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CALIFORNIA CIVIL CODE SECTION 47(3): SHOULD THERE BE A PUBLIC INTEREST PRIVILEGE IN CALIFORNIA?

I. INTRODUCTION

Throughout legal history there has been a heated tension between an individual's right to redress injuries to reputation and the need to protect publication of information concerning public issues. To regulate these competing interests, our legal system has served as referee by providing various privileges for communicators. If the conditions of a particular privilege are met, then an otherwise libelous or slanderous publication or statement is held not to be actionable. Privileges are extended to admittedly defamatory communications for "the common convenience and welfare of society" because "the good that may be accomplished by permitting an individual to make a defamatory statement without fear of liability for misinformation outweighs the harm that may be done to the reputation of others."¹ The privileges are founded in common-law principles, state and federal statutes, and state and federal constitutional provisions. These privileges can be either absolute² or qualified.³

In California, Civil Code section 47(3)⁴ grants one such qualified

1. R. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* 298 (1980). A defamatory statement is an unprivileged publication which tends to "injure reputation; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him." *BLACK'S LAW DICTIONARY* 375 (5th ed. 1979).

2. An absolute privilege serves as a total bar to recovery "without regard to the fault or mental state of the defendant." R. SMOLLA, *LAW OF DEFAMATION* § 8.01[2], at 8-3 (1986). For example, true statements are privileged in almost all jurisdictions, regardless of the defendant's motives or failure to exercise due care.

3. One defamation law expert provided this description of a "qualified" or "conditional" privilege:

"Conditional" or "qualified" privileges . . . involve speech deserving of some enhanced protection, but not the complete immunity that accompanies absolute privileges. Common law conditional privileges do not attach to certain speakers or forums but are triggered by particular "occasions" or "contexts" in which the speech is published, governed by the interrelationships between the speaker, the listener, the victim, and the content of the speech. The protection of a conditional privilege is forfeited if the privilege is "abused," which may, depending on the jurisdiction, mean that the defamation was published with "common law (ill-will) malice," or "actual malice" (knowing or reckless disregard of the truth), or published beyond the scope of those who were legitimately entitled to receive it, or published with simple negligence.

R. SMOLLA, *supra* note 2, at 8-4.

4. CAL. CIV. CODE § 47(3) (West 1982).

privilege to communicators. Section 47(3) provides that a privileged publication or broadcast is one made:

In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.⁵

Section 47(3) was adopted in 1872 as a means of codifying the traditionally recognized common-law privilege for interested parties to communicate sensitive information among themselves.⁶ Shortly after its adoption, media defendants began citing section 47(3) as a defense to defamation actions, claiming that the statute's concept of communica-

5. *Id.* When originally enacted in 1872, the code provision read:

A privileged publication is one made:

....

3. In a communication, without malice, to a person interested therein, by one who was also interested, or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, or who was requested by him to give the information; . . .

Id. (historical note). In 1873-1874, the provision was amended to read:

A privileged publication is one made:

....

Three—In a communication, without malice, to a person interest [sic] therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information. . . .

Id. (historical note). In 1945 the statute was amended to its present form. *Id.* (historical note).

6. *Taylor v. Lewis*, 132 Cal. App. 381, 383-84, 22 P.2d 569, 570-71 (1933). A long line of cases illustrates that the statute has been successful in this respect. *See, e.g.*, *Stationers Corp. v. Dun & Bradstreet, Inc.*, 62 Cal. 2d 412, 398 P.2d 785, 42 Cal. Rptr. 449 (1965) (letter published by mercantile agency discussing charges of irresponsibility made against the plaintiffs in litigation, and opinion by "legal authorities" that litigation had merit, held privileged); *Cuenca v. Safeway San Francisco Employees Fed. Credit Union*, 180 Cal. App. 3d 985, 995, 225 Cal. Rptr. 852, 857 (1986) (communications "made in a commercial setting relating to the conduct of an employee have been held to fall squarely within the qualified privilege for communications to interested persons"); *Williams v. Taylor*, 129 Cal. App. 3d 745, 181 Cal. Rptr. 423 (1982) (defendant's report to police that defendant suspected plaintiff of illegal conduct while acting as manager of an automobile dealership held privileged); *Martin v. Kearney*, 51 Cal. App. 3d 309, 124 Cal. Rptr. 281 (1975) (letter from students' parents to school principal complaining about the competence of a teacher held privileged); *Gantry Constr. Co. v. American Pipe & Constr. Co.*, 49 Cal. App. 3d 186, 122 Cal. Rptr. 834 (1975) (phone call and letter by defendant to bonding agency suggesting plaintiff was having financial problems held privileged); *Katz v. Rosen*, 48 Cal. App. 3d 1032, 121 Cal. Rptr. 853 (1975) (doctor's letter to a local bar association charging an attorney with unethical conduct held privileged); *Deaile v. General Tel. Co.*, 40 Cal. App. 3d 841, 115 Cal. Rptr. 582 (1974) (report prepared by an employee supervisor and addressed to corporate officials charging plaintiff with taking sick leave under false pretenses held privileged).

tions between interested parties applied to any published reports that addressed issues of public interest or concern,⁷ and that the statute embodied California's version of the "fair comment" privilege.⁸ For most of this century, California's legal system has been generally receptive to this admittedly pro-publisher interpretation of section 47(3).

However, in the 1980 case of *Rancho La Costa, Inc. v. Superior Court*,⁹ the Second District Court of Appeal reversed a long judicial trend towards broadening the scope of the statute and unequivocally held that section 47(3) does not confer upon the press a qualified privilege to report on matters of public concern. A year later, in *Rollenhagen v. City of Orange*,¹⁰ the Fourth District Court of Appeal sharply challenged the *Rancho La Costa* decision and expansively ruled that section 47(3) does, in fact, provide the mass media with a qualified privilege to report on issues of public interest.

For the past five years, no controversy has compelled the California Supreme Court to reconcile these conflicting rulings. The discord in the appellate courts was brought to the forefront, however, when former Iranian hostage Jerry Plotkin filed a defamation action against the Van Nuys Publishing Company and others.¹¹ Because Van Nuys Publishing and the other defendants have asserted a section 47(3) privilege in this high-profile case,¹² the California Supreme Court will finally be presented with an opportunity to enunciate a definitive rule on the scope of protec-

7. The argument of a general circulation newspaper would go something like this: the newspaper's readers are the general public; the general public is interested in articles that address matters of public concern, so the general public constitutes one half of the "interested party" equation. The newspaper then qualifies as the other interested party because: (1) as a servant of the public interest, the paper is also interested in the communication; (2) the paper, as a mere objective reporter of the news, stands in such relation to the general public that one could reasonably believe that the newspaper's motives are innocent; or (3) the paper has been requested by readers, by way of subscriptions and other forms of patronage, to provide its readers with articles of interest.

8. See *Williams v. Daily Review, Inc.*, 236 Cal. App. 2d 405, 416, 46 Cal. Rptr. 135, 142 (1965); Comment, *Fair Comment in California: An Unwelcome Guest*, 57 S. CAL. L. REV. 173 (1983). The fair comment privilege, under common law, was established to protect communications about matters of public concern. The privilege sprang from a recognition that "valuable discourse might be furthered by intuitive, evaluative statements that could not be proved either true or false by the rigorous deductive reasoning of the judicial process." Concern for the need to give some shelter to these evaluative statements was vented through limited protection for opinion" R. SMOLLA, *supra* note 2, § 6.02[1], at 6-4 to 6-5.

9. 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980), *cert. denied*, 450 U.S. 902 (1981).

10. 116 Cal. App. 3d 414, 172 Cal. Rptr. 49 (1981).

11. See *infra* text accompanying notes 14-37 for a discussion of *Plotkin v. Van Nuys Publishing Co.*, No. C 359 227 (Cal. Super. Ct. filed Mar. 4, 1981).

12. *Van Nuys Publishing Co. v. Superior Court*, No. L.A. 32210 (Cal. Sup. Ct. hearing granted June 26, 1986).

tion the statute provides. This Comment critically analyzes both the *Rancho La Costa* and *Rollenhagen* decisions, and discusses the public policy considerations implicated by each court's interpretation of section 47(3). Based on that analysis, this Comment recommends that the supreme court adopt, as a decisional rule to apply in the pending case of *Van Nuys Publishing Co. v. Superior Court*,¹³ an interpretation of section 47(3) that is in concert with the view expressed by the court in *Rollenhagen*.

II. THE PLOTKIN CASE: FORCING A DEFINITIVE RULING ON SECTION 47(3)

Jerry Plotkin, a resident of Sherman Oaks, California,¹⁴ went to Iran in October 1979 to consummate a private business transaction.¹⁵ On the fourth day of November, Plotkin checked in with the United States embassy in Tehran. For the next 444 days, Plotkin, along with fifty-one other Americans, was held hostage by a group of Iranian terrorists.¹⁶ Plotkin was the only private citizen kidnapped; because of his distinctive status, the American people were uniquely interested in Plotkin's reasons for being in Iran, and particularly in his reasons for being at the American embassy at the time of the kidnapping.¹⁷ During his period of captivity, Plotkin assumed a highly visible role: he sent communications to family members, media outlets, and even President Jimmy Carter, encouraging the United States government to recognize the terrorists' concerns in order to secure the hostages' release.¹⁸

On January 20, 1981, the hostages were finally freed and Plotkin was on his way back to California.¹⁹ On January 21, *The Daily News*, a newspaper generally circulated in the greater Los Angeles area,²⁰ printed an article suggesting that upon his return to the United States, Plotkin

13. *Id.*

14. Respondent's Memorandum of Points and Authorities in Support of Answer of Real Party-in-Interest to Petition for Writs of Mandate and Prohibition at 3, *Van Nuys Publishing Co. v. Superior Court*, No. L.A. 32210 (Cal. Sup. Ct. hearing granted June 26, 1986) [hereinafter Respondent's Memorandum of Points and Authorities].

15. *Id.* at 4.

16. *Id.*

17. Petitioner's Petition for Review at 7-8, *Van Nuys Publishing Co. v. Superior Court*, No. L.A. 32210 (Cal. Sup. Ct. petition for review filed Apr. 18, 1986); see also Petitioners' Reply Memorandum of Points and Authorities at 7-10, *Van Nuys Publishing Co. v. Superior Court*, No. L.A. 32210 (Cal. Sup. Ct. hearing granted June 26, 1986).

18. Petitioner's Petition for Review at 8, *Van Nuys Publishing Co. v. Superior Court*, No. L.A. 32210 (Cal. Sup. Ct. petition for review filed Apr. 18, 1986).

19. Respondent's Memorandum of Points and Authorities, *supra* note 14, at 5.

20. At that time, the paper was published by the Tribune Company; the current publisher is the Van Nuys Publishing Company.

would be questioned by government authorities about his possible involvement in narcotics trafficking in Iran. More specifically, the article alleged: (1) that federal law enforcement officials expected the State Department debriefing team to ask Plotkin if participation in a drug trafficking operation explained his presence in Iran at the time of the hostage crisis; (2) that Plotkin was being investigated by the Los Angeles Police Department at the time he left the United States for Iran; (3) that Plotkin was suspected of being a "heavyweight in cocaine and some heroin dealing" in the Los Angeles area when he left for Iran; and (4) that Los Angeles Police Department officers were anxious to quiz Plotkin about his business dealings in Iran.²¹

Plotkin requested a retraction of the article but *The Daily News* refused.²² Consequently, on March 4, 1981, Plotkin filed a defamation action against the Tribune Company, the Van Nuys Publishing Company, and Arnie Friedman and Adam Dawson, the two reporters who wrote the article.²³ A limited trial was commenced on January 15, 1986 to determine what standard of fault Plotkin would have to prove in order to recover actual damages.²⁴ The defendants argued that Plotkin was a public figure, and that this status obligated him to prove that the article was published with "actual malice."²⁵ Alternatively, the defendants presented evidence that the *Daily News* article was of great public interest at the time, and thus the article was protected by California Civil Code section 47(3)'s²⁶ qualified privilege.²⁷ If section 47(3) did apply, Plotkin

21. Friedman & Dawson, *Plotkin May Be Questioned in Drug Probe*, *The Daily News*, Jan. 21, 1981, at 1, col. 1.

22. Respondent's Memorandum of Points and Authorities, *supra* note 14, at 7.

23. *Plotkin v. Van Nuys Publishing Co.*, No. C 359 227 (Cal. Super. Ct. filed Mar. 4, 1981).

24. *Plotkin v. Van Nuys Publishing Co.*, No. C 359 227 (Cal. Super. Ct. mini-trial on public figure and public interest issues, Jan. 15, 1986).

25. Trial Brief of Defendants Van Nuys Publishing Company and Tribune Company on Trial to the Court of Certain Issues at 4-55, *Plotkin v. Van Nuys Publishing Co.*, No. C 359 227 (Cal. Super. Ct. mini-trial on public figure and public interest issues, Jan. 15, 1986) [hereinafter Defendants' Trial Brief]. In a line of cases beginning with the landmark ruling in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court held that in order to protect the type of political speech that is at the core of the first amendment, plaintiffs classified as either public officials or public figures must prove that an allegedly defamatory statement is false and that the statement was made by a media defendant with "actual malice." *Id.* at 279-80. According to the Court, to prove "actual malice" the plaintiff must show by clear and convincing evidence that the media defendant knew the statement to be false or acted with reckless disregard for the truth or falsity of the statement. *Id.* See *infra* notes 224-38 and accompanying text for a discussion of this important line of Supreme Court decisions.

26. CAL. CIV. CODE § 47(3) (West 1982). See *supra* text accompanying note 5 for the text of § 47(3).

27. Defendants' Trial Brief, *supra* note 25, at 69-80.

could not recover absent a showing of malice as defined by California law.²⁸ Plaintiff Plotkin countered that he was a private figure and that section 47(3) does not shield mass media reports concerning matters of public concern. To support their respective positions, the defendants relied on the holding in *Rollenhagen v. City of Orange*,²⁹ and the plaintiff cited as authority the ruling in *Rancho La Costa, Inc. v. Superior Court*.³⁰

Superior Court Judge Christian E. Markey, Jr. found for plaintiff Plotkin on both the public/private figure and section 47(3) issues.³¹ He held that Plotkin was a private figure,³² meaning that under the United States Constitution, Plotkin need only demonstrate some degree of fault on the part of the defendants to recover actual damages.³³ Judge Markey also ruled that section 47(3) did not apply to the case at hand. He explicitly endorsed *Rancho La Costa's* interpretation of the statute,³⁴ and rejected the broader view articulated by the court in *Rollenhagen*.³⁵

The defendants appealed both holdings. On April 8, 1986, the Second Appellate District denied review.³⁶ Ultimately, the California Supreme Court agreed to review the issue concerning the applicability of section 47(3).³⁷ The general question now before the court is: whether a communication published in a newspaper of general circulation, which concerns a matter of legitimate public interest and which defames a private figure, is privileged under section 47(3) of the California Civil Code.

28. The California Civil Code defines "actual malice" as that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice.

CAL. CIV. CODE § 48a(4)(d) (West 1982). For a definition of actual malice under federal constitutional law, see *supra* note 25.

29. 116 Cal. App. 3d 414, 172 Cal. Rptr. 49 (1981).

30. 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980), *cert. denied*, 450 U.S. 902 (1981).

31. Memorandum of Decision, *Plotkin v. Van Nuys Publishing Co.*, No. C 359 227 (L.A. Super. Ct. Feb. 25, 1986) [hereinafter Memorandum of Decision].

32. *Id.* at 1-2, 4-5.

33. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (private figure plaintiff only needs to prove that the defendant acted with fault, rather than constitutional actual malice, to recover actual damages against a media defendant). For a discussion of *Gertz*, see *infra* notes 239-49 and accompanying text.

34. Memorandum of Decision, *supra* note 31, at 2. For a thorough analysis of *Rancho La Costa*, see *infra* notes 38-126 and accompanying text.

35. *Id.* For a thorough analysis of *Rollenhagen*, see *infra* notes 153-89 and accompanying text.

36. *Van Nuys Publishing Co. v. Superior Court*, 2d Civil No. B019585 (Cal. Ct. App. petition for review filed Mar. 24, 1986, petition denied Apr. 8, 1986).

37. *Van Nuys Publishing Co. v. Superior Court*, No. L.A. 32210 (Cal. Sup. Ct. hearing granted June 26, 1986). Review was officially granted on June 26, but because of a clerical error the court amended its order on July 2.

To resolve this issue the court will have to critically examine both the *Rancho La Costa* and *Rollenhagen* decisions.

III. THE CONFLICT IN THE COURTS OF APPEAL

A. *Rancho La Costa: Repudiation of a Public Interest Privilege*

The *Rancho La Costa, Inc. v. Superior Court*³⁸ decision significantly altered the course of California Civil Code section 47(3)³⁹ jurisprudence. For decades, California's courts had incrementally broadened the dimensions of the statute. Before *Rancho La Costa*, the judiciary had analyzed the applicability of the statute to a libelous publication by first determining whether the subject matter of the publication was of legitimate public concern. If the publication was deemed to be in the public interest, the courts found the publication privileged under section 47(3), and forced the plaintiff to overcome the privilege by proving malice under California law. *Rancho La Costa* turned this decisional framework on its head.

The *Rancho La Costa* court not only refused to expand section 47(3)'s protections any further, but took a major step backward by narrowly interpreting the scope of the statute's privilege. The court chose not to emphasize the subject matter of the defamatory statement, but microscopically focused on the individual status of the plaintiff. However, to justify this dramatic analytical shift, the court relied on old and suspect authority, and summarily dismissed inconsistent holdings without persuasive explanation.

1. Background

In *Rancho La Costa*, a *Penthouse Magazine* article accused the plaintiffs—five corporations and four individuals associated with the La Costa resort development—of having ties to organized crime. The individual plaintiffs were described as being “mobsters, gangsters, [and] members of organized crime,” and the La Costa development was characterized as a headquarters for organized crime.⁴⁰ The article further implicated the owners and the resort in nationwide bank failures, securities frauds totaling more than \$50 billion, criminal misuse of Teamster monies and pension funds and even in the Watergate scandal.⁴¹

After the plaintiffs filed a defamation action against Penthouse In-

38. 106 Cal. App. 3d 646, 165 Cal. Rptr. 347, cert. denied, 450 U.S. 902 (1980).

39. CAL. CIV. CODE § 47(3) (West 1982). See *supra* text accompanying note 5 for the text of § 47(3).

40. *Rancho La Costa*, 106 Cal. App. 3d at 649, 165 Cal. Rptr. at 349.

41. *Id.*

ternational (Penthouse), the magazine moved for summary judgment, arguing in part that the article was privileged under section 47(3) because organized crime was a subject of legitimate public concern to the magazine's readers.⁴² Ultimately, after several legal maneuvers and rulings, the trial court held that the story was statutorily privileged.⁴³ The Second District Court of Appeal reversed, holding that the protections of section 47(3) were not activated merely because a publication "relates to a matter which may have general public interest."⁴⁴

Penthouse argued before the court of appeal that the statute's key concept of "interested parties" was satisfied: Organized crime is a societal disease which can affect the daily lives of our citizens, and Penthouse, by trying to identify some elements of that disease, was contributing to the public interest.⁴⁵ The court refused to accept this liberal interpretation of "interested parties," however, and held that for a communication to benefit from the statute the subject matter must involve a concern that represents more than "mere general or idle curiosity of the general readership of newspapers and magazines."⁴⁶ In the court's view, a privilege

42. *Id.*

43. *Id.* at 652, 165 Cal. Rptr. at 351. The plaintiffs' original complaint was filed in 1975. That same year, the defendants moved for summary judgment on the grounds that the plaintiffs were public figures and that constitutional actual malice could not be shown. Judge LeSage ruled that the plaintiffs were in fact public figures. *Id.* at 649-50, 165 Cal. Rptr. at 349-50. However, Judge LeSage's holding was reconsidered in light of the United States Supreme Court's timely holding in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (court held that wife of member of famous family was not a public figure even though her divorce proceedings were well-publicized, partly as a result of her own efforts). Upon reconsideration, Judge LeSage granted summary judgment only with respect to two of the individual plaintiffs found to be public figures. *Rancho La Costa*, 106 Cal. App. 3d at 650, 165 Cal. Rptr. at 350. The defendants' application for a writ of mandate was denied by the Court of Appeal, the California Supreme Court and the United States Supreme Court. *Id.* In 1977, the defendants again moved for summary judgment, this time exclusively on § 47(3) grounds. *Id.* Judge Foster denied the motion. *Id.* at 651, 165 Cal. Rptr. at 350. In 1978, the defendants filed a "motion for determination of issues without substantial controversy," which was eventually withdrawn. *Id.* After the dispute was finally assigned to Judge Dell, the defendants again moved for summary judgment. The ruling on this motion and the subsequent appeal led to the cited decision of *Rancho La Costa*. *Id.*

44. *Rancho La Costa*, 106 Cal. App. 3d at 664, 165 Cal. Rptr. at 358-59.

45. *Id.* at 667, 165 Cal. Rptr. at 360.

46. *Id.* at 664-65, 165 Cal. Rptr. at 359. The court, however, failed to explain why the topic of organized crime only appealed to the "general or idle curiosity" of *Penthouse's* readers. In *Cerrito v. Time, Inc.*, 302 F. Supp. 1071 (N.D. Cal. 1969), *aff'd*, 449 F.2d 306 (9th Cir. 1971), a federal district court declared that:

There can be no doubt that organized crime is a subject about which the public has an interest and a right to be informed. The vast expenditures of money by all branches of government, both state and federal, into the workings and extent of organized crime indicates the interest of the public, as well as its right to know or be informed.

Id. at 1073. On appeal, the Ninth Circuit agreed, stating that the subject of organized crime is

applies only to communications between two parties that satisfy a relatively restrictive definitional model. To qualify as "interested parties" under the statute, the court stated, the parties involved must share some type of contractual, business or similar relationship such as that enjoyed "between partners, corporate officers and members of incorporated associations,' or between 'union members [and] union officers.'"⁴⁷ Furthermore, the court held that a party can only be "interested" in a communication if the communication would contribute to the protection of a pecuniary or proprietary interest.⁴⁸ Finally, the court stated that the communication must be requested "in the course of a business or professional relationship."⁴⁹

2. Precedent employed by the court

To support its narrow view of section 47(3), and in response to Penthouse's arguments in support of a broader construction of the statute, the *Rancho La Costa* court cited several cases, principally relying on the ruling in *Gilman v. McClatchy*.⁵⁰ In *Gilman*, the California Supreme Court held that newspapers do not enjoy a privilege to report on any matters that the public has a "right" to know.⁵¹ At issue in that litigation was an article in the *Evening Bee*, a newspaper published by defendant C.K. McClatchy, which falsely charged that plaintiff Charles Gilman assaulted and attempted to rape a woman.⁵² In defense, McClatchy argued that the story was reported in good faith and should be privileged because the report concerned a matter of public concern. McClatchy's counsel contended that it was a "fundamental postulate" of California law that a newspaper has a right to print and publish "whatever every citizen has a right to know"⁵³

The *Gilman* court rejected McClatchy's argument, declaring that recognition of such a "fundamental postulate" would have the practical effect of immunizing the press from any liability stemming from the publication of defamatory material.⁵⁴ The court stated that the defendant's interpretation of libel law could be reduced to a highly self-serving opera-

one "of the utmost importance to the people of this country" *Cerrito v. Time, Inc.*, 449 F.2d 306, 307 (9th Cir. 1971).

47. *Rancho La Costa*, 106 Cal. App. 3d at 665, 165 Cal. Rptr. at 359 (citing 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS §§ 306-309 (8th ed. 1974)).

48. *Id.*

49. *Id.*

50. 111 Cal. 606, 44 P. 241 (1896).

51. *Id.* at 612-14, 44 P. at 242-43.

52. *Id.* at 609, 44 P. at 241.

53. *Id.* at 612, 44 P. at 242.

54. *Id.* at 613, 44 P. at 242.

tional model: "that a newspaper is a purveyor of news; the people have the right to read the news; any story gleaned by a reporter as this was gleaned, and published in the ordinary course of newspaper business without personal malevolence against the victim of the tale, should be held privileged."⁵⁵ The court declared that "[i]n support of this contention there is neither authority, law, nor justice."⁵⁶ The *Rancho La Costa* opinion further asserted that *Gilman's* 1896 holding had been reaffirmed in recent California cases.⁵⁷

Gilman is unpersuasive authority for a narrow interpretation of section 47(3) for several reasons. First, the *Gilman* court considered itself bound by the holding in *Wilson v. Fitch*,⁵⁸ an 1871 California Supreme Court decision. In that case, the supreme court held that good faith reports of matters of public interest were not privileged. The source of the litigation was an article in the *Evening Bulletin*, a San Francisco newspa-

55. *Id.* at 613-14, 44 P. at 242-43.

56. *Id.* at 614, 44 P. at 243. The court did seem to suggest that reports concerning public officials would benefit from a qualified privilege: "No point of similarity can be found between this case and those which protect a publisher who in good faith discusses the habits, qualifications, and official conduct of a person holding a public office or presenting himself as a candidate therefor." *Id.*

57. *Rancho La Costa*, 106 Cal. App. 3d at 666, 165 Cal. Rptr. at 359. The only case cited by the court in support of this claim was *Peoples v. Tautfest*, 274 Cal. App. 2d 630, 79 Cal. Rptr. 478 (1969). In that case, defendant Willard Tautfest and others, in an attempt to solicit signatures for a recall petition against a certain member of the city council, told voters that plaintiff Lorine Peoples served liquor to boys while employed by the city as a recreation director, and that the city councilman had nevertheless defended Peoples' actions. *Id.* at 633, 79 Cal. Rptr. at 480. The court held that these communications about Peoples, a private figure, were not privileged because Tautfest and his colleagues were not directing the information at interested parties. *Id.* at 637, 79 Cal. Rptr. at 482-83. Those that heard the remarks did not solicit them, and had no objective interest in them; the communication of the information served only the interests of Tautfest. The court alternatively noted that the allegations against Peoples "did not relate directly to the conduct of a public officer or employee or of a candidate for public office." *Id.*, 79 Cal. Rptr. at 483.

However, the *Rancho La Costa* court's reliance on *Tautfest* as a reaffirmation of the narrow holding in *Gilman* is flawed. First, the *Tautfest* opinion made no mention of *Gilman*, a curious omission if the decision was supposed to be a reaffirmance. Second, *Tautfest* is not even analogous to *Gilman* because the case did not involve a media publisher that disseminated news to a subscribing public. In *Tautfest*, the key factor was not the fact that the plaintiff was a private figure; the key was that the communications were completely unsolicited. *Id.*, 79 Cal. Rptr. at 482-83. Because the people who heard the allegedly defamatory statements about Peoples did not seek out the information, and were therefore not at all intrinsically interested in the matter, the court held that they could not be considered interested parties. *Id.* A newspaper or magazine, on the other hand, is only read by people who have purchased the publication because they are interested in the information contained therein. Furthermore, newspaper and magazine readers expect—even demand—to find information concerning their public welfare within the pages of the publication.

58. 41 Cal. 363 (1871) (court held that newspaper account alleging that plaintiff had swindled local mine investors was not privileged).

per, which accused plaintiff John Wilson of swindling investors in a local mine.⁵⁹ The defendant argued that the article was a good faith report of a matter of great public interest and concern and should therefore be privileged.⁶⁰ The court was not persuaded, declaring that a defamatory publication in a public journal is not privileged "simply because it relates to a subject of public interest, and was published in good faith, without malice, and from laudable motives."⁶¹ The court stated that no adjudicated case had ever acknowledged such a sweeping privilege, and that if such a privilege were recognized, "there would be but little security for private character."⁶²

However, since *Wilson* was decided a full year before section 47(3) was adopted, the *Wilson* court's ruling could hardly be considered any kind of a statement concerning the statute's scope. Although an argument can be made that *Wilson* was the quintessential statement of the common law which the California Legislature sought to codify when it drafted section 47(3), one can just as easily posit that the Legislature adopted the statute as a means of recognizing a privilege which the judiciary in *Wilson* refused to acknowledge.⁶³ Thus, by virtue of its reliance

59. *Id.* at 365-72.

60. *Id.* at 382.

61. *Id.*

62. *Id.* at 383. However, the court did admit that there were some justifications for a public interest privilege:

The public interest, and a due regard to the freedom of the press, demands that its conductors should not be mulcted in punitive damages for publications on subjects of public interest, made from laudable motives, after due inquiry as to the truth of the facts stated, and in the honest belief that they were true.

Id.

63. Because no legislative history exists for § 47(3), speculative arguments about the California Legislature's "intent" are inevitable. This Comment intentionally avoids the statutory interpretation issue because the California Supreme Court could use available rules of construction to justify either a *Rancho La Costa* or *Rollenhagen* approach. For arguments in support of a narrow statutory construction of § 47(3), see Memorandum of Points and Authorities in Support of Answer of Real Party-In-Interest To Petition for Writs of Mandate and Prohibition at 17-23, *Van Nuys Publishing Co. v. Superior Court*, No. L.A. 32210 (Cal. Sup. Ct. hearing granted June 26, 1986); Response of Real Party-In-Interest to Amici Curiae Brief of the Times-Mirror Company, McClatchy Newspapers, The Copley Press, Inc., and National Broadcasting Company, Inc. at 7-9, *Van Nuys Publishing Co. v. Superior Court*, No. L.A. 32210 (Cal. Sup. Ct. hearing granted June 26, 1986); Plaintiff's Closing Memorandum Re Private Figure and "Public Interest" Issues at 2-7, *Plotkin v. Van Nuys Publishing Co.*, No. C 359 227 (Cal. Super. Ct. mini-trial on public figure and public interest issues Jan. 16, 1986). For arguments in support of a broad statutory construction of § 47(3), see Petitioners' Reply Memorandum of Points and Authorities at 11-19, *Van Nuys Publishing Co. v. Superior Court*, No. L.A. 32210 (Cal. Sup. Ct. hearing granted June 26, 1986); Amici Curiae Brief of the Times Mirror Company, McClatchy Newspapers, The Copley Press, Inc., and National Broadcasting Company, Inc. in Support of Petitioners at 26-31, *Van Nuys Publishing Co. v. Superior Court*, No. L.A. 32210 (Cal. Sup. Ct. hearing granted June 26, 1986).

on the unconvincing and inapplicable ruling in *Wilson, Gilman* is rendered questionable authority at best.

The second flaw in *Rancho La Costa's* reliance on *Gilman* is that the *Gilman* opinion failed to embellish its holding with any substantive legal analysis. No policy arguments were offered to justify the court's sweeping repudiation of any public interest privilege except for a rambling quote from a Michigan decision, *McAllister v. Detroit Free Press*.⁶⁴ The cited passage from *McAllister* essentially stated that newspapers should not be subjected to lesser liability standards just because the public thirsts for news.⁶⁵ Yet this statement is hardly an indictment of a public interest privilege. Even the most zealous public interest privilege proponents would agree that newspaper publishers should not be allowed to define the standards of their own liability by their subjective judgment of what is newsworthy. However, it does not follow that articles which are objectively newsworthy precisely because they deal with truly compelling public issues should deserve lesser legal protection simply because they also satisfy the public's "curiosity." Furthermore, the *McAllister* decision was not interpreting section 47(3) nor any similar Michigan statute, so its usefulness in interpreting a California statutory privilege is suspect.⁶⁶

Another decision cited by the *Rancho La Costa* court as authority

64. 76 Mich. 338, 43 N.W. 431 (1889) (article which falsely accused plaintiff of committing a felony held actionable because communications are only privileged if the communicator seeks to protect his own interest, or if the communication is made in the context of the performance of a public or official duty, or if the communication is directed at an officer who possesses the power to redress a grievance).

65. *Gilman*, 111 Cal. at 614-15, 44 P. at 243 (quoting *McAllister v. Detroit Free Press*, 76 Mich. 338, 43 N.W. 431 (1889)). The *McAllister* court stated:

It is argued that a newspaper in this day and age of the world, when people are hungry for the news, and almost every person is a newspaper reader, must be allowed some latitude and more privilege than is ordinarily given under the law of libel as it has heretofore been understood. In other words, because the world is thirsting for criminal items, and the libel in a newspaper is more far-reaching and widespread than it used to be when tales were only spread by the mouth, or through the medium of books or letters, there should be given greater immunity to gossip in the newspaper, although the harm to the person injured is infinitely greater than it would be if published otherwise.

The greater the circulation the greater the wrong, and the more reason why greater care should be exercised in the publication of personal items. No newspaper has any right to trifle with the reputation of any citizen, or by carelessness or recklessness to injure his good name and fame or business.

McAllister, 76 Mich. at 355-56, 43 N.W. at 437.

66. *McAllister* is not even good law in Michigan anymore, for the state now recognizes a public interest privilege. See *Peisner v. Detroit Free Press, Inc.*, 82 Mich. App. 153, 266 N.W.2d 693 (1978) (qualified privilege to report on matters of public interest can only be overcome by defendant's proving of actual malice); see also *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1113 (6th Cir. 1978) (applying Michigan law) ("As a story about a matter of public concern, the article is protected under state law by the qualified privilege of 'fair comment.'").

for the proposition that section 47(3) does not apply to general press reports addressing matters of public interest was *Newby v. Times-Mirror Co.*⁶⁷ In *Newby*, the court held that a newspaper could not justify defaming a private figure by claiming the defamatory remarks were published in the course of the newspaper's fulfillment of its duty to report the news.⁶⁸ *Newby*, however, is no better authority than *Gilman* because *Newby*, too, chiefly relied on *Wilson v. Fitch*⁶⁹ and *Gilman* itself.⁷⁰

A third case the *Rancho La Costa* court relied on was the California Supreme Court's holding in *Earl v. Times-Mirror Co.*⁷¹ However, the issue in that case was whether the plaintiff, as a public figure,⁷² was deserving of lesser legal protections than a private figure.⁷³ The defendants in *Earl* did not even advance section 47(3) as a specific defense.

3. The court's attempt to distinguish adverse authority

After relying upon *Gilman*, *Newby* and *Earl* to support its narrow construction of section 47(3),⁷⁴ the *Rancho La Costa* opinion next at-

67. 46 Cal. App. 110, 188 P. 1008 (1920).

68. *Id.* at 120, 188 P. at 1012. Plaintiff Nathan Newby, a prominent lawyer, sued the *Los Angeles Times* for publishing a cartoon which portrayed him as a hypocrite. *Id.* at 115-16, 188 P. at 1010. The court stated that:

The duty of a newspaper to the public does not justify the publication of false and defamatory matter concerning a private citizen merely because he is active in promoting his own political views. A publication concerning such person, if libelous in its nature . . . can be justified only by pleading and proving that it is true. And the fact that the matter published tends to cause merriment, or is a "facetious rejoinder" to adverse criticisms made by other persons, does not justify the wrong.

Id. at 120, 188 P. at 1012.

69. *Id.* (citing *Wilson v. Fitch*, 41 Cal. 363 (1871)).

70. *Id.* (citing *Gilman v. McClatchey*, 111 Cal. 606, 44 P. 241 (1896)). The *Newby* court also cited *Edwards v. San Jose Printing & Publishing Soc'y*, 99 Cal. 431, 34 P. 128 (1893), as authority. *Newby*, 46 Cal. App. at 120, 188 P. at 1012. In *Edwards*, the court affirmed a libel judgment for plaintiff Edwards, who was described by an article in defendant's newspaper as being in charge of a "sack"—a warchest to be used for political corruption. *Edwards*, 99 Cal. at 434, 34 P. at 129. However, the *Edwards* court relied on previously discredited decisions (*Wilson* and *McAllister*) and failed to even mention § 47(3) in its opinion.

71. 185 Cal. 165, 196 P. 57 (1921) (fact that plaintiff was prominent publisher of two newspapers held, as a matter of law, to have no effect on standard of fault requirements to be applied in a defamation action).

72. The plaintiff, E.T. Earl, was a well-known publisher of two newspapers. *Earl*, 185 Cal. at 167, 196 P. at 58-59.

73. *Id.* at 196-97, 196 P. at 70-71.

74. Surprisingly, the *Rancho La Costa* court did not mention two somewhat supportive rulings. In *Stevens v. Storke*, 191 Cal. 329, 216 P. 371 (1923), the California Supreme Court specifically held that § 47(3) did not immunize the media from liability for defamatory remarks about a private citizen who actively promoted his own political views. The source of the suit in *Stevens* was a newspaper article which reported that the plaintiff had laid bad pavement, that he was employed in a job with no real responsibilities, that he was indicted and acquitted by a grand jury for an offense and that his close relationship with a judge had resulted in a

tempted to distinguish all adverse authority presented to the court by Penthouse. The court casually grouped the proffered cases into two immensely broad and ultimately unsatisfactory categories: the court stated that all the cases cited by Penthouse either (1) involved plaintiffs who were public officials, or (2) involved publications that were targeted at a specialized audience or that addressed issues of peculiar local concern. Because the *Penthouse* article did not concern a public official, because *Penthouse* is not a special interest publication, and because the article's subject matter—organized crime—was not of peculiar local concern to *Penthouse's* readers, the *Rancho La Costa* court held that none of the cases were persuasive. However, this conclusion requires an extremely restrictive reading of the cases cited by Penthouse. A closer inspection of *Rancho La Costa's* categorizations exposes the weaknesses in the court's reasoning.

a. the "public official" distinction

The *Rancho La Costa* court considered the first group of cases submitted by Penthouse unpersuasive because in each instance the plaintiffs were public officials. The holdings in *Snively v. Record Publishing Co.*,⁷⁵ *Harris v. Curtis Publishing Co.*⁷⁶ and *Everett v. California Teachers Association*⁷⁷ were included in this classification.⁷⁸

favorable judgment in a previous defamation action. *Id.* at 332, 216 P. at 372. The court conceded that § 47(3) applied to reports concerning the conduct of "local public officers," but refused to extend the reach of the privilege to a private figure. *Id.* at 337, 216 P. at 374.

In *Maier v. Devlin*, 203 Cal. 270, 263 P. 812 (1928), the supreme court again hinted that it preferred to read the statute narrowly. Although the court in *Maier* found an article accusing the mayor of Santa Cruz of mismanagement and misappropriation of public funds to be privileged under § 47(3), the court ruled that the key to the decision was the plaintiff's status as a public officer. *Id.* at 282, 263 P. at 817. The opinion expressly noted that the defendant's status as a general circulation newspaper had no bearing on the determination of an applicable privilege. *Id.*

75. 185 Cal. 565, 198 P. 1 (1921) (cartoon portraying chief of police as dishonest public official held privileged because conduct of public officers is of interest to every citizen officers serve).

76. 49 Cal. App. 2d 340, 121 P.2d 761 (1942) (article in national magazine discussing educational policy held privileged because subject matter was of public interest).

77. 208 Cal. App. 2d 291, 25 Cal. Rptr. 120 (1962) (article discussing competence of public school teacher held privileged because subject matter was of public concern).

78. *Rancho La Costa*, 106 Cal. App. 3d at 666, 165 Cal. Rptr. at 360. For other cases not discussed by *Rancho La Costa* which applied § 47(3) against public official plaintiffs, see *Kapellas v. Kofman*, 1 Cal. 3d 20, 27-28, 459 P.2d 912, 915-16, 81 Cal. Rptr. 360, 363-64 (1969) (editorial suggesting city council candidate should withdraw from race because her children were receiving inadequate parental attention held privileged under § 47(3); however, privilege eclipsed by showing of malice); *Taylor v. Lewis*, 132 Cal. App. 381, 384, 22 P.2d 569, 571 (1933) (newspaper article written by former city council member concerning qualifications

One cannot dispute the fact that all three of these cases involved plaintiffs who were public officials. But what the *Rancho La Costa* court failed to appreciate about these decisions is the way the plaintiff's status as a public official simplified the "interested party" analysis under section 47(3). Public officials, by definition, deal with matters of immediate concern to the citizens who elect them. The California Supreme Court, in *Snively*,⁷⁹ clearly recognized this: "the official conduct of public officers, especially in a government by the people, is a matter of public concern of which every citizen may speak in good faith and without malice."⁸⁰ Because any activity of a public official is therefore inherently a matter of public concern, the courts, beginning with *Snively*, have had no trouble concluding that defamatory articles dealing with public officials are privileged under section 47(3) because they are of obvious and unquestioned public interest.

The *Snively* court explicitly stated that articles concerning public officials are privileged not because of some special "fair comment" privilege which can only be triggered by the involvement of a public official, but because these types of publications fit nicely within section 47(3)'s concept of communications between interested parties:

Since the conduct of public officers in the administration of their offices is a matter in which every citizen of the community which they serve is *interested*, the publication in question, if otherwise privileged, must be considered as one made to persons *interested*, and on an occasion which would ordinarily afford reasonable grounds for supposing that it was *made from innocent motives*.⁸¹

The reasoning employed by the *Snively* court clearly conflicts with the notion that *all* articles in general circulation publications concerning

of city council candidate held privileged because "fair criticism of public officials is within the privilege of § 47(3) of the Civil Code").

79. In *Snively*, the California Supreme Court reversed a libel judgment which was in favor of plaintiff *Snively*, a police chief. The court held that the libelous communication was between interested parties and was therefore rendered privileged under § 47(3). The source of the controversy was a cartoon printed in the *Los Angeles Record*, a daily general circulation newspaper, which depicted *Snively* as a dishonest public official who secretly received money for unlawful purposes. *Snively*, 185 Cal. at 569, 198 P. at 2. Record Publishing Company argued that the publication was privileged because the cartoon, by discussing the conduct of a public official, was in the public interest. *Id.* The court agreed, and ruled that § 47(3) was the claimed privilege's appropriate source, *id.* at 570, 198 P. at 3, because the communication was between interested parties: *Snively* served the community where the *Record* was circulated; therefore, the *Record's* publication communicated information concerning *Snively* to readers who would be genuinely interested in *Snively's* conduct. *Id.* at 572, 198 P. at 3.

80. *Id.* at 571, 198 P. at 3 (emphasis added).

81. *Id.* at 572, 198 P. at 3 (emphasis added).

private figure plaintiffs are necessarily outside the scope of the privilege, as the *Rancho La Costa* holding suggests. Under the *Snively* rationale, if a private individual became embroiled in a controversy of true public concern, the mass media would be able to freely report on that matter just as they would be able to freely report on any event dominated by a public official. The key to the ruling in *Snively* was the content of the article, not the defamed party's status as a public official.

This analytical approach of interpreting section 47(3) by focusing on the subject matter of the article rather than the plaintiff's public or private status was also clearly evident in *Harris*, where a school board president was the allegedly defamed party. There, plaintiff Harris, who was also a Laguna Beach businessman, sued Curtis Publishing over an article in the *Saturday Evening Post*. The article, in the broader context of discussing educational policies throughout the nation, associated the cancellation of a banking education program in Laguna Beach's public school system with the prevalence of communism in the area.⁸² In finding the *Post* article privileged under section 47(3), the *Harris* court first posited that articles published in a nationally distributed magazine detailing events in even relatively obscure communities could benefit from section 47(3)'s protections if the article concerned an issue of potential interest to some of the magazine's readers:

There is a wide difference between a publication respecting a matter of purely local concern which is mainly circulated outside the interested area and to people having no interest therein, and one involving a matter of public policy or economic theory which, while arising in a local community, is directly connected with and may vitally affect the habits, modes of living and economic views of people throughout the nation. There is a marked distinction between the making of such a purely local attack and a comment upon political views and policies the effect of which cannot, from their very nature, be confined to any locality. There was evidence here that the respondents were interested in the educational systems of the nation and the various states, and in the opinions and theories used in connection with the education and training of our

82. *Harris*, 49 Cal. App. 2d at 344, 121 P.2d at 763. The article's only reference to Harris was the publication of a statement made by Harris at a local meeting of the Rotary Club. According to the article, Harris rhetorically asked the Rotary members, "Why should kids save, anyway? We are going to have old-age pensions, and kids should spend their money and let the government take care of them when they are old." *Id.* (quoting *Saturday Evening Post*). After mentioning this quote, the *Post* article went on to say that "Laguna Beach includes several hundred Communists. . . ." *Id.*

young people and that *some* of the readers of the *Post* were also interested in such matters.⁸³

The *Harris* court then concluded that questions regarding whether banking practices should be encouraged in public schools and whether an individual is a communist are of practically universal interest, and therefore the article in the *Post* was directed at an interested party—the general public—within the conceptual parameters of section 47(3).⁸⁴ Thus, *Harris* established that a general circulation publication could invoke section 47(3)'s protections for any article that addressed an issue of public concern, whatever the plaintiff's status. Notably, the court did not even mention the fact that the plaintiff, as a school board president, was a "public official."⁸⁵

In *Everett*, the third case distinguished by the *Rancho La Costa* court under the public official heading, plaintiff David Everett was a school district official who brought suit against an educational association and certain individuals over a published report that criticized Everett's professional performance.⁸⁶ As in *Snively* and *Harris*, the court held that the subject matter of the article, and not the plaintiff's status as a public official, was the critical determinant: "A publication seeking to convey pertinent information to the public in *matters of public interest* comes within the purview of the privilege in Civil Code section 47, subdivision 3."⁸⁷

Finally, the decision of *Williams v. Daily Review, Inc.*⁸⁸ clearly discredits *Rancho La Costa*'s dismissal of *Snively*, *Harris* and *Everett* on the singular ground that the plaintiffs in those three cases were public officials. The *Williams* court pointedly rejected the notion that section 47(3)'s protections were functionally related to the plaintiff's status: "[T]he scope of the term 'public interest' in California is not limited to matters relating solely to public officials."⁸⁹ The court noted that in two

83. *Id.* at 350, 121 P.2d at 766 (emphasis added).

84. *Id.*

85. This is significant because, according to *Gilman* and *Rancho La Costa*, the plaintiff's status as a public official is the only way the statute's protections can be invoked by a general circulation newspaper or magazine. Hence, the *Harris* decision serves as clearly contrary authority.

86. *Everett*, 208 Cal. App. 2d at 293-94, 25 Cal. Rptr. at 122.

87. *Id.* at 294, 25 Cal. Rptr. at 122 (emphasis added) (citing *Howard v. Southern Cal. Newspapers*, 95 Cal. App. 2d 580, 584, 213 P.2d 399, 402 (1950) (letter to editor discussing political race held privileged because "publications by which it is sought to convey pertinent information to the public in matters of public interest are permitted wide latitude")).

88. 236 Cal. App. 2d 405, 46 Cal. Rptr. 135 (1965) (newspaper article alleging that local contractor was behind schedule on city paving project held privileged under § 47(3)).

89. *Id.* at 417, 46 Cal. Rptr. at 143 (emphasis added).

prior cases,⁹⁰ the section 47(3) privilege had been applied where the subject matter of the article was determined to be of public interest and where the defamed individual was well-known among a certain interest group.⁹¹

b. the "special interest publication" distinction

Other rulings cited by Penthouse were grouped into a second broad category by the court in *Rancho La Costa* and discounted as unpersuasive because they all supposedly involved publications that were "limited to a local or a special interest group and related to matters of special concern."⁹² With this one casual comment, the court swept away decades of analysis supporting a public interest interpretation of section 47(3).⁹³

90. The court cited *Glenn v. Gibson*, 75 Cal. App. 2d 649, 171 P.2d 118 (1946), and *Maidman v. Jewish Publications, Inc.*, 54 Cal. 2d 643, 355 P.2d 265, 7 Cal. Rptr. 617 (1960). For a discussion of *Glenn*, see *infra* text accompanying notes 106-14; for a discussion of *Maidman*, see *infra* text accompanying notes 97-100.

91. *Williams*, 236 Cal. App. 2d at 417, 46 Cal. Rptr. at 143.

92. *Rancho La Costa*, 106 Cal. App. 3d at 667, 165 Cal. Rptr. at 360. Included in this category of cases were: *Maidman*, 54 Cal. 2d 643, 355 P.2d 265, 7 Cal. Rptr. 617 (editorial printed in Anglo-Jewish newspaper criticizing a prominent member of the Southern California Jewish community held privileged under § 47(3) as a communication between interested parties); *Brewer v. Second Baptist Church*, 32 Cal. 2d 791, 197 P.2d 713 (1948) (publication in national Baptist newspaper detailing expulsion charges against church members deemed privileged under § 47(3) as a communication between interested parties); *Toney v. State*, 54 Cal. App. 3d 779, 126 Cal. Rptr. 869 (1976) (press release concerning suspension of professor at public university held to be actionable because plaintiff's showing of malice overcame a § 47(3) privilege); *Williams*, 236 Cal. App. 2d 405, 46 Cal. Rptr. 135 (newspaper report that contractor was behind schedule in completing paving project deemed privileged under § 47(3) because matter was of public concern); *Glenn*, 75 Cal. App. 2d 649, 171 P.2d 118 (article reporting arrest of seven servicemen at alleged brothel held privileged under § 47(3) because activities of servicemen during times of war are of public interest); and *Heuer v. Kee*, 15 Cal. App. 2d 710, 59 P.2d 1063 (1936) (resolution calling for removal of a public teacher held privileged under § 47(3) because subject matter was of public concern).

93. See, e.g., *Maidman*, 54 Cal. 2d 643, 355 P.2d 265, 7 Cal. Rptr. 617 (editorial printed in Anglo-Jewish newspaper criticizing prominent member of the Southern California Jewish community held privileged as a communication between interested parties); *Brewer*, 32 Cal. 2d 791, 197 P.2d 713 (publication in national Baptist newspaper detailing expulsion charges against church members deemed privileged as a communication between interested parties); *Emde v. San Joaquin County Cent. Labor Council*, 23 Cal. 2d 146, 143 P.2d 20 (1943) (article in labor journal addressing labor policies of local business held privileged as a communication between interested parties); *Snively*, 185 Cal. 565, 198 P. 1 (cartoon portraying chief of police as dishonest public official held privileged because conduct of public officers is of interest to every citizen they serve); *Williams*, 236 Cal. App. 2d 405, 46 Cal. Rptr. 135 (report that contractor was behind schedule in completing paving project deemed privileged because matter was of public concern); *Glenn*, 75 Cal. App. 2d 649, 171 P.2d 118 (article reporting arrest of seven servicemen at alleged brothel held privileged because activities of servicemen during times of war are of public interest); *Harris*, 49 Cal. App. 2d 340, 121 P.2d 761 (article in

Some of the cases cited by Penthouse did involve special interest groups and special interest publications. For example, in *Brewer v. Second Baptist Church*,⁹⁴ a letter was distributed to members of a church congregation detailing charges which church officials believed justified the expulsion of two members. After the members were officially expelled, a report of the circumstances surrounding the expulsions was released to the press and ultimately printed in the *National Baptist Voice*, a nationally circulated Baptist newspaper.⁹⁵ The California Supreme Court found the article privileged under section 47(3) because "the common interest of the members of a church in church matters is sufficient to give rise to a qualified privilege to communications between members on subjects relating to the church's interest."⁹⁶

Similarly, in *Maidman v. Jewish Publications, Inc.*⁹⁷ the source of the alleged libel was an editorial printed in the *B'nai B'rith Messenger*, a weekly Anglo-Jewish newspaper published by the defendant and distributed primarily in Los Angeles County. The editorial criticized plaintiff Samuel Maidman, a prominent Jewish attorney, for calling a solemn Jewish holiday a joyous occasion and for persuading a judge to deny a request for a continuance out of respect for the holiday.⁹⁸ As in *Brewer*, the supreme court ruled that the publication was privileged because the editorial was targeted at members of the Jewish community who would be legitimately interested in Maidman's remarks and actions.⁹⁹

While a special interest publication which addresses the concerns of a tightly defined group may seem distinguishable from a national publication like *Penthouse*, the same logic which serves to legally protect the former under section 47(3) also extends to the latter. *Penthouse* obviously has a more diverse readership than a church newspaper, but that only means that to qualify for protection under the statute, the article in question must be of such universal interest and importance as to be of comparable concern to that diverse readership. In essence, the underlying justification used by the California Supreme Court in *Brewer* and

national magazine discussing Laguna Beach school board policies held privileged under § 47(3)); *Heuer*, 15 Cal. App. 2d 710, 59 P.2d 1063 (school board resolution alleging that teacher is unfit held privileged under § 47(3)).

94. 32 Cal. 2d 791, 197 P.2d 713.

95. *Id.* at 793-96, 197 P.2d at 715-16.

96. *Id.* at 796, 197 P.2d at 717. The court held for the plaintiff, however, because the publication was made with malice.

97. 54 Cal. 2d 643, 355 P.2d 265, 7 Cal. Rptr. 617.

98. *Id.* at 646-47, 355 P.2d at 266-67, 7 Cal. Rptr. at 618-19. The Jewish holiday at the source of the controversy was Rosh Hashanah, which is considered, along with Yom Kippur, to be one of the most solemn of the religion's holidays.

99. *Id.* at 651-52, 355 P.2d at 269, 7 Cal. Rptr. at 621.

Maidman was the same argument advanced by Penthouse in *Rancho La Costa*: an article in any type of publication should be privileged under section 47(3) so long as the article pertains to a matter of legitimate interest to a significant number of the publication's readers and so long as the purpose of the article is to protect or further that interest.¹⁰⁰ To illustrate, the court's analysis in *Maidman* can easily and logically be extended to general circulation newspapers or magazines: a *Los Angeles Times* article concerning a prominent Southern California attorney who refused to properly appreciate the significance of a national holiday like Martin Luther King Day would be of great interest to the readers of a widely-circulated paper like the *Times*, and should therefore be privileged.

Other decisions distinguished by *Rancho La Costa* involved even narrower communications than the special interest journals at issue in *Brewer* and *Maidman*. In *Heuer v. Kee*,¹⁰¹ a school board resolution calling for the removal of a Los Angeles public school teacher was the source of the alleged libel.¹⁰² When the teacher brought a defamation action against the author of the resolution, the court found the resolution privi-

100. In *Emde*, 23 Cal. 2d 146, 143 P.2d 20, a decision ignored by the court in *Rancho La Costa*, the California Supreme Court noted that "greater protection is accorded one who makes a statement, in a reasonable manner and for a proper purpose, to persons having a common interest with him in the subject matter of the communication, when the publication is of a kind reasonably calculated to protect or further it." *Id.* at 154, 143 P.2d at 25.

The source of the dispute in *Emde* was an article in the *Stockton Labor Journal* which accused plaintiffs George Emde and Lois Marshall, owners of a dairy business, of violating a contract with a local chapter of the Teamsters union, of hiring non-union drivers, and, in general, of adopting a "destructive labor policy." *Id.* at 149, 143 P.2d at 22-23. The article encouraged readers not to patronize Emde and Marshall's business. *Id.* at 148, 143 P.2d at 22.

The court found the article privileged under § 47(3) as one between interested parties. *Id.* at 161, 143 P.2d at 28. Although the opinion justified this finding on the grounds that the newspaper exclusively addressed the interests of organized labor, and the article in question involved a labor controversy, *id.*, it would be unreasonable to limit the scope of the holding to the facts of the case. The court's rationale applies with equal persuasiveness to a general circulation newspaper which publishes an article of national significance. For example, an editorial in the *New York Times* which encouraged its readership not to patronize a particular domestic automobile manufacturer because of its anti-labor policies would be of interest to its entire readership because all readers are consumers and many are also members of labor unions. This was the same analysis the court used in *Harris* to find that an article published in the *Saturday Evening Post* concerning public school policies in Laguna Beach was privileged under § 47(3). See *supra* notes 82-85 and accompanying text.

101. 15 Cal. App. 2d 710, 59 P.2d 1063.

102. A newspaper story charged that plaintiff M.A. Heuer, the school teacher, broke a boy's tooth by striking him on the back after she discovered that he was cheating on an examination. Defendant Kee, the father of two students enrolled in the school where Heuer taught, placed before the city council a resolution calling for Heuer's dismissal, alleging that she was unfit to be a teacher. The resolution cited the incident reported in the newspaper article as an example of Heuer's inability to exercise self-control. *Id.* at 712-13, 59 P.2d at 1063-64.

leged under section 47(3). However, the *Heuer* court made no effort to limit its holding to the narrow circumstances of the case. In fact, the court stressed not the special interest nature of the publication, but instead focused on the public's interest in the resolution: "The conduct of appellant in the discharge of her duties as a teacher was *a matter of public concern*, and there was sufficient evidence to justify the trial court in concluding that the publication of the matter complained of was . . . for the *public benefit*."¹⁰³ Thus the *Heuer* case is another example of judicial emphasis on the subject matter of the communication rather than the plaintiff's public or private status or the general or special interest circulation characteristics of the publication.

Toney v. State of California,¹⁰⁴ another decision distinguished by *Rancho La Costa*, also involved a publication of a limited nature: a press release discussing the suspension of a college professor at a public university, and related disciplinary and possible criminal proceedings. However, the *Toney* opinion barely discussed section 47(3), and could in no way be construed as a narrow interpretation of the statute.¹⁰⁵

The final two cases distinguished under the local or special interest group label, *Glenn v. Gibson*¹⁰⁶ and *Williams v. Daily Review, Inc.*,¹⁰⁷ clearly involved broader holdings than the *Rancho La Costa* court recognized. By failing to address these two critical decisions in a more substantial manner, the court greatly compromised the persuasive force of its ruling.

In *Glenn*, the court expansively held that under section 47(3) a newspaper could, without malice, print a libelous communication about a private businessman if the subject matter was of concern to the public.¹⁰⁸ In this 1946 case, an article in the *Times-Herald*, a newspaper published by defendant Luther Gibson, detailed the arrest of seven servicemen and seven "ladies of the night" at a hotel owned by plaintiff Helen Glenn.¹⁰⁹ A picture of Glenn's hotel was published in the newspaper a few days later and the caption described the building as a "drive-in

103. *Id.* at 715, 59 P.2d at 1065 (emphasis added).

104. 54 Cal. App. 3d 779, 126 Cal. Rptr. 869.

105. The *Toney* court only stated that "Toney concedes that State was prima facie entitled to protection of the privilege with respect to the press release . . ." *Id.* at 793, 126 Cal. Rptr. at 878. The court then concluded that the defendant's claim to the privilege was disqualified upon the plaintiff's showing of malice in the form of conduct motivated by hatred or ill will. *Id.* at 793-94, 126 Cal. Rptr. at 879.

106. 75 Cal. App. 2d 649, 171 P.2d 118.

107. 236 Cal. App. 2d 405, 46 Cal. Rptr. 135.

108. *Glenn*, 75 Cal. App. 2d at 659, 171 P.2d at 124.

109. *Id.* at 651, 171 P.2d at 119.

house of prostitution."¹¹⁰ Subsequent articles kept the public apprised of legal proceedings stemming from the raid.¹¹¹

The court found that Glenn's complaint "on its face" showed that the communications in the *Times-Herald* fell within the scope of section 47(3)'s protections. The court held that because the articles concerned the activities of United States military personnel during World War II, and were published in a community where extensive war activities were conducted, the subject matter of the *Times-Herald* articles was "a matter of vital concern to every right-thinking person."¹¹² The court underscored its adherence to a public interest interpretation of the statute by citing the Restatement of Torts, which at that time read in part that "[a]n occasion is conditionally privileged when the circumstances induce a correct or reasonable belief that (a) facts exist which affect a sufficiently *important public interest*. . . ." ¹¹³

Rancho La Costa's classification of the *Glenn* case as one involving nothing more than a local group is almost absurd. Military personnel, especially during a time of national mobilization, could not be considered simply a local or special interest group, and their conduct is not of any more "special" concern than the conduct of any individual or group who has any degree of public responsibility. Furthermore, the court in *Glenn* did not hold that only local citizens would be interested in the activities of the servicemen, but rather found that *any* "right-thinking person" would be concerned.¹¹⁴ Under the *Glenn* rationale, the same story, if printed in the *Los Angeles Times* rather than the local paper, would still be privileged under the statute.

In *Williams v. Daily Review, Inc.*,¹¹⁵ a case decided almost twenty years after *Glenn*, the court held that a newspaper account suggesting a local contractor was behind schedule on a public project was privileged under section 47(3).¹¹⁶ At issue in the case was an article published in *The Daily Review*, a newspaper predominantly circulated in Southern Alameda County.¹¹⁷ The article charged that plaintiff Anthony Williams' construction firm was behind schedule in completing a paving project for the city, impliedly because of incompetence.¹¹⁸ The court, in finding the

110. *Id.* at 652, 171 P.2d at 120.

111. *Id.* at 652-57, 171 P.2d at 120-23.

112. *Id.* at 659, 171 P.2d at 124 (emphasis added).

113. *Id.* (emphasis added) (quoting RESTATEMENT OF TORTS § 598 (1938)).

114. *Id.*

115. *Williams*, 236 Cal. App. 2d 405, 46 Cal. Rptr. 135.

116. *Id.* at 417, 46 Cal. Rptr. at 143.

117. *Id.* at 408, 46 Cal. Rptr. at 137.

118. *Id.* at 408-09, 46 Cal. Rptr. at 137-38.

article not actionable, noted that in California the common-law "fair comment" privilege was codified in section 47(3).¹¹⁹ The court also declared that the statute's application turns on the nature of the subject matter of the defamatory report, not the plaintiff's status as a public or private figure: "The crucial issue involved in determining the applicability of the 'fair comment' privilege is whether or not the publication was made in the public interest."¹²⁰ Accordingly, the court ruled that the article was privileged because the performance of a contractor hired by the city was of sufficient public interest to trigger the statute's legal protections.¹²¹

The *Williams* opinion expressly rejected a narrow view of section 47(3)'s public interest privilege, holding that "the scope of the term 'public interest' in California is not limited to matters relating solely to public officials."¹²² The court noted that the privilege had been applied to cases where the subject matter was determined to be of public interest, in addition to those cases where the defamed individual was well-known among a certain interest group.¹²³ Given this specifically broad statement by the *Williams* court concerning an article in a general circulation publication, it is difficult to see how the court in *Rancho La Costa* could credibly classify the *Williams* holding as being one concerning only a "local or a special interest group and related to matters of special concern."¹²⁴

4. Balancing privacy interests

After offering supposedly supporting authority, and after attempting to distinguish potentially contrary rulings, the *Rancho La Costa* court turned to a consideration of privacy rights. The court concluded that when the privacy interests of a private figure plaintiff clash with the free speech concerns of a media defendant, privacy rights must prevail despite the language of section 47(3):

Plaintiffs as private individuals are entitled to the protec-

119. *Id.* at 416, 46 Cal. Rptr. at 142.

120. *Id.* at 417, 46 Cal. Rptr. at 143.

121. *Id.* In so finding, the court upheld the appropriateness of a jury instruction which read in part:

The condition of streets, the use of them by taxpayers, and the inconvenience to taxpayers caused by delay in repair or alteration of streets, *are matters in which the taxpayers of the City of Hayward were interested.* Under these conditions, if the publication is not actuated by malice, it is privileged and, therefore, as such cannot render the defendants liable for damages.

Id. at 415 n.8, 46 Cal. Rptr. at 142 n.8 (emphasis added).

122. *Id.* at 417, 46 Cal. Rptr. at 143.

123. *Id.*

124. *Rancho La Costa*, 106 Cal. App. 3d at 667, 165 Cal. Rptr. at 360.

tion of their right of privacy. That right is entitled to redress when violated. Under the mandate of the recent federal Supreme Court rulings, the right of privacy is paramount to the right of free speech when in the exercise of free speech a defendant violates another's privacy by uttering a defamatory lie about him. The right of free speech guaranteed by the state and federal constitutions does not permit violation of the right of privacy. It most surely follows that the privilege created by Civil Code section 47(3), a statute, and thus a law of lesser organic force, cannot be expanded to permit violation of that same right of privacy. Whatever privilege is accorded defendants under Civil Code section 47(3), it must yield to the plaintiffs' constitutional rights of privacy.¹²⁵

Thus, the *Rancho La Costa* opinion dealt proponents of section 47(3)'s public interest privilege a double blow: not only did the court hold that the privilege did not extend to reports in general circulation publications which address matters of public concern or interest, but the court also found that the privilege could be overcome by the plaintiff's showing of a strong privacy interest.¹²⁶

B. *Pre-Rollenhagen Response to Rancho La Costa*

Immediate judicial reaction to *Rancho La Costa, Inc. v. Superior*

125. *Id.* The court did not specify which United States Supreme Court cases have held that privacy rights were paramount to free speech rights.

126. Although this Comment is primarily concerned with the *Rancho La Costa* court's unsatisfactory interpretation of § 47(3), the court's use of a privacy right analysis to counterbalance a free speech-related statutory privilege is also disturbing. One veteran first amendment litigator labeled the "explosion of privacy law" the "single most ominous threat to the First Amendment's guarantee of press freedom . . ." F. ABRAMS, *THE FIRST AMENDMENT IN A FREE SOCIETY* 49 (J. Bartlett ed. 1979). Essentially, the *Rancho La Costa* court may have critically erred in concluding that privacy interests outweigh free speech concerns:

Freedom of speech and press protect the transfer of information to and from every member of our society and shape society itself. Without the free exchange of ideas and information, neither participatory democracy nor our culture could survive. Protection of personal reputation and privacy, on the other hand, although a laudable libertarian goal, operates on a relatively isolated individual basis; very few persons are ever harmed by inadvertent factual misstatements. . . . On balance, then, the libertarian value of protecting individual reputations, especially in absence of tangible pecuniary harm, should give way to the more important policy of ensuring free expression.

Ashdown, Gertz and Firestone: *A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645, 654-55 (1977); see also A. SCHWARTZ, *THE FIRST FREEDOM TODAY* 283 (R. Downs & R. McCoy ed. 1984) ("[D]espite the undeniable value our society places on the protection of the individual for invasion of privacy and defamation, the First Amendment demands higher priority on unfettered communication. Where the two are in conflict, the latter must prevail.").

*Court*¹²⁷ was cautious and somewhat deferential. In *Lagies v. Copley*,¹²⁸ the Fourth District Court of Appeal, perhaps foreshadowing what was to come in *Rollenhagen v. City of Orange*,¹²⁹ continued to adhere to the relatively broad fair comment/public interest interpretation of California Civil Code section 47(3).¹³⁰ In *Lagies*, which was decided just four months after *Rancho La Costa*, plaintiff M.J. Lagies brought a defamation action against Helen Copley and others over an article published in the *California Journal*.¹³¹ In the article, Copley suggested that Lagies, a journalist, misstated facts in a news story Lagies authored.¹³² The court found Copley's statement concerning Lagies privileged under section 47(3) because Copley's views were "sought with respect to the 'liberalized' editorial policies of the Copley Press, Inc."¹³³ According to the court, the article containing Copley's remarks "was, is, a matter of public interest to this community and the State of California . . ."¹³⁴ The *Lagies* opinion made no mention of *Rancho La Costa*.¹³⁵

Conversely, *Rancho La Costa* weighed heavily on the collective mind of the court that decided *Institute of Athletic Motivation v. University of Illinois*.¹³⁶ This opinion, penned by the First District Court of Appeal and handed down just a month before *Rollenhagen*, featured a relatively thorough discussion of the protections afforded by section 47(3). The court held that a letter which discussed the reliability of a psychological test for athletes and which was printed in a publication

127. 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980), cert. denied, 450 U.S. 902 (1981).

128. 110 Cal. App. 3d 958, 168 Cal. Rptr. 368 (1980).

129. 116 Cal. App. 3d 414, 172 Cal. Rptr. 49 (1981).

130. CAL. CIV. CODE § 47(3) (West 1982). See *supra* text accompanying note 5 for the text of § 47(3).

131. *Lagies*, 110 Cal. App. 3d at 963, 168 Cal. Rptr. at 371. The *California Journal* is a monthly public affairs periodical published in California.

132. *Id.* at 963-64, 168 Cal. Rptr. at 371.

133. *Id.* at 967, 168 Cal. Rptr. at 373.

134. *Id.* (emphasis added).

135. The only authority relating to § 47(3) cited by the court was *Emde v. San Joaquin County Cent. Labor Council*, 23 Cal. 2d 146, 143 P.2d 20 (1943). For a discussion of *Emde*, see *supra* note 100. Two factors may explain the *Lagies* court's decision to ignore *Rancho La Costa*. First, because the *Rancho La Costa* decision was handed down only a few months before the *Lagies* ruling, the *Lagies* court may have already resolved the issue. Second, and more importantly, appellate courts are not bound by the decisions of other appellate courts. See *infra* note 189. The *Lagies* court, therefore, was not required by the doctrine of stare decisis to reconcile its holding with the result in *Rancho La Costa*. Given that the *Lagies* court analyzed the applicability of § 47(3) by focusing on the subject matter of the allegedly defamatory publication, rather than on the plaintiff's status as a public or private figure, the court would have had a difficult time trying to reconcile its conclusion with *Rancho La Costa* even if an attempt had been made. Conceptually, the two decisions are simply at odds with each other.

136. 114 Cal. App. 3d 1, 170 Cal. Rptr. 411 (1980).

read by the users of such tests was privileged under the statute.¹³⁷

The allegedly defamatory letter, written by sports psychologist and University of Illinois professor Rainer Martens, was critical of information concerning athletes provided by the Institute of Athletic Motivation (AMI).¹³⁸ Ultimately, the letter was reprinted in *Basketball Bulletin*, a periodical published by the National Basketball Coaches Association.¹³⁹ AMI brought a defamation suit against Martens and the University of Illinois,¹⁴⁰ and the defendants secured a general verdict at trial.¹⁴¹

Upon AMI's appeal, the defendants successfully argued that the letter was privileged under section 47(3) because all communications were between interested parties: the letter concerned the reliability of sports psychology tests and was addressed to the users and potential users of such tests.¹⁴² After reviewing a number of section 47(3) cases,¹⁴³ includ-

137. *Id.* at 13, 170 Cal. Rptr. at 418.

138. Martens' letter, which was sent to high schools, colleges and professional sports organizations throughout the country, charged that psychological tests of athletes conducted by the Institute of Athletic Motivation (AMI) should not be given credence because they were based on sparse documentation and were of suspect reliability. *Id.* at 4, 170 Cal. Rptr. at 413.

139. *Id.* at 5, 170 Cal. Rptr. at 413.

140. The university was joined in the action on a theory of respondeat superior. *Id.*

141. *Id.* at 4, 170 Cal. Rptr. at 412.

142. The court found that "Martens in his capacity as professor and student of sports psychology was one who stood in such a relation to the persons interested as to afford reasonable ground for supposing the motive for the communication to be innocent." *Id.* at 13, 170 Cal. Rptr. at 418.

143. The following rulings were discussed or cited by the AMI court: *Maidman v. Jewish Publications, Inc.*, 54 Cal. 2d 643, 355 P.2d 265, 7 Cal. Rptr. 617 (1960) (editorial printed in Anglo-Jewish newspaper criticizing a prominent member of the Southern California Jewish community held privileged as a communication between interested parties), *see supra* text accompanying notes 97-100; *Brewer v. Second Baptist Church*, 32 Cal. 2d 791, 197 P.2d 713 (1948) (publication in national Baptist newspaper detailing expulsion charges against church members deemed privileged as a communication between interested parties), *see supra* text accompanying notes 94-96; *Emde*, 23 Cal. 2d 146, 143 P.2d 20 (article in a labor journal addressing labor policies of a local business held privileged as a communication between interested parties), *see supra* note 100; *Maher v. Devlin*, 203 Cal. 270, 263 P. 812 (1928) (article suggesting that mayor of Santa Cruz was subject of recall election because of mismanagement and misappropriation of public funds held privileged because plaintiff was public officer), *see supra* note 74; *Stevens v. Storke*, 191 Cal. 329, 216 P. 371 (1923) (court held § 47(3) confers no privilege upon an article which suggested the plaintiff was of generally bad character), *see supra* note 74; *Snively v. Record Publishing Co.*, 185 Cal. 565, 198 P. 1 (1921) (cartoon portraying chief of police as dishonest public official held privileged because conduct of public officers is of interest to every citizen they serve), *see supra* notes 79-81 and accompanying text; *Lagies*, 110 Cal. App. 3d 958, 168 Cal. Rptr. 368 (journal article containing quote charging that reporter misstated facts in newspaper article deemed privilege because issue was of public concern and interest), *see supra* text accompanying notes 128-35; *Rancho La Costa*, 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (article charging that plaintiffs had ties to organized crime not privileged because § 47(3) does not protect reports on matters of public interest); *Toney v. State*, 54 Cal. App. 3d 779, 126 Cal. Rptr. 869 (1976) (press release concerning suspension of

ing *Rancho La Costa*, the court concluded that the privilege created by the statute "is not capable of precise or categorical definition," and that section 47(3)'s "application in a particular case depends upon an evaluation of the competing interests which defamation law and the privilege are designed to serve."¹⁴⁴ The opinion recognized that there had been both broad¹⁴⁵ and restrictive¹⁴⁶ interpretations of the statute. The court attempted to finally articulate the scope of the section 47(3) privilege by reasonably defining the concept of interested parties¹⁴⁷ and determined that Martens' letter was privileged because the letter was in fact communicated between genuinely interested parties as defined by the *AMI*

college professor at public university held to be actionable because plaintiff's showing of malice overcame a § 47(3) privilege); *Martin v. Kearney*, 51 Cal. App. 3d 309, 124 Cal. Rptr. 281 (1975) (letter from parents of student to school principal complaining about teacher's competence held privileged as a communication between interested persons); *Katz v. Rosen*, 48 Cal. App. 3d 1032, 121 Cal. Rptr. 853 (1975) (letter from doctor to local bar association detailing allegedly unethical practices of attorney deemed privileged as a communication between interested parties); *Deaile v. General Tel. Co.*, 40 Cal. App. 3d 841, 115 Cal. Rptr. 582 (1974) (supervisor's report to company officials detailing poor attendance practices by employee held privileged as a communication between interested parties); *Williams v. Daily Review, Inc.*, 236 Cal. App. 2d 405, 46 Cal. Rptr. 135 (1965) (report that contractor was behind schedule in completing paving project deemed privileged because matter was of public concern), *see supra* text accompanying notes 115-24; *Glenn v. Gibson*, 75 Cal. App. 2d 649, 171 P.2d 118 (1946) (article reporting arrest of seven servicemen at alleged brothel held privileged because activities of servicemen during times of war are of public interest), *see supra* text accompanying notes 106-14.

144. *AMI*, 114 Cal. App. 3d at 11, 170 Cal. Rptr. at 417.

145. As examples, the court discussed *Glenn* and *Williams* and referred the reader to *Toney* and *Lagies*. *Id.* at 9-10, 170 Cal. Rptr. at 416.

146. The court discussed *Rancho La Costa* as the sole example. *Id.* at 10, 170 Cal. Rptr. at 416-17.

147. The court cited a number of authoritative definitions of what types of communications are between interested parties. *Id.* at 11, 170 Cal. Rptr. at 417. The court noted that the Restatement of Torts suggests that a conditional privilege exists "if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know." *AMI*, 114 Cal. App. 3d at 11, 170 Cal. Rptr. at 417 (quoting RESTATEMENT (SECOND) OF TORTS § 596 (1977)). The court also quoted from a noted defamation treatise:

The common interest [to be shared by the recipient] must be a legitimate interest, i.e., an interest which the law recognizes as worthy of protection and not an interest which springs from and seeks to gratify idle curiosity alone. "The word 'interest' as used in the cases, is not used in any technical sense. It is used in the broadest popular sense, as when we say that a man is 'interested' in knowing a fact—not interested in it as a matter of gossip or curiosity, but as a matter of substance apart from its mere quality as news." "So long as the interest is of so tangible a nature that for the common convenience and welfare of society, it is expedient to protect it, it will come within the rule."

Id. at 11, 170 Cal. Rptr. at 417 (quoting L. ELDREDGE, THE LAW OF DEFAMATION § 87, at 841 (1978)).

opinion.¹⁴⁸

The *AMI* court strove to reconcile its holding with *Rancho La Costa*. First, the court noted that the publication was directed to a specific community, while the magazine article at issue in *Rancho La Costa* was addressed to the public at large. Thus, the court could more easily find that the communications were privileged because they were exchanged between obviously interested parties.¹⁴⁹ Second, the court argued that the nature of the publication at issue in *AMI* gave the injured parties greater opportunity to respond to the charges made against them in the same or similar publications.¹⁵⁰ That was not the case in *Rancho La Costa*. Third, the court held that in *Rancho La Costa* privacy rights helped play a role in outweighing any section 47(3) privilege, whereas in the dispute presently before the court there were no compelling privacy interests to balance against the recognition of a privilege.¹⁵¹

It is unfortunate that the court in *AMI* did not have a broader fact pattern to work with. Given that the justices' conclusions evolved from a truly scholarly attempt to articulate the breadth of protection offered by section 47(3), it would have been interesting to see how that court would have handled a situation where the legal dispute involved a private person/general circulation publication/public interest question.¹⁵² However, thanks to the narrow facts before it, the *AMI* court had little

148. *AMI*, 114 Cal. App. 3d at 13, 170 Cal. Rptr. at 418.

149. *Id.* at 12, 170 Cal. Rptr. at 418. Significantly, the *AMI* court did not suggest that a general circulation publication could never benefit from the statute. However, if the opinion meant to suggest that only publications directed to specific communities could be privileged under § 47(3), the court's analysis would be flawed. To illustrate, the communication at issue in *AMI* easily satisfied the interested party equation because the defamatory letter was authored by a special party and published in a magazine directed at a special interest group. But a communication published in a general circulation newspaper or magazine could still satisfy the interested party equation as long as the author or publisher shared a common interest with the readers of the publication. For example, a *Los Angeles Times* article discussing one authority's dissatisfaction with the reliability of drug tests would be of interest to that newspaper's readers because many of them are currently taking drug tests or may be subjected to drug testing in the future.

150. *Id.* at 12-13, 170 Cal. Rptr. at 418.

151. *Id.* at 13, 170 Cal. Rptr. at 418. See *supra* note 126 for a discussion of the dangers presented by a judicial formulation which balances personal privacy rights against free speech concerns.

152. By referring to the definitions of "interested parties" noted in the *AMI* opinion, it is possible to speculate on how that court would have handled other fact patterns. The court stated that if an interest is of "so tangible a nature that for the common convenience and welfare of society, it is expedient to protect it, it will come within the rule" of privileged communications between interested parties. *AMI*, 114 Cal. App. 3d at 11, 170 Cal. Rptr. at 417 (quoting L. ELDREDGE, *THE LAW OF DEFAMATION* § 87, at 841 (1978)). Arguably, at least, the *Daily News* article concerning Jerry Plotkin would fit within this definitional framework. The interest to be protected by the article is the public's concern for law enforcement

trouble ruling in favor of the defendants on section 47(3) grounds while still remaining consistent with *Rancho La Costa*. Thus, the stage was set for the court in *Rollenhagen* to finally confront the *Rancho La Costa* decision head-on.

C. *Rollenhagen: Reaffirmation of the Public Interest Privilege*

In a defamation action exclusively controlled by federal constitutional doctrine, the degree of fault the plaintiff must prove in order to recover actual damages is a function of the plaintiff's status. If the plaintiff is a public official or public figure, the United States Constitution requires that the plaintiff prove, by clear and convincing evidence, that the defendant acted with constitutional actual malice.¹⁵³ If the plaintiff is a private figure, the Constitution only requires that the plaintiff show that the defendant acted with some degree of fault.¹⁵⁴ However, in a defamation action also governed by state law which recognizes a public interest privilege, the liability standard the plaintiff must successfully plead is a function of the subject matter of the defamatory report, rather than the plaintiff's notoriety. If the issue reported on is one of public concern, then a liability standard more demanding than merely showing fault will be imposed on the plaintiff, even if the plaintiff is a private figure in the most literal sense.

In *Rancho La Costa, Inc. v. Superior Court*,¹⁵⁵ the court declared that in California the press does not enjoy a qualified privilege to report on issues of public concern under California Civil Code section 47(3).¹⁵⁶ Thus, under *Rancho La Costa*, if a plaintiff is a private figure but the defamatory publication indisputably deals with an issue of public concern, federal constitutional doctrine would control¹⁵⁷ and the plaintiff would only have to prove ordinary negligence to recover actual damages.

and the right of citizens to know a fellow private citizen's reasons for being in a foreign country at a time of great instability and consequent risk to national security.

153. Constitutional actual malice is acting with knowledge of falsity of a statement or with reckless disregard for the truth or falsity of a statement. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). For a discussion of *New York Times* and its progeny, see *infra* notes 224-38 and accompanying text.

154. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). However, to recover punitive damages, the *Gertz* Court held that even a private figure plaintiff must prove that a media defendant acted with constitutional actual malice. *Id.* at 349. For an extended analysis of the holding in *Gertz*, see *infra* notes 239-49 and accompanying text.

155. 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980), *cert. denied*, 450 U.S. 902 (1981). For a thorough discussion of *Rancho La Costa*, see *supra* notes 38-126 and accompanying text.

156. CAL. CIV. CODE § 47(3) (West 1982). See *supra* text accompanying note 5 for the text of § 47(3).

157. This of course assumes that no other applicable state constitutional or statutory privilege afforded the defendant protections which exceeded the federal constitutional floor.

However, if that same fact pattern were controlled by the section 47(3) interpretation set forth in *Rollenhagen v. City of Orange*,¹⁵⁸ the defamatory publication would be deemed privileged under California law and the plaintiff would have to prove that the defendant acted with malice.¹⁵⁹ These divergent analytical approaches highlight the most crucial difference between the rules of *Rancho La Costa* and *Rollenhagen*: under *Rancho La Costa*, the court's initial inquiry will always focus on the public/private status of the plaintiff while under *Rollenhagen*, the court's initial inquiry will focus exclusively on the nature of the subject matter of the allegedly defamatory publication.

To justify its markedly different interpretation of section 47(3), the *Rollenhagen* court did not rely so much on precedential authority, although plenty of supporting authority existed, but instead emphasized the public policy benefits of a broader reading of the statute.

1. Background

Peter Rollenhagen owned an automobile repair business called Peter's Foreign Car Service.¹⁶⁰ In 1973, Catherine and Elizabeth Mazur brought their 1965 Volkswagon to Rollenhagen's shop for repairs. Rollenhagen performed a number of service jobs on the car without complaint.¹⁶¹ Later that year, the Mazurs' car engine froze up on the freeway, and Rollenhagen determined that the vehicle had literally run out of oil; he told the Mazurs that he could repair the damage for about \$600.¹⁶² When Elizabeth came to pick up the car, Rollenhagen told her that one of her headlights had been stolen and that he had replaced it. He admonished her to report the theft to the City of Orange Police Department and to file a report so that she could properly recover an insurance claim to offset the cost of the repairs.¹⁶³ Elizabeth did go to the police, who in turn told her that they had received some complaints and heard a few "horror stories" about Rollenhagen's operation.¹⁶⁴ As a result of Elizabeth's visit, the police filed a comprehensive report of the Mazurs' dealings with Rollenhagen and contacted the State Consumer Affairs Department.¹⁶⁵

158. 116 Cal. App. 3d 414, 172 Cal. Rptr. 49 (1981).

159. To prove malice under California law, the plaintiff must show that the defendant was motivated by ill will. For the precise statutory definition, see *supra* note 28.

160. *Rollenhagen*, 116 Cal. App. 3d at 417, 172 Cal. Rptr. at 50.

161. *Id.*

162. *Id.* at 418, 172 Cal. Rptr. at 50-51.

163. *Id.* at 418, 172 Cal. Rptr. at 51.

164. *Id.*

165. *Id.*

Shortly thereafter, the police, acting in concert with the Consumer Affairs office, took a car to Rollenhagen's establishment, and Rollenhagen diagnosed some problems and accordingly performed repairs.¹⁶⁶ The car was actually in perfect working condition, but for an inoperative spark plug.¹⁶⁷ The local CBS-TV affiliate caught wind of the story, and station reporters interviewed the Mazurs, Rollenhagen and the police officers who investigated Rollenhagen's business.¹⁶⁸ After the station broadcasted a report about Peter's Foreign Car Service, and detailed the allegations against Rollenhagen,¹⁶⁹ Rollenhagen brought a defamation action against CBS, Elizabeth Mazur and the City of Orange.¹⁷⁰ The trial court held that the broadcast was privileged under section 47(3), and the plaintiff appealed.¹⁷¹ The Fourth District Court of Appeal, in pointed conceptual disagreement with *Rancho La Costa*, affirmed.¹⁷²

2. Analysis supporting a public interest interpretation

From the outset the *Rollenhagen* court adopted a pro-free speech stance, initially noting that in the context of interpreting section 47(3), "the California courts have recognized basic fair speech principles as paramount over plaintiffs whose status might be private or public, so long as there was no malice, and *the subject matter was one of public interest.*"¹⁷³

Rollenhagen's counsel argued that the United States Supreme Court, through its most recent holdings, had enabled private figure plain-

166. *Id.*

167. *Id.*

168. *Id.* at 419, 172 Cal. Rptr. at 51-52.

169. *Id.* at 419, 172 Cal. Rptr. at 52.

170. *Id.* at 416, 172 Cal. Rptr. at 50. The City of Orange was dismissed as a defendant by the trial court on a motion by the city for a judgment on the pleadings. *Id.*

171. *Id.* at 419-20, 172 Cal. Rptr. at 52.

172. *Id.* at 429, 172 Cal. Rptr. at 58.

173. *Id.* at 420, 172 Cal. Rptr. at 52 (emphasis added). In support, the court cited four cases: *Brewer v. Baptist Church*, 32 Cal. 2d 791, 197 P.2d 713 (1948) (publication in national Baptist newspaper detailing expulsion charges against church members deemed privileged under § 47(3) as a communication between interested parties); *Snively v. Record Publishing Co.*, 185 Cal. 565, 198 P. 1 (1921) (cartoon portraying chief of police as dishonest public official held privileged under § 47(3) because conduct of public officers is of interest to every citizen they serve); *Glenn v. Gibson*, 75 Cal. App. 2d 649, 171 P.2d 118 (1946) (article reporting arrest of seven servicemen at alleged brothel held privileged under § 47(3) because activities of servicemen during times of war are of public interest); and *Noral v. Hearst Publications, Inc.*, 40 Cal. App. 2d 348, 104 P.2d 860 (1940). The courts in *Snively*, *Glenn* and *Brewer* specifically applied § 47(3). In *Noral*, the court generally held that media reports commenting on matters of public policy deserve special legal protection. *Noral*, 40 Cal. App. 3d at 353, 104 P.2d at 863. For further discussion of *Noral*, see *infra* note 203.

tiffs to more easily recover libel judgments against media defendants.¹⁷⁴ However, the *Rollenhagen* court noted that federal constitutional doctrine, as defined by the Supreme Court in *Gertz v. Robert Welch, Inc.*,¹⁷⁵ allows the states to establish liability standards which are more protective of the press than the federal constitutional floor,¹⁷⁶ and that Califor-

174. *Rollenhagen*, 116 Cal. App. 3d at 420-22, 172 Cal. Rptr. at 52-53. The plaintiff essentially relied on *Gertz*, 418 U.S. 323, and its progeny's holdings that a private figure plaintiff need only show negligence, not constitutional actual malice, even where the publication deals with a matter of public interest. *Id.*

175. 418 U.S. 323.

176. *Rollenhagen*, 116 Cal. App. 3d at 422, 172 Cal. Rptr. at 53. In *Gertz*, the United States Supreme Court stated: "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U.S. at 347. Since *Gertz*, many jurisdictions have taken advantage of the *Gertz* Court's invitation and have adopted a public interest privilege within the confines of their own borders.

For example, in *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), the Indiana Court of Appeals rejected *Gertz*'s simple negligence standard and held that Indiana state law recognizes a qualified privilege for the press to report on matters of public concern. In an especially compelling opinion, the court found that absent a public interest privilege, the goal of robust debate that was central to the Supreme Court's holding in *New York Times* would be undermined. The court stated that "factual error is inevitable in the course of free debate and . . . some latitude for untrue or misleading expression must be accorded to the communications media." *Id.* at 678, 321 N.E.2d at 586. Otherwise, the court ruled, "free, robust debate worthy of constitutional protection would be deterred and self-censorship would be imposed in the face of unpopular controversy." *Id.*

Consequently, the court concluded that speech concerning public issues should be qualifiedly privileged regardless of the speaker's status:

The *New York Times* privilege standard was applied to defamatory falsehood concerning a public official or public figure to give effect to the primary function of our system of free expression—the encouragement of discussion and commentary on public issues. The media was not accorded a special constitutional privilege merely because society has a lesser interest in the protection and vindication of the reputations of public officials and public figures. The reputations of public figures and public officials merit the same quantum of protection as those of private citizens.

Id. at 681, 321 N.E.2d at 587. See *infra* text accompanying notes 224-27 for a discussion of *New York Times*.

Absent a qualified privilege, the *Aafco Heating* court continued, a mere negligence liability standard would chill communication by imposing upon the press the " 'intolerable [sic] burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.' " 162 Ind. App. at 683, 321 N.E.2d at 588 (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967)).

In *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450 (1975), the Colorado Supreme Court similarly ruled that a published defamatory remark concerning a private figure is not actionable if "the matter involved is of public or general concern" unless the publisher "knew the statement to be false or made the statement with reckless disregard for whether it was true or not." *Id.* at 98-99, 538 P.2d at 457 (emphasis added). In *Diversified Management, Inc. v. Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1983), the Colorado Supreme Court reaffirmed its support for a public interest privilege:

[A] simple negligence rule would have a chilling effect on the press that would be more harmful to the public interest than the possibility that a defamed private indi-

nia had recognized a public interest privilege similar to that enunciated in *Rosenbloom v. Metromedia, Inc.*¹⁷⁷ through the adoption and subsequent interpretation of section 47(3).¹⁷⁸

The *Rollenhagen* court also noted that other jurisdictions have "expressed fear that a negligence standard in a public interest setting promotes self-censorship and causes publishers to shun controversial articles."¹⁷⁹ These jurisdictions—Indiana, Colorado, Virginia and New York—today recognize, as a matter of state law, a broad public interest privilege.¹⁸⁰ The court stated:

While [these] states were apparently compelled to resort to

vidual would go uncompensated. In order to honor the commitment to robust debate embodied in the first amendment and to ensure sufficient scope for first amendment values, we [choose] to extend constitutional protection to any discussion involving matters of public concern, irrespective of the notoriety or anonymity of those involved.

Id. at 1106 (emphasis added).

New York also recognizes a public interest privilege. In *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975), the state's highest court held that where the defamatory publication concerns a subject which is "arguably within the sphere of legitimate public concern," a plaintiff can recover only if he can establish, by a preponderance of the evidence, that the publisher "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Id.* at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64 (emphasis added).

Alaska also protects speech concerning public issues. In *Gay v. Williams*, 486 F. Supp. 12 (D. Alaska 1979), a federal district court concluded that the Alaska Supreme Court, if faced with the issue today, would continue to recognize such a privilege despite the United States Supreme Court's holding in *Gertz*. *Id.* at 15-16. The district court ruled that long before *Gertz*, Alaskan law had weighed the competing interests of safeguarding an individual's reputation and allowing freedom of debate and expression on public issues and had "opted to extend the privilege in favor of the public's interest in freedom of discussion on public issues." *Id.* at 16 (emphasis added).

Although not mentioned by the *Rollenhagen* court, Michigan also recognizes a public interest privilege. See *Feisner v. Detroit Free Press, Inc.*, 82 Mich. App. 153, 266 N.W.2d 693 (1978) (qualified privilege to report on matters of public interest can only be overcome by defendant's proving of actual malice); see also *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1113 (6th Cir. 1978) (applying Michigan law) ("As a story about a matter of public concern, the article is protected under state law by the qualified privilege of 'fair comment'").

For a thorough discussion of state court reactions to *Gertz*, see Cohen, *Libel: State Court Approaches in Developing a Post-Gertz Standard of Liability*, 1984 ANN. SURV. AM. L. 155 (1985).

177. 403 U.S. 29 (1971) (private figure must show *New York Times* actual malice to recover against a media defendant when the libelous communication addresses an issue of public or general interest). For a more thorough discussion of *Rosenbloom*, see *infra* notes 231-38 and accompanying text.

178. *Rollenhagen*, 116 Cal. App. 3d at 422, 172 Cal. Rptr. at 53.

179. *Id.* at 422, 172 Cal. Rptr. at 53.

180. *Id.* See *supra* note 176 for a discussion of the privilege recognized in these jurisdictions.

their courts to define a post-*Gertz* liability standard for private individual plaintiffs, no such uncertainty exists in California. The California standard is codified in [section 47(3)], as granting a qualified privilege to all publications which concern a matter of legitimate public interest. This standard of liability predates *Gertz* by over 50 years and the only impact the *Gertz* decision has on the standard is to decree it a constitutionally acceptable one.¹⁸¹

The court thus declared that the *subject matter* of a report, and not an individual's notoriety, should be the cornerstone of analysis regarding the appropriate standard of fault to be applied in defamation actions: "If an individual becomes involved in a matter of public interest, whether he is famous, infamous, or unknown, should be irrelevant; *there is no cogent reason to subject the press to a varying standard of liability because of the subject's status.*"¹⁸² Accordingly, because the CBS broadcast was in the public interest,¹⁸³ and because no evidence indicated that either CBS or the Mazurs acted with malice,¹⁸⁴ the court concluded that the conditions for activating the section 47(3) privilege were satisfied. The court therefore held that the broadcast concerning Rollenhagen's business practices was not actionable.¹⁸⁵

As a seemingly token act of deference to the holding in *Rancho La Costa*, the *Rollenhagen* court made an effort, albeit a terse one, to reconcile the two decisions. First, the court stated that *Rancho La Costa*'s interpretation of what constitutes interested parties was "certainly broad enough to encompass the case at bench, for the arena of auto repair has been the subject of rather extensive legislative coverage in an attempt to protect the public from fraudulent and dishonest practices."¹⁸⁶ But upon closer scrutiny, this attempt to fit the *Rollenhagen* holding within the

181. *Rollenhagen*, 116 Cal. App. 3d at 422, 172 Cal. Rptr. at 53 (emphasis added).

182. *Id.* (emphasis added).

183. The court noted that "the arena of auto repair has been the subject of rather extensive legislative coverage in an attempt to protect the public from fraudulent and dishonest practices." *Id.* at 426, 172 Cal. Rptr. at 56.

184. The court pointed out that under § 47(3), the plaintiff must only show that the defendant had a state of mind of ill will or hatred toward the plaintiff. Constitutional actual malice—clear and convincing evidence that the defendant acted with knowledge of falsity or reckless disregard for the truth—is not required to negate the statutory privilege. *Id.* at 423, 172 Cal. Rptr. at 54. The court rejected the plaintiff's argument that the defendant's failure to thoroughly investigate its story constituted bad faith or malice under § 47(3). *Id.* Furthermore, the court found that there was no evidence indicating that CBS had negligently prepared the report concerning the plaintiff's business. *Id.* at 424, 172 Cal. Rptr. at 55.

185. *Id.* at 427, 172 Cal. Rptr. at 56.

186. *Id.* at 426, 172 Cal. Rptr. at 56.

rule of *Rancho La Costa* is analytically difficult to accept: the *Rancho La Costa* court emphatically rejected the notion that a generally circulated publication could benefit from section 47(3) and distinguished every decision which had interpreted the statute as containing any general public interest privilege component.

Second, the *Rollenhagen* court stated that it agreed with *Rancho La Costa*'s essential holding:

The rationale of [*Rancho La Costa*] appears to be that a publisher should not be able to define the scope of the privilege by its own determination of what it chooses to publish and that the court should consider the relationship between the publisher and the reader and the legitimacy of the public interest in the subject matter of the article. To this extent we agree.¹⁸⁷

However, the two decisions took remarkably different (and mutually-exclusive) paths toward realizing this common ground. While the rule of *Rollenhagen* focuses the legal discussion on the subject matter of a libelous communication and the degree to which the communication involves an issue of public concern, the rule of *Rancho La Costa* focuses on the status of the plaintiff. If the plaintiff is a private figure, then under *Rancho La Costa* the defendant cannot benefit from a section 47(3) privilege unless, perhaps, the communication is printed in a special interest or local publication and deals with an issue of special concern.¹⁸⁸

While the *Rollenhagen* court should be commended for attempting to reconcile its holding with *Rancho La Costa*,¹⁸⁹ the consistencies between the two decisions are superficial at best. Thus, a genuine conflict currently exists among California's appellate courts concerning the reach of section 47(3). Now, in *Van Nuys Publishing Co. v. Superior Court*,¹⁹⁰ the California Supreme Court must finally resolve the dispute. As the following section points out, both stare decisis and public policy consid-

187. *Id.* at 427, 172 Cal. Rptr. at 56.

188. In short, the rule of *Rancho La Costa* demands an extremely close nexus among the communicator, the recipient and the subject matter. The rule of *Rollenhagen*, by contrast, only requires some minimal connection among those three elements.

189. As a matter of law, this was unnecessary because courts of appeal are not bound by each other's decisions; they are only bound by decisions of the California Supreme Court. See *Los Angeles Police Protective League v. City of Los Angeles*, 163 Cal. App. 3d 1141, 1147, 209 Cal. Rptr. 890, 893 (1985); see also 9 WITKIN ON CALIFORNIA PROCEDURE § 772 (3d ed. 1985). At most, decisions of one district serve as persuasive authority and may provide guidance in terms of the legal analysis applied. See *Lawson v. Kolender*, 658 F.2d 1362, 1364 n.3 (9th Cir. 1981); *McGlothlen v. Department of Motor Vehicles*, 71 Cal. App. 3d 1005, 1017, 140 Cal. Rptr. 168, 176 (1977).

190. No. L.A. 32210 (Cal. Sup. Ct. hearing granted June 26, 1986). For a discussion of the controversy underlying *Van Nuys Publishing*, see *supra* notes 14-37 and accompanying text.

erations favor the court's affirmation of *Rollenhagen's* interpretation of section 47(3).

IV. THE BENEFITS OF A PUBLIC INTEREST PRIVILEGE

As the preceding analysis of the *Rancho La Costa, Inc. v. Superior Court*¹⁹¹ and *Rollenhagen v. City of Orange*¹⁹² decisions indicates, the California Supreme Court, if it were to decide *Van Nuys Publishing Co. v. Superior Court*¹⁹³ on purely stare decisis grounds, should clearly choose to side with *Rollenhagen*. The *Rancho La Costa* ruling is logically and foundationally flawed, and represents a lonely aberration in twentieth century California Civil Code section 47(3)¹⁹⁴ jurisprudence. However, the supreme court will surely consider the policy ramifications of the two rulings. Still, the court should reach the same result because the rule of *Rollenhagen* is far more workable and desirable than the holding of *Rancho La Costa*. A public interest privilege, where the standard of fault is linked to the subject matter of the defamatory report, could be more fairly and consistently applied than a rule which turns on the plaintiff's status. A public interest privilege would also result in less complex litigation and would encourage the type of speech that legal scholars and constitutional experts have repeatedly stated represents the core of the first amendment.

A. Fairness of Application

The most immediate problem a lower court would have, if the supreme court accepted *Rancho La Costa, Inc. v. Superior Court's*¹⁹⁵ interpretation of California Civil Code section 47(3),¹⁹⁶ would be trying to apply the law in a fair and consistent manner. According to the reasoning of *Rancho La Costa*, "a defamatory article published at large to a vast audience in a national magazine"¹⁹⁷ would not be privileged under section 47(3) while publications limited to "a local or special interest group

191. 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980), *cert. denied*, 450 U.S. 902 (1981). For a thorough discussion of *Rancho La Costa*, see *supra* notes 38-126 and accompanying text.

192. 116 Cal. App. 3d 414, 172 Cal. Rptr. 49 (1981). For a thorough analysis of *Rollenhagen*, see *supra* notes 153-89 and accompanying text.

193. No. L.A. 32210 (Cal. Sup. Ct. hearing granted June 26, 1986). For a discussion of the controversy underlying *Van Nuys Publishing*, see *supra* notes 14-37 and accompanying text.

194. CAL. CIV. CODE § 47(3) (West 1982). See *supra* text accompanying note 5 for the text of § 47(3).

195. 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980), *cert. denied*, 450 U.S. 902 (1981). For a thorough discussion of *Rancho La Costa*, see *supra* notes 38-126 and accompanying text.

196. CAL. CIV. CODE § 47(3) (West 1982). See *supra* text accompanying note 5 for the text of § 47(3).

197. *Rancho La Costa*, 106 Cal. App. 3d at 665, 165 Cal. Rptr. at 359.

and related to matters of special concern"¹⁹⁸ would be privileged. As one commentator has pointed out, this analytical approach is both vague and unworkable: "[U]nder [*Rancho La Costa*], it would be impossible to determine whether an article in *The New York Times* (which has a substantial national circulation in addition to its New York circulation) about a countywide or statewide organization of the Boy Scouts of America would be privileged under Section 47(3)."¹⁹⁹ Consequently, if a newspaper editor could not reasonably assess the legal consequences of an article, he might choose to "play it safe" and refuse to run a story altogether, thus contributing to self-censorship of speech on public issues.

Moreover, the *Rancho La Costa* approach could be considered discriminatory because large papers would rarely benefit from section 47(3), while small or local publications might be able to routinely invoke the statute's protections. Under *Rancho La Costa*, a small or local paper would have little to fear from publishing an article concerning a local individual. After all, the *Rancho La Costa* court did not challenge earlier applications of section 47(3) where the publications were targeted at a specialized or local audience. However, if the *Los Angeles Times* published the same story, the *Times* might not benefit from the section 47(3) privilege because the issue would not be of "local concern" to most of that paper's readers.²⁰⁰ Furthermore, *Rancho La Costa*'s distinction ignores the fact that local issues and the acts of local citizens might be of interest to all citizens. For example, a dispute in a small California town

198. *Id.* at 667, 165 Cal. Rptr. at 360.

199. Heinke, *Does Section 47(3) Protect the Press?*, L. A. Daily J., Sept. 2, 1981, at 4, col. 6. Conversely, one student commentator has concluded, after analyzing *Rollenhagen* in the context of general California and federal constitutional defamation law, that "the public interest privilege is too vague . . ." Comment, *Private Plaintiffs and the Public Interest*, 33 HASTINGS L.J. 985, 986 (1982). The author's primary concern is that recognition of such a privilege tips the scales too far in the defendants' favor:

Because the existence of malice has been found so infrequently, and because the extreme state of mind necessary to find an ill will is difficult to establish, it is evident that malice based on ill will shall continue to be a largely unsuccessful device to overcome the public interest privilege.

Id. at 1005. This is, of course, true, but the author's argument is hardly an indictment of the public interest privilege. In fact, making recovery more difficult for private figure plaintiffs is precisely the clear purpose of a public interest privilege. Just as the practically absolute public official/public figure privilege recognized in *New York Times* and its progeny protects defamatory matter for public policy reasons, so too does a public interest privilege protect certain publications that defame a private figure in the context of a discussion on an important public matter. The solution to the problem identified in the student Comment is not a repudiation of the privilege, but a privilege carefully defined so that only truly valuable types of speech are protected. That way the best balance is achieved between the interests of society as a whole and the interests of parties who have suffered reputational injury.

200. Heinke, *supra* note 199, at 4, col. 6.

concerning toxic waste disposal may be of great interest to residents of New Jersey, where toxic waste disposal problems also exist. Similarly, the opposition of a small town to the nearby deployment of MX missiles would be of great interest to citizens nationwide because the resolution of the dispute may have an impact on this country's national security and perhaps the international arms race.

The *Rollenhagen* approach would mitigate these problems by allowing all types of publications to benefit from section 47(3) so long as the article was of genuine interest to the publication's readers. Admittedly, in the case of large general circulation publications the defendant may have a more difficult time establishing that a given article is of interest to some of the publication's readers, but the privilege would still be an available and attractive legal shield. Under *Rancho La Costa*, a truly mass media outlet could rarely, if ever, successfully raise a section 47(3) defense.

B. Judicial Efficiency

California Supreme Court endorsement of *Rancho La Costa, Inc. v. Superior Court*'s²⁰¹ interpretation of California Civil Code section 47(3)²⁰² could also lead to hopelessly confusing litigation.²⁰³ Federal

201. 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980), *cert. denied*, 450 U.S. 902 (1981). For a thorough discussion of *Rancho La Costa*, see *supra* notes 38-126 and accompanying text.

202. CAL. CIV. CODE § 47(3) (West 1982). See *supra* text accompanying note 5 for the text of § 47(3).

203. One student commentator contends that the *Rollenhagen* approach would serve to "further confuse" defamation law by exacerbating problems associated with variable liability standards. Comment, *supra* note 8, at 193. The commentator states that the difficulty of proving statutory malice in California could provoke an "anomalous result" whereby "the media would receive greater protection under California's new fair comment privilege than under the federal constitutional privilege and, correspondingly, private individuals would be less protected by their own state law than by a [federal] constitutional privilege ostensibly designed to protect the press." *Id.* at 194. This argument, of course, assumes that state law should be no more protective than federal law. In California, at least, that is certainly not the case. The California Supreme Court has repeatedly held that state constitutional free speech guarantees are more expansive than federal constitutional guarantees. See, e.g., *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 908, 592 P.2d 341, 346, 153 Cal. Rptr. 854, 859 (1979), *aff'd*, 447 U.S. 74 (1980) ("[s]pecial protections thus accorded speech are marked in this court's opinions"); *Wilson v. Superior Court*, 13 Cal. 3d 652, 658, 532 P.2d 116, 120, 119 Cal. Rptr. 468, 472 (1975) ("[a] protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press"). Also, California's courts have appreciated, even outside the § 47(3) context, the virtues of speech that address matters of public concern. For example, in *Noral v. Hearst Publications, Inc.*, 40 Cal. App. 2d 348, 104 P.2d 860 (1940), the court explained why discussions concerning issues of public interest deserve added protection:

Charges of libel against a publication which has reported or commented upon matters involving public policy should be viewed with caution. It is in such matters

constitutional protections for the press in defamation actions, as defined by the United States Supreme Court in *New York Times Co. v. Sullivan*,²⁰⁴ *Curtis Publishing Co. v. Butts*²⁰⁵ and *Gertz v. Robert Welch, Inc.*²⁰⁶ are a function of the plaintiff's status. For a public official or public figure, a showing of constitutional actual malice is required; if the plaintiff is a private figure, all he need show is ordinary negligence. Thus, in any defamation action, the court must first determine the plaintiff's status before the requisite elements of recovery can be established. This is no simple task.

For example, to be considered a "public official," a plaintiff must have "substantial responsibility for or control over the conduct of gov-

that the freedom of the press is of paramount concern. Without such freedom, the march of progress might be stayed or the venom of alien cultures might stealthily undermine cherished landmarks. "It is far better for the public welfare that some occasional consequential injury to an individual, arising from general censure of his profession, his party, or his sect, should go without remedy, than that free discussion on the great questions of politics, or morals, or faith should be checked by the dread of embittered and boundless litigation."

Id. at 353, 104 P.2d at 863 (citation omitted).

The Comment author also argues that under *Rollenhagen's* public interest interpretation, private figure plaintiffs would be unduly burdened by having to meet evidentiary burdens almost as great as those imposed on public officials and public figures. *See*, Comment, *supra* note 8, at 94. This, the Comment author contends, would compromise the United States Supreme Court's holding in *Gertz* that private figures are more vulnerable to reputational injury and should thus have better prospects of recovery vis-a-vis public officials and public figures. *Id.* While this contention has merit, it is flawed in two respects.

First, the *Gertz* court did not declare that, as a matter of public policy, private figure defamation plaintiffs should *always* benefit from a lesser liability standard. To the contrary, the Court only held that under the United States Constitution a plaintiff of any status must show, as a minimum, some degree of fault, and invited the states to define more rigorous liability standards if they so desired. *Gertz*, 418 U.S. at 347.

Second, the author's contention fails to consider the public policy benefits that would accrue from a public interest privilege. The very purpose of any privilege is to protect speech which boasts benefits, in terms of the value of the information communicated, that outweigh its potential defamatory effects. This analysis may seem unduly harsh to the private figure who is defamed, but, according to the United States Supreme Court, that is a risk all citizens in an open democracy are obligated to take:

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. *The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.*

Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (emphasis added).

204. 376 U.S. 254 (1964).

205. 388 U.S. 130 (1967).

206. 418 U.S. 323 (1974).

ernmental affairs."²⁰⁷ Thus, a court would have to examine the duties the plaintiff performed in every public office he has ever held before making a proper determination of the plaintiff's status.

The process can be even more complicated if the media claims that the plaintiff is a "public figure." The United States Supreme Court has identified several different types of public figures. "General public figures" are individuals which "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes."²⁰⁸ "Limited public figures," on the other hand, "have thrust themselves to the forefront" of only "particular public controversies."²⁰⁹ Obviously, precise determination of a plaintiff's status as a "public figure" could involve lengthy and exhaustive discovery and other legal proceedings.²¹⁰

These complications are exacerbated if there are multiple plaintiffs, and the plaintiffs do not all share the same status. For example, in a case where one publication allegedly defamed both a public figure plaintiff and a private figure plaintiff, the private figure would only need to show negligence while the other plaintiff would have to show actual malice. Also, plaintiffs in the same suit may have different burdens of proof.²¹¹ Application of these differing standards has often resulted in seemingly incongruous results.²¹² This potential for confusion and inconsistent rul-

207. *Tague v. Citizens for Law & Order, Inc.*, 75 Cal. App. 3d Supp. 16, 21, 142 Cal. Rptr. 689, 692 (1977) (emphasis and citation omitted).

208. *Gertz*, 418 U.S. at 345.

209. *Id.* Limited public figures are further classified as being either voluntary, in the sense that the individual purposefully thrust himself into the public limelight, or involuntary in that they become involved "through no purposeful action of [their] own." *Id.*

210. Ironically, the *Plotkin* case itself required nearly a two-week mini-trial to determine the plaintiff's status. The mini-trial judge concluded that Plotkin was a private figure for all purposes. See Memorandum of Decision at 1-2 & 4-5, *Plotkin v. Van Nuys Publishing Co.*, No. C 359 227 (L.A. Super. Ct. Feb. 25, 1986). For a discussion of *Plotkin*, see *supra* notes 14-37 and accompanying text.

211. A public figure or public official plaintiff must show actual malice by clear and convincing evidence. See, e.g., *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 73, 155 Cal. Rptr. 29, 36 (1979), *cert. denied*, 444 U.S. 984 (1979). A private figure plaintiff may only have to show ordinary negligence by a preponderance of the evidence. *Roemer v. Retail Credit Co.*, 44 Cal. App. 3d 926, 931-32, 119 Cal. Rptr. 82, 85 (1975).

212. For example, compare *Rancho La Costa* (organized crime member not a public figure) with *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440, 445 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978) (organized crime member is a public figure); *Vegod Corp. v. American Broadcasting Cos.*, 25 Cal. 3d 763, 603 P.2d 14, 160 Cal. Rptr. 97 (1979), *cert. denied*, 449 U.S. 886 (1980) (plaintiff who advertised for and conducted a "close-out" sale for a landmark department store is not public figure) with *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273-74 (3d Cir. 1980) (plaintiff who advertised and sold discount steaks is a public figure); and, *Franklin v. Benevolent and Protective Order of Elks*, 97 Cal. App. 3d 915, 159 Cal. Rptr. 131

ings²¹³ may chill a publisher who cannot, even with the assistance of the most expert counsel, determine the potential legal consequences of running a news story by examining prior case law.

A public interest privilege would end this legal malaise. By focusing on the content of the speech, rather than the status of the plaintiff, no extended discovery proceedings concerning the plaintiff's background would be necessary until the court first determined that section 47(3) did not render the publication privileged.²¹⁴ Moreover, the courts would not be influenced by the inherently unique facts concerning the status of the individual parties to the actions, and could develop consistent standards for determining what types of published material fall within and outside the zone of public interest privilege protection.²¹⁵

C. *Encouragement of Robust Debate on Public Issues*

While problems of application might plague the courts in the short term, the long-term disadvantages of a *Rancho La Costa, Inc. v. Superior Court*²¹⁶ approach would prove to be even more serious. Simply put, adoption of the *Rollenhagen v. City of Orange*²¹⁷ court's interpretation of California Civil Code section 47(3)²¹⁸ would be far more consistent with the values of free speech that our founding fathers, and the California courts, have recognized as crucial to the successful functioning of our representative democracy.

(1979) (teacher not a public figure) *with* *Basarich v. Rodeghero*, 24 Ill. App. 3d 889, 892-93, 321 N.E.2d 739, 742 (1974) (teacher is a public figure).

213. One author has noted that "[d]istinguishing private from public persons has not yielded predictable results. As one beleaguered trial judge complained, '[d]efining public figures is much like trying to nail a jellyfish to the wall.'" Comment, *Defamation and the First Amendment: Protecting Speech on Public Issues*, 56 WASH. L. REV. 75, 95-96 (1980) (quoting *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978)).

214. The applicability of § 47(3), of course, could be clarified at an early stage of litigation by the filing of a demurrer or a motion for summary judgment on § 47(3) grounds.

215. A public interest privilege has been successfully applied in other jurisdictions, see *supra* note 176, and in other areas of the law. For example, in invasion of privacy suits the subject matter may be privileged if the court finds that it was newsworthy. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (court held that actual malice standard applies to false light cases involving publications relating to public interest); RESTATEMENT (SECOND) OF TORTS § 652D (1977) (plaintiff must show that articles are "not of legitimate concern to the public").

216. 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980), *cert. denied*, 450 U.S. 902 (1981). For a thorough discussion of *Rancho La Costa*, see *supra* notes 38-126 and accompanying text.

217. 116 Cal. App. 3d 414, 172 Cal. Rptr. 49 (1981). For a thorough analysis of *Rollenhagen*, see *supra* notes 153-89 and accompanying text.

218. CAL. CIV. CODE § 47(3) (West 1982). See *supra* text accompanying note 5 for the text of § 47(3).

Throughout our history, the United States Supreme Court has recognized the importance of protecting speech that involved matters of public interest or concern. For example, in *Grosjean v. American Press*,²¹⁹ where the Court struck down a discriminatory tax on large newspapers, the majority opinion forcefully stated that newspapers must be allowed to perform their crucial role of informing the public:

The newspapers, magazines and other journals of the country . . . have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.²²⁰

Similarly, in *Thornhill v. Alabama*,²²¹ where a state law which prohibited loitering or picketing near business establishments was invalidated, the Court stressed the value of a free flow of information concerning public issues. Justice Murphy, writing for the majority, stated that the ability of citizens to "speak as they think on matters vital to them" was "essential to free government."²²² He concluded: "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."²²³

In 1964, the Supreme Court issued perhaps its strongest statement yet concerning the unique importance of free speech in America. In *New York Times Co. v. Sullivan*,²²⁴ the Court, for the first time, reversed a state libel judgment on federal constitutional grounds. The Court declared that there was a "profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."²²⁵ To facilitate such robust debate, the Court ruled that a public official could not recover damages in a libel action unless he showed the report was false and that the defendant acted with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or

219. 297 U.S. 233 (1936).

220. *Id.* at 250.

221. 310 U.S. 88 (1940).

222. *Id.* at 95.

223. *Id.* at 102 (emphasis added).

224. 376 U.S. 254 (1964).

225. *Id.* at 270 (emphasis added).

not.”²²⁶ To justify its decision, the Court stressed the core values of the first amendment:

The general proposition that freedom of expression upon *public questions* is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”²²⁷

Not long after the historic holding in *New York Times*, however, cases arose where information of vital interest to the public was not uttered by or did not concern a public official. Hence, the Supreme Court, in the companion cases of *Curtis Publishing Co. v. Butts*²²⁸ and *Associated Press v. Walker*,²²⁹ extended federal constitutional protection to statements made about public figures. Chief Justice Warren’s concurrence explained the Court’s rationale:

Increasingly in this country, *the distinctions between governmental and private sectors are blurred*. . . . In many situations, policy determinations which traditionally were channelled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that *many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions*. . . .

. . . Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement *in public issues and events* is as crucial as it is in the case of “public officials.”²³⁰

226. *Id.* at 279-80.

227. *Id.* at 269 (emphasis added) (citation omitted).

228. 388 U.S. 130 (1967).

229. *Id.*

230. *Id.* at 163-64 (Warren, C.J., concurring) (emphasis added). Justice Harlan’s plurality

The next logical step was to apply the *New York Times* actual malice standard to private figures, but only when they spoke on matters of public interest. In *Rosenbloom v. Metromedia, Inc.*²³¹ the Court did just that. *Rosenbloom* represented the third consecutive major legal victory for the media, but the triumph would prove to be short-lived. In *Rosenbloom*, the Court held that the press enjoyed a federal constitutional privilege to non-maliciously report allegedly defamatory information about public or private figures if the information addressed matters of "public or general interest."²³²

Justice Brennan, who authored the Court's plurality opinion, explained that private figures, as well as public figures, are often involved in activities which greatly influence the lives of *all* Americans:

Self-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government. The commitment of the country to the institution of private property, protected by the Due Process and Just Compensation Clauses in the Constitution, places in private hands vast areas of economic and social power that vitally affect the nature and quality of life in the Nation. Our efforts to live and work together in a free society not completely dominated by governmental regulation necessarily encompasses far more than politics in a narrow sense.²³³

Justice Brennan further noted that the public's interest in many topics is a function of the subject matter, not the individuals involved:

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the con-

opinion also discussed the importance of a privilege to speak on matters of public concern: "The dissemination of the individual's opinions *on matters of public interest* is for us, in the historic words of the Declaration of Independence, 'an unalienable right' that 'governments are instituted among men to secure.'" *Id.* at 149 (emphasis added).

231. 403 U.S. 29 (1971).

232. *Id.* at 44.

233. *Id.* at 41. To further support this point, Justice Brennan cited an often-used quote from *Thornhill v. Alabama*: "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Id.* (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

duct, not the participant's prior anonymity or notoriety.²³⁴

Justice Brennan added that "the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a 'public official,' 'public figure,' or 'private individual,' as it derives from the question whether the allegedly defamatory publication concerns a matter of *public or general interest*."²³⁵ Accordingly, he found that it made perfect analytical sense for the Court to extend the *New York Times* actual malice rule to press reports concerning matters of public interest.²³⁶

Absent a federal constitutional public interest privilege, Justice Brennan believed the media would be intimidated. He feared that a "reasonable care" standard would place on the press the "intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait." Fear of guessing wrong must *inevitably cause self-censorship* and thus create the danger that the legitimate utterance will be deterred.²³⁷

In the view of one commentator, the *Rosenbloom* decision ushered in a new era of healthy media conduct, a period when the press most effectively performed the government watchdog role envisioned by the founding fathers:

From *Times v. Sullivan* to *Rosenbloom v. Metromedia*, a period of seven years, a Supreme Court influenced by Justices Warren, Black, Douglas, and Brennan expanded First Amendment protection for news reporters in a fashion consistent with the public's ever-growing need to know, and consistent also with the basic tenets of the First Amendment. The result was a climate of journalistic criticism and investigation which produced the revelations of the Pentagon Papers and Watergate. It was a time in which the press—and other media—finally came into its own, stubbing toes, barging in where it wasn't wanted, sometimes being vulgar, sometimes being wrong, but uncovering the essential insight, the unmentionable question, the buried fact, which allowed American society to see what its government was actually doing.²³⁸

Yet only three years after *Rosenbloom* the Court reversed itself and held that the public interest doctrine should not be an element of federal

234. *Id.* at 43.

235. *Id.* at 44 (emphasis added).

236. *Id.* at 44-45.

237. *Id.* at 50 (citation omitted) (emphasis added).

238. A. SCHWARTZ, *supra* note 126, at 283.

constitutional law. In *Gertz v. Robert Welch, Inc.*,²³⁹ in a marked analytical departure from the immediately preceding cases,²⁴⁰ the Court held that private figures only need to show that a media defendant acted with some degree of fault to recover actual damages,²⁴¹ even if the publication involves a matter of public interest. The Court noted the importance of protecting the reputations of individuals who do not have access to the mass media to answer the charges made against them,²⁴² and discussed the difficulties the legal system may face in enforcing and uniformly applying the *Rosenbloom* standard:

[The *Rosenbloom* holding] would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of "general or public interest" and which do not—to determine . . . "what information is relevant to self-government." We doubt the wisdom of committing this task to the conscience of judges.²⁴³

Unfortunately, the *Gertz* Court's distinction between public and private figures has led to more confusion than a public interest privilege ever could²⁴⁴ and has been severely criticized by numerous commentators because the distinction makes little analytical sense.²⁴⁵ For example, under the *Gertz* formulation, speech concerning a private figure's involvement with an issue of definite public interest—speech that is undoubtedly at the so-called "core" of the first amendment—is not protected by the *New York Times* actual malice rule, while speech discussing the unruly behav-

239. 418 U.S. 323 (1974).

240. Prior to *Gertz*, the focus of the Court's analysis was clearly on the subject matter of the speech, not the status of the communicator: "It was free expression that the Court said was protected, not free expression about particular sorts of potential plaintiffs. It was free debate on matters of public interest that the Court said was guaranteed, not debate free only from lawsuits brought by 'public' plaintiffs." R. SACK, *supra* note 1, at 17.

241. However, the *Gertz* Court also held that to recover punitive or presumed damages against a media defendant, a private figure plaintiff must still prove constitutional actual malice. *Gertz*, 418 U.S. at 349. For a definition of constitutional actual malice, see *supra* note 25.

242. *Id.* at 344.

243. *Id.* at 346 (citation omitted).

244. See *supra* note 212 for a discussion of the inconsistent results produced by applications of the *Gertz* rules.

245. See Ashdown, *supra* note 126, at 662 ("That the individual participating in a public event is a 'private' person does not diminish either the public's interest in being informed or the media's interest in reporting"); Comment, *Further Limits on Libel Actions—Extension of the New York Times Rule to Libels Arising from Discussion of "Public Issues,"* 16 VILL. L. REV. 955, 981 (1971) ("If the application of the first amendment to the press is to assure the circulation of ideas, there seems to be no valid reason why constitutional protection should depend on the party discussed rather than the idea that is circulated.").

ior of a movie star in a public place is protected.²⁴⁶ Thus, the *Gertz* approach is at odds with the fundamental purpose of *New York Times*:

In discarding *Rosenbloom*'s "public or general concern" test, *Gertz* restricts the *Times* doctrine's influence, confining its operation to "public plaintiff" cases. It thus undermines what had emerged as the dominant rationale for the constitutional privilege to defame—the conviction that the privilege is necessary to protect and encourage uninhibited debate on matters of public concern—and signals a return to a more restricted view of the purposes of the first amendment²⁴⁷

The *Gertz* decision is also counterproductive from a public policy perspective because the holding encourages media organizations to only investigate those parties who would definitely satisfy the public figure/public official test, thus leaving private figures who nonetheless exert great control over society free from serious press scrutiny.²⁴⁸ *Gertz* also contributes to media self-censorship by making libel litigation more attractive to a defamed individual, of any status.²⁴⁹

While the California Supreme Court cannot overrule *Gertz* as a controlling decision in the area of federal constitutional law, the court can nevertheless mitigate the harshness of the decision's application in California by ratifying *Rollenhagen* and recognizing within the scope of section 47(3) a public interest privilege similar to the one articulated by the United States Supreme Court in *Rosenbloom*. With a public interest privilege in place, the focus in California would properly be on the subject matter of the defamatory material, rather than on the status of the defamed party. This would bring California law more in line with the true spirit of first amendment values:

246. See Branson & Sprague, *The Public Figure-Private Person Dichotomy: A Flight From First Amendment Reality*, 90 DICK. L. REV. 627, 634-37 (1986).

247. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 445 (1975) (footnote omitted).

248. *Id.* at 480.

249. *Id.* at 452. Anderson argued that *Gertz* would increase the prospects for litigation in two ways: First, it encourages litigation by actually enhancing the prospects of recovery for private plaintiffs by reducing the fault standard from *New York Times* actual malice to simple negligence; second, *Gertz* encourages more plaintiffs to bring suit by positively affecting the plaintiffs' perceptions, valid or not, of the prospects for ultimate recovery. *Id.*

Some believe the *Gertz* decision has actually contributed to an increase in libel litigation. See Ashdown, *Of Public Figures and Public Interest—The Libel Law Conundrum*, 25 WM. & MARY L. REV. 937, 937-38 (1984) ("If libel law was dead following *New York Times Co. v. Sullivan* and its progeny, it certainly has enjoyed a resurrection in the wake of *Gertz v. Robert Welch, Inc.*"); Smith, *The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule*, 44 MONT. L. REV. 71 (1983) (author discusses recent upsurge in defamation suits and associates the rise with the relaxed recovery standards enunciated in *Gertz*).

Regardless of one's taste for the breadth of the actual holding in *Rosenbloom*, its subject matter perspective retains constitutional consistency and integrity. Even with the scope of the subject matter inquiry restricted to matters that directly affect self-government, it is essentially a one-issue approach independent of fastidious categorization based on the status of the potential libel plaintiff. If an article or story involves public policy or the functioning of government, it should be protected by the *New York Times* actual malice standard. Although resolution of this issue will not always be clear, *this standard of analysis gives the media the greatest protection in precisely those cases that lie at the philosophical heart of freedom of the press*. A publisher would be free to release a story about matters of public concern without fear of vindictive or vexatious retaliation by a plaintiff whose status is uncertain.²⁵⁰

The United States Supreme Court would have no quarrel with the formal adoption of the *Rosenbloom* public interest privilege doctrine in California. Despite the *Gertz* language rejecting a federal constitutional public interest privilege, the Court did not completely discount its merits; instead, the Court only held that the *federal* Constitution does not require such a privilege. The majority opinion, authored by Justice Powell, invited state courts to establish their own levels of protection as long as they do not impose liability without fault.²⁵¹ Hence, under *Gertz*, a state can adopt the *Rosenbloom* doctrine as its own state constitutional or statutory standard. To date, a number of states have done precisely that.²⁵²

Furthermore, since *Gertz*, the Court has repeatedly stressed how important the dissemination of information concerning public issues is to the successful functioning of our free society. For example, in *First National Bank of Boston v. Bellotti*,²⁵³ Justice Powell's majority opinion remarked that "[f]reedom of discussion . . . must embrace all issues about

250. Ashdown, *supra* note 249, at 951-53 (emphasis added) (footnotes omitted). For additional discussion in support of a public interest privilege, see Christie, *Underlying Contradictions in the Supreme Court's Classification of Defamation*, 1981 DUKE L. REV. 811, 821 ("My own personal preference . . . increasingly grows in favor of applying the *Sullivan* standard to all defamation actions. This standard provides maximum protection for freedom of discussion and preserves the plaintiff's right to redress when the defendant's conduct is particularly reprehensible."); Comment, *supra* note 215, at 75 ("Speech on public issues, being necessary for a self-governing democracy, is at the core of the first amendment. When such speech is at issue, the Court should not balance the value of speech against competing social values.")

251. *Gertz*, 418 U.S. at 347.

252. See *supra* note 176.

253. 435 U.S. 765 (1977) (spending limits imposed only on corporations in referendum campaigns held unconstitutional as an impermissible restriction on freedom of speech).

which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'"²⁵⁴ And in the more recent case of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,²⁵⁵ Justice O'Connor, speaking for the Court, opined that:

We have long recognized that not all speech is of equal First Amendment importance. It is speech on "'matters of public concern'" that is "at the heart of the First Amendment's protection." As we stated in *Connick v. Myers*, this "special concern [for speech on public issues] is no mystery":

"The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the hierarchy of First Amendment values,'" and is entitled to special protection."²⁵⁶

Hence, while the Court may have determined that not all speech related to matters of public concern could be explicitly protected under the federal Constitution, the Court nevertheless left that option open to the states and has since strongly hinted, through its language in cases such as *Belotti* and *Dun & Bradstreet*, that it would approve of protections at the state level like those recognized in *Rosenbloom*.

Some argue that recognition of a public interest privilege would be redundant in light of federal constitutional and/or state constitutional standards; that such a privilege would render meaningless the Supreme Court's public official/private figure distinction; and that a public interest privilege would obscure the justification in *Gertz* that private figure plaintiffs are more deserving of reputational protection than public figures.²⁵⁷ However, these concerns are easily dispelled.

In no way would a qualified section 47(3) public interest privilege render current federal constitutional protections meaningless. Instead, a statutory privilege would provide a valuable mid-level source of protection and thereby effectively balance the interests of private figure plain-

254. *Id.* at 776 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940)) (emphasis added).

255. 472 U.S. 749 (1985) (to collect presumed and punitive damages in a defamation action, a private figure plaintiff is not required to prove a non-media defendant acted with actual malice where the communication does not concern a matter of public interest).

256. *Id.* at 758-59 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)) (citations and footnotes omitted) (emphasis added).

257. See Respondent's Memorandum of Points and Authorities, *supra* note 14, at 46-48.

tiffs and society. The press would benefit because plaintiffs, in order to recover actual damages, would have to show more than simple negligence. Additionally, the private figure plaintiff would not be as burdened as the public official or public figure plaintiff because he or she would only need to show statutory malice, rather than constitutional actual malice, to overcome any privileges.²⁵⁸ Thus, a three-tier scheme of protection would be in force: if the article concerned a public official or public figure, the plaintiff would have to prove constitutional actual malice to recover actual damages; if the article involved a private figure and a matter of public interest, then the plaintiff would have to prove statutory malice as defined by California law to recover; finally, if the article involved a private figure and addressed an issue of private or limited concern, the plaintiff would only have to show ordinary negligence to recover.

V. A PROPOSAL

In *Van Nuys Publishing Co. v. Superior Court*,²⁵⁹ the California Supreme Court should hold as a matter of law that California Civil Code section 47(3)²⁶⁰ confers upon the press a qualified privilege to report on matters of public concern or interest. This privilege should be disqualified only by a showing of malice, as defined by the California Civil Code.²⁶¹ The court could define the precise scope of the privilege either broadly or narrowly.²⁶²

Should the court choose a broad definition of matters of public concern or interest, as the United States Supreme Court did in *Rosenbloom v. Metromedia, Inc.*,²⁶³ the extent of the privilege may be ambiguous at

258. Constitutional actual malice, as defined by the United States Supreme Court, requires that the plaintiff show by clear and convincing evidence that the defendant acted with knowledge of falsity or reckless disregard for the truth of the statement. *New York Times*, 376 U.S. at 280. Actual malice, under California law, only requires a showing by the plaintiff that the defendant's publication was false and motivated by ill will or evil motive. CAL. CIV. CODE § 48a(4)(d) (West 1982).

259. No. L.A. 32210 (Cal. Sup. Ct. hearing granted June 26, 1986). For a discussion of the controversy underlying *Van Nuys Publishing*, see *supra* notes 14-37 and accompanying text.

260. CAL. CIV. CODE § 47(3) (Deering 1971 & Supp. 1987). See *supra* text accompanying note 5 for the text of § 47(3).

261. See *supra* note 28 for the California definition of malice.

262. Either way, the privilege would still have to be consistent with the actual text of § 47(3). For example, the court would have to be able to conclude, in applying the privilege, that the article in question was of legitimate interest to some of the publication's readers, or that the nature of the publication was such that there was reason to believe that the publisher's motives were innocent, or that the readers of the publication in some way requested the information.

263. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). The *Rosenbloom* Court refused

first. Undoubtedly, the courts would initially have to determine the statute's application on a case-by-case basis, and as a consequence of the resulting uncertainty, the press may hesitate to initially rely on the privilege.²⁶⁴ However, our judiciary is eminently capable of tackling such a challenge,²⁶⁵ and in time the full confidence of the media would be restored and the press could return to effectively fulfilling its critical role as society's watchdog. While libel litigation would still be a concern, the plaintiff's prospects for success where the allegedly defamatory publication addressed a public issue would certainly be reduced.

While some critics may view a broadly interpreted public interest privilege as dangerously over-inclusive, the privilege would at least insure that all forms of truly important speech, regardless of the status of the actors involved, are accorded higher degrees of protection than is currently available under the United States Constitution,²⁶⁶ as interpreted under *Gertz v. Robert Welch, Inc.*²⁶⁷

Alternatively, the California Supreme Court could choose to more narrowly define an issue of public concern as one involving matters relevant to the concept of self-government. Proponents of this model argue that the public interest privilege should at the very least shelter "stories that facilitate public discussion on matters important to the governance

to specifically define what topics constitute issues of public or general concern. The Court stated that it would leave "the delineation of the reach of that term to future cases." *Id.* at 44-45. However, Justice Brennan's plurality opinion broadly stated that citizens should have access to all information which is "'needed or appropriate to enable the members of society to cope with the exigencies of their period.'" *Id.* at 41 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

264. Not all journalists would be concerned about this uncertainty. Currently, many reporters are willing to take legal risks for the sake of a "good story." If a public interest privilege is recognized—even a vague one—present risks will be reduced and the assertive reporter will feel even more license to aggressively investigate public issues.

265. As one commentator explained:

[U]nder the rubric of the "political and social change" sought to be encouraged by the first amendment, the courts could develop standards for the proper application. Courts are much better qualified to apply a legal principle such as [a public interest privilege] than juries are to apply [under *Gertz*] the general concept of negligence to the field of journalism, in which few, if any, generally recognized standards of practice exist.

Smith, *supra* note 249, at 90 (footnote omitted).

266. As one author observed:

Even if one does not subscribe to the *Rosenbloom* theory of the first amendment that the guarantees of speech and press extend not only to comments about public officials, public affairs, and public personalities, but to all relevant information necessary to enable a person to cope with a complex society, the public interest standard nevertheless provides insulation for the unfettered discussion of public policy and governmental operations, which are at the core of free expression.

Ashdown, *supra* note 249, at 955 n.97 (citation omitted).

267. 418 U.S. 323 (1974).

of the nation. Its purpose should be to protect the function of the 'citizen-critic of government.'"²⁶⁸ In application, this type of privilege might work this way:

If a private individual is involved in a matter related to a governmental function, he or she would be subject to the privilege. Conversely, the privilege would not apply to stories about the purely private lives of entertainers such as Carol Burnett or Johnny Carson. Of course, the public or private status of an individual will frequently affect the determination of whether the privilege applies. For example, a report of a private individual's divorce and financial crisis would not be privileged. However, if the very same story is written to prove a candidate's unfitness for public office, it would be related to the candidate's participation in government and would, therefore, be subject to the privilege.²⁶⁹

The primary benefit of this narrower view of the public interest privilege would be its greater predictability.²⁷⁰

While a broadly applied privilege would be more protective of free speech values, a narrow approach would still be far preferable to the repudiation of any privilege at all. As long as the court recognizes some kind of significant public interest privilege component under section 47(3), the focus of the court's inquiry will initially focus on the subject matter of the publication. This way truly critical forms of discussion will receive heightened judicial protection, whether the speech concerns a public or private figure.

Once the California Supreme Court declares that section 47(3) does render privileged mass media reports that concern matters of legitimate public interest, the court could dispose of the Jerry Plotkin controversy in one of two ways.²⁷¹ First, the court could remand the case to Los Angeles Superior Court, where Judge Markey could reconsider his ministerial ruling²⁷² in light of the court's fresh interpretation of the statute. Or

268. Branson & Sprague, *supra* note 246, at 637-38 (quoting *New York Times*, 376 U.S. at 282).

269. *Id.* at 638 (footnotes omitted).

270. Comment, *supra* note 213, at 95 ("If the public issue standard limited absolute protection to core speech, that is, speech necessary for self-government, lower courts would have sufficient guidance so that unpredictability could be minimized.").

271. The *Van Nuys Publishing* case is significant primarily because the suit is forcing the California Supreme Court to finally resolve the § 47(3) issue; the court's specific finding regarding the Plotkin article is of secondary importance in terms of the issues addressed in this Comment.

272. See *infra* notes 31-35 and accompanying text.

second, the supreme court could go a step further and apply its new rule to the facts of the case, and find the *Daily News* article privileged under section 47(3).²⁷³ Either way, the confusion that has pervaded the California courts for almost 100 years concerning the scope of section 47(3) will finally be put to rest.

273. For several reasons, the publication of the article about Jerry Plotkin clearly concerned a matter of legitimate public interest. First, uncontested evidence indicating the public had a tremendous interest in the Iranian hostages was presented by the defendants at a special mini-trial held for the purpose of determining the standard of fault the plaintiff was required to prove. Professor Marvin Zonis, a public opinion expert, testified that polls showed that an amazing 99% of the American public were aware of the taking of the hostages, and were unusually angry about the crisis. Petitioner's Reply Memorandum of Points and Authorities at 8, *Van Nuys Publishing Co. v. Superior Court*, No. L.A. 32210 (Cal. Sup. Ct. hearing granted June 26, 1986). Furthermore, Zonis told the court that certain communities tended to identify with and express special concern for hostages who were from those communities. *Id.* And the public wanted to know about the backgrounds of the individual hostages. According to one expert witness at the mini-trial, there was "a blossoming across the country of profiles and stories published in newspapers locally . . ." *Id.* Additionally, the general public was especially interested in Jerry Plotkin because he was the only hostage who was not an employee of the United States government. *Id.* at 8-9.

Second, the editors of the *Daily News* had good reason to believe that publication of the article would be in the public interest and for the public's benefit. Unquestionably, the article discussed material which was directly related to a major international political crisis. As an American held hostage by Iranian terrorists, Plotkin was thrust into the thick of one of the most significant news events of the 1970's. Because Plotkin was the only private citizen kidnapped, the American people had a legitimate reason to be interested in his justifications for being in Iran. Not only was Iran particularly unfriendly to the United States at the time the terrorists stormed the embassy, but the Middle East in general was then infamous for its internal political turmoil and consequent risk to foreign travelers.

Moreover, as a hostage in Iran, Plotkin was at the mercy of the negotiating prowess and international clout of the United States government. Accordingly, his reasons for being in Iran at the time the embassy was stormed would be of legitimate interest to the general public because the substance of those reasons might influence the degree of public support for various negotiating postures taken on his behalf. Perhaps some citizen-critics of our government would not support the use of military force, or any other form of government influence, to secure the release of a person who was kidnapped while allegedly attempting to consummate an illegal narcotics transaction.

Publication of the article could also be considered to be in the public interest because information in the article might have helped contribute to an understanding of Plotkin's highly visible conduct both during his captivity and after his release. Also, information in the article might have helped the public more honestly react to Plotkin upon his return to the United States. Because of the questions raised by the article, citizens might not feel comfortable treating him as a national hero in the same manner as other released hostages who were unquestionably fulfilling their role as dedicated government servants at the time they were kidnapped.

Finally, one can credibly and persuasively argue that reports of accusations of criminal involvement, reported in good faith, should be privileged as a matter of public interest because law enforcement matters are of inherent interest to any concerned citizen. As Justice Brennan stated: "The community has a vital interest in the proper enforcement of its criminal laws . . ." *Rosenbloom*, 403 U.S. at 43. Some Americans might not have known that drug deals are negotiated in the Middle East, and they might be troubled by the thought that such deals were possibly negotiated with the indirect support of an American embassy.

VI. CONCLUSION

California has a salutary tradition of protecting the free speech rights of the press. For more than sixty years, one form of protection has been the statutory recognition of a qualified privilege under California Civil Code section 47(3).²⁷⁴ This privilege has been applied by the judiciary to mass media reports concerning private figures which address matters of public concern. Now the law is in a state of confusion. As a result of the Second District Court of Appeal's ruling in *Rancho La Costa, Inc. v. Superior Court*,²⁷⁵ continued recognition of California's public interest privilege, as codified in section 47(3), is in jeopardy. If the *Rancho La Costa* interpretation becomes the controlling rule in the state, lower courts will have difficulty fairly applying the court's standard, defamation litigation will become increasingly complex, and the type of speech that first amendment experts consider vital to the functioning of a representative democracy might be chilled.

To strike the best balance between the overall interests of society and the needs of private figure defamation plaintiffs, the California Supreme Court, in *Van Nuys Publishing Co. v. Superior Court*,²⁷⁶ should endorse the Fourth District Court of Appeal's broad interpretation of section 47(3) as outlined in *Rollenhagen v. City of Orange*.²⁷⁷ Speech concerning compelling public issues deserves special legal protection, whether the actors involved are public officials, public figures or private figures. Formal adoption of the *Rollenhagen* interpretation of section 47(3), where the analysis focuses on the subject matter of the defamatory publication rather than the plaintiff's individual status, would best protect news reports which are published for the public's benefit. And a private figure plaintiff would not be greatly disadvantaged by the recognition of a public interest privilege because he would only have to prove statutory malice, rather than the more onerous burden of proving constitutional actual malice, to overcome the privilege.

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274. CAL. CIV. CODE § 47(3) (West 1982). See *supra* text accompanying note 5 for the text of § 47(3).

275. 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980), *cert. denied*, 450 U.S. 902 (1981). For a thorough discussion of *Rancho La Costa*, see *supra* notes 38-126 and accompanying text.

276. No. L.A. 32210 (Cal. Sup. Ct. hearing granted June 26, 1986). For a discussion of the controversy underlying *Van Nuys Publishing*, see *supra* notes 14-37 and accompanying text.

277. 116 Cal. App. 3d 414, 172 Cal. Rptr. 49 (1981). For a thorough analysis of *Rollenhagen*, see *supra* notes 153-89 and accompanying text.