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From Undermining Child Protection Statutes to Creating Exceptions to Prohibitions Against Racial Discrimination in Public Accommodations: The Unsettling Consequences of Mischaracterizing the Police Reporting Privilege

BY PETER ZABLOTSKY*

I. INTRODUCTION

Historically, an absolute immunity from tort liability was extended to participants in judicial and quasi-judicial proceedings for statements made relevant to those proceedings; a qualified immunity, lost if malice were present, was extended to individuals for statements made in the public interest, such as reports to the police. These immunity doctrines are commonly known as the judicial or quasi-judicial privilege on the one hand, and the public interest or police reporting privilege on the other. The privileges date back centuries; few doctrines appeared more established, or less controversial.¹

Within the past twenty years, however, some middle-level appellate courts in the United States began holding that reports to the police were covered by an absolute privilege.² The effect of these holdings, though damaging to individual litigants, was limited. Within the past three years, however, state courts of last resort have chosen to rule on the nature of these privileges with the result that, for the first time in the four hundred-year history of privilege law, a court of last resort has actually held the police reporting privilege to be absolute.³ These recent rulings are thus broadening the negative impact of the mischaracterization of the police reporting privilege; the rulings have already undermined child and elder protection statutes as well as statutes prohibiting racial discrimination in public accommodations. Even broader applications of the mischaracterization are currently under consideration.⁴

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1. See generally W. PAGE KEETON, PROSSER AND KEETON ON TORTS §§ 114, 115 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS §§ 583-592A, 593-612 (1977).

2. *Williams v. Taylor*, 181 Cal. Rptr. 423 (Cal. Ct. App. 1982); *Starnes v. Int'l Harvester Co.*, 539 N.E.2d 1372 (Ill. App. Ct. 1989) (applying rule to statements made to federal law enforcement personnel); *Delong v. Yu Enter., Inc.*, 13 P.3d 1012 (Or. Ct. App. 2000), *rev'd*, 47 P.3d 8 (Or. 2002).

3. See *Hagberg v. Ca. Bank FSB*, 81 P.3d 244 (Cal. 2004).

4. See *infra* notes 161-91 and accompanying text. Additional cases applying *Hagberg* or contemplating the application of *Hagberg* include *Kesmodel v. Rand*, 15 Cal. Rptr. 3d 118, 123 (Cal. Ct.

It is the thesis of this article that no authority exists in support of the notion that reports to the police are absolutely privileged and that attempts to conjure such authority can have unsettling consequences that reach far beyond the common law of torts.

The article begins with a review of the history and doctrine relevant to the privileges applied to judicial proceedings and police reports. It then analyzes the appropriate application of these privileges in situations where police reports ultimately serve as the basis for commencing judicial proceedings. Next, the article analyzes cases from the two states—Oregon and California—where court holdings recently departed significantly from established privilege doctrine and mischaracterized the privilege applicable to police reports. Finally, the article highlights the unsettling consequences, including and especially the unsettling consequences in the areas of civil rights and child protection that result when the police reporting privilege is so mischaracterized.

II. BACKGROUND: THE CENTURIES OLD JUDICIAL AND POLICE REPORTING PRIVILEGES

A. *The Judicial and Quasi-Judicial Privileges*

The judicial privilege has its source in the English rules that sought to protect, absolutely, judges engaged in the performance of judicial functions from tort actions—specifically, defamation.⁵ The privilege dates back at least three hundred fifty years.⁶ Since its inception, the privilege was deemed absolute because it was thought that the judge on the bench needed to be free to administer the law without fear of consequences; this independence could not exist if the judge were in daily apprehension of having an action for defamation brought against him.⁷ For the same reason, a similar absolute

App. 2004); *Purcio v. Fuentes*, 2004 WL 552972 (Cal. Ct. App. 2004); *Mulder v. Pilot Air Freight*, 81 P.3d 264, 265 (Cal. 2004); *Nelson v. State*, 2004 WL 2905252 (Cal. Ct. App. 2004); *Guerrero v. Univ. of San Francisco*, 2004 WL 2669262 (Cal. Ct. App. 2004); *Ballard v. De Rito*, 2004 WL 2429972 (Cal. Ct. App. 2004); *Negrete v. Exteriors by Design, Inc.*, 2004 WL 1879923 (Cal. Ct. App. 2004); *Hodo v. Cheryl R.*, 2004 WL 308667 (Cal. Ct. App. 2004).

5. *Scott v. Stansfield*, L.R. 3 Ex. 220 (1868); *Munster v. Lamb*, 11 Q.B.D. 588 (1883); *Seaman v. Netherclift*, L.R. 2 C.P.D. 53 (1876); *Trotman v. Dunn*, 4 Camp. 211, 171 Eng. Rep. 67 (1815); *Floyd v. Barker*, 12 Coke's Rep. 23 (1607); *R. v. Skinner*, Lofft. 55 (1772); *Jekyll v. Sir John Moore*, 2 B. & Po (N.R.) 341 (1806); *Revis v. Smith*, 18 C.B. 126 (1856); *Henderson v. Broomhead*, 4 H. & N. 569 (1859); *Fray v. Blackburn*, 3 B. & S. 576 (1863); *Thomas v. Churton*, 2 B. & S. 475 (1862).

6. See, e.g., *Boulton v. Clapham, Jones, W.*, 431, 82 Eng. Rep. 227 (1640).

7. See generally KEETON, *supra* note 1, at 816; RESTATEMENT (SECOND) OF TORTS, *supra* note 1, § 585 (stating "[t]he rule stated in this section is supported by a very large number of decisions") (citing *Scott v. Stansfield*, L.R. 3 Ex 220 (1868); *Law v. Llewellyn*, 1 K.B. 487 (1907); *Bradley v. Fisher*,

privilege was extended to grand and petit jurors,⁸ witnesses,⁹ lawyers in the conduct of the case,¹⁰ parties to private litigation, and defendants and prosecutors in criminal cases.¹¹ The privilege covered anything said in relation to the matter at issue,¹² whether it be in open court or on the pleadings.¹³

From another perspective, it was thought that in court, parties, lawyers, judges, jurors, and witnesses needed to be free to risk impugning the

80 U.S. 335 (1870); *McKinley v. Simmons*, 148 So. 2d 648 (Ala. 1963); *Young v. Moore*, 113 S.E. 701 (Ga. Ct. App. 1922); *Schulze v. Bd. of Educ. Sch. Dist. No. 258*, 559 P.2d 367 (Kan. 1977); *Ginger v. Wayne Cir. Judge*, 120 N.W.2d 842 (Mich. 1963), *cert. denied*, 380 U.S. 986 (1965); *Karelas v. Baldwin*, 261 N.Y.S. 518 (N.Y. App. Div. 1932) (justice of the peace); *Irwin v. Ashurst*, 74 P.2d 1127 (Or. 1938); *Webb v. Fisher*, 72 S.W. 110 (Tenn. 1902); *Houghton v. Humphries*, 147 P. 641 (Wash. 1915)).

8. *E.g.*, *O'Donoghue v. McGovern*, 23 Wend. 26 (N.Y. 1840); *Sidener v. Russell*, 34 Ill. App. 446 (1889); *Hayslip v. Wellford*, 263 S.W.2d 136 (Tenn. 1953), *cert. denied*, 346 U.S. 911 (1953); *Greenfield v. Courier-Journal & Louisville Times Co.*, 283 S.W.2d 839 (Ky. Ct. App. 1955); *Ryon v. Shaw*, 77 So. 2d 455 (Fla. 1955); *O'Regan v. Schermerhorn*, 50 A.2d 10 (N.J. 1946); *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896); *Engelke v. Chouteau*, 12 S.W. 358 (Mo. 1889); *Dunham v. Powers*, 42 Vt. 1 (1868); *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 424 (1874); *see generally* KEETON, *supra* note 1, at 816; RESTATEMENT (SECOND) OF TORTS, *supra* note 1, § 589.

9. *E.g.*, *Massey v. Jones*, 28 S.E.2d 623 (Va. 1944); *Johnson v. Dover*, 143 S.W.2d 1112 (Ark. 1940); *Taplin-Rice-Clerkin Co. v. Hower*, 177 N.E. 203 (Ohio 1931); *Felts v. Paradise*, 258 S.W.2d 727 (Tenn. 1942); *Aborn v. Lipson*, 256 N.E.2d 442 (Mass. 1970); *Dunbar v. Greenlaw*, 128 A.2d 218 (Me. 1956); *Dyer v. Dyer*, 156 S.W.2d 445 (Tenn. 1941); *Mezullo v. Maletz*, 118 N.E.2d 356 (Mass. 1951); *Jarman v. Offutt*, 80 S.E.2d 248 (N.C. 1954); *see generally* KEETON, *supra* note 1, at 816-17; RESTATEMENT (SECOND) OF TORTS, *supra* note 1, § 588.

10. *E.g.*, *McDavitt v. Boyer*, 48 N.E. 317 (Ill. 1897); *Vogel v. Gruaz*, 110 U.S. 311, (1884); *Carpenter v. Ashley*, 83 P. 444 (Cal. 1906); *Dineen v. Daughan*, 381 A.2d 663 (Me. 1978); *Romero v. Prince*, 513 P.2d 717 (N.M. Ct. App. 1973); *Irwin*, 74 P.2d 1127; *Gabriel v. McMullin*, 103 N.W. 355 (Iowa 1905); *Kidder v. Parkhurst*, 85 Mass. 393 (Mass. 1862); *Wells v. Toogood*, 131 N.W. 124 (Mich. 1911); *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909 (Tex. 1942); *Schultz v. Strauss*, 106 N.W. 1066 (Wis. 1906); *Adams v. Peck*, 415 A.2d 292 (Md. 1980); *Smith v. Suburban Rests., Inc.*, 373 N.E.2d 215 (Mass. 1978); *Youmans v. Smith*, 47 N.E. 265 (N.Y. 1897); *Chard v. Galton*, 559 P.2d 1280 (Or. 1977); *see generally* KEETON, *supra* note 1, at 817; RESTATEMENT (SECOND) OF TORTS, *supra* note 1, § 586.

11. *E.g.*, *Twyford v. Twyford*, 134 Cal. Rptr. 145 (Cal. Ct. App. 1976); *Matthis v. Kennedy*, 67 N.W.2d 413 (Minn. 1954); *Wiener v. Weintraub*, 239 N.E.2d 540 (N.Y. 1968); *Binder v. Triangle Publ'ns, Inc.*, 275 A.2d 53 (Pa. 1971); *Lann v. Third Nat. Bank in Nashville*, 277 S.W.2d 439 (Tenn. 1955); *Ritchey v. Maksin*, 376 N.E.2d 991 (Ill. 1978); *McDavitt v. Boyer*, 48 N.E. 317 (Ill. 1897); *Defend v. Lascelles*, 500 N.E.2d 712 (Ill. Ct. App. 1986); *Harrell v. Summers*, 178 N.E.2d 133 (Ill. Ct. App. 1961); *see generally* KEETON, *supra* note 1, at 817; RESTATEMENT (SECOND) OF TORTS, *supra* note 1, § 587.

12. *E.g.*, *Adams v. Ala. Lime & Stone Corp.*, 142 So. 424 (Ala. 1932); *Dachowitz v. Kranis*, 401 N.Y.S.2d 844 (N.Y. App. Div. 1978); *Binder v. Or. Bank*, 585 P.2d 655 (Or. 1978); *Penick v. Ratcliffe*, 140 S.E. 664 (Va. 1927). *See generally* KEETON, *supra* note 1, at 817-18; RESTATEMENT (SECOND) OF TORTS, *supra* note 1, § 587, cmt. c.

13. *E.g.*, *Di Blasio v. Kolodner*, 197 A.2d 245 (Md. 1964); *McClure v. Stretch*, 147 P.2d 935 (Wash. 1944); *Greenberg v. Aetna Ins. Co.*, 235 A.2d 576 (Pa. 1967), *cert. denied*, 392 U.S. 907 (1968); *Nissen v. Cramer*, 10 S.E. 676 (N.C. 1889); *McDavitt v. Boyer*, 48 N.E. 317 (Ill. 1897). *See generally* KEETON, *supra* note 1, at 817; RESTATEMENT (SECOND) OF TORTS, *supra* note 1, § 587.

reputations of others not only to discharge public duties,¹⁴ but also to protect individual rights. In this regard, the seminal American authority is an article written by Van Vechten Veeder, entitled *Absolute Immunity in Defamation*, which states in relevant part:

Absolute privilege has been conceded on obvious grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist. It is essential to the ends of justice that all persons participating in judicial proceedings (to take a typical class for illustration) should enjoy freedom of speech in the discharge of their public duties or in pursuing their rights, without fear of consequences. The purpose of the law is, not to protect malice and malevolence, but to guard persons acting honestly in the discharge of a public function, or in the defense of their rights, from being harassed by action imputing to them dishonesty and malice.¹⁵

As the nature and scope of the judicial process expanded and became more sophisticated, the privilege evolved to keep pace. So, for example, in recognition of the fact that many cases are settled before trial or even before the pleadings phase, more recent cases have applied the privilege to statements from attorneys to potential participants in litigation¹⁶ and even to an adverse party's insurer in advance of filing a civil complaint.¹⁷ Even with this expansion, however, the privilege has never been extended to any party who is not a judicial officer or otherwise directly controlled by a court.¹⁸

This judicial privilege is, in turn, the source of the quasi-judicial or official proceeding privilege.¹⁹ The quasi-judicial or official proceedings to which the absolute privilege attaches are proceedings conducted before administrative boards and officers.²⁰ In developing and analyzing this privilege, a plethora of significant precedent establishes that the term "quasi-judicial" or "official proceeding" is a proceeding which resembles judicial and legislative proceedings, such as transactions of administrative boards and

14. See, e.g., *Dachowitz*, 401 N.Y.S.2d at 844; *Binder*, 585 P.2d at 655-56; *McDavitt*, 48 N.E. at 319; *Greenberg*, 235 A.2d at 578.

15. Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 469 (1909).

16. E.g., *Hawkins v. Harris*, 661 A.2d 284 (N.J. 1995); *Kelley v. Bonney*, 606 A.2d 693 (Conn. 1992) (lawyer questioning potential witness before trial); *Rubin v. Green*, 847 P.2d 1044 (Cal. 1993) (attorney letter concerning potential litigation); *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 54 Cal. Rptr. 2d 830 (Cal. Ct. App. 1996) (attorney's letter sent to potential victims).

17. *Chard v. Galton*, 559 P.2d 1280 (Or. 1977).

18. See *supra* notes 5-17.

19. See DAN B. DOBBS, *THE LAW OF TORTS* 1153-54 (2000); KEETON, *supra* note 1, at 818-19; RESTATEMENT (SECOND) OF TORTS, *supra* note 1, § 585, cmts. (b) and (c).

20. DOBBS, *supra* note 19, at 1153-54.

quasi-judicial and quasi-legislative bodies. A determination of whether a governmental agency or private entity possesses the powers so as to qualify its proceedings as quasi-judicial or official proceedings as contemplated by the common law focuses on whether the administrative body is vested with discretion based upon investigation and consideration of evidentiary facts, whether it is entitled to hold hearings and decide the issue by the application of rules of law to the ascertained facts, and whether its power affects the personal or property rights of private pensions.²¹

In applying these factors in case after case, the courts have concluded that the proceedings of a government agency qualify as quasi-judicial or official proceedings only if the agency has the authority to summon witnesses, to conduct agency hearings, to cross-examine under oath, to compel the production of records by subpoena, and to impose penalties based on their findings.²² Pursuant to this analysis, the privilege has been applied to the following: proceedings of a state bar association because the association had the authority to conduct hearings and discipline attorneys;²³ proceedings conducted by the Internal Revenue Service because the Service had express statutory authority to summon witnesses to agency hearings and to conduct cross-examination under oath, to compel the production of records by subpoena, to serve process and make arrests and seizures in the enforcement of revenue laws, and to pay specified sums for the apprehension of criminal offenders;²⁴ a complaint to a school board charging misconduct of a teacher because the school board had the authority to discipline school employees;²⁵ a complaint to a police department charging misconduct of an officer because the police department had the authority to conduct hearings to discipline its own officers;²⁶ a complaint to a Division of Real Estate charging misconduct of a broker because the Division of Real Estate had the authority to conduct

21. *Id.*; see, e.g., *Gattis v. Kilgo*, 38 S.E. 931 (N.C. 1901); *Fenelon v. Super. Ct.*, 273 Cal. Rptr. 367 (Cal. Ct. App. 1990); *Allan & Allan Arts Ltd. v. Rosenblum*, 615 N.Y.S.2d 410 (N.Y. App. Div. 1994); see generally KEETON, *supra* note 1, at 819, nn.42-43, citing eight cases; RESTATEMENT (SECOND) OF TORTS, *supra* note 1, § 585, cmt. b, Reporter's Notes, citing 24 cases.

22. DOBBS, *supra* note 19, at 1153-54.

23. See, e.g., *Youmans v. Smith*, 47 N.E. 265 (N.Y. 1893); *James v. Brandon*, 7 S.E.2d 305 (Ga. Ct. App. 1940); *Ramstead v. Morgan*, 347 P.2d 594 (Or. 1959); *Chen v. Fleming*, 194 Cal. Rptr. 913 (Cal. Ct. App. 1983).

24. See, e.g., *Tiedemann v. Super. Ct.*, 148 Cal. Rptr. 242 (Cal. Ct. App. 1978); see also *Parker v. Kirkland*, 18 N.E.2d 709 (Ill. App. Ct. 1939) (state tax board).

25. See, e.g., *Martin v. Kearney*, 124 Cal. Rptr. 281 (Cal. Ct. App. 1975); *Schulze v. Bd. of Ed. Sch. Dist. No. 258*, 559 P.2d 367 (Kan. 1977).

26. See, e.g., *Imig v. Ferrar*, 138 Cal. Rptr. 540 (Cal. Ct. App. 1977); *Flannery v. Allyn*, 198 N.E.2d 563 (Ill. App. Ct. 1964); see also *Cushman v. Edgar*, 605 P.2d 1210 (Or. Ct. App. 1980); *Hanzimanolis v. City of New York*, 388 N.Y.S.2d 826 (N.Y. App. Div. 1976). But see, *Elder v. Holland*, 155 S.E.2d 369 (Va. 1967).

investigations of and discipline brokers;²⁷ the proceedings of a Commission on Teacher Credentialing because the Commission had the power to investigate and consider evidentiary facts and hold hearings in accordance with certain notice requirements and evidentiary standards;²⁸ and a letter to a State Board of Funeral Directors and Embalmers when the Board is engaging in its quasi-judicial function as a licensing body.²⁹

In addition to these factors, privilege doctrine also deems relevant whether or not there is an expressed statutory authorization for the administrative agency to exercise the above-catalogued official or quasi-judicial powers.³⁰ Here, the courts have been vigilant in limiting the application of the official proceeding privilege to only those entities created by legislative action. Pursuant to this requirement, the privilege has been applied to the following: a complaint to a State Bar charging attorney misconduct because the State Bar was authorized by statute;³¹ a complaint to a police department charging misconduct by an officer because the police department was authorized by city charter to conduct hearings and discipline its officers;³² a complaint to a school principal alleging teacher misconduct because the school board was authorized by statute to discipline school employees;³³ a complaint to the Division of Real Estate charging misconduct of a broker because the agency was authorized by statute to suspend or revoke brokers' licenses;³⁴ and a complaint filed with the Committee on Teaching Credentialing because the committee was authorized by statute to investigate and hold hearings.³⁵

Even though the official proceeding privilege has been applied to statements before all manner of agency, however, it has virtually never been

27. See, e.g., *McAlister & Co. v. Jenkins*, 284 S.W. 88 (Ky. 1926); *King v. Borges*, 104 Cal. Rptr. 414 (Cal. Ct. App. 1972); see also *Grubb v. Johnson*, 289 P.2d 1067 (Or. 1955) (revocation of insurance license); *Robertson v. Indus. Ins. Co.*, 75 So. 2d 198 (Fla. 1954) (same); *Regan v. Guardian Life Ins. Co.*, 166 S.W.2d 909 (Tex. 1942) (same).

28. See, e.g., *Picton v. Anderson Union Dist. High Sch.*, 57 Cal. Rptr. 2d 829 (Cal. Ct. App. 1996).

29. See, e.g., *Moore v. West Lawn Mem'l Park*, 512 P.2d 1344 (Or. 1973) (superseded by statute on other grounds); *Meyer v. Parr*, 37 N.E.2d 637 (Ohio Ct. App. 1941).

30. RESTATEMENT (SECOND) OF TORTS, *supra* note 1, § 585, comts. (b) and (c).

31. See, e.g., *Chen v. Fleming*, 194 Cal. Rptr. 913 (Cal. Ct. App. 1983) (relying on CAL. BUS. & PROF. CODE §§ 6040, 6043-44, 6077 (West 2005)).

32. See, e.g., *Imig*, 138 Cal. Rptr. 540 (relying on LOS ANGELES, CAL., CITY CHARTER § 202 (2005); LOS ANGELES, CAL., ADMIN. CODE § 4.186 (2005)).

33. See, e.g., *Martin v. Kearney*, 124 Cal. Rptr. 281 (Cal. Ct. App. 1975) (relying on CAL. CIV. PROC. § 430.70 (Deering 2005); CAL. EVID. CODE, § 452 (Deering 2005)).

34. See, e.g., *Borges*, 104 Cal. Rptr. 414 (relying on CAL. BUS. & PROF. CODE § 10176 (Deering 2005)).

35. See, e.g., *Picton*, 57 Cal. Rptr. 2d 829 (relying on CAL. EDUC. CODE §§ 44210 and 44242 (West 2005)).

applied in a context not involving an entity vested with quasi-judicial authority.³⁶

B. The Police Reporting (Public Interest) Privilege

By contrast, the protection from tort liability extended to publications in police reports has as its source the qualified privilege granted “to one who may act in the public interest.”³⁷ For this reason, this privilege is often referred to as the “public interest” privilege, and it is considered applicable to communications made to those who may be expected to take official action of some kind for the protection of some interest of the public.³⁸

This privilege includes, specifically, private citizens communicating to the police. Indeed, while the public interest privilege is applied in contexts other than police reports, it is the police reporting context that provides the bulk of the case law on which the more generally applicable privilege is based.³⁹ This phenomena was recognized in the mid-nineteenth century by the first torts treatise written in the United States⁴⁰ and by a group of cases involving police reports that also date from that period and slightly later.⁴¹

The police reporting privilege protects from defamation actions involving false statements of facts concerning an individual made in good faith but not those made with malice.⁴² Despite the often critical nature of the public interest involved, a qualified privilege was deemed sufficient to achieve the critical public purpose of encouraging citizens to come forth with information concerning criminal activity. This is so because if the information is given in good faith by an individual who believes that the information is true, he is protected against the imposition of liability in a tort action.⁴³ For his part, Van

36. See *supra* notes 19-35; KEETON, *supra* note 1, at 818-19; RESTATEMENT (SECOND) OF TORTS, *supra* note 1, § 585, cmts. (b) and (c).

37. KEETON, *supra* note 1, at 830.

38. See RESTATEMENT (SECOND) OF TORTS, *supra* note 1, § 598; KEETON, *supra* note 1, at 830-31.

39. See RESTATEMENT (SECOND) OF TORTS, *supra* note 1, app. at § 598 (Reporter's Notes). For a complete discussion of the cases cited in the Reporter's Notes, see *infra*, note 158 and accompanying text.

40. FRANCIS HILLIARD, THE LAW OF TORTS, 345-46 (3d ed. 1866).

41. See, *Grimes v. Coyle*, 45 Ky. 301 (Ky. Ct. App. 1845); *Smith v. Kerr*, 1 Edm. Sel. Cas. 190 (N.Y.Com.Pl.) (1845), *aff'd*, 1 Barb. 155 (1847); *Gassett v. Gilbert*, 72 Mass. (6 Gray) 94 (1856); *Greenwood v. Colley*, 42 N.W. 413 (Neb. 1889); *Hemmens v. Nelson*, 34 N.E. 342 (N.Y. 1893).

42. RESTATEMENT (SECOND) OF TORTS, *supra* note 1, § 598, cmt. (a), §§ 600-02; KEETON, *supra* note 1, at 824-25.

43. *Id.*; see *infra*, notes 44-45 and accompanying text. For one of the earliest articulations of this principle, see *Grimes*, 45 Ky. at 305:

[W]hen such communications are made in *good faith* and confidence, and with an honest view and purpose, to the object and end intimated, and is not made as a pretext to cover over secret malevolence or ill will towards the party spoken of, it is proper that they should be made, and the honest portion of the community should be encouraged rather than restrained

Vechten Veeder, again in his seminal article, took the position that the police reporting privilege needed to be qualified so as to discourage abuse of the privilege.⁴⁴

The protection afforded by a qualified privilege is formidable. As eloquently described by other commentators, the qualified privilege provides an atmosphere in which a civil minded citizen may, without fear, convey information which he believes the disclosure of which will redound to the benefit of the public:

Only those who act out of malice, rather than public interest, need hesitate before speaking. It is in these latter instances that '[p]roof of such indirect motive will defeat the privilege which would otherwise have attached, for it is not to the convenience and welfare of society that false and injurious communications as to the reputation of others would be made, not for the furtherance of some good object, but for the gratification of an evil and malicious disposition or for any other object than that which gave rise to the privilege.'⁴⁵

When complaints to police departments are considered in light of the complete evolution of privilege doctrine, it is clear that these reports not only do not, but should not, qualify for the absolute privilege bestowed by the judicial or quasi-judicial privilege. The police are not courts. They are not legislative bodies. They are not authorized by law to engage in quasi-judicial functions. Police agencies lack authority to hold hearings, to determine the applicability of rules of law to the facts (except to discipline their own personnel), or to decide to prosecute. They have no independent authority to compel production of evidence, to cross-examine witnesses, or to accord the accused the right to present evidence or even respond to the charges. The police cannot act without first going to court to obtain a warrant necessary in the performance of their functions; the entire body of search and seizure and

from making them, by the terror of legal responsibility.

44. Veeder, *supra* note 15, at 480-90.

45. *Toker*, 376 N.E.2d at 168 (citing CLEMENT GATLEY, LIBEL AND SLANDER 216 (3d ed.)). For a clear articulation of the damages of imposing an absolute privilege in the public interest privilege context, *see id.* at 169 ("[t]o clothe with absolute immunity communications made to a body acting in other than a quasi-judicial capacity—communications which because of the absence of a hearing may often go unheard of, let alone challenged, by their subject—would provide an unchecked vehicle for silent but effective character assassination."); *Fridovich*, 598 So. 2d at 69 ("There is no benefit to society or the administration of justice in protecting those who make intentionally false and malicious defamatory statements to the police. The countervailing harm caused by the malicious destruction of another's reputation by false accusation can have irreparable consequences.").

criminal rights law has accorded only a calculated, narrow authority to police officials.⁴⁶

In addition, and again by contrast to judicial and quasi-judicial entities, the authority vested in the police does allow them, based on a complaint, to impose deprivations of liberty without affording notice and opportunity type due process protections. Based on a complaint, the police can detain, restrain, handcuff, arrest, and use force. It is for this reason that not just those who speak to the police, but also the police themselves, have never been afforded an absolute privilege.⁴⁷

After considering the history and nature of these privileges, with the exception of California, many appellate courts or courts of last resort that have faced the issue have concluded that police reports receive a qualified privilege.⁴⁸ To indulge in tautology, before California, no court of last resort had ever accorded police reports an absolute privilege.

46. *Fenelon*, 273 Cal. Rptr. at 367.

47. *See, e.g., Pierson v. Ray*, 386 U.S. 547, 555 (1967).

48. *Tidwell v. Winn-Dixie Inc.*, 502 So. 2d 747 (Ala. 1987); *Cousins v. TG & Y Stores*, 514 So. 2d 904 (Ala. 1987); *Kress v. Self*, 526 P.2d 754, 756 (Ariz. Ct. Appl. 1974); *Schneider v. Pay N' Save*, 723 P.2d 619 (Alaska 1986); *Miller v. Nuckolls*, 91 S.W. 759 (Ark. 1905); *Burke v. Greene*, 963 P.2d 1119, 1122 (Colo. 1998); *Flanagan v. McLane*, 87 A. 727 (Conn. 1913); *Newark Trust Co. v. Brower*, 191 A.2d 615 (Del. 1958); *McClendon v. Coverdale*, 203 A.2d 815 (Del. 1964); *Fridovich*, 598 So. 2d 65, 69 (Fla. 1992); *Am. Nat'l Title v. The Guarantee Title*, 810 So. 2d 996 (Fla. 2002); *Hardaway v. Sherman Ent.*, 210 S.E.2d 363 (Ga. Ct. App. 1974); *Conn v. Paul Harris Stores, Inc.*, 439 N.E.2d 195 (Ind. App. Ct. 1982); *Winckel v. Von Maur Inc.*, 652 N.W.2d 453 (Iowa 2002); *Simon v. Variety Wholesalers Inc.*, 788 So. 2d 544 (La. Ct. App. 2001); *Truman v. Browne*, 788 A.2d 168 (Me. 2001); *Petit v. Key Bank of So. Me.*, 688 A.2d 427 (Me. 1994); *Caldor v. Bowden*, 625 A.2d 959 (Md. 1993) *rev'd on other grounds* 710 A.2d 267 (1996); *Smith v. Suburban Rest.*, 373 N.E.2d 215 (Mass. 1977); *Kefgen v. Davidson*, 617 N.W.2d 351 (Mich. Ct. App. 2000); *Smits v. Wal-Mart Stores, Inc.*, 525 N.W.2d 554, 557 (Minn. Ct. App. 1994); *Downtown Grill v. Connell*, 721 So. 2d 1113 (Miss. 1998); *Brown v. P.N. Hirsch & Co. Stores, Inc.*, 661 S.W.2d 587 (Mo. Ct. App. 1983); *Danberg v. Sears*, 252 N.W.2d 168 (Neb. 1977); *K-Mart Corp. v. Washington*, 866 P.2d 274 (Nev. 1993) *overruled in part*; *Dijkstra v. Westerink*, 401 A.2d 1118 (N.J. Super. Ct. App. 1979); *Geyer v. Faaiella*, 652 A.2d 1245 (N.J. Super. Ct. App. 1995); *Toker*, 376 N.E.2d 163 (N.Y. 1978); *Colon v. Wal-Mart Stores, Inc.*, 703 N.Y.S.2d 863 (N.Y. Gen. Term 1999); *Averitt v. Rozier*, 458 S.E.2d 26 (N.C. 1995); *Richmond v. Nodland*, 552 N.W.2d 586 (N.D. 1996); *Popke v. Hoffman*, 153 N.E. 248 (Ohio Ct. App. 1926); *DeLong v. Yu Enter.*, 13 P.3d 1012 (Or. Ct. App. 2000) *rev'd*, 47 P.3d 8 (Or. Ct. App. 2002); *Zarate v. Cortinas*, 553 S.W.2d 652 (Tex. Civ. App. 1977); *Perry v. Layton*, 7 S.W.2d 190 (Tex. Civ. App. 1928); *Pate v. Serv. Merch. Co., Inc.*, 959 S.W.2d 569 (Tenn. Ct. App. 1996); *Schnupp v. Smith*, 457 S.E.2d 42 (Va. 1995); *Story v. Shelter Bay Co.*, 760 P.2d 368 (Wash. Ct. App. 1988); *Otten v. Schutt*, 113 N.W.2d 152 (Wis. 1962); *Lever v. Cmty. First Banestates*, 989 P.2d 634 (Wyo. 1999); *Williams v. Blount*, 741 P.2d 595 (Wyo. 1987); *Columbia First Bank v. Ferguson*, 665 A.2d 650 (D.C. 1995).

III. WHEN POLICE REPORTS COMMENCE JUDICIAL PROCEEDINGS: (NEEDLESS) CONFUSION

Despite the foregoing, the absolute judicial and official privileges on the one hand and the qualified police reporting privilege on the other can become confused when applied to statements at the beginning of judicial or official proceedings, i.e., complaints. Those few courts falling victim to the confusion argue that, given that one complaining to the police, or even the police themselves, can ultimately go on to make statements that literally commence a judicial proceeding, perhaps the judicial privilege should extend all the way to the initial report; if a complaint to a school board or a letter by an attorney in contemplation of judicial proceedings is absolutely privileged, perhaps a complaint to the police should be as well.⁴⁹

The common law deals with, i.e., avoids, this confusion by extending the absolute privilege only to those complaints made to entities that can perform the functions and extend the protections that are judicial in nature. By limiting the absolute privilege to complaints before judicial and quasi-judicial entities—entities that must afford notice and opportunity-type due process protections before imposing any deprivation of liberty—the primary countervailing consideration relevant to the absolute privilege in the judicial context, i.e., the denial of a remedy to the victim of a maliciously false statement, is mitigated.⁵⁰ Indeed, it is for this reason—because the police reporting context does not extend motive and opportunity-to-be-heard-type due process protections to an individual before the police may act—that the common law never contemplated extending the absolute privilege to police reports or even to police officers themselves when they commence judicial proceedings as complaining witnesses.⁵¹

To the extent that confusion has arisen, particularly among some lower courts in some jurisdictions, it appears to stem from some language in two critically important secondary authorities—The Restatement (Second) of Torts, and Prosser.⁵²

49. See, e.g., *Delong*, 13 P.3d at 1015, *rev'd*, 47 P.3d 8 (Or. 2002); *Fenelon*, 273 Cal. Rptr. at 373 (Benke, J., dissenting) (“I do not believe any principled distinction can or should be made between a citizen who goes to the police department rather than the district attorney’s office with information about commission of a crime.”).

50. See *supra*, notes 42–45, and accompanying text.

51. *Pierson*, 386 U.S. at 555 (“The common law has never granted police officers an absolute and unqualified immunity . . .”).

52. See, e.g., *Starnes*, 539 N.E.2d 1372 (claiming that its decision to hold the police reporting privilege absolute “is supported by well-respected secondary sources,” specifically, “[s]ection 587 of the Restatement (Second) of Torts,” and “comment b to Section 587,” and concluding, “Dean Prosser, in his treatise, concurs . . .”). *Id.* at 1375.

Specifically, according to § 587, comment b, of the Restatement:

the absolute privilege applies to communications . . . to a prosecuting attorney or other proper officer preliminary to a proposed criminal prosecution, whether or not the information is followed by a formal complaint or affidavit.⁵³

Reading this statement out of context might suggest that the police are “other proper officer[s]” within the meaning of § 587.⁵⁴ A more complete reading of the Restatement, however, proves this is not the case. Rather, reports to the police actually form the basis of § 598 of the Restatement, and that section unequivocally treats police reports as deserving a qualified privilege. Section 598 of the Restatement (Second) of Torts provides:

§ 598. Communication to One Who May Act in the Public Interest

An occasion makes a publication conditional privileged if the circumstances induce a correct or reasonable belief that

- (a) there is information that affects a sufficiently important public interest, and
- (b) the public interest requires the communication of the defamatory matter to a public officer or a private citizen who is authorized or privilege to take action if the defamatory matter is true.⁵⁵

In the “Reporter’s Note” to this section, the Reporter who drafted this section cites eleven cases under the heading: “See, in support of this section: Information to public authorities for the prevention or detection of crime.”⁵⁶ Of the eleven, six deal with reports to the police⁵⁷ and one deals with a report to the Federal Bureau of Investigation.⁵⁸ In absolutely every case, without exception, these cases treat reports to the police as deserving of a qualified privilege. By contrast, absolutely none of the cases that form the basis of the absolute judicial privilege of § 587 involve police reports. Rather, not surprisingly, they involve statements made during judicial proceedings or in pleadings.⁵⁹

53. RESTATEMENT (SECOND) OF TORTS, *supra* note 1, § 587, cmt. (b).

54. *Id.*

55. RESTATEMENT (SECOND) OF TORTS, *supra* note 1, § 598.

56. RESTATEMENT (SECOND) OF TORTS, *supra* note 1, app. at § 598, (Reporter’s Note).

57. See *Newark Trust Co. v. Bruwer*, 141 A.2d 615 (Del. 1958); *Faber v. Byrle*, 229 P.2d 718 (Kan. 1951); *Hutchinson v. New England Tel. & Tel. Co.*, 214 N.E.2d 57 (Mass. 1966); *Popke*, 153 N.E. 248 (Ohio Ct. App. 1926); *Marsh v. Commercial & Sav. Bank*, 265 F.Supp. 614 (W.D. Va. 1967); *Joseph v. Baars*, 125 N.W. 913 (Wis. 1910). For further discussion of these cases see, *infra*, note 158 and accompanying text.

58. See *Foltz v. Moore McCormack Lines, Inc.*, 189 F.2d 537 (2d Cir. 1951).

59. See RESTATEMENT (SECOND) OF TORTS, *supra* note 1, app. at § 587 (Reporter’s Note) (citing *Boulton v. Clapham, Jones, W.*, 431, 82 Eng.Rep. 227 (1640); *Trotman v. Dunn*, 4 Camp. 211, 171 Eng.Rep. 67 (1815); *Twyford v. Twyford*, 134 Cal. Rptr. 145 (Cal. Ct. App. 1976); *Matthis v. Kennedy*, 67

According to Prosser, the absolute privilege extends to “every step in the proceeding.”⁶⁰ Here again, this language could be interpreted as encompassing police reports that ultimately are used to commence a judicial proceeding. Other language from Prosser, however, makes clear that the treatise does comport with the common law view that only complaints to judicial officers or before quasi-judicial entities are absolutely privileged. On this point, the treatise states that while “an informal complaint to a prosecuting attorney or a magistrate is to be regarded as an initial step in a judicial proceeding,”⁶¹ a qualified privilege applies to complaints that are to entities that are neither judicial or quasi-judicial, such as “information to proper authorities for the prevention and detection of crime,”⁶² and, specifically, complaints to police officers.⁶³

Finally, some other secondary authorities can be interpreted as suggesting that there is a dispute among primary authorities as to the nature of the privilege applicable to police reports. For example, *American Jurisprudence* states that “a communication to a law enforcement officer is generally held to be a qualified privilege. . . .”⁶⁴ *American Law Review* states that the “majority of cases expressly dealing with [communications to the police] hold that the privilege is qualified or conditional, not absolute.”⁶⁵ *Fridovich v. Fridovich*,⁶⁶ a case from the Supreme Court of Florida that is often cited as persuasive authority, states that “[a] handful of states have found an absolute privilege.”⁶⁷ As with the Restatement, however, a reading of the cases cited by these authorities in support of the notion that there is some dispute about the privilege applicable to police reports reveals that none of the cases cited by these authorities actually involve police reports. Rather, they deal with reports to entities that are judicial or quasi-judicial in nature.⁶⁸

N.W.2d 413 (Minn. 1954); *Wiener v. Weintraub*, 239 N.E.2d 540 (N.Y. 1968); *Binder v. Triangle Pubs. Inc.*, 275 A.2d 53 (Pa. 1971); *Lann v. Third Nat'l Bank in Nashville*, 277 S.W.2d 439 (Tenn. 1955).

60. KEETON, *supra* note 1, at 819.

61. *Id.*

62. *Id.* at 830.

63. *Id.* at 830 n.69.

64. 50 AM. JUR. 2D *Libel and Slander* § 214 (1995) (emphasis added).

65. Annotation, *Libel and Slander: Privilege Regarding Communications to Police or Other Officers Respecting Commission of Crime*, 140 A.L.R. 1466-78 (1942).

66. 598 So. 2d 65 (Fla. 1965).

67. *Id.* at 68 n.4.

68. Of the cases cited by *Fridovich*, 598 So. 2d at 68 n.4 only one—*Starnes*, 539 N.E.2d 1372—dealt with statements to law enforcement agents, and they were federal agents, not police officers. The others involved statements to lawyers discharging public duties or a communication between purely private parties, and therefore do not and cannot stand for the proposition that reports to police officers receive an absolute privilege. See *Gen. Elec. Co. v. Sargent & Lundy*, 916 F.2d 1119 (6th Cir. 1990) (statements made by architectural-engineering firm to utility company in contemplation of litigation); *Borg v. Boas*, 231 F.2d 788

IV. UNPRECEDENTED DEPARTURES: A RECENT TALE OF TWO STATES

A. Oregon

At the beginning of the twentieth century, relatively early in the development of its common law, Oregon conceptualized the doctrine of absolute and qualified privilege in the judicial context rather narrowly but in full recognition of and consistent with the historical developments of privilege doctrine in the United States.⁶⁹

One critical case in this regard was *Irwin v. Ashurst*.⁷⁰ In *Irwin*, the plaintiff, who was a witness for the state in a criminal trial, sued the presiding judge and the defense counsel for defamation.⁷¹ Regarding the judicial privilege, the Supreme Court of Oregon stated in part:

[w]e take the rule to be well settled by the authorities, that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere, would import malice and be actionable in themselves, are not actionable, if they are applicable and pertinent to the subject of inquiry.⁷²

The court then affirmed the verdicts rendered and motions granted in favor of the various defendants.⁷³

Another critical case, *Grubb v. Johnson*,⁷⁴ synthesized the developments in privilege law as they had advanced through the mid-1960's, stating that the doctrine of absolute privilege was limited to cases falling within the following categories: publications of statements by a judge in the course of judicial proceedings;⁷⁵ pleadings or publications filed by an attorney in the course of litigation;⁷⁶ statements made by private litigants or private prosecutors or

(9th Cir. 1956) (reports of proceedings of a judicial nature made at meeting called to urge grand jury); *Cutts v. Am. United Life Ins. Co.*, 505 So. 2d 1211 (Ala. 1987) (information provided to district attorney); *Hott v. Yarborough*, 245 S.W. 676 (Tex. 1922) (statements to county attorney and to grand jury).

69. See, *Pitts v. King*, 15 P.2d 379, 382 (Or. 1932) (citing WILLIAM BLAKE ODGERS, ODGERS ON LIBEL AND SLANDER 200 (6th ed. 1929); JOHN TOWNSHEND, TOWNSHEND ON SLANDER AND LIBEL § 221 (4th ed.); MARTIN NEWELL, NEWELL, SLANDER AND LIBEL §§ 358, 359 (4th ed. 1924)).

70. 74 P.2d 1127 (Or. 1938).

71. See *id.*

72. *Id.* at 1131 (citing and quoting *Hoar v. Wood*, 3 Metc. Mass. 193 (1841); *Cooper v. Phipps*, 33 P. 985 (Or. 1893)).

73. *Id.* at 1132.

74. 289 P.2d 1067 (Or. 1955).

75. *Id.* at 1071 (citing *Irwin*, 74 P.2d 1127).

76. *Id.* (citing *McKinney v. Cooper*, 98 P.2d 711 (Or. 1940)).

defendants in a criminal prosecution;⁷⁷ allegations by a party in a divorce action;⁷⁸ testimony of a witness in court;⁷⁹ and pertinent statements by counsel in a judicial proceeding.⁸⁰

Despite the Oregon Supreme Court itself again classifying its judicial privilege law as narrow,⁸¹ the common law of the state remained quite consistent with the privilege doctrine as generally applied as the Court's own references to Veeder's article and Prosser's treatise suggested.⁸²

The Oregon Supreme Court appeared to deviate from this path in the 1982 case of *Ducosin v. Mott*.⁸³ *Ducosin* involved a defendant who, during a dispute with the plaintiff over the proceeds of an inheritance, called the county medical examiner and suggested that the plaintiff possibly had poisoned his own mother, causing her death.⁸⁴ An autopsy was performed, and the cause of death was determined to have been natural.⁸⁵ The plaintiff then brought an action for defamation against the defendant.⁸⁶ The Oregon Supreme Court held that the defendant's statements were "cloaked with an absolute privilege," because the communications to a medical examiner regarding a possible homicide were an initial step in a judicial proceeding.⁸⁷ Though not dealing specifically with police reports, the *Ducosin* court certainly suggested that an absolute privilege attaches to statements made to law enforcement even when proceedings are in an early, investigative phase and no court or administrative action is yet pending.

In 2000, this suggestion was adopted by the Oregon Court of Appeals in *DeLong v. Yu Enterprises, Inc.*⁸⁸ In *DeLong*, the defendant-owner of a hotel reported to the police that hotel money and property had disappeared during the time that the plaintiff employee managed the hotel.⁸⁹ The police investigated and charges were filed against the plaintiff.⁹⁰ Ultimately, however, the charges against the plaintiff were dropped, and he sued for defamation and malicious prosecution.⁹¹ At the conclusion of the trial, the trial

77. *Id.* (citing *Strycker v. Levell and Peterson*, 190 P.2d 922 (Or. 1948)).

78. *Id.* (citing *Pitts*, 15 P.2d at 379).

79. *Grubb*, 280 P.2d at 1071 (citing *Cooper*, 33 P. at 985).

80. *Id.* (citing *Irwin*, 74 P.2d at 1127).

81. *DeLong v. Yu Enters., Inc.*, 47 P.3d 8 (Or. 2002); *Grubb*, 289 P.2d at 1067.

82. *See, e.g., DeLong*, 47 P.3d at 12 (citing Veeder, *supra* note 15, at 469); *Grubb*, 289 P.2d at 1071.

83. 642 P.2d 1168 (Or. 1982), *rev'd in part*, 47 P.3d 8 (Or. 2002).

84. *Id.* at 1169.

85. *Id.*

86. *Id.*

87. *Id.* at 1170-71.

88. 13 P.3d 1012 (Or. Ct. App. 2000), *rev'd*, 47 P.3d 8 (Or. 2002).

89. *Id.* at 1013.

90. *Id.*

91. *Id.*

court denied that defendant's statements to the police were subject only to a defense of qualified privilege and that a jury question existed as to the applicability of the defense to the evidence before it.⁹² The jury found for defendant on the malicious prosecution claim.⁹³

In the court of appeals, the defendant argued that the trial court erred in denying his statements the protection of absolute privilege. The appellate court agreed with the defendant, holding that a report of an alleged crime to the police is an absolute privilege and reversed the judgment of the trial court.⁹⁴

In its reasoning, it is clear that the appellate court was confused by the fact that reports to judicial and quasi-judicial officials are privileged and by the fact that police reports can sometimes result in the commencing of criminal, judicial proceedings. On these points, the court stated:

[f]ormal or informal complaints to a prosecuting attorney or other law enforcement officer concerning violations of the criminal law are absolutely privileged . . . Moreover, if the privilege applies to reports of possible wrongdoing to county medical examiners, county grievance committees of the state bar, state licensing boards, and the governor, we are hard pressed to divine a principled basis for concluding that it should not also apply to reports of possible criminal activity to a police officer. (*citations omitted*.)⁹⁵

The Supreme Court of Oregon reversed the court of appeals in no uncertain terms.⁹⁶ In doing so, the court relied primarily on the historical precedent of the nineteenth century and the influential commentary from the beginning of the twentieth. Specifically, the court stated:

[t]he distinction at common law between statements made in court, which carried an absolute privilege, and statements made to the police, which carried a qualified privilege, was based on practical considerations. In court, parties, lawyers, judges, jurors, and witnesses must be free to risk impugning the reputations of others, in order to discharge public duties and protect individual rights.

* * *

[B]y contrast, a citizen making an informal statement to police should not enjoy blanket immunity from an action; instead, such statements

92. *Id.*

93. *DeLong*, 13 P.3d at 1013.

94. *Id.* at 1015.

95. *Id.*

96. *DeLong*, 47 P.3d at 12.

should receive protection only if they were made in good faith, to discourage an abuse of the privilege.⁹⁷

Then the court went further. Recognizing that the earlier *Ducosin* case did not deal with a judicial or quasi-judicial, i.e., formal, proceeding, and was therefore contrary to the privilege doctrine as conceptualized historically, the court disavowed *Ducosin*. Specifically, the court stated:

[f]rom a historical perspective, the conclusion in *Ducosin* that the absolute privilege applied [to statements to the county medical officer] is somewhat surprising, particularly in light of the prevailing common-law rule that statements accusing others of crime were accorded a qualified rather than an absolute privilege

* * *

to the extent that the *dictum* in *Ducosin* can be read to suggest that such statements are absolutely privileged, it is disavowed. We are satisfied that the prevailing common-law rule—that informal statements to police made before the initiation of criminal proceedings enjoy only a qualified privilege—is the appropriate one.⁹⁸

Thus, after an earlier court slightly opened Pandora's box, the *DeLong* court slammed it shut. By contrast, when a California appellate court opened Pandora's Box, it remained open for two decades and many ills escaped; they are currently visiting themselves on the citizens of California.

B. California

1. The Historical Evolution of the Privilege Doctrine in California

For over a century, dating back to 1872, California had adopted and applied the privilege doctrines as dictated by precedent. That year, California codified the common law privilege in § 47 of its civil code. As originally enacted, the section read in relevant part that

[a] privileged publication was one made:

"1. In the proper discharge of an official duty;

"2. In testifying as a witness in any proceeding authorized by law to a matter pertinent and material, or in reply to a question allowed by the tribunal.

"3. In a communication, without malice, to a person interested therein, by one who was also interested, or who stood in such a relation to the

97. *Id.* at 11-12.

98. *Id.* at 11.

former as to afford a reasonable ground for supposing his motive for the communication to be innocent, or who was requested by him to give the information;⁹⁹

The current version of § 47 reads in relevant part:

A privileged publication or broadcast is one made:

(a) In the proper discharge of an official duty.

(b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law

* * *

(c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.¹⁰⁰

By its plain meaning, § 47(b) applied an absolute privilege only in the judicial or quasi-judicial context and did not extend an absolute privilege to police reports.

Rather, regarding police reports, the rule in California had always been that private citizens who file police reports are deserving of a qualified privilege. One of the earliest cases to establish this rule, decided over a century ago, was *Miller v. Fano*.¹⁰¹ *Miller* involved a plaintiff who was arrested by the police after having been mistakenly identified by the defendant as a seller of stolen railroad tickets. The court held that the defendant could not be liable for the mistaken identification because he had acted in good faith; the court added that “[n]o doubt, if a person should willfully identify the wrong man as being the criminal, for the purpose of having him arrested and prosecuted, and on such identification he should be arrested, such person [would be liable.]”¹⁰²

Miller was followed by, expounded upon, and expanded by a number of courts, including *Gogue v. MacDonald*.¹⁰³ In *Gogue*, the plaintiff alleged that the defendant reported certain facts to a justice of the peace who then issued a warrant for the plaintiff’s arrest. In holding that the plaintiff’s complaint failed to state a cause of action, the court emphasized that “[t]here is no

99. CAL. CIV. CODE § 47 (Deering 2005) (historical note).

100. *Id.* at § 47(b).

101. 66 P. 183 (Cal. 1901).

102. *Id.* at 184.

103. 218 P.2d 542 (Cal. 1950).

allegation of bad faith, such as willful falsity or malice, in the defendant's statement of the facts to the justice of the peace."¹⁰⁴

Continuing this trend well into the twentieth century was *Du Lac v. Perma Trans Products, Inc.*¹⁰⁵ *Du Lac* involved a plaintiff who alleged that defendants, who were business competitors, had him arrested. The plaintiff claimed that the defendants knew that the accusations they made to the police were false. Based on the allegedly false statements in the police report, the plaintiff brought an action for false imprisonment. The trial court dismissed the complaint; the appellate court reversed the dismissal and, specifically relying on the cases discussed above, held:

[i]n our view, a different rule controls when an arrest occurs because the defendant knowingly gave the police false or materially incomplete information, of a character that could be expected to stimulate an arrest. Such conduct instigates, encourages, and invites the arrest that follows; hence, such conduct can be a basis for imposing liability for false imprisonment.¹⁰⁶

This one-hundred-year-old line of cases was recently applied in *Devis v. Bank of America*.¹⁰⁷ *Devis* involved a plaintiff patron who sued a defendant bank for negligence and defamation based on an erroneous report to the police that the plaintiff was trying to cash a stolen check. The report had led to the plaintiff's arrest and jailing. The court dismissed the action, in part because "appellants have not alleged that the Bank acted without good faith."¹⁰⁸ In addressing the specific issue of what type of privilege § 47 grants to police reports, the court stated that "controlling authority establishes that the privilege applies only if the erroneous report to the police is made in good faith."¹⁰⁹

104. *Id.* at 543; accord *Hughes v. Oreb*, 228 P.2d 550 (Cal. 1951); *Turner v. Millen*, 257 P.2d 15 (Cal. 1953).

105. 163 Cal. Rptr. 335 (Cal. Ct. App. 1980) *rev'd in part*, 81 P.3d 244 (Cal. 2004).

106. *Id.* at 337 (citing *Pearson v. Galvin*, 454 P.2d 638 (Or. 1969)); *Jensen v. Barnett*, 134 N.W.2d 53 (Neb. 1965); *Wehrman v. Liberty Petroleum Co.* 382 S.W.2d 56 (Mo. Ct. App. 1964)).

107. 77 Cal. Rptr. 2d 238 (Cal. Ct. App. 1998).

108. *Id.* at 242.

109. *Id.*

2. The Unprecedented Holding in *Williams* and the Dissent in *Fenelon*

Suddenly, in 1982, in the midst of this common law analysis, *Williams v. Taylor*,¹¹⁰ from the third district of California, concluded that the police reporting privilege was absolute. Specifically, the court stated:

[i]n our view, a communication concerning possible wrongdoing, made to an official governmental agency such as a local police department, and which communication is designed to prompt action by that entity, is as much a part of an "official proceeding" as a communication made after an official investigation has commenced. (See *Imig v. Ferrar* (1977) 70 Cal. App. 3d 48, 55, 138 Cal. Rptr. 540.) After all, "[t]he policy underlying the privilege is to assure utmost freedom of communication between citizens and public authorities whose responsibility it is to investigate and remedy wrongdoing." (*Ibid.*) In order for such investigation to be effective, "there must be an open channel of communication by which citizens can call his attention to suspected wrongdoing. That channel would quickly close if its use subjected the use to a risk of liability for libel. A qualified privilege is inadequate under the circumstances . . . The importance of providing to citizens free and open access to governmental agencies for the reporting of suspected illegal activity outweighs the occasional harm that might befall a defamed individual. Thus the absolute privilege is essential." (*King v. Borges* (1972) 28 Cal. App. 3d 27, 34, 104 Cal. Rptr. 414.) And, since the privilege provided by section 47, subdivision 2, is absolute, it cannot be defeated by a showing of malice. (*Royer v. Steinberg* (1979) 90 Cal. App. 3d 490, 499, 153 Cal. Rptr. 499.)¹¹¹

The *Williams* court did no further analysis of the issue; the analysis, quoted in its entirety above, is deeply flawed on two levels. First, none of the cases cited by the court as precedent deal with police reports or other reports in the public interest. Rather, they deal with reports made to entities created by legislative bodies and limited by notice and opportunity-to-be-heard due process provisions, i.e., judicial or quasi-judicial entities authorized by law to conduct official proceedings.¹¹² As such, the cases in no way support the notion that reports to the police warrant an absolute privilege.

110. 181 Cal. Rptr. 423 (Cal. Ct. App. 1982).

111. *Id.* at 428.

112. For a contextual discussion of *Imig*, see *supra* notes 26 and 32 and accompanying text. For a contextual discussion of *King*, see *supra*, notes 27 and accompanying text.

Even more fundamentally, and striking at what is clearly the heart of the matter, the statement that "effective investigation requires an open channel of communication that would not be possible if a qualified privilege applied instead [of an absolute privilege]"¹¹³ finds no support anywhere in California jurisprudence or California or American history.

As stated earlier, the precursor to § 47(b) was enacted in 1872; from that time until the *Williams* decision in 1982, California courts were unanimous in their view that police reports were deserving of a qualified privilege.¹¹⁴ For the thirteen decades from 1872 to the present, i.e., virtually the entire existence of the California Civil Code and the state of California itself, police reports received a qualified privilege and there is no evidence that effective investigation by and communication with the police has not been possible.¹¹⁵ Indeed, if the statement from *Williams* were correct, it would mean that California still does not have such police forces and will not until the population learns that the police reporting privilege is absolute. Such a notion is untenable. Rather, California has had functioning police forces that have effectively investigated and with whom communication has been possible from 1872 to the present.

Furthermore, as discussed earlier, virtually every other jurisdiction in the United States,¹¹⁶ including those governed by federal law,¹¹⁷ holds that police reports receive a qualified privilege. If *Williams* were correct, these jurisdictions too would be without the possibility of effective policing. The reality, of course, is that other states in the union have (and have had) functioning police forces with whom communication is possible and that effectively investigate reports of criminal behavior; on the federal level, the FBI and the Secret Service can also be communicated with effectively. No other view of history can seriously be entertained.

At the time of its publication, the *Williams* case was the subject of some scholarly commentary, most of it negative.¹¹⁸ The case, however, was not appealed to the Supreme Court of California.

113. See *supra* note 111.

114. See *supra* notes 101-106 and accompanying text.

115. See *supra* notes 99-106 and accompanying text.

116. See *supra* note 48 and accompanying text.

117. See, e.g., *Foltz*, 189 F.2d at 537 (report to FBI receives qualified privilege; cited in support of RESTATEMENT (SECOND) OF TORTS § 598). See also *United States v. Dietrich*, 854 F.2d 1056 (7th Cir. 1988) (statements made to secret service agents do not qualify as "other proceedings" for purposes of FED. R. EVID. 801(d)(1)(A)); *United States v. Day*, 789 F.2d 1217 (6th Cir. 1986) (same rule applies to statements to police). Cf. *Briscoe v. LaHue*, 460 U.S. 325 (1983) (absolute privilege applies to witness who gives testimony at trial).

118. See, e.g., Paul S. Abalon, *Williams v. Taylor: Communications to Police with Absolute Immunity: Revenge Courtesy of Civil Code Section 47(2)*, 18 UWLA L. REV. 51, 56-57 (1986).

The flaws of the *Williams* analysis were identified in a subsequent California Court of Appeals case—*Fenelon v. Superior Court of San Diego County*.¹¹⁹ *Fenelon* involved a plaintiff doctor who brought a defamation action against defendants, alleging that they maliciously filed a false police report accusing him of soliciting murder. The defendants, relying on *Williams*, claimed that the statements in the police reports were absolutely privileged.¹²⁰

In holding the police reporting privilege qualified, the *Fenelon* majority criticized *Williams* in rather strong terms:

[i]gnoring the requirement that the “official proceeding” referred to in section 47(2) be quasi-judicial in nature, the court concluded that “a communication concerning possible wrongdoing, made to an official governmental agency such as a local police department, and . . . designed to prompt action by that entity, is as much a part of an ‘official proceeding’ as a communication made after an official investigation has commenced.” The court also ignored substantial authority in other jurisdictions which holds that statements made to police concerning suspected criminal activity are accorded only a qualified privilege.¹²¹

The observation and conclusion of the *Fenelon* majority, given that it comports with over a century of privilege doctrine, precedent, and policy, appeared to be beyond reproach, and the opinion had the potential to isolate and limit the aberration of *Williams*. In a dissenting opinion, however, the position taken by the *Williams* court found an equally ardent defender.¹²² In response to the criticism of *Williams*, the dissent stated:

[u]nder the foregoing cases and the Restatement, application of the privilege does not turn upon the official powers of the particular person to whom an offending communications has been made. To suggest, as the majority does, that the privilege applies only when a communication has been made to a quasi-judicial or quasi-legislative body ignores the fact that in *Pettitt* the privilege was applied to communications between alleged conspirators, that in *Lerette* the privilege was applied to a letter sent to a bank officer, that in *Izzi v. Rellas* the recipient was a private attorney, and that in *Block* a district attorney received the information which caused the plaintiff’s damage. Rather than focusing on the powers of the person who receives a communication, the California cases and the Restatement require that

119. 273 Cal. Rptr. 367 (Cal. Ct. App. 1990).

120. *Id.* at 368.

121. *Id.* at 370.

122. *Id.* at 371 (Benke, J., dissenting).

we look to the aims of the communication. If the communication is in anticipation of or designed to prompt official proceedings, the communication is protected.¹²³

The problem with the analysis of the dissent is that, here again, none of the authorities cited begin to support its notion that to whom the communication is directed is irrelevant and all involved communication to judicial or quasi-judicial officers or entities.¹²⁴ This is most true of the Restatement, which the dissent quite literally uses to begin and end its analysis. As described earlier, given the fact that the Restatement uses cases involving reports to the police as the primary source material for the entire public interest qualified privilege, it is inconceivable that the Restatement can be legitimately cited for the proposition that police reports should be accorded an absolute privilege.¹²⁵

3. The Nadar of Aberrant Interpretation of the Police Reporting Privilege

Subsequent to *Williams*, and still without guidance from the Supreme Court of California, lower courts in California, usually without analysis, simply began adopting the position of *Williams* and the *Fenelon* dissent on the one hand or the *Fenelon* majority on the other. Quantitatively, the *Williams* view prevailed, and California became the first jurisdiction in history in which, at least among a core group of middle-level appellate courts, the police reporting privilege was being mischaracterized as absolute.¹²⁶

123. *Id.* at 372 (internal citations omitted).

124. *Fenelon*, 273 Cal. Rptr. at 371-72. Perhaps the best example of this is *Pettitt v. Levy*, 104 Cal. Rptr. 650, 652 (Cal. Ct. App. 1972) which, in complete contradiction to Justice Benke's assertion, relied exclusively on the fact that the statements were made during a quasi-judicial proceeding and directed at quasi-judicial officers, stating:

Any publication made in a city planning commission or city council proceedings is within the protection of that section though the proceedings are not strictly judicial. The privilege extends to persons who are not parties but who are in the position of the defendants herein, being witnesses or interested members of the public desiring to oppose the granting of a variance to plaintiffs. (citations omitted).

Pettitt, 104 Cal. Rptr. at 652.

See also *Block v. Sacramento Clinical Tales, Inc.*, 182 Cal. Rptr. 438 (Cal. Ct. App. 1982) (statements made to district attorney); *Brody v. Montalbano*, 151 Cal. Rptr. 206 (Cal. Ct. App. 1978) (statements made to school board); *Izzi v. Rellas*, 163 Cal. Rptr. 689 (Cal. Ct. App. 1980) (statements made by attorney in response to offer to set aside default judgment); *Herzog v. "A" Co.*, 188 Cal. Rptr. 155 (Cal. Ct. App. 1982) (section 47 inapplicable to litigation contemplated in bad faith); *Lerette v. Dean Witter Org.*, 131 Cal. Rptr. 592 (Cal. Ct. App. 1976) (statements made in demand letter preliminary to a judicial proceeding).

125. See *supra* notes 54-57 and accompanying text.

126. See *Hunsucker v. Sunnyvale Hilton Inn*, 28 Cal. Rptr. 2d 722 (Cal. Ct. App. 1994) (relying on *Williams*, 181 Cal. Rptr. at 423; *Fenelon*, 273 Cal. Rptr. at 371-74; RESTATEMENT (SECOND) OF TORTS §

(a) Perpetuating the Unprecedented and Stating the Unthinkable:
Hagberg v. California Federal Bank

This trend reached its nadir in *Hagberg*.¹²⁷ *Hagberg* involved a Hispanic female who sought to cash a Smith Barney check.¹²⁸ Instead, she found herself handcuffed, searched, and questioned by police and told she “looked like a criminal” by a bank employee.¹²⁹ Subsequently, she alleged that she was subjected to private racial profiling by California Federal—that the bank branch had a policy of singling out minority patrons and subjecting them to stricter security measures and higher fraud alert, that she herself was subjected to this policy, and that pursuant to this policy California Federal called the police and reported that she was attempting to cash a counterfeit check.¹³⁰ Based on the foregoing, Ms. Hagberg brought an action for violation of her

598, *supra* note 1). See also *Berioz v. Wahl*, 100 Cal. Rptr. 2d 905 (Cal. Ct. App. 2001) (reports made to the police in Mexico received only a qualified privilege, contrasted them with police reports made in California); *Passman v. Torkan*, 40 Cal. Rptr. 2d 291 (Cal. Ct. App. 1995) (citing *Williams*, 181 Cal. Rptr. at 23, in support of holding that letter to district attorney absolutely privileged); *Fremont Comp. Ins. Co. v. Super. Ct. of Orange County*, 52 Cal. Rptr. 2d 211, 216-17 (Cal. Ct. App. 1996), holding that reports to the district attorney and Department of Insurance Fraud Bureau are absolutely privileged. This holding, as with *Passman*, would appear to be beyond dispute, and *Fremont* actually used *Fenelon* to support its conclusion, to wit:

[t]he central point of the *Fenelon* majority was that reports outside a judicial or “quasi-judicial” context lacked “safeguards” such as notice, hearing and review. (*citations omitted*). But such, or similar, safeguards certainly inhere in reports to prosecutors and the Department of Insurance Bureau of Fraudulent Claims. As to prosecutors, by definition anything they do with a report of workers’ compensation fraud (beyond, of course, investigating the claim), will entail notice, hearing and review. As to the fraud bureau, a statute specifically protects the person being investigated against “unwarranted injury” by making the bureau’s investigation not subject to public inspection for the period of the investigation except insofar as the police or other law enforcement agency request it. (Ins. Code. § 1872.3, subds. (d) & (e)).

Fremont, 52 Cal. Rptr. 2d at 216-17.

Fremont, *supra* *intra*, went on to disagree with *Fenelon*, *supra* *intra*, regarding police reports, but in doing so relied exclusively on the dissent in *Fenelon*, *supra* *intra*, and *Williams*, *supra* *intra*; *Johnson v. Symantex Corp.*, 58 F. Supp. 2d 1107 (N.D. Cal. 1999) (relying on *Williams*, *supra* *intra* line of cases.). But see, *Devis v. Bank of Am.*, 77 Cal. Rptr. 2d 238 (Cal. Ct. App. 1998):

[a]lthough some recent case law holds that the section 47 privilege is absolute, so that it cannot be defeated by a showing of malice (*citations omitted*), we believe that controlling authority establishes that the privilege applies only if the erroneous report to the police is made in good faith. (*citations omitted*).

Devis, 77 Cal. Rptr. 2d at 242.

127. *Hagberg v. Ca. Fed. Bank*, 81 P.3d 244 (Cal. 2004).

128. *Id.* at 245.

129. *Id.* at 246.

130. *Id.*

civil rights, i.e., discrimination based on race by a public accommodation, and for false imprisonment.¹³¹ The bank countered by claiming that everything alleged was absolutely privileged by § 47(b) because the police were called.¹³²

The case went all the way up to the Supreme Court of California.¹³³ The court squarely addressed the issue of whether the police reporting privilege was absolute or qualified, and on January 9, 2004, by a bare majority, the court became the first court of last resort in the three hundred fifty year history of privilege law to hold that the police reporting privilege was absolute.¹³⁴

The seven member court was deeply divided. The dissent, in an opinion written by Justice Janice Rogers Brown and joined by Justices Baxter and Werterger, favored retaining a qualified privilege for police reports.¹³⁵ The dissent based its conclusion on the history of and policies behind the development of privilege law in California, California case law, and, perhaps most critically, the relationship of § 47(b) to other California statutes to which the privilege is relevant, including and especially those statutes dealing with reporting child and elder abuse.¹³⁶

The four members of the court constituting the majority, in an opinion written by Chief Justice George and joined by Justices Chin, Kennard, and Mareno, held that the police reporting privilege was absolute.¹³⁷ As the opinion is among the first to ever hold the privilege absolute and the first written by a court of last resort to do so, it faced a significant challenge in marshalling authority in support of its position. It does not appear that the challenge has been met; the arguments used often appear to lack support and relevance, and portend consequences that are unsettling.

Specifically, after giving some of the facts and quoting § 47(b), the court began its analysis by reciting a statement of privilege policy. The court stated:

[w]e have explained that the absolute privilege established by section 47(b) serves the important public policy of assuring free access to the courts and other official proceedings. It is intended to “assure utmost freedom of communication between citizens and *public authorities whose responsibility is to investigate and remedy wrongdoing.*” We have explained that both the effective administration of justice and the citizen’s right of access to the government for redress of grievances would be threatened by permitting tort liability for communications

131. *Id.*

132. *Hagberg*, 81 P.3d at 246.

133. *Id.* at 248.

134. *Id.*

135. *Id.* at 261.

136. *Id.* at 261-62 (Brown, J., dissenting).

137. *See Hagberg*, 81 P.3d at 244.

connected with judicial or other official proceedings. Hence, without respect to the good faith or malice of the person who made the statement, or whether the statement ostensibly was made in the interest of justice, “courts have applied the privilege to eliminate the threat of liability for communications made during all kinds of truth-seeking proceedings: judicial, quasi-judicial, legislative and other official proceedings.” (*citations omitted; emphasis in original.*)¹³⁸

Few could quibble with this premise; it is, however, irrelevant to the police reporting privilege. It is, instead, by its very terms, an articulation of the judicial, i.e., “judicial, quasi-judicial, legislative, and other official proceedings,”¹³⁹ privilege.

Further indication that the majority is relying on policies not applicable to the police reporting privilege flows from the language quoted above to the effect that “access” to the police would be “threatened” if malice triggered liability.¹⁴⁰ Again, such a notion is untenable. As discussed earlier, every other jurisdiction in the country still extends only a qualified privilege to police reports.¹⁴¹ If the majority is correct, this means that the citizens of these jurisdictions have never had, and still do not have, effective access to the police. The same situation exists in California. In the words of the dissent:

Section 47(b) was enacted in 1872, and its relevant language has existed since an 1873-1874 amendment. Not until 1982, however, was it ever applied to reports to police. (*citation omitted*). For more than a century prior to *Williams*, the citizens of California reported crimes to police, and there is no evidence they were hesitant to do so because of the common law rule that such reports were subject to only a qualified privilege.¹⁴²

Thus, the majority premises its entire discussion on a thesis that would seem to be irrelevant and at odds with over a century of Californian and American jurisprudence and history.

Next, the court recites a plethora of cases that have discussed and applied the judicial privilege in the judicial and quasi-judicial context.¹⁴³ The discussion is accurate, but, as with the judicial privilege policy statement that began its discussion, it would seem to be irrelevant to the police reporting privilege.

138. *Id.* at 249.

139. *Id.*

140. *Id.*

141. *See supra* notes 48, 112 and accompanying text.

142. *Hagberg*, 81 P.3d at 260 (Brown, J., dissenting).

143. *Id.* at 249-51.

Then, the court finally turns to a discussion of cases dealing with police reports. Here, the court focuses on the only thing it can—the line of cases beginning with *Williams* and the dissent in *Fenelon*.¹⁴⁴ The flaw in this line of cases has been discussed earlier in this article; the discussion need not be repeated here. It is in trying to bolster the credibility of *Williams* and the *Fenelon* dissent, however, that the court's reasoning becomes troubling, thus warranting scrutiny.

In an attempt to bolster *Williams*, the Court states:

In the years following the decision in *Williams*, (citation omitted) and the developing weight of authority adhering to its holding and applying the *section 47(b)* privilege to various communications intended to instigate official investigation into wrongdoing, the Legislature has amended *section 47(b)* without indicating disapproval of those cases.¹⁴⁵

There are at least two problems with the majority's legislative inaction argument. First, to the extent that this argument is relevant, it completely undercuts the majority's position when it is applied to § 47(b). As discussed earlier, the relevant language of § 47(b) has existed since 1872. From that time until the decision was issued by the middle level appellate court in *Williams* in 1982, every California court, including the California Supreme Court on at least three occasions, had held that the police reporting privilege was qualified.¹⁴⁶ During this period, § 47(b) was amended six times, but never, in all of these decades, amended in response to those cases that the majority views as inconsistent with the statute.¹⁴⁷ In addition, *Fenelon*, which disagreed with *Williams*, "has also existed for 13 years without any legislative response,"¹⁴⁸ and *Devis v. Bank of America* has existed for seven years.¹⁴⁹ Thus, in direct contradiction to the majority's conclusion, the legislative inaction argument supports the view that the police reporting privilege is qualified.

Beyond this, however, the entire legislative inaction argument is invariably troubling. California courts have called it a "slim reed."¹⁵⁰ Too

144. *Id.* at 251-56.

145. *Id.* at 255.

146. *Miller v. Fano*, 66 P. 183 (Cal. 1901), *overruled by Hagberg*, 81 P.3d at 244; *Gogue v. MacDonald*, 218 P.2d 542 (Cal. 1950); *Hughes v. Oreb*, 228 P.2d 550 (Cal. 1951); *Turner v. W. Union Tel. Co.*, 257 P.2d 15 (Cal. 1953), *overruled by Hagberg*, 81 P.3d at 244.

147. CAL. CIV. CODE § 47 (Deering 2005) (Historical Note); *see also Lewis v. Dunne*, 66 P. 478, 482 (Cal. 1901) (act declared unconstitutional).

148. *Hagberg*, 81 P.3d at 261 (Brown, J., dissenting).

149. *Devis*, 77 Cal. Rptr. 2d 238.

150. *Quinn v. California*, 539 P.2d 761 (Cal. 1975).

often it is used, as the majority has used it here, to justify a position which finds no substantive support in the plain meaning or legislative history of a statute.¹⁵¹

The other statutory interpretation argument advanced in an attempt to support *Williams* is that that § 47(b) is somehow unique and therefore requires interpretation to begin with. On this point, this majority states:

As one court explained, with reference to the many sister-state decisions cited by the *Fenelon* majority, “eighteen of the nineteen cases merely apply the common law privilege for good faith communication between interested parties. . .or similar case law precedent. While the nineteenth case, [citation], did involve the application of a statutorily created privilege, the possibility of an *absolute* privilege did not arise because the statute at issue explicitly applied only to communications made in ‘good faith.’ [Citations] In none of the nineteen cases was the scope of a statutory privilege for ‘official proceeding[s]’ discussed.” (citation omitted).¹⁵²

This argument is troubling as well. As is clear from the plain meaning of § 47(b), the statute is nothing more than a codification of the common law judicial privilege as articulated and typically applied in American jurisprudence. In relevant part, the statute states as simply and directly as can be formulated that an absolute privilege applies to any “legislative proceeding,” “judicial proceeding,” and “other proceeding authorized by law.”¹⁵³ It is difficult to imagine a more straightforward articulation of this absolute privilege, or one that more simply and directly tracks the common law. The formulation is not unique and requires no unique interpretation. In the words of the dissent:

the majority does not dispute[] that the overwhelming weight of authority in the rest of the country is that a qualified, not absolute, privilege applies to reports to police. While the majority dismisses this authority on the ground that cases from our sister states do not discuss statutes with language similar to that of section 47(b), the majority does not in fact rely on the language of section 47(b) in reaching its conclusion regarding the scope of immunity for reports to police. Rather, it relies primarily on case law interpreting section 47(b), which in turn relies solely on the public policy consideration that citizens need open channels of communication with the police.

151. See *id.*; *Hagberg*, 81 P.3d at 261 (Brown, J., dissenting).

152. *Hagberg*, 81 P.3d at 254 (quoting *Johnson v. Symantec Corp.*, 58 F. Supp. 2d 1107, 1112 (N.D. Cal. 1999)).

153. CAL. CIV. CODE § 47(b).

Typically when construing a statute, we seek to determine the Legislature's intent. Here, the majority virtually ignores its obligation to interpret the statute By failing to examine legislative intent, the majority overlooks the critical fact that the Legislature has already restricted the open channels of communication so central to the majority's position.¹⁵⁴

In an attempt to bolster the dissent in *Fenelon*, the majority quotes with approval from that dissenting opinion. Specifically, the majority states:

As Justice Benke pointed out in her dissent in *Fenelon*, prior case law establishes that the critical question is the *aim* of the communication, not the forum in which it takes place. If the communication is made "in anticipation of or [is] designed to prompt official proceedings, the communication is protected." (citation omitted).¹⁵⁵

The problem here is that the majority omitted the first portion of the paragraph from which it is quoting. The omitted portion states that the "Restatement require[s]" the courts to look to the "aim[s] of the communication" and thereby compels the conclusion that the police reporting privilege is absolute.¹⁵⁶ As stated previously, there is no better authority than the Restatement for the contrary conclusion that the police reporting privilege is qualified; cases so holding form the very basis of the relevant section of the Restatement. The majority avoids dealing with this eminent, contrary authority by simply omitting any reference to the Restatement and by quoting Justice Benke's words without including the reference to the Restatement she misconstrued.¹⁵⁷ Given the continued misinterpretation of the Restatement (Second) of Torts by the California courts, it is perhaps past time to let the cases that form the basis of the police reporting privilege of § 598 speak for themselves. The relevant language of these cases is set forth below, in its entirety.¹⁵⁸

154. *Hagberg*, 81 P.3d at 261 (Brown, J., dissenting).

155. *Id.* at 254.

156. *Fenelon*, 273 Cal. Rptr. at 372.

157. *Compare Hagberg*, 81 P.3d at 254 with *Fenelon*, 273 Cal. Rptr. at 372.

158. *Marsh v. Commercial & Sav. Bank of Winchester, Va.*, 265 F.Supp. 614 (W.D. Va. 1967):

From the facts in the case at bar, we see that the two bank employees responded to questions asked them by investigating police officers at the bank, and later in Roanoke at the police station. This participation was a non-officious act of cooperation with the officers who had a legal duty to apprehend the bank robber, while the employees had a social and moral duty to cooperate. We find, as a matter of law, that the two occasions, upon which the plaintiff alleges the defamation occurred, were occasions of qualified privilege.

Marsh, 265 F.Supp. at 621.

Newark Trust Co. v. Brewer, 141 A.2d 615 (Del. 1958):

Finally, near the conclusion of its analysis, the majority states:

Since the imputation of the crime of forgery was made . . . to a police officer in connection with the latter's official duty to investigate the forgeries, it was clearly a privileged utterance, if made without malice. (citation omitted). Counsel were and are agreed upon the applicability of this principle of law.

Newark Trust, 141 A.2d at 617.

Hutchinson v. New England Tel., 214 N.E.2d 57 (Mass. 1966):

The pertinent principles are well established, but difficulty lies in their application to somewhat novel facts. We assume that Mrs. Doyle's statements to the police amounted to the charge of a crime against the plaintiff, and constituted slander for which she and the company might be liable. These statements were conditionally privileged. (citation omitted). Public policy demands that police investigations should not be thwarted by inability to obtain answers from persons who know the facts but fear civil actions. It is the duty and right of every citizen, when called upon by the proper officer, to communicate information as to the commission of a crime. (citations omitted). As the absence of express malice is conceded, there remains the question whether the privilege was lost because the charge was made recklessly.

Hutchinson, 214 N.E.2d at 59.

Faber v. Byrle, 229 P.2d 718 (Kan. 1951):

Touching the question involved in the first cause of action, namely, defendant's statement to an officer, we have held a communication to an officer of the law charging a person with a crime, made in an honest effort to recover stolen property and for the purpose of detecting and punishing the criminal, is privileged and that where in such an action there is no proof of malice, a demurrer to the evidence is rightly sustained. (citation omitted). In a later similar slander case, (citation omitted) we said: 'It is true, as defendant contends, that it is the duty of every one to assist in the detection of crime, and to that end he should communicate to the proper officer what he knows regarding the commission of a crime (citation omitted). Statements in themselves slanderous are protected as privileged if made in good faith in prosecuting an inquiry into a suspected crime.' (citation omitted).

Faber, 229 P.2d at 722.

Joseph v. Baars, 125 N.W. 913 (Wis. 1910):

[T]he defendant must show that he spoke the slanderous words to an officer of the law charged with the power or duty to arrest or prosecute (or one whom he honestly believed to be such officer) in good faith believing his communication to be true and acting simply from a sense of public duty. (citation omitted) 'For the sake of public justice, charges and communications which would otherwise be slanderous are protected if bona fide made in the prosecution of an inquiry into a suspected crime.' There must be good-faith belief in the fact that a crime has been committed and good-faith belief that the person to whom communication is made is a proper person or officer with whom the information should be lodged to the end that justice should be vindicated.

Joseph, 125 N.W. at 913-14.

Popke v. Hoffman, 153 N.E. 248 (Ohio Ct. App. 1926):

Certainly this information, if given in good faith to a police officer in the line of his duty, would be under a qualified privilege, and no action for slander would lie in the absence of evidence showing that the information was moved by actual malice in making the statement. Under the holding of the courts, the occasion would rebut the *prima facie* inference of malice, and the burden would rest on the plaintiff to show malice, in fact, before he would be entitled to recover.

Popke, 153 N.E. at 249.

A statement to the police that is designed to prompt investigation of crime is not different, in this respect, from statements designed to prompt investigation into the tax exempt status of a hospital, the failure of an entity to honor a contractual obligation to a charitable trust, the failure of a real estate broker to release funds from escrow, the complaint of a physician that another physician performed unnecessary surgery, or the many other examples noted above of complaints intended to elicit administrative action.¹⁵⁹

Here the majority has confused the judicial privilege with the police reporting privilege. This is the same error that was made by the Oregon Appellate Court and that was corrected by the Oregon Supreme Court in *DeLong*.¹⁶⁰

After completing its discussion of the police reporting privilege, the court attempted to justify its conclusion by relating it to child and elder abuse reporting statutes and state Civil Rights statutes. It is here that the majority's opinion becomes unsettling.

C. Undermining Child and Elder Protection Statutes

One of the unsettling consequences of the majority's misinterpretation of § 47(b) is that the California Supreme Court has now put in place a system in which the reporters of the crimes of child and elder abuse receive less protection than reporters of any other crime in the California penal code. Within the matrix created by the court, the reporters of these two crimes are the only reporters denied the absolute access to the police that the court believes vital to a functioning criminal justice system. To the extent that the majority opinion sends a message to the reporters of these two horrific crimes, one shudders to think what it is.

Specifically, Penal Code § 11172, subdivision (a) (§ 11172(a)), enacted in 1980, extends an absolute privilege to statutorily mandated reporters of

159. *Hagberg*, 81 P.3d at 254.

160. *See DeLong*, 13 P.3d at 1012. There is one other distinction. Typically, complaints to the quasi-judicial agencies mentioned are not alone sufficient to authorize a deprivation of liberty, but, as the majority's own language suggests, are "intended to elicit administrative action." *Hagberg*, 81 P.3d at 254. By contrast, a report to the police is in and of itself enough to impose a significant deprivation of liberty, including being arrested, detained, handcuffed, interrogated, searched, photographed, fingerprinted, subject to force (even deadly force), etc. In the words of Justice Brown,

The ramifications of an intentionally false report of suspected criminal activity to police are enormous. Citizens arrested pursuant to such a report will be stigmatized, and forever thereafter have to note the arrest on job, credit and housing applications. Assertions that the charges were dropped, and of ones actual innocence, will fall on deaf ears.

Hagberg, 81 P.3d at 264 (Brown, J., dissenting).

child abuse or neglect under the Child Abuse and Neglect Reporting Act.¹⁶¹ The same section extends a qualified privilege to nonmandated reporters, i.e., to any person who, though not statutorily mandated, chooses to make such a report.¹⁶² Further, § 11172(a) specifically provides for civil liability against nonmandated reporters if they maliciously file a false report.

In the words of the statute, if:

it can be proven that a false report was made and the person knew that the report was false or was made with reckless disregard of the truth or falsity of the report, [. . . then] any person who makes a report of child abuse or neglect known to be false or with reckless disregard of the truth or falsity of the report is liable for any damages caused.¹⁶³

Welfare and Institutions Code § 15634, subdivision (a) (§ 15634(a)), enacted in 1985, contains a similar provision for reports of elder and dependent-adult abuse.¹⁶⁴ In discussing the Child Abuse and Neglect Reporting Act, the majority states that “[t]here is evidence that in enacting the child abuse reporting provisions, the Legislature understood that the *general* rule was that reports to the police concerning criminal activity were privileged.”¹⁶⁵

Based on the foregoing, the only plausible conclusion is that those who report crimes to the police generally receive a qualified privilege, nonmandated reporters of child abuse continue to receive this qualified privilege, and individuals who are mandated by statute to report a specific crime receive extra protection from liability—an absolute privilege.¹⁶⁶ In this way reporting is encouraged, maliciously filed false reports are discouraged, and mandated reporters get the increased, meaningful, and absolute protection they deserve and indeed must have in order to give the entire statutory scheme the best chance of working.¹⁶⁷ Yet, remarkably, the majority reached the opposite conclusion—that reports to the police typically receive an absolute privilege and that the legislature purposefully chose to downgrade the protection extended to nonmandated reporters of child abuse to a qualified privilege.¹⁶⁸

It is difficult to know how to respond to such a conclusion. It is, at best, utterly inconsistent with the goals of the California legislature. In any event, the majority’s conclusion results in the victims of the crimes of child and elder

161. CAL. PENAL CODE § 11172(a) (Deering 2005).

162. *Id.*

163. *Id.*

164. CAL. WELF. & INST. CODE § 15634(a) (Deering 2005).

165. *Hagberg*, 81 P.3d at 256, n.6.

166. *See, e.g.*, *Storch v. Silverman*, 231 Cal. Rptr. 27, 31 (Cal. Ct. App. 1986) (Legislature sought to, *inter alia*, increase reporting of child abuse by granting absolute immunity to mandatory reporters.).

167. *Id.*

168. *Hagberg*, 81 P.3d at 256 n.6.

abuse being the least valued in terms of protecting those who report the crimes committed against them. The reporter of every other crime receives an absolute privilege; only reporters of child and elder abuse receive a qualified privilege. Working with the majority's premise, its conclusion means that the reporters of child and elder abuse are "threatened" by tort liability, while individuals who maliciously file false reports regarding any other offense, no matter how petty or serious, are not.¹⁶⁹ The reporters of child and elder abuse are denied "the citizen's right to access the government for redress of grievances," while individuals who maliciously file false reports regarding any other offense are not.¹⁷⁰ The reporters of the crimes of child and elder abuse do not serve "the effective administration of justice," while individuals who maliciously file false reports regarding every other crime do.¹⁷¹

It is inconceivable that the California State Legislature concocted such a statutory scheme; there is nothing in the plain meaning or legislative history of any California statute to suggest that it did. Rather, this unsettling anomaly only results because the majority inappropriately elevated—from qualified to absolute—the privilege "generally" extended to those who report crimes. In the words of the dissent:

It seems unlikely the Legislature would accord only a qualified privilege for those individuals who may be the only voice for reporting crimes against the most vulnerable of victims, but grant absolute immunity to those unsympathetic individuals who falsely report other types of crimes.¹⁷²

Unlikely indeed, but such is now the law in California.

D. Undermining Protection from Racial Discrimination

A second unsettling consequence of the majority's misinterpretation of § 47(b) is that the California Supreme Court has actually held that it is an open question as to whether California Civil Rights law prevents a business from adopting a policy of maliciously filing racially motivated false police reports so as to discourage patronage of minority customers.

Specifically, after finishing its discussion of § 47(b) and turning to a discussion of civil rights, the court stated:

[W]e have concluded that this is not an appropriate case in which to resolve the broad legal question whether proof that a business

169. *Id.* at 249.

170. *Id.*

171. *Id.*

172. *Id.* at 262 (Brown, J., dissenting).

establishment has called for police assistance (or has a policy of calling for police assistance) based on racial or ethnic prejudice could give rise to liability under the Unruh Civil Rights Act notwithstanding the provisions of section 47(b).¹⁷³

Once again, it is difficult to know what to make of this statement. It is one thing to say that the facts of a particular case do not constitute a civil rights violation; it is quite another for the highest court in a state, interpreting a state statute, to say that the legal question of whether a civil rights violation could exist, as a matter of law, is unresolved. In 2004, it would seem impossible that the Supreme Court of any state could suggest that there is anything “to resolve;” it would seem unthinkable that there might be an exception to prohibitions of racial discrimination in public accommodations, let alone an exception based on the common law police reporting privilege, that would shield a policy of discrimination based on race. Yet, there is no other way to interpret the above quoted language.

In the modern era of civil rights, the notion that a race based exception exists to prohibitions against racial discrimination in public accommodations is utterly without support. The notion that civil rights law might not prohibit a business covered by that law from having a policy of maliciously filing racially motivated false police reports so as to discourage patronage by minority customers is equally without support. Both notions are anathema to the concepts of civil rights and equal treatment.¹⁷⁴

The issue of whether the police reporting privilege creates an exception to the prohibition against racial discrimination is not unresolved. Be it California or elsewhere, there are no race based exceptions to prohibitions against racial discrimination in public accommodations covered by civil rights statutes.¹⁷⁵ Specifically, in California, the prohibition against racial

173. *Hagberg*, 81 P.3d at 260.

174. This phenomenon is sometimes called private racial profiling, and has been the subject of scholarly and public commentary. *See, e.g.*, Regina Austin, “A Nation of Thieves”: *Securing Black People’s Right to Shop and Sell in White America*, 1994 UTAH L. REV. 147 (1994); *see also*, Stephen E. Haydon, *A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations*, 44 UCLA L. REV. 1207 (1997); James L. Fennessy, *Comment: New Jersey Law and Police Response to the Exclusion of Minority Patrons from Retail Stores Based on the Mere Suspicion of Shoplifting*, 9 SETON HALL CONST. L.J. 549 (1999) [hereinafter *Comment*]. This phenomenon has also been the subject of litigation. *See, e.g.*, *Lewis v. Doll*, 765 P.2d 1341, 1342 (Wash. Ct. App. 1989); *Robinson v. Town of Colonie*, 878 F.Supp. 387, 392 (N.D.N.Y. 1995); *K-Mart Corp. v. W.Va. Human Rights Comm’n*, 383 S.E.2d 277, 278 (W.Va. 1989). For a passionate articulation of this anathema nature of racial profiling in law enforcement generally, *see* The Department of Justice Fact Sheet: *Racial Profiling*, (June 17, 2003) at http://www.tsa.gov/interweb/assetlibrary/DOJ_racial_profiling.pdf.

175. The only exception to prohibition against discrimination in public accommodation are those based not on race, but on the “nature of the business” doctrine. *See, e.g.*, *Wynn v. Montgomery Club*, 168 Cal. Rptr. 878 (Cal. Ct. App. 1980) (permissible to exclude compulsive gambler from a gambling club);

discrimination is found in §§ 51 and 52 of the Unruh Civil Rights Act. Section 51 states:

All persons within the jurisdiction of this state are free and equal, no matter what their sex, race, color, religion, ancestry, national origin, disability . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.¹⁷⁶

The prohibition against racial discrimination was re-affirmed in the 2000 amendments to Unruh, which state in part:

Section 1(a). The Legislature hereby finds and declares all of the following: (1) Section 52.1 of the Civil Code guarantees the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state without regard to his or her membership in a protected class identified by its race, color, religion, or sex, among other things.¹⁷⁷

Finally, California Civil Code § 52 makes available to the victim of discrimination every remedy in the civil justice system, including equitable remedies, statutory penalties, actual damages, punitive damages, treble damages, and attorney's fees, and preserves other independent remedies available to the victim.¹⁷⁸ Again, the legislative language is utterly decisive.

Not surprisingly, the clarity with which the California legislature has condemned racial discrimination, and the totality of that condemnation, is beyond dispute. The language of the sections quoted above prevents any manifestation of discrimination based on race by any business whatsoever.

With the exception of *Hagberg*, the California courts have been equally clear and total in their condemnation of racial discrimination. They have held that the language of Unruh is "clear and unambiguous,"¹⁷⁹ that the act "is to be given a liberal . . . construction with a view to effect its object . . .,"¹⁸⁰ and that

Ross v. Forest Lawn Memorial Park, 203 Cal. Rptr. 468 (Cal. Ct. App. 1984) (permissible to exclude "punk rockers" from private funeral); Harris v. Capital Growth Investors XIV, 805 P.2d 873 (Cal. 1991) (permissible to exclude persons without qualifying incomes, competitors, and persons under 21); Kioire v. Metro Car Wash, 707 P.2d 195 (Cal. 1985) (impermissible for car wash to offer discounts to women only); *In re Cox*, 474 P.2d 992 (Cal. 1970) (impermissible for shopping center to exclude "individuals who wear long hair or unconventional dress, who are black . . .").

176. CAL. CIV. CODE § 51 (Deering 2005).

177. *Id.* at § 52.

178. *Id.*

179. See, e.g., *Kioire*, 707 P.2d 195, 196 (Cal. 1985).

180. *Winchell v. English*, 133 Cal. Rptr. 20, 21 (1976).

all manner of discriminatory acts by businesses, especially those that discriminate based on race, are prohibited.¹⁸¹

An examination of relevant case law proves there is no authority holding that a business policy of singling out patrons based on race can be countenanced under Unruh, regardless of application of § 47(b) to any particular "statement." If this were so, the implications for civil rights prohibitions against racial discrimination generally, and the Unruh Civil Rights Act specifically, would be exceedingly troubling; indeed, they would be beyond troubling.

Regarding the general civil prohibition, the case of *Lewis v. Doll*¹⁸² offers an example. In *Lewis*, the operators of a 7-eleven tried to enlist the police in enforcing a policy of limiting access to the store by African-American shoppers "because the store had recently experienced a problem with blacks shoplifting."¹⁸³ Clearly, such a civil rights violation would run afoul of Unruh. Yet, under the *Hagberg* court's view, the operator would be absolutely privileged in terms of civil liability to engage in this conduct because the operator made statements to the police. Similarly, under the *Hagberg* court's view, if the operator simply waited for an African-American to enter the store and then falsely reported to the police that she was a shoplifter, his conduct would be absolutely privileged.

Regarding Unruh, California cases offer a plethora of similar examples. In *Jones v. Kehrlein*,¹⁸⁴ a defendant who discriminated based on race when seating African-American ticket holders would be absolutely privileged to do so if he effectuated his policy by calling the police and falsely reporting as criminal any African-American who sought alternative seating.¹⁸⁵ In *Suttles v. Hollywood Turf Club*,¹⁸⁶ a racetrack that refused to offer African-American clubhouse seating would be absolutely privileged if it simply called the police and reported as criminal any African-American ticket holder who sought clubhouse seating.¹⁸⁷ In *Jackson v. Superior Court*,¹⁸⁸ a defendant bank that told a customer that an African-American investment counselor was perpetuating a "scam," and who called the police and reported that the counselor was committing a forgery, would likewise be beyond the reach of

181. See *Everett v. Superior Court*, 128 Cal. Rptr. 2d 418 (Cal. Ct. App. 2002); *Jackson v. Superior Court*, 36 Cal. Rptr. 2d 207 (Cal. Ct. App. 1994); *Jones v. Kehrlein*, 651 P. 55 (Cal. Ct. App. 1920); *Kiore*, 707 P.2d 195; *Suttles v. Hollywood Turf*, 114 P.2d 27 (Cal. Ct. App. 1941); *Winchell*, 133 Cal. Rptr. at 20.

182. 765 P.2d 1341 (Wash. Ct. App. 1989).

183. *Id.* at 1342.

184. *Jones*, 651 P. at 55.

185. *Id.*

186. 114 P.2d 27.

187. *Id.*

188. 36 Cal. Rptr. 2d 207 (Cal. Ct. App. 1994).

Unruh.¹⁸⁹ Most recently, in *Everett v. Superior Court (Premier Parks, Inc.)*,¹⁹⁰ the court held that a defendant theme park that falsely accused an African-American of violating park policy, placed him under citizen's arrest, chained him to a fence for two hours, and taunted him with derogatory epithets would be within the reach of Unruh.¹⁹¹

If the majority is correct, and the relationship between § 47(b) and Unruh is unresolved, it means that all of these acts of racial discrimination are potentially shielded by the phone call to the police; it means that a racist individual running a business could engage in these acts of racial discrimination without a civil rights consequence so long as the police are called. It means that the legislature, in enacting § 47(b) put, as a matter of law, acts and policies of racial discrimination beyond the reach of the civil rights statute that prohibits them.

Of course, the legislature did not do this. Once again, the entire problem only arises because the court has mischaracterized reports to the police to be absolutely privileged. Returning police reports to their rightful status of deserving of a qualified privilege is the only way of restoring the integrity of Unruh's total prohibition against racial discrimination in public accommodation.

V. CONCLUSION

The major issues regarding the absolute nature of the judicial privilege on the one hand, and the qualified nature of the police reporting privilege on the other, had appeared long-settled. The appearance was deceiving. Instead, what has happened recently regarding the police reporting privilege is quite extraordinary. At odds with centuries of English common law, the common law and statutory law of virtually every state, and federal law, some mid-level appellate courts and the Supreme Court in California have distorted the doctrine of absolute privilege by extending blanket immunity to those who maliciously file false police reports. In this, these courts stand alone. Beyond this, things have reached the point that one court—again the Supreme Court of California—has actually held that this already unprecedented view of absolute privilege potentially operates to shield acts of racial discrimination in public accommodation and operates to render the reporting of child and elder abuse the least protected reporting of any crime in the penal code.

The notions that: (1) a state legislature would extend an absolute privilege to individuals who maliciously file false reports regarding every crime in the penal code, but extend only a qualified privilege to those who

189. *Id.* at 207-08.

190. 128 Cal. Rptr. 2d 418 (Cal. Ct. App. 2002).

191. *Id.* at 420.

report the heinous crimes of child and elder abuse; and (2) a state legislature would intend that its civil rights law not prohibit a business from having a policy of maliciously filing racially motivated false police reports so as to discourage patronage by minority customers, are completely contradicted by history, precedent, and policy. A judicial opinion espousing such notions highlights the unsettling consequences of disregarding centuries of carefully balanced doctrine which was thoughtfully arrived at and appropriately entrenched. As for remedying the ills that have been released by the Supreme Court of California, hope still resides with the California Legislature.

