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Delaney v. Superior Court: Balancing the Interests of Criminal Defendants and Newspersons Under California's Shield Law

Courts have long recognized the constitutional right of the criminally accused to have a fair opportunity to defend against the government's accusations.[1] The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[2] In addition, criminal defendants have also been found to have a right to information assisting their defense under the due process clause of the fourteenth amendment.[3] However, the right to present a defense is not absolute. Defendants must comply with evidentiary and procedural rules established by the state which may deny defendants access to

1. *See In re* Oliver, 333 U.S. 257, 273 (1948) (holding that imprisoning the petitioner for contempt without providing him an opportunity to present his defense or retain counsel violated the due process rights of the petitioner).

2. U.S. CONST. amend. VI.

3. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987) (holding that defendant was entitled to review files protected by psychotherapist-patient privilege in order to preserve defendant's rights under the due process clause of the fourteenth amendment). The California Constitution also provides a criminal defendant with the right to due process and to confront witnesses. CAL. CONST., art. I, § 15. Section 15 states:

> "The defendant in a criminal case has the right . . . to be confronted with the witnesses against the defendant . . . [and] may not . . . be deprived of life, liberty, or property without due process of law."

Id.

necessary information or may render inadmissible relevant evidence that would otherwise aid in their defense.[4]

Recently, the California Supreme Court, in *Delaney v. Superior Court*,[5] addressed the conflict between a defendant's right to present a defense and a reporter's right under California's newsperson's shield law[6] to avoid being adjudged in contempt for withholding information discovered during the newsgathering process.[7] The court established that the supremacy clauses of both the federal and state constitutions dictate that a federal constitutional right preempts a right delineated in a state constitution.[8] The California Supreme Court concluded that an accused who can show a violation of the federal constitutional right to present a defense necessarily overcomes a reporter's state-created immunity from disclosure.[9] The *Delaney* Court further explained that in order to assert a constitutional right to the reporter's testimony, defendants must show that there is a reasonable possibility that the information sought will assist in their defense.[10] Having established that possibility, the court must then evaluate the sensitivity or confidentiality of the information being withheld, determine the importance of the evidence to the accused's case, determine whether compelled disclosure will impede the policy of the shield law, and, in certain cases, search for an alternative source for the information that is less intrusive on the

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4. *See* Chambers v. Mississippi, 410 U.S. 284, 302-03 (1973) (holding that petitioner, who was not permitted to cross-examine a key witness who confessed to the same crime for which he was tried, or to introduce testimony from persons who heard the confession, was denied a fair trial in violation of the due process clause). In regard to the application of the defendant's right to a fair trial in light of a reporter's privilege, see Note, *Reporters and their Sources: The Constitutional Right to a Confidential Relation*, 80 YALE L.J. 317, 347 n.131 (1970) (stating that the criminally accused has not been accorded an absolute privilege in light of other privileges, and there should be no such absolute right with the reporter's privilege).

5. 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990), *reh'g denied.*

6. *See* CAL. EVID. CODE § 1070(a) (West Supp. 1991) (stating that newspersons are immune from contempt for refusing to disclose information obtained during the newsgathering process); CAL. CONST. art. I, § 2(b) (generally restating the language of section 1070).

7. Delaney v. Superior Court, 50 Cal. 3d at 794, 789 P.2d at 937-38, 268 Cal. Rptr. at 756-57.

8. *Id.* at 805-06, 789 P.2d at 945-46, 268 Cal. Rptr. at 764-65.

9. *Id.*

10. *Id.* at 808, 789 P.2d at 948, 268 Cal. Rptr. at 767.

newsperson's rights.[11] The California Supreme Court, after finding the information requested by the defendant nonconfidential and important to the defendant's case, held that Delaney had a constitutional right to the reporters' information.[12]

While the United States Supreme Court has concluded that the first amendment of the Federal Constitution does not provide a reporter with a privilege against disclosing information obtained in the newsgathering process, the Court has allowed the states to establish their own standards within the limits of the first amendment.[13] The *Delaney* decision, through the use of the balancing test defined above, establishes a standard to be used by trial courts in determining a newsperson's rights under California's shield law.[14] In addition, the *Delaney* court resolves the recurring conflict among the appellate courts regarding whether the shield law applies to nonconfidential as well as confidential information.[15]

Part I of this Note reviews existing case law and California statutes discussing the shield law, as well as the traditional standard used in establishing a defendant's right to a fair trial when confronted with a statute that would preclude certain evidence.[16] Part II examines the rationale and holding of the court in *Delaney*.[17] Finally, Part III presents the legal ramifications of the *Delaney* decision.[18]

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11. *Id.* at 808-12, 789 P.2d at 948-51, 268 Cal. Rptr. at 767-70.

12. *Id.* at 814-17, 789 P.2d at 952-54, 268 Cal. Rptr. at 771-73.

13. Branzburg v. Hayes, 408 U.S. 665, 684-708 (1972). For a discussion of the evolution of the common law privilege for newspersons, see generally Marcus, *The Reporter's Privilege: An Analysis of the Common Law,* Branzburg v. Hayes, *and Recent Statutory Developments*, 25 ARIZ. L.R. 815, 817-20 (1983).

14. The California shield law, which provides only an immunity from contempt, must be distinguished from a reporter's privilege, which prohibits all judicial sanctions. New York Times Co. v. Superior Court, 51 Cal. 3d 453, 462-64, 796 P.2d 811, 816-18, 273 Cal. Rptr. 98, 104-06 (1990).

15. *See infra* notes 182-87 and accompanying text (stating that the scope of the California shield law includes nonconfidential unpublished information).

16. *See infra* notes 19-151 and accompanying text.

17. *See infra* notes 152-237 and accompanying text.

18. *See infra* notes 238-67 and accompanying text.

I. LEGAL BACKGROUND

The *Delaney* case illustrates an entanglement of various constitutional and statutory rights that are asserted both by the criminal defendant and the newspersons. The defendant asserted his constitutional right to present a defense and examine witnesses when he asked the court to compel the newpersons' testimony regarding their observations of the defendant's arrest.[19] The newspersons claim that the shield law, detailed in both the California Evidence Code and the California Constitution, protected them from forced disclosure of unpublished information.[20] Finally, the appellate court in *Delaney* held that the shield law did not apply to the reporters' percipient observations of Delaney's arrest, so the question remained whether the scope of the shield law included nonconfidential as well as confidential information.[21]

In order to comprehend the significance of each of the constitutional and statutory rights asserted in *Delaney*, it is necessary to present the background of each of these asserted rights, and indicate the deference courts are willing to pay to them. First, it will be necessary to analyze a criminal defendant's right to present evidence at trial when countervailing interests, asserted through statutory or constitutional claims, attempt to exclude evidence necessary to the defendant's case.[22] Next, the traditional rights accorded newspersons through the shield law, as well as many courts' recognition of a newsperson's qualified first amendment right to avoid compelled disclosure of sources or unpublished information, will be examined, with an emphasis on the development of the shield law in California.[23] Finally, the judicial interpretation of the shield law will be analyzed in both the civil and criminal contexts.[24]

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19. *Delaney*, 50 Cal. 3d 785, 805-06, 789 P.2d 934, 945-46, 268 Cal. Rptr. 753, 764-65 (1990).
20. *Id.* at 794-97, 789 P.2d at 937-40, 268 Cal. Rptr. at 756-59.
21. *See infra* notes 182-87 and accompanying text.
22. *See infra* notes 30-63 and accompanying text.
23. *See infra* notes 64-110 and accompanying text.
24. *See infra* notes 111-51 and accompanying text.

A. The Accused's Constitutional Right to Present Evidence at Trial

Many states have enacted statutory privileges or other restrictions which interfere with an accused's right to present evidence at trial, yet the right to offer the testimony of a witness has long been equated with the constitutional right to present a defense.[25] Consequently, the Supreme Court of the United States has declared that many state statutes may be overcome upon a showing that they unnecessarily interfere with defendants' fundamental right to present witnesses in their behalf.[26]

Since the defendant in *Delaney* asserted his constitutional right to present witnesses in his behalf, or, more generally, his right to a fair trial, it is necessary to examine how the Supreme Court of the United States first recognized a constitutional right to present defense evidence.[27] Second, statutory and common law privileges which may impinge the defendant's right to a fair trial should also be examined to explore the circumstances under which a defendant's right to a fair trial is found to be outweighed by these privileges.[28] Finally, the defendant's right to a fair trial should be presented in light of privileges which have constitutional bases, such as the first amendment guarantee of a free press.[29]

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25. *See* Washington v. Texas, 388 U.S. 14, 18-19 (1967) (holding that the constitutional guarantee to present a defense includes the right to present witnesses).

26. *See id.* at 23 (holding that the defendant's constitutional right to present witnesses overcame Texas statutes which prohibited defendants from calling witnesses implicated in same crime); Chambers v. Mississippi, 410 U.S. 284, 302-03 (1973) (holding that a statute which prevented defendant from impeaching his own witnesses violated defendant's right to due process); Pennsylvania v. Ritchie, 480 U.S. 39, 58-61 (1987) (holding that the defendant's right to a fair trial dictated that the trial court must conduct an *in camera* review of psychotherapist-patient records to determine their materiality).

27. *See infra* notes 30-43 and accompanying text.

28. *See infra* notes 44-63 and accompanying text.

29. *See infra* notes 64-90 and accompanying text.

1. The Recognition of a Defendant's Constitutional Right to Present a Defense

In *Washington v. Texas*,[30] the Supreme Court of the United States addressed two Texas statutes which prohibited an accused from calling, as a defense witness, any person charged or convicted as a criminal in the same crime.[31] The statutes prohibited a defendant, on trial for murder, from calling as a witness another man convicted in the same shooting.[32] The Court held that the statutes violated the accused's constitutional guarantee to present a defense, and concluded that the right of an accused to confront the prosecution's witnesses for the purpose of challenging their testimony also includes the right to present defense witnesses.[33]

The decision in *Washington* was reaffirmed by the Court in the 1973 decision of *Chambers v. Mississippi*.[34] In *Chambers*, a homicide defendant called a witness to the stand who had previously confessed to the killing, but subsequently recanted his admission.[35] One of Chambers' defenses to the murder charge was that the witness, rather than Chambers, had killed the victim.[36] However, under a Mississippi rule of evidence known as the "voucher" rule, parties to an action could not impeach their own witnesses.[37] Thus, the trial court, in applying the "voucher" rule, prevented Chambers from calling the witness to the stand for purposes of cross-examination.[38]

This rule effectively precluded the defendant from presenting exculpatory evidence which would implicate the witness in the murder.[39] The Supreme Court in *Chambers* held that the rulings

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30. 388 U.S. 14 (1967).
31. *Id.* at 16-17.
32. *Id.*
33. *Id.* at 18-19.
34. 410 U.S. 284 (1973).
35. *Id.* at 288-89. Chambers had called the witness, McDonald, to testify after the state had refused to call McDonald, and made a motion to examine McDonald as an adverse witness. *Id.* at 291.
36. *Id.* at 289.
37. *Id.* at 295.
38. *Id.* at 295-98.
39. *Id.* at 297-98.

of the trial court precluding Chambers from cross-examining the witness deprived him of a fair trial and denied him due process of law.[40]

The significance of the decisions in *Washington* and *Chambers* is that the decisions arm defendants with a constitutional challenge to overturn statutes, common law decisions, and court rules which may exclude relevant evidence for use in their behalf.[41] In the American system of jurisprudence, if conflicts arise between constitutional provisions and statutes or common law decisions, the constitutional provisions prevail.[42] Therefore, when statutes, common law decisions, or court rules prevent the admission of evidence presented on behalf of an accused, the defendant's constitutional right to present a defense necessarily overrides those assertions that attempt to exclude evidence.[43]

2. *Statutory and Common Law Privileges Which Interfere with the Right to Present a Defense*

While the defendants in both *Washington* and *Chambers* knew what information was being withheld, courts have reacted differently when evidence is requested by the defense in preparation for trial, without knowledge of the content of the

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40. *Id.* at 302-03.

41. *See* IMWINKELREID, EXCULPATORY EVIDENCE § 1-2 (1990) (indicating that *Washington* and *Chambers* have had a significant effect on the decisions of even the conservative Burger and Rehnquist Courts, leading the courts to uphold the constitutional right to present defense evidence, as announced by Chief Justice Warren in *Washington*). *See also* Davis v. Alaska, 415 U.S. 308, 319-20 (1974) (holding that a criminal defendant's rights under the confrontation clause of the sixth amendment necessitate the disclosure of confidential juvenile convictions relevant to the defendant's defense). *Davis* is often cited when a defendant's efforts to impeach a prosecution witness are thwarted by an evidentiary privilege. Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communication Privilege*, 30 STAN. L. REV. 934, 959-60 (1978). In *Olden v. Kentucky*, 488 U.S. 227 (1988), the Court held that the trial judge's refusal to allow cross-examination which was designed to establish the witness' bias violated defendant's confrontational guarantee under the Sixth Amendment. *Olden*, 488 U.S. at 231-33.

42. *See* IMWINKELREID, *supra* note 41, at § 11-1 (stating that constitutional rights are "of a higher order" than statutory rights). *See also* 16 C.J.S. *Constitutional Law* §§ 86-87, 94, 107-08 (1984) (stating that courts have a duty to insure legislation does not affect the federal constitutional rights of the people).

43. *See* IMWINKELREID, *supra* note 41, at § 1-2 (discussing the direct and indirect consequences flowing from recognition of constitutional right to present defense evidence).

evidence. Commonly, this situation arises when a party asserts a statutory or common law privilege to avoid disclosure of certain information. In *Pennsylvania v. Ritchie*,[44] the Supreme Court of the United States was forced to resolve the conflict that can arise between a defendant's right to a fair trial and an individual's statutorily enforced privilege against compulsion of certain evidence.[45]

In *Ritchie*, the defendant, accused of sexually abusing his minor child, subpoenaed documents from the Pennsylvania Children and Youth Services (CYS) agency, which had investigated the charges.[46] CYS claimed the records were privileged under a state statute and refused to comply with the subpoena.[47] The trial judge, acknowledging he had not read the agency's entire file, denied the defendant's motion to produce the documents.[48]

The Supreme Court focused on the due process clause of the fourteenth amendment, which prior case law had recognized as including a fundamental right to a fair trial.[49] The Court, while acknowledging the public interest in preserving the confidential investigatory information gathered by a private agency, concluded that the privilege was not an absolute one.[50] The Court remanded the case to the trial court to determine whether the information should be admitted into evidence under the protection of an *in camera* review.[51] The Court concluded that the defendant had no right to inspect the information himself, because that would undermine the public interest in protecting child abuse information.[52] In ascertaining the admissibility of the information, the Court instructed the trial court to examine whether the agency's

44. 480 U.S. 39 (1987).
45. *Id.* at 51-53.
46. *Id.* at 43.
47. *Id.*
48. *Id.* at 44.
49. *Id.* at 56.
50. *Id.* at 57-58.
51. *Id.* at 58.
52. *Id.* at 60.

file "contains information that probably would have changed the outcome of [the] trial."[53]

Justice Powell, in a portion of the opinion joined by only three members of the Court, stated that the sixth amendment right to confront witnesses is a "trial right," and that none of the Court's precedents supported the view that the confrontation clause necessarily compels pretrial discovery.[54] Justice Powell distinguished the right to offer evidence at trial from the right to seek evidence that is not known or otherwise discoverable.[55] Justice Powell concluded that the confrontation clause only guarantees the defendant an opportunity for effective cross-examination, not cross-examination that is effective in "every way."[56]

The right of a criminal defendant to overcome an assertion of a privilege has also been addressed by a California appellate court in *People v. Caplan.*[57] In *Caplan*, the defendant was convicted of engaging in sexual activity with a five-year-old girl.[58] During pretrial motions, the defendant requested discovery of the girl's psychotherapy records from her therapists and, at trial, sought to cross-examine the girl regarding the statements she made to the therapists.[59] The trial court, acknowledging the relevance of the requested information, denied discovery of the records, citing the patient-psychotherapist privilege.[60]

On appeal, the *Caplan* court held that the defendant was entitled to have the trial court inspect the victim's psychotherapy records to determine whether the information would assist the defendant's case-in-chief.[61] The court concluded that Caplan's

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53. *Id.* at 58.
54. *Id.*
55. *Id.* at 53-54.
56. *Id.* at 53.
57. 193 Cal. App. 3d 543, 238 Cal. Rptr. 478 (1987).
58. *Id.* at 545-46, 238 Cal. Rptr. at 478-79.
59. *Id.* at 554-55, 238 Cal. Rptr. at 484-85.
60. *Id. See* CAL. EVID. CODE § 1014 (West Supp. 1991) (stating that a patient has a privilege to refuse to disclose, or prevent another from disclosing, certain confidential communications between a patient and a psychotherapist).
61. People v. Caplan, 193 Cal. App. 3d at 558, 238 Cal. Rptr. at 487.

right to the records was mandated by his constitutional right to cross-examine and confront witnesses, and ordered an *in camera* review to determine the relevance of the records.[62] The court added that constitutional due process compels the prosecution to provide evidence in its possession that is favorable to the accused and material in determining the guilt of the defendant.[63]

While the *Caplan* court gave some deference to the statutorily created psychotherapist privilege, courts necessarily give greater deference to federal constitutional provisions which interfere with an accused's federal constitutional right to present a defense, since the supremacy clause is not implicated. Although the *Delaney* case addresses the California shield law provision, it is necessary to address the federal constitutional rights of the criminal defendant in light of the federal first amendment protection afforded newspersons in many states which recognize a nonstatutory shield law. The cases examined will demonstrate the extent of the federal first amendment rights afforded reporters, and how many courts recognize such a right.

B. A Newsperson's First Amendment Right to Withhold Information

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of . . . the press . . . ."[64] It is generally agreed that, unless a constitutional right to gather news exists, the free flow of information to the public will be inhibited.[65] A testimonial

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62. *Id.* at 558, 238 Cal. Rptr. at 487.

63. *Id.* (citing Pennsylvania v. Ritchie, 480 U.S. 39 (1987)).

64. U.S. CONST. amend. I.

65. The importance of the reporter's privilege in light of the first amendment, particularly in regard to compelling a reporter to reveal confidential sources, was explained in *Zerilli v. Smith*, 656 F.2d 705 (1981). The court stated:

> "The First Amendment guarantees a free press primarily because of the important role it can play as a vital source of public information . . . Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability; journalists frequently

privilege for newspersons under the first amendment's guarantee of freedom of the press was first recognized in *Garland v. Torre*.[66] In *Torre*, actress Judy Garland brought a defamation suit against Columbia Broadcasting System (CBS) for statements allegedly made by a CBS executive and published in the New York Herald Tribune.[67] The trial court held the reporter in contempt for refusing to identify the source of the statement quoted in the article.[68] Writing for the majority, Judge (later Justice) Potter Stewart explicitly recognized a privilege to not disclose, noting the chilling effect forced disclosure may have on the freedom of the press.[69] Nevertheless, the court of appeals held that the plaintiff's right to present evidence outweighed the reporter's qualified first amendment privilege.[70] Despite the recognition in *Torre* of a privilege for the press, few other courts recognized a first amendment privilege for reporters.[71] The confusion among the lower courts, caused by the *Torre* decision and a growing number of subpoenas for reporters, forced the Supreme Court of the United States to address whether the first amendment may shield a reporter from compelled testimony.

In *Branzburg v. Hayes*,[72] the Court addressed four different cases, consolidated for purposes of determining whether there exists a qualified first amendment right to withhold information.[73] The four cases shared one common characteristic: in each case a grand jury sought information regarding a crime which a reporter

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depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant."

Id. at 710-11.

66. 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

67. *Id.* at 545.

68. *Id.* at 547.

69. *Id.* at 548.

70. *Id.* at 550.

71. *See, e.g.*, State v. Buchanan, 250 Or. 244, 251, 436 P.2d 729, 732 (1968), *cert. denied*, 392 U.S. 905 (1968). *See also* Comment, *The Newsman's Privilege After* Branzburg*: The Case for a Federal Shield Law*, 24 U.C.L.A. L. REV. 160, 170 (1976) (describing the pre-*Torre* evolution of the reporters' privilege).

72. 408 U.S. 665 (1972).

73. *See In re* Pappas, 358 Mass. 604, 266 N.E. 2d 297 (1971); Branzburg v. Meigs, 503 S.W. 2d 748 (Ky. Ct. App. 1971); Branzburg v. Pound, 461 S.W. 2d 345 (Ky. Ct. App. 1970). Defendant Hayes was Judge Pound's successor. Branzburg v. Hayes, 408 U.S. 665, 668 n.3.

witnessed and subsequently wrote about.[74] In *Branzburg*, Justice White, writing for the plurality, concluded that the first amendment does not provide newspersons with even a qualified privilege against appearing before a grand jury and being compelled to answer questions as to either the identity of news sources or information received therefrom.[75] The plurality, however, stated that it was permissible for states to enact legislation that would allow the states to fashion their own standards within the limitations of the first amendment, and to recognize a privilege, either qualified or absolute, for reporters.[76] In opposition, Justice Douglas in a dissenting opinion stated that the First Amendment affords a newsperson an absolute immunity.[77] In another dissenting opinion, Justice Stewart, writing for himself and two other justices, would have found a qualified privilege under the first amendment.[78]

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74. Branzburg v. Hayes, 408 U.S. at 670-79.

75. *Id.* at 690. Justice White acknowledged that news gathering qualified for some first amendment protection. *Id.* at 681. Justice White also indicated that the reporter's first amendment interest in avoiding testimony before grand juries was too insubstantial to overcome the public interest in prosecuting crime. *Id.* at 695. Finally, in recognizing that the Constitution does not allow grand juries to harass the press, Justice White concluded that the judges supervising grand juries would be sufficiently sensitive to the first amendment to minimize the danger of abuse. *Id.* at 707-08. While the *Branzburg* decision centered on the rights of reporters with regard to grand jury proceedings, Justice White indicated that the Court's holding was applicable to criminal trials as well, stating that the public interest in law enforcement may override reporters' "consequential but uncertain" right to withhold information. *Id.* at 690-91.

76. *Id.* at 706. The plurality added that it was "powerless" in preventing state courts from recognizing a qualified or absolute privilege under their own state constitutions. *Id.* Justice Powell, in a concurring opinion, attempted to limit the nature of the plurality's holding by stating that "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Id.* at 710 (Powell, J., concurring). The *Branzburg* decision has been widely criticized by commentators. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-22, at 972-76 (1988) (stating that the qualified privilege rejected in *Branzburg* is mandated by the first amendment's "implicit guarantee against undue interference with the acquisition of knowledge"); Comment, *Sixth Amendment Limitations on the Newsperson's Privilege: A Breach in the Shield*, 13 RUTGERS L.J. 361, 367 (1982) (stating that the *Branzburg* decision was "at best, vague and, at worst, opaque"); Marcus, *supra* note 13, at 836-37 (stating that discovering with certainty the meaning of the *Branzburg* opinion is extremely difficult).

77. *Branzburg*, 408 U.S. at 712 (Douglas, J., dissenting).

78. *Id.* at 738-44 (Stewart, J., dissenting). Justice Stewart, joined by Justices Brennan and Marshall, held that in order to compel a reporter to testify before a grand jury, the government must demonstrate: (1) That there was probable cause that the reporter had information clearly relevant to a specific probable violation of law; (2) that the information sought could not be obtained from an

The judiciary's early reaction to *Branzburg* was to conclude that, by denying the reporter's a privilege, the plurality disposed of any rights of the media in the criminal context.[79] However, several state and federal judges disagreed with this view and have interpreted *Branzburg* to confer a qualified privilege even in grand jury proceedings.[80] Many judges have held that, based on Justice Powell's concurring opinion, that courts should balance the freedom of the press under the federal first amendment with the obligation of citizens to give relevant testimony related to criminal conduct.[81] Currently, twenty-eight states have enacted statutes, designated generally as shield laws, which serve to protect information gathered by reporters by declaring reporters immune from giving pertinent testimony.[82]

While California is among the states which have enacted such shield laws, California courts have also recognized a qualified first amendment privilege for newspersons.[83] In *KSDO v. Superior*

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alternative source less intrusive on first amendment rights; and (3) that there is a compelling and overriding interest in the information. *Id.* at 743 (Stewart, J., dissenting).

79. *See* Marcus, *supra* note 13, at 839 (citing *In re* Farber, 78 N.J. 259, 394 A.2d 330 (1978), *cert. denied*, 439 U.S. 997 (1978)).

80. *Id.* While the holding in *Branzburg* could arguably apply only to grand jury proceedings, Justice White in dicta indicated that the plurality's holding was also applicable to criminal trials. *Branzburg*, 408 U.S. at 690-91. *See* TRIBE, *supra* note 76, at 976 (stating that the *Branzburg* case represents a rejection of any first amendment privilege for reporters). *See generally* J. BARRON AND C. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS § 8:6 (1979) (discussing the post-*Branzburg* developments in regard to assertion of reporters' privileges in criminal trials).

81. *See, e.g.*, State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974). In *St. Peter*, the court stated that a television news reporter had a right under the First Amendment to refuse disclosure of certain information, absent a showing by the criminal defendant that no alternative sources exist and that the information is material and relevant. *Id.*, 315 A.2d at 256. *See also* Los Angeles Memorial Coliseum Comm'n v. N.F.L., 89 F.R.D. 489, 492 (C.D. Cal. 1981) (stating that "if one aligns Justice Powell's concurring opinion with Justice Stewart's dissent, joined by Justices Brennan and Marshall, and with Justice Douglas' dissent, a majority of five justices accepted the proposition that journalists are entitled to at least a qualified First Amendment privilege"). For a detailed analysis of the impact of the *Branzburg* decision, see generally Marcus, *supra* note 13, at 821-50.

82. *A Shift Toward Stronger Shields*, Nat'l L.J., May 28, 1990 at 3. These states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, and Tennessee. *Id.* Many states which have not expressly enacted shield laws have created the functional equivalent. *Id.*

83. The California Supreme Court recognized a qualified First Amendment privilege for reporters in a defamation action in *Mitchell v. Superior Court*, 37 Cal. 3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (1984). *See supra* notes 64-92 and accompanying text (discussing *Branzburg* and other

Court,[84] the California Court of Appeal for the Fourth District undertook a federal first amendment analysis after finding that the newspersons were not protected by the California shield law.[85] In *KSDO*, members of a local police department brought a libel action against a radio station and a newspaper after a broadcaster stated that the department was under investigation for transporting heroin.[86] A newspaper repeated the broadcast in an article, adding that corruption extended to the highest levels of the department.[87] The trial court denied the plaintiffs' motion to compel discovery of the sources used for the stories.[88] The court stated that the California shield law "is an immunity from contempt, not a privilege against disclosure," and therefore, since the defendants were neither threatened with nor cited for contempt, the California shield law immunity was inapplicable.[89] However, the court, citing Justice Powell's concurring opinion in *Branzburg*, set forth a balancing test that considered: (1) the nature of the particular proceeding; (2) whether the newsperson is a party or nonparty; (3) whether there are alternative sources for the information; and (4) whether the requested information goes to the heart of the claim.[90] The court found that there had been no showing by the plaintiffs that the information sought was unavailable from another source or that the materials were at the heart of the plaintiffs' claim, and therefore held that the qualified privilege under the first amendment

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cases addressing whether a reporter has a qualified first amendment right to withhold unpublished information).

84. 136 Cal. App. 3d 375, 186 Cal. Rptr. 211 (1982).

85. *Id.* at 384-85, 186 Cal. Rptr. at 216-17. Other California appellate courts recognizing a federal first amendment privilege for reporters include *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 212-16, 124 Cal. Rptr. 427, 441-44 (1975), *cert. denied*, 427 U.S. 912 (1976); *CBS, Inc. v. Superior Court*, 85 Cal. App. 3d 241, 252-53, 149 Cal. Rptr. 421, 427-28 (1978); and *Hallissy v. Superior Court*, 200 Cal. App. 3d 1038, 1045-46, 248 Cal. Rptr. 635, 638-39 (1988).

86. *KSDO*, 136 Cal. App. 3d at 378, 186 Cal. Rptr. at 212.

87. *Id.*

88. *Id.* at 379, 186 Cal. Rptr. at 213.

89. *Id.* at 384, 186 Cal. Rptr. at 216.

90. *Id.* at 385-86, 136 Cal. Rptr. at 217-18 (citing *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring)). While the *KSDO* court expressly recognized Justice Powell's concurring opinion, a similar balancing test was actually set forth in Justice Stewart's dissenting opinion. *Branzburg*, 408 U.S. at 743 (Stewart, J., dissenting).

shielded the defendants from compelled disclosure.[91] While the court in *KSDO* considered the federal first amendment rights of newspersons to withhold privileged information, other California courts have proceeded only under the newsperson's shield law immunity recognized in a California statute and state constitutional provision.

C. *The History of the California Shield Law*

California's shield law was first enacted in 1935.[92] The statute, codified as section 1881 of the Code of Civil Procedure, provided in pertinent part that newspaper employees could not be held in contempt of court for refusing to disclose their sources to courts, the legislature, or another administrative body.[93] Unfortunately, very little legislative history was provided for section 1881, and since its inception courts have struggled with interpreting its intended purpose.[94] The modern shield law is currently codified in Evidence Code section 1070.[95] A 1974 amendment expanded

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91. *KSDO*, 136 Cal. App. 3d at 386, 186 Cal. Rptr. at 217-18.

92. 1935 Cal. Stat. ch. 532, sec. 1, at 1608-10 (amending CAL. CIV. PROC. CODE § 1881).

93. *Id.*

94. *See, e.g.*, Rosato v. Superior Court, 51 Cal. App. 3d 190, 218-19, 124 Cal. Rptr. 427, 446 (1975) (interpreting the shield law as not protective of reporters who observe a crime).

95. 1965 Cal. Stat. ch. 299 sec. 2, at 1297, 1323-35 (enacting CAL. EVID. CODE § 1070). The Civil Procedure section was relocated to the Evidence Code in 1965, becoming effective in 1967. 7 CAL. L. REVISION COMM. REP. REC. & STUDIES 912, 913 (1965).
The text of section 1070, as amended in 1974, reads as follows:

> (a) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.
>
> (b) Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for

the shield law to protect against the compelled disclosure of "unpublished information" as well as sources responsible for divulging such information.[96]

Particularly troubling to the courts is the clause providing that a reporter "cannot be adjudged for contempt" for refusing to disclose certain information.[97] Several appellate courts have interpreted this immunity as equivalent to an evidentiary privilege.[98] Support for a broad interpretation of the shield law comes from other states that enacted shield laws prior to California for protection purposes rather than punishment.[99] In light of the prevailing view that the legislative intent behind the shield law was impeded by the power of the courts, the legislature attempted to reinforce the importance of the shield law by amending the California Constitution.[100]

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communication to the public.

(c) As used in this section, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

Id.

96. 1974 Cal. Stat. ch. 1323, sec. 1, at 2877 (amending CAL. EVID. CODE § 1070); 1974 Cal. Stat. ch. 1456, sec. 2, at 3183 (amending CAL. EVID. CODE § 1070).

97. CAL. EVID. CODE § 1070(a) (West Supp. 1991). *See, e.g.*, KSDO v. Superior Court, 136 Cal. App. 3d 375, 379-84, 186 Cal. Rptr. 211, 216-18 (1982) (stating that the California shield law immunity applies only if a reporter has been cited for or threatened with a contempt citation).

98. *See, e.g.*, Hammarley v. Superior Court, 89 Cal. App. 3d 388, 396-98, 153 Cal. Rptr. 608, 612-14 (1979) (recognizing section 1070 of the Evidence Code as creating a statutory privilege for reporters); CBS, Inc. v. Superior Court, 85 Cal. App. 3d 241, 250, 149 Cal. Rptr. 421, 426 (1978) (stating that statute granting privilege to reporters did not preclude compelled disclosure of video and audio tapes of drug transactions); Rosato v. Superior Court, 51 Cal. App. 3d 190, 216 n.17, 124 Cal. Rptr. 427, 444 n.17 (1975), *cert. denied*, 427 U.S. 912 (1976) (stating that the labeling of the shield law as an immunity rather than a privilege is of no importance).

99. *See generally* Note, *The Newsgatherer's Shield--Why Waste Space in the California Constitution?* 15 SW. U.L. REV. 527, 539 (1985) (broad construction of California's shield law appropriate since shield law provides reporters with a general immunity from contempt, rather than prohibiting the discovery of certain categories of material). Two states enacted shield laws prior to California: Maryland (1896) and New Jersey (1933). *Id.* (citing 6 CAL. LAW REVISION COMM. REP., REC. & STUDIES 481, 486 (1964)).

100. *Note, supra note 99,* at 545.

1. Elevation of the Shield Law to Constitutional Status

In 1978, the California Assembly proposed an amendment to section 2 of article I of the California Constitution, relating to freedom of the press.[101] This proposition was in response to two decisions in which courts indicated that legislators were infringing upon the internal processes of the courts, an area in which judges claimed exclusive authority.[102] A California appellate court expressed this sentiment in *Farr v. Superior Court*,[103] which addressed the applicability of the shield law statute to judicial bodies. The *Farr* court held that the shield law did not apply to violations of orders issued by the court which bar potentially prejudicial pretrial publicity.[104] The court declared that the courts had exclusive authority in areas of internal processes, and that the shield law unconstitutionally interfered with the power and duty of the court.[105] In addition to correcting the detrimental effect resulting from decisions such as *Farr*, legislators wanted to restate the aim and importance of the shield law in light of the United States Supreme Court's decision regarding the scope of reporters' rights under the federal first amendment in *Branzburg v. Hayes*.[106]

On June 3, 1980, the voters approved Proposition 5,[107] which amended the California Constitution, article I, section 2, by adding subdivision (b), which contains language virtually identical to

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101. *Id.* at 545.

102. *Id.* (citing *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976); *Farr v. Superior Court*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied*, 409 U.S. 1011 (1972)).

103. 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied*, 409 U.S. 1011 (1972).

104. *Id.* at 71, 99 Cal. Rptr. at 349.

105. *Id.* (citing *Shepard v. Maxwell*, 384 U.S. 333 (1961)). In *Shepard*, the Court stated that trial courts have a constitutional power to issue contempt citations with which the legislature may not interfere. *Shepard*, 384 U.S. at 350-51.

106. 408 U.S. 665 (1972). *See supra* notes 72-81 and accompanying text (discussing the *Branzburg* decision).

107. Proposition 5 was passed by a 73.3% majority. Note, *supra* note 99, at 527, n.1.

Evidence Code section 1070.[108] While the amendment was designed to clarify and strengthen the purpose behind section 1070, subsequent decisions by California courts which attempted to interpret the constitutional provision indicated continued confusion regarding the applicability and scope of the shield law immunity. For example, several California appellate courts had refused to recognize that "nonconfidential" information was protected under the shield law, despite clear language to the contrary.[109]

D. Judicial Interpretation of the Shield Law

When newspersons claim an immunity from disclosure under the shield law, a major factor in courts' decisions to recognize the immunity is the type of proceeding for which the information is requested. For instance, a plaintiff in a civil action wishing to overcome the newsperson's shield law will face greater obstacles than a criminal defendant, since the criminal defendant has a sixth

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108. Article I, section 2(b) of the California Constitution provides:

> A publisher, editor, reporter . . . shall not be adjudged in contempt . . . for refusing to disclose the source of any information procured while so connected or employed for publication . . . or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.
>
> Nor shall a radio or television news reporter or other person connected with or employed by a radio or television station . . . be so adjudged in contempt for refusing to disclose the source of any information . . . or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.
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> As used in this subdivision, 'unpublished information' includes information not disseminated to the public . . . and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

Id.

109. *See* Liggett v. Superior Court, 224 Cal. App. 3d 420, 423-24, 260 Cal. Rptr. 161, 171-72 (1989), *review granted and opinion superseded*, 788 P.2d 34, 263 Cal. Rptr. 119 (1989) (stating that a reporter's eyewitness observations of a public event are not protected by the shield law); Delaney v. Superior Court, 215 Cal. App. 3d 681, 689, 249 Cal. Rptr. 60, 65-66 (1988) *aff'd*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990) (stating that the shield law was enacted to protect confidential sources); CBS, Inc. v. Superior Court, 85 Cal. App. 3d 241, 250, 149 Cal. Rptr. 421, 426 (1978) (restricting application of the shield law to confidential information).

amendment right to a fair trial and to present evidence.[110] While the *Delaney* decision addresses the rights of criminal defendants, examining the manner in which California courts have treated the rights of reporters under the shield law in both the criminal and civil contexts is helpful in understanding the reasoning of the *Delaney* decision and the implications of the decision in regard to future shield law cases.[111]

1. *Civil Case Law*

In *Playboy Enterprises, Inc. v. Superior Court*,[112] the Court of Appeal for the Second District addressed the rights of a civil litigant in compelling the disclosure of information possessed by a magazine. In *Playboy*, two entertainers sued their managers for inducing them to enter into an unfavorable movie contract, as well as for breaching the fiduciary relationship owed to the entertainers.[113] The entertainers discussed incidents relating to the case in an interview with *Playboy* Magazine, and the managers sought the unpublished materials in *Playboy*'s possession relating to the interview, claiming they could be used to impeach the plaintiffs' credibility.[114] The trial court granted the requested order for discovery.[115]

The *Playboy* court noted that the shield law protects unpublished information regardless of whether published information had been disseminated, adding that published material that can be confirmed, amplified, or discredited by undisseminated source material is considered to be "based upon" the undisseminated source material, and subject to protection.[116] The *Playboy* court stated that the inclusion of the shield immunity in

110. *See infra* notes 139-51 and accompanying text (noting California decisions which address rights of criminal defendants in light of shield law).

111. For an analysis of the interaction between the California legislature and the media, *see generally* Sylvester, *How California Governs the Media*, 26 SANTA CLARA L. REV. 381 (1986).

112. 154 Cal. App. 3d 14, 201 Cal. Rptr. 207 (1984).

113. *Id.* at 18, 201 Cal. Rptr. at 211.

114. *Id.*

115. *Id.*

116. *Id.* at 23, 201 Cal. Rptr. at 214-15.

the constitution was intended to give reporters "the highest level of protection under the state law."[117] Furthermore, the court stated that permitting litigants to compel nonparty newspersons to present their information to the trial court for inspection, balancing of interests, and probable disclosure, would greatly reduce the protection afforded newspersons.[118] The court concluded that civil litigants do not have sixth amendment or due process rights to trigger a balancing process between themselves and reporters.[119] Noting the unqualified nature of the shield law, the court held that the magazine's materials were protected.[120]

Following the decision in *Playboy*, the California Supreme Court, in *Mitchell v. Superior Court*,[121] examined for the first time the scope of the amended Evidence Code section 1070 and the addition of the shield law to the California Constitution.[122] In *Mitchell*, the court addressed a defamation action brought against several parties concerning an article in *Reader's Digest* discussing Pulitzer Prize-winning reports by two reporters, David and Cathy Mitchell.[123] The plaintiffs requested the Mitchells to produce all documents containing information connected with the series of articles.[124] The Mitchells claimed that the shield law, or, in the alternative, the first amendment, permitted them to withhold certain information gathered in preparing the story in question.[125] The trial court, in compelling disclosure by the Mitchells, stated that the

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117. *Id.* at 27, 201 Cal. Rptr. at 217-18.

118. *Id.*

119. *Id.* at 29, 201 Cal. Rptr. at 218.

120. *Id.*

121. 37 Cal. 3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (1984).

122. Since parties to a civil action are subject to sanctions beyond a contempt citation, from which a reporter is immunized under the California shield law, the *Mitchell* court also proceeded to analyze the reporters' rights to avoid disclosure under the first amendment. *Id.* at 274-84, 690 P.2d at 628-35, 208 Cal. Rptr. at 155-62.

123. *Id.* at 272-73, 690 P.2d at 626-27, 208 Cal. Rptr. at 153-54. The plaintiffs, members of the Synanon Church, claimed the articles by the Mitchells, which addressed the church's drug rehabilitation program, implied that the plaintiffs' program was unsuccessful. *Id.*

124. *Id.* at 273, 690 P.2d at 627, 208 Cal. Rptr. at 154. The plaintiffs' requests to produce documents listed nearly 40 documents. *Id.*

125. *Id.*

inclusion of the shield law in the constitution did not affect a reporter who is a party to the litigation.[126]

The *Mitchell* court first noted that the Mitchells' refusal to comply with the trial court's order to produce the documents did not implicate California's shield law, which merely provides an immunity from contempt, not a protection from sanctions.[127] The court then addressed the Mitchells' nonstatutory claim that the first amendment and the free speech provisions contained in article I of the California Constitution provided a qualified privilege against disclosure.[128] The court, acknowledging the nonstatutory claims of the Mitchells, formulated a balancing test to determine when a reporter must reveal confidential information.[129] First, the court stated that disclosure is normally appropriate, particularly when a reporter is a party to the litigation.[130] Second, the court required a showing that the requested information goes to the "heart of the case" of the party seeking discovery.[131] Third, the court determined that the party seeking the unpublished information must exhaust all alternative sources before compelling disclosure.[132] Finally, the court stated that the trial court should consider the importance of preserving the confidentiality of the unpublished information or source.[133] The court, noting the plaintiffs' failure to demonstrate a search for available alternatives and the lack of specificity in the plaintiffs' claims for the Mitchells' information, prohibited the trial court from enforcing the discovery orders against the Mitchells.[134]

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126. *Id.* at 273-74, 690 P.2d at 627-28, 208 Cal. Rptr. at 154-55.

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

128. *Id.* The Mitchells also claimed a common law reporter's privilege. *Id.* The court rejected this claim, noting that Evidence Code section 911 precludes courts from establishing a common law privilege in California, by providing that "except as otherwise provided by statute . . . [n]o person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing." *Id.* (citing Evidence Code section 911). *See* CAL. EVID. CODE § 911 (West 1966).

129. Mitchell v. Superior Court, 37 Cal. 3d at 279-83, 690 P.2d at 631-35, 208 Cal. Rptr. at 158-62.

130. *Id.* at 279, 690 P.2d at 631, 208 Cal. Rptr. at 158.

131. *Id.* at 280-82, 690 P.2d at 632-34, 208 Cal. Rptr. at 159-61.

132. *Id.* at 282, 690 P.2d at 634, 208 Cal. Rptr. at 161.

133. *Id.* at 282-83, 690 P.2d at 633-34, 208 Cal. Rptr. at 160-61.

134. *Id.* at 283-84, 690 P.2d at 634-35, 208 Cal. Rptr. at 162.

Following the decisions in *Playboy* and *Mitchell*, reporters' interests in avoiding compelled disclosure appeared well protected. The *Playboy* decision provided that, under the California shield law, reporters have an absolute right to withhold information when threatened with contempt.[135] Following *Playboy*, the *Mitchell* court held that, in the case where the shield law is not applicable, courts will recognize a qualified first amendment privilege, and balance the competing interests of the parties.[136] However, the decisions in *Playboy* and *Mitchell* discuss civil cases, which address entirely different rights than criminal actions. The *Mitchell* court illustrated this difference, stating that the balancing factors were applicable only to civil cases, since "[i]n criminal proceedings, both the interests of the state in law enforcement . . . and the interest of the defendant in discovering exonerating evidence outweigh any interest asserted in ordinary civil litigation."[137] In contrast to the right of a civil litigant to compel disclosure of information protected by the shield law immunity or a qualified privilege, the right of a criminal defendant to compel disclosure of this information is afforded greater deference in light of the constitutional provisions guaranteeing the defendant's right to present a defense.[138]

2. *Criminal Case Law*

In *Hammarley v. Superior Court*,[139] a criminal defendant's right to present evidence was found to outweigh a reporter's right to withhold information.[140] In *Hammarley*, a homicide defendant requested unpublished information from a reporter who interviewed

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135. *See supra* notes 112-20 and accompanying text (discussing the *Playboy* decision, which held that a magazine's materials were protected under the shield law).

136. *See supra* notes 121-34 and accompanying text (discussing the *Mitchell* case and delineating the balancing test).

137. *Mitchell*, 37 Cal. 3d at 278, 690 P.2d at 631, 208 Cal. Rptr. at 158.

138. *See supra* notes 25-63 and accompanying text (illustrating the rights of criminal defendants in light of evidentiary privileges which interfere with their right to present a defense).

139. 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979) (*disapproved by Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990)).

140. *Id.* at 402-03, 153 Cal. Rptr. at 616-17.

the prosecutor's key witness for articles published in a newspaper and magazine.[141] The defendant claimed that the information was necessary to impeach the credibility of the witness, who had implicated the defendant and others in the killing.[142] The *Hammarley* court placed the burden on the parties seeking to avoid the privilege to demonstrate: (1) That the evidence sought is relevant and necessary to the case; (2) that the evidence is not available from a source less intrusive to the privilege; and (3) that the evidence is likely to lead to the defendant's exoneration.[143] Finding that the defendant had met this burden, the court affirmed the trial court's contempt order against the reporter, in order to protect the defendant's constitutional right to a fair trial.[144]

While the court in *Hammarley* found the defendant's interests in the unpublished information outweighed the reporter's asserted protection against disclosure under the shield law, a criminal defendant's right to compel such disclosure is not absolute. For example, in *Hallissy v. Superior Court*,[145] the Court of Appeal for the First District found that a homicide defendant's right to present evidence did not outweigh a reporter's assertion of immunity under the shield law.[146] In *Hallissy*, a reporter interviewed the defendant, charged with three counts of first degree murder, and wrote a newspaper article in which the defendant confessed that he was a paid killer.[147] The defendant, attempting to discredit the accuracy of the published statements, subpoenaed the reporter to testify regarding the interview and produce her notes, in order to prove contradictions in the defendant's statements made during the interview.[148]

The *Hallissy* court, using the analysis set forth in *Hammarley*, stated that the defendant failed to meet his burden in overcoming

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141. *Id.* at 393, 153 Cal. Rptr. at 610.
142. *Id.*
143. *Id.* at 399, 153 Cal. Rptr. at 614.
144. *Id.* at 401-04, 153 Cal. Rptr. at 615-17.
145. 200 Cal. App. 3d 1038, 248 Cal. Rptr. 635 (1988) (*disapproved by Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753).
146. *Id.* at 1046, 248 Cal. Rptr. at 639.
147. *Id.* at 1041, 248 Cal. Rptr. at 635-36.
148. *Id.*

the reporter's shield law immunity.[149] The court concluded that the defendant's admission that other individuals heard his confessions and could testify as to its truth or falsity was significant in determining that the defendant failed to show that less intrusive alternatives could not be utilized.[150] Moreover, the defendant's admission showed that the information was unnecessary to his case, and would not lead to his exoneration.[151] Therefore, following the decisions in *Hammarley* and *Hallissy*, the burden a California court would place on a criminal defendant to overcome the shield law would be to show that there was a lack of available alternatives for the information, that the information was necessary and relevant to the defendant's case, and that the information was likely to lead to the defendant's exoneration.

Prior to *Delaney*, numerous conflicts arose among California appellate courts regarding the scope and application of the shield law. Issues such as the application of the shield law to nonconfidential information, the classification of the shield law as a privilege versus an immunity, and the California Supreme Court's interpretation of the application of the shield law to a criminal defendant remained unanswered. Also undecided was whether the federal first amendment provided newspersons with additional ammunition in avoiding compelled disclosure.

II. THE CASE

In *Delaney v. Superior Court*,[152] the California Supreme Court addressed the issue of whether a defendant's constitutional right to present a defense may overcome a reporter's shield law immunity.[153] The court set forth a four-part balancing test to guide trial courts in resolving a conflict between a reporter's right to withhold information and a defendant's right to a fair trial.[154]

149. *Id.* at 1046, 248 Cal. Rptr. at 639.
150. *Id.*
151. *Id.*
152. 50 Cal. 3d 785; 789 P.2d 934, 268 Cal. Rptr. 753 (1990), *reh'g denied.*
153. *Id.* at 792-93, 789 P.2d at 936-37, 268 Cal. Rptr. at 755-56.
154. *Id.* at 807-13, 789 P.2d at 947-51, 268 Cal. Rptr. at 766-70.

The court also resolved a conflict among the appellate courts as to whether the shield law applies to nonconfidential as well as confidential information.[155] Despite concluding that the reporters' unpublished, nonconfidential information was protected under the shield law, the *Delaney* court held that the defendant's federal constitutional right to a fair trial outweighed the rights asserted by the reporters under the shield law.[156]

A. The Facts

On September 23, 1987, *Los Angeles Times* reporter Roxana Kopetman and photographer Roberto Santiago Bertero were accompanying members of a Long Beach Police Department task force on patrol when they observed defendant Sean Delaney and a companion sitting on a bench in the Long Beach Plaza Mall.[157] The officers asked Delaney about a plastic bag, the type commonly used for storing drugs, which protruded from his shirt pocket.[158] Delaney showed the officers that the bag contained a piece of gold and jewelry which he claimed he was planning to sell at the mall.[159]

Since there were no pawnshops at the mall, the officers became suspicious, and asked Delaney for his identification.[160] According to the officers, as Delaney reached for the jacket next to him to get his wallet, the officers asked to search the jacket for weapons, and Delaney consented.[161] An officer felt a hard object in the pocket of the jacket, reached inside, and retrieved a set of brass knuckles, which Delaney claimed was a key chain.[162] Delaney was charged with a misdemeanor for the possession of brass knuckles in violation of section 12020(a) of the Penal Code.[163]

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155. *Id.* at 796-805, 789 P.2d at 939-45, 268 Cal. Rptr. at 758-64.
156. *Id.* at 807-13, 789 P.2d at 947-51, 268 Cal. Rptr. at 766-70.
157. *Id.* at 793, 789 P.2d at 937, 268 Cal. Rptr. at 756.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id. See* CAL. PENAL CODE § 12020(a) (West Supp. 1991).

An article about the task force appeared in the *Los Angeles Times* four days later.[164] The article included information regarding the police contact with Delaney but did not discuss whether Delaney had consented to the search of his jacket pocket.[165] At a preliminary hearing, Delaney moved to suppress the evidence of the brass knuckles on the grounds that the search of his jacket was nonconsensual, and that the seizure of the brass knuckles was illegal because the officers lacked reasonable suspicion.[166]

Delaney subpoenaed the reporters to testify on his behalf at the suppression hearing.[167] The reporters moved to quash the subpoenas, claiming that they could not be compelled to testify about facts relating to their eyewitness observation, because such facts constituted "unpublished information" and were therefore protected under section 1070 of the California Evidence Code.[168] The trial judge denied the motions, and after testimony by the officers at the suppression hearing, the reporters were called by the prosecution to testify.[169] Having acknowledged that they possessed pertinent information regarding the nature of the search, the reporters nevertheless refused to answer any questions relating specifically to Delaney's consent to the search.[170]

The municipal court held that the shield law did not apply to the eyewitness observations by the reporters of the search and seizure.[171] Furthermore, the court reasoned that, even if the shield law applied, the need for the reporters' neutral testimony on the consent issue outweighed any claim protected under the shield law.[172] As a result, the reporters were cited for contempt.[173] The reporters filed a petition seeking habeas corpus relief, which

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164. *Delaney*, 50 Cal. 3d at 793, 789 P.2d at 937, 268 Cal. Rptr. at 756.
165. *Id.*
166. *Id.* at 793-94, 789 P.2d at 937, 268 Cal. Rptr. at 756.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 794, 789 P.2d at 937-38, 268 Cal. Rptr. at 756-57.
173. *Id.* at 794, 789 P.2d at 938, 268 Cal. Rptr. at 757.

was granted by a superior court judge, who interpreted the shield law as granting a reporter immunity from any testimony.[174] Following an appeal by Delaney and the state, the Court of Appeal for the Second District ordered the superior court to vacate the order granting the petitions for habeas corpus relief, finding that the shield law does not extend to percipient observations of a public event.[175]

B. The Majority Opinion

The California Supreme Court, in a majority opinion written by Justice Eagleson,[176] affirmed the decision of the court of appeal, finding that while the reporter's shield law was applicable, any rights conferred upon the reporters through Evidence Code section 1070 and the California Constitution were outweighed by the defendant's federal constitutional right to a fair trial.[177] In reaching this conclusion, the majority first discussed whether the shield law's definition of "unpublished information" includes newpersons' unpublished, nonconfidential observations of occurrences in public places.[178] Next, the majority addressed Delaney's constitutional right to a fair trial.[179] The majority then set forth a balancing test to be used in determining when a defendant's constitutional right to a fair trial compels disclosure of information protected by the shield law.[180] Finally, the majority applied the balancing test to the facts surrounding Delaney's case

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174. *Id.*

175. *Id.*

176. Justices Mosk and Broussard filed concurring opinions. *Id.* at 817-22, 789 P.2d at 954-58, 268 Cal. Rptr. at 773-77 (Mosk, J., concurring); *id.* at 822-25, 789 P.2d at 958-60, 268 Cal. Rptr. at 777-79 (Broussard, J., concurring).

177. *Id.* at 815-16, 789 P.2d at 952-54, 268 Cal. Rptr. at 771-73. For purposes of convenience, the *Delaney* court referred to article I, section 2(b) of the California constitution while discussing the shield law, rather than the virtually identical language located in Evidence Code section 1070. *Id.* at 796 n.4, 789 P.2d at 939 n.4, 268 Cal. Rptr. at 758 n.4.

178. *Id.* at 796-805, 789 P.2d at 939-45, 268 Cal. Rptr. at 758-64.

179. *Id.* at 805-07, 789 P.2d at 945-47, 268 Cal. Rptr. at 764-66.

180. *Id.* at 807-13, 789 P.2d at 947-51, 268 Cal. Rptr. at 766-70.

and concluded that Delaney's right to a fair trial outweighed those rights afforded the reporters under the shield law.[181]

1. The Shield Law Protects Unpublished, Nonconfidential Information

The defendant argued that the shield law's protections did not extend to nonconfidential unpublished information that was obtained through the reporters' eyewitness observations.[182] To determine whether the shield law affords protection to nonconfidential unpublished information, the majority began by simply looking to the express terms of the statute and amendments to the constitution.[183] Noting that the language provides that a newsperson shall be immune from contempt for "refusing to disclose any unpublished information,"[184] the majority found that excluding "nonconfidential" information from the protection of the shield law would be contrary to the intent of the legislature and voters in enacting the law.[185] The history of the shield law would only reflect the legislative and voting *intent*, which may be deduced by looking at the face of the statute or constitutional amendment

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181. *Id.* at 814-17, 789 P.2d at 952-54, 268 Cal. Rptr. at 771-73.

182. *Id.* at 799-800, 789 P.2d at 941-42, 268 Cal. Rptr. at 760-61.

183. *Id.* at 798-800, 789 P.2d at 940-42, 268 Cal Rptr. at 759-61. *See supra* note 95 (presenting the full text of Evidence Code section 1070, virtually identical to article I, section 2(b) of the California Constitution).

184. *See supra* notes 95 (citing full text of CAL. EVID. CODE § 1070; *see also supra* note 108 (citing full text of CAL. CONST. Art. I § 2(b)).

185. Delaney v. Superior Court, 50 Cal. 3d at 798-803, 789 P.2d at 940-44, 268 Cal. Rptr. at 759-63. The majority also stated that, contrary to the findings of several appellate courts, the shield law provides only an immunity from contempt, not a privilege. *Id.* at 797-98 n.6, 789 P.2d at 939-40 n.6, 268 Cal. Rptr. at 758-59 n.6 (disapproving Hammarley v. Superior Court, 89 Cal. App. 3d 388, 396-98, 153 Cal. Rptr. 608, 612-14 (1979), and CBS, Inc. v. Superior Court, 85 Cal. App. 3d 241, 250, 149 Cal. Rptr. 421, 426 (1978)). Since the shield law is classified as an immunity from contempt, reporters asserting their rights under the shield law will only be protected from a contempt citation, whereas a privilege would protect the reporter from other judicial sanctions as well. *Id.* The distinction between an immunity and privilege became highly relevant in *New York Times v. Superior Court*, 51 Cal. 3d 453, 796 P.2d 811, 273 Cal. Rptr. 98 (1990), in which nonparty reporters were ordered by the trial court to produce photographs taken of an automobile accident in a personal injury action. *New York Times*, 51 Cal. 3d at 456-58, 796 P.2d at 812-13, 273 Cal. Rptr. at 99-100. The California Supreme Court held that, since the shield law provides only an immunity from contempt, the reporters disobeying the subpoena to produce the photographs were subject to monetary sanctions. *Id.* at 462-64, 796 P.2d at 816-18, 273 Cal. Rptr. at 103-05.

when its language is unambiguous.[186] The majority concluded that the appellate court had wrongly decided that the shield law only applies to confidential information.[187]

2. *Delaney's Constitutional Right to a Fair Trial*

While the majority rejected the claim made by both the prosecution and the defense that the shield law did not apply to nonconfidential information, this finding was not dispositive of the case.[188] The majority first explained that the shield law is necessarily overcome by a showing that a defendant's federal constitutional right to a fair trial has been violated.[189] The majority also indicated that the incorporation of the shield law into the California Constitution has no bearing on the defendant's federal constitutional rights.[190] Therefore, the court stated, the supremacy clause dictates that federal constitutional rights will overcome any rights granted by a state.[191] The only remaining question involved the burden of proof necessary to show a violation of an accused's constitutional rights.[192]

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186. *Delaney*, 50 Cal. 3d at 800-02, 789 P.2d at 942-44, 268 Cal. Rptr. at 761-63. Despite its reluctance to search for indications of voters' intent beyond the language of the constitutional amendment, the majority addressed Delaney's claim that the ballot argument in favor of Proposition 5 indicated that only confidential information was worthy of protection. *Id.* at 801-03, 789 P.2d at 943-44, 268 Cal. Rptr. at 762-63. While the ballot argument referred only to confidential information, the majority stated that the greater weight should be placed on the unambiguous language of article I, section 2(b), rather than on a claim based on an extrinsic source. *Id.*

187. *Id.* at 804, 789 P.2d at 945, 268 Cal. Rptr. at 764. The majority also addressed the findings of two appellate courts, which disagreed as to whether confidential information is protected by the shield law. *See* Liggett v. Superior Court, 224 Cal. App. 3d 420, 423-24, 260 Cal. Rptr. 161, 171-72 (1989), *review granted and opinion superseded*, 788 P.2d 34, 263 Cal. Rptr. 119 (1989) (stating that the shield law protects only confidential information); New York Times Co. v. Superior Court, 215 Cal. App. 3d 672, 679, 248 Cal. Rptr. 426, 429-30 (1988), *aff'd*, 51 Cal. 3d 43, 796 P.2d 811, 273 Cal. Rptr. 98 (1990), (stating that the shield law protects nonconfidential as well as confidential information).

188. *Delaney*, 50 Cal. 3d at 805, 789 P.2d at 945-46, 268 Cal. Rptr. at 764-65.

189. *Id.*

190. *Id.* at 805-06, 789 P.2d at 946, 268 Cal. Rptr. at 765.

191. *Id.*

192. *Id.* at 807, 789 P.2d at 947, 268 Cal. Rptr. at 766.

3. *Balancing the Interests*

The majority formulated a balancing test to determine whether a criminal defendant's constitutional right to a fair trial outweighs a reporter's interest in asserting the shield law.[193] The majority began with a threshold requirement which a defendant would have to meet in order to overcome a prima facie showing by a reporter that the information is protected by the shield law.[194] The majority stated that a defendant must first show a "reasonable possibility the information will materially assist his defense."[195] The majority's threshold requirement altered the showing that was required in many past cases, where appellate courts had held that the defendant must show that the evidence is "necessary" to the defense.[196] However, the majority indicated that the threshold requirements of *Hammarley* and *Hallissy* were actually consistent with the "reasonable possibility" standard, and that the only difference is a cognitive one.[197] The additional requirement that the information sought must "materially assist the defense" is a variation of the higher standard employed in lower court decisions, which have required a showing that the evidence sought might lead to the defendant's "exoneration."[198] The majority determined that the higher showing required by the trial courts places too great a burden on the trial court to determine whether the information sought would lead a jury to exonerate a defendant.[199]

If the defendant meets the threshold requirement, the majority's test then employs a multitude of balancing factors to consider the importance of protecting the unpublished information.[200] The first

193. *Id.* at 809-13, 789 P.2d at 949-51, 268 Cal. Rptr. at 768-70.

194. *Id.* at 807-08, 789 P.2d at 947-48, 268 Cal. Rptr. at 766-67.

195. *Id.* at 808, 789 P.2d at 948, 268 Cal. Rptr. at 767.

196. *Id. See* Hallissy v. Superior Court, 200 Cal. App. 3d 1038, 1045-46, 248 Cal. Rptr. 635, 638-39 (1988); Hammarley v. Superior Court, 89 Cal. App. 3d 388, 399, 153 Cal. Rptr. 608, 614 (1979).

197. *Delaney*, 50 Cal. 3d at 808 n.22, 789 P.2d at 948 n.22, 268 Cal. Rptr. at 767 n.22.

198. *See, e.g.*, Playboy Enterprises, Inc. v. Superior Court, 154 Cal. App. 3d 14, 24-25, 201 Cal Rptr. 207, 215-16 (1984); CBS, Inc. v. Superior Court, 85 Cal. App. 3d 241, 251, 149 Cal. Rptr. 421, 427 (1978).

199. *Delaney*, 50 Cal. App. 3d at 808-09, 789 P.2d at 948-49, 268 Cal. Rptr. at 767-68.

200. *Id.* at 809, 789 P.2d at 949, 268 Cal. Rptr. at 768.

factor the majority considered is whether the information being sought by the defendant is "confidential or sensitive."[201] The majority determined that confidential or sensitive information is deserving of greater protection than nonconfidential or nonsensitive information.[202] The majority also noted the impact that revelation of a confidential source would have upon the newsperson's ability to gather news in the future.[203]

The second factor to be considered is the interests sought to be protected by the shield law.[204] Noting that the policy behind the shield law is to protect reporters from breaching the confidence placed in them by their sources, the majority stated that if the criminal defendant requesting the information was the source the reporters were trying to protect, the reporters cannot argue that this confidence has been breached.[205] Therefore, in situations in which the criminal defendant is the source of the information, the reporters' future newsgathering ability will not be prejudiced.[206]

The third factor cited by the majority in considering the protections afforded particular information is the value of the information to the criminal defendant.[207] The majority indicated a showing by the defendant that the information would go to the "heart of his case" would tend to weigh in favor of disclosure.[208]

Another issue the majority considered was whether the criminal defendant must show a lack of available alternative sources for the unpublished information requested from the newspersons.[209] While the majority acknowledged that some appellate court

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201. *Id.* at 810, 789 P.2d at 949, 268 Cal. Rptr. at 768.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 810, 789 P.2d at 950, 268 Cal. Rptr. at 769. The majority disapproved *Hallissy*, which did not take into account the fact that the defendant himself was the source of the information being protected by the reporters in finding that the right of the reporters under the shield law outweighed the criminal defendant's right to the information. *Id.* at 810-12 n.27, 789 P.2d at 949-51 n.27, 268 Cal. Rptr. at 768-70 n.27.

206. *Id.*

207. *Id.* at 811, 789 P.2d at 950, 268 Cal. Rptr. at 769.

208. *Id.*

209. *Id.*

decisions applied a rigid test requiring the defendant to "exhaust all alternative sources,"[210] before compelling newspersons to disclose the information, the majority stated that in light of a defendant's constitutional right to a fair trial, a rigid alternative source requirement was not always necessary.[211] The majority instructed trial courts to examine the nature of the unpublished information to determine whether an alternative source requirement is necessary.[212] After finding that the alternative source rule was designed to protect confidential information, the majority rejected such a strict rule, stating that to impose a strict alternative source rule for nonconfidential information would be to "sustain a rule without a reason."[213] In addition to examining the confidentiality or sensitivity of the information, the majority listed other factors to consider in determining the necessity of an alternative source requirement, including the importance of the information to the defendant and the practicality of obtaining certain information from the alternative source.[214]

In opposition to the motion compelling disclosure of their observations of the Delaney arrest, the reporters claimed that the court must require an *in camera* hearing to determine the necessity of the forced disclosure.[215] In response, the majority rejected the need for an absolute requirement of an *in camera* hearing, finding

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210. The majority disapproved the *Hallissy* and *Hammarley* decisions based on their use of the alternative source rule in a criminal trial in any circumstance. *Id.* at 813 n.29, 789 P.2d at 951 n.29, 268 Cal. Rptr. at 770 n.29. *See* Hallissy v. Superior Court, 200 Cal. App. 3d 1038, 1045-1046, 248 Cal. Rptr. 635, 638-39 (1988) (holding that defendant failed to demonstrate a lack of available alternatives for the requested information that were less intrusive on the reporters' rights); Hammarley v. Superior Court, 89 Cal. App. 3d 388, 399-400, 153 Cal. Rptr 608, 614-15 (1979) (holding that defendant made a substantial showing that alternative sources were unavailable). *See also* Mitchell v. Superior Court, 37 Cal. 3d 268, 282, 690 P.2d 625, 634, 208 Cal. Rptr. 152, 161 (1984) (using a strict alternative source requirement in a defamation action).

211. *Delaney*, 50 Cal. 3d 785, 811, 789 P.2d 934, 950, 268 Cal. Rptr. 753, 769.

212. *Id.* at 811-12, 789 P.2d at 950, 268 Cal. Rptr. at 769.

213. *Id.* at 812, 789 P.2d at 950, 268 Cal. Rptr. at 769.

214. *Id.* at 812-13, 789 P.2d at 950-51, 268 Cal. Rptr. at 769-70. The majority also stated that in determining whether an alternative source rule is applicable, a trial court should look to the type of information being sought, *i.e.*, whether the information is an eyewitness observation by a reporter or the names of potential witnesses, as well as the quality of the alternative source. *Id.* The majority concluded that, in effect, the application of the alternative source requirement will depend on the facts of the particular case. *Id.*

215. *Id.* at 813, 789 P.2d at 951-52, 268 Cal. Rptr. at 770-71.

that judicial resources would be wasted in conducting such a hearing to evaluate undisclosed information that is neither confidential or sensitive.[216]

4. The Application of the Balancing Test

The majority concluded that Delaney was entitled to the reporters' testimony regarding whether Delaney consented to the search of his jacket by the officers.[217] The majority determined that Delaney had met the threshold showing by proving that the question of whether he consented to the search was critical to his case.[218] In balancing the factors to determine whether to require the reporters to testify, the majority first stated that an observation of a search and arrest in a public place cannot be considered confidential or sensitive.[219] Second, the majority concluded that disclosure of the information would not impede the reporters' future newsgathering abilities.[220] In determining that the reporters' future newsgathering abilities would not be prejudiced, the majority looked to the source the reporter was trying to protect, and found that since the only "source" involved was Delaney, the reporters could not reasonably argue that Delaney would feel his confidence had been breached if the reporters revealed the information.[221] Third, the majority reiterated the assertion that the reporters' testimony would probably determine the outcome of the case.[222] Finally, the majority agreed with the trial judge's determination that Delaney made a sufficient showing that alternative sources were not available.[223] Having applied its balancing test, the majority ordered the reporters to testify as to

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216. *Id.* at 814, 789 P.2d at 952, 268 Cal. Rptr. at 771.

217. *Id.*

218. *Id.* The court cited the municipal court's finding that the reporters' testimony regarding whether Delaney consented to the search by the officers is critical, since the case "will rise or fall on the admission or not of those brass knuckles." *Id.*

219. *Id.* at 815, 789 P.2d at 953, 268 Cal. Rptr. at 772.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 815-16, 789 P.2d at 953, 268 Cal. Rptr. at 772.

whether Delaney had consented to the police search, and ordered the superior court to vacate its prior orders and deny the reporters habeas corpus relief.[224]

C. Concurrence by Justice Mosk

In a concurring opinion, Justice Mosk expressed his disagreement with the balancing test set forth by the majority.[225] Justice Mosk stated that the importance of the federal constitutional right to a fair trial outweighs any state interest, and that the focus should be on determining the defendant's interests in the disclosure of the information, rather than the reporter's rights under the shield law.[226]

Justice Mosk suggested that the defendant should be required to make two threshold showings.[227] The defendant must first show the existence of a reasonable possibility that the information will assist the defense, and second that no alternative sources are available.[228] Unlike the majority, Justice Mosk emphasized the importance of the alternative source requirement in preventing misuse of the press.[229] Justice Mosk stated that the question of whether alternative sources are available addresses the central issue of whether the defendant needs the information to receive a fair trial.[230] Justice Mosk concluded that the shield law immunity dictates that the reporters' information should be avoided at all possible costs.[231]

While Justice Mosk found that the alternative source rule should be required as a threshold showing by the defendant, he concluded that the rule is inapplicable when reporters are percipient

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224. *Id.* at 817, 789 P.2d at 954, 268 Cal. Rptr. at 773.

225. *Id.* at 817, 789 P.2d at 954, 268 Cal. Rptr. at 773 (Mosk, J., concurring).

226. *Id.* at 817-18, 789 P.2d at 954-55, 268 Cal. Rptr. at 773-74 (Mosk, J., concurring).

227. *Id.* at 818, 789 P.2d at 955, 268 Cal. Rptr. at 774 (Mosk, J., concurring).

228. *Id.* These requirements were also suggested by the majority as part of their balancing of factors. *Id.* at 807-13, 789 P.2d at 947-51, 268 Cal. Rptr. at 766-70.

229. *Id.* at 821, 789 P.2d at 957, 268 Cal. Rptr. at 776 (Mosk, J., concurring).

230. *Id.* at 820, 789 P.2d at 956, 268 Cal. Rptr. at 775 (Mosk, J., concurring).

231. *Id.* (Mosk, J., concurring).

witnesses to an event.[232] Therefore, since Delaney had shown that the information sought from the reporters was important to his case, Justice Mosk agreed with the majority that the reporters must testify.[233]

D. Concurrence by Justice Broussard

Justice Broussard wrote the second concurring opinion, stating that the majority's exclusive emphasis on the language of the California constitution and Evidence Code section 1070 in determining whether the shield law applied to unpublished nonconfidential information was misplaced.[234] Justice Broussard emphasized the importance of the legislative history and judicial interpretation of the shield law in determining to which areas the provision should apply.[235] Justice Broussard concluded that both the language and history of the shield law demonstrate that the shield law applies to all unpublished information regardless of whether the information is confidential, therefore agreeing with the result reached by the majority.[236] Despite his disagreement with the majority's reasoning in determining the scope of the shield law, Justice Broussard agreed with the majority's analysis in determining that Delaney's rights under the federal constitution outweigh the reporters asserted rights under the shield law.[237]

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232. *Id.* at 821-22, 789 P.2d at 957, 268 Cal. Rptr. at 776 (Mosk, J., concurring).

233. *Id.* at 822, 789 P.2d at 957-58, 268 Cal. Rptr. at 776-77 (Mosk, J., concurring). Since a percipient witness is not an "alternative source" in the sense that the observer of an event is not a fungible, stable source, as is a recording of an interview or a document, Justice Mosk determined that the better description of a percipient witness is a source of *different* information, which is not relevant for alternative source rule purposes. *Id.* (Mosk, J., concurring).

234. *Id.* at 822-23, 789 P.2d at 958, 268 Cal. Rptr. at 777 (Broussard, J., concurring).

235. *Id.* (Broussard, J., concurring).

236. *Id.* (Broussard, J., concurring).

237. *Id.* at 825, 789 P.2d at 959-60, 268 Cal. Rptr. at 778-79 (Broussard, J., concurring).

III. LEGAL RAMIFICATIONS

The decision in *Delaney* settled a dispute among the appellate courts by concluding that the California shield law applies to nonconfidential as well as confidential information. The court, through the adoption of a balancing test, gave trial courts a guide in determining when criminal defendants' fair trial rights under the federal constitution have been implicated. Therefore, the *Delaney* decision impacts both the scope of the shield law and its application in light of the interests of a criminal defendant.

A. The Impact of Delaney *on the Shield Law*

The *Delaney* decision will have an immediate impact on California appellate courts' interpretation of the shield law. In contrast to a number of appellate court decisions, including the appellate court in the *Delaney* case itself, the California Supreme Court clearly stated that the shield law is applicable to nonconfidential as well as confidential sources, and that the shield law is an immunity from contempt, rather than a privilege.[238] The *Delaney* court reached these conclusions by simply examining the unambiguous language of both the constitutional and statutory shield laws, thus avoiding an analysis of the intention of the legislature or the voters who enacted the law.[239]

While the *Delaney* decision provided some long-awaited answers regarding the scope of the shield law, the decision is also noteworthy for the questions it left open. Most notably, the *Delaney* decision, involving a criminal defendant, did not specify the requirements for civil litigants in overcoming the shield law immunity. Furthermore, although the prosecution in the *Delaney* case requested the reporters to appear and testify regarding their percipient observations, the court did not determine whether the

238. *See supra* note 185 (discussing the court's findings regarding the privilege/immunity distinction).

239. *See supra* notes 182-87 and accompanying text (discussing the majority's analysis of the express terms of the shield law).

prosecution, as opposed to the defense, has the right to overcome the shield law.[240] Instead, the court focused on Delaney's rights to compel the reporters' testimony.

Another point the court did not address is whether, following *Delaney*, newspersons may argue that compelled disclosure of unpublished information violates their first amendment rights as well as their rights under the shield law. Despite the California Supreme Court's recognition of a qualified first amendment privilege for reporters in *Mitchell*,[241] the *Delaney* court proceeded exclusively under the California shield law in determining the relative rights of the reporters and the defendant.[242] It is not known, therefore, whether the qualified privilege recognized in *Mitchell*, a civil case involving the protection of confidential sources, extends to the situation presented in *Delaney*, a criminal action involving nonconfidential unpublished information.[243] Recognition by the court of a qualified first amendment right would have eliminated the *Delaney* court's supremacy clause[244] argument, however, and might have diminished the court's analysis that Delaney's rights outweighed the reporters' rights.[245] On the other hand, the court may have been implying that the qualified

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240. *See Delaney*, 50 Cal. 3d at 816 n.34, 789 P.2d at 954 n.34, 268 Cal. Rptr. at 773 n.34 (stating that the question as to whether the state had the right to overcome the shield law was rendered moot by the decision that Delaney was entitled to the information sought from the reporters).

241. *See Mitchell v. Superior Court*, 37 Cal. 3d at 274-84, 690 P.2d 625, 627-35, 208 Cal. Rptr. at 154-62 (1984) (finding a qualified first amendment privilege for a newsperson who faced sanctions in addition to contempt, the immunity from which is contained in the California shield law). The *Mitchell* court stated that "in a civil action a reporter . . . has a qualified privilege to withhold disclosure of the identity of confidential sources and of unpublished information supplied by such sources." *Id.* at 279, 690 P.2d at 632, 208 Cal. Rptr. at 159.

242. *Delaney*, 50 Cal. 3d at 794-817, 789 P.2d at 938-54, 268 Cal. Rptr. at 757-73.

243. The California Supreme Court also refused to state whether a qualified first amendment privilege exists for civil litigants in its decision in *New York Times v. Superior Court*, 51 Cal. 3d 453, 460 n.8, 796 P.2d 811, 815 n.8, 273 Cal. Rptr. 98, 102 n.8 (1990). *See* Comment, *A Barometer of Freedom of the Press: The Opinions of Mr. Justice White*, 8 PEPPERDINE L. REV. 157, 172 (1980) (stating that press privileges should not extend to criminal actions).

244. U.S. CONST., art. VI, cl. 2; CAL. CONST., art. I, § 2(b).

245. *Delaney*, 50 Cal. 3d at 814-17, 789 P.2d at 952-54, 268 Cal. Rptr. at 952-54. *Cf.* Mitchell v. Superior Court, 37 Cal. 3d 272, 274-75, 690 P.2d 625, 628, 208 Cal. Rptr. 152, 155 (1984) (illustrating the importance of reporters' right to withhold information under the federal first amendment).

first amendment privilege for newspersons does not extend to criminal trials. Despite the questions left unanswered following *Delaney*, the court's definitive statement that the shield law applies to nonconfidential information was an important step in expanding the application of the shield law to information which is afforded protection under the express language of the shield law.

B. The Delaney *Balancing Test*

In light of the case law handed down by the Supreme Court of the United States, which dictates that evidentiary rules and procedures that interfere with the defense are necessarily overcome upon a showing of a violation of a criminal defendant's federal constitutional right to a fair trial, it is necessary for courts to balance the rights of a criminal defendant with countervailing state interests.[246] The *Delaney* court weighed the competing state interests and the importance of the information to the criminal defendant through its four-part balancing test. Before the balancing test is initiated, however, a defendant is required to meet a threshold requirement by establishing a "reasonable possibility" that the information requested will assist the defense. One may argue that the "reasonable possibility" standard places an insubstantial burden on defendants, and therefore does not afford reporters adequate protection under the shield law. The "reasonable possibility" standard implies that a criminal defendant must merely show that the information requested is relevant, since the requirement that the requested information has a "reasonable possibility" of aiding the defendant's case is analogous to the general definition of relevant evidence, namely, evidence having any tendency to make a fact of consequence more or less likely.[247] Since terming evidence as relevant is a threshold

246. *See, e.g.*, Pennsylvania v. Ritchie, 480 U.S. 39, 57-60 (1986) (finding the strong public interest in psychotherapist-patient privileges could be overcome only upon a finding by the trial judge that the information would change the outcome of the trial); Davis v. Alaska, 415 U.S. 308, 319-20 (1974) (acknowledging the strong state interest in preserving the confidential nature of juvenile convictions, but finding the defendant's rights outweighed the state's interest).

247. *See* FED. R. EVID. 401; CAL. EVID. CODE § 210 (West 1966) (defining relevant evidence).

requirement for *any* evidence introduced during trial,[248] the "reasonable possibility" standard set forth in *Delaney* places no additional burden on a criminal defendant and affords no additional protection for newspersons to withhold unpublished information.[249]

Once the threshold requirement is met, the trial court must initiate a balancing test to weigh the relative interests of newspersons and criminal defendants. In determining the weight to be given the state interest in a particular case, the majority proceeded to examine the policy reasons and purpose behind the shield law, finding that the shield law was enacted in order to protect a newsperson's future newsgathering ability.[250] The court concluded that only the protection of confidential or sensitive information is needed to preserve the ability of reporters to gather news.[251] Therefore, the majority's balancing test provided little or no protection to nonconfidential or nonsensitive information.[252]

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248. *See* FED. R. EVID. 402; CAL. EVID. CODE § 350 (West 1966) (stating that only relevant evidence is admissible).

249. This fact was recognized by the California Supreme Court in *Mitchell*, a civil case, which stated that "mere relevance is insufficient to compel discovery; disclosure should be denied unless the information goes to the heart of the plaintiff's claim." *Mitchell*, 37 Cal. 3d at 280, 690 P.2d at 632, 208 Cal. Rptr. at 159.

250. Delaney v. Superior Court, 50 Cal. 3d 785, 810, 789 P.2d 934, 949, 268 Cal. Rptr. 753, 768 (1990).

251. *Id.*

252. The majority stated that it was not eliminating all protection for nonconfidential information, by stressing the importance of confidential or sensitive information. *Id.* at 810 n.26, 789 P.2d at 949 n.26, 268 Cal. Rptr. at 768 n.26. However, the practical effect of the majority's emphasis on confidential or sensitive information is to render the protection for nonconfidential and nonsensitive information virtually nonexistent. For instance, under the majority's requirement, a criminal defendant who wishes to compel nonconfidential information from a newsperson will not likely be required to prove the existence of alternative sources for the information. *Id.* at 812-13, 789 P.2d at 950-51, 268 Cal. Rptr. at 769-70. Furthermore, the majority concluded that only confidential or sensitive information should receive the benefit of *in camera* review by the trial judge. *Id.* at 813-14, 789 P.2d at 951-52, 268 Cal. Rptr. at 770-71. Finally, the majority's conclusion that future newsgathering will not be impinged by the disclosure of nonconfidential and nonsensitive information eliminates both factors in the balancing test which recognize newspersons' interests under the shield law. Therefore, the result of the majority's balancing test in regard to production of nonconfidential and nonsensitive information is to require criminal defendants to merely meet the threshold requirement by showing a reasonable possibility that the information will assist their defense. As noted above, this requirement provides scant protection for a newsperson's nonconfidential and nonsensitive information.

1. Is Nonconfidential Information Worthy of Protection?

The majority stated its preference for confidential and sensitive information over nonconfidential and nonsensitive information despite its recognition that the shield law does not make such a distinction.[253] One may question the majority's premise that nonconfidential or nonsensitive information is undeserving of the protection afforded confidential and sensitive information.[254]

As the majority noted, shield laws are designed to protect against the chilling effect that disclosure has on future newsgathering.[255] However, there is no indication that this chilling effect will be less severe with the compelled production of nonconfidential or nonsensitive information.[256] For example, forcing a newsperson to become a witness at a trial may create a perception that can cause sources or reporters to become apprehensive.[257] The burden placed on newspersons to respond to or to contest a subpoena is equally great, whether the information is of a confidential or nonconfidential nature.[258] In

253. *Id.* 50 Cal. 3d at 804, 789 P.2d at 945, 268 Cal. Rptr. at 764. The irony in the fact that the majority afforded greater deference to confidential information after recognizing that the shield law contains no such distinction was pointed out by Justice Mosk in his concurring opinion. *Id.* at 818, 789 P.2d at 955, 268 Cal. Rptr. at 774 (Mosk, J., concurring).

254. The majority defined "sensitive" information as information which, if disclosed, would restrict the potential newsgathering capabilities of reporters. *Id.* at 810, 789 P.2d at 949, 268 Cal. Rptr. at 768. However, since the compelled disclosure of *any* unpublished information may harm the future newsgathering capabilities of reporters, concluding that the information is nonconfidential or nonsensitive should not preclude an analysis of the newspersons' interests under the shield law. *See infra* notes 256-60 and accompanying text (arguing that the majority places too much emphasis upon the confidential nature of the information).

255. *Delaney*, 50 Cal. 3d at 810, 789 P.2d at 949, 268 Cal. Rptr. at 768.

256. *See* United States v. Blanton, 534 F. Supp. 295, 297 (S.D. Fla. 1982) (stating that "although no confidential source or information is involved . . . this is irrelevant to the chilling effect enforcement of the subpoena would have on the flow of information to the press and public"); Loadholtz v. Fields, 389 F. Supp. 1299, 1303 (N.D. Fla. 1975) (stating that "the compelled production of a reporter's [nonconfidential] resource materials is equally as invidious as the compelled disclosure of his confidential informants"). *But see* United States v. LaRouche Campaign, 841 F.2d 1176, 1181 (1st Cir. 1988) (concluding with no explanation that confidential information is deserving of greater protection than nonconfidential information); Commonwealth v. Corsetti, 387 Mass. 1, 7, 438 N.E.2d 805, 809, *stay denied*, 458 U.S. 1306 (1982) (finding no common law or constitutional privilege where source and contents are disclosed in article).

257. *In re* Schuman, 114 N.J. 14, 27, 552 A.2d 602, 611 (1989).

258. *Id.*

addition, it seems reasonable to assume that potentially valuable sources, who learn of a newsperson's forced testimony, will be less likely to provide their stories to newspersons whether the information to which the newsperson testified was confidential or nonconfidential in nature.[259] Consequently, compelled disclosure of any type of information may cause apprehension to newspersons and discourage potential confidential sources, as well as place a heavy burden on the media to disclose information. These factors could certainly hinder the future ability of a newsperson to gather news. Since both the language of the shield law and the practical consequences of compelled disclosure indicate that nonconfidential information is worthy of protection, one can argue that the majority placed too much emphasis on the protection of confidential and sensitive information.

2. The Alternative Source Requirement

The majority also looked to the confidential nature of the information when determining whether a strict alternative source rule should be utilized.[260] The balancing test set forth by the majority requires a defendant, in certain instances, to seek alternative sources before compelling the reporters to disclose the unpublished information. The alternative source rule is a valuable requirement due to the fact that when a defendant can obtain similar material from other sources, the interests of both the newsperson and the criminal defendant are protected.[261] While an alternative source rule is recognized by a majority of jurisdictions that either possess a statutory shield law or recognize a qualified first amendment right to withhold information, the *Delaney* majority qualified its adoption of the alternative source rule by only

259. *Id.*

260. Delaney v. Superior Court, 50 Cal. 3d 785, 812, 789 P.2d 934, 950, 268 Cal. Rptr. 753, 769.

261. *Delaney*, 50 Cal. 3d at 819, 789 P.2d at 955-56, 268 Cal. Rptr. at 774-75 (Mosk, J., concurring) (citing State v. Boiardo, 82 N.J. 446, 414 A.2d 14 (1980)).

applying the rule when confidential information is requested.[262] However, as noted above,[263] the confidentiality or sensitivity of the information should not be dispositive of the rights of newspersons.

The underlying purpose behind the alternative source rule, to prevent reporters from being an initial source of information when alternate sources are available, was seemingly disregarded by the court in *Delaney*. During the search of Delaney's jacket which produced the brass knuckles, four police officers, the defendant, and the defendant's companion were all in a position to observe whether the defendant consented to the officer's search of the jacket.[264] Only the reporters were asked to testify.[265] The majority downplayed the availability of other witnesses by stating that, contrary to the reporters, neither the companion nor the officers were "disinterested" witnesses.[266]

Presumably, the officers would have testified that Delaney consented to the search of his jacket, and Delaney's companion would have asserted that Delaney did not consent to the search. On the other hand, since the trial court failed to inquire into the individual impressions of the officers and the companion, it is possible that the witnesses' testimony would not be in conflict, and the reporters' testimony would be unnecessary. In compelling the reporters' testimony before conducting an adequate investigation into the content of the statements of the officers and Delaney's companion, the court treated the reporters as an *initial* source of the information. One may argue that, despite the nonconfidential nature of the information sought, a newsperson protected by the express

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262. *Id.* at 812, 789 P.2d at 950, 268 Cal. Rptr. at 769. *See also* Marcus, *supra note* 13, at 850 (stating that virtually all courts agree that a strict alternative source test is required); Comment, *California's "New" Newsmen's Law and Criminal Defendants' Right to a Fair Trial*, 26 SANTA CLARA L. REV. 219, 249-50 (1986) (calling for a strict alternative source rule). California cases adopting a rigid alternative source rule include *Hallissy v. Superior Court*, 200 Cal. App. 3d 1038, 1046, 248 Cal. Rptr. 635, 641 (1988); *Mitchell v. Superior Court*, 37 Cal. 3d 282, 283, 690 P.2d 625, 634 208 Cal. Rptr. 152, 161 (1984); and *KSDO v. Superior Court*, 136 Cal. App. 3d 375, 384-86, 186 Cal. Rptr. 211, 216-17 (1982).

263. *See supra* notes 256-60 and accompanying text.

264. *Id.* at 815-16, 789 P.2d at 953, 268 Cal. Rptr. at 772.

265. *Id.*

266. *Id.*

terms of the shield law should not be an initial source of an investigation when several other unexplored alternatives are reasonably available. Therefore, absent a showing that the four officers and the defendant's companion had no personal knowledge as to whether Delaney consented to the search, or that the testimony of the reporters was necessary to resolve a conflict between the witnesses, the court should not compel the reporters to disclose the unpublished information.

Based on the foregoing reasons, it is the author's opinion that the balancing test adopted by the majority does not provide adequate protection to newspersons, in light of the nature of the California shield law. A more appropriate standard would require the defendant to establish at the threshold a reasonable probability that the unpublished information is relevant, material, and necessary to the defense, which is a stricter standard requiring more than a showing of mere relevance.[267] Once this requirement is satisfied, the court should undertake an *in camera* inspection to determine the extent to which compelled disclosure will deter the newsperson's future ability to gather news. While the court may consider the nature of the information sought, nonconfidential information should receive more than the nominal protection it receives under the *Delaney* test. Next, the defendant must establish a lack of alternative sources for the information sought. Finally, the court should examine the importance of the information to the defendant's case. The factors listed in this test attempt to grant appropriate deference to the rights of criminal defendants, in light of the strong countervailing interests of newspersons under the California shield law.

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267. The "reasonable probability" requirement is set forth in the New Jersey shield law privilege, which expressly addresses the relative rights of criminal defendants and reporters. *See* N.J. STAT. ANN. 2A:84A-21.3(b) (West Supp. 1990). *See also* Comment, *Sixth Amendment Limitations on the Newsperson's Privilege: A Breach in the Shield*, 13 RUTGERS L.J. 361, 387 (1981) (criticizing the language of the New Jersey shield law as requiring a defendant to prove more than a sixth amendment right prior to *in camera* inspection).

IV. CONCLUSION

In *Delaney v. Superior Court*, the California Supreme Court expanded the scope of the shield law to protect nonconfidential as well as confidential information, and set forth a four-part balancing test which expressly recognized the competing interests of newspersons when determining whether the defendant's constitutional right to a fair trial has been impinged.

While the balancing test set forth in *Delaney* seeks to accommodate the state's interests under the shield law as well as a criminal defendant's interests in a fair trial, the factors adopted by the majority are open to scrutiny. For instance, one may argue that the court placed too great an emphasis upon the nature of the information sought by the criminal defendant. Despite the majority's recognition that the shield law extends to confidential and nonconfidential information, the *Delaney* decision virtually eliminated any protection accorded to nonconfidential information in relation to the rights of a criminal defendant.

The majority's alternative source requirement also stresses the importance of confidential and sensitive information, and may lead to unnecessary intrusions into a newsperson's resources when alternative sources are readily available, as in the *Delaney* case itself. Furthermore, the threshold requirement adopted by the majority, requiring defendants to show a reasonable possibility the information sought will assist their defense, may not afford newspersons adequate protection from the initiation of the balancing test.

While one may find flaws in the balancing test set forth by the majority, the test's flexible requirements provide trial courts with enough latitude to use their own discretion in determining whether to compel production of a newsperson's unpublished information. Therefore, only when trial courts are faced with resolving conflicts between criminal defendants and newspersons will the true impact of the *Delaney* balancing test be realized.

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