 1989).
scribe the history of the California shield law, and examine standards used in cases decided under it. It will also evaluate the implications of the standard formulated by the Delaney court, and whether it renders moot a newsperson's shield law immunity from contempt, at least in a criminal context. Finally, the possible effect of the Delaney decision on shield law immunity in civil cases is discussed.

II. STATEMENT OF THE CASE—DELANEY V. SUPERIOR COURT

A. Statement of Facts

In September, 1987 a new Long Beach Police Department task force was patrolling downtown Long Beach, in an effort to "make this a desir-able place." On September 23, Los Angeles Times reporter Roxana Kopetman and photographer Roberto Santiago Bertero, real parties in interest in Delaney, accompanied the task force. The officers saw Sean Delaney and a friend sitting on a bench in the Long Beach Plaza mall. Both were "shabbily dressed." A plastic bag of a type often used to store narcotics was protruding from Delaney's shirt pocket. When the officers asked about the contents of the bag, Delaney showed them it contained a piece of gold and a piece of jewelry. He said he intended to pawn the items at the mall. The officers were suspicious because the mall had no pawnshops. They asked Delaney for his identification, and he reached for a jacket lying next to him on the bench. A police officer ran his fingers along the outside of the jacket, and he felt a hard object in its pocket. The officer reached inside and retrieved a set of brass knuckles, which Delaney said was a key chain.

Delaney was charged in a misdemeanor complaint with possession of brass knuckles, in violation of California Penal Code § 12020(a). He moved to suppress the evidence of the brass knuckles, saying that because he had not consented to the search of his jacket, the seizure of the

14. Delaney, 50 Cal. 3d at 793, 789 P.2d at 937, 268 Cal. Rptr. at 756.
16. Delaney, 50 Cal. 3d at 793, 789 P.2d at 937, 268 Cal. Rptr. at 756.
17. Id.
18. Id.
19. Id.
20. Id.
21. Delaney, 50 Cal. 3d at 793, 789 P.2d at 937, 268 Cal. Rptr. at 756.
22. Id.
23. Id.
knuckles was illegal.24 According to the officers, Delaney had consented to the search of his jacket.25

On September 27, 1987 Kopetman published an article in the Los Angeles Times about the Long Beach police task force.26 The article described Delaney and his friend, included a photograph of them, and contained information about their contact with the officers and the discovery of the gold and jewelry.27 The article did not, however, mention whether Delaney consented to the search of his jacket.28

B. Procedural History

Delaney subpoenaed Kopetman and Bertero to testify at the municipal court hearing on the issue of whether he could suppress the evidence obtained through the allegedly illegal search (that is, the brass knuckles).29 The reporters30 moved to quash the subpoena, contending that "they could not be compelled to testify because their eyewitness observations of the public search and seizure constituted 'unpublished information' protected by the newspersons' shield law from disclosure."31 The court denied the reporters' motions.32

At the suppression hearing, the reporters were called to testify.33 They testified that they observed the search in question, and were in a position to observe whether Delaney had consented to it.34 However, they refused to reveal their unpublished observations. The municipal court held the shield law inapplicable to the reporters' eyewitness observations of the public search and seizure, and held that even if it did apply, Delaney's need for the testimony outweighed the reporters' shield law immunity.35 The judge cited the reporters for contempt.36 The reporters filed petitions for writs of habeas corpus in superior court. The

24. Id. at 793-94, 789 P.2d at 937, 268 Cal. Rptr. at 756.
25. Id. at 793, 789 P.2d at 937, 268 Cal. Rptr. at 756.
28. Id.
29. Delaney, 50 Cal. 3d at 794, 789 P.2d at 937, 268 Cal. Rptr. at 756.
30. The term "reporter" will be used throughout to indicate any person specified in the shield law as being entitled to its protection.
31. Delaney, 50 Cal. 3d at 794, 789 P.2d at 937, 268 Cal. Rptr. at 756.
32. Id.
33. Id.
34. Id.
35. Id., 789 P.2d at 937-38, 268 Cal. Rptr. at 756-57.
36. Delaney, 50 Cal. 3d at 794, 789 P.2d at 938, 268 Cal. Rptr. at 757.
superior court granted their petitions. Delaney and the Long Beach City Prosecutor filed a joint petition in the court of appeal seeking to vacate the superior court's orders granting the reporters' habeas corpus petitions.

The court of appeal held that the "unpublished information" provisions of the shield law do not apply to compelled eyewitness testimony regarding a public event, and ordered the superior court to vacate the orders granting the reporters habeas corpus. The California Supreme Court modified this holding, and concluded that "the shield law's broad definition of 'unpublished information' does not require a showing by the newsperson that the information was obtained in confidence." They further held "that a newsperson's protection under the shield law must yield to a criminal defendant's constitutional right to a fair trial when the newsperson's refusal to disclose information would unduly infringe on that right."

III. THE HISTORY OF THE NEWSPERSON'S SHIELD LAW IN CALIFORNIA

A. Legislative History

California's first shield law was enacted in 1935 as an amendment to Code of Civil Procedure § 1881. This statute immunized newspaper employees from being held in contempt for nondisclosure of their sources. It was amended in 1961 to provide broader immunity, and then in 1965 its text was moved to Evidence Code § 1070. Through a series of amendments, the immunity from contempt has been extended to publishers, editors, radio and television reporters, and other persons associated with newspapers, magazines, periodicals, press associations,

37. *Id.*
38. *Id.*
40. *Id.*
41. *Delaney,* 50 Cal. 3d at 793, 789 P.2d at 937, 268 Cal. Rptr. at 756.
42. *Id.*
43. Codified in CAL. CODE OF CIV. PRO. § 1881(6) (West 1955); *Delaney,* 50 Cal. 3d at 795, 789 P.2d at 938, 268 Cal. Rptr. at 757.
44. *Delaney,* 50 Cal. 3d at 795, 789 P.2d at 938, 268 Cal. Rptr. at 757.
47. See Stats. 1971, ch. 1717, § 1; Stats. 1972, ch. 1431, § 1; and Stats. 1974, ch. 1456, § 2.
television and radio.  

In the landmark case of *Branzburg v. Hayes*, the United States Supreme Court was asked to interpret the first amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. A plurality of the Court declined to do so. However, the Court also stated that it was "powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege." The California Legislature's 1974 amendment to California Evidence Code § 1070 was apparently in response to *Branzburg*. This amendment extended the shield law protection not only to "sources" of information, but also to "unpublished information."

The Evidence Code provision was made part of the California Constitution by Proposition 5 in the June 3, 1980 primary election. Evidence Code § 1070 and California Constitution article I, § 2(b) ("article I, § 2(b)") are identical except for insignificant differences in wording. For example, Evidence Code § 1070 states that a newsperson "cannot be adjudged in contempt," while article I, § 2(b) states that a newsperson "shall not be adjudged in contempt." Article I, § 2(b) provides in part:

A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication . . . shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured . . . for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public . . . .

As used in this subdivision, 'unpublished information' includes

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48. CAL. EVID. CODE § 1070 (West 1988).
50. *Branzburg*, 408 U.S. at 690.
51. *Id.*
52. *Id.* at 706.
53. See Delaney, 50 Cal. 3d at 796, 789 P.2d at 939, 268 Cal. Rptr. at 758.
54. *Id.*
56. Delaney, 50 Cal. 3d at 796, 789 P.2d at 939, 268 Cal. Rptr. at 758.
57. CAL. EVID. CODE § 1070 (West 1988), CAL. CONST., art. I, § 2(b) (emphasis added to each).
information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data . . . whether or not published information based upon or related to such material has been disseminated.58

The intent of the constitutional provision was to strengthen the shield law.59 Its practical effect was to make it harder for California courts to overcome shield law protection and compel disclosure.60

B. California Courts Created Exceptions to the Statutory Shield Law

On four separate occasions, California appellate courts refused to uphold shield law immunity under Evidence Code § 1070 by carving exceptions out of the protection provided by the statute.61 These exceptions were related to criminal defendants' rights, and an examination of them is necessary to properly analyze Delaney.

1. Evidence Code § 1070 is Inapplicable When a Court Investigates Possible Violations of its Orders Barring Potentially Prejudicial Pretrial Publicity62

Farr v. Superior Court63 ("Farr"), grew out of the 1970 trial of Charles Manson and his codefendants for two sets of multiple murders.64 In the much-publicized Manson case, an Order re Publicity, a protective order prohibiting the release of testimony or evidence that might be given at trial, became effective on December 10, 1969.65 During the trial, Virginia Graham, a potential witness, recited in a written statement that one of Manson's codefendants, Susan Atkins, had confessed "in lurid detail"

59. Kevane, The News-gatherer's Shield—Why Waste Space in the California Constitution?
60. Id.
64. Id. at 63-4, 99 Cal. Rptr. at 344.
65. Id. at 64, 99 Cal. Rptr. at 344.
that she and her codefendants had "planned to murder a series of show business personalities each in a particularly vicious and bizarre manner." 66 One copy of the statement, edited to exclude inadmissible testimony, was delivered to each defense attorney, all of whom were subject to the protective order. 67 William T. Farr, a Los Angeles Herald Examiner reporter, sought and received copies of the statement. 68 Upon learning that Farr had the statement, the judge presiding over the Manson trial held an in-chambers hearing. 69 At the hearing, Farr refused to reveal his sources for the statement, asserting immunity under § 1070. 70

After Manson, Atkins and the other codefendants were found guilty, the trial court held a "hearing to determine the source of Farr's Herald Examiner story recounting the Graham statement." 71 At issue was whether the violation of the order had jeopardized the defendants' right to a fair trial. 72 Upon his refusal to reveal his sources, Farr was held in contempt. 73 The California Court of Appeal upheld the judgment of contempt, 74 stating that to grant immunity to Farr would be an "unconstitutional interference by the legislative branch with an inherent and vital power of the court to control its own proceedings and officers." 75 The court further stated that allowing immunity in this case would violate the principle of separation of powers. 76 The court held that it must balance "the interest to be served by disclosure of source against its potential inhibition upon the free flow of information," and then concluded that, in this case, Farr was not entitled to the immunity afforded him in Evidence Code § 1070. 77

In Rosato v. Superior Court ("Rosata"), 78 the trial court issued a gag order 79 prohibiting individuals connected to a criminal proceeding involving bribery and conspiracy charges against officials of the city of

66. Id.
67. Id.
68. Farr, 22 Cal. App. 3d at 64, 99 Cal. Rptr. at 344.
69. Id. at 64-5, 99 Cal. Rptr. at 344.
70. Id. at 65, 99 Cal. Rptr. at 344.
71. Id., 99 Cal. Rptr. at 344-45.
72. Id., 99 Cal. Rptr. at 345.
74. Id., 99 Cal. Rptr. at 346.
75. Id. at 69, 99 Cal. Rptr. at 348.
76. Id. at 70, 99 Cal. Rptr. at 348.
77. Id. at 73, 99 Cal. Rptr. at 350.
79. A gag order is "a court-imposed order to restrict information or comment about a case. The ostensible purpose of such an order is to protect the interests of all parties and preserve the right to a fair trial by curbing publicity likely to prejudice a jury." BARRON'S LAW DICTIONARY 201 (2d ed. 1984).
Fresno from releasing information about the case. After stories quoting extensively from the sealed grand jury transcript appeared in the Fresno Bee, the court convened a hearing concerning the apparent violation of its orders. Fresno Bee reporters and editors were questioned at the hearing regarding the source of their information. When they refused to answer, the trial court held them in contempt. The court of appeal upheld the contempt citations.

As in Farr, the Rosato court acknowledged that the legislature's recognition of the importance of maintaining a free flow of information was embodied in § 1070. The Rosato court went on, however, to consider two limitations on § 1070. First, § 1070 cannot apply to shield newspaper personnel from "testifying about criminal activity in which they have participated or which they have observed." The court supported this limitation by analogizing to other areas in which such a limitation has applied to deny a statutory immunity from contempt. Second, the court applied the limitation enunciated in Farr, that of the inherent power of the judiciary to control its own proceedings and officers. The Rosato court found that:

The key to the court's power to compel [disclosure] in the case at bench in the face of Evidence Code section 1070 is the necessity of exploring the violation of its orders by those subject thereto as a means of enforcing the court's constitutional obligation to prevent prejudicial publicity from emanating from its officers.

Therefore, the shield law does not apply when "questions asked may tend to identify who, if anyone, among those subject to a court's order, may have violated it." The court's contention that the shield law still pro-

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80. Rosato, 51 Cal. App. 3d at 199-201, 124 Cal. Rptr. at 433-34; Real Parties in Interest's Opening Brief on the Merits at 18, Delaney v. Superior Court, 50 Cal. 3d 785 (No. S006866) (hereinafter, Real Parties in Interest's Opening Brief).
81. Real Parties in Interest's Opening Brief at 18.
82. Rosato, 51 Cal. App. 3d at 201, 124 Cal. Rptr. at 434.
83. Real Parties in Interest's Opening Brief at 19.
84. Id.
85. Id.
88. Id. at 218, 124 Cal. Rptr. at 446.
89. Id.
90. Id. at 218-19, 124 Cal. Rptr. at 446.
91. Id. at 219, 124 Cal. Rptr. at 446-47.
92. Rosato, 51 Cal. App. 3d at 222, 124 Cal. Rptr. at 448.
93. Id. at 224, 124 Cal. Rptr. at 450 (emphasis in original).
tects against the compelled disclosure of sources other than those subject to protective orders may have been a token reassurance to the press, because the Rosato court nevertheless pierced another hole in § 1070's shield protection.

2. Evidence Code § 1070 Does Not Apply if the Identity of the Newsperson's Sources Has Already Been Revealed

In CBS, Inc. v. Superior Court, criminal defendants charged with selling PCP, also known as angel dust, subpoenaed petitioner CBS to produce "certain video tapes, tape recordings and motion pictures of three meetings between the defendants and narcotics officers of the Santa Clara Sheriff's Department on August 12, 1977, between 8:00 and 9:15 p.m." CBS had compiled the materials as part of a "60 Minutes" program segment. CBS moved to quash the subpoena, relying in part on the immunity afforded by § 1070. CBS argued that under § 1070 they did not have to produce unpublished material such as outtakes. The court, however, found the unpublished nature of the outtakes "insignificant" because CBS had failed to explain "what of substance in the materials sought to be produced has not already been revealed." This finding was based on the fact that the confidentiality which CBS had promised the officers in getting permission to tape the events in the first place had already been lost when the officers revealed their identities at trial. The court denied CBS's motion and ordered CBS to produce video and audio tapes, photographs, and outtakes of the meetings.

The CBS court stated that, in balancing the right of "newsgathering" against the defendants' right to a fair trial, the "necessity of permitting discovery becomes clear." The court also articulated the standard that "where a criminal defendant has demonstrated a reasonable possibility that evidence sought to be discovered might result in his exoneration,

94. Id.
96. Id.
97. Id. at 246, 149 Cal. Rptr. at 423.
98. Id.
99. Id., 149 Cal. Rptr. at 424.
100. CBS, Inc., 85 Cal. App. 3d at 250, 149 Cal. Rptr. at 426. An outtake is "a scene, or take, photographed for a motion picture or television show, but not included in the shown version." WEBSTER'S NEW WORLD DICTIONARY 1011 (2d ed. 1978).
102. Id.
103. Id. at 247, 149 Cal. Rptr. at 424.
104. Id. at 251-52, 149 Cal. Rptr. at 426-27.
he is entitled to its discovery."105

3. Even Where § 1070 Applies, the Immunity It Provides a
   Newsperson Must Yield Where a Criminal Defendant
   Demonstrates a Need for the Information Sought
   to be Disclosed

   In Hammarley v. Superior Court ("Hammerly"),106 the California
   Third District Court of Appeal upheld a contempt judgment against a
   Sacramento Union news reporter when he refused to comply with an or-
   der to produce for the court's in camera inspection tapes, notes and tran-
   scriptions of interviews with an individual who had eyewitnessed and
   participated in a murder.107 The reporter, John Hammarley, had written
   four articles about murders allegedly committed by members of the
   "Mexican Mafia."108 The articles contained statements by Edward Gon-
   zales, a self-confessed former member of the "Mexican Mafia," implica-
   ting defendants in the murder of Ellen Delia.109 Gonzales, a key witness
   for the prosecution, had assumed a new identity in another state, where
   he was protected from retaliation by his former associates.110

   The Hammarley court held that defendants had satisfied a three-
   prong test to overcome Hammarley's claim of § 1070 immunity. De-
   fendants had shown that (1) the evidence sought was "relevant and nec-
   essary" to their case; (2) the evidence was "not available from a source
   less intrusive" upon the § 1070 immunity; and (3) there was a "reason-
   able possibility that the evidence sought might result" in their exonera-
   tion.111 Therefore, the judgment of contempt was valid. The court
   supported its decision by stating that "[t]he state may not abridge a de-
   fendant's constitutional right to a fair trial by denying the accused access
   to all evidence that can throw light on the issues in the case . . . ."112

105. Id., 149 Cal. Rptr. at 427 (citing People v. Borunda, 11 Cal. 3d 523, 113 Cal. Rptr.
     825, 522 P.2d 1 (1974); Honore v. Superior Court, 70 Cal. 2d 162, 449 P.2d 169, 74 Cal. Rptr.
     233 (1969)) (emphasis in original).
108. Id. at 392-93, 153 Cal. Rptr. at 610.
109. Id.
110. Id. at 393, 153 Cal. Rptr. at 610.
111. Id. at 399, 153 Cal. Rptr. at 614.
112. Hammarley, 89 Cal. App. 3d at 401-02, 153 Cal. Rptr. at 616 (citing People v. Riser,
     47 Cal. 2d 566, 586, 305 P.2d 1, 13 (1956)).
C. Civil Cases Dealing With California’s Constitutional Shield Law Did Not Require Disclosure

The first reported case to confront the shield law in its constitutional form was *KSDO v. Superior Court* ("KSDO"). 113 *KSDO* involved a civil suit for libel and violation of civil rights. 114 Plaintiffs, members of the Riverside County Police Department, sued, among others, KSDO radio station and Hal Brown, a reporter for KSDO, over a broadcast about an investigation into allegations of "transportation of large amounts of heroin from Tijuana to Riverside by city police in official cars." 115 During his deposition, Brown revealed his sources for the broadcast. 116 The trial court granted the police officers’ motion for disclosure of Brown’s notes and memoranda of his conversations with the sources. 117 The defendants petitioned for a writ of mandate/prohibition to prevent the enforcement of the trial court’s order. 118 The court of appeal said the shield law provided an immunity from contempt, not a privilege against disclosure. 119 Because petitioner had not been threatened with or cited for contempt, the shield law did not apply. 120

The *KSDO* court then looked to the first amendment to determine whether an order compelling discovery was appropriate. 121 The court formulated a factual analysis for deciding whether to compel disclosure of a newsperson’s information. 122 This factual analysis balanced several factors: "(1) the nature of the proceeding, (2) the status of the newsperson as a party or nonparty, (3) alternative sources of the information, and (4) the relationship of the information to the heart of the claim." 123 The court found that the plaintiffs failed to show the information they sought was unavailable from other sources, and that the materials actually went to the heart of the claim. 124 Therefore, although the shield law did not apply, Brown was entitled to a qualified privilege under the first amendment, and not required to disclose his information. 125

114. Id. at 377, 186 Cal. Rptr. at 212.
115. Id. at 377-78, 186 Cal. Rptr. at 212.
116. Id. at 379, 186 Cal. Rptr. at 213.
117. Id.
118. KSDO, 136 Cal. App. 3d at 379, 186 Cal. Rptr. at 213.
119. Id. at 384, 186 Cal. Rptr. at 216 (citing Comment, *Newsmen’s Immunity Needs a Shot in the Arm*, 11 SANTA CLARA L. REV. 56, 68 (1970)).
120. KSDO, 136 Cal. App. 3d at 384, 186 Cal. Rptr. at 216.
121. Id.
122. Id. at 385, 186 Cal. Rptr. at 217.
123. Id.
124. Id. at 386, 186 Cal. Rptr. at 217-18.
125. KSDO, 136 Cal. App. 3d at 386, 186 Cal. Rptr. at 218.
In *Playboy Enterprises, Inc. v. Superior Court* the court of appeal decided whether “the interest of a nonparty publisher in asserting [shield law] protection . . . overcome[s] the competing interests of civil litigants in obtaining [the publisher's information].” The court concluded that civil litigants have neither constitutional nor other legal rights sufficient to overcome shield law protection. In *Playboy*, Cheech & Chong, a comedy team, sued their former accountants, financial advisors and business managers for breach of contract and breach of fiduciary duty. *Playboy* magazine published an article based on an interview with Cheech & Chong. During discovery, the defendants sought disclosure of materials related to the interview, which allegedly included statements made by Cheech that he later denied. The trial court ordered disclosure.

The court of appeal denied disclosure, however, by vacating the superior court’s order. First, the court held that the materials requested fell within the protection of the shield law, since “unpublished information,” as that term is used in article I, § 2(b), refers to “factual information that is within the newperson’s knowledge, whether contained in source material or in memory.” Second, the court stated that the rule enunciated in *KSDO* would “eviscerate the newperson’s protection.” The court stated:

If every civil litigant who postulates that some information material to his case is contained within the undisseminated materials of a newperson may compel that nonparty newperson to present his information to the trial court for inspection, balancing of interests, and probable disclosure, the protection afforded newpersons would be greatly reduced, if not wholly vitiated.

Therefore, *Playboy* created a conflict among the California Courts of Appeal with regard to when the shield law should apply.

The California Supreme Court recognized a qualified newperson’s
privilege in *Mitchell v. Superior Court*.\textsuperscript{138} *Mitchell* stemmed from a libel action by the Synanon Church and Charles Dederich against *Reader’s Digest*, David and Cathy Mitchell, David MacDonald, and Richard Ofshe.\textsuperscript{139} A *Reader’s Digest* article, written by MacDonald, described how the Mitchells won the Pulitzer Prize for writing materials which were critical about Synanon.\textsuperscript{140} Synanon sought documents available to the Mitchells prior to the publication of the *Reader’s Digest* article.\textsuperscript{141} The superior court had ordered the Mitchells to identify all such documents and to produce all the specific documents described in part of Synanon’s request for production of documents.\textsuperscript{142}

In *Mitchell*, the California Supreme Court held that “in a civil action a reporter, editor, or publisher has a qualified privilege to withhold disclosure of the identity of confidential sources and of unpublished information supplied by such sources.”\textsuperscript{143} The scope of the qualified privilege depends on the balancing of several factors: (1) the nature of the litigation and whether the reporter is a party; (2) the relevance of the information sought to plaintiff’s cause of action; (3) a showing that plaintiff has exhausted all alternative sources of obtaining the needed information; and (4) the importance of protecting confidentiality.\textsuperscript{144} The supreme court called for California courts to recognize a qualified reporter’s privilege, depending on this balancing of relevant considerations.\textsuperscript{145} It held that in this case the balance weighed against disclosure, and restrained the superior court from enforcing its order requiring the Mitchells to reveal confidential sources or information.\textsuperscript{146}

**D. A Criminal Case Dealing With California’s Constitutional Shield Law Did Not Require Disclosure, Yet Weakened Shield Law Protection**

In a recent case involving the shield law in a criminal matter, the court also used a balancing test.\textsuperscript{147} In *Hallissy v. Superior Court* ("A
Halissy”), the defendant, John Sapp, was charged with three counts of murder in the first degree. Before his preliminary examination, Halissy, a reporter for the Contra Costa Times, interviewed Sapp. She published an article entitled “I Killed Many for Pay,” based on this interview with Sapp. After the article appeared, the prosecutor in the case added an additional charge of murder for financial gain to his complaint against Sapp. Sapp subpoenaed Hallissy for her notes from the interview. Because the evidence against Sapp consisted of statements made by him, defense counsel argued that disclosure of Hallissy’s notes was necessary to discredit Sapp by demonstrating inconsistencies in his statements. Hallissy successfully quashed the subpoena on the basis of shield law protection. Upon a later motion by Sapp, the court balanced the interests involved. It compared the detriment to Hallissy from revealing her unpublished notes with the effect of nondisclosure on Sapp’s defense, and ruled in favor of Sapp. When Hallissy refused to comply with the court’s order, she was held in contempt.

The court of appeal in Hallissy held that the shield law confers an absolute immunity from contempt when a nonparty witness refuses to disclose information covered under the shield law. Accordingly, the order of contempt was set aside. The balancing test utilized by the Hallissy court included the following factors: (1) whether the information sought is relevant and necessary; (2) whether the information is available from a source less intrusive upon a newsperson’s privilege; and (3) whether the defendant can show a reasonable possibility that the evidence sought might result in his exoneration. Because Sapp had not shown the information was necessary, and unavailable from a source less intrusive, Hallissy was not held in contempt, and was not required to disclose her notes. However, by making disclosure in a criminal proceeding dependent upon a vague standard of relevance and necessity, the

148. Id.
149. Id. at 1041, 248 Cal. Rptr. at 635.
150. Id. at 1040-41, 248 Cal. Rptr. at 635-36.
151. Id. at 1041, 248 Cal. Rptr. at 636.
153. Id.
154. Id.
155. Id.
156. Id.
158. Id. at 1045, 248 Cal. Rptr. at 638.
159. Id. at 1044, 248 Cal. Rptr. at 638.
160. Id. at 1046, 248 Cal. Rptr. at 639 (citing Hammarley v. Superior Court, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979)).
Hallissy court opened the door for criminal defendants to argue for disclosure in every case. The use of such a standard places the decision of whether to compel disclosure completely within the courts’ discretion, without any clearly defined limits. This is particularly dangerous for shield law protection in light of the courts’ tendency to favor defendants over the press in this area, as the press presents a potential threat of interference with court proceedings.

IV. THE CALIFORNIA SUPREME COURT’S REASONING IN DELANEY

A. Does the Term “Unpublished Information” in the California Newsperson’s Shield Law Include a Reporter’s Nonconfidential, Eyewitness Observations of an Occurrence in a Public Place?

The California Supreme Court looked at three factors in evaluating the scope of the shield law: (1) the language of the provision itself; the legislative history of the shield law; and (3) prior decisions in California. The court then concluded that “article I, section 2(b) [of the California Constitution] is not contingent on a showing that a newspaper’s unpublished information was obtained in confidence,” and therefore the information at issue in Delaney was included in the definition of material protected by the shield law.

1. The Language of Article I, § 2(b)

The court said the language of article I, § 2(b) is “clear and unambiguous.” The provision states plainly that a reporter shall not be cited for contempt for “refusing to disclose any unpublished information.” The court said that the “use of the word ‘any’ makes clear that [the shield law] applies to all information, regardless of whether it was obtained in confidence.” A restriction on the scope of article I, § 2(b)

164. Delaney, 50 Cal. 3d at 798, 789 P.2d at 940, 268 Cal. Rptr. at 759.
165. Id. at 800, 789 P.2d at 942, 268 Cal. Rptr. at 761.
166. Id. at 803, 789 P.2d at 944, 268 Cal. Rptr. at 763.
167. Id. at 805, 789 P.2d at 945, 268 Cal. Rptr. at 764.
168. Id. at 798, 789 P.2d at 941, 268 Cal. Rptr. at 760.
169. Delaney, 50 Cal. 3d at 798, 789 P.2d at 941, 268 Cal. Rptr. at 760 (emphasis in original).
170. Id.
to confidential information would "read the word 'any' out of the section." 171

The court also looked at the definition of "unpublished information" contained in the shield law itself, 172 and saw no evidence of any explicit or implied restriction of article I, § 2(b) to confidential information. 173 It held that courts are not free to add provisions to what is declared clearly in the constitution, and to limit the shield law to confidential information would be to do just that. 174 Therefore, based on the shield law's plain language, the court held that "unpublished information" is not restricted to information obtained in confidence. 175

2. The Legislative History of the Shield Law

The Delaney court stated that the legislative history of Evidence Code § 1070 is "beside the point" for two reasons. 176 First, the language of § 1070 and article I, § 2(b) of the California Constitution are virtually identical. 177 Because the court determined that the constitutional provision was unambiguous, and its language so closely matched the statute's, it was unnecessary to go beyond the words of the statute to extrinsic aids such as legislative history. 178 Second, the court did not need to construe § 1070, but only article I, § 2(b), since the voters of California had incorporated the language of the statute into the California Constitution. 179

Delaney relied on the ballot argument in favor of Proposition 5 in 1980 to support his argument that the shield law only applies to confidential information. 180 The court conceded that ballot arguments are relevant as a source of voters' intent, and that the repeated references in the argument to confidentiality may permit an inference that the shield law only applies to confidential information. 181 The court held this inference noncompelling, however, because ballot arguments emphasize what

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171. Id.
172. Cal. Const., art. I, § 2(b) defines "unpublished information" as "information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and...whether or not published information based upon or related to such material has been disseminated."
173. Delaney, 50 Cal. 3d at 799, 789 P.2d at 941, 268 Cal. Rptr. at 760.
174. Id.
175. Id. at 800, 789 P.2d at 942, 268 Cal. Rptr. at 761.
176. Id.
177. Id.
178. Delaney, 50 Cal. 3d at 800, 789 P.2d at 942, 268 Cal. Rptr. at 761 (citing Lungren v. Deukmejian, 45 Cal. 3d 727, 248 Cal. Rptr. 115, 755 P.2d 299 (1988)).
179. Delaney, 50 Cal. 3d at 800-01, 789 P.2d at 942, 268 Cal. Rptr. at 761.
180. Id. at 801, 789 P.2d at 943, 268 Cal. Rptr. at 762.
181. Id. at 801-02, 789 P.2d at 943-44, 268 Cal. Rptr. at 762-63.
is seen as the greatest need, and this emphasis is not to the exclusion of other concerns. Further, the court refused to give the ballot argument more weight than the actual constitutional provision.

3. Prior California Decisions

The Delaney court noted that, while there was some conflict among the courts of appeal regarding the scope of the shield law, the initial majority view was that it applied equally to nonconfidential and confidential information. Only one court had previously restricted the shield law’s application to confidential information. However, the “conflict began to sharpen.”

Two weeks before the Delaney court held the shield law applicable only to confidential information, a different division of the same district held in New York Times Co. v. Superior Court that it is applicable to both confidential and nonconfidential information. After the supreme court granted review in Delaney and New York Times, a third court of appeal held that a reporter’s eyewitness observations of a public event are not protected by the shield law.

Because of the conflict between the courts of appeal, the supreme court saw little utility in a detailed review of prior cases involving the shield law. Instead, the court noted two themes in shield law cases: (1) the courts which apply the shield law to all information, confidential or not, rely on the explicit language of the shield law, whereas (2) those which restrict the shield law to confidential information pay insufficient attention to the law’s language. The court disapproved of cases which fall into the second category. The court also refused to examine public policy, choosing to take the shield law “as they find it”—that is, clear

182. Id. at 802, 789 P.2d at 944, 268 Cal. Rptr. at 763.
183. Id. at 803, 789 P.2d at 944, 268 Cal. Rptr. at 763.
186. Delaney, 50 Cal. 3d at 803, 789 P.2d at 944, 268 Cal. Rptr. at 763.
189. Delaney, 50 Cal. 3d at 804, 789 P.2d at 945, 268 Cal. Rptr. at 764.
190. Id.
191. Id.
and unambiguous—and not to judge its wisdom.  

B. In the Context of a Criminal Proceeding, Can a Newsperson Be Held in Contempt for Refusing to Disclose Information Protected by the Shield Law?

The shield law’s protection is overcome in a criminal proceeding on a showing that nondisclosure would deprive the defendant of his federal constitutional right to a fair trial. The reporters concede this issue. The reporters disagreed with Delaney and the prosecution, however, on the showing required to overcome a newsperson’s claim of immunity under the shield law. Delaney proposed that he must simply establish a reasonable possibility that the evidence sought might result in his exoner-ation. On the other hand, the reporters proposed that a defendant must meet four requirements: (1) the information must go to the heart of the case; (2) it must have a significant effect on the outcome of the case; (3) the information is not available from alternative sources; and (4) the infringement on the defendant’s rights caused by nondisclosure must outweigh the newsperson’s interests. In formulating the proper test for accommodating these conflicting constitutional rights, the Delaney court used the four relevant factors identified in Mitchell v. Superior Court as a springboard. Those factors are: (1) the nature of the proceeding; (2) the information must go to the heart of the case; (3) discovery should be denied unless all alternative sources of the information have been exhausted; and (4) the importance of protecting confidentiality. However, the Mitchell test, formulated in a civil context, was not entirely appropriate for the situation in Delaney, a criminal proceeding.

1. The Threshold Showing Required

The Delaney court examined the prevailing rule from CBS, Inc. v. Superior Court that a criminal defendant must demonstrate a reason-
able possibility that evidence sought to be discovered might result in his exoneration.\textsuperscript{201} It also reiterated the principle that a criminal defendant is entitled to a fair trial and intelligent defense in light of all relevant information.\textsuperscript{202} The court then held that a criminal defendant must show a \textit{reasonable possibility} the information will materially assist his defense.\textsuperscript{203} The court expressed the view that this threshold showing is a workable requirement that would uphold the integrity of the judicial system, which depends on full disclosure of facts.\textsuperscript{204}

The court identified three factors to clarify the application of the \textit{Delaney} standard for trial courts. First, the burden is on the defendant to make the required showing. Second, the defendant’s showing must rest on more than speculation, but need not be detailed or specific. Third, the defendant does not have to show that the evidence will lead to his exoneration, but only that it will assist his defense.\textsuperscript{205}

2. Factors to Consider

The fact that a criminal defendant meets the threshold requirement does not mean he is automatically entitled to disclosure.\textsuperscript{206} The court must also weigh the importance of protecting the unpublished information.\textsuperscript{207} In doing so, the court must take into account many factors: first, \textit{whether the information is confidential or sensitive.}\textsuperscript{208} In other words, would disclosure “unduly restrict the newperson’s access to future sources and information?”\textsuperscript{209} Second, the court must look at \textit{the interests sought to be protected by the shield law.}\textsuperscript{210} Will the policy of the shield law be “thwarted by disclosure?”\textsuperscript{211} Third, the \textit{importance of the information to the defendant.}\textsuperscript{212} If the evidence would be dispositive in his favor, it weighs more heavily than if there is only a reasonable possibility the evidence would assist his defense.\textsuperscript{213} Fourth, \textit{is there an alter-}

\begin{itemize}
\item \textsuperscript{201} \textit{Delaney}, 50 Cal. 3d at 807-08, 789 P.2d at 947, 268 Cal. Rptr. at 766.
\item \textsuperscript{202} \textit{Id.} at 808, 789 P.2d at 947, 268 Cal. Rptr. at 766 (quoting Hammarley v. Superior Court, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979)).
\item \textsuperscript{203} \textit{Delaney}, 50 Cal. 3d at 808, 789 P.2d at 948, 268 Cal. Rptr. at 767 (emphasis in original).
\item \textsuperscript{204} \textit{Id.}
\item \textsuperscript{205} \textit{Id.} at 809, 789 P.2d at 948-49, 268 Cal. Rptr. at 767-68.
\item \textsuperscript{206} \textit{Id.}, 789 P.2d at 949, 268 Cal. Rptr. at 768.
\item \textsuperscript{207} \textit{Id.}
\item \textsuperscript{208} \textit{Delaney}, 50 Cal. 3d at 810, 789 P.2d at 949, 268 Cal. Rptr. at 768 (emphasis added).
\item \textsuperscript{209} \textit{Id.}
\item \textsuperscript{210} \textit{Id.}, 789 P.2d at 949-50, 268 Cal. Rptr. at 768-69 (emphasis added).
\item \textsuperscript{211} \textit{Id.} at 811, 789 P.2d at 949-50, 268 Cal. Rptr. at 768-69.
\item \textsuperscript{212} \textit{Id.}, 789 P.2d at 950, 268 Cal. Rptr. at 769 (emphasis added).
\item \textsuperscript{213} \textit{Delaney}, 50 Cal. 3d at 811, 789 P.2d at 950, 268 Cal. Rptr. at 769.
\end{itemize}
The purpose of this requirement is to protect against unnecessary disclosure of a reporter's confidential or sensitive information. The alternative source requirement is flexible, and in deciding whether to impose an alternative source requirement, a trial court should consider the nature of the information, the quality of the alternative source, and the practicality of getting the information from the alternative source. The court declined to hold that any one factor or combination of them is determinative, choosing instead to analyze the shield law cases with their balancing test on a case-by-case basis.

In applying the factors to Delaney's case, the court stated that the case "will rise or fall on the admission or not of those metal knuckles." In the words of the balancing test, there is a "reasonable possibility" the reporters' testimony will assist Delaney in his defense. Delaney thus surpassed the threshold showing. The court further held that the balance of the remaining factors weighed heavily in favor of compelled disclosure. The testimony is not confidential nor sensitive; there is no suggestion that disclosure would impinge on the future newsgathering ability of the reporters; the reporters' testimony is likely to determine the case's outcome; and even if an exhaustion of alternative sources were a rigid requirement, the unique nature of eyewitness testimony means there is no alternative source.

V. THE IMPLICATIONS OF THE DELANEY DECISION: IS THERE SHIELD LAW IMMUNITY FROM CONTEMPT IN A CRIMINAL CASE?

The Delaney decision is an effort by the California Supreme Court to reconcile conflicting cases involving reporters' claims of shield law immunity from contempt of court citations for refusing to disclose confidential sources or unpublished information. The court recognized the potential for the infringement of a criminal defendant's constitutional rights if reporters are consistently able to claim immunity. The court saw the danger a reporter's silence may mean for a criminal defendant

214. *Id.* (emphasis added).
215. *Id.* at 810-11, 789 P.2d at 950, 268 Cal. Rptr. at 769.
216. *Id.* at 811-13, 789 P.2d at 950-51, 268 Cal. Rptr. at 769-70.
217. *Id.* at 813, 789 P.2d at 951, 268 Cal. Rptr. at 770.
218. *Delaney*, 50 Cal. 3d at 814, 789 P.2d at 952, 268 Cal. Rptr. at 771.
219. *Id.* at 814-15, 789 P.2d at 952, 268 Cal. Rptr. at 771.
220. *Id.* at 815, 789 P.2d at 952, 268 Cal. Rptr. at 771.
221. *Id.*, 789 P.2d at 953, 268 Cal. Rptr. at 772.
222. *Id.* at 815-16, 789 P.2d at 953, 268 Cal. Rptr. at 772.
whose only practical source of testimony is that reporter. To deal with these issues, the court formulated a balancing test.

The problem is that in protecting the constitutional rights of criminal defendants, the court ignored the danger the balancing test may mean for the free press in California. If reporters are compelled to testify about what they observe in the course of "gathering, receiving or processing of information for communication to the public," this will undoubtedly have an effect on their future newsgathering ability. When reporters like Kopetman and Bertero, the reporters in Delaney, are compelled to testify, they may be disadvantaged the next time they ask police officers to let them accompany a task force on their rounds. On one hand, officers probably will not want Kopetman "looking over their shoulders if there's some chance that she may later dispute on the witness stand the official version of how an arrest was made; the police may simply refuse to let her ride along, which would deprive the public of worthwhile information." On the other hand, if Kopetman supports the police version of the arrest, "she may be no better off; she is likely to be regarded by [Delaney] and other witnesses as an arm of law enforcement." Witnesses will therefore be less willing to give her information they may have about crimes and other events of interest to the general public. In turn, the general public will be less informed about such events.

Reporters are frequently present at the scene of accidents and other events giving rise to litigation. They are trained to observe, and report their observations. If litigants are permitted to do so, they will often subpoena reporters as witnesses. The impact on reporters' rights if they are essentially used as private investigators for criminal defendants would be severe.

In New York Times Co. v. Superior Court the California Supreme Court considered whether the shield law's protection can be overcome in a civil action by a litigant's showing of need for a reporter's unpublished information. In New York Times, a news photographer for the Santa Barbara News-Press took several photographs of an automobile accident

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223. CAL. EVID. CODE § 1070 (West amended 1974).
225. Id.
227. Id.
228. Id.
229. Id.
involving Jerome and Joyce Sortomme.\textsuperscript{232} Two of the pictures were published in the newspaper; the rest were not.\textsuperscript{233} The Sortommes filed a products liability action against Volkswagen, and a negligence action against the State of California.\textsuperscript{234} Volkswagen subpoenaed the News-Press for production of the unpublished photographs.\textsuperscript{235} The trial court, after an \textit{in camera} inspection of the photographs, ordered the News-Press to produce the photographs.\textsuperscript{236} The court of appeal held the shield law protects nonparty journalists in civil litigation from being compelled to disclose unpublished information.\textsuperscript{237} The supreme court held that the case was unlike \textit{Delaney},\textsuperscript{238} in which they found a need to balance a reporter's interests against a criminal defendant's right to a fair trial.\textsuperscript{239} However, in a footnote the court acknowledged the possibility that "in a future case a civil litigant seeking discovery from a nonparty newsperson might have either a state or federal constitutional right that would have to be weighed against a claim of immunity under the shield law."\textsuperscript{240} \textit{Delaney} demonstrated the threat such a weighing of interests poses for newspersons' immunity from contempt in criminal proceedings. The court's footnote in \textit{New York Times} illustrates that this threat is a pervasive one. The door is now open for courts to strike down shield law immunity in both criminal and civil proceedings.

\textbf{VI. CONCLUSION}

The description of "shield law" conjures up visions of broad protection and sweeping privilege.\textsuperscript{241} At first glance, the California Supreme Court in \textit{Delaney} appears to support this vision, by broadening shield law protection beyond that provided by the court of appeal in the same case. The supreme court overturned the lower court's ruling that nonconfidential eyewitness observations are not subject to the shield law. In the final analysis, though, \textit{Delaney} destroys the vision of broad protection and sweeping privilege. The California Supreme Court has offered reporters

\textsuperscript{232} Id.
\textsuperscript{233} Id.
\textsuperscript{234} Id.
\textsuperscript{235} Id.
\textsuperscript{237} Id.
\textsuperscript{240} Id. at 11180, n.11.
neither protection nor privilege. Its decision renders the constitutionally provided shield protection superfluous, by effectively disabling the shield law in criminal matters.

_Delaney_ also set the stage for disabling the shield law in civil matters. While the supreme court upheld shield law protection in a civil matter a few months after _Delaney_, the fact that the court noted in a footnote that the protection may not always be upheld in civil cases demonstrates the decreasing value of the shield law for reporters.

_**Jill S. Linhardt***

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