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# California Supreme Court Survey - A Review of Decisions: January 1994-February 1995

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# California Supreme Court Survey

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*The California Supreme Court Survey provides a brief synopsis of recent decisions by the supreme court. The purpose of the survey is to inform the reader of the issues that have been addressed by the supreme court, as well as to serve as a starting point for researching any of the topical areas. The decisions are analyzed in accordance with the importance of the court's holding and the extent to which the court expands or changes existing law. Attorney discipline and judicial misconduct cases have been omitted from the survey.*

# I. ARBITRATION AND AWARD

*A remedy fashioned by an arbitrator is within the scope of the arbitrator's authority if the remedy is rationally related to the contract and to the breach, as interpreted by the arbitrator:*
**Advanced Micro Devices, Inc. v. Intel Corp.**

## I. INTRODUCTION

In *Advanced Micro Devices, Inc. v. Intel Corp.*,[1] the California Supreme Court considered whether an equitable remedy, other than specific performance, fashioned by an arbitrator for a breach of contract was within the scope of the arbitrator's authority.[2] As a matter of first

1. 9 Cal. 4th 362, 885 P.2d 994, 36 Cal. Rptr. 2d 581 (1994). Justice Werdegar authored the majority opinion in which Chief Justice Lucas and Justices Arabian and George joined. *Id.* at 366-91, 885 P.2d at 996-1012, 36 Cal. Rptr. 2d at 583-99. Justice Kennard filed a dissenting opinion in which Justices Mosk and Spencer joined. *Id.* at 391-406, 885 P.2d at 1012-22, 36 Cal. Rptr. 2d at 599-609 (Kennard, J., dissenting).

2. *Id.* at 366-67, 885 P.2d at 996, 36 Cal. Rptr. 2d at 583. In February 1982, Advanced Micro Devices, Inc. (AMD) and Intel Corp. (Intel), two computer chip manufacturers, entered into a contract that provided for the mutual exchange of technical information. *Id.* at 368, 885 P.2d at 997, 36 Cal. Rptr. 2d at 584. The contract further provided for binding arbitration as a method of alternative dispute resolution. *Id.* After AMD invoked the arbitration clause to resolve disputes concerning product exchanges, Intel notified AMD of its intent to terminate the contract. *Id.* at 368 & n.3, 885 P.2d at 997 & n.3, 36 Cal. Rptr. 2d at 584 & n.3.

After four and a half years of arbitration, the arbitrator found that Intel breached the contract's implied covenants—including the covenant of good faith and fair dealing—and, consequently, fashioned an equitable remedy for AMD. *Id.* at 369, 885 P.2d at 997-98, 36 Cal. Rptr. 2d at 584-85. In paragraph five of the award, the arbitrator awarded AMD "a permanent, nonexclusive and royalty-free license to any Intel intellectual property embodied in the Am386." *Id.* at 370, 885 P.2d at 998-99, 36 Cal. Rptr. 2d at 585-86. In paragraph six of the award, the arbitrator awarded AMD a "two-year extension of certain patent and copyright licenses, insofar as they related to the Am386." *Id.* at 370-71, 885 P.2d at 999, 36 Cal. Rptr. 2d at 586. Thus, these provisions awarded AMD the use of certain intellectual property of Intel. *Id.* The other provisions of the award are no longer disputed. *Id.* at 371 n.6, 885 P.2d at 999 n.6, 36 Cal. Rptr. 2d at 586 n.6.

Pursuant to California Civil Procedure § 1286, AMD petitioned for court confirmation of the arbitrator's award. *Id.* at 371, 885 P.2d at 999, 36 Cal. Rptr. 2d at 586; *see* CAL. CIV. PROC. CODE § 1286 (West 1982 & Supp. 1995) (providing the powers of a court to confirm an arbitration award). Conversely, Intel petitioned for court correction of the award. *Advanced Micro Devices*, 9 Cal. 4th at 371, 885 P.2d at 999, 36 Cal. Rptr. 2d at 586; *see* CAL. CIV. PROC. CODE § 1286.6 (West 1982 & Supp. 1995)

impression, the court articulated the standard for judicial review of a remedy awarded by arbitrators.[3] The court adopted the "essence" test, traditionally used in federal labor arbitration, as the standard for judicial review.[4] Accordingly, the court reasoned that a remedy fashioned by an arbitrator is within the scope of the arbitrator's authority if the remedy bears a rational relationship to the contract and to the breach.[5]

Applying that standard to the instant case, the court found that the source of the remedies awarded by the arbitrator was the contract between Intel Corp. (Intel) and Advanced Micro Devices, Inc. (AMD), as interpreted by the arbitrator, and Intel's breach of the contract's implied covenants.[6] Thus, the court held that the remedy was rationally related to the contract and to the breach.[7] The court, therefore, upheld the relief awarded by the arbitrator because it was within the scope of his authority.[8]

## II. TREATMENT

### A. *The Majority Opinion*

Justice Werdegar, writing for the majority, noted that under California Civil Procedure Code sections 1286.2(d) and 1286.6(b), a court may vacate or correct an arbitration award for breach of contract if "[t]he arbitrators exceeded their powers."[9] The majority proffered that, gener-

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(providing the grounds for correction of an arbitration award). The court of appeal reversed the superior court's confirmation of the award, but "ordered the award corrected and confirmed rather than vacated." *Advanced Micro Devices*, 9 Cal. 4th at 371-72, 885 P.2d at 999, 36 Cal. Rptr. 2d at 586. *See generally* 6 CAL. JUR. 3D *Arbitration and Award* §§ 66-87 (1988 & Supp. 1994) (discussing the postarbitral judicial enforcement of the award); 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* § 40 (9th ed. 1990 & Supp. 1994) (discussing the vacation of an award). Because the court of appeal reviewed the controversy "de novo," the California Supreme Court granted review. *Advanced Micro Devices*, 9 Cal. 4th at 371-72, 885 P.2d at 999, 36 Cal. Rptr. 2d at 586.

For a discussion of the court of appeal's decision, see Donna M. Sadowy, Advanced Micro Devices v. Intel: *Do You Really Want to Arbitrate?*, 10 SANTA CLARA COMPUTER & HIGH TECH. L.J. 239 (1994). For a general discussion of the horizontal agreement between AMD and Intel, see Jerre B. Swann, Jr., *Protecting Intellectual Property Within Horizontal Exchange Relationships*, 2 J. INTELL. PROP. L. 363 (1994).

3. *Advanced Micro Devices*, 9 Cal. 4th at 367, 885 P.2d at 996, 36 Cal. Rptr. 2d at 583.

4. *Id.* at 377-81, 885 P.2d at 1003-06, 36 Cal. Rptr. 2d at 590-93.

5. *Id.* at 381, 885 P.2d at 1005-06, 36 Cal. Rptr. 2d at 592-93.

6. *Id.* at 383-84, 885 P.2d at 1007-08, 36 Cal. Rptr. 2d at 594-95.

7. *Id.* at 384, 885 P.2d at 1007-08, 36 Cal. Rptr. 2d at 594-95.

8. *Id.* at 391, 885 P.2d at 1012, 36 Cal. Rptr. 2d at 599.

9. *Id.* at 366, 885 P.2d at 996, 36 Cal. Rptr. 2d at 583 (citing CAL. CIV. PROC. CODE §§ 1286.2(d), 1286.6(b) (West 1982 & Supp. 1995) (providing the grounds for vacating or correcting an award, respectively)). *See generally* 6 CAL. JUR. 3D *Arbitra-*

ally, arbitrators' decisions regarding arbitrability are considered final because of the "substantial deference" given to the arbitrator.[10] In *Moncharsh v. Heily & Blase*,[11] the court explained two reasons for the rule of "arbitral finality."[12] First, parties agree to arbitration to avoid the delay and expense of going to trial.[13] Second, to hold otherwise would defeat the expectations of the parties.[14]

Intel contended that a "less deferential rule" should apply when the court reviews remedies awarded by an arbitrator than when the court reviews arbitrability. The court noted, however, that the California statutes fail to distinguish between the two.[15] The court further noted that the issues decided and the remedies awarded significantly overlap.[16] The court explained that the test for both is "whether the arbitrators have 'exceeded their powers.'"[17] Thus, the court reasoned that the general

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*tion and Award* § 80 (1988 & Supp. 1994) (discussing grounds for vacation of an award when an arbitrator exceeds his or her powers). California's private arbitration laws are codified in the California Code of Civil Procedure. *See* CAL. CIV. PROC. CODE §§ 1280-1294.2 (West 1982 & Supp. 1995). *See generally* 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* § 37 (9th ed. 1990 & Supp. 1994) (discussing arbitration statutes, including California's). For the text of the Federal Arbitration Act, see 9 U.S.C.A. §§ 1-14 (West 1988 & Supp. 1994).

10. *Advanced Micro Devices*, 9 Cal. 4th at 373, 885 P.2d at 1000, 36 Cal. Rptr. 2d at 587.

11. 3 Cal. 4th 1, 832 P.2d 899, 10 Cal. Rptr. 2d 183 (1992). In *Moncharsh*, the California Supreme Court held that an award fashioned by an arbitrator was not reviewable for erroneous findings of fact or law, even if the errors are obvious and create substantial injustice. *Id.* at 33, 832 P.2d at 919, 10 Cal. Rptr. 2d at 203. For a discussion of *Moncharsh*, see Nancy G. Dragutsky, California Supreme Court Survey, 20 PEPP. L. REV. 1582 (1993).

12. *Advanced Micro Devices*, 9 Cal. 4th at 373, 885 P.2d at 1000, 36 Cal. Rptr. 2d at 587. For a discussion of the general rule of arbitral finality, see Bernard F. Ashe, *Arbitration Finality and the Public Policy Exception*, 49 DISP. RESOL. J. 22 (1994).

13. *Advanced Micro Devices*, 9 Cal. 4th at 373, 885 P.2d at 1000, 36 Cal. Rptr. 2d at 587.

14. *Id.*

15. *Id.*; *see* CAL. CIV. PROC. CODE §§ 1286.2(d), 1286.6(b) (West 1982 & Supp. 1995).

16. *Advanced Micro Devices*, 9 Cal. 4th at 373, 885 P.2d at 1000, 36 Cal. Rptr. 2d at 587. The court cited Morris v. Zuckerman, 69 Cal. 2d 686, 447 P.2d 1000, 72 Cal. Rptr. 880 (1968), as an illustration of this overlap. *Advanced Micro Devices*, 9 Cal. 4th at 373, 885 P.2d at 1000, 36 Cal. Rptr. 2d at 587. In *Morris*, the court held that arbitrators have broad discretion to determine what issues are "necessary" to resolve the controversy. *Morris*, 69 Cal. 2d at 690, 447 P.2d at 1003, 72 Cal. Rptr. at 883; *see* CAL. CIV. PROC. CODE § 1283.4 (West 1982 & Supp. 1995) (providing that an arbitrator may determine all issues "necessary in order to determine the controversy").

17. *Advanced Micro Devices*, 9 Cal. 4th at 373, 885 P.2d at 1000, 36 Cal. Rptr. 2d

rule of deference also applies to an arbitrator's choice of remedies.[18] Although an arbitrator is given broad discretion, the arbitrator's choice of remedies is neither "unrestricted [n]or unreviewable."[19] Because of the deference given to an arbitrator, however, such review should not be "de novo."[20]

In determining what standard should apply when considering whether an arbitrator exceeded his or her authority in awarding a remedy, the court first examined the decisions of the California courts of appeal and derived two tests.[21] First, the lower courts have found that arbitrators exceed their authority if their interpretation of the contract was "'completely irrational.'"[22] Second, courts have also found that arbitrators exceeded their authority if the award "amounts to an 'arbitrary remaking' of the contract."[23] The court of appeal in *Southern California Rapid Transit District v. United Transportation Union*[24] combined these two tests into a single test;[25] however, the majority determined that these tests were inapplicable because they focused on the contract itself rather than the remedies awarded.[26]

The court next examined federal court decisions.[27] The court considered the "essence" test, set forth by the United States Supreme Court in *United Steelworkers v. Enterprise Wheel & Car Corp.*,[28] which focused on the "source of the arbitrators' chosen remedy."[29] Although *Enterprise Wheel & Car* involved a collective bargaining agreement in the

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at 587; *see* CAL. CIV. PROC. CODE §§ 1286.2(d), 1286.6(b) (West 1982 & Supp. 1995).

18. *Advanced Micro Devices*, 9 Cal. 4th at 374, 885 P.2d at 1001, 36 Cal. Rptr. 2d at 588.

19. *Id.* at 375, 885 P.2d at 1002, 36 Cal. Rptr. 2d at 589; *see* CAL. CIV. PROC. CODE §§ 1286.2(d), 1286.6(b) (West 1982 & Supp. 1995) (providing the grounds for judicial review of an arbitral award).

20. *Advanced Micro Devices*, 9 Cal. 4th at 375-76, 885 P.2d at 1002, 36 Cal. Rptr. 2d at 589.

21. *Id.* at 376, 885 P.2d at 1002, 36 Cal. Rptr. 2d at 589; *see* CAL. CIV. PROC. CODE §§ 1286.2(d), 1286.6(b) (West 1982 & Supp. 1995).

22. *Advanced Micro Devices*, 9 Cal. 4th at 376, 885 P.2d at 1002, 36 Cal. Rptr. 2d at 589.

23. *Id.*

24. 5 Cal. App. 4th 416, 6 Cal. Rptr. 2d 804 (1992). For a discussion of *Southern California Rapid Transit District*, see Karen M. Speiser, Note, *Labor Arbitration in Public Agencies: An Unconstitutional Delegation of Power or the "Waking of a Sleeping Giant?"*, 1993 J. DISP. RESOL. 333 (1991).

25. *Southern Cal. Rapid Transit Dist.*, 5 Cal. App. 4th at 423, 6 Cal. Rptr. 2d at 807.

26. *Advanced Micro Devices*, 9 Cal. 4th at 377, 885 P.2d at 1003, 36 Cal. Rptr. 2d at 590.

27. *Id.*

28. 363 U.S. 593, 597 (1960).

29. *Advanced Micro Devices*, 9 Cal. 4th at 377, 885 P.2d at 1003, 36 Cal. Rptr. 2d at 590.

context of labor arbitration, the court found its reasoning applicable.[30] The court concluded that the proper analysis is not "whether the arbitrator correctly interpreted the agreement, but . . . whether the award is drawn from the agreement as the arbitrator interpreted it or derives from some extrinsic source."[31]

After examining two federal appellate court decisions applying the "essence test,"[32] *Ethyl Corp. v. United Steelworkers*[33] and *Local 1, Int'l Molders & Allied Workers Union v. Brooks Foundry, Inc.*,[34] the court concluded that:

> The remedy awarded . . . must bear some rational relationship to the contract and the breach. The required link may be to the contractual terms as actually interpreted by the arbitrator (if the arbitrator has made that interpretation known), to an interpretation implied in the award itself, or to a plausible theory of the contract's general subject matter, framework or intent.[35]

The court noted that not only is the "essence" test an objective test,[36] but it has also been applied in the commercial context.[37] The court further noted that, contrary to the dissent's view, the policies underlying the "essence" test in labor arbitration are equally applicable in the commercial context.[38] Thus, the court adopted the "essence" test as the standard that applies to the judicial review of the remedies awarded by an arbitrator for a breach of contract.[39]

Applying that standard to the instant case, the court found that the rules of arbitration agreed to between the parties granted the arbitrator broad authority to fashion remedies.[40] The court found no restrictions and no agreement for heightened review beyond that afforded by statute.[41] The court then concluded that both paragraphs five and six of the arbitration award passed the "essence" test because the awards were rationally related to the contract.[42]

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30. *Id.* at 379-80, 885 P.2d at 1004-05, 36 Cal. Rptr. 2d at 591-92.
31. *Id.* at 378, 885 P.2d at 1004, 36 Cal. Rptr. 2d at 591.
32. *Id.* at 379-81, 885 P.2d at 1004-05, 36 Cal. Rptr. 2d at 591-92.
33. 768 F.2d 180 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986).
34. 892 F.2d 1283 (6th Cir. 1990).
35. *Advanced Micro Devices*, 9 Cal. 4th at 381, 885 P.2d at 1005, 36 Cal. Rptr. 2d at 592 (citation omitted).
36. *Id.* at 380, 885 P.2d at 1005, 36 Cal. Rptr. 2d at 592.
37. *Id.* at 378, 885 P.2d at 1004, 36 Cal. Rptr. 2d at 591.
38. *Id.* at 379, 885 P.2d at 1004, 36 Cal. Rptr. 2d at 591.
39. *Id.* at 381, 885 P.2d at 1005-06, 36 Cal. Rptr. 2d at 592-93.
40. *Id.* at 383-84, 885 P.2d at 1007, 36 Cal. Rptr. 2d at 594.
41. *Id.* at 384, 885 P.2d at 1007, 36 Cal. Rptr. 2d at 594.
42. *Id.* at 384, 885 P.2d at 1007-08, 36 Cal. Rptr. 2d at 594-95.

Although the remedies for breach of contract are usually limited to damages or to specific performance, the court found that the award of equitable relief, although not specific performance, was rationally related to the contract.[43] The court reasoned that the arbitrator interpreted the contract as having implied covenants, including the covenant of good faith and fair dealing.[44] The arbitrator found that Intel breached these implied covenants and granted relief based upon the breaches.[45] Thus, the court upheld the award as within the scope of the arbitrator's authority because the remedy was rationally related to his interpretation of the contract.[46]

### *B. The Dissenting Opinion*

Justice Kennard, writing for the dissent, criticized the majority for taking "another major step in the direction of turning arbitration into a game of chance and an instrument of injustice."[47] The dissent characterized the court's decision in *Moncharsh* and in the instant case as discouraging arbitration.[48] The dissent argued for application of a conjunctive two-part test as the standard when reviewing the remedies awarded by an arbitrator.[49] First, the dissent applied the "scope-of-available-remedies" test and found the remedy improper because it could not have been obtained in court.[50] Second, the dissent applied a "rational relationship" test.[51]

The dissent explained that the "essence" test adopted by the majority was too broad for private arbitration because it was traditionally applied

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43. *Id.* at 384-85, 885 P.2d at 1008, 36 Cal. Rptr. 2d at 595. *See generally* 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 797 (9th ed. 1987 & Supp. 1992) (discussing the possible remedies for breach of contract).

44. *Advanced Micro Devices*, 9 Cal. 4th at 385, 885 P.2d at 1008, 36 Cal. Rptr. 2d at 595. *See generally* 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §§ 743-744 (9th ed. 1987 & Supp. 1992) (discussing the implied covenant of good faith and fair dealing).

45. *Advanced Micro Devices*, 9 Cal. 4th at 385-87, 885 P.2d at 1008-09, 36 Cal. Rptr. 2d at 594-95.

46. *Id.* at 367, 885 P.2d at 996, 36 Cal. Rptr. 2d at 583.

47. *Id.* at 391, 885 P.2d at 1012, 36 Cal. Rptr. 2d at 599 (Kennard, J., dissenting).

48. *Id.* at 391-92, 885 P.2d at 1012-13, 36 Cal. Rptr. 2d at 599-600 (Kennard, J., dissenting). Justice Kennard, joined by Justice Mosk, also dissented from the majority's analysis in Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 34, 832 P.2d 889, 920, 10 Cal. Rptr. 2d 183, 204 (1992) (Kennard, J., concurring and dissenting). For a good discussion of the growth of arbitration and the subsequent dissatisfaction with its results, see S. Gale Dick, *ADR at the Crossroads*, 49 DISP. RESOL. J. 47 (1994).

49. *Advanced Micro Devices*, 9 Cal. 4th at 392, 885 P.2d at 1013, 36 Cal. Rptr. 2d at 600 (Kennard, J., dissenting).

50. *Id.* at 394, 885 P.2d at 1014, 36 Cal. Rptr. 2d at 601 (Kennard, J., dissenting).

51. *Id.* (Kennard, J., dissenting).

only in the context of federal labor arbitration.[52] The dissent asserted that the policies underlying labor arbitration law are distinguishable from those underlying commercial contract law.[53] The dissent claimed that "the twin policy reasons [of] the impossibility of reducing all aspects of a labor-management relationship to writing and the need for an ongoing process of amendment during the life of a collective bargaining agreement" are inapplicable in the commercial context.[54]

The dissent applied its test to the equitable remedies fashioned by the arbitrator in the instant case, which gave AMD the right to use Intel's intellectual property,[55] and concluded that AMD would not have been entitled to such equitable relief in a court of law; thus, the equitable remedies failed the "scope-of-available-remedies" test.[56] The dissent further asserted that the equitable remedies failed the "rational relationship" test.[57] The dissent claimed that AMD was not damaged by Intel's breach, but rather was damaged by its own failure to mitigate damages.[58] Thus, according to the dissent, the remedy was not rationally related to the contract and to the breach, and consequently, the arbitrator exceeded his powers.[59]

## III. CONCLUSION

In *Advanced Micro Devices, Inc. v. Intel Corp.*, the California Supreme Court delineated the standard of judicial review that applies to the remedies fashioned by an arbitrator. The court adopted the "essence" test used in federal labor arbitration law; thus, the arbitrator does not exceed his or her powers if the remedy is rationally related to the contract. This holding is consistent with the general rule of "arbitral finality" and the court's previous holdings granting broad discretion and deference to

52. *Id.* at 396, 885 P.2d at 1015, 36 Cal. Rptr. 2d at 602 (Kennard, J., dissenting).
53. *Id.* at 398, 885 P.2d at 1016-17, 36 Cal. Rptr. 2d at 603-04 (Kennard, J., dissenting).
54. *Id.* at 399, 885 P.2d at 1017, 36 Cal. Rptr. 2d at 604 (Kennard, J., dissenting).
55. *Id.* at 401, 885 P.2d at 1019, 36 Cal. Rptr. 2d at 606 (Kennard, J., dissenting).
56. *Id.* at 402-03, 885 P.2d at 1019-20, 36 Cal. Rptr. 2d at 606-07 (Kennard, J., dissenting).
57. *Id.* at 404-05, 885 P.2d at 1021, 36 Cal. Rptr. 2d at 608 (Kennard, J., dissenting).
58. *Id.* at 404, 885 P.2d at 1020-21, 36 Cal. Rptr. 2d at 607-08 (Kennard, J., dissenting).
59. *Id.* at 404-05, 885 P.2d at 1021, 36 Cal. Rptr. 2d at 608 (Kennard, J., dissenting).

arbitrators. The court's holding is further consistent with the parties' desires to avoid the delay and expense of a jury trial and their expectations that the arbitration will be binding.

KANDY L. PARSON

# II. CRIMINAL LAW

A. *The fresh-complaint doctrine no longer serves as a basis for admitting evidence of a complaint made by an alleged victim of a sexual offense; however, evidence of such a complaint is admissible under generally applicable evidentiary standards:* **People v. Brown.**

## I. INTRODUCTION

In *People v. Brown*,[1] the California Supreme Court considered the viability of the common law "fresh-complaint doctrine."[2] The court concluded that the doctrine's underlying historical premise was invalid and denounced it as a basis for the admissibility of evidence.[3] However, the court held that evidence that was previously made admissible by the doctrine should remain admissible, but only under "generally applicable evidentiary standards."[4] Thus, the evidence must be relevant[5] and its probative value must outweigh its prejudicial effect.[6] Applying those standards, the court found a child's statements disclosing incidents of

1. 8 Cal. 4th 746, 883 P.2d 949, 35 Cal. Rptr. 2d 407 (1994). Justice George authored the unanimous opinion, in which Chief Justice Lucas and Justices Mosk, Kennard, Arabian, Baxter and Werdegar concurred. *Id.* at 748, 883 P.2d at 950, 35 Cal. Rptr. 2d at 408.

2. *Id.* For a general discussion of the admissibility of prior complaints in prosecutions for sexual assault, see 17 CAL. JUR. 3D *Criminal Law* §§ 667-668 (1984 & Supp. 1994).

3. *Brown*, 8 Cal. 4th at 749, 883 P.2d at 950-51, 35 Cal. Rptr. 2d at 408.

4. *Id.*

5. Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." CAL. EVID. CODE § 210 (West 1966 & Supp. 1995). *See generally* 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *Circumstantial Evidence* § 289 (3d ed. 1986 & Supp. 1994) (discussing the admissibility of relevant evidence).

6. *Brown*, 8 Cal. 4th at 759-60, 883 P.2d at 957, 35 Cal. Rptr. 2d at 415. Courts weigh the probative value of the evidence against its prejudicial effect under Evidence Code § 352, which provides, in pertinent part, that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." CAL. EVID. CODE § 352 (West 1966 & Supp. 1995). *See generally* 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *Circumstantial Evidence* §§ 298-308 (3d ed. 1986 & Supp. 1994) (discussing the exclusion of relevant evidence for policy reasons).

sexual abuse to be admissible even though the statements failed to qualify under the fresh-complaint doctrine.[7]

## II. STATEMENT OF THE CASE

A jury convicted the defendant, Ricky Lee Brown, of several sex-related offenses with the victim, Audrey S., a minor, and sentenced him to twenty-six years in prison.[8] Audrey lived with her mother and the defendant, her mother's boyfriend, over a period of several years during which the alleged sexual abuse took place.[9] At trial, an adult friend testified that Audrey disclosed the incidents of sexual abuse to her, but that she did so reluctantly and in response to a series of probing questions.[10] The defendant challenged the trial court's admission of evidence pertaining to the complaints on appeal, claiming that the complaints failed to qualify under the fresh-complaint doctrine because of their delayed and prompted nature.[11]

The court of appeal upheld that admission of the complaints into evidence, finding the complaints to be reasonably "fresh." The court further found that the prompted nature of the statements did nothing to diminish their quality as evidence.[12] The court of appeal's decision directly contradicted another court of appeal decision, *In re* Cheryl H.,[13] which held that a "complaint must have been volunteered a short time after the sexual assault . . . [t]hat is, it must truly be 'fresh' and it must truly be in the nature of a 'complaint' and not a response to questions" in order to fall under the fresh-complaint doctrine.[14] The supreme court granted review to resolve the apparent conflict between the two decisions.[15]

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7. *Brown*, 8 Cal. 4th at 763-64, 883 P.2d at 959, 35 Cal. Rptr. 2d at 418.

8. *Id.* at 753-54, 883 P.2d at 953, 35 Cal. Rptr. 2d at 411. "The jury found [the] defendant guilty of nine counts of lewd and lascivious conduct with a child under fourteen years of age." *Id.* (citing CAL. PENAL CODE § 288(a) (West 1988 & Supp. 1994). The jury also found the defendant guilty of two counts of "substantial sexual conduct with a victim under eleven years of age." *Id.* (citing CAL. PENAL CODE § 1203.066(a)(8) (West 1982 & Supp. 1994)). Finally, it rendered a guilty verdict on six counts, characterizing the defendant as a person who occupied "a position of special trust" while continuing the acts of "substantial sexual conduct." *Id.* (citing CAL. PENAL CODE § 1203.066(a)(9) (West 1982 & Supp. 1994)).

9. *Id.* at 750, 883 P.2d at 951, 35 Cal. Rptr. 2d at 409.

10. *Id.* at 752-53, 883 P.2d at 952-53, 35 Cal. Rptr. 2d at 410.

11. *Id.* at 754, 883 P.2d at 953, 35 Cal. Rptr. 2d at 411.

12. *Id.*

13. 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (1984).

14. *Id.* at 1129, 200 Cal. Rptr. at 809. In *In re Cheryl H.*, the court found the child's statements, made at least one month after the alleged incidents occurred and only in response to questioning, were "neither fresh nor volunteered and thus [were] inadmissible under the 'fresh-complaints' theory." *Id.*

15. *Brown*, 8 Cal. 4th at 754, 883 P.2d at 953, 35 Cal. Rptr. 2d at 411.

## III. TREATMENT

The fresh-complaint doctrine, grounded in ancient origins,[16] served as a basis for the admissibility into evidence of an extrajudicial complaint by an alleged victim of a sexual offense in a prosecution for that same offense.[17] Underlying the doctrine was the belief that it was only "natural" for a victim of a sexual offense to complain promptly.[18] Therefore, if the victim made no prompt complaint, the courts assumed that no such offense occurred.[19] Recently, state courts, as well as legal commentators, have not only questioned this rationale, but have also disproven it.[20] The court in the present case also denounced the underlying reasoning behind the fresh-complaint doctrine, ultimately holding that it was not an adequate basis for the admissibility of such evidence.[21]

The court followed the position taken in other jurisdictions[22] and found the evidence surrounding a victim's complaint to be relevant and, therefore, generally admissible unless its prejudicial effect outweighs its probative value.[23] The court expressly noted that the use of such evi-

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16. *Id.* at 754, 883 P.2d at 954, 35 Cal. Rptr. 2d at 411.

17. *Brown*, 8 Cal. 4th at 748-49, 883 P.2d at 950, 35 Cal. Rptr. 2d at 408.

18. *Id.* at 755, 883 P.2d at 954, 35 Cal. Rptr. 2d at 412.

19. *Id.* at 755-56, 883 P.2d at 954-55, 35 Cal. Rptr. 2d at 412-13 (citing People v. Burton, 55 Cal. 2d 328, 351, 359 P.2d 433, 443-44, 11 Cal. Rptr. 65, 75-76 (1961) (setting forth the formulation and justification of the fresh-complaint doctrine)).

20. *Id.* at 757-58, 833 P.2d at 955-56, 35 Cal. Rptr. 2d at 413-14. *See, e.g.*, Commonwealth v. Licata, 591 N.E. 2d 672, 674 (Mass. 1992); State v. Hill, 578 A.2d 370, 380 (N.J. 1990); 1 *Bernard S. Jefferson, California Evidence Benchbook* § 1.1 (2d ed. 1982).

21. *Brown*, 8 Cal. 4th at 749, 883 P.2d at 950, 35 Cal. Rptr. 2d at 408. The court noted that an "overwhelming" amount of support "establishes that it is not inherently 'natural' for the victim to confide in someone or to disclose, immediately following commission of the offense, that he or she was sexually assaulted." *Id.* at 758, 883 P.2d at 956, 35 Cal. Rptr. 2d at 414.

22. *See, e.g.*, *Licata*, 591 N.E.2d at 674; *Hill*, 578 A.2d at 380; Battle v. United States, 630 A.2d 211 (D.C. Cir. 1993). For a discussion of the positions taken by other jurisdictions, compare Deborah A. Brandon, *Going to Extremes: The Doctrine of Prompt Complaint and Louisiana Code of Evidence Article 801(D)(1)(D)*, 39 LOY. L. REV. 151 (1993) with Russell M. Coombs, *Reforming New Jersey Evidence Law on Fresh Complaint of Rape*, 25 RUTGERS L.J. 699 (1994).

23. *Brown*, 8 Cal. 4th 759-60, 883 P.2d at 957, 35 Cal. Rptr. 2d at 415; *see* CAL. EVID. CODE § 352 (West 1966 & Supp. 1995) (allowing the discretion to exclude evidence if its probative value is substantially outweighed by substantial danger of undue prejudice). For guidance, the court then examined nonsexual offenses, including robbery, where "evidence of the circumstances surrounding a crime victim's disclosure or report of an offense" is relevant and admissible. *Brown*, 8 Cal. 4th at 760,

dence should be limited to "the fact that a complaint was made, and the circumstances surrounding its making," and not to prove the truth of the matter asserted.[24]

Furthermore, the court explained that the timing of a victim's complaint, whether prompt or delayed, should not affect its relevance.[25] The court reasoned that the evidence is relevant to avoid the risk that the jury will infer that no such complaint was made and to give the jury a complete and accurate view of the facts.[26] The court insisted that evidence of a delayed complaint is essential when, as in the present case, the abuse allegedly occurred "over a considerable period of time, during which the victim had the opportunity to disclose the alleged offenses to others but failed to do so."[27] The court further insisted that the admission of evidence regarding a victim's complaint, whether prompt or delayed, is also potentially favorable to the defendant in that it could be used to impeach or attack the credibility of the victim.[28]

Therefore, although the court found the basis underlying the fresh-complaint doctrine to be invalid, evidence of a victim's complaint disclosing sexual abuse remains relevant and admissible.[29] However, the court asserted that such evidence is admissible only for the limited, nonhearsay purpose of proving that the victim made such a complaint.[30] The court further asserted that the timing of a victim's complaint is not determinative of its admissibility, but rather affects the weight accorded the evidence.[31]

In the instant case, the court found the evidence of Audrey's complaint probative as to whether or not the alleged abuse occurred, and, therefore, relevant.[32] Furthermore, the court acknowledged that the use of Audrey's complaint of sexual abuse was limited to the fact that she made

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883 P.2d at 957, 35 Cal. Rptr. 2d at 415 (citing People v. Blalock, 238 Cal. App. 2d 209, 47 Cal. Rptr. 604 (1965); People v. Washington, 203 Cal. App. 2d 609, 21 Cal. Rptr. 788 (1962)).

24. *Brown*, 8 Cal. 4th at 760, 883 P.2d at 957-58, 35 Cal. Rptr. 2d at 415-16. To admit a complaint outside these parameters would violate the hearsay rule. *Id.*

25. *Id.* at 761, 883 P.2d at 958, 35 Cal. Rptr. 2d at 416.

26. *Id.* at 761-62, 883 P.2d at 958-59, 35 Cal. Rptr. 2d at 416-17.

27. *Id.* at 762, 883 P.2d at 958-59, 35 Cal. Rptr. 2d at 416-17. If this evidence is not disclosed, the jury is likely to be left "with an incomplete or erroneous understanding of the victim's behavior." *Id.*

28. *Id.* at 762, 883 P.2d at 959, 35 Cal. Rptr. 2d at 417.

29. *Id.* at 749-50, 883 P.2d at 950-51, 35 Cal. Rptr. 2d at 408-09; *see* CAL. EVID. CODE § 210 (West 1966 & Supp. 1995) (defining "relevant evidence" as evidence "having any tendency in reason to prove or disprove any disputed fact . . . of consequences to the . . . action").

30. *Brown*, 8 Cal. 4th at 762, 883 P.2d at 959, 35 Cal. Rptr. 2d at 417.

31. *Brown*, 8 Cal. 4th at 763, 883 P.2d at 959, 35 Cal. Rptr. 2d at 417.

32. *Id.* at 763-64, 883 P.2d at 960, 35 Cal. Rptr. 2d at 418.

such a complaint and the circumstances surrounding the disclosure. Its evidentiary use, therefore, fell "within the limits" prescribed.[33] Accordingly, the supreme court upheld the trial court's admission of the complaints and affirmed the defendant's conviction.[34]

## IV. CONCLUSION

In *People v. Brown*, the California Supreme Court abrogated the fresh-complaint doctrine, reasoning that its underlying premise is based on outdated assumptions.[35] However, the court held that evidence of a victim's complaint remains relevant and admissible, but under "generally applicable evidentiary standards."[36] Therefore, the court's holding acknowledges that the evidence of a victim's complaint should be used to combat, and not perpetuate, subsequent victimization by outdated assumptions.

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33. *Id.* at 764, 883 P.2d at 960, 35 Cal. Rptr. 2d at 418; *see* CAL. EVID. CODE § 352 (West 1966 & Supp. 1995) (defining "relevant evidence").
34. *Brown*, 8 Cal. 4th at 764, 883 P.2d at 960, 35 Cal. Rptr. 2d at 418.
35. *Id.* at 749, 883 P.2d at 950, 35 Cal. Rptr. 2d at 408.
36. *Id.*

B. *Viability of the fetus is not an element of fetal murder; however, this holding constitutes a major change in the law and applying this holding to the defendant in this case would have violated due process principles:* **People v. Davis.**

## I. INTRODUCTION

In *People v. Davis*,[1] the California Supreme Court addressed the issue of whether viability of a fetus was an element of fetal murder.[2] While the court concluded that viability was not an element of fetal murder, the holding was not applied to the defendant in this case due to the court's conclusion that its decision was a "major change in the law" and it would violate due process principles to impose the new construction on this defendant.[3] Accordingly, the trial court's instruction, which defined viability as the "possibility" of survival outside the womb, amounted to prejudicial error under ex post facto principles, and the court of appeal's reversal of the murder conviction was affirmed.[4]

## II. STATEMENT OF THE CASE

During the course of a robbery, the defendant shot a woman who was between twenty-three and twenty-five weeks pregnant.[5] While the woman survived, the fetus was stillborn on the following day as a direct result of its mother's blood loss, low blood pressure, and state of shock.[6] The defendant was subsequently charged with the assault and robbery of the mother and the murder of her fetus.[7]

At trial, the prosecution offered expert medical testimony indicating that the fetus would have had a seven to forty-seven percent chance of

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1. 7 Cal. 4th 797, 872 P.2d 591, 30 Cal. Rptr. 2d 50 (1994). Chief Justice Lucas authored the plurality opinion in which Justice Arabian joined. *Id.* at 800, 872 P.2d at 593, 30 Cal. Rptr. 2d at 52. Justice Kennard wrote the concurring opinion in which Justice Stone concurred. *Id.* at 815, 872 P.2d at 603, 30 Cal. Rptr. 2d at 62. Justice Baxter concurred in part and dissented in part and filed an opinion in which Justice George joined. *Id.* at 818, 872 P.2d at 604, 30 Cal. Rptr. 2d at 63. Justice Mosk filed a dissenting opinion. *Id.* at 822, 872 P.2d at 607, 30 Cal. Rptr. 2d at 66.

2. *Id.* at 800, 872 P.2d at 593, 30 Cal. Rptr. 2d at 52.

3. *Id.* at 811, 872 P.2d at 600, 30 Cal. Rptr. 2d at 59.

4. *Id.* at 814, 872 P.2d at 602, 30 Cal. Rptr. 2d at 61.

5. *Id.* at 800, 872 P.2d at 593, 30 Cal. Rptr. 2d at 52.

6. *Id.*

7. *Id.* at 802, 872 P.2d at 593, 30 Cal. Rptr. 2d at 52. In addition, the defendant was charged with a special circumstance of robbery-murder. *Id.* at 801, 872 P.2d at 593, 30 Cal. Rptr. 2d at 52.

surviving outside the womb.[8] The defense countered with medical experts who opined that there was only a three percent possibility of survival of the fetus.[9] Although both the experts called by the prosecution and the defense indicated that the fetus' survival could have been possible, neither believed survival probable.[10] While the murder statute does not explicitly require viability of the fetus,[11] the trial court followed several court of appeal decisions requiring the jury to find viability before a defendant could be convicted of murder under the statute.[12] However, the trial court did not give the standard jury instruction which defined a viable fetus as one which would probably survive outside the womb.[13] Instead, the court gave an instruction that a fetus with a possibility of surviving outside the womb was viable.[14] The defendant was convicted of numerous counts, including the special circumstance murder of a fetus during a robbery, and sentenced to life imprisonment without possibility of parole.[15]

On appeal, the defendant, relying on a United States Supreme Court decision defining viability in terms of probabilities, not possibilities, when limiting a woman's right to abortion, argued that it was prejudicial error for the trial court to have given the instruction on viability using *possible* survival as the test as opposed to *probable*.[16] The People argued

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8. *Id.* at 801, 872 P.2d at 592, 30 Cal. Rptr. 2d at 52.

9. *Id.*

10. *Id.*

11. CAL. PENAL CODE § 187(a) (West Supp. 1994). "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." *Id.* Abortions complying with the Therapeutic Abortion Act are specifically exempted. CAL. PENAL CODE § 187(b)(1) (West 1988 & Supp. 1994); *see also* 1 B.E. WITKIN, CALIFORNIA CRIMINAL LAW, *Crimes Against the Person* § 450 (2d ed. 1988 & Supp. 1994); 17 CAL. JUR. 3D *Criminal Law* § 182 (1984 & Supp. 1994).

12. *Davis*, 7 Cal. 4th at 801, 872 P.2d at 593, 30 Cal. Rptr. 2d at 52.

13. CALJIC 8.10 & 8.12 (1993). "A viable human fetus is one that has attained such form and development of organs as to be normally capable of living outside of the uterus without artificial medical support." *Id.*; *see also* 17 CAL. JUR. 3D *Criminal Law* § 183 (1984 & Supp. 1994).

14. *Davis*, 7 Cal. 4th at 801, 872 P.2d at 593, 30 Cal. Rptr. 2d at 52. The exact instruction given by the trial court was: "[a] fetus is viable when it has achieved the capability for independent existence; that is, when it is possible for it to survive the trauma of birth, although with artificial medical aid." *Id.*

15. *Id.*

16. *Id.*; *see* Roe v. Wade, 410 U.S. 113, 163 (1973) (defining viability as the point when a fetus, if born, could live normally outside the womb); *see also* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (upholding viability definition from *Roe*); Colautti v. Franklin, 439 U.S. 379, 388 (1979) (defining viability as the point where

that prosecution under section 187(a) did not require fetal viability, and therefore no jury instruction on viability was necessary.[17] The court of appeal reviewed section 187(a) and its legislative history, the treatment of the issue in other jurisdictions, and scholarly commentary before agreeing with the People and holding that fetal viability is not a required element of murder.[18] However, the court of appeal reversed the murder conviction on due process grounds because this new interpretation of section 187(a) constituted a major change in the law.[19] The California Supreme Court affirmed both the court of appeal's holdings that viability is not an element of fetal murder under section 187(a) and the reversal of the murder conviction on due process grounds.[20]

## III. TREATMENT

### A. *The Plurality Opinion*

Under California Penal Code section 187(a), "[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought."[21] The legislative history of that statute indicates that the legislature considered limiting the statute to "viable fetuses," but the version the legislature passed contained no such limitation.[22]

The United States Supreme Court has concluded that in abortion situations, where the mother's constitutional privacy interests are balanced against a state's interest in protecting a fetus, the state cannot assert its interest before the fetus is viable.[23] Following this ruling, a California Court of Appeal concluded that section 187(a) applied only to viable

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fetus has reasonable likelihood of sustained survival outside womb, with or without life support); 17 CAL. JUR. 3D *Criminal Law* § 183 (1984 & Supp. 1994).

17. *Davis*, 7 Cal. 4th at 802, 872 P.2d at 594, 30 Cal. Rptr. 2d at 53.

18. *Id.*

19. *Id.*

20. *Id.*

21. *See supra* note 11 and accompanying text.

22. Assem. Bill No. 816 (1970 Reg. Sess.). *See generally* Borden D. Webb, Comment, *Is the Intentional Killing of an Unborn Child Homicide?*, 2 PAC. L.J. 170, 174 (1971).

23. *Davis*, 7 Cal. 4th at 804, 872 P.2d at 594-95, 30 Cal. Rptr. 2d at 53-54 (citing Roe v. Wade, 410 U.S. 113 (1973)); *see supra* note 16 and accompanying text.

fetuses as defined by *Roe v. Wade*.[24] The viability limitation was recognized in several subsequent California Court of Appeal decisions.[25]

In deciding *Davis*, the California Supreme Court considered the assertions of several commentators who stated: "[b]y holding that the Fourteenth Amendment does not cover the unborn, the Supreme Court was left with only one constitutionally mandated right, that of the mother's privacy, to be considered along with the legitimate state interest in protecting an unborn's potential life."[26] In situations where no conflict exists between the mother's privacy rights and the state's interest in protecting the unborn, the state may protect its interest without having to satisfy the *Roe* test.[27] Several other states with statutes that protect fetuses have also concluded that, in non-abortion situations where no parental privacy rights are implicated, it is not constitutionally required that the fetus be viable for the statute to attach.[28] The California Supreme

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24. *Davis*, 7 Cal. 4th at 804, 872 P.2d at 595, 30 Cal. Rptr. 2d at 54 (citing People v. Smith (Karl Andrew), 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (1976) (holding that killing of non-viable fetus did not trigger murder statute)). "Implicit in *Wade* is the conclusion that as a matter of constitutional law the destruction of a nonviable fetus is not a taking of human life. It follows that such destruction cannot constitute murder or other form of homicide . . . ." *Id.* (quoting People v. Smith (Karl Andrew) 59 Cal. App. 3d 751, 757, 129 Cal. Rptr. 498, 502 (1976)).

25. *See, e.g.*, People v. Henderson, 225 Cal. App. 3d 1129, 275 Cal. Rptr. 837 (1990) (holding that statute is not vague and the viability limitation was a decisional law interpretation of the statute); People v. Smith (Robert Porter), 188 Cal. App. 3d 1495, 234 Cal. Rptr. 142 (1987) (reasoning that it was error for the trial court to give instruction with a viability definition different from *Wade*); People v. Apodaca, 76 Cal. App. 3d 479, 142 Cal. Rptr. 830 (1978) (holding that California Penal Code § 187(a) was not unconstitutionally vague).

26. *Davis*, 7 Cal. 4th at 807, 872 P.2d at 597, 30 Cal. Rptr. 2d at 56 (citing Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 HARV. J. ON LEGIS. 97, 144 (1985)).

27. *Id.*; *see, e.g.*, People v. Henderson, 225 Cal. App. 3d 1129, 275 Cal. Rptr. 837 (1990) (holding that statute is not vague and the viability limitation was a decisional law interpretation of the statute in a case where defendant was charged with killing his wife's unborn baby); People v. Smith (Robert Porter), 188 Cal. App. 3d 1495, 234 Cal. Rptr. 142 (1987) (reasoning that it was harmless error for trial court to give instruction with viability definition different from *Wade* in a case of a man accused of murder of woman and her unborn child); People v. Apodaca, 76 Cal. App. 3d 479, 142 Cal. Rptr. 830 (1978) (holding that statute was not unconstitutionally vague in a trial of a man who purposefully attacked his ex-wife to kill her unborn baby).

28. *Davis*, 7 Cal. 4th at 808, 872 P.2d at 598, 30 Cal. Rptr. 2d at 57; *see, e.g.*, People v. Ford, 581 N.E.2d 1189 (Ill. App. Ct. 1991) (holding no due process or equal protection violation by fetal murder statute which did not distinguish viable from non-viable fetuses); State v. Merrill, 450 N.W.2d 318 (Minn.), *cert. denied*, 496 U.S.

Court followed these jurisdictions and held that viability is not an element of fetal murder, defining a fetus as "the unborn offspring in the post-embryonic period, after major structures have been outlined."[29]

The defendant argued that the court's redefinition of the law constitutes a major change in the law and consequently his conviction must be reversed on due process grounds.[30] A statute "'which makes more burdensome the punishment for a crime, after its commission'" is in violation of art. I, sec. 9, cl. 3, of the United States Constitution,[31] and art. I, sec. 9 of the California Constitution[32] as ex post facto criminal punishment. Unforeseeable judicial enlargement of a criminal statute, if applied retroactively, would function as an ex post facto law.[33] The defendant's contention was that prior to his prosecution, the courts of appeal had required a showing of viability for conviction under section 187(a) and that the defendant could not have been put on notice that his conduct fell within the statute.[34] The supreme court agreed with the court of appeal that since the viability requirement had been consistently used in interpreting section 187(a), it would violate due process principles to apply the redefined statute to the defendant.[35]

In examining the trial court's instruction on viability, the supreme court focused on the language in the instruction given, which stated that a fetus with a *possibility* of survival was viable, as opposed to the language of CALJIC 8.10 which states that a fetus with a *probability* of survival was viable.[36] Both sides' expert testimony revealed only a possibility, not a probability of survival, and had the jury been given the prop-

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931 (1990) (same).

29. *Davis*, 7 Cal. 4th at 810, 872 P.2d at 599, 30 Cal. Rptr. 2d at 58 (quoting SLOANE-DORLAND ANNO. MEDICAL-LEGAL DICT. 281 (1987)). The fetal period begins seven or eight weeks after conception and is to be determined by the trier of fact. *Id.*

30. *Id.* at 811, 872 P.2d at 600, 30 Cal. Rptr. at 59.

31. *Id.*; *see* Collins v. Youngblood, 497 U.S. 37, 42 (1990) (holding that statute allowing reformation of improper verdicts is not ex post facto law).

32. *Davis*, 7 Cal. 4th at 811, 872 P.2d at 600, 30 Cal. Rptr. 2d at 59 (citing Tapia v. Superior Court, 53 Cal. 3d 282, 807 P.2d 434, 279 Cal. Rptr. 592 (1991) (holding portions of statute regarding prosecution and trial procedures applied to defendants already arrested was not ex post facto)).

33. *Id.* (citing Bouie v. City of Columbia, 378 U.S. 347, 354 (1964) (holding trespass statute applied to Negroes at lunch counter violated due process)); *see also* People v. Escobar, 3 Cal. 4th 740, 837 P.2d 1100, 12 Cal. Rptr. 2d 586 (1992) (finding erroneous instruction did not violate due process since not reasonably probable that jury would have reached different verdict if given proper instruction).

34. *Davis*, 7 Cal. 4th at 811, 872 P.2d at 600, 30 Cal. Rptr. 2d at 59; *see* Rose v. Locke, 423 U.S. 48, 50 (1975) (holding that due process concerns demand that the law must provide notice to defendant that his actions would result in criminal liability so that he may act accordingly).

35. *Davis*, 7 Cal. 4th at 812, 872 P.2d at 601, 30 Cal. Rptr. 2d at 60.

36. *Id.* at 814, 872 P.2d at 602, 30 Cal. Rptr. 2d at 61 (emphasis added).

er instruction, a determination that the fetus was *not* viable would probably have been revealed.[37] The supreme court concluded that the error was prejudicial to the defendant and that the fetal murder conviction must be reversed.[38]

### *B. The Concurring Opinions*

Justice Kennard joined the lead opinion in concluding that the fetus need not be viable to constitute fetal murder under section 187(a).[39] She also engaged in a further discussion of *Roe v. Wade* and refuted several assertions made by the dissent.[40]

Justice Baxter concurred in the conclusion that viability is not an element of fetal murder, but he dissented in the decision to reverse the conviction.[41] He contended that the defendant should have reasonably expected his conduct would fall within the statute because the plain words of section 187(a) contain no viability requirement for fetal murder,[42] and decisional law had not fully settled the issue of whether there was a viability requirement for section 187(a).[43] Further, Baxter reasoned that while several court of appeal decisions recognized a viability requirement, it was never fully settled whether possible survival or probable survival would be the correct test for viability.[44] For all of the preceding reasons, Justice Baxter reasoned that the challenged jury instruc-

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37. *Id.* (emphasis added).

38. *Id.* at 814-15, 872 P.2d at 602, 30 Cal. Rptr. 2d at 61.

39. *Id.* at 817, 872 P.2d at 604, 30 Cal. Rptr. 2d at 63 (Kennard, J., concurring).

40. *Id.* at 815-18, 872 P.2d at 603-05, 30 Cal. Rptr. 2d at 62-63 (Kennard, J., concurring). Part of the dissent's argument on determining legislative intent in passing the 1970 amended version of § 187(a) is the contention that once the court of appeal began limiting § 187(a) to viable fetuses, the legislature would have acted to expand the statute to include both viable and non-viable fetuses had that been their original intention. *See infra* notes 52-56 and accompanying text. Justice Kennard pointed out that the court of appeal determined the viability element to be constitutionally required, and the legislature would not have the power to expand the statute to non-viable fetuses. *Davis*, 7 Cal. 4th at 816, 872 P.2d at 603, 30 Cal. Rptr. 2d at 62 (Kennard, J., concurring).

41. *Davis*, 7 Cal. 4th at 818, 872 P.2d at 605, 30 Cal. Rptr. 2d at 64 (Baxter, J., concurring).

42. *Id.* at 819, 872 P.2d at 605, 30 Cal. Rptr. 2d at 64 (Baxter, J., concurring).

43. *Id.* (Baxter, J., concurring).

44. *Id.* (Baxter, J., concurring). *See generally* People v. Henderson, 225 Cal. App. 3d 1129, 275 Cal. Rptr. 837 (1990) (finding a fetus viable when there is a possibility of survival outside the mother's womb); People v. Apodaca, 76 Cal. App. 3d 479, 142 Cal. Rptr. 830 (1978) (same).

tion defining a viable fetus as one with a possibility of survival did not amount to a major change in the law, and did not justify a reversal of defendant's conviction on due process grounds.[45]

### *C. The Dissenting Opinion*

Justice Mosk agreed with the lead opinion that the court of appeal decisions which found a viability requirement in section 187(a) to be a constitutional requirement pursuant to *Roe* were incorrect in their rationale.[46] However, the basis of Justice Mosk's dissent lies in a different interpretation of the legislative intent in its use of the term "fetus" in section 187(a).[47] Justice Mosk believed that the legislature intended "fetus" to mean a viable fetus.[48]

In addition, Justice Mosk noted that Penal Code section 187 was amended in 1970 to include fetuses as a protected class within the statute.[49] This was in direct response to the public outcry following the California Supreme Court's decision in *Keeler v. Superior Court*,[50] in which section 187 was held not to apply to the defendant who had kicked his estranged and pregnant wife in the abdomen intending to "stomp [the fetus] out," an act resulting in the 35 week old fetus being stillborn with a fractured skull.[51]

Justice Mosk noted that since the amending of section 187(a) to include fetuses came in response to the *Keeler* decision, it should be inferred that the legislature was only seeking to expand the statute to the extent that the facts of *Keeler* would now fall within the murder statute.[52] The facts of *Keeler* involved the killing of a viable fetus.[53]

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45. *Davis*, 7 Cal. 4th at 822, 872 P.2d at 607, 30 Cal. Rptr. 2d at 66 (Baxter, J., concurring).

46. *Id.* at 827 n.1, 872 P.2d at 610 n.1, 30 Cal. Rptr. 2d at 69 n.1 (Mosk, J., dissenting).

47. *Id.* at 822, 872 P.2d at 607, 30 Cal. Rptr. 2d at 66 (Mosk, J., dissenting).

48. *Id.* (Mosk, J., dissenting).

49. *Id.* (Mosk, J., dissenting).

50. 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (holding that killing of viable but unborn fetus did not fall within murder statute).

51. *Id.* at 623-24, 470 P.2d 617-18, 87 Cal. Rptr. 481-82. The California Supreme Court reluctantly applied the common law requirement of live birth before the victim could be considered a human being for the purposes of the murder statute, stating that the killing of an "unborn but viable" fetus may be as grave an offense as murder, but that the statute did not extend criminal liability to those situations and it is a matter for the legislature, and not the courts to act upon. *Id.* at 642, 470 P.2d at 625, 87 Cal. Rptr. at 489.

52. *Davis*, 7 Cal. 4th at 823, 872 P.2d at 610, 30 Cal. Rptr. 2d at 69 (Mosk, J., dissenting); *see* Webb, *supra* note 22, at 175.

53. *Keeler*, 2 Cal. 3d at 624, 470 P.2d at 618, 87 Cal. Rptr. at 483.

Justice Mosk argued that further evidence of legislative intent to apply the statute only to viable fetuses arose from the legislature's lack of response to the numerous court of appeal decisions which imposed viability as an element under the statute.[54] Mosk also noted that "[l]egislative silence after a court has construed a statute gives rise at most to an arguable inference of acquiescence or passive approval."[55] Thus, Justice Mosk reasoned, if the courts were not construing the statute as the legislature had intended, the legislature would have acted to clarify their intent.[56]

Justice Mosk further criticized the lead opinion as having adopted an imprecise test for the onset of the fetal period.[57] He believed that defining the age of viability as either seven or eight weeks after conception was too imprecise.[58]

Justice Mosk believed that using such an early stage of pregnancy as the point at which the statute attaches creates the problem of a defendant who could not possibly know that a woman was pregnant. If he was in the process of committing a felony and his actions resulted in a miscarriage, he might be subject to the death penalty under the felony-murder rule.[59] Justice Mosk further pointed out that many women experience early pregnancy miscarriages without any outside influence, thus creating a risk that a defendant could be convicted of murder and sentenced to death for causing a miscarriage which would have occurred in the absence of his actions.[60] For the above reasons Justice Mosk dissented from the holding that there is not a viability requirement in section 187(a).

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54. *Davis*, 7 Cal. 4th at 826-29, 872 P.2d at 610-12, 30 Cal. Rptr. 2d at 69-71 (Mosk, J., dissenting).

55. *Id.* at 829, 872 P.2d at 612, 30 Cal. Rptr. 2d at 71 (Mosk, J., dissenting) (citing People v. Daniels, 71 Cal. 2d 1119, 1127, 459 P.2d 225, 234, 80 Cal. Rptr. 897, 901 (1969)).

56. *Id.* (Mosk, J., dissenting).

57. *Id.* at 831, 872 P.2d at 614, 30 Cal. Rptr. 2d at 73 (Mosk, J., dissenting) (referring to the lead opinion's use of seven to eight weeks after fertilization as ambiguous).

58. *Id.* at 832, 872 P.2d at 614, 30 Cal. Rptr. 2d at 73 (Mosk, J., dissenting).

59. *Id.* at 839, 872 P.2d at 619, 30 Cal. Rptr. 2d at 78. (Mosk, J., dissenting). Justice Mosk also discussed his objections to the felony-murder rule in general. *Id.* (Mosk, J., dissenting).

60. *Id.* at 840-41, 872 P.2d at 620, 30 Cal. Rptr. 2d at 79 (Mosk, J., dissenting).

## IV. IMPACT & CONCLUSION

While this case contains four separate opinions, there is considerable agreement on its primary holding. All seven justices were unanimous in their determination that, in non-abortion situations, the state may act on its interest in protecting unborn fetuses, unencumbered by the viability requirement of *Roe* and its progeny. Six justices agreed that Penal Code section 187(a) does not require viability as an element of fetal murder. Only Justice Mosk had a different interpretation of the legislative history of the statute, believing that the legislature had intended the term "fetus" to include only viable fetuses.[61] *Davis* has eliminated viability as an element of fetal murder under section 187(a).

Interestingly, the dissenting portion of Justice Baxter's opinion argued that the defendant's conviction should not be overturned on due process grounds because the trial court's jury instruction did not amount to a major change in the law.[62] This analysis seems misplaced since the lead opinion indicated that it was the *Davis* decision itself, and not the trial court's instruction, which amounted to a major change in the law. A practitioner trying to determine what degree of change in the law would justify reversal on due process grounds should not interpret the Baxter opinion as a rift in the court's position on this topic.

Justice Kennard's concurring opinion illustrated a weakness in the dissent's argument.[63] The legislature's inaction following the court of appeal's imposition of a constitutional viability requirement cannot be interpreted as acquiescence or approval of such a requirement since the legislature lacks the authority to change something that is constitutionally mandated.

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61. *See supra* notes 46-60 and accompanying text.
62. *See supra* notes 41-45 and accompanying text.
63. *See supra* note 40 and accompanying text.

C. *Section 368(a) of the California Penal Code is not unconstitutionally vague when construed to limit criminal liability for failure to prevent elder abuse to those under an existing legal duty to control the conduct of the abuser; defendant could not be charged with violating section 368(a) because no such legal duty existed:* **People v. Heitzman.**

## I. INTRODUCTION

In *People v. Heitzman*,[1] the California Supreme Court considered whether California Penal Code section 368(a) was unconstitutionally vague.[2] The statutory language at issue is as follows:

> Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult, with knowledge that he or she is an elder or dependent adult, to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependant adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation such that his or her person or health is endangered, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison for two, three, or four years.[3]

The court determined that the language of section 368(a) was overbroad and therefore unconstitutionally vague.[4] However, judicial interpretation limits liability to those who have a legal duty to control the conduct of others who abuse elders.[5] This judicial construction allows the statute to

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1. 9 Cal. 4th 189, 886 P.2d 1229, 37 Cal. Rptr. 2d 236 (1994). Chief Justice Lucas wrote the majority opinion, in which Justices Kennard, Arabian, and George concurred. *Id.* at 193-215, 886 P.2d at 1231-46, 37 Cal. Rptr. 2d at 238-253; *see infra* notes 4-93 and accompanying text. Justices Mosk and Werdegar joined in Justice Baxter's dissent. *Heitzman*, at 215-23, 886 P.2d at 1246-51, 37 Cal. Rptr. 2d at 253-58 (Baxter, J., dissenting); *see infra* notes 94-114 and accompanying text.

2. *Heitzman*, 9 Cal. 4th at 193, 886 P.2d at 1231, 37 Cal. Rptr. 2d at 238; *see* CAL. PENAL CODE § 368(a) (West 1988 & Supp. 1995).

3. CAL. PENAL CODE § 368(a) (West 1988 & Supp. 1995).

4. *Heitzman*, 9 Cal. 4th at 193, 886 P.2d at 1231, 37 Cal. Rptr. 2d at 238.

5. "Elder" refers to both elders and dependent adults for purposes of this article. *See* CAL. PENAL CODE §§ 368(d)-(e) (West 1988 & Supp. 1995) (defining "elder" as any person age 65 or older, and "dependent adult" as persons aged 18-64 with a physical or mental limitation that impairs the "ability to carry out normal activities or protect his or her rights"). References to "section" in this Note's text or footnotes refer to the California Penal Code unless otherwise specified.

withstand constitutional scrutiny despite its broad language.[6] Further, the court based this duty to control on principles of tort law.[7] The court ultimately held that it was improper to charge the defendant with violating section 368(a) because she was under no existing legal duty to control the abuser's conduct.[8]

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6. *Heitzman*, 9 Cal. 4th at 193-94, 886 P.2d at 1231, 37 Cal. Rptr. 2d at 238.
7. *Id.* at 212-13, 886 P.2d at 1243-44, 37 Cal. Rptr. 2d at 250-51.
8. *Id.* at 194, 215, 886 P.2d at 1231, 1245, 37 Cal. Rptr. 2d at 238, 252.

The defendant, Susan Valerie Heitzman, was charged with violating section 368(a) after police found her partially paralyzed father dead on a rotted mattress in his bedroom. *Id.* at 194-96, 886 P.2d at 1231-32, 37 Cal. Rptr. 2d at 238-39. The police described the decedent's mattress as reeking of urine and feces, and the bathtub as filthy and containing "fetid, green-colored water that appeared to have been there for some time." *Id.* at 194, 886 P.2d at 1231, 37 Cal. Rptr. 2d at 238. Susan's father lived with her two brothers, Jerry and Richard, Sr., who were responsible for his care. *Id.* The defendant lived in the house until a year before her father's death, and she continued to visit the house after moving out. *Id.* at 194-95, 886 P.2d at 1232, 37 Cal. Rptr. 2d at 239. When she noticed the living conditions had deteriorated, she spoke to both of her brothers about it. *Id.* at 195, 886 P.2d at 1232, 37 Cal. Rptr. 2d at 239. In particular, five weeks before her father's death, Susan discovered the soiled mattress and some feces-covered clothing on her father's bedroom floor. *Id.* Two weeks prior to his death, the defendant observed that her father, who was 67, appeared weak and disoriented. *Id.* Although she stayed in the house the weekend he died, her father's bedroom door was shut, and she did not see him. *Id.*

In superior court, Susan moved to set aside the information, claiming the evidence presented at the preliminary hearing failed to establish probable cause that she committed a crime. *Id.* at 196, 886 P.2d at 1232, 37 Cal. Rptr. 2d at 239; *see* People v. Heitzman, 29 Cal App. 4th 150, 23 Cal. Rptr. 2d 199 (1993), *review granted and opinion superseded*, 863 P.2d 634, 25 Cal. Rptr. 2d 389 (1993), *rev'd*, 9 Cal. 4th 189, 886 P.2d 1229, 37 Cal. Rptr. 2d 236 (1994); *see also* CAL. PENAL CODE § 995(a)(2)(B) (West 1985) (stating that an indictment or information will be set aside absent probable cause). The defendant contended that she could not be held criminally liable for her father's death because she was under no legal duty to act to prevent the harm caused by her brothers. *Heitzman*, 9 Cal. 4th at 196, 886 P.2d at 1232, 37 Cal. Rptr. 2d at 239. The court took the matter under submission and granted her leave to file a demurrer. *Id.* at 196, 886 P.2d at 1232-33, 37 Cal. Rptr. 2d at 239-40. Susan filed a demurrer, stating that section 368(a) was unconstitutionally vague because it did not define the class of persons having a legal duty to act. *Id.* at 196, 886 P.2d at 1233, 37 Cal. Rptr. 2d at 240. The superior court sustained the demurrer and dismissed the information. *Id.* Following an appeal by the People, the court of appeal reversed the decision. *Id.*

The court of appeal stated that Susan was criminally liable if she was under a duty to act. *Id.*; *see* People v. Heitzman, 29 Cal. App. 4th 151, 23 Cal. Rptr. 2d at 200. Based on interpretations of the financial support statutes, § 270(c) and former Civil Code §§ 206 and 242, the appellate court further found she had a duty to protect her father. *Heitzman*, 9 Cal. 4th at 196, 886 P.2d at 1233, 37 Cal. Rptr. 2d at 240; *see* CAL. PENAL CODE § 270(c) (West 1988 & Supp. 1995); CAL. FAM. CODE § 4400 (West 1994) (formerly CAL. CIV. CODE § 206, 242 (West 1982) (repealed 1994). The court of appeal reasoned that the defendant was under an affirmative duty to repel any threat to her father's well-being because of his "pensioner" status. *Heitzman*, 9

## II. TREATMENT

### A. *The Majority Opinion*

Section 368(a) of the California Penal Code is not void for vagueness when construed to limit criminal liability for failure to prevent elder abuse to those with an existing legal duty to control the conduct of the abuser.[9]

The language of the section is problematic because it creates criminal liability for failure to act without defining the underlying legal duty to act.[10] Section 368(a) imposes criminal liability for both active and passive conduct which injures or inflicts mental suffering on an elder.[11] However, criminal liability for failure to act may only be imposed when the accused is "under an existing duty to take positive action."[12] When a criminal statute does not define the legal duty to act by its own language, the court may assume the statute infers the duty from another source.[13]

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Cal. 4th at 197, 886 P.2d at 1233, 37 Cal. Rptr. 2d at 240. Both the defendant and the People appealed the decision, and the supreme court granted the review petitions of both parties. *Heitzman*, 9 Cal. 4th at 197, 886 P.2d at 1233, 37 Cal. Rptr. 2d at 240.

For a discussion of the appellate court's decision, see Lawrence Zahn, Note, *Extending the Scope of the Duty of Care under Criminal Negligence Statutes:* People v. Heitzman, 21 AM. J. CRIM. L. 491 (1994). For a discussion of elder abuse legislation, see Audrey S. Garfield, Note, *Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 859 (1991).

9. *Heitzman*, 9 Cal. 4th at 209-214, 886 P.2d at 1242-45, 37 Cal. Rptr. 2d at 249-52.

10. *Id.* at 197-98, 886 P.2d at 1233-34, 37 Cal. Rptr. 2d at 240-41; *see* CAL. PENAL CODE § 368(a) (West 1988 & Supp. 1995).

11. *Heitzman*, 9 Cal 4th at 197-98, 886 P.2d at 1233-34, 37 Cal. Rptr. 2d at 240-41; CAL. PENAL CODE § 368(a) (West 1988 & Supp. 1995).

12. *Heitzman*, 9 Cal. 4th at 197, 886 P.2d at 1233-34, 37 Cal. Rptr. 2d at 240-41; *see* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, *Omission to Act* § 3.3, at 202-12 (2d ed. 1986) (discussing criminal liability for failure to act and bases of duty); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW, *Negative Acts* § 4, at 658-62 (3d ed. 1982) (discussing criminal liability for failure to act and corresponding requirement of legal duty); 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Elements of Crime* § 115 (2d ed. 1988 & Supp. 1994) (stating that failure to act gives rise to criminal liability only where duty to act exists).

13. *Heitzman*, 9 Cal. 4th at 198, 886 P.2d at 1234, 37 Cal. Rptr. 2d at 241; *see* LAFAVE & SCOTT, *supra* note 12, § 3.3(a) at 203 (stating that where the statute does define the duty, it may be found in other statutes, the common law, or a contract); 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Elements of Crime* § 115(2) (2d ed. 1988 & Supp. 1994) (stating that duty to act can be determined by statute, contract, circumstances, or the relationship of the parties).

The statute may incorporate a duty from case law or other criminal or civil statutes.[14] The constitutional issue before the court was whether section 368(a) adequately defined the class of persons who have a legal duty to act to prevent injury or harm to elders.[15]

1. Tests for Statutory Vagueness

The court began its analysis by reviewing the guidelines for assessing vagueness.[16] The test for vagueness is derived from the due process clause of the Fourteenth Amendment, which requires there be a "reasonable degree of certainty in legislation, especially in criminal law . . . "[17] In order to satisfy due process, a criminal statute must provide (1) a standard of conduct which is definite enough to give notice of the proscribed conduct and (2) guidelines to prevent arbitrary and discriminatory enforcement by police.[18]

*a. Standards identifying proscribed conduct*

In determining whether section 368(a) meets these requirements, the court examined its plain language, legislative history, and case law.[19] The court determined that the express language of section 368(a) makes it a felony for "any person to willfully permit the infliction of pain or

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14. *Heitzman*, 9 Cal. 4th at 198, 886 P.2d at 1234, 37 Cal. Rptr. 2d at 241; *see, e.g.*, People v. Glenn, 164 Cal. App. 3d 736, 739, 211 Cal. Rptr. 547, 549 (1985) (stating that § 1202.4, which requires payment of restitution, borrows its enforcement provision from CAL. GOV'T CODE § 13967.5); Williams v. Garcetti, 5 Cal. 4th 561, 570, 853 P.2d 507, 511, 20 Cal. Rptr. 2d 341, 345 (1993) (concluding that § 272 incorporates parental duties developed in tort law); *see also* LAFAVE & SCOTT, *supra* note 12, § 3.3(a), at 203 (discussing origins of duties).

15. *Heitzman*, 9 Cal. 4th at 199, 886 P.2d at 1234, 37 Cal. Rptr. 2d at 241.

16. *Id.* at 199-200, 886 P.2d at 1234-35, 37 Cal. Rptr. 2d at 241-42.

17. *Id.* at 199, 886 P.2d at 1234-35, 37 Cal. Rptr. 2d at 241-42 (quoting *In re* Newbern, 53 Cal. 2d 786, 792, 3 Cal. Rptr. 364, 350 (1960)); *see* U.S. CONST. amend. XIV; CAL. CONST. art. 1, §7. *See generally* A. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (discussing the purpose of the doctrine and the classification of cases invoking it).

18. *Heitzman*, 9 Cal. 4th at 199-200, 886 P.2d at 1235, 37 Cal. Rptr. 2d at 242. A number of cases explore the void-for-vagueness doctrine. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983); Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. CT. 2294, 2298-99 (1972); Walker v. Superior Court, 47 Cal. 3d 112, 141, 763 P.2d 852, 871, 253 Cal. Rptr. 1, 20 (1988), *cert. denied*, 491 U.S. 905 (1989); People v. Superior Court (Caswell), 46 Cal. 3d 381, 389-90, 758 P.2d 1046, 1049, 250 Cal. Rptr. 515, 518 (1988).

19. *Heitzman*, 9 Cal. 4th at 200, 886 P.2d at 1235, 37 Cal. Rptr. 2d at 242; *see Walker*, 47 Cal. 3d at 143, 763 P.2d at 872, 253 Cal. Rptr. at 21; Pryor v. Municipal Court, 25 Cal. 3d 283, 246, 599 P.2d 636, 640, 158 Cal. Rptr. 330, 334 (1979). Both *Walker* and Pryor consider the areas that must be analyzed to determine vagueness.

suffering on an elder."[20] While the People argued that this language itself imposes a duty on every individual to prevent abuse of elders, the defendant argued that this language was overbroad, imposing a duty upon those who "might not reasonably know they have such a duty."[21]

The court ultimately agreed with the defendant,[22] noting that an individual cannot be civilly liable for failure to protect another unless there is a "legal or special relationship between the parties giving rise to a duty to act."[23] To construe section 368(a) as the State urged would extend criminal liability to those who have only fleeting contact with the abused.[24] The result would be an imposition of felony criminal liability where no civil liability could be found under the same circumstances.[25] The court concluded that the legislature did not intend such a result.[26] In addition, the court noted that section 368(a) was enacted before section 15631 of the California Welfare and Institutions Code, and that a broad interpretation of section 368(a) would render the more recent statute meaningless.[27]

Having decided that the plain language of section 368(a) failed to provide adequate notice to those with a legal duty, the court then looked to its legislative history for further guidance.[28] The court determined that the goal of section 368(a) is the same as the felony child abuse statute, from which much of the language of section 368(a) was taken verbatim.[29] The goal of the child abuse statute is to "protect the members of a

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20. *Heitzman*, 9 Cal. 4th at 200, 886 P.2d at 1235, 37 Cal. Rptr. 2d at 242.

21. *Id.*

22. *Id.*

23. *Id.* at 200-201, 886 P.2d at 1236, 37 Cal. Rptr. 2d at 243 (citing Williams v. State, 34 Cal. 3d 18, 664 P.2d 137, 192 Cal. Rptr. 233 (1983)).

24. *Id.* at 200, 886 P.2d at 1235, 37 Cal. Rptr. 2d at 242.

25. *Id.* The court offered as an example a delivery person who notices an elder in poor condition when making a delivery, and fails to intervene. *Id.* Under tort law, the delivery person would not be liable for failure to act because the delivery person owed no special legal duty to the elder. *See* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 858 (1988 & Supp. 1994) (discussing the necessity of special relationship to create duty to act).

26. *Heitzman*, 9 Cal. 4th at 201, 886 P.2d at 1236, 37 Cal. Rptr. 2d at 243.

27. *Id.* Section 15630 of the California Welfare and Institutions Code requires custodians of elders, health practitioners, county adult protective services employees, and law enforcement officials to report known or suspected elder abuse. CAL. WELF. & INST. CODE § 15630 (West Supp. 1995). Section 15631 states that all others *may* report elder abuse, but are not required to do so. CAL. WELF. & INST. CODE § 15631 (West Supp. 1995).

28. *Heitzman*, 9 Cal. 4th at 201, 886 P.2d at 1236, 37 Cal. Rptr. 2d at 243.

29. *Id.* at 201-03, 886 P.2d at 1236-37, 37 Cal. Rptr. 2d at 243-44. Section 368(a) is

vulnerable class from abusive situations in which serious injury or death is likely to occur."[30] Although the legislative history of section 368(a) reveals that caretakers have a duty to protect elders from abuse, it does not indicate others who may also share this duty.[31]

Finding no guidance in the legislative history, the court then considered case law construing both section 368(a) and the felony child abuse statute on which section 368(a) is based.[32] Before *Heitzman*, California courts had not precisely addressed the section's lack of clarity, but they had considered other aspects of its constitutionality.[33] In People v. McKelvey,[34] the court of appeal found section 368(a) to be uncertain because it "[did] not describe those persons liable for permitting or causing a dependent adult to suffer."[35] In *McKelvey*, however, the court did not directly rule on vagueness because it found the defendant had assumed the care and custody of the victim, and that his actions violated the express language of section 368.[36] In *People v. Manis*,[37] the court of appeal addressed the vagueness of the word "care" in section 368(a).[38] Stating that the meaning of "care" was not uncertain and that it gave adequate notice without further definition, the appellate court upheld the constitutionality of the section.[39] Neither of these cases, however, aided the *Heitzman* court in its analysis.

Further, interpretations of the underlying felony child abuse statutes provided no guidance to the *Heitzman* court, since the court found no

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based largely on §§ 273a and 273d, which create criminal liability for those who actively or passively inflict harm upon a child. The language of section 368(a) was taken verbatim from section 273a, except that the word "child" was replaced with "dependent adult." *See* CAL. PENAL CODE §§ 273a, 368(a) (West 1988 & Supp. 1995). Subsequent amendments to both sections have not resulted in any major substantive changes. *See* CAL PENAL CODE §§ 273a, 368(a) (West Supp. 1995).

30. *Heitzman*, 9 Cal. 4th at 203, 886 P.2d at 1238, 37 Cal. Rptr. 2d at 245; *see* People v. Lee, 234 Cal. App. 3d 1214, 1220, 286 Cal. Rptr. 117, 120 (1991) (stating that the purpose of section 273a is to protect children from serious injury).

31. *Heitzman*, 9 Cal. 4th at 204, 886. P.2d at 1238, 37 Cal. Rptr. 2d at 245.

32. *Id.*

33. *Id.*

34. 230 Cal. App. 3d 399, 281 Cal. Rptr. 359 (1991). In *McKelvey*, the defendant neglected his mother to the point that she was covered with insects and laid in excrement. *Id.* at 402, 281 Cal. Rptr. at 360.

35. *Id.* at 404, 281 Cal. Rptr. at 361.

36. *Id.* Note that subsections 368 (a)and (b) apply to those "having the care or custody of any elder." CAL. PENAL CODE §§ 368(a) and (b) (West 1988 & Supp. 1995).

37. 10 Cal. App. 4th 110, 12 Cal. Rptr. 2d 619 (1992). In *Manis*, the defendant neglected his mother to the point that she was near death from dehydration and burns caused by sitting in her own urine. *Id.* at 113, 12 Cal. Rptr. 2d at 620.

38. *Id.* at 116-17, 12 Cal. Rptr. 2d at 623.

39. *Id.* The California Supreme Court disapproved *Manis*. *Heitzman*, 9 Cal 4th at 209 n.17, 886 P.2d at 1236 n.17, 37 Cal. Rptr. 2d at 248 n.17.

case law concerning the duty to prevent abuse.[40] The court was careful to rebut the dissent's contention that the language of section 273a supports the imposition of a duty on *everyone* to prevent elder abuse.[41] The court noted that in every case resulting in criminal liability for failure to prevent child abuse, the defendant was a parent of the abused child.[42] Accordingly, criminal liability under section 273a is based on the legal duty of parents to protect their children, not on a general duty of "any person" to prevent child abuse.[43] Since the supreme court was unable to find case law delineating persons who have a duty under sections 368(a) or 273, it held that section 368(a) did not give sufficient notice "to the class of persons who may be under an affirmative duty to prevent the infliction of abuse."[44]

*b. Protection against arbitrary enforcement*

The court next analyzed whether the statute provided enough guidance to prevent arbitrary and discriminatory enforcement by police.[45] Indeed, the facts of *Heitzman* provide an example of inconsistent enforcement.[46] The police arrested the defendant and her two brothers, charging all of them with violating section 368(a).[47] At the time of the arrest, the brothers lived in the house with the victim and were responsible for

40. *Heitzman*, 9 Cal. 4th at 205, 886 P.2d at 1238-39, 37 Cal. Rptr. 2d at 245-46.

41. *Id.* at 205 n.14, 886 P.2d at 1238-39 n.14, 37 Cal. Rptr. 2d at 246 n.14.

42. *Id.*

43. *Id.*; *cf.* Williams v. Garcetti, 5 Cal. 4th 561, 570, 853 P.2d 507, 511, 20 Cal. Rptr. 2d 341, 345 (1993) (stating that parental duties to protect and care for their children are "well established"). *See generally* S. Randall Humm, *Criminalizing Poor Parenting Skills as Means to Contain Violence by and Against Children*, 139 U. PA. L. REV. 1123 (1991) (discussing criminal liability for parents who do not protect or control their children); Nancy A. Tanck, Note, *Commendable or Condemnable? Criminal Liability for Parents who Fail to Protect Their Children from Abuse*, 1987 WISC. L. REV. 659 (1987) (discussing criminal liability for parents who fail to protect children from abuse).

44. *Heitzman*, 9 Cal. 4th at 205, 886 P.2d at 1239, 37 Cal. Rptr. 2d at 246. Seeking a definition of those bound by section 368(a), the court examined the language of the statute, the legislative history, and case law. *See supra* notes 19-44 and accompanying text.

45. *Heitzman*, 9 Cal. 4th at 205-07, 886 P.2d at 1239, 37 Cal. Rptr. 2d at 246.

46. *Id.* at 206, 886 P.2d at 1239, 37 Cal. Rptr. 2d at 246; *see infra* notes 47-54 and accompanying text.

47. *Heitzman*, 9 Cal. 4th at 194, 886 P.2d at 1231, 37 Cal. Rptr. 2d at 238; *see also supra* note 3.

his care.[48] Although the defendant no longer lived in the house, she visited often.[49] However, the police did not arrest the defendant's sister, even though she too had visited and knew her brothers neglected her father.[50] Furthermore, the victim's grandson lived in the house with him but was neither arrested nor charged.[51] The court explained that prosecuting the defendant did not necessarily amount to arbitrary or discriminatory enforcement.[52] However, the facts demonstrated that "under the statute as broadly construed, officers and prosecutors might well be free to take their guidance not from any legislative mandate embodied in the statute, but rather, from their own notions of the proper legal obligation owed by a child to his or her aging parent."[53] Consequently, the court held that section 368(a) failed to provide a definite standard for law enforcement.[54]

2. Judicial Construction to Uphold Constitutionality

Rejecting the State's argument that the statute is constitutionally sound, the court held that section 368(a) failed both void-for-vagueness tests.[55] The prosecution first contended that narrow construction of section 368(a) required proof of criminal negligence, and therefore, the statute was not impermissibly vague.[56] The court agreed that a threshold determination of criminal negligence provided a clear standard of care.[57] However, to pass constitutional muster, all elements of a section 368(a) violation must be clear.[58] The class of persons who have a legal duty must also be well-defined.[59]

The People's second argument emphasized that prior decisions found that the felony child abuse statute was constitutional.[60] For this reason,

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48. *Heitzman*, 9 Cal. 4th at 194, 886 P.2d at 1231, 37 Cal. Rptr. 2d at 238.
49. *Id.* at 194-95, 886 P.2d at 1232, 37 Cal. Rptr. 2d at 239.
50. *Id.* at 206, 886 P.2d at 1240, 37 Cal. Rptr. 2d at 247.
51. *Id.* at 206, 886 P.2d at 1239, 37 Cal. Rptr. 2d at 246.
52. *Id.* at 207, 886 P.2d at 1240, 37 Cal. Rptr 2d at 247.
53. *Id.* at 207, 886 P.2d at 240, 37 Cal. Rptr. 2d at 247.
54. *Id.*
55. *Id.*
56. *Id.* The State relied on cases that upheld section 368(a) by construing it to require criminal negligence. *See* People v. Manis, 10 Cal. App. 4th 110, 12 Cal. Rptr. 2d 619 (1992); People v. Superior Court (Holvey), 205 Cal. App. 3d 51, 60, 252 Cal. Rptr. 335, 341 (1988) (stating that conduct necessary to violate section 368(a) must amount to recklessness or gross or criminal negligence).
57. *Heitzman*, 9 Cal. 4th at 208, 886 P.2d at 1241, 37 Cal. Rptr. 2d at 248.
58. *See id.* at 208, 886 P.2d at 1241, 37 Cal. Rptr. 2d at 248.
59. *Id.* at 208, 886 P.2d at 1241, 37 Cal. Rptr. 2d at 248.
60. *Id.* Section 273a reads as follows: "Any person who, under circumstances or conditions likely to produce great bodily harm or death, or willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suf-

they argued that stare decisis required the court to follow a line of cases beginning with People v. Smith.[61] In *Smith*, the California Supreme Court held that the statutory language, "unjustifiable physical pain or mental suffering," provided both adequate notice and a standard for enforcement.[62] Thus, it was not unconstitutionally vague.[63] Four years later, in *People v. Superior Court* (Holvey),[64] the court of appeal held that section 368(a) was constitutional, since its language was identical to that analyzed in *Smith*.[65] The majority in *Heitzman* distinguished *Smith*, claiming that the issue under consideration was not addressed in *Smith* or other previous cases.[66] The court then declared that *Holvey* was disapproved to the extent it held section 368(a) to be "facially constitutional without the curative construction set forth herein."[67]

*a. Imposing a legal duty limitation*

Although the court rejected the State's arguments and section 368(a) failed both certainty tests, section 368(a) is enforceable.[68] This is because courts may not invalidate a statute "if any reasonable and practical construction can be given to its language."[69] If the court is able to give

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fering . . . [may be punished] by imprisonment in the county jail not exceeding one year, or in the state prison for 2, 4, or 6 years." CAL. PENAL CODE § 273a (West 1988 & Supp. 1995).

61. 35 Cal. 2d 798, 678 P.2d 886, 201 Cal. Rptr. 311 (1984).

62. *Id.* at 809-10, 678 P.2d at 893-94, 201 Cal. Rptr at 318-19; *see Heitzman*, 9 Cal. 4th at 208, 886 P.2d at 1241, 37 Cal. Rptr. 2d at 248 (citing *Smith*, 35 Cal 3d at 809-10, 678 P.2d at 893-95, 201 Cal. Rptr. at 318-19); *see also* CAL. PENAL CODE § 273a(1) (West 1988 & Supp. 1995).

63. *Smith*, 35 Cal. 3d at 809-10, 678 P.2d at 893-94, 201 Cal. Rptr. at 318-19; *see also Heitzman*, 9 Cal. 4th at 208, 886 P.2d at 1241, 37 Cal. Rptr. 2d at 248 (citing *Smith*, 35 Cal. 3d at 809-10, 678 P.2d at 893-94, 201 Cal. Rptr. at 318-19).

64. 205 Cal. App. 3d 51, 252 Cal. Rptr. 335 (1988).

65. *Holvey*, 205 Cal. App. 3d at 60, 252 Cal. Rptr. at 340; *see Heitzman*, 9 Cal. 4th at 208-09, 886 P.2d at 1241, 37 Cal. Rptr. 2d at 248 (citing *Holvey*, 205 Cal. App. 3d at 60, 252 Cal. Rptr. at 340); *accord* People v. Manis, 10 Cal. App. 4th 110, 114, 12 Cal. Rptr. 2d 619, 621 (1992) (upholding section 368(a)).

66. *Heitzman*, 9 Cal. 4th at 209, 886 P.2d at 1241, 37 Cal. Rptr. 2d at 248; *see* People v. Myers, 43 Cal. 3d 250, 265 n.5, 729 P.2d 698, 707 n.5, 233 Cal. Rptr. 264, 272 n.5 (1987), *denial of habeas corpus rev'd*, Myers v. Ylst, 897 F.2d 417 (9th Cir. 1990), *cert. denied*, 498 U.S. 879 (1990). *See generally* 16 CAL. JUR. 3D *Courts* §§ 174, 177 (1983 and Supp. 1994) (discussing application of stare decisis).

67. *Heitzman*, 9 Cal. 4th at 209, 886 P.2d at 1241, 37 Cal. Rptr. 2d at 248. Note that this disapproval also applies to *Manis*. *Id.*

68. *Id.* at 209, 886 P.2d at 1242, 37 Cal. Rptr. 2d at 248-49.

69. Walker v. Superior Court, 47 Cal. 3d 112, 143, 763 P.2d 852, 873, 253 Cal. Rptr.

"specific content to terms that might otherwise be unconstitutionally vague," it may not void the statute for vagueness.[70] Accordingly, the *Heitzman* court determined that judicial construction could clarify section 368(a) and save it from invalidation.[71]

The majority disagreed with the appellate court's construction of section 368(a), which integrated section 270c and two repealed sections of the California Civil Code, sections 206 and 242.[72] These provisions address the financial obligation of adult children to aid their needy parents.[73] The court found that it was inappropriate to base the affirmative duty to prevent elder abuse on this financial relationship because the statutory schemes have different underlying purposes and the purpose of section 368(a) would not be furthered by such construction.[74] The purpose of the elder abuse statutes is to protect "*all* elders, both indigent and financially secure, from abusive situations."[75] Basing the duty to prevent abuse on financial support statutes does not protect infirm, but solvent, elders.[76]

Concerned with political inequities, the court found it unsatisfactory to base the duty upon any relationship between the victim and the individual charged with failure to act.[77] It preferred to base the duty on the relationship between the person actually inflicting the abuse and the person who allegedly failed to prevent the abuse.[78] This approach is consistent

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1, 22 (1988) (quoting Lockheed Aircraft Corp. v. Superior Court, 28 Cal. 2d 481, 484 171 P.2d 21, 24 (1946)), *cert. denied*, 491 U.S. 905 (1989); *see Heitzman*, 9 Cal. 4th at 209, 886 P.2d at 1242, 37 Cal. Rptr. 2d at 249 (quoting *Walker*, 47 Cal. 3d at 143, 763 P.2d at 873, 253 Cal. Rptr. at 22).

70. *Id.* at 209, 886 P.2d at 1241, 37 Cal. Rptr. 2d at 248-49 (quoting Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 598, 557 P.2d 473, 482, 135 Cal. Rptr. 41, 50 (1976)).

71. *Id.* at 209-14, 886 P.2d at 1242-45, 37 Cal. Rptr. 2d at 249-52.

72. *Id.* at 209-10, 886 P.2d at 1242, 37 Cal. Rptr. 2d at 249.

73. *Id.* at 210, 886 P.2d at 1242, 37 Cal. Rptr. 2d at 249; *see* CAL. PENAL CODE § 270c (West 1988 and Supp. 1995) (making it a misdemeanor to for adult children to fail to provide for indigent parents); CAL. FAM. CODE §§ 4400, 4401 (West 1994 & Supp. 1995); *see supra* note 8. *See generally* 17 CAL. JUR. 3D *Criminal Law* § 973 (1984 and Supp. 1994) (discussing criminal liability for failure to support indigent parents); 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Decency and Morals* § 834 (2d ed. 1988) (discussing criminal liability for failure to support indigent parents).

74. *Heitzman*, 9 Cal. 4th at 210-11, 886 P.2d at 1242-43, 37 Cal. Rptr. 2d at 249-50. The purpose of the financial statutes is to place the burden of supporting on their children rather than the public. *Id.* at 210, 886 P.2d at 1242, 37 Cal. Rptr. 2d at 249 (quoting *In re* Jerald C., 36 Cal. 3d 1, 9-10, 678 P.2d 917, 922, 201 Cal. Rptr. 342, 347 (1984) (citations omitted)).

75. *Id.* at 211, 886 P.2d at 1243, 37 Cal. Rptr. 2d at 250.

76. *Id.*

77. *Id.* at 212, 886 P.2d at 1243, 37 Cal. Rptr. 2d at 250.

78. *Id.*

with principles of tort law.[79] Thus, one only has a legal duty to control the conduct of certain people—those with whom there is a special relationship.[80]

Tort law recognizes several special relationships that give rise to a duty to control.[81] These include parent/minor child, employer/employee, and landowner/licensee.[82] In addition, one who has responsibility for a person whom he knows or should know poses a threat to others has a duty to control the dangerous party."[83]

In order for there to be a legal duty under tort law, a party must not only have responsibility to control another, he must also have the ability to control him.[84] Where no ability to control exists, there is no duty.[85] This principle impacts criminal law statutes similar to section 368(a), since legislators have borrowed the special relationship concept from tort law.[86] Following legislative example, the *Heitzman* court constructed section 368(a) to mean that "one will be criminally liable for the abusive conduct of another only if he or she has the ability to control such conduct."[87]

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79. *Id.* at 212, 886 P.2d at 1243-44, 37 Cal. Rptr. 2d at 250-51.

80. *Id.; see* RESTATEMENT (SECOND) OF TORTS § 315 (1965); 57B AM. JUR. 2D *Negligence* §§ 1768-69 (1989 & Supp. 1994) (discussing negligence for failure to control); 74 AM. JUR. 2D, *Torts* § 11 (1974 & Supp. 1993) (stating that duty to protect is inactionable unless certain relationships exist).

81. *Heitzman*, 9 Cal. 4th at 212, 886 P.2d at 1243-44, 37 Cal. Rptr. 2d at 250-51.

82. *Id.* at 212, 886 P.2d at 1244, 37 Cal. Rptr. 2d at 251.

83. *Heitzman*, 9 Cal 4th at 212, 886 P.2d at 1244, 37 Cal. Rptr. 2d at 251; *see* RESTATEMENT (SECOND) OF TORTS §§ 316-20 (1965). *See generally* Wade R. Habeeb, Annotation, *Parents' Liability for Injury of Damage Intentionally Inflicted by Minor Children*, 54 A.L.R. 3D 974 (1973 & Supp 1994); B.C. Rickets, Annotation, *Validity and Construction of Statutes Making Parents Liable for Tort Committed by Their Minor Children*, 8 A.L.R. 3D 612 (1966 & Supp. 1994).

84. *Heitzman*, 9 Cal 4th at 213, 886 P.2d at 1244, 37 Cal. Rptr. 2d at 251 (citing Megeff v. Doland, 123 Cal. App. 3d 251, 261, 176 Cal. Rptr. 467, 472 (1981)).

85. *Id.*

86. *See id.* at 212-13, 886 P.2d at 1244-45, 37 Cal. Rptr. 2d at 251. *See generally* 17 CAL. JUR 3D *Criminal Law* § 83 (1984) (discussing criminal liability for failure to act); Eunice A. Eichelberger, Annotation, *Criminal Responsibility of Parent for Act of Child*, 12 A.L.R. 4TH 673 (1982) (discussing criminal liability of parents for acts of their children).

87. *Heitzman*, 9 Cal. 4th at 213, 886 P.2d at 1244, 37 Cal. Rptr. 2d at 251; *see* Williams v. Garcetti, 5 Cal. 4th 561, 574, 853 P.2d 507, 514, 20 Cal. Rptr. 2d 341, 348 (1993) (stating that inability of parent to control child does not create civil liability). *See generally* Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CAL. L. REV. 547 (1988) (discussing criminal liability for failure to act).

The court reasoned that this construction of section 368(a) is reasonable because it "gives meaning to the statutory language . . . while at the same time it refrains from extending the reach of the statute in a manner that is unlikely to have been intended by the Legislature."[88] Further, this construction prohibits both active and passive conduct which results in elder abuse and thus upholds the statute's integrity.[89] Inflicting abuse and failing to prevent it both carry the same punishment under section 368(a).[90] Therefore, the court reasoned that the duty imposed on persons to prevent abuse must have "sufficient stature and seriousness" to equal the prohibition against causing injury to another.[91]

In addition, since criminal liability for caretakers or custodians attaches at a lesser degree of harm, it is fair and consistent with the statutory scheme to limit non-custodial liability for failure to prevent abuse.[92] This construction of section 368(a) narrows its scope sufficiently to provide "fair notice to those already under a duty to control" and to clarify guidelines for enforcement.[93] For these reasons, the court upheld section 368(a).[94]

*b. Application of statute as construed*

Applying section 368(a) as construed above, the court found that the state did not present evidence at the preliminary hearing to show that the defendant had a legal duty to control her brothers' conduct.[95] Because the State did not meet its burden, the supreme court reversed the appellate court's decision and dismissed the charges against the defendant.[96]

*B. The Dissenting Opinion*

The dissent, led by Justice Baxter, attacked the majority's conclusion that a special relationship is required to clarify section 368(a) and satisfy concerns about constitutionality.[97] According to the dissent, the State's criminal prosecution of the defendant was valid, and judicial construc-

88. *Heitzman*, 9 Cal. 4th at 213, 886 P.2d at 1244, 37 Cal. Rptr. 2d at 251.
89. *Id.* at 213-14, 886 P.2d at 1244, 37 Cal. Rptr. 2d at 251-52.
90. *Id.* at 214, 886 P.2d at 1244-45, 37 Cal. Rptr. 2d at 251-52.
91. *Id.* at 214, 886 P.2d at 1244-45, 37 Cal. Rptr. 2d at 252.
92. *Id.* at 214, 886 P.2d at 1245, 37 Cal. Rptr. 2d at 252.
93. *Id.*
94. *Id.*
95. *Id.* at 215, 886 P.2d at 1245, 37 Cal. Rptr. 2d at 252.
96. *Id.* at 215, 886 P.2d at 1245, 37 Cal. Rptr. 2d at 252.
97. *Id.* at 215-23, 886 P.2d at 1246-51, 37 Cal. Rptr. 2d at 253-58 (Baxter, J., dissenting). Justices Mosk and Werdegar concurred in the dissent. *Id.* at 223, 886 P.2d at 1251, 37 Cal. Rptr. 2d at 258 (Baxter, J., dissenting).

tion of section 368(a) was unnecessary to comply with legislative intent.[98] Justice Baxter argued that section 368(a) on its face requires proof of criminal negligence and that this requirement renders the statute constitutional.[99] Further, the dissent found that the preliminary hearing evidence established the defendant's criminal negligence and agreed with the court of appeal that charges should be reinstated against the defendant.[100]

Justice Baxter disagreed with the majority view that the statutory language, "any person who permits" abuse, does not by its own words impose a duty to act to prevent elder abuse.[101] He argued that "any person" unambiguously applies to anyone "who commits the misconduct described" in section 368(a)."[102] Under this view, the statutory language creates and defines the class of offenders, making the majority's construction unnecessary.[103]

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98. *Id.* at 215-16, 886 P.2d at 1246, 37 Cal. Rptr. 2d at 253 (Baxter, J., dissenting).

99. *Id.* at 216, 886 P.2d at 1246, 37 Cal. Rptr. 2d at 253. The dissent argued that the language of section 368(a) itself establishes a criminal negligence standard of conduct. *Id.* at 218, 886 P.2d at 1246, 37 Cal. Rptr. 2d at 255. For the language of section 368(a), *see supra* text accompanying note 3.

100. *Heitzman*, 9 Cal. 4th at 216, 886 P.2d at 1246, 37 Cal. Rptr. 2d at 253 (Baxter, J., dissenting). The dissent noted that the defendant was formerly her father's caretaker, knew of his full dependence on others for daily care, and had actual knowledge of the conditions in which he lived. *Id.* at 222, 886 P.2d at 1250, 37 Cal. Rptr. 2d at 257 (Baxter, J., dissenting). Despite her knowledge, the defendant did nothing to help her father, and his death was a direct result of that neglect. *Id.* at 222, 886 P.2d at 1250-51, 37 Cal. Rptr. 2d at 257-58 (Baxter, J., dissenting). The dissent found these facts sufficient to show probable cause to believe she was criminally negligent. *Id.* (Baxter, J., dissenting).

101. *Id.* at 216-17, 886 P.2d at 1246-47, 37 Cal. Rptr. 2d at 253-54 (Baxter, J., dissenting).

102. *Id.* at 217, 886 P.2d at 1247, 37 Cal. Rptr. 2d at 254 (Baxter, J., dissenting).

103. *Id.* (Baxter, J., dissenting). Justice Baxter noted that the majority cited no authority for its assertion that "any person" is an ambiguous term. *Id.* (Baxter, J., dissenting) He further argued that "*most* criminal statutes apply . . . to all persons who commit the proscribed act," and the fact that the act under section 368(a) is really an omission does not create ambiguity. *Id.* (Baxter, J., dissenting). To support his position, he cited several criminal statutes that impose liability for "any person" who "willfully or knowingly 'permit' or 'allow' a specified wrong to occur." *Id.* (Baxter, J., dissenting). For example, under § 499.2 of the California Business and Professions Code, "[e]very person who willfully makes any false statement . . . or permits . . . any other person to impersonate him" is criminally liable for failure to stop the fraudulent conduct. CAL. BUS. & PROF. CODE § 4992.7 (West 1990). Similarly, "[e]very person who willfully causes, procures, or allows himself or any other person to be registered as a voter, knowing that he or that the other person is not entitled to

The dissent then argued that when the Legislature incorporated the language of section 273a into section 368(a), it also adopted its purpose: "to protect individuals who, because of their age or dependency, are the most vulnerable to abuse and neglect."[104] A construction that limits liability to those who have a "special relationship" to the abuser is contrary to this legislative purpose.[105] Furthermore, to interpret section 368(a) as requiring criminal negligence is consistent with prior decisions which construed it and its parent statute.[106]

In the dissent's view, section 368(a) provides both adequate notice and guidelines for enforcement when construed to require proof of criminal negligence.[107] Justice Baxter explained that the criminal negligence standard has been upheld in other criminal statues, including section 273a, and "is not vague or unreasonable."[108] The standard of conduct requires not only that the defendant "willfully" permit the abuse, but also that the negligence be "aggravated, gross, culpable, or reckless."[109] According to

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registration" faces criminal liability for this conduct. CAL. ELEC. CODE § 29200 (West 1989); *see also* CAL. FIN. CODE § 5307 (West Supp. 1995) (providing for criminal liability for making or permitting defamation that harms business reputation).

104. *Heitzman*, 9 Cal. 4th at 218, 886 P.2d at 1248, 37 Cal. Rptr. 2d at 254-55 (Baxter, J., dissenting). Since courts may assume the legislature knows of existing constructions of statues when it drafts new legislation, it follows that the legislature knew of existing constructions of section 273a when it enacted 368(a) with identical language. *See* People v. Harrison, 48 Cal. 3d 321, 768 P. 2d 1078, 256 Cal. Rptr. 2d 410 (1989).

105. *Heitzman*, 9 Cal. 4th at 218, 886 P.2d at 1248, 37 Cal. Rptr. 2d at 254 (Baxter, J., dissenting).

106. *Id.* at 218, 886 P.2d at 1248, 37 Cal. Rptr. 2d at 255 (Baxter, J., dissenting). The dissent explained that § 273a has been construed to "impose a general duty to intervene where failure to do so would be criminally negligent." *Id.* at 218, 886 P.2d at 1248, 37 Cal. Rptr. 2d at 255 (Baxter, J., dissenting); *see, e.g.*, People v. Lee, 234 Cal. App. 3d 1214, 1220-21, 286 Cal Rptr. 117, 120 (1991) (explaining that liability attaches when conduct is willful and likely to produce great bodily harm or injury); People v. Hernandez, 111 Cal. App. 3d 888, 895, 168 Cal. Rptr. 2d 898, 902 (1980) (stating that section 273a requires that conduct amount to gross departure from ordinary care); People v. Peabody, 46 Cal. App. 3d 43, 48-49, 119 Cal. Rptr. 2d 780, 783 (1975) (holding that section 273a requires proof of criminal negligence).

107. *Heitzman*, 9 Cal. 4th at 219-22, 886 P.2d at 1249-50, 37 Cal. Rptr. 2d at 255-57 (Baxter, J., dissenting).

108. *Id.* at 220, 886 P.2d at 1249, 37 Cal. Rptr. 2d at 255 (Baxter, J., dissenting); *see* Williams v. Garcetti, 5 Cal. 4th 561, 853 P.2d 507, 20 Cal. Rptr. 2d 341 (1993) (requiring criminal negligence as an element contributing to delinquency of a minor); People v. Oliver, 210 Cal. 3d 138, 258 Cal. Rptr. 138 (1989) (construing involuntary manslaughter to require criminal negligence); People v. Penny, 44 Cal. 2d 861, 285 P.2d 926 (1955) (construing involuntary manslaughter statute to require criminal negligence); *see also* Walker v. Superior Court, 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 2d 1 (1988) (stating that the criminal negligence standard provides adequate notice under vagueness doctrine), *cert. denied*, 491 U.S. 905 (1989).

109. *Heitzman*, 9 Cal 4th at 219-20, 886 P.2d at 1249, 37 Cal. Rptr. 2d at 255 (quot-

the dissent, the majority's fear of liability ensuing from brief exposure to abused or neglected elders is unfounded.[110] The dissent submitted that case law has provided factors that are typically present where criminal negligence is found and that the factual situations therein serve as notice of prohibited conduct.[111] Under this reasoning, the standard is also sufficiently clear to serve as a guideline for law enforcement officials and jurors.[112] The dissent noted that even if a situation were to arise where the defendant's conduct wavered on the brink of liability, courts may not invalidate statutes simply because it may be difficult to decide "whether certain marginal offenses fall within its grasp."[113]

Evidence presented at the preliminary hearing showed that the defendant knew her father's living conditions were likely to result in serious illness or death unless he received medical attention, yet she did not do anything to help him.[114] For this reason, the dissent believed that probable cause existed to support the information charging her with violating section 368(a).[115]

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ing *Penny*, 44 Cal. 2d at 879, 285 P.2d at 937).

The dissent rejected the argument that the statute does not provide fair warning of the type of conduct that creates criminal liability, stating that the law often requires people to make subtle distinctions between conduct that is lawful and conduct that is criminally negligent. *Id.* at 221, 886 P.2d at 1249, 37 Cal. Rptr. 2d at 256 (Baxter, J., dissenting) (quoting *Walker*, 47 Cal. 3d at 142, 763 P.2d at 872, 253 Cal. Rptr. at 21).

110. *Id.* at 221-22, 886 P.2d at 1250, 37 Cal. Rptr. 2d at 257 (Baxter, J., dissenting). The dissent noted that similar concern has never been expressed regarding the child abuse statute. *Id.* (Baxter, J., dissenting).

111. *Id.* (Baxter, J., dissenting). Factors noted by the dissent include: (1) the defendant knew that the victim was in urgent need of help; (2) high probability of "serious injury or death" without help; (3) the defendant did not act or inexcusably delayed acting; (4) the defendant demonstrated an intent or willingness to allow the victim to suffer; and (5) the defendant had "a reasonable opportunity to provide assistance." *Id.* at 221, 886 P.2d at 1249-50, 37 Cal. Rptr. 2d at 256-57 (Baxter, J., dissenting) (citations omitted). When the State pursues violations of §§ 368(a) or 273a, all of these factors are usually present. *See id.* (Baxter, J., dissenting). However, the jury ultimately weighs these factors to determine the parameters of criminal negligence. *See id.* (Baxter, J., dissenting).

112. *Id.* at 222, 886 P.2d at 1250, 37 Cal. Rptr. 2d at 257 (Baxter, J., dissenting).

113. *Id.* (Baxter, J., dissenting) (quoting Williams v. Garcetti, 5 Cal. 4th 561, 573, 853 P.2d 507, 513, 20 Cal. Rptr. 2d 341, 347 (1993).

114. *Id.* at 222-23, 886 P.2d at 1250-51, 37 Cal. Rptr. 2d at 257-58 (Baxter, J., dissenting).

115. *Id.* (Baxter, J., dissenting).

## III. IMPACT AND CONCLUSION

*Heitzman* distinguishes the duty to protect elders from the duty to protect children, despite the virtually identical language of the two statutes. Section 368(a) no longer creates liability for failure to act without a pre-existing legal duty to act.[116] This is a significant departure from the child abuse statute which continues to impose liability on anyone who is criminally negligent in failing to prevent child abuse, without requiring a pre-existing legal duty.[117] As noted by the dissent, this interpretation calls into question the constitutionality of all criminal statutes that impose liability for omissions but fail to specifically define the class of offenders who have a duty to act. The decision of the *Heitzman* majority may have far-reaching implications—especially on section 273a. If statutes cannot be saved by the same "special relationship" construction imposed by the majority in this case, there is a risk that future courts will find them unconstitutional.[118] Since the duty set forth in the explicit language of section 268(a) is overbroad, is the duty to protect children under section 273a similarly unconstitutional?

The holding in *Heitzman* effectively limits the class of potential offenders under section 368(a) to caretakers and custodians of elders, because of this the number of persons under a pre-existing legal duty to control the acts of the abuser is likely to be small.[119] This result seems contrary to the intent of the Legislature.[120] The Legislature clearly modeled the elder abuse law on the child abuse law.[121] If it had intended to make the scope of liability narrower for elder abuse, would it not have explicitly done so?

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116. *Id.* at 211-13, 886 P.2d at 1243-44, 37 Cal. Rptr. 2d at 250-51.

117. *See supra* notes 101-02 and accompanying text.

118. *Heitzman*, 9 Cal. 4th at 217, 886 P.2d at 1247, 37 Cal. Rptr. 2d at 254 (Baxter, J., dissenting).

119. *See id.* at 213, 886 P.2d at 1244, 37 Cal. Rptr. 2d at 251.

120. *See id.* at 218-19, 886 P.2d at 1247-48, 37 Cal. Rptr. 2d at 254-55 (Baxter, J., dissenting).

121. *Id.* at 202-03, 886 P.2d at 1236-37, 37 Cal. Rptr. 2d at 243-44.

D. *Based on the statutory nature of a pretrial competency proceeding, an attorney has the authority to waive a jury trial on the issue of his client's competence despite the client's objection:*
**People v. Masterson.**

## I. INTRODUCTION

In *People v. Masterson*,[1] the California Supreme Court evaluated the authority of defense counsel to stipulate, over the defendant's objection, to an eleven-member jury in a pretrial competency proceeding.[2] The supreme court reversed the court of appeal's decision, concluding that a defense attorney may waive a defendant's right to a jury trial altogether when determining his client's competence to stand trial.[3] This sweeping

1. 8 Cal. 4th 965, 884 P.2d 136, 35 Cal. Rptr. 2d 679 (1994), *cert. denied*, 115 S. Ct. 1703 (1995). Justice Arabian wrote the unanimous opinion of the court with Chief Justice Lucas and Justices Mosk, Kennard, Baxter, George and Werdegar concurring.

2. *Id.* at 966-74, 884 P.2d at 138-42, 35 Cal. Rptr. 2d at 681-85. *See generally* 5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2996 (2d ed. 1989 & Supp. 1995) (discussing the capacity to demand jury trial in competency proceedings); 41 AM. JUR. 2D *Incompetent Persons* § 18 (1982 & Supp. 1993) ("[i]t has been said that a jury trial in an insanity proceeding is not essential to due process."); 21 CAL. JUR. 3D *Criminal Law* § 2886 (1985 & Supp. 1995) (describing the nature of competency evaluation); J.E. Macy, Annotation, *Constitutional Right to Jury Trial in Proceeding for Adjudication of Incompetency or Insanity or for Restoration*, 33 A.L.R. 2d 1145 (1954) (outlining the historical development of the right to a jury trial in competency determination proceedings); Richard. J. Bonnie, *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. MIAMI L. REV. 539 (1993) (discussing competency proceedings in the criminal setting); Gregory A. Conley, *Project: Criminal Procedure, Competence to Stand Trial*, 71 GEO. L.J. 540 ( 1982) (examining the competency requirement); B.J. George, Jr., *The American Bar Association's Mental Health Standards: An Overview*, 53 GEO. WASH. L. REV. 338 (1985) (evaluating the ABA approach to mental health in the criminal justice context). *Cf.*; Brian R. Boch, *Fourteenth Amendment—The Standard of Mental Competency to Waive Constitutional Rights Versus the Competency Standard to Stand Trial*, 84 J. CRIM. L. & CRIMINOLOGY 883 (1993) (analyzing the Supreme Court's holding in Godinez v. Moran, 113 S. Ct. 2680 (1993)); David S. Cohn, *Offensive Use of the Insanity Defense: Imposing the Insanity Defense Over the Defendant's Objection*, 15 HASTINGS CONST. L.Q. 295 (1988) (discussing the capacity of counsel to present an insanity defense over the objection of defendant who is competent to stand trial).

3. *Masterson*, 8 Cal. 4th at 974, 884 P.2d at 142, 35 Cal. Rptr. 2d at 685. A magistrate expressed doubt about the mental competence of Michael Todd Masterson, who was facing felony charges for shooting a security guard in the face while robbing a drugstore. *Id.* at 967, 884 P.2d at 137, 35 Cal. Rptr. 2d at 680. The

affirmation of counsel's discretion facilitated the court's finding that the attorney in *Masterson* acted justifiably in the exercise of a lesser, included authority.[4]

## II. TREATMENT

Justice Arabian, writing for a unanimous court, began by focusing on the competency hearing that precipitated the instant appeal.[5] The court framed the threshold issue in the case as whether counsel at a competency proceeding "can waive the right to a jury trial entirely over the objection of the defendant."[6]

The court prefaced its reasoning by detailing the authority structure within an attorney-client relationship.[7] While "'counsel is captain of the ship'" regarding procedural matters, the court acknowledged that counsel cannot usurp the defendant's decision-making authority on "fundamental matters."[8] One such matter, the court explained, is the waiver of a jury trial in a criminal case.[9] However, the court immediately asserted that a competency hearing is a "special proceeding" devoid of designation as either criminal or civil.[10] Therefore, the court reasoned that a competency hearing did not implicate California's constitutional guarantee of a jury trial in criminal and civil cases.[11]

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magistrate's concern was the impetus for a competency hearing pursuant to California Penal Code § 1368. *Id.* The California Constitution provides that a jury will consist of twelve members of the defendant's community. CAL. CONST., art. I, § 16. However, only eleven jurors were available at the outset of the competency proceeding. Despite this deficiency, prosecution and defense stipulated to an eleven-member jury. *Masterson*, 8 Cal. 4th at 967, 884 P.2d at 137, 35 Cal. Rptr. 2d at 681. The trial judge informed the defendant of this arrangement and asked whether he objected. *Id.* Masterson replied, "I'd rather have 12 jurors myself." *Id.* The eleven jurors found Masterson competent and ultimately convicted him of the criminal charge. *Id.* at 968, 884 P.2d at 138, 35 Cal. Rptr. 2d at 681.

4. *Id.* at 972, 884 P.2d at 141, 35 Cal. Rptr. 2d at 681.

5. *Id.* at 967-68, 884 P.2d at 137-38, 35 Cal. Rptr. 2d at 680-81. A competency hearing may be necessary to ensure compliance with California Penal Code § 1367, which provides, "A person cannot be tried or adjudged to punishment while such person is mentally incompetent." CAL. PENAL CODE § 1367 (West 1982 & Supp. 1995).

6. *Masterson*, 8 Cal. 4th at 968, 884 P.2d at 137-38, 35 Cal. Rptr. 2d at 681. The lower court's decision directly conflicted with the decision in People v. Harris, 14 Cal. App. 4th 984, 990-92, 18 Cal. Rptr. 2d 92, 95-97 (1993), which upheld defense counsel's authority to waive a jury trial in a competency proceeding.

7. *Masterson*, 8 Cal. 4th at 969, 884 P.2d at 138, 35 Cal. Rptr. 2d at 681.

8. *Id.* (quoting *In re* Horton, 54 Cal. 3d 82, 94, 813 P.2d 1335, 1342, 284 Cal. Rptr. 305, 312 (1991)).

9. *Id.* (citing People v. Ernst, 8 Cal. 4th 441, 881 P.2d 298, 34 Cal. Rptr. 2d 238 (1994)).

10. *Id.*; *see* CAL. CIV. PROC. CODE § 23 (West 1982 & Supp. 1995).

11. *Masterson*, 8 Cal. 4th at 969, 884 P.2d at 139, 35 Cal. Rptr. 2d at 682; *see* CAL.

Affirming that the right to a jury in a competency hearing is merely a creature of statute, the court flatly rejected the lower court's emphasis on the civil aspects of the proceeding as a means of constitutionalizing jury trials therein.[12] Rather, the court focused its evaluation on the legal nature of the hearing and the controverted right.[13]

The court noted, "The sole purpose of a competency proceeding is to determine . . . whether the defendant is able to understand the nature of the criminal proceedings and to assist counsel in a rational manner."[14] In expounding upon this limited purpose, the court examined the United States Supreme Court's decisions confirming the authority of an attorney to request a competency hearing despite his client's objections.[15] The court additionally pointed to relevant parts of its prior decisions confirming counsel's freedom to act independently when a defendant's competence is in question.[16] The court noted that an attorney's authority to act contrary to his client's wishes is necessarily extensive throughout competency adjudication because the client's capacity to act rationally is in question.[17]

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CONST., art. I, § 16 (granting the right to jury trial in state criminal and civil cases).

12. *Masterson*, 8 Cal. 4th at 970, 884 P.2d at 139, 35 Cal. Rptr. 2d at 682.

13. *Id.* at 971, 884 P.2d at 140, 35 Cal. Rptr. 2d at 683.

14. *Id.* (citing CAL. PENAL CODE, § 1367 (West 1982 & Supp. 1995); People v. Mickle, 54 Cal. 3d 140, 182 n.25, 814 P.2d 290, 313 n.25, 284 Cal. Rptr. 511, 534 n. 25 (1991), *cert. denied*, 503 U.S. 988 (1992); People v. Samuel, 29 Cal. 3d 489, 496, 629 P.2d 485, 487, 174 Cal. Rptr. 684, 686 (1981)).

15. *Masterson*, 8 Cal. 4th at 970, 884 P.2d at 139, 35 Cal. Rptr. 2d at 682; *see* Pate v. Robinson, 383 U.S. 375, 384 (1966) ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial.").

16. *Masterson*, 8 Cal. 4th at 971-72, 884 P.2d at 140-41, 35 Cal. Rptr. 2d at 683-84; *see Samuel*, 29 Cal. 3d at 495, 629 P.2d at 487, 174 Cal. Rptr. at 686 ("[I]f counsel represents a defendant as to whose competence the judge has declared a doubt sufficient to require a section 1368 hearing, he should not be compelled to entrust key decisions about fundamental matters to his client's apparently defective judgment."); People v. Hill, 67 Cal. 2d 105, 115 n.4, 429 P.2d 586, 593 n.4, 60 Cal. Rptr. 234, 241 n.4 ("Obviously, where the attorney has doubts as to the present sanity of the defendant he should be able to make decisions as to how the proceedings should be conducted . . . . [I]n such circumstances counsel must be free to act even contrary to the express desires of his client."), *cert. denied*, 389 U.S. 1009 (1967).

17. *Masterson*, 8 Cal. 4th at 972, 884 P.2d at 140, 35 Cal. Rptr. 2d at 683; *see* People v. McPeters, 2 Cal. 4th 1148, 1169, 832 P.2d 146, 154, 9 Cal. Rptr. 2d 834, 842 (1992), *cert. denied*, 113 S. Ct. 1865 (1993). The McPeters court noted:

> [T]he procedure adopted by counsel and the court did not deprive defendant of any of his rights. Section 1368 entitles defendant to a 'hearing' on the

The court conceded that the trial court acted *unnecessarily* when it asked Masterson his opinion of his counsel's stipulation to an eleven-member jury.[18] This consideration may be relevant in the criminal context where waiver conflicts between defense counsel and the defendant must be resolved in the client's favor.[19] The court concluded that in the context of a competency hearing, however, "counsel must be allowed to do what counsel believes is best in determining the client's competence."[20]

According to the court, the lower court's contravention of this principle resulted mainly from a misinterpretation of the supreme court's holding in *People v. Mickle*.[21] In *Mickle*, the trial court upheld a defendant's refusal to waive the attorney-client privilege in a competency hearing.[22] The supreme court held that this was not prejudicial error, referring to the state's statutory presumption of competence.[23] The *Masterson* lower court applied *Mickle* to contend that a statutory presumption of competence conflicts with the assertion that a client is not qualified to control procedural strategy at the competency hearing.[24]

The *Masterson* court characterized this application as an overstatement of the prevailing law and factually distinguished *Mickle* from the instant case.[25] The court also reasoned that the presumption of competence as a rule of procedure functions solely as a burden-shifting device and thus "cannot negate the fact the court here declared a doubt as to

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> issue of competence and he received one . . . . Defendant's counsel, for understandable reasons, elected to waive certain available incidents of the hearing procedure, i.e. the right to jury trial . . . .

*Id.*

18. *Masterson*, 8 Cal. 4th at 972, 884 P.2d at 141, 35 Cal. Rptr. 2d at 684.

19. *Id.* (citing *In re* Horton 54 Cal. 3d 82, 95, 813 P.2d 1335, 1342, 284 Cal. Rptr. 305, 312 (1991)).

20. *Id.* at 973, 884 P.2d at 141, 35 Cal. Rptr. 2d at 684.

21. *Id.* (discussing People v. Mickle, 54 Cal. 3d 140, 814 P.2d 290, 284 Cal. Rptr. 511 (1991), *cert. denied*, 503 U.S. 988 (1992)). At this point in its analysis, the court also criticized the lower court's failure to employ dicta from *Hill* as a mechanism for framing its construction of *Mickle*. *Id.*; *see* People v. Hill, 67 Cal. 2d 105, 115, 429 P.2d 586, 593, 60 Cal. Rptr. 234, 241, *cert. denied*, 389 U.S. 1009 (1967); *Mickle*, 54 Cal. 3d at 183-84, 814 P.2d at 314, 284 Cal. Rptr. at 535.

22. *Masterson*, 8 Cal. 4th at 973, 884 P.2d at 141, 35 Cal. Rptr. 2d at 684 (citing *Mickle*, 54 Cal. 3d at 184, 814 P.2d at 314, 284 Cal. Rptr. at 535).

23. *Id.* at 973, 884 P.2d at 141-42, 35 Cal. Rptr. 2d at 684-85.

24. *Id.*

25. *Id.* at 973-74, 884 P.2d at 141-42, 35 Cal. Rptr. 2d at 684-83. "[T]he [*Mickle* trial] court, unlike here, never expressed a doubt on the record as to the defendant's competence. Rather, 'the trial court obviously ordered a competence hearing in an overabundance of caution, and not because it was statutorily or constitutionally compelled to do so.'" *Id.* at 974, 884 P.2d at 142, 35 Cal. Rptr. 2d at 685 (quoting *Mickle*, 54 Cal. 3d at 184, 814 P.2d at 314, 284 Cal. Rptr. at 535).

defendant's competence."[26] Accordingly, the court found that the statutory presumption did not conflict with the rationale "that the person whose competence is in question cannot be entrusted to make basic decisions regarding the conduct of that proceeding."[27]

The court concluded that in a competency proceeding, counsel may waive a jury trial entirely despite his client's objection. Consequently, the court ratified the attorney's lesser use of his authority to consent to an eleven-person jury.[28]

## III. IMPACT

The court's decision in *Masterson* defined trial rights in competency hearings as purely statutory in nature, rendering constitutional debate irrelevant in this context. The court's holding clarifies the due process implications of an attorney's action on behalf of a defendant whose competency is in question. Essentially, no due process implications arise, absent patently egregious conduct on the part of counsel and the court. The narrow purpose of competency hearings, as well as the ever-present threat of malpractice litigation, however, will limit the impact of this decision on attorney conduct in the determination of a defendant's competence.

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26. *Id.* at 974, 884 P.2d at 142, 35 Cal. Rptr. 2d at 685.
27. *Id.*
28. *Id.*

E. *A jury finding of not true on a sentence enhancement allegation does not implicate the Double Jeopardy Clause of the Fifth Amendment in a retrial on the substantive charge:* **People v. Santamaria.**

## I. INTRODUCTION

In *People v. Santamaria*,[1] the California Supreme Court evaluated the double jeopardy implications, at retrial, of a jury finding on a factual matter considered for sentence enhancement.[2] Specifically, the court assessed the applicability of collateral estoppel where the jury convicted the defendant on the substantive charge, but released him from an enhancement allegation of personal knife use.[3] The court held that the

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1. 8 Cal. 4th 903, 884 P.2d 81, 35 Cal. Rptr. 2d 624 (1994). Justice Arabian wrote the majority opinion joined by Chief Justice Lucas, Justices Baxter and George. Also joining in the opinion was the Honorable Robert K. Puglia, presiding justice of the Third Circuit Court of Appeal, assigned to this case by the Judicial Council. *Id.* at 927, 884 P.2d at 94, 35 Cal. Rptr. 2d at 637. Justices Mosk and Kennard each filed an opinion concurring and dissenting.

2. *Id.* at 910-26, 884 P.2d at 83-93, 35 Cal. Rptr. 2d at 626-36. *See generally* 21 AM. JUR. 2D *Criminal Law* §§ 243-320 (1981 & Supp. 1995) (discussing constitutional guarantees against double jeopardy); 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* § 271 (2d ed. 1988) (discussing constitutional and statutory provisions on double jeopardy protection); 20 CAL. JUR. 3D *Criminal Law* § 2313 (1985 & Supp. 1995) (discussing constitutional guarantees against double jeopardy); Bradley E. Kotler et al., *Double Jeopardy*, 82 GEO. L.J. 962 (1994) (reviewing the general applicability of the Double Jeopardy Clause); Eli J. Richardson, *Eliminating Double-Talk from the Law of Double Jeopardy*, 22 FLA. ST. U. L. REV. 119 (1994) (discussing the application of the Double Jeopardy Clause in the context of multiple prosecutions); Donald Eric Burton, Note, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 OHIO ST. L.J. 799 (1988) (discussing the Supreme Court's analysis of the Fifth Amendment guarantee); Ernest H. Schopler, Annotation, *Supreme Court's Views of Fifth Amendment's Double Jeopardy Clause Pertinent To or Applied In Federal Criminal Cases*, 50 L. Ed. 2d 830 (1978 & Supp. 1993) (detailing facets of Supreme Court jurisprudence on the Double Jeopardy Clause).

3. *Santamaria*, 8 Cal. 4th at 910-26, 884 P.2d at 83-93, 35 Cal. Rptr. 2d at 626-36. In 1985, Victor Guadron was found murdered in Moss Beach, California. *Id.* at 908, 884 P.2d at 82, 35 Cal. Rptr. 2d at 625. "Evidence indicated the body had been stabbed, run over by a car, and strangled . . . ." *Id.* Jose Napoleon Santamaria was convicted of this robbery murder, largely as a result of the testimony of his accessory, Anthony Nubla. *Id.* at 909-10, 884 P.2d at 82, 35 Cal. Rptr. at 625. Despite Nubla's testimony that Santamaria was the stabber, however, the jury found the sentence enhancement allegation of personal knife use to be "not true." *Id.* at 909, 884 P.2d at 82, 35 Cal. Rptr. 2d at 625. The state court of appeal reversed the judgment, "finding that an 11-day continuance during jury deliberations was prejudicial error." *Id.* At retrial, the prosecution dropped the personal knife use allegation. *Id.* Nonetheless, the defendant sought to invoke the Double Jeopardy Clause to preclude relitigation of the substantive charge. *Id.* On remand, the trial court upheld the defendant's position. *Id.* The court of appeal affirmed the lower court's use of collateral estoppel in this set-

defendant's claim did not satisfy the elements of collateral estoppel and reversed the decision of the court of appeal.[4]

## II. TREATMENT

After recounting the facts, Justice Arabian launched the majority opinion with an examination of the jurisprudential framework for double jeopardy principles.[5] The majority noted that while the Double Jeopardy Clause proscribes court action that "'twice [places a defendant] in jeopardy of life or limb,'"[6] it does not prohibit retrial after reversal on procedural error.[7] The majority further acknowledged that a jury acquittal on one allegation does not preclude a facially inconsistent conviction on another related charge.[8] The court noted that these fundamental precepts limiting application of the Double Jeopardy Clause "would not preclude defendant's retrial on the murder charge despite the earlier reversal . . . even if inconsistent with the not true finding on the use enhancement."[9]

Defendant Santamaria's constitutional challenge did not question these principles.[10] Rather, on appeal he sought the application of collateral estoppel in the limited factual setting where the jury finding on the knife use allegation directly conflicted with the district attorney's theory for prosecuting the murder.[11]

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ting. *Id.* at 910, 884 P.2d at 82-83, 35 Cal. Rptr. 2d at 625-26; *see, e.g.*, 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* § 355 (2d ed. 1988) (discussing how to raise collateral estoppel as a defense); *cf.* Anne Bowen Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal*, 58 U. CIN. L. REV. 1 (1989) (discussing criminal collateral estoppel in the evidentiary context). *See generally* George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323 (1986) (analyzing the double jeopardy implications of successive prosecutions).

4. *Santamaria*, 8 Cal. 4th at 926-27, 884 P.2d at 93-94, 35 Cal. Rptr. 2d at 636-37.

5. *Id.* at 910-13, 884 P.2d at 83-84, 35 Cal. Rptr. 2d at 626-27.

6. *Id.* at 910, 884 P.2d at 83, 35 Cal. Rptr. 2d at 626 (quoting U.S. CONST. amend. 5); *see also* CAL. CONST. art. I, § 15 ("Persons may not twice be put in jeopardy for the same offense. . . .").

7. *Santamaria*, 8 Cal. 4th at 910-11, 884 P.2d at 83, 35 Cal. Rptr. 2d at 626 (citing Lockhart v. Nelson 488 U.S. 33, 38 (1988)).

8. *Id.* at 911, 884 P.2d at 83, 35 Cal. Rptr. 2d at 626 (citing United States v. Powell, 469 U.S. 57 (1984); People v. Pahl, 226 Cal. App. 3d 1651, 277 Cal. Rptr. 656 (Ct. App. 1991)); *see* CAL. PENAL CODE § 954 (Deering 1994) ("An acquittal of one of more counts shall not be deemed an acquittal of any other count.").

9. *Santamaria*, 8 Cal. 4th at 911, 884 P.2d at 83, 35 Cal. Rptr. 2d at 626.

10. *Id.* at 911, 884 P.2d at 83-84, 35 Cal. Rptr. 2d at 626-27.

11. *Id.* This contention manifests a direct conflict between the California Courts of

Collateral estoppel rules, as the majority noted, proscribe the relitigation of an issue decided by a final judgment.[12] The United States Supreme Court delineated the relationship between this principle and the Double Jeopardy Clause in *Ashe v. Swenson*.[13] Accordingly, the majority devoted a significant amount of its substantive analysis to applying the guidelines established by the Supreme Court for the application of collateral estoppel.[14]

Determining the applicability of collateral estoppel in the retrial of a criminal defendant requires a practical approach[15] toward concluding "'whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'"[16] It was upon this foundation of constitutional law that the majority constructed its remaining analysis for the resolution of two primary issues: (1) whether the retrial of a previously convicted defendant implicates the doctrine of collateral estoppel in the manner contemplated

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Appeal that precipitated the supreme court's hearing of the case. *See* People v. Pettaway, 206 Cal. App. 3d 1312, 254 Cal. Rptr. 436 (1988) (holding that collateral estoppel did not apply to directly analogous facts). *Pettaway* was effectively reversed by the federal court's hearing of the case on habeas corpus in Pettaway v. Plummer, 943 F.2d 1041 (9th Cir. 1991). *See also* People v. White, 185 Cal. App. 3d 822, 231 Cal. Rptr. 569 (1986) (holding that the Double Jeopardy Clause precluded relitigation of the substantive charge when a jury had acquitted a defendant as to the enhancement allegation). *See generally* Annotation, *Modern Status of Doctrine of Res Judicata in Criminal Cases*, 9 A.L.R. 3d 203 (1966 & Supp. 1994) (detailing the use of issue preclusion in the criminal setting); 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* §§ 340-341 (2d ed. 1988) (discussing collateral estoppel in general and as a safeguard against double jeopardy violations).

12. *Santamaria*, 8 Cal. 4th at 912, 884 P.2d at 84, 35 Cal. Rptr. 2d at 627. The Supreme Court characterized collateral estoppel as "'an awkward phrase . . . mean[ing] . . . that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *Id.* (quoting Ashe v. Swenson, 397 U.S. 436, 443 (1970)).

13. 397 U.S. 436 (1970). The factual setting of *Ashe* involved six men robbed by three or four masked bandits. *Id.* at 437. The identity of the offender, which the jury was unable to determine, was the only issue at the first trial. *Id.* at 438-39. The defendant was acquitted but subsequently convicted for the robbery of a second victim. *Id.* at 439-40. The Supreme Court, applying the doctrine of collateral estoppel rather than attempting to sort through the complexities of the Double Jeopardy Clause, held the subsequent trial to be violative of the defendant's Fifth Amendment rights. *Id.* at 443-47. For additional commentary on *Ashe*, consult William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 438-43 (1993); Poulin, *supra* note 3, at 5-8; Richardson, *supra* note 2, at 129-30.

14. *Santamaria*, 8 Cal. 4th at 913-23, 884 P.2d at 84-91, 35 Cal. Rptr. 2d at 627-34.

15. The *Ashe* Court disapproved the use of a "hypertechnical and archaic approach of a 19th century pleading book" and emphasized the need for "realism and rationality." *Ashe*, 397 U.S. at 444.

16. *Santamaria*, 8 Cal. 4th at 912, 884 P.2d at 84, 35 Cal. Rptr. 2d at 627 (quoting *Ashe*, 397 U.S. at 444).

by the Double Jeopardy Clause; and (2) whether those principles control the instant case.[17]

Factual distinction was the first mechanism applied by the court in questioning the applicability of collateral estoppel in the setting of a retrial after conviction.[18] Unlike the constitutional violation in *Ashe*, which was a separate trial on the same issue, the instant case concerned the appellate phase of the same proceeding.[19] This difference, the court noted, was sufficient to remove the instant case from *Ashe*'s purview.[20] "Retrial after reversal is not the sort of 'governmental oppression' protected by the Double Jeopardy Clause."[21]

The majority further supported its position that the doctrine was not necessarily applicable to the facts at hand by reflecting on its underlying rationale.[22] The court asserted that the doctrine's three purposes—to promote judicial economy, to prevent inconsistent judgments which undermine the integrity of the judicial system, and to prevent vexatious litigation—were inapplicable to a retrial following a conviction.[23]

Distinguishing several other Supreme Court holdings on collateral estoppel in the criminal setting,[24] the majority held that no clear indica-

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17. *Id.* at 912-13, 884 P.2d at 84, 35 Cal. Rptr. 2d at 627.

18. *See id.* at 913, 884 P.2d at 84, 35 Cal. Rptr. 2d at 627.

19. *See id.* at 913-14, 884 P.2d at 85, 35 Cal. Rptr. 2d at 628. "The high court has never suggested the doctrine applies to the same proceeding. Indeed, it has consistently stated it applies to 'successive prosecutions.'" *Id.* at 913, 884 P.2d at 84, 35 Cal. Rptr. 2d at 627 (quoting Brown v. Ohio, 432 U.S. 161, 167 n.6 (1977)).

20. *Id.* at 913, 884 P.2d at 84, 35 Cal. Rptr. 2d at 627.

21. *Id.* at 914, 884 P.2d at 85, 35 Cal. Rptr. 2d at 628 (quoting United States v. Scott, 437 U.S. 82, 91 (1977)).

22. *Id.*

23. *Id.* (citing People v. Taylor, 12 Cal. 3d 686, 695, 527 P.2d 622, 625, 117 Cal. Rptr. 70, 73 (1974)).

24. *See id.* at 914-15, 884 P.2d at 85-86, 35 Cal. Rptr. 2d at 628-29. In Bullington v. Missouri, 451 U.S. 430 (1981), and Arizona v. Rumsey, 467 U.S. 203 (1984), the United States Supreme Court held that the Double Jeopardy Clause prevented the prosecution from seeking the death penalty at retrial after failing to secure it originally. *Id.* at 914, 884 P.2d at 85, 35 Cal. Rptr. 2d at 628. Yet, the court noted that the Supreme Court had softened the effect of this precedent with its decision in *Caspari v. Bohlen*, where the Court asserted, "Both *Bullington* and *Rumsey* were capital cases, and our reasoning in those cases was based largely on the unique circumstances of a capital sentencing proceeding." *Id.* (quoting *Caspari*, 114 S. Ct. 948, 957 (1994)). The California Supreme Court also noted that even if applicable, *Bullington* and *Rumsey* would only effect relitigation of the charge enhancement allegation. *Id.* For background on the Supreme Court's application of collateral estoppel in the context of capital punishment, see generally Alan I. Bigel, *William H. Rehnquist on Capital*

tion exists that the High Court would "apply *Ashe* . . . to a retrial of a count the jury had convicted the defendant of in the same action."[25] The court explained, however, that the failure of Santamaria's claim to satisfy the elements of collateral estoppel relieved the court from any duty to "'reach the issue of whether the doctrine of collateral estoppel is limited like its parent doctrine of double jeopardy, only to successive prosecutions.'"[26]

The majority prefaced it application of the elements of collateral estoppel by noting that the courts define the requirements for issue preclusion in different ways.[27] As the court noted, Santamaria's assertion of the

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*Punishment*, 17 OHIO N.U. L. REV. 729 (1991); Beth Greenfeld, *The Death Penalty*, 73 GEO. L.J. 707 (1984); Michael P. Doss, Comment, *Resentencing Defendants and the Protection Against Multiple Punishment*, 133 U. PA. L. REV. 1409 (1985).

The majority also noted that the defendant did not controvert the Supreme Court's assertion in United States v. Powell, 469 U.S. 57 (1984). *Santamaria*, 8 Cal. 4th at 914-15, 884 P.2d at 86, 35 Cal. Rptr. 2d at 629. Under *Powell*, the court reasoned, patently inconsistent jury verdicts do not provide a defendant with the capacity to invoke collateral estoppel. *Id.* Santamaria maintained, however, that "what applies to an inconsistent verdict does not apply to a verdict that might have a rational basis." *Id.* at 915, 884 P.2d at 86, 35 Cal. Rptr. 2d at 629. The court pointed to the obvious anomaly created by such a contention and concluded that the Supreme Court's decision in *Powell* by no means required such an application. *Id.*

25. *Id.* at 915, 884 P.2d at 86, 35 Cal. Rptr. 2d at 629 (citations omitted).

26. *Id.* at 915-16, 884 P.2d at 86, 35 Cal. Rptr. 2d at 629 (quoting United States v. Farmer, 923 F.2d 1557, 1563 n.12 (11th Cir. 1991)).

27. *Id.* at 916, 884 P.2d at 87, 35 Cal. Rptr. 2d at 630. According to the court, the United States Supreme Court defines elements of collateral estoppel as follows: "[T]he issue to be precluded must be 'an issue of ultimate fact' that 'has once been determined by a valid and final judgment' [with the defendant having] the burden of showing that the issue 'was actually decided in the first proceeding.'" *Id.* (citing *Ashe*, 397 U.S. at 443; Schiro v. Farley, 114 S. Ct. 783, 790 (1994), and Dowling v. United States, 493 U.S. 342, 350 (1990)). The majority reiterated its own method for determining issue preclusion:

> 'if (1) the issue necessarily decided at the previous trial is identical to the one which is sought to be relitigated; if (2) the previous trial resulted in a final judgment on the merits; and if (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior trial.'

*Id.* (quoting People v. Taylor, 12 Cal. 3d 686, 691, 527 P.2d 622, 625, 117 Cal. Rptr. 70, 73 (1974)). Finally, the court listed the position of the Ninth Circuit:

> 'Collateral estoppel analysis involves a three-step process: (1) An identification of the issues in the two actions for the purpose of determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine; (2) an examination of the record of the prior case to decide whether the issue was 'litigated' in the first case; and (3) an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case.'

*Id.* at 916-17, 884 P.2d at 87, 35 Cal. Rptr. 2d at 630 (quoting Pettaway v. Plummer, 943 F.2d 1041, 1043-44 (9th Cir. (1991)).

doctrine did not satisfy any accepted definition.[28] Consequently, the court limited its inquiry to whether the murder charge and the knife use allegation were "identical issues" and the extent to which the defendant's knife use was an "ultimate issue" in his trial for murder.[29]

The majority found that the issue of the defendant's guilt on the murder charge was not identical to the allegation of personal knife use.[30] In supporting this conclusion, the court relied on state law that distinguishes the substantive offense (murder) from the enhancement allegation (knife use).[31] For the personal knife use charge to be applied in the sentencing phase, the jury must find the charge to be true beyond a reasonable doubt.[32] The majority reasoned, however, that murder as a substantive offense need not be premised on the theory of personal weapon use.[33] Therefore, the court hypothesized:

> the jury here may not have been able to decide beyond a reasonable doubt whether defendant or Nubla actually wielded the knife, but was convinced beyond a reasonable doubt that, either way, defendant was guilty of Guadron's murder.[34] The court stated that this application of the requirement that the defendant prove the existence of an identical issue was consistent with the Supreme Court's mandate that collateral estoppel be applied with 'realism and rationality.'[35]

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28. *Id.* at 917, 884 P.2d at 87, 35 Cal. Rptr. 2d at 630.

29. *Id.* at 917-22, 884 P.2d at 87-91, 35 Cal. Rptr. 2d at 630-34; *see* 21 AM. JUR. 2D *Criminal Law* §§ 325-335 (1981 & Supp. 1995) (discussing the elements of collateral estoppel); 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* § 342 (2d ed. 1988 & Supp. 1995) (discussing the elements of collateral estoppel).

30. *Santamaria*, 8 Cal. 4th at 920, 884 P.2d at 89, 35 Cal. Rptr. 2d at 632.

31. *Id.* at 917-18, 884 P.2d at 88, 35 Cal. Rptr. 2d at 631.

32. *Id.* at 918, 884 P.2d at 88, 35 Cal. Rptr. 2d at 631; *see* CAL. PENAL CODE § 12022(b) (Deering 1994) (stating the personal use requirement).

33. *Santamaria*, 8 Cal. 4th at 917-18, 884 P.2d at 88, 35 Cal. Rptr. 2d at 631.

34. *Id.* at 920, 884 P.2d at 89, 35 Cal. Rptr. 2d at 632. Counsel for the defendant, Lawrence Gibbs, was outraged by this line of reasoning when confronted therewith by Justice Puglia during oral argument:

> Justice Puglia's question, it seems to me, calls into question the entire theory of collateral estoppel . . . . If you were to simply explain away express acquittal on the theory that, well, it may have been a reasonable doubt, or it may have been the product of compromise, or lenity, or mercy, or heaven knows what, you might as well take the doctrine of collateral estoppel and throw it in the garbage can!

Scott Graham, *Heavyweights Live Up To Their Billing*, THE RECORDER, Sept. 9, 1994 at 6 (quoting Gibbs).

35. *Santamaria*, 8 Cal. 4th at 920, 884 P.2d at 89, 35 Cal. Rptr. 2d at 633 (quoting *Ashe*, 397 U.S. at 444).

The court similarly rejected the defendant's claim that the knife use allegation was an issue of ultimate fact in the murder conviction.[36] The court reasoned that although personal knife use was "ultimate" to the enhancement issue, it was not so in regard to the murder charge.[37] Therefore, the majority determined that "the jury's not true finding on the enhancement allegation does not mean defendant did not use the knife, only that there was a reasonable doubt that he did."[38] This acknowledgement confirmed the majority's contention that the use allegation was not an "ultimate fact" of guilt under the California murder statute.[39] The defendant's failure to satisfy either element of collateral estoppel led the court to find the doctrine inapplicable.[40]

In reaching its conclusion, the court addressed the federal district court's divergent holding in *Pettaway v. Plummer*.[41] In *Pettaway*, the Ninth Circuit reversed the California court of appeal and applied collateral estoppel under analogous facts.[42] The majority attributed this result to the Ninth Circuit's misunderstanding of California law and reiterated the

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36. *Id.* at 921-22, 884 P.2d at 90-91, 35 Cal. Rptr. 2d at 633-34.

37. *Id.* at 922, 884 P.2d at 91, 35 Cal. Rptr. 2d at 634. The court framed this determination in the context of the Supreme Court's holding in *Dowling v. United States*; *see Dowling*, 493 U.S. 342 (1990) (holding that collateral estoppel did not apply where prosecutor introduced evidence from defendant's prior acquittal on a similar charge); *see also* United States v. Seley, 957 F.2d 717, 723 (9th Cir. 1992) ("*Dowling* did not alter *Ashe* so much as it introduced a new perspective on the meaning of the 'ultimate fact.' . . . Instead of meaning that certain acts did not happen, an acquittal means that they were not proved beyond a reasonable doubt."). *See generally* Craig L. Crawford, Comment, Dowling v. United States: *A Failure of the Criminal Justice System*, 52 OHIO ST. L.J. 991 (1991) (discussing the implications of the *Dowling* holding); Ronald A. Goldstein, Note, *Double Jeopardy, Due Process, and Evidence from Prior Acquittals*: Dowling v. United States, 110 S. Ct. 688 (1990), 13 HARV. J.L. & PUB. POL'Y 1027 (1990) (evaluating the Court's holding in *Dowling*); Cynthia L. Randall, Comment, *Acquittals in Jeopardy: Criminal Collateral Estoppel and the Use of Acquitted Act Evidence*, 141 U. PA. L. REV. 283 (1992) (discussing the implications of the *Dowling* holding).

38. *Santamaria*, 8 Cal. 4th at 922, 884 P.2d at 91, 35 Cal. Rptr. 2d at 634. The court explained that the combined evidence of Santamaria's personal weapon use and his participation as an aider and abettor allowed the jury to reach its conclusion, but the weapon use was unnecessary to gain a murder conviction. *Id.*

39. *Id.*

40. *Id.* In denying Santamaria's claim, the court voiced its disapproval for the contrary decision in People v. White, 185 Cal. App. 3d 822, 231 Cal. Rptr. 569 (1986). *Id.*

41. 943 F.2d 1041 (9th Cir. 1991) (holding that jury's rejection of sentence enhancement based on theory that defendant fired fatal shot collaterally estopped retrial for murder charge due to double jeopardy effect). The court noted that although the federal court precedent was not binding upon it, federal court review could effectively overrule the state court decision through the grant of habeas relief. *Santamaria*, 8 Cal. 4th at 923, 884 P.2d at 91-92, 35 Cal. Rptr. 2d at 634-35.

42. *Santamaria*, 8 Cal. 4th at 923, 884 P.2d at 91, 35 Cal. Rptr. 2d at 634.

principle that a not true finding on the enhancement allegation did not preclude conviction the substantive charge.[43] Stressing that the *Pettaway* decision "unduly hampers prosecution of crimes involving weapons," the majority urged the federal courts to "reconsider that decision."[44]

### *A. Justice Mosk's Concurring and Dissenting Opinion*

Justice Mosk concurred with the majority opinion to the extent that it allowed for the retrial of the defendant.[45] He disagreed, however, with the majority's contention that this retrial would be unaffected by collateral estoppel.[46] Under Justice Mosk's analysis of the relevant law, the doctrine would prevent retrial for murder on the sole theory that Santamaria had personally used a knife.[47] The justice rebuked the majority's curtailment of this constitutional protection.[48]

Justice Mosk began his criticism of the majority by restating the underlying facts.[49] He detailed the procedural steps at the trial level that led to the superior court's application of collateral estoppel[50] and acknowledged the court of appeal's affirmation.[51]

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43. *Id.* at 923-24, 884 P.2d at 92, 35 Cal. Rptr. 2d at 635. The majority also noted that the federal court relied heavily on Grady v. Corbin, 495 U.S. 508 (1990), and pointed to the fact that the relevant portion of the *Grady* opinion had been subsequently overruled. *Santamaria*, 8 Cal. 4th at 925, 884 P.2d at 93, 35 Cal. Rptr. 2d at 636. (citing United States v. Dixon, 113 S. Ct. 2849, 2860, 2864 (1992)). *See generally* Aquannette Y. Chinnery, Comment, United States v. Dixon: *the Death of the* Grady v. Corbin *"Same Conduct" Test for Double Jeopardy*, 47 RUTGERS L. REV. 247 (1994) (discussing the effect of *Dixon* on *Grady*); John Giannopoulos, United States v. Dixon: *the Double Jeopardy Clause and the Appropriate Test for Determining What Constitutes the Same Offense*, 20 J. CONTEMP. L. 225 (1994) (discussing the implications of the Court's holding in *Dixon*).

44. *Santamaria*, 8 Cal. 4th at 925, 884 P.2d at 93, 35 Cal. Rptr. 2d at 636.

45. *Id.* at 927, 884 P.2d at 94, 35 Cal. Rptr. 2d at 637 (Mosk, J., concurring and dissenting).

46. *Id.* (Mosk, J., concurring and dissenting).

47. *Id.* at 927-35, 884 P.2d at 97-104, 35 Cal. Rptr. 2d at 637-50 (Mosk, J., concurring and dissenting).

48. *Id.* at 927, 884 P.2d at 94, 35 Cal. Rptr. 2d at 637 (Mosk, J., concurring and dissenting).

49. *Id.* at 927-29, 884 P.2d at 94-95, 35 Cal. Rptr. 2d at 637-38 (Mosk, J., concurring and dissenting).

50. *Id.* at 927-28, 884 P.2d at 94-95, 35 Cal. Rptr. 2d at 637-38 (Mosk, J., concurring and dissenting).

51. *Id.* at 929, 884 P.2d at 95, 35 Cal. Rptr. 2d at 638 (Mosk, J., concurring and

After briefly recounting the fundamental constitutional principles involved in this case, Justice Mosk then delineated the flaws in the majority's reasoning.[52] He rejected the majority's reliance on a distinction between the enhancement allegation and the substantive offense.[53] According to Justice Mosk, the not true finding on this charge prevented retrial on the substantive offense where guilt was predicated solely on a theory of personal knife use.[54]

Therefore, while Justice Mosk agreed that knife use was not necessarily identical to the substantive issue in the murder charge, he reasoned that it was identical when the prosecution's sole theory for guilt was personal knife use.[55] Justice Mosk similarly characterized the weapons allegation as an issue of ultimate fact where the "unlawful act" component of the murder charge rested solely on defendant's conduct as the stabber.[56] Nothing in this application, according to the justice, would preclude the defendant's retrial for murder.[57] It would merely foreclose from consideration his personal knife use as the sole issue of guilt.[58] As

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dissenting). Justice Werdegar authored the opinion of the lower court, prior to her appointment to the California Supreme Court. *See id.* at 929 n.1, 884 P.2d at 95 n.1, 35 Cal. Rptr. 2d at 638 n.1. *See generally* Richard Barbieri, Double Jeopardy Covers Sentence Enhancements, THE RECORDER, Aug. 10, 1993, at 3 (evaluating the First District Court of Appeal's decision in *Santamaria*).

52. *Santamaria*, 8 Cal. 4th at 931-32, 884 P.2d at 97, 35 Cal. Rptr. 2d at 640 (Mosk, J., concurring and dissenting).

53. *Id.* at 930-31, 884 P.2d at 96, 35 Cal. Rptr. 2d at 639 (Mosk, J., concurring and dissenting).

> It is true that personal use of a knife is not an element of the crime of murder. It is also true that, generally, it is not even a necessary fact for any of the elements. But it is indeed such a fact for the requisite unlawful act *insofar as guilt is predicated on a theory dependent thereon* . . . .

*Id.* at 931, 884 P.2d at 96, 35 Cal. Rptr. 2d at 639 (Mosk, J., concurring and dissenting) (emphasis added).

54. *Id.* at 931-33, 884 P.2d at 96-97, 35 Cal. Rptr. 2d at 639-40 (Mosk, J., concurring and dissenting).

55. *Id.* at 930-32, 884 P.2d at 95-97, 35 Cal. Rptr. 2d at 638-40 (Mosk, J., concurring and dissenting).

56. *Id.* at 931, 884 P.2d at 96, 35 Cal. Rptr. 2d at 639 (Mosk, J., concurring and dissenting).

57. *Id.* (Mosk, J., concurring and dissenting).

58. *Id.* at 933, 884 P.2d at 97, 35 Cal. Rptr. 2d at 640 (Mosk, J., concurring and dissenting). It was at this juncture that Justice Mosk detracted from the trial court's application of collateral estoppel. He found that the superior court had required that "'the jury is to be instructed at appropriate intervals throughout the case that the defendant did not personally use a knife during the killing of the victim.'" *Id.* at 934, 884 P.2d at 98, 35 Cal. Rptr. 2d at 641 (Mosk, J., concurring and dissenting). According to Justice Mosk, the jury would have been appropriately "instructed *only* that it could not find that defendant was guilty as a principal . . . *solely through his personal use of a knife.*" *Id.* (Mosk, J., concurring and dissenting).

Justice Mosk noted, "What [the defendant] is entitled to may not be much, but he is entitled to it nonetheless."[59]

The justice questioned the strength of the majority's disagreement with *Pettaway*, and reiterated his belief that personal knife use was both an identical and ultimate issue at the trial level.[60] He concluded by agreeing with the reversal of the lower decision because it entirely prevented the use of evidence regarding Santamaria's knife use.[61] This aspect of the crime, Justice Mosk concluded, could properly be presented to the jury, but not as the sole theory of guilt.[62]

### *B. Justice Kennard's Concurring and Dissenting Opinion*

Justice Kennard diverged from the majority only on the issue of whether collateral estoppel may ever be applied at retrial.[63] While the majority believed that it most likely would *never* be applicable, Justice Kennard stated, "I would not foreclose the possibility that in some cases, application of the doctrine on retrial *may* well be appropriate."[64]

## III. IMPACT & CONCLUSION

The impact of the California Supreme Court's holding in *People v. Santamaria* will, as Justice Mosk remarked, depend largely on the response of the federal courts, and eventually the United States Supreme Court. This response is destined to hinge almost entirely on federal court acceptance of the majority's emphasis on the state law character of weapons use enhancement allegations. While predictions as to the outcome of this undoubtedly forthcoming analysis are difficult to make, it is reasonable to believe that the majority's decision will stand. The statutory nature of the sentence enhancement charge seems to adequately re-

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59. *Id.* at 933, 884 P.2d at 97, 35 Cal. Rptr. 2d at 641 (Mosk, J., concurring and dissenting).

60. *Id.* at 934-35, 884 P.2d at 98-99, 35 Cal. Rptr. 2d at 641-42 (Mosk, J., concurring and dissenting).

61. *Id.* at 935, 884 P.2d at 99, 35 Cal. Rptr. 2d at 642 (Mosk, J., concurring and dissenting).

62. *Id.* (Mosk, J., concurring and dissenting).

63. *Id.* at 935-36, 884 P.2d at 107, 35 Cal. Rptr. 2d at 650 (Kennard, J., concurring and dissenting). Justice Kennard specifically dissented as to part II-B of the majority opinion. *Id.* (Kennard, J., concurring and dissenting).

64. *Id.* at 936, 884 P.2d at 107, 35 Cal. Rptr. 2d at 650 (Kennard, J., concurring and dissenting) (emphasis added).

move the jury verdict based thereon from the class of situations contemplated by the Double Jeopardy Clause. The California Supreme Court is also armed with a powerful policy objective: preserving the state's capacity to prosecute violent criminal conduct. These juridical and pragmatic considerations are likely to drive federal court affirmance of this decision and provide California prosecutors with another vehicle for success in the retrial of violent crimes.

DANIEL P. FLIFLET

# III. DELIQUENT, DEPENDENT, AND NEGLECTED CHILDREN

*Under former Civil Code section 232, subdivision (a)(7) (now Fam. Code section 7828(a)(2)), once a child spends one year in an out-of-home placement, a court may order termination of parental rights upon a showing of clear and convincing evidence that (1) returning the child to the parent would be detrimental to the child and (2) the parent failed to maintain, and is likely to fail to maintain, in the future an adequate parental relationship with the child:* **In re Jasmon O.**

## I. INTRODUCTION

In *In re Jasmon O.*,[1] the California Supreme Court considered whether, under former Civil Code section 232 (a)(7),[2] there was clear and convincing evidence of detriment to the child and parental inadequacy to support a superior court order terminating the father's parental rights.[3] Furthermore, two additional issues were raised by the court of appeal's treatment of the case. First, whether the court of appeal erred in holding that the superior court order terminating parental rights under section 232[4] became moot when the court of appeal, after reviewing a separate

1. 8 Cal. 4th 398, 878 P.2d 1297, 33 Cal. Rptr. 2d 85 (1994). Justice Mosk wrote the majority opinion, in which Chief Justice Lucas and Justices Arabian, George and Werdegar concurred. *Id.* at 407-31, 878 P.2d at 1299-1315, 33 Cal. Rptr. 2d at 87-103. Justice Baxter filed a separate dissenting opinion, in which Justice Kennard concurred. *Id.* at 432-38, 878 P.2d at 1316-21, 33 Cal. Rptr. 2d at 104-09 (Baxter, J., dissenting).

2. CAL. CIV. CODE § 232(a)(7) (repealed 1994) (now CAL. FAM. CODE §§ 7802, 7808, 7820-7829 (West 1994 & Supp. 1995)). A court may not order termination of parental rights under former Civil Code § 232 unless there is clear and convincing evidence that (1) returning the child to the parent would be detrimental to the child and that (2) the parent had failed and would most likely continue to fail to maintain an adequate parental relationship with the child. CAL. FAM. CODE §§ 7821, 7828 (West 1994).

3. *In re* Jasmon O., 8 Cal. 4th at 408, 878 P.2d at 1300, 33 Cal. Rptr. 2d at 88. On January 1, 1989, the dependency laws were amended, requiring that hearings for termination of parental rights take place in juvenile court according to the statutory scheme set forth in WELF. & INST. CODE § 366.26. *Id.* at 408 n.1, 878 P.2d at 1300 n.1, 33 Cal. Rptr. 2d at 88 n.1.

4. All further references to code sections are to the Civil Code unless otherwise noted.

juvenile court order in the same case, concluded that the child should be returned to the father.[5] Second, whether the court of appeal erred in holding that a court hearing a petition under Welfare and Institutions Code section 388[6] may not rely on evidence of the long-term emotional damage to a child if the bond between her and her foster parents is severed to conclude that the interest of the child requires setting aside a prior juvenile court order.[7]

The California Supreme Court concluded that "sufficient evidence . . . support[ed] the trial court's conclusion that detriment to the child and parental inadequacy warranted the termination of the father's parental rights."[8] The court also concluded that the court of appeal erred in dismissing the appeal as moot. The court disagreed with the appellate court's holding that Welfare and Institutions Code section 388 precludes a court from finding that the best interests of the child require setting aside the earlier juvenile court order on the ground that the child may suffer severe, long-term emotional damage.[9] Accordingly, the court reversed the court of appeal's dismissal, reinstated the appeal and affirmed the trial court's order terminating parental rights.[10]

## II. STATEMENT OF THE CASE

On June 18, 1987, when Jasmon was six months old, her mother relinquished her to Child Protective Services of San Diego County and the Department of Social Services (the Department) because she was unable to care for her.[11] A few weeks later, the court declared Jasmon a dependent child and placed her in foster care.[12] The court terminated the

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5. *In re* Jasmon O., 8 Cal. 4th at 411-14, 878 P.2d at 1302-04, 33 Cal. Rptr. 2d at 90-92.

6. CAL. WELF. & INST. CODE § 388 (West 1984 & Supp. 1995).

7. *In re* Jasmon O., 8 Cal. 4th at 414-22, 878 P.2d at 1304-09, 33 Cal. Rptr. 2d at 92-97.

8. *Id.* at 407-08, 878 P.2d at 1299-1300, 33 Cal. Rptr. 2d at 87-88.

9. *Id.*

10. *Id.* at 431, 878 P.2d at 1315, 33 Cal. Rptr. 2d at 103.

11. *Id.* at 408, 878 P.2d at 1300, 33 Cal. Rptr. 2d at 88. Jasmon's mother was living in a halfway house for the mentally ill when she met and became sexually active with Jasmon's father. *Id.* at 429, 878 P.2d at 1314, 33 Cal. Rptr. 2d at 102. At that time he was 24 and she was 16. *Id.* Jasmon's father had a long history of drug and alcohol abuse, as well as a previous hospitalization for mental illness. *Id.* At the time Jasmon was turned over to the Department, her father was unable to care for Jasmon since *he* was also in a halfway house for the mentally ill, suffering from a drug dependency problem. *Id.*

12. Both the majority and the dissent discussed the existence of a conflict of interest on the part of the Department in placing the child in the care of her foster parents, and sharply disagreed on the effects of such conflict. *See id.* at 408, 435, 878 P.2d at 1300, 1318, 33 Cal. Rptr. 2d at 88, 106. The actual conflict was that the

mother's parental rights after she failed to comply with the reunification plan during the dependency proceedings.[13] Jasmon's father, on the other hand, made an amazing recovery by overcoming his drug problem, gaining employment, and maintaining regular visits with Jasmon.[14]

At a permanency planning hearing on February 17, 1989, the juvenile court referee found that despite the father's remarkable turnaround, "it would be detrimental to Jasmon to return her to her father's custody."[15] Pursuant to section 388,[16] the father petitioned to have the order set aside, however, the petition was denied on the basis that there was a "lack of sufficient new evidence."[17]

On March 14, 1990, on retrial of the entire permanency planning proceedings, a second referee concluded that Jasmon should be returned to her father.[18] While the order was stayed pending a transition schedule, the psychologist supervising the transition halted the proceeding "because of the child's mental distress" during the visitation process and over the separation from her foster parents.[19]

On March 18, 1991, the Department petitioned for an order, pursuant to section 388, to set aside or modify the second referee's order.[20] On May 15, 1991, after a hearing on the matter, a third referee concluded that the previous referee's order should be set aside "because new evi-

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Department's social worker in charge of the case convinced the Department to place Jasmon in the home of her sister and brother in law, who were childless and had discussed the possibility of eventually adopting Jasmon. *Id.* at 435, 878 P.2d at 1318, 33 Cal. Rptr. 2d at 106 (Baxter, J., dissenting). The majority considered this harmless because the foster home provided for Jasmon was ultimately a good one. *Id.* at 408, 878 P.2d at 1300, 33 Cal. Rptr. 2d at 88. The dissent, however, complained that the Department's agent caused Jasmon to be placed in the home of her sister, which created the child's bond to her foster parents, and thereby disrupted the child's potential bond with the father. *Id.* at 435-36, 878 P.2d at 1318-19, 33 Cal. Rptr. 2d at 106-07 (Baxter, J., dissenting).

13. *Id.* at 408, 878 P.2d at 1300, 33 Cal. Rptr. at 88.

14. *Id.*

15. *Id.* at 408-09, 878 P.2d at 1300, 33 Cal. Rptr. 2d at 88.

16. CAL. WELF. & INST. CODE § 388 (West 1984 & Supp. 1995).

17. *In re* Jasmon O., 8 Cal. 4th at 409, 878 P.2d at 1300, 33 Cal. Rptr. 2d at 88. While the father's petition under § 388 was denied, his motion for a mistrial, based on his assertion that he was "entitled to a new permanency planning hearing on the merits," was granted and a mistrial was ordered. *Id.* at 409, 878 P.2d at 1300, 33 Cal. Rptr. 2d at 88.

18. *Id.* at 409, 878 P.2d at 1300-01, 33 Cal. Rptr. at 88-89.

19. *Id.*

20. *Id.* at 410, 878 P.2d at 1301, 33 Cal. Rptr. 2d at 89.

dence established that it was not in the best interests of the child to be placed with her father."[21] The referee also "ordered the Department to file an action under former Civil Code section 232 for termination of parental rights."[22] The father then filed a notice of appeal.[23]

On September 9, 1991, a hearing under section 232 commenced and on October 1, 1991, the superior court made a de novo determination that it would be detrimental to the child to return her to her father and that "the father had failed or was likely to fail to maintain an adequate parental relationship."[24] Therefore, the superior court determined that the father's parental rights should be terminated.[25] The father filed a separate appeal from the superior court's order.[26]

On appeal from the third referee's order, the court of appeal reversed the order granting the Department's section 388 petition on the ground that the Department's petition "contained insufficient factual allegations to warrant a hearing."[27] The court of appeal also "purported to order the child returned to her father," despite the fact that the superior court had already terminated the father's parental rights under former Civil Code section 232.[28] In doing so, the court of appeal did not reverse the superior court's judgment, rather, it dismissed the father's appeal as moot.[29]

The Department petitioned the California Supreme Court for review.[30]

## III. TREATMENT OF THE CASE

### A. *The Court of Appeal's Dismissal of the Superior Court Judgment As Moot*

Under former Civil Code section 232 "[a]n action may be brought for the purpose of having any child under the age of 18 years declared free

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21. *Id.*

22. *Id.* "An action pursuant to former Civil Code section 232 is an independent proceeding in the superior court." *Id.* at 411, 878 P.2d at 1302, 33 Cal. Rptr. 2d at 90 (citing *In re* Kristin B., 137 Cal. A[[. 3d 596, 602-04, 232 Cal. Rptr. 36, 39-40 (1986); *In re* Shannon W., 69 Cal. App. 3d 956, 960-61,138 Cal. Rptr. 432, 434-35 (1977)).

23. *Id.* at 410, 878 P.2d at 1301, 33 Cal. Rptr. 2d at 89.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* The court also found that even if there was sufficient evidence to grant the hearing, the evidence was insufficient to support the referee's order in that hearing. *Id.* at 411, 878 P.2d at 1301, 33 Cal. Rptr. 2d at 89.

28. *Id.*

29. *Id.* at 411, 878 P.2d at 1301-02, 33 Cal. Rptr. 2d at 89-90.

30. *Id.* at 411, 878 P.2d at 1302, 22 Cal. Rptr. at 90.

from the custody and control of either or both of his or her parents."[31] Such an action is an independent proceeding.[32]

The father argued that the superior court judgment could be collaterally attacked through the appeal from the order of the juvenile court referee.[33] The supreme court rejected this argument, finding several flaws in the father's argument and reasoning that a section 232 proceeding is not only independent from a juvenile court proceeding, but has a different purpose and generally supersedes a juvenile court dependency proceeding.[34] As such, the court failed to understand how the court of appeal could have concluded that the superior court's judgment was moot because of the disposition of the appeal from the juvenile court dependency hearing, especially in light of the fact that it left the superior court judgment intact.[35] Therefore, the court concluded that the court of

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31. CAL. CIV. CODE § 232(a) (repealed 1994). The statute also states that when the child has been in out-of-home placement "under the supervision of the juvenile court, the county welfare department, or other . . . agency for a one-year period, if the court finds that return of the child to the child's parent or parents would be detrimental to the child *and* that the parent or parents have failed during that period, and are likely to fail in the future, to maintain an adequate parental relationship with the child," the child may be freed from custody and control of the parent. CAL. CIV. CODE § 232(a)(7) (repealed 1994). Under § 232, a court must find both detriment to the child and unfitness of the parent before terminating parental rights. *Id.*

32. *See supra* note 21 and accompanying text.

33. *In re* Jasmon O., 8 Cal. 4th at 412, 878 P.2d at 1302-03, 33 Cal. Rptr. 2d at 90-91. The father's argument is based on the Court of Appeal's holding that since the third juvenile court referee erred in setting aside the previous order to return the child to her father, the child was not in an "out-of-home placement," a requisite finding before a § 232 action can be brought, but in the custody of her father. *Id.*

34. *Id.* at 412-14, 878 P.2d at 1303-04, 33 Cal. Rptr. 2d at 91-92. The court pointed out that the order to return the child to the father was halted, resulting in Jasmon remaining in her "out-of-home placement" status. *Id.* Therefore, the father's argument fails. *Id.* Furthermore, the court of appeal did not, in fact, collaterally attack the superior court judgment, but merely declared the appeal as moot. *Id.* Thus, there was no need for a collateral attack since the father could, and did in fact, appeal the superior court order directly. *Id.* Finally, the court rejected the argument that if the referee in the § 388 hearing committed an error by granting the Department's petition, such an error would invalidate the § 232 proceedings. *Id.* The court did so on the grounds that first, there was no error in the § 388 proceedings and second, even if there was, the superior court § 232 proceeding, being de novo and independent of the juvenile court hearing, would remain unaffected by such error. *Id.*

35. *Id.* at 413, 878 P.2d at 1303, 33 Cal. Rptr. 2d at 91. The court's interpretation of the court of appeal's ignoring the superior court judgment was that such an action equalled an involuntary dismissal, which in turn left the superior court judgment intact. *Id.*; *see In re* Oliver's Conservatorship, 192 Cal. App. 2d 232, 835, 13 Cal. Rptr.

appeal erred in dismissing the appeal from the superior court judgment.[36]

### *B. The Welfare and Institutions Code Section 388*

Since the court of appeal based its decision on the assumption that the juvenile court referee erred in granting the Department's petition to set aside the order to return the child to her father, the court analyzed the merits of that assumption.[37]

The court first focused on the language of section 388, which provides that:

> Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court.[38]

A petition pursuant to section 388 allows the setting aside of an earlier juvenile court order if the petition presents "any evidence that a hearing would promote the best interests of the child".[39] According to the court of appeal, there simply was not sufficient evidence to either grant the hearing or set aside the previous order.[40] The California Supreme Court disagreed with the court of appeal, reasoning that ample testimony from different psychologists indicated that Jasmon suffered from separation anxiety and that continued mental distress could cause severe, long-term damage.[41]

The court concluded that the psychologists' testimony, an independent psychoanalyst's testimony, and Jasmon's conduct "overwhelmingly" established sufficient new evidence to grant the petition for a hearing pursuant to section 388 and to set aside the previous order as "not in the child's best interests."[42] The court also held that a parent's fundamental right to maintain the parent-child relationship is not absolute and may, at a certain point, be outweighed by the child's fundamental right to stable

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695, 698 (1961); 9 B.E. WITKIN, CAL. PROC., *Appeals* § 528 (3d ed. 1985).

36. *In re* Jasmon O., 8 Cal. 4th at 414, 878 P.2d at 1304, 33 Cal. Rptr. 2d at 92.

37. *Id.* at 414-15, 878 P.2d at 1304, 33 Cal. Rptr. 2d at 92.

38. CAL. WELF. & INST. CODE § 388 (West 1984 & Supp. 1995).

39. *In re* Jasmon O., 8 Cal 4th at 414, 878 P.2d at 1304, 33 Cal. Rptr. 2d at 92 (quoting *In re* Heather P., 209 Cal. App. 3d 886, 891, 257 Cal. Rptr. 545, 548 (1989)).

40. *See supra* note 26 and accompanying text.

41. *In re* Jasmon O., 8 Cal. 4th at 416-17, 878 P.2d at 1305-06, 33 Cal. Rptr. 2d at 93-94.

42. *Id.* at 417, 878 P.2d at 1306, 33 Cal. Rptr. 2d at 94.

and permanent placement.[43] Therefore, the supreme court reversed the judgment of the Court of Appeal.[44]

### *C. The Former Civil Code Section 232 Proceeding*

The court reinstated the father's appeal and transferred it to it jurisdiction in order to hear the propriety of the order terminating his parental rights.[45]

Section 232 provides that when the child has been in an out-of-home placement for over a year, the court may terminate parental rights if it finds that

> return of the child to the child's parent or parents would be detrimental to the child and that the parent or parents have failed during that period, and are likely to fail in the future, to maintain adequate parental relationship with the child, which includes providing a home and care and control for the child.[46]

Both of these elements under section 232 must be established by clear and convincing evidence.[47] Section 232 also provides that courts must make a finding that the Department has provided "reasonable" services aimed at helping the parent(s) overcome the reasons that led to losing custody of the child in the first place and that, despite these services, return of the child to the parent would prove detrimental to the child.[48]

Upon review of the record, the court found that substantial evidence existed to support the superior court's decision to terminate the father's parental rights.[49] The court pointed to, among other things, the father's inability to establish a parental relationship with Jasmon, his lack of

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43. *Id.* In doing so, the court disapproved a prior case, relied upon by the dissent, where the court rejected an argument that detriment to the child could be proven by testimony of psychologists alone. *See generally In re* Venita L., 191 Cal. App. 3d 1229, 236 Cal. Rptr. 859 (1987) (overruled by *In re* Jasmon O., 8 Cal 4th at 421, 878 P.2d at 1308, 33 Cal. Rptr. 2d at 96). The court distinguished *In re Venita L.* by differenting between evidence of "transitory" emotional distress versus "long-term," serious emotional trauma, concluding that courts may place great weight on the latter. *In re* Jasmon O., 8 Cal. 4th at 418-19, 878 P.2d at 1306-07, 33 Cal. Rptr. 2d at 94-95.

44. *In re* Jasmon O., 8 Cal. 4th at 422, 878 P.2d at 1309, 33 Cal. Rptr. 2d at 97.

45. *Id.*

46. CAL. CIV. CODE § 232(a)(7) (repealed 1994) (now FAM. CODE § 7828(a)(2) (West 1994).

47. *In re* Jasmon O., 8 Cal. 4th at 422-23, 878 P.2d at 1309, 33 Cal. Rptr. 2d at 97; *see also In re* Laura F., 33 Cal. 3d 826, 662 P.2d 922, 191 Cal. Rptr. 464 (1983).

48. *In re* Jasmon O., 8 Cal. 4th at 422, 878 P.2d at 1309, 33 Cal. Rptr. 2d at 97.

49. *Id.* at 423, 878 P.2d at 1310, 33 Cal. Rptr. 2d at 98.

awareness of the child's mental distress, and his lack of empathy and warmth, as evidence of his inability to meet Jasmon's extraordinary needs.[50] The court also pointed out that at the time a court hears an action to terminate parental rights, the state's efforts have shifted from reunification to finding adoptive parents or some other form of permanent, out of home placement.[51]

The father argued that the Department failed to provide adequate reunification services aimed at solving the problems created by this protracted dispute, mainly Jasmon's anxiety at losing her foster parents.[52] While the court refused to state which services should be offered by the Department, it also rejected the father's argument regarding the inadequacy of the services actually offered by the Department.[53]

Therefore, the court concluded, the superior court had met the requisites of section 232 and substantial evidence existed to support its judgment terminating the father's parental rights.[54] Accordingly, the court affirmed the trial court's decision.[55]

## III. DISSENT

In his dissenting opinion, Justice Baxter discussed the definitions of detriment to the child and unfitness of the parent under section 232.[56]

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50. *Id.* at 424, 878 P.2d at 1310, 33 Cal. Rptr. 2d at 98. "Although the court discounted the evidence that the father was incapable of acting as an adequate parent to any child, it expressly concluded that he was incapable of meeting this child's extraordinary needs." *Id.*

51. *Id.* at 425, 878 P.2d at 1311, 33 Cal. Rptr. 2d at 99. The court reasoned that, at such a stage, the focus is on the child's well-being and, therefore, a court may find that the child's interest in receiving a stable environment within which to grow up outweighs the parent's interest in care and custody of the child. *Id.*

52. *Id.* at 424, 878 P.2d at 1310, 33 Cal. Rptr. at 98.

53. *Id.* at 425, 878 P.2d at 1311, 33 Cal. Rptr. 2d at 99. The court observed that the Department did in fact offer services aimed at making the transition from the foster parents to the father easier, but that it was the father's own inability to deal with the child's anxiety, and his lack of cooperation with a series of psychologists appointed to help him, that ultimately thwarted the possibility of returning the child to him. *Id.*

54. *Id.* at 431, 878 P.2d at 1315, 33 Cal. Rptr. 2d at 103.

55. *Id.*

56. *Id.* at 432, 878 P.2d at 1316, 33 Cal. Rptr. 2d at 104 (Baxter, J., dissenting). According to Justice Baxter, the majority diluted the requirements of § 232 because its determination that a child's interest in stability may outweigh the parent's interest in care and custody of the child "suggests that a finding of parental unfitness is not required and that termination is to be determined by the child's best interests." *Id.* (Baxter, J., dissenting); *see also* Adoption of Kelsey S., 1 Cal. 4th 816, 850-51, 823 P.2d 1216, 1237-38, 4 Cal. Rptr. 2d 615, 636-37 (1992) (holding that a parent's rights cannot be terminated in the absence of a showing of parental unfitness); Cynthia D. v. Superior Court, 5 Cal. 4th 242, 251, 851 P.2d 1307, 1310, 19 Cal. Rptr. 2d 698, 703

Baxter focused on the Department's misconduct in this particular case. He argued that the majority's conclusions of "detriment" and "unfitness" were nothing but a bootstrap argument, since the department's misconduct actually caused the problems that it later argued were justification for termination of the father's rights.[57]

Baxter also attacked the majority's reliance on the psychological experts' testimony questioning the experts' credibility in light of their relationship with the Department.[58] Having discarded the evidence of the psychologists to support detriment to the child, the dissent turned to the question the father's unfitness.[59] Justice Baxter argued that the majority could not find Jasmon's father unfit because he could not meet Jasmon's "extraordinary needs" when such needs were not created by the father.[60]

The dissent concluded that the majority's decision does little more than water down the constitutional protection afforded to a parent facing termination proceedings since the evidence in this case did not rise to the requisite clear and convincing standard.[61] Therefore, in the dissent's view, the finding of unfitness violated the father's right to federal substantive due process.[62]

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(1993) (precluding assumption that the parent's and child's interests differ until a finding of unfitness on the part of the parent has been made). The dissent argues that this internal inconsistency in the majority's decision calls into question whether parental unfitness is constitutionally required. *In re* Jasmon O., 8 Cal. 4th at 434, 878 P.2d at 1317, 33 Cal. Rptr. 2d at 105 (Baxter, J., dissenting).

57. *In re* Jasmon O., 8 Cal. 4th at 435, 878 P.2d at 1318, 33 Cal. Rptr. 2d at 106 (Baxter, J., dissenting). Justice Baxter suggested that the impropriety involved in the Department's acquiescence to place Jasmon in its social worker's sister's home actually amounted to something more akin to the first step in an overt manipulation of the system to allow the foster parents to adopt Jasmon rather than facilitate her reunification with her father. *Id.* (Baxter, J., dissenting).

58. *Id.* at 436-37, 878 P.2d at 1319, 33 Cal. Rptr. 2d at 106-07 (Baxter, J., dissenting). Justice Baxter cited a Supreme Court decision in which Justice Brennan pointed out studies that suggest that social workers have "an inherent hostility toward biological parents." *Id.* (Baxter, J., dissenting) (citing Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 834-835 (1977)).

59. *Id.* at 437-38, 878 P.2d at 1319-20, 33 Cal. Rptr. 2d at 107-08 (Baxter, J., dissenting).

60. *Id.* (Baxter, J., dissenting). The majority refuted that argument by observing that it was the father's original inability to care for the child that placed the child in the care of the Department in the first place. *Id.* at 429, 878 P.2d at 1314, 33 Cal. Rptr. 2d at 102.

61. *Id.* at 439, 878 P.2d at 1320-21, 33 Cal. Rptr. 2d at 108-09 (Baxter, J., dissenting).

62. *Id.* at 439, 878 P.2d at 1321, 33 Cal. Rptr. 2d at 109 (Baxter, J. dissenting).

## IV. CONCLUSION

The *In re Jasmon O.* decision weighs the fundamental right of a child to a stable environment against the parental rights of the natural father. This decision establishes that while a parent has a fundamental right to the care, custody and companionship of the child, the right is not unlimited. Under section 388 of the Welfare and Institutions Code, once a child has been in out-of-home placement for a period of one year or more, the courts may consider the child's rights to stable placement to be paramount to the parent's rights if evidence shows that breaking the bond between the child and the foster parents would cause the child *long-term* damage. It is important to note that Jasmon was with her foster parents for a period of over seven years before this court rendered its decision. Practitioners should recognize that while each case will be evaluated separately to determine detriment to the child and the adequacy of the natural parent, the more "substantial" the period of time spent by the child in foster care, the greater weight a court may afford to the emotional damage caused by severing the child's bond with the foster parents.

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The dissent criticized the lack of constitutional boundaries on the meaning of "unfitness" despite the fact that the High Court has had an opportunity to rule on the issue. *Id.* (Baxter, J., dissenting) (citing 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 17.4(c), at 616 n.47 (2d ed. 1992); *see* Moore v. Sims, 442 U.S. 415 (1979); Doe v. Delaware, 450 U.S. 382 (1981).

# IV. ELECTION LAW

*Candidates for political office must disclose their names and addresses in mass mailings to prospective voters in accordance with section 84305 of the California Government Code:*

**Griset v. Fair Political Practices Commission.**

## I. INTRODUCTION

In *Griset v. Fair Political Practices Commission*,[1] the California Supreme Court examined whether candidates running for political office must disclose their identities in mass mailings pursuant to California Government Code section 84305.[2] The court explored several United States Supreme Court cases that dealt with the First Amendment right to free expression and the extent to which the government may compel disclosure.[3] After a thorough analysis, the California Supreme Court held

1. 8 Cal. 4th 851, 884 P.2d 116, 35 Cal. Rptr. 2d 659 (1994), *cert. denied*, 115 S. Ct. 1794 (1995). Justice Kennard authored the opinion, in which Chief Justice Lucas and Justices Mosk, Arabian, Baxter, George and Werdegar concurred in the judgment. *Id.* at 853-67, 884 P.2d at 117-26, 35 Cal. Rptr. 2d at 660-69.

2. *Id.* at 853, 884 P.2d at 117, 35 Cal. Rptr. 2d at 660; *see* CAL. GOVT. CODE § 84305 (West 1993). Daniel Griset, seeking reelection to the Santa Ana City Council in 1988, sent a mass mailing to voters with the letterhead: "Washington Square Neighborhood Association," and did not identify himself or his campaign committee as the sender. *Id.* at 854, 884 P.2d at 117, 35 Cal. Rptr. 2d at 660. Later that same month, a different campaign committee for Griset sent four additional mailings that attacked Griset's opponent but did not identify Griset as the sender. *Griset*, 8 Cal. 4th at 854, 884 P.2d at 117-18, 35 Cal. Rptr. 2d at 660-61. In March 1990, the Fair Political Practices Commission (FPPC) filed an enforcement action against Griset and his committees, alleging violations of § 84305 of the California Government Code, which requires disclosure of the identities of those sending mass mailings. *Id.* at 854, 884 P.2d at 118, 35 Cal. Rptr. 2d at 661. The FPPC fined Griset $10,000 for the five violations. *Id.* Following the FPPC proceeding, Griset filed a petition for writ of administrative mandamus, in which he sought declaratory and injunctive relief. *Id.* Griset contended that § 84305 was invalid both on its face and as applied. *Id.* The trial court denied the petition and also denied Griset's motion for summary judgment. *Id.* Griset appealed only from the order denying the petition for writ of mandate. *Id.* The court of appeal affirmed the lower court's decision that denied the writ of administrative mandamus, but also examined the constitutional validity of § 84305 as applied to all persons, not just political candidates. *Id.* at 855, 884 P.2d at 118, 35 Cal. Rptr. 2d at 661. The supreme court did not address the broader issue raised by the court of appeal, holding § 84305 to be valid as applied to Griset and his committees. *Id.*

3. *Id.* at 856-59, 884 P.2d at 119-21, 35 Cal. Rptr. 2d at 662-64.

that section 84305 does not violate the First Amendment rights of candidates by requiring candidates and candidate-controlled committees to disclose their identities in mass mailings.[4]

## II. TREATMENT OF THE CASE

The court began its constitutional analysis of section 84305 by outlining the situations in which the United States Supreme Court allowed the government to compel disclosure of the identities of those engaged in First Amendment activities.[5] In *NAACP v. Alabama*,[6] the Supreme Court held that the government could not compel disclosure of NAACP membership lists because such disclosure would likely deter members from exercising their right to freely associate.[7] In *Bates v. City of Little Rock*,[8] the Court again prevented disclosure of NAACP membership lists, concluding that the government's requirement that nonprofit organizations register members was not reasonably related to Little Rock's stated objective.[9]

In *Talley v. California*,[10] the Supreme Court invalidated an ordinance prohibiting the distribution of handbills that did not specify the names and addresses of those who distributed them.[11] The Court held that the ordinance abridged First Amendment rights, reasoning that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."[12] In these cases, the right to free association

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4. *Id.* at 866, 884 P.2d at 125-26, 35 Cal. Rptr. 2d at 668-69. Section 84305(a) states in pertinent part: "Except as provided in subdivision (b), no candidate or committee shall send a mass mailing unless the name, street address, and city of the candidate or committee are shown on the outside of each piece of mail in the mass mailing." CAL. GOV'T CODE § 84305 (West 1993). Section 82041.5 defines "mass mailing" as "over two hundred substantially similar pieces of mail, but does not include a form letter or other mail which is sent in response to an unsolicited request, letter or other inquiry." CAL. GOV'T CODE § 82041.5.

5. *Griset*, 8 Cal. 4th at 856-59, 884 P.2d at 119-21, 35 Cal. Rptr. 2d at 662-64.

6. 357 U.S. 449, 466 (1958).

7. *Id.* The nondisclosure of membership lists allows those members "to pursue their lawful private interests privately and to associate freely with others . . . within the protection of the Fourteenth Amendment." *Id.*

8. 361 U.S. 516 (1960).

9. *Id.* at 525-26. The city of Little Rock claimed that disclosure was required to determine if the NAACP was to receive tax-exempt status. *Id.* at 517-19. Had the government shown a compelling justification for disclosure, such as an occupational license requirement or tax claims, then compulsory disclosure of specific sources of funds or membership lists would likely be justified. *Id.* at 527.

10. 362 U.S. 60 (1960).

11. *Id.* at 65. Employing a historical analysis, the Talley Court concluded that anonymity sometimes served valuable purposes in the establishment of democracies and "the progress of mankind." *Id.* at 64.

12. *Id.* at 65.

prohibited the government from compelling disclosure.[13] The Supreme Court detailed the requirements for compelled-disclosure statutes, stating that "any statute that requires disclosure must be reasonably related to the asserted government purpose and must be narrowly tailored to achieve that purpose."[14]

On the other hand, when the government's objective is to ensure the integrity and reliability of the electoral process, the Supreme Court has held that this may justifiably require disclosure of identity.[15] In *Buckley v. Valeo*,[16] the United States Supreme Court upheld federal laws requiring disclosure of all persons making financial contributions to political campaigns.[17] That Court specified three justifications for compelling disclosure of the identities of those making political contributions: (1) to "allow voters to place each candidate in the political spectrum . . . [and to] alert the voter to the interests to which a candidate is most likely to be responsive;" (2) to "deter actual corruption and avoid the appearance of corruption by exposing large contributions . . . to the light of publicity;" and (3) to "gather[ ] the data necessary to detect violations of the contribution limitations."[18] In *First National Bank v. Bellotti*,[19] the Court found a statute unconstitutional that prohibited corporations from making political contributions to influence the vote.[20] The Court stated, however, that requiring identification of the sources behind advertisements would be permissible in order to allow the populace to evaluate the arguments contained within those advertisements.[21]

Having established from these United States Supreme Court decisions that a balancing test must be used to determine whether a candidate's First Amendment right to free association is superseded by the government's interest in informing the public in voting, the court then examined the constitutionality of California Government Code section

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13. *Griset*, 8 Cal. 4th at 857-58, 884 P.2d at 120, 35 Cal. Rptr. 2d at 663.

14. *Id.* at 858, 884 P.2d at 120, 35 Cal. Rptr. 2d at 663.

15. *Id. See generally* 28 CAL. JUR. 3D *Elections* §§ 105, 280 (1986 & Supp. 1995) (discussing importance of fair elections and outlining improper campaign literature and its penalties); 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 205, 248 (9th ed. 1988 & Supp. 1994) (discussing the requirements of campaign disclosure and political speech generally).

16. 424 U.S. 1 (1976).

17. *Id.* at 13.

18. *Id.* at 67-68.

19. 435 U.S. 765 (1978).

20. *Id.* at 795.

21. *Id.* at 791-92.

84305.[22] The court addressed all points made by *Griset* and ultimately held that section 84305 survives First Amendment scrutiny.[23] Although the court did not resolve which level of scrutiny the government interest requires, it found the state's interest to be compelling and "of sufficient magnitude to permit the restriction on the First Amendment rights of candidates."[24]

The Court compared the interests advanced in this case to the interests in *Buckley*, namely to assure that the electorate has information regarding the source of political campaign funds so as to enable the voters to better evaluate candidates for public office.[25] As part of the Political Reform Act of 1974, the Fair Political Practices Commission's purpose "is to inform the electorate and to prevent corruption of the electoral process."[26] Although these interests met the "substantial interest" test of *Buckley*, the court found further analysis necessary.[27] The Supreme Court has held that restraints on First Amendment privileges must be narrowly drawn.[28] To determine the constitutionality of section 84305, the court found that it must balance the state's interests against the potential burden on those candidates seeking to send anonymous mass mailings.[29] The court held that, although section 84305 requires disclosure of the identity of the sender, it does not regulate the expressive content of the mailings and, therefore, does not in and of itself hamper the communication of ideas.[30] The court reasoned that requiring candidates for political office to disclose only their identities in mass mailings is a necessary, yet relatively minor, burden to insure the efficient dissemination of information necessary for the voting public.[31] In the court's view, the disclosure requirement will not likely deter political candidates from sending truthful mass mailings, because they will still want to inform the public of their strengths and of their opponent's weaknesses.[32] If the disclosure requirement deters mass mailings at all, it will likely only be those deceptive mass mailings.[33] Requiring disclosure in mass

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22. *Griset*, 8 Cal. 4th at 859-60, 884 P.2d at 121, 35 Cal. Rptr. 2d at 664.

23. *Id.* at 859-61, 884 P.2d 121-23, 35 Cal. Rptr. 2d at 664-66.

24. *Id.* at 861-62, 884 P.2d at 123, 35 Cal. Rptr. 2d at 666.

25. *Id.* at 862, 884 P.2d at 123, 35 Cal. Rptr. 2d at 666.

26. *Id.* at 861-62, 884 P.2d at 123, 35 Cal. Rptr. 2d at 666. *See generally* 28 CAL. JUR. 3D *Elections* § 280 (1986)(outlining improper campaign literature and its penalties); 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 205 (9th ed. 1988 & Supp. 1994) (discussing the requirements of campaign disclosure).

27. *Griset*, 8 Cal. 4th at 862, 884 P.2d at 123, 35 Cal. Rptr. 2d at 666.

28. *Id.* at 861, 884 P.2d at 122, 35 Cal. Rptr. 2d at 665 (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

29. *Id.* at 862, 884 P.2d at 123, 35 Cal. Rptr. 2d at 665-66.

30. *Id.* at 862, 884 P.2d at 123, 35 Cal. Rptr. 2d at 666.

31. *Id.* at 862-63, 884 P.2d at 123, 35 Cal. Rptr. 2d at 666.

32. *Id.* at 863, 884 P.2d at 123-24, 35 Cal. Rptr. 2d at 666-67.

33. *Id.* In *Canon v. Justice Court*, the California Supreme Court invalidated a stat-

mailings that are nothing more than smear campaigns against other candidates reduces the weight the electorate will give to those mass mailings.[34]

Furthermore, *Griset* contended that section 84305 was unconstitutional because it failed to distinguish between protected and unprotected speech.[35] *Griset* relied on *Schuster v. Municipal Court*,[36] which held unconstitutional a statute that made it unlawful to reproduce written material relating to an election without the name or address of the person reproducing it.[37] The *Schuster* court distinguished that case from *Buckley* by asserting that only one of the three interests present in *Buckley* was present in the case before it.[38] The court disagreed with the court of appeal's reasoning, stating that the United States Supreme Court has never suggested that the constitutionality of a statute depended on the number of government interests it serves nor that a single government interest, such as promoting an informed electorate, would be insufficient to withstand First Amendment scrutiny.[39] *Griset* further contended that only false or defamatory speech could be subject to compelled disclosure.[40] However, the court concluded that *Griset*'s theory was irreconcilable with the *Buckley* decision.[41]

Finally, the court clarified the distinction between direct and indirect restraints on speech espoused in *Buckley*.[42] The court stated that unlike expenditure limitations, which directly reduce the amount of expression by restricting the number of issues discussed and the depth given to each issue, mandatory disclosure requirements do not restrict the quantity of expression because the candidates remain free to discuss their

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ute prohibiting the distribution of literature that personally attacked other candidates without the proper disclosure of its source. 61 Cal. 2d 446, 393 P.2d 428, 39 Cal. Rptr. 228 (1964). The court stated: "Identification permits confrontation and often makes refutation easier and more effective. It tends to reduce irresponsibility. It enables the public to appraise the source." *Id.* at 459, 393 P.2d at 435, 39 Cal. Rptr. at 235.

34. *Griset*, 8 Cal. 4th at 863-64, 884 P.2d at 123-24, 35 Cal. Rptr. 2d at 666-67.

35. *Id.* at 864, 884 P.2d at 124, 35 Cal. Rptr. 2d at 667.

36. 109 Cal. App. 3d 887, 897, 167 Cal. Rptr. 447, 452 (1980), *cert. denied*, California v. Schuster, 450 U.S. 1042 (1981).

37. *Id.* at 897, 167 Cal. Rptr. at 452.

38. *Id.* at 898-99, 167 Cal. Rptr. at 453.

39. *Griset*, 8 Cal. 4th at 864-65, 884 P.2d at 125, 35 Cal. Rptr. 2d at 668.

40. *Id.* at 865, 884 P.2d at 125, 35 Cal. Rptr. 2d at 668.

41. *Id.*

42. *See id.*

positions at length.[43] Section 84305 simply requires that the candidate or respective committee provide disclosure "to the prospective voters when they seek to persuade."[44]

## III. IMPACT AND CONCLUSION

In the past, the California Supreme Court sought to properly balance the First Amendment right to free speech with the more practical concerns of insuring a proper electoral process. As seen in *Buckley* and its progeny, the First Amendment has become a barrier to legislation aimed at remedying improper or irrational electorate outcomes.[45] In *Griset*, the court upheld section 84305 because it "is narrowly tailored to serve a compelling state interest: to provide the voters with important information to assist them in making a reasoned choice at the polls."[46] Furthermore, "[w]ith the advent of media-dominated political campaigns," it is likely that the United States Supreme Court will find the goal of an informed electorate an interest which is compelling enough to warrant continued restrictions on political candidate's First Amendment rights.[47]

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43. *Id.* at 865-66, 884 P.2d at 125, 35 Cal. Rptr. 2d at 668.

44. *Id.* at 866, 884 P.2d at 125, 35 Cal. Rptr. 2d at 668.

45. *See* James A. Gardner, Comment, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892, 894 (1984).

46. *Griset*, 8 Cal. 4th at 866, 884 P.2d at 125, 35 Cal. Rptr. 2d at 668.

47. Gardner, *supra* note 45, at 894.

# V. ENVIRONMENTAL LAW

*Approved timber harvesting plans not in effect before the passage of California Code of Regulations Title 14, section 919.9, are considered "proposed timber operations" and must conform to regulations enacted to protect the northern spotted owl:*

**Public Resources Protection Ass'n of Cal. v. California Dep't of Forestry and Fire Protection.**

## I. INTRODUCTION

In *Public Resources Protection Ass'n of Cal. v. California Dep't of Forestry*,[1] the California Supreme Court addressed whether certain timber operations approved by the Department of Forestry and Protection ("the Department") before the enactment of California Code of Regulations Title 14, section 919.9,[2] by the Board of Forestry ("the Board") to protect the northern spotted owl, were "proposed timber operations" under the regulations and thus obligated to comply with the section 919.9 requirements ("the rules").[3] A unanimous court held that because a court order

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1. 7 Cal. 4th 111, 865 P.2d 728, 27 Cal. Rptr. 2d 11 (1994). Justice Panelli wrote the unanimous opinion.

2. Section 919.9 provides in pertinent part:

> Every proposed timber harvesting plan . . . located in the range of the northern spotted owl shall follow one of the procedures required in subsections (a)-(g) below for the area within the THP boundary as shown on the THP map and also for adjacent areas as specified within this section. The submitter may choose any alternative (a)-(g) that meets the on-the-ground circumstances. The required information shall be used by the Director to evaluate whether or not the proposed activity would result in the "take" of an individual northern spotted owl.

CAL. CODE REGS. tit. 14, § 919.9 (1993). For a general discussion on the need for spotted owl protection, see Mark Bonnett & Kurt Zimmerman, *Politics and Preservation: The Endangered Species Act and the Northern Spotted Owl*, 18 ECOLOGY L.Q. 105 (1991).

3. *Public Resources*, 7 Cal. 4th at 118, 865 P.2d at 735, 27 Cal. Rptr. 2d at 13. On September 12, 1988, Louisiana-Pacific Corporation submitted to the Board of Forestry ("the Board") a timber harvesting plan (plan 1-88-665 MEN) for the logging of 437 acres in Mendocino County. *Id.* at 116, 865 P.2d at 731, 27 Cal. Rptr. 2d at 14. On October 28, 1988, the plan was found to be "'in conformance with the rules of Board of Forestry and to State laws, and regulations.'" *Id.* On November 7, 1988, numerous environmental groups (collectively "PuRePAC") filed a petition for a writ of mandate, challenging the Board director's finding that Louisiana-Pacific's plan complied with all

previously stayed the timber operations, they were still considered "proposed timber operations" under the rules and were thus subject to the rules' requirements.[4] However, in contrast to the court of appeal, the supreme court held that this finding did not necessarily require the Department to vacate its approval of plan 1-88-665 MEN.[5]

## II. TREATMENT

In making its determination, the supreme court narrowed its discussion to whether timber harvesting plan 1-88-665 MEN was required to "conform to the rules enacted by the board for the protection of the northern spotted owl."[6] The court noted that the answer was in the wording of the rule itself: "a rule that addresses proposed timber harvesting plans would apply to proposed plans, while a rule that addresses proposed timber operations would apply to proposed operations."[7] Be-

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the applicable requirements under Public Resources Code §§ 4581-4582. *Id.* Section 4581 required the submission of a plan and § 4582 detailed the proper information to be contained within the plan. *Id.* at 116-17, 865 P.2d at 731, 27 Cal. Rptr. 2d at 14-15. After the trial court denied the petition, PuRePAC filed an appeal, along with a "petition for writ of supersedeas seeking a stay of timber operations." *Id.* The court of appeal granted the stay. *Id.* at 117, 865 P.2d at 731-32, 27 Cal. Rptr. 2d at 15. For a general discussion of writs of supersedeas see 8 B.E. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* § 16 (3d ed. 1985). Acting on its own motion, the court of appeal investigated "'whether the emergency rules enacted for the protection of the northern spotted owl (Cal.Code Regs. tit. 14, §§ 919.9, 919.10) apply to the Timber Harvest Plan at issue herein (Pub.Resources Code, § 4583).'" *Public Resources*, 7 Cal. 4th at 117, 865 P.2d at 732, 27 Cal. Rptr. 2d at 15. The court of appeal concluded that plan 1-88-665 MEN was subject to the spotted owl regulations; because the plan did not conform to these rules, the court held it invalid. *Id.* at 118, 865 P.2d at 732, 27 Cal. Rptr. 2d at 15-16.

4. *Id.* at 121-22, 865 P.2d at 734-35, 27 Cal. Rptr. 2d at 18.

5. *Id.* at 122, 865 P.2d at 735, 27 Cal. Rptr. 2d at 18.

6. *Id.* at 118, 865 P.2d at 733, 27 Cal. Rptr. 2d at 16.

7. *Id.* at 120, 865 P.2d at 733, 27 Cal. Rptr. 2d at 16-17. The court of appeal took a different approach and instead looked to Public Resources Code § 4583 for guidance. *Id.* at 119, 865 P.2d at 733, 27 Cal. Rptr. 2d at 16. Section 4583 provides in pertinent part:

> A timber harvesting plan shall conform to all standards and rules which are in effect at the time the plan becomes effective . . . . [A]ll timber operations shall conform to any changes or modifications of standards and rules made thereafter unless prior to the adoption of such changes or modifications, substantial liabilities for timber operations have been incurred in good faith and in reliance upon the standards in effect at the time the plan became effective and the adherence to such new rules or modifications would cause unreasonable additional expense to the owner or operator.

CAL. PUB. RES. CODE § 4583 (West 1984 & Supp. 1995).

Louisiana-Pacific argued that this statute regulates merely the procedure by which timber harvesting plans were approved, rather than the conduct associated with timber

cause Louisiana-Pacific's timber operations had not begun by March 25, 1991 (the effective date of the current version of section 919.9), the supreme court determined that they fell within the scope of "proposed timber operations" under section 919.9.[8] As such, the operations were subject to the rules' requirements.[9] The court found no ambiguity in the rule as written and was therefore required to uphold the rule.[10] Accordingly, unless Louisiana-Pacific could show that adapting its plans to comply with the rules protecting the spotted owl would cause "unreasonable

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operations already approved. *Public Resources*, 7 Cal. 4th at 119, 865 P.2d at 733, 27 Cal. Rptr. 2d at 16. The court of appeal rejected this argument, stating:

> It is the [timber harvesting plan] which governs and carefully delimits the parameters of the proposed timber operations . . . . The only reason the Legislature said that 'timber operations,' rather than a 'timber harvest plan,' would be subject to subsequent rule change is obvious: the plan itself is already completed and the only operative activity is the actual act of logging, i.e., timber operations.

*Id.* at 119-120, 865 P.2d at 733, 27 Cal. Rptr. 2d at 16. The supreme court, however, concluded that the court of appeal erred in assuming that § 4583 provided the answer to the issue in this case. *Id.* at 120, 865 P.2d at 733, 27 Cal. Rptr. 2d at 16.

8. *Id.* at 121-22, 865 P.2d at 734-35, 27 Cal. Rptr. 2d at 18.

9. *Id.*

10. *Id.* at 120, 865 P.2d at 733-34, 27 Cal. Rptr. 2d at 17. Another consideration by the court was whether the Board overstepped its authority. *See generally* CAL. GOV'T CODE §§ 11342.1-11342.2 (West 1992 & Supp. 1995); *see also* Association for Retired Citizens v. Department of Developmental Servs., 38 Cal. 3d 384, 390-91, 696 P.2d 150, 153, 211 Cal. Rptr. 758, 761 (1985). Had the court found any ambiguity, it would have sent the rules back to the Board for clarification. *Public Resources*, 7 Cal. 4th at 120, 865 P.2d at 733, 27 Cal. Rptr. 2d at 17.

California Public Resources Code § 4551 vests in the Board the "authority to adopt forest practice rules and regulations 'to assure the continuous growing and harvesting of commercial forest tree species and to protect the soil, air, fish, and wildlife, and water resources . . . .'" *Id.* at 120, 865 P.2d at 734, 27 Cal. Rptr. 2d at 17. California Public Resources Code § 4583 describes the limits on the Board's exercise of authority:

> (1) If the plan calls for reforestation, stocking standards in effect when operations begin may not be changed; and (2) an owner or operator need not comply with a rule change if it has incurred 'substantial liabilities' in reliance on the existing rules and adherence to the new rules would cause 'unreasonable additional expense.'

*Id.* at 120-21, 865 P.2d at 734, 27 Cal. Rptr. 2d at 17. For a general discussion on construction of statutes by a court, see 13 CAL. JUR. 3D *Constitutional Law* §§ 63-69 (1989); 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 95 (9th ed. 1988).

expense," it would be required to submit updated plans in accordance with those rules.[11]

Although the court determined that the timber operations set forth in plan 1-88-665 MEN were "proposed timber operations," it concluded that this ruling did not require the Board to overturn its approval of the plan.[12] Because the Department previously approved the timber harvesting plan, Louisiana-Pacific's chosen alternative would determine how to proceed.[13] If Louisiana-Pacific's changes were only a "minor deviation" from the original plan and were immediately reported, it could proceed without submitting an amended plan.[14] If, however, the plan incorporated changes that constituted a "substantial deviation" from the originally approved plan, the new plan could not be implemented without department approval, pursuant to sections 4582.7 and 4583.[15] Based on these rules, the court determined that although Louisiana-Pacific's plan was required to meet the new guidelines set forth in section 919.9, the Board did not need to vacate the plan.[16]

## III. CONCLUSION

The California Supreme Court correctly concluded that although Louisiana-Pacific's timber harvesting plan was required to conform to the

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11. *Public Resources*, 7 Cal. 4th at 121, 865 P.2d at 734, 27 Cal. Rptr. 2d at 17.

12. *Id.* at 122, 865 P.2d at 735, 27 Cal. Rptr. 2d at 18. This decision was based on the fact that rule 919.9 allows a submitter to choose an alternative plan to meet the "on-the-ground circumstances." *Id.*

13. *Id.*

14. *Id.* at 123, 865 P.2d at 735, 27 Cal. Rptr. 2d at 18-19. Minor deviations are defined as:

> any change, minor in scope, in a plan which can reasonably be presumed not to make a significant change in the conduct of timber operations and which can reasonably be expected not to significantly adversely affect timberland productivity or values relating to soil, water quality, watershed, wildlife, fisheries, range and forage, recreation, and aesthetic enjoyment.

*Id.* at 123, 865 P.2d at 735, 27 Cal. Rptr. 2d at 19 (quoting CAL. CODE REGS. tit. 14, § 1036(a)). The timber operator may act upon these plans without approval of the Board if the director has not acted upon the proposed deviations within five days. *Id.* at 123, 865 P.2d at 736, 27 Cal. Rptr. 2d at 19.

15. *Id.* at 122-23, 865 P.2d at 735, 27 Cal. Rptr. 2d at 18; *see* CAL. PUB. RES. CODE § 4591 (West 1984 & Supp. 1995). For a general discussion of § 4511, see Comment, *Environmental Protection; Z'berg-Nejedly Forest Practice Act of 1973*, 5 PAC. L.J. 420 (1974).

16. *Public Resources*, 7 Cal. 4th at 122-23, 865 P.2d at 735, 27 Cal. Rptr. 2d at 18. Because Louisiana-Pacific had not yet indicated how it was going to comply with rule 919.9, the court "express[ed] no opinion as to whether it must secure the department's approval before commencing operations." *Id.* at 123, 865 P.2d at 736, 27 Cal. Rptr. 2d at 19.

rules enacted for the protection of the northern spotted owl, the Department of Forestry did not, as the court of appeal held, have to vacate its approval of plan 1-88-665 MEN. In reaching its conclusion on this narrow and unique issue, the court correctly relied on the wording of rule 919.9 to determine its meaning, rather than using other statutes as the court of appeal did. By requiring Louisiana-Pacific to update its plan to meet the new rules, while at the same time not invalidating the plan altogether, the court struck a fair balance between greatly needed environmental protection and economic fairness. Should this issue arise again, lower courts will have a much better guideline with which to determine the fate of "proposed timber operations."

ERIC WEITZ

# VI. HOLIDAYS

*Under Education Code section 88203, Presidential Proclamation No. 6257 does not establish a paid holiday for classified employees of the Marin Community College District because the proclamation was not accompanied by a corresponding federal holiday, and presidential intent to establish a holiday was not apparent in the proclamation's language:*

**California School Employees Ass'n v. Governing Board of the Marin Community College District.**

## I. INTRODUCTION

In *California School Employees Ass'n v. Governing Board of the Marin Community College District*,[1] the California Supreme Court addressed whether the "National Days of Thanksgiving" proclaimed by President George Bush after the cessation of hostilities in the Persian Gulf could be considered "appointed" days of thanksgiving within the meaning of California Education Code section 88203, resulting in holiday compensation for the community college's classified employees.[2] The court held that President Bush's proclamation did not rise to the level of an "appointed" day and, consequently, that the classified employees were not entitled to holiday compensation.[3] In so holding, the court established a test for determining whether a presidential proclamation constitutes a holiday for purposes of California Code of Education sections 88203 and 79020.[4] This new test requires the classified employees to demonstrate that the President intended to establish a national holiday by also establishing a corresponding federal holiday.[5] In addition, the Court held that the President's intent must be apparent in the "language and tone" of the proclamation itself.[6]

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1. 8 Cal. 4th 333, 878 P.2d 1321, 33 Cal. Rptr. 2d 109 (1994). Chief Justice Lucas authored the majority opinion in which Justices Arabian, Baxter, George and Werdegar concurred. *Id.* at 335-47, 878 P.2d at 1324-31, 33 Cal. Rptr. 2d at 112-19. Justice Kennard wrote a separate dissenting opinion in which Justice Mosk concurred. *Id.* at 347-60, 878 P.2d at 1331-40, 33 Cal. Rptr. 2d. at 119-28 (Kennard, J., dissenting).

2. *Id.* at 336, 878 P.2d at 1324, 33 Cal. Rptr. 2d at 112. *See generally* 37 CAL. JUR. 3D *Holidays* §§ 1, 2, 5, 6 (1977); 40 C.J.S. *Holidays* §§ 1-7 (1991).

3. *California School Employees Ass'n* (hereinafter *CSEA*), at 344, 878 P.2d at 1329, 33 Cal. Rptr. 2d at 117.

4. *See id.* at 346, 878 P.2d at 1331, 33 Cal. Rptr. 2d at 119.

5. *Id.*

6. *Id.*

## II. STATEMENT OF THE CASE

On March 7, 1991, President Bush issued Presidential Proclamation No. 6257 (Proclamation 6257), calling for the observance of "National Days of Thanksgiving" on April 5, 6, and 7, 1991, to commemorate the end of the Persian Gulf War.[7] The California School Employees Association (CSEA) represents the classified personnel employed by the Governing Board of the Marin Community College District (District).[8] CSEA wanted the District to recognize the days specified in Proclamation 6257 as paid holidays for the District's classified employees and to pay them suitable compensation.[9] The District denied CSEA's request.[10]

CSEA then obtained a writ of mandate from the Marin County Superior Court requiring the District to recognize the days specified in Proclamation 6257 as holidays and to pay its classified employees accordingly.[11] The District appealed, but the court of appeal affirmed the superior

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7. *Id.* at 336, 878 P.2d at 1324, 33 Cal. Rptr. 2d at 112; Proclamation No. 6257, 56 Fed. Reg. 10,353 (1991). The proclamation reads in pertinent part:

> I, GEORGE BUSH, President of the United States of America, do hereby proclaim April 5-7, 1991, as National Days of Thanksgiving. I ask that Americans gather in homes and places of worship to give thanks to Almighty God for the liberation of Kuwait, for the blessings of peace and liberty, for our troops, our families, and our Nation. In addition, I direct that the flag of the United States be flown on all government buildings, I urge all Americans to display the flag, and I ask that bells across the country be set ringing at 3:00 p.m. (eastern daylight savings time) on April 7, 1991, in celebration of the liberation of Kuwait and the end of the hostilities in the Persian Gulf.

*CSEA*, 8 Cal. 4th at 336, 878 P.2d at 1324, 33 Cal. Rptr. 2d at 112 (citing Proclamation No. 6257, 56 Fed. Reg. 10,353 (1991)).

8. *CSEA*, 8 Cal. 4th at 336, 878 P.2d at 1324, 33 Cal. Rptr. 2d at 112. "Classified" employees hold positions that are "not defined by the regulations of the board of governors as . . . academic position[s] . . . ." CAL. EDUC. CODE § 88004 (West 1995). "'Academic position[s]' include[] every type of service . . . for which minimum qualifications have been established by the board of governors . . . ." CAL. EDUC. CODE § 87001 (West 1995). Thus, the court identified secretaries, maintenance workers, and food service personnel as classified employees under the code. *CSEA*, 8 Cal. 4th at 337 n.4, 878 P.2d at 1325 n.4, 33 Cal. Rptr. 2d at 113 n.4. The court also noted that its decision addressed similar issues that arose under § 45203, which provides holiday pay for classified employees in the elementary and high school districts. *Id.* at 337 n.5, 878 P.2d at 1325 n.5, 33 Cal. Rptr. 2d at 113 n.5; *see* CAL. EDUC. CODE § 45203 (West 1995).

9. *CSEA*, 8 Cal. 4th at 336, 878 P.2d at 1324, 33 Cal. Rptr. 2d at 112.

10. *Id.*

11. *Id.* at 336-37, 878 P.2d at 1324, 33 Cal. Rptr. 2d at 112.

court's decision.[12] The California Supreme Court granted review and reversed the decision of the court of appeal.[13]

## III. TREATMENT

### A. *Majority Opinion*

The supreme court observed that, although the President lacks the power to compel a state entity to declare a paid holiday for its employees, sections 88203 and 79020 of the California Education Code provide for holiday compensation and college closure on days appointed by the President or the Governor.[14] The court, therefore, began its analysis by determining the type of presidential action required to trigger an entitlement to holiday compensation.[15]

In its search for the presidential triggering mechanism, the court examined the plain language of the statutes.[16] The court noted that the statutes relied on the use of the term "thanksgiving" in the presidential announcement to trigger a paid holiday.[17] The court pointed out, however, that applying such "a literal interpretation of the statute produces [an] absurd result," in which "a paid holiday is recognized not because of the President's designation of a day of nationwide significance, but rather, through a semantic lottery of sorts in which the determinative factor is that the winning words (in this case, 'day' of 'thanksgiving') appear in the President's proclamation."[18]

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12. *Id.* at 337, 878 P.2d at 1324, 33 Cal. Rptr. 2d at 112.

13. *Id.* at 337, 347, 878 P.2d at 1324, 1331, 33 Cal. Rptr. 2d at 112, 119.

14. *Id.* at 337-38, 878 P.2d at 1325, 33 Cal. Rptr. 2d at 113. Section 88203 states in relevant part that classified employees are entitled to holiday pay on "every day appointed by the President, or the Governor of this state, as provided for in subdivisions (c) and (d) of Section 79020 for a public fast, thanksgiving or holiday . . . ." CAL. EDUC. CODE § 88203 (West 1995). Section 79020 states that "[t]he community colleges shall close on every day appointed by the President as a public fast, thanksgiving, or holiday, unless it is a special or limited holiday." CAL. EDUC. CODE § 79020(d) (West 1995).

15. *CSEA*, 8 Cal. 4th at 338, 878 P.2d at 1325, 33 Cal. Rptr. 2d at 113.

16. *Id.*; *see supra* note 14 and accompanying text.

17. *CSEA*, 8 Cal. 4th at 338, 878 P.2d at 1326, 33 Cal. Rptr. 2d at 114. The court also acknowledged the District's argument that the term "appointed" was fairly vague, but found the argument unpersuasive after consulting WEBSTER'S NEW INT'L DICTIONARY 105 (3d ed. 1981). CSEA, 8 Cal. 4th at 338, 878 P.2d at 1325-26, 33 Cal. Rptr. 2d at 113-14.

18. *Id.* at 340, 878 P.2d at 1327, 33 Cal. Rptr. 2d at 115. The court also observed that a holiday pay entitlement may or may not be created solely on the basis of whether the President used terms that had virtually identical meanings, such as "day of prayer" and "day of thanksgiving." *Id.* at 339-406, 878 P.2d at 1326, 33 Cal. Rptr. 2d at 114.

The court reasoned that it was not required to follow a particular statutory construction when doing so would lead to an absurd conclusion or reach results far different from those contemplated by the original legislation.[19] Acknowledging the lack of any express legislative purpose behind section 88203, the court hypothesized that the probable purpose of the section was "to provide a mechanism whereby those connected with the state's community colleges could join the rest of the nation in observing special . . . days contemplated by the President as national holidays."[20] Accordingly, the court defined its task as interpreting the language of the statute in a manner consistent with its purpose.[21]

To accomplish this task, the court established a test for determining presidential intent to "appoint" a paid holiday for purposes of the California Education Code.[22] As a threshold requirement, the court requires the President to manifest intent by announcing a corresponding federal holiday.[23] Once this threshold requirement has been met, presidential intent to establish a national holiday must also be apparent in the proclamation itself.[24] The "words and tone" of the announcement and the President's recommendation for the manner of observance can serve as evidence of this intent.[25]

Applying this test, the court observed that President Bush did not declare a federal holiday in connection with Proclamation 6257.[26] The court further noted that the language of Proclamation 6257 spoke in

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19. *Id.* at 340, 878 P.2d at 1327, 33 Cal. Rptr. 2d at 115; *see also* People v. Belleci, 24 Cal. 3d 879, 884, 598 P.2d 473, 477, 157 Cal. Rptr. 503, 507 (1979) (declining to follow statute's plain language when such construction would lead to absurd results).

20. *CSEA*, 8 Cal. 4th at 341, 878 P.2d at 1327, 33 Cal. Rptr. 2d at 115.

21. *Id.* at 341, 878 P.2d at 1328, 33 Cal. Rptr. 2d at 116; *cf.* Provigo Corp. v. Alcoholic Beverage Control Appeals Bd., 7 Cal. 4th 561, 567, 869 P.2d 1163, 1166, 28 Cal. Rptr. 2d 638, 641 (1994) (interpreting statute in manner different than plain language, but consistent with the probable intent of the framers).

22. *CSEA*, 8 Cal. 4th at 342, 878 P.2d at 1328, 33 Cal. Rptr. 2d at 116.

23. *Id.* The court stressed that the requirement of a corresponding federal holiday was consistent with its construction of the language in Government Code § 6700, subdivision (n). *Id.* at 342-43, 878 P.2d at 1328, 33 Cal. Rptr. 2d at 116; Laubisch v. Roberdo, 43 Cal. 2d 702, 709-10, 277 P.2d 9, 14 (1954).

24. *CSEA*, 8 Cal. 4th at 343, 878 P.2d at 1328, 33 Cal. Rptr. 2d at 116; *see also Laubisch*, 43 Cal. 2d 702, 277 P.2d 9 (1954) (examining a presidential proclamation to ascertain intent); Vidal v. Backs, 218 Cal. 99, 21 P.2d 952 (1933) (examining a presidential proclamation to ascertain intent).

25. *CSEA*, 8 Cal. 4th at 343, 878 P.2d at 1328, 33 Cal. Rptr. 2d at 116.

26. *Id.* at 344, 878 P.2d at 1329, 33 Cal. Rptr. 2d at 117. Federal employees reported for work, and all federal courts and offices remained open. *Id.*

broad religious terms and called on Americans to express themselves by giving thanks, ringing bells, and displaying the flag.[27] The court reasoned that such requests called for a "traditional commemoration of a noteworthy national event" rather than a national holiday.[28] The court concluded that Proclamation 6257 did not "appoint" holidays under the California Education Code and, therefore, the classified employees of the Marin Community College District were not entitled to holiday compensation for working on April 5, 6, and 7, 1991.[29]

### *B. Dissenting Opinion*

In her dissent, Justice Kennard argued that the plain language of the statute and the court's earlier holding in *Laubisch v. Roberdo*[30] supported the conclusion that Proclamation 6257 "appointed" paid holidays for the classified community college workers.[31] Justice Kennard further asserted that absurd consequences result not from the application of the plain language of section 88203, but rather from the majority's newly established "'federal-holiday-plus-something-more-than-a-ceremonial-commemoration' test."[32] Finally, she observed, the legislative history of section 88203 reinforced the plain meaning of the statute.[33] Relying on

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27. *Id.*

28. *Id.* at 344, 878 P.2d at 1329, 33 Cal. Rptr. 2d at 117. The court also compared Proclamation 6257 with other presidential proclamations, including Proclamation No. 3919, 34 Fed. Reg. 12,079 (1969) (calling for "National Day of Participation," closing all federal agencies, excusing employees, and calling on state governors to take similar action), Proclamation No. 5936, 54 Fed. Reg. 3,575 (1989) (calling for day of prayer without declaring federal holiday), and Proclamation No. 6409, 57 Fed. Reg. 8,395 (1992) (calling for day of prayer without declaring federal holiday). *Id.* at 345, 878 P.2d at 1330, 33 Cal. Rptr. 2d at 118.

29. *Id.* at 346-47, 878 P.2d at 1331, 33 Cal. Rptr. 2d at 119.

30. 43 Cal. 2d 702, 277 P.2d 9 (1954).

31. *CSEA*, Cal. 4th at 351, 878 P.2d at 1334, 33 Cal. Rptr. 2d at 122 (Kennard, J., dissenting).

32. *Id.* at 353, 878 P.2d at 1335, 33 Cal. Rptr. 2d at 123 (Kennard, J., dissenting). Justice Kennard noted that under the majority's test, none of the four "days of thanksgiving" proclaimed by presidents over the past 50 years would constitute holidays. *Id.* (Kennard, J., dissenting); *see* Proclamation No. 6257, 56 Fed. Reg. 10,353 (1991) (commemorating victory in the Persian Gulf War); Proclamation No. 5936, 54 Fed. Reg. 3,575 (1989) (commemorating the American Bicentennial Presidential Inaugural); Proclamation No. 4181, 38 Fed. Reg. 2,737 (1973) (commemorating the end of the Vietnam War); Proclamation No. 3979, 35 Fed. Reg. 6,309 (1970) (commemorating the safe return of the Apollo 13 astronauts).

33. *CSEA*, 8 Cal. 4th at 355, 878 P.2d at 1337, 33 Cal. Rptr. 2d at 125 (Kennard, J., dissenting). The dissent noted that for more than 120 years the President's description of a day as a "day of thanksgiving" has been sufficient to trigger a holiday under the statutory language of California Education Code § 88203. *Id.* at 355, 878 P.2d at 1337, 33 Cal. Rptr. 2d at 125 (Kennard, J., dissenting).

these findings, Justice Kennard concluded that Proclamation 6257 did in fact "appoint" paid holidays for community college classified employees.[34]

## IV. CONCLUSION

With its holding in *CSEA*, the supreme court established a new test for determining whether presidential proclamations establish paid holidays for classified community college workers. This new test, with its partial reliance on an inquiry into subjective presidential intent, will likely result in increased litigation of the issue. However, in light of the relative infrequency of such presidential proclamations, the overall impact of the court's decision in *CSEA* will likely be nominal.

L. SCOTT BARTELL

34. *Id.* at 360, 878 P.2d at 1340, 33 Cal. Rptr. 2d at 128 (Kennard, J., dissenting).

# VII. INCOME TAXES

*Title 31, section 3124(a) of the United States Code does not exempt dividend income derived from repurchase agreements involving federal securities from state taxation:* **Bewley v. Franchise Tax Board.**

## I. INTRODUCTION

In *Bewley v. Franchise Tax Board*,[1] the California Supreme Court considered "whether [31 U.S.C.] section 3124(a)[2] prohibits California from imposing state income tax on shareholder dividend income derived from repurchase agreements involving federal securities."[3] The court of appeal affirmed the judgment of the trial court, holding that income originating in federal securities is exempt from state taxation under section 3124(a).[4] The California Supreme Court reversed the judgment of the court of appeal[5] and remanded the case for further proceedings.[6]

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1. 9 Cal. 4th 526, 886 P.2d 1292, 37 Cal. Rptr. 2d 298 (1995). Justice Kennard authored the unanimous opinion of the court with Chief Justice Lucas, Justices Arabian, Baxter, George, Mosk and Werdegar concurring. *Id.* at 527, 886 P.2d at 1293, 37 Cal. Rptr. 2d at 299.

2. All references to § 3124(a) are to Title 31 of the United States Code. This section provides that "[s]tocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax . . . ." 31 U.S.C. § 3124(a) (1982). *See generally* 71 AM. JUR. 2D *State and Local Taxation* § 237 (1973 & Supp. 1994).

3. *Bewley*, 9 Cal. 4th at 527, 886 P.2d at 1293, 37 Cal. Rptr. 2d at 299. Ross and Marilyn Bewley owned shares in a trust which was a federally regulated mutual, investing exclusively in federal government securities and repurchase agreements involving such securities. *Id.* at 528, 886 P.2d at 1294, 37 Cal. Rptr. 2d at 300. In 1987 the Bewleys reported the dividends from the trust as income on their state income tax return. *Id.* Furthermore, they paid income tax to the Franchise Tax Board on these dividends. *Id.* Subsequently, in 1989, the plaintiffs filed a claim for a refund, which the Franchise Tax Board denied. In response, the Bewleys filed a complaint seeking a refund of the taxes and declaratory judgment. *Id.*

4. *Id.* at 529, 886 P.2d at 1294, 37 Cal. Rptr. 2d at 300.

5. The California Supreme Court heard arguments on this case, November 7, 1994. *Id.* at 528 n.1, 886 P.2d at 1293 n.1, 37 Cal. Rptr. 2d at 299 n.1. On December 12, 1994, the United States Supreme Court decided Nebraska Department of Revenue v. Loewenstein, 115 S. Ct. 557 (1994). The Court held that § 3124(a) does not exempt from state taxation income derived from repurchase agreements involving federal securities. *Loewenstein*, 115 S. Ct. at 563-64. The parties in *Bewley*, acknowledged that the *Loewenstein* holding was dispositive of their issue. *Bewley*, 9 Cal. 4th at 528, 886 P.2d at 1293, 37 Cal. Rptr. 2d at 299; *see* Shad E. Sumrow, Note, *State Taxation of Income from "Repurchase Agreements":* Loewenstein v. Department of Revenue, 28 CREIGHTON L. REV. 275 (1994) (analyzing in depth the *Loewenstein* case).

6. *Bewley*, 9 Cal 4th at 534, 886 P.2d at 1297, 37 Cal. Rptr. 2d at 303. The trial

## II. TREATMENT

Justice Kennard prefaced the court's analysis with a thorough definition of "repurchase agreements."[7] She then recounted the decision of the the United States Supreme Court in *Nebraska Department of Revenue v. Loewenstein*,[8] noting that the characteristics of the repos at issue in Loewenstein were also present in *Bewley*.[9] The Supreme Court based its decision on four features of the repurchase agreement.[10] First, the "repo interest bears no relation to either the coupon interest paid or the discount interest accrued on the federal securities during the term of the repo."[11] Second, where a default occurs and the trust liquidates the collateral, the trust may only keep the amount of the debt plus expenses. Additionally, if the value of the collateral is inadequate, the trust may seek the difference from the seller-borrower.[12] Third, the arrangement of the agreement is such that the lender attempts to obtain the best possible collateral and the borrower seeks to provide as little collateral as possible.[13] Finally, the seller-borrower is free to "'substitute' federal se-

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court granted summary adjudication for two causes of action, and the parties stipulated to dismissal of the other causes of action and to entry of judgment for plaintiffs based on the first two causes of action. As a result, neither the parties nor the court of appeal dealt with the separate challenges to the "tax" raised in the complaint. *Id.* at 528, 886 P.2d at 1294, 37 Cal. Rptr. 2d at 299; *see infra* notes 15-18 and accompanying text.

7. Repurchase agreements, also known as "repos," involve two transactions. "[T]he seller-borrower agrees to transfer securities to the buyer-lender in exchange for cash; and the seller-borrower agrees to repurchase the securities from the buyer-lender at the original price plus 'interest' on a specified future date or upon demand." *Bewley*, 9 Cal. 4th at 529, 886 P.2d at 1294, 37 Cal. Rptr. 2d at 300. The "interest" referred to above is not the same as that interest paid by the United States, but rather the "premium" paid by the trust as the agreed upon amount. *Id.* at 530 n.2, 886 P.2d at 1295 n.2, 37 Cal. Rptr. 2d at 300 n.2; *see* Sumrow, *supra* note 5, at 278 n.26 (defining repurchase agreement).

8. 115 S. Ct. 557 (1994).

9. *Bewley*, 9 Cal. 4th at 531-32, 886 P.2d at 1296, 37 Cal. Rptr. 2d at 301-02.

10. *Id.* at 531, 886 P.2d at 1296, 37 Cal. Rptr. 2d at 301 (citing *Loewenstein*, 115 S. Ct. at 563).

11. *Id.* (quoting *Loewenstein*, 115 S. Ct. at 563).

12. *Id.* at 531, 886 P.2d at 1296, 37 Cal. Rptr. 2d at 301-02 (citing *Loewenstein*, 115 S. Ct. at 563).

13. *Id.* at 531, 886 P.2d at 1296, 37 Cal. Rptr. 2d at 302. The actual provision asserted that if the value of the collateral falls below 102% of the original assessed value (the amount paid), the seller-borrower must provide additional funds or securities "to restore the value of the securities held by the Trust to 102% of the original payment amount." *Bewley*, 9 Cal. 4th at 531, 886 P.2d at 1296, 37 Cal. Rptr. 2d at

curities of equal market value for the federal securities initially involved in the transaction."[14] Since the four features found in the *Loewenstein* repurchase agreement were also found in the Bewley's repurchase agreement, the parties agreed that the decision of the Supreme Court was dispositive.[15]

Even though the plaintiff conceded that the Supreme Court's decision was dispositive of the issue, the plaintiff maintained that it did not fully resolve the case.[16] The plaintiffs "also challenged the tax on the repurchase agreement income on the separate ground that the tax violates the inter-governmental tax immunity doctrine of the supremacy clause of the United States Constitution . . . ."[17]

Justice Kennard looked again to *Loewenstein* in determining the supremacy clause issue.[18] The *Loewenstein* Court did not rule out the applicability of the intergovernmental tax immunity doctrine.[19] Instead, the Supreme Court stated that "when effort is made . . . to establish the unconstitutional character of a particular tax by claiming its remote effect will be to impair the borrowing power of the government, courts . . . ought to have something more substantial to act upon than mere conjecture. The injury ought to be *obvious* and *appreciable*."[20] Thus, in order for the plaintiffs in the present case to prevail on the constitutional issue, they needed to make a showing of "'obvious and appreciable' injury to the borrowing power of the United States Government."[21] Due to the fact that the lower level courts did not address this challenge, the California Supreme Court ordered the case remanded for further proceedings.[22]

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302 (citing *Loewenstein*, 115 S. Ct. at 563). Furthermore, if the opposite occurs and the value of the securities increase above the 102% mark the seller-borrower may require the trust to return the excess amount. *Id.* (citing *Loewenstein*, 115 S. Ct. at 563).

14. *Bewley*, 9 Cal. 4th at 531-32, 886 P.2d at 1296, 37 Cal. Rptr. 2d at 302 (quoting *Loewenstein*, 115 S. Ct. at 563).

15. *Id.* at 532, 886 P.2d at 1296, 37 Cal. Rptr. 2d at 302.

16. *Id.* The Bewleys and the Trust agreed that the *Loewenstein* decision is dispositive for some of their causes of action, but not on their constitutional challenge. *Id.*

17. *Id.*; *see* U.S. CONST. art. VI, cl. 2. *See generally* Sumrow, *supra* note 5 (analyzing the *Loewenstein* case); William F. Haggerty, *Lifting the Cloud of Uncertainty Over the Repo Market: Characterization of Repos as Separate Purchases and Sales of Securities*, 37 VAND. L. REV. 401 (1984) (discussing the legal characterization of repurchase agreements).

18. *Id.* at 532-33, 886 P.2d at 1296-97, 37 Cal. Rptr. 2d at 302-03.

19. *Loewenstein*, 115 S. Ct. at 565-66.

20. *Id.* at 566 (quoting Plummer v. Coler, 178 U.S. 115, 137-38 (1900) (emphasis added)).

21. *Bewley*, 9 Cal. 4th at 533, 886 P.2d at 1297, 37 Cal. Rptr. 2d at 303.

22. *Id.* at 533-34, 886 P.2d at 1297, 37 Cal. Rptr. 2d at 302.

## III. CONCLUSION

In *Bewley v. Franchise Tax Board*, an unanimous California Supreme Court held that section 3124(a) of Title 31 of the United States Code does not exempt dividend income derived from repurchase agreements involving federal securities from state taxation.[23] The decision is in accord with the recent United States Supreme Court ruling in *Loewenstein*.[24] These decisions have given states a major victory.[25] The court did not address the plaintiffs' constitutional challenge to the tax under the doctrine of intergovernmental tax immunity, but rather remanded the case for further proceedings.[26]

JACQUES GARDEN

23. *Id.* at 533, 886 P.2d at 1297, 37 Cal. Rptr. 2d at 303.

24. *See supra* notes 8-22 and accompanying text.

25. According to Roxanne Davis, an attorney with the Federation of Tax Administrators, the amount of revenue that states collect from repo income is in the billions. Roxanne Davis, *Nebraska Allowed to Tax Repos Involving U.S. Securities*, THE BANKING ATT'Y, Dec. 19, 1994, at 9.

26. *Bewley*, 9 Cal. 4th at 533-34, 886 P.2d at 1297, 37 Cal. Rptr. 2d at 303.

# VIII. INCOMPETENT PERSONS

*The exclusionary rule does not apply to involuntary conservatorship proceedings under the Lanterman-Petris-Short Act*: **Conservatorship of Susan T.**

## I. INTRODUCTION

In *Conservatorship of Susan T.*,[1] the California Supreme Court addressed the issue of whether the exclusionary rule should apply to involuntary conservatorship proceedings under the Lanterman-Petris-Short Act (Act).[2] Susan T. was a forty-eight-year-old schizophrenic living alone in a filthy, squalid apartment in Nice, California.[3] Alerted by Susan T.'s doctor, the county mental health department questioned her family and then sent a "crisis worker" to Susan T.'s apartment.[4] During the interview with the crisis worker, Susan T. became "combative, loud and agitated."[5] A sheriff's deputy then took her to a psychiatric ward, in accordance with section 5150 of the Act.[6] Hours later, mental health department worker Bonnie Taylor took photographs of Susan T.'s apartment to document her living conditions.[7] Despite Susan T.'s objections, the trial court

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1. 8 Cal. 4th 1005, 884 P.2d 988, 36 Cal. Rptr. 2d 40 (1994) [hereinafter *Susan T.*]. Justice Werdegar authored the majority opinion, in which Chief Justice Lucas and Justices Kennard, Arabian, Baxter and George concurred. *Id.* at 1008-20, 884 P.2d at 988-97, 36 Cal. Rptr. 2d at 40-49. Justice Mosk wrote a separate concurring and dissenting opinion. *Id.* at 1021-29, 884 P.2d at 997-1002, 36 Cal. Rptr. 2d at 49-54 (Mosk, J., concurring in part and dissenting in part).

2. CAL. WELF. & INST. CODE §§ 5000-5772 (West 1984 & Supp. 1995). The exclusionary rule is a court made rule designed to deter unlawful searches and seizures by deeming the evidence obtained thereby inadmissible in a criminal prosecution. 21 CAL. JUR. 3D § 3176 (3d ed. 1985 & Supp. 1995). For a more complete discussion of the origin and purpose of the exclusionary rule see 1 Wayne R. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §§ 1.1 (2d ed. 1987) (discussing the origins and purposes of the exclusionary rule). *See generally* 21 CAL. JUR. 3D §§ 3176-3181 (2d ed. 1985 & Supp. 1995) (for a discussion of the standard and scope of the exclusionary rule).

3. *Id.* at 1009, 884 P.2d at 989, 36 Cal. Rptr. 2d at 41. Her apartment was littered with dirty dishes, trash, and collections of human and animal waste stored in plastic bags. Rocks had been placed over the drains in the bathroom sink and shower. *Id.* at 1010-11, 884 P.2d at 990, 36 Cal. Rptr. 2d at 42.

4. *Id.* at 1010, 884 P.2d at 990, 36 Cal. Rptr. at 42. Susan T.'s family was worried that she could not take care of herself. *Id.*

5. *Id.*

6. *Id.* Section 5150 of the California Welfare and Institutions Code provides: "When any person, as a result of mental disorder, is a danger to others, or to himself . . . or gravely disabled, a peace officer . . . or other professional person designated by the county may . . . take, or cause to be taken, the person into custody . . . ." CAL. WELF. & INST. CODE § 5150 (West 1984 & Supp. 1995).

7. *Susan T.*, 8 Cal. 4th at 1010-11, 884 P.2d at 990, 36 Cal. Rptr. 2d at 42. Taylor

admitted the photographs as evidence relevant to whether she was "gravely disabled" under the Act.[8] The jury found Susan T. gravely disabled, and the court appointed a conservator.[9] Susan T. appealed, arguing that the court erroneously admitted the photograph's and Taylor's testimony.[10] The court of appeal found that Taylor's actions constituted a search in violation of the Fourth Amendment and that the exclusionary rule should apply to conservatorship proceedings.[11] Nevertheless, the court of appeal affirmed the trial court's judgment, finding the denial of Susan T.'s motion to be suppress harmless error.[12] The California Supreme Court granted the department's petition for review to determine if the exclusionary rule should apply to conservatorship proceedings.[13]

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told the apartment manager that she needed to secure any valuables because the mental health department was responsible for them under § 5156 of the Act. *Id.* "At the time a person is taken into custody for evaluation, . . . the person taking him into custody shall take reasonable precautions to preserve and safeguard the personal property in the possession of or on the premises occupied by the person." CAL. WELF. & INST. CODE § 5156 (West 1984 & Supp. 1995). Taylor also took photographs of the apartment, which were later used as evidence in the trial against Susan T. *Susan T.*, 8 Cal. 4th at 1010, 884 P.2d at 990, 36 Cal. Rptr. 2d at 42. The photographs showed piles of large trash bags, and newspapers with dog feces next to rumpled bedding in the sleeping area. *Id.* at 1010-11, 884 P.2d at 990-91, 36 Cal. Rptr. 2d at 42-43. Taylor never attempted to secure any valuables. *Id.* at 1013-14, 884 P.2d at 992, 36 Cal. Rptr. 2d at 44.

8. *Susan T.*, 8 Cal. 4th at 1013-14, 884 P.2d at 992, 36 Cal. Rptr. 2d at 44.

9. *Id.* at 1011, 884 P.2d at 990, 36 Cal. Rptr. 2d at 42.

10. *Id.*

11. *Id.* at 1011, 884 P.2d at 990-91, 36 Cal. Rptr. 2d at 42-43.

12. *Id.* at 1011, 884 P.2d at 991, 36 Cal. Rptr. 2d at 43.

13. *Id.* "The department petitioned for review, contending Bonnie Taylor's entry into Susan T.'s home did not violate the Fourth Amendment and, even if it did, we should not apply the exclusionary rule to proceedings under the act." *Id.* The supreme court discussed in dicta the argument that Taylor's actions did not violate the Fourth Amendment and found that the record indicated otherwise. *Id.* at 1012-13, 884 P.2d at 991-92, 36 Cal. Rptr. 2d at 43-44. The court did not consider the issue as part of its reasoning because the first time the department advanced such an argument was in its petition for rehearing. *Id.* "As a matter of policy, on petition for review we normally will not consider any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal." *Id.* at 1013, 884 P.2d at 992, 36 Cal. Rptr. 2d at 44.

## II. TREATMENT

### A. *The Majority Opinion*

The majority opinion began with a history of the exclusionary rule.[14] The court noted that the United States Supreme Court has never applied the exclusionary rule to civil proceedings.[15] The court next examined the types of civil proceedings where the exclusionary rule was applied.[16] The court recognized that both it and the United States Supreme Court applied similar reasoning when extending the exclusionary rule to forfeiture proceedings.[17] The Supreme Court determined that such forfeiture proceedings were "quasi-criminal"[18] and that there was a "close identity to the aims and objectives of criminal law enforcement."[19] Using these standards, the California Supreme Court also applied the exclusionary rule to the commitment proceedings of a narcotics addict.[20] In the instant case, supreme court distinguished the aims and objectives of the Act from those of criminal law, concluding that the Act was designed to benefit gravely disabled persons, and contrary to criminal law, no punishment or penalty was involved.[21]

Furthermore, the court applied the balancing test formulated by the United States Supreme Court in *United States v. Janis*.[22] Under the balancing test, if the deterrent effect of the rule outweighs the likely social costs of excluding the evidence, then the exclusionary rule should apply to such proceedings.[23] Using this new standard, the California Supreme Court has declined to extend the exclusionary rule to both parole revocation proceedings[24] and state bar attorney discipline proceedings.[25]

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14. *Id.* at 1014-17, 884 P.2d at 993-95, 36 Cal. Rptr. 2d at 45-48.

15. *Id.* at 1014, 884 P.2d at 993, 36 Cal. Rptr. 2d at 45 (citing United States v. Janis, 428 U.S. 433, 447 (1976)).

16. *Id.*

17. *Id.* (citing One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) and People v. One 1960 Cadillac Coupe, 62 Cal. 2d 92, 396 P.2d 706, 41 Cal. Rptr. 290 (1964)).

18. *One 1958 Plymouth Sedan*, 380 U.S. at 700.

19. *One 1960 Cadillac Coupe*, 62 Cal. 2d at 96-97, 396 P.2d at 709, 41 Cal. Rptr. at 293.

20. People v. Moore, 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968). *See also* 38 CAL. JUR. 3D *Incompetent, Addicted, and Disordered Persons* § 59 (1977 & Supp. 1995) (discussing similarities between narcotic commitment proceedings and criminal cases).

21. *Susan T.*, 8 Cal. 4th at 1015, 884 P.2d at 993, 36 Cal. Rptr. 2d at 45.

22. *Id.* at 1016, 889 P.2d at 994, 36 Cal. Rptr. 2d at 46; *see* United States v. Janis, 428 U.S. 433 (1975).

23. *Susan T.*, 8 Cal. 4th at 1015, 884 P.2d at 993, 36 Cal. Rptr. 2d at 45. For a discussion of proceedings to which the exclusionary rule applies, see 4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Exclusion of Illegally Obtained Evidence* § 2242 (2d ed. 1989 & Supp. 1995)

24. *In re* Martinez, 1 Cal. 3d 641, 463 P.2d 734, 83 Cal. Rptr. 382 (1970).

Having examined the history of the exclusionary rule, the supreme court turned to the issue at hand: Should the exclusionary rule apply to conservatorship proceedings under the Act?[26] For purposes of this case, the supreme court assumed that Taylor's entry into Susan T.'s home violated the Fourth Amendment.[27] The court then looked at the deterrent effect of applying the rule to conservatorship proceedings.[28] Specifically, the court considered whether application of the rule would deter mental health workers from violating the Fourth Amendment rights of persons committed under section 5150.[29] Although initial detention of persons under section 5150 is for a 72-hour period of treatment and evaluation,[30] there is no guarantee that such detention will lead to a conservatorship proceeding.[31] The court reasoned that this uncertainty lessened the deterrent effect of the exclusionary rule.[32] The court found that the Act was designed so that the detainee would receive any necessary treatment, and thereby decrease the need for a conservatorship.[33] Furthermore, the Act is framed so that conservatorship proceedings arise only if the temporary involuntary treatment provisions have failed and voluntary treatment has been refused.[34] Given this fact, the court reasoned that the possibility of exclusion of evidence at such a proceeding is not likely to influence the actions of a mental health worker taking a person into custody under section 5150.[35] The court further reasoned that the temporary involuntary treatment provisions give the department an opportunity to gather evidence of the detainee's grave disability, elimi-

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25. Emslie v. State Bar, 11 Cal. 3d 210, 520 P.2d 991, 113 Cal. Rptr. 175 (1974). For a discussion of the exclusionary rule as applied in administrative proceedings, see Jerry D. Mackey, *The California Constitutional Right of Privacy and Exclusion of Evidence in Civil Proceedings*, 6 PEPP. L. REV. 231, 236-240 (1978-79). *See generally* LaFave, *supra* note 2, § 1.7 (discussing exclusionary rule in quasi-criminal, civil and administrative proceedings).

26. *Susan T.*, 8 Cal. 4th at 1017, 884 P.2d at 995, 36 Cal. Rptr. 2d at 47.

27. *See supra* note 7 and accompanying text.

28. *Susan T.*, 8 Cal. 4th at 1018, 884 P.2d at 995, 36 Cal. Rptr. 2d at 47.

29. *Id.*

30. CAL. WELF. & INST. CODE § 5150 (West 1984 & Supp. 1995). The 72 hour detention period is the minimum period for which an individual may be involuntarily committed under the Act. *Id.* The Act provides for the extension of this minimum period for 14 to 180 days depending upon the assessment of the individual during this initial detention. *Susan T.*, 8 Cal. 4th at 1009, 884 P.2d at 989, 36 Cal. Rptr. 2d at 41.

31. *Susan T.*, 8 Cal. 4th at 1018, 884 P.2d at 996, 36 Cal. Rptr. 2d at 48.

32. *Id.*

33. *Id.* at 1018-19, 884 P.2d at 996, 36 Cal. Rptr. 2d at 48.

34. *Id.*

35. *Id.* at 1019, 884 P.2d at 996, 36 Cal. Rptr. 2d at 48.

nating the need to seek additional outside evidence of the individual's mental condition.[36] The court found that this opportunity lessens the likelihood that the department will need to rely on evidence found at the time of the detention and, therefore, weakens the deterrent effect of the rule.[37] The court concluded that the rule had a minimal deterrent effect on conservatorship proceedings.[38]

Next, the court balanced the social costs of applying the exclusionary rule in involuntary civil commitment proceedings against this minimal deterrent effect.[39] The court found that the purposes of conservatorship proceedings are to provide for the evaluation of gravely disabled persons and to ensure that they receive proper care and treatment for their own safety, as well as for the safety of others.[40] The court reasoned that fulfillment of these goals requires examining the best evidence of the detainee's mental condition, and excluding relevant evidence of the detainee's condition from the proceedings would frustrate the achievement of these goals.[41] The court further reasoned that exclusion of such evidence could lead to depriving the disabled detainee of necessary care to treat an ongoing condition, which would be detrimental to both the detainee and the public.[42] The court viewed such a possibility as having "potentially severe consequences."[43] Balancing these likely social costs against a minimal deterrent effect, the court had little difficulty in declining to extend the exclusionary rule to the conservatorship proceedings under the Act.[44]

### *B. The Concurring and Dissenting Opinion*

Justice Mosk filed a separate opinion, concurring with the majority's assumption that Taylor's actions constituted a search in violation of the Fourth Amendment and with the court of appeal's judgment that the trial court's denial of the motion to suppress was harmless error.[45] Justice Mosk disagreed, however, with the majority's conclusion that the exclusionary rule should not apply to conservatorship proceedings.[46] Like the majority, Justice Mosk balanced the deterrent effects of the rule

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36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 1019-20, 884 P.2d at 996, 36 Cal. Rptr. 2d at 48.
41. *Id.* at 1020, 884 P.2d at 996-97, 36 Cal. Rptr. 2d at 48-49.
42. *Id.* at 1020, 884 P.2d at 997, 36 Cal. Rptr. 2d at 49.
43. *Id.*
44. *Id.*
45. *Id.* at 1021, 884 P.2d at 997, 36 Cal. Rptr. 2d at 49 (Mosk, J., concurring and dissenting).
46. *Id.* (Mosk, J., concurring and dissenting).

against the likely social costs, but he also considered the magnitude of the consequences to the detainee.[47] Justice Mosk stated that the potential conservatee faced a substantial "loss of liberty and social stigma."[48] He emphasized past supreme court decisions that gave potential conservatees many of the same rights as criminal defendants.[49]

Unlike the majority, Justice Mosk found that the exclusionary rule would have a strong deterrent effect on mental health officials.[50] He argued that knowledge of the rule would act as a strong incentive for mental health workers to get a warrant.[51] He reasoned that the deterrence argument is strongest when the party who participated in the illegal conduct is also the party administering the proceedings against the detainee.[52]

Justice Mosk further reasoned that the social costs of applying the rule were minimal.[53] He argued that the "Act itself reduces the risk" that a gravely disabled person will not receive the proper treatment and will then be released without an appointed conservator.[54] He concluded that the deterrent effect of the rule outweighed the likely social costs, and therefore, the exclusionary rule should be applied to conservatorship proceedings under the Act.[55]

## III. CONCLUSION

The supreme court's decision not to extend the exclusionary rule to conservatorship proceedings is in keeping with its past decisions that have refused to apply the exclusionary rule to civil proceedings. The court's decision in *Susan T.* emphasizes this refusal to apply the

47. *Id.* at 1022, 884 P.2d at 998, 36 Cal. Rptr. 2d at 50 (Mosk, J., concurring and dissenting).

48. *Id.* at 1022-23, 884 P.2d at 998-99, 36 Cal. Rptr. 2d at 50-51 (Mosk, J., concurring and dissenting).

49. *Id.* at 1023, 884 P.2d at 999, 36 Cal. Rptr. 2d at 51 (Mosk, J., concurring and dissenting).

50. *Id.* at 1026, 884 P.2d at 1001, 36 Cal. Rptr. 2d at 53 (Mosk, J., concurring and dissenting).

51. *Id.* (Mosk, J., concurring and dissenting).

52. *Id.* (Mosk, J., concurring and dissenting).

53. *Id.* at 1027, 884 P.2d at 1001, 36 Cal. Rptr. 2d at 53 (Mosk, J., concurring and dissenting).

54. *Id.* at 1028, 884 P.2d at 1002, 36 Cal. Rptr. 2d at 54 (Mosk, J., concurring and dissenting).

55. *Id.* at 1029, 884 P.2d at 1002, 36 Cal. Rptr. 2d at 54 (Mosk, J., concurring and dissenting).

exclusionary rule to civil proceedings absent some "quasi-criminal" nature. The court's movement away from an analysis of the nature of the proceedings to a balancing test makes it less likely that it will apply the exclusionary rule to civil proceedings because of the likelihood of finding that the social costs will outweigh the rule's deterrent effect.[56]

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56. *See In re* Martinez, 1 Cal. 3d 641, 463 P.2d 734, 83 Cal. Rptr. 382 (1970); *see also* Emslie v. State Bar, 11 Cal. 3d 210, 520 P.2d 991, 113 Cal. Rptr. 175 (1979). *But cf.* Mackey, *supra* note 25 (making an argument for using the exclusionary rule in civil cases).

# IX. INSURANCE COMPANIES

*Proposition 103's rate rollback requirement is valid on its face, and the California Insurance Commissioner's rate rollback and refund order is effective as applied to 20th Century Insurance Company:* **20th Century Ins. Co. v. Garamendi.**

## I. INTRODUCTION

In *20th Century Insurance Co. v. Garamendi*,[1] the California Supreme Court reviewed the California Insurance Commissioner's[2] "implementation of Proposition 103's[3] rate rollback requirement provision."[4] The court concluded that the rate rollback provision of Proposition 103 was valid on its face and as applied and, therefore, upheld the commissioner's implementation.[5]

## II. STATEMENT OF THE CASE

### A. *Proposition 103 and* Calfarm

On November 8, 1988, the voters of California approved Proposition 103,[6] a ballot initiative, at the General Election.[7] In part, Proposition 103

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1. 8 Cal. 4th 216, 878 P.2d 566, 32 Cal. Rptr. 2d 807 (1994), *cert. denied*, 115 S. Ct. 1106 (1995). Justice Mosk wrote the majority opinion in which Chief Justice Lucas and Justices Kennard, Arabian, Baxter, George and Werdegar concurred. *Id.* at 239-329, 878 P.2d at 580-638, 32 Cal. Rptr. 2d at 821-79. Justice Mosk also wrote a separate concurring opinion. *Id.* at 329-32, 878 P.2d at 638-40, 32 Cal. Rptr. 2d at 879-81 (Mosk, J., concurring).

2. The Insurance Commissioner is an elected official. CAL. INS. CODE § 12900 (West Supp. 1995). *See generally* 39 CAL. JUR. 3D *Insurance Companies* § 11 (Supp. 1995) (discussing the office of the Insurance Commissioner). The first elected commissioner was John Garamendi. *20th Century*, 8 Cal. 4th at 240, 878 P.2d at 580, 32 Cal. Rptr. 2d at 821.

3. *See infra* notes 6-20 and accompanying text.

4. *20th Century*, 8 Cal. 4th at 240, 878 P.2d at 580, 32 Cal. Rptr. 2d at 821.

5. *Id.* at 329, 878 P.2d at 638, 32 Cal. Rptr. 2d at 879. *See generally* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1117A (9th ed. Supp. 1995) (describing the provisions of Proposition 103).

6. *See generally* Stephen D. Sugarman, *California Insurance Regulation Revolution: The First Two Years of Proposition 103*, 27 SAN DIEGO L. REV. 683 (1990) (describing in detail the policies behind Proposition 103, its constituencies, and its effect on insurers); Suzanne Yelen, *Withdrawal Restrictions in the Automobile Insurance Market*, 102 YALE L.J. 1431 (1993) (discussing the impact of Proposition 103); Christo-

added sections 1861.01[8] and 1861.05[9] to the California Insurance Code.[10] The two sections created a new scheme for the regulation of insurance rates[11] in California.[12]

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pher L. Mass, Comment, *Proposition 103: Too Good to be True*, 12 WHITTIER L. REV. 403 (1991) (discussing the impact of Proposition 103).

7. *20th Century*, 8 Cal. 4th at 239-40, 878 P.2d at 580, 32 Cal. Rptr. 2d at 821. *See generally* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 121 (9th ed. 1988 & Supp. 1994) (defining the policy and scope of ballot initiatives).

8. Section 1861.01 of the California Insurance Code provides in pertinent part:

> (a) For any coverage for a policy for automobile and any other form of insurance subject to this chapter issued or renewed on or after November 8, 1988, every insurer shall reduce its charges to levels which are at least 20% less than the charges for the same coverage which were in effect on November 8, 1987.
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> (b) Between November 8, 1988, and November 8, 1989, rates and premiums reduced pursuant to subdivision (a) may be only increased if the commissioner finds, after a hearing, that an insurer is substantially threatened with insolvency.
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> (c) Commencing November 8, 1989, insurance rates subject to this chapter must be approved by the commissioner prior to their use.

CAL. INS. CODE § 1861.01 (West 1993). Subdivision (b) of § 1861.01 was held unconstitutional by the California Supreme Court in Calfarm Insurance Co. v. Deukmejian, 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989). Specifically, the court found that the Due Process Clauses of both the state and federal constitutions were violated because subdivision (b) prevented adjustments that were "necessary to achieve the constitutional standard of fair and reasonable rates." *Id.* at 821, 771 P.2d at 1255, 258 Cal. Rptr. at 169; *see infra* note 15 and accompanying text.

9. Section 1861.05 provides in pertinent part:

> (a) No rate shall be approved or remain in effect which is excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter. In considering whether a rate is excessive, inadequate or unfairly discriminatory, no consideration shall be given to the degree of competition and the commissioner shall consider whether the rate mathematically reflects the insurance company's investment income.
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> (b) Every insurer which desires to change any rate shall file a complete rate application with the commissioner. A complete rate application shall include all data referred to in Sections 1857.7, 1857.9, 1857.15, and 1864 and such other information as the commissioner may require. The applicant shall have the burden of proving that the requested rate change is justified and meets the requirements of this article.

CAL. INS. CODE § 1861.05 (West 1993 & Supp. 1995).

10. *20th Century*, 8 Cal. 4th at 242-43, 878 P.2d at 581-82, 32 Cal. Rptr. 2d at 822-23.

11. "[A] rate is the price or premium that an insurer charges its insureds for insurance." *Id.* at 240, 878 P.2d at 580, 32 Cal. Rptr. 2d at 821.

12. *Id.* at 243, 878 P.2d at 582, 32 Cal. Rptr. 2d at 823. "[T]he regulation of the insurance industry is squarely within the state's police power." *Id.* at 240, 878 P.2d at 580, 32 Cal. Rptr. 2d at 821. *See generally* 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 1084 (9th ed. Supp. 1994) (describing the nature and the source of the state's police power); 39 CAL. JUR. 3D *Insurance Coverage & Contracts*

First, a "permanent regulatory regime" was established whereby insurers must obtain prior approval from the Insurance Commissioner for their insurance rates beginning on November 8, 1989.[13] Second, a "temporary regulatory regime" was established whereby a rate reduction and rate freeze were implemented "for the period extending from November 8, 1988, through November 7, 1989."[14]

The California Supreme Court reviewed the constitutionality of Proposition 103 in *Calfarm Insurance Co. v. Deukmejian*.[15] In *Calfarm*, the

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§ 337 (1977 & Supp. 1995) (discussing the regulation of the automobile insurance industry).

Prior to the passage of Proposition 103, California had the less-regulated, "open competition" system for insurance rates "under which 'rates [were] set by insurers without prior or subsequent approval by the Insurance Commissioner.'" *20th Century*, 8 Cal. 4th at 240, 878 P.2d at 582, 32 Cal. Rptr. 2d at 821 (quoting King v. Meese, 43 Cal. 3d 1217, 1221, 743 P.2d 889, 891, 240 Cal. Rptr. 829, 831 (1987)).

13. *20th Century*, 8 Cal. 4th at 243, 878 P.2d at 582, 32 Cal. Rptr. 2d at 823; *see* CAL. INS. CODE § 1861.01(c) (West 1993). "Under the 'prior approval' system, the insurer is effectively free to set for itself whatever rate it chooses, provided that . . . its rate is neither 'excessive' nor 'inadequate.'" *20th Century*, 8 Cal. 4th at 252, 878 P.2d at 588, 32 Cal. Rptr. 2d at 829. "Excessive" is defined by the rate regulations as "a rate that is 'expected to yield the reasonably efficient insurer a profit that exceeds a fair return on the investment used to provide the insurance.'" *Id.* at 253, 878 P.2d at 588, 32 Cal. Rptr. 2d at 829 (quoting CAL. CODE REGS. tit. 10, § 2642.11 (1995)). "Inadequate" is defined by the rate regulations as "a rate 'under which a reasonably efficient insurer is not expected to have the opportunity to earn a fair return on the investment that is used to provide the insurance.'" *Id.* (quoting CAL. CODE REGS. tit. 10, § 2642.3 (1995)).

Accordingly, the commissioner must allow a rate between the maximum permitted earned premium and the minimum permitted earned premium. *Id.* at 254, 878 P.2d at 589, 32 Cal. Rptr. 2d at 830; *see* CAL. CODE REGS. tit. 10, § 2644.1 (1995). A rate above the maximum permitted earned premium is "excessive," while a rate below the minimum permitted earned premium is "inadequate." *20th Century*, 8 Cal. 4th at 254, 878 P.2d at 589, 32 Cal. Rptr. 2d at 830.

14. *20th Century*, 8 Cal. 4th at 243, 878 P.2d at 582, 32 Cal. Rptr. 2d at 823. Pursuant to § 1861.01(a), the rates for the rollback year must be "at least 20% less than the charges for the same coverage which were in effect on November 8, 1987." CAL. INS. CODE § 1861.01(a) (West 1993).

"[U]nder the rate rollback, the insurer is *not* free to set for itself whatever rate it chooses between the 'excessive' and the 'inadequate.'" *20th Century*, 8 Cal. 4th at 253, 878 P.2d at 588, 32 Cal. Rptr. 2d at 829; *see supra* note 13. "Rather, it is required to charge a rate no higher than the maximum rate set by Proposition 103 . . . i.e., the rate that is 80 percent of the 1987 rate *or* such rate greater than 80 percent of the 1987 rate as is minimally nonconfiscatory, whichever is higher." *20th Century*, 8 Cal. 4th at 253, 878 P.2d at 588, 32 Cal. Rptr. 2d at 829.

15. 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989). Insurers challenged

court explained that the rate rollback requirement of Proposition 103, section 1861.01(a) of the Insurance Code, "would be facially invalid because [it would be] confiscatory if rate adjustments necessary to avoid confiscation were not available for individual insurers."[16] The court struck down Proposition 103's "procedural mechanism for relief from the rate rollback requirement provision," section 1861.01(b) of the Insurance Code, "because it preclude[d] rate adjustments necessary to avoid confiscation, and further [could] not be sustained as a temporary or emergency measure."[17]

Nonetheless, the *Calfarm* court, after stating that section 1861.01(b) was severable, concluded that section 1861.05 provided the standard for individual rate adjustments.[18] The court further concluded that section 1861.01(a) was "not facially invalid because . . . rate adjustments necessary to avoid confiscation are in fact available for individual insur-

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the constitutionality of Proposition 103, arguing that "the rate rollback requirement provision was on its face invalid as confiscatory and arbitrary, discriminatory, or demonstrably irrelevant to legitimate policy in violation of the takings clause . . . and the due process clause" under both the United States and California Constitutions. *20th Century*, 8 Cal. 4th at 243-44, 878 P.2d at 582, 32 Cal. Rptr. 2d at 823; see U.S. CONST. amends. V, XIV. For the California constitutional counterparts, *see* CAL. CONST. art. I, §§ 7, 19. *See generally* 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 918 (9th ed. 1988) (discussing the nature of eminent domain).

16. *20th Century*, 8 Cal. 4th at 244, 878 P.2d at 582, 32 Cal. Rptr. 2d at 823 (citing *Calfarm*, 48 Cal. 3d at 820, 771 P.2d at 1255, 258 Cal. Rptr. at 169).

17. *Id.* (citing *Calfarm*, 48 Cal. 3d at 816-21, 771 P.2d at 1252-55, 258 Cal. Rptr. at 166-69).

18. *Id.* at 244-45, 878 P.2d at 582-83, 32 Cal. Rptr. 2d at 823-24 (citing *Calfarm*, 48 Cal. 3d at 822-23, 771 P.2d at 1255-56, 258 Cal. Rptr. at 170-71).

ers."[19] Accordingly, the court upheld the rate rollback provision of Proposition 103.[20]

### *B. Procedural History*

The court's decision in *Calfarm*[21] gave insurers the opportunity to submit applications to allow them to charge more than "maximum rate of 80 percent of the 1987 rate."[22] Further, the court allowed insurers to charge these rates "pending approval" of their applications.[23] 20th Century Insurance Company filed seven such applications.[24] The Insurance Commissioner "issued an order to show cause and notice of a hearing in the matter of 20th Century's rate rollback liability,"[25] precipitating a hearing before an administrative law judge. The judge concluded *inter*

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19. *Id.* at 245, 878 P.2d at 583, 32 Cal. Rptr. 2d at 824 (citing *Calfarm*, 48 Cal. 3d at 816-26, 771 P.2d at 1252-59, 258 Cal. Rptr. at 166-73). The court in *Calfarm* set out the procedure as follows:

> [A]ny insurer who believes the rates set by [Insurance Code section 1861.01(a)] are confiscatory may file an application with the Insurance Commissioner for approval of a higher rate. If that application is filed before November 8, 1989, the insurer may immediately begin charging that higher rate pending approval from the commissioner. After that date insurance rates . . . must be approved by the commissioner prior to their use, but . . . the commissioner can approve an interim rate pending her final decision. If the commissioner finds the initiative's rate, or some other rate less than the insurer charged, is fair and reasonable, the insurer must refund excess premiums collected with interest. No insurer, however, will be compelled to charge the rates set by the initiative unless it either acquiesces in that rate or is unable to prove that a higher rate is constitutionally required.

*Calfarm*, 48 Cal. 3d at 825, 771 P.2d at 1258-59, 258 Cal. Rptr. at 172-73 (footnotes omitted). The court noted that the rate set by the commissioner is subject to judicial review. *20th Century*, 8 Cal. 4th at 246, 878 P.2d at 584, 32 Cal. Rptr. 2d at 825; *see* CAL. INS. CODE § 1861.09 (West 1993).

20. *20th Century*, 8 Cal. 4th at 240, 878 P.2d at 580, 32 Cal. Rptr. 2d at 821. *See generally* 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 888A (9th ed. Supp. 1994) (discussing the constitutionality of Proposition 103); 39 CAL. JUR. 3D *Insurance Companies* § 3 (Supp. 1995) (discussing the court's decision in *Calfarm*); Robert J. Mills, *California Supreme Court Survey*, 17 PEPP. L. REV. 561 (1990) (same).

21. *See supra* notes 15-20 and accompanying text.

22. *20th Century*, 8 Cal. 4th at 256, 878 P.2d at 590, 32 Cal. Rptr. 2d at 831.

23. *Id.*

24. *Id.*

25. *Id.* The commissioner also requested that 20th Century refund overcharged and overpaid premium amounts to its insureds with interest. *Id.*

*alia*, that "the rate regulations are valid on their face as necessary and proper for the implementation of Proposition 103's rate rollback requirement provision"[26] and that "the rate regulations are not impermissibly 'retroactive.'"[27]

The commissioner, adopting the administrative law judge's opinion, "ordered 20th Century to refund to each insured an amount equal to the premiums paid for the rollback year multiplied by a refund percentage of 12.203 percent" and interest thereon.[28]

Following a bench trial, a superior court judge ruled in favor of 20th Century and held that the Insurance Commissioner's order was void.[29] Appeals and cross-appeals followed.[30]

## III. TREATMENT

### A. *Majority Opinion*

#### 1. Preliminary Issues

First, the court asserted that the litigation was not moot.[31] The court then concluded that the "rate regulations . . . do indeed come within the rate-setting exception, hence fall outside the OAL [Office of Administrative Law] review requirement, and therefore are not invalid because of OAL disapproval."[32]

Next, the court addressed which standards of review would apply to the trial court's decision.[33] The court concluded that it would independently review the lower court's decision because the issues were predominantly legal.[34] The court approved the superior court's discrete

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26. *Id.* at 258, 878 P.2d at 591, 32 Cal. Rptr. 2d at 832.

27. *Id.* at 260, 878 P.2d at 593, 32 Cal. Rptr. 2d at 834.

28. *Id.* at 263, 878 P.2d at 595, 32 Cal. Rptr. 2d at 836.

29. *Id.* at 263-69, 878 P.2d at 595-98, 32 Cal. Rptr. 2d at 836-39. Three cases brought by insurers challenging the validity of the commissioner's rate regulations were consolidated for trial. *Id.* at 240-42, 878 P.2d at 580-81, 32 Cal. Rptr. 2d at 821-22. The supreme court transferred the cause from the court of appeal. *Id.* at 240, 878 P.2d at 580, 32 Cal. Rptr. 2d at 821.

30. *Id.* at 269, 878 P.2d at 598-99, 32 Cal. Rptr. 2d at 839-40.

31. *Id.* at 270, 878 P.2d at 599, 32 Cal. Rptr. 2d at 840.

32. *Id.* The Office of Administrative Law (OAL) disapproved of the commissioner's proposed rate regulations *Id.* at 248, 878 P.2d at 585, 32 Cal. Rptr. 2d at 826; *see* CAL. GOV'T CODE §§ 11340-11356 (West 1992 & Supp. 1995) (establishing the OAL and defining its mission). The Insurance Commissioner argued that "the rate regulations come within the rate-setting exception . . . and therefore are not invalid because of OAL disapproval." *20th Century*, 8 Cal. 4th at 248, 878 P.2d at 585, 32 Cal. Rptr. 2d at 826.

33. *20th Century*, 8 Cal. 4th at 271, 878 P.2d at 600, 32 Cal. Rptr. 2d at 841.

34. *Id.*

analysis of the two central issues, whether Proposition 103 allowed the Insurance Commissioner to create regulations to implement the initiative and whether any such regulations are consistent with Proposition 103.[35] Yet, to answer the question of whether the actual rate rollback regulations used by the commissioner were required to implement Proposition 103, the regulations must be examined carefully for "arbitrariness and/or capriciousness."[36] Finally, as to the commissioner's rollback order, the majority charged the trial court with the task of evaluating the factual support for the order and validating it accordingly.[37]

The court rejected the insurers' argument that the rate rollback regulations "should not be deemed regulations,"[38] reasoning that "ratemaking has uniformly been considered a quasi-legislative action."[39] Accordingly, the court concluded that the rate rollback regulations would be considered regulations for "standard-of-review purposes."[40]

2. General Validity of Rate Rollbacks

The court began by announcing that the rate rollback regulations were not facially invalid as they related to either procedure or substance.[41] Initially, the court determined that the Insurance Commissioner has the power to make rules in "quasi-legislative proceedings" that apply to all insurers.[42] This includes, the court continued, "incorporating generic determinations, i.e., findings relating to all or at least several insurers made by the commissioner in consolidated hearings conducted in accor-

35. *Id.* at 271-72, 878 P.2d at 600, 32 Cal. Rptr. 2d at 841.
36. *Id.* at 272, 878 P.2d at 600, 32 Cal. Rptr. 2d at 841.
37. *Id.*
38. *Id.* at 275, 878 P.2d at 602, 32 Cal. Rptr. 2d at 843.
39. *Id.* at 277, 878 P.2d at 604, 32 Cal. Rptr. 2d at 845 (citing California Hotel & Motel Ass'n v. Industrial Welfare Comm'n, 25 Cal. 3d 200, 211, 599 P.2d 31, 37-38, 157 Cal. Rptr. 840, 846-47 (1979)). The court explained that "an 'administrative action is quasi-legislative' when the 'administrative agency is creating a new rule for future application.'" *Id.* at 275, 878 P.2d at 602, 32 Cal. Rptr. 2d at 843 (quoting Dominey v. Department of Personnel Admin., 205 Cal. App. 3d 729, 737 n.4, 252 Cal. Rptr. 620, 624 n.4 (1988)). On the other hand, "an administrative action is quasi-adjudicative when the administrative agency . . . is applying an existing rule to existing facts." *Id.* at 275, 878 P.2d at 603, 32 Cal. Rptr. 2d at 844 (internal quotation marks omitted) (quoting *Dominey*, 205 Cal. App. 3d at 737 n.4, 252 Cal. Rptr. at 624 n.4).
40. *Id.* at 275, 878 P.2d at 602, 32 Cal. Rptr. 2d at 843.
41. *Id.* at 280, 878 P.2d at 606, 32 Cal. Rptr. 2d at 847.
42. *Id.*

dance with quasi-adjudicatory procedures and then adopted by him as regulations."[43]

The court rejected the insurers' argument that each individual insurer's rates must be determined using quasi-adjudicatory procedures.[44] The court reasoned that nothing in the initiative supported the insurers' argument.[45] Next, the insurers argued that the rate rollback regulations were "impermissibly 'retroactive.'"[46] The court also rejected this argument, finding that the rate regulations and ordering of rate refunds were both prospective in nature and, therefore, not "retroactive."[47] Additionally, even if the regulations were retroactive, they were valid, having the effect of "secondary retroactivity[,] . . . an entirely lawful consequence of much agency rulemaking."[48] Furthermore, the court explained that the insurers had actual notice of the effects of Proposition 103's rate rollback regulations before its adoption.[49]

The court next considered the ratemaking formula used by the commissioner in setting the rollback rate regulations.[50] The court disagreed with the trial court's determination that the rate rollback requirement was facially invalid with respect to the ratemaking formula.[51] The commissioner "does not himself 'set' rates for insurers."[52] The commissioner merely decides rates each insurer may charge under Proposition 103 as interpreted in *Calfarm*.[53]

The court found that the superior court and the insurers were incorrect in applying the same procedure used for setting rates under the

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43. *Id.*

44. *Id.* at 280-81, 878 P.2d at 606-07, 32 Cal. Rptr. 2d at 847-48.

45. *Id.* at 281, 878 P.2d at 607, 32 Cal. Rptr. 2d at 848.

46. *Id.*

47. *Id.* "'The fixing of a rate and the reducing of that rate are prospective in application.'" *Id.* (quoting Consumers Lobby Against Monopolies v. Public Util. Comm'n, 25 Cal. 3d 891, 909, 603 P.2d 41, 51, 160 Cal. Rptr. 124, 134 (1979)). The court concluded that "the ordering of a refund of rates is itself prospective." *Id.*

48. *Id.* at 281-82, 878 P.2d at 607, 32 Cal. Rptr. 2d at 848 (internal quotations omitted) (quoting National Medical Enters., Inc. v. Sullivan, 957 F.2d 664, 671 (9th Cir. 1992)). The court explained that "secondary retroactivity" results from regulations that impact future liability for transactions. *Id.* at 281, 878 P.2d at 607, 32 Cal. Rptr. 2d at 848 (citing *National Medical Enters.*, 957 F.2d at 671).

49. *Id.* at 282, 878 P.2d at 607, 32 Cal. Rptr. 2d at 848.

50. *Id.*; *see* CAL. CODE REGS. tit. 10, §§ 2641.1-2647.1 (1995). "The ratemaking formula is designed to yield a premium that the insurer should receive from its insureds in order to earn a sum amounting to (1) the reasonable cost of providing insurance and (2) the capital used and useful for providing insurance multiplied by a fair rate of return." *20th Century*, 8 Cal. 4th at 251, 878 P.2d at 587, 32 Cal. Rptr. 2d at 828.

51. *20th Century*, 8 Cal 4th at 284, 878 P.2d at 609, 32 Cal. Rptr. 2d at 850.

52. *Id.*

53. *Id.* at 284-85, 878 P.2d at 609, 32 Cal. Rptr. 2d at 850; *see supra* notes 16-19 and accompanying text.

"prior approval" system to the rate rollback regulations.[54] Even after *Calfarm*, only the procedural mechanism for the prior approval system, as opposed to the substantive standard, applies to the rate rollbacks.[55]

Rejecting the trial court's conclusion that the criteria in the formula used for determining the rate rollback was facially invalid,[56] the court concluded that each factor was valid and therefore disposed of that argument.[57]

The court then examined the validity of the method used to determine the measurement of an insurer's capital.[58] The requirement that "an insurer's capital be measured in accordance with statutory accounting principles . . . instead of generally accepted accounting principles" is permissible.[59] The court explained that using statutory accounting principles, "which are more conservative than generally accepted accounting principles," to measure an insurer's capital is appropriate.[60] Insurers should not profit on premiums paid while insureds derive no similar benefit from the surplus.[61] Further, the court added that "[t]here is certainly nothing confiscatory in the requirement that an insurer's capital be measured in accordance with statutory accounting principles instead of generally accepted accounting principles."[62]

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54. *20th Century*, 8 Cal. 4th at 286-87, 878 P.2d at 610-11, 32 Cal. Rptr. 2d at 851-52; *see* CAL. INS. CODE § 1861.05 (West 1993 & Supp. 1995).

55. *20th Century*, 8 Cal. 4th at 287, 878 P.2d at 611, 32 Cal. Rptr. 2d at 852; *see* CAL. INS. CODE § 1861.05 (West 1993 & Supp. 1995); *see supra* notes 16-19 and accompanying text.

56. *20th Century*, 8 Cal. 4th at 288, 878 P.2d at 611, 32 Cal. Rptr. 2d at 852; *see supra* note 50.

57. *20th Century*, 8 Cal. 4th at 288-301, 878 P.2d at 611-20, 32 Cal. Rptr. 2d at 852-61.

58. *Id.* at 301, 878 P.2d at 620, 32 Cal. Rptr. 2d at 861.

59. *Id.*

60. *Id.* at 301-02, 878 P.2d at 620, 32 Cal. Rptr. 2d at 861. "That statutory accounting principles apparently operate to limit the insurer's capital base to capital used and useful for providing insurance is unexceptionable. As noted, an insurer's surplus is its available capital backing up premiums." *Id.* The court explained that "[s]urplus surplus—i.e., surplus beyond what is useful to back up premiums—inflates the insurer's capital base and any rate set thereon to the disadvantage of its insureds, while at the same time it produces investment income from appreciating assets." *Id.* at 302, 878 P.2d at 620, 32 Cal. Rptr. 2d at 861. The court agreed with the conclusion that "insureds need not provide a return on capital that is not actually employed for insurance business" because they should "not have to pay for what does not give them any benefit whatsoever." *Id.*

61. *Id.* at 302, 878 P.2d at 620, 32 Cal. Rptr. 2d at 861.

62. *Id.*

Turning to the issue of the validity of the figure of ten percent as a reasonable rate of return for insurers,[63] the court agreed again with the superior court's determination that the rate rollback regulations were not facially invalid "insofar as they define 10 percent as the lower boundary of the range of reasonable rates of return."[64] The administrative law judge's findings and conclusions based on "'historical rates of return actually achieved by the industry'" and the average returns earned by the industry supported this determination.[65]

Insofar as the rate rollback regulations concerned the insurers' earthquake line of insurance,[66] the court disagreed with the trial court's determination that the rate rollback regulations were invalid.[67] The court explained that there was not a taking or a denial of due process merely because insurers would not be guaranteed to recoup their reinsurance costs.[68] The court reasoned that a "regulated firm may be disallowed an element of its cost of service—even one that is reasonable—without suffering a taking or a denial of due process."[69] Accordingly, the court concluded that "there is nothing confiscatory in the treatment of the line of earthquake insurance."[70]

Next, the court examined the leverage factor used in determining the validity of rate regulations.[71] The trial court found that the leverage factor was confiscatory.[72] The supreme court disagreed, explaining that the leverage factor was not confiscatory.[73] The court continued by stating

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63. *Id.* at 302, 878 P.2d at 621, 32 Cal. Rptr. 2d at 862.

64. *Id.*

65. *Id.* (quoting the administrative law judge). Industry figures from 1980 to 1989 determined the historical rate of return. *Id.*

66. *Id.* at 307, 878 P.2d at 624, 32 Cal. Rptr. 2d at 865.

67. *Id.*

68. *Id.* at 307-08, 878 P.2d at 624, 32 Cal. Rptr. 2d at 865.

69. *Id.* at 308, 878 P.2d at 624, 32 Cal. Rptr. 2d at 865 (citing Baltimore & O.R. v. United States, 345 U.S. 146, 147-150 (1953)).

70. *Id.* at 309, 878 P.2d at 625, 32 Cal. Rptr. 2d at 866.

71. *Id.*

72. *Id.* at 310, 878 P.2d at 625, 32 Cal. Rptr. 2d at 866.

73. *Id.* The court explained that "the leverage factor is crucial to the determination of rates." *Id.* at 309, 878 P.2d at 625, 32 Cal. Rptr. 2d at 866. For a discussion of the ratemaking formula, *see supra* note 50. The court added that:

> The leverage factor directly contributes to the definition of the capital that is deemed used and useful for providing insurance by inverse relationship: the higher the leverage ratio, the smaller the used-and-useful capital; the lower the leverage ratio, the greater the used-and-useful capital. It follows that the leverage factor indirectly contributes to the setting of the rate itself by inverse relationship: the higher the leverage ratio, the smaller the used-and-useful capital and hence the smaller the rate; the lower the leverage ratio, the greater the used-and-useful capital and hence the greater the rate. Thus, so far as the determination of rates is concerned, the insurer generally favors

that variances are expressly provided to ensure that the rate regulations for rollbacks are not confiscatory.[74] Furthermore, the court concluded that although "the leverage factor may be said to favor the insured over the insurer," it does not do so unreasonably.[75]

The court also considered whether individual hearings were required for each insurer's rate rollback determination.[76] The trial court concluded that, because individualized hearings are precluded to insurers, the rate rollback regulations are facially invalid.[77] The court disagreed and explained that the "relitigation bar" does not prevent proof of confiscation by an individual insurer.[78] The court reasoned that, in light of its decision in *Calfarm*, under the regulations an insurer will be allowed to present evidence "'relevant to the determination of the minimum nonconfiscatory rate . . . provided the evidence is not offered for the purpose of relitigating a matter already determined by [the] regulations or by a generic determination.'"[79] Accordingly, the court concluded that the relitigation bar would not deny an insurer its right to demonstrate that a particular rate is, as applied to that insurer, confiscatory.[80] Therefore, although the regulations do not provide for individual hearings in each instance, the regulation is not facially invalid because of this.[81]

Next, the court examined the uniform maximum rates and uniform percentage refunds as they related to the rate rollback determinations.[82] The court agreed with the superior court's determination that the rate rollback regulations are not facially invalid to the extent that they mandate a "uniform, maximum rate for the rollback year" and a "uniform

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a lower leverage ratio and its insureds generally favor a higher leverage ratio.

*20th Century*, 8 Cal. 4th at 309, 878 P.2d at 625, 32 Cal. Rptr. 2d at 866. "The leverage factor functions as an application of the used and useful rule. That rule is a permissible [tool] of ratemaking under the takings clause." *Id.* at 310, 878 P.2d at 625, 32 Cal. Rptr. 2d at 866 (internal quotation marks omitted) (quoting Jersey Cent. Power & Light Co. v. Federal Energy Regulatory Comm'n, 810 F.2d 1168, 1175 (D.C. Cir. 1987)).

74. *20th Century*, 8 Cal. 4th at 311, 878 P.2d at 626, 32 Cal. Rptr. 2d at 867.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 311-12, 878 P.2d at 626-27, 32 Cal. Rptr. 2d at 867-68; *see* CAL. CODE REGS. tit. 10, § 2646.4(e) (1995) (stating that relitigating rates determined by regulation is not allowed).

79. *20th Century*, 8 Cal. 4th at 311-12, 878 P.2d at 626-27, 32 Cal. Rptr. 2d at 867-68 (quoting CAL. CODE REGS. tit. 10, § 2646.4(e) (1995)).

80. *Id.* at 312, 878 P.2d at 627, 32 Cal. Rptr. 2d at 868.

81. *See id.* at 311-13, 878 P.2d at 626-28, 32 Cal. Rptr. 2d at 867-69.

82. *Id.* at 313, 878 P.2d at 628, 32 Cal. Rptr. 2d at 869.

percentage refund" of overcharged and overpaid premiums for that year without reference to the particular insurers' "excessiveness" or "inadequacy" in individual lines.[83] The court concluded that the result in *Calfarm* and the purpose of the initiative illustrated that Proposition 103 both expressly and "impliedly requires a uniform percentage refund of premiums charged and paid over the uniform, maximum rate for the rollback year."[84] The court reasoned that any other method might lead to a practice whereby some insureds would receive more than the premiums they had paid and others would receive less than they had paid.[85] Additionally, the court concluded that the uniform, maximum rate requirement is not confiscatory.[86]

Next, the court addressed the issue of interest.[87] The rate regulations permissibly "require the insurer to pay interest on the dollar amount of premiums overcharged and overpaid for the rollback year" at a fixed rate of ten percent per annum.[88] Although the insurers did not contest the requirement that they pay interest, they did contest the rate of ten percent.[89] Explaining that insurers could not demand excess premiums and noting that the lack of evidence that the ten percent rate was unreasonable, the court determined that the ten percent rate was not confiscatory.[90] Additionally, the court concluded that the interest requirement, in and of itself, was not confiscatory.[91] Finally, the court determined that the rate rollback regulations are not facially invalid as impermissibly retroactive.[92] The court explained that even though the regulations had "secondary retroactivity,"[93] this "is an entirely lawful consequence of rulemaking and hence, does not itself offend any law, including the United States and California Constitutions."[94]

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83. *Id.*

84. *Id.* at 313-14, 878 P.2d at 628, 32 Cal. Rptr. 2d at 869. "Proposition 103 expressly requires a uniform, maximum rate for the rollback year—i.e., 80 percent of the 1987 rate *or* such percentage of the 1987 rate greater than 80 percent as is minimally nonconfiscatory." *Id.* Proposition 103 was passed in order to protect consumers. *Id.* at 314, 878 P.2d at 628, 32 Cal. Rptr. 2d at 869.

85. *Id.* at 314, 878 P.2d at 628, 32 Cal. Rptr. 2d at 869.

86. *Id.*

87. *Id.* at 315, 878 P.2d at 629, 32 Cal. Rptr. 2d at 870.

88. *Id.* "In *Calfarm*, we expressly held that 'insurer[s] must refund excess premiums collected [for the rollback year] with interest.'" *Id.* (quoting Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 825, 771 P.2d 1247, 1258, 258 Cal. Rptr. 161, 173 (1989)).

89. *Id.*

90. *Id.* at 315-16, 878 P.2d at 629, 32 Cal. Rptr. 2d at 870.

91. *Id.* at 316, 878 P.2d at 629, 32 Cal. Rptr. 2d at 870.

92. *Id.* at 316, 878 P.2d at 629-30, 32 Cal. Rptr. 2d at 870-71.

93. *See supra* note 47 and accompanying text.

94. *20th Century*, 8 Cal. 4th at 316, 878 P.2d at 630, 32 Cal. Rptr. 2d at 871.

3. Validity of Rate Rollbacks as Applied to 20th Century

Lastly, the court considered the validity and effectiveness of the 20th Century rate rollback order.[95] Initially, the court set out the rules and the process for challenging a regulation.[96] A challenge under the due process clause in regard to a rate order must be examined to determine whether the rate order itself is "arbitrary, discriminatory, or demonstrably irrelevant to legitimate policy."[97] On the other hand, under a takings clause challenge, "the question is whether, in the particular case, its terms set a rate that is unjust and unreasonable and hence confiscatory."[98]

The court applied the foregoing principles to the commissioner's order in the instant case and concluded that "there is nothing in the 20th Century rate rollback order that is arbitrary, discriminatory, or demonstrably irrelevant to the legitimate policy of the protection of consumer welfare."[99] The court explained that the rate regulations themselves were not facially invalid and that 20th Century had the burden of showing that the specific rollbacks were invalid as applied.[100] Concluding that 20th Century had not carried this burden and that, in effect, the refund returns the parties to their positions before 20th Century overcharged its insureds,[101] the court upheld the commissioner's rate rollback order.[102]

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95. *Id.* at 317, 878 P.2d at 630, 32 Cal. Rptr. 2d at 871.

96. *Id.*

97. *Id.* at 318, 878 P.2d at 630-31, 32 Cal. Rptr. 2d at 871-72.

98. *Id.* at 318, 878 P.2d at 631, 32 Cal. Rptr. 2d at 872.

99. *Id.* at 328, 878 P.2d at 637, 32 Cal. Rptr. 2d at 878.

100. *Id.* at 319-28, 878 P.2d at 631-37, 32 Cal. Rptr. 2d at 872-78; *see, e.g.*, Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944) ("[H]e who would upset the rate order . . . carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.")

The United States Supreme Court in *Hope* explained that "[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return . . . ." *Hope*, 320 U.S. at 605.

101. *20th Century*, 8 Cal. 4th at 328, 878 P.2d at 637, 32 Cal. Rptr. 2d at 878. The court called this "equity." *Id.*

102. *Id.* at 329, 878 P.2d at 638, 32 Cal. Rptr. 2d at 879.

### B. *Justice Mosk's Concurring Opinion*

Although he wrote the majority opinion, Justice Mosk also wrote a separate concurring opinion.[103] Justice Mosk wrote separately to discuss whether any individual insurer could ever "suffer confiscation under the takings clause of the Fifth Amendment" through Proposition 103's rate rollback provision.[104] Justice Mosk explained that the Takings Clause of the Fifth Amendment applies where government price regulation effects a "regulatory taking"; however, it does not apply "where the regulated group is not required to participate in the regulated industry."[105]

Justice Mosk reasoned that because each individual insurer had the right to withdraw from providing services and, therefore, is not compelled to provide services, the insurers are voluntarily participating in the price-regulated program and "thereby voluntarily subject[ing] themselves to Proposition 103's rate rollback requirement provision."[106] Therefore, Justice Mosk concluded that "*no* insurer, through the operation of Proposition 103's rate rollback requirement provision, can suffer confiscation under the takings clause of the Fifth Amendment."[107]

## IV. IMPACT AND CONCLUSION

The court has been consistent in its position that Proposition 103 is enforceable against the insurance industry.[108] This marks the second time that the court has sought to effectuate the will of the California voters as embodied in Proposition 103.[109] The insurance industry, however, continues to fight its implementation, defying both the California

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103. *Id.* at 329-32, 878 P.2d at 638-40, 32 Cal. Rptr. 2d at 879-81 (Mosk, J., concurring).

104. *Id.* at 329, 878 P.2d at 638, 32 Cal. Rptr. 2d at 879 (Mosk, J., concurring). "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

105. *20th Century*, 8 Cal. 4th at 329-30, 878 P.2d at 638, 32 Cal. Rptr. 2d at 879 (Mosk, J., concurring); *see* Bowles v. Willingham, 321 U.S. 503, 517-18 (1944).

106. *20th Century*, 8 Cal. 4th at 331, 878 P.2d at 639, 32 Cal. Rptr. 2d at 880 (Mosk, J., concurring); *see, e.g.*, *Willingham*, 321 U.S. 503 (dealing with rent control); Burditt v. United States Dep't of Health & Human Servs., 934 F.2d 1362 (5th Cir. 1991) (imposing a civil penalty on a physician).

107. *20th Century*, 8 Cal. 4th at 331, 878 P.2d at 639, 32 Cal. Rptr. 2d at 880 (Mosk, J., concurring).

108. *See id.* at 329, 878 P.2d at 638, 32 Cal. Rptr. 2d at 879; Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989).

109. *See generally 20th Century*, 8 Cal. 4th 216, 878 P.2d 566, 32 Cal. Rptr. 2d 807 (validating Proposition 103); *Calfarm*, 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (same).

legislative and judicial branches. Seven years later, insureds are still waiting for refund checks from their insurers.

MICHAEL WILLIAMS

# X. JUDGMENTS

*An appellate court must set aside and review a default judgment wherein the trial court has manifestly abused its discretion:* **Rappleyea v. Campbell.**

## I. INTRODUCTION

In *Rappelyea v. Campbell*,[1] the California Supreme Court addressed the rather confusing procedural question of whether the trial court's abuse of discretion in rendering a default judgment mandates its reversal.[2] The supreme court held that such an abuse requires the appellate court to set aside the default judgment, and reversed the court of appeal.[3]

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1. 8 Cal. 4th 975, 884 P.2d 126, 35 Cal. Rptr. 2d 669 (1994). Justice Mosk authored the majority opinion and was joined by Justices Kennard, Arabian, and George. *Id.* at 978-85, 884 P.2d 127-32, 35 Cal. Rptr. 2d 670-775. Justice Arabian wrote a separate concurring opinion. *Id.* at 985-86, 884 P.2d at 132, 35 Cal. Rptr. 2d at 675. Justice Baxter wrote a dissenting opinion in which Chief Justice Lucas and Justice Werdegar concurred. *Id.* at 986-91, 884 P.2d at 132-36, 35 Cal. Rptr. 2d at 675-79.

2. *Id.* at 978, 884 P.2d at 127, 35 Cal. Rptr. 2d at 670.

3. The defendants, Arizona residents, decided to represent themselves in a California default action after being personally served with a summons and complaint on November 1, 1990. *Id.* The Los Angeles Superior Court misinformed the defendants' Arizona lawyer about the cost of the filing fee. *Id.* The clerk's office quoted the filing fee as being $89, when the filing fee for two defendants was in fact $159. *Id.* The defendants answered by mail, enclosing $89. Subsequently, the clerk's office rejected the answer, and the defendants resubmitted it with the proper fee. *Id.* The answer was filed eight days late. *Id.* at 979, 884 P.2d at 127, 35 Cal. Rptr. 2d at 670. Consequently, the clerk entered a default judgment against the defendants at the request of the plaintiff on December 4, 1990. *Id.*

There was some question as to the events following the entry of default. *Id.* The plaintiff contended that "he repeatedly warned defendants they must apply to the court for relief from the default." *Id.* at 979, 884 P.2d at 128, 35 Cal. Rptr. 2d at 671. The defendants contended that the plaintiff lied to them about stipulating to the application which caused the defendants to miss the deadline. *Id.*

In October 1991, the defendants moved to set aside the judgment after the court notified them that it would enter judgment against them if the plaintiff's papers were adequate. *Id.* at 980, 884 P.2d at 128, 35 Cal. Rptr. 2d at 671. The trial court denied the defendants' motion, citing their failure to show good cause for reversing the default as required by § 473 of the Code of Civil Procedure. *Id.* The court then denied the defendants' motion for reconsideration because it was untimely. *Id.* On one occasion, the court imposed sanctions on the plaintiff for failing to appear. *Id.* In October 1991, the plaintiff appeared, but failed to prove damages. The trial court entered a default judgment on January 29, 1992. *Id.*

## II. TREATMENT OF THE CASE

### *A. Majority Opinion*

Justice Mosk prefaced the majority opinion by noting that, ordinarily, the court will not grant a legal remedy based on the ignorance or naiveté of the parties.[4] In setting aside the default judgment, the supreme court relied on two specific facts to serve as a basis for relief. First, the clerk's office had misinformed the defendants as to the filing fee.[5] Second, the "plaintiff misinformed defendants about the legal effect of the . . . default."[6] The plaintiff's lawyer sent a letter to the defendants stating, in substance, that they could not defeat the entry by pleading "inadvertence, mistake, or excusable neglect."[7] This assertion is contrary to the language of section 473 of the California Code of Civil Procedure.[8]

The supreme court noted that if the trial court had denied relief within the statutory six month period under section 473 it unquestionably would have abused its discretion.[9] However, since the six month period expired prior to the ruling, the lower court erred in applying the good cause requirement of section 473 in denying the motion.[10] Thus, the supreme court's review focused on whether the lower court could have denied the motion on sound legal principles.[11] Justice Mosk emphasized that the trial court has complete discretion to vacate a default judgment; there-

4. *Id.* at 979, 884 P.2d at 128, 35 Cal. Rptr. 2d at 671.

5. *Id.*

6. *Id.*

7. *Id.* (internal quotation marks omitted) (quoting letter to defendants from plaintiff's counsel).

8. *Id.* Section 473 authorizes the court to relieve a party "from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect. Application for this relief . . . shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." CAL. CIV. PROC. CODE § 473 (West 1993 & Supp. 1995). *See generally* 9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* §§ 145, 274 (3d ed. 1985) (explaining grounds for default judgment and process of appealing same).

9. *Rappleyea*, 8 Cal. 4th at 980, 884 P.2d at 128, 35 Cal. Rptr. 2d at 671; *see* Elston v. City of Turlock, 38 Cal. 3d 227, 233, 695 P.2d 713, 716, 211 Cal. Rptr. 416, 419 (1985) ("[B]ecause the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default.")

10. *Rappleyea*, 8 Cal. 4th at 980, 884 P.2d at 129, 35 Cal. Rptr. 2d at 672.

11. *Id.* at 981, 884 P.2d at 129, 35 Cal. Rptr. 2d at 672.

fore, when it does not, the reviewing court must sustain the judgment.[12] According to the court, its authority is limited to reviewing the default judgment itself[13] and does not extend to an independent evaluation of an order denying a motion to set aside the default judgment.[14] Nonetheless, the court noted one case that allowed an appeal of the order after judgment.[15] The majority also noted that a trial court can vacate a default judgment for equitable reasons even after the six month period has expired.[16] These principles provided the framework for the majority's search for a sound legal reason to sustain the trial court's ruling.[17]

Having established its authority to review the default judgment, the supreme court then examined alternative grounds for denying the motion to set aside the default.[18] The majority asserted that the abuse of discretion standard applies to section 473 decisions as well as to challenges to a court's refusal to set aside a default.[19] Equitable relief may be granted in cases of extrinsic mistake, such that "a mistake led a court to do what it never intended" to do.[20] Yet, the court acknowledged that public policy mandates that courts award relief from a default judgment rarely, and only under very special circumstances.[21] However, the court asserted, and the facts of this case do not implicate public policy favoring the finality of judgments as they did in *Aheroni v. Maxwell*,[22] *In re Marriage of Stevenot*,[23] and *Stiles v. Wallis*.[24] The court noted that the plaintiff had not obtained a default judgment until after the defendant's motion to

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12. *Id.*

13. *Id.* (citing Jade K. v. Viguri, 210 Cal. App. 3d 1459, 1465, 258 Cal. Rptr. 907, 911 (1989)).

14. *Id.*

15. *Id.* (citing Winter v. Rice, 176 Cal. App. 3d 679, 682, 222 Cal. Rptr. 340, 341 (1986)).

16. *Id.*

17. *See id.*

18. *Id. See generally* 9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* §§ 145, 274 (3d ed. 1985) (explaining grounds for default judgment and process of appealing same).

19. *Rappleyea*, 8 Cal. 4th at 981, 884 P.2d at 129, 35 Cal. Rptr. 2d at 672.

20. *Id.* (internal quotation marks omitted) (quoting Kulchar v. Kulchar, 1 Cal. 3d 467, 471-72, 462 P.2d 17, 19, 82 Cal. Rptr. 489, 492 (1969). *But see In re* Marriage of Stevenot, 154 Cal. App. 3d 1051, 1066-67, 202 Cal. Rptr. 116, 127 (1984) (discussing prior extrinsic mistake cases and criticizing the extrinsic mistake rule).

21. *Rappleyea*, 8 Cal. 4th at 982, 884 P.2d at 129, 35 Cal. Rptr. 2d at 672.

22. 205 Cal. App. 3d 284, 252 Cal. Rptr. 369 (1988) (affirming default judgment against defendant who moved to extend time to answer plaintiff's complaint, but subsequently failed to file and answer).

23. 154 Cal. App. 3d 1051, 202 Cal. Rptr. 116 (1984) (affirming default and interlocutory judgment against wife who failed to seek legal advice before a year and a half after entry of default).

24. 147 Cal. App. 3d 1143, 195 Cal. Rptr. 377 (1983) (affirming default judgment against defendant who failed to diligently move to set aside a default until twenty months following entry thereof).

set aside the default failed.[25] Under these circumstances, the defendant's motion would not have prejudiced the plaintiff, even if it was successful.[26] Furthermore, the plaintiff showed little interest in obtaining a judgment.[27]

The court then addressed the defendant's eligibility for equitable relief in the context of the three-part test propounded in *Stiles v. Wallis*.[28] *Stiles* requires the following: (1) the "defaulted party must demonstrate . . . a meritorious case[, (2)] the party seeking to set aside the default must articulate a satisfactory excuse for not presenting a defense to the original action[, and (3)] the moving party must demonstrate diligence in seeking to set aside the default once . . . discovered."[29]

Turning to the case at hand, the court found that the defendants had a viable defense under the first prong of the *Stiles* test.[30] The court first noted that a verified answer will normally indicate the merit of a default judgment.[31] Neither the answer nor the complaint in the instant case were verified, however, as the majority was quick to emphasize.[32] Moving beyond the technical aspects of formal verification, the court found that the defendants' answer satisfactorily responded to the allegations in the complaint.[33]

The majority determined that "the clerk's misunderstanding as to the number of answering defendants" was an extrinsic mistake. Therefore, the mistake prevented the defendants from answering the original complaint and from presenting a defense, satisfying the second prong of *Stiles*.[34] The supreme court then analogized the present case to *Baske v. Burke*,[35] in which the defendant's correspondences with the court clerk were never filed as responses to the complaint against him.[36] The *Baske*

25. *Rappleyea*, 8 Cal. 4th at 982, 884 P.2d at 130, 35 Cal. Rptr. 2d at 673.
26. *Id.*
27. *Id.*
28. *Id.* at 982, 884 P.2d 129-30, 35 Cal. Rptr. 2d at 672-73.
29. *Id.* at 982, 884 P.2d at 130, 35 Cal. Rptr. 2d at 673 (internal quotation marks omitted) (quoting Stiles v. Wallis, 147 Cal. App. 3d 1143, 1147-48, 195 Cal. Rptr. 377, 379 (1983)).
30. *Rappleyea*, 8 Cal. 4th at 982-83, 884 P.2d at 130, 35 Cal. Rptr. 2d at 673.
31. *Id.* at 982, 884 P.2d at 130, 35 Cal. Rptr. 2d at 673 (citing Stiles v. Wallis, 147 Cal. App. 3d 1143, 1148, 195 Cal. Rptr. 377, 379 (1983)).
32. *Id.*
33. *Id.*
34. *Id.* at 983, 884 P.2d at 130, 35 Cal. Rptr. 2d at 673.
35. 125 Cal. App. 3d 38, 177 Cal. Rptr. 794 (1981).
36. *Id.* at 44, 177 Cal. Rptr. at 798.

court held that "the doctrine of relief in equity from mistake has applied where the mistake is that of the clerk of the court."[37]

Moreover, the court determined that the issues of whether the defendant exercised diligence in trying to set aside the default judgment and whether the plaintiff suffered prejudice necessarily control in determining a party's eligibility for equitable relief were related.[38] The majority based its decision on the fact that plaintiff misinformed the defendants about their legal right to seek statutory relief, the plaintiff's difficulty in proving damages, and the possible prejudice to the defendants that lessened the burden to prove diligence.[39] Although the defendants failed to move for relief until a year after the litigation began, the court did not consider them "callously derelict" in their attempt to set aside the default, because the evidence showed them to have misunderstood the legal consequences of being in default.[40] Furthermore, the defendants' acted quickly after the court notified them of their pending default, this action constituted adequate evidence of diligence, thus satisfying the third prong of Stiles.[41]

In its conclusion, the supreme court reiterated the premise with which it began its inquiry: that self-representation, ill-advised or not, will not usually suffice to reverse a default judgment.[42] Nonetheless, the unusual fact of the clerk's error and the plaintiff's incorrect recitation of the law controlled the abnormal outcome of this case.[43] Justice Mosk cautioned, however, that to provide disparate treatment for pro per parties and those represented by counsel "would lead to a quagmire in the trial courts" and should rarely, if ever, be followed.[44]

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37. *Id.*

38. *Id.* at 984, 884 P.2d at 131, 35 Cal. Rptr. 2d at 674. *See generally* Don M. Sowers, Note, *Vacating Default Judgments Entered Due Solely to Attorney Neglect*, CHI. BAR ASS'N REC., Oct. 1992, at 36 (discussing importance in Illinois courts of diligence with respect to a party's pending litigation). The supreme court noted that "[i]f heightened prejudice strengthens the burden of proving diligence, so must reduced prejudice weaken it." *Rappelyea*, 8 Cal. 4th at 984, 884 P.2d at 131, 35 Cal. Rptr. 2d at 674.

39. *Id.* at 982-85, 884 P.2d at 129-32, 35 Cal. Rptr. 2d at 672-75 ("Of the three items a defendant must show to win equitable relief from default, diligence is the most inextricably intertwined with prejudice.").

40. *Id.* at 984, 884 P.2d at 131, 35 Cal. Rptr. 2d at 674.

41. *Id.*

42. *Id.*

43. *Id.* at 984, 884 P.2d at 131, 35 Cal. Rptr. 2d at 674.

44. *Id.* at 985, 884 P.2d at 131, 35 Cal. Rptr. 2d at 674.

### *B. Justice Arabian's Concurring Opinion*

Concurring with the majority opinion, Justice Arabian emphasized a purely equitable rationale for reversing the default judgment. He noted that a $70 error led to a $200,000 default, that the plaintiff had proven damages only after defendants had been denied relief from default, and that the plaintiff's lawyer sent a letter several days before the six month period expired.[45] Most important to Justice Arabian's analysis was the degree to which the plaintiff's lawyer capitalized on the defendants' ignorance of California law and their lack of familiarity with default procedures.[46] Justice Arabian asserted that this fact pattern demanded equitable relief.[47]

### *C. Justice Baxter's Dissenting Opinion*

In his dissent, Justice Baxter was primarily concerned that this judgment offers potential litigants the opportunity to pursue claims with no legal basis.[48] According to Justice Baxter, "the majority seeks to rescue the defendants from the consequences of their own procrastination."[49] Despite the majority's contentions, Baxter held that the proper test for abuse of discretion is "whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered."[50] Thus, if the facts provide more than one reasonable inference, a reviewing court does not have the power to replace the trial court's deductions with its own.[51] The dissent contended that the majority ignored the applicable law, that the trial court did not abuse its discretion in failing to grant the defendants' motion for section 473 relief, and that the appellate court was correct in leaving the judgment alone.

Justice Baxter next asserted that the facts most crucial to the majority's decision were irrelevant for purposes of appellate review.[52]

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45. *Id.* at 985, 884 P.2d at 132, 35 Cal. Rptr. 2d at 675 (Arabian, J., concurring).
46. *Id.* at 986, 884 P.2d at 132, 35 Cal. Rptr. 2d at 675 (Arabian, J., concurring).
47. *Id.* (Arabian, J., concurring).
48. *Id.* (Baxter, J., dissenting).
49. *Id.* (Baxter, J., dissenting).
50. *Id.* at 987, 884 P.2d at 133, 35 Cal. Rptr. at 676 (Baxter, J., dissenting) (internal quotation marks omitted) (quoting *In re* Marriage of Connolly, 23 Cal. 3d 590, 597-598, 591 P.2d 911, 915, 153 Cal. Rptr. 423, 427 (1979)).
51. *Id.* at 987, 884 P.2d at 133, 35 Cal. Rptr. at 676 (Baxter, J., dissenting) (citing *In re* Marriage of Connolly, 23 Cal. 3d 590, 597-598, 591 P.2d 911, 915, 153 Cal. Rptr. 423, 427 (1979)).
52. *Id.* (Baxter, J., dissenting).

Justice Baxter argued that the clerk's misinformation merely gave rise to the defendants' capacity to seek relief under section 473.[53] Therefore, he characterized the misleading statements of plaintiff's counsel as unimportant because they did not contribute to the defendants' failure to file a section 473 motion.[54] Justice Baxter further noted that the defendant was unable to cite precedent authorizing equitable relief after failing to comply with statutory time constraints.[55] Consequently, Justice Baxter was firm in his conviction that greater deference was due the trial court's decision.

Justice Baxter discounted the majority's characterization of the facts following the entry of default as "murky" and asserted that the trial court "made all findings on disputed evidence necessary to support its ruling."[56] As the record reflected, defendants received adequate notice that a default judgment had been entered against them and were fully advised that they would have to make a motion to set the judgment aside.[57]

According to Justice Baxter, the only ground for setting aside a default judgment is that "extrinsic factors have prevented one party to the litigation from presenting his or her case."[58] Justice Baxter asserted that no extrinsic factor prohibited the defendants in this case from filing a timely section 473 motion.[59] Justice Baxter found irrelevant the inquiry as to whether the plaintiffs tricked the defendants into missing the deadline.[60] Such circumstances, Baxter noted, do not change the fact that neither the court of appeal nor the California Supreme Court possess the requisite authority "for substituting its judgment for that of the trial court."[61] Considering that the defendants filed the section 473 motion after the six month period had passed, the trial court's denial of the motion was properly grounded in the facts.[62]

Justice Baxter further noted that a trial court may not grant equitable relief on the basis of extrinsic mistake when section 473 relief is available.[63] Once the trial court observes the defendant's failure to diligently pursue section 473 relief within six months, equitable relief is unavailable

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53. *Id.* (Baxter, J., dissenting).
54. *Id.* (Baxter, J., dissenting).
55. *Id.* at 988, 884 P.2d at 134, 35 Cal. Rptr. 2d at 677 (Baxter, J., dissenting).
56. *Id.* at 989, 884 P.2d at 135, 35 Cal. Rptr. 2d at 678 (Baxter, J., dissenting).
57. *Id.* at 989, 884 P.2d at 134, 35 Cal. Rptr. 2d at 677 (Baxter, J., dissenting).
58. *Id.* at 989, 884 P.2d at 134-35, 35 Cal. Rptr. 2d at 677-78 (Baxter, J., dissenting) (quoting *In re* Marriage of Park, 27 Cal. 3d 337, 342, 612 P.2d 882, 886, 165 Cal. Rptr. 792, 796 (1980)).
59. *Id.* at 989-90, 884 P.2d 135-36, 35 Cal. Rptr. 2d 678-79 (Baxter, J., dissenting).
60. *Id.* (Baxter, J., dissenting).
61. *Id.* (Baxter, J., dissenting).
62. *Id.* (Baxter, J., dissenting).
63. *Id.* (Baxter, J., dissenting).

to him absent evidence of circumstances that "made it impossible for the party to make a timely motion under section 473."[64] In this case, the dissent pointed out, the defendants' failure to explain why they did not seek section 473 relief within six months precluded the trial court from administering equitable relief.[65] Finally, Justice Baxter pointed out that, without more, lack of prejudice to the opposing party is inadequate to justify granting equitable relief to those who fail to comply with the requirements of section 473.[66]

## III. IMPACT AND CONCLUSION

Procedural errors like those recorded in *Rappleyea v. Campbell* are quite unique.[67] In this decision, the court bent the rules and granted equitable relief to the aggrieved party; however, this case cannot provide authority for widespread challenges of default judgments. The majority's discussion of the practical problems in granting equitable relief and the dissent's criticism of the majority decision, indicate that the procedure to overturn a default judgment does provide some safeguards against abuse by those who hope to manipulate the process to advance their own interests. Despite the court's generosity in granting equitable relief to the defendants in this case, courts after *Rappleyea* will probably not award or overturn default judgments with any greater frequency than they did before this decision.

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64. *Id.* (Baxter, J., dissenting).

65. *Id.* (Baxter, J., dissenting).

66. *Id.* at 991, 884 P.2d at 135, 35 Cal. Rptr. 2d at 679 (Baxter, J., dissenting).

67. *Rappleyea* is a case involving multiple errors, the defendants' as well as the clerk's. *Cf.* Standard Guar. Ins. Co. v. Fidelity & Deposit Co. of Md., 140 F.R.D. 5, 9-11 (M.D. Fla. 1991) (upholding entry of default judgment against the defendants for failure to sign papers by attorney where the defendant had waited to the last possible day to respond to the complaint), *rev'd in part, vacated in part*, 980 F.2d 1447 (11th Cir. 1992) (unpublished opinion, persuasive value only).

# XI. LABOR LAW

*The Meyers-Milias-Brown Act intrinsically provides county attorneys with a statutory right to sue the county for breach of duty to bargain in good faith on an employer-employee agreement; moreover, suing the county does not violate said attorneys' duty of loyalty to their public employer:*

**Santa Clara County Counsel Attorneys Ass'n v. Woodside.**

## I. INTRODUCTION

In *Santa Clara County Counsel Attorneys Ass'n v. Woodside*,[1] the California Supreme Court considered whether the Santa Clara County Counsel Attorneys Association (Association) is protected by the enforcement provisions of the Meyers-Milias-Brown Act (MMBA).[2] Moreover, the court examined whether the duty of loyalty required of all attorneys should restrain the Association from filing a lawsuit against its employer, the County of Santa Clara (County), even if the Association attorneys are protected under the Act.[3] The court examined the scope of

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1. 7 Cal. 4th 525, 869 P.2d 1142, 28 Cal. Rptr. 2d 617 (1994). Justice Mosk authored the majority opinion in which Chief Justice Lucas and Justices Kennard, Arabian, Baxter, and George concurred. *Id.* at 532-58, 869 P.2d at 1144-61, 28 Cal. Rptr. 2d at 619-36. Justice Panelli wrote a dissenting opinion. *Id.* at 558-60, 869 P.2d at 1161-63, 28 Cal. Rptr. 2d at 636-38 (Panelli, J., dissenting).

2. *Id.* at 532, 869 P.2d at 1144, 28 Cal. Rptr. 2d at 619. The Meyers-Milias-Brown Act is codified at CAL. GOV'T CODE § 3500 et seq. (West 1980 & Supp. 1994). All statutory references are to the California Government Code unless otherwise stated. *See also* 2 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 456 (9th ed. 1987 & Supp. 1994) (delineating the general nature of the MMBA); 52 CAL. JUR. 3D *Public Officers* § 184 (1979 & Supp. 1994) (same). *See generally* Nina Schuyler, *Identity Crisis*, 14 CAL. LAW. 45 (June 1994) (discussing the implications of classifying in-house counsel as employees instead of lawyers for purposes of enforcing employee rights and suing for wrongful termination); *State Labor Law Developments*, 8 A.B.A. SEC. LAB. & EMPL. L. 618, 646 (1992) (reviewing major cases affecting labor law in California, including government employees' right to strike under the Meyer-Milias-Brown Act).

3. *Woodside*, 7 Cal. 4th at 532, 869 P.2d at 1144, 28 Cal. Rptr. 2d at 619. The Association, which consists of half of the attorneys in the Santa Clara County Counsel's Office, refused to accept an approved wage package negotiated by the deputy public defenders in 1989, and requested an opportunity to meet and confer with the County independently. *Id.* at 532-35, 869 P.2d at 1144-45, 28 Cal. Rptr. 2d at 620. The County declined such a hearing. *Id.* at 534, 869 P.2d at 1145, 28 Cal. Rptr. 2d at 620. The Association then sought arbitration to set the rate of pay, but the County ignored this and later requests. *Id.* When the County enacted the wage increase, it negotiated with the deputy public defenders and applied that increase to

the MMBA's coverage and declared that the Act explicitly provided the Association[4] with protection that inherently includes a right to sue the

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Association members. The Association then announced its intent to sue the County in order to compel good faith bargaining pursuant to the MMBA. *Id.*

The County's counsel, Steven Woodside, examined the county attorneys' ethical obligations and concluded that the attorneys had to quit their jobs with the County before they could litigate the dispute. *Id.* at 534, 869 P.2d at 1146, 28 Cal. Rptr. 2d at 621. Woodside prohibited Association members from attending confidential meetings and contacting the Board. *Id.* The Association filed an action for injunctive and declaratory relief, alleging that the County breached its duty to meet and confer regarding wages as required by the MMBA. *Id.* at 535, 869 P.2d at 1146, 28 Cal. Rptr. 2d at 621.

Specifically, the Association asked the court to do the following: (1) declare that members of the Association need not resign prior to filing a petition for writ of mandate against the County over the wage issue; (2) declare that a writ of mandate action does not create a conflict of interest or violate any ethical code that would subject the attorneys to disciplinary action; (3) grant an injunction prohibiting the County from preventing the attorneys from performing their customary duties and from disciplining or terminating the attorneys or referring them to the State Bar for discipline; and (4) reinstate the attorneys to their full employment responsibilities, including confidential meetings with the Board and other County policymaking officials. *Id.*

The County cross-claimed against the Association, asking for an injunction to prevent the Association from filing a mandamus action. *Id.* Alternatively, the County demanded that the Association be required to show "(1) that there is a likelihood of prevailing on the merits, and (2) that harm to the County would be minimal" before filing the petition for writ of mandate. *Id.*

The trial court held for the Association on the first three points, but held against the Association on the fourth point. *Id.* The Court of Appeal reversed the trial court, finding that the attorneys were not authorized by the Act to bring the mandamus action and that the lawsuit constituted a breach of their duty of loyalty. *Id.* at 535-36, 869 P.2d at 1146, 28 Cal. Rptr. 2d at 621.

*See* Dennis J. Block et al., *The Duty of Loyalty and the Evolution of the Scope of Judicial Review*, 59 BROOK. L. REV. 65 (1993) (undertaking an extensive review of the duty of loyalty required of corporate fiduciaries). *See generally* Russell J. Hanlon, *From the Agliano Era Into the Cottle Era: A Review of the Opinions of the California Court of Appeal for the Sixth Appellate District in Civil Cases Decided in 1991 Through 1993*, 26 PAC. L.J. 1 (1994) (noting the California Court of Appeal's decision in *Santa Clara County Attorneys Association v. Woodside*, and the grounds of the California Supreme Court's reversal of the Court of Appeal); Barry Winograd, *California Public Employees and the Developing Duty of Fair Representation*, 9 INDUS. REL. L.J. 410, 411 (1987) (discussing the relationship of the duty of fair representation to "[c]onflicts between a union and bargaining unit employees").

4. *Woodside*, 7 Cal. 4th at 537, 869 P.2d at 1147, 28 Cal. Rptr. 2d at 622; CAL. GOV'T CODE § 3507.3 (West 1980) ("Professional employees shall not be denied the right to be represented separately from non-professional employees by a professional employee organization . . . .").

County for breaching its duties[5] under the Act.[6] Furthermore, the court maintained, the Association's right to sue the County under the Act was not constitutionally prohibited because it did not constitute a breach of the attorneys' duty of loyalty.[7] The supreme court concluded by emphasizing that the statute prohibits the County from terminating attorneys for utilizing their right to sue; however, the statute allows the County to reassign attorneys within the office as needed to ensure adequate legal representation.[8]

## II. TREATMENT

### A. *The Majority Opinion*

Justice Mosk, writing for the majority, evaluated the County's two main arguments: (1) that the Act does not authorize the filing of a mandamus action by the Association; and (2) that the Act is, at least in part, unconstitutional legislation because it allows attorneys to breach the duty of loyalty imposed upon them by the judiciary.[9]

The majority began by examining the purpose and scope of the Meyers-Milias-Brown Act and its relationship to the case at hand.[10] Hav-

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5. *See* CAL. GOV'T CODE § 3505 (West 1980) (requiring the "governing body of a public agency . . . [to] meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of . . . recognized employee organizations . . . ."). *Id.*; *see also* 2 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 460 (9th ed. 1987 & Supp. 1994) (discussing the MMBA's meet and confer requirements); 52 CAL. JUR. 3D *Public Officers* § 185 (1979 & Supp. 1994) (same).

6. *Woodside*, 7 Cal. 4th at 542, 869 P.2d at 1150-52, 28 Cal. Rptr. 2d at 625-26.

7. *Id.* at 553, 869 P.2d at 1157-58, 28 Cal. Rptr. 2d at 632-33.

8. *Id.* at 532, 869 P.2d at 1144, 28 Cal. Rptr. 2d at 619.

9. *Id.* at 536, 869 P.2d at 1146-47, 28 Cal. Rptr. 2d at 621-22.

10. *Id.* at 536-38, 869 P.2d at 1147-48, 28 Cal. Rptr. 2d at 622-23. The court looked to the Act itself to discern its purpose. *Id.*; *see* CAL. GOV'T CODE § 3500 (West 1980) (stating that the Act is meant to furnish "a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment . . . ."). Moreover, the court found that the MMBA's meet-and-confer provision is the primary method of accomplishing that purpose. *Woodside*, 7 Cal. 4th at 536-37, 869 P.2d at 1147, 28 Cal. Rptr. 2d at 622; CAL. GOV'T CODE § 3505 (West 1980) (requiring the "governing body of a public agency . . . [to] meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of . . . recognized employee organizations . . . ."). In addition, the court cited two cases which have interpreted the meet and confer provision, respectively, to (1) constitute a duty to bargain, and (2) prevent employers from unilaterally changing "employees' wages and working conditions until the employer and employee association have bargained to an impasse . . . ." *Woodside*, 7 Cal. 4th at 537, 869 P.2d at 1147, 28 Cal. Rptr. 2d at 622 (citing Glendale City Employees' Ass'n, Inc. v. City of Glendale, 15 Cal. 3d 328, 336, 540 P.2d 609, 614, 124 Cal. Rptr. 513, 518 (1975)) (finding the duty to meet and confer to signify a duty to bargain) and San Joaquin

ing established that the Association was entitled to coverage under the Act, the court then addressed the County's first argument.[11] The County contended that the Act's failure to specify enforcement procedures indicated the legislature's desire to leave provisions for enforcement open to court interpretation.[12] In rejecting this argument, the majority stressed that the supreme court has uniformly held that the Act intentionally confers enforceable rights on public employees.[13] Moreover it is immaterial that the Act does not specifically grant public employees the right to sue because the Act's grant of substantive rights allows employees to enforce their rights by filing for a writ of mandamus.[14] The majority acknowl-

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County Employees Ass'n v. City of Stockton, 161 Cal. App. 3d 813, 818-19, 207 Cal. Rptr. 876, 879-80 (1984) (expounding on the duty to bargain, insisting that employers bargain with employees and forbear making decisions alone until an impasse is reached)).

11. *Woodside*, 7 Cal. 4th at 537-38, 869 P.2d at 1148, 28 Cal. Rptr. 2d at 622-23; CAL. GOV'T CODE § 3507.3 (West 1980) ("[p]rofessional employees [including attorneys] shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization . . . .").

12. *Woodside*, 7 Cal. 4th at 538, 869 P.2d at 1148, 28 Cal. Rptr. 2d at 623. The County supported this assertion by referring to the supreme court's opinion in International Bhd. of Elec. Workers v. City of Gridley, 34 Cal. 3d 191, 197, 666 P.2d 960, 962 193 Cal. Rptr. 518, 520 (1983). In *International Bhd.*, the court stated that the Meyers-Milias-Brown Act "furnishes only a 'sketchy and frequently vague framework of employer-employee relations for California's local government agencies.'" *Id.* (citing Organization of Deputy Sheriffs v. County of San Mateo, 48 Ca. App. 3d 331, 336, 122 Cal. Rptr. 210, 213 (1975)). However, as Justice Mosk points out, the supreme court's opinion in *International Bhd.* went on to state "[n]otwithstanding its otherwise 'sketchy' provisions, the act contains strong protection for the rights of public employees to join and participate in the activities of employee organizations, and for the rights of those organizations to represent employees' interests with public agencies." *Woodside*, 7 Cal. 4th at 539, 869 P.2d at 1148, 28 Cal. Rptr. 2d at 623 (citing International Bhd. of Elec. Workers v. City of Gridley, 34 Cal. 3d at 197, 666 P.2d at 962, 193 Cal. Rptr. at 520).

13. *Id.* at 539, 869 P.2d at 1148, 28 Cal. Rptr. 2d at 623.

14. *Id.* at 539, 869 P.2d at 1149, 28 Cal. Rptr. 2d at 624; *see* CAL. CIV. PROC. CODE § 1085 (West 1980) (stating that a writ may be issued "by any court . . . to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station . . . "). *Cf.* Timothy M. Gill, Comment, *Public Employee Strikes: Legalization Through the Elimination of Remedies*, 72 CAL. L. REV. 629 (1984) (evaluating employer's remedies when public employees strike); Susan T. Sekler, *Collective Bargaining Under the Meyers-Milias-Brown Act—Should Local Public Employees Have the Right to Strike?*, 35 HASTINGS L.J. 523 (1984) (discussing the statute, judicial interpretations, and possible modification of the common-law rule); David P. Haberman, Comment, *California Public Employees Granted Right to Strike Without Legislative*

edged the employees' right to bring a mandamus action by finding that the Act met the requirements for seeking relief by writ.[15]

Next, the County argued that the court should limit the use of mandamus under the Act on public policy grounds.[16] The majority rejected this argument, declaring that the legislature acts affirmatively when it intends to prevent the use of a mandamus action to enforce rights.[17] Furthermore, since the Act does not affirmatively prevent or limit the use of a writ of mandate, and since the right to seek a writ is statutory, the court insisted that the court could not create a common-law limit for public policy reasons.[18] The majority concluded that the Association's right to file for writ of mandamus is intrinsic to the Act.[19]

The County next asked the court to find the Act unconstitutional to the extent that it would allow attorneys to breach the duty of loyalty imposed upon them by the judiciary.[20] The majority began its response by reviewing the powers held by the judiciary and the legislature over

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*Authorization: County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees Association, Local 660*, 64 WASH. U. L.Q. 263 (1986) (arguing that the California Supreme Court erred in making policy where other states have left policy-making to their legislatures).

15. *Woodside*, 7 Cal. 4th at 539-40, 869 P.2d at 1149, 28 Cal. Rptr. 2d at 624. The requirements for a mandamus action are: "(1) a clear, present and usually ministerial duty on the part of the respondent . . . ; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty . . . ." *Id.* (quoting Baldwin-Lima-Hamilton Corp. v. Superior Court, 208 Cal. App. 2d 803, 813-814, 25 Cal. Rptr. 798, 805 (1962) (citations omitted)). The court found that the Act met the first requirement since it imposes a duty on public employers to meet and confer with employees over salary and other employment-related conditions. *Id.* at 540, 869 P.2d at 1149, 28 Cal. Rptr. 2d at 624. Additionally, public employees clearly have the right to performance of that duty, thereby satisfying the second requirement. *Id.*

16. *Id.* at 539-40, 869 P.2d at 1149, 28 Cal. Rptr. 2d at 624.

17. *Id.* at 540, 869 P.2d at 1149, 28 Cal. Rptr. 2d at 624.

18. *Id.* at 542, 869 P.2d at 1150, 28 Cal. Rptr. 2d at 625-26.

19. *Id.* at 542, 869 P.2d at 1150-51, 28 Cal. Rptr. 2d at 625-26. The court set forth the test for attacking the constitutionality of a statute affecting the legal profession under the separation of powers doctrine: the party challenging the statute "must at least show that a direct and fundamental conflict exists between the operation of the statute in question, as it applies to attorneys, and attorneys' settled ethical obligations, as embodied in this state's Rules of Professional Conduct or some well-established common law rule." *Id.* at 544, 869 P.2d at 1152, 28 Cal. Rptr. 2d at 627.

20. *Id.* at 542, 869 P.2d at 1151, 28 Cal. Rptr. 2d at 626.

the legal profession.[21] The majority found the Act to be clearly within the reasonable exercise of the legislature's police powers.[22]

The court also considered whether the Act ran afoul of the separation of powers doctrine by permitting an attorney to violate the Rules of Professional Conduct.[23] The majority quickly rejected the County's argument that the Act allowed attorneys to violate rules 3-300 and 3-310.[24] The majority remarked that rule 3-300 did not concern the Association's petition for writ of mandamus since the rule addresses only business transactions between attorney and client and other ways of "acquiring . . . a pecuniary interest" from the client, neither of which encompasses the filing of a writ of mandate.[25] Further, the majority found that rule 3-310's prohibition against conflicts of interest did not apply because the conflict in this case was outside the "subject matter of representation" the attorneys were hired to undertake.[26] The majority concluded,

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21. *Id.* at 542-44, 869 P.2d at 1151-52, 28 Cal. Rptr. 2d at 626-27. Article IV of the California Constitution "implicitly vests the power to govern the legal profession in the judiciary." *Id.* at 542, 869 P.2d at 1151, 28 Cal. Rptr. 2d at 626 (quoting CAL. CONST. Art. IV). The judiciary has imposed a duty of loyalty on attorneys both at common law and under the Rules of Professional Conduct. *Id.* at 542-43, 869 P.2d at 1151, 28 Cal. Rptr. 2d at 626. However, the supreme court "has respected the exercise by the Legislature under the police power, of 'a reasonable degree of regulation and control over the profession and practice of law'" in California. *Id.* at 543, 869 P.2d at 1151, 28 Cal. Rptr. 2d at 626 (quoting Hustedt v. Workers' Comp. Appeals Bd., 30 Cal. 3d 329, 337, 636 P.2d 1139, 1143, 178 Cal. Rptr. 801, 805 (1981)).

22. *Id.* at 544, 869 P.2d at 1151-52, 28 Cal. Rptr. 2d at 626-27.

23. *Id.* at 544-48, 869 P.2d at 1152-55, 28 Cal. Rptr. 2d at 627-29.

24. *Id.* at 545, 869 P.2d at 1152, 28 Cal. Rptr. 2d at 627; *see* Mark L. Tuft, *California Rules of Professional Conduct*, 517 PLI/LIT 9 (1994) (setting forth all the Rules of Professional Conduct and clarifying of individual rules).

25. *Id.* at 545, 869 P.2d at 1152-53, 28 Cal. Rptr. 2d at 627-28; RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA Rule 3-300 (1989 & Supp. 1995). Rule 3-300 states that an attorney "shall not knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client." *Id.*

26. *Id.* at 546-47, 869 P.2d at 1153-54, 28 Cal. Rptr. 2d at 628-29; RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA Rule 3-310(B)(4) (1989 & Supp. 1995). Rule 3-310(B)(4) states that an attorney may not represent a client when "[t]he member has or had a legal, business, financial, or professional interest in the subject matter of the representation" without disclosure of that relationship. *Id.*; *see* Mark L. Tuft, *Identifying and Avoiding Conflicts of Interest*, 517 PLI/LIT 123 (1994) (delineating the nature of various conflicts of interest, the American Bar Association's Model Rules and advice for avoiding disqualification); Mark L. Tuft, *Identifying and Avoiding Conflicts of Interest: Identifying Conflicts of Interest and How To Deal With Them, Types of Conflicts, and Avoiding Disqualification*, 493 PLI/LIT 73 (1994) (same); Mark L. Tuft, *Identifying and Avoiding Conflicts of Interest*, 802 PLI/CORP

therefore, that the Association's writ of mandate action did not contravene the Rules of Professional Conduct.[27]

In addition, the majority addressed the County's claim that the common-law duty of loyalty must prevent an attorney suit against a current client.[28] Finding the County's statement of the issue too general, the court redefined the issue to be "whether an attorney's lawsuit to enforce rights granted pursuant to a statutory scheme of public employer-employee bargaining is fundamentally incompatible with the essentials of the duty of loyalty."[29] The court examined informal opinions of the American Bar Association Committee on Ethics and Professional Responsibility (ABA) and concurred with the ABA's approach to government attorney associations.[30] The majority concluded that collective bargaining by government attorney associations pursuant to statute did not violate the attorney's duty of loyalty.[31] Further, the majority found that filing a writ of mandate to protect the attorneys' right to collective bargaining was permissible as long as the attorneys continued to competently represent their clients.[32] Finally, the court held that the Association's mandamus action under the Act did not constitute a violation of its attorneys' ethical obligations to their clients.[33]

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101 (1993) (same).

27. *Woodside*, 7 Cal. 4th at 544-45, 869 P.2d at 1152, 28 Cal. Rptr. 2d at 627.

28. *Id.* at 548-54, 869 P.2d at 1154-59, 28 Cal. Rptr. 2d at 629-33. The court reiterated the position it took in a case more than sixty years earlier: "[i]t is . . . an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent . . . ." *Id.* at 548, 869 P.2d at 1154-55, 28 Cal. Rptr. 2d at 629-30 (quoting Anderson v. Eaton, 211 Cal. 113, 116, 293 P. 788, 789-90 (1930)); *see* Block, *supra* note 3, at 71-75 (evaluating the elements of loyalty in the corporate law environment); Marcia M. McMurray, *A Historical Perspective on the Duty of Care, the Duty of Loyalty, and the Business Judgment Rule*, 40 VAND. L. REV. 605, 623-29 (1987) (covering the history of the duty of loyalty and its pervasiveness in the United States); E. Norman Veasley, *Duty of Loyalty: The Criticality of the Counselor's Role*, 45 A.B.A. SEC. BUS. L. 2065 (1990) (discussing breaches of the duty of loyalty and the non-applicability of the Business Judgment Rule to violations of the duty of loyalty).

29. *Woodside*, 7 Cal. 4th at 549, 869 P.2d at 1155, 28 Cal. Rptr. 2d at 630.

30. *Id.* at 550-52, 869 P.2d at 1155-57, 28 Cal. Rptr. 2d at 630-32; *see* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1325 (1975); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 986 (1967); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 917 (1966).

31. *Woodside*, 7 Cal. 4th at 551, 869 P.2d at 1157-58, 28 Cal. Rptr. 2d at 632.

32. *Id.* at 553, 869 P.2d at 1157, 28 Cal. Rptr. 2d at 632. The majority stated that the test for determining a breach of ethics is whether the attorney permitted antagonism from the labor dispute to affect his competency and compromise the quality of client representation. *Id.* at 552, 869 P.2d at 1157, 28 Cal. Rptr. 2d at 632.

33. *Id.* at 553, 869 P.2d at 1157-58, 28 Cal. Rptr. 2d at 632-33.

Moreover, the majority made it clear that the Act offered statutory protection against discharging attorneys who choose to enforce their right to collective bargaining and that the Act was "an exception to the general rule . . . that a client may discharge an attorney at will."[34] However, the majority also recognized the need for protecting the County's interests and granted the County the right to reorganize its office to meet these interests.[35]

### *B. The Dissenting Opinion*

Justice Panelli dissented, objecting to the majority's failure to consider the plight of the client.[36] Justice Panelli argued that antagonism between attorney and client would destroy the client's trust and denigrate the loyalty due him, regardless of whether the antagonism was limited to the topic of attorney compensation.[37] Justice Panelli reviewed the case law and emphasized that in every prior instance where a client and an attorney became adversaries in litigation, the supreme court has denounced the appearance of impropriety and ruled in favor of the client.[38] Moreover, the attorneys' access to confidential information and familiarity with their clients placed the clients at a great disadvantage in trying to defend themselves.[39]

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34. *Id.* at 557, 869 P.2d at 1159-60, 28 Cal. Rptr. 2d at 634-35; *see* CAL. CIV. PROC. CODE § 284 (West 1982) ("[t]he attorney in an action . . . may be changed at any time . . . [u]pon consent of both client and attorney . . . [or] [u]pon the order of the court . . . ."); *see* John H. McGuckin, Jr., *Blowing Whistles in Hurricanes: The Ethical Dilemma*, 517 PLI/LIT 391 (1994) (delineating the duty of loyalty in-house attorneys owe to their clients and the effect of the California Supreme Court's recent holding in *General Dynamics v. Superior Court* on whether attorneys who "blow the whistle" on their clients may be terminated); Mark L. Tuft, *The Ethical Implications of Concluding a Case*, 517 PLI/LIT 383 (1994) (discussing the voluntary and involuntary termination of attorneys and how they should deal with client files after termination).

35. *Woodside*, 7 Cal. 4th at 557, 869 P.2d at 1161, 28 Cal. Rptr. 2d at 635-36.

36. *Id.* at 558-560, 869 P.2d at 1161-63, 28 Cal. Rptr. 2d at 636-38 (Panelli, J., dissenting).

37. *Id.* at 558, 869 P.2d at 1161, 28 Cal. Rptr. 2d at 636 (Panelli, J., dissenting).

38. *Id.* at 559, 869 P.2d at 1162, 28 Cal. Rptr. 2d at 636-37 (Panelli, J., dissenting); *see* Mark R. McDonald, *Literary-Rights Fee Agreements in California: Letting the Rabbit Guard the Carrot Patch of Sixth Amendment Protection and Attorney Ethics?*, 24 LOY. L.A. L. REV. 365 (1991) (arguing that attorneys who continue to represent clients after a conflict of interest develops may thus be providing inadequate representation and cause the public to lose confidence in the judicial process).

39. *Woodside*, 7 Cal. 4th at 559, 869 P.2d at 1162, 28 Cal. Rptr. 2d at 637 (Panelli,

Justice Panelli further criticized the majority's reasoning that only the legislature has the power to limit the statutory right to writ of mandamus.[40] Instead, he argued, the power at issue is the court's constitutional power to regulate the legal profession and the rule is that constitutional provisions control when there is a conflict with a statute.[41] Finally, Justice Panelli hypothesized that decisions like *Woodside*, which diminish the ethical standards of government and other in-house attorneys, will ultimately damage the professional reputation of these attorneys and ultimately, their usefulness to clients.[42]

## III. IMPACT

The California Supreme Court is arguably heading down a path that is unprecedented in California, and perhaps in United States history. This path allows government and possibly corporate attorneys to sue their current employers for allegedly violating labor laws.[43] Moreover, with the recent growth in the number of government entities and corporations hiring in-house attorneys, the right of these attorney-employees to sue

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J., dissenting). Justice Panelli emphasized the fact that "[a]s plaintiffs, [the Association] will have an awareness of their defendants' strategies, resources and legal opinions that would be protected from any other plaintiff by the attorney-client privilege." *Id.* (Panelli, J., dissenting). Moreover, "when governmental and other in-house lawyers sue their clients, the former relationship of trust and confidence becomes an unfair tactical and informational advantage that the client may well view as a serious betrayal." *Id.* at 560, 869 P.2d at 1162, 28 Cal. Rptr. 2d at 637 (Panelli, J., dissenting).

40. *Id.* at 560, 869 P.2d at 1162, 28 Cal. Rptr. 2d at 637 (Panelli, J., dissenting).

41. *Id.* (Panelli, J., dissenting).

42. *Id.* at 560, 869 P.2d at 1163, 28 Cal. Rptr. 2d at 638 (Panelli, J., dissenting).

43. The majority stated, "No reported appellate cases in this state have considered the extent to which an attorney's duty of loyalty to a client prohibits the attorney from suing the client. It may well be that the lack of case law is due to the obviousness of the prohibition." *Id.* at 548-49, 869 P.2d at 1155, 28 Cal. Rptr. 2d at 630. Moreover, as one Connecticut court stated:

> The almost complete absence of authority governing the situation where . . . the lawyer is still representing the client whom he sues clearly indicates to us that the common understanding and the common conscience of the bar is in accord with our holding that such a suit constitutes a reprehensible breach of loyalty and a violation of the preamble to the Canons of Profession Ethics.

*Woodside*, 7 Cal. 4th at 549, 869 P.2d at 1155, 28 Cal. Rptr. 2d at 630 (quoting Grievance Comm. of Bar of Hartford County v. Rottner, 152 Conn. 59, 66, 203 A.2d 82, 85 (1964)). Furthermore, Justice Panelli argued that the reasonable inference to be drawn from the absence of a specific rule prohibiting attorneys from suing their clients "is that in most cases no rule is necessary. From [Justice Panelli's] experience, any lawyer in private practice so bold as to sue his client can expect to be fired on the spot." *Woodside*, 7 Cal. 4th at 559, 869 P.2d at 1161, 28 Cal. Rptr. 2d at 636 (Panelli, J., dissenting).

their employer is a consideration that may become a major factor when government and corporate employers decide whether to increase their in-house staff or "farm out" work to private law firms.[44] Only time will tell whether Justice Panelli's fears of harm to the legal profession will be realized.

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44. *Id.* at 560, 869 P.2d at 1163, 28 Cal. Rptr. 2d at 638 (Panelli, J., dissenting).

# XII. POLLUTION AND CONSERVATION LAWS

*Courts generally may only consider evidence not contained in the administrative record when reviewing the substantiality of the evidence supporting a quasi-legislative administrative decision under Public Resources Code section 21168.5. Additionally, extra-record evidence is generally not admissible to show that an agency "has not proceeded in a manner required by law" in making a quasi-legislative decision:*

**Western States Petroleum Ass'n v. Superior Court.**

## I. INTRODUCTION

In *Western States Petroleum Association v. Superior Court*,[1] the California Supreme Court considered whether the trial court erred in refusing to allow Western States Petroleum Association (WSPA) to admit evidence not contained in the administrative record when challenging administrative regulations.[2] The court of appeal granted a writ of manda-

1. 9 Cal. 4th 559, 888 P.2d 1268, 38 Cal. Rptr. 2d 139 (1995). Justice Mosk wrote the unanimous opinion of the court in which Chief Justice Lucas and Justices Kennard, Arabian, Baxter, George, and Werdegar concurred. *Id.* at 564-79, 888 P.2d at 1269-79, 38 Cal. Rptr. 2d at 140-50.

2. *Id.* at 564-65, 888 P.2d at 1269, 38 Cal. Rptr. 2d at 140. The administrative record was a compilation of all actions, hearings, comments, and responses to proposed regulations concerning a low-emission vehicle/clean fuels (LEV/CF) program. *Id.* at 565-66, 888 P.2d at 1269-70, 38 Cal. Rptr. 2d at 140-41. It also included the final version of regulations adopted by the Air Resources Board (ARB). *Id.*

The ARB enacted the LEV/CF program to lower emissions from automobiles that cause smog. *Id.* at 565, 888 P.2d at 1269, 38 Cal. Rptr. 2d at 140. When adopting new standards, "the ARB was required to comply with the Administrative Procedure Act (APA)." *Id.* at 565, 888 P.2d at 1270, 38 Cal. Rptr. 2d at 141. *See generally* CAL. GOVT. CODE §§ 11340-11356 (West 1992 & Supp. 1995) (defining and explaining the APA). The ARB "prepared a notice of public hearing, an initial statement of reasons, and a technical support document." *Western States Petroleum*, 9 Cal. 4th at 565, 888 P.2d at 1270, 38 Cal. Rptr. 2d at 141. Additionally, to comply with the APA, the ARB allowed public access to all the documents and held a public hearing. *Id. See generally* 8 B.E. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* § 247(a) (3d ed. 1985 & Supp. 1995) (discussing the APA); *see also* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 559 (9th ed. 1988 & Supp. 1995). WSPA and other companies submitted written and oral statements during the hearing. *Western States Petroleum*, 9 Cal. 4th at 565, 888 P.2d at 1270, 38 Cal. Rptr. 2d at 141. The ARB subsequently ratified the regulations with some revisions. *Id.* The regulations were then distributed and open to critique. *Id.* The ARB drafted a statement of reasons in response to the critique. *Id.* The ARB then prepared a final draft of the regulations, which was approved by the Office of Administrative Law. *Id.* at 565-66, 888 P.2d at

mus, ordering the trial court to admit the evidence.[3] The California Supreme Court reversed the decision of the court of appeal.[4]

## II. TREATMENT

A party may petition for administrative mandamus[5] or traditional mandamus[6] when seeking to set aside an administrative decision[7]. The ad-

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1270, 38 Cal. Rptr. 2d at 141.

WSPA subsequently filed an administrative petition for reversal of the regulations; the petition was denied. *Id.* at 566, 888 P.2d at 1270, 38 Cal. Rptr. 2d at 141. WSPA then filed in the Los Angeles County "[S]uperior [C]ourt seeking both declaratory and mandamus relief on the grounds that the regulations were based on inaccurate and unsound data and that the ARB adopted them without complying with CEQA [California Environmental Quality Act]." *Id. See generally* 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Estate* § 58 (9th ed. 1987 & Supp. 1995); Sean Stuart Varner, Comment, *The California Environmental Quality Act (CEQA) After Two Decades: Relevant Problems and Ideas for Necessary Reform*, 19 PEPP. L. REV. 1447 (1992) (discussing CEQA).

WSPA made a discovery request for items that were not part of the administrative record. *Western States Petroleum*, 9 Cal. 4th at 566, 888 P.2d at 1270, 38 Cal. Rptr. 2d at 141. The ARB sought to restrict the evidence to that included in the administrative record. *Id.* The trial court held that items not included in the administrative record were inadmissible, unless "WSPA made an offer of proof and could demonstrate the evidence was admissible." *Id.*

3. *Id.* at 566, 888 P.2d at 1270, 38 Cal. Rptr. 2d at 141.

4. *Id.* at 579, 888 P.2d at 1279, 38 Cal. Rptr. 2d at 150. The supreme court denied the petition for writ of mandamus. *Id.*

5. *Id.* at 566, 888 P.2d at 1270, 38 Cal. Rptr. 2d at 141; *see* CAL. CIV. PROC. CODE § 1094.5 (West 1980 & Supp. 1995). Administrative mandamus is proper when the review is sought of an "'adjudicatory' or 'quasi-judicial' decision." *Western States Petroleum*, 9 Cal. 4th at 566-67, 888 P.2d at 1270, 38 Cal. Rptr. 2d at 141. Quasi-judicial decisions are those decisions when the "'determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency, on the grounds of noncompliance with [CEQA].'" *Id.* at 566, 888 P.2d at 1270, 38 Cal. Rptr. 2d at 141 (quoting CAL. PUB. RES. CODE § 21168 (West 1986 & Supp. 1995)); *see* 8 B.E. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* § 245-46 (3d ed. 1985 & Supp. 1995) (discussing administrative mandamus).

6. *Western States Petroleum*, 9 Cal. 4th at 566, 888 P.2d at 1270, 38 Cal. Rptr. 2d at 141; *see* CAL. CIV. PROC. CODE § 1085 (West 1980 & Supp. 1995). Traditional mandamus is proper "in all other actions brought 'to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with [CEQA]." *Western States Petroleum*, 9 Cal. 4th at 567, 888 P.2d at 1271, 38 Cal. Rptr. 2d at 142 (quoting CAL. PUB. RES. CODE § 21168.5 (West 1986 & Supp. 1995)).

7. *Id.* at 566, 888 P.2d at 1270, 38 Cal. Rptr. 2d at 141. WSPA sought to set aside

ministrative decision in this case dealt with the adoption of air quality regulations by the ARB [Air Resources Board], a quasi-legislative action.[8] Therefore, traditional mandamus was the correct petition.[9] The court chronicled the discrepancies between case law and legal scholars' opinions with reference to the appropriate form of action, administrative or traditional mandamus.[10] The court stated that the relevant codes contain a "distinction between quasi-legislative and quasi-judicial administrative decisions."[11]

Having determined that traditional mandamus was the proper mechanism for attacking the regulation, the court further ascertained "whether a court may consider evidence outside the administrative record in determining whether a quasi-legislative administrative decision was an abuse of discretion under this statute."[12] Justice Mosk analyzed the logic by which the court of appeal came to its decision.[13] The court of appeal reasoned "that extra-record evidence is generally admissible in a traditional mandamus action alleging that an agency abused its discretion within the meaning of Public Resources Code section 21168.5."[14] The California Supreme Court rejected this line of reasoning.[15]

The ARB compared the "substantial evidence standard of review proscribed by section 21168.5" to the "substantial evidence standard used by appellate courts to review . . . trial courts."[16] The court agreed with the

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the administrative decision for an alleged failure to comply with CEQA. *Id.*

8. *Id.* at 567, 888 P.2d at 1271, 38 Cal. Rptr. 2d at 142.

9. *Id.*

10. *Id.* at 567-68, 888 P.2d at 1271, 38 Cal. Rptr. 2d at 142. Courts have "held that quasi-legislative actions must be challenged in traditional mandamus proceedings . . . even if the administrative agency was required by law to conduct a hearing and take evidence." *Id.* at 567, 888 P.2d at 1271, 38 Cal. Rptr. 2d at 142 (citations omitted). Scholars have asserted that when a hearing is required by law, administrative mandamus should be used and where no hearing is required by law, traditional mandamus should be utilized. *Id.* at 568, 888 P.2d at 1271, 38 Cal. Rptr. 2d at 142 (citations omitted). These scholars eliminated the distinction between quasi-judicial and quasi-legislative. *Id.* at 567, 888 P.2d at 1271, 38 Cal. Rptr. 2d at 142.

11. *Id.* at 568, 888 P.2d at 1272, 38 Cal. Rptr. 2d at 143.

12. *Id.* at 568-69, 888 P.2d at 1272, 38 Cal. Rptr. 2d at 143 (referring to CAL. PUB. RES. CODE § 21168.5 (West 1986 & Supp. 1995)).

13. *Id.* at 569, 888 P.2d at 1272, 38 Cal. Rptr. 2d at 143 (explaining that the court of appeal relied on dictum from No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 529 P.2d 66, 118 Cal. Rptr. 34 (1974)). The ARB asserted that the dictum from *No Oil* was incorrect, and the court of appeal should not have relied on it. *Id.* at 569-70, 888 P.2d at 1272, 38 Cal. Rptr. 2d at 143.

14. *Id.* at 570, 888 P.2d at 1273, 38 Cal. Rptr. 2d at 144; *see* 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Estate* § 62 (9th ed. 1989 & Supp. 1994) (discussing substantial evidence standard).

15. *Western States Petroleum*, 9 Cal. 4th at 570, 888 P.2d at 1273, 38 Cal. Rptr. 2d at 144.

16. *Id.*; *see* 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Estate* § 62 (9th ed.

ARB's analogy.[17] Thus, "a court generally may consider only the administrative record in determining whether a quasi-legislative decision was supported by substantial evidence."[18] The court found the ARB's contention influential for three reasons: (1) In drafting section 21168.5, the legislature used the words "substantial evidence," and these words have a specific legal definition;[19] (2) since the legislature delegated quasi-legislative authority to the ARB, the court should grant the ARB great judicial deference in its decisions;[20] (3) since regulatory agencies, such as the ARB, develop a high degree of expertise in the fields they oversee, deference should be afforded.[21]

The ARB further asserted that "extra-record evidence is not admissible to show that an administrative agency 'has not proceeded in a manner required by law' within the meaning of Public Resources Code section 21168.5 in making a quasi-legislative decision."[22] The court acknowledged that there are differences between CEQA and non-CEQA cases,[23] but held that the "[l]egislature intended traditional mandamus actions challenging quasi-legislative administrative decisions on CEQA grounds to be governed by 'existing law.'"[24]

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1989 & Supp. 1995) (explaining the substantial evidence standard).

17. *Western States Petroleum*, 9 Cal. 4th at 573, 888 P.2d at 1274-75, 38 Cal. Rptr. 2d at 145-46.

18. *Id.* at 573, 888 P.2d at 1275, 38 Cal. Rptr. 2d at 146.

19. *Id.* at 570-71, 888 P.2d at 1273, 38 Cal. Rptr. 2d at 144. The "substantial evidence" standard has been well defined by the courts. *Id.* at 571, 888 P.2d at 1273, 38 Cal. Rptr. 2d at 144. "'In reviewing the evidence on . . . appeal all conflicts must be resolved in favor of the [prevailing party] . . . . [W]hen a [finding] is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the [finding].'" *Id.* (quoting Crawford v. Southern Pac. Co., 3 Cal. 2d 427, 429, 45 P.2d 183, 184 (1935)).

20. *Id.* at 572, 888 P.2d at 1274, 38 Cal. Rptr. 2d at 145. *See* CAL. CONST., ART. III, § 3; California Hotel & Motel Ass'n v. Industrial Welfare Comm'n, 25 Cal. 3d 200, 212, 599 P.2d 31, 38, 157 Cal. Rptr. 840, 847 (1979).

21. *Western States Petroleum*, 9 Cal. 4th at 572, 888 P.2d at 1274, 38 Cal. Rptr. 2d at 145 (following the United States Supreme Court's decision in Chevron, U.S.A. v. Natural Res. Defense Council, Inc., 467 U.S. 837, 844-45 (1984)).

22. *Id.* at 574, 888 P.2d at 1275, 38 Cal. Rptr. 2d at 146.

23. *Id.* at 574, 888 P.2d at 1275-76, 38 Cal. Rptr. 2d at 146-47. The differences being that non-CEQA cases are governed by the "arbitrary and capricious" standard, and the CEQA cases are governed by the "prejudicial abuse of discretion" standard. *Id.*

24. *Id.* at 575, 888 P.2d at 1276, 38 Cal. Rptr. 2d at 147. The court then set down the existing law, rejecting the dictum from *No Oil*, and held "that extra-record evi-

The court then discussed the three exceptions proposed by WSPA.[25] First, extra-record evidence should be admitted to show that an agency has not weighed "all relevant factors."[26] Second, extra-record evidence should be admitted to show that the evidence considered by an agency did not support its decision.[27] The court declined to accept WSPA's assertions, on the grounds that such "exception[s] would swallow the rule."[28] Third, if "in the exercise of reasonable diligence" the evidence was not available at the administrative level, it should be admitted at the traditional mandamus proceeding.[29] The court recognized this exception, but found that WSPA's interpretation of it was too broad.[30] The court held that "[e]xtra-record evidence is admissible under this exception only in those rare instances in which (1) the evidence in question existed *before* the agency made its decision, and (2) it was not possible in the exercise of reasonable diligence to present the evidence to the agency *before* the decision was made so that it could be considered and included in the administrative record."[31]

## III. CONCLUSION

In *Western States Petroleum*, the California Supreme Court held that extra-record evidence is not admissible in traditional mandamus actions challenging quasi-legislative administrative decisions.[32] Additionally, "extra-record evidence can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision."[33]

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dence is generally not admissible in traditional mandamus actions challenging quasi-legislative administrative decisions on the ground that the agency 'has not proceeded in a manner required by law.'" *Id.* at 576, 888 P.2d at 1277, 38 Cal. Rptr. 2d at 148. However, the court added that "in traditional mandamus actions challenging ministerial or informal administrative actions," extra-record evidence will be admitted if the facts are in dispute. *Id.*

25. *Id.* at 576-78, 888 P.2d at 1277-78, 38 Cal. Rptr. 2d at 148-49.

26. *Id.* at 576, 888 P.2d at 1277, 38 Cal. Rptr. 2d at 148. WSPA sought to introduce expert testimony contradicting the expert opinion relied upon by the ARB. *Id.* at 576-77, 888 P.2d at 1277-78, 38 Cal. Rptr. 2d at 148-49.

27. *Id.* at 577, 888 P.2d at 1278, 38 Cal. Rptr. 2d at 149.

28. *Id.* at 577-78, 888 P.2d at 1277-78, 38 Cal. Rptr. 2d at 148-49. In granting such requests, the court would circumvent the notion of deferring to the administrative agency's expertise. *Id.* at 577, 888 P.2d at 1277-78, 38 Cal. Rptr. 2d at 148-49.

29. *Id.* at 578, 888 P.2d at 1278, 38 Cal. Rptr. 2d at 149.

30. *Id.* The WSPA's interpretation "would allow it to introduce . . . expert testimony and reports prepared *after* the ARB adopted the regulations." *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 579, 888 P.2d at 1279, 38 Cal. Rptr. 2d at 150.

This decision will eliminate the strategy of assembling evidence or studies, for the purpose of court challenges, after an agency decision has been made. The decision will also force all those in support or opposition of a particular action to ensure that they have meticulously created a complete record in support of their respective positions. Furthermore, the ruling should reduce litigation and speed up the formulation of regulations and approval of specialized permits from agencies.

JACQUES GARDEN

## XIII. PUBLIC WORKS AND CONTRACTS

*The Los Angeles City Charter does not prohibit the City from requiring bidders for competitive bidding contracts to document and exercise good faith efforts to involve minority and women-owned subcontractors in making their bids:*

**Domar Electric, Inc. v. City of Los Angeles.**

### I. INTRODUCTION

In *Domar Electric, Inc. v. City of Los Angeles*,[1] the California Supreme Court held that a city's minority outreach program contractors seeking city contracts to make a good faith effort to involve minority and woman-owned subcontractors does not violate the City's Charter.[2] The Los Angeles City Charter requires the City to award contracts to the "'lowest and best regular responsible bidder.'"[3] Conversely, the outreach program in question, based on social policy, requires that bidders demonstrate that they attempted to use minority and women-owned subcontractors in making their bids.[4]

Unfortunately, the supreme court's holding in *Domar* and its honorable attempt to support the outreach program will work against the best economic interest of the City. Clearly, the city's intent, as manifested in its Charter, is to award contracts to the lowest bidder, thereby saving the City money.[5] The addition of the good faith requirement, however, is incompatible with this intent because the requirements can only work to disqualify the lowest bidder and can never actually lower bids, despite the court's standing to the contrary.[6] The addition of this good faith requirement will no doubt lead to increased contractual costs and contin-

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1. 9 Cal. 4th 161, 885 P.2d 934, 36 Cal Rptr. 2d 521 (1994). Justice Baxter wrote the majority opinion, in which Chief Justice Lucas and Justices Mosk, Kennard, George, and Werdegar concurred. Justice Arabian wrote a separate dissenting opinion. *Id.* at 179-88, 885 P.2d at 944-50, 36 Cal. Rptr. 2d at 531-37 (Arabian, J., dissenting).

2. *Id.* at 165, 885 P.2d at 935, 36 Cal. Rptr. 2d at 522; *cf.* Feriozzi Co., Inc. v. City of Atlantic City, 628 A.2d 821, 829 (N.J. Super Ct. Law Div. 1993) (finding that City's affirmative action plan seeking, but not requiring, 10% minority participation in public contracts did not deny nonminority contractors equal protection).

3. *Domar*, 9 Cal. 4th at 165, 885 P.2d at 935, 36 Cal. Rptr. 2d at 522 (quoting LOS ANGELES, CAL., CITY CHARTER § 386(f) (1991) (amended 1992)).

4. *Id.* at 166-67, 885 P.2d at 935-36, 36 Cal. Rptr. 2d at 522-23.

5. *See* LOS ANGELES, CAL., CITY CHARTER § 386(f) (1992); *Domar*, 9 Cal. 4th at 173, 885 P.2d at 934, 36 Cal. Rptr. 2d at 527 (quoting 10 EUGENE L. MCQUILLAN, MUNICIPAL CORPORATIONS, *Contracts in General* § 29.29, at 375 (3d ed. 1990)).

6. *See Domar*, 9 Cal. 4th at 179-88, 885 P.2d at 944-50, 36 Cal. Rptr. 2d at 531-37 (Arabian, J., dissenting).

ued tension over the issue of affirmative action.[7] Therefore, the decision is, at best, open to criticism, and at worst, detrimental to the City's economic interest.

## II. STATEMENT OF THE CASE

Los Angeles operates under a charter that "requires competitive bidding on contracts involving the expenditure of more than $25,000."[8] The Charter also requires the City to award the contract to the lowest bidder.[9] In 1983, the City adopted an affirmative action program designed to involve minority and women-owned subcontractors in awarding city contracts.[10] Because of subsequent United States Supreme Court decisions limiting affirmative action, the City amended the outreach program.[11] Currently, and at the time Domar filed this action, the program simply requires that bidders for city contracts exercise good faith efforts to involve minority and women-owned subcontractors.[12] The good faith requirement necessitates that bidders submit paperwork stating that they made a good faith effort to involve the target groups.[13] The bidder has three days in which to submit the paperwork after the bid is submitted.[14] If the City does not receive the proper paperwork, the bidder is disqualified.[15]

In October 1991 the city requested bids on a contract to provide computer services at a City sewage treatment plant.[16] Domar Electric, Inc.

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7. *See id.* (Arabian, J., dissenting).

8. *Id.* at 165, 885 P.2d at 935, 36 Cal. Rptr. 2d at 522 (citing LOS ANGELES, CAL. CITY CHARTER § 386(f) (1991) (amended 1992)).

9. *Id.*

10. *Id.* at 165-66, 885 P.2d at 935, 36 Cal. Rptr. 2d at 522. Executive Directive No. 1-B "declared it was the policy of the City 'to utilize Minority and Women-Owned Business Enterprise[s] [MBE's and WBE's] in all aspects of contracting relating to procurement, construction, and personal services.'" *Id.* at 165, 885 P.2d at 935, 36 Cal. Rptr. 2d at 522.

11. *Id.*; *see* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding mandatory set-asides for minorities violate the Equal Protection Clause of the United States Constitution).

12. *Domar*, 9 Cal. 4th at 166, 885 P.2d at 935-36, 36 Cal. Rptr. 2d at 522-23.

13. *Id.* at 168, 885 P.2d at 937, 36 Cal. Rptr. 2d at 524.

14. *Id.*

15. *Id.* The "bidder's checklist" provided in relevant part, "'I am aware that the failure to submit the appropriate pages of the Proposal, properly completed and signed, may render my bid non-responsive and subject to rejection by the Board of Public Works.'" *Id.* (quoting the Outreach Program's "bidder's checklist").

16. *Id.*

submitted the lowest bid on the project—$3,335,450.[17] It failed, however, to submit the required good faith paperwork within the three-day time period and was subsequently disqualified as a non responsive bidder.[18] The City then awarded the contract to the next lowest bidder, Bailey Controls Company, which bid $3,987,622, and Domar sought a writ of mandamus from the superior court.[19] The superior court denied the petition for the writ.[20] Domar appealed on several grounds and the court of appeal reversed the lower court's judgment.[21] The City's petition for review was then granted.[22]

## III. TREATMENT

### A. *Majority Opinion*

The court began by reviewing the applicable City Charter provisions which require competitive bidding on all contracts involving more than $25,000.[23] The court framed the issue to be whether the Charter precludes the Los Angeles Board of Public Works from requiring bidders to make a good faith effort to comply with the City's subcontractor outreach program.[24]

Applying the rule that "charter provisions are construed in favor of the exercise of the power over municipal affairs and 'against the existence of any limitation or restriction thereon which is not expressly stated in the [C]harter, . . . '" the court concluded that the outreach program did not violate of the City's Charter despite the fact that the charter does not expressly authorize such a requirement.[25] Examining whether the outreach program contravenes the purposes of competitive bidding, the court noted that section 386(f) of the Los Angeles City Charter "'guard[s] against favoritism, improvidence, extravagance, fraud and corruption; [prevents] the waste of funds; and [obtains] the best economic result for

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17. *Id.* at 168, 885 P.2d at 937, 36 Cal. Rptr. 2d at 524.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 168-69, 885 P.2d at 937, 36 Cal. Rptr. 2d at 524.
22. *Id.*
23. *Id.* at 169-70, 885 P.2d at 937-38, 36 Cal. Rptr. 2d at 524-25. Competitive bidding requires that bidders submit their proposals, and if necessary, specifically detail the costs of their proposal. *Id.* at 169, 885 P.2d at 938, 36 Cal. Rptr. 2d at 525. The City then reviews the proposals and awards the contract "'to the lowest and best regular responsible bidder furnishing satisfactory security for its performance.'" *Id.* at 170, 885 P.2d at 938, 36 Cal. Rptr. 2d at 525 (quoting LOS ANGELES, CAL., CITY CHARTER § 386(f) (1991) (amended 1992)).
24. *Id.* at 170, 885 P.2d at 938, 36 Cal. Rptr. 2d at 525.
25. *Id.* at 171, 885 P.2d at 939, 36 Cal. Rptr. 2d at 526 (quoting City of Grass Valley v. Walkinshaw, 34 Cal. 2d 595, 599, 212 P.2d 894, 897 (1949)).

the public.'"[26] The court then applied these goals to the instant case and concluded that there is "no conflict between the outreach program and the purposes of competitive bidding."[27]

Addressing several of Domar's arguments,[28] the court concluded that they were without merit.[29] Accordingly, the court held that "the Board's outreach program does not violate the competitive bidding provisions set forth in the City's Charter."[30]

### *B. Justice Arabian, Dissenting*

Justice Arabian sharply disagreed with the majority and concluded that the outreach program is incompatible with the City Charter.[31] According to Justice Arabian, the outreach program promotes social policy, while the competitive bidding process promotes economic policy.[32]

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26. *Id.* at 173, 885 P.2d at 940, 36 Cal. Rptr. 2d at 527 (quoting Graydon v. Pasadena Redevelopment Agency, 104 Cal. App. 3d 631, 636, 164 Cal. Rptr. 56, 59 (Cal. Ct. App. 1980), *cert. denied*, 449 U.S. 983 (1980)). Ironically, the outreach program as applied in *Domar* did not comply with these purposes since Domar's disqualification cost the City approximately an additional $650,000 to contract with the next lowest bidder. *See id.* at 174 n.7, 885 P.2d at 941 n.7, 36 Cal. Rptr. 2d at 528 n.7.

27. *Id.* at 173, 885 P.2d at 940, 36 Cal. Rptr. 2d at 527. The court reasoned that "competitive bidding requirements necessarily imply equal opportunities," the outreach program "seeks to guard against favoritism and improvidence by prime contractors," and the outreach program will save the City money. *Id.* at 173-74, 885 P.2d at 940-41, 36 Cal. Rptr. 2d at 527-28 (quoting 64 AM. JUR. 2D *Public Works and Contracts* § 37 (1972)).

28. Domar argued that there was no evidence that the outreach program would "promote competition or reduce prices" or "lead to lower prices." *Id.* at 174, 885 P.2d at 941, 36 Cal. Rptr. 2d at 528. Further, Domar claimed that the Mayor did not have the authority to issue the Directives that gave rise to the outreach program and thus the "program is void." *Id.* at 178 n.13, 885 P.2d at 944 n.13, 36 Cal. Rptr. 2d at 531 n.13. Domar relied on precedents that disallowed preferences to contractors who were not the lowest bidders. *Id.* at 176, 178, 885 P.2d at 942, 943, 36 Cal. Rptr. 2d at 529, 530; *see* Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987); City of Inglewood-L.A. County Civic Ctr. Auth. v. Superior Court, 7 Cal. 3d 861, 500 P.2d 601, 103 Cal. Rptr. 689 (1972); Neal Publishing Co. v. Rolph, 169 Cal. 190, 146 P. 659 (1915). The court distinguished those cases by implying that, under the outreach program, contracts still *could* go to the lowest bidders. *Domar*, 9 Cal. 4th at 176-78, 885 P.2d at 942-43, 36 Cal. Rptr. 2d at 529-30.

29. *Domar*, 9 Cal. 4th at 174-78, 885 P.2d at 941-44, 36 Cal. Rptr. 2d at 528-31.

30. *Id.* at 178, 885 P.2d at 944, 36 Cal. Rptr. 2d at 531.

31. *Id.* at 179, 885 P.2d at 944, 36 Cal. Rptr. 2d at 531 (Arabian, J., dissenting).

32. *Id.* (Arabian, J., dissenting).

Arabian construed the charter to require a contract "be awarded to the lowest bidder unless it is found that he is not responsible, i.e., not qualified to do the particular work under construction."[33] Any limitation that deviates from this requirement must be void.[34] Arabian also noted that the outreach program in fact "narrows the field of qualified bidders, undermines meaningful competition and can only lead to the city's fiscal detriment by contributing to higher contractual costs."[35] Arabian correctly points out that in the present case, the outreach program worked to the City's fiscal detriment by disqualifying the lowest bidder, which cost the City approximately $650,000.[36]

Finally, Arabian disagreed with the majority in its assertion that the outreach program actually promotes market competition, finding "no empirical or intuitive support for this assumption."[37] Therefore, he concluded that requiring general contractors to provide evidence of good faith efforts to comply with the outreach program eliminates competition and, therefore, "plainly contravenes" the City Charter.[38]

## IV. IMPACT AND DISCUSSION

Regardless of one's opinion of the merit of affirmative action, *Domar* clearly demonstrates the ineffectiveness of toothless affirmative action programs.[39] The Charter provision in *Domar* does not mandate minority

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33. *Id.* at 180, 885 P.2d at 945, 36 Cal. Rptr. 2d at 532 (Arabian, J., dissenting) (quoting City of Inglewood-L.A. County Civic Ctr. Auth. v. Superior Court, 7 Cal. 3d 861, 867, 500 P.2d 601, 604, 103 Cal. Rptr. 689, 692 (1972)).

34. *Id.* (Arabian, J., dissenting); *see* San Francisco Fire Fighters v. City & County of San Francisco, 68 Cal. App. 3d 896, 902-03, 137 Cal. Rptr. 607, 611 (1977).

35. *Domar*, 9 Cal. 4th at 181, 885 P.2d at 945, 36 Cal. Rptr. 2d at 532 (Arabian, J., dissenting).

36. *Id.* at 181, 185, 885 P.2d at 946, 948, 36 Cal. Rptr. 2d at 533, 535 (Arabian, J., dissenting).

37. *Id.* at 184, 885 P.2d at 947, 36 Cal. Rptr. 2d at 534 (Arabian, J., dissenting).

38. *Id.* at 188, 885 P.2d at 950, 36 Cal. Rptr. 2d at 537 (Arabian, J., dissenting).

39. The future of affirmative action in California and the United States is currently a hot political topic. *See generally* Virginia Ellis, *Wilson Attacks Affirmative Action Laws*, L.A. TIMES, Dec. 31, 1994, at A1 (discussing governor Pete Wilson's position in favor of abolishing state affirmative action). A recent United States Supreme Court decision, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), found that affirmative action is subject to strict scrutiny, as other race-based classifications. 488 U.S. at 493-511 (holding that the affirmative action program was not justified by a compelling government interest and was overbroad for its purpose of countering prior discrimination). In California, the issue is especially acute. California will have a ballot measure before the voters in 1996 designed to end affirmative action in the state. *See generally* Susan Yoachum, *Wilson for Affirmative Action Ban; Governor to Back Ballot Measure*, S.F. CHRON., Feb. 25, 1995, at A1 (discussing Governor Wilson's anti-affirmative action stand and upcoming ballot measure for 1996 that will put the issue to the voters). The number of articles and commentaries dealing with affirmative

participation in City projects.[40] Rather, the contractor need only state that he made a good faith effort to involve minority and women-owned subcontractors in the bidding process.[41] Further, the bidder need not actually use minority owned subcontractors; he must merely complete paperwork stating that he made an effort to do so.[42] Therefore, "a bidder gains no advantage from meeting the anticipated participation level nor a disadvantage from not meeting it."[43]

Justice Arabian's concern that the decision in *Domar* could cost the taxpayers of Los Angeles millions of dollars per year seems warranted.[44] By disqualifying Domar, the City paid more than $650,000 in additional contracting costs.[45] Further, the outreach program's good faith requirement will disqualify the lowest bidders if they fail to complete and submit the necessary paperwork on time.[46] In the present case, for example, Domar was the low bidder by over $650,000.[47] But, because they did not submit the good faith paperwork to the city within the three-day time period, they were disqualified as a bidder, costing the city an additional $650,000 to contract with the next lowest bidder.[48] In a day where public school teachers are seeing their salaries cut on an annual basis and in

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action is immense. *See, e.g.*, John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 314 (1994) (summarizing arguments against affirmative action); Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79 (1994) (discussing the two most recent supreme court cases purporting to settle the affirmative action issue: *J.A. Croson* and Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990)); Ferdinand S. Tinio, Annotation, *Affirmative Action Benefiting Particular Employees or Prospective Employees as Violating Other Employees' Rights Under Federal Constitution or Under Federal Civil Rights Legislation—Supreme Court Cases*, 92 L. Ed. 2d 849 (listing cases considering whether certain affirmative action plans constitute unlawful reverse discrimination). *See generally* 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 776-783 (9th ed. 1988 & Supp. 1994) (discussing affirmative action in relation to California law and collecting sources).

40. *See Domar*, 9 Cal. 4th at 179-88, 885 P.2d at 944-50, 36 Cal. Rptr. 2d at 531-37 (Arabian, J., dissenting).

41. *Id.* at 167-68, 885 P.2d at 935-37, 36 Cal. Rptr. 2d at 523-24.

42. *Id.* at 168, 885 P.2d at 937, 36 Cal. Rptr. 2d at 524.

43. *Id.*

44. *See id.* at 179-88, 885 P.2d at 944-50, 36 Cal. Rptr. 2d at 531-37 (Arabian, J., dissenting).

45. *See id.* at 174 n.7, 885 P.2d at 941 n.7, 36 Cal. Rptr. 2d at 528 n.7.

46. *See id.* at 179-88, 885 P.2d at 944-50, 36 Cal. Rptr. 2d at 531-37 (Arabian, J., dissenting).

47. *Id.* at 185, 885 P.2d at 948, 36 Cal. Rptr. 2d at 535. (Arabian, J., dissenting).

48. *Id.* (Arabian, J., dissenting).

an era where public funding of every kind is under close scrutiny, it is ironic that the courts allow bureaucratic barriers to be erected that cost the taxpayers of California so much, when they can afford, and are willing to pay so little.

While minority and women-owned businesses should be given every possible opportunity to participate at the same level as other businesses and contractors, the outreach program presented in *Domar* fails to accomplish this goal. When bureaucratic attempts to legislate and ensure minority participation work against the clear intent of a city's charter and against the best interest of the citizens of that city, the courts must step in and find such programs illegal.

The outreach program as applied in *Domar* met neither its own goals nor the City's goals. First, the City Charter is designed to award contracts to the lowest bidder.[49] In the present case, that did not happen. Instead, the city paid an additional $650,000 that would not have been required if the outreach program had not disqualified Domar for failing to meet the filing deadline. Second, the intent behind the outreach program is to involve minority contractors and subcontractors in the City's contracting awards.[50] Yet, although Domar was disqualified, there was no guarantee that the second lowest bidder would employ a minority or woman-owned firm.[51] Therefore, not only did the outreach program cost the city of Los Angeles more than $650,000 in this one case alone, but it also failed to involve minorities and women in the contracting process.

## V. CONCLUSION

In *Domar*, the court concluded that the Los Angeles City Charter does not prohibit city officials from requiring bidders for city contracts to make a good faith effort to include minority and women subcontractors when presenting bids. The court felt that the additional requirement was consistent with the Charter and could reduce the City's contracting costs. Unfortunately, this assessment is too optimistic. In fact, the decision adversely impacts the economic welfare of Los Angeles. Not only does it

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49. *Id.* at 165, 885 P.2d at 935, 36 Cal. Rptr. 2d at 522 (citing LOS ANGELES, CAL., CITY CHARTER § 386(f)(1991) (amended 1992)).

50. *Id.* at 166, 885 P.2d at 935, 36 Cal. Rptr. 2d at 522. "'It is the policy of the City of Los Angeles to provide Minority Business Enterprises (MBEs), Women Business Enterprises (WBEs) *and all other business enterprises* an equal opportunity to participate in . . . all city contracts.'" *Id.* (quoting Executive Directive No. 1-C (March 6, 1989)).

51. *See id.* at 179-88, 885 P.2d at 944-50, 36 Cal. Rptr. 2d at 531-37 (Arabian, J., dissenting).

mean additional costs for contracting projects, but also it adds one more bureaucratic layer to the contracting process.[52]

PAUL TYLER

52. The factual scenario of the case itself illustrates the problems associated with the court's decision. Specifically, as a result of the good faith requirement, the lowest bidder in *Domar* was disqualified, requiring the city to accept the second lowest bid. This disqualification cost the city more than $650,000 in additional costs, an unfortunate and unnecessary expenditure for Los Angeles in an economy where every dollar counts. Hopefully, the instances where a low bidder is disqualified will be few, but where contracts are bid in the millions of dollars, even one disqualification can be costly.