James R. Wheaton, State Bar No. 115230
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**FIRST AMENDMENT PROJECT**
1736 Franklin Street, 9th Floor
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Attorneys for Movant
DAVID MORSE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

| IN RE SEARCH WARRANT ISSUED DECEMBER 12, 2009 | Warrant No.: 2009-2775<br><br>**DECLARATION OF GEOFFREY KING IN SUPPORT OF REPLY MEMORANDUM TO QUASH SEARCH WARRANT AND RETURN PROPERTY**<br><br>DATE: June 18, 2010<br>TIME: 2:00 PM<br>DEPT: 115<br>Hon. Yolanda Northridge |
|---|---|

1
2 **DECLARATION OF GEOFFREY KING**

3 I, GEOFFREY KING, declare under penalty of perjury that, unless otherwise indicated, the
4 following is true and correct of my own personal knowledge, and would testify hereto if called at
5 trial:

6 1. Attached hereto as Exhibit A is a true and correct copy of a letter I sent to counsel for the
7 University of California ("UC") on June 7, 2010 expressing David Morse's belief that copies of the
8 majority of his photographs seized on December 11, 2009 had not been returned to him at the
9 hearing before this Court on June 4, 2010.

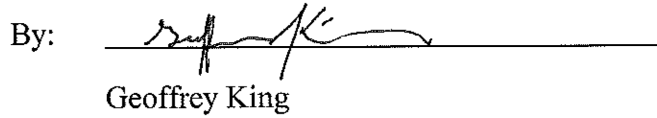
10 2. Subsequent to sending this letter, I received a second disc from UC that contained most of
11 Mr. Morse's photographs seized by UC on December 11. I discussed the contents of the CD-ROM
12 with Mr. Morse and determined that at least one photograph he described as the last or one of the
13 last in the series—a picture he says he made of an approaching UC police car—is not present on the
14 disc.

15 3. Attached hereto as Exhibit B is a true and correct copy of a letter I sent to counsel for UC
16 on June 8 expressing Mr. Morse's belief that UC still had not returned a copy of all of the
17 photographs seized from him on December 11, 2009.

18 4. Attached hereto as Exhibit C is a copy of the First Amended Complaint in Long Haul v. The
19 Regents of the University of California, Case No. 09-00168-JSW, filed May 28, 2009. I retrieved
20 this document from the website of counsel for Plaintiff at the URL
21 http://www.eff.org/files/filenode/longhaul_v_UC/LH-amended_complaint-52809.pdf on June 15,
22 2010.

23 5. Attached hereto as Exhibit D is a true and correct copy of excerpts from Ian W. Craig,
24 "Delaney v. Superior Court: Balancing the Interests of Criminal Defendants and Newspersons under
25 California's Shield Law," 22 *Pac. L. J.* 1371, 1387 & n.102 (July 1991). Attached hereto as Exhibit
26 E is a true and correct copy of excerpts from Note, "The Newsgatherer's Shield—Why Waste Space
27 in the California Constitution?" 15 *SW. U.L. REV.* 527, 539, 545-548, 572-573 (1985).
28

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and executed this 15th day of June, 2010 in Oakland, California.

By: 

Geoffrey King

# EXHIBIT A

## Geoffrey King

**From:** Geoffrey King [gking@thefirstamendment.org]
**Sent:** Monday, June 07, 2010 2:20 PM
**To:** 'eric.behrens@ucop.edu'
**Cc:** 'David Greene'
**Subject:** Letter seeking additional photographs seized from David Morse by UC on December 11, 2009
**Attachments:** 2010-06-07 letter to UC re missing photos.pdf

Dear Mr. Behrens:

Attached please find a letter regarding additional photographs seized from David Morse by UC on December 11, 2009.

Thank you.

Sincerely,
*Geoff King*

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**GEOFFREY KING**
**STAFF ATTORNEY**
**FIRST AMENDMENT PROJECT**
Phone: 510.208.7744
Fax: 510.208.4562
gking@thefirstamendment.org

# FIRST AMENDMENT PROJECT

1736 Franklin St., 9th Floor, Oakland, CA 94612 ▫ phone: 510.208.7744 ▫ fax: 510.208.4562 ▫ www.thefirstamendment.org

David Greene, Executive Director/Staff Counsel | Geoffrey King, Staff Attorney | James Wheaton, Senior Counsel

June 7, 2010

Eric K. Behrens
University of California
Office of the General Counsel
1111 Franklin Street, 8th Floor
Oakland, CA 94607
eric.behrens@ucop.edu

**By Email**

Dear Mr. Behrens:

Thank you for presenting counsel for David Morse with a CD-ROM disc containing Mr. Morse's unpublished news photographs at the hearing in Alameda County Superior Court on Friday, June 4, 2010. Mr. Morse has now reviewed the disc. Unfortunately, it seems that the disc does not contain all of the photographs seized by the University of California ("UC") on December 11, 2009.

The supporting affidavit for the warrant authorizing the search of Mr. Morse's memory discs lists two Memorex CD-R discs, each with a capacity of 210 megabytes. Can you please conduct an additional review of the photographs seized from Mr. Morse and ensure that he has a copy of all photographs seized from him by UC? It would be appreciated if this could be completed by the time UC files its opposition papers at close of business tomorrow, June 8, 2010.

Thank you for your prompt attention to this matter.

Sincerely,

Geoffrey King
Counsel for David Morse

# EXHIBIT B

## Geoffrey King

**From:** Geoffrey King [gking@thefirstamendment.org]
**Sent:** Tuesday, June 08, 2010 12:48 PM
**To:** 'eric.behrens@ucop.edu'; 'michael.goldstein@ucop.edu'
**Cc:** 'David Greene'
**Subject:** Second letter seeking photographs seized from David Morse by UC on December 11, 2009
**Attachments:** 2010-06-08 letter to UC re missing photos.pdf

Dear Mr. Behrens:

Attached please find a letter regarding additional photograph(s) seized from David Morse by UC on December 11, 2009. It appears that at least one photograph is still missing from the second disc furnished to counsel for Mr. Morse.

Thank you.

Sincerely,
*Geoff King*

---

**GEOFFREY KING**
**STAFF ATTORNEY**
**FIRST AMENDMENT PROJECT**
Phone: 510.208.7744
Fax: 510.208.4562
gking@thefirstamendment.org

# FIRST AMENDMENT PROJECT

1736 Franklin St., 9th Floor, Oakland, CA 94612 ▫ phone: 510.208.7744 ▫ fax: 510.208.4562 ▫ www.thefirstamendment.org

David Greene
Executive Director/Staff Counsel

Geoffrey King
Staff Attorney

James Wheaton
Senior Counsel

June 8, 2010

Eric K. Behrens
University of California
Office of the General Counsel
1111 Franklin Street, 8th Floor
Oakland, CA 94607
eric.behrens@ucop.edu

**By Email**

Dear Mr. Behrens:

Today I retrieved a second CD-ROM disc containing David Morse's unpublished news photographs from the University of California ("UC") Office of General Counsel. Mr. Morse and his counsel appreciate your prompt efforts to remedy the fact that the disc given to counsel at the June 4, 2010 hearing did not include all of Mr. Morse's unpublished photographs seized by UC on December 11, 2009.

However, Mr. Morse believes that at least one of his photographs is still missing from the discs given to his counsel. That photograph depicts the first police car to approach the scene. Mr. Morse strongly recalls both making the picture and Officer Wyckoff's statement that he had seen Mr. Morse make the picture. Mr. Morse believes that this photograph should be the last in the series of .JPG files presented to him.

The final photograph in the series, file number DSC05346.JPG, presently does not depict a police car. Thus, Mr. Morse would appreciate it if UC would once again review the photographs seized from him, preferably by reviewing the original disc(s) taken from him, in order to ensure that Mr. Morse has a copy of all photographs seized from him by UC.

Thank you for your prompt attention to this matter.

Sincerely,

Geoffrey King
Counsel for David Morse

# EXHIBIT C

Jennifer Stisa Granick (State Bar No. 168423)
Matt Zimmerman (State Bar No. 212423)
Marcia Hofmann (State Bar No. 250087)
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, California 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993
Email: jennifer@eff.org
mattz@eff.org

Ann Brick (State Bar No. 65296)
Michael T. Risher (State Bar No. 191627)
AMERICAN CIVIL LIBERTIES FOUNDATION
OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, California 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-8437
Email: abrick@aclunc.org
mrisher@aclunc.org

Attorneys for Plaintiffs LONG HAUL, INC. and EAST BAY PRISONER SUPPORT

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| LONG HAUL, INC. and EAST BAY PRISONER SUPPORT,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES OF AMERICA; VICTORIA HARRISON; KAREN ALBERTS; WILLIAM KASISKE; WADE MACADAM; TIMOTHY J. ZUNIGA; BRUCE BAUER; MIKE HART; LISA SHAFFER; AND DOES 1-25,<br><br>Defendants. | Case No.: 09-00168-JSW<br><br>**FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND FOR DAMAGES**<br><br>**DEMAND FOR JURY TRIAL** |

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## PRELIMINARY STATEMENT

1. Long Haul, Inc. ("Long Haul"), also known as the Long Haul Infoshop, is an all-volunteer collective that provides a lending library, a bookstore, Internet-connected computers, and a community space to members of the public from its two-story storefront, located at 3124 Shattuck Avenue in Berkeley, California. Long Haul also publishes Slingshot, a quarterly newspaper, out of an office on its second floor.

2. The East Bay Prisoner Support group ("EBPS") occupies an office on the first floor of Long Haul but is otherwise unaffiliated with Long Haul. EBPS publishes a newsletter of prisoners' writings to the general public, and distributes literature to prisoners. EBPS provides support for prisoners, including LBGT, and female prisoners, on a national and international level, including prisoners in California and Texas.

3. On August 27, 2008, six or more law enforcement officers from the University of California at Berkeley Police Department and the Federal Bureau of Investigation ("raid team"), all of whom are Defendants herein, raided Long Haul. Despite the dictates of the Fourth Amendment that "no warrant shall issue without . . . particularly describing the place to be searched, and the persons or things to be seized," raid team members sought, obtained and acted upon a facially invalid warrant that purported to authorize officers to enter the building where Plaintiffs are located and conduct a general seizure and search of "all electronic data" for "evidence."

4. The illegality of this general warrant was especially obvious and egregious for two reasons. First, the officers had no reason to suspect Plaintiffs of any wrongdoing and presented no evidence to the issuing magistrate alleging Plaintiffs were involved in any illegal acts. The Statement of Probable Cause presented to the magistrate only alleged improper transmission, by an unknown member of the public, of emails through a public-access computer located at Long Haul to U.C. Berkeley scientists performing research on animals. Nevertheless, Defendants sought and obtained a warrant to search and seize and did search and seize materials that were not accessible to the public and that were unrelated to any justification presented in support of the application for the warrant. Second, the officers left important information out of the Statement of Probable Cause.

1 They did not inform the magistrate that both Long Haul and EBPS are distributors of information
2 to the public and that, accordingly, federal and state law protects their computers from seizure
3 except under special conditions not present here. Nor did the officers inform the magistrate that
4 EBPS was unaffiliated with Long Haul but maintained office space in the building.

5 5. At a time when Long Haul was closed, the raid team forced entry through the back
6 door of Long Haul. The raid team looked through the list of people who had borrowed books from
7 the library, looked at book sale records, seized all of the public access computers from a space on
8 the second floor of Long Haul, broke the locks on the Slingshot office, took the computers and
9 digital storage media used for the publication of that newspaper, unscrewed the lock on the door to
10 the EBPS office, and took the computer used by that organization for the publication of prisoner-
11 rights information.

12 6. Plaintiffs are informed and believe that Defendants and/or their agents have copied
13 the data on the computers and storage media that they seized, have searched those materials, and
14 continue to search some of them.

15 7. Long Haul and EBPS seek the following relief: (1) to regain control over their
16 information; (2) to preserve the confidentiality of their private information, the private information
17 of their members and patrons, and the information collected or created for public dissemination; (3)
18 to prevent any retaliation, monitoring, or surveillance enabled by the seizure of this information;
19 and (4) to obtain compensation for the invasion of these interests that has already occurred.

20 **JURISDICTION**

21 8. This case arises under the United States Constitution, under Title 42 of the United
22 States Code § 1983 (civil rights action) and § 2000aa *et seq.* (Privacy Protection Act), under Title
23 28 of the United States Code §§ 2201 and 2202 (declaratory relief), and under *Bivens v. Six*
24 *Unknown Named Agents*, 403 U.S. 388 (1971).

25 9. This Court has jurisdiction under 28 U.S.C. §§ 1331 (federal question), 1343 (civil
26 rights), and 2201 (declaratory relief), and 42 U.S.C. § 2000aa-6(h) (Privacy Protection Act).

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## INTRADISTRICT ASSIGNMENT AND VENUE

10. The unlawful acts alleged herein occurred in the County of Alameda, California, which is within this judicial district. Venue is proper in this district under 28 U.S.C. §§ 1391(b) and (e) and assignment to either the San Francisco or Oakland Division is proper pursuant to Local Rule 3-2(d).

## PARTIES

11. Plaintiff Long Haul, Inc., DBA Long Haul ("Long Haul") is a non-profit corporation under § 501(c)(3) of the Internal Revenue Code. Long Haul has operated a library, bookshop and community space in Alameda County, California for 15 years. It is located at 3124 Shattuck Avenue in the City of Berkeley.

12. Plaintiff East Bay Prisoner Support ("EBPS") is an unincorporated prisoner-rights group that provides information to the public about Bay Area prison conditions, prison abolition, and prisoner support work, as well as information on national and international prisoner support activities. EBPS occupies an office on the first floor of Long Haul.

13. Defendant United States of America is the United States, its departments, agencies, and entities.

14. Defendant Victoria Harrison is Associate Vice Chancellor/Chief of Police of the University of California at Berkeley Police Department ("UCPD"). UCPD's primary duty is the enforcement of law within the campus of the University of California at Berkeley and an area within one mile of the exterior boundaries of that campus. Defendant Harrison is responsible for the operations of the UCPD and for training, supervising and controlling UCPD officers. Plaintiffs are informed and believe that Defendant Harrison failed to adequately train, supervise and control Defendants Alberts, Kasiske, MacAdam, Bauer and Zuniga, causing said Defendants to violate Plaintiffs' constitutional and statutory rights as alleged herein. At all relevant times, Defendant Harrison acted under color of law and in the course and scope of her employment with the UCPD. She is sued in her official capacity.

1 15. Defendant Sergeant Karen Alberts is a Sergeant of Investigations at UCPD. She
2 participated in the execution of the warrant as more fully described herein. Plaintiffs are informed
3 and believe that Defendant Alberts is responsible for supervising and controlling the other UCPD
4 officers involved in this search and seizure. At all relevant times, Defendant Alberts acted under
5 the color of law and in the course and scope of her employment with the UCPD. She is sued in her
6 individual and official capacities.
7 16. Defendant Detective William Kasiske is a UCPD police officer. Detective Kasiske
8 applied for and obtained the August 26, 2008 search warrant at issue in this case. Defendant
9 Kasiske also participated in the execution of the warrant as more fully described herein. At all
10 relevant times, Defendant Kasiske acted under the color of law and in the course and scope of his
11 employment with UCPD. He is sued in his individual and official capacities.
12 17. Defendant Detective Wade MacAdam is a UCPD police officer. He participated in
13 the execution of the warrant as more fully described herein. At all relevant times, Defendant
14 MacAdam acted under the color of law and in the course and scope of his employment with the
15 UCPD. He is sued in his individual and official capacities.
16 18. Defendant Corporal Timothy J. Zuniga is a UCPD police officer. He participated in
17 the execution of the warrant as more fully described herein. At all relevant times, Defendant
18 Zuniga acted under the color of law and in the course and scope of his employment with the
19 UCPD. He is sued in his individual and official capacities.
20 19. Defendant Officer Bruce Bauer is a UCPD police officer. He participated in the
21 execution of the warrant as more fully described herein. At all relevant times, Defendant Bauer
22 acted under the color of law and in the course and scope of his employment with UCPD. He is sued
23 in his individual and official capacities.
24 20. Defendant Special Agent Lisa Shaffer is a special agent of the Federal Bureau of
25 Investigation ("FBI"). Plaintiffs are informed and believe that Shaffer regularly investigates threats
26 to university-employed scientists who use animals in their research, including seeking search and
27 arrest warrants. For example, on February 19, 2009, Shaffer obtained a criminal complaint in this
28 District against four defendants for using force, violence or threats to interfere with the operations

1 of the University of California in violation of 18 U.S.C. § 43. Plaintiffs are informed and believe
2 that Shaffer participated in obtaining and executing the search warrant in this case. At all relevant
3 times, Defendant Shaffer acted under the color of law and in the course and scope of her
4 employment with the FBI. She is sued in her individual and official capacities.

5 21. Defendant Mike Hart participated in the events described herein, including the
6 investigation leading up to the raid and the raid itself, as a deputized law enforcement officer under
7 the authority and control of the FBI. Defendant Hart is a retired member of the Alameda County
8 Sheriff's Department, where he held the rank of Lieutenant. He participated in the execution of the
9 warrant as more fully described herein. At all relevant times, Defendant Hart acted under the color
10 of law and in the course and scope of his employment with the FBI. He is sued in his individual
11 and official capacities.

12 22. Plaintiffs are ignorant of the true names and capacities of Defendant DOES 1-25
13 inclusive and therefore sue these Defendants by such fictitious names. Plaintiffs are informed and
14 believe and thereon allege that each Defendant so named is responsible in some manner for the
15 injuries and damages sustained by Plaintiffs as set forth herein. Plaintiffs will amend their
16 complaint to state the names and capacities of DOES 1-25 when they have been ascertained.

17 23. Plaintiffs are informed and believe that each of the Defendants caused, and is liable
18 for, the unconstitutional and unlawful conduct and resulting injuries alleged in this complaint, by,
19 among other things, personally participating in said conduct and/or acting jointly with others who
20 did so and/or by authorizing, acquiescing or setting in motion policies, plans or actions that led to
21 the unlawful conduct taken by employees under his or her direction and control. Plaintiffs are
22 informed and believe that Defendants' actions were pursuant to a policy, custom, or usage of the
23 UCPD, the FBI or other related agencies. Each of these Defendants was acting in concert with
24 every other Defendant or was the agent and employee of every other Defendant, acting within the
25 course and scope of their agency or employment with every other Defendant.

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## FACTUAL ALLEGATIONS RELATED TO ALL COUNTS

24. Long Haul was founded as an unincorporated association in 1979 by Alan Haber, one of the founding members of the 1960's new-left group Students for a Democratic Society. It leased the premises at 3124 Shattuck Ave in Berkeley. Long Haul was named after the long hallway that runs through its space; the name is also a reference to Long Haul's vision of the process towards achieving individual political freedom. Long Haul was incorporated as a public benefit corporation in 1993 and obtained a determination from the IRS that it was tax exempt in 1994.

25. Long Haul educates the public about matters relevant to peace, justice and history through its lending library and community center. Long Haul also sells "zines" and used books about subjects relevant to peace, justice and history and provides the public with free computer use, Internet access, and resources for creating magazines.

26. Long Haul serves as a meeting space and resource hub for local activist groups and members of the community. The space hosts Pilates classes, acupuncture consultations, knitting circles, radical movie nights, anarchist study groups, and other events.

27. Long Haul publishes Slingshot, a quarterly newspaper. Slingshot is an all-volunteer project of Long Haul. Slingshot has been in continuous publication since 1988. Slingshot has historically reported on the policies of UC Berkeley and continues to do so. These reports are often highly critical of the University, UCPD officers, and their practices.

28. In 1993, Slingshot, which had previously been located on the University of California Berkeley campus, took up residence at, and became part of, Long Haul. The newspaper is distributed by mail subscription and is available at 200 independent bookstores and small businesses around the United States. It is also available at Long Haul and other locations around Berkeley, California. There are many past and current copies of Slingshot available in a newsrack at the front entrance of Long Haul.

29. Slingshot's office is on the second floor of Long Haul and marked with a sign that clearly reads "Slingshot." The primary items within the small office are bookcases and file cabinets

1 with back issues of Slingshot as well as items used in the publication of Slingshot. Before August
2 27, 2008, there were two computers in the Slingshot office. Those computers were not accessible to
3 the general public. The Slingshot office is locked when none of the Slingshot workers are present.
4 On and before August 27, 2008, those computers were off-limits to members of the public and to
5 anyone who did not work on the Slingshot newspaper.

6 30. Long Haul offers an Internet room with computers providing online access to the
7 public, especially to those otherwise unable to afford it. The Internet room is located on the second
8 floor of Long Haul, up a staircase separate from the staircase leading to the Slingshot office. Before
9 August 27, 2008, the Internet room was unlocked and contained approximately four operative
10 Internet-connected computers, two hard drives, and eight non-operative computers that were not
11 connected to monitors.

12 31. Long Haul does not create, collect or keep records that identify individuals who visit
13 Long Haul, including individuals who use the public access computers. This fact would be
14 apparent to anyone who visited Long Haul, since they would not be asked to sign in. Any member
15 of the public can use the space when it is open, much like a public library.

16 32. East Bay Prisoner Support's office is on the first floor of Long Haul and is marked
17 with a sign indicating that that space is the EBPS office. On and before August 27, 2008, the EBPS
18 office was kept locked and was not accessible to members of Long Haul or to the public.

19 33. EBPS is a volunteer-run prisoner rights project. It is not affiliated with Long Haul.
20 EBPS collects information about prisoner issues to disseminate to the public, both on its own
21 behalf and acting in conjunction with other organizations. EBPS publishes a newsletter of prisoner
22 writings. It also helps publish Prison Action News and other small pamphlets. Its primary purpose
23 as a publisher of information is clearly set forth on its publicly available website at
24 http://www.myspace.com/ebps, which reads:

25 > We serve as a resource center that provides information about bay area prison
> abolition and prison support work, as well as some information on national and
26 > international prisoner support activities.

27 34. This website, including the description of EBPS's activities, was available to the
28 public prior to and including August 26, 2008, when the warrant in question here was issued, and

1 on August 27, 2008, when the raid team executed the warrant. It remains available as of the date of
2 the filing of this Complaint.

3 **THE AUGUST 27TH RAID**

4 35. On August 26, 2008, Defendant Detective William Kasiske applied for and obtained
5 a search warrant from the Alameda County Superior Court. The warrant purported to authorize the
6 search of "premises, structures, rooms, receptacles, outbuildings, associated storage areas, and
7 safes situated at the Long Haul Infoshop, 3124 Shattuck Avenue, Berkeley, CA." The warrant
8 authorized search for and seizure of documents containing the names or other identifying
9 information of "patrons who used the computers at Long Haul" and of electronic processing and
10 storage devices. The warrant also purported to authorize officers to transfer the booked evidence to
11 a secondary location for searching and to search the computers beyond the ten-day issuance period.
12 The warrant stated that the search authorized was "for evidence."

13 36. The warrant was improper at least because it (1) authorized searches and seizures of
14 areas and effects for which the affidavit failed to provide probable cause, and (2) did not
15 specifically describe the place to be searched or the things to be seized.

16 37. Specifically, the Statement of Probable Cause established no reason to suspect
17 Plaintiffs of any wrongdoing and presented no evidence to the issuing magistrate alleging Plaintiffs
18 were involved in any illegal acts. Rather, the Statement of Probable Cause only alleged improper
19 use by an unknown member of the public of a public-access computer located at Long Haul.
20 Despite this, Defendant Kasiske requested and obtained a warrant applying to all the rooms at Long
21 Haul, even those inaccessible to the general public, and all electronic processing and storage
22 devices, even those not used by or accessible to the general public. Neither the Statement of
23 Probable Cause nor the warrant made any reference to EBPS, nor did the warrant authorize a
24 search of EBPS offices or other areas that were not under the control of Long Haul.

25 38. Defendant Kasiske's acts and omissions caused the warrant to improperly issue.
26 Defendant Kasiske omitted material information from the Statement of Probable Cause. He failed
27 to inform the magistrate that Long Haul contains four locked offices, including the Slingshot and
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EBPS offices, which are not accessible to the public. He failed to inform the magistrate that EBPS occupies office space at Long Haul and is not affiliated with Long Haul. He failed to inform the magistrate that Long Haul publishes a newspaper or that EBPS disseminates information to the public, and thus that the Slingshot and EBPS computers are not subject to seizure except under special conditions not present here. As a result, the warrant that issued authorized a general search of places for which there was no probable cause, and seizure of items that could not legally be seized.

39. On Wednesday morning, August 27, 2008, at least four officers from the UCPD (Defendants Kasiske, MacAdam, Alberts, and Bauer) and at least two officers acting on behalf of the Federal Bureau of Investigation (Defendants Shaffer and Hart) (collectively "raid team") arrived at Long Haul. No one was inside. The raid team contacted the landlord, who refused to allow them entry. They then entered through the front door of the Homeless Action Center next door, went through that office to the back of Long Haul, and forced their entry into Long Haul through its secured back door.

40. An attorney with an office nearby and Long Haul members arrived at the scene while officers were conducting the raid. Despite the request of Long Haul members, the raid team refused to show them any warrant.

41. The raid team spent over two hours searching the premises without allowing Long Haul members entry to the building. Long Haul members were able to view the actions of the raid team through the plate glass window at the front of Long Haul. Plaintiffs are informed and believe, and on that basis allege, that, while inside, the raid team went through every room, both public and locked – cutting, crowbarring, or unscrewing the locks. The raid team cut locks off of cabinets behind the front desk and looked through the log of individuals that borrowed books from the library and through the log of book sales, both of which were stored there.

42. The raid team removed every computer from the building. They removed all the computers from Long Haul's un-monitored public space where people come to use the machines. They also removed all the computers from closed, locked offices. The computers taken from the

1 locked offices were used for the day-to-day operation of Plaintiffs, including for the publication of
2 information and for other education efforts.

3 43. Specifically, during the raid, the raid team broke open the locked door of the
4 Slingshot office and seized Slingshot computers.

5 44. The Slingshot computers contained materials upon which information is recorded
6 (documentary materials), including materials that were prepared or produced in anticipation of
7 communicating the materials to the public, that were possessed for the purpose of communicating
8 these materials to the public, and which contained mental impressions, conclusions, opinions, or
9 theories of the person(s) who prepared or produced them (work product materials). The
10 documentary and work product materials were possessed in connection with a purpose to
11 disseminate to the public a newspaper or other similar form of public communication.

12 45. Defendants knew or should reasonably have known at the time of the raid that
13 materials on the Slingshot computers were possessed in connection with a purpose to disseminate
14 to the public a newspaper, book, broadcast, or other similar form of public communication.

15 46. Plaintiffs are informed and believe that the raid team searched the Slingshot filing
16 cabinets, including files, folders, and documents stored therein. The raid team left photographs that
17 had been archived in the filing cabinet piled on the desk in the Slingshot office, with a humorous
18 *circa* 1994 photo of some nude individuals in face masks on the top of the pile, presumably to send
19 the message to Long Haul members that the contents of the filing cabinet had been searched.

20 47. During the raid, the raid team damaged the door jamb to the EBPS office and also
21 unscrewed the lock fastened on the door of the EBPS office. The raid team entered the EBPS office
22 and seized the EBPS computer.

23 48. The EBPS computer contained documentary and work product materials possessed
24 in connection with a purpose to disseminate to the public a newspaper or other similar form of
25 public communication, including information intended for prisoners, and information from
26 prisoners intended for the general public.

27 49. Defendants knew or should reasonably have known that materials on the EBPS
28 computers were possessed in connection with a purpose to disseminate to the public a newspaper,

1 book, broadcast, or other similar form of public communication, including, specifically,
2 newsletters, 'zines and pamphlets.

3 50. The raid team also seized miscellaneous CDs, computer disks and a USB drive.

4 51. The raid team left the EBPS office in disarray. EBPS had physically organized its
5 voluminous mail in separate, categorized piles. The raid team left all the mail in one jumbled pile.

6 52. After the search was completed, the raid team left a copy of the warrant and an
7 inventory of items seized.

8 53. Plaintiffs are informed and believe that Doe Defendant agents of UCPD and/or the
9 Federal Bureau of Investigation ("search agents"), who may or may not include members of the
10 raid team, have copied or caused to be copied the data from the computers and storage media
11 seized from Long Haul, the Slingshot office, and the EBPS office. The devices were returned to
12 Plaintiffs following the raid, but Defendants have illegally retained copies of the data.

13 54. On October 22, 2008, counsel for Plaintiffs informed the UCPD and FBI by letter
14 that the Slingshot computers are protected by the Privacy Protection Act, 42 U.S.C. §§ 2000aa *et*
15 *seq*. On October 27, 2008, counsel for Plaintiffs informed the UCPD and FBI by letter that the
16 EBPS computers are also protected by that same act. Both letters asked the UCPD and FBI to cease
17 any search of the computer data and destroy any copies. UCPD refused. The FBI did not respond.

18 55. Plaintiffs are informed and believe that between August 27, 2008 and May 19, 2009,
19 some or all of the Defendants unnecessarily seized, searched and retained private information
20 and/or searched data copied from the devices. After May 19, 2009, pursuant to stipulation between
21 the parties, this Court ordered Defendants to refrain from searching any of the data that Defendants
22 seized or copied from Slingshot and EBPS without advance notice to Plaintiffs. (*See* Docket 38).
23 No such restrictions have been imposed on Defendants with regard to the data copied from the
24 computers Defendants seized from the public access area, and Plaintiffs are informed and believe
25 that Defendants have searched and continue to search that data.

26 56. As the warrant did not specifically describe what Defendant search agents are
27 authorized to search for, any searching and any data retention were and continue to be
28 unconstrained and illegal.

1 57. Plaintiffs' ability and the ability of Plaintiffs' members to communicate with other
2 organizations and individuals have been disrupted by the actions of Defendants. Plaintiff Long
3 Haul's ability to publish Slingshot was disrupted by the seizure of Slingshot computers and storage
4 media. Plaintiff EBPS's ability to provide information to the public about prisoner rights and
5 prisoner support efforts was disrupted by the seizure of EBPS's computer and storage media.
6 Plaintiff Long Haul's ability to lend books, sell books, host meetings and have meetings of Long
7 Haul members and other associates was disrupted by the search of the library lending log, the sales
8 log, the seizure of the property and the ongoing reasonable belief that Long Haul space is subject to
9 or will be subject to further police surveillance.
10 58. Plaintiffs are suffering and will continue to suffer irreparable injury through the
11 illegal retention, search, and use of their private information, and no legal remedy adequately
12 redresses all the injuries to Plaintiffs as a result of Defendants acts set forth above.
13
14 **COUNT I**
15 **VIOLATION OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION**
16
17 **Claim for Damages Against Defendants Alberts, Kasiske, MacAdam, Zuniga, Bauer, Hart and Shaffer in Their Individual Capacities**
18
19 **Claim for Equitable Relief Against Defendants Harrison, Alberts, Kasiske, MacAdam, Zuniga, Bauer, Hart and Shaffer in Their Official Capacities**
20
21 59. Plaintiffs reallege and incorporate here the allegations in Paragraphs 1-58 above, as
22 though fully set forth.
23 60. Defendants' above-described policies, practices and conduct have violated and
24 continue to violate Plaintiffs' free speech and associational rights guaranteed by the First
25 Amendment.
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## COUNT II

## VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION

**Claim for Damages Against Defendants Alberts, Kasiske, MacAdam, Zuniga, Bauer, Hart and Shaffer in Their Individual Capacities**

**Claim for Equitable Relief Against Defendants Harrison, Alberts, Kasiske, MacAdam, Zuniga, Bauer, Hart and Shaffer in Their Official Capacities**

61. Plaintiffs reallege and incorporate here the allegations in Paragraphs 1-60 above, as though fully set forth.

62. Defendants' above-described policies, practices and conduct have violated and continue to violate Plaintiffs' rights to be free from unreasonable search and seizure as guaranteed by the Fourth Amendment.

## COUNT III

## PRIVACY PROTECTION ACT, 42 U.S.C. §§ 2000aa *et seq.*

**Claim for Damages against the United States and Against Defendants Alberts, Kasiske, MacAdam, Zuniga, and Bauer in Their Individual Capacities**

63. Plaintiffs reallege and incorporate here the allegations in Paragraphs 1-62 above, as though fully set forth.

64. Defendants' policies, practices and conduct in seizing the EBPS and Slingshot computers and storage media violated Plaintiffs' rights under the Privacy Protection Act, 42 U.S.C. §§ 2000aa *et seq*.

## COUNT IV

## DECLARATORY RELIEF UNDER 28 U.S.C. §§ 2201, 2202

**Against Defendants Harrison, Alberts, Kasiske, MacAdam, Zuniga, Bauer, Hart and Shaffer in Their Official Capacities**

65. Plaintiffs reallege and incorporate here the allegations in Paragraphs 1-64 above, as though fully set forth.

66. There exists an actual, present and justiciable controversy between Plaintiffs and

1 Defendants concerning their rights and duties with respect to Defendants' conduct described
2 herein. Plaintiffs contend that Defendants violated and are continuing to violate Plaintiffs' rights
3 under the constitution and laws of the United States through their seizure, retention of information
4 and data seized during the raid. Plaintiffs are informed and believe that Defendants deny that their
5 conduct violates Plaintiffs' rights under the constitution and laws of the United States. Plaintiffs
6 fear that they are now and will again be subjected to such unlawful and unconstitutional actions,
7 and seek a judicial declaration that Defendants' conduct has deprived and is depriving Plaintiffs of
8 their rights under the constitution and laws of the United States.

9 67. This controversy is ripe for judicial decision, and declaratory relief is necessary and
10 appropriate so that the parties may know the legal obligations that govern their present and future
11 conduct.

12 **PRAYER FOR RELIEF**

13 WHEREFORE, Plaintiffs seek relief from this Court as follows:

14 1. Issue preliminary and permanent injunctions against Defendants, prohibiting them
15 and their officers, agents, successors, employees representatives and any and all
16 persons acting in concert with them from searching, examining, transmitting,
17 manipulating, transferring to others, or otherwise making use of data seized from
18 Plaintiffs or information derived from such data and requiring that they delete,
19 destroy, and/or expunge any data seized from Plaintiffs or information derived from
20 such data and requiring that they identify any third parties to whom they transferred
21 any such data or information;

22 2. Issue a judicial declaration that Defendants' actions as alleged in this Complaint
23 violate the First and Fourth Amendments of the United States Constitution and 42
24 U.S.C. §§ 2000aa *et seq.*

25 3. Award Plaintiffs nominal, compensatory, special, and statutory damages, in an
26 amount according to proof, and to the extent permitted by law;

27 4. Award pre-judgment and post judgment interest to the extent permitted by law;

28

5. Award Plaintiffs their costs and expenses, including reasonable attorneys' fees under 42 U.S.C. § 1988 and 28 U.S.C. § 2412; and
6. Award such other and further relief as is just and proper.

**DEMAND FOR JURY TRIAL**

In accordance with Fed. R. Civ. P. 38(b), and Northern District Local Rule 3-6(a), Plaintiffs hereby demand a jury trial for all issues triable by jury.

DATED: May 28, 2009

By *_/s/Jennifer Granick_*

Jennifer Stisa Granick (State Bar No. 168423)
Matt Zimmerman (State Bar No. 212423)
Marcia Hofmann (State Bar No. 250087)
ELECTRONIC FRONTIER FOUNDATION

Ann Brick (State Bar No. 65296)
Michael T. Risher (State Bar No. 191627)
AMERICAN CIVIL LIBERTIES FOUNDATION
OF NORTHERN CALIFORNIA

Attorneys for Plaintiffs

# EXHIBIT D

C

Pacific Law Journal
July, 1991

Casenote

# *1371 DELANEY v. SUPERIOR COURT: BALANCING THE INTERESTS OF CRIMINAL DEFENDANTS AND NEWSPERSONS UNDER CALIFORNIA'S SHIELD LAW

Ian W. Craig

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Courts have long recognized the constitutional right of the criminally accused to have a fair opportunity to defend against the government's accusations. [FN1] 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." [FN2] 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. [FN3] 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 *1372 necessary information or may render inadmissible relevant evidence that would otherwise aid in their defense. [FN4]

Recently, the California Supreme Court, in Delaney v. Superior Court, [FN5] addressed the conflict between a defendant's right to present a defense and a reporter's right under California's newsperson's shield law [FN6] to avoid being adjudged in contempt for withholding information discovered during the newsgathering process. [FN7] 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. [FN8] 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. [FN9] 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. [FN10] 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 *1373 newsperson's rights. [FN11] 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. [FN12]

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. [FN13] The Delaney decision, through the use of the balancing test defined above, establishes a standard to be used by trial courts in determining a

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California's shield law was first enacted in 1935. [FN92] 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. [FN93] Unfortunately, very little legislative history was provided for section 1881, and since its inception courts have struggled with interpreting its intended purpose. [FN94] The modern shield law is currently codified in Evidence Code section 1070. [FN95] A 1974 amendment expanded ***1386** the shield law to protect against the compelled disclosure of "unpublished information" as well as sources responsible for divulging such information. [FN96]

Particularly troubling to the courts is the clause providing that a reporter "cannot be adjudged for contempt" for refusing to disclose certain information. [FN97] Several appellate courts have interpreted this immunity as equivalent to an evidentiary privilege. [FN98] 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. [FN99] 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. [FN100]

***1387** 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. [FN101] 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. [FN102] A California appellate court expressed this sentiment in Farr v. Superior Court, [FN103] 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. [FN104] 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. [FN105] 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. [FN106]

On June 3, 1980, the voters approved Proposition 5, [FN107] which amended the California Constitution, article I, section 2, by adding subdivision (b), which contains language virtually identical to ***1388** Evidence Code section 1070. [FN108] 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. [FN109]

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 ***1389** amendment right to a fair trial and to present evidence. [FN110] While the Delaney decision addresses the rights of criminal defendants, examining the manner in which California courts have treated the

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[FN101]. Id. at 545.

[FN102]. 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)).

[FN103]. 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), cert denied, 409 U.S. 1011 (1972).

[FN104]. Id. at 71, 99 Cal. Rptr. at 349.

[FN105]. 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 no interfere. Shepard, 384 U.S. at 350-51.

[FN106]. 408 U.S. 665 (1972). See supra notes 72-81 and accompanying text (discussing the Branzburg decision).

[FN107]. Proposition 5 was passed by a 73.3% majority. Note, supra note 99, at 527, n.1.

[FN108]. 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.
>
> 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.

[FN109]. See Liggett v. Superior Court, 224 Cal. App. 3d 420, 423-24, 260 Cal. Rptr. 161, 171-172 (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).

[FN110]. See infra notes 139-51 and accompanying text (noting California decisions which address rights of criminal

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# EXHIBIT E

# THE NEWSGATHERER'S SHIELD—WHY WASTE SPACE IN THE CALIFORNIA CONSTITUTION?

## I. Introduction

On June 3, 1980, the California electorate did a curious thing. By an overwhelming majority,[1] it added a provision to the constitution's free speech clause[2] which, in its statutory form,[3] had been consistently repudiated by the courts. The new provision, virtually identical to its statutory precursor,[4] barred a court from adjudging a reporter in contempt for

1. Statewide, the ballot proposition was favored by 73.3% of the voters. Some individual localities registered even higher margins. In San Francisco, for example, up to 81% of the electorate voted yes on the proposed amendment. MARCH FONG EU, SECRETARY OF STATE, SUPPLEMENT TO STATEMENT OF VOTE, PRIMARY ELECTION JUNE 3, 1980 at 6-8. California was the first state to try this approach to the protection of a newsperson's sources.

2. Prior to the amendment, the clause read: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL CONST. art. I, § 2. By virtue of the amendment, this clause was redesignated subdivision "a." The newly added shield law was correspondingly designated subdivision "b."

3. The full text of § 1070 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 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.

CAL. EVID. CODE § 1070 (West Supp. 1985).

4. The statutory version states that a reporter "cannot" be adjudged in contempt. *Id.* The



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to a wise policy rather than to mischief or absurdity."[75] Unfortunately, the court did not go on to apply the so-called immunity.[76] Nevertheless, the principle of broad construction it enunciated has been echoed by other courts.[77]

Several other signposts support a broad interpretation of the shield law. The Nation's other shield laws were protection, rather than punishment, oriented. That is, they prohibited the discovery of certain categories of material rather than prohibiting the potential sanctions which might be used to gain access to that material. The two state statutes enacted before the California statute provided for an absolute privilege.[78] And, the state statutes enacted simultaneously with California's, presumably upon the same stimulus,[79] also granted an absolute privilege against compelled disclosure.[80] Apparently then, unless the legislature designed "contempt" to be all-inclusive, the California statute represented a marked departure from a uniform trend.

A broad construction is especially appropriate when the ordinary meaning of contempt is analyzed. Traditionally, contempt has been considered a punishment of the last resort.[81] Conceivably, therefore, the intent of the 1935 legislature may have been to preclude only the use of this severe sanction and, by implication, to permit the use of other, necessarily less drastic, measures. But it is also arguable that the legislature intended to subsume lesser penalties under a single prohibition against

75. *Id.* at 217, 124 Cal. Rptr. at 445 (quoting 45 CAL. JUR. 2D *Statutes* § 116 (1958)).

76. *See infra* notes 113-15 and accompanying text.

77. Playboy Enters., Inc. v. Superior Court, 154 Cal. App. 3d 14, 201 Cal. Rptr. 207 (1984); KSDO v. Superior Court, 136 Cal. App. 3d 375, 186 Cal. Rptr. 211 (1982); Hammarley v. Superior Court, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979).

78. Maryland enacted its shield law in 1896, New Jersey in 1933. *Privileges Study, supra* note 53, at 481 n.3, 485-86. Though never enacted, federal shield laws were proposed as early as 1929. *See* S. 2175, 71st Cong., 1st Sess., 71 CONG. REC. 5832 (1929); H.R. 5403, 71st Cong., 1st Sess., 71 CONG. REC. 5918 (1929); H.R. 5281, 71st Cong., 1st Sess., 71 CONG. REC. 5739 (1929). Bills continue to be proposed regularly. *See* Branzburg v. Hayes, 408 U.S. 665, 689 n.28 (1972).

79. *See supra* note 53 and accompanying text.

80. Alabama, Kentucky, Arizona and Pennsylvania barred disclosure under any circumstances. Arkansas' statute, though worded conditionally, was effectively absolute since the person seeking disclosure had to first demonstrate that the information was disseminated in bad faith, with malice, and against the public interest. *Privileges Study, supra* note 53, at 481 n.3.

81. *E.g.*, Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 451 (1911). *See also* Riley v. City of Chester, 612 F.2d 708, 718 (3d Cir. 1979) (public interest calls for restraint in the judicial imposition of sanctions on press); J. FOX, CONTEMPT OF COURT (1927); S. METCALF, RIGHTS AND LIABILITIES OF PUBLISHERS, BROADCASTERS AND REPORTERS § 3.13 (1982); Isaacson, *Fair Trial and Free Press: An Opportunity for Coexistence*, 29 STAN. L. REV. 561, 572-73 (1977); Comment, *Newsmen's Privilege Against Compulsory Disclosure of Sources in Civil Suits—Toward an Absolute Privilege?*, 45 U. COLO. L. REV. 173, 186-87 (1973). *But see* STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 4.1 (Approved draft 1968) (Reardon Report) (under limited circumstances, conviction for contempt does not abridge freedom of speech or of the press).

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contempt. If so, the courts should not assume that contempt proceedings are a necessary precondition to the use of the shield statute. Rather, the statute should come into play in all situations where coerced disclosure is possible. The basis for this interpretation may lie in the historical origins of the contempt power.

The contempt power has been traced as far back as the tenth century in England.[82] Because the early courts were considered mere adjuncts to the king, their broad power to control the conduct of litigants was simply a reflection of the king's power over all facets of life.[83] As the courts grew more autonomous, the contempt power was retained even though the reason for its existence had vanished.[84] In fact, an eighteenth century English justice audaciously stated that the court's power to vindicate its authority stemmed only from "immemorial usage and practice."[85] As with most precepts of early common law, the power of contempt became embedded in American law.[86]

The history of the contempt power suggests that it is an instrument regulating a conflict between a state and an individual.[87] Indeed, it is incontrovertibly only "a governmental power to be used essentially for governmental purposes, any private aspects notwithstanding."[88] In this respect, contempt bears a similarity to legislatively created crimes. But, its character is not defined in the manner of a statutory wrong; rather, it is defined situationally—the contempt device comes into play in contumacious situations, whatever they may be.[89] In this sense, the penalty *is*

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82. R. GOLDFARB, THE CONTEMPT POWER 12 (1971).

83. *Id.* at 10.

84. *Id.* at 10-16. "The natural inclination to claim this power as one innate in judicial institutions was but one step in the rise of the power of the courts, and later the Parliament, in England." *Id.* at 12.

85. *Id.* at 15 (citing the justice's notes published in 1802).

86. *Id.* at 18-22. *See In re* Shortridge, 99 Cal. 526, 532, 34 P. 227, 229 (1893) (contempt doctrine is coeval with the existence of the courts).

87. R. GOLDFARB, *supra* note 82, at 18-22. Despite a contemporary dichotomy between civil and criminal contempt, both devices are the same "from standpoints of pragmatic effects and political realities." *Id.* at 53. The author notes that in "civil contempt cases, though the rationale may be assistance to a private party litigant in the execution of his civil remedies, there is an exaltation of government and a strengthening of its control and power through the judicial process." *Id.* at 52. Likewise, in criminal contempt cases, there "inheres a . . . private, typically civil element, such as the extraction of cooperation from a recalcitrant witness . . . ." *Id. See also* United States v. Criden, 633 F.2d 346, 350-53 (3d Cir. 1980) (vindication of the authority of the court is just as vital as interests of private litigants), *cert. denied*, 449 U.S. 1113 (1981).

88. R. GOLDFARB, *supra* note 82, at 52.

89. *Id.* at 261-62. "I suspect that recourse to the contempt device is had . . . often because it is the only allowable way of bringing retributive punishment upon an individual . . . ." *Id.* at 262. *See also* Comment, *The California Approach to the Yielding of the Newsman's Shield Law*, 3 PEP-

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the crime.[90] "The catchall description of the proscribed act and punishment is [what] . . . makes contempt law so peculiar."[91]

That peculiarity also suggests a broad interpretation of California's shield law. Under this interpretation, the prohibition against contempt is but a means of withdrawing a particular situation—a journalist's refusal to reveal confidential information—from the court's control. In effect, the legislature was condoning a particular act of disobedience; it was eliminating a threat and with it the remedy. By its decree, embodied in the shield law, a court could have no right to be indignant, let alone punish. In this sense, the shield law bars the use of the court's power to effect a change in the relationship between parties solely because of the refusal by a reporter to disclose a confidential source.[92] The use of other penalties, though not within the contempt nomenclature, is thus also prohibited. In sum, a journalist's insubordinacy should not be an infraction of any sort.

This interpretation gains credence from the primacy of the public interests behind the statute. In California, the purpose of the shield law is to maintain, if not encourage, the free flow of information to the public.[93] Compelled disclosure of confidential sources substantially inter-

PERDINE L. REV. 313, 324-29 (1976) (California decisions "hinge on a judicial obsession" with court's power to mandate compliance).

90. R. GOLDFARB, *supra* note 82, at 268-69. "In criminal law, it is the statute, not the later specific accusation under it, that prescribes the rule to govern conduct and warn against transgression." *Id. See also* Times-Mirror, Co. v. Superior Court, 15 Cal. 2d 99, 123, 98 P.2d 1029, 1042 (1940) (Gibson, J., dissenting) (contempt should be subject to the usual rules of criminal trial and general statute law), *rev'd sub nom.* Bridges v. California, 314 U.S. 252 (1941).

91. R. GOLDFARB, *supra* note 82, at 269. *Cf.* Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969). In *Soglin,* the court ruled that a standardless power to stem resistance to authority was unconstitutional. The court found that university disciplinary proceedings for "misconduct" were violative of the due process clause of the fourteenth amendment. Recognizing the indisputable power of the school to discipline disruptive students, the court nonetheless observed that the "[p]ower to punish and the rules defining the exercise of that power are not . . . identical. Power alone does not supply the standards needed to determine its application to types of behavior or specific instances of 'misconduct.' " *Id.* at 167.

92. *Cf.* Maness v. Meyers, 419 U.S. 449 (1975) (lawyer may not be held in contempt for advising his client in good faith to disobey a subpoena duces tecum on fifth amendment grounds); United States v. Cox, 342 F.2d 167 (5th Cir.) (en banc) (prosecutor's office retains independent discretion to seek indictments which trial judge cannot manipulate by use of the contempt sanction), *cert. denied,* 381 U.S. 935 (1965).

93. Rosato v. Superior Court, 51 Cal. App. 3d 190, 217, 124 Cal. Rptr. 427, 445 (1975), *cert. denied,* 427 U.S. 912 (1976). Such a policy is fostered "by enabling a reporter to assure an otherwise reluctant supplier of information that his identity will not be made public if he desires anonymity . . . ." Hammarley v. Superior Court, 89 Cal. App. 3d 388, 396, 153 Cal. Rptr. 608, 612 (1979). *See generally* Immerwahr & Doble, *Public Attitudes Toward Freedom of the Press,* 46 PUB. OPINION Q. 177 (1982). The research study revealed that a majority of Americans define freedom of the press from a listener's perspective; that is, they equate press freedom with the quantity of information reaching them. The study confirms the normative aspect of the first amendment in promoting a

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feres with this goal. Logically, if the contempt remedy was to be prohibited, less harsh forms of punishment should also be forbidden. Otherwise, the exalted purpose of the statute might be thwarted by the most insignificant of sanctions, an absurd result. It would be anomalous if the interests protected by the statute could be overcome merely through a selective use of alternate forms of punishment.

### *C. Judicial Interpretation of the Contempt Clause*

Despite the historical and policy reasons supporting a broad interpretation of the contempt prohibition, California courts have proceeded in the opposite direction. In *Bramson v. Wilkerson,*[94] Superior Court Judge Philbrick McCoy held that the statute,[95] by negative implication, authorized the use of discovery sanctions simply because they were not flatly prohibited.

In *Bramson,* representatives of the Writers Guild of America sued a *Hollywood Reporter* columnist for libel. The columnist had written two stories which allegedly suggested that the Guild, embroiled in a strike with television producers, was controlled by communists. Noting that,

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marketplace of ideas. *Contra* Miami Herald Publ. Co. v. Tornillo, 418 U.S. 241 (1974) (first amendment does not require that newspapers grant a right of reply to political candidates they have criticized). *See FCC Opens Hearings on Fairness,* L.A. Times, Feb. 8, 1985, Part VI, at 1, col. 5.

In a current case, the allegedly defamed plaintiffs argued that the first amendment privilege, because of the policies it serves, applies solely to the "paradigmatic situation" where a news story is expressly conditioned on a grant of confidentiality. Thus, a retroactive pledge of confidentiality, where there is no cause and effect relationship between the information elicited and the pledge, should not protect the source. If it did, plaintiffs argued, informants could test the defamatory content of their stories in the media and later, if litigation appeared imminent, request a confidentiality bath. The superior court agreed with the plaintiffs on this issue. Transcript of Proceedings, Corona v. Times-Mirror Publ. Co., Nos. C418542 & C418544 (Cal. Super. Ct. July 8, 1985). *See* NIMMER ON FREEDOM OF SPEECH § 4.09(c) (1984). The constitutional shield law, however, protects "*any* unpublished information," regardless of the timing of the grant of confidentiality. CAL. CONST. art. I, § 2(b) (emphasis added). Moreover, it is unclear that the policies underlying a first amendment privilege support a bar on retroactive pledges of confidentiality. First, confidentiality cannot be issued as a matter of course prior to the beginning of a conversation since, by definition, the need for it has not yet been established. Second, a bar on retroactive confidentiality would raise difficulties in application, *i.e.,* at what point is it too late for a source to request confidentiality. Third, it would hinder the free flow of information because it assumes that the only sources needing confidentiality are those fearful of coming forward, thus penalizing those otherwise willing informants who simply wish to minimize the repercussions of their revelations. *But see In re* Lewis, 384 F. Supp. 133 (C.D. Cal. 1974), *aff'd sub nom.* Lewis v. United States, 517 F.2d 236 (9th Cir. 1975) (unsolicited receipt of communique from underground group did not create a confidential newsman-informant relationship); New York v. Korkala, 10 Med. L. Rep. (BNA) 1355 (N.Y. App. Div. 1984) (contrary to prior court interpretations, 1981 amendment to N.Y. shield law did not eliminate "cloak of confidentiality" prerequisite). *See also infra* note 205.

94. *Bramson, supra* note 8, at 72.

95. CAL. CIV. PROC. CODE § 1881(6) (West 1964).

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long as the information was procured while they were connected with or employed by that medium. The scope of protection encompasses both sources and unpublished material. The latter category itself encompasses physical documents retained by the reporter as well as information retained in the reporter's memory.[112] The degree of protection is, in the literal words of the statute, limited to an immunity from an adjudication for contempt. Currently, the state entities affected are the judicial and legislative branches, administrative bodies, and any other bodies capable of issuing subpoenas.

### *E. Constitutionalization of the Shield Statute*

In 1978, the State Assembly took a close look at the statute and the decisions emerging from the courts and proposed an amendment to the state constitution, particularly section two of article one relating to freedom of the press. The decisions with which the Assembly was concerned were *Rosato v. Superior Court*[113] and *Farr v. Superior Court.*[114] Both cases held the statute inapplicable to a court's investigation into violations of orders, issued by the court, barring potentially prejudical pretrial publicity. In the area of their internal processes, the courts held, *they* had exclusive authority. The court in *Farr,* for example, succinctly declared that application of the legislatively created statute "unconstitutionally interfere[d] with the power and duty of the court."[115]

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refuse to disclose interview material). *See generally* Branzburg v. Hayes, 408 U.S. 665, 705 (1972) (informative function performed by press is also performed by "lecturers, political pollsters, novelists, academic researchers, and dramatists"); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (broad definition of press); Feuillan, *Every Man's Evidence Versus a Testimonial Privilege for Survey Researchers,* 40 PUB. OPINION Q. 39 (1976); Rohde, *Real to Reel: The* Hirsch *Case and First Amendment Protection for Film-makers' Confidential Sources of Information,* 5 PEPPERDINE L. REV. 351 (1978); Comment, *Free Press, Privacy, and Privilege: Protection of Researcher-Subject Communications,* 17 GA. L. REV. 1009 (1983); Comment, *Academic Researchers and the First Amendment: Constitutional Protection for Their Confidential Sources?,* 14 SAN DIEGO L. REV. 876 (1977).

112. For an unusual formulation of protected material, see Klose v. United States Bankr. Ct. (*In re* Christian Life Center), 23 Bankr. 770 (Bankr. 9th Cir. 1982). The court vacated a contempt citation issued at a reporter who had initiated a state inquiry into the banking operations of a church. The reporter had refused to answer questions pertaining to his role in bringing about the investigation; neither the sources nor the content of his news stories was addressed. The dissent objected to this extension of the privilege to nonreportorial functions. It observed that a "reporter's protected duties do not include either the manufacturing of news or its orchestration. [Reporters] are simply the purveyors of existing information." *Id.* at 772 (George, Bankr. J., dissenting).

113. Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied,* 427 U.S. 912 (1976).

114. Farr v. Superior Court, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied,* 409 U.S. 1011 (1972).

115. *Id.* at 71, 99 Cal. Rptr. at 349. For a full discussion, see Comment, *supra* note 89. *See also* Ammerman v. Hubbard Broadcasting, 89 N.M. 307, 551 P.2d 1354 (1976) (holding New Mexico shield law unconstitutional as applied to judicial bodies).

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Presumably, therefore, the motive behind the proposed constitutional amendment was to resolve the perceived intrusion by the legislature into the court's province. This was to be accomplished by the creation of a superior authority which both bodies would have to respect.[116] Proponents of the amendment noted that the free flow of information to the public was being "threatened by actions of some members of the California Judiciary [who] have created exceptions to the current Newsman's Shield Law. . . . By giving existing law constitutional status, judges will have to give the protection greater weight before attempting to compel reporters to breach their pledges of confidentiality."[117]

Ostensibly, the amendment was intended to strengthen existing law. In reality, it merely curtailed the court's ability to compel disclosure under the gloss of controlling its own proceedings or disciplining court officers. The amendment's effect on other confrontations between the reporter and the state remains uncertain. In the situation where the reporter is being sued for libel, one court has declared that "the effects of the constitutionalization of [the] immunity" are immaterial.[118] More recently, in *Mitchell v. Superior Court,* the California Supreme Court reiterated, and thereby validated, the *Bramson* doctrine.[119] The court asserted that the constitution, like the Evidence Code, only protected a reporter from contempt.

In the situation where the federally guaranteed rights of a criminal defendant are involved, the constitutional provision may prove as ineffective as the statute. In *Hammarley v. Superior Court,* the court of appeal held that the statutory privilege must yield to the right of an accused to a fair trial.[120] The court insisted that it was not mechanically resolving the clash between statutory and constitutional values.[121] Nevertheless, the defendants' right to have the "benefit of all evidence reasonably available,"[122] rendered the shield law impotent. This was not a necessary re-

116. *See, e.g.,* Playboy Enters., Inc. v. Superior Court, 154 Cal. App. 3d 14, 28, 201 Cal. Rptr. 207, 218 (1984). The court remarked that "[i]t has long been acknowledged that our state Constitution is the highest expression of the will of the people acting in their sovereign capacity as to matters of state law. When the Constitution speaks plainly on a particular matter, it must be given effect as the paramount law of the state." *Id.* (citations omitted).

117. MARCH FONG EU, SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION JUNE 3, 1980 at 18, 19.

118. KSDO v. Superior Court, 136 Cal. App. 3d 375, 383, 186 Cal. Rptr. 211, 216 (1982).

119. 37 Cal. 3d 268, 274, 690 P.2d 625, 628, 208 Cal. Rptr. 152, 155 (1984) ("A party to civil litigation who disobeys an order to disclose evidence, however, may be subject to a variety of other sanctions, including the entry of judgment against him.").

120. 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979).

121. *Id.* at 399, 153 Cal. Rptr. at 614.

122. *Id.* at 401, 153 Cal. Rptr. at 615.

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sult; presumably, the legislature had made the considered judgment that criminal trials should not go forward at the expense of compelled disclosure.[123] Although no California cases have arisen in the criminal area since the constitutional amendment was passed, it is settled that when a conflict exists between a state constitutional right and a right granted by the federal constitution, (specifically, the right to a fair trial[124]) the former must yield to the latter.[125] Thus, in this context too, it appears that the constitutional amendment, though passed by a three to one margin,[126] may not provide the guarantees to reporters which enable them to serve as the "watchdogs" of the state.[127]

Arrayed against these uncertainties are the various reasons for which initiatives are proposed and enacted. Most are intended to bypass legislative intransigence in a particular area.[128] California's initiative law was purposely enacted in 1911 to "offer recourse to the Southern Pacific's domination of the Legislature."[129] Many constitutional changes arise out of discontent with a particular trend in law or politics and are meant to arrest further erosion or violations by making new law that is "absolute and irrefutable."[130] Constitutionalization of the shield law, for

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123. AMERICAN ENTERPRISE INSTITUTE, AEI FORUMS, THE PRESS AND THE COURTS: COMPETING PRINCIPLES (1978). Discussing the case of Myron Farber, the N.Y. Times reporter who spent 39 days in jail in 1978, a panelist observed:

> With regard to the *Farber* case, one aspect that has gotten very little attention is the existence in New Jersey of a virtually absolute newsman shield law. . . . Theoretically, that law represents a decision by the political organs of government in New Jersey that, if such evidence is necessary to the trial, the [defendant] shall not be prosecuted. What I find phenomenal about the case is that in the name of a fair trial, the courts have simply laid waste to the political judgments of the state legislature.
>
> The number of prosecutions that are aborted by virtue of the exclusionary rule to keep tainted evidence out of criminal prosecutions must certainly be far greater than the number of prosecutions a shield law would abort. So, we have a very odd situation. In the name of Fourth Amendment privacy, we abort prosecutions on a daily basis; but when a state legislature decides that certain criminal prosecutions shall be aborted because of a perceived threat to First Amendment interests, the court says the prosecution shall go forward.

*Id.* at 13-14. *See also In re* Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied,* 439 U.S. 997 (1978); Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests,* 1983 A.B.F. RES. J. 611; Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment,* 1983 A.B.F. RES. J. 585.

124. U.S. CONST. art. VI, § 2. *See* Hammarley v. Superior Court, 89 Cal. App. 3d 388, 403, 153 Cal. Rptr. 608, 616-17 (1979) (intransigent resistance to court compelled disclosure is "strictly private and unofficial" action not violative of right to fair trial).

125. Mondou v. New York, N. H. & Hartford R.R., Co., 223 U.S. 1, 54 (1911).

126. *See supra* note 1.

127. MARCH FONG EU, SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION JUNE 3, 1980 at 18, 19.

128. *See generally* Gunn, *Initiatives and Referendums: Direct Democracy and Minority Interests,* 22 URB. L. ANN. 135 (1981).

129. Stall, *Initiatives are Dubious Propositions,* L.A. Times, Nov. 25, 1984, Part IV, at 3, col. 1.

130. KSDO v. Superior Court, 136 Cal. App. 3d 375, 381, 186 Cal. Rptr. 211, 215 (1982).

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example, besides providing the higher source of power which trumped the reasoning of *Farr* and *Rosato,* was also meant to insulate the shield law from judicial tampering. This was to be accomplished by engraving it in constitutional bedrock.[131] Given the depth of public support for the measure,[132] it was presumably going to be difficult for the courts to ignore the new shield law. As this assumption now appears to have been false, reporters have come to rely on the First Amendment to the United States Constitution as an alternative grounds for nondisclosure.

## IV. Evolving First Amendment Protection

In the absence of statutory authority, many courts, especially federal courts, have applied first amendment tests to the newsgatherer's struggle

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131. The constitutional amendment joins the already broad language of the California Constitution in article I, section 2(a). There it is stated that "every person may freely . . . publish." Considered jointly with section 2(b) (the shield law), this injunction suggests that freedom from the obstruction and nuisance occasioned by subpoenas and court appearances is simply an inherent aspect of the freedom to publish. Constitutionalization of the shield law may thus have provided the independent state grounds which would shelter a California decision from review by the Supreme Court. *See* Blubaugh, *California's Constitution: The Reporter's Forgotten Ally,* 55 CAL. ST. B.J. 12 (1980). *But see In re* Lance W., 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985) (the sole limits on admissibility of evidence are those compelled by U.S. Constitution); *Evidence Decision Reverses 30-Year State Court Trend,* L.A. Times, Feb. 10, 1985, Part I, at 3, col. 5. Justice Mosk, who dissented in *Lance W.*, observed that: "I think the people of California will be interested to know their Constitution . . . has now become useless." *Id.* at 33, col. 6.

In this sense, the shield law amendment may be considered a rejoinder to the *Hammarley* court's refusal to "avoid the holding of the United States Supreme Court in *Branzburg v. Hayes* . . . by finding independent state constitutional grounds for a [reporter's] privilege." 89 Cal. App. 3d at 399 n.4, 153 Cal. Rptr. at 614 n.4. Independent state grounds, if established, would be helpful to the California news media, especially in light of recent United States Supreme Court decisions which have set firm boundaries to federal first amendment rights. *See, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (first amendment not offended by protective order prohibiting dissemination of pretrial information); Calder v. Jones, 465 U.S. 783 (1984) (first amendment concerns do not enter into jurisdictional analysis); Keeton v. Hustler Magazine, 465 U.S. 770 (1984) (first amendment does not confine libel suits to victim's home forum); Herbert v. Lando, 441 U.S. 153 (1979) (first amendment does not prohibit inquiry into editorial process); Houchins v. KQED, 438 U.S. 1 (1978) (no right of access to government information); Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) (first amendment does not grant right of information about a trial); Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (first amendment does not grant newsmen right of access to prisons or prison inmates); Pell v. Procunier, 417 U.S. 817 (1974) (same).

The Court does occasionally give the first amendment some bite. *See, e.g.*, Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984) (broad standard of review where first amendment is involved); Press-Enterprise, Co. v. Superior Court, 464 U.S. 501 (1984) (guarantee of open criminal proceedings applies to voir dire proceedings); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (closed trials statute violates first amendment); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 554 (1980) (first amendment implicitly guarantees right to attend criminal trials). For an overview, see Comment, *A First Amendment Right of Access to Judicial Disciplinary Proceedings,* 132 U. PA. L. REV. 1163 (1984).

132. *See supra* note 1.

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would not be an abuse of the privilege for it to advocate confidentiality. Playboy's status, therefore, is conducive to invocation of the privilege.

Additionally, the confirmation of Tommy Chong's statements did not go to the heart of Greene and Reynold's defense; although relevant, their inability to use the statements would not ordain their defeat. Thus, under the second element, the preservation of confidentiality is further supported. Third, since Greene and Reynolds had not deposed the freelance reporter, they failed to exhaust all alternative sources. The *Mitchell* court required a party to pursue discovery until reaching an "irreducible core of information."[306] Only then would a party have complied with the exhaustion requirement. Since *Playboy Magazine* had not yet divulged the address of its reporter, Greene and Reynolds had obviously not reached this point. Once again, application of the privilege would be buttressed. The fourth prong would likely support disclosure since Playboy's interview tapes did not relate to "matters of great public importance."[307] Moreover, there was no risk of harm to a source.[308] The last *Mitchell* prong is only applicable in defamation cases. On balance, the above factors would probably limit discovery of the freelance reporter's notes and tapes. Although further interpretation of the *Mitchell* decision would be necessary to predict an outcome with certainty, it is likely that use of the first amendment privilege, as delineated in *Mitchell,* would work to the benefit of nonparty newspersons.[309]

## VI. CONCLUSION

Although the history and intent of the shield law are ambiguous, certain policies behind it can be discerned. Essentially, the theory is that sources will be measurably reassured if their identities are not carelessly exposed in public forums. As a consequence, the free flow of information to the public will be advanced.

To promote this end, courts should adopt all appropriate means.[310] A construction of the statute which frustrates the end, such as limiting it to an immunity from contempt, will result in highly inconsistent decisions—a default judgment worth millions of dollars might be permitted in lieu of a contempt citation.

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

307. *Id.* at 283, 690 P.2d at 634, 208 Cal. Rptr. at 161.

308. *Id.* The court identified the revelation of hidden criminal or unethical conduct as reportage meriting confidentiality. *Id.*

309. *But see* Dalitz v. Penthouse Int'l, Ltd., 168 Cal. App. 3d 468, 214 Cal. Rptr. 254 (1985) (*Mitchell* privilege did not extend to cross-complainants).

310. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819).

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The California courts should apprehend this rapidly approaching scenario and shift their stance on the shield law. An appropriate response would be to acknowledge that the shield law is broadly intended to prohibit coerced disclosure, however achieved. The longer the courts cling to a narrow construction, however, the more viable first amendment protections become. Indeed, the predicament of the nonparty reporter, barely resolved by the shield law, would probably be resolved in the same fashion by uncodified first amendment principles. If so, then in the name of trimming nonfunctional surplusage, article I, section 2(b) of the California Constitution should be repealed.

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