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California Supreme Court Survey - A Review of Decisions: September 1993-October 1994

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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. ATTORNEYS AT LAW

An attorney's status as "in-house" counsel does not bar the pursuit of retaliatory discharge and implied-in-fact contract claims as long as it does not jeopardize attorney-client privilege; the client's unilateral and unrestricted right to sever the attorney-client relationship does not apply to corporate in-house counsel:
General Dynamics Corporation v. Superior Court.

I. INTRODUCTION

In *General Dynamics Corp. v. Superior Court*, the California Supreme Court considered whether a corporate client possesses an unrestricted right to terminate an in-house counsel with or without cause.[1] The court distinguished the corporate client-corporate counsel relationship from the traditional attorney-client relationship.[2] The court found that the unilateral right to sever the professional relationship in the traditional attorney-client setting does not extend to the termination of in-house counsel.[3]

The defendant relied upon *Fracasse v. Brent*[4] to support its contention that a client holds an unrestricted right to terminate in-house counsel at any time and for any reason.[5] The trial court overruled the defendant's demurrer.[6] The court of appeal denied General Dynamic's

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1. 7 Cal. 4th 1164, 876 P.2d 487, 32 Cal. Rptr. 2d 1 (1994). Justice Arabian authored the unanimous opinion of the court, with Chief Justice Lucas and Justices Mosk, Kennard, Baxter, George, and Turner concurring. *Id.* at 1192, 876 P.2d at 505, 32 Cal. Rptr. 2d at 19.

2. *Id.* at 1174-75, 876 P.2d at 493, 32 Cal. Rptr. 2d at 7.

3. *Id.* The defendant, General Dynamics, fired Andrew Rose in 1991 after 14 years of employment. *Id.* at 1170, 876 P.2d at 490, 32 Cal. Rptr. 2d at 4. Rose filed a complaint alleging that General Dynamics wrongfully terminated his employment for the following reasons:

(1) General Dynamics wished to cover up evidence uncovered by Rose of widespread drug use among the members of its workforce.

(2) Rose protested the company's refusal to investigate the electronic bugging of the office of the chief of security.

(3) Rose informed General Dynamics that its salary policy might violate the Fair Labor Standard Act.

Id. at 1170-71, 876 P.2d at 490-91, 32 Cal. Rptr. 2d at 4-5. General Dynamics demurred on the grounds that the complaint failed to properly state a claim for relief. *Id.* at 1171, 876 P.2d at 491, 32 Cal. Rptr. 2d at 5.

4. 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972). For a discussion of this case, see *infra* note 10 and accompanying text.

5. *General Dynamics*, 7 Cal. 4th at 1173, 876 P.2d at 492, 32 Cal. Rptr. 2d at 6.

6. *Id.* at 1171, 876 P.2d at 491, 32 Cal. Rptr. 2d at 5.

petition for a writ of mandate on the ground that the complaint adequately stated a claim for relief.[7]

II. TREATMENT

The California Supreme Court initially distinguished the duties of in-house counsel with those of attorneys employed in law firms.[8] The court found that the economic dependence of in-house counsel on a single employer made them much more similar to corporate employees than an attorney working independently for numerous clients.[9] In this regard, the court rejected the defendant's reliance upon *Fracasse*[10] by limiting the client's unrestricted right to discharge an attorney to cases handled on a contingency fee basis.[11] The court recognized that although a corporate client does indeed possess a unilateral right to discharge its corporate counsel, such a right may not be absolute and may not always be exercised with legal impunity.[12]

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7. *Id.*

8. *Id.* at 1172, 876 P.2d at 491, 32 Cal. Rptr. 2d at 5; *see* Grace M. Giesel, *The Ethics of Employment Dilemma of In-House Counsel*, 5 GEO. J. LEGAL ETHICS 535 (1992).

9. *General Dynamics*, 7 Cal. 4th at 1172, 876 P.2d at 491, 32 Cal. Rptr. 2d at 5. The court also pointed out pressures that are unique to the position of in-house counsel. The economic dependence upon a single client dictates that the attorney must endeavor to further the objectives of his or her company, yet the ethical regulations imposed by the Rules of Professional Responsibility may conflict with this effort. *Id.* This may force an attorney to choose between adhering to the ethical standards of the legal profession and an employer's economic needs. *Id.* The court reasoned that without judicial redress for wrongful termination, corporate counsel would be less likely to fulfill their ethical obligation of protesting activities which violate public policy. *Id.*

10. Fracasse v. Brent, 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972), involved an attorney-client relationship based on a contingent fee contract. The *Fracasse* court established a client's unilateral right to sever the attorney-client relationship at any time. *Id.* However, in so doing, the client must compensate the attorney for the reasonable value of the services rendered upon recovery. *See General Dynamics*, 7 Cal. 4th at 1175, 876 P.2d at 493, 32 Cal. Rptr. 2d at 7.

11. *General Dynamics*, 7 Cal. 4th at 1176, 876 P.2d at 494, 32 Cal. Rptr. 2d at 8. *See generally* 1 B.E. WITKIN, CALIFORNIA PROCEDURE, *Attorneys* §§ 82-83 (3d ed. 1985 & Supp. 1994) (discussing a client's absolute right to discharge an attorney); 7 CAL. JUR. 3D *Attorneys at Law* §§ 77-187 (1989 & Supp. 1994) (discussing the attorney-client relationship and the various methods for its termination).

12. *General Dynamics*, 7 Cal. 4th at 1177, 876 P.2d at 495, 32 Cal. Rptr. 2d at 9. The corporate client may be liable for lost wages and other relevant damages. *Id.*

The court examined the appropriate classification of the contract at issue and determined that General Dynamics' course of conduct created an implied-in-fact contract which permitted termination only for good cause.[13] In verifying the presence of all the elements necessary to establish an implied-in-fact contract, the court found that the claim should withstand a general demurrer.[14] The court reasoned that nothing inherent in the duties of an in-house counsel position should hinder the right of an attorney-employee to bring such an action since other corporate employees are free to do so.[15]

The court next considered the merits of the plaintiff's retaliatory discharge claim.[16] The majority noted that although forty-three jurisdictions have adopted this cause of action, California case law sets forth two prominent requirements for bringing such claims.[17] The first requirement is that "the public policy at issue must be one that is not only 'fundamental' but is clearly established in the Constitution and positive law of the state."[18] The second requirement dictates that the policy implicated by the employee's conduct must truly be one that benefits the public at large rather than the interests of a particular class of persons.[19]

Additionally, the court noted a third characteristic of cases involving wrongful discharge in violation of public policy.[20] The court emphasized

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13. *Id.* at 1178, 876 P.2d at 496, 32 Cal. Rptr. 2d at 9-10 (stating "these pleadings . . . adequately allege that a 'course of conduct, including various oral representations, created a reasonable expectation' that the plaintiff would not be terminated without good cause").

14. *Id.* at 1178, 876 P.2d at 495, 32 Cal. Rptr. 2d at 9-10. The court identified the elements of an implied-in-fact contract as "a 'course of conduct, including various oral representations, creat[ing] a reasonable expectation' that plaintiff would not be terminated without good cause." *Id.* (quoting Foley v. Interactive Data Corp., 47 Cal. 3d 654, 675, 765 P.2d 373, 383, 254 Cal. Rptr. 211, 221 (1988)).

15. *Id.* at 1178, 876 P.2d at 496, 32 Cal. Rptr. 2d at 10. The court relied upon it's earlier determination that an in-house attorney works in a position similar to that of any corporate employee. *Id.*

16. *Id.* at 1180, 876 P.2d at 496, 32 Cal. Rptr. 2d at 11. The court pointed out that this tort is separate and distinct from an action based in contract because it arises out of the employer's obligation to comply with public policy. *Id.*

17. *Id. See generally* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* §§ 163-170 (9th ed. 1987 & Supp. 1994) (discussing wrongful termination in violation of law or public policy); 29 CAL. JUR. 3D *Employer and Employee* §§ 62-67 (1986 & Supp. 1994) (discussing the grounds for discharge of an employee and the employee's remedies for wrongful discharge).

18. *General Dynamics*, 7 Cal. 4th at 1178, 876 P.2d at 497, 32 Cal. Rptr. 2d at 11; *see also* Gantt v. Sentry Ins., 1 Cal. 4th 1083, 824 P.2d 680, 4 Cal. Rptr. 2d 874 (1992) (outlining the elements required for a claim alleging wrongful discharge in violation of public policy).

19. *General Dynamics*, 7 Cal. 4th at 1180, 876 P.2d at 497, 32 Cal. Rptr. 2d at 11.

20. *Id.* at 1180-81, 876 P.2d at 497, 32 Cal. Rptr. 2d at 11 (stating that this third characteristic may be of "surpassing significance" in the context of in-house counsel

that the greater goal of protecting the public at large is facilitated by shielding individual employees from retaliation.[21] Citing *Foley*, the court noted that such tort actions protect the public interest be protecting employees who refuse to commit criminal acts or attempt to report criminal conduct and other unethical or illegal practices.[22]

The court recognized that the policy underlying wrongful discharge claims originates from the public's desire to prevent an employer from coercively subverting another person's constitutional and legal interests.[23] Thus, the purpose of the cause of action lies in safeguarding the public good rather than protecting a particular person's interest in employment.[24] Accordingly, the court recognized that the Rules of Professional Conduct require an attorney to act in such a was as to promote the public interest at large.[25] The court found that the dual interest between serving the employer's interests and upholding the ethical standards of the profession place in-house counsel in a precarious position which justifies greater legal protection.[26]

The court next evaluated the potential problems created by allowing in-counsel to pursue retaliatory discharge claims.[27] However, the court's greatest concern centered on the possibility that the attorney-client privilege might be jeopardized.[28] Once again, the court found no reason to

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cases).

21. *Id.*

22. *Id.* (quoting Foley v. Interactive Data Corp., 47 Cal. 3d 654, 670, 765 P.2d 373, 380, 254 Cal. Rptr. 211, 218 (1988)).

23. *Id.* at 1180-81, 876 P.2d at 497, 32 Cal. Rptr. 2d at 11; *see also* Foley, 47 Cal. 3d 654, 670, 765 P.2d 373, 380, 254 Cal. Rptr. 211, 218 (recognizing the public policy served by encouraging claims alleging wrongful termination).

24. *General Dynamics*, 7 Cal. 4th at 1181, 876 P.2d at 497, 32 Cal.Rptr. 2d at 11.

25. *Id.* at 1181-82, 876 P.2d at 498, 32 Cal. Rptr. 2d at 12. The court again referred to the financial dependence of an in-house attorney on his or her corporate employer. *Id.*

26. *Id.* at 1182, 876 P.2d at 498, 32 Cal. Rptr. 2d at 12. The court stated: "[I]n-house counsel, forced to choose between the demands of the employer and the requirements of a professional code of ethics have, if anything, an even more powerful claim to judicial protection than their nonprofessional colleagues." *Id.; see* Sara A. Corello, Note, *In-House Counsel's Right to Sue for Retaliatory Discharge*, 92 COLUM. L. REV. 389 (1992).

27. *General Dynamics*, 7 Cal. 4th at 1182, 876 P.2d at 498, 32 Cal. Rptr. 2d at 12.

28. *Id.* Such actions which implicate privileged information might damage the attorney-client relationship by discouraging corporate employers from candidly sharing information for fear that it might ultimately be used against them. *Id.; see also* Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991) (holding that the wrongfully discharged in-house counsel cannot maintain a retaliatory discharge action partly because it would

treat the corporate attorney differently from the non-attorney corporate employee.[29] However, the court expressly rejected any dilution of the attorney-client privilege between the in-house counsel and the corporate client.[30] The court decided that while the in-house counsel may pursue a retaliatory discharge action where a non-attorney in the same situation may do so, "where the elements of a wrongful discharge in violation of fundamental public policy claim cannot . . . be fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege."[31]

III. CONCLUSION

The California Supreme Court recognized the prevalence of in-house counsel in today's corporate society and the need to offer legal protection to such employees who may be torn between the competing interests of their professional code of ethics and the demands of their employer.[32] The court determined that corporate counsel working in-house more closely resembles non-attorney corporate employees than traditional attorneys.[33] As such, corporate in-house counsel require access to the judicial remedies afforded to their non-attorney corporate counterparts in wrongful termination claims.

The court, however, required the dismissal of such suits when they present a likelihood of breaching the attorney-client privilege. This safeguard should serve to protect the sanctity of the attorney-client relationship.[34] Thus, this decision should function as an effective compromise which protects a variety of interests, including those of the general public, the corporate in-house counsel employee and the attorney-client privilege.

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adversely affect the attorney-client relationship).

29. *General Dynamics*, 7 Cal. 4th at 1185-86, 876 P.2d at 500-02, 32 Cal. Rptr. 2d at 14-15.

30. *Id.* at 1190, 876 P.2d at 503-04, 32 Cal. Rptr. 2d at 18.

31. *Id.* at 1190, 876 P.2d at 503-04, 32 Cal. Rptr. 2d at 17-18. The court stated that judges should take "an aggressive managerial role" in handling these cases so as to "minimize the dangers to the legitimate privilege interests." *Id.* at 1191, 876 P.2d at 504, 32 Cal. Rptr. 2d at 18. Further, the court noted that an attorney who brings such a suit and ultimately loses may be subject to disciplinary proceedings by the state bar for any disclosure of privileged material. *Id.*

32. *Id.* at 1171, 876 P.2d at 491, 32 Cal. Rptr. 2d at 5.

33. *Id.* at 1172, 876 P.2d at 491, 32 Cal. Rptr. 2d at 5.

34. *Id.* at 1190, 876 P.2d at 503, 32 Cal. Rptr. 2d at 17-18.

II. CONSTITUTIONAL LAW

A. *Under the Fourth Amendment, it is constitutionally permissible to operate highway sobriety checkpoints without providing advance notice of the checkpoint to the public:* **People v. Banks.**

I. INTRODUCTION

In *People v. Banks*,[1] the California Supreme Court considered whether it is constitutionally permissible, under the Fourth Amendment,[2] to conduct highway sobriety checkpoints without providing advance notice of the operation of the checkpoint to the public.[3]

The defendant in this case was convicted for driving while under the influence of alcohol after the police arrested her at a sobriety checkpoint.[4] The defendant contended that her arrest was unlawful pursuant to the Fourth Amendment because the sobriety checkpoint did not adhere to previously established guidelines regulating the operation of sobriety checkpoints.[5] The court held that the police were not constitutionally required to give advance notice.[6] In deciding this issue, the court considered whether, in light of *Michigan State Police Department v. Sitz*,[7] advance notice was constitutionally required to operate such a checkpoint.[8]

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1. 6 Cal. 4th 926, 863 P.2d 769, 25 Cal. Rptr. 2d 524 (1993). Justice George wrote the majority opinion, in which Chief Justice Lucas and Justices Kennard, Arabian, and Baxter concurred. *Id.* at 931-49, 836 P.2d at 769-82, 25 Cal. Rptr. 2d at 524-37. Justice Panelli wrote a dissenting opinion, in which Justice Mosk concurred. *Id.* at 949-51, 863 P.2d at 782-84, 25 Cal. Rptr. 2d at 537-39 (Panelli, J., dissenting).

2. U.S. CONST. amend. IV. The relevant portion of the Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." *Id.*

3. *Banks*, 6 Cal. 4th at 931, 863 P.2d at 769, 25 Cal. Rtpr. 2d at 524.

4. *Id.*

5. *Id.* at 932, 863 P.2d at 770, 25 Cal. Rptr. 2d at 525.

6. *Id.* at 948-49, 863 P.2d at 781-82, 25 Cal. Rptr. 2d at 536-37.

7. 496 U.S. 444 (1990).

8. *Banks*, 6 Cal. 4th at 934-35, 863 P.2d at 772, 25 Cal. Rptr. 2d at 527.

II. TREATMENT OF THE CASE

A. *Majority Opinion*

The majority prefaced its opinion by explicitly rejecting the defendant's interpretation of *Ingersoll v. Palmer*[9] as holding that advance notice is required in order to operate sobriety checkpoints.[10] The court noted that the checkpoint in *Ingersoll* satisfied all of the minimum intrusiveness factors.[11] Therefore, the issue of whether the absence of the advance publicity factor would negate the constitutionality of the checkpoint[12] was neither at issue nor examined at length in the analysis.[13]

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9. 43 Cal. 3d 1321, 743 P.2d 1299, 241 Cal. Rptr. 42 (1987). In *Ingersoll*, a group of California taxpayers challenged the constitutionality of a sobriety checkpoint program implemented by a local police department. *Id.* at 1325-27, 743 P.2d at 1302-03, 241 Cal. Rptr. at 45-46. The court laid out several factors necessary to evaluate the intrusiveness of sobriety checkpoints. *Id.* at 1341-47, 743 P.2d at 1313-17, 241 Cal. Rptr. at 56-60. One such factor was whether the authorities gave sufficient advance publicity of the checkpoint. *Id.* at 1346-47, 743 P.2d at 1316-17, 241 Cal. Rptr. at 60. The court held that the steps taken by the police department, including giving advance notice of the checkpoint, adequately minimized the intrusiveness of the search. *Id.* at 1347, 743 P.2d at 1317, 241 Cal. Rptr. at 60.

10. *Id.* at 1346-47, 743 P.2d at 1316-17, 241 Cal. Rptr. at 60. The defendant argued that the *Ingersoll* court, in concluding that the sobriety checkpoint was preceded by advance notice, resumed that "[a]dvance publicity is important to the maintenance of a constitutionally permissible sobriety checkpoint. Publicity [without disclosure of the precise location of the checkpoint] both reduces the intrusiveness of the stop and increases the deterrent effect of the roadblock." *Id.* at 1346, 743 P.2d at 1316, 241 Cal. Rptr. at 60.

11. *Banks*, 6 Cal. 4th at 938, 836 P.2d at 774, 25 Cal. Rptr. 2d at 529. The *Ingersoll* court listed eight factors to be evaluated in determining whether a sobriety checkpoint adequately minimizes the intrusiveness toward motorists. *Ingersoll*, 43 Cal. 3d at 1341-47, 743 P.2d at 1313-17, 241 Cal. Rptr. at 56-60. The factors are as follows:

(1) The decision, selection, and procedures for establishing a sobriety check point are made by supervisory personnel.

(2) The procedure in which motorists are stopped is neutrally computed.

(3) Adequate safety procedures are implemented, such as signals warning oncoming motorists of the checkpoint.

(4) The location of the checkpoint is reasonable and determined by policy making personnel.

(5) The time and length of the operation of the checkpoint are indicative that the law enforcement personnel exercised good judgment.

(6) The checkpoint adequately conveys to motorists that the nature of the stop is on the part of law enforcement officials.

(7) The duration and characterization of the stop is kept to a minimum.

(8) The public is given advance notice of the checkpoint.

Id.

12. However, the defendant argued that checkpoints which operate without providing advance notice are unconstitutional. *Banks*, 6 Cal. 4th at 935, 863 P.2d at 772, 25 Cal. Rptr. 2d at 527; *see* People v. Morgan, 221 Cal. App. 3d Supp. 1, 270 Cal. Rptr. 597 (1990) (holding that sobriety checkpoints conducted in the absence of ad-

The court reasoned that the Supreme Court's decision in *Sitz* determined that advance publicity was not required in order to operate a sobriety checkpoint.[14] The court expounded that the rationale behind the advance publicity factor was both to minimize the intrusiveness of the checkpoint and to discourage motorists from driving while intoxicated because the checkpoint would serve as a deterrent, neither of which are constitutional requirements under *Sitz*.[15]

The court further reasoned that *Sitz* considered both subjective and objective criteria in evaluating whether the checkpoint violated the defendant's Fourth Amendment rights[16] and concluded that both criteria had been satisfied.[17] The court noted that the objective intrusion of requiring the defendant to stop at the checkpoint would be the same as requiring the defendant to stop at a border crossing, which has been upheld as constitutionally permissible.[18]

Additionally, the court explained that the subjective intrusion, characterized by creating surprise and apprehension in the defendant, was also within constitutional bounds because the defendant motorist may perceive the officer's authority and realize that other people are being stopped, thus serving to reduce the fear and discomfort of the intrusion.[19] The court concluded that the intrusion analysis in *Sitz* clearly advocates that, while advance notice may serve to lessen the surprise and delay, such notice is not constitutionally required in order to justify a sobriety checkpoint.[20]

The court further rationalized that, in some circumstances, such as during holiday weekends and after sporting events, the general policy

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vance notice are unconstitutional), *overruled by Banks*, 6 Cal. 4th 926, 863 P.2d 763, 25 Cal. Rptr. 2d 524 (1993). *See generally* Clark H. Cameron, Note, Ingersoll v. Palmer: *Have Sobriety Checkpoints Driven the Fourth Amendment Too Far?*, 17 SW. U. L. REV. 261 (1987) (analyzing the constitutionality of sobriety checkpoints).

13. *Banks*, 6 Cal. 4th at 938, 863 P.2d at 774, 25 Cal. Rptr. 2d at 529. The court stated that, "[a]lthough our decision in *Ingersoll* did not determine explicitly whether each of the safeguards discussed in that opinion was essential to the constitutional validity of a sobriety checkpoint, the United States Supreme Court's subsequent decision in *Sitz* demonstrates that advance publicity is not a constitutionally required prerequisite." *Id.* at 935, 863 P.2d at 772, 25 Cal. Rptr. 2d at 527.

14. *Id.* at 943, 863 P.2d at 778, 25 Cal. Rptr. 2d at 533.

15. *Id.* at 942, 863 P.2d at 777, 25 Cal. Rptr. 2d at 532.

16. *Id.* (citing *Sitz*, 496 U.S. at 451-52).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 943, 836 P.2d at 778, 25 Cal. Rptr. 2d at 533.

goal of deterring people from driving under the influence of alcohol is often better served by not providing advance notice because motorists would not know where the checkpoints would be located and thus could not easily avoid them.[21] Furthermore, financial constraints may limit the ability of law enforcement agencies to publicize sobriety checkpoints.[22]

The court noted that even before the Supreme Court's decision in *Sitz*, the great weight of authority held that advance publicity is not necessary to operate a sobriety checkpoint.[23] Thus, the court concluded that maintaining a sobriety checkpoint without advance notice in itself was not unconstitutional under the Fourth Amendment.[24]

B. Justice Panelli's Dissenting Opinion

In support of his dissenting opinion, Justice Panelli argued that there are circumstances where the absence of advance publicity, in conjunction with other factors, could lead to a conclusion that a checkpoint is unconstitutional.[25] Justice Panelli reasoned that the majority minimized the importance of advance publicity by stating that the absence of such publicity is not per se unconstitutional.[26] Justice Panelli warned that the majority interpretation would dissuade law enforcement officials from engaging in advance publicity when they erect sobriety checkpoints because advance notice is no longer a factor which needs to be considered.[27]

Justice Panelli noted that the majority's reliance on *Sitz* is misplaced because *Sitz* dealt with the constitutionality of a Michigan checkpoint system, and is consequently not applicable to California's checkpoint system.[28] In this manner, Justice Panelli concluded that the majority opinion sends an ambiguous message, neither confirming that the ad-

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21. *Id.* at 943-44, 863 P.2d at 778, 25 Cal. Rptr. 2d at 533.

22. *Id.*

23. *Id.* at 945-46, 863 P.2d at 779-80, 25 Cal. Rptr. 2d at 534-35; *see* State v. DeCamera, 237 N.J. 380, 568 A.2d 86, 88 (1989) (reasoning that lack of advance publicity would deter motorists from driving because they would not know the location of the checkpoints); People v. Bartley, 109 Ill. 2d 273 (1985) (noting that lack of publicity preceding a sobriety roadblock did not render the checkpoint unconstitutional).

24. *Banks*, 6 Cal. 4th at 948-49, 863 P.2d at 782, 25 Cal. Rptr. 2d at 537.

25. *Id.* at 950, 863 P.2d at 783, 25 Cal. Rptr. 2d at 538 (Panelli, J., dissenting). *See generally* People v. Carlson, 677 P.2d 310 (Colo. 1984); Elena A. Rodney, *Constitutional Law—Roadside Sobriety Tests May Not Be Administered by Law Enforcement Officials Without Probable Cause to Believe the Defendant Was Driving While Intoxicated*, 14 U. BALT. L. REV. 581, 586 (1985) (analyzing the historic development of sobriety tests and checkpoints and the various challenges to their constitutionality).

26. *Banks*, 6 Cal. 4th at 950, 863 P.2d at 783, 25 Cal. Rptr. 2d at 538 (Panelli, J., dissenting).

27. *Id.* at 950-51, 863 P.2d at 783, 25 Cal. Rptr. 2d at 538 (Panelli, J., dissenting).

28. *Id.* at 951, 863 P.2d at 783, 25 Cal. Rptr. 2d at 538 (Panelli, J., dissenting).

vance publicity requirement is still a factor to be considered under *Ingersoll*, nor expressly removing it as a balancing factor from due process analysis.[29]

III. CONCLUSION

The impact of the California Supreme Court's decision that advance publicity of sobriety checkpoints is not a constitutional prerequisite may be interpreted in two different manners.

On one hand, the court has clearly resolved the troublesome issue regarding the propriety of arrests made at sobriety checkpoints where no advance publicity is given in that such arrests are not per se unconstitutional for lack of advance notice.

However, the dissent notes that the decision may also be perceived as a tacit removal of the advance notice requirement altogether.[30] The court, in making explicit references to the favored policy of deterring motorists from driving while under the influence of alcohol, commented that the success of general deterrence is best achieved when drivers are unaware of sobriety checkpoints because motorists are less inclined to drive when they are aware of the possibility of random sobriety checkpoints.[31]

Nevertheless, it is certain that law enforcement authorities will be buoyed by the announced decision. Under either interpretation, law enforcement officials will be able to conduct more sobriety checkpoints without advance publicity. Police may either compensate for lack of advance notice with a strong showing of the other seven *Ingersoll* factors, or, if the majority opinion is to be construed as no longer requiring advance publicity as a consideration, they need only balance the remaining seven factors in order to lawfully operate sobriety checkpoints.

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29. *Id.* at 951, 863 P.2d at 783-84, 25 Cal. Rptr. 2d at 538-39 (Panelli, J., dissenting).

30. *See supra* note 25 and accompanying text.

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

B. *An injunction does not violate the First Amendment rights of anti-abortion protestors when it prohibits them from demonstrating, picketing and counseling on a public sidewalk in front of an abortion clinic and requires them to conduct all such activities on the public sidewalk directly across the street:* **Planned Parenthood Shasta-Diablo, Inc. v. Williams.**

I. INTRODUCTION

In *Planned Parenthood Shasta-Diablo, Inc. v. Williams*,[1] the California Supreme Court considered whether an injunction violates the First Amendment rights of anti-abortion protesters when it effectively bars the protesters from demonstrating, picketing and counseling on a public sidewalk in front of an abortion clinic and requires them to conduct all such activities on the public sidewalk directly across the street.[2] The

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1. 7 Cal. 4th 860, 873 P.2d 1224, 30 Cal. Rptr. 2d 629, *cert. granted*, 115 S. Ct. 413 (1994). Justice Arabian wrote the majority opinion, in which Chief Justice Lucas and Justices Mosk, Baxter, and George concurred. *Id.* at 864-81, 873 P.2d at 1226-37, 30 Cal. Rptr. 2d at 631-42. The Honorable Gary E. Strankman, presiding justice of the First District Court of Appeal, was assigned by the Acting Chairperson of the Judicial Council, and also concurred in the opinion. Justice Baxter wrote a separate concurring opinion in which Justice George concurred. *Id.* at 881-93, 873 P.2d at 1237-38, 30 Cal. Rptr. 2d at 642-43. Justice Kennard wrote a separate dissenting opinion. *Id.* at 883-91, 873 P.2d at 1238-45, 30 Cal. Rptr. 2d at 643-50.

Following the decision, the United States Supreme Court granted the defendant's petition for a writ of certiorari and vacated the California Supreme Court's decision. *See* Williams v. Planned Parenthood Shasta-Diablo, Inc., 115 S. Ct. 413 (1994). The Court also remanded the case "for further consideration in light of Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516 (1994)." *Id.*

2. *Planned Parenthood Shasta-Diablo, Inc.*, 7 Cal. 4th at 868, 873 P.2d at 1228, 30 Cal. Rptr. 2d at 633. In *Planned Parenthood Shasta-Diablo, Inc.*, a family health care clinic that provides abortion services brought suit against Solano Citizens For Life, an organization that opposes abortion. *Id.* at 865, 873 P.2d at 1226, 30 Cal. Rptr. 2d at 631. The defendants picketed, demonstrated and provided "counseling" services on the public sidewalk directly in front of the plaintiff's clinic, as well as in the clinic's parking lot located immediately in front of the clinic. *Id.* at 865-66, 873 P.2d at 1226, 30 Cal. Rptr. 2d at 631.

The defendants' activities included delaying the entry of cars through the clinic's driveway while "attempting to pass literature through the windows even as they were being rolled up," recording the license numbers of the entering cars, and "pressing anti-abortion literature and plastic replicas of fetuses" on patients as they entered and left the clinic. *Id.* at 865-66, 873 P.2d at 1226-27, 30 Cal. Rptr. 2d at 631-32.

The defendants also advised patients "to reconsider their decision to have an abortion," yelled at the clinic's staff, and photographed the staff and the patients. *Id.*

The plaintiff obtained a temporary restraining order, which restricted picketing to the sidewalk in front of the clinic and prohibited the defendants "from harassing any person entering or leaving the clinic." *Id.* at 866, 873 P.2d at 1227, 30 Cal. Rptr. 2d at 632. Subsequently, the plaintiff obtained a preliminary injunction, which limited the

court found that the injunction: (1) was content neutral, (2) was narrowly tailored to serve a significant governmental interest, and (3) left open ample alternative channels for communication of the information.[3] Thus, the court held that the injunction did not violate the First Amendment rights of the protesters.[4]

II. TREATMENT

A. *Majority Opinion*

1. Demonstrating, Picketing and Counseling on a Public Sidewalk Constitutes Public Forum Speech and Is Given Heightened First Amendment Protection

The First and Fourteenth Amendments to the United States Constitution prohibit state action that abridges the freedom of speech.[5] State action includes judicial injunctions,[6] and protected speech includes

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number of pickets on the sidewalk to four and required that at least two of the pickets remain "a minimum of ten feet away from the other two." *Id.*

Ultimately, the plaintiff obtained a permanent injunction, which prohibited the defendants from the following activities:

> (1) blocking any entrance or exit to the clinic building; (2) recording the license numbers of cars entering or leaving the clinic; (3) photographing any person entering or leaving the clinic building; (4) referring, in oral statements while at the clinic site, to physicians, staff or clients as "murdering" or "murderers," "killing" or "killers," or to children or babies being "killed" or "murdered" by anyone in the clinic building in the presence of children under 12; and (5) shouting at or touching physicians, staff or patients entering or leaving the clinic or making noise that could be heard inside the premises.

Id. at 867, 873 P.2d at 1227, 30 Cal. Rptr. 2d at 632. Moreover, the permanent injunction required the defendants to conduct all their activities on the public sidewalk across the street from the clinic. *Id.* at 867, 873 P.2d at 1227-28, 30 Cal. Rptr. 2d at 632-33. This final requirement was the only issue on appeal to the California Supreme Court. *Id.* at 868, 873 P.2d at 1228, 30 Cal. Rptr. 2d at 633.

3. *Id.* at 869-81, 873 P.2d at 1229-36, 30 Cal. Rptr. 2d at 634-41.

4. *Id.* at 864, 873 P.2d at 1226, 30 Cal. Rptr. 2d at 631.

5. The First Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. CONST. amend. I. The First Amendment applies to the states through the Fourteenth Amendment, which provides in pertinent part that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws." U.S. CONST. amend. XIV, § 1. *See generally* Russell W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883 (1991) (providing a general overview of the First Amendment freedom of speech).

6. *Planned Parenthood Shasta-Diablo, Inc.*, 7 Cal. 4th at 868, 873 P.2d at 1228, 30 Cal. Rptr. 2d at 633. The court stated that "when . . . the judicial process is invoked

peaceful "picketing and leafletting."[7] The California Supreme Court held that the injunction in the instant case constituted state action which implicated First Amendment protection because the injunction restricted the picketing activities of the antiabortion protesters.[8]

The court then stated that courts give greater protection to speech that occurs in a public forum, such as the public sidewalk in the instant case.[9] Nevertheless, the court ruled that the state may restrict the time, place or manner of protected speech if: (1) the restrictions are content neutral; (2) the restrictions are "narrowly tailored to serve a significant governmental interest;" and (3) the restrictions "leave open ample alternative channels for communication of the information."[10]

2. The Injunction Is Content Neutral

Restrictions on protected speech are content neutral if they do not refer to the content of the regulated speech.[11] In the instant case, the court observed that the injunction did not focus on the anti-abortion message of the defendants' speech.[12] Instead, it "merely provide[d] that all picketing, demonstrating, or counseling shall take place on the sidewalk across the street from the clinic."[13] The court rejected the defendants' argument that the injunction was content based because it

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to restrict expressive activities on public property, 'state action' is implicated." *Id.* (citing Bakery Drivers Local v. Wohl, 315 U.S. 769 (1942)).

7. *Id.* at 869, 873 P.2d at 1228, 30 Cal. Rptr. 2d at 633 (citing Frisby v. Schultz, 487 U.S. 474 (1988) (holding that an ordinance "operates at the core of the First Amendment" when it prohibits anti-abortion protesters from picketing)).

8. *Id.*

9. *Id.* at 869-70, 873 P.2d at 1228-29, 30 Cal. Rptr. 2d at 633-34. (citing Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 44-45 (1983)). *See generally* 13 CAL. JUR. 3D *Constitutional Law* § 255 (1992 & Supp. 1994) ("Streets, sidewalks, parks . . . are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising those rights cannot be denied broadly and absolutely.").

10. *Planned Parenthood Shasta-Diablo, Inc.*, 7 Cal. 4th at 869-70, 873 P.2d at 1228-29, 30 Cal. Rptr. 2d at 633-34; *see also* 13 CAL. JUR. 3D *Constitutional Law* § 260 (1992 & Supp. 1994) ("To be valid, time, place, or manner regulations must serve a significant governmental interest and must leave ample alternative channels for communication, must be narrowly tailored to further the state's legitimate interest, and may not be based upon either the content or subject matter of speech.").

11. *Planned Parenthood Shasta-Diablo Inc.*, 7 Cal. 4th at 869, 873 P.2d at 1229, 30 Cal. Rptr. 2d at 634 (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (ruling that time, place and manner restrictions must be "justified without reference to the content of the regulated speech")).

12. *Id.*

13. *Id.* The court noted that "a similar injunction might just as readily apply to pro-choice demonstrations or to any other disruptive protest in close physical proximity to the clinic." *Id.* at 871, 873 P.2d at 1230, 30 Cal. Rptr. 2d at 635.

had been issued specifically for and applied only to antiabortion activities.[14] The court reasoned that injunctions are content neutral, even if they incidentally affect only particular types of speech, because they are properly confined to activities that warrant their issuance.[15]

3. The Injunction Is Narrowly Tailored to Achieve the Significant Governmental Interest of Protecting the Health and Safety of the Abortion Clinic's Patients

The court recognized a significant governmental interest in protecting the health and safety of abortion patients.[16] The court noted that a woman's constitutional right to an abortion encompasses the right to a safe abortion procedure that is performed according to proper medical standards.[17] Thus, the state may restrict the time, place, or manner of speech or conduct that is "'incompatible' with the health and safety of patients in a medical facility."[18]

The court found that the activities of the defendants were incompatible with the physical and emotional health and safety of the abortion clinic's patients.[19] The court referred to the trial court's findings that the defendants implemented "confrontational tactics" and "physical intimidation" that caused the patients emotional trauma, which "could result in

14. *Id.* at 869-71, 873 P.2d at 1229-30, 30 Cal. Rptr. 2d at 634-35.

15. *Id.* at 870, 873 P.2d at 1229, 30 Cal. Rptr. 2d at 634 (citing Northeast Women's Ctr., Inc. v. McMonagle, 939 F.2d 57, 63 (3d Cir. 1991) (stating that an injunction properly applied only to antiabortion activists because they alone created a threat of violence and intimidation to a women's health clinic)).

16. *Id.* at 872, 873 P.2d at 1230, 30 Cal. Rptr. 2d at 635. The court noted that the state's interest in safeguarding the health and safety of medical patients is "particularly acute in the context of family planning clinics that perform the most intimate of medical services, including abortions." *Id.* at 873, 873 P.2d at 1231, 30 Cal. Rptr. 2d at 636.

17. *Id.* at 873, 873 P.2d at 1231-32, 30 Cal. Rptr. 2d at 636-37 (quoting Roe v. Wade, 410 U.S. 113, 154 (1973) ("[A] state may properly assert important interests in safeguarding health, [and] in maintaining medical standards [in the performance of abortions].")).

18. *Id.* at 872-73, 873 P.2d at 1230-31, 30 Cal. Rptr. 2d at 635-36 (quoting Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.")); *see also* 13 CAL. JUR. 3D *Constitutional Law* § 260 (1992 & Supp. 1994) ("[T]he crucial question in determining the validity of . . . a time, place, and manner restriction is whether the restricted activity is basically incompatible with the normal activity in the area.").

19. *Planned Parenthood Shasta-Diablo, Inc.*, 7 Cal. 4th at 875-76, 873 P.2d at 1232-33, 30 Cal. Rptr. 2d at 637-38.

serious medical problems."[20] Therefore, the court held that the state may implement narrowly tailored restrictions on the defendants' activities.[21]

The court concluded that the injunction was narrowly tailored to achieve the interest of safeguarding the health and safety of the abortion patients.[22] The court held that a time, place, or manner restriction is "narrowly tailored" as long as the restriction "'promotes a substantial government interest that would be achieved less effectively absent the [restriction].'"[23] The court explained that the injunction in the instant case was the most effective response to the defendants' "threatening and intimidating behavior," which was incompatible with the medical activities at an abortion clinic.[24]

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20. *Id.* at 875, 873 P.2d at 1232-33, 30 Cal. Rptr. 2d at 637-38; *see also* American College of Obstetricians & Gynecologists, Pennsylvania Section v. Thornburgh, 613 F. Supp. 656, 666 (E.D. Pa. 1985) (finding that anxiety levels and emotional problems of abortion patients are exacerbated when picketers verbally harass them); Pro-Choice Network of W. New York v. Project Rescue W. New York, 799 F. Supp. 1417, 1427 (W.D.N.Y. 1992) (finding that "[i]ncreased stress and anxiety can . . . cause [abortion] patients to . . . have elevated blood pressure, . . . hyperventilate, . . . require sedation, or . . . require special counseling and attention").

The defendants' tactics included forcing plastic fetuses and literature through car windows that were being rolled up, and pursuing and encircling patients on their way to their cars, including patients who expressed the desire to be left alone. *See supra* note 2.

21. *Id.* at 876, 873 P.2d at 1233, 30 Cal. Rptr. 2d at 638. The court noted that the means used by the state to protect the health and safety of clinic patients must be "narrowly tailored" and cannot "unnecessarily interfere with First Amendment freedoms." *Id.* (quoting Schaumburg v. Citizens For Better Env't, 444 U.S. 620, 637 (1980)).

22. *Id.* at 878, 873 P.2d at 1235, 30 Cal. Rptr. 2d at 640.

23. *Id.* at 876, 873 P.2d at 1233, 30 Cal. Rptr. 2d at 638 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (citation omitted). The court distinguished a "narrowly tailored" standard, which is applicable to the instant case, from a "least restrictive means" standard, which requires that there be no other alternative restriction that is less burdensome on speech. *Id.* Accordingly, the court rejected the defendants' claim that the injunction was not narrowly tailored because "a narrower zone or a limit on the number of protesters" would have been less burdensome on their First Amendment rights. *Id.* at 879-80, 873 P.2d at 1235-36, 30 Cal. Rptr. 2d at 640-41.

24. *Id.* at 877, 873 P.2d at 1234, 30 Cal. Rptr. 2d at 639. The court noted that the defendants' behavior was "plainly inappropriate in the context of a health care facility treating women who are already undergoing the stress normally associated with abortions and other obstetrical or gynecological treatment." *Id.* Additionally, the court noted that several federal courts have held that "clear zones" around a health facility are narrowly tailored to achieve the significant government interest of protecting the health and safety of abortion patients. *Id.* at 877, 873 P.2d at 1234, 30 Cal. Rptr. 2d at 639 (citing Portland Feminist Women's Health Ctr. v. Advocates For Life, 859 F.2d 681, 686 (9th Cir. 1988) (upholding an injunction that prohibited demonstrators from picketing within a 12-foot "free zone" around a clinic)); *Pro-Choice Network of W. New York*, 799 F. Supp. at 1440-41 (granting a preliminary injunction that established

4. The Injunction Leaves Open Adequate Alternatives of Communication

Finally, the court held that the injunction did not foreclose other adequate avenues through which the defendants could communicate their message.[25] The court reasoned that the clinic's staff and patients could still see the defendants and their signs and that the presence and views of the defendants could "readily be perceived by persons entering and leaving the clinic," even if the defendants were across the street.[26]

Moreover, the court rejected the defendants' argument that the injunction did not provide adequate alternatives because it prevented them from physically confronting the clinic's staff and patients.[27] The court explained that the First Amendment gives "'the opportunity to win the attention'" of willing listeners, but does not give the right to a captive audience.[28]

In sum, the court found that the injunction was constitutional because it was content neutral, it was narrowly tailored to serve a compelling government interest, and it left open adequate alternative channels for communication.[29]

B. Justice Baxter's Concurring Opinion

Justice Baxter agreed with the majority that the injunction was constitutional.[30] He wrote separately, however, to emphasize that the First

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a 15-foot clear zone around clinic entrances); Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church, 765 F. Supp. 617, 626-27 (N.D. Cal. 1991) (imposing a 25-foot no-protest zone).

25. *Planned Parenthood Shasta-Diablo, Inc.*, 7 Cal. 4th at 881, 873 P.2d at 1236, 30 Cal. Rptr. 2d at 641; *see also* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 286 (9th ed. Supp. 1994) (discussing California cases involving "picketing of abortion clinics").

26. *Planned Parenthood Shasta-Diablo, Inc.*, 7 Cal. 4th at 880-81, 873 P.2d at 1236, 30 Cal. Rptr. 2d at 641. The court stated that "[t]he alternative site across the street . . . affords [the defendants] . . . a vantage . . . that is reasonably close to the clinic and, . . . within plain view of their target audience." *Id.*

27. *Id.* at 880, 873 P.2d at 1236, 30 Cal. Rptr. 2d at 641.

28. *Id.* (quoting Bering v. Share, 721 P.2d 918, 930 (Wash. 1986) (explaining that the First Amendment gives only "the opportunity to win the attention of passersby and engage them in conversation *if the latter so desire*") (emphasis added), *cert. dismissed*, 479 U.S. 1050 (1987)). The court noted that willing listeners could easily take the "short walk across the street." *Id.* at 881, 873 P.2d at 1236, 30 Cal. Rptr. 2d at 641.

29. *Id.* at 871-72, 881, 873 P.2d at 1230, 1236, 30 Cal. Rptr. 2d at 635, 642.

30. *Id.* at 881, 873 P.2d at 1237, 30 Cal. Rptr. 2d at 642 (Baxter, J., concurring).

Amendment does not protect highly confrontational activities even if the activities have speech aspects.[31] According to Justice Baxter, the court did not need to subject the injunction to rigorous constitutional scrutiny, in so far as the injunction responded to the defendants' highly confrontational activities, which "crossed the line from protected expression to unprotected interference with the lawful activities of other citizens."[32]

C. *Justice Kennard's Dissenting Opinion*

In dissent, Justice Kennard attacked the majority's conclusion, which she claimed was based on an incomplete picture of the facts.[33] According to Justice Kennard, the injunction was not entirely content neutral, was not narrowly tailored to achieve the significant government interest, and did not leave open adequate alternative channels of communication.[34] Therefore, Justice Kennard would support a "buffer zone" around the abortion clinic, but not a complete ban of speech within the zone.[35]

Justice Kennard asserted that not all of the majority's proposed justifications for the injunction satisfied the content neutrality requirement.[36] Specifically, the justification that the injunction "[prevents] emotional or psychological distress to women seeking abortion" could be content based because the women's distress may be due in part to the defendants' anti-abortion message.[37]

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31. *Id.* at 882-83, 873 P.2d at 1237-38, 30 Cal. Rptr. 2d at 642-43 (Baxter, J., concurring). Justice Baxter explained that vicious personal attacks, fighting words, and disruptive conduct "do not necessarily fall within the aegis of the First Amendment." *Id.* at 882, 873 P.2d at 1237, 30 Cal. Rptr. 2d at 642 (Baxter, J., concurring).

32. *Id.* at 883, 873 P.2d at 1237-38, 30 Cal. Rptr. 2d at 642-43 (Baxter, J., concurring); *see* 13 CAL. JUR. 3D *Constitutional Law* § 261 (1992 & Supp. 1994) (describing types of speech that the First Amendment does not protect).

33. *Planned Parenthood Shasta-Diablo, Inc.*, 7 Cal. 4th at 883, 873 P.2d at 1238, 30 Cal. Rptr. 2d at 643 (Kennard, J., dissenting). Justice Kennard explained that the appropriate standard of review for a First Amendment constitutional claim is "an independent examination of the whole record . . . to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 883-84, 873 P.2d at 1238, 30 Cal. Rptr. 2d at 643 (Kennard, J., dissenting) (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984)) (citation omitted). Justice Kennard criticized the majority for not giving the "trial evidence the careful scrutiny that the standard requires." *Id.* at 884, 873 P.2d at 1238, 30 Cal. Rptr. 2d at 643 (Kennard, J., dissenting).

34. *Id.* at 889-94, 873 P.2d at 1242-45, 30 Cal. Rptr. 2d at 647-50 (Kennard, J., dissenting).

35. *Id.* at 883, 873 P.2d at 1238, 30 Cal. Rptr. 2d at 643 (Kennard, J., dissenting).

36. *Id.* at 890, 873 P.2d at 1242, 30 Cal. Rptr. 2d at 647 (Kennard, J., dissenting).

37. *Id.* (Kennard, J., dissenting). Justice Kennard pointed out that "[t]he justification for the restriction must take no account of the content of the restricted speech" to be content-neutral. *Id.* at 889-90, 873 P.2d at 1242, 30 Cal. Rptr. 2d at 647 (Kennard,

Next, Justice Kennard disagreed that picketing on the public sidewalk across the street was an adequate alternative means of communication.[38] Justice Kennard pointed out the difficulty of noticing people who are standing on the other side of a "busy, four-lane avenue."[39]

Moreover, Justice Kennard suggested the danger that the defendants' message "will be grossly misinterpreted by casual viewers."[40] According to Justice Kennard, the injunction's effect is to make the defendants, who are abortion protesters, stand right in front of an antiabortion organization's office, which is located directly across the street from the clinic.[41] Thus, passersby might think that "the protest is directed against that organization, which opposes abortions, rather than against the medical clinic, which provides them."[42]

Finally, Justice Kennard agreed with the majority that the government had a significant interest in protecting the health and safety of the clinic's patients but disagreed that the injunction was narrowly tailored to achieve this interest.[43] Justice Kennard reasoned that the less restrictive preliminary injunction already effectively protected the health and safety of the patients.[44] Justice Kennard noted that there was no evidence that the defendants rendered the preliminary injunction ineffective by resorting to physical violence or by repeatedly and seriously violating the preliminary injunction.[45]

J., dissenting) (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

38. *Id.* at 890-91, 873 P.2d at 1242, 30 Cal. Rptr. 2d at 647 (Kennard, J., dissenting).

39. *Id.* at 890, 873 P.2d at 1242, 30 Cal. Rptr. 2d at 647 (Kennard, J., dissenting). Justice Kennard added that the defendants will neither be able to speak to their target audience "in a normal tone of voice" nor hand literature to them unless "[the target audience] take[s] the effort to cross that roadway." *Id.*

40. *Id.* at 891, 873 P.2d at 1242, 30 Cal. Rptr. 2d at 647 (Kennard, J., dissenting).

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

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

43. *Id.* at 891-94, 873 P.2d at 1243-45, 30 Cal. Rptr. 2d at 648-50 (Kennard, J., dissenting).

44. *Id.* at 891, 873 P.2d at 1243, 30 Cal. Rptr. 2d at 648 (Kennard, J., dissenting). The preliminary injunction merely limited to four the number of pickets on the sidewalk directly in front of the clinic. *Id.* (Kennard, J., dissenting).

45. *Id.* at 891-92, 873 P.2d 1243, 30 Cal. Rptr. 2d at 648 (Kennard, J., dissenting) (citing Steiner v. Long Beach Local No. 128, 19 Cal. 2d 676, 123 P.2d 20 (1942)). *Steiner* held that a court may constitutionally ban all picketing only "where past picketing has become so irrevocably blended with acts of violence, physical intimidation, or other unlawful conduct as to give rise to a justifiable belief that future picketing is likely to result in a continuance of the illegal acts." *Steiner*, 19 Cal. 2d at 683, 123 P.2d at 24.

III. IMPACT AND CONCLUSION

The California Supreme Court's decision impacts the countless armies of protesters who engage in the controversial and perpetual abortion debate. Specifically, the decision limits the protest activities that are permissible in front of abortion clinics.[46] The courts can, and will, constitutionally enjoin overzealous conduct, by either pro-life or pro-choice protesters, that causes physical or emotional trauma to abortion clinics' patients.

The California Supreme Court's decision also recognized a substantial "governmental interest in safeguarding the health and safety" of abortion clinics' patients.[47] However, parties seeking an injunction against protesters located in front of abortion clinics must still make sure that the injunction does not refer to the content of the protesters' message, that the injunction restricts only the overzealous activities that are "incompatible" with the health and safety of abortion patients, and that the injunction does not preclude other reasonable methods for the protesters to convey their message.[48]

As a whole, the California Supreme Court's decision in *Planned Parenthood Shasta-Diablo, Inc.* attempts to strike a balance between the sensitive and competing interests of the protesters' freedom of speech and the woman's right to undergo a safe abortion.[49]

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46. *See generally* Neil Bernstein, *Sidewalk Wars: The Ideological Battle Over Abortion Is Over. Now It's a Turf Fight, With Victories Measured By Inches*, 13 CAL. LAW 48 (Sept. 1993) (discussing the general status of and recent events relating to abortion protesting in the state of California).

47. *Planned Parenthood Shasta-Diablo*, 7 Cal. 4th at 872, 873 P.2d at 1230, 30 Cal. Rptr. 2d at 635.

48. *Id.* at 869-81, 873 P.2d at 1229-36, 30 Cal. Rptr. 2d at 634-41.

49. *See also* Note, *Too Close For Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856 (1988) (arguing that the establishment of buffer zones around abortion clinics is an appropriate compromise between First Amendment and privacy rights).

III. CRIMINAL LAW

A. *The doctrine of "imperfect" self-defense provides that a criminal defendant charged with murder, acting with an actual, but unreasonable, belief of imminent harm of death or great bodily injury lacks the requisite mental state for malice and, therefore, cannot be found guilty of murder:* In re Christian S.

I. INTRODUCTION

In *In re Christian S.*,[1] the California Supreme Court addressed the issue of whether the California Legislature eliminated the doctrine of "imperfect self-defense"[2] in 1981 when it abolished the diminished capacity defense.[3] Since neither the plain language nor the legislative history

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1. 7 Cal. 4th 768, 872 P.2d 574, 30 Cal. Rptr. 2d 33 (1994). Justice Baxter authored the majority opinion, in which Justices Mosk, Kennard, Arabian, and George concurred. *Id.* at 771-84, 872 P.2d at 575-84, 30 Cal. Rptr. 2d at 34-43. Justice Mosk wrote a separate concurring opinion. *Id.* at 784-86, 872 P.2d at 584-85, 30 Cal. Rptr. 2d at 43-44 (Mosk, J., concurring). Chief Justice Lucas filed a separate dissenting opinion. *Id.* at 786-96, 872 P.2d at 585-91, 30 Cal. Rptr. 2d at 44-50 (Lucas, C.J., dissenting). Justice Puglia, presiding justice of the Court of Appeal, Third Appellate District, serving by assignment from the acting chairperson of the Judicial Council, dissented with the Chief Justice. *Id.* at 796, 872 P.2d at 591, 30 Cal. Rptr. 2d at 50.

2. The court explained:

> Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant *actually* but unreasonably believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter.

Id. at 771, 872 P.2d at 575, 30 Cal. Rptr. 2d at 34.

Under the doctrine of "perfect" self-defense, the defendant must have killed another under circumstances that were "sufficient to excite the fears of a reasonable person, and the . . . [defendant] must have acted under the influence of such fears alone." CAL. PENAL CODE § 198 (West 1988). If the defendant is found by the trier of fact to have acted reasonably, the killing is considered a justifiable homicide. *See id.* § 197(1) (West 1988). *See generally* 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* §§ 239, 241 (2d ed. 1988 & Supp. 1994) (discussing self-defense and the doctrine of imperfect self-defense); Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-defense*, 33 UCLA L. REV. 1679 (1986) (discussing the application of the doctrine of imperfect self-defense to "battered" women who kill their abusers).

3. *Christian S.*, 7 Cal. 4th at 771, 872 P.2d at 575, 30 Cal. Rptr. 2d at 34. "The defense of diminished capacity is hereby abolished." CAL. PENAL CODE § 25(a) (West 1988). "As a matter of public policy there shall be no defense of diminished capaci-

of the statutory amendments to the California Penal Code reflect an intent to abolish the doctrine,[4] the court held that the legislature did not eliminate the doctrine of imperfect self-defense.[5] Therefore, the court remanded the case to the trial court in order to determine whether the defendant acted with "an actual belief of imminent harm."[6]

II. TREATMENT

A. *Majority Opinion*

The court began its opinion by explaining that the doctrine of imperfect self-defense was "firmly established" when the California Legislature abolished the diminished capacity defense.[7] The court determined that the language of the statutory amendments to the California Penal Code did not specifically refer to the doctrine of imperfect self-defense.[8]

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ty . . . in a criminal action . . . ." *Id.* at § 28(b). The California Legislature abolished the diminished capacity defense as a "direct response to the public outcry against the diminished capacity defense successfully used in the infamous trial of a San Francisco City and County supervisor who had killed the city's mayor and another supervisor." *Christian S.*, 7 Cal. 4th at 771, 872 P.2d at 575, 30 Cal. Rptr. 2d at 34. *See generally* 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* §§ 208-211 (2d ed. 1988 & Supp. 1994) (discussing diminished capacity defense and its abolition); 20 CAL. JUR. 3D *Criminal Law* § 2303 (1985) (discussing the abolition of the diminished capacity defense); Frederic R. Krausz, Comment, *The Relevance of Innocence: Proposition 8 and the Diminished Capacity Defense*, 71 CAL. L. REV. 1197 (1983) (discussing the abolition of the diminished capacity defense).

4. *Christian S.*, 7 Cal. 4th at 774-82, 872 P.2d at 577-83, 30 Cal. Rptr. 2d at 36-42.

5. *Id.* at 783, 872 P.2d at 583, 30 Cal. Rptr. 2d at 42.

6. *Id.* at 783-84, 872 P.2d at 583-84, 30 Cal. Rptr. 2d at 42-43. The defendant, a minor, was charged with second degree murder for killing Robert Elliott, "a so-called skinhead and a possible gang member." *Id.* at 772, 872 P.2d at 575, 30 Cal. Rptr. 2d at 34. The defendant had been "physically and verbally harassed and threatened by Elliott's friends" for approximately one year. *Id.* Additionally, Elliott had accused the defendant of damaging his truck. *Id.* On the day of the killing, Elliott threatened and taunted the defendant on several occasions while chasing him down the beach. *Id.* The defendant, who was carrying a handgun, "shot and killed Elliott from a range of at least 20 feet" after Elliott taunted and challenged the defendant to shoot. *Id.*

Defendant was made a ward of the juvenile court after the trial court sustained a petition charging him with second degree murder. *Id.* The trial court rejected defendant's claims of imperfect self-defense, self-defense, and voluntary manslaughter. *Id.* The court of appeal reversed the trial court's decision holding that "applying the doctrine, . . . defendant's state of mind—that is, his honest belief—negated any finding that defendant acted with malice." *Id.* at 772, 872 P.2d at 576, 30 Cal. Rptr. 2d at 35.

7. *Id.* at 774, 872 P.2d at 577, 30 Cal. Rptr. 2d at 36. The court declared that by 1981, the doctrine of imperfect self-defense was deemed "to be so well-established a doctrine that it 'should be considered a general principle for purposes of jury instruction.'" *Id.* (quoting People v. Flannel, 25 Cal. 3d 668, 682, 603 P.2d 1, 9, 160 Cal. Rptr. 84, 92 (1979)).

8. *Id.* at 774-75, 872 P.2d at 577-78, 30 Cal. Rptr. 2d at 36-37. The court assumed

The court rejected the State's argument that the doctrine of imperfect self-defense and the diminished capacity defense were "so closely related" that the legislature eliminated both when it abolished the diminished capacity defense.[9] The court reasoned that the two doctrines were mutually exclusive and, therefore, the legislature's intent to eliminate one did not necessarily reflect an intent to eliminate the other.[10]

Next, the court examined the 1981 penal code amendments and found nothing in the legislative history indicating an intent to discard the imperfect self-defense doctrine.[11] The court contended that the legislature clearly intended to eliminate only the diminished capacity defense.[12] Therefore, the court held that the California Legislature did not eliminate the doctrine of imperfect self-defense when it abolished the diminished capacity defense.[13]

The court concluded that when a defendant charged with murder is found to have acted with an actual, but unreasonable, belief that "he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and cannot be convicted of murder."[14] Accordingly, the court remanded the case to the trial court in

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that "the Legislature was aware of both doctrines and would have made clear any intent to abolish either doctrine." *Id.* at 774, 872 P.2d at 577, 30 Cal. Rptr. 2d at 36.

9. *Id.* at 776-78, 872 P.2d at 578-80, 30 Cal. Rptr. 2d at 37-39.

10. *Id.* at 777-78, 872 P.2d at 579, 30 Cal. Rptr. 2d at 38.

> Unlike diminished capacity, imperfect self-defense is not rooted in any notion of mental capacity or awareness of the need to act lawfully . . . . A defendant could assert one doctrine even though the facts did not support the other. The diminished-capacity defense could be—and often has been—asserted when self-defense was not an issue; and, conversely, imperfect self-defense could be raised when there was no claim of diminished capacity.

Id.

11. *Id.* at 781-82, 872 P.2d at 581-82, 30 Cal. Rptr. 2d at 40-41. The court did not find a "single reference to eliminating imperfect self-defense" in the legislative history. *Id.* at 781, 872 P.2d at 581, 30 Cal. Rptr. 2d at 40.

12. *Id.* at 781-82, 872 P.2d at 581-82, 30 Cal. Rptr. 2d at 40-41. This is consistent with the position of the Legislature's Joint Committee for the Revision of the Penal Code and the Governor's staff during the time changes to the penal code were being contemplated. *Id.* at 781, 872 P.2d at 581-82, 30 Cal. Rptr. 2d at 40-41.

13. *Id.* at 783, 872 P.2d at 583, 30 Cal. Rptr. 2d at 42.

14. *Id.*; *see, e.g.*, People v. Flannel, 25 Cal. 3d 668, 682, 603 P.2d 1, 9, 160 Cal. Rptr. 84, 92 (1979) (explaining that the "legal doctrine" of imperfect self-defense "negates the mental state of malice aforethought that is necessary for a murder conviction").

Murder is defined as "the unlawful killing of a human being . . . with malice aforethought." CAL. PENAL CODE § 187(a) (West 1988). "Such malice may be express

order to determine whether the defendant acted with "an actual belief of imminent harm."[15]

B. *Justice Mosk's Concurring Opinion*

Justice Mosk concurred with the majority opinion, but wrote separately to emphasize to the California Legislature "that the law of homicide is in need of revision."[16] Justice Mosk pointed out the difficulties with the law of implied malice, the "multiple anomalies . . . for the law of unlawful homicide and intoxication," and the difficulties with the second-degree felony murder rule.[17] Additionally, Justice Mosk expressed concern that the definition of "reasonable doubt" used in state criminal trials was confusing and would likely "result in future reversals by the United States Supreme Court."[18]

C. *Chief Justice Lucas's Dissenting Opinion*

Chief Justice Lucas disagreed with the majority and concluded that the California Legislature eliminated the doctrine of imperfect self-de-

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or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart." *Id.* at § 188. *See generally* 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against the Person* §§ 487-489 (2d ed. 1988 & Supp. 1994) (discussing the definition of malice and absence of malice as "evidence to negative mental state"); 17 CAL. JUR. 3D *Criminal Law* §§ 203-205 (1984 & Supp. 1994) (discussing malice and implied malice).

15. *Christian S.*, 7 Cal. 4th at 784, 872 P.2d at 583-84, 30 Cal. Rptr. 2d at 42-43. The court was "unable to determine with certainty the precise basis of the trial court's determination that the defendant was not entitled to the benefit of the imperfect self-defense doctrine." *Id.* at 783, 872 P.2d at 583, 30 Cal. Rptr. 2d at 42. The record was not clear whether the trial court rejected application of the doctrine because it believed that the doctrine was abolished or "on the fact-based ground that defendant had no actual belief in the need for self-defense." *Id.* at 772, 872 P.2d at 576, 30 Cal. Rptr. 2d at 35. The defendant would be entitled to the doctrine only if "he had an actual but unreasonable belief." *Id.* at 784, 872 P.2d at 583, 30 Cal. Rptr. 2d at 42.

16. *Id.* at 784, 872 P.2d at 584, 30 Cal. Rptr. 2d at 43 (Mosk, J., concurring).

17. *Id.* at 785, 872 P.2d at 584, 30 Cal. Rptr. 2d at 43 (Mosk, J., concurring).

18. *Id.* at 785-86, 872 P.2d at 585, 30 Cal. Rptr. 2d at 43 (Mosk, J., concurring). Reasonable doubt is defined as "'that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge.'" CAL. PENAL CODE § 1096 (West 1985). Justice Mosk stated that at least three justices on the United States Supreme Court expressed concern with the use of the phrase "moral certainty" in jury instructions for determining "reasonable doubt." *Christian S.*, 7 Cal. 4th at 785-86, 872 P.2d at 585, 30 Cal. Rptr. 2d at 44 (Mosk, J., concurring) (citing Victor v. Nebraska, 114 S. Ct. 1239 (1994)).

fense by redefining "the legal concept of 'malice' in 1981 by amendment to Penal Code section 188."[19] Chief Justice Lucas observed that "the doctrine of imperfect self-defense . . . was derived from an expansive definition of malice that included an awareness of one's legal and societal obligations."[20]

Chief Justice Lucas stressed that since Penal Code section 188 currently provides that "malice" can be established by merely showing that a defendant acted with an intention to unlawfully kill another,[21] the doctrine of imperfect self-defense "is no longer available to negate the element of malice arising from an unlawful intentional killing, and thereby to reduce a murder to voluntary manslaughter."[22] Therefore, Chief Justice Lucas concluded that the court should not resurrect the imperfect self-defense doctrine because it was purposefully eliminated by the legislature.[23]

III. IMPACT AND CONCLUSION

While the court's opinion makes it clear that the doctrine of imperfect self-defense is still available to criminal defendants charged with murder,[24] the court cautioned that "the doctrine is narrow."[25] "It requires without exception that the defendant must have had an actual belief in the need for self-defense."[26] Additionally, the defendant's "actual belief" must relate to the fear of imminent, not future, harm.[27] Furthermore, the defendant must present "substantial evidence" in order to warrant an instruction to the jury on the doctrine of imperfect self-de-

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19. *Id.* at 787, 872 P.2d at 585-86, 30 Cal. Rptr. 2d at 44 (Lucas, C.J., dissenting); *see supra* note 14 and accompanying text.

20. *Christian S.*, 7 Cal 4th at 792, 872 P.2d at 589, 30 Cal. Rptr. 2d at 48 (Lucas, C.J., dissenting).

21. *Id.* at 793, 872 P.2d at 589, 30 Cal. Rptr. 2d at 48-49 (Lucas, C.J., dissenting); *see* CAL. PENAL CODE § 188 (West 1988).

22. *Christian S.*, 7 Cal. 4th at 793, 872 P.2d at 589, 30 Cal. Rptr. 2d at 48 (Lucas, C.J., dissenting); *see* People v. Saille, 54 Cal. 3d 1103, 820 P.2d 588, 2 Cal. Rptr. 2d 364 (1992) (holding that voluntary intoxication does not reduce what would otherwise be a murder conviction to voluntary manslaughter).

23. *Christian S.*, 7 Cal. 4th at 795, 872 P.2d at 591, 30 Cal. Rptr. 2d at 50 (Lucas, C.J., dissenting).

24. *See id.* at 783, 872 P.2d at 583, 30 Cal. Rptr. 2d at 42.

25. *Id.*

26. *Id.*

27. *Id.* "'An imminent peril is one that, from appearances, must be instantly dealt with.'" *Id.* (quoting People v. Aris, 215 Cal. App. 3d 1178, 1187, 264 Cal. Rptr. 167, 173 (1989)).

fense.[28] Moreover, the doctrine of imperfect self-defense will only serve to reduce a second degree murder conviction down to voluntary manslaughter.[29] Finally, the court observed that the California Legislature can eliminate the doctrine if it desires to do so.[30]

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28. *Id.* (quoting *Aris*, 215 Cal. App. 3d at 1192, 264 Cal. Rptr. at 176) The court stated that the trial court is "not required to accept the defendant's bare assertion of such a fear." *Id.* An additional restriction is that the defendant cannot create the situation which gives rise to the need to defend himself "through his own wrongful conduct." *Id.* at 773 n.1, 872 P.2d at 576 n.1, 30 Cal. Rptr. 2d at 35 n.1.

29. *Id.* at 773, 872 P.2d at 576, 30 Cal. Rptr. 2d at 35; *see* CAL. PENAL CODE § 192 (West 1988) (defining manslaughter).

30. *Christian S.*, 7 Cal. 4th at 782, 872 P.2d at 582, 30 Cal. Rptr. 2d at 41. Whether the legislature should do so "is a public policy issue properly left to the Legislature." *Id.*

B. *The state may impose sentence enhancements on juveniles who commit crimes while released from custody pending trial, thereby extending the maximum period of physical confinement of the juvenile ward:* **In re Jovan B.**

I. INTRODUCTION

In *In re Jovan B.*,[1] the California Supreme Court addressed the issue of whether juveniles who commit crimes while released from custody pending trial are subject to the sentence enhancements their adult counterparts receive under Penal Code section 1170.[2] The supreme court held that the enhancement provisions apply to juvenile court proceedings and thereby extended the maximum period of physical confinement of juvenile wards.[3] The supreme court's decision effectively overruled the lower court's opinion which prohibited the application of section 1170 to juveniles because the Penal Code was written in terms used exclusively when referring to adults.

II. STATEMENT OF THE CASE

The Determinate Sentencing Act (DSA) of Penal Code section 12022.1 provides that adult offenders who commit felonies while released on bail or on their own recognizance, pending final resolution of the prior felony charge, shall serve an additional two years with any prison term imposed for either offense.[4] In *Jovan*, the juvenile court sentenced the minor in accordance with this statute.[5] The minor argued that sec-

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1. 6 Cal. 4th 801, 863 P.2d 673, 25 Cal. Rptr. 2d 428 (1993). Justice Baxter authored the unanimous opinion of the court, in which Chief Justice Lucas and Justices Mosk, Panelli, Kennard, Arabian, and George concurred. *Id.* at 807-20, 863 P.2d at 674-83, 25 Cal. Rptr. 2d at 429-38.

2. CAL. PENAL CODE § 1170 (West 1985 & Supp. 1994).

3. *Jovan*, 6 Cal. 4th at 820, 863 P.2d at 683, 25 Cal. Rptr. 2d at 438.

4. CAL. PENAL CODE § 12022.1 (West 1992 & Supp. 1994). *See generally* 22 CAL. JUR. 3D *Criminal Law* §§ 3367-3368 (1985 & Supp. 1994) (discussing violent felonies and felonies committed while released from custody pending trial).

5. *Jovan*, 6 Cal. 4th at 807, 863 P.2d at 674, 25 Cal. Rptr. 2d at 429. On July 1, 1991, the Madera County District Attorney filed a juvenile court petition alleging that the minor, having committed a felony of residential burglary, came within Welfare and Institutions Code § 602. *Id.* On August 9, 1991, a contested jurisdictional hearing was held. *Id.* The court sustained the petition. *Id.* Later that day, the district attorney's office filed another petition alleging the minor violated § 140 of the Penal Code by threatening a witness. *Id.* at 807, 863 P.2d at 675, 25 Cal. Rptr. 2d at 430.

tion 12022.1's sentence enhancement scheme did not apply to juvenile proceedings because the provision used terms such as "conviction", "arraignment", and "bail" which are used exclusively in adult sentencing.[6] The minor appealed both the jurisdictional order and the dispositional order.[7] The court of appeal agreed with the minor and remanded the proceeding for modification of the dispositional order.[8]

III. TREATMENT

In determining whether the Penal Code controls the sentence enhancement of juveniles, the court examined how the Penal Code applies to the juvenile setting.[9] The language and purpose of Welfare and Institutions Code section 726[10] plainly states that a minor's maximum confinement may equal the maximum term which could be imposed on an adult in accordance with Penal Code section 1170.[11] The court reasoned that

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On August 26, the court amended the latter petition "to assert under Penal Code § 12022.1 that the threats against Benjamin occurred while the minor was out of custody pending trial on the burglary." *Id.* at 808, 863 P.2d at 675, 25 Cal. Rptr. 2d at 430. The court found both allegations to be true, made the minor a ward of the court, and placed him on probation. *Id.* On September 19, the court classified the minor's witness-threatening as a felony and entered a dispositional order. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 808-14, 862 P.2d at 675-79, 25 Cal. Rptr. 2d at 430-34. *See generally* 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* § 1509 (2d ed. 1988 & Supp. 1993) (discussing statutory enhancements and applications to adult and juvenile settings); 22 CAL. JUR. 3D *Criminal Law* § 3380 (1985 & Supp. 1990) (discussing the enhancement of punishment in other jurisdictions); 21 AM. JUR. 2D Criminal Law § 630 (1989) (addressing issues pertaining to sentences of life without possibility of parole for juveniles); 24 C.J.S. *Criminal Law* §§ 1526-1528 (1989) (addressing the issue of sentence enhancement); John C. Williams, Annotation, *Authority of Court to Order Juvenile Delinquent Incarcerated in Adult Penal Institution*, 95 A.L.R. 3d 568 (1993).

10. Section 726 reads in pertinent part: "As used in this section and in Section 731, 'maximum term of imprisonment' means the longest of the three time periods set forth in paragraph (2) of subdivision (a) of Section 1170 of the Penal Code . . . plus enhancements which must be proven if pled." CAL. WELF. & INST. CODE § 726(c) (West 1984 & Supp. 1994).

11. *See* CAL. WELF. & INST. CODE § 726 (West 1984 & Supp. 1994).

> The 'aggregate term of imprisonment' . . . [is] the sum of the 'principal term' (the greatest term imposed for any of the offenses, plus specified enhancements applicable to the principal offense), the 'subordinate term' (the sum of one-third the middle terms for each other offense on which the court is sentencing consecutively, plus one-third of specified enchancements applicable to each such subordinate offense which is a 'violent felony', and 'any additional term[s] imposed pursuant to [Penal Code] [s]ection[s] 667, 667.5, 667.6 or 12022.1.

the Welfare and Institutions Act expressly adopts the aggregate sentencing computations in the Penal Code.[12] With such purposeful reference to the Penal Code, the DSA's sentencing scheme would necessarily apply to dispositions of minors in juvenile court.

Having established that the DSA provisions of the Penal Code govern juvenile sentencing, the supreme court then examined whether the practice of enhancing sentences complies with the juvenile court's rehabilitative aims.[13] The court held that the enhancement scheme in the DSA should always be applied unless the enhancement is "manifestly at odds with the principles of juvenile law."[14] Rather than enumerating such principles, the court examined the purpose of sentence enhancements. The court explained that in either the adult or juvenile context, the enhancement system is designed to meet public concern over those committing offenses while released on bail.[15] The enhancements must apply to both systems because they serve the same purposes of deterring criminal activity and boosting public confidence in law enforcement.[16]

Although the Welfare and Institutions Code unequivocally defers to the DSA provisions in governing juvenile sentencing, the supreme court considered whether the language employed in the DSA prohibited its application to the juvenile setting.[17] The court examined the import of the terminology and the legislative intent.[18] It found that the word "conviction" as used in the DSA is not a term of art.[19] Instead, the drafters of

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Jovan, 6 Cal. 4th at 812, 863 P.2d at 678, 25 Cal. Rptr. 2d at 433. *See generally* 27 CAL. JUR. 3D *Delinquent and Dependent Children* § 183 (1987 & Supp. 1994) (discussing commitments to the Youth Authority); 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 823 (9th ed. 1989 & Supp. 1994) (discussing maximum sentences for minors).

12. *Jovan*, 6 Cal. 4th at 811, 863 P.2d at 677, 25 Cal. Rptr. 2d at 432.

13. *Id.* at 813, 863 P.2d at 678, 25 Cal. Rptr. 2d at 433.

14. *Id.*

15. *Id.* at 813, 863 P.2d at 679, 25 Cal. Rptr. 2d at 434. Furthermore, the enhancements seek to deter persons from committing offenses while "'released from custody on an earlier felony' and to recognize such offender's 'breach of the terms of his special custodial status.'" *Id.* (quoting People v. McClanahan, 3 Cal. 4th 860, 868-71, 838 P.2d 241, 247-49, 12 Cal. Rptr. 2d 719, 725-27 (1992)); *see* People v. Jackson, 129 Cal. App. 3d 209, 237 Cal. Rptr. 373 (1987) (stating that the purpose is to deter offenders arrested for a crime and then allowed back on the streets a short time later only to commit more crimes). *See generally* 22 CAL. JUR. 3D *Criminal Law* § 3368 (1985 & Supp. 1994) (discussing felonies committed while individual released from custody pending trial).

16. *Jovan*, 6 Cal. 4th at 813, 863 P.2d at 679, 25 Cal. Rptr. 2d at 434.

17. *Id.*

18. *Id.* at 812, 863 P.2d at 678, 25 Cal. Rptr. 2d at 433.

19. *Id.* at 814, 863 P.2d at 679, 25 Cal. Rptr. 2d at 434. The court of appeal deter-

the Code denoted a nontechnical meaning which demonstrated their attempt to make judicially certain those instances in which enhancements would apply.[20] Likewise, the statute's use of the words "bail" and "own recognizance" requires a more liberal interpretation.[21] Although the juvenile court releases a minor to the custody of his/her parent or guardian and not on bail, the supreme court reasoned that the minor's commission of a new felony while in this special custody, like an offense committed by an adult while released on bail, is a breach of the court's trust.[22] The court reasoned that the difference in terminology would negate not only the legislature's intent to apply the DSA to juveniles, but would also serve to automatically preclude any changes intended by the legislature and invalidate the Welfare and Institutions Act as a whole.[23]

The Welfare and Institutions Act was amended prior to the inclusion of bail enhancements in the DSA.[24] With this in mind, the minor contended that the statutory construction of *Palermo v. Stockton Theaters*[25] governed, thus allowing enhancements in juvenile court only as they existed in 1977.[26] The California Supreme Court held that when a statute makes general references to another statute's provisions as a "body of laws," the reference incorporates the statute as it existed at that time as well as any subsequent modifications to the adopted statute.[27] The court reasoned that the statute references the DSA as a "system or body of law" that states the "central fundamental principles by which all DSA sentences are to be computed."[28] The Welfare Code's references to enhancements are general, necessarily implying that the code would incorporate subsequent modification of the DSA provisions when adopted.[29]

The court held that the legislative intent of such provisions permits the juvenile court to adopt the DSA as it currently exists.[30] The legisla-

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mined that the order adjudging the minor to be a ward of the state was not a conviction and thus sentence enhancement could not be applied. *Id.* at 811, 863 P.2d at 677, 25 Cal. Rptr. 2d at 432.

20. *Id.* at 814, 863 P.2d at 679, 25 Cal. Rptr. 2d at 434. Both the "bailed" and "while-on-bail" charges must be found true for enhancements to apply to juveniles. *Id.*

21. *Id.* at 814-15, 863 P.2d at 680, 25 Cal. Rptr. 2d at 435.

22. *Id.* at 815, 863 P.2d at 680, 25 Cal. Rptr. 2d at 435.

23. *Id.* at 815-20, 863 P.2d at 680-83, 25 Cal. Rptr. 2d at 435-38.

24. *Id.* at 815, 863 P.2d at 680, 25 Cal. Rptr. 2d at 435; *see* CAL. PENAL CODE § 12022.1 (West 1992 & Supp. 1994); CAL. WELF. & INST. CODE § 726 (West 1984 & Supp. 1994).

25. 32 Cal. 2d 53, 58-59, 195 P.2d 1, 5 (1948) (holding that a statute which adopts by specific reference the provisions of another statute incorporates the adopted statute's provisions in the form in which they exist at the time of the references and does not include any subsequent modifications).

26. *Jovan*, 6 Cal. 4th at 816, 863 P.2d at 680, 25 Cal. Rptr. 2d at 435.

27. *Palermo*, 32 Cal. 2d at 59, 195 P.2d at 5.

28. *Jovan*, 6 Cal. 4th at 819, 863 P.2d at 682, 25 Cal. Rptr. 2d at 437.

29. *Id.* at 819, 863 P.2d at 682, 25 Cal. Rptr. 2d at 437.

30. *Id.* at 816, 863 P.2d at 680, 25 Cal. Rptr. 2d at 435 (quoting People v.

ture intended to put the sentences of adults and juveniles on equal footing to prevent constitutional inequality.[31] The minor's view of statutory construction would require amending section 726 of the Welfare Code each time the legislature amended the DSA.[32] Furthermore, the minor would expect the legislature to amend the Welfare Code to grant the benefit of more lenient sentences to juveniles if the DSA adopted a more liberal sentencing scheme, which is contrary to the purpose of the statute.[33] Therefore, the legislature's intent is best fulfilled by considering the statute to make a specific reference to the adopted statute and merely incorporating the statute as it exists at the time it is adopted.

IV. IMPACT AND CONCLUSION

The supreme court's groundbreaking decision to extend enhancements to juvenile court impacts the constitutional rights of minors and challenges the mission of the juvenile court system. Critics of the juvenile system question whether the court has protected the interests of the juvenile. In the past, the court system has afforded juveniles many constitutional protections through the Fifth and Sixth Amendments.[34] Nevertheless, courts have refrained from giving juveniles blanket constitutional protection, due to the juvenile court's rehabilitative nature.[35] The California Supreme Court lays the foundation for longer punishment without the due process protections guaranteed to adults.[36]

Enhancing juvenile sentences in this manner creates an apparent conflict of interest between the purpose of enhancements and the juvenile court's purported mission to "rehabilitate, not punish."[37] Courts impose enhancements to deter new crimes and punish those who violate

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Domagalski, 214 Cal. App. 3d 1380, 1386, 263 Cal. Rptr. 249, 253 (1989) (stating that the legislative intent is the determining factor when the words of the incorporating statute do not clearly indicate whether it is a general or specific reference).

31. David Dormont, Note, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 MINN. L. REV. 1769, 1779 (1991).

32. *Jovan*, 6 Cal. 4th at 819, 863 P.2d at 683, 25 Cal. Rptr. 2d at 438.

33. *Id.* at 820, 863 P.2d at 683, 25 Cal. Rptr. 2d at 438.

34. *See* U.S. CONST. amends. V, VI. Such rights include adequate notice of charges, right to counsel, the right to be protected from self-incrimination and the right to cross-examine witnesses. Jan Costello, *Rejuvenation: How to Reform Juvenile Court*, DAILY J. CORP., October 1993, at 3 (1993).

35. Dormont, *supra* note 31, at 1777.

36. Dormont, *supra* note 31, at 1796-99.

37. Costello, *supra* note 34, at 2.

conditions of bail. In essence, the court enhances treatment-oriented sentences with punitive sentences, thus criminalizing the minor's sentence.[38] The court's decision to enhance sentences of juveniles adopts not only provisions of the Penal Code, but also the adult system's purpose to punish.

In an effort to appear tough on crime and increase public confidence in law enforcement, the California Supreme Court may have sacrificed the minor's constitutional rights as well as the therapeutic nature of the juvenile system.

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38. Dormont, *supra* note 31, at 1796.

C. *While section 1101 of the California Evidence Code remains applicable in criminal proceedings, evidence of a defendant's uncharged criminal conduct is admissible when the uncharged criminal conduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common design or plan, unless the prejudicial effect of such evidence substantially outweighs its probative value:* **People v. Ewoldt.**

I. INTRODUCTION

In *People v. Ewoldt*,[1] the California Supreme Court addressed the issue of whether California Evidence Code section 1101,[2] which bars the use of character evidence to prove conduct on a specific occasion,[3] remains applicable in criminal proceedings after the adoption of article I, section 28(d) of the California Constitution.[4] The court held that even if

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1. 7 Cal. 4th 380, 867 P.2d 757, 27 Cal. Rptr. 2d 646 (1994). Justice George authored the majority opinion in which Chief Justice Lucas and Justices Kennard, Arabian, Baxter, and Panelli concurred. Justice Mosk filed a dissenting opinion. *Id.* at 408-13, 867 P.2d at 774-77, 27 Cal. Rptr. 2d at 663-66 (Mosk, J., dissenting).

2. Section 1101 provides in pertinent part:

> (a) Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.
>
> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake of accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

CAL. EVID. CODE § 1101 (West 1966 & Supp. 1994).

3. CAL. EVID. CODE § 1101(a) (West 1966 & Supp. 1994). *See generally* 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *Circumstantial Evidence* §§ 325-326, 356 (3d ed. 1986 & Supp. 1994) (recognizing that character evidence is inadmissible); 31 CAL. JUR. 3D *Evidence* § 203 (1976 & Supp. 1994) (discussing the inadmissibility of character evidence to prove conduct on a specific occasion).

4. *Ewoldt*, 7 Cal. 4th at 386, 867 P.2d at 759, 27 Cal. Rptr. 2d at 648. Article I, § 28(d) of the California Constitution states in pertinent part:

> Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be

section 1101 was abrogated by the adoption of section 28(d), the California Legislature "reenacted section 1101 when it amended that statute in 1986 by more than a two-thirds vote."[5]

The court then considered whether evidence of the defendant's uncharged misconduct was admissible under section 1101.[6] The court held

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excluded in any criminal proceeding . . . . Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103.

CAL. CONST. art. I, § 28(d). *See generally* 13 CAL. JUR. 3D *Constitutional Law* § 10 (1989) (discussing proposals for amendment or revision of state constitution); 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *Introduction* §§ 7-9 (3d ed. 1986 & Supp. 1994) (discussing Proposition 8).

5. *Ewoldt*, 7 Cal. 4th at 390, 867 P.2d at 762, 27 Cal. Rptr. 2d at 651. "A section of a statute may not be amended unless the section is re-enacted as amended." CAL. CONST. art. IV, § 9. *See generally* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 102 (9th ed. 1988) (discussing amendment and reenactment provisions).

6. *Ewoldt*, 7 Cal. 4th at 393, 867 P.2d at 763, 27 Cal. Rptr. 2d at 652. The defendant was charged with four counts of violating California Penal Code § 288(a) (lewd act upon a child under the age of fourteen years) and one count of violating Penal Code § 647.6 (molesting a child under the age of eighteen years). *Id.* at 387, 867 P.2d at 760, 27 Cal. Rptr. 2d at 648-49. The defendant's stepdaughter, Jennifer, was the alleged victim. *Id.* at 387, 867 P.2d at 760, 27 Cal. Rptr. 2d at 649.

The first trial was declared a mistrial after the jury was unable to reach a verdict. *Id.* One of the four counts of committing a lewd act upon a child under the age of fourteen years was dismissed prior to the second trial. *Id.* At the second trial, Jennifer testified that the defendant had "touched" her "'in a way [she] didn't like'" from the time she was six or seven until she was fourteen years old. *Id.* at 387-88, 867 P.2d at 760, 27 Cal. Rptr. 2d at 649.

Jennifer was allowed to testify about the first incident, for which the defendant was not charged, where the defendant touched "either her breasts or her vaginal area" while she was watching television with him. *Id.* at 388, 867 P.2d at 760, 27 Cal. Rptr. 2d at 649. Jennifer also testified regarding the incidents for which the defendant had been charged. *Id.* at 388-89, 867 P.2d at 760-61, 27 Cal. Rptr. 2d at 649-50. The first two charged incidents involved the defendant fondling Jennifer on the defendant's bed. *Id.* at 388, 867 P.2d at 760, 27 Cal. Rptr. 2d at 649. The third charged incident occurred in Jennifer's bedroom and involved the defendant forcing Jennifer to touch his penis. *Id.* The last charged incident occurred when the defendant touched Jennifer's breasts while she was asleep. *Id.* at 389, 867 P.2d at 761, 27 Cal. Rptr. 2d at 650. During this incident, Jennifer asked the defendant what he was doing and "he
replied he was covering her with a blanket." *Id.*

Additionally, Jennifer's older sister, Natalie, testified that, when she was ten or eleven years old, she awoke on three different occasions to find the defendant "touching her breasts and vaginal area." *Id.* "On the third occasion, when she asked the defendant what he was doing, he said he was 'straightening up the covers.'" *Id.* Natalie also testified that the defendant peeked into her bedroom window while she and her older sister, Teresa, were dressing. *Id.* The defendant testified that none of the incidents described by Jennifer had occurred, and he also denied looking into Natalie's window. *Id.*

that "evidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan."[7] The court concluded that the prejudicial effect of the evidence of defendant's uncharged criminal conduct did not substantially outweigh its probative value and was, therefore, admissible.[8] Finally, the court concluded that the uncorroborated testimony of the complaining witness regarding the defendant's uncharged criminal conduct was also admissible.[9]

II. TREATMENT

A. *Majority Opinion*

Writing for the majority, Justice George first concluded that California Evidence Code section 1101 remains applicable in criminal proceedings.[10] The court reasoned that because the Legislature amended section

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The defendant was found guilty of two counts of committing lewd acts upon a child under the age of fourteen years and one count of molesting a child under the age of eighteen years, for which he received an eight-year prison sentence. *Id.* at 390, 867 P.2d at 761, 27 Cal. Rptr. 2d at 650. The court of appeal reversed the conviction on the grounds that "the trial court erred in admitting Natalie's testimony" and also erred in admitting Jennifer's uncorroborated testimony concerning the defendant's uncharged misconduct. *Id.*

7. *Ewoldt*, 7 Cal. 4th at 401, 867 P.2d at 769, 27 Cal. Rptr. 2d at 658; *see* CAL. EVID. CODE § 1101(b) (West 1966 & Supp. 1994). *See generally* 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *Circumstantial Evidence* §§ 374-375 (3d ed. 1986 & Supp. 1994) (discussing the admissibility of character evidence to prove common plan or scheme); 31 CAL. JUR. 3D *Evidence* § 204 (1976 & Supp. 1994) (discussing the inadmissibility of character evidence to prove common plan); 21 CAL. JUR. 3D *Criminal Law* § 3169 (1985) (discussing the admissibility of character evidence to show common scheme or plan); William Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 PEPP. L. REV. 297 (1982) (discussing admissibility of prior misconduct).

8. *Ewoldt*, 7 Cal. 4th at 405, 867 P.2d at 772, 27 Cal. Rptr. 2d at 661. "The 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). *See generally* 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *Circumstantial Evidence* §§ 298-308 (3d ed. 1986 & Supp. 1994) (discussing Evidence Code § 352); Miguel A. Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003 (1984) (discussing the replacement of common law rules of character evidence with judicial discretion).

9. *Ewoldt*, 7 Cal. 4th at 408, 867 P.2d at 773-74, 27 Cal. Rptr. 2d at 662-63.

10. *Id.* at 393, 867 P.2d at 763, 27 Cal. Rptr. 2d at 652. The People argued that

1101(b) in 1986,[11] "the Legislature thus reenacted, in its entirety, section 1101 as amended."[12]

Justice George then considered whether the disputed evidence concerning the defendant's uncharged misconduct was admissible under Evidence Code section 1101.[13] The court recognized that while section 1101(a) prohibits the admission of evidence of specific instances of uncharged misconduct to prove conduct on a specific occasion, section 1101(b) allows such evidence if it is relevant to prove "some fact other than the person's character or disposition."[14] The court held that "evidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan."[15]

The court reasoned that since: (1) both victims of the charged and uncharged offenses were the defendant's stepdaughters of similar ages and living with the defendant at the time of the acts; (2) the defendant molested each stepdaughter on different occasions while they slept and offered similar excuses when discovered; and (3) the defendant molested Jennifer on one occasion prior to the charged offenses, evidence of the uncharged misconduct was relevant to establish that defendant acted in accordance with a plan.[16] Therefore, the court concluded that there

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§ 1101 was no longer in effect after the adoption of article I, § 28(d) of the California Constitution. *Id.* at 390, 867 P.2d at 761, 27 Cal. Rptr. 2d at 650; *see* CAL. CONST. art. I, § 28(d).

11. CAL. EVID. CODE § 1101(b) (West 1966 & Supp. 1994).

12. *Ewoldt*, 7 Cal. 4th at 391, 867 P.2d at 762, 27 Cal. Rptr. 2d at 651; *see* CAL. CONST. art. IV, § 9.

13. *Ewoldt*, 7 Cal. 4th at 393, 867 P.2d at 763, 27 Cal. Rptr. 2d at 652; *see supra* note 6 and accompanying text.

14. *Ewoldt*, 7 Cal. 4th at 393, 867 P.2d at 763, 27 Cal. Rptr. 2d at 652; *see* CAL. EVID. CODE § 1101 (West 1966 & Supp. 1994).

15. *Ewoldt*, 7 Cal. 4th at 401, 867 P.2d at 769, 27 Cal. Rptr. 2d at 658; *see also* People v. Thomas, 20 Cal. 3d 457, 573 P.2d 433, 143 Cal. Rptr. 215 (1978) (holding evidence of prior misconduct admissible to prove common design or plan); People v. Archerd, 3 Cal. 3d 615, 477 P.2d 421, 91 Cal. Rptr. 397 (1970) (holding prior misconduct admissible to show common design or plan); People v. Ing, 65 Cal. 2d 603, 422 P.2d 590, 55 Cal. Rptr. 902 (1968) (holding evidence of prior misconduct relevant to prove common scheme or plan by defendant); People v. Lisenba, 14 Cal. 2d 403, 94 P.2d 569 (1939) (holding evidence of prior misconduct by defendant admissible to prove common design or plan). The *Ewoldt* court overruled People v. Tassell, 36 Cal. 3d 77, 679 P.2d 1, 201 Cal. Rptr. 567 (1984), and People v. Ogunmola, 39 Cal. 3d 120, 701 P.2d 1173, 215 Cal. Rptr. 855 (1985), to the extent that they held "that evidence of a defendant's uncharged similar misconduct is admissible to establish a common design or plan only where the charged and uncharged acts are part of a single, continuing conception or plot." *Ewoldt*, 7 Cal. 4th at 401, 867 P.2d at 769, 27 Cal. Rptr. 2d at 658.

16. *Id.* at 403, 867 P.2d at 770-71, 27 Cal. Rptr. 2d at 659-60. "To establish the

were sufficient similar features between the charged offenses and the uncharged misconduct to support an inference that both were manifestations of a common design or plan.[17]

Next, the court concluded that the trial court did not abuse its discretion in admitting evidence of defendant's prior misconduct.[18] The court reasoned that the evidence strongly demonstrated the existence of a plan by the defendant[19] and that the prejudicial effect of the evidence "was no stronger and no more inflammatory than the testimony concerning the charged offenses."[20]

Lastly, the court concluded that Jennifer's uncorroborated testimony regarding the defendant's uncharged misconduct was admissible.[21] Although uncorroborated testimony may have less probative value than corroborated testimony, the court stated that such evidence will be admissible unless its prejudicial effect substantially outweighs its probative value.[22] The court reasoned that Jennifer's testimony concerning the uncharged conduct outweighed the minimal prejudicial effect to the defen-

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existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." *Id.* at 403, 867 P.2d at 770, 27 Cal. Rptr. 2d at 659.

17. *Id.* at 403, 867 P.2d at 771, 27 Cal. Rptr. 2d at 660. Evidence of a common design or plan is used to prove that a defendant engaged "in the conduct alleged to constitute the charged offense," not, however, to prove the defendant's intent or identity. *Id.* at 394, 867 P.2d at 764, 27 Cal. Rptr. 2d at 653.

18. *Id.* at 405, 867 P.2d at 772, 27 Cal. Rptr. 2d at 661; *see* CAL. EVID. CODE § 352.

19. *Ewoldt*, 7 Cal. 4th at 404, 867 P.2d at 771, 27 Cal. Rptr. 2d at 660. The probative value of such evidence is also affected to the extent that "its source is independent of the evidence of the charged offense." *Id.* The court recognized that Natalie's testimony was not "independent" because she did not make her accusation until after she learned of Jennifer's experience. *Id.* at 405, 867 P.2d at 771, 27 Cal. Rptr. 2d at 660.

20. *Id.* at 405, 867 P.2d at 772, 27 Cal. Rptr. 2d at 661. The court recognized the danger of admitting evidence of uncharged misconduct not resulting in conviction because juries are likely to want to punish the defendant for the alleged misconduct. *Id.* at 405, 867 P.2d at 771, 27 Cal. Rptr. 2d at 660.

21. *Id.* at 407-08, 867 P.2d at 773, 27 Cal. Rptr. 2d at 662.

22. *Id.* The defendant argued that Jennifer's uncorroborated testimony concerning the uncharged offense was inadmissible according to the rule in People v. Stanley, 67 Cal. 2d 812, 433 P.2d 913, 63 Cal. Rptr. 825 (1967) (prohibiting the admission of the complaining witness' uncorroborated testimony regarding the uncharged offenses). *Ewoldt*, 7 Cal. 4th at 407, 867 P.2d at 773, 27 Cal. Rptr. 2d at 662. The court, however, ruled that "evidence of uncharged misconduct properly may be admitted to prove any fact material to the prosecution's case" (limited by Evidence Code § 352). *Id.* at 407-08, 867 P.2d at 773, 27 Cal. Rptr. 2d at 662.

dant because it was relevant to establish defendant's "recurring pattern" of abuse.[23]

B. *Justice Mosk's Dissenting Opinion*

Although Justice Mosk agreed with the majority that California Evidence Code section 1101 was applicable in criminal proceedings,[24] he disagreed with the majority's decision to overrule *Tassell*.[25] Justice Mosk stated that evidence of prior uncharged misconduct is admissible only if relevant to prove some ultimate disputed fact such as identity or intent, or to show that the plan was part of a "conspiracy of which the charged offense formed a part."[26]

Justice Mosk reasoned that, in the present case, there was no issue of intent or identity and that the uncharged offenses were not part of an "overarching plan."[27] Justice Mosk concluded that the evidence of the defendant's uncharged misconduct was used merely to prove criminal disposition and was, therefore, barred by Evidence Code section 1101(a).[28]

III. IMPACT AND CONCLUSION

The court's holding in *Ewoldt* makes it clear that evidence of a defendant's uncharged misconduct is relevant if offered to establish the existence of a common design or plan.[29] However, admissibility will be determined on a case-by-case basis with the trial court weighing the prejudicial effect of the evidence against its probative value.[30] Furthermore, the court recognized that evidence of a defendant's similar uncharged misconduct will not be admissible in many criminal prosecutions because either the prejudicial effect of the evidence will outweigh its

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23. *Id.* at 408, 867 P.2d at 773, 27 Cal. Rptr. 2d at 662. The court noted that Jennifer's testimony regarding the uncharged offense was no more inflammatory than the testimony regarding the charged offenses, and additionally, "it was unlikely the jury would return a guilty verdict based upon the uncharged misconduct rather than the charged offenses." *Id.*

24. *Id.* at 408, 867 P.2d at 774, 27 Cal. Rptr. 2d at 663 (Mosk, J., dissenting).

25. *Id.* (Mosk, J., dissenting); *see supra* note 15 and accompanying text. Justice Mosk would have adhered to the decision in *Tassell* "as a matter of stare decisis." *Ewoldt*, 7 Cal. 4th at 408, 867 P.2d at 774, 27 Cal. Rptr. 2d at 663 (Mosk, J., dissenting).

26. *Id.* at 410, 867 P.2d at 775, 27 Cal. Rptr. 2d at 664 (Mosk, J., dissenting).

27. *Id.* at 411, 867 P.2d at 776, 27 Cal. Rptr. 2d at 665 (Mosk, J., dissenting).

28. *Id.* (Mosk, J., dissenting); *see* CAL. EVID. CODE § 1101(a).

29. *See Ewoldt*, 7 Cal. 4th at 401, 867 P.2d at 769, 27 Cal. Rptr. 2d at 658.

30. *See id.* at 404, 867 P.2d at 771, 27 Cal. Rptr. 2d at 660; *see also* CAL. EVID. CODE § 352.

probative value or the evidence will be offered concerning an issue not in dispute.[31]

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31. *Ewoldt*, 7 Cal. 4th at 405-06, 867 P.2d at 772, 27 Cal. Rptr. 2d at 661. "This is so because evidence of a common design or plan is admissible only to establish that the defendant engaged in the conduct alleged to constitute the charged offense, not to prove other matters, such as the defendant's intent or identity as to the charged offense." *Id.* at 406, 867 P.2d at 772, 27 Cal. Rptr. 2d at 661.

D. *California Penal Code section 667(b) mandates that when a defendant is exposed to multiple statutory enhancements for the same underlying prior felony conviction, one of which is available under section 667, the longer enhancement, but not both, must be imposed, except where a statute explicitly specifies that the enhancements are to be applied cumulatively:* **People v. Jones.**

I. INTRODUCTION

In *People v. Jones*,[1] the California Supreme Court considered whether multiple statutory sentence enhancement provisions apply cumulatively under California Penal Code section 667(b), and if not, which provision would prevail.[2] The court analyzed the language of the California Constitution, the meaning of section 667 in conjunction with section 667.5, and the intent of the voters who supported Proposition 8. The court further examined its previous ruling in *People v. Prather*.[3] The court ultimately held that both enhancements could not apply to the same prior offense under section 667(b).[4] However, the court concluded that the most reasonable reading of section 667(b) required the imposition of the greater enhancement.[5]

II. STATEMENT OF THE CASE

The defendant[6] was convicted of three counts of forcible sodomy[7] and one count of sexual penetration with his finger[8] against a fellow inmate.[9] The trial court found the defendant's sentence[10] should be en-

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1. 5 Cal. 4th 1142, 857 P.2d 1163, 22 Cal. Rptr. 2d 753 (1993). Justice Mosk wrote the majority opinion, in which Justices Kennard, Arabian, and George joined. *Id.* at 1144, 857 P.2d at 1163, 22 Cal. Rptr. 2d at 753. Chief Justice Lucas wrote the dissenting opinion, in which Justices Baxter and Panelli joined. *Id.* at 1153, 857 P.2d at 1169, 22 Cal. Rptr. 2d at 759 (Lucas, C.J., dissenting).

2. *Id.* at 1144-45, 857 P.2d at 1163, 22 Cal. Rptr. 2d at 753.

3. 50 Cal. 3d 428, 787 P.2d 1012, 267 Cal. Rptr. 605 (1990).

4. *Jones*, 5 Cal. 4th at 1152-53, 857 P.2d at 1169, 22 Cal. Rptr. 2d at 759.

5. *Id.* at 1149-50, 857 P.2d at 1166-67, 22 Cal. Rptr. 2d at 756-57.

6. The defendant was serving time in the San Francisco County Jail for three prior felonies, one of which was an aggravated form of kidnapping under § 209 of the California Penal Code. *Id.* at 1145, 857 P.2d at 1163-64, 22 Cal. Rptr. 2d at 753-54.

7. CAL. PENAL CODE § 286(b) (West 1988 & Supp. 1994).

8. *Id.* § 289(a).

9. The victim was 18 years old and had only been in San Francisco for 12 days before he was arrested for possession of marijuana with intent to distribute. Prior to this he had resided in Marrimack, New Hampshire. *Jones*, 5 Cal. 4th at 1145, 857 P.2d at 1163, 22 Cal. Rptr. 2d at 753. The victim testified that the defendant thought

hanced by three consecutive one-year terms under section 667.5(b)[11] because the defendant had committed a felony after having served a prison sentence for three prior felonies.[12] The trial court further found that the defendant's sentence should be enhanced by an additional consecutive five-year term under section 667(a)[13] because the defendant had a serious prior felony and his current conviction was also for a serious felony.[14] The California Court of Appeal affirmed.[15] The California Supreme Court remanded with directions to strike the lesser one-year term under section 667.5(b)[16] but affirmed all other sentence enhancements.[17]

III. TREATMENT

A. *Majority Opinion*

In 1982, California voters enacted Proposition 8,[18] which added sec-

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he was "cute and feminine" and that after rebuffing the defendant's sexual advances, the defendant forcibly inserted his finger into the victim's rectum and sodomized him three times. *Id.* The defendant rebutted that the sex was consensual and in exchange for money and that both men were gay. *Id.* Additionally, the defendant testified that he only penetrated the defendant twice and did not insert his finger. *Id.*

10. The defendant was sentenced under Penal Code § 667(d), or alternatively under § 667(c), both of which provide for full, separate and consecutive sentences for each commission of certain serious sexual or violent felonies. *Id.* at 1145, 857 P.2d at 1164, 22 Cal. Rptr. 2d at 754. The defendant was sentenced to a base term of six years and three consecutive middle terms of six years; thus, the defendant's sentence was 24 years before calculating the enhancements. *Id.* at 1145-46, 857 P.2d at 1164, 22 Cal. Rptr. 2d at 754.

11. *Id.* at 1146, 857 P.2d at 1164, 22 Cal. Rptr. 2d at 754.

12. *Id.* at 1145, 857 P.2d at 1164, 22 Cal. Rptr. 2d at 754.

13. *Id.* Section 667 of the California Penal Code was added by Proposition 8 on June 8, 1982. CAL. PENAL CODE § 667 (West 1988 & Supp. 1994) (amended by Stats. 1986, c. 85 § 1.5, urgency, eff. May 1986).

14. *Jones*, 5 Cal. 4th at 1145, 857 P.2d at 1164, 22 Cal. Rptr. 2d at 754.

15. *Id.* at 1147, 857 P.2d at 1165, 22 Cal. Rptr. 2d at 755.

16. *Id.* at 1153, 857 P.2d at 1169, 22 Cal. Rptr. 2d at 759.

17. *Id.*

18. *Id.* at 1146, 857 P.2d at 1164, 22 Cal. Rptr. 2d at 754-55. *See generally* Hank M. Goldberg, *Proposition 8: A Prosecutor's Perspective*, 23 PAC. L.J. 947 (1992) (discussing how Proposition 8 has been delayed, ignored, and even changed since being passed by the voters); Jeff Brown, *Proposition 8: Origins and Impact—A Public Defender's Perspective*, 23 PAC. L.J. 881 (1992) (discussing the origins, purposes, and impact of Proposition 8); J. Clark Kelso & Brigitte A. Bass, *The Victims Bill of Rights: Where Did it Come From and How Much Did It Do?*, 23 PAC. L.J. 843 (1992) (providing a general description of Proposition 8).

tion 28 to article I of the California Constitution,[19] and also added several new sections to the Penal Code and the Welfare and Institutions Code,[20] including Penal Code section 667.[21]

The court first addressed whether the legislature created sections 667 and 667.5 with the intent to impose sentence enhancements based on two different statuses.[22] Section 667 imposes an enhancement based on a prior serious felony conviction,[23] while section 667.5 imposes an enhancement based on a prior prison term for any felony conviction.[24] The

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Proposition 8 was known as the Victim's Bill of Rights initiative. *See* Brosnahan v. Brown, 32 Cal. 3d 236, 242-45, 651 P.2d 274, 277-79, 186 Cal. Rptr. 30, 33-35 (1982) (summarizing Proposition 8).

19. *Jones*, 5 Cal. 4th at 1147, 857 P.2d at 1164, 22 Cal. Rptr. 2d at 754-55; *see* CAL. CONST. art I, § 28. The preamble of Proposition 8 provides in part:

> The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance.

CAL. CONST. art. I, § 28(a).

20. *See* CAL. PENAL CODE §§ 25, 667, 1191.1, 1192.7, 3043 (West 1988 & Supp. 1994); CAL. WELF. & INST. CODE §§ 1767, 1732.5, 6331 (West 1984 & Supp. 1995).

21. *Jones*, 5 Cal. 4th at 1146, 857 P.2d at 1164, 22 Cal. Rptr. 2d at 754; *see* CAL. PENAL CODE § 667 (West 1988 & Supp. 1994).

22. *Jones*, 5 Cal. 4th at 1144-49, 857 P.2d at 1163-66, 22 Cal. Rptr. 2d at 753-56.

23. The pertinent text of CAL. PENAL CODE § 667 states:

> (a)(1) In compliance with subdivision (b) of section 1385, any person convicted of a serious felony [as defined in subdivision (c) of section 1192.7 and section 1192.8] who previously has been convicted of a serious felony in this state or any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.
>
> (b) This section shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this section to apply.

CAL. PENAL CODE § 667 (West 1988 & Supp. 1994).

24. The pertinent text of CAL. PENAL CODE § 667.5 states:

> (a) Where one of the new offenses is one of the violent felonies specified in subdivision (c), in addition and consecutive to any other prison term therefor, the court shall impose a three-year term for each prior separate prison term served by the defendant where the prior was one of the violent felonies specified in subdivision (c). However, no additional term shall be imposed under this subdivision for any prison term served prior to a period of 10 years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction.

California Supreme Court rejected the appellate court's reasoning that each statute permissibly punishes a different status.[25] The majority reasoned that the precedent set by the court in *Prather* was dispositive on the issue before the court.[26] The court affirmed that the distinction between a prior felony conviction and a prison term based on that conviction was "'untenable' and by inference 'hypertechnical' and 'supertechnical.'"[27]

(b) Except where subdivision (a) applies, where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction.

Id. § 667.5 (West 1988 & Supp. 1994)

25. *Jones*, 5 Cal. 4th at 1147-48, 857 P.2d at 1165, 22 Cal. Rptr. 2d at 755. The court of appeal reasoned that each statute was meant to punish according to a different status: a prior felony conviction indicates recidivist behavior whereas a prior prison term indicates a criminal mind undeterred by incarceration. *Id.* The court of appeal believed that the drafter's intent was to create separate enhancement punishments by employing the different status phrases. *Id.*

26. *Id.* at 1148-49, 857 P.2d at 1166, 22 Cal. Rptr. 2d at 756. In *People v. Prather*, the court held that article I, § 28(f), barred application of Penal Code § 1170.1(g), to prior prison terms. 50 Cal. 3d 428, 430-31, 787 P.2d 1012, 1013, 267 Cal. Rptr. 605, 606 (1990). Penal Code § 1170.1 generally limits the total term to a maximum of twice the base term imposed under Penal Code 1170(b). CAL. PENAL CODE § 1170.1(g)(1) (West 1988 & Supp. 1994). Although article I, § 28(f) of the California Constitution specifies that "prior felony conviction[s]" shall be used without limitation for enhancement purposes, the *Jones* court found prior felony convictions to include prior prison terms. *Jones*, 5 Cal. 4th at 1148, 857 P.2d at 1166, 22 Cal. Rptr. 2d at 7556. "[W]e hold that the broad mandate of article I, section 28, subdivision(f), concerning the use of any 'prior felony conviction'[s]' for enhancement purposes, necessarily includes the lesser category of enhancements based on prior felony convictions for which imprisonment was imposed." *Id.* at 1148-49, 857 P.2d at 1166, 22 Cal. Rptr. 2d at 756 (quoting *Prather*, 50 Cal. 3d at 440, 787 P.2d at 1020, 267 Cal. Rptr. at 613; *see* 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* §§ 1486-1496 (2d ed. 1989 & Supp. 1994) (discussing generally the limitations on the use of enhancements and the exceptions to the rule).

27. *Jones*, 5 Cal. 4th at 1149, 857 P.2d at 1166, 22 Cal. Rptr. 2d at 756 (quoting *Prather*, 50 Cal. 3d at 439, 787 P.2d at 1019, 267 Cal. Rptr. at 612). However, the court recognized that Proposition 8 voters intended to increase prison terms for repeat offenders by stating that "[t]he more obdurate the offender, the greater the sentence to be imposed." *Id.* at 1147, 857 P.2d at 1165, 22 Cal. Rptr. 2d at 755; *see also* Brown, *supra* note 18, at 925-36 (discussing the intent of Proposition 8 proponents).

Having determined that sections 667 and 667.5 apply to the same basic facts—a prior felony conviction—the court set out to determine whether Proposition 8 voters, nonetheless, intended to impose both enhancements cumulatively.[28] In determining the voters' intent, the court first looked to the language of the constitutional amendment and section 667.[29] The majority found the contemporaneous construction of article I, section 28(f) and Penal Code section 667(b) passed by Proposition 8 voters to be ambiguous.[30] Where constitutional or statutory language is ambiguous, extrinsic evidence may be used to determine the voters' or the legislature's intent.[31]

The court found that the only reasonable construction of sections 667 and 667.5 barred a cumulative enhancement for the same prior offense.[32] The majority's support for its conclusion was threefold: (1) any other construction leads to "peculiar results";[33] (2) the legislature has not amended sections 667 and 667.5 to be imposed cumulatively;[34] and (3) the court's construction of sections 667 and 667.5 does not conflict with the California Constitution.[35]

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28. *Jones*, 5 Cal. 4th at 1149, 857 P.2d at 1166, 22 Cal. Rptr. 2d at 756; *see* Kaiser v. Hopkins, 6 Cal. 2d 537, 538, 58 P.2d 1278, 1279 (1936) (holding that voters' intent governs the construction of a constitutional provision adopted by them).

29. *Jones*, 5 Cal. 4th at 1146, 857 P.2d at 1164, 22 Cal. Rptr. 2d at 754; *see* Brown v. Kelly Broadcasting Co., 48 Cal. 3d 711, 771 P.2d 406, 412, 257 Cal. Rptr. 708, 714 (1989) (holding that determining intent first requires looking at the language of the provision); Lungren v. Deukmejian, 45 Cal. 3d 727, 755 P.2d 299, 248 Cal. Rptr. 115 (1988) (holding that where a provision's language is unambiguous there is no need to resort to indicia of voter or legislative intent).

30. *Jones*, 5 Cal. 4th at 1149, 857 P.2d at 1166, 22 Cal. Rptr. 2d 756 (citing *Prather*, 50 Cal. 3d at 437, 787 P.2d at 1017, 267 Cal. Rptr. at 610-11). The pertinent part of article I, § 28(f) provides: "Any prior felony conviction . . . shall subsequently be used *without limitation* for purposes of . . . enhancement of sentence in any criminal proceeding." CAL. CONST. art. I, § 28(f) (emphasis added). Penal Code § 667(b) states: "This section shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this section to apply." CAL. PENAL CODE § 667(b) (West 1985 & Supp. 1994); *see also* 22 CAL. JUR. 3D *Criminal Law* §§ 3365-3391 (1985 & Supp. 1994) (discussing sentence enhancement for subsequent offenders).

31. *See Jones*, 5 Cal. 4th at 1149-52, 857 P.2d at 1166-68, 22 Cal. Rptr. 2d 756-58; *see also* Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978) (holding that the language of an initiative must be construed liberally so as to give life to the "growing needs of the people").

32. *Jones*, 5 Cal. 4th at 1149-50, 857 P.2d at 1166-67, 22 Cal. Rptr. 2d at 756-57.

33. *Id.* at 1150, 857 P.2d at 1166, 22 Cal. Rptr. 2d at 757.

34. *Id.* at 1150 n.2, 1151-52, 857 P.2d at 1167 n.2, 1166-67, 22 Cal. Rptr. 2d at 757 n.2, 758.

35. *Id.* at 1150-51, 857 P.2d at 1167, 22 Cal. Rptr. 2d at 757.

The majority found that it is unreasonable to read sections 667 and 667.5 as imposing cumulative punishments.[36] Penal Code sections 1192.7(c) and 1192.8 define "serious felonies" applicable to 667(a), which add a five-year enhancement.[37] Section 667.5(c) defines "violent felonies" applicable to section 667.5(a), which adds a three-year enhancement.[38] A prior violent felony under section 667.5(c) will a fortiori also be a prior serious felony under section 667(a), which if imposed cumulatively, will in most cases lead to an eight-year enhancement instead of a five-year sentence.[39] Furthermore, Proposition 8 had no effect on either section 667 or section 667.5 because both have been amended since its passage.[40] Considering the legislature's ability to impose harsh enhancements for serious recidivism,[41] the court reasoned that voters would have amended the statutes had they wished for the terms to be combined.[42]

The court also considered the intent of the legislature. The legislature has amended both sections 667 and 667.5 subsequent to passage of the Victim's Bill of Rights.[43] However, the legislature has not amended these sections to explicitly state that the enhancements are to be im-

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36. *Id.*

37. CAL. PENAL CODE §§ 1192.7, 1192.8 (West 1982 & Supp. 1995).

38. *Id.* §§ 667.5(a), 667.5(c) (West 1988).

39. *Jones*, 5 Cal. 4th at 1150, 857 P.2d at 1167, 22 Cal. Rptr. 2d at 757. However, conversely, a serious felony under §§ 1192.7 or 1192.8 will not a fortiori also be a violent felony under § 667.5. Section 1192.7 includes narcotics sales to minors and violent crimes associated with prison inmates within the definition of "serious felony," which are not included in § 667.5. CAL. PENAL CODE § 1192.7 (West 1982 & Supp. 1995).

40. *Jones*, 5 Cal. 4th at 1150 n.2, 857 P.2d at 1167 n.2, 22 Cal. Rptr. 2d at 757 n.2. The California Supreme Court reasoned:

> Many felonies serious enough to require incarceration, however, are likely to be encapsulated in section 1192.7, subdivision (c), and therefore will subject the recidivist offender to the five-year enhancement of 667, subdivision (a), on the commission of a new and serious felony. Just as it would be anomalous for the law to impose an eight-year enhancement when the voters specified five, so also would it be for the law to impose a six-year enhancement when the voters specified five.

Id. at 1150, 857 P.2d at 1167, 22 Cal. Rptr. 2d at 757.

41. *Id.*; *see, e.g.*, CAL. PENAL CODE § 667.51 (West 1988) (imposing 15 years to life for recidivist sex offenders); *id.* § 667.6 (imposing a 10 year enhancement for violent recidivists); *id.* § 667.7 (imposing life sentence for habitual offenders); *id.* § 667.75 (imposing a minimum sentence of 17 years for habitual drug offenders).

42. *Jones*, 5 Cal. 4th at 1150-51, 857 P.2d at 1167, 22 Cal. Rptr. 2d at 757.

43. *Id.* at 1150 n.2, 857 P.2d at 1167 n.2, 22 Cal. Rptr. 2d at 757 n.2.

posed cumulatively, as it did with sections 667 and 667.9.[44] The court considered this omission as evidence of the legislature's intent that sections 667 and 667.5 be imposed alternatively and not cumulatively.[45]

Moreover, the court considered its statutory interpretation as being harmonious with article I, section 28(f) of the California Constitution,[46] whereas a strict literal interpretation of the constitution would lead to a nullification of section 667(b).[47] Thus, the court concluded that Proposition 8 voters did not intend such a literal interpretation, because it would result in a self-cancelling statute.[48]

Finally, the court held that the most reasonable interpretation of the statutory scheme mandated the imposition of the greater of the two enhancement alternatives.[49] Although section 667 was passed by voter initiative, the legislature retained the power to define enhancements. However, the legislature may not permissibly impose a general cap on enhancement length.[50] Although construing sections 667 and 667.5 as alter-

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44. *Id.* (citing Pasadena Police Officer's Ass'n v. City of Pasadena, 51 Cal. 3d 564, 797 P.2d 608, 273 Cal. Rptr. 584 (1990)). The court points to another enhancement statute, § 667.9, which imposes a one or two year enhancement "in addition to the sentence provided under Section 667" for certain violent crimes knowingly committed against under people younger than 14, older than 65, or substantially disabled. *Id.* However, the dissent points out that § 667.9 enhances a sentence based on aggravating factors in the present offense, not a prior offense, and is thus unpersuaded by the majority's analogy. *Id.* at 1159, 857 P.2d at 1173, 22 Cal. Rptr. 2d at 763. (Lucas, C.J., dissenting).

45. *Id.* at 1150-51, 857 P.2d at 1167, 22 Cal. Rptr. 2d at 757.

46. *Id.*

47. *Id.*

48. *Id.* at 1150, 857 P.2d at 1167, 22 Cal. Rptr. 2d at 757. The court did not determine whether the defendant's federal constitutional rights were violated because the court's decision rests on state grounds. Moreover, the court noted that both the State and the defendant foresaw that this issue might be decided on the basis of California Penal Code § 654.

Section 654 provides:

> An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other.

CAL. PENAL CODE § 654 (West 1988 & Supp. 1994).

The court did not determine the issue of whether § 654 prevented §§ 667 and 667.5 from cumulative imposition because it found that § 654 was prohibited under the narrower grounds of § 667.5(b). *Jones*, 5 Cal. 4th at 1150, 857 P.2d at 1167, 22 Cal. Rptr. 2d at 757. However, under the majority's reasoning, if a prior conviction and prison term are not separate "acts," then § 654 would prohibit the imposition of both §§ 667 and 667.5 cumulatively because the punishments would be for the same act, a prior felony conviction.

49. *Jones*, 5 Cal. 4th at 1150, 857 P.2d at 1167, 22 Cal Rptr. 2d at 757.

50. *Id.* at 1151-52, 857 P.2d at 1168, 22 Cal. Rptr. 2d at 758. The supreme court

native and not cumulative limits on the length of the enhancement, such a limitation is permissible because categorizing convictions is within the legislature's power to define enhancement statutes.[51] Thus, under section 667(b), when the enhancement term of another applicable provision is greater in length than the enhancement term imposed under section 667, the section 667 term is not applied when calculating the total sentence.[52]

B. Chief Justice Lucas' Dissenting Opinion

Writing for the dissent, Chief Justice Lucas attacked the majority's opinion by asserting that it only gave lip service to the statutory rules of construction.[53] The dissent rejected the court's position that the statutory and constitutional language is ambiguous.[54] Furthermore, the dissent argued that there is a valid distinction between a prior felony conviction and a prior prison term served for that felony.[55] *Prather*, according to the dissent, should not be dispositive in this case because the majority had misconstrued the scope of the court's precedent.[56] Finally,

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illustrated the difference between definitional restrictions and general restrictions. The legislature may limit an enhancement statute to a certain category of felonies, such as "serious" felonies. However, the legislature may not effectively void an enhancement statute by placing a "general cap" on the total duration of a sentence. *Id.* (paraphrasing the court's quotation of *People v. Prather*, 50 Cal. 3d 428, 438-39, 787 P.2d 1012, 1018-19, 267 Cal. Rptr. at 605, 611-12) (1990)).

51. *Id.* at 1152, 857 P.2d at 1168, 22 Cal. Rptr. 2d at 758.

52. *Id.* at 1152-53, 857 P.2d at 1169, 22 Cal. Rptr. 2d at 759.

53. *Id.* at 1153, 857 P.2d at 1169, 22 Cal. Rptr. 2d at 759 (Lucas, C.J., dissenting). The dissent felt there was "little, if any, ambiguity" in article I, § 28(f) of the California Constitution. Moreover, the dissent felt the language of § 667 was likewise free from ambiguity. *Id.* at 1153-54, 857 P.2d at 1169, 22 Cal. Rptr. 2d at 759 (Lucas, C.J., dissenting).

54. *Id.* at 1155, 857 P.2d at 1171, 22 Cal. Rptr. 2d at 761 (Lucas, C.J., dissenting). The dissent believed that the reasonable interpretation of § 667(b), which precludes application of § 667 when another "provision of law would result in a longer term," is that § 667 will not be imposed when § 667.7 can be imposed, because § 667.7 was part of Proposition 8 and imposes a mandatory life sentence. *Id.* at 1157, 857 P.2d at 1172, 22 Cal. Rptr. 2d at 762 (Lucas, C.J., dissenting); *see* People v. Skeirik, 229 Cal. App. 3d 444, 468, 280 Cal. Rptr. 175, 90 (1991); People v. Lobaugh, 188 Cal. App. 3d 780, 783-84, 233 Cal. Rptr. 683, 684-85 (1987).

55. *Jones*, 5 Cal. 4th at 1154-55, 857 P.2d at 1170, 22 Cal. Rptr. 2d at 760 (Lucas, C.J., dissenting). The dissent noted that § 667.5 is discretionary because the judge may strike the enhancement under § 1170.1(h), while the enhancement under § 667 is mandatory. *Id.* at 1158, 857 P.2d at 1172, 22 Cal. Rptr. 2d at 762.

56. *Id.* at 1154-55, 857 P.2d at 1169-70, 22 Cal. Rptr. 2d at 759-60 (Lucas, C.J., dis-

the dissent argued that section 654 was the proper statute to utilize in determining whether section 667 and section 667.5 enhancements should be imposed cumulatively.[57] The dissent concluded that it was clearly the intent of Proposition 8 voters to impose cumulative enhancements under sections 667 and 667.5 in order to achieve more effective deterrence, punishment, and public safety.[58]

IV. IMPACT AND CONCLUSION

The court's decision impacted the defendant by reducing his thirty-two year term to thirty-one years. However, the general effect of this statute will limit the total enhancement term for a single prior felony conviction or the prison term for that felony. Where the five-year enhancement is available under section 667 for a serious felony, the three year enhancement under section 667.5(a) for violent felonies or the one year enhancement under section 667 for any felony cannot be cumulatively added at the discretion of the trial judge. Some courts of appeal have distinguished[59] or criticized the holding in *Jones*[60] because there are no other provisions which prohibit cumulative enhancement for the same prior conviction, with the possible exception of Penal Code section 654.[61]

Thus, because *Jones* defines a prior felony and prior term served for that felony as the same prior act, the crucial issue remains whether section 654 will be interpreted to preclude the imposition of cumulative sentences for prior acts in view of the constitutional amendments enacted by Proposition 8 voters.

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senting).

57. *Id.* at 1155, 857 P.2d at 1170, 22 Cal. Rptr. 2d at 760 (Lucas, C.J., dissenting).

58. *Id. See generally* Frank Carrington & George Nicholson, *Victim's Movement: An Idea Whose Time has Come*, 11 PEPP. L. REV. 1 (1984) (discussing the rise of the Victim's Rights movement regarding crime); Bill Blum & Gina Lobaco, *The Prop 8 Puzzle*, 5 CAL. LAWYER, Feb. 1985, at 29 (discussing the implications within Proposition 8).

59. People v. Wiley, 25 Cal. App. 4th 159, 164, 30 Cal. Rptr. 2d 701, 705 (1994) (rejecting the defendant's assertion that the holding in *Jones* precluded the trial court from imposing §§ 667 and 667.5 for a term served when a serious felony enhancement is imposed for the conviction of a separate crime where the two convictions resulted in a joint trial).

60. People v. Coronado, 28 Cal. App. 4th 1175, 1776-77, 34 Cal. Rptr. 2d 315, 316 (1994) (holding that the decision in *Jones* does not bar the use of a same prior offense to elevate a charge to a felony and enhance a sentence under § 667.5(b)).

61. *Id.* at 1181, 34 Cal. Rptr. 2d at 318-19.

E. *One may be found liable on a theory of aiding and abetting if he or she forms the intention to commit, encourage, or facilitate the commission of a burglary prior to the time the perpetrator departs the building; therefore CALJIC No. 14.54 as drafted is an incorrect statement of the law:*
People v. Montoya.

I. INTRODUCTION

In *People v. Montoya*,[1] the Supreme Court of California considered whether the trial court erred by not instructing the jury, sua sponte, that in order to be found guilty of burglary on a theory of aiding and abetting, a person must have formed the requisite intent to commit, encourage, or facilitate the commission of the burglary prior to or at the time the perpetrator entered the dwelling.[2] The court of appeal affirmed the judgment of the trial court, holding that the facts of the present case were adequately different from precedent cases where trial courts were held to have had a sua sponte duty to instruct.[3] The court of appeal also held

1. 7 Cal. 4th 1027, 874 P.2d 903, 31 Cal. Rptr. 2d 128 (1994). Justice George authored the majority opinion of the court, with Chief Justice Lucas, and Justices Arabian, Kennard, Baxter, and Lillie (assigned, Mildred L. Lillie, Presiding Justice, Court of Appeal, Second District, Division Seven) concurring. *Id.* at 1031-51, 874 P.2d at 904-17, 31 Cal. Rptr. 2d at 129-42. Justice Mosk filed a separate concurring and dissenting opinion. *Id.* at 1051-56, 874 P.2d at 917-21, 31 Cal. Rptr. 2d at 142-46. (Mosk, J., concurring and dissenting).

2. *Id.* at 1032, 874 P.2d at 904, 31 Cal. Rptr. 2d at 129-30. On September 27, 1990, the defendant, Montoya, accompanied Raymond Gaxiola to an apartment building, which Gaxiola proceeded to burglarize. *Id.* at 1033, 874 P.2d at 905, 31 Cal. Rptr. 2d at 130. Montoya contends he never entered the apartment, but rather remained in the car during the burglary. Montoya claims that he never even knew that Gaxiola was burglarizing the unit. Montoya maintains Gaxiola told him that Gaxiola had to go pick up his "stuff" (TV, VCR, Nintendo, radio, and jewelry) from his girlfriend's apartment, for which he possessed a key. Gaxiola and Montoya then went to an apartment to sell some of the "stuff" that had just been stolen. *Id.* at 1037, 874 P.2d at 908, 31 Cal. Rptr. 2d at 133.

Montoya and Gaxiola were arrested the same day. *Id.* at 1035, 874 P.2d at 906, 31 Cal. Rptr. 2d at 131-32. Gaxiola subsequently pleaded guilty. *Id.* at 1032, 874 P.2d at 905, 31 Cal. Rptr. 2d at 130. A jury subsequently found Montoya guilty of California Penal Code § 460(a), burglary of an inhabited dwelling. The court of appeal affirmed the conviction. *Id.* at 1038, 874 P.2d at 908-09, 31 Cal. Rptr. 2d at 133-34. The California Supreme Court granted review. *Id.* at 1038, 874 P.2d at 909, 31 Cal. Rptr. 2d at 134.

3. *Id.* at 1038, 874 P.2d at 908, 31 Cal. Rptr. 2d at 133.

that an instruction as to when the defendant formed the requisite intent as an aider and abettor would have been inconsistent with the defendant's defense theory.[4] The California Supreme Court held "a person who, with the requisite knowledge and intent, aids the perpetrator, may be found liable on a theory of aiding and abetting if he or she formed the intent to commit, encourage, or facilitate the commission of a burglary prior to the time the perpetrator finally departed from the structure."[5] Additionally, the court concluded that the trial court had no duty, absent a specific request from the defendant, to instruct the jury as to the point in time by which an aider or abettor must have formed the requisite intent.[6] The court therefore affirmed the judgment of the court of appeal.[7]

II. TREATMENT

A. *Majority Opinion*

The court detailed the evidence presented at the trial court.[8] Justice George then asserted that the intent of an aider or abettor must be formed before or as an offense is being committed.[9] The duration of the burglary for purposes of establishing liability was the pivotal question.[10] The defense inferred that since the crime of burglary is complete upon entry, the requisite intent must be formed by the aider or abettor at that time.[11]

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4. *Id.* at 1038, 874 P.2d at 908-09, 31 Cal. Rptr. 2d at 133-34 (finding that since the defendant maintained that he did not know that a burglary had occurred, such an instruction may have invited a jury to question defendant's defense).

5. *Id.* at 1050-51, 874 P.2d at 917, 31 Cal. Rptr. 2d at 142.

6. *Id.* at 1051, 874 P.2d at 917, 31 Cal. Rptr. 2d at 142.

7. *Id.*

8. *See supra* note 2. The trial court instructed the jury on the elements of burglary and as to culpability for aiding and abetting. The defendant did not request an instruction concerning when he must have formed the requisite intent. *Montoya*, 7 Cal. 4th at 1037-38, 874 P.2d at 908, 31 Cal. Rptr. 2d at 133.

9. *Id.* at 1038, 874 P.2d at 909, 31 Cal. Rptr. 2d at 134. This is a well established principle of law. *See* People v. Cooper, 53 Cal. 3d 1158, 1164, 811 P.2d 742, 747, 282 Cal. Rptr. 450, 455 (1991) (stating that intent "must be formed prior to or during commission of that offense"); People v. Beeman, 35 Cal. 3d 547, 558, 674 P.2d 1318, 1324, 199 Cal. Rptr. 60, 66-67 (1984) (stating that providing aid prior to commission satisfied intent). *See generally* 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Introduction to Crimes* § 88 (2d ed. 1988 & Supp. 1994).

10. *Montoya*, 7 Cal. 4th at 1038, 874 P.2d at 909, 31 Cal. Rptr. 2d at 134.

11. *Id.* at 1039-40, 874 P.2d at 910, 31 Cal. Rptr. 2d at 135. One may be liable for burglary upon entry with the requisite intent to commit a felony or theft, whether the felony or theft actually is committed. *Id.* at 1041-42, 874 P.2d at 911, 31 Cal. Rptr. 2d at 136; *see* People v. Macedo, 213 Cal. App. 3d 554, 558, 261 Cal. Rptr. 754, 756 (1989); People v. Forte, 204 Cal. App. 3d 1317, 1321, 251 Cal. Rptr. 855, 857 (1988); People v. Brady, 190 Cal. App. 3d 124, 133, 235 Cal. Rptr. 248, 254 (1987).

The court rejected this line of reasoning, stating that in determining the duration of an offense for the purposes of aiding or abetting one must take into consideration the types of interests that the provision is seeking to safeguard.[12] Justice George used an example to illustrate this point—the crime of rape. A "'rape victim . . . would not agree that the crime was completed once the crime was initially committed (i.e., at the point of initial penetration),' but rather would consider the offense not to have ended 'until all of the acts that constitute the rape have ceased.'"[13] The court analogized this to a person who happens to be in a structure during a burglary; he or she would not agree that the burglary has ceased after entry, but only ceases once the burglar leaves and the danger passes.[14] Additionally, even if no person is present in the structure, the danger to property does not cease at the time of entry but rather once the burglar departs.[15]

The court further reasoned that in the case of multiple entries and exits of the structure, as in the case at bar, the duration of burglary for purposes of aider and abettor liability encompasses any time before final egress by the perpetrator.[16]

After laying a foundation, the court directed its attention to the original question of whether the trial court erred in not instructing the jury, sua sponte, that in order to be found guilty of burglary on a theory of aiding and abetting, a person must have formed the intent to commit, encourage, or facilitate the commission of the burglary prior to or at the time the perpetrator entered the structure.[17] Even if no request is made for a particular jury instruction, a trial court must instruct upon every theory that is closely and openly connected to the facts before the court

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See generally 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Property* § 663 (2d ed. 1988 & Supp. 1994); 18 CAL. JUR. 3d *Criminal Law* § 1087 (1984 & Supp. 1994); 6A CAL. DIG. 2d *Burglary* §§ 1-2 (1991 & Supp. 1994).

12. *Montoya*, 7 Cal. 4th at 1040, 874 P.2d at 910, 31 Cal. Rptr. 2d at 135. The basis of burglary laws are in recognition of personal safety. *Id.* at 1042, 874 P.2d at 912, 31 Cal. Rptr. 2d at 136-37. *See generally* 18 CAL. JUR. 3d *Criminal Law* § 1082 (1984 & Supp. 1994); 6A CAL. DIG. 2d *Burglary* § 1 (West 1991 & Supp. 1994).

13. *Montoya*, 7 Cal. 4th at 1040-41, 874 P.2d at 910, 31 Cal. Rptr. 2d at 135 (quoting *Cooper*, 53 Cal. 3d at 1164, 811 P.2d at 747, 282 Cal. Rptr. at 455 n.7 (1991)).

14. *Id.* at 1045, 874 P.2d at 913, 31 Cal. Rptr. 2d at 138.

15. *Id.* at 1045, 874 P.2d at 914, 31 Cal. Rptr. 2d at 139.

16. *Id.* at 1045-46, 874 P.2d at 914, 31 Cal. Rptr. 2d at 139.

17. *Montoya*, 7 Cal. 4th at 1047, 874 P.2d at 915, 31 Cal. Rptr. 2d at 140. *See generally* 5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2924 (2d ed. 1989 & Supp. 1994).

and that are necessary for the jury's understanding.[18] The argument of the prosecutor in the present case was that the defendant was aware of Gaxiola's intent to commit burglary and therefore, the defendant's intent to aid or abet was formed prior to initial entry.[19] The argument advanced by the defense was that the defendant did not know that a burglary was planned, nor that a burglary was being committed, nor that a burglary had been committed.[20] Justice George concluded that in light of the parties' arguments "the significance of the precise time at which defendant must have formed the requisite intent in order to be liable as an aider and abettor was not an issue 'closely and openly' connected with the case."[21] The court further asserted that it was not the duty of the trial court to identify issues that could have been raised by the parties.[22] The court concluded that the instructions given to the jury were adequate[23] and the trial court was under no duty, sua sponte, to instruct the jury regarding the point in time by which an aider or abettor must have formed the requisite intent.[24] Additionally, a person with the requisite knowledge and intent "may be found liable of aiding and abetting if he or she formed the intent to commit, encourage, or facilitate the commission of a burglary prior to the time the perpetrator finally departed from the structure."[25] Furthermore, the majority held CALJIC 14.54 to be an inaccurate statement of the law and ordered it not be given in any case.[26]

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18. *Montoya*, 7 Cal. 4th at 1047, 874 P.2d at 915, 31 Cal. Rptr. 2d at 140.

19. *Id.* at 1048, 874 P.2d at 916, 31 Cal. Rptr. 2d at 141.

20. *Id.* at 1049, 874 P.2d at 916, 31 Cal. Rptr. 2d at 141.

21. *Id.* at 1050, 874 P.2d at 917, 31 Cal. Rptr. 2d at 142.

22. *Id.* (citing People v. Wade, 53 Cal. 2d 322, 334-35, 1 Cal. Rptr. 683, 692, 348 P.2d 116, 125 (1959) (stating a "trial court cannot be required to anticipate every possible theory that may fit the facts of the case before it and instruct the jury accordingly . . . . Omniscience is not required of our trial courts.")).

23. The trial court gave the following instructions to the jury: CALJIC 3.01 (aiding and abetting - defined); CALJIC 3.14 (criminal intent necessary to make one an accomplice); CALJIC 14.50 (burglary - defined); CALJIC 3.31 (concurrence of act and specific intent). *Montoya*, 7 Cal. 4th at 1047-48, 874 P.2d at 915-16, 31 Cal. Rptr. 2d at 140-41.

24. *Id.* at 1050, 874 P.2d at 917, 31 Cal. Rptr. 2d at 142.

25. *Id.* at 1050-51, 874 P.2d at 917, 31 Cal. Rptr. 2d at 142.

26. *Id.* at 1047, 874 P.2d at 915, 31 Cal. Rptr. 2d at 140. "In order for an accused to be guilty of burglary as an aider and abettor, [he][she] must have formed the intent . . . prior to the time [that person] made entry." *Id.* at 1038 n.4, 874 P.2d at 908 n.4, 25 Cal. Rptr. 2d at 134 n.4 (quoting CALJIC 14.54 (1993 Rev.) (Supp. 1994)).

B. Justice Mosk's Concurring and Dissenting Opinion

Justice Mosk disagreed in the finding that an aider or abettor may be liable if intent is formed prior to the perpetrator's final exit from the structure, but agreed that the trial court had no duty, sua sponte, to give a jury instruction regarding the point in time by which an aider or abettor must have formed the requisite intent.[27] Justice Mosk stated that since burglary is a specific intent crime, the aider or abettor must share that intent.[28] Justice Mosk proposed that once the elements of burglary have been satisfied,[29] the burglary is complete and the actual felony or theft proceeds thereafter.[30] Justice Mosk logically concluded that one who forms the intent to assist after the perpetrator's entry is no longer guilty of aiding and abetting a burglary, but rather guilty of aiding and abetting the felony or theft taking place.[31] Justice Mosk rejected Justice George's reference to rape.[32] Justice Mosk additionally maintained that CALJIC 14.54 is a correct statement of the law and should not be amended, but rather continued to be given where appropriate.[33]

III. CONCLUSION

In *Montoya*, the California Supreme Court held that a trial court does not have a sua sponte duty to give jury instructions regarding a specific issue unless that issue is "closely and openly" connected with the case.[34] Furthermore, persons may be held liable as an aider or abettor of burglary if they form the intention to facilitate the offense prior to

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27. *Id.* at 1051, 874 P.2d at 917, 31 Cal. Rptr. 2d at 142-43 (Mosk, J., concurring and dissenting).

28. *Id.* at 1052, 874 P.2d at 918, 31 Cal. Rptr. 2d at 143 (Mosk, J., concurring and dissenting) (quoting People v. Beeman, 35 Cal. 3d 547, 560, 674 P.2d 1318, 1326, 199 Cal. Rptr. 60, 68 (1984)).

29. *See* CAL. PENAL CODE § 459 (West 1988 & Supp. 1994) (defining burglary as entry into a structure with specific intent to commit a felony or theft).

30. *Montoya*, 7 Cal. 4th at 1052, 874 P.2d at 918, 31 Cal. Rptr. 2d at 143 (Mosk, J., concurring and dissenting).

31. *Id.* at 1052, 874 P.2d at 918-19, 31 Cal. Rptr. 2d at 143-44 (Mosk, J., concurring and dissenting).

32. The notion of initial penetration fulfilling the elements of rape is intended to define what is minimally required to establish rape. Rape encompasses the entire duration of unconsented sexual intercourse. *Id.* at 1054, 874 P.2d at 919, 31 Cal. Rptr. 2d at 144 (Mosk, J., concurring and dissenting).

33. *Id.* at 1056, 874 P.2d at 921, 31 Cal. Rptr. 2d at 146 (Mosk, J., concurring and dissenting); *see supra* note 24 and accompanying text.

34. *Montoya*, 7 Cal. 4th at 1050, 874 P.2d at 917, 31 Cal. Rptr. 2d at 142.

the perpetrator's final exit from the structure.[35] In light of the court's conclusion regarding aider or abettor liability, the court held that CALJIC 14.54 was an inaccurate statement of law and should not be given.[36] This decision clarified a discrepancy that existed between case law and CALJIC 14.54.

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35. *Id.* at 1050-51, 874 P.2d at 917, 31 Cal. Rptr. 2d at 142.
36. *Id.* at 1047, 874 P.2d at 915, 31 Cal. Rptr. 2d at 140; *see supra* note 24.

F. *Sellers of alcoholic beverages cannot rely on the California constitutional provision that prohibits minors from buying alcoholic beverages as a defense to selling alcoholic beverages to underage decoys:* **Provigo Corp. v. Alcoholic Beverage Control Appeals Board.**

I. INTRODUCTION

In *Provigo Corp. v. Alcoholic Beverage Control Appeals Board*,[1] the California Supreme Court granted review to determine whether sellers of alcoholic beverages can rely on the California constitutional provision that prohibits minors from buying alcoholic beverages as a defense to selling alcoholic beverages to underage decoys.[2] The court held that sellers of alcoholic beverages cannot use article XX, section 22 of the California Constitution as a defense to selling alcoholic beverages to underage decoys.[3] In addition, the court found that police use of underage decoys to purchase alcoholic beverages constitutes neither entrapment, in the absence of pressure or "overbearing" conduct,[4] nor a due process violation, in the absence of "outrageous" conduct.[5]

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1. 7 Cal. 4th 561, 869 P.2d 1163, 28 Cal. Rptr. 2d 638 (1994). Chief Justice Lucas authored the unanimous opinion, in which Justices Mosk, Kennard, Arabian, Baxter, and George concurred. The Honorable Clinton W. White, who is the Presiding Justice of the First District Court of Appeal and who was assigned by the Acting Chairperson of the Judicial Council, concurred in the opinion as well.

2. *Provigo* consolidated two cases involving police use of underage decoys to purchase alcoholic beverages. *Id.* at 564, 869 P.2d at 1164, 28 Cal. Rptr. 2d at 639. Provigo Corporation and Lucky Stores were the respective defendants in the two cases. *Id.* The first case involved an underage decoy who purchased a pack of wine coolers and the second case involved an underage decoy who purchased a six pack of beer. *Id.* Both decoys passed through the checkout counters of the respective defendants' grocery stores. *Id.* After the police filed accusations, the Department of Alcoholic Beverage Control suspended the defendants' licenses to sell alcohol. *Id.* at 564-65, 869 P.2d at 1164-65, 28 Cal. Rptr. 2d at 639-40. The Alcoholic Beverage Control Appeals Board subsequently affirmed the suspensions. *Id.* at 565, 869 P.2d at 1165, 28 Cal. Rptr. 2d at 640.

3. *Id.* at 564, 869 P.2d at 1164, 28 Cal. Rptr. 2d at 639.

4. *Id.* at 570, 869 P.2d at 1168, 28 Cal. Rptr. 2d at 643.

5. *Id.* at 570-71, 869 P.2d at 1168, 28 Cal. Rptr. 2d at 643 (citing United States v. Russell, 411 U.S. 423 (1973) (holding that due process may bar criminal convictions if there is "outrageous" police conduct)).

II. TREATMENT

In *Provigo*, the California Supreme Court considered three issues involved in police use of underage decoys to purchase alcoholic beverages: (1) whether the practice violates article XX, section 22 of the California Constitution, (2) whether it constitutes entrapment, and (3) whether it violates a defendant's due process rights.[6]

The California Constitution prohibits both vendors from selling alcoholic beverages to minors, and minors from purchasing alcoholic beverages.[7] Accordingly, the defendants argued that the court should excuse their alcoholic beverage sales to the decoys because the decoys themselves violated the constitution when they purchased alcoholic beverages as minors.[8]

The supreme court rejected the defendants' argument. The court refused to construe article XX, section 22 literally since doing so would contradict the legislative intent, which is to protect minors "from exposure to the 'harmful influences' associated with the consumption of [alcoholic] beverages."[9] The court stated that the seller should not escape liability simply because a minor purchased the alcoholic beverages.[10]

Conversely, police use of underage decoys to purchase alcoholic beverages clearly promotes the legislative intent of section 22 because it

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6. *Id.* at 566-71, 869 P.2d at 1166-69, 28 Cal. Rptr. 2d at 641-43. As a preliminary matter, the court indicated that it will uphold, in the absence of a clear abuse of discretion, the decisions of the Department of Alcoholic Beverage Control regarding the suspension, revocation, or denial of alcoholic beverage licenses. *See* CAL. CONST. art. XX, § 22 (granting the Department of Alcoholic Beverage Control the power and discretion to deny, suspend, or revoke alcoholic beverage licenses).

7. Article XX, § 22 states in relevant part: "The sale . . . of any alcoholic beverage to any person under the age of 21 years is hereby prohibited . . . and no person under the age of 21 years shall purchase any alcoholic beverage." CAL. CONST. art. XX, § 22 (amended in 1954 to include relevant prohibitions); *see also* CAL. BUS. & PROF. CODE § 25658 (West 1993) (making it a misdemeanor to sell alcoholic beverages to minors and for minors to purchase alcoholic beverages). *See generally* 3 CAL. JUR. 3D *Alcoholic Beverages* § 10 (1973 & Supp. 1994) ("It is also a misdemeanor to sell . . . alcoholic beverages to persons under the age of 21 . . . ."); 3 CAL. JUR. 3D *Alcoholic Beverages* § 54 ("The selling . . . of alcoholic beverages to any person under 21 years of age is prohibited . . . . [A] person under the age of 21 may not purchase any alcoholic beverage . . . .") (1973 & Supp. 1994).

8. *Provigo*, 7 Cal. 4th at 569, 869 P.2d at 1167, 28 Cal. Rptr. 2d at 642.

9. *Id.* at 567, 869 P.2d at 1166, 28 Cal. Rptr. 2d at 641 (citing Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control, 261 Cal. App. 2d 181, 188, 67 Cal. Rptr. 734, 738 (1968)). Although the court found no clear intent in the available legislative history behind the enactment, the court stated that this was the likely purpose of § 22. *Id.*

10. *Id.* The court stated that it would be absurd to allow the seller to "defend against criminal or administrative sanctions by relying on the purchaser's minority." *Id.*

helps enforce laws that prohibit the sale of alcoholic beverages to minors.[11] Therefore, the court held that the practice does not violate the California Constitution.[12]

Next, the court considered the entrapment issue.[13] According to the court, "the use of decoys to expose illicit activity does not constitute entrapment, so long as no pressure or overbearing conduct is employed by the decoy."[14]

The *Provigo* court found no evidence in the instant case that the underage decoys pressured or encouraged the defendants' sales personnel to sell the alcoholic beverages to them.[15] Although the decoys were "mature and self-assured in appearance and demeanor," the court noted that the defendants could have protected themselves by requiring their agents to routinely check the identification of buyers.[16]

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11. For the use of similar rationale by other state courts, see, e.g., *Survey of 1992-93 Developments in Alabama Case Law*, 45 ALA. L. REV. 317 (1993) (citing *Ex Parte* Alabama Alcoholic Beverage Control Bd., No. 1910325, 1993 WL 40431, at *4 (Ala. Feb. 19, 1993) ("[T]he use of a minor in an undercover operation 'was probably the most effective manner of regulating and enforcing the laws of this state prohibiting the sale of alcoholic beverages to minors.'")).

12. *Provigo*, 7 Cal. 4th at 567, 869 P.2d at 1166, 28 Cal. Rptr. 2d at 641.

13. *Id.* at 568, 869 P.2d at 1167, 28 Cal. Rptr. 2d at 642; *see* 20 CAL. JUR. 3D *Criminal Law* §§ 2267-2274 (1985 & Supp. 1994) (describing California entrapment law). *See generally* Fred W. Bennett, *From Sorrells To Jacobson: Reflections of Six Decades of Entrapment Law, and Related Defenses, In Federal Court*, 27 WAKE FOREST L. REV. 829 (1992) (discussing entrapment defense in federal practice);

14. *Provigo*, 7 Cal. 4th at 568, 869 P.2d at 1167, 28 Cal. Rptr. 2d at 642 (citing Reyes v. Municipal Court, 117 Cal. App. 3d 771, 777, 173 Cal. Rptr. 48, 51 (1981) (discussing use of decoy prostitutes)). *See generally* 20 CAL. JUR. 3d *Criminal Law* § 2270 (1985 & Supp. 1994).

> [W]here a person was regularly engaged in doing certain prohibited acts, such as unlawfully selling liquor . . . and had done such acts on his own initiative, it would not avail him as a defense that . . . an officer of the law directly or indirectly occasioned the commission of the particular offense charged."

Id.

15. *Provigo*, 7 Cal. 4th at 568, 869 P.2d at 1167, 28 Cal. Rptr. 2d at 642. The court analogized the use of underage decoys for buying alcoholic beverages to the use of decoys for soliciting acts of prostitution. *Id.* In the latter case, undercover officers act as prostitutes "despite statutory language making it a misdemeanor for 'every person' to solicit or engage in acts of prostitution." *Id.* (citing CAL. PENAL CODE § 647(b) (West 1988)). In both cases, the use of decoys is permissible as long as there is no "badgering" or "importuning" that would "induce an otherwise law-abiding person to commit a crime." *Id.* (quoting Reyes v. Municipal Court, 117 Cal. App. 3d 771, 777, 173 Cal. Rptr. 48, 51 (1981)).

16. *Id.* at 565, 869 P.2d at 1165, 28 Cal. Rptr. 2d at 640 (citing Kirby v. Alcoholic

In fact, the Business and Professions Code expressly allows sellers to rely on bonafide evidence of majority as a defense to liability.[17] Routine checking of identification, according to the court, does not overly burden sales personnel because the procedure is already routinely required when a buyer pays by check or by credit card.[18]

Finally, the court addressed the due process implications of police use of underage decoys to purchase alcoholic beverages.[19] The court stated that a due process violation does not exist in the absence of "outrageous" police conduct.[20] In the instant case, the court found that the use of underage decoys to enforce the liquor laws was "at most a technical violation [of due process] that could not be deemed so 'outrageous' as to afford a defense to prosecution."[21]

III. IMPACT AND CONCLUSION

The supreme court's decision clearly impacts the thousands of alcoholic beverage sellers in California. In order to avoid the loss or suspension of their licenses, sellers will likely be more emphatic in requiring their personnel to check the identification of buyers. Although this may inconvenience both the personnel and the buyers, it will certainly prove less costly for the sellers than outright suspension or revocation of their licenses to sell alcoholic beverages.

The supreme court's decision also impacts the practices of California law enforcement. Police now effectively have the license to use un-

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Beverage Control Appeals Bd., 267 Cal. App 2d 895, 898, 73 Cal. Rptr. 352, 354-55 (1968) (holding that good faith reliance upon a government issued document constitutes a defense to license suspension)). The court stressed that a seller cannot rely on the appearance of the buyer. *Id.* at 569, 869 P.2d at 1167-68, 28 Cal. Rptr. 2d at 642-43.

17. CAL. BUS. & PROF. CODE § 25660 (West 1993) ("Proof that the defendant-licensee, or his employee or agent, demanded, was shown and acted in reliance upon such bona fide evidence . . . shall be a defense to any criminal prosecution therefor or . . . suspension or revocation of any license."); *see also* 3 CAL. JUR. 3D *Alcoholic Beverages* § 54 (1990 & Supp. 1994) (quoting same language from Code).

18. *Provigo*, 7 Cal. 4th at 569, 869 P.2d at 1168, 28 Cal. Rptr. 2d at 643.

19. *Id.* at 570-71, 869 P.2d at 1168-69, 28 Cal. Rptr. 2d at 643-44. *See generally* 20 CAL. JUR. 3D *Criminal Law* § 2272 (1990 & Supp. 1994) ("[I]t has been stated that the defense of police misconduct so gross and outrageous as to constitute a violation of due process has little application in California . . . [s]ince the purpose of the . . . claim is the same as California's entrapment defense.").

20. *Provigo*, 7 Cal. 4th at 570, 869 P.2d at 1168, 28 Cal. Rptr. 2d at 643 (citing United States v. Russell, 411 U.S. 423, 431-32 (1973)). The court assumed that the *Russell* rule applies to California: "due process may bar criminal convictions if 'outrageous' conduct by law enforcement officers." *Id.*

21. *Id.* The court found no "outrageous" conduct even though the police failed "to follow the [d]epartment's suggested decoy program 'guidelines' and instead used more mature-appearing persons as decoys." *Id.*

derage decoys to target merchandisers who sell alcoholic beverages to minors. As long as the decoys do not employ pressure or overbearing conduct, the police do not have to concern themselves with entrapment issues. Consequently, police departments throughout the state will probably implement this procedure more frequently.[22]

Moreover, the supreme court's decision affirms the judiciary's commitment to the strict enforcement of constitutional and statutory prohibitions against the sale of alcoholic beverages to minors.[23] In light of the numerous deaths caused by teenage drunk driving, as well as the countless criminal incidents that involve intoxicated minors, the supreme court's decision is both timely and appropriate.[24] *Provigo* will certainly promote the legislative intent of article XX, section 22 to protect minors from exposure to the "harmful influences associated with the consumption" of alcoholic beverages.[25]

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22. *See California Department of Alcoholic Beverage Control: Minor Decoy Operation Nets Bakersfield Businesses*, PR Newswire, June 13, 1994 ("[A] massive minor decoy operation . . . this past weekend . . . was the biggest minor decoy operation in Bakersfield since the Supreme Court ruled in April that using minors to check establishments was not entrapment and did not violate due process requirements.").

23. For previous California cases enforcing the constitutional and statutory prohibitions against the sale of alcoholic beverages to minors, see Burako v. Munro, 174 Cal. App. 2d 688, 691-92, 345 P.2d 124, 127 (1959) (holding that a licensee has the burden of establishing the defense that the buyer showed a bona fide identification immediately before the sale of liquor); Nickola v. Munro, 162 Cal. 2d 449, 328 P.2d 271 (1958) (holding that the seller did not have a valid defense when due to a misunderstanding, it served cognac to a minor who ordered a non-alcoholic drink).

24. *See, e.g., Safety Board Adds Underage Drinking, Driving to Curb Its "Most Wanted List"*, NTSB, May 24, 1994, *available in* WESTLAW, File No. 248812 ("[T]here are still more than 9,000 deaths annually involving young drivers."); *Stronger State Laws and Vigorous Enforcement Needed to Save Teen Lives*, NTSB, Mar. 3, 1993, *available in* WESTLAW, File No. 74855 ("Underage drinking and driving continues to play a major role in youth traffic crashes and fatalities.")

25. *See supra* note 10 and accompanying text.

IV. CRIMINAL PROCEDURE

A defendant who pleads guilty pursuant to a plea agreement is not entitled to relief from a trial court's failure to advise the defendant of the full consequences of his plea, if he fails to make a timely objection; the imposition of a statutorily mandated registration requirement, even when the court fails to advise the defendant of the requirement, does not constitute a violation of the plea agreement: **People v. McClellan.**

I. INTRODUCTION

The California Supreme Court in *People v. McClellan*[1] held that a defendant was bound to the terms of a plea agreement, despite the trial court's error in failing to advise the defendant that a guilty plea to the charge of assault with intent to commit rape requires the defendant to register as a sex offender.[2] The court found that the defendant, by failing to object to the requirement that he register as a sex offender pursuant to California Penal Code section 290,[3] waived his right to relief from the

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1. 6 Cal. 4th 367, 862 P.2d 739, 24 Cal. Rptr. 2d 739 (1993). Justice George authored the majority opinion, with Chief Justice Lucas and Justices Panelli, Arabian, and Baxter concurring. *Id.* at 369, 862 P.2d at 741, 24 Cal. Rptr. 2d at 741. Justice Mosk filed a dissenting opinion. *Id.* at 381, 862 P.2d at 749, 24 Cal. Rptr. 2d at 749, 24 Cal. Rptr. 2d at 749 (Mosk, J., dissenting). Justice Kennard wrote a separate dissent. *Id.* at 385, 862 P.2d at 751, 24 Cal. Rptr. 2d at 751. (Kennard, J., dissenting).

2. *Id.* at 381, 862 P.2d at 749, 24 Cal. Rptr. 2d at 749. The defendant, Gregory McClellan pled guilty, pursuant to a plea agreement, to assault with intent to commit rape, and admitted to infliction of great bodily injury, a prior serious felony, and a prior prison term. *Id.* at 370-71, 862 P.2d at 741, 24 Cal. Rptr. 2d at 741. The plea was conditioned on the defendant receiving no more than a thirteen year prison term. *Id.* No mention was made of a registration requirement by either the people or the defendant. *Id.* At the sentencing hearing, the court sentenced McClellan to four years for the assault with intent to commit rape, a three year enhancement for the infliction of great bodily injury, a consecutive five year enhancement for the prior serious felony, and a one year consecutive enhancement for the prior prison term. *Id.* at 373, 862 P.2d at 743, 24 Cal. Rptr. 2d at 743. After the sentencing, the trial court ordered the defendant to "register as required under the provisions of Section 290 of the Penal Code." *Id.* The defendant made no objection and did not request permission to change his plea. *Id.* On appeal, McClellan contended that he would not have pled guilty had he been advised of the registration requirement. *Id.* The court of appeal unanimously held that the defendant must be given an opportunity to change his plea, and remanded the case to the trial court. *Id.* at 373-74, 862 P.2d at 743, 24 Cal. Rptr. 2d at 743.

3. Penal Code § 290(a) states in pertinent part:

> Any person who . . . is . . . convicted in this state of the offense of assault with intent to commit rape . . . shall, within . . . 14 days of coming into any county or city, or city and county in which he or she temporarily

court's failure to advise.[4] The court also held that the imposition of a registration requirement does not constitute a violation of the plea agreement because sex offender registration is required by law for all persons convicted of assault with intent to commit rape.[5]

In his dissent, Justice Mosk, with Justice Kennard concurring,[6] argued that the imposition of a registration term is a denial of due process.[7] Justice Mosk also argued separately that the defendant should be entitled either to withdraw his plea or to serve according to the terms of the plea agreement as represented to him, without having to comply with the sex offender registration requirement.[8]

II. ANALYSIS

A. *Majority Opinion*

The court first addressed the defendant's contention that he was entitled to relief on the grounds that the trial court had failed to advise him of the consequences of pleading guilty to assault with intent to commit rape.[9] The court relied on prior California Supreme Court decisions holding that sex offender registration was one consequence of a plea agreement of which a defendant must be informed.[10] The court relied on its holdings in *In re Birch*[11] and *Bunnell v. Superior Court*[12] as the basis for its finding of error. In *Birch*, the court found that a sex offender registration requirement was one "grave and direct consequence" of a

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resides or is domiciled for that length of time register with the chief of police of the city in which he or she is domiciled or the sheriff of the county if he or she is domiciled in an unincorporated area . . . .

CAL. PENAL CODE § 290(a) (West 1988 & Supp. 1994).

4. *McClellan*, 6 Cal. 4th at 377, 862 P.2d at 746, 24 Cal. Rptr. 2d at 746.

5. *Id.* at 380, 862 P.2d at 748, 24 Cal. Rptr. 2d at 748.

6. Justice Kennard issued a separate dissent in which she concurred with Justice Mosk in all but one respect. *See infra* note 42.

7. *McClellan*, 6 Cal. 4th at 381-82, 862 P.2d at 749, 24 Cal. Rptr. 2d at 749 (Mosk, J., dissenting); *see also* U.S. CONST. amend. XIV, § 1.

8. *McClellan*, 6 Cal. 4th at 384, 862 P.2d at 751, 24 Cal. Rptr. 2d at 751 (Mosk, J., dissenting).

9. *Id.* at 374, 862 P.2d at 743, 24 Cal. Rptr. 2d at 743.

10. *Id.* at 376, P.2d at 745, 24 Cal. Rptr. 2d at 745 (citing Bunnell v. Superior Court, 13 Cal. 3d 592, 531 P.2d 1086, 119 Cal. Rptr. 302 (1975); *In re* Birch, 10 Cal. 3d 314, 515 P.2d 12, 110 Cal. Rptr. 212 (1973)).

11. 10 Cal. 3d 314, 515 P.2d 12, 110 Cal. Rptr. 212 (1973).

12. 13 Cal. 3d 592, 531 P.2d 1086, 119 Cal. Rptr. 302 (1975).

plea bargain of which the defendant must be informed,[13] and that the responsibility for advising the defendant "in the absence of counsel . . . rested with the court."[14] In *Bunnell*, the court held that *Birch* specifically applied to statutory registration requirements such as section 290.[15]

Thus, the court found that because the trial court had failed to advise the defendant that a guilty plea would compel him to register pursuant to Penal Code section 290, a *Bunnell* error had occurred.[16] However, the court reasoned that *Bunnell* error alone did not entitle the defendant to relief from his guilty plea.[17] The court cited *People v. Walker*[18] for the proposition that the failure to object when the court fails to advise operates as a waiver of the defendant's right to notice.[19] The purpose of the waiver doctrine is "to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had."[20] Since the defendant had been presented with the probation report which recommended that he be compelled to register as a sex offender eleven days before the sentencing hearing,[21] and he still failed to object both to the report and to the imposition of the registration requirement,[22] the court concluded that the defendant had waived any claim of prejudicial error.[23]

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13. *Birch*, 10 Cal. 3d at 322, 515 P.2d at 17, 110 Cal. Rptr. at 217 (vacating a conviction for lewd conduct based on a guilty plea after the trial court failed to inform the defendant, *in pro per*, that a conviction for urinating outside of a Taco Bell restaurant would require his registration as a sex offender).

14. *Id.*

15. *Bunnell*, 13 Cal. 3d at 605, 531 P.2d at 1094, 119 Cal. Rptr. at 310.

16. *McClellan*, 6 Cal. 4th at 376, 862 P.2d at 745, 24 Cal. Rptr. 2d at 745; *Bunnell*, 13 Cal. 3d at 605, 531 P.2d at 1094, 119 Cal. Rptr. at 310.

17. *McClellan*, 6 Cal. 4th at 377-78, 862 P.2d at 746-47, 24 Cal. Rptr. 2d at 746-47.

18. 54 Cal. 3d 1013, 819 P.2d 861, 1 Cal. Rptr. 2d 902 (1991).

19. *Id.* at 1023, 819 P.2d at 866, 1 Cal. Rptr. 2d at 908.

20. *McClellan*, 6 Cal. 4th at 377, 862 P.2d at 746, 24 Cal. Rptr. 2d at 746 (quoting People v. Melton, 218 Cal. App. 3d 1406, 1408-09, 267 Cal. Rptr 640, 642 (1990) (finding waiver where the defendant failed to object at his sentencing hearing to the imposition of a fine)). For a discussion of the waiver doctrine as it applies to criminal procedure, see generally 21A AM. JUR. 2D *Criminal Law* §§ 633-634 (1981 & Supp. 1993) (discussing waiver doctrine); *see also* Schick v. United States, 195 U.S. 65, 71 (1904) (holding that the rights of a criminal defendant may not be waived when there is a statutory mandate, or when doing so would be contrary to public policy). For a discussion of the waiver doctrine as applied by California courts in criminal cases, see People v. Saunders, 5 Cal. 4th 580, 589-91, 853 P.2d 1093, 1096-98, 20 Cal. Rptr. 2d 638, 641-43 (1993) (finding waiver where the defendant failed to object to the trial court's premature dismissal of the jury in a bifurcated trial), *cert. denied*, 114 S. Ct. 1101 (1994).

21. *McClellan*, 6 Cal. 4th at 377, 862 P.2d at 746, 24 Cal. Rptr. 2d at 746.

22. *Id.*

23. *Id.*

The court also rejected the defendant's contention that no waiver had occurred due to the failure of the court to advise him of his right under Penal Code section 1192.5[24] to change his plea should the sentence imposed be more severe than what he expected.[25] The defendant cited *Walker* to support his claim that waiver does not occur when the court has failed to advise the defendant of his rights under section 1192.5.[26] The court rejected the defendant's claim, holding that *Walker* applied only to cases in which the plea agreement was violated, and did not extend to the failure to object to the direct consequences of a plea agreement.[27]

Furthermore, the court noted that the record did not establish that the defendant was prejudiced by the trial court's failure to advise him of the section 290 registration requirement.[28] Although the court noted that the defendant's appellate pleading stated that he would not have pled guilty if he knew of the registration requirement,[29] the court refused to

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24. Penal Code § 1192.5 reads in pertinent part:

> If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of the judgment, withdraw its approval in the light of further consideration of the matter, and (3) in such case, the defendant shall be permitted to withdraw his plea if he desires to do so.

CAL. PENAL CODE § 1192.5 (West 1982).

25. *McClellan*, 6 Cal. 4th at 377-78, 862 P.2d at 746, 24 Cal. Rptr. 2d at 746.

26. *Id.*; *see Walker*, 54 Cal. 3d at 1024, 819 P.2d at 867, 1 Cal. Rptr. 2d at 909 (finding waiver of the right to advisement of the consequences of the plea agreement by defendant's failure to object, but finding no waiver of defendant's claim of deviation from the plea agreement).

27. *McClellan*, 6 Cal. 4th at 377-78, 862 P.2d at 746, 24 Cal. Rptr. 2d at 746.

28. *Id.* at 378, 862 P.2d at 746, 24 Cal. Rptr. 2d at 746. The court's analysis of the defendant's claim of prejudice is worth noting. Having established that the defendant waived any claim of prejudicial error, the court did not have to analyze this claim. Since the court resolved the case by deciding that the defendant waived any possible claim of prejudice, the court's *arguendo* review of the defendant's prejudice claim is curious. Perhaps the court sought to prevent reversal of the case by grounding its holding on the alternate basis of failure to establish prejudice in the event that the United States Supreme Court overrules the court's waiver analysis. *See, e.g.*, 5 CAL. JUR. 3D *Appellate Review* § 487 (1973); *see also* Lissak v. Crocker Estate Co., 119 Cal. 442, 446-47, 51 P. 688, 689 (1897) (refusing to rule on a demurrer after ordering a new trial which resulted in allowing the parties an opportunity to amend their respective complaints); 5 AM. JUR. 2D *Appeal and Error* § 760 (1962 & Supp. 1994) (discussing the judicial principle of refusing to decide unnecessary or moot questions).

29. *McClellan*, 6 Cal. 4th at 378, 862 P.2d at 746-47, 24 Cal. Rptr. 2d at 746-47.

accept the pleading as evidence of prejudice since an appellate pleading gives a trial court "no occasion to pass upon the veracity of [the] defendant's present claim."[30] The court limited its consideration of prejudice against the defendant to the trial court record, and found that the imposition of the registration requirement did not effect the defendant's willingness to plead guilty.[31]

The court then analyzed the defendant's claim that the terms of the plea agreement were violated, entitling him to relief from the plea agreement.[32] The court observed that although there was no mention of the requirement of sex offender registration at the defendant's hearing, the registration requirement could not properly constitute a term of the plea agreement because the parties made no mention of it.[33] The court cited *Santobello v. New York*[34] for the proposition that for a plea term to be binding, it must be based on "a promise or agreement of the prosecutor . . . that . . . can be said to be part of the inducement or consideration."[35] The court found that the registration requirement in *McClellan* did not constitute such a term.[36]

Next, the court distinguished *McClellan* from *Walker*, in which the court granted relief to a defendant whose plea agreement called for jail time and no punitive fine, but who was subsequently sentenced to jail time and a "restitutionary" fine.[37] The *Walker* court reasoned that it was appropriate to consider fines in plea negotiations.[38] The defendant in *Walker*, therefore, could have reasonably understood that, according to his agreement, there would be no fine.[39] However, in *McClellan*, the

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30. *Id.*

31. *Id.*

32. For an overview of the plea bargain process and the constitutional rights involved, see John J. Farley, *Guilty Pleas*, 81 GEO. L.J. 1184 (1993).

33. *McClellan*, 6 Cal. 4th at 379, 862 P.2d at 747, 24 Cal. Rptr. 2d at 747. The court's opinion *McClellan* and in its companion case, *In re* Moser, 6 Cal. 4th 342, 862 P.2d 723, 24 Cal. Rptr. 2d 723 (1993), suggest that the court's analysis in cases in which the defendant alleges that the prosecution breached a plea agreement, will turn on a close examination of the elements of the bargain. Only those areas which the trial court clearly addresses will constitute terms of the bargain for the purpose of determining whether or not the prosecution violated the agreement. *Id.*

34. 404 U.S. 257 (1971). *See generally* 22 C.J.S. *Criminal Law* §§ 365-374 (1989 & Supp. 1993) (discussing plea bargaining and negotiations); 21 CAL. JUR. 3D *Criminal Law* § 2824 (1985 & Supp. 1994) (discussing a defendant's remedies for breach of a plea agreement).

35. *McClellan*, 6 Cal. 4th at 379, 862 P.2d at 747, 24 Cal. Rptr. 2d at 747 (quoting *Santobello*, 404 U.S. at 262).

36. *Id.* at 379, 862 P.2d at 747, 24 Cal. Rptr. 2d at 747.

37. *Walker*, 54 Cal. 3d 1013, 1030-31, 819 P.2d 861, 871, 1 Cal. Rptr. 2d 902, 912-13.

38. *Id.* at 1024, 819 P.2d at 867, 1 Cal. Rptr. 2d at 908-09.

39. *McClellan*, 6 Cal. 4th at 379-80, 862 P.2d at 748, 24 Cal. Rptr. 2d at 748 (quoting

court held that the statutory registration requirement, because it is imposed by law on anyone convicted of assault with intent to commit rape, gave no discretion to the court to forego the imposition of the requirement, and thus it was an improper subject for plea negotiations.[40] Accordingly, the court found no violation of the defendant's right to due process of law.[41]

B. Justice Mosk's Dissenting Opinion

Justices Mosk, joined by Justice Kennard,[42] argued in a passionate dissent that McClellan's right of due process had been violated.[43] While the dissenters conceded that "not any deviation from the terms of the agreement is a violation of due process,"[44] they argued that any significant deviation from the agreement "may not be added without violating the defendant's rights."[45]

The dissenters further noted that even the Attorney General had agreed that the defendant was entitled to "some relief."[46] They characterized the majority as apparently "conclud[ing] that unless the plea expressly *excludes* a term of punishment, that term may be added ex post facto."[47] Such a rule, they contended, was contrary to *Walker* and *Santobello* as well as established contract principles.[48]

Moser, 6 Cal. 4th at 356-57, 862 P.2d at 732-33, 24 Cal. Rptr. 2d at 732-33 (explaining the rationale behind the *Walker* decision)).

40. *Id.* at 380, 862 P.2d at 748, 24 Cal. Rptr. 2d at 748; *see also Moser*, 6 Cal. 4th at 357, 862 P.2d at 733, 24 Cal. Rptr. 2d at 733 (stating that the length of a parole term in which the term is statutorily mandated is an improper subject for plea settlement negotiations).

41. *McClellan*, 6 Cal. 4th at 381, 862 P.2d at 749, 24 Cal. Rptr. 2d at 749.

42. Justice Mosk authored a dissenting opinion in which Justice Kennard concurred in all respects except for the proposition that the defendant was entitled to specific performance of the plea bargain. *Id.* at 385, 862 P.2d at 751, 24 Cal. Rptr. 2d at 751 (Kennard, J., dissenting). Justice Kennard wrote that because sex offender registration was mandated by law, "the only remedy available to the defendant is withdrawal of the guilty plea." *Id.* at 385, 862 P.2d at 751, 24 Cal. Rptr. 2d at 751 (Kennard, J., dissenting).

43. *Id.* at 381, 862 P.2d at 749, 24 Cal. Rptr. 2d at 749 (Mosk, J., dissenting).

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

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

46. *Id.* at 382, 862 P.2d at 749, 24 Cal. Rptr. 2d at 749 (Mosk, J., dissenting).

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

48. *Id.* at 382, 862 P.2d at 749-50, 24 Cal. Rptr. 2d at 749-50 (Mosk, J., dissenting).

The dissenters then criticized the majority's distinguishing *Walker* on the basis that the registration requirement, as opposed to fines, was not a proper subject of bargaining. The court in *Walker*, the dissenters argued, granted the defendant relief because restitutionary fines were not discussed in the plea settlement,[49] and not because fines were a proper subject of negotiation,[50] as the majority asserted.

Justices Mosk and Kennard then dismissed the statutory requirement of sex offender registration as controlling the issue, arguing that "[t]he prosecution . . . may not escape its voluntary promise and still get the benefit of the guilty plea simply because its promise may have been ultra vires."[51] The dissenters further argued that if the plea agreement had been ambiguous as to the issue of sex offender registration, then such an ambiguity should be construed against the government.[52]

The dissenters also criticized the majority for refusing to grant relief to the defendant on the basis that his lawyer failed to make a timely ob-

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49. *Id.* at 383, 862 P.2d at 750, 24 Cal. Rptr. 2d at 750 (Mosk, J., dissenting).

50. *Id.* (Mosk, J., dissenting). Both the majority and the dissent cited the same passage in *Walker* as support for their respective arguments. The disputed passage in *Walker* holds:

> When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement. The punishment may not significantly exceed that which the parties agreed upon.
>
> "'[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled' . . . . The Supreme Court has thus recognized that due process applies not only to the procedure of accepting the plea, . . . but that the requirements of due process attach also to implementation of the bargain itself. It necessarily follows that violation of the bargain by an officer of the state raises a constitutional right to some remedy." . . . . Although the purpose of a restitution fine is not punitive, we believe its consequences to the defendant are severe enough that it qualifies as punishment for this purpose. Accordingly, the restitution fine should generally be considered in plea negotiations.
>
> This does not mean that *any* deviation from the terms of the agreement is constitutionally impermissible . . . the variance must be "significant" in the context of the plea bargain as a whole to violate the defendant's rights. A punishment or related condition that is insignificant relative to the whole, such as a standard condition of probation, may be imposed whether or not it was part of the express negotiations.

Walker, 54 Cal. 3d at 1024, 819 P.2d at 867, 1 Cal. Rptr. 2d at 908-09 (citations omitted) (quoting People v. Mancheno, 32 Cal. 3d 855, 860, 654 P.2d 211, 214, 187 Cal. Rptr. 441, 444 (1982).

51. *McClellan*, 6 Cal. 4th at 383, 862 P.2d at 750, 23 Cal. Rptr. 2d at 750. (Mosk, J., dissenting).

52. *Id.* at 384, 862 P.2d at 750-51, 23 Cal. Rptr. 2d at 750-51. (Mosk, J., dissenting).

jection to the registration requirement.[53] "No court should callously compel that result,"[54] the dissenters concluded, as "[t]here is no rational reason why this court should obdurately refuse relief."[55]

III. CONCLUSION

McClellan sought to clarify the issues that must be considered in determining whether plea agreements are violated. Errors made by the trial court such as the failure to advise the defendant of the consequences of his plea, and the failure to advise him of the right to change a plea, are waived if the defendant does not object and there is no violation of the plea agreement. Accordingly, the court's analysis of whether a plea agreement has been violated will involve a close scrutiny of the exact terms of the agreement in future cases. Any additional impositions on the defendant, if not specifically bargained for, will not be considered terms of the agreement for purposes of *Santobello* analysis if they are insignificant or not a permissible subject for a plea agreement, such as statutorily mandated requirements.

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53. *Id.* at 384, 862 P.2d at 751, 23 Cal. Rptr. 2d at 751 (Mosk, J., dissenting).
54. *Id.* (Mosk, J., dissenting).
55. *Id.*

V. DEATH PENALTY

A. *California's death penalty selection factors are not subject to the Eighth Amendment vagueness standard despite the United States Supreme Court's holding in* Stringer v. Black*; the correct standard for the penalty selection-phase is specificity of terms used and their relevance to sentence determination:* **People v. Bacigalupo.**

I. INTRODUCTION

In *People v. Bacigalupo* (*Bacigalupo II*),[1] the California Supreme Court held that the California penalty selection phase factors set forth in California Penal Code section 190.3,[2] assisting a jury in its sentence se-

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1. 6 Cal. 4th 457, 862 P.2d 808, 24 Cal. Rptr. 2d 808 (1993), *cert. denied*, 114 S. Ct. 2782 (1994). Justice Kennard delivered the majority opinion, with Chief Justice Lucas and Justices Arabian, Baxter, and George concurring. *Id.* at 462-79, 862 P.2d at 810-21, 24 Cal. Rptr. 2d at 810-21. Justice Panelli concurred in the judgment but filed a separate opinion. *Id.* at 479-84, 862 P.2d at 821-25, 24 Cal. Rptr. 2d 821-25 (Panelli , J., concurring). Justice Mosk also concurred in the judgment but filed a separate dissenting opinion. *Id.* at 484-93, 862 P.2d at 825-31, 24 Cal. Rptr. 2d at 825-31 (Mosk, J., concurring and dissenting).

2. Section 190.3 provides the following non-exclusive list of factors for the trier of fact to consider in the penalty phase:

> (a) The circumstances of the crime of which the defendant was convicted . . . and . . . any special circumstances found to be true pursuant to section 190.1.
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction.
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> (f) Whether or not . . . the defendant reasonably believed [there] to be a moral justification or extenuation for his conduct.
>
> (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired [by] mental disease or defect, or the affects of intoxication.
>
> (i) The age of the defendant at the time of the crime.
>
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

lection for a defendant already determined eligible for the death penalty, are not subject to the Eighth Amendment vagueness standard[3] used to evaluate the preliminary question of death sentence eligibility.[4] The court also established an alternative standard for sentence selection factors and upheld the specific factors upon which the defendant appealed.[5]

The defendant was found eligible for the death penalty by a jury which then imposed a death sentence upon considering the factors set forth in section 190.3.[6] The defendant appealed to the California Supreme Court on the ground that the enumerated factors were vague.[7] However, the court declined to review the defendant's conviction, stating that the Eighth Amendment standard applied to only the death penalty eligibility phase, not the penalty selection phase.[8] Relying on *Stringer v. Black*,[9] decided shortly after *Bacigalupo I*,[10] the defendant appealed to

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CAL. PENAL CODE § 190.3 (West 1988 & Supp. 1994).

All further statutory references are to the California Penal code unless otherwise specified.

3. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Eighth Amendment thus subjects the death penalty to several restrictions. One notable limitation requires that any capital punishment statute defining death eligibility must set forth a "narrowing principle that channels jury discretion and provides a principled way to distinguish those cases in which the death penalty is imposed from the many cases in which it is not." *Bacigalupo II*, 6 Cal. 4th at 462, 862 P.2d at 810, 24 Cal. Rptr. 2d at 810. If the statute does not meet this standard, it is viewed as vague under the Eighth Amendment, and is therefore unconstitutional. *Id.* (citing Maynard v. Cartwright, 486 U.S. 356 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980)).

4. *Id.* at 463, 862 P.2d at 810, 24 Cal. Rptr. 2d at 810. Three days before the announcement of the *Bacigalupo II* decision, the United States Supreme Court granted certiorari to hear two California cases addressing Stringer v. Black, 112 S. Ct. 1130 (1992), in which the court could either affirm or reject the California Supreme Court's rationale in the instant case. *See* People v. Proctor, 4 Cal. 4th 499, 842 P.2d 1100, 15 Cal. Rptr. 2d 340 (1992), *cert. granted sub nom.*; Proctor v. California, 114 S. Ct. 598 (1993); People v. Tuilaepa, 4 Cal. 4th 569, 842 P.2d 1142, 15 Cal. Rptr. 2d 382 (1992), *cert. granted sub nom.* Tuilaepa v. California, 114 S. Ct. 598 (1993), *aff'd*, 114 S. Ct. 2630 (1994); *see also* 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* § 1381 (2d ed. 1989 & Supp. 1994).

5. *Bacigalupo II*, 6 Cal. 4th at 463, 862 P.2d at 810, 24 Cal. Rptr. 2d at 810.

6. *Id.* at 457, 862 P.2d at 808, 24 Cal. Rptr. 2d at 808.

7. *Id.*

8. *Id.* at 464, 862 P.2d at 810, 24 Cal. Rptr. 2d at 810. In People v. Bacigalupo, 1 Cal. 4th 103, 820 P.2d 559, 2 Cal. Rptr. 2d 335, 360 (1992) (*Bacigalupo I*), the defendant argued that factor (b) of § 190.3 was impermissibly vague. *Bacigalupo II*, 6 Cal. 4th at 463-64, 862 P.2d at 810, 24 Cal. Rptr. 2d at 810.

9. 112 S. Ct. 1130 (1992).

the United States Supreme Court.[11] The Supreme Court vacated and remanded the case for reconsideration in light of *Stringer*.[12]

On remand, the California Supreme Court first reviewed the application of the vagueness standard to death penalty cases prior to *Stringer*, highlighting the distinction between the death penalty eligibility phase and the penalty selection phase.[13] The court then explained why the *Stringer* analysis was inapplicable to California's sentence selection factors.[14] Based on these considerations, the court determined that the contested factors passed muster under a more lenient alternative Eighth Amendment standard.[15]

II. TREATMENT

A. *Majority Opinion*

In *Bacigalupo II*, the California Supreme Court noted the United States Supreme Court's distinction between two aspects of death penalty statutes—"'narrowing' and 'selection.'"[16] The Court has required that "narrowing" factors define conduct which would render a defendant eligible for the death penalty, a function subject to review under the Eighth Amendment vagueness standard.[17] The court articulated this standard in *Godfrey v. Georgia*, establishing that any statutory designation of conduct deserving potential imposition of the death penalty must narrow the class of defendants eligible for a death sentence as well as

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10. 1 Cal. 4th 103, 820 P.2d 559, 2 Cal. Rptr. 2d 335 (1992).

11. In *Bacigalupo I*, the jury found the defendant guilty on two counts of first degree murder. The jury also found true the allegation of special circumstances—robbery-murder and multiple-murder. *Bacigalupo II*, 6 Cal. 4th at 464, 862 P.2d at 810, 24 Cal. Rptr. 2d at 810; *see also* CAL. PENAL CODE § 190.2 (West 1988 & Supp. 1994) (enumerating special circumstances utilized in death penalty eligibility-phase).

12. Bacigalupo v. California, 113 S. Ct. 32 (1992).

13. *Bacigalupo II*, 6 Cal. 4th at 465-71, 862 P.2d at 811-16, 24 Cal. Rptr. 2d at 811-16.

14. *Id.* at 471-77, 862 P.2d at 816-20, 24 Cal. Rptr. 2d at 816-20.

15. *Id.* at 477-79, 862 P.2d at 820-21, 24 Cal. Rptr. 2d at 820-21.

16. *Id.* at 465, 862 P.2d at 812, 24 Cal. Rptr. 2d. at 812 (quoting Zant v. Stephens, 462 U.S. 862, 878 (1983)); *see also* William J. Kopeny, *Capital Punishment—Who Should Choose?* 12 W. ST. U. L. REV. 383 (1985).

17. *Bacigalupo II*, 6 Cal. 4th at 465, 862 P.2d at 811, 24 Cal. Rptr. 2d at 811 (quoting Lewis v. Jeffers, 497 U.S. 764, 774 (1990), for the proposition that "'the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed' violates the Eighth and Fourteenth Amendments to the federal Constitution"). For a general discussion of California death penalty cases, see John G. Marich et al., *California Supreme Court Survey*, 10 PEPP. L. REV. 835 (1983). *See generally* 22 CAL. JUR. 3D *Criminal Law* §§ 3340-3342 (1985 & Supp. 1994).

provide an objective basis for distinguishing between cases actually warranting the death penalty from those that do not.[18] Once a defendant is determined "death penalty-eligible," the sentence selection must also be considered. In this second phase, the jury or court must make an individualized determination regarding the imposition of death.[19]

Capital statutes divide the death penalty determination into two phases: eligibility for the death penalty and subsequent sentence selection.[20] The narrowing and selection aspects noted above are not always addressed in the separate phases respectively; in other words, the narrowing function is not always sufficiently confined to the eligibility phase.[21] Some statutory schemes limit the class of people eligible for capital punishment by strictly confining the definition of capital offenses such that an initial "finding of guilt" represents the requisite narrowing function during the eligibility-phase, i.e., requiring a specific intent to kill.[22] "Other states define capital offense[] more broadly," and then require the sentencer 'to determine whether one or more aggravating circumstances are present.[23] This approach fulfills the narrowing function within the penalty phase. The California Supreme Court emphasized that the individualized determination may include a consideration of numerous factors bearing on the offender's background and character and entails virtually unbridled discretion.[24]

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18. *See* Godfrey v. Georgia, 446 U.S. 420, 427-29 (1980). The narrowing function is served by the legislature's prescription of the circumstances and conduct that bring particular actions within the purview of the death penalty; a constitutional capital statute also must provide an objective basis for appellate review. Zant v. Stephens, 462 U.S. 862, 878 (1983); *Godfrey*, 446 U.S. at 428 (setting forth the principle that the determination of whether a defendant is eligible for the death penalty must be sufficiently narrowed and be made on an objective basis reviewable on appeal); *see also* Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988) (holding that certain aggravating circumstances were unconstitutionally vague).

19. The requirement that the sentencing determination be sufficiently individualized is satisfied when the capital statute allows for broad sentence discretion to consider a myriad of both mitigating and aggravating evidence such as the character of the defendant and victim impact. Johnson v. Texas, 113 S. Ct. 2658, 2665 (1993); Lowenfield v. Phelps, 484 U.S. 231, 246 (1988); California v. Ramos, 463 U.S. 992, 1008 (1983).

20. *Bacigalupo II*, 6 Cal. 4th at 465, 862 P.2d at 811-12, 24 Cal. Rptr. 2d at 811-12.

21. *Id.* at 476, 862 P.2d at 819, 24 Cal. Rptr. 2d at 819.

22. *Id.* at 465, 862 P.2d at 812, 24 Cal. Rptr. 2d at 812.

23. *See id.*

24. *See supra* note 18; *see also* 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* §§ 1592-1593 (2d ed. 1989 & Supp. 1994); 22 CAL. JUR. 3D *Criminal Law* § 3344 (1985 & Supp. 1994) (discussing the court's deter-

The majority analyzed the California death penalty statute before further developing the significance of these distinctive capital statutory features.[25] Divided into two phases,[26] California's statute first requires two determinations: (1) that the defendant is guilty of first degree murder and (2) the truth of any alleged special circumstances, any of which, if found true, render the offender death penalty-eligible.[27] The second phase[28] focuses solely on whether or not the death penalty-eligible defendant shall receive a capital sentence instead of life imprisonment without the possibility of parole.[29] Thus, the California statute addresses the narrowing and selection requirements in separate and distinct phases.

The special circumstance requirement of the California statute's guilt phase[30] serves to "guide and channel" the jury by restricting the class of murderers to those who will become eligible for the death penalty.[31] Thus, California's *eligibility phase* "special circumstances" requirement performs the same function as the "aggravating circumstances" or

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mination of death as punishment at a penalty hearing).

25. *Bacigalupo II*, 6 Cal. 4th at 467, 862 P.2d at 813, 24 Cal. Rptr. 2d at 813.

26. "If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in section 190.2 has been charged and found true, . . . there shall . . . be further proceedings on the sentence to be imposed . . . conducted in accordance with the provisions of Sections 190.3 and 190.4." CAL. PENAL CODE § 190.1 (West 1988); *see also* 22 CAL. JUR. 3D *Criminal Law* § 3342 (1985 & Supp. 1994) (discussing the procedure used to determine a convicted defendant's punishment).

27. CAL. PENAL CODE § 190.1 (West 1988). Section 190.1 provides in pertinent part that "the question of defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in § 190.2." *Id.*; *see also* Pulley v. Harris, 465 U.S. 37, 53 (1984) (limiting death sentence to a small subclass of offenders by requiring the jury to find at least one special circumstance beyond a reasonable doubt).

28. Section 190.1 provides an alternative phase when defendants plead insanity. CAL. PENAL CODE § 190.1 (b) (West 1988). However, that section is not relevant to this discussion.

29. *See* CAL. PENAL CODE § 190.3 (West 1988). For a thorough discussion of the guiding factors set forth in the second phase, see Richard R. Wirick, *Dark Year on Death Row: Guiding Sentence Discretion After Zant, Barclay, and Harris*, 17 U.C. DAVIS L. REV. 689 (1984).

30. This phase can also be referred to as the death penalty eligibility phase. *See* 22 CAL. JUR. 3D *Criminal Law* § 3343 (1985 & Supp. 1994) (discussing the court's consideration of findings regarding special circumstances when determining a convicted defendant's punishment).

31. *Bacigalupo II*, 6 Cal. 4th at 467, 862 P.2d at 813, 24 Cal. Rptr. 2d at 813 (quoting People v. Brown, 40 Cal. 3d 512, 539-40, 726 P.2d 516, 531, 230 Cal. Rptr. 834, 849 (1985), *rev'd on other grounds sub nom.* California v. Brown, 479 U.S. 538 (1987)). For a general discussion of the current court with regard to special circumstances, see John W. Poulos, *The Lucas Court and Capital Punishment: The Original Understanding of the Special Circumstances*, 30 SANTA CLARA L. REV. 333 (1990).

"aggravating factors" used by other states during the *penalty selection phase* to satisfy the constitutionally required narrowing function.[32]

Next, in the penalty phase, the California Code provides a nonexclusive list of discretion-guiding factors.[33] This second phase provides a separate opportunity for the sentencer to consider additional evidence and exercise *individualized discretion* in determining whether to impose the death sentence.[34] The court explained that the weighing of the aggravating and mitigating factors required by the California statute allows for a "mental balancing process."[35] Recognizing the distinct functions death penalty statutes must perform, the court emphasized that the section 190.3 factors pertain exclusively to sentence selection, and were clearly unrelated to the narrowing prong.[36]

After discussing the two functions served by death penalty statutes, the court focused on the reasoning in several capital cases decided by the United States Supreme Court.[37] These cases established the Supreme Court's distinction between weighing states and non-weighing states, as were termed in *Stringer*.[38] The Court's vagueness of each analysis dif-

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32. *Bacigalupo II*, 6 Cal. 4th at 468, 862 P.2d at 813, 24 Cal. Rptr. 2d at 813; *see also* Gregg v. Georgia, 428 U.S. 153, 193 n.44 (1976) (setting forth special circumstances in a 1962 model code §).

33. *See supra* note 2 and accompanying text.

34. The penalty selection-phase is grounded in "'the jury's moral assessment of those facts . . . [bearing on the character of the individual and the circumstances of the crime] as they reflect on whether [the] defendant should be put to death.'" *Bacigalupo II*, 6 Cal. 4th at 468-69, 862 P.2d at 814, 24 Cal. Rptr. 2d at 814 (quoting *Brown*, 40 Cal. 3d at 540, 762 P.2d at 576, 230 Cal. Rptr. at 834, *see* Zant v. Stephens, 462 U.S. 862, 879 (1983); *see also* 22 CAL. JUR. 3D *Criminal Law* § 3344 (1985 & Supp. 1994).

35. *Bacigalupo II*, 6 Cal. 4th at 470, 862 P.2d at 815, 24 Cal. Rptr. 2d at 815 (stating that the statute does not require that the death penalty be imposed unless the juror is *convinced* after balancing the various factors that death is the appropriate penalty); *see also id.* at 476, 862 P.2d at 819, 24 Cal. Rptr. 2d at 819. For a less obfuscated explanation as compared to Justice Kennard's treatment regarding this aspect, see Justice Panelli's concurrence. *Id.* at 480-81, 862 P.2d at 822, 24 Cal. Rptr. 2d at 822 (Panelli, J., concurring); *see also* Richmond v. Lewis, 113 S. Ct. 528 (1992) (interpreting Arizona law—ARIZ. REV. STAT. ANN. § 13-703E (1989)); Espinosa v. Florida, 112 S. Ct. 2926 (1992) (interpreting Florida law—FLA. STAT. ANN. § 921.141(2)(a) (West 1988 & Supp. 1994)).

36. *Bacigalupo II*, 6 Cal. 4th at 467, 862 P.2d at 813, 24 Cal. Rptr. 2d at 813 (stating that this distinction underlied the court's denial of a vagueness review in *Bacigalupo I*).

37. Stringer v. Black, 112 S. Ct. 1130 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988); Zant v. Stephens, 462 U.S. 862 (1983); Godfrey v. Georgia, 446 U.S. 420 (1980).

38. *Stringer*, 112 S. Ct. at 1136.

fers subtly. In a weighing state, after guilt is determined, and at least one aggravating factor has been found, the statute requires imposition of the death penalty unless the sentencer finds the aggravating factor's sufficiently outweighed by mitigating factors. In a non-weighing state, the sentencer "must find the existence of one aggravating factor before imposing the death penalty, but aggravating factors as such no specific function in the jury's [decision regarding death sentence eligibility]."[39]

Zant v. Stephens[40] was a decision involving the Georgia death penalty statute—a non-weighing statute. In *Zant*, the Court considered one death sentence eligibility factor (out of three relied upon by the jury) that was unconstitutionally vague and asked whether the consideration of that factor "infected" the subsequent sentence selection.[41] The Court found no infection of the sentence phase, reasoning that the narrowing factors are confined to the eligibility phase and not designed to play a role in the selection-phase.[42]

Stringer involved a Mississippi capital statute in which the narrowing process occurred within the penalty selection phase.[43] In the Mississippi statute, the sentencer determines the truth of any aggravating factors after the guilt phase. After an aggravating factor is found to be true during the eligibility phase, the defendant is then eligible for the death penalty.[44] The sentencer then weighs any mitigating evidence against the aggravating factors already considered.[45] The *Stringer* court revisited the infection issue in this context and found that the selection process had been tainted by the vagueness of the aggravating factors employed in the selection-phase.[46] The *Stringer* court stated that:

> [A] vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentence discretion . . . . [and] used in the weighing process is . . . worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty.[47]

In *Bacigalupo II*, the defendant argued that *Stringer* should be read as applying the *Godfrey* standard to both the eligibility phase and the sen-

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39. *Bacigalupo II*, 6 Cal. 4th at 473, 862 P.2d at 817, 24 Cal. Rptr. 2d at 817 (quoting *Stringer*, 112 S. Ct. at 1136).

40. 462 U.S. 862 (1983).

41. *Id.* at 471, 862 P.2d at 815-16, 24 Cal. Rptr. 2d at 815-16.

42. *Id.* (citing *Zant*, 462 U.S. at 874). The court left unanswered whether consideration of a similarly vague aggravating eligibility factor in a weighing state might infect the sentence selection. *Id.*

43. *Id.* at 471-72, 862 P.2d at 816, 24 Cal. Rptr. 2d at 816.

44. *Id.* at 473, 862 P.2d at 817, 24 Cal. Rptr. 2d at 817.

45. *Id.* at 474, 862 P.2d at 817, 24 Cal. Rptr. 2d at 817.

46. *Id.* (citing *Stringer*, 112 S. Ct. at 1136).

47. *Id.* at 473-74, 862 P.2d at 817-18, 24 Cal. Rptr. 2d at 817-18.

tence selection phase.[48] The majority in *Bacigalupo II* explained that the *Stringer* court did not hold that factors used solely for the sentence selection-phase were subject to the *Godfrey* standard.[49] In fact, the court pointed out that the *Godfrey* analysis is more appropriately limited to those factors used to circumscribe the class of dependant's eligible for the death penalty—the narrowing function.[50]

The majority reasoned that when a capital statute provides sufficient narrowing factors in the eligibility phase, the Eighth Amendment places no similar restraint on the penalty selection phase.[51] The court stated that applying the same standard to the two separate phases is contrary to the high court's line of decisions distinguishing between them.[52] As further support for its conclusion that the California selection-factors are exempt from the vagueness standard, the *Bacigalupo II* court also noted that "in granting the jury 'unbridled discretion' in its sentence selection decision," the *Zant* court upheld a sentence selection scheme that did not provide an objective basis for a reviewing court.[53]

The court emphasized that section 190.3 factors merely guide the sentencer's broad discretion with factors that draw attention to the character of the crime and the defendant's background.[54] The court further reasoned that such factors are not employed until after the narrowing function has already been performed in the eligibility-phase.[55] Thus, the

48. *Id.* at 475, 862 P.2d at 819, 24 Cal. Rptr. 2d at 819.

49. *Id.* at 476-77, 862 P.2d at 819-20, 24 Cal. Rptr. 2d at 819-20; *see supra* note 17 and accompanying text.

50. *Bacigalupo II*, 6 Cal. 4th at 475-76, 862 P.2d at 819-20, 24 Cal. Rptr. 2d at 819-20 (quoting Stringer v. Black, 112 S. Ct. 1130, 1139 (1992)). The California Supreme Court rejected the defendant's contention as incorrectly implying that the mere inclusion of the term "weighing" brought the California statutory scheme under the *Stringer* analysis. *Id; see also id.* at 480-81, 862 P.2d at 822, 24 Cal. Rptr. 2d at 822 (Panelli, J., concurring) (clarifying the implicit logic of the majority's conclusion).

51. *Id.* at 475, 862 P.2d at 818-19, 24 Cal. Rptr. 2d at 818-19.

52. *Id.*

53. *Id.*

54. *Id.* at 476-77, 862 P.2d at 819-20, 24 Cal. Rptr. 2d at 819-20; *see also* Payne v. Tennessee, 501 U.S. 808, 824 (1991); Boyde v. California, 494 U.S. 370, 377 (1990); 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* §§ 1605-1606, 1608-1609 (2d ed. 1989 & Supp. 1994) (discussing factors properly considered as mitigating circumstances).

55. *Bacigalupo II*, 6 Cal. 4th at 477, 862 P.2d at 819-20, 24 Cal. Rptr. 2d at 819-20.

majority held that the penalty-phase factors were not subject to the Eighth Amendment vagueness standard.[56]

After concluding that the *Godfrey* standard did not apply to the sentencing factors, the court turned its attention to the potential for "randomness" and "death penalty bias" in the selection-phase as the court had previously addressed in *People v. Tuilaepa*[57] and the United States Supreme Court had considered in *Stringer*.[58] The court explained that the sentence selection factors must meet the dual standards of "'specificity'" and "'relevance,'" providing terms that are "sufficiently clear and specific" and that direct the sentencer to "relevant" and "appropriate" evidence for penalty determination.[59]

According to the court, factors (a) and (b),[60] which defendant complained were impermissibly vague, did not relate to the narrowing function and, therefore, were not subject to that standard.[61] Instead, the court analyzed the defendant's contention under a new standard articulated in *Tuilaepa* and determined both subsections were sufficiently clear and relevant.[62]

B. The Concurring and Dissenting Opinions

In his concurring opinion, Justice Panelli agreed with the majority regarding the inapplicability of the Eighth Amendment vagueness standard to sentence selection factors when those factors are clearly separate from the narrowing process.[63] However, Justice Panelli stated that the majority's opinion reflects the ambiguous and questionable applicability of *Stringer* to the California sentencing factors and provided a more clearly reasoned justification for the same conclusion.[64]

Justice Panelli disagreed with the majority's reliance on *Tuilaepa* because the majority was adding to it to create a "new Eighth Amendment vagueness standard," which only applies to sentencing factors.[65] Justice

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56. *Id.* at 477, 862 P.2d at 820, 24 Cal. Rptr. 2d at 820.

57. 4 Cal. 4th 569, 842 P.2d 1142, 15 Cal. Rptr. 2d 382 (1992), *cert. granted sub nom.* Tuilaepa v. California, 114 S. Ct. 598 (1993), *aff'd*, 114 S. Ct. 2630 (1994).

58. 112 S. Ct. 1130, 1139 (1992). This is the extent of the case precedents upon which the majority based its prescription of a new standard.

59. *Bacigalupo II*, 6 Cal. 4th at 477, 477 P.2d at 820, 24 Cal. Rptr. 2d at 820 (quoting *Tuilaepa*, 4 Cal. 4th at 595).

60. *See supra* note 2.

61. *Bacigalupo II*, 6 Cal. 4th at 478, 862 P.2d at 820-21, 24 Cal. Rptr. 2d at 820-21.

62. *Id.* at 478, 862 P.2d at 821, 24 Cal. Rptr. 2d at 821.

63. *Id.* at 480-81, 862 P.2d at 822-23, 24 Cal. Rptr. 2d at 822-23 (Panelli, J., concurring).

64. *Id.* at 480-83, 862 P.2d at 822-24, 24 Cal. Rptr. 2d at 822-24 (Panelli, J., concurring).

65. *Id.* at 483, 862 P.2d at 824, 24 Cal. Rptr. 2d at 824 (Panelli, J., concurring) (stat-

Panelli generally criticized the majority for ignoring the dearth of precedential authority for its implicit activism.[66] He specifically criticized the piecemeal application of *Stringer* to the California statute, stating that it either "applies to our sentencing factors or it does not."[67] Justice Panelli reasoned that in *Tuilaepa*, without deciding applicability, the court had held the sentencing factors valid in the event *Stringer* controlled.[68] Justice Panelli concluded by stating that, "properly interpreted, *Stringer* has nothing to say about California's sentencing factors; but assuming for the sake of argument that it does, our sentencing factors are not vague."[69]

In a separate opinion, Justice Mosk concurred in the judgement but dissented with both the majority and the concurrence.[70] Justice Mosk viewed the court's recognition of subtle distinguishing nuances as ignoring what he viewed as the United States Supreme Court's correct and express rationale in *Stringer*. Justice Mosk significantly relied on the statement in *Stringer*, that a vague aggravating factor utilized in the sentence selection phase is perhaps more dangerous than in the eligibility phase due to the potential that the sentencer will rely on an "illusory circumstance."[71] Justice Mosk disagreed that the statement was made within a context distinguishable from California's statute, concluding that *Stringer* does in fact impose the traditional Eighth Amendment standard on California's penalty selection factors.[72]

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ing that the majority goes much further in *Bacigalupo II* than in *Tuilaepa* by creating a new standard).

66. *Id.* (Panelli, J., concurring).

67. *Id.* (Panelli, J., concurring).

68. *Id.* at 483, 862 P.2d at 824, 24 Cal. Rptr. 2d at 824 (Panelli, J., concurring).

69. *Id.* (Panelli, J., concurring) (citing People v. Montiel, 5 Cal. 4th 877, 944, 855 P.2d 1277, 1316, 21 Cal. Rptr. 2d 705, 744, (1993), *cert. denied*, 114 S. Ct. 2782 (1994); People v. Simms, 5 Cal. 4th 405, 465-66, 853 P.2d 992, 1029, 20 Cal. Rptr. 2d 537, 574, (1993), *cert. denied*, 114 S. Ct. 2782 (1994); People v. Stansbury, 4 Cal. 4th 1017, 1071, 846 P.2d 756, 789, 17 Cal. Rptr. 2d 174, 209, *cert. granted sub nom.* Stansbury v. California, 114 S. Ct. 380 (1993)).

70. *Bacigalupo II*, 6 Cal. 4th at 484, 862 P.2d at 825, 24 Cal. Rptr. 2d at 825 (Mosk, J., concurring and dissenting).

71. *Id.* (Mosk, J., concurring and dissenting); *see* 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* § 1370A (2d ed. 1989 & Supp. 1994) (citing several recent California Supreme Court decisions in which *Stringer* has been repeatedly rejected where it challenges the selection factors as unconstitutionally vague). However, the United States Supreme Court has granted certiorari to two of the cases cited. *See supra* note 4.

72. *Bacigalupo II*, 6 Cal. 4th at 491-92, 862 P.2d at 829-30, 24 Cal. Rptr. 2d at 829-

III. IMPACT

The sentence selection factors enumerated under section 190.3 withstood recent constitutional scrutiny when the Supreme Court affirmed the California Supreme Court's decision in *Tuilaepa*.[73] The Court has also denied certiorari in *Bacigalupo II*.[74] Both decisions have implications regarding the applicability of *Stringer* to section 190.3 and the vagueness review to which the selection factors will be subject. However, the Supreme Court's ruling in *Tuilaepa* is considerably more enlightening than the denial of certiorari.

Although the Court recognized that eligibility and selection factors alike shall be subject to a vagueness review, they indicated that such a review has been and will continue to be "quite deferential" to a state's particular statutory construction.[75] The Court held that neither phase of the California penalty scheme was unconstitutionally vague.[76] Furthermore, the Court stated that the section 190.3 selection factors are subject to a less stringent standard than the eligibility factors.[77] It should be noted that the Court did not go as far as California went in *Bacigalupo II* when it articulated the distinctly separate vagueness review for sentence selection factors. Even so, the Court clearly established that where the narrowing function is sufficiently satisfied in the eligibility phase sentence selection factors are subject to a less stringent vagueness review.[78] It is clear from both *Tuileapa* and *Bacigalupo II* that California's particular selection factors are constitutionally sound.[79]

Although the California Supreme Court's "specificity" and "relevance" test, as set forth in *Bacigalupo II*, is not strongly supported by precedent, that standard appears to be simply a more specific manifestation of the United States Supreme Court's implicit distinction recognized in *Tuilaepa* and thus, arguably in line with the high Court's reasoning. However, because the Court denied certiorari in *Bacigalupo II*, it is unclear whether or not they are favorably disposed to the new standard. Finally, regarding the applicability of *Stringer*, as the petitioners in both cases relied on the reasoning there in their challenges to section 190.3, it is clear that the Supreme Court did not intend to apply the *Stringer* analysis to a death penalty scheme such as California's.

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30 (Mosk, J., concurring and dissenting).

73. Tuilaepa v. California, 114 S. Ct. 2630 (1994).

74. People v. Bacigalupo, 114 S. Ct. 2782 (1994).

75. *Id.* at 2635.

76. *Tuilaepa*, 114 S. Ct. at 2634.

77. *Id.* at 2635-37.

78. *Id.*

79. *Id.*

The *Bacigalupo II* standard of review allows a greater degree of vagueness for the selection factors, but also recognizes the need to provide reasonable safeguards when life, the most revered of rights, lies in the balance. However, that standard has not been embraced by the high court. Thus, the decision stands as the state of the law with regard to the limited applicability of *Stringer* to the California's death penalty scheme, but in as far as it establishes California's new vagueness test its constitutional legitimacy is not secured.

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B. *A witness' psychiatric records not obtained or created as part of the prosecution's investigation, but derived from previous psychotherapy, might not be deemed in the government's possession for purposes of applying the* Pennsylvania v. Ritchie *exception to privileged therapist-patient communications; when a laboratory evidentiary procedure provides a directly identifiable image that is clear to a lay jury, it is not subject to the* People v. Kelly *scientific evidence standard:* **People v. Webb.**

I. INTRODUCTION

In *People v. Webb*,[1] the California Supreme Court ruled against each of the defendant's numerous contentions on automatic appeal from his death penalty sentence. The defendant's legal arguments were not particularly compelling. Thus, analysis of the court's opinion is limited to the following holdings: denial of the defendant's request to view prosecution witness' psychiatric records did not violate his right to due process; the *People v. Kelly*[2] evidentiary standard, which states that scientific procedures must be generally accepted within the scientific community, did not apply to the laboratory analysis of the defendant's fingerprint; the police did not fail to adequately preserve evidence (a revolver); and the defendant's claims regarding penalty phase mitigation, defendant sentencing testimony, and the constitutionality of the death penalty were without merit.[3]

The trial court convicted the defendant of two counts of first degree murder, and found three aggravating factors.[4] He was thereby rendered eligible for capital punishment. At trial, the sentencer found the aggravating evidence outweighed that in mitigation and, therefore, imposed the death penalty. On automatic appeal, the defendant raised a significant number of meritless claims that the court patiently addressed.

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1. 6 Cal. 4th 494, 862 P.2d 779, 24 Cal. Rptr. 2d 779 (1993). Justice Baxter delivered the majority opinion, with Chief Justice Lucas and Justices Panelli, Arabian, and George concurring. *Id.* at 503, 862 P.2d at 784, 24 Cal. Rptr. 2d at 784. Justice Mosk and Justice Kennard each filed separate opinions that concurred with the judgment, but dissented with a portion of the majority's opinion. *Id.* at 537, 862 P.2d at 807, 24 Cal. Rptr. at 807.

2. 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976).

3. *Id.*

4. *Id.* at 503, 862 P.2d at 784, 24 Cal. Rptr. 2d at 784. The special circumstances were multiple murder, robbery-murder, and burglary-murder. *Id.*

II. DISCUSSION

This Note discusses the more significant claims the defendant brought before the California Supreme Court, but relegates treatment of the less significant issues to minimal footnote commentary. The most contentious issue addressed by the majority was the defendant's assertion that the trial court erred when it denied his motion for full access to the key prosecution witness' (Sharon White Bear) psychiatric record.[5]

The defendant claimed he was prejudicially denied his Sixth Amendment right to effective cross-examination because the trial court granted only limited disclosure of the prosecution witness' psychiatric file.[6] In arguing for an exception to the psychotherapist-patient privilege, the defendant relied on *Pennsylvania v. Ritchie*,[7] which stands for the proposition that the state is required to give the defense "all 'material' exculpatory evidence in its 'possession,' even" when the evidence is privileged[8] under state law.[9] The court rejected the petitioner's claim, recognizing that both the magistrate and the superior court subjected the files to multiple in camera reviews and found little "relevant" information supporting the defendant's contention that the defendant's confrontation clause rights should prevail over the therapist-patient privilege.[10] The California Supreme Court noted that the lower court had provided "sanitized" versions of the file that revealed only the relevant information. The court held that even assuming *Ritchie* applied, the lower court satisfied the necessary in camera reviews and properly concluded the irrelevance of the evidence to the defendant's claims.

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5. The majority's treatment of the psychiatric evidence issue drew comment from both dissenters. *Id.* at 537-38, 862 P.2d at 807-08, 24 Cal. Rptr. 2d at 807-08.

6. *Id.* at 517-18, 862 P.2d at 793-94, 24 Cal. Rptr. 2d at 793-94 (but also noting that absolute privileges are not subject to the rule in *Ritchie*).

7. 480 U.S. 39 (1987).

8. The court included a caveat that *Ritchie* apparently does not apply when the recognized privilege is absolute. *Webb*, 6 Cal. 4th at 518, 862 P.2d at 794, 24 Cal. Rptr. 2d at 794; *see Ritchie*, 480 U.S. at 56-58; *see also* 3 B.E. WITKIN, CALIFORNIA EVIDENCE, *Introduction of Evidence at Trial* §§ 1683A, 1683B (3d ed. 1986 & Supp. 1994) (discussing the right to compulsory process and the right to present evidence).

9. *Webb*, 6 Cal. 4th at 518, 862 P.2d at 794, 24 Cal. Rptr. 2d at 794 (quoting *Ritchie*, 480 U.S. at 56-58). *Ritchie* established the rule that where the defendant seeks potentially privileged evidence the court must view it in camera to determine the evidence's "materiality" to guilt or innocence. *Id.*

10. *Id.* at 516-17, 862 P.2d at 793-94, 24 Cal. Rptr. at 793-94.

Prior to reaching its decision, the court raised its own question regarding the applicability of *Ritchie* in this particular instance.[11] One of the necessary elements of *Ritchie* is that the psychiatric records "be deemed 'in the possession' of the 'government.'"[12] The court indicated that the records were not compiled by the prosecution, nor in the course of the investigation, and that neither party controlled access to the records.[13] Thus, the court intimated, that based on such facts, "it seems likely that defendant [had] no constitutional right to examine the records even if they [were] 'material' to the case."[14] However, it appears the court relied on the "in camera examinations" as the basis of its conclusion that the trial court properly denied the requests.[15] Thus, the court's language questioning *Ritchie* is merely dicta.[16]

The court also considered the defendant's contention that fingerprint evidence should not be admitted because it was the result of a technical procedure not accepted within the scientific community.[17] The court recognized that California adopted the "*Kelly* test" to prevent jurors from being unduly influenced by scientific evidence that only appears reliable to the layperson.[18] However, the court reasoned that the use of the laser and chemical process utilized in the petitioner's case was reliable because it produced a directly recognizable photographic image.[19] The

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11. *Id.* at 518, 862 P.2d at 794, 24 Cal. Rptr. 2d at 794.

12. *Id.*; *see* 3 B.E. WITKIN, CALIFORNIA EVIDENCE, *Introduction of Evidence at Trial* § 1683A (3d ed. Supp. 1994) (discussing the *Ritchie* decision); *see also* 21 CAL. JUR. 3D *Criminal Law* § 2843 (discussing discovery by the defendant and rights of the accused).

13. *Webb*, 6 Cal. 4th at 518, 862 P.2d at 794, 24 Cal. Rptr. 2d at 794.

14. *Id.* In fact, the magistrate and superior court both controlled access to the files. *Id.*

15. *Id.*

16. *See Webb*, 6 Cal. 4th at 518, 862 P.2d at 794, 24 Cal. Rptr. 2d at 794; *see also id.* at 537-38, 862 P.2d at 807-08, 24 Cal. Rptr. 2d at 807-08 (Mosk, J. & Kennard, J. separately dissenting).

17. *Webb*, 6 Cal. 4th at 523, 862 P.2d at 797, 24 Cal. Rptr. 2d at 797.

18. People v. Kelly, 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976) (setting forth the rule that evidence derived from new and scientific methods is not admissible unless it is shown that the procedure is not viewed with skepticism within the scientific community); *see* 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Demonstrative, Experimental and Scientific Evidence* §§ 862-864 (3d ed. 1986 & Supp. 1994) (discussing the scientific basis and reliability of evidence of chemical and physical tests); *see also* People v. Stoll, 49 Cal. 3d 1136, 1155-61, 783 P.2d 698, 707-14, 265 Cal. Rptr. 111, 120-26 (1989). For the origination of this evidentiary standard, see Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923).

19. *Webb*, 6 Cal. 4th at 523-24, 862 P.2d at 797-98, 24 Cal. Rptr. 2d at 797-98. The prosecution's latent print analyst isolated a fingerprint that was found on a role of tape the police seized at the scene of the crime, and without physically altering it, produced a photographic image of the print that matched a sample print from the

court concluded that because the procedure provided an image "whose existence, appearance, nature, and meaning" was clear to a lay jury, it was not subject to a *Kelly* analysis.[20]

The defendant also challenged the trial court's decision to reject his alternative motion to suppress the gun that the prosecution offered as the murder weapon.[21] He argued that the police had failed to adequately preserve evidence.[22] The court stated that the police's duty under *California v. Trombetta*[23] only applies to material evidence. To be material, the evidence must possess exculpatory value that is evident before its destruction, and be so uniquely critical to a defendant's case that the defendant could not obtain comparable evidence.[24] The United States Supreme Court recently added the requirement that the defendant must show police bad faith in the demise of the evidence to prove there was a failure to preserve evidence.[25]

In the instant case, the court reasoned that the police did not intentionally expose the gun to destructive forces, but merely left it at the crime scene.[26] The court found that the gun was not material to the drug related arrest because it was not until sometime later that the de-

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defendant.

20. *Id.* By so deciding the court avoided discussing the relatively new conflict between the "*Kelly* Test" (or the federal "*Frye* Test") and the high court's recent opinion in Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993). For a thorough and timely review of the this issue and related concerns, see William P. Haney, Comment, *Scientific Evidence in the Age of Daubert: A Proposal for a Dual Standard of Admissibility in Civil and Criminal Cases*, 21 PEPP. L. REV. 1391 (1994).

21. *Webb*, 6 Cal. 4th at 518-19, 862 P.2d at 794, 24 Cal. Rptr. 2d at 794. Prior to investigating the defendant for the murder, the police arrested the defendant and Sharon at Sharon's home for entirely unrelated drug possession and sales crimes. At that time the police discovered three hand guns and marked them as evidence, but accidentally left one behind. Sharon was released, but the defendant was kept in jail due to a probation violation. Soon thereafter, before the police suspected the defendant, the defendant instructed Sharon to destroy the weapon that had been overlooked by the police. *Id.* at 518-20, 862 P.2d at 794-95, 24 Cal. Rptr. 2d at 794-95.

22. California v. Trombetta, 467 U.S. 479, (1984) (discussing police duty to preserve evidence); *see* 3 B.E. WITKIN, CALIFORNIA EVIDENCE, *Introduction of Evidence at Trial* §§ 1791, 1791A, 1793 (3d ed. 1986 & Supp. 1994) (discussing the failure to gather evidence).

23. 467 U.S. 479 (1984).

24. *Webb*, 6 Cal. 4th at 519, 862 P.2d at 795, 24 Cal. Rptr. 2d at 795 (citing *Trombetta*, 467 U.S. at 479).

25. *See* Arizona v. Youngblood, 488 U.S. 51, 58 (1988).

26. *Webb*, 6 Cal. 4th at 519-20, 862 P.2d at 795, 24 Cal. Rptr. 2d at 795.

fendant was suspected of the handgun killings, and because the defendant himself instructed Sharon White Bear to destroy the gun.[27] Applying the *Trombetta* test, the court concluded that because no proof of police bad faith intent existed, and the evidence did not have exculpatory value evident at the time the officers seized it, the officers' actions did not constitute a failure to preserve evidence in the manner the high court sought to prevent.[28]

The court next turned its attention to the defendant's penalty deliberation complaints. The defendant challenged the trial court's denial of his motion to strike evidence of a prior felony, one of the aggravating factors employed in the selection phase,[29] because the defendant had knowingly and intelligently waived his jury trial, confrontation, and self-incrimination rights when he pled guilty to the prior criminal charge.[30] Although there was no transcript of the guilt plea hearing, the "Stipulation of Evidence" and the "Waiver of Jury" documents signed by the defendant contained express statements waiving these rights.[31] Thus, the court concluded that the "documentary record of the prior proceeding" established that the defendant knowingly waived his rights, and therefore the sentencer properly considered the prior conviction.[32]

The defendant also questioned the penalty selection phase regarding aggravating and mitigating factors.[33] He requested that the inapplicable mitigating factors be struck from the jury instructions[34] and argued that certain of the aggravating factors were unconstitutionally vague.[35]

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27. *Id.*

28. *See id.*

29. CAL. PENAL CODE § 190.3(c) (West 1988).

30. *Webb*, 6 Cal. 4th at 531-32, 862 P.2d at 803, 24 Cal. Rptr. 2d at 803 (citing Boykin v. Alabama, 395 U.S. 238 (1969); *In re* Tahl, 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969) establishing that a court must expressly advise defendants, on the record, of the *Boykin/Tahl* rights; *see* 4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Proceedings Before Trial* §§ 2149-2150, 2157-2158 (1989 & Supp. 1994) (discussing the requirements for a valid plea in felony cases and admonitions required); 21 CAL. JUR. 3D *Criminal Law* §§ 2816-2817 (1985 & Supp. 1994) (discussing the necessity that the defendant's plea be voluntary and advice to the defendant).

31. *Webb*, 6 Cal. 4th at 532, 862 P.2d at 803, 24 Cal. Rptr. 2d at 803.

32. *Id.*

33. *Id.* at 532-33, 862 P.2d at 804, 24 Cal. Rptr. 2d at 804.

34. *Id.*

35. *Id.* at 535, 862 P.2d at 806, 24 Cal. Rptr. 2d at 806. The questioned aggravating factors were "circumstances of the crime" and "age." *Id.* For a more thorough discussion of the various factors considered in the California death penalty statutory scheme, see Richard E. Wirick, Comment, *Dark Year on Death Row: Guiding Sentencer Discretion After Zant, Barclay, and Harris*, 17 U.C. DAVIS L. REV. 689 (1984). The defendant also complained that the prosecution, in closing arguments, inappropriately told the jury that an absence of mitigating evidence was an aggravating factor. Although ac-

The defendant cited *Stringer v. Black*,[36] which he argued might be construed as extending the Eighth Amendment vagueness analysis, that is generally applied to the special circumstances phase, to the aggravating factors set forth in the penalty selection phase.[37] The vagueness analysis, however, has traditionally been limited to the factors in death sentencing statutes that serve to narrow the acts which qualify an offender for capital punishment.[38] But until *Stringer's* arguably narrow ruling, the test had not been applied to subsequent sentence selection unless the two functions of narrowing and selection were insufficiently separate.[39] Referring to its opinion in *Bacigalupo II*, issued at the same time as *Webb*, the court rejected the defendant's claim that the individual sentencing factors enumerated in section 190.3 were unconstitutionally vague.[40] It should also be noted that the United States Supreme Court recently upheld California's sentence selection factors against a similar vagueness challenge.[41]

In addressing the defendant's claim that the jury should not be informed of any inapplicable mitigating factors, the court stated that "'[s]entencing discretion is best guided where the jury is fully apprised of the factors which the state deems relevant to the penalty determination.'"[42] The court reasoned that it is the jury's function to determine which factors apply when considering the weight of the factors either for

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knowledging that such a statement constitutes incorrect law, the court explained that, in actuality, the prosecution instructed the jury that "the opposite was true." *Webb*, 6 Cal. 4th at 533, 862 P.2d at 804, 24 Cal. Rptr. 2d at 804. The court also explained that the prosection correctly instructed the jury not to weigh the number of factors, but rather their value, as the jury saw fit to assign each factor. Thus, the court held that the prosecution did not use an "improper 'arithmetical approach.'" *Id.*; *see* People v. Brown, 40 Cal. 3d 512, 726 P.2d 516, 230 Cal. Rptr. 834 (1985), *rev'd*, California v. Brown, 479 U.S. 538 (1989).

36. 503 U.S. 222 (1992).

37. *Webb*, 6 Cal. 4th at 535, 862 P.2d at 806, 24 Cal. Rptr. 2d at 806.

38. *See* People v. Bacigalupo (*Bacigalupo II*), 6 Cal. 4th 457, 862 P.2d 808, 24 Cal. Rptr. 2d 808 (1993), *cert. denied*, 114 S. Ct. 2782 (1994).

39. *Id.*

40. *Webb*, 6 Cal. 4th at 535, 862 P.2d at 806, 24 Cal. Rptr. 2d at 806 (rejecting the broad application of *Stringer* to all capital statutes that weigh aggravating against mitigating factors; choosing, rather, to view *Stringer* as limited to only those statutes that insufficiently distinguish between narrowing and selection phases).

41. Tuilaepa v. California, 114 S. Ct. 2630 (1994).

42. *Webb*, 6 Cal. 4th at 532-33, 862 P.2d at 804, 24 Cal. Rptr. 2d at 804 (quoting People v. Whitt, 51 Cal. 3d 620, 653, 798 P.2d 849, 868-69, 274 Cal. Rptr. 252, 271-72 (1990)).

or against a death sentence. Thus, the court concluded that the jury should be able to consider the possibility that a defendant's act lacked justification for a more lenient sentence when compared to other similar acts under different circumstances.[43]

The court considered a number of other issues raised by the defendant. As is the "nature of the beast" with automatic appeals from death penalty verdicts, not all the claims raised by the defendant were worthy of significant review. Therefore, the defendant's arguments regarding venue,[44] corpus delicti,[45] sufficiency of the evidence,[46] probable cause for the search warrant,[47] the preemptory judicial challenge,[48] as well as *Miranda* and Sixth Amendment right to counsel claims,[49] merited only routine examination from the supreme court which agreed with the trial court's application of well-settled legal principles.

In his dissent, Justice Mosk questioned the majority's brief dismissal of the defendant's objection to the standard instruction defining reasonable doubt.[50] Justice Mosk simply renewed: (1) his long standing assertion that the "unnecessarily confusing" definition of reasonable doubt within the standard instruction violates due process, and (2) his suggestion that the definition be deleted by the legislature so that the standard would read as it did from 1850 to 1927.[51]

Both Justices Mosk and Kennard criticized the majority's assertion in dictum that the *Ritchie* compulsory discovery mechanism did not apply to the prosecution witness's psychotherapy records.[52] Justice Kennard questioned the majority's reasoning that *Ritchie* was inapplicable because the records were not in the prosecution's "possession."[53] Instead,

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43. *See* People v. Whitt, 51 Cal. 3d 620, 653, 798 P.2d 849, 868-69, 274 Cal. Rptr. 252, 271-72 (1990).

44. *Webb*, 6 Cal. 4th at 514-15, 862 P.2d at 791-92, 24 Cal. Rptr. 2d at 791-92.

45. *Id.* at 529-31, 862 P.2d at 802-03, 24 Cal. Rptr. 2d at 802-03.

46. *Id.* at 528-29, 862 P.2d at 801-02, 24 Cal. Rptr. 2d at 801-02.

47. *Id.* at 521, 862 P.2d at 796, 24 Cal. Rptr. 2d at 796.

48. *Id.* at 522-23, 862 P.2d at 797, 24 Cal. Rptr. 2d at 797.

49. *Id.* at 525, 862 P.2d at 798-99, 24 Cal. Rptr. 2d at 798-99.

50. *Id.* at 537, 862 P.2d at 807, 24 Cal. Rptr. 2d at 807 (Mosk, J., concurring and dissenting).

51. *Id.*; *see also* CALJIC No. 2.90 (1979); CAL. PENAL CODE § 1096 (West 1985 & Supp. 1994).

52. *Webb*, 6 Cal. 4th at 537-38, 862 P.2d at 807-08, 24 Cal. Rptr. 2d at 807-08 (Mosk, J., concurring and dissenting, & Kennard, J., concurring and dissenting).

53. *Id.* (Kennard, J., concurring and dissenting). Justice Mosk provided only a brief comment in disagreement. He took contention with the majority's intimation that the term "government," as used in *Ritchie*, did not encompass records that were not developed or created in the course of a criminal investigation. *Id.* at 537, 862 P.2d at 807, 24 Cal. Rptr. 2d at 807 (Mosk, J., concurring and dissenting).

she argued that the emphasis is more appropriately placed on whether the evidence is material and favorable to the accused,[54] in conjunction with the provision for an in camera review of the records as a precautionary privacy measure.

III. IMPACT

The decision in *Webb*, beyond the consequence to the defendant, is not likely to have a significant impact. The reasoning that pertains to the *Ritchie* standard for production of psychiatric records is notable. However, this standard is not relied upon for the court's ultimate conclusion. Thus, it provides only questionable authority upon which the prosecution might rely in the future. The only other noteworthy commentary appears in the court's affirmation of its *Bacigalupo II* holding that the California death penalty statute is constitutionally viable. However, it is only a brief reference that adds nothing to the rationale set forth in *Bacigalupo II*, and has been resolved, largely, by the United States Supreme Court's recent ruling in *Tuilaepa*.

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54. *Id.* at 537-38, 862 P.2d at 807, 24 Cal. Rptr. 2d at 807 (Kennard, J. concurring and dissenting) (citing numerous California case authorities).

VI. ENVIRONMENTAL LAW

Under section 21160 of the California Environmental Quality Act, the Department of Forestry is authorized to require that timber harvesting plans include information not specified within the Board of Forestry rules; the Board of Forestry's approval of a plan, absent such information, is subject to judicial review under the abuse of discretion standard:
Sierra Club v. State Board of Forestry.

I. INTRODUCTION

In *Sierra Club v. State Board of Forestry*,[1] the California Supreme Court considered two issues. First, the court considered whether the Department of Forestry (Department) has authority to request information not specified in the California Board of Forestry rules when it is evaluating a timber harvesting plan (THP).[2] Second, the court considered whether the Board of Forestry (Board) abused its discretion by approving a THP that lacked the information requested by the Department.[3] The court held that the Department has the authority to request any information considered necessary to determine whether a THP will significantly affect the environment.[4] The court further held that the Board abused its discretion by approving a THP that lacked such information.[5]

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1. 7 Cal. 4th 1215, 876 P.2d 505, 32 Cal. Rptr. 2d 19 (1994). Justice Baxter wrote the unanimous opinion, with Chief Justice Lucas and Justices Mosk, Kennard, Arabian, George and Werdeger concurring. *Id.* at 1219-37, 876 P.2d at 507-19, 32 Cal. Rptr. 2d at 21-33.

2. *Id.* at 1227-35, 876 P.2d at 513-18, 32 Cal. Rptr. 2d at 27-32. Although the court noted that, prior to review of this case, the California Board of Forestry (Board) rules were amended to authorize the Department of Forestry's (Department) request for information pertaining to the presence of old-growth-dependent species. It determined that the issue was not moot because the amendment did not address the Department's authority to request other types of information. *Sierra Club*, 7 Cal. 4th at 1227-28, 876 P.2d at 513, 32 Cal. Rptr. 2d at 27; *see* CAL. CODE REGS., tit. 14 § 1034, subd. (w) (1994).

3. *Sierra Club*, 7 Cal. 4th at 1235-37, 876 P.2d at 518-19, 32 Cal. Rptr. 2d at 32-33. The Department of Forestry and Fire Protection and the State Board of Forestry are the two state agencies responsible for regulating California timber harvesting operations in accordance with the Z'berg-Nejedly Forest Practice Act of 1973. *See generally* CAL. PUB. RES. CODE §§ 4511-4592 (West 1984 & Supp. 1995) (discussing the provisions of the Forest Practice Act). The board is responsible for reviewing the department's decisions and ensuring that all THPs adhere to the Forest Practice Act and board rules and regulations. CAL. PUB. RES. CODE § 4582.7 (West 1984 & Supp. 1995).

4. *Sierra Club*, 7 Cal. 4th at 1228, 876 P.2d at 513, 32 Cal. Rptr. 2d at 27.

5. *Id.* at 1220, 876 P.2d at 508, 32 Cal. Rptr. 2d at 22.

II. STATEMENT OF THE CASE

On February 16, 1988, the Department received two THPs from the Pacific Lumber Company (Pacific Lumber).[6] The Department returned one of them, requesting Pacific Lumber to conduct additional wildlife surveys in the area and resubmit the THP with the results.[7] Pacific Lumber refused to conduct additional surveys on the grounds that such information exceeded the requirements set forth by the Board's rules.[8] Despite Pacific Lumber's refusal to submit additional information, the Board accepted the THPs for filing on March 3.[9]

On March 11 and March 21, the Department of Fish and Game (Fish and Game) and Pacific Lumber conducted joint pre-harvest inspections of the area.[10] Subsequently, Fish and Game prepared a report recommending that the THP include mitigation measures to maintain adequate old-growth habitat for species present in the area.[11] But Fish and Game could not recommend the nature and extent of the mitigation measures until additional surveys were conducted to determine the existence of six particular species in the area.[12] As a result, Fish and Game also re-

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6. *Id.* at 1221, 876 P.2d at 508, 32 Cal. Rptr. 2d at 22. Pacific Lumber was seeking the Department's approval to log "virgin old-growth redwood" timber in an area covering a total of three hundred and nineteen acres in Humboldt County. *Id.*; *see* Ruth McLay, *The Timber Harvest Plan Exemption from the California Environmental Quality Act: Due Process and Statutory Intent*, 41 HASTINGS L.J. 727 (1990) (discussing the harmful clear-cutting policies adopted after Maxxam Corp. took over Pacific Lumber in 1985).

7. Both the Department and the Department of Fish and Game (Fish and Game) considered the surveys necessary to determine whether the operation would have a significant adverse effect on the following old-growth-dependent species: the goshawk, the Olympic salamander, the tailed frog, the red tree vole, the Pacific fisher, the spotted owl, and the marbled murrelet. *Sierra Club*, 7 Cal. 4th at 1222, 876 P.2d at 509, 32 Cal. Rptr. 2d at 23.

8. *Id.* at 1222, 876 P.2d at 509, 32 Cal. Rptr. 2d at 23.

9. *Id.*

10. *Id.* at 1223, 876 P.2d at 510, 32 Cal. Rptr. 2d at 24. Prior to the inspections, the Department sent another letter to Pacific Lumber including Fish and Game's request for the same information the Department had requested. *Id.* at 1222-23, 876 P.2d at 509, 32 Cal. Rptr. 2d at 23.

11. *Id.* at 1223, 876 P.2d at 510, 32 Cal. Rptr. 2d at 24. Fish and Game's report concluded that the plan, as submitted, would not "provide and maintain" an adequate habitat for the species present in the area and would, therefore, result in significant impact on those species. *Id.* at 1223, 876 P.2d at 510, 32 Cal. Rptr. 2d at 24.

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

quested Pacific Lumber to conduct additional surveys.[13] Pacific Lumber refused to conduct any additional surveys.[14]

On April 19, the department rejected both THPs as incomplete due to Pacific Lumber's refusal to conduct the requested surveys.[15] On May 20, Pacific Lumber appealed the Department's decision to the Board.[16] After a hearing on the matter, the Board approved the THPs on June 8, overturning the Department's decision.[17] On June 16, the Sierra Club and the Environmental Protection Information Center, Inc. filed "a petition for writ of mandate seeking an order to compel the board to withdraw its approval of [the THPs]."[18] On October 23, 1989, the trial court denied the petition for writ of mandate.[19] The court of appeal reversed the trial court's ruling.[20] Pacific Lumber filed a petition for review, which the California Supreme Court granted on June 11, 1992.[21]

III. TREATMENT OF THE CASE

A. *The Department Has the Authority to Request Information Not Specified in the Board's Rules*

The California Supreme Court began its analysis of this case with a discussion of the Forest Practice Act[22], its purpose and goals, and the

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13. *Sierra Club*, 7 Cal. 4th at 1223, 876 P.2d at 510, 32 Cal. Rptr. 2d at 24. Pacific Lumber provided some information on the tailed frog and the Olympic salamander, but without additional surveys regarding the other species, Fish and Game could not make an appropriate recommendation as to what mitigation measures should be implemented. *Id.*

14. *Id.*

15. *Id.* The Department considered the THPs materially incomplete because they neither confirmed nor denied the existence of the remaining species in the plan area. *Id.*

16. *See supra* note 3 and accompanying text. The Board's appellate review of Department decisions and any order pursuant to such power is an adjudicatory function subject to judicial review. CAL. CODE CIV. PROC. § 1094.5 (West 1980 & Supp. 1994).

17. *Sierra Club*, 7 Cal. 4th at 1224, 876 P.2d at 510, 32 Cal. Rptr. 2d at 24. The Board found that the THPs "were 'in conformance with the rules and regulations.'" *Id.* at 1224, 876 P.2d at 510, 32 Cal. Rptr. 2d at 24. The Board reasoned that the information on the record proved adequate to assess mitigation measures and that requiring additional surveys, based on speculation that certain species might exist in the area, was unreasonable. *Id.* at 1224, 876 P.2d at 510-11, 32 Cal. Rptr. 2d at 24-25.

18. *Id.* at 1224, 876 P.2d at 511, 32 Cal. Rptr. 2d at 25.

19. *Id.* at 1225, 876 P.2d at 511, 32 Cal. Rptr. 2d at 25.

20. *Id.*; *see* Sierra Club v. Department of Forestry, 225 Cal. App. 3d 537, 275 Cal. Rptr. 243 (1st Dist. 1990) (reversing and remanding with instructions to issue the writ of mandate that the Board rescind its approval of the THPs).

21. Sierra Club v. California Bd. of Forestry, 832 P.2d 146, 9 Cal. Rptr. 2d 834 (1992).

22. *Sierra Club*, 7 Cal. 4th at 1226, 876 P.2d at 512, 32 Cal. Rptr. 2d at 26. "The

respective roles that the Board and the Department play in achieving those goals.[23] The court stated that neither the Forest Practice Act nor the Board rules expressly authorizes the Department to request information not specified in the rules.[24]

However, the court noted the Board specifically imposes upon the Department the obligation to disapprove plans that fail to incorporate mitigating measures that "substantially lessen significant adverse impacts on the environment."[25] The court reasoned that it would be impossible for the Department to discharge this duty without the ability to request information necessary to identify the adverse impact.[26] Accordingly, the court concluded that the Board impliedly vests the Department with the authority to seek whatever information is necessary to determine whether a THP will have a significant impact on the environment.[27]

More importantly, the court concluded that section 21160 of the California Environmental Quality Act (CEQA)[28] expressly vests the Department with the authority to request information necessary to identify a

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purpose of the Forest Practice Rules is to implement the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 in a manner consistent with . . . the California Environmental Quality Act (CEQA) of 1970." CAL. CODE REGS. tit. 14, § 896 (1994). For a thorough discussion of the Z'berg-Nejedly Forest Practice Act, see *Regulation of Private Logging in California*, 5 ECOLOGY L.Q. 139 (1975) (concluding that the Act did not radically depart from prior law); *see also* REVIEW OF SELECTED 1973 LEGISLATION, 5 PAC. L.J. 420 (1974) (surveying the Z'berg-Nejedly Forest Practice Act and discussing the legislative intent behind the Act).

23. *Sierra Club*, 7 Cal. 4th at 1226, 876 P.2d at 512, 32 Cal. Rptr. 2d at 26. The court recognized that the Forest Practice Act grants the Board power to adopt site-specific rules and regulations to achieve the twin goals of controlling harvesting of commercial forests while protecting the environment. The Department is responsible for reviewing THPs and ensuring that they adhere not only with the legislative requirements but also with any additional requirements expressly specified in the board's rules and regulations. *Id.* For a general discussion of California legislation dealing with management of forest products, see 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 83 (9th ed. 1987 & Supp. 1994).

24. *Sierra Club*, 7 Cal. 4th at 1228, 876 P.2d at 513, 32 Cal. Rptr. 2d at 27.

25. *Id.*

26. *Id.* In this case, the significant adverse impact was the potential loss of habitat of several species. *Id.* at 1221, 876 P.2d at 508, 32 Cal. Rptr. 2d at 27.

27. *Sierra Club*, 7 Cal. 4th at 1228, 876 P.2d at 513, 32 Cal. Rptr. 2d at 77.

28. CAL. PUB. RES. CODE §§ 21000-21193 (West 1986 & Supp. 1994). For administrative regulations mandated for the implementation of CEQA, see CAL. CODE REGS. tit. 14, §§ 15000-15387 (1990).

plan's environmental impact.[29] The court noted the language of section 21160, which provides in part:

> [W]henever any person applies to any public agency for a lease, permit, license, certificate, or other entitlement for use, the public agency may require that person to submit data and information which may be necessary to enable the public agency to determine whether the proposed project may have a significant effect on the environment or to prepare an environmental impact report.[30]

The court reached its conclusion based on the fundamental assumption that since CEQA applies to all state agencies including the Department, the process of reviewing and approving THPs must comply with both the Forest Practice Act and CEQA.[31]

Acknowledging that CEQA's application to the timber industry is an issue frequently visited in the courts, Justice Baxter explained the court's conclusion in detail.[32] At the root of the controversy over CEQA's application to the timber industry is a certification procedure that exempts certain regulatory processes from CEQA's provisions.[33] Under this process, the THP regulatory "scheme" is exempt from several CEQA provisions.[34] However, the court explained that the THP exemption is only a partial, and not a complete, exemption from CEQA's provisions.[35] The

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29. *Sierra Club*, 7 Cal. 4th at 1228, 876 P.2d at 513, 32 Cal. Rptr. 2d at 27; *see also* Lynn Considine Cass, *Validity, Construction, and Application of Statutes Requiring Assessment of Environmental Information Prior to Grants of Entitlements for Private Land Use*, 76 A.L.R.3D 388 (1977) (discussing applicability of CEQA to timber harvesting industry).

30. *Sierra Club*, 7 Cal. 4th at 1228, 876 P.2d at 513, 32 Cal. Rptr. 2d at 27 (quoting CAL. PUB. RES. CODE § 21160).

31. *Id.*; *see also* Gallegos v. State Bd. of Forestry, 76 Cal. App. 3d 945, 952, 142 Cal. Rptr. 86, 90 (1978) (holding that timber harvesting operations are subject to CEQA); Natural Resources Defense Council, Inc. v. Arcata Nat'l Corp., 59 Cal. App. 3d 959, 131 Cal. Rptr. 172 (1976) (holding that application of CEQA to the timber industry is not redundant despite the similar aims of CEQA and the Forest Practice Act).

32. *Sierra Club*, 7 Cal. 4th at 1228-30, 876 P.2d at 513-15, 32 Cal. Rptr. 2d at 27-29.

33. *Id.* at 1230, 876 P.2d at 514, 32 Cal. Rptr. 2d at 28. The Secretary of Resources has statutory power to exempt from the preparation of an Environmental Impact Report (EIR) any state agency regulatory program that requires the preparation and review of a document that is functionally equivalent to an EIR. *Id.*; *see also* CAL. PUB. RES. CODE § 21080.5 (West 1986 & Supp. 1994) (providing that a written plan required by a regulatory scheme may be submitted in lieu of a required EIR in some circumstances).

34. In 1976, the Secretary of Resources expressly exempted the THP process from the provisions in CEQA's chapters 3, 4, and § 21167. *Sierra Club*, 7 Cal. 4th at 1230, 876 P.2d at 514-15, 32 Cal. Rptr. 2d at 28-29.

35. *Id.* The court found it significant that at the time of the enactment of the Forest Practice Act the legislature temporarily exempted the THP process from CEQA's provisions for a period of a year but later failed to adopt several bills designed to provide a permanent exemption. *Id.* at 1231 n.4, 876 P.2d at 515 n.4, 32 Cal. Rptr. 2d at 29 n.4.

court, applying the "expressio unius est exclusio alterius"[36] maxim of statutory construction, refused to imply additional exemptions.[37] As a result, Justice Baxter found that the specific exemptions do not preclude the application of CEQA's remaining provisions to timber harvesting.[38] The court concluded that the THP process is not exempt from CEQA's section 21160, meaning the Department has the authority to require information "necessary" to determine whether a THP will have a "significant" effect on the environment.[39]

Pillsbury, Madison & Sutro and several other Amici Curiae joined Pacific Lumber in arguing that Public Resources Code section 4582.75 "precludes the department from requesting information not expressly specified in the forest practice rules."[40] Section 4582.75 provides: "The rules adopted by the board shall be the only criteria employed by the [Department] when reviewing [THPs] pursuant to section 4582.7."[41] After clarifying that "a request for information is not a *criterion* for reviewing a [THP], but is instead a prerequisite to the application of the criteria", the court rejected Pacific Lumber's argument with respect to section 4582.75.[42]

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36. "The expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

37. *Sierra Club*, 7 Cal. 4th at 1230, 876 P.2d at 515, 32 Cal. Rptr. 2d at 29. *See generally* Michael A. DiSabatino, *Validity, Construction, and Application of Endangered Species Act of 1973 (16 U.S.C.S. §§ 1531-1543)*, 32 A.L.R. FED. 332, § 5 (1977 & Supp. 1994) (providing an example of the United States Supreme Court's application of the maxim within the context of the Endangered Species Act).

38. *Sierra Club*, 7 Cal. 4th at 1230, 876 P.2d at 515, 32 Cal. Rptr. 2d at 29; *see also* Californians for Native Salmon Assn. v. Department of Forestry, 221 Cal. App. 3d 1419, 1422, 271 Cal. Rptr. 270-71 (1990) (holding that CEQA is considered part of the Forest Practice Act and fully applies to timber harvesting with the exception of a few procedural requirements relating to the EIR); Environmental Protection Info. Ctr., Inc. v. Johnson, 170 Cal. App. 3d 604, 216 Cal. Rptr. 502 (1985) (holding that partial exemptions from CEQA's EIR requirement do not exempt the industry from adhering to CEQA as a whole).

39. *Sierra Club*, 7 Cal. 4th at 1231, 876 P.2d at 515, 32 Cal. Rptr. 2d at 29. For the express language of § 21160, see *supra* note 29 and accompanying text.

40. *Sierra Club*, 7 Cal. 4th at 1231, 876 P.2d at 516, 32 Cal. Rptr. 2d at 29.

41. *Id.* (quoting CAL. PUB. RES. CODE § 4582.75 (1984 & Supp. 1994)).

42. *Id.* at 1232-33, 876 P.2d at 516, 32 Cal. Rptr. 2d at 30. The court explained that the purpose of § 4582.75 was to limit the Department's incorporation of mitigation measures to those based on the Board's rules, not to hamstring the Department's power to compel the production of relevant information. *Id.* at 1233-34, 876 P.2d at 516-17, 32 Cal. Rptr. 2d at 30-31; *see* CAL. PUB. RES. CODE § 4582.75; *cf.* CAL CODE REGS., tit. 14, § 898.1 (c)(1) (stating that the Director should disapprove plans that do not incor-

The court also rejected the argument that permitting the Department to require information not specified in the rules violates the time frame provisions requiring speedy pre-harvest inspections and review of THPs.[43] The court reasoned that these sections do not apply until after the Department makes the threshold determination that the THP is complete.[44]

Therefore, the court concluded that the department's exercise of its "information gathering powers" does not violate the time frames established in sections 4582.7 and 4604 of the California Public Resources Code.[45]

B. The Board Abused Its Discretion

Concluding that the Department possessed the authority to request information not specified in the Board's rules and regulations, the court considered the Board's approval of the THP under the circumstances.[46] The court noted that under the abuse of discretion standard of review, "[o]nly if the manner in which an agency failed to follow the law is shown to be prejudicial, or is presumptively prejudicial as when the department or board fails to comply with mandatory procedures, must the decision be set aside."[47] The court then reasoned that the Board's approval of the THP, based solely on the information already on the record, and without the additional data requested by the Department, constituted a failure to comply with the mandatory provisions of CEQA.[48] The court

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porate procedures designed to lessen the adverse impact on the environment).

43. *Sierra Club*, 7 Cal. 4th at 1234-35, 876 P.2d at 517-18, 32 Cal. Rptr. 2d at 31-32; *see also* CAL. PUB. RES. CODE § 4582.7 (requiring Department review of a THP within 15 days of pre-harvest inspection); CAL. PUB. RES. CODE § 4604 (requiring pre-harvest inspection within ten days of filing of a THP).

44. *Sierra Club*, 7 Cal. 4th at 1235, 876 P.2d at 518, 32 Cal. Rptr. 2d at 32; *see also* CAL. CODE REGS., tit. 14, § 1037 (granting the Department ten days from time of submission of a THP to determine if it is complete); CAL. PUB. RES. CODE § 4582.7 (providing that the Director has fifteen days from when the inspection is complete or the determination is made that no inspection is needed to review the plan for conformance with regulations).

45. *Sierra Club*, 7 Cal. 4th at 1235, 876 P.2d at 518, 32 Cal. Rptr. 2d at 32.

46. *Id.*

47. *Id.* at 1236, 876 P.2d at 518, 32 Cal. Rptr. 2d at 32 (quoting Environmental Protection Info. Ctr., Inc. v. Johnson, 170 Cal. App. 3d at 622, 216 Cal. Rptr. at 513-14. For a discussion of the abuse of discretion standard in Federal Courts, see Michelle Migdal Gee, *What Standards Govern Appellate Review of Trial Courts, Conditional Ruling, Pursuant to Rule 50(c)(1) Of Federal Rules of Civil Procedure On Party's Motion For New Trial*, 52 A.L.R. FED. 494 (1993).

48. *Sierra Club*, 7 Cal. 4th at 1236, 876 P.2d at 518, 21 Cal. Rptr. 2d at 32. According to CEQA, the Board "shall" give "major consideration . . . to preventing environmental damage," CAL. PUB. RES. CODE § 21000 (g), and "should not approve projects as

found that such a failure to comply was prejudicial.[49] Accordingly, the court affirmed the lower court's decision directing the Board to rescind its approval of the timber harvesting plans.[50]

IV. CONCLUSION

The supreme court decided that section 21160 of CEQA grants the Department authority to request information not specified in the Board's rules whenever it is evaluating a THP as long as such information is "necessary" to determine whether the THP will significantly affect the environment. The court further decided that the Board's approval of a THP that lacks such necessary information is an abuse of discretion. In doing so, the court concluded that timber harvesting exemptions from CEQA's environmental impact statement provisions do not preclude the application of CEQA's remaining provisions to the THP process. This decision clarifies the Department's authority favoring an informed decision-making approach that is consistent with the environmental policies and goals identified by the legislature in both the Forest Practice Act and CEQA.

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proposed . . . if feasible mitigation measures [are] available." CAL. PUB. RES. CODE § 21002. In the instant case, although mitigating measures existed, the Department was unable to recommend any of them without first identifying the THP's effect on *all* the species in the area. *Sierra Club*, 7 Cal. 4th at 1236, 876 P.2d 518, 32 Cal. Rptr. 2d at 32 (emphasis added). The record on which the Board relied contained no data whatsoever on four of the six old-growth-dependent species identified by Fish and Game. *Id.* The record also reflected that neither the Department nor Fish and Game had made any recommendations for mitigation measures. *Id.*

49. *Id.* at 1236-37, 876 P.2d at 519, 32 Cal. Rptr. 2d at 33; *see also* CAL. CIV. PROC. CODE § 1094.5 (stating that prejudicial abuse of discretion is established "if the respondent has not proceeded in the manner required by law").

50. *Sierra Club*, 7 Cal. 4th at 1237, 876 P.2d at 519, 32 Cal. Rptr. 2d at 33.

VII. EVIDENCE

The Kelly-Frye *"general acceptance" standard remains the rule for admissibility of novel scientific evidence:* **People v. Leahy.**

I. INTRODUCTION

If *People v. Leahy*[1] is not the most significant case reviewed by the California Supreme Court this year, it is at least the most widely anticipated case in quite some time.[2] In *Leahy*, the California Supreme Court considered whether to replace the existing standard for admissibility of novel scientific evidence, that of general acceptance within the relevant scientific community,[3] with the much looser relevancy standard established in 1993 by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[4] In a six-to-one decision, the California Supreme Court decided to retain the *Kelly-Frye* general acceptance standard.[5]

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1. 8 Cal. 4th 587, 882 P.2d 321, 34 Cal. Rptr. 2d 663 (1994). Chief Justice Lucas wrote the majority opinion, joined by Justices Mosk, Kennard, Arabian, George, and Werdegar. Justice Baxter wrote a separate dissenting opinion. *Id.* at 613, 882 P.2d at 337, 34 Cal. Rptr. 2d at 679.

2. Most of the media attention given to this case stems from *Leahy's* impact on the admissibility of DNA evidence in the O.J. Simpson murder trial. People v. Orenthal James Simpson, BA 097211 (L.A. Super. Ct. 1995). Newspapers and magazines have printed numerous articles in anticipation of *Leahy*'s impact on DNA testing. *See, e.g.*, Harriet Chiang, *State Court Won't Relax DNA Rules; 6-1 Decision Will Be Factor in O.J. Case*, S.F. CHRON., Oct. 28, 1994, at A1 (discussing the impact of *Leahy* on DNA evidence and the O.J. Simpson trial); Harriet Chiang, *Justices Consider Easing Admission of DNA Tests*, S.F. CHRON., Aug. 31, 1994, at A3 (anticipating the court's decision and its possible impact on the O.J. Simpson trial); Maura Dolan, *Court Upholds Scientific Evidence Rule*, L.A. TIMES, Oct. 28, 1994, at A3 (addressing the impact of the decision on DNA evidence and noting that the supreme court "took the unusual step of issuing a summary of its opinion to reporters"); Richard C. Paddock, *Court Hears Case Pivotal to DNA Tests*, L.A. TIMES, Aug. 31, 1994, at B1 (explaining *Leahy's* potential application to the Simpson trial).

3. The general acceptance standard was originally established in the 1923 landmark federal case of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and was adopted in California in *People v. Kelly*, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976). Hence, the general acceptance rule in California is called the *Kelly-Frye* rule. *See generally*, 2 B.E. WITKIN CALIFORNIA EVIDENCE, *Demonstrative, Experimental and Scientific Evidence* § 864 (3d ed. 1986 & Supp. 1994) (discussing the application of the *Kelly-Frye* rule and listing other sources addressing this issue). However, now that Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993) has overruled *Frye*, the more current and proper description of the California law is simply the *Kelly* rule.

4. 113 S. Ct. 2786 (1993).

5. *Leahy*, 8 Cal. 4th at 591, 882 P.2d at 323, 34 Cal. Rptr. 2d at 673. California is not the only state to refuse to adopt the *Daubert* relevancy standard on state law

Although *Leahy* clearly will affect the courts, it is unclear if the impact will be significant. In more established sciences, such as deoxyribonucleic acid (DNA) analysis,[6] the decision may not be as significant as some imagine. *Leahy's* true impact will likely be felt on the fringes—the borderland of science and scientific theory.[7] Under the *Kelly-Frye* standard, to be admissible, a new scientific technique must undergo peer review and testing and gain general acceptance.[8] This process of moving from the experimental stage to the demonstrable stage takes time. Therefore, scientific techniques in the process of passing through this stage will

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grounds. *See* State v. Alt, 504 N.W.2d 38, 45-46 (Minn. Ct. App. 1993) (rejecting *Daubert* in light of the Minnesota Supreme Court's 1989 reaffirmation of *Frye*, stating, "It is for our supreme court, not this court, to decide *Daubert's* impact in Minnesota"); State v. Dean, 523 N.W.2d 681, 692 (Neb. 1994) ("*Daubert* does not apply to state court decisions. The increasing prevalence of expert evidence cautions against the admission of scientific evidence which is still the subject of dispute and controversy in the relevant scientific communities. [Citations omitted.] We thus adhere to the *Frye* standard . . . ."); People v. Wesley, 633 N.E.2d 451, 454 n.2 (N.Y. 1994) (noting that *Daubert* applies only to federal courts and declining to adopt its more relaxed standard).

6. The forensic use of deoxyribonucleic acid (DNA) involves: (1) the collection of biological evidence samples from a crime scene; (2) a comparison of those samples to samples from a known individual, usually the suspect or the victim; and (3) if a match is indicated, a laboratory calculation of the statistical probability that the sample found at the crime scene came from the same individual as the known sample.

7. By scientific theory, the author means scientific techniques that are so new it is difficult to assess whether they are legitimate techniques suitable for demonstrable use in court. In *Frye v. United States*, the court addressed this situation by stating:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye, 293 F. 1013, 1014 (D. C. Cir. 1923); *see also* United States v. Downing, 753 F.2d 1224, 1235 (3d Cir. 1985) (citing United States v. Brown, 557 F.2d 556 (6th Cir. 1977)) ("The general acceptance standard also safeguards against the possible prejudicial effects of testimony based upon 'an unproved hypothesis in an isolated experiment.'"); 2 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL, Rule 702, at *5 (6th ed. 1994) *available in* LEXIS, GENFED Library, FREMAN file ("The difference wrought by *Daubert* will probably be felt at the margin.").

8. *See infra* notes 34-37 and accompanying text (discussing the *Kelly-Frye* standard in more detail).

likely not be admissible, even though they may in fact prove to be reliable.

By contrast, the federal relevancy standard avoids this "cultural lag"[9] by allowing a judge to determine whether the particular method is reliable, with general acceptance being only one factor considered.[10] Therefore, by retaining the *Kelly-Frye* standard, it is possible, even likely, that situations will occasionally arise in which courts exclude otherwise reliable evidence because the evidence has not had time to receive general acceptance. This is where *Leahy's* impact will be felt, and not surprisingly, is one of the major criticisms of the general acceptance standard.[11]

As for scientific evidence that has moved beyond the experimental stage and has become more established in the relevant scientific community, *Leahy's* affirmation of *Kelly* will likely prove to be less outcome-determinative, although still providing additional hoops through which proponents of scientific evidence must leap. The forensic use of DNA best exemplifies this fact. Although the forensic use of DNA is still relatively young,[12] there can be little doubt that DNA is now admissible in both *Frye* and *Daubert* jurisdictions.[13] Therefore, as this Note demonstrates, all of the hype and anticipation of *Leahy's* impact on DNA admissibility will prove to be much ado about nothing.

The purpose of this Note is to survey the decision in *People v. Leahy* and present an analysis of its impact, particularly on the use of forensic DNA evidence in court. Part II provides a summary of the historical background of the case, analyzing the creation of the general acceptance

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9. Courts and commentators have used this term as a criticism of the time necessary for an otherwise reliable science to be reviewed by the relevant scientific community and thereby gain general acceptance. *See, e.g., Leahy*, 8 Cal. 4th at 602, 882 P.2d at 330, 34 Cal. Rptr. 2d at 672 (citing People v. Stoll, 49 Cal. 3d 1136, 1156, 783 P.2d 698, 710, 265 Cal. Rptr. 111, 123 (1989)) (referring to the "'considerable lag' between scientific advances and their admission as evidence").

10. *See infra* notes 43-47 and accompanying text (discussing the factors judges consider in assessing reliability under the *Daubert* relevancy standard).

11. *See, e.g., Leahy*, 8 Cal. 4th at 626, 882 P.2d at 345-46, 34 Cal. Rptr. 2d at 687-88 (Baxter, J., dissenting) (stating that *Kelly's* conservatism is "of no benefit to the defendant who is convicted and sentenced to death when probative and even crucial evidence is excluded" because the evidence has yet to meet with general acceptance). The commentator most associated with criticisms of *Frye* is Professor Paul C. Giannelli. His article, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half Century Later*, 80 COLUM. L. REV. 1197 (1980), is a must for serious students of the relevancy/general acceptance debate. Professor Giannelli outlines the various criticisms of *Frye* and concludes that the *Frye* test "has proved unworkable." *Id.* at 1250.

12. DNA was used for the first time in a United States court in 1988. Andrews v. State, 533 So. 2d 841 (Fla. Dist. Ct. App. 1988) (admitting DNA evidence).

13. *See infra* notes 97-164 and accompanying text.

test in *Frye v. United States*, its adoption in California, and the United States Supreme Court's subsequent abandonment of *Frye* in *Daubert v. Merrell Dow Pharmaceuticals*.[14] Part III summarizes the factual setting of *Leahy*[15] while Part IV addresses the court's near-unanimous affirmation of the *Kelly-Frye* general acceptance standard.[16] Part V discusses the impact of the court's decision in detail,[17] focusing on the current status of DNA admissibility in California.[18] Although California appellate courts are split on whether DNA is admissible,[19] the current status of the scientific debate clearly warrants admission of both restriction fragment length polymorphism (RFLP) and polymerase chain reaction (PCR) DNA typing results using the product rule rather than the ceiling principle.[20] Finally, this Note concludes that the court's decision in *Leahy* was the right decision.[21] Although the general acceptance standard has received criticism from many sources, the *Daubert* alternative is equally problematic. *Kelly-Frye* is deeply ingrained in California law.[22] Dismissal of it would have been dismissal of a standard that, while not perfect, does provide a conservative means of filtering new and novel scientific evidence through those best suited to assess its reliability—experts, not judges.

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14. *See infra* notes 23-51 and accompanying text.

15. *See infra* notes 52-60 and accompanying text.

16. *See infra* notes 61-88 and accompanying text.

17. *See infra* notes 89-96 and accompanying text.

18. *See infra* notes 97-164 and accompanying text. A detailed discussion of the scientific techniques and procedures used in DNA typing is beyond the scope of this Note. For a thorough description of these procedures, see People v. Barney, 8 Cal. App. 4th 798, 805-10, 10 Cal. Rptr. 2d 731, 734-37 (1992); Kamrin T. MacKnight, *The Polymerase Chain Reaction (PCR): The Second Generation of DNA Analysis Methods Takes the Stand*, 9 SANTA CLARA COMPUTER & HIGH TECH. L.J. 287, 294-308 (1993); Thomas M. Fleming, Annotation, *Admissibility of DNA Identification Evidence*, 84 A.L.R.4th 313, 318-23 (1991 & Supp. 1994).

19. *See infra* note 107 and accompanying text.

20. *See infra* notes 129-51 and accompanying text (discussing recent developments in the admissibility of DNA).

21. *See infra* notes 165-70 and accompanying text.

22. People v. Shirley, 31 Cal. 3d 18, 51-52, 641 P.2d 775, 794-95, 181 Cal. Rptr. 243, 263 (1982) (noting that California courts have invoked *Kelly-Frye* to determine the admissibility of polygraph examinations, truth serum, Nalline testing, experimental systems of blood typing, voiceprint analysis, human bite marks, and microscopic identification of gunshot residue particles), *cert. denied*, 459 U.S. 860 (1982).

II. HISTORICAL BACKGROUND[23]

A. *Establishment of the General Acceptance Standard*—Frye v. United States

In *Frye v. United States*,[24] the Court of Appeals of the District of Columbia established the standard for the admissibility of novel scientific evidence in federal courts—the general acceptance standard.[25] Under this test, any novel form of scientific evidence admitted into evidence "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[26] This test requires the trial judge to determine, based on expert testimony, whether legitimate debate exists within the scientific community regarding the reliability of the particular technology.[27] Although the true meaning of general acceptance is somewhat unclear,[28] it does not require a showing of universal acceptance.[29] In California, subsequent cases have delineated that general acceptance means a "consensus," or the absence of public opposition by "'scientists significant either in number or expertise.'"[30]

In applying the general acceptance standard to a particular science or technology, trial courts hold pre-trial in limine hearings at which expert witnesses for both sides testify before the judge regarding the reliability of the scientific test at issue. The judge determines whether the technique is generally accepted in the relevant scientific community based on: (1) the expert testimony presented at the hearing; (2) prior judicial opinions; and (3) publications in scientific and legal journals.[31] If the

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23. *Leahy's* historical background is given here in brief form only. For a more expansive discussion of *Frye* and *Daubert*, including a survey of criticisms, see William P. Haney, III, Comment, *Scientific Evidence in the Age of* Daubert*: A Proposal for a Dual Standard of Admissibility in Civil and Criminal Cases*, 21 PEPP. L. REV. 1391, 1394-1436 (1994).

24. 293 F. 1013 (D.C. Cir. 1923). In *Frye*, the defendant appealed his second-degree murder conviction after the trial court refused to allow expert testimony concerning a systolic blood pressure deception test taken by the defendant. *Id.* at 1013.

25. *Id.* at 1014.

26. *Id.*

27. *Id.*

28. Giannelli, *supra* note 11, at 1210-11.

29. 22A C.J.S. *Criminal Law* § 759 (1989 & Supp. 1994).

30. People v. Reilly, 196 Cal. App. 1127, 1134, 242 Cal. Rptr. 496, 500 (1987) (quoting People v. Shirley, 31 Cal. 3d 18, 56, 641 P.2d 775, 797, 181 Cal. Rptr. 243, 266, *cert. denied*, 459 U.S. 860 (1982)).

31. People v. Smith, 215 Cal. App. 3d 19, 25, 263 Cal. Rptr. 678, 682 (1989) (stating that courts may examine "California precedent, cases from other jurisdictions, and scientific literature to ascertain whether a particular technique is generally accepted"); *see also* State v. Williams, 599 A.2d 960, 964 (N.J. Super. Ct. Law Div. 1991) ("There are

technique is generally accepted, the evidence is admissible. Although the *Frye* test has been criticized over the years,[32] it remains the most common standard among the states.[33]

B. People v. Kelly: *California Adopts the* Frye *General Acceptance Test*

California adopted a modified *Frye* standard in *People v. Kelly*.[34] The *Kelly-Frye* test requires that the proponent of a new scientific technique prove that the technique satisfies three criteria: (1) "the technique or method [must be] sufficiently established to have gained general acceptance in its field; (2) testimony with respect to the technique and its application [must be] offered by a properly qualified expert; and (3) correct scientific procedures have been used in the particular case."[35] As these three elements demonstrate, *Kelly* did not leave *Frye* in its original form. Rather, *Kelly* built upon *Frye* by requiring that the correct scientific procedures be used in the particular case.[36] This reliability require-

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three methods of proving the general acceptance of newly discovered scientific principle or theory: (1) expert testimony, (2) authoritative scientific and legal writings, and (3) judicial opinions.").

32. *Frye* has been widely debated in both commentaries and judicial opinions. *See generally* United States v. Downing, 753 F.2d 1224, 1233-39 (rejecting *Frye* "based on the language and policies of the Federal Rules of Evidence"), *aff'd*, 780 F.2d 1017 (3d Cir. 1985); Lawrence B. Ebert, Frye *After* Daubert: *The Role of Scientists in Admissibility Issues as Seen Through the Analysis of the DNA Profiling Cases*, 1993 U. CHI. L. SCH. ROUNDTABLE 219, 244-53 (1993) (responding to criticisms of *Frye* and concluding that *Frye* is preferable to *Daubert*); Haney, *supra* note 23, at 1397-98 (summarizing criticisms and benefits of *Frye*). Essentially, the criticisms are: (1) *Frye* is too conservative; (2) it produces inconsistent results; and (3) it was overruled by the promulgation of the Federal Rules of Evidence. *Id.*

33. R. Stephen Kramer, *Admissibility of DNA Statistical Data: A Proliferation of Misconception*, 30 CAL. W. L. REV. 145, 156 (1993) ("The majority of state and federal courts have used the standard set forth in *Frye* . . . .").

34. 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976). In *Kelly*, the court examined the general reliability of a voice print analysis used by police to identify the defendant. *Id.* at 28, 549 P.2d at 1242-43, 130 Cal. Rptr. at 146-47. The court concluded that the voiceprint evidence was unreliable. *Id.* at 40, 649 P.2d at 1251, 130 Cal. Rptr. at 155. *See generally* 2 B.E. WITKIN CALIFORNIA EVIDENCE, *Demonstrative, Experimental and Scientific Evidence* § 864 (3d ed. 1986 & Supp. 1994) (discussing *Kelly* and collecting sources).

35. People v. Wash, 6 Cal. 4th 215, 242, 861 P.2d 1107, 1122, 24 Cal. Rptr. 2d 421, 436 (1993), *cert. denied*, 115 S. Ct. 116 (1994); *see also Kelly*, 17 Cal. 3d at 30, 549 P.2d at 1244, 130 Cal. Rptr. at 148. *See generally* 2 B.E. WITKIN CALIFORNIA EVIDENCE, *Demonstrative, Experimental and Scientific Evidence* § 864 (3d ed. 1986 & Supp. 1994).

36. *Kelly*, 17 Cal. 3d at 20, 549 P.2d at 1244, 130 Cal. Rptr. at 148. Other courts

ment was later added to the federal approach in *United States v. Two Bulls.*[37]

C. Daubert v. Merrell Dow Pharmaceuticals, Inc.[38] *and the Promulgation of the Federal Rules of Evidence*

The promulgation of the Federal Rules of Evidence in 1975 acutely focused the criticism of *Frye* in the federal courts. By design, the federal rules are liberal in their admission of expert testimony.[39] Conversely, *Frye* is conservative and even restrictive.[40] Since the federal rules do not mention *Frye*, Many argued *Frye* had been superseded.[41] Then, in 1993, the debate over *Frye's* future in the federal courts came to an end with the Supreme Court's decision in *Daubert.*[42]

In *Daubert*, the United States Supreme Court found that the Federal Rules of Evidence superseded *Frye.*[43] Instead of the general acceptance

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also use a similar modified *Frye* test. *See, e.g.*, People v. Castro, 545 N.Y.S.2d 985 (N.Y. Sup. Ct. 1989).

37. 918 F.2d 56 (8th Cir. 1990).

38. 113 S. Ct. 2786 (1993). In *Daubert*, the plaintiff sued Merrell Dow Pharmaceuticals to recover for birth defects allegedly caused by Bendectin, a drug manufactured by the defendant. *Id.* at 2791.

39. *Id.* at 2794 (mentioning the "'liberal thrust' of the Federal Rules") (quoting Beach Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)); *see* FED. R. EVID. 702; Saltzburg, *supra* note 7, at *5 ("[F]ederal rules 702 and 403 are written in terms of a presumption of admissibility. . . . ").

40. *See Daubert*, 113 S. Ct. at 2794 (describing the general acceptance standard as rigid and austere); *Kelly*, 17 Cal. 3d at 31, 549 P.2d at 1245, 130 Cal. Rptr. at 149 (describing *Frye* as conservative and supporting "a posture of judicial caution"); Saltzburg, *supra* note 7, at *5 (describing *Frye* as relatively exclusive and conservative).

41. *See Daubert*, 113 S. Ct. at 2794. To avoid the *Frye*/relevancy controversy, some states have incorporated the *Frye* rule into their relevancy statutes. *See, e.g.*, TENN. R. EVID. 702 advisory committee's note (providing that "Tennessee law is consistent with *Frye*"). However, subsequent Tennessee cases have noted that the inclusion of this comment did not solve the confusion concerning which standard to apply. *See* State v. Harris, 866 S.W.2d 583, 586-87 (Tenn. Crim. App. 1992) (noting disagreement as to whether relevancy or *Frye* standard controls).

42. For a thorough, critical discussion of *Daubert*, see Robert G. Blomquist, Comment, *The Dangers of "General Observations" on Expert Scientific Testimony: A Comment on* Daubert v. Merrell Dow Pharmaceuticals, Inc., 82 KY. L.J. 703, 728 (1994) (summarizing the Court's holding, projecting the impact of the decision, and concluding that *Daubert's* "grasp . . . exceeds its reach"). Some commentators have welcomed *Daubert. See* Kimberly Ann Satterwhite, Note, *Taking the Sizzle Out of the* Frye *Rule:* Daubert v. Merrell Dow Pharmaceuticals *Opens the Door to Novel Expert Testimony*, 28 U. RICH. L. REV. 531 (1994) (concluding that *Daubert* should result in "more informed decisions" and should increase the efficiency of litigation). However, other commentators have noted that *Daubert* itself is open to many of the same criticisms as *Frye. See infra* note 48.

43. *Daubert*, 113 S. Ct. at 2793.

test, *Daubert* directs district court judges to act as gatekeepers for the admission of novel scientific evidence.[44] To do this, the trial court must conclude, pursuant to Federal Rule of Evidence 702, that the proposed testimony constitutes "scientific . . . knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue."[45] This requires the court to make "a preliminary assessment of whether the reasoning or methodology . . . is scientifically valid and of whether that reasoning methodology can properly be applied to the facts in issue."[46] To assess the reliability of novel scientific evidence under Rule 702, the Court instructed trial judges to consider: (1) whether the theory or technique is capable of being or has been tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the standards controlling the technique's operation; and (4) whether the theory or technique is generally accepted in the particular scientific field.[47]

Unfortunately, *Daubert* did not end the debate on the propriety of *Frye*. In fact, many commentators have correctly noted that *Daubert* is, in fact, open to many of the same criticisms.[48] Others have stressed that the similarities between the *Daubert* factors and those commonly utilized in *Frye* jurisdictions indicate that *Daubert* does not substantially change the standard of admission.[49] In terms of DNA admissibility, the two major differences between *Frye* and *Daubert* are: (1) *Daubert* requires a consideration of error rates whereas *Frye* typically does not;[50] and (2) in

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44. *Id.* at 2794-95.

45. *Id.* at 2794.

46. *Id.* at 2796.

47. *Id.* at 2796-97.

48. *See* Timothy B. Dyk & Greg A. Castanias, Daubert *Doesn't End Debate on Experts*, NAT'L L.J., Aug. 2, 1993, at 17 (suggesting problems with *Daubert's* application and noting that judges are the wrong people to assess the reliability of various sciences); *The Supreme Court, 1992 Term, Leading Cases*, 107 HARV. L. REV. 144, 258-64 (1993) (criticizing *Daubert* and noting that "judges lack the competence to carry out the [gatekeeping role]") (hereinafter *Leading Cases*). Perhaps the greatest criticism of *Daubert* is that it places judges in the position of scientists, requiring them to assess a science's reliability rather than allowing the appropriate expert to do so. *Id.* "If the scientific community is in discord about whether a particular science has received general acceptance, can judges be expected to have the competence necessary to determine whether the technique or theory is scientifically valid?" *Id.* at 261.

49. *See Leading Cases*, *supra* note 48, at 258 ("[T]he similarity of the four *Daubert* criteria to factors commonly utilized under *Frye* suggests that the practical impact of the new test will be minimal.").

50. State v. Alt, 504 N.W.2d 38, 53 n.26 (Minn. Ct. App. 1993) ("Courts are admitting

Frye jurisdictions, the debate over how to calculate the significance of a genetic match goes toward the admissibility of the evidence, whereas in *Daubert* jurisdictions, it goes toward the weight.[51]

This series of events presented the California Supreme Court with a dilemma. While California is still relying on *Frye*, the federal courts, in which *Frye* originated, abandoned the standard. Does this not require California to follow suit and abolish *Kelly-Frye*? The supreme court granted review in *People v. Leahy* to answer this question.

III. FACTS OF THE CASE

William Michael Leahy was pulled over for speeding.[52] Upon observing Leahy, the officer noted that Leahy's "face was flushed, his eyes were red and watery, his speech was slurred, his balance was unsteady," and he smelled of alcohol.[53] The officer proceeded to give Leahy a field sobriety test, including the horizontal gaze nystagmus (HGN) test.[54] The officer concluded that Leahy failed the HGN test and subsequently arrested him.[55] Leahy was charged with driving under the influence of alcohol.[56]

At trial, Leahy moved in limine to exclude the HGN test results.[57] The trial court denied the motion on the grounds that "*Kelly-Frye* . . . is inapplicable because the nature of this test isn't a specific test for the determination of alcohol."[58] The court of appeal reversed, concluding that "[i]t was error to admit HGN evidence . . . without a proper scientific [*Kelly-Frye*] foundation."[59] The supreme court granted review on the question of whether the *Kelly-Frye* standard should be modified pursuant to *Daubert*.[60]

DNA test results from laboratories with no known or available error rates."); Barry C. Scheck, *DNA and* Daubert, 15 CARDOZO L. REV. 1959, 1967 (1994) ("Laboratory error rate . . . has not been considered a *Frye* issue by the courts.").

51. *See infra* note 165.

52. People v. Leahy, 8 Cal. 4th 587, 592, 882 P.2d 321, 323, 34 Cal. Rptr. 2d 663, 665 (1994).

53. *Id.*

54. *Id.* "An inability of the eyes to maintain visual fixation as they are turned from side to side . . . is known as . . . HGN." *Id.* Alcohol is believed to increase the frequency and magnitude of HGN. *Id.*

55. *Id.* at 592, 882 P.2d at 324, 34 Cal. Rptr. 2d at 666.

56. *Id.*

57. *Id.*

58. *Id.* at 593, 882 P.2d at 324, 34 Cal. Rptr. 2d at 666. HGN is merely a signal of possible alcohol consumption. *Id.*

59. *Id.*

60. *Id.* at 591, 882 P.2d at 323, 34 Cal. Rptr. 2d at 665.

IV. TREATMENT

A. Majority Opinion

1. *Daubert* Does Not Afford a Compelling Reason For Abandoning *Kelly*

The court, discussing the adoption of the *Kelly-Frye* rule in California, began by summarizing *Kelly*,[61] *Daubert*,[62] and the applicable California rules of evidence.[63] The court noted that California Evidence Code sections 350, 351 and 210, all dealing with admissibility of relevant evidence, mirror the "'liberal' admissibility provisions of federal law."[64] Therefore, if adopted, *Daubert* would be compatible with the California rules. Although the court found nothing in the legislative history of the evidence code to indicate an intent to include a general acceptance standard, the court nevertheless concluded that "[n]o significant relevant developments have occurred in this state since *Kelly* was decided to justify abandoning its conclusions. Thus, the principle of stare decisis appears applicable here, unless the criticism of the *Frye* doctrine persuades us otherwise."[65]

Interestingly, both the defendant and the state urged the court to retain the *Kelly-Frye* standard.[66] In addition, numerous amici curiae briefs supported the retention of *Kelly*.[67] After summarizing the arguments made by the amici, and after acknowledging the criticisms of the *Kelly-Frye* standard, the court found it significant that it has had the opportunity to review and abandon *Kelly* on numerous occasions, but has never done so.[68] Further, the legislature could have amended the evidence

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61. *Id.* at 594-95, 882 P.2d at 324-25, 34 Cal. Rptr. 2d at 666-67.

62. *Id.* at 595-97, 882 P.2d at 325-27, 34 Cal. Rptr. 2d at 667-69.

63. *Id.* at 597-98, 882 P.2d at 327, 34 Cal. Rptr. 2d at 669.

64. *Id.* at 597, 882 P.2d at 327, 34 Cal. Rptr. 2d at 669. The pertinent California Evidence Code sections dealing with expert testimony are §§ 720 and 802. *Id.* The court also noted that these sections are equivalent to Federal Rule of Evidence § 702. *Id.*

65. *Id.* at 599, 882 P.2d at 328, 34 Cal. Rptr. 2d at 670.

66. *Id.*

67. *Id.* Other amici curiae, however, supported *Daubert*, including the California District Attorneys Association. *Id.* "These amici seem more concerned with the narrow issue of the exclusion of DNA test evidence . . . than with the general question of the retention of *Kelly*." *Id.*

68. *Id.* at 604, 882 P.2d at 331, 34 Cal. Rptr. 2d at 673.

code if it so desired.[69] The court concluded that "the *Kelly* formulation survived *Daubert* in this state, and that none of the above described authorities critical of that formulation persuades us to reconsider or modify it at this time."[70]

2. HGN Testing is a New Scientific Technique Under *Kelly*[71]

The court next addressed whether the HGN test was a "'new scientific technique' within the scope of the *Kelly* formulation."[72] Although law enforcement has used HGN for more than thirty years, the court found more persuasive the fact that other states have subjected HGN to *Frye* with mixed results.[73] Therefore, the court reasoned that HGN is "new" or "novel" under *Kelly-Frye*.[74] The court also found that HGN was a "scientific" technique.[75] Because HGN is a new scientific theory, the court concluded that HGN is subject to the general acceptance standard of *Kelly-Frye*.[76]

3. A Police Officer's Testimony is Insufficient to Establish General Acceptance[77]

Because the HGN test is subject to *Kelly-Frye*, expert testimony must establish its general acceptance.[78] In the present case, only the arresting police officer testified that the HGN test was properly administered at the time of arrest.[79] The court found his testimony to be insufficient and concluded that an officer's testimony "regarding the mere *administration* of the test is insufficient to meet the general acceptance standard required by *Kelly*."[80] The court concluded that remand for a trial court determination on the issue of HGN's general acceptance was appropriate.[81]

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 605-06, 882 P.2d at 332, 34 Cal. Rptr. 2d at 674. "To hold that a scientific technique could become immune from *Kelly* scrutiny merely by reason of longstanding and persistent use by law enforcement *outside* the laboratory or the courtroom, seems unjustified." *Id.* at 606, 882 P.2d at 332, 34 Cal. Rptr. 2d at 674.

74. *Id.* at 606, 882 P.2d at 332, 34 Cal. Rptr. 2d at 675.

75. *Id.* at 606, 882 P.2d at 333, 34 Cal. Rptr. 2d at 675.

76. *Id.* at 607, 882 P.2d at 333-34, 34 Cal. Rptr. 2d at 676.

77. *Id.* at 608, 882 P.2d at 334, 34 Cal. Rptr. 2d at 676.

78. *Id.* at 612, 882 P.2d at 337, 34 Cal. Rptr. 2d at 679.

79. *Id.* at 609, 882 P.2d at 334, 34 Cal. Rptr. 2d at 676.

80. *Id.*

81. *Id.* at 610, 882 P.2d at 335, 34 Cal. Rptr. 2d at 677. The court deemed a full

B. Justice Baxter's Dissenting Opinion

Justice Baxter dissented on the issues of whether the HGN test is a novel scientific principle[82] and whether *Kelly-Frye* should be abolished.[83] Justice Baxter explained that "[o]ne need not be a rocket scientist to be able to observe and assess the reaction of the suspect."[84] In other words, the testimony of trained officers who observe a suspect's eyes during an HGN test should be admissible.[85]

Further, Justice Baxter disagreed with the *Kelly-Frye* formulation, stating that the court lacks the power to exclude relevant evidence using a "court made rule of evidence."[86] Justice Baxter argued that both the evidence code and "The Victim's Bill of Rights" are liberal in the admissibility of evidence, whereas *Kelly-Frye* is not.[87] Attacking both the conservative nature of *Kelly-Frye* as well as the majority's misplaced lack of confidence in the ability of trial judges to determine admissibility under a *Daubert* standard, Justice Baxter concluded that not only is HGN outside the scope of *Kelly-Frye*, but that *Kelly-Frye* itself should be abandoned.[88]

V. IMPACT

A. Generally

Because California has operated under *Kelly-Frye* for over twenty years, *Leahy* simply means it is business as usual in California.[89] Al-

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trial unnecessary. *Id.* If the trial court determined that HGN is generally accepted, the trial court must then reinstate the judgment. *Id.* If the trial court determined otherwise, then a new trial would be appropriate. *Id.* The defendant unsuccessfully objected to the limited remand order. *Id.* at 611, 882 P.2d at 336, 34 Cal. Rptr. 2d at 678.

82. *Id.* at 613, 882 P.2d at 337, 34 Cal. Rptr. 2d at 679 (Baxter, J., dissenting).

83. *Id.* at 614, 882 P.2d at 338, 34 Cal. Rptr. 2d at 680 (Baxter, J., dissenting).

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

85. *Id.* at 614-15, 882 P.2d at 338, 34 Cal. Rptr. 2d at 680 (Baxter, J., dissenting).

86. *Id.* at 624-25, 882 P.2d at 345, 34 Cal. Rptr. 2d at 687 (Baxter, J., dissenting).

87. *Id.* at 625-26, 882 P.2d at 345, 34 Cal. Rptr. 2d at 687 (Baxter, J., dissenting).

88. *Id.* at 626-29, 882 P.2d at 346-47, 34 Cal. Rptr. 2d at 688-89 (Baxter, J., dissenting).

89. Because the California Supreme Court did not adopt *Daubert*, a discussion of *Daubert's* impact is beyond the scope of this article. However, environmental litigation will feel *Daubert's* wake, but no one can agree on just how much. For a discussion of *Daubert's* effect on toxic tort law, see *Full Impact of* 'Daubert' *Ruling Discussed by Speakers at N.Y. Bar Association Seminar*, 8 TOXIC L. REP. 691 (1993), *available in*

though *Frye* has been criticized for years, one should not quickly discount its propriety. The primary problem with the relevancy standard is the awkward role in which it places judges, one for which they are not well suited—that of scientific expert.[90] Under *Daubert*, judges must make the determination as to whether a particular science is reliable. A cursory reading of DNA texts and articles highlights the difficulty with this position.[91] Some sciences are so intricate and specialized that judges truly may be unsuited to evaluate them. *Kelly* and *Frye* each recognized that fact.[92]

Additionally, in relevancy jurisdictions, judges will likely continue to rely on experts to assist them in their determinations.[93] The problem with this is that rather than having experts on both sides argue for or against a particular technology, only one or two experts may ultimately assist the judge and create a false impression of a technology's reliability.[94]

LEXIS, BNA Library, TOXICS file (discussing varying views of *Daubert's* impact and suggesting that the impact will not be significant); George E. Berry & Jean Hobart, *The Ninth Circuit After* Daubert*: The District Court as Evidentiary Gatekeeper*, 9 TOXIC L. REP. 639 (1994), *available in* LEXIS, BNA Library, TOXICS file (discussing post-*Daubert* Ninth Circuit cases and *Daubert's* impact on them, including DNA, voiceprint analysis, and a breast implant ruling, concluding that all district court admissibility holdings have been affirmed on appeal); *Practitioners Debate Impact of* 'Daubert' *on Evidence Admitted in Environmental Cases*, 7 TOXIC L. REP. 1398 (1993), *available in* LEXIS, BNA Library, TOXICS file (presenting different views of *Daubert's* impact on environmental litigation).

90. This is perhaps the most powerful criticism of *Daubert* and a criticism not lost on the dissenters in that opinion. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2800 (1993) (Rehnquist, C.J., dissenting) ("I do not think [Rule 702] imposes on [district judges] either the obligation or the authority to become amateur scientists in order to perform [the role of gatekeeper]."); *see also* People v. Kelly, 17 Cal. 3d 24, 31, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 ("'The requirement of general acceptance . . . assures that *Those (sic) most qualified to assess the general validity of a scientific method will have the determinative voice.*'") (quoting United States v. Addison, 498 F.2d 741, 743-44 (D.C. Cir. 1974)).

91. One court even admitted that it was unqualified to assess some aspects of the DNA issue. State v. Cauthron, 846 P.2d 502, 517 (Wash. 1993) (admitting that the court "lack[s] the scientific expertise to either assess or explain the [NRC's] methodology").

92. *See supra* note 90 and accompanying text; *see also supra* note 48 and accompanying text. Further, allowing a judge to make a subjective determination of reliability allows for more inconsistency than does *Frye*. What one judge finds reliable the next may not.

93. *See* Spencer v. Commonwealth, 393 S.E.2d 609, 621 (Va.) ("In making the threshold finding of fact, the court must usually rely on expert testimony."), *cert. denied*, 498 U.S. 908 (1990); United States v. Downing, 753 F.2d 1224, 1239 n.19 (3d Cir. 1985) (noting that a judge may appoint an expert to assist in his determination of scientific reliability); *Leading Cases*, *supra* note 48, at 262 ("The general lack of judicial scientific competence means that courts' reliance on experts in some form is unavoidable."); *see also* FED. R. EVID. 706 (providing for court-appointed experts).

94. Alan Dershowitz noted, in the context of formulating legal defenses, that "we

In sum, despite the fact that *Frye* has been criticized, *Daubert* presents problems of its own. *Kelly-Frye* is a process with which California's trial courts are familiar,[95] and it provides California with a conservative means for filtering new scientific evidence into the courtroom. Furthermore, *Kelly-Frye* ensures more consistent opinions because the standard is not dependent on the subjective viewpoint of the particular judge.[96] Despite *Kelly-Frye's* shortcomings, the court's affirmation of the general acceptance standard in *Leahy* should be welcomed.

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must not be seduced by the jargon of experts, particularly 'experts' who are really advocates for a particular position or worldview. New knowledge must prove its worth, first empirically and then morally, before society is prepared to rely on it for important policy judgments." ALAN DERSHOWITZ, THE ABUSE EXCUSE 38 (1994). Although the above quote is given in a different context, Professor Dershowitz properly recognizes that one "expert" may have an opinion that is one-sided and not representative of others in the field.

This highlights the problem presented by *Daubert*. For example, in the case of DNA, if a judge relies on Barry Scheck or Peter Neufeld, two "pioneers in the field of discrediting DNA," the judge would likely not admit the evidence, even though most other DNA experts would attest to DNA's reliability. *See also* People v. Leahy, 8 Cal. 4th 587, 611, 882 P.2d 321, 336, 34 Cal. Rptr. 2d 663, 678 (1994) (quoting *Kelly*, 17 Cal. 3d at 37, 549 P.2d at 1248, 130 Cal. Rptr. at 152) ("[It is] questionable whether the testimony of a single witness alone is ever sufficient to represent, or attest to, the views of an entire scientific community."); *Leading Cases*, *supra* note 48, at 262 ("A judge . . . may not always recognize whether she is receiving a fair assessment of the scientific evidence, particularly if only one side can afford experts.").

95. *See supra* note 22 and accompanying text.

96. *But see Downing*, 753 F.2d at 1237 (concluding that *Frye* has "prove[n] too malleable" and created inconsistent results).

B. *Admissibility of DNA Evidence*[97]

1. Introduction

The most widely anticipated impact of *Leahy* is its obvious application in the area of DNA typing.[98] Ironically, however, the admissibility of DNA evidence is the one area in which *Leahy* will have little impact. Today, using either *Kelly-Frye* or a relevancy standard, DNA typing evidence is likely admissible.[99] However, in the early 1990s, California Appellate courts excluded DNA evidence, not because the science itself was unreliable, but because of the debate over how to calculate the significance of an apparent genetic "match."[100] This debate focused on whether subgrouping (or substructuring) affects the multiplication rule.[101]

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97. For the practitioner dealing with the admissibility of DNA evidence for the first time, there are numerous sources available to assist in developing a strategy for the *Kelly* hearing. *See generally* Fleming, *supra* note 18, at § 3b (providing "practice pointers," including what kind of experts to seek and the best areas on which to closely cross-examine opposing witnesses); 8 AM. JUR. PROOF OF FACTS 3D *Foundation for DNA Finderprint Evidence* 749 (1990 & Supp. 1994) (providing method for laying foundation for admission of DNA testing, including a sample direct examination). For assistance in locating and preparing scientific experts, see 2 AM. JUR. TRIALS 585 (1964 & Supp. 1994) (discussing the proper methods to prepare expert witnesses to take the stand); F. LEE BAILEY & HENRY B. ROTHBLATT, INVESTIGATION AND PREPARATION OF CRIMINAL CASES 182-97 (2d ed. 1985) (discussing the selection and preparation of expert witnesses). For an excellent and comprehensive treatment of DNA in an easy to understand format, see HOWARD COLEMAN & ERIC SWENSON, DNA IN THE COURTROOM A TRIAL WATCHER'S GUIDE (1994).

For those seeking to exclude DNA evidence, an interesting and comprehensive place to begin and end is the O.J. Simpson case. BA 097211 (L.A. Super. Ct.). The defense team's memorandum of points and authorities in support of excluding DNA evidence can be found on Westlaw. 1994 WL 568647 (Cal. Super. Doc.). Two of the pioneers in the field of opposing DNA in court, Barry Scheck and Peter Neufeld, prepared the memorandum. Scheck and Neufeld focused on the "absence of generally accepted statistical methods that address both the probability of a coincidental match between two people who share common genetic characteristics and the probability that that match would mistakenly be reported due to laboratory error," and the "failure of the testing laboratories to use a generally accepted method for determining the probability of a coincidental match." *Id.* at *2.

98. *See supra* note 2.

99. The California Supreme Court recently granted review on several DNA cases to consider whether or not RFLP evidence will be admissible in California. *See* Maura Dolan, *State High Court to Rule on DNA Tests*, L.A. TIMES, Mar. 17, 1995, at A3.

100. People v. Wallace, 14 Cal. App. 4th 651, 659, 17 Cal. Rptr. 2d 721, 725 (1993); People v. Barney, 8 Cal. App. 4th 798, 822, 10 Cal. Rptr. 2d 731, 745 (1992); *see also* People v. Pizarro, 10 Cal. App. 4th 57, 89, 12 Cal. Rptr. 2d 436, 457 (1992) (remanding on issue of statistical calculation process). The *Frye* standard traditionally has been an obstacle to DNA proponents. Kramer, *supra* note 33, at 164 ("States employing a *Frye* related test have had more difficulty with the admission of DNA statistical data.").

101. *See* Richard L. Lewontin & Daniel L. Hartl, *Population Genetics in Forensic*

After a DNA test is completed and an apparent genetic match declared, the laboratory must then determine what statistical significance should be attached to the match. For example, are the chances that the sample came from someone other than the defendant one in one hundred, one in a million, or some number far higher? The problem was that if subgrouping existed, using current genetic databases to calculate the significance of genetic matches would be unreliable and possibly highly prejudicial because the genetic databases did not account for subgrouping.[102] The subgrouping debate forced California, as well as other *Frye* jurisdictions, to exclude DNA evidence. It also prompted the development of an "interim" method for making statistical DNA typing calculations by the National Research Council (NRC).[103]

DNA Typing, 254 SCI. 1745, 1747 (1991). Substructuring, originally espoused by Dr. Richard L. Lewontin and Dr. Daniel L. Hartl, is the theory that homogenous populations—Caucasians, Hispanics and African Americans—do not mate randomly. *Id.* Rather, very diverse subpopulations are likely to exist within the larger racial classification. *Id.* For example, rather than group all Hispanics together, proponents of substructuring would contend that genetic databases must subdivide the larger Hispanic group into Mexicans, Puerto Ricans, etc. The theory is that these subgroups do not mix together randomly, even in the United States. *Id.* Rather, they marry among themselves and do not form a "biological melting pot." *Id.*

102. People v. Soto, 30 Cal. App. 4th 340, 353, 35 Cal. Rptr. 2d 846, 853 n.15 (summarizing testimony that use of the product rule was questionable "because of fears that population substructuring might negatively affect the accuracy of such applications"), *review granted and opinion superseded by*, 1995 WL 150936 (Cal. Mar. 16, 1995).

103. NATIONAL RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE (National Academy of Sciences, 1992). In an effort to allow DNA to continue to be admitted during the subgrouping debate, the NRC developed what is now called the "ceiling principle." *Id.* Basically, this method allows a very conservative statistical estimate to be given to the jury. *Id.* It is conservative because it does not use race as a determinative factor. *Id.* Rather, frequency estimates are given in relation to the population as a whole, not just to African-Americans, Hispanics, Caucasians, etc.

In *People v. Barney*, the court stated that if the NRC report was met with general acceptance in the scientific community, then it could be used by the courts. 8 Cal. App. 4th at 822, 10 Cal. Rptr. 2d at 745. *See infra* notes 121-28 and accompanying text. At least two California appellate courts have approved of the NRC approach. People v. Venegas, 31 Cal. App. 4th 234, 36 Cal. Rptr. 2d 856 *review granted and opinion superseded by*, 1995 WL 150958 (Cal. Mar. 16, 1995); People v. Taylor, No. A064328, 1995 Cal. App. LEXIS 256, at *12 (Cal. Ct. App. Mar. 21, 1995) (admitting DNA using modified ceiling principle). Several other jurisdictions have also used the NRC ceiling principle to admit DNA evidence. *See* Commonwealth v. Lanigan, 641 N.E.2d 1342, 1349-50 (Mass. 1994) (admitting DNA using ceiling principle); State v. Bloom, 516 N.W.2d 159, 167 (Minn. 1994) (same); State v. Vandebogart, 1994 WL 698238, at *7 (N.H. Dec. 9, 1994) (using ceiling principle); State v. Anderson, 881 P.2d 29, 47 (N.M. 1994) (same); State v. Duran, 881 P.2d 48, 49 (N.M. 1994) (finding NRC's

Today, however, the theory that substructuring adversely affects statistical probabilities has disintegrated, clearly signaling that future *Kelly-Frye* hearings will find DNA evidence admissible.[104] This signal is just now been seen by the courts,[105] and, surprisingly, entirely ignored by others.[106] Despite this fact, and despite the fact that the California appellate courts are split on whether or not DNA is admissible,[107] recent

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"modified ceiling principle" admissible at trial); State v. Cauthron, 846 P.2d 502, 517 (Wash. 1993) (admitting DNA using ceiling principle). *But see* People v. Wallace, 14 Cal. App. 4th 651, 660, 17 Cal. Rptr. 2d 721, 725 (1993) ("However, recent developments have shown that general acceptance [of the NRC report] may not be easily achieved."); Peter Aldhouse, *Geneticists Attack NRC Report as Scientifically Flawed*, 259 SCI. 755, 755-56 (1993) (surveying the assault on the NRC report in the scientific literature); B. Devlin, et al., *Comments on the Statistical Aspects of the NRC's Report on DNA Typing*, 39 J. FORENSIC SCI. 28, 28 (1993) (finding the report "difficult to justify because it is based on inadequate population genetics and statistical theory"); B. Devlin, et al., *Statistical Evaluation of DNA Fingerprinting: A Critique of the NRC's Report*, 259 SCI. 748, 748-50 (1993) (discussing "serious flaws" in the NRC approach); Bernard Robertson & Tony Vignaux, *Why the NRC Report on DNA is Wrong*, 142 NEW L.J. 1619, 1619-21 (1992) ("The whole [NRC] report so seriously fails to meet proper standards of argument that one suspects that hidden agendas are being pursued.").

104. *See infra* notes 139-51 and accompanying text (presenting authority supporting conclusion that subgrouping proponents have lost the debate).

105. *See* People v. Wilds, 31 Cal. App. 4th 636, 37 Cal. Rptr. 2d 351 (finding RFLP admissible due to end of subgrouping debate), *review granted and opinion superseded by*, 1995 WL 150940 (Cal. Mar. 16, 1995); People v. Soto, 30 Cal. App. 4th 340, 361, 35 Cal. Rptr. 2d 846, 858 (finding RFLP admissible and the use of the product rule appropriate in light of the end of subgrouping debate); State v. Grayson, No. K2-94-1298, 1994 WL 670312 (Minn. Dist. Ct. Nov. 8, 1994) (finding PCR admissible under Frye standard).

106. At least one recent decision in a Frye jurisdiction has simply relied on older California cases such as *Barney* and has not considered controlling scientific developments that have occurred since *Barney* was decided. State v. Carter, 524 N.W.2d 763, 783 (Neb. 1994) (relying on *Barney* and finding PCR inadmissible due to subgrouping debate). Without considering the fact that the subgrouping debate has ended, *Carter* and other decisions like it are as obsolete as *Barney*. This is unfortunate since *Carter* is one of the first state supreme courts to consider the PCR DNA issue.

107. People v. Taylor, No. A064328, 1995 Cal. App. LEXIS 256, at *12 (Cal. Ct. App. Mar. 21, 1995) (admitting DNA using modified ceiling principle); *Wilds*, 31 Cal. App. 4th 636, 37 Cal. Rptr. 2d 351 (finding RFLP admissible due to end of subgrouping debate); People v. Venegas, 31 Cal. App. 4th 234, 36 Cal. Rptr. 2d 856 (1995) (remanding for a determination of whether or not the FBI's RFLP technique has met with general acceptance); *Soto*, 30 Cal. App. 4th 340, 361, 35 Cal. Rptr. 2d 846, 858 (1994) (holding RFLP DNA typing admissible due to end of subgrouping debate); People v. Wallace 14 Cal. App. 4th 651, 659, 17 Cal. Rptr. 2d 721, 725 (1993) (finding RFLP inadmissible); People v. Pizarro, 10 Cal. App. 4th 57, 89, 12 Cal. Rptr. 2d 436, 457 (1992) (remanding on issue of statistical calculation process); *Barney*, 8 Cal. App. 4th 798, 820, 10 Cal. Rptr. 2d 731, 743 (1992) (finding RFLP inadmissible due to subgrouping debate); People v. Axell, 235 Cal. App. 3d 836, 856, 1 Cal. Rptr. 2d 411, 423 (1991) (finding RFLP admissible).

scientific developments have eclipsed those cases excluding DNA.[108] Given the layperson's trust in DNA evidence,[109] the fact that DNA is now likely to be universally admitted in California is not insignificant. The discussion below will independently address the two types of DNA testing currently employed—RFLP[110] and (DQa) PCR[111]—arguing that both are now admissible under the *Kelly-Frye* standard affirmed in *Leahy*.

2. Restriction Fragment Length Polymorphism (RFLP) Tests

RFLP is the most established and widely used DNA test to date.[112] It has been endorsed by the Office of Technology Assessment of the United States Congress as well as the National Research Council.[113] Like PCR testing, RFLP produces genetic band patterns that technicians compare

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108. *See infra* notes 129-70 and accompanying text (discussing recent scientific developments and cases pertinent to DNA admissibility).

109. A recent Gallup telephone poll asked 521 adults, "How reliable do you think DNA blood tests are in matching blood to an individual person . . . ?" Seventy-seven percent of the respondents said they thought DNA was very reliable or somewhat reliable. Only 8% thought it was somewhat unreliable or very unreliable. Fifteen percent expressed no opinion. Gallup Poll, Survey 9/18/94-9/20/94. This poll seems to indicate that jurors may be willing to rely heavily on DNA evidence in the courtroom.

110. Although a thorough description of the RFLP and PCR techniques are beyond the scope of this article, a short description of the techniques may prove useful. "Basically, RFLP involves (1) using restriction enzymes to chop up the DNA of interest into segments of differing sizes and molecular weights; (2) running these DNA segments on an electrophoresis gel to separate them into 'bands' based on their size and weight; (3) denaturing the DNA to make it single-stranded; (4) 'blotting' the DNA onto a membrane; (5) adding radioactively labeled DNA oligonucleotide probes complementary to a particular sequence of interest; (6) exposing the membrane to X-ray film to produce an autoradiogram; (7) observing the banding patterns produced by the radioactive probes on the autoradiogram (or 'autorad'); and (8) comparing the banding patterns produced by the different test samples." MacKnight, *supra* note 18, at 296-97.

111. "PCR tests identify an area of DNA in which there tends to be variation from one person to another and then 'amplify' that area by causing the DNA strands to replicate themselves multiple times. Once it is amplified, the DNA can be 'typed' through the use of genetic probes. If the two samples have the same type, they may have a common source; if they do not have the same type, they could not have the same source." William C. Thompson, *Evaluating the Admissibility of New Genetic Identification Tests: Lessons From the DNA War*, 84 J. CRIM. L. & CRIMINOLOGY 22, 28 (1993). Generally, labs use a PCR technique which examines the DQ-alpha gene. *Id.* However, numerous new PCR techniques are currently being employed. *Id.* at 30.

112. Fleming, *supra* note 18, at 320.

113. Kramer, *supra* note 33, at 161.

to the sample given by the test subject. *See Figure 1.* One purported weakness of the RFLP technique is the subjectivity involved in interpreting these band patterns because they are often blurry and difficult to read.[114] Nevertheless, most courts have recognized the reliability of RFLP testing and have admitted them in the criminal context and in paternity cases.[115] In California, the acute nature of the debate over admissibility of RFLP results is reflected in the development of the appellate case law.

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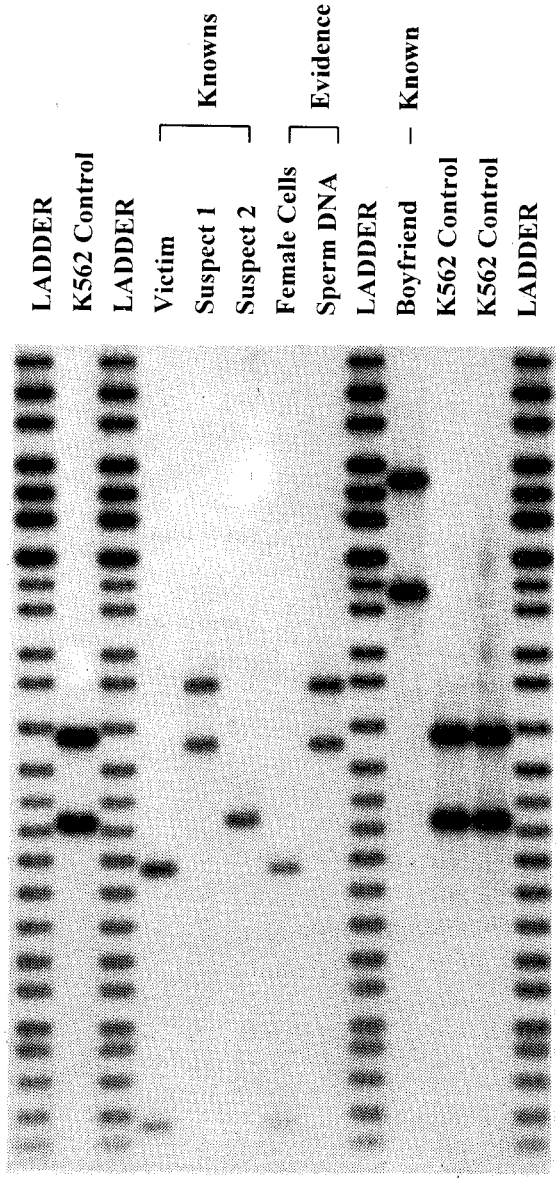
114. Fleming, *supra* note 18, at 326. However, the California appellate courts have continually rejected this argument. *See* People v. Axell, 235 Cal. App. 3d, 836, 868, 1 Cal. Rptr. 2d 411, 431 (1991) (rejecting attacks on the matching step of DNA analysis); People Barney, 8 Cal. App. 4th 798, 811-4, 10 Cal. Rptr. 2d 731, 738-9 (1992). "Appellant's challenge to the subjectivity of interpreting a match does not invalidate the procedure because interpretation of bands on an autorad is fairly straightforward and involves a minimal amount of subjective analysis." *Id.* at 813 (quoting *Axell*, 235 Cal. App. 3d at 864-65, 1 Cal. Rptr. 2d at 429); *see also* People v. Wilds, 31 Cal. App. 4th 636, 645, 37 Cal. Rptr. 2d 351, 356 (1995) ("[W]e hold that the processing and matching steps of the DNA analysis undertaken in this case are satisfactory under *Kelly*.").

115. Fleming, *supra* note 18, at 328.

Figure 1

Sexual Assault Case



a. People v. Axell[116]

The evolution of the RFLP evidence issue in California has developed rapidly, beginning with the 1991 case of *People v. Axell.* In *Axell,* the court held that RFLP DNA tests are admissible.[117] After hearing testimony from several experts, the court allowed comparison of samples found at the crime scene to the genetic database for Hispanics.[118] At the time, the debate over subgrouping had yet to develop. Therefore, because the Hispanic database was "representative of Hispanics in Southern California, the relevant population group," it was the correct database with which to compare the samples found at the crime scene.[119] In holding RFLP evidence admissible, the *Axell* court is in agreement with most jurisdictions across the country.[120]

b. People v. Barney[121] *and the debate over subgrouping*

Shortly after *Axell,* a significant debate erupted among scientists. The central question was whether general racial databases should be used to calculate the statistical significance of a DNA match, as was done in *Axell,* or whether racial databases must account for substructuring. This debate focused around two key articles published in *Science.* The first, by Lewontin and Hartl, argued that the use of the multiplication rule with current genetic databases was improper because there is "on aver-

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116. 235 Cal. App. 3d 836, 1 Cal. Rptr. 2d 411 (1991). *See generally* 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Demonstrative Experimental and Scientific Evidence* § 864F (3d ed. Supp. 1994) (discussing *Axell*).

117. *Axell,* 235 Cal. App. 3d at 856, 1 Cal. Rptr. 2d at 423. The RFLP procedures in *Axell* were performed by Cellmark. *Id.* Evidently, however, California courts will require the techniques used in each laboratory performing RFLP to be independently established as generally accepted. *See* People v. Venegas, 31 Cal. App. 4th 234, 36 Cal. Rptr. 2d 856 (1995) (holding that the FBI's RFLP procedure had not been established in California as generally accepted and noting that *Axell* dealt with Cellmark tests, not FBI).

118. *Axell,* 235 Cal. App. 3d at 866, 1 Cal. Rptr. 2d at 429.

119. *Id.* at 867, 1 Cal. Rptr. 2d at 431. "Any question or criticism of the size of the data base or the ratio pertains to weight of the evidence and not to its admissibility." *Id.* at 868, 1 Cal. Rptr. 2d at 431.

120. *See, e.g.,* Fishback v. People, 851 P.2d 884, 893 (Colo. 1993); Smith v. Deppish, 807 P.2d 144, 159 (Kan. 1991); People v. Wesley, 633 N.E.2d 451, 455 (N.Y. 1994); State v. Ford, 392 S.E.2d 781, 784 (S.C. 1990), *aff'd* 442 S.E.2d 604 (S.C. 1994); State v. Myers, No. 03-C-01-9108-CR-00255, 1992 WL 297626, at *2 (Tenn. Crim. App. Oct. 22, 1992); *see also* State v. Anderson, 881 P.2d 29, 41 (N.M. 1994) (listing *Frye* jurisdictions in which DNA has been admitted).

121. 8 Cal. App. 4th 798, 10 Cal. Rptr. 2d 731 (1992). *See generally* 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Demonstrative Experimental and Scientific Evidence* § 864G (3d ed. Supp. 1994) (discussing *Barney*).

age, one third more genetic variation among Irish, Spanish, Italians, Slavs, Swedes, and other subpopulations, than there is on the average between Europeans, Asians, Africans, Amerinds, and Oceanians."[122] In the other article, Chakraborty and Kidd specifically disagreed, arguing that even if subgrouping does exist, it has a negligible effect on DNA typing probabilities.[123]

This debate brought about the decision in *People v. Barney*. In *Barney*, the court found that there was no consensus in the scientific community on whether or not subgrouping affects the multiplication rule.[124] In holding that RFLP DNA tests were inadmissible as a result of this lack of consensus in the scientific community, the court stated that "in a future *Kelly-Frye* hearing . . . DNA analysis evidence will be admissible" only if there is a "sufficiently conservative method for determining statistical significance," such as the NRC's ceiling principle.[125] The court noted that it did not disagree with *Axell*, but that *Axell* had simply "been eclipsed on this point by subsequent scientific developments."[126] Therefore, after *Barney*, the admissibility of RFLP DNA evidence essentially rests on the NRC's ceiling frequency method, assuming that method receives general acceptance.[127] The *Barney* court stated the issue succinctly:

> The question now at hand is whether the interim and future methods of statistical calculation proposed by the NRC report will be generally accepted by population geneticists. If, as appears likely, this question is answered in the affirmative in a future *Kelly-Frye* hearing, then DNA analysis evidence will be admissible in California.[128]

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122. Lewontin & Hartl, *supra* note 102, at 1747.

123. Ranajit Chakraborty & Kenneth Kidd, *The Utility of DNA Typing in Forensic Work*, 254 SCI. 1735, 1738 (1991).

124. *Barney*, 8 Cal. App. 4th at 820, 10 Cal. Rptr. 2d at 743.

125. *Id.* at 821-22, 10 Cal. Rptr. 2d at 745.

126. *Id.* at 821, 10 Cal. Rptr. 2d at 744. Another California court agreed with *Barney* and held DNA inadmissible due to the subgrouping debate. People v. Pizarro, 10 Cal. App. 4th 57, 12 Cal. Rptr. 2d 436 (1992). *See generally* 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Demonstrative Experimental and Scientifc Evidence* § 864H (Supp. 1994) (discussing *Pizarro*).

127. *See supra* note 104 and accompanying text (collecting cases approving of the ceiling principle and articles criticizing it).

128. *Barney*, 8 Cal. App. 4th at 822, 10 Cal. Rptr. 2d at 745. For a critical analysis of the court's opinion in *Barney*, see Rockne P. Harmon, *Legal Criticisms of DNA Typing: Where's the Beef?* 84 J. CRIM. L. & CRIMINOLOGY 175, 178-85 (1993) (criticizing *Barney* on numerous grounds).

c. Recent scientific developments eclipse Barney's *rationale*

Since the *Barney* decision, dramatic developments have occurred in the debate over whether subgrouping has an effect on statistical probability estimates. These developments place *Barney's* rationale in question. Specifically, Lewontin and Hartl, the two scientists who originally argued for substructuring and wrote the *Science* article that sparked the debate, have significantly changed their opinion that substructuring affects the multiplication rule.[129]

On April 23, 1993, Lewontin and Hartl published their revised opinion in a letter to the editor, in which they concluded that "there is approximately as much genetic variation among ethnic groups within major races as there is among the races."[130] In other words, even if substructuring exists, it makes little or no difference for purposes of calculating the statistical frequency of a DNA match. "This reversal of opinion should be sufficient to illustrate that the effect of population substructuring has little impact on the significance attached to DNA profile match found in forensic case analysis."[131] As one commentator noted:

> Lewontin's and Hartl's recent reversal of opinion represents a major breakdown in their population substructuring theory. By saying that there is at least as much genetic variation among ethnic groups as there is among major races, Lewontin and Hartl have abandoned the idea that subgroups affect the multiplication rule. Essentially, their data yields the same conclusion that Chakraborty, Kidd and the NRC committee found—any effect of population substructure on the multiplication rule's reliability is negligible.[132]

Equally damaging to DNA opponents are two additional and independent endorsements of the forensic use of DNA typing. First, and perhaps most important, is an article published in late 1994 by Eric Lander, a molecular biologist at the Massachusetts Institute of Technology, and Bruce Budowle, a forensic scientist with the FBI.[133] This article, supporting the use of DNA evidence in court, is significant because Lander had been regarded as "'the most vocal and important critic of DNA testing.'"[134] Lander and Budowle found Lewontin and Hartl's analysis

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129. Daniel L. Hartl & Richard C. Lewontin, *DNA Fingerprinting Report (Letter)*, 260 SCI. 473, 474 (1993).

130. *Id.*

131. Ranajit Chakraborty, *NRC Report on DNA Typing (Letter)*, 260 SCI. 1059, 1059 (1993). Chakraborty's letter was published in response to Lewontin and Hartl's revised opinion. *Id.* Chakraborty again concluded that subgrouping has a negligible effect on the multiplication rule. *Id.*

132. Kramer, *supra* note 33, at 176.

133. Eric Lander & Bruce Budowle, *DNA Fingerprinting Dispute Laid to Rest*, 371 NATURE 735 (1994) (endorsing the use of DNA typing).

134. Harriet Chiang, *State Court Won't Relax DNA Rules: 6-1 Decision Will Be Factor*

"flawed" and also noted that the NRC report allowed this "minor academic debate to snowball to the point that it threatens to undermine the use of DNA fingerprinting."[135]

Secondly, the FBI published a five-volume study of DNA profiling data that essentially refutes the Lewontin and Hartl subgrouping argument.[136] The FBI study specifically denies the contention that subgrouping affects probability estimates.[137] Therefore, Lewontin and Hartl's revised opinion, the articles by Chakraborty and Kidd, Lander and Budowle's article, and the FBI's extensive study all lead to the conclusion that DNA evidence and the accompanying statistical probabilities should now be admissible.

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in O.J. Case, S.F. CHRON., Oct. 28, 1994, at A1 (quoting George Clark, deputy district attorney in San Diego).

135. Lander & Budowle, *supra* note 133, at 737.

136. 1A U.S. DEPT. JUSTICE, FBI REP., VNTR POPULATION DATA: A WORLDWIDE STUDY 2 (1993). The FBI study concluded:

> (1) that there are sufficient population data available to determine whether or not forensically significant differences might occur when using different population data bases [sic]; (2) that subdivision, either by ethnic group or by U.S. geographic region, within a major population group does not substantially affect forensic estimates of the likelihood of occurrence of a DNA profile; (3) that estimates of the likelihood of occurrence of a DNA profile using major population group databases (e.g., Caucasian, Black, and Hispanic) provide a greater range of frequencies than would estimates for subgroups of a major population category; therefore, the estimate of the likelihood of occurrence of a DNA profile derived by the current practice of employing the multiplication rule and using general population databases for allele frequencies is reliable, valid, and meaningful, without forensically significant consequences; and (4) that the data do not support the need for alternate procedures, such as the ceiling principle approach (NRC Report 1992), for deriving statistical estimates of DNA profile frequencies (Budowle et al. 1993a and 1993b, submitted).

People v. Soto, 30 Cal. App. 4th 340, 357, 35 Cal. Rptr. 2d 846, 856 (quoting 1A U.S. DEPT. JUSTICE, FBI REP., VNTR POPULATION DATA: A WORLDWIDE STUDY 2 (1993).

137. Some prosecutors have attempted to bypass the subgrouping debate entirely by subjecting DNA samples to twice as many tests and by testing at more than one laboratory. Rachel Nowak, *Forensic DNA Goes to Court with O.J.: DNA Fingerprinting Evidence in O.J. Simpson Murder Case*, 265 SCI. 1352 (1994). "'There are experts that hold that you can eliminate the statistical issue' if you conduct enough different tests . . . . And if you send samples to more than one laboratory . . . 'you can pretty much blow the possibility of a laboratory error out the window.'" *Id.* (quoting Los Angeles prosecutor Lisa Kahn).

d. People v. Soto[138] *recognizes the end of the subgrouping debate*

The first court in California, and one of the first in the United States to recognize the impact of these recent developments is the Fourth District Court of Appeals. In *People v. Soto*, the court held that RFLP DNA typing is admissible under *Kelly-Frye*.[139] In *Soto*, the defendant allegedly raped an elderly woman, who suffered a severe stroke shortly thereafter.[140] The only evidence introduced by the prosecutor against Soto was RFLP DNA test results derived from semen stains found on the victim's bed.[141] After his conviction, Soto appealed on the grounds that the method used to calculate the statistical significance of his DNA match, the product rule, had not been "sufficiently accepted in the relevant scientific community" to meet the *Kelly-Frye* requirement.[142] The court disagreed and affirmed the conviction.[143]

In support of its conclusion, the *Soto* court noted that: (1) both Lander and Hartl had shifted their positions away from support of substructuring;[144] (2) the recent and extensive FBI report concluded that "[subgrouping] . . . within a major population group does not substantially affect forensic estimates of the likelihood of occurrence of a DNA profile;"[145] and (3) a large number of jurisdictions have admitted DNA evidence.[146] Based on this analysis, the court concluded that the trial court properly admitted DNA typing evidence in conformity with the decision in *Axell*.[147] Shortly thereafter, California's Second District Court of Appeal agreed with *Soto* in *People v. Wilds* and issued a similar opinion.[148]

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138. 30 Cal. App. 4th 340, 361, 35 Cal. Rptr. 2d 846, 858 (1994) (holding RFLP DNA typing admissible using product rule due to end of subgrouping debate); *see also* People v. Wilds, 31 Cal. App. 4th 636, 37 Cal. Rptr. 2d 351 (1995) (same).

139. *Soto*, 30 Cal. App. 4th at 361, 35 Cal. Rptr. 2d at 858.

140. *Id.* at 345-57, 35 Cal. Rptr. 2d at 848-49.

141. *Id.* at 345, 35 Cal. Rptr. 2d at 847.

142. *Id.* at 345, 35 Cal. Rptr. 2d at 847-48.

143. *Id.* at 345, 35 Cal. Rptr. 2d at 848.

144. *Id.* at 359, 35 Cal. Rptr. 2d at 857.

145. *Id.* at 357, 35 Cal. Rptr. 2d at 856.

146. *Id.* at 359-60, 35 Cal. Rptr. 2d at 857-58.

147. *Id.* at 361, 35 Cal. Rptr. 2d at 858. Specifically, the court stated that "[b]ecause DNA RFLP is so highly reliable and relevant, to 'allow a minor academic debate . . . to snowball to the point that it threatens to undermine the use of [it] in court is throwing the baby out with the bathwater." *Id.* at 362, 35 Cal. Rptr. 2d at 859 (citations omitted). The court reaffirmed what *Axell* had stated several years earlier, that "'any question or criticism of the size of the data base or the ratio pertains to the weight of the evidence not to its admissibility.'" *Id.* at 361, 35 Cal. Rptr. 2d at 858 (quoting People v. Axell, 235 Cal. App. 3d 836, 868, 1 Cal. Rptr. 2d 411, 431 (1991)).

148. People v. Wilds, 31 Cal. App. 4th 636, 639, 37 Cal. Rptr. 2d 351, 352 (1995)

Soto and *Wilds* properly recognize the impact signaled by the scientific advances discussed above. Other courts have been slower to recognize this signal, or at least less thorough in their analysis.[149] Without exception, these cases fail to mention either the Lander article, the Lewontin-Hartl change in position, or the publication of the FBI report. Rather, they rely on past case law, including the *Barney* case in California. By relying only on cases from several years ago, these decisions fail to recognize recent scientific discussions that have eclipsed *Barney*, just as *Barney* temporarily proclaimed to eclipse *Axell*.

In addition, the courts should no longer consider the NRC's ceiling principal as an alternative in admitting probability statistics with DNA evidence. The issue is no longer whether the ceiling principle has gained general acceptance in the scientific community; rather, the issue is whether the ceiling principle is still necessary given the end of the subgrouping debate. Because the ceiling principle was developed as an interim method for admitting statistics during the height of the subgrouping debate and because it was never meant to be exclusive,[150]

("[We] find that the [disagreement over subgrouping] has now passed. We are back to the analysis set forth in *Axell*. The question of whether genetic profiling evidence satisfies *Kelly* has been unequivocally answered in the affirmative.").

149. *See* State v. Carter, 524 N.W.2d 763, 783 (Neb. 1994) (finding PCR inadmissible due to subgrouping debate); *cf.* People v. Venegas, 31 Cal. App. 4th 234, 36 Cal. Rptr. 2d 856 (1995). In *Venegas*, the court issued an interesting and relatively unusual decision. First, the court held that the FBI's RFLP procedure had not been established in California as generally accepted. *Id.* at 243, 36 Cal. Rptr. 2d at 863. California cases such as *Axell* have only held Cellmark's procedures to be generally accepted. *Id.* Second, the court held that the NRC ceiling principle was properly found to be generally accepted. *Id.* at 245, 36 Cal. Rptr. 2d at 865. Third, the court found that the FBI did not adhere to the accepted NRC methods in its calculations of the statistical probability of the match. *Id.* The court reversed and remanded the case for a determination of whether the FBI's procedures are also generally accepted and to afford the FBI a chance to recalculate the statistical component. *Id.* at 248, 36 Cal. Rptr. 2d at 868. The court noted that the FBI procedures will likely meet with general acceptance. *Id.*

150. One reason the NRC developed the conservative ceiling principle approach was to bypass the issue of substructuring. *See* State v. Vandebogart, 616 A.2d 483, 494 (N.H. 1992) ("The NRC asserts that the ceiling principle can account for any error caused by possible population substructure. Therefore, the admissibility of population frequency estimates does not necessarily await resolution of the population substructure issue. . . ."). If the substructure issue has been decided, then in many ways, the NRC approach has become irrelevant. *See* People v. Soto, 30 Cal. App. 4th 340, 361, 35 Cal. Rptr. 2d 846, 858 ("[T]he FBI's report indicates an 'interim' approach is unnecessary."). *Soto* also stated that "the ceiling principle was not intended to be exclusive." *Id.* at 361 n.24, 35 Cal. Rptr. 2d at 858 n.24.

its value was by design short-lived. The end of the subgrouping debate heralded the end of the need to consider the ceiling principle as a viable method of producing probability statistics. As in *Axell*, *Soto*, and *Wilds*, the product rule should once again be the method of choice for calculating probability statistics for use with DNA evidence.[151]

In short, the forensic use of DNA has developed at a blinding speed. Having been used for the first time in a United States court in 1988, scholarly debate on the forensic use of DNA evidence continues to evolve. As with the demonstrable use of any new science, growing pains clearly surfaced. In *Axell*, the court found DNA RFLP evidence admissible. Then came the subgrouping debate and the *Barney* decision, temporarily erecting a wall to the admission of DNA evidence. Finally, with the end of the subgrouping debate, that wall rightly came down under *Soto* and *Wilds*. In essence, a *Kelly-Frye* analysis of RFLP DNA evidence should now bring about a conclusion in line with *Axell*, *Soto*, and *Wilds*—RFLP evidence is admissible using the product rule.

151. *Accord, e.g.*, Lindsay v. People, No. 93SC167, 1995 Colo. LEXIS 41 (Colo. March 6, 1995) (finding RFLP and accompanying statistical calculations using product rule were properly admitted under *Frye*); Taylor v. State, 889 P.2d 319, 336 (admitting RFLP under *Daubert* using the product rule) (Okla. Crim. App. 1995). *But see* People v. Taylor, No. A064328, 1995 Cal. App. LEXIS 256, at *12 (Cal. Ct. App. Mar. 21, 1995) (admitting DNA using modified ceiling principle); State v. Buckner, No. 62043-1, 1995 WL 109013 (Wash. Mar. 16, 1995) (reversing and remanding so that the DNA can be presented to the jury using the ceiling principle rather than the product rule); State v. Streich, No. 91-335, 1995 WL 73724, at *8-9 (Vt. Feb. 17, 1995) (finding RFLP admissible using ceiling principle and noting that "even under *Daubert* it is inappropriate to allow evidence based on the unmodified product rule.").

3. Polymerase Chain Reaction (PCR) Tests[152]

Another method of DNA identification is PCR amplification. PCR allows testing on samples smaller in size than allowed by RFLP. In fact, PCR techniques can analyze a sample as small as a single strand of hair.[153] However, PCR is less specific in identifying a particular individual to the exclusion of others.[154] Additionally, because the technique is

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152. The discussion below focuses on DQ-alpha (DQa) PCR testing. DQa is the most commonly utilized PCR technique and the technique that has been at issue in all state and federal cases in which the admissibility of PCR was debated. Genetic researchers are currently developing and utilizing other PCR techniques. These techniques, called AMPFLPs (amplifiable fragment length polymorphism), include: (1) D1S80, (2) 2p24-p23, (3) D17S30, and (4) 12q13.1. S. Rand, et al., *Population Genetics and Forensic Efficiency Data of 4 AMPFLP's*, 104 INT. J. LEGAL MED. 329, 329 (1992). D1S80 is the most commonly utilized of these AMPFLPs. However, only one state case has even mentioned D1S80. *See* Commonwealth v. Francis, 648 A.2d 49, 52 (Pa. Super. Ct. 1994) ("Although the record is unclear, it appears that genetic "fingerprinting" results may be possible with the D1S80 test after PCR amplification.").

Although AMPFLPs are newer, there is a large amount of published research on them. *See* R. Deja et al., *Population Genetic Characteristics of the D1S80 Locus in Seven Human Populations*, 94 HUM. GENETICS 252, 252 (1994) ("Characteristics of the D1S80 locus make it a very useful marker for population genetic research, genetic linkage studies, forensic identification of individuals, and for determination of biological relatedness of individuals."); Ate D. Klooseterman et al., *PCR-Amplification and Detection of the Human D1S80 VNTR Locus*, 105 INT. J. LEGAL MED. 257, 257 (1993) ("The results of this study suggest that in the near future analysis of the D1S80 locus by DNA-amplification can be applied in actual forensic case work."); E. Donald Shapiro et al., *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. & HEALTH 1, 36 n.186 (1992-93) ("[AFLP] . . . relies on technology that is newer and perhaps less widely accepted than the other tests.") (citations omitted); Antti Sajantilla, et al., *PCR Amplification of Alleles at the D1S80 Locus; Comparison of a Finnish and a North American Caucasian Population Sample and Forensic Casework Evaluation*, 50 AM. J. HUM. GENETICS 816, 823-24 (1992) (AMP-FLP analysis of the D1S80 locus can be applied to routine forensic casework and "should provide a powerful new forensic tool for the DNA characterization of identity"); Gurpreet S. Sandhu et al., *Amplification of Reproducible Allele Markers for Amplified Fragment Length Polymorphism Analysis*, 12 BIOTECHNIQUES 16 (1992) ("Using the AFLP [D1S80] technique . . . should prove suitable in forensic analyses . . . ."); Thompson, *supra* note 112, at 28 n.36 ("The use of these newer [AMPFLP] methods in forensic identification appears to be still at the experimental stage. Most forensic PCR tests conducted to date have examined only the HLA DQ-alpha gene.").

153. Janet C. Hoeffel, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 STAN. L. REV. 465, 475 (1990) (stating that Cetus Corporation, which uses PCR techniques, "claims to be able to conduct its test on a single hair"). The hair must include the root. *Id.*

154. *Id.* at 475.

several years newer than RFLP, PCR has had less opportunity to find its way into published opinions. In fact, PCR has yet to be established by a California appellate court as an admissible form of scientific evidence. Nevertheless, there is substantial authority for California courts to hold that PCR tests are admissible pursuant to *Leahy*.

Although no published California case has dealt with the admissibility of PCR test results,[155] numerous other *Frye*[156] and relevancy[157] jurisdictions have admitted the evidence. Additionally, journal treatment of PCR generally has been very favorable,[158] and molecular geneticists

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155. California trial courts frequently have dealt with the issue, however, with the more recent cases admitting the evidence. *See, e.g.*, People v. Moffett, No. 103094 (San Diego County Super. Ct. May 1991) (admitting PCR); People v. Quintanilla, No. C-23691 (San Mateo County Super. Ct. Aug. 16, 1991) (same). *But see* People v. Mack, No. 86116 (Sacramento County Super. Ct. Sept. 1990) (holding that PCR evidence should be excluded as not being accepted in the relevant scientific community); People v. Martinez, No. C 82183 (L.A. County Super. Ct. 1989) (holding that PCR evidence should be excluded).

156. Seritt v. State, 647 So. 2d 1 (Ala. Crim. App. 1994) (finding trial court properly admitted DQa PCR evidence under adopted *Frye* standard); Harrison v. State, 644 N.E.2d 1243, 1254 (Ind. Jan. 4, 1995) (finding "no reversible error in the trial court's admission of the [PCR] DNA test results"); State v. Grayson, No. K2-94-1298, 1994 WL 670312, at *1 (Minn. Dist. Ct. Nov. 8, 1994) (finding PCR admissible under *Frye*); State v. Williams, 599 A.2d 960 (N.J. Super. Ct. Law Div. 1991) (finding trial court properly admitted DQa PCR evidence); People v. Palumbo, 618 N.Y.S.2d 197 (N.Y. Crim. Ct. 1994) (finding PCR (DQa) typing "has been generally accepted as reliable in the scientific community"); State v. Gentry, 888 P.2d 1105, 1118 (Wash. 1995) ("It is now settled law in this state that the PCR technique of DNA analysis passes the *Frye* test and is admissible evidence in Washington.").

Dozens of trial courts have also found DQa PCR evidence admissible. One article recently compiled a useful table which lists the trial court cases that have dealt with DQa typing. *See* Edward Blake et al., *Polymerase Chain Reaction (PCR) Amplification and Human Leukocyte Antigen (HLA)-DQa Oligonucleotide Typing on Biological Evidence Samples: Casework Experience*, 37 J. FORENSIC SCI. 700, 722-23 (1992) (collecting trial court case admitting PCR). According to this article, DQa PCR tests have been admitted in several trial court cases following a *Frye* hearing. *Id.* According to that same article, DQa tests were also admitted in several cases, although a *Frye* hearing was not held or the court was in a relevancy jurisdiction. *Id.*

157. *See, e.g.*, State v. Moore, 885 P.2d 457, 475 (Mont. 1994) (holding that PCR analysis is sufficiently reliable to be admitted into evidence); State v. Lyons, 863 P.2d 1303, 1311 (Or. Ct. App. 1993) (admitting PCR evidence under "relevancy test"); Trimboli v. State, 817 S.W.2d 785, 792 (Tex. Ct. App. 1991) (upholding admission of PCR evidence), *aff'd en banc*, 826 S.W.2d 953 (Tex. Crim. App. 1992); Clarke v. State, 813 S.W.2d 654, 655 (Tex. Ct. App. 1991) (upholding admission of PCR evidence as relevant), *aff'd per curiam*, 839 S.W.2d 92 (Tex. Crim. App. 1992), *cert. denied*, 113 S. Ct. 1611 (1993); Spencer v. Commonwealth, 393 S.E.2d 609 (Va. 1990) (upholding admission of PCR evidence under relevancy test), *cert. denied*, 498 U.S. 908 (1990); *cf.* Harrison v. State, 644 N.E.2d 1243, 1254 (Ind. 1995) ("Likewise, we find no reversible error in the trial court's admission of the [PCR] DNA test results . . . . [T]he record suggests that defense counsel consented to the admission of the test results . . . .").

158. A great number of journal articles discuss PCR. The articles typically support

have subjected the technology to substantial review and validation.[159]

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the procedure and its application in the area of forensic science. *See* Norman Arnheim et al., *Application of PCR: Organismal and Population Biology; Polymerase Chain Reaction*, 40 BIOSCIENCE 174 (1990) ("PCR has many virtues that are likely to lead to its rapid dispersal through the community of organismal and population biologists. It is a . . . simple method for acquiring information about the sequence of DNA . . . ."); Blake et al., *supra* note 156, at 723-24 (concluding that "DQa testing [is] . . . a very useful tool for the analysis of biological evidence" and that DQa "promises to have a major impact in forensic science"); Catherine Comey & Bruce Budowle, *Validation Studies on the Analysis of the HLA DQa Locus Using the Polymerase Chain Reaction*, 36 J. FORENSIC SCI. 1633, 1633 (1991) ("The results of [the] . . . validation experiments indicate that typing of the DQa gene . . . can be accomplished . . . without producing false positive or false negative results."); Henry A. Erlich et al., Letter, *Reliability of the HLA-DQa PCR-Based Oligonucleotide Typing System*, 35 J. FORENSIC SCI. 1017, 1017-18 (1990) (arguing that DQa typing results are reproducible and reliable); MacKnight, *supra* note 18, at 314-22 (arguing for the reliability of the PCR procedure and addressing its perceived problems); A.F. Markham, *The Polymerase Chain Reaction: A Tool for Molecular Medicine; Education and Debate*, 306 BRIT. MED. J. 441 (1993) ("In the past four years [PCR] . . . has become probably the most widely used single technique in all branches of the biological sciences."); Barry C. Scheck, *DNA and* Daubert, 15 CARDOZO L. REV. 1959, 1963-64 n.17 (1994) ("Certainly, a strong case can be made for the admissibility of HLA DQ-Alpha technique, particularly when it is used to exclude someone as the source of trace evidence.").

Molecular geneticists have also extensively reviewed and validated the application of the DQa PCR technique. *See* Rhea Helmuth et al., *HLA-DQa Allele and Genotype Frequencies In Various Human Populations, Determined by Using Enzymatic Amplification and Oligonucleotide Probes*, 47 AM. J. HUM. GENETICS 515 (1990).

159. For the purposes of a *Kelly-Frye* analysis of admissibility, the courts generally do not consider error rates. *See, e.g.*, State v. Alt, 504 N.W.2d 38, 53 n.25 (Minn. Ct. App. 1993) ("Courts are admitting DNA test results from laboratories with no known or available error rates."); Scheck, *supra* note 158, at 1967 ("Laboratory error rate . . . has not been considered a *Frye* issue by the courts.").

Nevertheless, laboratories have substantially blind-tested the PCR DQa technique to determine error rates. These tests proved the technique is very reliable. First, laboratories conducted two blind trials involving DQa typing of simulated evidence samples taken from the trial court case, *Texas v. Fuller*. "In the first . . . blind trial carried out in 1987 using the DQa dot-blot format, all 50 samples [tested] gave typing results. . . . However, one sample out of 50 was incorrectly typed . . . ." Blake et al., *supra* note 156, at 704-05. "In the second . . . blind trial . . . in 1989, ... [a]ll 50 samples were correctly typed." *Id.* at 705.

Secondly, in other, more extensive tests, five forensic science laboratories evaluated the DQa kit to assess the labs' ability to perform the PCR DQa technique. *See* P. Sean Walsh et al., *Report of the Blind Trial of the Cetus AmpliType HLA DQa Forensic Deoxyribonucleic Acid (DNA) Amplification and Typing Kit*, 36 J. FORENSIC SCI. 1551, 1556 (1991) (summarizing the success of the blind trial of DQa techniques). None of the DNA-containing samples were mistyped. *Id.* In fact, results were reported for 178 of the 180 samples analyzed (98.9%), and all of the 178 samples were correctly

PCR is also used extensively outside the courtroom. For example, PCR has been used to help identify those killed in the Persian Gulf War and is also used in HIV detection and diagnostics, neonatal screening, and in the development of numerous other tests.[160]

However, PCR does not come without its difficulties. Commentators have recognized at least four primary problems with PCR testing: (1) allelic drop-out or differential amplification; (2) the sensitivity of the test and the potential for contamination; (3) the small number of labs conducting the tests; and (4) interpretation problems.[161] These problems, however, "do not affect the general acceptance of the underlying PCR methodology."[162] Although the courts have recognized that these problems may exist, courts generally do not consider them significant enough to warrant the exclusion of the evidence.[163]

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typed. *Id.* at 1554. The tests showed "that a forensic science laboratory can . . . successfully use the AmpliType HLA DQa forensic DNA amplification and typing kit to analyze forensic samples." *Id.* at 1556; *see also* State v. Williams, 599 A.2d 960, 966 (N.J. Super. Ct. Law Div. 1991) (stating that PCR techniques are almost unanimously positive and attributing the few errors to human error and "not to any problem or defect in the procedure itself"); Comey & Budowle, *supra* note 158, at 1633 (reporting on experiments that evaluated DQa and concluding that DQa typing "can be accomplished, when the typing is done using proper protocols, without false positive or false negative results").

For studies dealing with the AmpliType PM PCR testing system, see N. Fildes & R. Reynolds, *Consistency and Reproducibility of AmpliType PM Results Between Seven Laboratories: Field Trial Results*, 40 J. FORENSIC SCI. (forthcoming 1995) ("The field trial demonstrated that laboratories can easily implement the AmpliType PM system to analyze DNA-containing samples and controls successfully for forensic casework applications."); George Herrin, Jr. et al., *Evaluation of the AmpliType PM DNA Test System on Forensic Case Samples*, 39 J. FORENSIC SCI. 1247, 1247 (1994) ("In all cases in which a conclusive answer was reached for the AmpliType PM system, the results agreed with or surpassed results previously obtained with RFLP testing.").

160. MacKnight, *supra* note 18, at 302-04. Additionally, *Science*, a leading scientific journal, designated PCR the "molecule of the year" in 1989. *Id.* at 304.

161. *See id.* at 314-22 (discussing each of these problems in detail and explaining why they are not significant).

162. State v. Russell, 882 P.2d 747, 767 (Wash. 1994). The court went on to address the "potential testing problems" of PCR analysis. *Id.* at 767-68.

163. *See, e.g., id.* at 768 (dismissing these problems and admitting DQa PCR typing); State v. Lyons, 863 P.2d 1301, 1309-11 (Or. Ct. App. 1993) (discussing these problems while nevertheless admitting PCR); *see also* Markham, *supra* note 158 (stating that the problems with the PCR technique are not usually serious and "any teething troubles can usually be overcome quickly by minor and obvious adjustment to reaction conditions"); ANDREA A. MOENSSENS ET AL., SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES §15.10 (4th ed. 1995) ("While some contaminants may suppress PCR amplification or otherwise affect the reaction, for the most part they do not prevent the success of PCR typing.").

As with RFLP, court concern over the subgrouping debate, not concern about the underlying methodology, is the primary reason for the exclusion of PCR in recent decisions.[164] Therefore, as with RFLP, the end of the subgrouping debate may have also heralded the beginning of widespread acceptance of PCR typing in the courts. Without subgrouping proponents arguing against DNA evidence, appellate courts in *Frye* jurisdictions across the country will likely embrace PCR testing.

VI. CONCLUSION

The *Leahy* decision will not live up to its media-given status as the key to lock or unlock the door to DNA evidence. Relevancy jurisdictions have typically admitted DNA, considering the subgrouping debate as a factor going towards the weight rather than the admissibility of the evidence.[165] Therefore, courts in relevancy jurisdictions admitted DNA evidence through the height of the subgrouping debate in the early 1990s. Conversely, *Frye* jurisdictions, including California, excluded DNA evi-

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164. *See, e.g.*, State v. Carter, 524 N.W.2d 763, 783 (Neb. 1994) (finding PCR inadmissible due to subgrouping debate). Early trial court cases in California did, however, find that PCR was not a generally accepted technique. *See, e.g.*, People v. Mack, No. 86116 (Sacramento County Super. Ct. Sept. 1990) (holding that PCR evidence should be excluded as unaccepted in the relevant scientific community); People v. Martinez, No. C 82183 (L.A. County Super. Ct. 1989) (same).

165. *See, e.g.*, United States v. Chischilly, 30 F.3d 1144, 1153 (9th Cir. 1994) ("[W]e conclude that under *Daubert* the district court did not abuse its discretion in admitting evidence of a [RFLP] DNA match and testimony regarding the probability of a coincidental match."), *cert. denied*, 115 S. Ct. 946 (1995); United States v. Martinez, 3 F.3d 1191, 1197 (8th Cir. 1993) ("[T]he general theory and techniques of DNA profiling are valid under . . . *Daubert*, and . . . in the future courts can take judicial notice of their reliability."), *cert. denied*, 114 S. Ct. 734 (1994). Those jurisdictions using a relevancy or *Daubert* standard have had far less trouble admitting DNA evidence, primarily because in relevancy jurisdictions, the debate over subgrouping affects the weight of the evidence, not its admissibility. *See* Toranzo v. State, 608 So. 2d 83, 84 (Fla. 1992) (per curiam) (admitting population frequency data); State v. Anderson, 881 P.2d 29, 46 (N.M. 1994) (admitting DNA with statistical debate going to weight, not admissibility); State v. Pierce, 597 N.E.2d 107, 115 (Ohio 1992) (holding population frequency data admissible and stating that questions of reliability go to the weight of the evidence); Kelly v. State, 824 S.W.2d 568, 574 (Tex. Crim. App. 1992) (en banc) (admitting DNA population frequency data under relevancy and reliability standard); Springfield v. State, 860 P.2d 435, 447-48 (Wyo. 1993) (admitting statistical data because possible existence of population substructuring affects the weight of the evidence and the jury was "free to disregard or disbelieve [the] expert testimony") (citations omitted). For a comprehensive discussion of *Daubert's* effect on DNA admissibility from one of the leading opponents of DNA in the courtroom, see Scheck, *supra* note 158.

dence during the height of the subgrouping debate, with the subgrouping issue affecting DNA's admissibility rather than its weight.

Today, however, in light of the end of the subgrouping debate, there is no readily apparent reason why California and other *Frye* jurisdictions should not admit both RFLP and PCR typing results. Therefore, *Leahy's* effect on DNA would have been the same had the court abandoned *Kelly-Frye*. In addition, California courts should no longer consider the NRC's ceiling principle[166] a viable means to admit population frequency data.[167] The NRC created the ceiling principle as an *interim* method for presenting frequency data to the jury. It was never intended to be a permanent alternative.[168] The end of the subgrouping debate is, in reality, the vanguard of the ceiling principle's passing. Courts should admit DNA evidence in accordance with *Axell*, *Soto*, and *Wilds*.[169]

If a practitioner seeks to exclude DNA evidence at trial, it would be wise to focus the attack on the third prong of the *Kelly* analysis—whether the correct procedures were used in the present case.[170]

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166. *See supra* note 103 (discussing the ceiling principle).

167. *See* 1A U.S. DEPT. JUSTICE, FBI REP., VNTR POPULATION DATA: A WORLDWIDE STUDY 2 (1993) (concluding that alternative procedures such as the NRC report are unnecessary).

168. *See supra* note 150 and accompanying text.

169. The final word on the admissibility of DNA evidence ultimately rests with the California Supreme Court. Fortunately, the Court granted review on several RFLP DNA cases on March 16, 1995, including People v. Venegas, People v. Wilds and People v. Soto. *See* Maura Dolan, *State High Court to Rule on DNA Tests*, L.A. TIMES, Mar. 17, 1995, at A3. Therefore, the contraversy surrounding RFLP will shortly be resolved.

170. *See* People v. Venegas, 31 Cal. App. 4th 234, 36 Cal. Rptr. 2d 856 (1995) (reversed and remanded due to failure of FBI to conform to accepted NRC methodology); State v. Gentry, 888 P.2d 1105 (Wash. 1995) ("[H]uman error in the forensic laboratory will continue to be a relevant inquiry."); Nowak, *supra* note 137 ("[L]ab error is the most likely place to get a false incrimination of an innocent person or a guilty person going free."). *See generally* People v. Barney, 8 Cal. App. 4th 798, 822-25, 10 Cal. Rptr. 2d 731, 745-47 (1992) (discussing the "use of correct scientific procedures" prong of *Kelly*).

In the federal courts, however, evidence may be admitted even if improper standards were employed. *See, e.g.*, United States v. Chischilly, 30 F.3d 1144, 1153 (9th Cir. 1994) ("[P]otential faults in the DNA sample extraction processes conducted in FBI laboratories, go to the weight to be accorded the evidence, not to its admissibility. . . . "; United States v. Jakobetz, 955 F.2d 786, 800 (2d Cir.), *cert. denied*, 113 S. Ct. 104 (1992). The *Jakobetz* court stated:

> The district court should focus on whether accepted protocol was adequately followed in a specific case, but the court, in exercising its discretion, should be mindful that this issue should go more to the weight than to the admissibility of the evidence. Rarely should such a factual determination be excluded from jury consideration. With adequate cautionary instructions from the trial judge, vigorous cross-examination of the government's experts, and challenging testimony from defense experts, the jury should be allowed to

Human error and misapplication of procedures will always be factors in any scientific technique, and in any given case, courts may exclude DNA on those grounds. Nevertheless, California courts should more fully embrace DNA evidence, despite *Leahy's* adhesion to the more conservative general acceptance standard of admissibility.

PAUL B. TYLER[171]

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make its own factual determination as to whether the evidence is reliable.

Id.

171. The author was introduced to the issue of DNA admissibility through his work as a law clerk for Los Angeles County Superior Court Judge Lance A. Ito where he assisted Judge Ito on the O.J. Simpson double-murder case. People v. Orenthal James Simpson, BA 097211 (L.A. Super. Ct. 1995).

VIII. HEALING ARTS AND INSTITUTIONS

The Medical Injury Compensation Reform Act (MICRA), limiting recovery of noneconomic damages against a health care provider for professional negligence to $250,000, applies to an action for partial equitable indemnification by a concurrent tortfeasor; furthermore, an indemnitee's reasonable settlement in good faith, without notice or opportunity to defend, cannot bind an indemnitor:
Western S.S. Lines v. San Pedro Peninsula Hospital.

I. INTRODUCTION

In *Western S.S. Lines v. San Pedro Peninsula Hospital*,[1] the California Supreme Court examined the issue of whether provisions in the Medical Injury Compensation Reform Act (MICRA) limiting noneconomic damages to $250,000 should apply to partial equitable indemnification against health care providers.[2] The court of appeal affirmed the lower court's ruling, holding that MICRA did not apply because Western sought economic damages from the hospital.[3] The appellate court further found that no MICRA provision would prohibit an indemnitee from seeking an allocation of liability involving the negligence of a health care provider.[4]

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1. 8 Cal. 4th 100, 876 P.2d 1062, 32 Cal Rptr. 2d 263 (1994). Justice Arabian authored the majority opinion, in which Chief Justice Lucas and Justices Kennard, Baxter, George and Cottle concurred. *Id.* at 104, 876 P.2d at 1063, 32 Cal. Rptr. 2d at 264; *see infra* notes 2-28 and accompanying text. Justice Mosk wrote a separate dissenting opinion. *Id.* at 119, 876 P.2d at 1073, 32 Cal. Rptr. 2d at 274 (Mosk, J., dissenting); *see also infra* notes 29-32 and accompanying text (discussing Justice Mosk's dissenting opinion).

2. *Western*, 8 Cal. 4th at 100, 876 P.2d at 1063, 32 Cal. Rptr. 2d at 264.

3. *Id.* at 105-06, 876 P.2d at 1064, 32 Cal. Rptr. 2d at 265-66.

4. *Id.* at 106, 876 P.2d at 1065, 32 Cal Rptr. 2d at 266. On October 28, 1993, Ann Lennon became seriously ill while working as an assistant purser for Western Steamship Lines, Inc. *Id.* at 104, 876 P.2d at 1063, 32 Cal. Rptr. 2d at 264. She was taken to San Pedro Peninsula Hospital where she was treated by Dr. Samuel Wirtschafter. *Id.* at 104-05, 876 P.2d at 1063-64, 32 Cal. Rptr. 2d at 265. The hospital staff improperly intubated Lennon, causing her to suffer cardiac arrest and oxygen deprivation. *Id.* at 105, 876 P.2d at 1064, 32 Cal. Rptr. 2d at 265. She never regained consciousness. *Id.* Lennon's guardian sued Western based on "negligence and unseaworthiness" and sought damages for "maintenance and cure and unearned wages." *Id.* The jury awarded Lennon $7.75 million. *Id.* Western appealed, but finally settled with Lennon's guardian for $6 million, including "maintenance and cure." *Id.* Western then sought indemnification from the hospital and the doctor to the extent of their proportionate share of liability, which the jury found to be 50 percent and 30 percent, respectively. *Id.* Dr. Wirtschafter settled with Western for $1 million. *Id.* The trial court determined that MICRA did not apply and entered judgment against the hospital for $1.8 million. *Id.* at

II. TREATMENT

A. Majority Opinion

In determining the appropriateness of equitable indemnification for concurrent tortfeasors, the California Supreme Court analyzed the "unique context"[5] of Western's recovery rather than relying solely on the statutory construction of section 3333.2 of the California Civil Code.[6] In determining whether equitable indemnification is available to a negligent healthcare provider from a concurrent tortfeasor, the supreme court began with a historical overview of the doctrine of equitable indemnification.[7] Courts often limit the application of equitable indemnification in circumstances where countervailing considerations may require limited recovery, such as immunity for good-faith settlements and exclusivity for workers' compensation.[8] In these situations, the strong public policies of encouraging settlement negotiations and shielding employers paying workers' compensation from third-party liability to concurrent

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106, 876 P.2d at 1064, 32 Cal. Rptr. 2d at 265. The court of appeal affirmed. *Id.*

5. *Id.* at 107, 876 P.2d at 1065, 32 Cal. Rptr. 2d at 266 (stating that a broad examination of all the relevant circumstances is required to determine whether Western's recovery is appropriate).

6. *See* CAL. CIVIL CODE § 3333.2 (West Supp. 1994). Section 2333.2 reads in pertinent part:

> (a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.
>
> (b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000).

Id. See generally 70 C.J.S. *Physicians and Surgeons* §§ 101-107 (1987 & Supp. 1994); 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 778 (9th ed. 1988 & Supp. 1994) (discussing MICRA's provisions); 36 CAL. JUR. 3D *Healing Arts and Institutions* § 185 (Supp. 1994) (discussing MICRA provisions).

7. *Western*, 8 Cal. 4th at 107, 876 P.2d at 1065, 32 Cal. Rptr. 2d at 266. Indemnity, which originated from common law, at one time permitted a tortfeasor to shift the entire burden of loss to another tortfeasor. However, the doctrine has been modified to permit partial indemnity, which is apportioned among multiple tortfeasors based upon each tortfeasor's relative degree of fault. American Motorcycle Ass'n. v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). Nevertheless, the court found specific instances in which the application of partial equitable indemnity is prohibited. *Id.* at 607 n.9, 578 P.2d at 918 n.9, 146 Cal. Rptr. at 201 n.9. *See generally* 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 89 (9th ed. 1988); 14 CAL. JUR. 3D *Contribution* § 81 (1974 & Supp. 1994).

8. *Western*, 8 Cal. 4th at 109, 876 P.2d at 1067, 32 Cal. Rptr. 2d at 268.

tortfeasors, respectively, have superceded application of the doctrine.[9] Analyzing the statutory language of section 3333.2 is ineffectual because such analysis "fails to account for such countervailing policy considerations" that prohibit the application of indemnity.[10] Therefore, the court should not assess the noneconomic damages of a claim for partial indemnity, but rather, examine the legal principles upon which MICRA is based.[11]

Having established the proper analysis, the supreme court then examined the public policy of MICRA to determine if such countervailing policy considerations exist.[12] The legislature enacted the provisions of MICRA to control the rising cost of medical malpractice insurance and, more specifically, to minimize the possibility that many doctors would practice without insurance, "leaving patients who might be injured by such doctors with the prospect of uncollectible judgments."[13] The availability of adequate medical care is a function of affordable insurance coverage, which, in large part, depends on the costs associated with medical malpractice litigation.[14] Accordingly, MICRA attempts to reduce the cost of medical malpractice insurance by limiting noneconomic damages.[15] By limiting noneconomic damages, MICRA is designed to create a more stable base upon which to set insurance rates and obviate the unpredictability of large settlements.[16] To exempt indemnification actions from the limits set forth in MICRA would only serve to regenerate the instability and unpredictability of noneconomic awards that were present before the enactment of MICRA.[17]

Justice Arabian analogized the present case to the indemnification exception in workers' compensation.[18] Prior to the enactment of Labor Code section 3864, employers who were liable for workers' compensation found themselves also liable to third parties through partial equitable indemnity, despite the "exclusive remedy theory of workmen's compensation statutes."[19] The legislature enacted Labor Code section 3864

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9. *Id.* at 110, 876 P.2d at 1067, 32 Cal. Rptr. 2d at 268.

10. *Id.* at 110-11, 876 P.2d at 1067-68, 32 Cal. Rptr. 2d at 269.

11. *Id.* at 111, 876 P.2d at 1068, 32 Cal. Rptr. 2d at 269.

12. *Id.*

13. *Id.* (quoting Fein v. Permanente Medical Group, 38 Cal. 3d 137, 158, 695 P.2d 665, 680, 211 Cal. Rptr. 368, 383, *appeal dismissed*, 474 U.S. 892 (1985)).

14. *Id.* (citing American Bank & Trust Co. v. Community Hosp., 36 Cal. 3d 359, 372, 683 P.2d 670, 678, 204 Cal. Rptr. 671, 679 (1984)).

15. *Id.* at 112, 876 P.2d at 1068, 32 Cal. Rptr. 2d at 269.

16. *Fein*, 38 Cal. 3d at 163, 695 P.2d at 683, 211 Cal. Rptr. at 386.

17. *Western*, 8 Cal. 4th at 112, 876 P.2d at 1068-69, 32 Cal. Rptr. 2d at 270.

18. *Id.* at 113-14, 876 P.2d at 1069-70, 32 Cal. Rptr. 2d at 270-71.

19. *Id.* at 113, 876 P.2d at 1069, 32 Cal. Rptr. 2d at 270 (quoting City of Sacramento v. Superior Court, 205 Cal. App. 2d 398, 404-05, 23 Cal. Rptr. 43, 47 (1962)).

not only to protect employers from the double liability arising from both the injured employee's workers' compensation and additional damage awards to third parties,[20] but also to reduce employer insurance costs.[21] The court concluded that the relevant provisions of MICRA, like its counterparts in the Labor Code, seek to contain insurance costs. Therefore, to allow equitable indemnity against health care providers in excess of $250,000 would undoubtedly contravene the express intent of the statute.[22]

In addition to its consideration of legislative intent, the court noted the fact that indemnification does not always follow fault.[23] Because indemnification only arises where a legal obligation exists, it is subject to ordinary limitations.[24] The court drew an analogy between the present case and the case of *Colich & Sons v. Pacific Bell*.[25] In a negligence action for interrupted phone service, Colich, an excavation subcontractor who damaged phone lines belonging to United Airlines, could not seek comparative indemnity from Pacific Bell because a liability tariff filed with the Public Utilities Commission precluded direct and derivative claims against the phone company.[26] Similarly, the statutory scheme of MICRA limits liability of health care providers to those who bring an action directly as well as to those concurrent tortfeasors who bring an action derivatively.[27]

Having determined that a right to indemnification exists only when a legal obligation exists, the court held that because MICRA limits health care providers' legal obligation, the providers are not unjustly enriched at

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20. California Labor Code § 3864 reads:

> If an action as provided in this chapter prosecuted by the employee, the employer, or both jointly against the third person results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury.

CAL. LAB. CODE § 3864 (West 1989).

21. *Id.*

22. *Western*, 8 Cal. 4th at 116, 876 P.2d at 1071, 32 Cal. Rptr. 2d at 272-73.

23. *Id.* at 115, 876 P.2d at 1070, 32 Cal. Rptr. 2d at 272 (citing Colich & Sons v. Pacific Bell, 198 Cal. App. 3d 1225, 1236, 244 Cal. Rptr. 714, 719 (1988)).

24. *Id.* at 114-15, 876 P.2d at 1070, 32 Cal. Rptr. 2d at 271.

25. 198 Cal. App. 3d 1225, 244 Cal. Rptr. 714 (1988).

26. *Western*, 8 Cal. 4th at 115, 876 P.2d at 1071, 32 Cal. Rptr. at 272.

27. *Id.* at 116, 876 P.2d at 1071, 32 Cal. Rptr. 2d at 272.

the expense of concurrent tortfeasors.[28] This case is like any other in which one tortfeasor is immunized or insolvent and the remaining tortfeasor has to pay more than his or her fair share.[29] To achieve the goal of reducing insurance costs, MICRA shifts the burden from health care providers to injured plaintiffs, and, in this case, to negligent non-MICRA defendants.[30]

In addressing the question of whether a health care provider is bound by the good faith settlement of an indemnitee, the court concluded that the indemnitor cannot be bound by the indemnitee without due process and notice.[31]

B. Justice Mosk's Dissenting Opinion

Justice Mosk agreed with the court of appeal's "dispassionate reading"[32] and examination of the provisions of MICRA, namely, that if the legislature intended the statute to govern in cases of equitable indemnification, it would have stated this intention in "word or context."[33] Furthermore, Justice Mosk agreed that Western sought economic damages from the hospital and, therefore, MICRA should not apply.[34]

More importantly, Justice Mosk reviewed the brief, unproductive history of MICRA.[35] Instead of containing the rising cost of medical malpractice insurance, MICRA forces the innocent victim to bear the burden of the health care provider's wrongdoing.[36] Justice Mosk expressed doubt as to the constitutionality of these provisions, and refused to risk extending the scope of these provisions to indemnification actions, especially in light of MICRA's pronounced failure to fulfill its goal.[37]

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28. *Id.* at 116-17, 876 P.2d at 1072, 32 Cal. Rptr. 2d at 272-73.

29. Colich & Sons v. Pacific Bell, 198 Cal. App. 3d at 1237, 244 Cal. Rptr. at 720 (1988).

30. *Western*, 8 Cal. 4th at 117, 876 P.2d at 1072, 32 Cal. Rptr. 2d at 273.

31. *Id.* at 118, 876 P.2d at 1073, 32 Cal. Rptr. 2d at 274; *see also* Jennings v. United States, 374 F.2d 983, 986 (4th Cir. 1967) (stating that in order to satisfy due process requirements, notice and opportunity to be heard are required before an indemnitor can be bound by an indemnitee's unilateral acts, even if the acts are "reasonable and undertaken in good faith").

32. *Western*, 8 Cal. 4th at 119, 876 P.2d at 1074, 32 Cal. Rptr. 2d at 275 (Mosk, J., dissenting).

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

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

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

36. *Id.* (Mosk, J., dissenting) (citing American Bank & Trust Co. v. Community Hosp., 36 Cal. 3d 359, 387, 204 Cal. Rptr. 671, 688, 683 P.2d 670, 689 (1984) (Mosk, J., dissenting).

37. *Id.* at 120, 876 P.2d at 1074, 32 Cal. Rptr. 2d at 275 (Mosk, J., dissenting).

III. IMPACT AND CONCLUSION

Critics of MICRA have voiced concerns over the potential constitutional problems which arise in medical malpractice cases.[38] Many states have responded to these criticisms by finding such provisions unconstitutional.[39] Furthermore, many argue that statutory caps obstruct the constitutional guarantee of the right to a jury trial because statutory caps substitute a jury's findings of fact with predetermined legislative findings.[40] Nevertheless, the California Supreme Court has upheld the constitutionality of MICRA despite its effect of shifting the burden to injured plaintiffs.

It is obvious that the California Supreme Court will continue to interpret MICRA in a manner that fulfills its express purpose even though it has the effect of subjecting medical malpractice victims to a greater burden. Allowing concurrent non-MICRA tortfeasors to bear part of the burden in indemnification actions is a natural extension of the court's overall goal to reduce medical malpractice insurance costs, which, in turn, will theoretically lead to more affordable care for the populous at large. The court clearly felt that the importance of maintaining adequate health care for the state outweighs the possible inequitable allocation of damages. The supreme court will undoubtedly continue to pursue its goal of shifting liability away from health care providers in accordance with MICRA provisions. However, with growing concern over such statutory

38. *See* Stephen K. Meyer, Comment, *The California Statutory Cap on Noneconomic Damages in Medical Malpractice Claims: Implications on the Right to a Trial By Jury*, 32 SANTA CLARA L. REV. 1197, 1200 (1992). There is no evidence to support the premise that statutory caps on the amount recoverable in cases involving health care provider negligence reduce insurance costs. *Id.* Furthermore, opponents contend that such caps treat plaintiffs with differing levels of pain and suffering the same and that its goal of affixing a price on a plaintiff's life is objectionable. *See* Jane C. Arancibia, Note, *Statutory Caps on Damage Awards in Medical Malpractice Cases*, 13 OKLA. CITY U. L. REV. 135, 151 (1988).

39. Todd M. Kossow, Note, Fein v. Permanente Medical Group*: Future Trends in Damage Limitation Adjudication*, 80 NW. U. L. REV. 1643, 1653 (1986); *see also* Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) (stating that implementing statutory caps on the amount recoverable in a medical malpractice case was an insubstantial method for reducing insurance rates).

40. Meyer, *supra* note 38, at 1210.

caps, it remains to be seen how far the court can go in order to achieve this aim.

STEVEN HORNBERGER

IX. JUVENILE LAW

When a juvenile is arrested without a warrant, the Constitution requires a prompt hearing to determine probable cause; however, such a hearing need not be held within forty-eight hours:
Alfredo A. v. Superior Court.

I. INTRODUCTION

In *Alfredo A. v. Superior Court*,[1] the California Supreme Court considered Alfredo A.'s contention that a juvenile is entitled to a prompt hearing within forty-eight hours following a warrantless arrest.[2] The

1. 6 Cal. 4th 1212, 865 P.2d 56, 26 Cal. Rptr. 2d 623, *cert. denied*, 115 S. Ct. 86 (1994). Chief Justice Lucas authored the plurality opinion, with Justices Panelli and Baxter concurring. *Id.* at 1215-32, 865 P.2d at 57-69, 26 Cal. Rptr. 2d at 624-36. Justice Arabian filed a separate concurring and dissenting opinion. *Id.* at 1232-36, 865 P.2d at 69-71, 26 Cal. Rptr. 2d at 636-39 (Arabian, J., concurring and dissenting). Justice Mosk filed a dissenting opinion, with Justices George and Kennard concurring. *Id.* at 1236-58, 865 P.2d at 71-85, 26 Cal. Rptr. 2d at 639-53 (Mosk, J., dissenting). Justice George also wrote a separate dissent. *Id.* at 1258-59, 865 P.2d at 85-86, 26 Cal. Rptr. 2d at 653-54 (George, J., dissenting).

2. *Id.* at 1215-16, 865 P.2d at 58, 26 Cal. Rptr. 2d at 625. On July 24, 1991, Alfredo A., a 16 year old minor, was arrested without a warrant on suspicion of possession of cocaine base for sale. *Id.* at 1216-17, 865 P.2d at 59, 26 Cal. Rptr. 2d at 626. The following day, Alfredo A. filed a petition for a writ of habeas corpus alleging that:

> Pursuant to the Fourth Amendment to the United States Constitution, petitioner is entitled to a judicial determination of probable cause for his continued detention within 48 hours of his arrest. No such judicial determination has been made, and no determination will be made within the 48-hour period. This is because the Los Angeles County Superior Court, Juvenile Court, has adopted as its "official position" that a juvenile is not entitled to such a prompt probable cause determination.

Id. at 1217, 865 P.2d at 59, 26 Cal. Rptr. 2d at 626 (quoting petition for habeas corpus).

Although petitioner's claim was moot because he was released after five days in custody, the court of appeal decided to hear the case because the claim was "'capable of repetition, yet evading review.'" *Id.* at 1219, 865 P.2d at 60, 26 Cal. Rptr. 2d at 627 (quoting Schall v. Martin, 467 U.S. 253, 256 n.3 (1984) (where the Court heard juveniles' constitutional due process argument concerning their pre-trial detention hearings)). The court of appeal rejected the petitioner's claim and found that California's statutory scheme passed constitutional muster, thereby rendering the 48-hour rule inapplicable to juveniles. *Alfredo A.*, 6 Cal. 4th at 1218, 865 P.2d at 60, 26 Cal. Rptr. 2d at 627. The California Supreme Court granted review. *Id.* at 1215-16, 865 P.2d at 58, 26

United States Supreme Court in *County of Riverside v. McLaughlin*[3] held that "a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest" satisfies the Fourth Amendment's promptness requirement.[4] The California Supreme Court granted review to determine the constitutionality of the Los Angeles County Juvenile Court's policy in refusing to apply *McLaughlin*'s forty-eight hour rule in juvenile detention proceedings.[5] On rehearing, the supreme court held that the Constitution does not require that a juvenile be given a probable cause hearing within forty-eight hours following a warrantless arrest.[6]

II. TREATMENT

A. *The Lead Opinion*

The determinative question in *Alfredo A.* was what constitutes a prompt hearing following a warrantless arrest of a juvenile.[7] The petitioner contended that promptness, as defined under *McLaughlin*, required that a court make a probable cause determination within forty-eight hours of arrest.[8] The respondent argued that the forty-eight hour

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Cal. Rptr. 2d at 625.

3. 500 U.S. 44 (1991).

4. *Id.* at 56. In *McLaughlin*, the Supreme Court considered whether persons arrested without a warrant are entitled to receive a probable cause determination within 48 hours after arrest even if such probable cause determinations are combined with other pre-trial proceedings. *Id.* at 47-50. The Court held that a prompt determination of probable cause must be made within 48 hours of arrest. *Id.* at 56. The Court reasoned that when a probable cause determination is made within 48 hours, the burden is on the arrested person to show unreasonable delay, whereas, when a probable cause determination is not made within 48 hours, the burden is on the government to show that no unreasonable delay existed. *Id.* at 56-57. For a discussion of County of Riverside v. McLaughlin, see Victoria W. Chavey, Comment, *The Forty-Eight Hour Rule and* County of Riverside v. McLaughlin, 72 B.U. L. REV. 403 (1992), and Elizabeth J. Morahan, Comment, County of Riverside v. McLaughlin: *The "Promptness" of a Probable Cause Determination*, 27 NEW ENG. L. REV. 411 (1992).

5. *Alfredo A.*, 6 Cal. 4th at 1215-16, 865 P.2d at 58, 26 Cal. Rptr. 2d at 625. The Los Angeles County Juvenile Court adopted this policy in July of 1991. *Id.*

6. *Id.* at 1231-32, 865 P.2d at 68, 26 Cal. Rptr. 2d at 636.

7. *Id.* at 1222, 865 P.2d at 62, 26 Cal. Rptr. 2d at 629; *see* Gerstein v. Pugh, 420 U.S. 103, 114, 120 (1975) (holding that the Fourth Amendment mandates a prompt determination of probable cause following a warrantless arrest). For a discussion of *Gerstein*, see Wendy L. Brandes, *Post-Arrest Detention and the Fourth Amendment: Refining the Standard of* Gerstein v. Pugh, 22 COLUM. J.L. & SOC. PROBS. 445 (1989), which argues that the *Gerstein* standard is too vague to adequately protect Fourth Amendment rights.

8. *Alfredo A.*, 6 Cal. 4th at 1217, 865 P.2d at 59, 26 Cal. Rptr. 2d at 626; *see McLaughlin*, 500 U.S. at 56.

time limitation following a warrantless arrest is inapplicable to juveniles because the rights of juveniles are distinguishable from those of adults.[9]

The supreme court acknowledged that the Fourth Amendment of the United States Constitution requires a prompt determination of the existence of probable cause to believe that the juvenile has committed the crime.[10] Nevertheless, the court observed that while there is precedent requiring a hearing to take place within forty-eight hours of a warrantless arrest of an adult, the instant case was factually distinguishable because it involved a juvenile.[11] The court reasoned that certain differences exist in the treatment of juveniles and adults because "'juveniles, unlike adults, are always in some form of custody.'"[12] Accordingly, the California Supreme Court found that the Fourth Amendment does not compel juvenile detention hearings to be held within forty-eight hours following a warrantless arrest.[13] Therefore, the court held that Alfredo A. lacked a valid claim for unlawful detention because *McLaughlin* does not apply to juveniles.[14]

In accordance with section 632, subdivision a, of the California Welfare and Institutions Code, a formal juvenile detention hearing must be conducted within seventy-two hours pursuant to a juvenile's warrantless arrest.[15] The California Supreme Court noted that courts should include

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9. *Alfredo A.*, 6 Cal. 4th at 1216, 865 P.2d at 58, 26 Cal. Rptr. 2d at 625.

10. *Id.* at 1230-31, 865 P.2d at 67-68, 26 Cal. Rptr. 2d at 635; *see* U.S. CONST. amend. IV; *Gerstein*, 420 U.S. at 114, 120.

11. *Alfredo A.*, 6 Cal. 4th at 1225, 865 P.2d at 64, 26 Cal. Rptr. 2d at 631; *see McLaughlin*, 500 U.S. at 56.

12. *Alfredo A.*, 6 Cal. 4th 1228, 865 P.2d at 66, 26 Cal. Rptr. 2d at 633 (quoting Schall v. Martin, 467 U.S. 253, 265 (1984)); *see* Santosky v. Kramer, 455 U.S. 745, 766 (1982) (holding that juvenile proceedings are fundamentally different from adult proceedings because of the state's parens patriae interest in the child); McKeiver v. Pennsylvania, 403 U.S. 528, 545-50 (1971) (holding that a minor has no right to a jury trial).

13. *Alfredo A.*, 6 Cal. 4th at 1231-32, 865 P.2d at 68, 26 Cal. Rptr. 2d at 636; *see* U.S. CONST. amend. IV; Reno v. Flores, 113 S. Ct. 1439, 1449-51 (1993) (addressing procedural due process claims and implicitly rejecting a rigid 48-hour maximum time limit detaining juvenile immigrants following a warrantless arrest).

14. *Alfredo A.*, 6 Cal. 4th at 1231-32, 865 P.2d at 68, 26 Cal. Rptr. 2d at 636; *see McLaughlin*, 500 U.S. at 56. Although the United States Supreme Court decided *McLaughlin* seven years after *Schall*, the Supreme Court of California construed *Schall* to limit the due process rights of juveniles, including the right to a hearing within 48 hours following a warrantless arrest. *Alfredo A.*, 6 Cal. 4th at 1231-32, 865 P.2d at 68, 26 Cal. Rptr. 2d at 636.

15. *Id.* at 1231, 865 P.2d at 68, 26 Cal. Rptr. 2d at 635; *see* CAL. WELF. & INST.

nonjudicial days[16] when calculating the seventy-two hour period within which they must hold a detention hearing.[17] The court explained that there is no exception for nonjudicial days in calculating statutory time limitations on retaining juveniles in custody.[18] Instead, "a separate, timely judicial determination of probable cause for any extended period of detention beyond the 72 hours following arrest" is required to prevent the unlawful detention of juveniles.[19]

B. Justice Arabian's Concurring and Dissenting Opinion

Justice Arabian concurred in the plurality opinion to the extent that the Constitution requires a prompt probable cause determination within seventy-two hours of a juvenile's warrantless arrest.[20] Justice Arabian dissented from the lead opinion's due process approach to decide the issue rather than analyzing Alfredo A.'s contention under the Fourth Amendment.[21] Justice Arabian emphasized that the court should recognize the need for flexibility when adjudicating juvenile cases.[22]

Justice Arabian criticized the plurality for addressing issues that went beyond the scope of the petitioner's claim.[23] He found *McLaughlin* distinguishable and that a determination of probable cause within seventy-two hours satisfies the juvenile's constitutional right to a prompt hearing.[24] Justice Arabian reasoned that permitting the retention of juveniles

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CODE § 632(a) (West 1984 & Supp. 1994). *See generally* 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent & Child* §§ 737, 743 (9th ed. 1989 & Supp. 1994) (discussing time and conduct of detention hearings).

16. Nonjudicial days are defined as weekends and holidays in which the court is not open or in session. *See Alfredo A.*, 6 Cal. 4th at 1232 & n.6, 865 P.2d at 68-69 & n.6, 26 Cal. Rptr. 2d at 636 & n.6.

17. *Id.* at 1232, 865 P.2d at 68-69, 26 Cal. Rptr. 2d at 636.

18. *Id.*

19. *Id.* at 1232, 865 P.2d at 69, 26 Cal. Rptr. 2d at 636.

20. *Alfredo A.*, 6 Cal. 4th at 1232, 865 P.2d at 69, 26 Cal. Rptr. 2d at 636 (Arabian, J., concurring and dissenting); *see* U.S. CONST. amends. IV, XIV.

21. *Alfredo A.*, 6 Cal. 4th at 1232, 865 P.2d at 69, 26 Cal. Rptr. 2d at 636-37 (Arabian, J., concurring and dissenting); *see* U.S. CONST. amends. IV, XIV.

22. *Alfredo A.*, 6 Cal. 4th at 1235, 865 P.2d at 71, 26 Cal. Rptr. 2d at 638 (Arabian, J., concurring and dissenting). "[T]he Supreme Court has reiterated that 'probable cause determinations must be prompt—not immediate' to maintain a necessary measure of '"flexibility" and "experimentation"' within each state's criminal justice system." *Id.* at 1236, 865 P.2d at 71, 26 Cal. Rptr.2d at 639 (Arabian, J., concurring and dissenting) (quoting County of Riverside v. McLaughlin, 500 U.S. 44, 54 (1991)); *see* New Jersey v. T.L.O., 469 U.S. 325, 341 (1985); Breed v. Jones, 421 U.S. 519, 540 (1975); McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).

23. *Alfredo A.*, 6 Cal. 4th at 1232-33, 865 P.2d at 69, 26 Cal. Rptr. 2d at 636-37 (Arabian, J., concurring and dissenting).

24. *Id.* at 1233, 865 P.2d at 69, 26 Cal. Rptr. 2d at 637 (Arabian, J., concurring and

arrested without a warrant in custody for seventy-two hours without exempting nonjudicial days was reasonable under the Fourth Amendment due to the particularized concerns facing the detention of juveniles.[25]

C. The Dissenting Opinions

Justice Mosk dissented from the majority opinion because he believed that the United States Supreme Court's definition of promptness under *McLaughlin* applied to juveniles and, consequently, entitled Alfredo A. to a hearing within forty-eight hours of his warrantless arrest.[26] Justice Mosk reasoned that the Bill of Rights extends to juveniles, as well as adults, and that it would be unreasonable to detain a minor longer than forty-eight hours prior to holding a hearing to establish probable cause.[27] Although there are certain situations where adult and juvenile rights differ, Justice Mosk explained that all persons arrested without a warrant should be entitled to a hearing within forty-eight hours.[28] Analogizing to *McLaughlin*, Justice Mosk argued that just as adults are released within forty-eight hours if grounds for probable cause are lacking, juveniles should also be released within forty-eight hours where no grounds exist for further detention.[29]

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dissenting); *see McLaughlin*, 500 U.S. at 56.

25. *Alfredo A.*, 6 Cal. 4th at 1236, 865 P.2d at 71, 26 Cal. Rptr. 2d at 639 (Arabian, J., concurring and dissenting); *see* U.S. CONST. amend. IV. The juvenile justice system, in accordance with California Welfare and Institutions Code §§ 626, 626.5, 628 and 628.1, provides an opportunity for counseling and rehabilitation of youthful offenders. *Alfredo A.*, 6 Cal. 4th at 1236, 865 P.2d at 71, 26 Cal. Rptr. 2d at 639 (Arabian, J., concurring and dissenting); *see* CAL. WELF. & INST. CODE §§ 626, 626.5, 628, 628.1 (West 1984 & Supp. 1994).

26. *Alfredo A.*, 6 Cal. 4th at 1236-37, 865 P.2d at 71-72, 26 Cal. Rptr. 2d at 639 (Mosk, J., dissenting).

27. *Id.* at 1243-44, 865 P.2d at 76, 26 Cal. Rptr. 2d at 644 (Mosk, J., dissenting). *See generally In re* Gault, 387 U.S. 1, 13 (1967) (holding that the Bill of Rights, which includes notice of charges, right to counsel, privilege against self-incrimination, right to confrontation and cross examination, applies to juveniles as well as to adults); *In re* William G., 40 Cal. 3d 550, 557, 709 P.2d 1287, 1290, 221 Cal. Rptr. 118, 121 (1985) (holding that the Fourth Amendment's protection against unreasonable searches and seizures applies to both juveniles and adults).

28. *Alfredo A.*, 6 Cal. 4th at 1244, 865 P.2d at 76-77, 26 Cal. Rptr. 2d at 644 (Mosk, J., dissenting). Justice Mosk reasoned that juveniles should not be unnecessarily detained because "[t]he presence of youth does not make up for the absence of probable cause." *Id.* at 1244, 865 P.2d at 77, 26 Cal. Rptr. 2d at 644 (Mosk, J., dissenting).

29. *Id.* at 1245, 865 P.2d at 77, 26 Cal. Rptr. 2d at 644 (Mosk, J., dissenting); *see*

The dissent further criticized the majority's reliance on the United State Supreme Court's holding in *Schall v. Martin*, which determined that a juvenile's right to due process may be subordinate to a state's parens patriae interest.[30] Justice Mosk reasoned that *Schall* is inapplicable because the Court based its decision on the Fourteenth Amendment due process clause rather than a Fourth Amendment analysis.[31] Furthermore, Justice Mosk found *Schall* factually distinguishable from the instant case because it discussed adversarial, formal probable cause hearings in which there was a court order authorizing the minor's detention.[32] Contending that the *Schall* opinion cannot reasonably be read to limit the forty-eight hour promptness requirement solely to adults, the dissenting Justices would have reversed the judgment of the court of appeal and required the lower courts to apply *McLaughlin* to juveniles as well as adults.[33]

Justice George concurred in Justice Mosk's dissenting opinion and wrote separately, stating that the Court's decision in *McLaughlin* should control and that no persons arrested without a warrant should remain in custody longer than forty-eight hours prior to a probable cause hearing.[34] Justice George agreed with Justice Mosk's conclusion that no state interest justifies detaining a juvenile for a longer period of time than an adult prior to making a probable cause determination.[35] He observed that because of their age, juveniles are more likely to be negatively impacted by a prolonged detention than adults.[36] As a result, Justice George would have found all persons entitled to a probable cause hearing within forty-eight hours of a warrantless arrest.[37]

County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

30. *Alfredo A.*, 6 Cal. 4th at 1247-48, 865 P.2d at 78-79, 26 Cal. Rptr. 2d at 646-47 (Mosk, J., dissenting); *see* Schall v. Martin, 467 U.S. 253, 263 (1984).

31. *Alfredo A.*, 6 Cal. 4th at 1249, 865 P.2d at 79, 26 Cal. Rptr. 2d at 647 (Mosk, J., dissenting); *see* U.S. CONST. amend. IV, XIV; *Schall*, 467 U.S. at 258 n.5.

32. *Alfredo A.*, 6 Cal. 4th at 1249, 865 P.2d at 79, 26 Cal. Rptr. 2d at 647 (Mosk, J., dissenting); *see Schall*, 467 U.S. at 258-59.

33. *Alfredo A.*, 6 Cal. 4th at 1257, 865 P.2d at 85, 26 Cal. Rptr. 2d at 653 (Mosk, J., dissenting); *see McLaughlin*, 500 U.S. at 56; *Schall*, 467 U.S. at 263.

34. *Alfredo A.*, 6 Cal. 4th at 1258, 865 P.2d at 85, 26 Cal. Rptr. 2d at 653 (George, J., dissenting); *see McLaughlin*, 500 U.S. at 56.

35. *Alfredo A.*, 6 Cal. 4th at 1258, 865 P.2d at 85, 26 Cal. Rptr. 2d at 653-54 (George, J., dissenting).

36. *Id.* at 1258, 865 P.2d at 85-86, 26 Cal. Rptr. 2d at 654 (George, J., dissenting); *see In re* William M., 3 Cal. 3d 16, 31 n.25, 473 P.2d 737, 747 n.25, 89 Cal. Rptr. 33, 43 n.25 (1970).

37. *Alfredo A.*, 6 Cal. 4th at 1258, 865 P.2d at 85, 26 Cal. Rptr. 2d at 653 (George, J., dissenting).

III. IMPACT AND CONCLUSION

The California Supreme Court decided that although the Constitution requires a juvenile detention hearing, it does not mandate one within forty-eight hours of a warrantless arrest.[38] The supreme court rejected the *McLaughlin* decision as it applies to juveniles and found that a juvenile detention hearing held within seventy-two hours of a warrantless arrest satisfies constitutional due process concerns.[39] Thus, this court's decision clarifies the application of *Gerstein* and *McLaughlin* in determining when a prompt detention hearing must be held following the warrantless arrest of a juvenile.[40]

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38. *Id.* at 1231-32, 865 P.2d at 68, 26 Cal. Rptr. 2d at 636.

39. *Id.* at 1216, 865 P.2d at 58-59, 26 Cal. Rptr. 2d at 625-26; *see* U.S. CONST. amend. XIV; County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

40. *Alfredo A.*, 6 Cal. 4th at 1216, 865 P.2d at 58-59, 26 Cal. Rptr. 2d at 625-26; *see McLaughlin*, 500 U.S. at 56; Gerstein v. Pugh, 420 U.S. 103, 114, 120 (1975).

X. LIBEL AND SLANDER

Deposition testimony and other statements taken in connection with private, contractual arbitration proceedings are protected from tort liability by the absolute immunity granted under California's litigation privilege embodied in Civil Code section 47(b): **Moore v. Conliffe.**

I. INTRODUCTION

In *Moore v. Conliffe*,[1] the California Supreme Court addressed the issue of whether statements made by an expert witness at a deposition held in connection with a private, contractual arbitration proceeding fall within the litigation privilege[2] embodied in Civil Code section 47, subdi-

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1. 7 Cal. 4th 634, 871 P.2d 204, 29 Cal. Rptr. 2d 152 (1994). Justice George authored the majority opinion in which Chief Justice Lucas, Justice Arabian and Justice Sills concurred. *Id.* at 637-58, 871 P.2d at 205-19, 29 Cal. Rptr. 2d at 153-67; *see infra* notes 7-26 and accompanying text. Justice Baxter wrote a separate dissenting opinion in which Justices Mosk and Kennard concurred. *Moore*, 7 Cal. 4th at 658-72, 871 P.2d at 219-28, 29 Cal. Rptr. 2d at 167-76 (Baxter, J., dissenting); *see infra* notes 27-41 and accompanying text.

2. *Moore*, 7 Cal. 4th at 637-38, 871 P.2d at 205, 29 Cal. Rptr. 2d at 153. DeWanda Atkinson died of hepatitis in 1984, allegedly as a result of taking the drug Isoniazid, prescribed by her physicians at Kaiser (DeWanda's health insurance company) to treat her tuberculosis. *Id.* at 638-39, 871 P.2d at 206, 29 Cal. Rptr. 2d at 154. DeWanda's mother and siblings, along with her estate, filed a wrongful death action against Kaiser, asserting that the prescription of Isoniazid amounted to negligence. *Id.*

The parties stipulated to mandatory arbitration, as was called for by the provisions of the insurance contract. *Id.* Kaiser retained Dr. Conliffe as a medical expert. *Id.* During a break in the arbitration proceedings, the plaintiffs deposed Dr. Conliffe. *Id.* at 638-39, 871 P.2d at 206, 29 Cal. Rptr. 2d at 154. At the deposition, Dr. Conliffe failed to produce copies of documents he reviewed before giving his testimony and he also stated that he was unaware of any medical literature supporting the plaintiff's contention that the decedent could have contracted hepatitis through the use of Isoniazid. *Id.*

The arbitrators found in favor of Kaiser. *Id.* Although they found negligence, the majority of arbitrators found that the plaintiffs had not proven death by Isoniazid-induced hepatitis. *Id.* The plaintiff's attorney later discovered an article, published only three months prior to Dr. Conliffe's deposition, containing information that Dr. Conliffe submitted to the author and using DeWanda's case "as an example of Isoniazic-induced death." *Id.*

The plaintiffs filed a petition seeking to vacate the arbitration award. *Id.* at 640, 871 P.2d at 207, 29 Cal. Rptr. 2d at 155. In addition, the plaintiffs filed a lawsuit to recover damages for misconduct against Kaiser, their attorneys, and the arbitrator. *Id.* The plaintiffs added Dr. Conliffe to the lawsuit and alleged, in part, intentional and negligent misrepresentation and suppression of fact. *Id.* The trial court sustained a demurrer by Dr. Conliffe, stating that Dr. Conliffe's statements fell within the litigation privilege, and dismissed the action with prejudice. *Id.* The court of appeal reversed,

vision (b).[3] The court carefully considered the purpose and history of the litigation privilege in addition to several California decisions interpreting and applying section 47(b).[4]

After noting that the purpose of the litigation privilege is to encourage witnesses to testify completely, truthfully, and without fear of potential liability, the court found that this purpose strongly supported applying the litigation privilege to arbitration.[5] Accordingly, the court held that

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stating that the § 47(b) litigation privilege does not apply to statements taken as part of a private contractual arbitration proceeding. *Id.*

3. California Civil Code § 47(b) states in relevant part: "A privileged publication or broadcast is one made: . . . (b) In any . . . (2) judicial proceeding, or (3) in any other official proceeding authorized by law . . . ." CAL. CIV. CODE § 47 (West 1982 & Supp. 1994). All remaining statutory references are to the Civil Code unless otherwise specified.

See also 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 504-505 (9th ed. 1988 & Supp. 1994) (stating that witnesses enjoy absolute privilege for statements made in relation to judicial proceedings, which includes arbitration proceedings because of their similarity to judicial proceedings). *See generally* Douglas R. Richmond, *The Emerging Theory of Expert Witness Malpractice*, 22 CAP. U. L. REV. 693 (1993) (surveying the current state of the law and advancing a theory that courts should move away from absolute immunity for expert witnesses); Douglas Pahl, Note, *Absolute Immunity for the Negligent Expert Witness: Bruce v. Byrne-Stevens*, 26 WILLAMETTE L. REV. 1051 (1990) (analyzing the rule of witness immunity as applied to the expert witness and explaining the problems in applying the rule in *Bruce v. Byrne-Stevens*, 113 Wash. 2d 123, 776 P.2d 666 (Wash. 1989)).

4. *Moore*, 7 Cal. 4th at 640-56, 871 P.2d at 207-18, 29 Cal. Rptr. 2d at 155-166; *see* Silberg v. Anderson, 50 Cal. 3d 205, 786 P.2d 365, 266 Cal. Rptr. 638 (1990) (ruling that the privilege accorded to defamatory statements made during judicial proceedings is now applicable to any communication and all torts except malicious prosecution); Ribas v. Clark, 38 Cal. 3d 355, 696 P.2d 637, 212 Cal. Rptr. 143 (1985) (holding that arbitration hearings are within the scope of § 47(b) because they are analogous to judicial proceedings); Hackethal v. Weissbein, 24 Cal. 3d 55, 592 P.2d 1175, 154 Cal. Rptr. 423 (1979) (finding that a peer review proceeding held before a private medical society "judicial commission" was not an official proceeding entitled to absolute privilege under § 47(b)); Baar v. Tigerman, 140 Cal. App. 3d 979, 211 Cal. Rptr. 426 (1983) (recognizing that arbitrators are immune from civil liability for statements and actions made in their quasi-judicial capacity, but finding a qualified immunity as opposed to an absolute immunity). *But see* CAL. CIV. PROC. CODE § 1280.1 (West 1985 & Supp. 1994) (effectively overruling *Barr* by enacting a provision which gives arbitrators absolute immunity). *See generally* 6 CAL. JUR. 3D *Assault and Other Wilful Torts* § 214 (1988 & Supp. 1994) (delineating the scope and history of the privilege in judicial proceedings).

5. *Moore*, 7 Cal. 4th at 643, 871 P.2d at 209, 29 Cal. Rptr. 2d at 157; *see* RESTATEMENT (SECOND) OF TORTS § 588 cmt. a (1965) (witness testimony is fundamentally important to the justice system and must not be hindered by fear of defamation lawsuits); 53 C.J.S. *Libel and Slander* § 71 (1987) (public policy dictates the need for an

the litigation privilege encompassed and absolutely protected statements made in the context of private, contractual arbitration proceedings.[6]

II. TREATMENT

A. *Majority Opinion*

Justice George, writing for the majority, first considered the previous supreme court case of *Silberg v. Anderson*[7] in which the court undertook an extensive examination of the scope, nature and purpose of the litigation privilege embodied in section 47(b).[8] The majority stated that the purpose of the litigation privilege, as described in *Silberg*[9], supported applying the privilege to witnesses who testify in connection with private, contractual arbitration proceedings.[10]

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absolute privilege to allow the parties to speak freely and to protect them from defamation lawsuits); J.H. Crabb, Annotation, *Testimony of Witness as Basis of Civil Action for Damages*, 54 A.L.R.2D 1298, 1310 (1957) (witnesses in nonjudicial hearings have traditionally been accorded the same privileges of immunity from libel and slander as witnesses in judicial proceedings when the hearing is similar in nature).

6. *Moore*, 7 Cal. 4th at 658, 871 P.2d at 219, 29 Cal. Rptr. 2d at 167; *see also ADR Immunity Holds*, NAT'L L.J., May 9, 1994, at A8 (the California Supreme Court brings California "back in line with national policy" by holding that witnesses cannot be sued for statements made during private arbitration proceedings).

7. 50 Cal. 3d 205, 786 P.2d 365, 266 Cal. Rptr. 638 (1990). In *Silberg*, the court defined the litigation privilege as applying "to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Id.* at 212, 786 P.2d at 369, 266 Cal. Rptr. 642; *see generally* 6 CAL. JUR. 3D *Assault and Other Wilful Torts* § 214 (1988 & Supp. 1994) (delineating the scope and history of the privilege).

8. *Moore*, 7 Cal. 4th at 641, 871 P.2d at 207, 29 Cal. Rptr. 2d at 155; CAL. CIV. CODE § 47 (West 1982 & Supp. 1994).

9. 50 Cal. 3d at 213-14, 786 P.2d at 369-70, 266 Cal. Rptr. at 642-43. The purposes include: (1) allowing witnesses and litigants to testify without fear of legal reprisals; (2) encouraging "open channels of communication" and the effective introduction of evidence in judicial proceedings; (3) assuring open communications between citizens and public authorities who investigate wrongdoings; and (4) ensuring the integrity and finality of the ultimate outcome reached through the litigation process. *Id.*; *see also* Briscoe v. LaHue, 460 U.S. 325 (1983) (examining the same policy considerations for an absolute privilege accorded to witnesses at common law); Eugene Scalia, Comment, *Police Witness Immunity Under § 1983*, 56 U. CHI. L. REV. 1433 (1989) (discussing the Supreme Court's decision in Briscoe v. LaHue, 460 U.S. 325 (1983)).

10. *Moore*, 7 Cal. 4th at 643-44, 871 P.2d at 209, 29 Cal. Rptr. 2d at 157 (stating that the privilege was broad enough to include all statements, not just those made in a deposition proceeding); *see also* 50 AM. JUR. 2D *Libel & Slander* § 237 (1970) (stating that the rule granting absolute privilege to judicial proceedings also extends to arbitration proceedings, pre-trial depositions, and discovery proceedings); M. Schneiderman, Annotation, *Libel & Slander: Application of Privilege Attending Statements Made in Course of Judicial Proceedings to Pretrial Deposition and Discovery Procedures*, 23

The court's analysis hinged on its finding that arbitration is designed to serve a function similar to that of a trial court hearing.[11] The majority thought it inherently unfair to deny the privilege to a witness compelled to testify in a private arbitration proceeding while granting that privilege to a witness compelled to testify in a judicial proceeding.[12] Accordingly, the majority considered the "big picture" and determined that an absolute privilege of protection for arbitration witnesses was necessary to protect the integrity and finality of the arbitrator's decision and to prevent unending litigation.[13]

The court next addressed the plaintiffs' argument that the language of section 47(b) precluded application of the statute to arbitration.[14] Relying on two previous supreme court decisions,[15] the majority pronounced that section 47(b) was clearly broad enough to encompass arbitration proceedings within the litigation privilege.[16] First, it was noted that the

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A.L.R.3D 1172, 1176 (1969 & Supp. 1994) (the privilege applies to depositions and discovery procedures "so long as the statements have some relevance to the proceeding in which they are uttered").

11. *Moore*, 7 Cal. 4th at 643-44, 871 P.2d at 209, 29 Cal. Rptr. 2d at 157; *see* Sturdivant v. Seaboard Serv. Sys., Ltd., 459 A.2d 1058 (D.C. 1983); 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 504-505 (9th ed. 1988 & Supp. 1994) (stating that witnesses enjoy absolute privilege for statements made in arbitration proceedings because of their similarity to judicial proceedings); RESTATEMENT (SECOND) OF TORTS § 586 cmt. d (1977); William J. Andrle, Jr., *Extension of Absolute Privilege to Defamation in Arbitration Proceedings*—Sturdivant v. Seaboard Service System, Ltd., 33 CATH. U. L. REV. 1073, 1079-84 (1984) (arbitration proceedings are "quasi-judicial" proceedings which require the same protections afforded witnesses and parties in judicial proceedings); Paul T. Hayden, *Reconsidering the Litigator's Absolute Privilege to Defame*, 54 OHIO ST. L.J. 985, 994 (1993) (courts that have followed the Restatement's position that the term "judicial proceedings" may include arbitration proceedings have applied the immunity privilege to statements made in connection with arbitration).

12. *Moore*, 7 Cal. 4th at 643-44, 871 P.2d at 209, 29 Cal. Rptr. 2d at 157.

13. *Id.* at 644, 871 P.2d at 209, 29 Cal. Rptr. 2d at 157; *see generally* S. Gale Dick, *ADR at the Crossroads*, 49 DISP. RESOL. J. 47 (1994) (contemplating the current trends in court decisions regarding the dispute resolution process, including the application of privileges); Dennis R. Nolan & Roger I. Abrams, *Arbitral Immunity*, 11 INDUS. REL. L.J. 228 (1989) (discussing the origin, theory and legal status of arbitral immunity).

14. *Moore*, 7 Cal. 4th at 644-45, 871 P.2d at 210, 29 Cal. Rptr. 2d at 158; CAL. CIV. CODE § 47 (West 1982 & Supp. 1994) ("A privileged publication or broadcast is one made . . . (b) [i]n any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law . . . .").

15. Silberg v. Anderson, 50 Cal. 3d 205, 786 P.2d 365, 266 Cal. Rptr. 2d 638 (1990); Ribas v. Clark, 38 Cal. 3d 355, 696 P.2d 637, 212 Cal. Rptr. 143 (1985).

16. *Moore*, 7 Cal. 4th at 645, 871 P.2d at 210, 29 Cal. Rptr. 2d at 158.

Silberg court found that the term "judicial proceeding" also applied to "quasi-judicial" proceedings.[17] Second, the majority pointed out that the *Ribas v. Clark* decision specifically stated that arbitration hearings fall within the scope of the section 47(b) privilege because of their similarity to judicial proceedings.[18] In addition to these two cases, the court cited section 588 of the Restatement Second of Torts as further support of its position.[19]

In an effort to establish that the legislature did not intend the section 47(b) privilege to extend to non-governmental proceedings,[20] the plaintiffs relied on *Hackethal v. Weissbein*.[21] *Hackethal* involved a peer review proceeding by a private medical society in which the court held that the litigation privilege did not apply.[22] The majority distinguished *Hackethal* from the instant case by stating that peer review hearings are clearly different from private contractual arbitration.[23] The court further reasoned that the litigation privilege was intended by the legislature to encompass both governmental and non-governmental proceedings and that *Hackethal* was effectively overruled by the legislature when it enacted a new subsection to section 47(b) which extended the privilege to

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17. *Silberg*, 50 Cal. 3d at 212, 786 P.2d at 369, 266 Cal. Rptr. at 642; *see supra* note 7 and accompanying text for a discussion of the privilege as defined in *Silberg*.

18. *Moore*, 7 Cal. 4th at 645, 871 P.2d at 210, 29 Cal. Rptr. 2d at 158 (the majority states that a review of *Ribas* indicates that the stated principle that arbitration hearings fall within the scope of section 47(b) was an essential element of the holding in *Ribas*, and not dictum as the plaintiff claimed); Ribas, 38 Cal. 3d at 364, 696 P.2d at 643, 212 Cal. Rptr. at 148 ("[p]laintiff concedes, as he must, that an arbitration hearing falls within the scope of this [section 47(b)] privilege because of its analogy to a judicial proceeding."); *see* 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 504-505 (9th ed. 1988 & Supp. 1994) (stating that witnesses enjoy absolute privilege for statements made in arbitration proceedings because of their similarity to judicial proceedings); RESTATEMENT (SECOND) OF TORTS § 586 cmt. d (1977)(stating that arbitration proceedings are included in the term "judicial proceedings").

19. "A witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as a part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding . . . ." RESTATEMENT (SECOND) OF TORTS § 588 (1965). "Judicial proceedings include all proceedings in which an officer or tribunal exercises judicial functions, as to which see § 585, Comments c and f. As indicated there, an arbitration proceeding may be included." RESTATEMENT (SECOND) OF TORTS § 588 & cmt. d (1965).

20. *Moore*, 7 Cal. 4th at 651, 871 P.2d at 214-15, 29 Cal. Rptr. 2d at 162-63.

21. 24 Cal. 3d 55, 592 P.2d 1175, 154 Cal. Rptr. 423 (1979).

22. *Id.*

23. *Moore*, 7 Cal. 4th at 651, 871 P.2d at 214-15, 29 Cal. Rptr. 2d at 162-63. Distinguishing characteristics include: (1) the peer review procedure is a private organization's internal procedure which is not a substitute for a court proceeding as is arbitration; and (2) the decision makers in a peer review proceeding were not, at that time, protected by the absolute privilege as arbitrators have been for many years. *Id.*

"any other proceeding authorized by law and reviewable [by writ of mandate]."[24]

In sum, the *Moore v. Conliffe* majority recognized that witnesses testifying in connection with private contractual arbitration proceedings are protected by the statutory privilege, effectively making them immune from tort liability for their statements.[25] Accordingly, the court reversed and remanded to the court of appeal to affirm the trial court's dismissal of the complaint against Conliffe on the grounds of privilege.[26]

B. The Dissenting Opinion

Writing for the dissent, Justice Baxter attacked the majority's reasoning on two grounds.[27] First, Baxter proffered that the legislature created the privilege in section 47(b) solely for the protection of communications made in a judicial proceeding and that the scope of the privilege could not be enlarged by the court.[28] Second, Baxter argued that the legislature has already addressed the arbitration setting by creating immunity for arbitrators, but significantly has not created immunity for any other party in arbitration.[29]

The dissent further attacked the majority's reliance on a single sentence in *Ribas* to declare that the court has already extended the litigation privilege to arbitration.[30] The dissent asserted that the sentence was only a concession mentioned in "dictum" and certainly not sound prece-

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24. *Moore*, 7 Cal. 4th at 652, 871 P.2d at 163, 29 Cal. Rptr. 2d at 215; CAL. CIV. CODE § 47 (West 1982 & Supp. 1994).

25. *Moore*, 7 Cal. 4th at 658, 871 P.2d at 219, 29 Cal. Rptr. 2d at 167.

26. *Id.*

27. *Id.* (Baxter, J., dissenting, joined by Justices Mosk and Kennard).

28. *Id.* The dissent quoted the Code of Civil Procedure § 1858 to support the proposition that the majority's view is incorrect. The majority sought to insert into the statute that which was omitted rather than simply ascertaining and declaring the substance of the statute.

29. *Id*; *see* CAL. CIV. PROC. CODE § 1280.1.

30. *Moore*, 7 Cal. 4th at 661, 871 P.2d at 221, 29 Cal. Rptr. 2d at 169; *see supra* note 16 and accompanying text.

dent.[31] Therefore, the dissent concluded that the majority's reliance on the asserted precedent value of *Ribas* was misplaced.[32]

Additionally, Baxter's dissent set forth a list of the factors taken into account by the California legislature in its decision to create the litigation privilege for judicial proceedings.[33] Baxter then contrasted private arbitration with judicial proceedings, concluding that private arbitration lacks the protections afforded by the judicial process.[34] Ultimately, the dissent found that the legislature has not overlooked the possible need to extend the communication privileges as evidenced by both its granting of immunity to arbitrators and its creation of privileges in numerous other instances.[35]

Finally, the dissent asserted that a private contractual arbitration proceeding is not an official proceeding within the design of section 47(b).[36] Baxter cited *Hackethal*[37] in support of this position,[38] arguing that the basis for the *Hackethal*[39] decision "was that the [l]egislature did not intend section 47, subdivision (b)(2) to apply to non-governmental proceedings [and therefore] [w]hether or not the proceeding resembled a judicial proceeding was not dispositive."[40] Accordingly, the dissent favored af-

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31. *Id.* The dissent continued on to quote the Constitution of California, Article VI, section 14, which mandates: "[d]ecisions of the Supreme Court and courts of appeal that determine causes shall be in writing with the reasons stated." CAL. CONST. art. VI, § 14.

32. *Moore*, 7 Cal. 4th at 661, 871 P.2d at 221, 29 Cal. Rptr. 2d at 169.

33. *Id.* at 663, 871 P.2d at 222, 29 Cal. Rptr. 2d at 170.

34. *Id.* at 663-65, 871 P.2d at 222-24, 29 Cal. Rptr. 2d at 170-72. Factors relevant to judicial proceedings include: (1) a judicial proceeding is a public proceeding; (2) the judge and jury are not dependent upon the parties to the litigation for their income; (3) witnesses must take an oath to tell the truth; (4) discovery is obtainable by all the parties; and (5) the trier of fact is bound by the law and his/their decision is reviewable by the appellate process for errors, including insufficiency of credible evidence. *Id.* Contrast the factors relevant to arbitration proceedings: (1) arbitration proceedings are private; (2) the arbitrator is dependent upon the parties for his or her income; (3) the party must request that a witness be sworn or an oath is not administered; (4) discovery is not guaranteed; (5) there is no requirement that a record be kept of the proceedings; and (6) appellate review is not available for claims of insufficiency of evidence. *Id.*

35. *Id.* at 666, 871 P.2d at 224, 29 Cal. Rptr. 2d at 172 (the dissent listed several instances where the legislature has created communication privileges).

36. *Id.* at 669, 871 P.2d at 226, 29 Cal. Rptr. 2d at 174 (the dissent considered the statutory history of the term "official proceeding" within the purview of section 47(b)); CAL. CIV. CODE § 47 (West 1982 & Supp. 1994).

37. 24 Cal. 3d 55, 592 P.2d 1175, 154 Cal. Rptr. 423 (1979); *see supra* notes 19-23 and accompanying text.

38. *Moore*, 7 Cal. 4th at 671, 871 P.2d at 227, 29 Cal. Rptr. 2d at 175.

39. 24 Cal. 3d 55, 60-61, 592 P.2d 1175, 1178-79, 154 Cal. Rptr. 423, 426-27.

40. *Moore*, 7 Cal. 4th at 672, 871 P.2d at 228, 29 Cal. Rptr. 2d at 176.

firming the judgment of the court of appeal on the basis that *Hackethal* is dispositive of the defendant's claim that arbitration falls within the scope of the judicial proceeding privilege.[41]

III. IMPACT

The supreme court's decision in *Moore* has already had an impact on at least two subsequent court decisions. In *Ryan v. Garcia*,[42] a California court of appeal labelled the *Moore* decision as encouraging broad application of the litigation privilege in situations that further the public policies underlying section 47.[43]

The Supreme Court of Pennsylvania also had occasion to consider *Moore*[44] in *Preiser v. Rosenzweig*.[45] That court cited the California Supreme Court case in support of the proposition that defamatory statements made in the course of arbitration are protected by a litigation privilege.[46] The Pennsylvania court decided the issue consistent with *Moore* but went on to find that the unique facts of the case did not warrant an application of the litigation privilege.[47]

In conclusion, the California Supreme Court's decision in *Moore* limited a plaintiff's right to seek redress when he or she has been defamed or subjected to some misconduct during the course of arbitration. This holding will clearly have a broad impact on future lawsuits claiming the privilege in various arbitration and mediation proceedings. It seems inevitable that the California legislature must eventually more clearly define

41. *Id.*

42. 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994).

43. *Ryan*, 27 Cal. App. 4th at 1011, 33 Cal. Rptr. 2d at 161; CAL. CIV. CODE § 47 (West 1982 & Supp. 1994).

44. 7 Cal. 4th 634, 871 P.2d 204, 29 Cal. Rptr. 2d 152 (1994).

45. 646 A.2d 1166 (Pa. 1994).

46. *Id.*

47. *Id.* (the court found that the plaintiff did not consent to the arbitration proceeding and therefore, he was libelled without the proper safeguards to protect his interests).

the term "official proceeding" and also clarify under what circumstances the litigation privilege may be used.

SHERI L. MARVIN

XI. MEDICAL MALPRACTICE

In the context of a medical malpractice action, a third-party physician does not violate the Confidentiality of Medical Information Act by disclosing the patient-plaintiff's medical records to the insurer responsible for defending the case as long as the third-party physician runs the risk of being sued himself; further, there was no claim stated for invasion of privacy under the California Constitution: **Heller v. Norcal Mutual Insurance Co.**

I. INTRODUCTION

On July 25, 1994, the California Supreme Court, in *Heller v. Norcal Mutual Insurance Co.*,[1] addressed the applicability of both the Confidentiality of Medical Information Act[2] (the Act) and the constitutional right

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1. 8 Cal. 4th 30, 876 P.2d 999, 32 Cal. Rptr. 2d 200 (1994). Chief Justice Lucas authored the majority opinion, in which Justices Arabian, Baxter, George, and Peterson concurred. *Id.* at 34-46, 876 P.2d at 1000-08, 32 Cal. Rptr. 2d at 201-09; *see infra* notes 26-39 and accompanying text. Justice Mosk wrote a separate opinion, concurring and dissenting. *Id.* at 46-55, 876 P.2d at 1008-14, 32 Cal. Rptr. 2d at 209-16; *see infra* notes 40-53 and accompanying text. Justice Kennard also wrote separately, concurring and dissenting. *Id.* at 55-67, 876 P.2d at 1014-22, 32 Cal. Rptr. 2d at 215-23; *see infra* notes 54-65 and accompanying text.

2. CAL. CIV. CODE §§ 56 (West 1982 & Supp. 1994); *see also* 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Witnesses* § 1102, (3d ed. 1986 & Supp. 1994).

> The revised act regulates the disclosure of identifiable information regarding a patient's medical history, mental or physical condition, or treatment by a provider of health care and the use or disclosure of such information by an employer, or third party administrator, by providing specific requirements, exemptions, and sanctions concerning the dissemination of these medical records.

Id.; *see Review of Selected 1979 California Legislation: Consumer Protection*, 11 PAC. L.J. 259, 381 (1980) (discussing the original legislative purpose behind the Act and presenting an overview of the Act's components); *Review of Selected 1981 California Legislation: Health and Welfare*, 13 PAC. L.J. 513, 713 (1981) (discussing the revised Act, the reasons behind the revisions, and briefly surveying the components of the revised Act); *see also* Board of Med. Quality Assurance v. Gherardini, 93 Cal. App. 3d 669, 678, 156 Cal. Rptr. 55, 60 (1979) ("A person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected."); *cf.* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 473, (9th ed. 1988 & Supp. 1994) (listing other types of "privacy statutes" in California).

to privacy[3] to an unauthorized disclosure of medical records. The case arose from a prior medical malpractice action against a doctor whose alleged negligence resulted in the amputation of one of the plaintiff's fingers. The defendant in the present case released the plaintiff's medical records to the insurer responsible for defending the prior action. After settlement of the initial suit, the plaintiff brought the instant case alleging that the defendant's disclosure of her medical records to the insurer violated both the Act and the plaintiff's constitutional right to privacy.[4] The court held that there was no violation of the Act[5] because the ex parte discussions with the doctor were for the purpose of assisting Norcal in the defense of the malpractice action, a legitimate purpose under California Civil Code section 56.10(c)(4).[6] Further, under the standard set forth in *Hill v. NCAA*,[7] it must be established that there was "a reasonable expectation of privacy in the information that was disclosed," and here the plaintiff failed to meet this burden.[8] As a result, the supreme court reversed the court of appeals judgment.[9]

The impact of *Heller* should be welcomed by professional malpractice defense teams, although the decision is not entirely unexpected. The purpose behind the 1981 revisions of the Act was "to provide for the confidentiality of individually identifiable medical information, while permitting certain limited and reasonable uses of that information."[10] *Heller* exemplifies this purpose by allowing the unauthorized disclosure to an insurer responsible for defending professional liability, a use justified under California Civil Code section 56.10.[11] As a result, malpractice defense teams are now standing on firm ground when they need the plaintiff's medical records in similar cases.

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3. *See* CAL. CONST. art I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.").

4. *Heller*, 8 Cal. 4th at 34-35, 876 P.2d at 1001-02, 32 Cal. Rptr. 2d at 201-02.

5. *See infra* note 29 (quoting this section in full).

6. *Heller*, 8 Cal. 4th at 35, 876 P.2d at 1001, 32 Cal. Rptr. at 202; *see* CAL. CIV. CODE § 56.10(c)(4) (West Supp. 1994) ("The [medical] information may be disclosed . . . to persons or organizations insuring, responsible for, or defending professional liability which a provider may incur.").

7. 7 Cal. 4th 1, 865 P.2d 633, 26 Cal. Rptr. 2d 834 (1994).

8. *Heller*, 8 Cal 4th at 35, 876 P.2d at 1001, 32 Cal. Rptr. 2d at 202.

9. *Id.*

10. *Heller*, 8 Cal. 4th at 46, 876 P.2d at 1008, 32 Cal. Rptr. 2d at 209 (Mosk, J., concurring and dissenting); *see Review of Selected 1981 California Legislation: Health & Welfare*, supra note 2, at 713.

11. *Heller*, 8 Cal. 4th at 35, 876 P.2d at 1001, 32 Cal. Rptr. 2d at 202.

On the other hand, the factual scenario in *Heller* is rather unusual: a third-party physician turning over medical records to an insurance company involved in defending another doctor. Therefore, it is unclear whether *Heller* will have an adverse impact on the plaintiff's bar. If, as seems likely, the rule only applies to this unusual factual scenario, *Heller's* impact will not be greatly felt. Regardless, *Heller's* most significant contribution may prove to be its holding on the collateral issue of whether or not ex parte interviews are an acceptable means of discovery. The court's holding seems to indicate that ex parte interviews are acceptable, despite prior case law which forbids such interviews in medical malpractice actions.

The purpose of this article is to briefly survey the decision in *Heller* and address its possible impact. Part II of this note restates the factual setting of *Heller*,[12] while part III briefs the opinion, exposing a slight deviation in view between the majority and the dissenters on both the issue of the Act's applicability as well as the privacy issue.[13] Lastly, part IV focuses on *Heller's* possible impact on future cases.[14]

II. STATEMENT OF THE CASE

In 1987, the plaintiff was admitted to the hospital to have a bone spur removed from her left hand.[15] Dr. Geis performed the surgery, and Dr. Yamaguchi assisted.[16] Shortly after the surgery, the plaintiff developed a post-operative staphylococcal infection which Dr. Geis diagnosed and treated.[17] As a result of this infection, Dr. Geis had to amputate plaintiff's third finger on her left hand, assisted once again by Dr. Yamaguchi.[18] Plaintiff, feeling she received negligent treatment from Dr. Geis, dismissed him as her physician.[19] Dr. Yamaguchi, however, continued to treat the plaintiff following the second operation.[20]

Shortly thereafter, the plaintiff brought a medical malpractice action against Dr. Geis. Dr. Yamaguchi agreed to appear as an expert witness

12. *See infra* notes 15-25 and accompanying text.
13. *See infra* notes 26-65 and accompanying text.
14. *See infra* notes 66-68 and accompanying text.
15. *Heller*, 8 Cal. 4th at 36, 876 P.2d at 1001, 32 Cal. Rptr. 2d at 202.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*

on behalf of Dr. Geis.[21] During the discovery stage of the trial, however, Norcal, the insurance company responsible for Dr. Geis' defense, conducted several ex parte interviews[22] with Dr. Yamaguchi concerning the plaintiff's medical condition. During these interviews, Dr. Yamaguchi disclosed the plaintiff's medical records to Norcal.[23] This disclosure lead to the instant action, wherein the plaintiff claimed that the disclosure of her medical information violated the Confidentiality of Medical Information Act as well as her constitutional right to privacy.[24] Plaintiff settled the original suit against Dr. Geis for $400,000 prior to the filing of the present action.[25]

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21. *Id.*

22. The majority allowed ex parte interviews in this case, *id.* at 42, 876 P.2d at 1005, 32 Cal. Rptr. 2d at 207, despite a substantial split of authority as to the propriety of doing so. *See* Daniel P. Jones, Annotation, *Discovery: Right to Ex Parte Interview With Injured Party's Treating Physician*, 50 A.L.R. 4th 714 (1986) (summarizing the state and federal cases dealing with whether counsel for civil litigants may contact an injured party's treating physician ex parte, or whether counsel is limited to depositions and other formal discovery methods); *see also Heller*, 8 Cal. 4th at 63-67, 876 P.2d at 1019-22, 32 Cal. Rptr. 2d at 220-23 (Kennard, J., concurring and dissenting) (arguing that the majority mistakenly passed over this issue despite the wide divergence of opinion in the courts). The majority disregarded the plaintiff's claim that the common law prohibits ex parte interview for discovery purposes. *See, e.g.*, Torres v. Superior Court, 221 Cal. App. 3d 181, 188, 270 Cal. Rptr. 401, 405 (1990) (holding that the physician could testify subject to a protective order prohibiting ex parte interviews). The court stated that to the extent *Torres* and other similar cases "prohibit all ex parte contacts between a physician and his attorneys or insurers, . . . those cases are disapproved." *Heller*, 8 Cal. 4th at 41, 876 P.2d at 1005, 32 Cal. Rptr. 2d at 206. Therefore, an important collateral result of this case is that it appears to give "unqualified approval to ex parte interviews of a medical malpractice plaintiff's doctor." *Id.* at 56, 876 P.2d at 1014, 32 Cal. Rptr. 2d at 215 (Kennard, J., concurring and dissenting); *see also infra* notes 62-65 and accompanying text (outlining Justice Kennard's treatment of this issue).

23. *Heller*, 8 Cal. 4th at 56, 876 P.2d at 1014, 32 Cal. Rptr. 2d at 215 (Kennard, J., concurring and dissenting).

24. *Id.* at 36, 876 P.2d at 1001-02, 32 Cal. Rptr. 2d at 202-03.

25. *Id.* at 36, 876 P.2d at 1001, 32 Cal. Rptr. 2d at 202. The trial court sustained defendants' demurrers on all but a negligence count on the ground that defendants' conduct were immunized by the litigation privilege of California Civil Code § 47, "which immunizes from liability all communications that occur" during the course of a judicial proceeding. *Id.* at 36, 876 P.2d at 1002, 32 Cal. Rptr. 2d at 203. The court of appeal reversed the trial court decision on several counts and concluded that Yamaguchi violated the Act and the plaintiff's constitutional right to privacy. *Id.* at 37, 876 P.2d at 1002, 32 Cal. Rptr. 2d at 203. The court of appeal concluded that "although the medical information obtained by Norcal from Yamaguchi may have been legally discoverable," the method used by Norcal, i.e., an ex parte interview, violated the Act. *Id.* The supreme court granted review on these two issues. *Id.*

III. TREATMENT

A. Majority Opinion

1. Yamaguchi's Disclosure to Norcal Was Lawful Because it Fell Within One of the Exemptions of the Confidentiality of Medical Information Act

In addressing whether the Act had been violated by Dr. Yamaguchi, the court began by briefly reviewing the history of the Act and outlining its provisions. When read together, the court noted that numerous statutory provisions of the Act "require a health care provider to hold confidential a patient's medical information unless the information falls under one of several exceptions."[26] Therefore, "in order to violate the Act, a provider of health care must make an unauthorized, unexcused disclosure of privileged medical information."[27] However, disclosure of this information by a health care provider may be excused if "the disclosure is excepted either by the mandatory or permissive provisions of the Act."[28]

The court's opinion mainly focuses on section 56.10(c)(4) of the Act, the "permissive" provision, which allows disclosure in certain circumstances.[29] Specifically, California Civil Code section 56.10(c)(4) provides that medical information may be disclosed "to persons or organizations which insure or are responsible for defending professional liability."[30] Surprisingly, the court had little difficulty applying this section to the

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26. *Id.* at 38, 876 P.2d at 1003, 32 Cal. Rptr. 2d at 204.

27. *Id.*

28. *Id.* The "mandatory" provision is found in CAL. CIV. CODE § 56.10(b) (West 1991), and the "permissive" provision is found in CAL. CIV. CODE § 56.10(c)(4) (West 1991).

29. The section reads in its entirety:

> The information may be disclosed to organized committees and agents of professional societies or of medical staffs of licensed hospitals, or to licensed health care service plans, or to professional standards review organizations, or to utilization and quality control peer review organizations as established by Congress in Public Law 97-248 in 1982, *or to persons or organizations insuring, responsible for, or defending professional liability which a provider may incur*, if the committees, agents, plans, organizations, or persons are engaged in reviewing the competence or qualifications of health care professionals or in reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges.

CAL. CIV. CODE § 56.10(c)(4) (West 1991) (emphasis added).

30. *Heller*, 8 Cal. 4th at 39, 876 P.2d at 1003, 32 Cal. Rptr. 2d at 204 (citing CAL. CIV. CODE § 56.10(c)(4) (West 1991)).

facts of *Heller*, noting that clear and unambiguous statutory language is given its plain meaning, without looking to legislative intent.[31] Since the court found the language of section 56.10 to be clear and unambiguous, the court held that "Yamaguchi, as a health care 'provider,' and Norcal, as an organization 'responsible for defending professional liability,' were specifically exempted from the act."[32] Therefore, Dr. Yamaguchi did not violate the Act by making the unauthorized disclosure of the plaintiff's medical records to Norcal.[33]

2. Plaintiff Failed to Show a Violation of Her Constitutional Right to Privacy Under *Hill v. NCAA*[34]

The court next addressed whether Dr. Yamaguchi violated the plaintiff's constitutional right to privacy[35] by making the disclosure to

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31. *Id.* (citing Lungren v. Deukmejian, 45 Cal. 3d 727, 735, 755 P.2d 299, 303-04, 248 Cal. Rptr. 115, 120 (1988); *see also* J.A. Jones Constr. Co. v. Superior Court, 27 Cal. App. 4th 1568, 1578, 33 Cal. Rptr. 2d 206, 210 (1994) (stating that when interpreting a statute, the court must first view the actual language of legislation, and the court need go no further if legislative text is clear as applied to given case).

32. *Heller*, 8 Cal. 4th at 39, 876 P.2d at 1003, 32 Cal. Rptr. 2d at 204.

33. Having plainly applied the language of the Act to the factual setting, the Chief Justice then went to great lengths to justify the opinion, stating that "[o]ther provisions of the act support our interpretation." *Id.* at 40, 876 P.2d at 1004, 32 Cal. Rptr. 2d at 205. First the court looked at California Civil Code § 56.105 and found that the legislative history behind the Act demonstrates that prior to its enactment, the legislature contemplated a situation much like *Heller*, wherein a health care provider lawfully discloses medical information to those involved in the defense of a pending malpractice claim. *Id.* Second, the court examined California Civil Code § 56.16, also finding support for their position. *Id.* Finally, the court dismissed plaintiff's assertion that the common law prohibits ex parte contacts between physicians and their insurers. *Id.* at 40, 876 P.2d at 1004, 32 Cal. Rptr. 2d at 205-06. *See generally* Torres v. Superior Court, 221 Cal. App. 3d 181, 270 Cal. Rptr. 401 (1990); Province v. Center for Women's Health & Family Birth, 20 Cal. App. 4th 1673, 25 Cal. Rptr. 2d 667 (1993). The court found the cases cited by plaintiff "inapposite," partly because the Act was not at issue in those cases. *Heller*, 8 Cal. 4th at 41, 876 P.2d at 1005, 32 Cal. Rptr. 2d 206. This collateral holding on ex parte interviews may be the most significant part of the decision. *See supra* note 22 and accompanying text; *see also infra* notes 62-68 and accompanying text.

34. 7 Cal 4th 1, 865 P.2d 633, 26 Cal. Rptr. 2d 834 (1994). *See generally* Jennifer Spaziano, *California Supreme Court Survey*, 22 PEPP. L. REV. 794 (1994) (analyzing holding and impact of Hill v. NCAA).

35. *See supra* note 3 and accompanying text. For a thorough discussion of the constitutional right to privacy in California, see generally J. Clark Kelso, *California's Constitutional Right to Privacy*, 19 PEPP. L. REV. 327 (1992) (providing analysis of the legislative history of the privacy clause, critically reviewing cases arising under the clause, and discussing privacy protections apart from the privacy clause); *see also* Cutter v. Brownbridge, 183 Cal. App. 3d 836, 842, 228 Cal. Rptr. 545, 549 (1986) (stating that the "zones of privacy" created by the constitution's privacy clause "extend to the details of

Norcal. Although the court of appeals found that such a violation had occurred, the supreme court nevertheless reversed this decision.[36] Basing its analysis on *Hill v. NCAA*,[37] the court found that as a matter of law the plaintiff failed to state a cause of action for invasion of her state constitutional right to privacy since she "did not adequately plead facts supporting a conclusion that any expectation of privacy as to her medical condition would be reasonable under the circumstances of this

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one's medical history"); Jones v. Superior Court, 119 Cal. App. 3d 534, 549, 174 Cal. Rptr. 148, 157 (1981) (stating that one's medical history is an "area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized").

36. The court of appeal relied on Urbaniak v. Newton, 226 Cal. App. 3d 1128, 277 Cal. Rptr. 354 (1991), "which held that an alleged unauthorized disclosure of plaintiff's HIV status gave rise to an action for a violation [of] plaintiff's constitutional right to privacy." *Heller*, 8 Cal. 4th at 42, 876 P.2d at 1005, 32 Cal. Rptr. 2d at 206. However, the supreme court found Hill v. NCAA controlling. *Id.* Evidently the court viewed the disclosure of a patient's HIV status as distinguishable from ordinary medical records: "Although the Urbaniak decision may have been correct . . . in the context of a patient's HIV status, we view the present [case] in a different light." *Id.* For more information on disclosure of HIV status and the constitutional right to privacy, see generally Roger Daughty, *The Confidentiality of HIV-Related Information: Responding to the Resurgence of Aggressive Public Health Interventions in the AIDS Epidemic*, 82 CAL. L. REV. 111 (1994) (suggesting ways to increase protections against future potential breaches of confidentiality in the context of AIDS and HIV); Bruce A. McDonald, *Ethical Problems for Physicians raised by AIDS and HIV Infection: Conflicting Legal Obligations of Confidentiality and Disclosure*, 22 U.C. DAVIS L. REV. 557 (1989) (arguing that AIDS-related ethical problems are not unprecedented but are part of the larger context of medical ethics). Many states have enacted statutes to govern the dissemination of the fact that an individual has AIDS or HIV. *See* Annotation, *State Statutes or Regulations Expressly Governing Disclosure of Fact that Person Has Tested Positive for Human Immunodeficiency Virus (HIV) or Acquired Immunodeficiency Syndrome (AIDS)*, 12 A.L.R.5TH 149 (1993).

37. The court in *Hill* held that "a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." Hill v. NCAA, 7 Cal. 4th 1, 39-40, 865 P.2d 633, 657, 26 Cal. Rptr. 2d 834, 859 (1994). The court also noted that "[a] defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests." *Id.* at 40, 865 P.2d at 657, 26 Cal. Rptr. 2d at 859.

case."[38] Therefore, plaintiff was unable to recover under this legal theory.[39]

B. Justice Mosk's Concurring and Dissenting Opinion

1. Unlimited Ex Parte Disclosure on the Part of a Doctor Who Fears Malpractice Liability is Unnecessary and Inconsistent with the Purposes of the Act

Justice Mosk diverged from the majority's interpretation of the Act. Specifically, Justice Mosk asserted that the exception permitting lawful disclosure of medical records found in California Civil Code section 56.10(c)(4) was inappropriate to the present case.[40] Under Justice Mosk's interpretation, the statute does not allow a doctor to disclose medical records just because the physician feared malpractice liability.[41] Rather, Justice Mosk argued that the correct interpretation hinged on the term "quality of care" found in the statute, stating that the majority wrongly interpreted this phrase to include the question of malpractice liability.[42] In the context of the entire Act, however, Justice Mosk interpreted the phrase to mean that the physician may disclose records to a insurer only to assist in deciding whether or not to offer to continue providing medical malpractice insurance to the physician.[43]

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38. *Heller*, 8 Cal. 4th at 43, 876 P.2d at 1006, 32 Cal Rptr. 2d at 207. In *Heller*, the plaintiff's case was problematic in that she was unable to show a reasonable expectation of privacy. By placing her physical condition at issue in the underlying litigation, she effectively lowered any expectation of privacy she might have had. *Id.* Further, any invasion that might have occurred was not serious enough to constitute a cause of action. *Id.* at 44, 876 P.2d at 1007, 32 Cal. Rptr. 2d at 208.

39. For other medical malpractice actions in which the plaintiff has attempted to recover for tortious invasion of privacy, see generally Judy E. Zelin, Annotation, *Physician's Tort Liability for Unauthorized Disclosure of Confidential Information About Patient*, 48 A.L.R.4TH 668 (1986) (collecting the state and federal cases in which the courts have considered whether tort liability exists when a physician or other medical practitioner makes an unauthorized disclosure of confidential information about his patient).

40. *Heller*, 8 Cal. 4th at 48, 876 P.2d at 1009, 32 Cal. Rptr. 2d at 210 (Mosk, J., concurring and dissenting).

41. *Id.* at 52, 876 P.2d at 1009-10, 32 Cal. Rptr. 2d at 212 (Mosk, J., concurring and dissenting).

42. *Id.* at 49-50, 876 P.2d at 1011, 32 Cal. Rptr. 2d at 211 (Mosk, J., concurring and dissenting).

43. *Id.* at 50, 876 P.2d at 1011, 32 Cal. Rptr. 2d at 211 (Mosk, J., concurring and dissenting).

2. The Litigation Privilege of California Civil Code Section 47(b) Immunized Dr. Yamaguchi From Liability Because His Disclosures Occurred in Connection with the Ongoing Litigation Against Dr. Geis

Justice Mosk concurred in the judgment, finding that the litigation privilege of California Civil Code section 47 permitted disclosure by Dr. Yamaguchi.[44] Noting that the litigation privilege was "absolute" and absolved the litigant of all tort liability except for an action for malicious prosecution, Justice Mosk concluded that the communications between Dr. Yamaguchi and the insurer clearly related to the litigation, thereby rendering the litigation privilege applicable.[45]

In so finding, Justice Mosk saw the true issue as not whether Dr. Yamaguchi violated the Act, but rather "whether [he] injured plaintiff through conduct or through communication."[46] If the disclosure was communicative it would then fall under the litigation privilege of California Civil Code section 47(b). Citing to several prior cases that made this distinction,[47] Justice Mosk concluded that Dr. Yamaguchi's disclosure of the medical records was communicative since Dr. Yamaguchi made it with the intent to aid the insurer in its defense of the ongoing

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44. "Section 47(b) immunizes publications '(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.'" *Heller*, 8 Cal. 4th at 52, 876 P.2d at 1012, 32 Cal. Rptr. 2d at 213 (Mosk, J., concurring and dissenting) (citing Silberg v. Anderson, 50 Cal. 3d 205, 212, 786 P.2d 365, 369, 266 Cal. Rptr. 638, 642 (1990)).

45. *Id.* (Mosk, J., concurring and dissenting). Justice Mosk noted that the appellate court held otherwise on this issue and found that conduct, not communication, was at issue. *Id.*

46. *Id.* at 53, 876 P.2d at 1012-13, 32 Cal. Rptr. 2d at 214 (Mosk, J., concurring and dissenting).

47. *See, e.g.*, Rubin v. Green, 4 Cal. 4th 1187, 1202-04, 847 P.2d 1044, 1053-54, 17 Cal. Rptr. 2d 828, 837-38 (1993) (holding that an attorney's solicitation of business in violation of the Business Code was communicative and therefore privileged under § 47(b) of the Civil Code); Kimmel v. Goland, 51 Cal. 3d 202, 213-14, 793 P.2d 524, 530-31, 271 Cal. Rptr. 191, 197-98 (1990) (distinguishing immunized communicative acts related to the litigation from illegal conduct not related to the judicial proceeding); Ribas v. Clark, 38 Cal. 3d 355, 365, 696 P.2d 637, 643, 212 Cal. Rptr. 143, 149 (1985) (holding that when it is noncommunicative conduct, such as eavesdropping, rather than communication that causes injury, the litigation privilege does not apply).

litigation.[48] Therefore, the litigation privilege immunized the communication.[49]

3. The Plaintiff Cannot State a Claim for Invasion of Privacy Under the California Constitution

Like the majority, Justice Mosk concluded that the plaintiff "failed to make out a claim for violation of the constitutional right to privacy."[50] Applying *Hill v. NCAA*, Justice Mosk also found that: (1) the plaintiff had a "relatively limited" privacy interest in her medical records from Dr. Geis' treatment since a medical malpractice action obviously required disclosure of such information;[51] and (2) the disclosures did not "represent the serious invasion of privacy that we said should be actionable in *Hill*."[52] As a result, the plaintiff's claim for invasion of privacy failed.

C. Justice Kennard's Concurring and Dissenting Opinion

Although she agreed with the majority on the issue of the Act's applicability, and with Justice Mosk on the applicability of the litigation privilege, Justice Kennard nevertheless disagreed on the constitutional right to privacy issue.[53] Justice Kennard restated much of what the other justices had already stated: the facts of the case,[54] the argument for the Act's applicability,[55] and also briefly reiterated Justice Mosk's sentiments regarding the litigation privilege.[56] The heart of Justice Kennard's opinion, however, dealt with the state constitution.

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48. *Heller*, 8 Cal. 4th at 54, 876 P.2d at 1013, 32 Cal. Rptr. 2d at 214 (Mosk, J., concurring and dissenting).

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

50. *Id.* at 55, 876 P.2d at 1013, 32 Cal. Rptr. 2d at 214 (Mosk, J., concurring and dissenting).

51. *Id.* at 54-55, 876 P.2d at 1013, 32 Cal. Rptr. 2d at 214 (Mosk, J., concurring and dissenting).

52. *Id.* at 55, 876 P.2d at 1013, 32 Cal. Rptr. 2d at 214 (Mosk, J., concurring and dissenting). Further, Justice Mosk felt that the disclosure of the records may have "served another right of constitutional magnitude, . . . the right to free access to the courts." *Id.*

53. *Id.* at 55, 876 P.2d at 1014, 32 Cal. Rptr. 2d at 215 (Kennard, J., concurring and dissenting).

54. *Id.* at 56-57, 876 P.2d 1014-15, 32 Cal. Rptr. 2d at 215-16 (Kennard, J., concurring and dissenting).

55. *Id.* at 57-58, 876 P.2d at 1015-16, 32 Cal. Rptr. 2d at 216-17 (Kennard, J., concurring and dissenting).

56. *Id.* at 59, 876 P.2d at 1016, 32 Cal. Rptr. 2d at 217 (Kennard, J., concurring and dissenting).

1. The Plaintiff has Stated a Claim for Violation of Her Constitutional Right to Privacy

Justice Kennard agreed with the majority that the plaintiff's claim for invasion of privacy was "defective" on the grounds that the plaintiff did not have a reasonable expectation of privacy in the medical information relating to the malpractice action.[57] In Justice Kennard's view, however, this did not defeat the cause of action.[58] In short, Justice Kennard believed that under the *Hill* analysis, any medical information Yamaguchi disclosed directly concerning the issue of Dr. Geis's negligence or resulting damages "would be directly relevant to the issues in the [prior] litigation" and therefore carry no reasonable expectation of privacy.[59] However, the plaintiff would retain a reasonable expectation of privacy in all other information she "imparted" to Yamaguchi in confidence, such as information regarding her financial and emotional state.[60] It is this collateral information upon which the plaintiff's cause of action should have been successful.[61]

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57. *Id.* at 59-60, 876 P.2d at 1016, 32 Cal. Rptr. 2d at 217 (Kennard, J., concurring and dissenting).

58. *Id.* at 60, 876 P.2d at 1016, 32 Cal. Rptr. 2d at 217 (Kennard, J., concurring and dissenting).

59. *Id.* at 60, 876 P.2d at 1016-17, 32 Cal. Rptr. 2d at 217-18 (Kennard, J., concurring and dissenting).

60. *Id.* at 60, 876 P.2d at 1017, 32 Cal. Rptr. 2d at 218 (Kennard, J., concurring and dissenting).

61. Justice Kennard's opinion on this issue is not without merit. For example, although the filing of a malpractice lawsuit certainly lowers one's expectation of privacy in those medical records at issue, thereby constituting a waiver of privacy rights, "the scope of this waiver 'must be narrowly . . . construed.'" *Id.* at 60, 876 P.2d at 1017, 32 Cal. Rptr. 2d at 218 (Kennard, J., concurring and dissenting) (citing Britt v. Superior Court, 20 Cal. 3d 844, 859, 574 P.2d 766, 775, 143 Cal. Rptr. 695, 704 (1978)). Further, matters protected by the right to privacy are only discoverable if they are "directly relevant to the plaintiff's claim and essential to the fair resolution of the lawsuit." *Id.* (citing Vinson v. Superior Court, 43 Cal. 3d 833, 842, 740 P.2d 404, 440, 239 Cal Rptr. 292, 298 (1987). *But see id.* at 43 n.4, 876 P.2d at 1006 n.4, 32 Cal. Rptr. 2d at 207 n.4 ("Plaintiff's allegations concerning Yamaguchi's disclosure to Norcal of her financial and emotional state do not fall within the protection of either section 56 et seq. or the constitutional right to privacy, for the information is unrelated to her medical condition."). Justice Kennard's stance is also clearly in line with the rules of evidence. For example, all evidence codes recognize that only relevant evidence is admissible. *See, e.g.*, FED. R. EVID. 402 ("All relevant evidence is admissible . . . . Evidence which is not relevant is not admissible."). As Justice Kennard suggested, there seems to be no reason why a reasonable expectation of privacy cannot be maintained in those items that are irrelevant to the issues in the lawsuit. *Heller*, 8 Cal. 4th at 62-63, 876 P.2d at

2. The Majority Erred by Giving Unqualified Approval to Ex Parte Interviews of a Medical Malpractice Plaintiff's Doctor

Justice Kennard's final point was that the court erred when it held that ex parte interviews of a medical malpractice plaintiff's doctor are acceptable. Interestingly, Justice Kennard does not appear to either support or condone this practice. Rather, Justice Kennard merely recognizes that both state and federal courts are highly divided on the propriety of this practice.[62] In her view, the majority's "offhand" discussion of this issue made "further discussion necessary."[63]

Justice Kennard's discussion merely focused on the split of authority that exists. Some courts allow the practice, some do not, and at least one, New Jersey, has articulated a middle ground in the debate.[64] Given what she called the majority's "limited holding"—if "an ex parte interview does occur without the plaintiff's knowledge or consent, the physician does not . . . violate the [Act],"—Justice Kennard argued that the issue is likely to return, at which time she hopes the "court gives [it] the thorough consideration . . . [it] deserve[s]."[65]

IV. IMPACT AND CONCLUSION

It is unclear if *Heller* will have a significant impact on future medical malpractice actions. Certainly, *Heller* should be welcomed by professional malpractice defense teams in similar cases since the case provides firm ground upon which to stand when the plaintiff's medical records are needed as evidence. Now there can be no question that the records are obtainable. On the other hand, the factual scenario in *Heller* is rather unusual: a third-party physician turning over medical records to an insur-

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1018-19, 32 Cal. Rptr. 2d at 219-20 (Kennard, J., concurring and dissenting).

62. *Id.* at 63, 876 P.2d at 1019, 32 Cal. Rptr. 2d at 220 (Kennard, J., concurring and dissenting). *See, e.g.*, Philip H. Corboy, *Ex Parte Contacts Between Plaintiff's Physician and Defense Attorneys: Protecting the Patient-Litigant's Right to a Fair Trial*, 21 LOY. U. CHI. L.J. 1001 (1990). *See generally* David L. Woodard, *Shielding the Plaintiff and Physician: The Prohibition of Ex Parte Contacts with a Plaintiff's Treating Physician*, 13 CAMPBELL L. REV. 233 (1991); Daniel P. Jones, Annotation, *Discovery: Right to Ex Parte Interview With Injured Party's Treating Physician*, 50 A.L.R.4TH 714 (1986) (collecting and discussing the state and federal cases addressing whether opposing counsel conducting discovery in civil litigation may interview the injured party's treating physician ex parte or is limited to formal discovery methods such as by deposition).

63. *Heller*, 8 Cal. 4th at 63, 876 P.2d at 1019, 32 Cal. Rptr. 2d at 220 (Kennard, J., concurring and dissenting).

64. *Id.* at 64-66, 876 P.2d at 1020-21, 32 Cal. Rptr. 2d at 221-22 (Kennard, J., concurring and dissenting). *See generally* Stempler v. Speidell, 49 A.2d 857 (N.J. 1985).

65. *Id.* at 67, 876 P.2d at 1021-22, 32 Cal. Rptr. 2d at 222-23 (Kennard, J., concurring and dissenting).

ance company involved in defending another doctor.[66] Therefore, it remains to be seen whether *Heller* will indeed have an adverse impact on the plaintiff's bar.

The most significant ground covered by *Heller* seems to be the collateral holding by the court on the issue of ex parte interviews. If this holding is taken at face value, arguably the court has shifted away from the common law rule prohibiting ex parte interviews between physicians and their insurers.[67] This is significant since it will likely result in a step away from a patient's right to confidentiality in the physician-patient relationship.[68]

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66. The number of California cases in which the Confidentiality of Medical Information Act has been at issue are few. *See In re* Troy D., 215 Cal. App. 3d 889, 901, 263 Cal. Rptr. 869, 875 (1989) (holding there was no violation of the Confidentiality of Medical Information Act by a hospital social worker's discretionary decision to report positive test results and for those results to be introduced at a juvenile court hearing); Inabnit v. Berkson, 199 Cal. App. 3d 1230, 1231-32, 245 Cal. Rptr. 525, 526 (1988) (holding that a licensed physician may release his records pertaining to psychiatric treatment furnished to a patient without that patient's authorization when the production of those records is compelled by a subpoena duces tecum issued in a judicial proceeding in which the physician is not a party).

67. *See, e.g.*, Province v. Center for Women's Health & Family Birth, 20 Cal. App. 4th 1673, 1685, 25 Cal. Rptr. 2d 667, 674 (1993) (stating that counsel must "avoid ex parte communications with physicians" until after discovery is completed); Torres v. Superior Court, 221 Cal. App. 3d 181, 187-88, 270 Cal. Rptr. 401, 405 (1990) (holding that the physician could testify subject to a protective order prohibiting ex parte interviews). The court stated that "to the extent [they] could be read to prohibit all ex parte contacts those cases are disapproved." *Heller*, 8 Cal. 4th at 41, 876 P.2d at 1005, 32 Cal. Rptr. 2d at 206.

68. Although ex parte interviews may save time and money when compared to formal discovery, Justice Kennard correctly noted that it is possible that "defense counsel may use an ex parte interview with the plaintiff's doctor to solicit sympathy for the defendant, and thereby compromise the doctor's loyalty to the patient." *Id.* at 66, 876 P.2d at 1021, 32 Cal. Rptr. 2d at 222 (Kennard, J., concurring and dissenting).

XII. PRODUCTS LIABILITY

A manufacturer may not be held liable for failing to label a nonprescription drug with warnings in a language other than English:
Ramirez v. Plough, Inc.

I. INTRODUCTION

In *Ramirez v. Plough, Inc.*,[1] the court considered "whether a manufacturer of nonprescription drugs may incur tort liability for distributing its products with warnings [written] in English only."[2] Reasoning that "uniformity and predictability" are critical, the court determined that "the rule for tort liability should conform to state and federal statutory and administrative law."[3] The court concluded that a manufacturer is not liable for omitting warnings in languages other than English from nonprescription drug labels because state and federal law only require warnings in English.[4]

In 1986, the plaintiff, who was less than four months old, was given St. Joseph Aspirin for Children (SJAC) by his mother, despite the label's direction that dosage for a child under two years of age was "as directed by doctor."[5] While the plaintiff's mother was only literate in Spanish, she failed to ask any of the English-speaking members of her household to translate the label or package insert for her.[6] Two days later, after a to-

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1. 6 Cal. 4th 539, 863 P.2d 167, 25 Cal. Rptr. 2d 97 (1993). Justice Kennard authored the majority opinion, with Chief Justice Lucas and Justices Arabian, Panelli, Baxter, and George concurring. Justice Mosk delivered a separate concurring opinion emphasizing that the decision does not preclude "the possibility of tort liability presumed upon the content of foreign-language advertising," such as when it is "materially misleading" and the consumer relied upon it to his detriment. *Id.* at 556-57, 863 P.2d at 178, 25 Cal. Rptr. 2d at 108 (Mosk, J., concurring). Justice Mosk determined that a foreign-language advertisement is materially misleading if it promotes the product's health benefits without warning a "non-english-literate consumer" against the risks of misuse. *Id.* at 557, 863 P.2d at 179, 25 Cal. Rptr. 2d at 109 (Mosk, J., concurring). Justice Mosk suggested that a "[n]otice on a drug's product label in the foreign languages in which the drug is advertised, not to take or apply the drug before reading a package insert's detailed warning" may offer reasonable notice to a non-English-literate consumer of the risks of misuse. *Id.* at 557-58, 863 P.2d at 179, 25 Cal. Rptr. 2d at 109 (Mosk, J., concurring).

2. *Id.* at 542, 863 P.2d at 168, 25 Cal. Rptr. 2d at 98.

3. *Id.*

4. *Id.*

5. *Id.* at 543, 863 P.2d at 169, 25 Cal. Rptr. 2d at 99.

6. *Id.* at 544, 863 P.2d at 169, 25 Cal. Rptr. 2d at 99. She purchased SJAC without seeing or relying on any advertising for SJAC in either English or Spanish. *Id.* at 544, 863 P.2d at 169, 25 Cal. Rptr. 2d at 99-100. She had, however, taken aspirin herself in

tal of three aspirin had been given to the plaintiff, the child's mother took him to the hospital.[7] Disregarding the doctor's advice to treat her son with nonprescription medication containing no aspirin, the plaintiff's mother continued to treat her son with SJAC.[8] Consequently, the boy developed Reye's syndrome, resulting in "cortical blindness, spastic quadriplegia, and mental retardation."[9]

The trial court granted the defendant's motion for summary judgment stating, "there was 'no duty to warn in a foreign language' and no causal relationship between plaintiff's injury and the defendant's activities."[10] The court of appeal reversed, concluding that the issue of whether the defendant was reasonable in not labeling SJAC with a Spanish language warning was a triable issue of fact.[11] The court supported its conclusion by noting that although evidence demonstrated that the defendant knew that non-English-literate Hispanics were using SJAC, there was insufficient evidence presented as to the expenses of labeling in Spanish. The supreme court reversed the judgment of the court of appeal and affirmed the defendant's motion for summary judgment.[12]

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the past and a friend had recommended SJAC. *Id.* at 544, 863 P.2d at 169, 25 Cal. Rptr. 2d at 100. The lawsuit filed was "premised on the theory of failure to warn about the dangers of Reye's syndrome." *Id.* The plaintiff alleged that defendant was negligent in failing to warn, failed to adequately warn under a products liability theory, and committed fraud by falsely representing that SJAC was safe under the circumstances. *Id.*

7. *Id.* at 543, 863 P.2d at 168, 25 Cal. Rptr. 2d at 99.

8. *Id.*

9. *Id.* "Reye's syndrome occurs in children and teenagers during or while recovering from a mild respiratory tract infection, flu, chickenpox, or other viral illness." *Id.* The disease has a 20-30% fatality rate, and many of the survivors sustain permanent brain damage. *Id.* Although the cause of Reye's syndrome is unknown, studies in the early 1980's showed a correlation "between ingestion of aspirin during a viral illness . . . and the subsequent development of Reye's syndrome." *Id.* A permanent FDA regulation requiring aspirin products to warn that "Reye's syndrome is reported to be associated with aspirin use" took effect in 1988. *Id.* (citing 53 Fed. Reg. 21,633 (proposed June 9, 1988)).

Prior to the federal regulation becoming mandatory, SJAC displayed a Reye syndrome warning on its packages and in its package inserts. *Id.* at 543-44, 863 P.2d at 169, 25 Cal. Rptr. 2d at 99. "These warnings were printed in English on the label of the SJAC that plaintiff's mother purchased in March of 1986." *Id.* at 544, 863 P.2d at 169, 25 Cal. Rptr. 2d at 99.

10. *Id.* at 545, 863 P.2d at 170, 25 Cal. Rptr. 2d at 100.

11. *Id.* at 545, 863 P.2d at 170-71, 25 Cal. Rptr. 2d at 100-101.

12. *Id.* at 556, 863 P.2d at 178, 25 Cal. Rptr. 2d at 108. Review was granted on Dec. 31, 1992, in Ramirez v. Plough, Inc., 843 P.2d 624, 15 Cal. Rptr. 2d 679 (1992).

II. TREATMENT

Recognizing SJAC's duty to warn purchasers about the correlation between aspirin use and Reye's syndrome, the majority narrowed its focus to the scope of this duty and whether it required the defendant "to provide label or package warnings in Spanish."[13] Although the standard of care for tort liability is generally framed as a reasonably prudent person under similar circumstances, the standard of care may be prescribed by statute or "settled" by the court.[14] The defendant argued "that the standard of care for packaging and labeling nonprescription drugs . . . has been appropriately fixed by the dense layer of state and federal statutes and regulations that control virtually all aspects of the marketing of its products."[15]

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13. *Ramirez*, 6 Cal. 4th at 546, 863 P.2d at 171, 25 Cal. Rptr. 2d at 101; *see* RESTATEMENT (SECOND) OF TORTS § 328 B cmt. f (1965) (noting it is the court's function to "formulate the standard of conduct to which the duty requires the defendant to conform").

14. *Ramirez*, 6 Cal. 4th at 546-47, 863 P.2d at 171, 25 Cal Rptr. 2d at 101 (citing Beauchamp v. Los Gatos Golf Course, 273 Cal. App. 2d 20, 26-27, 77 Cal. Rptr. 914, 919 (1969)). While it is a question of law for the court to frame the standard of care once a duty is found, it is the fact-finder's responsibility to determine whether the defendant has complied with the standard. *Id.* at 546, 863 P.2d at 171, 25 Cal. Rptr. 2d at 101 (citing Ishmael v. Millington, 241 Cal. App. 2d 520, 525, 50 Cal. Rptr. 592, 595 (1966)); *see* RESTATEMENT (SECOND) OF TORTS §§ 328 B subd. (c), 328 C subd. (b) (1965) (stating the court shall determine the standard of conduct required by the defendant by his legal duty that the jury determines whether the defendant's conduct is a legal cause of the harm to the plaintiff).

15. *Ramirez*, 6 Cal. 4th at 548, 863 P.2d at 172-73, 25 Cal. Rptr. 2d at 102-103. The court noted that in negligence actions, plaintiffs frequently advance "[s]tatutory standards of conduct to establish a breach of duty by the defendant." *Id.* at 547, 863 P.2d at 172, 25 Cal. Rptr. 2d at 102. This "raises a presumption of negligence that may be rebutted only by evidence establishing a justification or excuse for the statutory violation." *Id.* at 547-48, 863 P.2d at 172, 25 Cal. Rptr. 2d at 102. Defendants rarely invoke a defense of statutory compliance because it does not preclude the application of a higher standard. The court cited the Restatement (Second) of Torts, providing:

> Where a statute, ordinance or regulation is found to define a standard of conduct for the purposes of negligence actions, . . . the standard defined is normally a minimum standard, applicable to the ordinary situations contemplated by the legislation. This legislative or administrative minimum does not prevent a finding that a reasonable [person] would have taken additional precautions where the situation is such as to call for them.

Id. at 548, 863 P.2d at 172, 25 Cal. Rptr. 2d at 102 (citing RESTATEMENT (SECOND) OF TORTS § 288 C cmt. a (1965)). *Compare* Elsworth v. Beech Aircraft Corp., 37 Cal. 3d 540, 552, 691 P.2d 630, 637, 208 Cal. Rptr. 874, 881 (1984) (concluding manufacturer's compliance with federal aircraft safety regulations did not preclude liability for defective design), *cert. denied*, 471 U.S. 1110 (1985), *with* Arata v. Tonegato, 152 Cal. App. 2d 837, 842-43, 314 P.2d 130, 134 (1957) (finding jury entitled to consider compliance with federal labeling requirements for hair dye as factor in determining negligence).

Section 502 of the Food, Drug, and Cosmetic Act[16] regulates the labeling of nonprescription drugs, including warning labels on aspirin.[17] Although the FDA encourages labeling "to meet the needs of non-English speaking or special user populations so long as such labeling fully complies with agency regulations,"[18] the controlling regulation requires only English labeling unless the drug is "'distributed solely in the Commonwealth of Puerto Rico or in a Territory where the predominant language is one other than English . . . .'"[19] California law is patterned after the federal law and only requires English language warnings.[20]

The court cited numerous examples of legislation imposing a duty on government agencies to provide foreign language materials.[21] The court

16. 21 U.S.C. § 352 (1988).

17. *Ramirez*, 6 Cal. 4th at 548-49, 863 P.2d at 173, 25 Cal. Rptr. 2d at 103. Aspirin products carry warnings regarding use during pregnancy and nursing (21 C.F.R. § 201.63(a) (1993)), the need to keep the product out of the hands of children (21 C.F.R. § 201.314(a) (1993)), and a warning about Reye's syndrome (21 C.F.R. § 201.314(h) (1993)). *Id.* at 549, 863 P.2d at 173, 25 Cal. Rptr. 2d at 103. "The pharmaceutical industry believes that []state-mandated warnings are not necessary because the field of drug labeling is adequately covered by provisions of the Federal Food, Drug, and Cosmetic Act and regulations promulgated by the FDA under the Act." Mark B. Gelbert, *State Statutes Affecting the Labeling of OTC Drugs: Constitutionality Based on Commerce Clause and Federal Preemption Theories*, 46 FOOD DRUG COSM. L.J. 629, 630-31 (1991).

18. *Ramirez*, 6 Cal. 4th at 549-50, 863 P.2d at 173, 25 Cal. Rptr. 2d at 103 (quoting 53 Fed. Reg. 21, 633, 21, 636 (proposed June 9, 1988)).

19. *Id.* at 550, 863 P.2d at 173, 25 Cal. Rptr. 2d at 103 (citing 21 C.F.R. § 201.15(c)(1) (1993)). However, once a manufacturer chooses to make a "'representation in a foreign language,' then all required words, statements, and other foreign information' must appear in the foreign language as well as in English." *Id.* at 550, 863 P.2d at 173-74, 25 Cal. Rptr. 2d at 103 (citing 21 C.F.R. § 201.15(c)(2)-(3) (1993)). The court suggested that if "representation" goes to the "uses or effectiveness of the product, then some abbreviated warnings (such as, 'If you do not read English, ask someone to translate this label for you before using this product') in a foreign language might not violate the regulation." *Id.* at 550 n.4, 863 P.2d at 173 n.4, 25 Cal. Rptr. 2d at 104 n.4; *see supra* note 1 for Justice Mosk's concurrence emphasizing this point.

20. *Ramirez*, 6 Cal. 4th at 550, 863 P.2d at 173, 25 Cal. Rptr. at 104. Section 25900 of the California Health and Safety Code provides: "Cautionary statements which are required by law, or regulations adopted pursuant to law, to be printed upon the labels of containers in which dangerous drugs . . . are packaged shall be printed in the English language . . . ." CAL. HEALTH & SAFETY CODE § 25900 (West 1984).

21. *See, e.g.*, CAL. GOV'T CODE §§ 7290-7299.8 (West 1980) (requiring bilingual employees and written materials at state agencies); CAL. WELF. & INST. CODE § 19013.5 (West 1991) (providing special language assistance to non-English speaking handicapped individuals participating in the state department's public or private rehabilitation pro-

noted that legislative and administrative bodies are best suited for defining situations in which information should be provided in a language other than English.[22] Acknowledging that the legislature clearly mandates when foreign language communications must be included,[23] the court further reasoned that if the legislature sought to require foreign language warnings, it would have done so expressly.[24] The court found further significance in the fact that, given the FDA's sensitivity to the benefits of multilingual package warnings, failure to require such labeling would suggest that the FDA determined the costs and burdens of such warnings did not warrant their use.[25]

The court considered and rejected applicable statutes and regulations for determining the proper standard of care.[26] The court concluded that adopting a "reasonable person" standard of care would require multilingual package inserts because "it is foreseeable that eventually each nonprescription drug will be purchased by a non-English-speaking resident or foreign tourist."[27] Such packaging requirements would be costly, burdensome, and counterproductive, requiring an unwieldy accommodation to many languages.[28]

Furthermore, the court decided that the issue was unsuitable for a judicial declaration of a standard of care.[29] Reasoning that the determination of labeling requirements would entail considerable investigation and evaluation of "empirical data," the court concluded that a legislative body is better suited for this type of determination.[30] Hence, the court

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grams); CAL. ELEC. CODE § 10012 (West 1977) (requiring clerks provide Spanish translations for candidate's statements). Parties involved in private commercial transactions are sometimes charged with the duty to furnish information in a foreign language. *See* CAL. CIV. CODE § 1632 (West 1985) (requiring those engaged in negotiating business or trade primarily in Spanish to provide Spanish language translation of contracts, etc.); CAL. BUS. & PROF. CODE § 9998.2 (West Supp. 1994) (requiring employment service contracts engaging foreign workers be in the foreign worker's language).

22. *Ramirez*, 6 Cal. 4th at 550-51, 863 P.2d at 174, 25 Cal. Rptr. 2d at 104.

23. *Id.* "Often, the Legislature has used a numerical threshold of affected or potentially affected persons speaking a given language to define the scope of the relevant duty to provide information in that language." *Id.* at 551, 863 P.2d at 175, 25 Cal. Rptr. 2d at 105; *see, e.g.*, CAL. ELEC. CODE § 14203 (West 1977) (requiring the posting of the ballot in Spanish, "if a significant and substantial need is found by the clerk").

24. *Ramirez*, 6 Cal. 4th at 552, 863 P.2d at 175, 25 Cal. Rptr. 2d at 105.

25. *Id.* The court noted that "the FDA for a time required manufacturers . . . to provide Spanish language translations of their patient package inserts on request to doctors and pharmacists." *Id.* However, this requirement was eventually abandoned due to the difficulties of obtaining adequate translations. *Id.*

26. *Id.*

27. *Id.* at 552-53, 863 P.2d at 175-76, 25 Cal. Rptr. 2d at 105.

28. *Id.* at 553, 863 P.2d at 175-76, 25 Cal. Rptr. 2d at 105-06.

29. *Id.* at 553, 863 P.2d at 176, 25 Cal. Rptr. 2d at 106.

30. *Id.* Examples of such considerations would include space limitations in

decided "to adopt for tort purposes the existing legislative and administrative standard of care on this issue."[31]

Amici curiae submitted on behalf of the plaintiff contended "that the right of persons accused of crime to the services of an interpreter demonstrates the existence of a general legal obligation to accommodate . . . persons not proficient in English."[32] The court rejected this argument, emphasizing that the due process requirements of a criminal proceeding were inapplicable in this case.[33] The court observed that an interpreter was required in the courtroom because the accused was restricted from normal channels of language assistance, such as family and friends.[34] Further, the court noted that courts can ascertain the need for an interpreter "without engaging in the complex balance of advantages and costs required to set an industry-wide standard to meet the diverse linguistic needs of the large, heterogeneous population . . . ."[35]

In addition, plaintiff's amici curiae proposed that a judicially declared rule could limit the breadth of a nonprescription drug manufacturer's duty to warn by requiring foreign-language warnings in only those languages in which the manufacturer chose to advertise.[36] The court acknowledged that in some situations, the legislature has required "that one who advertises, negotiates, or makes an oral sales presentation in a foreign language must also provide a written contract or make other disclosure in the same language."[37] The court noted that this argument further

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packaging, the costs of translation, the impact of cost spreading on a product's availability to the consumer, the risks of misuse, and the extent of foreign-language advertising used to promote the products, among others. *Id.*

31. *Id.*

32. *Ramirez*, 6 Cal. 4th at 554, 863 P.2d at 176, 25 Cal. Rptr. 2d at 106. Lawyers for the American Civil Liberties Union (ACLU), the Mexican American Legal Defense and Educational Fund, the Public Citizens Health Research Group, and Trial Lawyers for Public Justice called the case "'a potential landmark in terms of language discrimination.'" Pamela Warrick, *When a Warning May Not Be Enough*, L.A. TIMES, May 25, 1993, at 1.

33. *Ramirez*, 6 Cal. 4th at 554, 863 P.2d at 176, 25 cal. Rptr. 2d at 106.

34. *Id.*

35. *Id.*

36. *Id.* The amici argued that "defendant's use of foreign-language advertising demonstrate[d] its knowledge that persons understanding only that language are likely to buy its products, and because it is morally blameworthy to advertise a product in a foreign language without also conveying necessary warnings in that same language." *Id.* at 554, 863 P.2d at 176-77, 25 Cal. Rptr. 2d at 106-07.

37. *Id.* at 554, 863 P.2d at 177, 25 Cal. Rptr. 2d at 107; *see supra* note 19 and accompanying text.

supports the conclusion that multilingual warnings are more suitable for the legislature's consideration.[38]

The majority emphasized that its decision does not preclude the "possibility of tort liability premised upon the *content* of foreign-language advertising," particularly as to a "consumer who detrimentally relied upon foreign-language advertising that was materially misleading as to product risks."[39] However, this case did not involve the content of the Spanish advertising since the plaintiff's mother acknowledged that she did not see or hear the advertising, and thus did not rely upon it.[40]

Accordingly, the court espoused the "legislative/regulatory standard of care that mandates nonprescription drug package warnings in English only."[41] It based its decision upon two rationales. First, legislative and administrative bodies have the "superior technical and procedural law-making resources" needed to evaluate the complex issues involved in determining a standard of care.[42] Second, the court chose to conform with the FDA's emphasis on the need for uniformity and clarity of the warnings provided with nonprescription drugs.[43]

Lastly, the supreme court declined the alternative grounds for liability proposed by the plaintiff.[44] The court rejected liability premised on a defect in the English language labeling because the plaintiff's mother neither read nor obtained translation of the product labeling.[45] Therefore, no causal relationship could be shown between the label's language and the plaintiff's injury.[46]

The plaintiff argued that SJAC should not have been marketed at all "because the risks of Reye's syndrome clearly outweighed any benefit to be derived from the product."[47] The court rejected this argument, deferring to the FDA's conclusion in 1986, that pending further studies, product warnings were sufficient.[48] Therefore, the court held that manufac-

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38. *Ramirez*, 6 Cal. 4th at 554, 863 P.2d at 177, 25 Cal. Rptr. 2d at 107.

39. *Id.* at 555, 863 P.2d at 177, 25 Cal. Rptr. 2d at 107; *see supra* note 1 for Justice Mosk's development of this point in his concurrence.

40. *Ramirez*, 6 Cal. 4th at 555, 863 P.2d at 177, 25 Cal. Rptr. 2d at 107.

41. *Id.*

42. *Id.*

43. *Id.*; *see* 50 Fed. Reg. 51400, 51402 (1985); *see also* 51 Fed. Reg. 16258, 16260 (1986).

44. *Ramirez*, 6 Cal. 4th at 555-56, 863 P.2d at 177-78, 25 Cal. Rptr. 2d at 107-08.

45. *Id.* at 555, 863 P.2d at 177, 25 Cal. Rptr. 2d at 107.

46. *Id.* For a drug manufacturer's negligence liability, see 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 957 (9th ed. 1988).

47. *Ramirez*, 6 Cal. 4th at 556, 863 P.2d at 177, 25 Cal. Rptr. 2d at 107. For a discussion on the unavoidably unsafe products theory, see 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 1310, 1313 (9th ed. 1988).

48. *Ramirez*, 6 Cal. 4th at 556, 863 P.2d at 178, 25 Cal. Rptr. 2d at 108. SJAC was

turers of nonprescription drugs currently have no "legal duty, within the tort law system, to include foreign-language warnings with their packaging materials."[49]

III. CONCLUSION

In *Ramirez v. Plough, Inc.*, the California Supreme Court adhered to the rule established by the Food and Drug Administration in holding that any duty a drug manufacturer has to warn of dangers of administering its product extends to English-language warnings only.[50]

It is likely that the legislature will examine this issue in the future.[51] As the population of Spanish-speaking consumers expands in California, foreign-language media will grow. Latino groups may boycott drug manufacturers who choose to target the Latino community for sales without providing corresponding protection through labeling in Spanish.[52] The decision was decried for meaning "'that if you don't speak English, you have less protection as a consumer.'"[53]

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no longer distributed after December 31, 1986. *Id.* The court stated that the plaintiff failed to submit any evidence that would prompt the court to doubt the FDA's opinion in early 1986 that when distributed with warnings, aspirin could be a reasonably safe product for children. *Id.*

49. *Id.*

50. *Id.* at 542, 863 P.2d at 168, 25 Cal. Rptr. 2d at 98.

51. The court suggested that the California Legislature may be prompted by this decision to review the issue of foreign-language labeling for nonprescription drugs and that "further study might persuade the Legislature, the FDA, or any other concerned agency to revise the controlling statutes or regulations for nonprescription drugs." *Id.* at 553, 863 P.2d at 176, 25 Cal. Rptr. 2d at 106.

52. This case has been closely followed by Latino groups because Scheiring Plough directly advertised its products on Spanish-speaking television and radio stations in Los Angeles and New York. Harriet Chiang, *Drug Label Warnings Need Not be Multilingual, Court Rules*, S. F. CHRON., Dec. 10, 1993, at A1.

53. *Id.* (quoting Irma Rodriguez, an attorney with the Mexican-American Legal Defense and Educational Fund in Los Angeles).

XIII. RIPARIAN RIGHTS

A public entity does not have absolute immunity against damage caused to downstream riparian property, but is subject to a test of reasonableness for both tort and inverse condemnation actions: **Locklin v. City of Lafayette.**

I. INTRODUCTION

In *Locklin v. City of Lafayette*,[1] the California Supreme Court addressed the standard for determining the liability of a public entity for damage caused to downstream riparian property by the discharge of surface water into a natural watercourse.[2] The court first determined that a rule of reasonableness should be applied to the standard used to establish the liability of a public or private landowner for a tort claim for damage to downstream property.[3] In addition, the court pronounced that a government could be liable for inverse condemnation for damage caused to downstream property.[4] Lastly, the court determined that a landowner is only proportionately liable for his part of the damage done to downstream property.[5]

The plaintiffs own property along Reliez Creek, a natural watercourse in which the runoff has increased considerably due to the recent developments in the area surrounding Contra Costa County.[6] The increase in runoff caused erosion and a widening of the creek, prompting the plaintiffs to file an action to recover for "extensive landslide" to their prop-

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1. 7 Cal. 4th 327, 867 P.2d 724, 27 Cal. Rptr. 2d 613 (1994). Justice Baxter wrote the majority opinion for the court, joined by Chief Justice Lucas and Justices Kennard, Arabian, George, and Panelli. *Id.* at 337-78, 867 P.2d at 728-56, 27 Cal. Rptr. 2d at 617-45. Justice Mosk concurred in a separate opinion. *Id.* at 378-79, 867 P.2d at 756-57, 27 Cal. Rptr. 2d at 45-46 (Mosk, J., concurring).

2. *Id.* at 337, 867 P.2d at 728, 27 Cal. Rptr. 2d at 617.

3. *Id.* at 337, 867 P.2d at 729, 27 Cal. Rptr. 2d at 618. The factors to take into account are: "consideration of the purpose for which the improvements were undertaken, the amount of surface water runoff added to the streamflow by the defendant's improvements in relation to that from development of other parts of the watershed, and the cost of mitigating measures available to both upper and downstream owners." *Id.*

4. *Id.* Liability exists when the governmental entity fails to use other, less injurious alternatives to improve property or converts a watercourse into a public work which causes damage. *Id.*

5. *Id.* at 338, 867 P.2d at 729, 27 Cal. Rptr. 2d at 618.

6. *Id.* at 338-39, 867 P.2d at 729-30, 27 Cal. Rptr. 2d at 618-19. The increase in runoff is due to the discharge of surface water into Reliez Creek. *Id.* at 339, 867 P.2d at 730, 27 Cal. Rptr. 2d at 619. Surface waters are those waters arising from rain or snow that flow over the ground and that are not confined to a watercourse. *See* 63 CAL. JUR. 3D *Water* § 705 (1981 & Supp. 1994).

erty.[7] The defendants included: the City of Lafayette, the County of Contra Costa, the Contra Costa County Flood Control District, the California Department of Transportation (CalTrans), and the Bay Area Rapid Transit District (BART).[8]

The trial court ruled for the defendants on the inverse condemnation and tort causes of actions and granted the defendants absolute immunity for damages under the natural watercourse rule.[9] The plaintiffs appealed the decision arguing that the trial court erred in giving defendants absolute immunity. The court of appeal, however, affirmed the trial court's decision.[10]

II. TREATMENT OF THE CASE

A. Majority Opinion

The court first addressed the court of appeal ruling which granted the defendants absolute immunity from liability under the natural watercourse rule.[11] The two principal aspects of the natural watercourse rule

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7. *Locklin*, 7 Cal. 4th at 339, 867 P.2d at 730, 27 Cal. Rptr. 2d at 619. The plaintiffs sought injunctive relief and recovery on inverse condemnation, nuisance, dangerous condition of public property, and trespass to real property. *Id.*

8. *Id.* at 340, 867 P.2d 730, 27 Cal. Rptr. 2d 619.

9. *Id.* at 342, 867 P.2d 732, 27 Cal. Rptr. 2d 622. For a discussion on the natural watercourse rule see *infra* notes 12 and 13 and accompanying text. The trial court found that Reliez Creek was not a public improvement and the "natural watercourse rule" shielded the defendants from liability. *Locklin*, 7 Cal. 4th at 342-43, 867 P.2d at 732-33, 27 Cal. Rptr. 2d at 621-22; *see* Archer v. City of Los Angeles, 19 Cal. 2d 19, 24-25, 119 P.2d 1, 5 (1941) (establishing immunity to upper riparian landowners for damage to lower riparian land caused by the discharge of surface water into a natural watercourse).

10. *Locklin*, 7 Cal. 4th 344, 867 P.2d at 733, 27 Cal. Rptr. 2d at 622. The court of appeal relied on *Archer*, but did not look to San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920), the case relied upon by the court in *Archer*. *Locklin*, 7 Cal. 4th at 344-48, 867 P.2d at 733-36, 27 Cal Rptr. 2d at 622-25. *San Gabriel Valley Country Club* implied a standard of reasonableness by stating that the improvements to a natural watercourse must be reasonable and not burdensome on lower riparian landowners. *San Gabriel Valley Country Club*, 182 Cal. at 399-400, 188 P. at 557.

11. *Locklin*, 7 Cal. 4th at 348-61, 867 P.2d at 736-45, 27 Cal. Rptr. 2d 625-34. The court focused on the rule applied to private parties who alter the flow of surface water into natural watercourses and analyzed the issue as it relates to governmental entities. *Id.* For a discussion on tort liability with regard to riparian rights, see 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 798 (9th ed. 1987 & Supp. 1994).

are: (1) the riparian landowner has the right to gather and discharge surface water into a natural watercourse, and (2) improvements in the natural watercourse to increase drainage and avoid erosion are permitted even if it would damage lower riparian land.[12] Upperstream development of property benefits from the natural watercourse rule because it limits liability for damage to lower riparian property.[13]

The court implemented a rule of reasonableness in the natural watercourse rule by analogizing that rule to the rule utilized for natural runoff between upper and lower properties.[14] Since the court declined to distinguish between downstream and downslope property, the rule of reasonableness would apply equally to natural watercourse damage.[15] Even though the court has never before applied the rule of reasonableness to the natural watercourse rule, many court of appeal cases used the rule in natural watercourse or flood control improvement cases.[16]Accordingly, a court must now look at all circumstances[17] to determine if both the upper and lower riparian landowners acted reasonably.[18] If both parties acted reasonably, then the civil law rule[19] immunizes the upper riparian

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12. *Locklin*, 7 Cal 4th at 350, 867 P.2d at 737, 27 Cal. Rptr. 2d at 626.

13. *See San Gabriel Valley Country Club*, 182 Cal. at 401, 188 P. at 558.

14. *Locklin*, 7 Cal. 4th at 350, 867 P.2d at 738, 27 Cal. Rptr. 2d at 627. A court will apply a test of reasonableness to a landowner's conduct affecting the runoff of water onto adjacent land. *See* Keys v. Romley, 64 Cal. 2d 396, 409, 412 P.2d 529, 536, 50 Cal. Rptr. 273, 280 (1966) (stating that "[n]o party, whether an upper or a lower landowner, may act arbitrarily and unreasonably in his relations with other landowners and still be immunized from all liability"). For a discussion on the discharge of surface water, see 2 CAL. JUR. 3D *Adjoining Landowners* § 5 (1973 & Supp. 1994).

15. *Locklin*, 7 Cal. 4th at 352, 867 P.2d at 739, 27 Cal. Rptr. 2d at 628.

16. *Id.* at 354-55, 867 P.2d 740-41, 27 Cal. Rptr. 2d at 629-30; *see* Ektelon v. City of San Diego, 200 Cal. App. 3d 804, 808, 246 Cal. Rptr. 483, 486 (1988) (stating that the decision in *Keys* should be applied broadly to all factual situations involving water law); Martinson v. Hughey, 199 Cal. App. 3d 318, 328, 244 Cal. Rptr. 795, 801 (1988) (noting that an "upper owner has a right to discharge reasonable and noninjurious amounts of irrigation water through natural areas of flow onto lower [land]"); Weaver v. Bishop, 206 Cal. App. 3d 1351, 254 Cal. Rptr. 425 (1988) (noting the use of the reasonableness test in determining liability for damage to lower riparian property caused by improvements in a natural watercourse to protect upper riparian property). The trend of most jurisdictions is to apply the rule of reasonableness. *See* A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3.05[1] (1992). The rule of reasonableness adopted in *Keys* was first implemented by the New Jersey Supreme Court in Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956), a watercourse case, giving further support to the court's decision. *Locklin*, 7 Cal. 4th at 356-57, 867 P.2d at 742-43, 27 Cal. Rptr. 2d at 631-32.

17. The relevant factors include "the amount of harm caused, the foreseeability of the harm . . . , [and] the purpose or motive [of the actions]." *Id.* at 359, 867 P.2d at 744, 27 Cal. Rptr. 2d at 633 (quoting *Keys*, 64 Cal. 2d at 410, 412 P.2d at 537, 50 Cal. Rptr. at 281).

18. *Id.*

19. The civil law rule for natural watercourses "immunizes the upper riparian owner

property owner from liability.[20] By maintaining a certain level of immunity, society benefits because developers do not fear liability for damage to lower riparian property.[21]

The court concluded that the court of appeal erred in giving the defendants absolute immunity, but declined to overrule the decision based on insufficient evidence to establish unreasonable behavior by the defendants.[22]

Based on the court's decision regarding the natural watercourse rule, a governmental entity may be liable for its unreasonable actions which result in damages to lower riparian property caused by the discharge of surface water into a natural watercourse.[23]

Under Article I, section 19 of the California Constitution, the taking or damaging of private property for public use may only be accomplished where the government provides just compensation.[24] A private person may bring an inverse condemnation action[25] if the government does not compensate the taking of or damage to private property.[26]

In water law, however, a government may assert immunity from an inverse condemnation action if a private party receives immunity for the same action.[27] The government does not have an absolute privilege, but a conditional privilege, and will be held proportionately liable in an inverse condemnation action for unreasonable conduct in improving or altering a natural watercourse that substantially causes damage to ripar-

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for damage caused by the alteration of the natural discharge of surface water into a watercourse and by improvements in the stream bed." *Locklin*, 7 Cal. 4th at 360, 867 P.2d at 744, 27 Cal. Rptr. 2d at 633.

20. *Id.*

21. *Id.* at 367, 867 P.2d at 745, 27 Cal. Rptr. 2d at 634.

22. *Id.*

23. *Id.* at 361-62, 867 P.2d at 745, 27 Cal. Rptr. 2d at 634.

24. CAL. CONST. art I, § 19 (West 1983 & Supp. 1994). This article of the constitution was formerly Article I, Section 14.

25. For a general overview of inverse condemnation, see 29 CAL. JUR. 3D *Eminent Domain* §§ 302-340 (1986 & Supp. 1994).

26. *Locklin*, 7 Cal. 4th 362, 867 P.2d at 746, 27 Cal. Rptr. 2d at 635. The party in an inverse condemnation does not have to prove any negligence or tort by the government. Reardon v. City of San Francisco, 66 Cal. 492, 505, 6 P. 317, 325 (1885).

27. *Locklin*, 7 Cal. 4th at 362-63, 867 P.2d at 746, 27 Cal. Rptr. 2d at 635 (citing San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 406, 188 P. 559, 560 (1920) (stating that an injury *damnum absque injuria* [harm without injury] occurring between private persons will be treated the same as an injury occurring between a private party and a governmental entity)).

ian property.[28] To recover for damages the plaintiff must show the unreasonableness of the defendant's conduct with regard to the potential for downstream damage, the cost to avoid downstream damage, and the reasonable means available to protect the plaintiff's property.[29]

The court held that Reliez Creek was not converted to a public work,[30] that the City's, CalTrans', and BART's conduct were not a substantial cause of the property damage,[31] and that the County and District did not contribute to the increased runoff.[32] Therefore, the court ruled in favor of the defendants, noting that the plaintiffs failed to provide sufficient evidence of unreasonable conduct, or that the plaintiffs took reasonable steps to prevent the damage.[33]

The court concluded by holding that an unsuccessful plaintiff in an inverse condemnation action may be liable for costs.[34] A defendant property owner receives compensation for costs in defending an eminent domain action because an actual taking occurs, but in an unsuccessful

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28. *Id.* at 366, 867 P.2d at 749, 27 Cal. Rptr. 2d at 638. The court looked to a history of cases, and to the policy behind Article I, § 19, to form its decision on inverse condemnation. *See* Belair v. Riverside County Flood Control Dist., 47 Cal. 3d 550, 564-65, 764 P.2d 1070, 1078-79, 253 Cal. Rptr. 693, 701-02 (1988) (establishing the difference in treatment between private and public owners with regard to immunity for riparian property damage); Holtz v. Superior Court, 3 Cal. 3d 296, 306-07, 475 P.2d 441, 447-48, 90 Cal. Rptr. 345, 351-52 (1970) (noting that the *Archer* rule would consume the policy behind the right to inverse condemnation); Albers v. County of Los Angeles, 62 Cal. 2d 250, 263, 398 P.2d 129, 137, 42 Cal. Rptr. 89, 97 (1965) (recognizing that the policy behind Article I section 19 was to make no one person contribute more than his fair share to any public project); Archer v. City of Los Angeles, 19 Cal. 2d 19, 24, 119 P.2d 1, 4 (1941) (supporting immunity by stating that the California Constitution does not create a cause of action, but only provides for remedies for existing causes of action).

29. *Locklin*, 7 Cal. 4th at 366-67, 867 P.2d at 749, 27 Cal. Rptr. 2d at 638.

30. *Id.* at 370, 867 P.2d at 751, 27 Cal. Rptr. 2d at 640. To convert a natural watercourse into a public work, the governmental entity must exert control and maintain the watercourse. *Id.*

31. *Id.* at 371-72, 867 P.2d at 751-52, 27 Cal. Rptr. 2d at 640. The plaintiffs argued for joint and several liability, but the court noted that liability is proportional. *Id.* at 372, 867 P.2d at 752-53, 27 Cal. Rptr. 2d at 641-42; *see* Mehl v. People, 13 Cal. 3d 710, 718, 532 P.2d 489, 494, 119 Cal. Rptr. 625, 630 (1975) (noting that in an inverse condemnation action the plaintiff must prove proportionate liability to recover).

32. *Locklin*, 7 Cal. 4th at 373-74, 867 P.2d at 753-54, 27 Cal. Rptr. 2d at 642-43.

33. *Id.* at 372-74, 867 P.2d at 752-54, 27 Cal. Rptr. 2d at 641-43.

34. *Id.* at 375-77, 867 P.2d at 754-56, 27 Cal. Rptr. 2d at 643-45. The defendants to this action attempted to recover costs under §§ 1032 and 1038 of the California Civil Procedure Code. *Id.* at 375, 867 P.2d at 754, 27 Cal. Rptr. 2d at 643. A prevailing party may recover costs for any action or proceeding, unless an exception exists. *See* CAL. CIV. PROC. CODE § 1032 (West 1994). The trial court denied the award of costs, ruling that under Blau v. City of Los Angeles, 32 Cal. App. 3d 77, 107 Cal. Rptr. 727 (1973), no award of costs are allowed in inverse condemnation actions. *Locklin*, 7 Cal. 4th at 375, 867 P.2d at 754, 27 Cal. Rptr. 2d at 643.

inverse condemnation action no taking or damage award arises.[35] Therefore, a plaintiff, while bringing an action in good faith, must prove a taking or damage before being protected from liability for costs in an inverse condemnation action.[36]

B. Justice Mosk's Concurring Opinion

In a separate concurring opinion, Justice Mosk offered a clarification on the issue of inverse condemnation liability.[37] Because of the cost-spreading rationale of inverse condemnation, the holding by the majority signifies that public entities are responsible for "monitoring and mitigating the effects of cumulative development of streets and highways on downstream owners."[38] Justice Mosk noted that the term "reasonable mitigation" should be decided on a case by case basis.[39]

III. CONCLUSION

The California Supreme Court concluded that the natural watercourse rule and inverse condemnation actions involving water rights are both subject to a rule of reasonableness. The old law of absolute immunity, even though rationally based, gave too much latitude to upper riparian owners. The added rule of reasonableness to both tort and inverse condemnation actions does not inhibit those persons wishing to develop their property, but only promotes conscious development. Therefore, a balance between development and riparian rights for both upper and lower riparian landowners has developed.

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35. *Id.* at 375, 867 P.2d at 755, 27 Cal. Rptr. 2d at 644.
36. *Id.* at 377, 867 P.2d at 756, 27 Cal. Rptr. 2d at 645.
37. *Id.* at 378-79, 867 P.2d at 756-57, 27 Cal. Rptr. 2d at 645-46 (Mosk, J., concurring).
38. *Id.* at 378, 867 P.2d at 756, 27 Cal. Rptr. 2d at 645 (Mosk, J., concurring).
39. *Id.*

XIV. WORKERS COMPENSATION

Labor Code sections 3600 and 3602 of the Worker's Compensation Act do not bar an employee from maintaining a civil action against his employer for false imprisonment when the employer's intentional misconduct exceeds the proper role of the employment relationship: **Fermino v. Fedco.**

I. INTRODUCTION

In *Fermino v. Fedco*,[1] the California Supreme Court addressed whether Labor Code sections 3600 and 3602,[2] the exclusivity provisions of the Worker's Compensation Act, barred Julie Fermino from maintaining a civil action against her employer, Fedco, when she was accused of theft and falsely imprisoned by Fedco's security agents.[3] The supreme court reversed both the court of appeal and the trial court's decisions and clarified the treatment of an employer's intentional misconduct under the workers' compensation system.[4] In a unanimous opinion, the California

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1. 7 Cal. 4th 701, 872 P.2d 559, 30 Cal. Rptr. 2d 18 (1994). Justice Mosk delivered the unanimous opinion of the court, in which Chief Justice Lucas and Justices Kennard, Arabian, Baxter, George, and Klein joined.

2. California Labor Code § 3600(a) provides, in relevant part:

> Liability for the compensation provided by this division, in lieu of any other liability whatsoever . . . shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment . . . in those cases where the . . . conditions of compensation concur . . . .

CAL. LAB. CODE § 3600(a) (West 1989 & Supp. 1994).

Labor Code § 3602(a) provides, in pertinent part: "Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is . . . the sole and exclusive remedy of the employee . . . ." CAL. LAB. CODE § 3602(a) (West 1989 & Supp. 1994).

3. *Fermino*, 7 Cal. 4th at 706, 872 P.2d at 560, 30 Cal. Rptr. 2d at 20. Julie Fermino was a jewelry salesclerk at a Fedco department store. During Ms. Fermino's shift, the store's personnel manager requested that she accompany him to a windowless room where he and two other store security agents kept her for over an hour. They demanded that she confess to an alleged theft of $4.95, and did not release her, despite her repeated denials of guilt, until she broke down into tears. *Id.* at 706-07, 872 P.2d at 561, 30 Cal. Rptr. 2d at 20. Following this incident, Ms. Fermino filed a civil suit against Fedco for false imprisonment, claiming that Fedco's policy of employee interrogation exceeded the scope of a normal employment relationship. *Id.* at 707-08, 872 P.2d at 561, 30 Cal. Rptr. 2d at 20.

4. *Fermino*, 7 Cal. 4th at 708-09, 872 P.2d at 560, 30 Cal. Rptr. 2d at 21. The court recognized that the workers' compensation system should not provide the sole remedy to employees for certain types of employer misconduct. *Id.*; *see also* Shoemaker v. Myers, 52 Cal. 3d 1, 16, 801 P.2d 1054, 1063, 276 Cal. Rptr. 303, 312 (1990) (stating

Supreme Court held that an employee may maintain a civil action for false imprisonment against her employer since this intentional misconduct is beyond the scope of the workers' compensation system.[5]

II. TREATMENT

A. The Scope of the Workers' Compensation Exclusivity Statute

At issue was whether an employer's act of falsely imprisoning an employee constitutes an exception to the exclusivity provisions of the Workers' Compensation Act.[6] The court began its analysis by interpreting the "compensation bargain" embodied within the workers' compensation exclusivity statutes as a compromise requiring employers to assume liability for an employee's injuries sustained in the course of employment, in exchange for the employee's relinquishment of other remedial rights available in tort law.[7] The court acknowledged the ambiguity in both the relevant statutes and case law regarding whether the workers' compensation system excludes an employer's tortious acts against its employees as an exception to the exclusivity rules.[8] The court concluded that when an

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that the exclusive remedy provisions do not apply where the employer steps outside of a proper role in the business relationship); Cole v. Fair Oaks Fire Protection Dist., 43 Cal. 3d 148, 161, 729 P.2d 743, 751, 233 Cal. Rptr. 308, 316 (1987) (noting that recovery in tort is permissible for an employer's intentional misconduct). *See generally* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 53 (9th ed. 1987 & Supp. 1994) (discussing conduct normal in employment); 65 CAL. JUR. 3D *Work Injury Compensation* § 27 (1981 & Supp. 1994) (explaining rights to bring action for intentional injury exclusive of the Worker's Compensation Act); Stuart E. Frank, *California Supreme Court Survey*, 19 PEPP. L. REV. 310 (1991) (analyzing the treatment of wrongful termination claims under the exclusivity provisions); Joseph H. King, Jr., *The Exclusiveness of an Employer's Workers' Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405 (1988) (analyzing the exclusiveness rule and its exceptions).

5. *Fermino*, 7 Cal. 4th at 723, 872 P.2d at 572, 30 Cal. Rptr. 2d at 31; *see* CAL. LAB. CODE §§ 3600, 3602 (West 1989 & Supp. 1994).

6. *Fermino*, 7 Cal. 4th at 706, 872 P.2d at 560-61, 30 Cal. Rptr. 2d at 19.

7. *Id.* at 708, 872 P.2d at 561-62, 30 Cal. Rptr. 2d at 20; *see Cole*, 43 Cal. 3d at 158, 729 P.2d at 749, 233 Cal. Rptr. at 314 (defining the compensation bargain as employers assuming limited no fault liability in exchange for employees receiving compensation without the availability of additional tort damages).

8. *Fermino*, 7 Cal. 4th at 709-10, 872 P.2d at 562-63, 30 Cal. Rptr. 2d at 21-22; *see* Johns-Mansville Prods. Corp. v. Superior Court, 27 Cal. 3d 465, 473-74, 612 P.2d 948, 953-54, 165 Cal. Rptr. 858, 863 (1980) (holding that injuries resulting from an employer's intentional misconduct are compensable under Labor Code § 4553 because allowing employees to sue outside the workers' compensation system to recover for intentional torts frustrates the purpose of the system). *But see* Gantt v. Sentry Ins., 1

employer's conduct toward an employee steps out of the "proper role" of the employment relationship, the workers' compensation exclusivity statutes do not preclude an employee from maintaining a civil action against the employer.[9] The court indicated that restricting employees to recovering under the Workers' Compensation Act for an employer's misconduct exceeding the scope of the compensation bargain will not further the state's interest in eliminating employer conduct that violates public policy.[10]

B. False Imprisonment and the Proper Role Exception to the Worker's Compensation Act

1. Fedco's False Imprisonment of Fermino Exceeded the Conditions of the Compensation Bargain

The court interpreted the crime of false imprisonment as a violation of an individual's liberty and characterized the tort as the "intentional confinement of a person, without lawful privilege, for an appreciable length of time."[11] Examining the pleadings, the court found that Fermino stated a cause of action for false imprisonment because she pled that Fedco held her against her will and exceeded any privilege to briefly detain individuals suspected of theft.[12] In addition, the court noted that while an employer's intentional behavior alone may not be actionable outside the exclusivity provisions, an employer's intentional misconduct beyond the scope of a normal employment relationship provides an exception to the limited remedies available under the workers' compensation system.[13] Fedco not only exhibited malevolent behavior but also criminally

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Cal. 4th 1083, 1097, 824 P.2d 680, 692, 4 Cal. Rptr. 2d 874, 886 (1992) (permitting an employee to maintain a civil action outside workers' compensation system for employer misconduct).

9. *Fermino*, 7 Cal. 4th at 714-15, 872 P.2d at 566, 30 Cal. Rptr. 2d at 25. *See generally* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 40 (9th ed. & Supp. 1994) (discussing exceptions to the exclusive remedy provisions).

10. *Fermino*, 7 Cal. 4th at 715, 872 P.2d at 566, 30 Cal. Rptr. 2d at 25; *see Gantt*, 1 Cal. 4th at 1095, 824 P.2d at 688, 4 Cal. Rptr. at 882 (stating that employees are protected against employer actions that contravene fundamental state policy).

11. *Fermino*, 7 Cal. 4th at 715, 872 P.2d at 567, 30 Cal. Rptr. 2d at 26; *see* Molko v. Holy Spirit Ass'n., 46 Cal. 3d 1092, 1123, 762 P.2d 46, 63, 252 Cal. Rptr. 122, 134 (1988) (stating the elements necessary to establish the tort of false imprisonment). *See generally* CAL. PENAL CODE § 236 (West 1988 & Supp. 1994) (discussing criminal false imprisonment).

12. *Fermino*, 7 Cal. 4th at 723, 872 P.2d at 572, 30 Cal. Rptr. 2d at 31. *See generally* CAL. PENAL CODE § 490.5 (codifying the common law merchant's privilege to detain individuals suspected of theft).

13. *Fermino*, 7 Cal. 4th at 717-18, 872 P.2d at 568, 30 Cal. Rptr. 2d at 27.

deprived Fermino of her personal liberty.[14] Such employer conduct is outside the scope of the compensation bargain.[15]

2. Labor Code Section 3602 Does Not Constitute a Complete List of Exceptions to the Workers' Compensation Exclusivity Provisions

The court examined section 3602 and determined its relevancy within the workers' compensation exclusivity provisions.[16] The court discussed the legislative intent of section 3602, concluding that it only stated judicial expansions of specific types of employer conduct outside the compensation bargain, and did not act as a principal source for resolving ambiguities within the exclusivity provisions.[17] Although section 3602 describes judicially recognized exceptions to the exclusivity provisions, the 1982 amendments did not explicitly exclude employment-related false imprisonment claims.[18] The court reasoned that false imprisonment in the employment relationship had not been fully adjudicated, and that the amended statute could not anticipate future judicial developments.[19] Therefore, the court found that section 3602 did not explicitly address the treatment of false imprisonment in employment relationships.[20]

3. Legitimate Employer Objectives Do Not Justify an Employment-related False Imprisonment

Finally, the court dismissed Fedco's argument that the alleged false imprisonment served legitimate employer objectives, rejecting Fedco's implication that there may be certain "reasonable" false imprison-

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14. *Id.* at 718, 872 P.2d at 568, 30 Cal. Rptr. 2d at 27; *see* CAL. PENAL CODE § 236 (West 1988 & Supp. 1994).

15. *Fermino*, 7 Cal. 4th at 718, 872 P.2d at 568, 30 Cal. Rptr. 2d at 27.

16. *Id.* at 719-21, 872 P.2d at 569-70, 30 Cal. Rptr. 2d at 28-29.

17. *Id.* at 719-20, 872 P.2d at 569, 30 Cal. Rptr. 2d at 28-29. *See* CAL. LAB. CODE § 3602 (West 1989 & Supp. 1994).

18. *Fermino*, 7 Cal. 4th at 721, 872 P.2d at 570, 30 Cal. Rptr. 2d at 29.

19. *Id.* at 720-21, 872 P.2d at 570, 30 Cal. Rptr. 2d at 29. The 1982 amendments to California Labor Code § 3602 were intended to clarify court decisions involving the "dual capacity doctrine." The amendments expand the exceptions to the exclusivity provisions and recite other exceptions recognized by court decisions. *Id. See generally* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 50 (9th ed. 1987 & Supp. 1994) (discussing legislative curtailment of dual capacity doctrine); 65 CAL. JUR. 3D *Work Injury Compensation* § 25 (1981 & Supp. 1994) (discussing employer tort liability under the dual capacity doctrine).

20. *Fermino*, 7 Cal. 4th at 721, 872 P.2d at 570, 30 Cal. Rptr. 2d at 29.

ments.[21] The court explained that employers who falsely imprison employees exceed the reasonable limits of the employment relationship, despite an employer's initial legitimate purpose for employee detention.[22] The court concluded that for a claim to be actionable outside the workers' compensation system, an employee must demonstrate that her employer's conduct was a deliberate act anomalous to the employment relationship.[23]

III. IMPACT AND CONCLUSION

The California Supreme Court held that an employee may maintain a civil action for false imprisonment against her employer, despite the fact that the exclusivity statute of the Worker's Compensation Act does not specifically address the issue.[24] In cases where an employer's intentional misconduct criminally deprives an employee of her liberty, courts will likely find that the employee has a right to additional remedies outside the scope of the Worker's Compensation Act.[25] The *Fermino* court clarified the treatment of employers' intentional torts within the workers' compensation system by ruling that such conduct falls outside the compensation bargain.[26] In doing so, the court further defined the proper role exception of the exclusivity statute, thereby allowing employees to pursue additional remedies in civil actions when an employer's behavior exceeds the reasonable limitations of the employment relationship.[27]

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21. *Id.* at 721, 872 P.2d at 570-71, 30 Cal. Rptr. 2d at 29-30. The court stated, "[A] 'reasonable' false imprisonment is oxymoronic. False imprisonment is, by definition an unreasonable and indeed criminal confinement." *Id.*

22. *Id. See generally* CAL. PENAL CODE § 490.5 (West 1988 & Supp. 1994) (codifying common law merchant's privilege to detain individuals suspected of theft).

23. *Fermino*, 7 Cal. 4th at 721-22, 872 P.2d at 571, 30 Cal. Rptr. 2d at 30. However, the court has held that certain employer actions, such as demotions, promotions, criticisms of work practices, and frictions in negotiations over grievances are all within the compensation bargain. Cole v. Fair Oaks Fire Protection Dist., 43 Cal. 3d 148, 160, 729 P.2d 743, 750, 233 Cal. Rptr. 308, 315 (1987).

24. *Fermino*, 7 Cal. 4th at 723, 872 P.2d at 572, 30 Cal. Rptr. 2d at 31; *see* CAL. LAB. CODE §§ 3600, 3602 (West 1989 & Supp. 1994).

25. *Fermino*, 7 Cal. 4th at 723, 872 P.2d at 572, 30 Cal. Rptr. 2d at 31; *see* CAL. LAB. CODE §§ 3600, 3602 (West 1989 & Supp. 1994).

26. *Fermino*, 7 Cal. 4th at 723, 872 P.2d at 572, 30 Cal. Rptr. 2d at 31.

27. *Id. See* CAL. LAB. CODE §§ 3600, 3602 (West 1989 and Supp. 1994).