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California Supreme Court Survey July 1992 - December 1993

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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 recently 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. CIVIL PROCEDURE

The exemption criteria presented in the Freedom of Information Act bears no significance on the exemption of investigatory records from public disclosure under the California Public Records Act; and exemption status does not end with the completion of the investigation:
Williams v. Superior Court.

I. INTRODUCTION

In *Williams v. Superior Court*,[1] the California Supreme Court decided the issue of exemption status for public disclosure of law enforcement investigatory records under the California Public Records Act ("CPRA").[2] In interpreting the statute, the court focused on two main issues: whether to incorporate the Freedom of Information Act ("FOIA")[3] criteria when determining exemption status; and whether to limit the exemption status only to those files related to pending investigations.[4] The court ruled that the CPRA does not incorporate the FOIA criteria,[5] and that the exemption status does not end with the completion of an investigation.[6]

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1. 5 Cal. 4th 337, 852 P.2d 377, 19 Cal. Rptr. 2d 882 (1993). Justice Panelli delivered the unanimous opinion of the court, joined by Chief Justice Lucas and Justices Mosk, Kennard, Arabian, Baxter, and George.

2. *Id.* at 341, 852 P.2d at 378-79, 19 Cal. Rptr. 2d at 883-84; *see* CAL. GOV'T CODE §§ 6250-65 (West 1980 & Supp. 1994) (giving statutory authority for inspection of public records, subject to specific exemptions noted within the statute). For a general overview of the purpose and workings of the CPRA, see 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Witnesses* §§ 1249-53 (3d ed. 1986 & Supp. 1993) (discussing the nature and purpose of the CPRA); 55 CAL. JUR. 3D, *Records and Recording Laws* §§ 6-9 (1980 & Supp. 1993) (discussing inspection of public records).

3. 5 U.S.C. § 552 (1988). The FOIA is the federal counterpart to the CPRA, but it sets out different criteria for the exemption status of records. The criteria are discussed *infra* note 17. For a list of cases applying the FOIA, *see* 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Witnesses* § 1261 (3d ed. 1986 & Supp. 1994) (discussing the Federal Freedom of Information Act).

4. *Williams*, 5 Cal. 4th at 345-46, 852 P.2d at 382, 19 Cal. Rptr. 2d at 887.

5. *Id.* at 348, 852 P.2d at 383, 19 Cal. Rptr. 2d at 888.

6. *Id.* at 355, 852 P.2d at 388, 19 Cal. Rptr. 2d at 893. *See* CAL. GOV'T CODE §§ 6250-65 (West 1980 & Supp. 1994).

The issue before the court arose from a dispute over the Daily Press', (real party in interest), request for disclosure of investigatory files compiled by the Sheriff of San Bernadino County ("the Sheriff") concerning alleged police brutality.[7] The Sheriff refused to disclose the investigatory records citing overriding "privacy interests."[8] Adhering to statutory procedures, the Daily Press petitioned the superior court for review of the Sheriff's refusal to disclose the records.[9] The court then issued an order to show cause directing the Sheriff to disclose the records or turn them over to the court for an in camera review.[10] Despite the order to show cause, the Sheriff continued to refuse to disclose the records, citing section 6254(f) of the California Government Code[11] in making the argument that a specific exemption exists for the investigatory records.[12]

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7. *Williams*, 5 Cal. 4th at 341, 852 P.2d at 379, 19 Cal. Rptr. 2d at 884. In 1990, the Sheriff investigated an alleged beating of a civilian by two deputies. *Id.* Initially, the Sheriff claimed exempt status under the California Penal Code §§ 832.5, 832.7, arguing that the files were "peace officer personnel records" not to be disclosed in any criminal or civil proceeding. *Id.* at 341-42, 852 P.2d at 379, 19 Cal. Rptr. 2d at 884. *See* CAL. PENAL CODE §§ 832.5 & 832.7 (West 1985) (stating that peace officer personnel records are not subject to disclosure in civil or criminal proceedings unless pursuant to a motion).

8. *Williams*, 5 Cal. 4th at 342, 852 P.2d at 379, 19 Cal. Rptr. 2d at 884. The Sheriff later relied on the CPRA when he argued that the investigatory files were protected from disclosure because they contained private information concerning the deputies. *Id.* California Government Code § 6254(c) authorizes the withholding of records when disclosure "would constitute an unwarranted invasion of personal privacy." CAL. GOV'T CODE § 6254(c) (West 1980 & Supp. 1994).

9. *Williams*, 5 Cal. 4th at 342, 852 P.2d at 379, 19 Cal. Rptr. 2d at 884. The relevant code section of the CPRA states that "[a]ny person may institute proceedings . . . in any court of competent jurisdiction to enforce his right to inspect . . . any public record . . . under [the CPRA]." CAL. GOV'T CODE § 6258 (West 1980 & Supp. 1994); *see* 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Witnesses* § 1253 (3d ed. 1986 & Supp. 1993)(discussing the available court proceedings to obtain disclosure of public records).

10. *Williams*, 5 Cal. 4th at 342, 852 P.2d at 380, 19 Cal. Rptr. 2d at 885. Pursuant to California Government Code § 6259, if the superior court, based upon a petition, believes that investigatory records are improperly withheld, it has the authority to compel disclosure for an in camera review. CAL. GOV'T CODE § 6259 (West 1980 & Supp. 1994); *see* 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Witnesses* § 1259 (3d ed. 1986 & Supp. 1994)(discussing in camera review when claiming an exemption).

11. California Government Code § 6254(f), hereinafter subdivision (f), exempts from disclosure:

> [r]ecords of complaints to, or investigations conducted by . . . any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes . . . .

CAL. GOV'T CODE § 6254(f) (West 1980 & Supp. 1994).

12. *Williams*, 5 Cal. 4th at 343, 852 P.2d at 380, 19 Cal. Rptr. 2d at 885. The Sher-

The superior court rejected the Sheriff's argument and again ordered disclosure of the records, thereby prompting the Sheriff to petition the court of appeal for a writ of mandate to vacate the superior court's disclosure order.[13] The court of appeal denied the petition, and on remand, the superior court ordered the disclosure of the requested records for an in camera review.[14] After the superior court's grant of disclosure, the Sheriff once again unsuccessfully petitioned the court of appeal for a writ of mandate, whereby the supreme court granted review and directed the court of appeal to issue an alternative writ.[15]

The court of appeal then vacated the disclosure order and issued a new standard for the superior court to follow when interpreting the exemption status of investigating records under the CPRA.[16] First, the court of appeal utilized the FOIA criteria in determining the exemption status of law enforcement investigatory records under the CPRA.[17] In addition, the court of appeal pronounced that the exempt status of inves-

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iff claimed that § 6259, authorizing an in camera review of the records, does not apply to records specifically exempted from disclosure under the CPRA. *Id.* For an overview of all relevant exemptions to the CPRA, see 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Witnesses* §§ 1245-58 (3d ed. 1986 & Supp. 1994)(discussing exceptions and scope of the CPRA).

13. *Williams*, 5 Cal. 4th at 344, 852 P.2d at 381, 19 Cal. Rptr. 2d at 886.

14. *Id.* The superior court separated the documents into administrative investigatory and criminal investigatory files, and granted disclosure of certain records. *Id.* at 344-45, 852 P.2d at 381, 19 Cal. Rptr. 2d at 886.

15. *Id.* at 345, 852 P.2d at 381, 19 Cal. Rptr. 2d at 886. The supreme court stayed the order of disclosure while the court of appeal issued the alternative writ. *Id.*

16. *Id.* at 345-46, 852 P.2d at 382, 19 Cal. Rptr. 2d at 887. The court of appeal ordered the superior court to conduct another in camera review consistent with the opinion expounded by the court. *Id.*

17. *Id.* 5 U.S.C. § 552(b)(7) exempts from disclosure those records compiled for law enforcement purposes in which disclosure:

> (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial, (C) could reasonably be expected to constitute an unwarranted invasion of privacy, (D) could reasonably be expected to disclose the identity of a confidential source . . . (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of an individual . . . .

5 U.S.C. § 552(b)(7) (1988). With these criteria in effect, the records in question would not be exempt from disclosure. *Williams*, 5 Cal. 4th at 346, 852 P.2d at 382, 19 Cal. Rptr. 2d at 887.

tigatory records is limited to the duration of the investigation.[18] With both of these standards implemented, the records in question would not be considered exempt, and thus, the Sheriff petitioned the supreme court for review.[19]

II. TREATMENT

The supreme court granted review to analyze the court of appeal's interpretation of subdivision (f).[20] The court emphasized that the court of appeal's decision to incorporate the FOIA criteria into the CPRA, and to limit the investigatory file exemption to pending investigations, must be carefully reviewed.[21] The court separated the analysis into two distinct discussions.

A. Incorporation of the FOIA Criteria into the CPRA

First, the court addressed the issue regarding the propriety of incorporating the FOIA criteria into the CPRA when determining exemption status of certain public records.[22] The court focused on the legislative intent, as articulated in the language of the statute, to assert that the FOIA criteria[23] should not be incorporated into subdivision (f).[24] The court noted that the language in subdivision (f) clearly allows for nondisclosure of certain records, but also provides for the disclosure of certain information contained in those records.[25] Because the additional criteria

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18. *Williams*, 5 Cal. 4th at 346, 852 P.2d at 382, 19 Cal. Rptr. 2d at 887.

19. *Id.*

20. *Id. See* CAL. GOV'T CODE § 6254(f) (West 1980 & Supp. 1994).

21. *Williams*, 5 Cal. 4th at 347, 852 P.2d at 383, 19 Cal. Rptr. 2d at 888. The supreme court observed that other claims advanced by both the Sheriff and the Daily Press were not discussed before the superior court and the court of appeal, therefore, the supreme court dismissed those claims from review. *Id.* at 347-48, 852 P.2d at 383, 19 Cal. Rptr. 2d at 888.

22. *Id.* at 348-54, 852 P.2d at 383-88, 19 Cal. Rptr. 2d at 888-93.

23. *See supra* note 17.

24. *Williams*, 5 Cal. 4th at 350, 852 P.2d at 385, 19 Cal. Rptr. 2d at 890.

25. *Id.* at 349-50, 852 P.2d at 384-85, 19 Cal. Rptr. 2d at 889-90. Subdivision (f) provides for exemption of law enforcement investigatory records, but requires disclosure of certain information in those records. However, mandatory disclosure is subject to a withholding of information if the disclosure would endanger the safety of a witness or other person involved in the investigation, endanger the successful completion of the investigation, or contains the analysis or conclusions of the investigating officers. *See* CAL. GOV'T CODE § 6254(f) (West 1980). *See also* City of Santa Rosa v. Press Democrat, 187 Cal. App. 3d 1315, 1321, 232 Cal. Rptr. 445, 448 (1986)(noting that the amendments to subdivision (f) in 1982 provided for public access to information contained in records otherwise exempt from disclosure).

set out in the FOIA are not found within the language of the CPRA, the court concluded is that the legislature did not intend to further limit the exemption of investigatory records.[26] The court further noted that incorporating the FOIA criteria would contradict the language in subdivision (f) and force the disclosure of certain records that would otherwise be protected under the CPRA.[27] In addition, the court stated that the CPRA adequately addresses the concerns voiced by the FOIA within the plain language of the statute.[28] Based on these conclusions, the court proclaimed that the legislature did not intend to limit exemption status to records satisfying the FOIA criteria.[29]

The court of appeal in *Williams* based its decision to incorporate the FOIA criteria into the CPRA on a single lower court decision,[30] *South Coast Newspapers, Inc. v. City of Oceanside*.[31] In *South Coast*, the court misinterpreted the language set forth in *American Civil Liberties Union Foundation v. Deukmejian*,[32] where the California Supreme

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26. *Williams*, 5 Cal. 4th at 350, 852 P.2d at 385, 19 Cal. Rptr. 2d at 890.

27. *See supra* note 17, for the FOIA criteria, discussed in 5 U.S.C. § 552(b)(7).

28. *Williams*, 5 Cal. 4th at 350, 852 P.2d at 385, 19 Cal. Rptr. 2d at 890. California Government Code § 6254(c) addresses the FOIA concerns over an "unwarranted invasion of personal privacy." *Id. See* CAL. GOV'T CODE § 6254(c) (West Supp. 1994) (providing exemption status for files the disclosure of which would constitute an "unwarranted invasion of personal privacy"); 5 U.S.C. § 552(b)(7)(C) (1982). Subdivision (f) specifically addresses the concern voiced in the FOIA regarding the protection of "the identity of a confidential source," the protection of information that "could reasonably be expected to endanger the life or physical safety of any individual," and the protection for information that could reasonably be expected to cause "interfere[nce] with enforcement proceedings." *Williams*, 5 Cal. 4th at 350-51, 852 P.2d at 385, 19 Cal. Rptr. 2d at 890 (citing 5 U.S.C. §§ 552(b)(7)(A), (D), & (F) (1982)); *see* CAL. GOV'T CODE § 6254(f) (West Supp. 1994)(providing exemption status for records containing information regarding "confidential informants," for records of which disclosure "would endanger the safety of a witness or other person involved in the investigation," and for records of which disclosure would "endanger the successful completion of the investigation").

Additionally, the court noted that § 6254(b) of the California Government Code covers the FOIA concern over the protection of the right to a fair trial. *Williams*, 5 Cal. 4th at 351 n.10, 852 P.2d at 385 n.10, 19 Cal. Rptr. 2d at 890 n.10. *See* 5 U.S.C. § 552(b)(7)(B) (1982); CAL. GOV'T CODE § 6254(b) (West Supp. 1994) (providing an exemption for "[r]ecords pertaining to pending litigation . . . until the pending litigation or claim has been finally adjudicated or otherwise settled").

29. *Williams*, 5 Cal. 4th at 348, 852 P.2d at 383, 19 Cal. Rptr. 2d at 888.

30. *Id.* at 351, 852 P.2d at 386, 19 Cal. Rptr. 2d at 891.

31. 160 Cal. App. 3d 261, 268, 206 Cal. Rptr. 527, 531 (1984) (concluding that subdivision (f) is subject to the criteria set forth in the FOIA).

32. 32 Cal. 3d 440, 651 P.2d 822, 186 Cal. Rptr. 235 (1982).

Court stated that the FOIA and CPRA "should receive a parallel construction."[33] The California Supreme Court in *Williams* distinguished *American Civil Liberties Union* by explaining that the FOIA criteria was only used to determine the meaning of a term in the CPRA not determinable from the language in the statute.[34] The court, however, emphasized that it had not intended to incorporate the exemption criteria of the FOIA into the CPRA when it stated that the two statutes should be given "parallel construction."[35]

Additionally, the court noted that Congress enacted the FOIA criteria to correct the misconception of an absolute exemption for all law enforcement investigatory files; a misconception that did not exist in California.[36] On the contrary, the California Legislature specifically provided for the disclosure of information contained in otherwise exempt records as opposed to implementing the exemption criteria.[37] Therefore, the court maintained that the legislature's effort to provide access to information while keeping certain records exempt would be negated by incorporating the FOIA criteria into the CPRA.[38]

B. *Termination of Exemption Upon the Completion of an Investigation*

The court next turned to the issue regarding the duration of the exemption status for the disclosure of investigatory files.[39] While the court

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33. *Williams*, 5 Cal. 4th at 351, 852 P.2d at 386, 19 Cal. Rptr. 2d at 891 (quoting American Civil Liberties Union Foundation v. Deukmejian, 32 Cal. 3d 440, 451, 651 P.2d 822, 828, 186 Cal. Rptr. 235, 241 (1982)).

34. *Id.* at 351-52, 852 P.2d at 386, 19 Cal. Rptr. 2d at 891. The court stressed that solely because the term "intelligence information" was not defined in subdivision (f), it turned to the FOIA to give meaning to the words. *Id.* (citing American Civil Liberties Union Foundation v. Deukmejian, 32 Cal. 3d 440, 449, 651 P.2d 822, 827, 186 Cal. Rptr. 235, 240 (1982)).

35. *Id.* at 352, 852 P.2d at 386, 19 Cal. Rptr. 2d at 891.

36. *Id.* at 353, 852 P.2d at 387, 19 Cal. Rptr. 2d at 892.

37. *Id.*

38. *Id.* at 353-54, 852 P.2d at 387, 19 Cal. Rptr. 2d at 892. The court emphasized that a court should not interpret a statute in a way which will render much of the language useless. *Id.* at 354, 852 P.2d at 387, 19 Cal. Rptr. 2d at 892.

39. *Id.* at 354-62, 852 P.2d at 388-93, 19 Cal. Rptr. 2d at 893-98. The Daily Press argued that the exemption only continues for the duration of the investigation, while the Sheriff argued that no time limitation exists. *Id.* at 355, 852 P.2d at 388, 19 Cal. Rptr. 2d at 893. The court noted the interest in keeping investigatory files exempt from disclosure. *Id.* at 355-56, 852 P.2d at 388-89, 19 Cal. Rptr. 2d at 893-94. For a discussion of the scope of the investigatory file exemption, see Uribe v. Howie, 19 Cal. App. 3d 194, 212-13, 96 Cal. Rptr. 493, 504-05 (1971) (noting that subdivision (f) does not shield a record from disclosure just because it is contained in an investigatory file). *See also* Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 654, 117 Cal. Rptr. 106, 111 (1974)(declaring that information in investigatory files becomes exempt

of appeal addressed the issue in a cursory ruling, the supreme court affirmatively rejected that holding.[40] Once again, the court turned to the legislative intent to determine whether the exemption status for investigatory records ceased with the end of an investigation.[41] The court first relied on the language of the statute to determine the duration of the investigatory file exemption.[42] The court noted that if the legislature intended to limit the exemption to files of pending investigations, they would have done so with specific statutory language.[43] In addition, the court noted that any time limitation would contradict the specific language of subdivision (f).[44]

The court next rejected the argument that the federal rule limiting the exemption to pending investigations should be applied in California.[45] The Daily Press argued that, through *American Civil Liberties Union*,[46] the court adopted the *Bristol-Myers* doctrine for the construction of the CPRA in California.[47] The court dispelled this argument by stating that instead of adopting the dicta espoused in *Bristol-Myers*, only the limited holding of *Bristol-Myers* was adopted.[48] In addition, the court emphasized that Congress, rather than the *Bristol-Myers* case, had determined the scope of the exemption status.[49] The California Legislature decided

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only when "the prospect of enforcement proceedings [becomes] concrete and definite").

40. *Williams*, 5 Cal. 4th at 361, 852 P.2d at 393, 19 Cal. Rptr. 2d at 898.

41. *Id.* at 357, 852 P.2d at 390, 19 Cal. Rptr. 2d at 895.

42. *Id.*

43. *Id.* The court reasoned that a file compiled for law enforcement purposes continues to meet the statutory definition after the completion of an investigation. *Id.*

44. *Id.* The access to information in exempted investigatory files does not apply when the disclosure will endanger the safety of a person in an investigation or will inhibit the successful completion of a related investigation. *See* CAL. GOV'T CODE § 6254(f) (West Supp. 1994). Therefore, imposing a time limitation would effectively contravene the language in the statute, nullifying its effect. *Williams*, 5 Cal. 4th at 357, 852 P.2d at 390, 19 Cal. Rptr. 2d at 895. Under the California Code of Civil Procedure § 1858, a court may not interpret a statute in a way so as to nullify its language. CAL. CIV. PROC. CODE § 1858 (Supp. 1994).

45. *Williams*, 5 Cal. 4th at 358-61, 852 P.2d at 391-93, 19 Cal. Rptr. 2d at 896-98. Bristol-Myers Co. v. Federal Trade Comm'n, first espoused the federal view, in dicta, that the investigatory file exemption lasts only until the end of an investigation. 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

46. 32 Cal. 3d 440, 651 P.2d 822, 186 Cal. Rptr. 235 (1982).

47. *Williams*, 5 Cal. 4th at 358, 852 P.2d at 391, 19 Cal. Rptr. 2d at 896.

48. *Id.* The court adopted the limited holding that investigatory files only exist with the prospect of enforcement proceedings. *Id.*

49. *Id.* at 359, 852 P.2d at 391, 19 Cal. Rptr. 2d at 896. Through the enactment of

to adopt the CPRA which sets out different exemption criteria than that enacted by Congress under the FOIA which the CPRA did not incorporate.[50] Thus, the language in the CPRA controls the duration of the exemption, not *Bristol-Myers* or the FOIA, and the statute has no "pending investigation" limitation.

III. CONCLUSION

In *Williams v. Superior Court*, the court addressed interpretation questions relating to the exemptions available under the California Public Records Act. The court concluded that in interpreting the CPRA, a court may not use the criteria set forth in the Federal Freedom of Information Act to determine the exemption status of investigatory records.[51] In addition, the court concluded that exemption status under the CPRA does not end with the termination of an investigation.[52]

In recent years, courts have used the Freedom of Information Act to interpret the CPRA because of their similar goals.[53] The holding in this case disapproves of any further use of the Freedom of Information Act for interpretive purposes, but permits use of the federal act to elicit the meaning of certain common terms in the acts.[54] In addition, any change limiting the exemption status to pending investigations must come from the legislature.[55] It is unlikely that any changes will be implemented due

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the FOIA, investigatory files are not exempt unless they meet one of six criteria. *See supra* note 17. For example, if disclosure "interfere[s] with enforcement proceedings," the FOIA allows exemption of investigatory files. 5 U.S.C. § 552(b)(7)(A) (1982). This criteria essentially limits the exemption status to pending investigations because, upon termination of an investigation, the possibility of interference with disclosure of files ceases to exist. *Williams*, 5 Cal. 4th at 360, 852 P.2d at 392, 19 Cal. Rptr. 2d at 897.

50. *Williams*, 5 Cal. 4th at 360-61, 852 P.2d at 392, 19 Cal. Rptr. 2d at 897. California adopted a statute allowing for the disclosure of information in investigatory files in lieu of the records themselves. *Id. See also* CAL. GOV'T CODE § 6254(f) (West Supp. 1994). The court noted that it cannot change the exemption status, because it must follow the language of the statute. *Williams*, 5 Cal. 4th at 361, 852 P.2d at 393, 19 Cal. Rptr. 2d at 898.

51. *Williams*, 5 Cal. 4th at 352, 852 P.2d at 387, 19 Cal. Rptr. 2d at 892. *See supra* notes 20-38 and accompanying text.

52. *Id.* at 361-62, 852 P.2d at 393, 19 Cal. Rptr. 2d at 898. *See supra* notes 39-50 and accompanying text.

53. 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Witnesses* § 1256 (3d ed. 1986 & Supp. 1993)(discussing the application of California Government Code § 6254(f)). It appears that even Witkin has misinterpreted the law by incorporating the FOIA criteria into the exemption. *See id.*

54. *Williams*, 5 Cal. 4th at 352, 852 P.2d at 386, 19 Cal. Rptr. 2d at 891. *See supra* notes 33-35 and accompanying text.

55. *Id.* at 361, 852 P.2d at 393, 19 Cal. Rptr. 2d at 898. *See supra* note 50.

to the broad range of information rules contained within the current statute.[56]

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56. *See* CAL. GOV'T CODE §§ 6250-6265 (West 1980 & Supp. 1994).

II. CONTRACT LAW

Under Business and Professions Code section 16602, agreements between law partners requiring withdrawing partners to relinquish certain contractual withdrawal benefits if they compete against the former law firm are enforceable: **Howard v. Babcock.**

I. INTRODUCTION

In *Howard v. Babcock*,[1] the California Supreme Court considered whether Business and Professions Code section 16602[2] permits a partnership agreement between lawyers of the same law firm that penalizes withdrawing partners in denying recovery of withdrawal benefits.[3] The court held that such an agreement was, as a matter of public policy, valid and enforceable to the extent that the agreement was reasonable.[4]

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1. 6 Cal. 4th 409, 863 P.2d 150, 25 Cal. Rptr. 2d 80 (1993). Justice Mosk authored the majority opinion, in which Chief Justice Lucas, Justices Panelli, Arabian, Baxter, and George concurred. Justice Kennard wrote a dissenting opinion. *Id.* at 426-34, 863 P.2d at 161-66, 25 Cal. Rptr. 2d at 91-96.

2. California Business & Professions Code § 16602 states in relevant part:

> Any partner may, upon or in anticipation of a dissolution of the partnership, agree that he will not carry on a similar business within a specified county or counties, city or cities, or a part thereof, where the partnership business has been transacted, so long as any other member of the partnership, or any person deriving title to the business or its goodwill from any such other member of the partnership, carries on a like business therein.

CAL. BUS. & PROF. CODE, § 16602 (West 1987).

3. *Howard*, 6 Cal. 4th at 412, 863 P.2d at 151, 25 Cal. Rptr. 2d at 81.

The California Supreme Court granted review to answer the narrow question of whether such an agreement was enforceable. *Id.* at 426, n.9, 863 P.2d at 161, n.9, 25 Cal. Rptr. 2d at 91, n.9. The plaintiffs appealed from the trial court judgment for the defendants which held the agreement enforceable. Id. at 415, 863 P.2d at 153, 25 Cal. Rptr. 2d at 83. The court of appeal determined that the disputed portion of the agreement was void, holding that the Rules of Professional Conduct ban such agreements. Howard v. Babcock, 18 Cal. App. 4th, 7 Cal. Rptr. 2d 687. The California Supreme Court reversed, holding the agreement enforceable and consistent with the Rules of Professional Conduct. *Howard*, 6 Cal. 4th at 412, 863 P.2d at 151, 25 Cal. Rptr. 2d at 81. The remaining judgment of the court of appeal was affirmed. *Id.* at 426, 863 P.2d at 161, 25 Cal. Rptr. 2d at 153.

4. *Howard*, 6 Cal. 4th at 425, 863 P.2d at 160, 25 Cal. Rptr. 2d at 90. *See generally* 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 570 (1987 & Supp. 1993). Section 16602 formerly allowed anticipatory partnership dissolution agreements which precluded competition against one another within the city or town where the business was located. Currently, § 16602 has been expanded to include more than one city or county. CAL. BUS. & PROF. CODE § 16602 (West 1987).

The four plaintiffs in this case were former partners of a law firm who, as general partners, were subject to a partnership agreement.[5] The agreement provided that if more than one partner withdrew and competed with the firm, the withdrawing partners would forfeit their existing withdrawal benefits in certain instances.[6] The plaintiffs here established a partnership in competition with the defendants, taking with them approximately 200 clients from the original firm.[7] While the defendants compensated the plaintiffs for their portion of the firm's capital, the defendants refused to tender payment of the withdrawal benefits under the partnership agreement.[8] The plaintiffs subsequently filed suit against the defendants seeking an accounting of the capital structure of the firm and the respective profits attributable to each party.[9]

II. TREATMENT OF THE CASE

A. *The Majority Opinion*

The majority began its analysis by noting that section 16602 provides a firm foundation for the regulation of competition between withdrawing partners within a restricted geographical area.[10] The majority stressed

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5. *Howard*, 6 Cal. 4th at 412, 863 P.2d at 151, 25 Cal. Rptr. 2d at 81.

6. *Id.* The relevant portion of the agreement states that:

> [s]hould more than one partner, associate or individual withdraw from the firm prior to age sixty-five (65) and thereafter within a period of one year practice law . . . together or in combination with others, including former partners or associates of this firm, in a practice engaged in the handling of liability insurance defense work as aforesaid within the Los Angeles or Orange County Court system, said partner or partners shall be subject, at the sole discretion of the remaining non-withdrawing partners to forfeiture of all their rights to withdrawal benefits other than capital as provided for in Article V herein.

Id. Three of the four plaintiffs had signed the partnership agreements containing these terms. *Id.* at 412-13, 863 P.2d at 151-52, 25 Cal. Rptr. 2d at 82-83.

7. *Id.* at 413, 863 P.2d at 152, 25 Cal. Rptr. 2d at 82.

8. *Id.* at 413-14, 863 P.2d at 152-53, 25 Cal. Rptr. 2d at 82-83.

9. *Id.* at 413, 863 P.2d at 152, 25 Cal. Rptr. 2d at 82. In addition, the plaintiffs sought determination that the partnership agreement was not binding, or alternatively, that the withdrawal provisions were void. *Id.*

10. *Id.* at 416, 863 P.2d at 154, 25 Cal. Rptr. 2d at 84. *See generally* 44 CAL. JUR. 3D *Monopolies* § 9 (1978 & Supp. 1993). "At common law a restriction as to the territory in which one could engage in a competing business, trade, or profession was enforced if it was deemed reasonable . . . ." *Id.*

that although section 16602 may restrain competition between partners, all such agreements must be reasonable in order to be valid.[11]

The court reasoned that although section 16602 had not yet been applied to the legal profession, the legislature did not intend to create an exception for lawyers.[12] Therefore, the court concluded that section 16602 was applicable to partners in law firms.[13]

The court next addressed whether an agreement which penalizes law partners who withdraw from a law firm is consistent[14] with the Rules of Professional Conduct.[15] In its analysis, the court agreed with *Haight*,

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11. *Howard*, 6 Cal. 4th at 416, 863 P.2d at 154, 25 Cal. Rptr. 2d at 84. The court stated that the common law "rule of reason" test should be used in evaluating whether the agreement was permissible under § 16602. *Id. See* Swenson v. File, 3 Cal. 3d 389, 396, 475 P.2d 852, 857, 90 Cal. Rptr. 580, 585 (1970) (noting that the legislature intended that the common law test of reasonableness be applied to § 16602). "At common law, a restraint against competition was valid to the extent reasonably necessary for the protection of the covenantee." *Id. See also* Farthing v. San Mateo Clinic, 143 Cal. App. 2d 385, 392, 299 P.2d 977, 982 (1956) (holding that in a covenant for breach of partnership agreement, liquidated damages must result from a reasonable estimate of the loss that might be sustained by the promisee and must have a reasonable relation to the loss).

12. *Howard*, 6 Cal. 4th at 417-18, 863 P.2d at 155, 25 Cal. Rptr. 2d at 85. The court found no ambiguity in the terms of the statute, and therefore, determined that the statute applies to the legal profession as well as other professions. *Id.* (citing Morse v. Municipal Court, 13 Cal. 3d 149, 156, 529 P.2d 46, 50, 118 Cal. Rptr. 14, 18 (1974)).

13. *Id. See generally* 44 CAL. JUR. 3D *Monopolies* § 14 (1978 & Supp. 1993) (noting that "[t]he Business and Professions Code provides that any partner may, in anticipation of or on dissolution of partnership, agree that he will not carry on a similar business within a specified county or counties . . . ."). *See also* 58 C.J.S. *Monopolies* § 47 (1948 & Supp. 1993).

> It has also been held that a contract between private corporations . . . which does not require either wholly to refrain from engaging in the business for which it was organized, but allows each to engage in the business without restriction, except within designated territory . . . is not objectionable as being in restraint of trade or as creating a monopoly.

Id.

14. *Howard*, 6 Cal. 4th at 418, 863 P.2d at 155, 25 Cal. Rptr. 2d at 85. The court noted that it maintains the authority to prescribe a higher standard of conduct for attorneys than the standards applicable to other professionals. *Id. See* CAL. BUS. & PROF. CODE, § 6076 (West 1990). "With the approval of the Supreme Court, the Board of Governors may formulate and enforce rules of professional conduct for all members of the bar in the State." *Id. See generally* Emslie v. State Bar, 11 Cal. 3d 210, 224-25, 520 P.2d 991, 998-99, 113 Cal. Rptr. 175, 181 (1974) (noting that the supreme court retains the power to exercise control over disciplinary proceedings); Friday v. State Bar, 23 Cal. 2d 501, 506, 144 P.2d 564, 567 (1943) (noting that the supreme court has the power to approve state bar regulations concerning professional conduct).

15. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1-500 (1988). The relevant portion of the rule states:

Brown & Bonesteel v. Superior Court[16] holding that law partnership agreements which require the withdrawing partners to pay a reasonable cost for competing with the firm were consistent with the Rules of Professional Conduct.[17] In finding *Haight* consistent with section 16602,[18] the California Supreme Court recognized the urgent need for law firms to protect their interests as business enterprises.[19] The court further emphasized that such economic interests have grown more precarious in recent times, thus requiring further protection to safeguard their existence.[20] The court reasoned that the increased mobility of lawyers who take valuable clients with them necessitates additional protection for firms that are unable to absorb substantial losses.[21]

> A member shall not be a party to or participate in offering or making an agreement . . . if the agreement restricts the right of a member to practice law, except that this rule shall not prohibit such an agreement which:
>
> (1) Is a part of an employment, shareholders', or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship . . . .

Id.

16. 234 Cal. App. 3d 963, 285 Cal. Rptr. 845 (1991).

17. *Howard*, 6 Cal. 4th at 419, 863 P.2d at 156, 25 Cal. Rptr. 2d at 86. In *Haight*, several departing members of a law firm signed a partnership agreement waiving the right to represent clients previously represented by the firm and forfeiting certain economic rights upon withdrawal. *Haight, Brown & Bonesteel*, 234 Cal. App. 3d at 966-67, 285 Cal. Rptr. at 846-47. The court determined that the agreement was not inconsistent with rule 1-500 in that it permitted withdrawing partners to leave the firm and practice elsewhere, while simultaneously allowing the law firm to maintain its stability. *Id.* at 969-70, 285 Cal. Rptr. at 848. In addition, by keeping the withdrawing partner's share of capital, the firm is compensated for any loss of business it may incur from clients leaving to follow a departing lawyer. *Id.* The majority in *Howard* adopted this construction. *Howard*, 6 Cal. 4th at 419-20, 863 P.2d at 156, 25 Cal. Rptr. 2d at 86.

18. *Id.* at 420, 863 P.2d at 156, 25 Cal. Rptr. 2d at 86. See 44 CAL. JUR. 3D *Monopolies & Restraints of Trade* § 25 (Supp. 1993). "Although attorneys in California cannot enter in to agreements restricting an attorney's right to practice (Rules Prof. Conduct, rule 1-500), attorneys are not prohibited from entering into noncompetition agreements to the extent other professionals can." *Id.*

19. *Howard*, 6 Cal. 4th at 420-21, 863 P.2d 156-57, 25 Cal. Rptr. 2d at 86-87.

20. *Id.* "'The traditional view of the law firm as a stable institution with an assured future is now challenged by an awareness that even the largest and most prestigious firms are fragile economic units . . . .'" *Id.* (quoting ROBERT W. HILLMAN, LAW FIRM BREAKUPS § 1.1, at 1 (1990)).

21. *Id.* at 421, 863 P.2d. at 157, 25 Cal. Rptr. 2d at 87. "Recognizing these sweeping changes in the practice of law, we can see no legal justification for treating partners in law firms differently in this respect from partners in other businesses and professions." *Id.*

The court concluded that the partnership agreement imposed a reasonable penalty on withdrawing partners, preserved the client's interest in choosing his own attorney,[22] and maintained a stable environment for law firms.[23] In addition, the court analogized the forfeiture clause of the agreement to a liquidated damages clause, a standard and accepted staple of contract law.[24]

B. Justice Kennard's Dissent

In a vigorous dissenting opinion, Justice Kennard noted that the majority opinion directly contradicts rule 1-500 of the Rules of Professional Conduct.[25] The plain meaning of the rule prohibits attorneys from entering into agreements which constrain their right to practice law upon leaving a law firm.[26] Justice Kennard maintained that the protection the majority afforded to law firms devalues a client's rights.[27] Further, valid reasons for withdrawing from the law firm may exist,[28] and thus, partners should not be indiscriminately penalized for withdrawing from the firm.[29]

Finally, Justice Kennard questioned the majority's conclusion that the unstable economic status of existing law firms merits the enforcement of noncompetition agreements.[30] She noted that the majority presented no

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22. *Id.* at 424, 863 P.2d at 159, 25 Cal. Rptr. 2d at 89. The plaintiff argued that by imposing the penalty on withdrawing partners, many attorneys would be discouraged from leaving their firms, to the detriment of the client. However, the court did not find this argument persuasive. *Id.*

23. *Howard*, 6 Cal. 4th at 424-25, 863 P.2d at 159, 25 Cal. Rptr. 2d at 89-90. The court noted that noncompetition agreements and withdrawal penalties may directly benefit clients because it alleviates client grabbing, which often creates distrust and subsequently damages the reputation of the firm. *Id.*

24. *Id.* at 425, 863 P.2d at 160, 25 Cal. Rptr. 2d at 90.

> Under this standard, a partner's agreement to pay former partners, or to forego benefits otherwise due under the contract, in an amount that at the time of the agreement is reasonably calculated to compensate the firm for losses that may be caused by the withdrawing partner's competition with the firm, would be permitted.

Id.

25. *Id.* at 428-30, 863 P.2d at 162-63, 25 Cal. Rptr. 2d at 92-94 (Kennard, J., dissenting).

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

27. *Id.* at 430, 863 P.2d at 164, 25 Cal. Rptr. 2d at 94 (Kennard, J., dissenting).

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

29. *Id.* at 432-33, 863 P.2d at 165-66, 25 Cal. Rptr. 2d at 95-96 (Kennard, J., dissenting). One example of a valid reason for withdrawal is the unwillingness by other parties to equitably share income. *Id.* at 433, 863 P.2d at 166, 25 Cal. Rptr. 2d at 96 (Kennard, J., dissenting).

30. *Id.* at 432, 863 P.2d at 165, 25 Cal. Rptr. 2d at 95 (Kennard, J., dissenting).

evidence showing a correlation between such agreements and the economic malaise of law firms.[31] Justice Kennard concluded, therefore, that the majority's decision to enforce noncompetition agreements serves only to weaken the rules of ethics and is detrimental to the client.[32]

III. CONCLUSION

The California Supreme Court's decision to allow reasonable noncompetition agreements to be enforced is an attempt to assuage two sides with diametrically opposed interests. On one side, the court recognized that law firms are no longer the vibrant, monolithic institutions that they were in the past.[33] While on the other side, the announced decision attempts to preserve the vitality of law firms by imposing penalties on withdrawing partners. The penalty here is the compensation by the withdrawing partner for the loss of clients resulting from the lawyer's departure. This decision attempts to ameliorate the economy's negative impact on law firms.[34]

On the other side, the court attempted to maintain the freedom of lawyers to relocate to other practices and to potentially compete with their former firms.[35] Thus, *Howard* represents a shift toward protecting the law firm's economic interests at the expense of the withdrawing lawyer's autonomy.

Howard explicitly recognizes that noncompetition agreements are consistent with the Model Rules of Professional Conduct[36] provided they are reasonable.[37] Therefore, this holding should enable more law firms

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31. *Id.* at 433 n.2, 863 P.2d at 166 n.2, 25 Cal. Rptr. 2d at 96 n.2 (Kennard, J., dissenting).

32. *Id.* at 434, 863 P.2d at 166, 25 Cal. Rptr. 2d at 96 (Kennard, J., dissenting).

33. *See supra* notes 19-21 and accompanying text. Interestingly, the validity of a partnership agreement which imposes penalties on withdrawing partners after they leave a firm has been addressed in other jurisdictions with differing conclusions. *See e.g.*, Densburg v. Parker, Chapin, Flattau & Kimpl, 624 N.E.2d 995, 1000 (1993) (holding invalid a partnership agreement which required withdrawing partners to compensate the former law firm should they compete against the firm for a period of five years after withdrawal).

34. *See supra* notes 19-21 and accompanying text.

35. *See supra* note 17.

36. *See supra* note 17 and accompanying text.

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

to enact and enforce noncompetition agreements among partners, thus protecting the firm's interests against future withdrawing partners.

JOSHUA MARK FRIED

A. *Penal Code section 667.6 empowers trial courts to impose consecutive, full-term sentences for separate crimes arising out of an indivisible or single transaction when the crimes occur during the commission of an enumerated sex offense:* **People v. Hicks.**

I. INTRODUCTION

In *People v. Hicks*,[1] the California Supreme Court considered whether, under section 667.6(c) of the California Penal Code, the imposition of consecutive sentences for burglary and rape constituted permissible multiple punishment.[2] While the general provisions of section 654 of the Penal Code prohibit the imposition of multiple punishments for the same act, section 667.6(c) allows consecutive sentences for the commission of specified sex offenses.[3]

The defendant was convicted on six counts of rape, two counts of forcible sodomy, two counts of genital penetration by a foreign object,

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1. 6 Cal. 4th 784, 863 P.2d 714, 25 Cal. Rptr. 2d 469 (1993). Justice George wrote the majority opinion, in which Chief Justice Lucas and Justices Panelli, Kennard, Arabian, and Baxter concurred. Justice Mosk authored a separate dissenting opinion. *Id.* at 797, 863 P.2d at 723, 25 Cal. Rptr. 2d at 478 (Mosk, J., dissenting).

2. Section 667.6(c) provides, in pertinent part:

> [I]n lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation . . . by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person whether or not the crimes were committed during a single transaction.

CAL. PENAL CODE § 667.6(c) (West 1988 & Supp. 1994). *See* People v. Jones, 46 Cal. 3d 585, 597, 758 P.2d 1165, 1172, 250 Cal. Rptr. 635, 641 (1988) (recognizing that § 667.6(c) is not limited to multiple sex offenses and can include situations in which the defendant is convicted of either multiple sex felonies or multiple nonsex felonies).

3. CAL. PENAL CODE § 654 (West 1988 & Supp. 1994). This section states in relevant part: "[a]n 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 . . . ." *Id. See* People v. Latimer, 5 Cal. 4th 1203, 1207-09, 858 P.2d 611, 614-15, 23 Cal. Rptr. 2d 144, 147-48 (1993) (noting that if two offenses are committed by the same act or if an act is necessary to both offenses, § 654 would apply and both acts could not be punished); People v. Harrison, 48 Cal. 3d 321, 335, 768 P.2d 1078, 1086, 256 Cal. Rptr. 401, 409 (1989) (recognizing that § 654 applies only where punishment arises out of multiple statutory violations stemming from the same act).

and one count of burglary.[4] The defendant was sentenced to eighty years in prison for the ten sexual offenses, and three years for the burglary count.[5]

II. TREATMENT OF THE CASE

A. *The Majority Opinion*

Justice George first addressed the defendant's argument that his sentencing for the burglary conviction was in direct violation of Penal Code section 654 because the burglary was merely incidental to the sexual offenses for which he had already been sentenced.[6] The court reasoned that section 654 applied solely when multiple punishments stem from multiple violations of the law produced by the same transaction.[7] However, the court noted that Penal Code section 667.6(c) permits consecutive, full-term sentences regardless of whether the crimes were committed during the same transaction.[8] Therefore, the court concluded that because section 667.6(c) allows for the punishment of multiple offenses, even if committed during the same transaction, any crime enumerated in section 667.6(c) is excluded from coverage under section 654.[9]

In doing so, the court distinguished *Hicks* from its holding in *People v.*

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4. *Hicks*, 6 Cal. 4th at 787, 863 P.2d at 715-16, 25 Cal. Rptr. 2d at 470-71.

5. *Id.*

6. *Id.* at 788, 863 P.2d at 716, 25 Cal. Rptr. 2d at 471. The defendant maintained that he entered the bakery with the specific objective of sexually assaulting the victim. Therefore, the defendant argued, that under § 654, he could not be punished for the burglary because he was already convicted of the sexual offenses. *Id.* at 789, 863 P.2d at 717, 25 Cal. Rptr. 2d at 472. *See In re* McGrew, 66 Cal. 2d 685, 688, 427 P.2d 161, 162-63, 58 Cal. Rptr. 561, 562-63 (1967) (recognizing that the defendant was subjected to impermissible, multiple punishment under § 654 for the crimes of rape and burglary which were based on the same, indivisible act); People v. Pena, 7 Cal. App. 4th 1294, 1312, 9 Cal. Rptr. 2d 550, 561 (1992) (noting that the trial court erred in imposing a concurrent burglary and rape sentence).

7. *Hicks*, 6 Cal. 4th at 791, 863 P.2d at 718, 25 Cal. Rptr. 2d at 473 (quoting People v. Harrison, 48 Cal. 3d 321, 335, 768 P.2d 1078, 1086, 256 Cal. Rptr. 401, 409 (1989)).

8. *Id.* at 791-92, 863 P.2d at 718-19, 25 Cal. Rptr. 2d at 473-74.

9. *Id.* at 792, 863 P.2d at 719, 25 Cal. Rptr. 2d at 474. *See generally* 17 CAL. JUR. 3D *Criminal Law* § 621 (1984).

> The code provides for the permissible imposition of full, separate, and consecutive terms for each violation of forcible rape . . . whether or not the crime was committed during a single transaction, and the mandatory imposition of such terms if the crime involves separate victims or the same victim on separate occasions.

17 CAL. JUR. 3D *Criminal Law* § 621 (1984).

Siko,[10] where the court ruled that the defendant could not be punished twice for the same acts committed during the same transaction.[11] The court noted that the defendant in *Siko* was convicted of crimes originating from the same act in a single transaction.[12] Hicks, however, was convicted of separate acts stemming from a single transaction.[13]

The court further reasoned that the legislative history of section 667.6(c) suggests that the statute was intended as an exception to the constraints of section 654.[14] The court found the statutory language both unclear and ambiguous noting that the ambiguity was evidenced by the contrary decisions rendered in various courts of appeal.[15] However, the court reasoned that if section 654 applied, section 667.6(c) would be entirely devoid of any meaning.[16]

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10. 45 Cal. 3d 820, 755 P.2d 294, 248 Cal. Rptr. 110 (1988). In *Siko*, the defendant was convicted of forcible rape, forcible sodomy, and forcible lewd conduct. *Id.* at 822-23, 755 P.2d at 295, 248 Cal. Rptr. at 111.

11. *Id.* at 826, 755 P.2d at 297-98, 248 Cal. Rptr. at 113-14.

12. *Id.* In *Siko*, the acts of forcible rape, forcible sodomy, and forcible lewd conduct, all derived from the same act; thus, when the defendant committed the act of forcible rape, he also committed forcible sodomy and forcible lewd conduct. The court stated that the prohibition on "multiple punishment for a single 'act or omission' [contained in § 654] would be violated by punishing the defendant on all three convictions 'because he committed only two criminal acts.'" *Hicks*, 6 Cal. 4th at 790, 863 P.2d at 718, 25 Cal. Rptr. 2d at 473 (quoting *Siko*, 45 Cal. 3d at 823, 755 P.2d at 296, 248 Cal. Rptr. at 112).

13. *Hicks*, 6 Cal. 4th at 796-97, 863 P.2d at 722, 25 Cal. Rptr. 2d at 477. The court held that Hicks' acts of burglary and rape were two separate acts even though they both occurred during the same transaction in which Hicks entered the victim's place of work and raped her. *Id.*

14. *Id.* at 792-93, 863 P.2d at 719-20, 25 Cal. Rptr. 2d at 474-75. The legislative bill introducing § 667.6(c) originally contained the phrase: "whether or not the crimes were committed with a single intent or objective or during a single transaction." *Id.* However, the phrase "with a single intent or objective" was deleted before the bill was passed. *Id.* While the legislative history contained no apparent justification for the change, the court reasoned that this deletion was indicative of the legislature's intent to remove § 667.6(c) from the limitations of § 654. *Id.*

15. *See, e.g.*, People v. Andrus, 226 Cal. App. 3d 73, 79, 276 Cal. Rptr. 30, 33 (1990) (noting that under § 654, the defendant could be punished for both kidnapping and rape where the kidnapping was clearly the result of the intent to rape). *But see* People v. Masten, 137 Cal. App. 3d 579, 589, 187 Cal. Rptr. 515, 522-23 (1982) (holding that the defendant could not receive consecutive sentences for kidnapping and sex crimes even if the kidnapping occurred for the purpose of committing the sexual offenses).

16. *Hicks*, 6 Cal. 4th at 796, 863 P.2d at 722, 25 Cal. Rptr. at 477. The court emphasized that the two alternative constructions of § 667.6(c) were not equally reasonable. *Id.*

The court concluded, therefore, that the purpose of section 667.6(c) was to enhance the punishment of sex offenders who commit multiple offenses because these types of criminals are more deserving of castigation than offenders who commit only single act sexual crimes.[17] The court reasoned that the burglary at the victim's place of work increased the victim's vulnerability and limited her means of escape, thus aggravating the crime, which in turn merited the additional punishment.[18]

B. Justice Mosk's Dissent

Justice Mosk based his dissenting opinion on the premise that section 654 completely precluded the defendant's burglary conviction.[19] Justice Mosk maintained that the elimination of the "single transaction" phrase from the final version of section 667.6(c) bore no relation to section 654 because sex offenses normally did not bar multiple sentencing.[20] Therefore, Justice Mosk determined that it was unnecessary to create an exception to section 654 for sex offenses, because multiple punishments would be available in that instance.[21] Justice Mosk reasoned that the rationale behind the deletion of "single intent and objective" from section 667.6(c) was that the phrase would imply that consecutive sentencing

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17. *Id.* These increased penalties are appropriate because a defendant who commits several criminal acts is "more culpable than a defendant who commits only one such act." *Id.* (quoting People v. Perez, 23 Cal. 3d 545, 553, 591 P.2d 63, 67, 153 Cal. Rptr. 40, 44 (1979)). *See* 17 CAL. JUR. 3D *Criminal Law* § 621 (1984 & Supp. 1993) (These statutes provide a discretionary sentencing alternative to other general and more lenient consecutive sentencing provisions; thus, in sentencing a defendant convicted of both sex offenses and nonsex offenses, a trial court has the discretion to designate which type of offense will be the principal term.")

18. *Hicks*, 6 Cal. 4th at 796-97, 863 P.2d at 722, 25 Cal. Rptr. 2d at 477. *See* 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime*, § 1406 (2d ed. 1989 & Supp. 1993). Witkin states:

> The purpose of the multiple punishment prohibition of [Penal Code §] 654 'is to insure that a defendant's punishment will be commensurate with his culpability.' The section applies not only to a single act in the ordinary sense, but also to a course of conduct that constitutes an indivisible transaction. However, separate punishment is permitted if the defendant entertained multiple criminal objectives that were independent of, and not merely incidental to, each other.

Id. (quoting *Perez*, 23 Cal. 3d at 551, 591 P.2d at 66, 153 Cal. Rptr. at 43).

19. *Hicks*, 6 Cal. 4th at 797, 863 P.2d at 723, 25 Cal. Rptr. 2d at 478 (Mosk, J., dissenting).

20. *Id.* at 798, 863 P.2d at 723, 25 Cal. Rptr. 2d at 478. (Mosk, J., dissenting). Justice Mosk stated that it would be peculiar if the "single transaction" phrase bore any resemblance to § 654 because in the context of sex offenses, § 654 does not generally preclude multiple punishment. *Id.* (Mosk, J., dissenting).

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

was mandatory, and not discretionary.[22] Lastly, Justice Mosk asserted that the legislature had not intended to make full, consecutive sentencing a requirement for every case involving the applicable sex offenses.[23]

III. CONCLUSION

In holding that section 667.6(c) permits multiple sentencing of sex offenders who commit other crimes in the process of committing specific sex offenses, the court has expanded the discretion of courts to impose longer sentences for enumerated sex crimes.[24]

First, the California Supreme Court has settled the long standing debate between the courts of appeal regarding the applicability of section 667.6(c) to section 654. Under the new rule, the section 667.6(c) exception to the general prohibition on multiple sentences will be permitted, at least in the case of specific sex offenses. However, multiple sentences will not be allowed if the other crime is committed only incidentally to the sex crime.

Second, the courts now have more discretion in handing down stiffer sentences to sex offenders.[25] This decision would appear to protect victims of sex crimes because additional crimes that are often overshadowed by the sex offense are nonetheless prosecutable to the full extent of the law. This new policy should deter future sex offenders now armed with the knowledge that they could be incarcerated for a multitude of incidental crimes that occur in conjunction with the sexual offense they commit. Thus, these would-be sex offenders should potentially be deterred from committing the crime in the first place.

Nevertheless, the impact of the announced decision may have only a negligible effect on the deterrence of future sex crimes because increased incarceration would probably not deter sociopathic individuals who have unequivocally decided to commit sex crimes. One thing is certain, however, and that is that trial judges may now sentence sex of-

22. *Id.* at 799, 863 P.2d at 724, 25 Cal. Rptr. 2d at 479. (Mosk, J., dissenting).

23. *Id.* (Mosk, J., dissenting). Justice Mosk contended that the court had already adopted this interpretation of the legislative history of § 667.6(c). *Id.* (Mosk, J., dissenting). *See, e.g.*, People v. Jones, 46 Cal. 3d 585, 598, 758 P.2d 1165, 1172-73, 250 Cal. Rptr. 635, 642-43 (1988).

24. *See supra* note 8 and accompanying text.

25. *See supra* note 18.

fenders for other crimes committed during the transaction of the sex offense without the fear of being overruled by the court of appeal.

JOSHUA MARK FRIED

B. *Minors who commit either attempted premeditated murder or first degree murder are eligible for CYA placement upon conviction; persons using firearms in the commission of a felony, or attempt thereof, are subject to a sentence enhancement for each separate offense involving the firearm:* **People v. King**

I. INTRODUCTION

The California Supreme Court granted review in *People v. King*[1] to resolve an apparent paradox arising from the interplay of Welfare and Institutions Code section 1731.5 and Penal Code sections 664 and 190,[2] as applied to California Youth Authority ("CYA") commitment.[3] The Welfare and Institutions Code states that persons under the age of eighteen, who are tried as adults, and sentenced to death or life imprisonment, are ineligible for CYA placement.[4] Under Penal Code section 190, persons convicted of first degree murder are punishable for twenty-five years to life.[5] Due to this indeterminate sentence length, courts interpret this language to allow minors convicted of first degree murder to be eligible for CYA placement.[6] However, Penal Code section 664 mandates that persons convicted of attempted premeditated murder be sentenced to "life with the possibility of parole."[7] This serves to bar CYA eligibility because the language closely parallels that of Welfare and Institutions

1. 5 Cal. 4th 59, 851 P.2d 27, 19 Cal. Rptr. 2d 233 (1993). Justice Arabian authored the majority opinion, in which Justices Panelli, Baxter, and George joined. Justice Mosk wrote a separate opinion concurring in part and dissenting in part, in which Chief Justice Lucas and Justice Kennard joined.

2. CAL. WELF. & INST. CODE § 1731.5 (West 1984 & Supp. 1993); CAL. PENAL CODE § 664 (West 1985 & Supp. 1993); CAL. PENAL CODE § 190 (West 1988 & Supp. 1993).

3. *King*, 5 Cal. 4th at 65, 851 P.2d at 30, 19 Cal. Rptr. 2d at 236.

4. CAL. WELF. & INST. CODE § 1731.5(a)(2) (West 1984 & Supp. 1993). Minors may not be committed to CYA if sentenced to "imprisonment for life." *Id.* Although persons convicted of murder committed when between sixteen and twenty-one years of age may petition for CYA placement, the legislature presumes them unfit. CAL. PENAL CODE § 7(c) (West 1993).

5. CAL. PENAL CODE § 190(a) (West 1988 & Supp. 1993).

6. *See In re* Jeanice D., 28 Cal. 3d 210, 221, 617 P.2d 1087, 1093, 168 Cal. Rptr. 455, 461 (1980) (concluding that pursuant to Penal Code § 190, 25 years to life is an indeterminate sentence, and therefore, distinguishable from "imprisonment for life" under § 1731.5).

7. CAL. PENAL CODE § 664(1) (West 1988 & Supp. 1993).

section 1731.5.[8] Thus, such disparity results in a greater punishment for a lesser offense.

Additionally, the court struck down its previous *In re Culbreth*[9] decision by holding that sentence enhancement, for use of a firearm during the commission of a felony, should be based on a "consecutive use" analysis, rather than a "per transaction" analysis.[10] Accordingly, multiple use of a firearm in the perpetration of a single crime will be treated the same as a firearm's use in the commission of multiple crimes, and thus, subject to similar review for sentence enhancement purposes.[11]

II. STATEMENT OF THE CASE

Armed with a gun, the sixteen year old defendant entered a Thrifty Drug Store, demanded keys to the display cabinets, and ordered the two attendants to lay prone on the floor. He then shot the male attendant in the head and the female in the arm. As the defendant bent over to retrieve several spent shell casings, he noticed the female looking at him. He reacted by shooting her in the face. After taking several items, he fled the store. The female survived the incident and was able to testify against the defendant at trial.[12]

Tried as an adult,[13] the defendant plead guilty to first degree murder, attempted premeditated murder, two counts of second degree robbery, and use of a firearm in commission of the crime.[14] Upon the defendant's request, the court ordered a CYA amenability study to determine fitness for placement in a youth facility.[15] Although the report indicated suitability for such treatment, the trial court found the defendant statutorily barred from access to the program,[16] and sentenced him to twenty-

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8. People v. Ladanio, 211 Cal. App. 3d 1114, 1120, 260 Cal. Rptr. 12, 15 (1989) ("defendants convicted of first degree murder have a sentencing advantage in being eligible for commitment to CYA.").

9. 17 Cal. 3d 330, 551 P.2d 23, 130 Cal. Rptr. 719 (1976).

10. *King*, 5 Cal. 4th at 79, 851 P.2d at 39, 19 Cal. Rptr. 2d at 245. *See* CAL. PENAL CODE § 12022.5 (West 1992 & Supp. 1993).

11. *King*, 5 Cal. 4th at 79, 851 P.2d at 39, 19 Cal. Rptr. 2d at 245.

12. *Id.* at 62-64, 851 P.2d at 29, 19 Cal. Rptr. 2d at 235.

13. *Id.* at 64, 851 P.2d at 29, 19 Cal. Rptr. 2d at 235. *See* CAL. WELF. & INST. § 707 (West 1993) (listing the criteria for determining whether a minor should be tried as an adult).

14. *King*, 5 Cal. 4th at 64, 851 P.2d at 29, 19 Cal. Rptr. 2d at 235.

15. *See* 1 HENRY HALL, CALIFORNIA JUVENILE COURT PRACTICE, *Delinquent Minors* § 9.72-9.73 (1992) (discussing minors convicted of first degree murder in adult court and listing the requirements of diagnostic study for CYA placement).

16. *King*, 5 Cal. 4th at 64, 851 P.2d at 29, 19 Cal. Rptr. 2d at 235. *See* CAL. WELF. & INST. CODE § 1731.5 (West 1984 & Supp. 1993). A portion of the code dictates that

five years to life for the murder, with a consecutive sentence of life in prison with possibility of parole for the attempted murder.[17] In addition, the court imposed a two year sentence enhancement for each use of the firearm during the event.[18] The defendant was then placed with the CYA until transfer to state prison was appropriate.[19]

Citing *People v. Ladanio*,[20] the court of appeal affirmed the trial court's decision regarding CYA placement, but relying on *In re Culbreth*,[21] overturned the application of multiple firearm sentence enhancements.[22] The supreme court granted review based on both the defendant's petition questioning eligibility for CYA, and the Attorney General's petition challenging the *Culbreth* analysis.[23]

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a court may commit minors to the CYA unless they have been convicted of first degree murder committed when 18 or older, or when they have been sentenced to death or imprisonment for life. *Id.* at (a)(1). *See In re* Jeanice D., 28 Cal. 3d 210, 221, 617 P.2d 1087, 1093, 168 Cal. Rptr. 455, 461 (1980) (holding a sentence of 25 years to life for first degree murder to be indeterminate, and thereby allowing consideration for CYA eligibility).

17. *King*, 5 Cal. 4th at 64, 851 P.2d at 29, 19 Cal. Rptr. 2d at 235. "Sentencing on the robbery counts was made concurrent." *Id.*

18. *See generally* 3 B.E. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* §§ 1500-1508 (2d ed. 1989) (providing definitions and a detailed discussion of the provisions of the Deadly Weapons Act and subsequent court implementation).

19. *See* CAL. WELF. & INST. CODE § 1731.5(c) (West 1984 & Supp. 1993) (maintaining that any person under 21, not directly committed to the CYA, may be transferred and housed there by order of the court).

20. 211 Cal. App. 3d 1114, 260 Cal. Rptr. 12 (1989). The appellate court refused to extend provisions of § 1731.5 of the Welfare and Institutions Code to include CYA placement when the defendant was sentenced to "imprisonment for life" for attempted murder. *Id.* at 1118, 260 Cal. Rptr. at 14. The court further concluded that the legislature did not intend to tie CYA eligibility with the availability of parole. *Id.*

21. 17 Cal. 3d 330, 551 P.2d 23, 130 Cal. Rptr. 719 (1976). The court found it essential to evaluate the circumstances of the crime as a prerequisite to determining the appropriate number of sentence enhancements. *Id.* at 335, 551 P.2d at 26, 130 Cal. Rptr. at 722. "Such analysis here clearly indicates the homicides—the two second degree murders and the manslaughter—occurred within a matter of seconds, all part of a single melee. There was but one occasion, one intent, one objective, one indivisible transaction. Therefore § 12022.5 may be applied only once." *Id.*

22. *King*, 5 Cal. 4th at 64, 851 P.2d at 29, 19 Cal. Rptr. 2d at 235.

23. *Id.*

III. ANALYSIS

A. *Minors Who Commit First Degree Murder or Attempted Premeditated Murder are Eligible for CYA Assignment*[24]

The California Supreme Court considered whether a sixteen year old tried as an adult, who commits the violent crimes of first degree murder or attempted premeditated murder satisfies the statutory requirements for CYA eligibility.[25] The court's *In re Jeanice*[26] decision previously determined that persons sentenced to twenty-five years to life for first degree murder were not barred from CYA placement.[27] In response, the legislature passed emergency statutory provisions[28] prohibiting persons convicted of first degree murder, committed when eighteen or older, from CYA eligibility.[29] The bill, however, was silent on the application of these provisions to minors between sixteen and seventeen years of age, and those convicted of attempted premeditated murder.[30] Consequently, the *Ladanio* court concluded that a sentence of life imprisonment for at-

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24. Justice Mosk concurred in a decision to reverse the court of appeal which held that the defendant was ineligible for CYA commitment and the decision to affirm the sentence enhancements imposed. *Id.* at 81, 851 P.2d at 41, 19 Cal. Rptr. 2d at 247 (Mosk, J., concurring in part and dissenting in part). He dissented from the majority's decision to overrule *Culbreth*. Chief Justice Lucas and Justice Kennard joined in this position. *Id.* at 83, 851 P.2d at 42, 19 Cal. Rptr. 2d at 233 (Mosk, J., concurring in part and dissenting in part).

25. *Id.* at 65, 851 P.2d at 235, 19 Cal. Rptr. 2d at 29. *See generally* MALVINA E. J. ABBOTT ET AL., CAL. PROC. & PRAC. §§ 37.16-37.19 (Anne Harris ed., 1986 & Supp. 1992); EARNEST KAMM, JUVENILE LAW AND PROCEDURE IN CALIFORNIA, at 224-29 (3d ed. 1981) (discussing the parameters of CYA placement, and providing concise descriptions of CYA eligibility versus ineligibility).

26. 28 Cal. 3d 210, 617 P.2d 1087, 168 Cal. Rptr. 455 (1980).

27. *Id.* at 221, 617 P.2d at 1093, 168 Cal. Rptr. at 461.

28. This reflects the continued tension arising from conflicting policies concerning youthful offenders' amenability to treatment, and danger to society. *See, eg.*, Barry C. Field, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987).

Former sentencing reform acts created juvenile court systems designed to encourage rehabilitation, seeking the "reform of the offender rather than punishment of the offense." *Id.* at 474. This contrasts with judicial waiver and legislative enactments, which are designed to move serious offenders from juvenile court jurisdiction to adult criminal court. *Id. See also* Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323 (1991) (providing a historical analysis of the juvenile justice system). *Cf.* Joseph L. Hoffmann, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229 (1989) (noting the inconsistency in legislative and court imposition of the death penalty in capital offense sentencing concerning juveniles).

29. *King*, 5 Cal. 4th at 66, 851 P.2d at 30-31, 19 Cal. Rptr. 2d at 236-37. The legislature enacted Welfare and Institutions Code § 1731.5, subdivision (a)(2) in 1984.

30. *Id.*

tempted premeditated murder was determinate in term thus barring CYA commitment.[31] Faced with this anomaly, the supreme court concluded that the legislative intent behind section 1731.5 was to prevent adults convicted of first degree murder from possible early release.[32] Therefore, the court held that by logical extension of the statute, persons aged sixteen and seventeen, convicted of first degree murder or attempted premeditated murder, were not barred by section 1731.5 from consideration for CYA eligibility.[33]

B. King *Overruled* Culbreth[34]

The supreme court re-evaluated its previous finding in *Culbreth* that multiple use of a firearm in the commission of a felony constituted "one transaction," and therefore subject to only one possible sentence enhancement.[35] California Penal Code section 12022.5, enacted to deter firearm use,[36] provides for additional punishment when a firearm is used in the commission of a felony.[37] *Culbreth* required an examination of the defendant's "use" according to intent and objective during commission of the crime.[38] This approach produced results which served to undermine the purpose of the statute,[39] because it rewarded defendants who could

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31. *Id.* at 67, 851 P.2d at 31, 19 Cal. Rptr. 2d at 237 (citing *People v. Ladanio*, 211 Cal. App. 3d 1114, 260 Cal. Rptr. 12 (1989)).

32. *King*, 5 Cal. 4th at 68-69, 851 P.2d at 32, 19 Cal. Rptr. 2d at 238. *See* CAL. WELF. & INST. CODE § 1731.5(a)(2) (West 1984 & Supp. 1993).

33. *King*, 5 Cal. 4th at 69-70, 851 P.2d at 33, 19 Cal. Rptr. 2d at 239.

34. Justice Mosk dissented from the majority decision to overrule *Culbreth*, indicating that stare decisis and predictability of the law outweighed concerns in judicial application of the decision. Chief Justice Lucas and Justice Kennard joined this position. *Id.* at 83, 851 P.2d at 42, 19 Cal. Rptr. 2d at 248 (Mosk, J., concurring in part and dissenting in part).

35. 17 Cal. 3d 330, 334-35, 551 P.2d 23, 26, 130 Cal. Rptr. 719, 722 (1976).

36. *See* Andreas C. Rockas et al., Project, *Review of Selected 1992 California Legislation: Crimes*, 24 PAC. L.J. 727 (1993) (providing the current definition of firearm). *See generally* Jill C. Rafaloff, Note, *The Armed Career Criminal Act: Sentence Enhancement Statute or New Offense?*, 56 FORDHAM L. REV. 1085 (1988) (discussing federal enactment of sentence enhancements as a deterrent measure). *See also* 22 CAL. JUR. 3D *Criminal Law* § 3363 (1985).

37. CAL. PENAL CODE § 12022.5(a) (West 1992 & Supp. 1993).

38. *King*, 5 Cal. 4th at 71, 851 P.2d at 34, 19 Cal. Rptr. 2d at 240.

39. *Id.* For example, under *Culbreth*, a defendant who loses control and kills twenty innocent persons who happen upon the scene of a crime, receives only one sentence enhancement. Conversely, a person who seeks out and murders two members of his family receives two sentence enhancements. Thus, the statute does not effec-

characterize their crimes as a "single transaction".[40]

After considering section 12022.5 of the Penal Code and the lower courts' difficulties in applying the *Culbreth* rule, the supreme court concluded that the rule was no longer a viable tool for such analysis.[41] therefore, the court held, that for purposes of sentence enhancement, an additional term will be imposed for each incident involving the use of a firearm.[42] The court emphasized its strong opinion on this matter by specifically overruling *Culbreth*.[43]

IV. CONCLUSION

In *People v. King*, the California Supreme Court resolved a disparity in the treatment of juvenile offenders by holding that courts will treat persons under the age of eighteen, who are tried as adults for attempted premeditated or first degree murder, similarly with respect to consideration for CYA placement. However, the court remained firm in requiring adult incarceration for convicted murderers aged eighteen or older. The probable effect of this ruling will be an increase in the number of juvenile offenders within custody of the California Youth Authority who will be eligible for early release. This decision reflects the continuing belief that juvenile offenders are more amenable to rehabilitation than their adult counterparts.[44]

The court also struck down its previous *Culbreth* holding by requiring that future sentence enhancements, arising from a firearm's use during the commission of a felony, attach on a "per use" basis, rather than the "per transaction" approach as applied previously. This decision enables

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tively serve as a deterrent to firearm use. *Id.*

40. The problem arises in defining the word "transaction". For example, in People v. Raby, the defendant was convicted of nine separate robberies, which were conducted in two locations, on two separate evenings. People v. Raby, 179 Cal. App. 3d 577, 580, 224 Cal. Rptr. 576, 577 (1986). The court concluded that each night's performance constituted a transaction, and applied only two enhancements, in spite of the multiple victims. *Id.* at 591, 224 Cal. Rptr. at 584-85.

41. *King*, 5 Cal. 4th at 77, 851 P.2d at 38, 19 Cal. Rptr. 2d at 244.

42. *Id.* at 79, 851 P.2d at 39, 19 Cal. Rptr. 2d at 245.

43. *Id.*

44. *See* Forst & Blomquist, *supra* note 28 (developing the historical and philosophical approach of the judicial system and the juvenile offender).

the lower courts to take advantage of multiple enhancements, thereby providing an opportunity to reinforce legislative intent in deterring violent crime.

CATHERINE CONVY

C. *In drug possession cases, questions about the purity of the drug and the quantity necessary to produce the narcotic effect are not relevant to the issue of whether the drug constituted a usable quantity:*

People v. Rubacalba.

In *People v. Rubacalba*,[1] the California Supreme Court examined whether the trial court abused its discretion in sustaining relevance objections to questions concerning the purity of the cocaine and the amount of cocaine required to produce a "narcotic effect."[2] The defendant attempted to show that the drug was not a "usable quantity." The court of appeal reversed the defendant's conviction for possession of cocaine, finding that "the trial court improperly restricted defendant's right to cross-examine the prosecution witnesses."[3] The supreme court reversed, concluding that the purity of a drug and the amount of the substance required to produce a narcotic effect "need not be proven in order to establish a usable quantity."[4]

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1. 6 Cal. 4th 62, 859 P.2d 708, 23 Cal. Rptr. 2d 628 (1993). Justice Arabian issued the unanimous opinion of the court.

The defendant was arrested for possession of rock cocaine after a police officer saw the defendant look in the officer's direction and then observed the defendant turn away and raise his hand toward his mouth. The defendant dropped an off-white object roughly one-quarter the size of an aspirin. The officer testified that he seized the object and arrested the defendant after determining that the defendant's actions were consistent with trying to dispose of the object. *Id.* at 63-64, 859 P.2d at 709, 23 Cal. Rptr. 2d at 629. *See* Danny R. Veilleux, Annotation, *Drug Possession-Minimum Amount* 4 A.L.R. 5th 1, 33 (1992) (stating that when attempting to establish the defendant's possession of a minute quantity was intentional, his attempt to conceal, dispose of, or destroy the contraband is relevant).

2. *Rubacalba*, 6 Cal. 4th at 66, 859 P.2d at 711, 23 Cal. Rptr. 2d at 631. The defendant attempted to question both the arresting officer and the criminalist who performed qualitative tests on the evidence regarding the purity of the cocaine. *Id.*

3. *Id.* at 64, 859 P.2d at 709, 23 Cal. Rptr. 2d at 629. In reversing, the court of appeal relied on People v. Johnson, 5 Cal. App. 3d 844, 85 Cal. Rptr. 238 (1970). In *Johnson*, the trial court failed to instruct the jury that the substance must be "in an amount sufficient to be used as a narcotic." *Id.* at 848, 85 Cal. Rptr. at 241.

In People v. Schenk, 24 Cal. App. 3d 233, 101 Cal. Rptr. 75 (1972), the court noted that "[c]ertain language in *Johnson* is subject to inference that one necessary ingredient of the crime of possession is that the quantity in question must be 'usable' in the sense that it be capable of producing a drug effect on the user." *Id.* at 238, 101 Cal. Rptr. at 78. The court in *Schenk* "rejected the contention that the crime of possession . . . requires that the quantity of the drug be sufficient to produce a drug effect." *Id.* at 238-39, 101 Cal. Rptr. at 78; *see also* People v. Pohle, 20 Cal. App. 3d 78, 82, 97 Cal. Rptr. 364, 366 (1971) (stating that "there is no requirement that evidence be produced as to the quantity of a specific ingredient within the contraband").

4. *Rubacalba*, 6 Cal. 4th at 66, 859 P.2d at 711, 23 Cal. Rptr. 2d at 631. *See infra* notes 5-7 and accompanying text (explaining the term "usable quantity").

In reaching this conclusion, the court first considered the "usable quantity" rule established in *People v. Leal*.[5] In *Leal*, the court did not deem possession of useless traces or a blackened residue of a drug a violation of the legislature's proscription against "possession of a substance that has a narcotic potential."[6] The court's reference to narcotic potential was more specifically in regard to a substance's ability to be used or sold.[7] Hence, the "usable quantity" rule premises conviction of possession of an illegal substance to instances where an amount greater than a trace or residue could be usable for sale or consumption.[8]

The supreme court next distinguished *People v. Johnson*,[9] a case the appellate court relied on heavily.[10] In *Johnson*, the trial judge instructed the jury that "the statute on possession of these dangerous drugs does not specify any particular amount" and that "[a] small amount is possession just as much as a large amount, if the law is violated in other ways."[11] The judge failed to "instruct the jury that the substance must be 'in an amount sufficient to be used as a narcotic.'"[12]

California Jury Instructions ("CALJIC") require that the defendant "have knowledge of the presence of the controlled substance and its nature as a controlled substance,"[13] and that the substance possessed be "in an amount sufficient to be used as a controlled substance."[14] The instructions further explain that it is not necessary that "the amount pos-

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5. 64 Cal. 2d 504, 512, 413 P.2d 665, 670, 50 Cal. Rptr. 777, 782 (1966) (stating that possession of a spoon encrusted with one-half grain of blackened residue of heroin was insufficient to independently sustain a conviction for possession).

6. *Id.*

7. *Id.* The court in *Leal* clarified that useless "traces of narcotics in a defendant's possession is [not] without legal significance." *Id.* "The presence of such traces would, for example, often be necessary to establish that otherwise innocent-appearing implements comprise a narcotics injection outfit." *Id.* at 512 n.8, 413 P.2d at 670 n.8, 50 Cal. Rptr. at 782 n.8.

8. *Id.* at 512, 413 P.2d at 670, 50 Cal. Rptr. at 782. In *Rubacalba*, the arresting officer determined that the object dropped was a usable quantity because its size was such that it "could be placed in a pipe or similar smoking device and smoked." *Rubacalba*, 6 Cal. 4th at 64, 859 P.2d at 709, 23 Cal. Rptr. 2d at 629.

9. 5 Cal. App. 3d 844, 85 Cal. Rptr. 238 (1970); *see supra* note 3 and accompanying text.

10. *Rubacalba*, 6 Cal. 4th at 64, 859 P.2d at 709, 23 Cal. Rptr. 2d at 629.

11. *Johnson*, 5 Cal. App. 3d at 848, 85 Cal. Rptr. at 240.

12. *Rubacalba*, 6 Cal. 4th at 66, 859 P.2d at 711, 23 Cal. Rptr. 2d at 631 (quoting People v. Johnson, 5 Cal. App. 3d at 848, 85 Cal. Rptr. at 241).

13. *Id.* at 64, 859 P.2d at 709, 23 Cal. Rptr. 2d at 629.

14. *Id.* (quoting CALJIC No. 12.00 (5th ed. 1989)).

sessed, if used, would have the effect it is ordinarily expected to produce, referred to as narcotic effect" nor that "the narcotic ingredient in the particular substance possessed was capable of producing a narcotic effect."[15] Unlike *Johnson*, the jury instructions in *Rubacalba* followed the notion that a "usable quantity" refers to an amount that can be used or sold, regardless of whether that amount produces the expected narcotic effect.[16]

Courts construing *Leal* have determined that "[t]here is no requirement that any particular purity or potential narcotic effect be proven."[17] Evidence submitted to chemical analysis "need only establish the existence of a controlled substance."[18] The evidence need not establish any particular purity.[19] In *Rubacalba*, the supreme court agreed with the *Leal* "usable quantity" rule that exempts trace or residue quantities that are insufficient for use or sale.[20] The court, however, maintained that this rule "does not extend to a substance containing contraband, even if not pure, if the substance is in a form and quantity that can be used."[21]

The court carefully noted that the quantification of purity may be relevant when attempting to disprove an element of the crime of possession other than "usable quantity," such as knowledge.[22] The court ultimately resolved that "the awareness of the defendant of the presence of the narcotic" is the critical element of the crime of possession, not the forensic chemist's ability to quantify minute traces of a narcotic that would be unusable for sale or consumption.[23] The court stated that "[t]he presence of the narcotic must be reflected in such form as reasonably

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15. *Id.* (quoting CALJIC No. 12.33 (5th ed. 1988)).

16. *Id.* at 64, 859 P.2d at 709, 23 Cal. Rptr. 2d at 629.

17. *Rubacalba*, 6 Cal. 4th at 65, 859 P.2d at 710, 23 Cal. Rptr. 2d at 630.

18. *Id.*

19. *Id.* (citing People v. Karmelich, 92 Cal. App. 3d 452, 455-56, 154 Cal. Rptr. 842, 844 (1979) (affirming conviction for possession even though chemist could not testify as to the percentage of heroin contained within the substance because the chemist did not perform a quantitative analysis). Similarly, in *Rubacalba*, the criminalist testified that the tests performed on the substance dropped by the defendant were "'qualitative rather than quantitative.'" *Rubacalba*, 6 Cal. 4th at 64, 859 P.2d at 709, 23 Cal. Rptr. 2d at 629. Consequently, the trial court prohibited the defense from questioning the criminalist as to the purity of the cocaine when the prosecution objected. *Id.*; *see* People v. Piper, 19 Cal. App. 3d 248, 250, 96 Cal. Rptr. 643, 644 (1971) (rejecting defendant's claim that a quantitative analysis of an illegal substance must be made to establish the substance's potential to produce a narcotic effect).

20. *Rubacalba*, 6 Cal. 4th at 65, 859 P.2d at 710, 23 Cal. Rptr. 2d at 630.

21. *Id.* at 66, 859 P.2d at 710, 23 Cal. Rptr. 2d at 630.

22. *Id.* at 67, 859 P.2d at 711, 23 Cal. Rptr. 2d at 631. The crime of possession requires that the defendant know he possessed a controlled substance.

23. *Id. See also* People v. Aguilar, 223 Cal. App. 2d 119, 122-23, 35 Cal. Rptr. 516, 519 (1963) (holding that a miniscule amount of heroin found on parts of narcotic injection kits could not sustain a conviction for possession).

imputes knowledge to the defendant."[24] Therefore, the purity of the substance is inconsequential to the issue of knowledge.[25] Instead, the form of the substance, and possibly the circumstance of arrest, establish the element of knowledge.[26]

The defendant did not argue that the questions regarding the purity of the cocaine were relevant to establishing the element of knowledge.[27] Instead, the defendant argued that the questions related solely to the issue of "usable quantity."[28] Therefore, the trial court acted within its discretion when sustaining the prosecution's objections.[29]

In *People v. Rubacalba*, the California Supreme Court resolved contradictory appellate court decisions addressing the propriety of questions regarding the "usable quantity" of a narcotic substance. The supreme court clearly differentiated the permissibility of a conviction based on minute quantities of proscribed substances from an impermissible conviction based on trace or residue amounts that are otherwise unusable for sale or consumption.

As a practical note, a defendant must establish that the condition or form of the drugs rendered them unusable in order to question their purity or narcotic effect.[30] Otherwise, when questioning the purity of a substance, a defense attorney will need to establish that she is disputing an element of the crime of possession, such as knowledge, in order to withstand a relevance objection.

LORI ELLEN AUSTEIN

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24. *Rubacalba*, 6 Cal. 4th at 67, 859 P.2d at 711, 23 Cal. Rptr. 2d at 631 (quoting People v. Aguilar, 223 Cal. App. 2d 119, 122-23, 35 Cal. Rptr. 516, 519 (1963)). *See generally* Danny R. Veilleux, Annotation, *Drug Possession-Minimum Amount*, 4 A.L.R. 5th 1, 22, 110-11 (1992) (discussing the amount of a substance required to establish the elements of possession).

25. *Rubacalba*, 6 Cal. 4th at 67, 859 P.2d at 711, 23 Cal. Rptr. 2d at 631.

26. *Id.* In *Rubacalba*, the form of the substance and the officer's testimony about the defendant's conduct were sufficient to establish the requisite level of knowledge. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. The court explained that "if, for example, the substance was found in a package of talcum powder, testimony that it contained only a microscopic amount of cocaine might be relevant to the defendant's knowledge of the presence of the contraband." *Id.*

D. *A prosecutor seeking to impose a sentence enhancement against a criminal defendant may introduce into evidence the defendant's abstract of judgment and prison commitment form to establish that the defendant completed a prior prison term:* **People v. Tenner**

In *People v. Tenner*,[1] the California Supreme Court addressed an unresolved issue[2] concerning the amount of evidence necessary to prove the completion of a prior prison sentence by a criminal defendant.[3] The

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1. 6 Cal. 4th 559, 862 P.2d 840, 24 Cal. Rptr. 2d 840 (1993). Justice Panelli authored the opinion, in which Chief Justice Lucas and Justices Arabian, Baxter, and George concurred. Justice Mosk dissented in an opinion in which Justice Kennard joined. The defendant, Willie Tenner, was convicted at trial after pleading guilty to the sale of cocaine. *Id.* at 561, 862 P.2d at 841, 24 Cal. Rptr. 2d at 841. He appealed the subsequent imposition of an eight-year sentence (which included a one-year enhancement for a prior felony), arguing that the abstract of judgment and commitment form presented by the prosecution were inadequate to support a finding that the defendant completed his prison term. California Penal Code § 667.5(b) requires such a showing of completion before a prison sentence may be enhanced. CAL. PENAL CODE § 667.5 (West 1988). The court of appeal held that an abstract of judgment and commitment form were insufficient to establish completion of the term, and accordingly struck the one-year sentence enhancement. *Tenner*, 6 Cal. 4th at 562, 862 P.2d at 841, 24 Cal. Rptr. 2d at 841.

2. The courts of appeal have expressed contrasting views on this matter. *See, e.g.*, People v. Castillo, 217 Cal. App. 3d 1020, 1024-25, 266 Cal. Rptr. 271, 273 (1990) (concluding that an abstract of judgment and documents indicating subsequent conviction constituted proof of completion of sentence in the absence of contrary evidence); People v. Crockett, 222 Cal. App. 3d 258, 266, 271 Cal. Rptr. 500, 505 (1990) (holding that an abstract of judgment is adequate to show completion of a prison term); People v. Elmore, 225 Cal. App. 3d 953, 960, 275 Cal. Rptr. 315, 319 (1990) (allowing the prosecution to rely on an abstract of judgment along with the defendant's testimony regarding imprisonment to establish completion of sentence). *But see* People v. Jones, 203 Cal. App. 3d 456, 461, 249 Cal. Rptr. 840, 842 (1988) (noting that an abstract of judgment is permissible to show imprisonment, but inadequate to show completion of sentence); People v. Green, 134 Cal. App. 3d 587, 596-97, 184 Cal. Rptr. 652, 657 (1982) (concluding that an abstract of judgment, a jail release slip, and a record of mailings to defendant while in prison are insufficient to establish completion of sentence).

3. *Tenner*, 6 Cal. 4th at 561, 862 P.2d at 841, 24 Cal. Rptr. at 841. The majority pronounced the requirements of proof under the relevant state law:

> Imposition of a sentence enhancement under Penal Code section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; *(3) completed that term of imprisonment*; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction.

court, in considering the applicable state law mandating such proof as a prerequisite to sentence enhancement,[4] held that neither statutory language[5] nor due process[6] requires the admission of certified prison records as evidence of a defendant's completed prior sentence.[7] Rather, the court adopted a less rigid standard of proof, finding that the prosecution's introduction of an abstract of judgment and commitment form[8] was adequate to establish the presumption of completion of the prison term in accordance with the California Penal Code.[9]

Id. at 563, P.2d at 842, 24 Cal. Rptr. 2d at 842 (emphasis added) (citing People v. Elmore, 225 Cal. App. 3d 953, 956-57, 275 Cal. Rptr. 315, 316 (1990).

4. CAL. PENAL CODE § 667.5 (West 1988). Subdivision (b) of § 667.5, the relevant provision on sentence enhancement, provides:

> 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. at § 667.5(b) (emphasis added). For a discussion on sentence enhancement, see generally 3 B.E. WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crimes* §§ 1473-74 (2d ed. 1989 & Supp. 1993). *See also* 22 CAL. JUR. 3D *Criminal Law* § 3387 (1985 & Supp. 1993) (discussing the proof necessary to establish prior convictions for sentence enhancement); 24 C.J.S. *Criminal Law* §§ 1526-28 (1989 & Supp. 1993) (describing the various state statutes for sentence enhancement).

5. *Tenner*, 6 Cal. 4th at 563, 862 P.2d at 842, 24 Cal. Rptr. 2d at 842. While the majority acknowledged that certified records from the defendant's prison are admissible as prima facie evidence that the defendant served the full term of his sentence, it further indicated that no statute *requires* the introduction of these documents as proof that the defendant completed his sentence. *Id. See* CAL. PENAL CODE § 969(b) (West 1985).

6. The court recognized that before the defendant's sentence may be enhanced, the prosecution must satisfy due process by proving each element of the enhancement beyond a reasonable doubt. *Tenner*, 6 Cal. 4th at 566-67, 862 P.2d at 845, 24 Cal. Rptr. 2d at 845. *See infra* note 11 and accompanying text.

7. *Id.* at 566, 862 P.2d at 844, 24 Cal. Rptr. 2d at 844. For a detailed analysis of the statutory one-year enhancement provision under California Penal Code § 667.5, see Steven M. Vartabedian, *Enhancing Sentences with Prior Felony Convictions: The Limits of "Without Limitation,"* 23 PAC. L.J. 1051 (1992).

8. The court defined abstracts of judgment as "orders sending the defendant to prison and imposing on the warden the duty to carry out the punishment." *Tenner*, 6 Cal. 4th at 565, 862 P.2d at 844, 24 Cal. Rptr. 2d at 843 (citing People v. Crockett, 222 Cal. App. 3d 258, 266, 271 Cal. Rptr. 500, 505 (1990)).

9. *Id.* at 566, 862 P.2d at 844, 24 Cal. Rptr. 2d at 844.

The court based its holding on four considerations: (1) an abstract of judgment and commitment form explicitly imposes a duty on the relevant officials to ensure that the convict's sentence is carried out;[10] (2) a presumption exists in the law of evidence that such duties are regularly performed by those responsible;[11] (3) a convict will always complete his prison term in the absence of extraordinary factors;[12] and (4) the fact that the defendant was free from incarceration when he committed the present offense suggests that he likely completed his prior sentence.[13]

The majority avoided a ruling that would deprive the jury of the right to consider presumptions otherwise deemed valid under the laws of evidence.[14] While the court's decision allows the prosecution to rely on the lesser documents, it strongly discourages this practice in favor of what it terms the "better practice" of introducing the prison records when available.[15] The court's cautionary words exhibit its apprehension toward widening the application of statutory presumptions against criminal defendants.[16]

Building on this apprehension, Justice Mosk's dissenting opinion argued that giving the official duty presumption an expanded interpretation relieves the prosecution of having to prove every aspect of the case beyond a reasonable doubt.[17] Alternatively, the court's holding in *Tenner*

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10. *Id.* at 564, 862 P.2d at 843, 24 Cal. Rptr. 2d at 843.

11. *Id.* (citing CAL. EVID. CODE § 664 (West 1966)). In addressing the due process concern, Justice Panelli indicated that the presumption was rebuttable, allowing a defendant to present evidence to negate the presumption. *Id.* at 567, 862 P.2d at 845, 24 Cal. Rptr. 2d at 845. For a general discussion of the constitutionality of statutory presumptions, see 16A AM. JUR. 2D *Constitutional Law* § 796 (1979 & Supp. 1993).

12. *Tenner*, 6 Cal. 4th at 565, 862 P.2d at 843, 24 Cal. Rptr. 2d at 843 (citing People v. Crockett, 222 Cal. App. 3d 258, 265, 271 Cal. Rptr. 500, 504 (1990)).

13. *Id.* at 565-66, 862 P.2d at 844, 24 Cal. Rptr. 2d at 844.

14. The court reasoned that any other holding would "essentially be creating a new rule of evidence peculiar to the trials of enhancement allegations under California Penal Code § 667.5." *Id.* at 565, 862 P.2d at 844, 24 Cal. Rptr. 2d at 844.

15. *Id.* at 567, 862 P.2d at 845, 24 Cal. Rptr. 2d at 845.

16. *Id.*

17. *Tenner*, 6 Cal. 4th at 568, 862 P.2d at 846, 24 Cal. Rptr. 2d at 846 (Mosk, J., dissenting). Noting that the period of time between the issuance of an abstract of judgment and the completion of a sentence is normally measured in years, Justice Mosk expressed doubt that the legislature intended to use the official duty presumption where "numerous events may occur which could interrupt completion of the prison sentence . . . ." *Id.* at 568, 862 P.2d at 846, 24 Cal. Rptr. 2d at 846 (Mosk, J., dissenting). For an analysis of the standard of proof required in sentence enhancement proceedings, see generally Scott M. Brennan, *Due Process Comes Due: An Argument for the Clear and Convincing Evidentiary Standard in Sentencing Hearings*, 77 IOWA L. REV. 1803 (1992).

potentially eliminates "an unintended loophole which protects rather than punishes the career criminal."[18]

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18. People v. Crockett, 222 Cal. App. 3d 258, 265, 271 Cal. Rptr. 500, 504 (1990). The majority compared the present case to *Crockett*, claiming that the latter accurately applied state law on the allowable scope of the official duty presumption. *Tenner*, 6 Cal. 4th at 565, 862 P.2d at 844, 24 Cal. Rptr. 2d at 844.

IV. CRIMINAL PROCEDURE

A. *The reciprocal pretrial discovery provisions of Proposition 115 apply to both guilt phase and penalty phase evidence; nevertheless, the courts may exercise discretion under appropriate circumstances and postpone disclosure of the defendant's penalty phase evidence until the guilt phase has concluded:* **People v. Superior Court (Mitchell).**

I. INTRODUCTION

In *People v. Superior Court (Mitchell)*,[1] the California Supreme Court addressed the question of whether, in capital cases, the reciprocal discovery provisions enacted by Proposition 115[2] apply to the penalty phase of trial.[3] The court granted review in *Mitchell* in order to further define the scope of permissible prosecutorial discovery,[4] pursuant to California Penal Code section 1054.3.[5] Additionally, the court reconciled any appar-

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1. 5 Cal. 4th 1229, 859 P.2d 102, 23 Cal. Rptr. 2d 403 (1993). Chief Justice Lucas delivered the majority opinion of the court, in which Justices Panelli, Kennard, Arabian, Baxter, and George concurred. Justice Mosk wrote a dissenting opinion. *Id.* at 1239, 859 P.2d at 110, 23 Cal. Rptr. 2d at 411.

2. Proposition 115, the "Crime Victims Justice Reform Act," was enacted into law by voter initiative in the June 1990 California primary election. 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Introduction to Crimes* § 10A (2d ed. Supp. 1993) (discussing adoption of the Crime Victims Justice Reform Act). Section 5 of the act amended the California Constitution by adding § 30(c) to article I, providing that "discovery in criminal cases shall be reciprocal in nature." CAL. CONST. art. I, § 30(c) (West Supp. 1994). *See generally* 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Discovery and Production of Evidence* § 1678A (3d ed. Supp. 1993) (delineating nature and purpose of Proposition 115).

3. *Mitchell*, 5 Cal. 4th at 1231, 859 P.2d at 104, 23 Cal. Rptr. 2d at 405. The defendant was charged with felony murder involving special circumstances. The prosecution requested discovery from the defense pursuant to Penal Code § 1054.3. Nevertheless, the defendant failed to comply with the discovery request, refusing to disclose any evidence relevant to the penalty phase of the trial. The prosecution petitioned the court of appeal for a writ of mandate, directing the trial court to grant a motion to compel such discovery, as authorized by Proposition 115. The court of appeal affirmed the prosecution's right to discovery. *Id.* at 1232, 859 P.2d at 105, 23 Cal. Rptr. 2d at 406. Subsequently, the supreme court granted review. *Id.*

4. *Id.* at 1231, 859 P.2d at 104, 23 Cal. Rptr. 2d at 405.

5. Section 1054.3 provides in pertinent part: "[t]he defendant and his or her attorney shall disclose to the prosecuting attorney . . . [t]he names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial." CAL. PENAL CODE § 1054.3 (West Supp. 1994). *See generally* 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Discovery and Production of Evidence* § 1678C (3d ed. Supp. 1993) (discussing information subject to prosecutorial discovery following enactment of § 1054.3); 5

ent discrepancy between this provision and Penal Code section 190.3,[6] which explicitly authorizes only defense discovery of penalty phase evidence.[7] Finding that the language of section 190.3 did not preclude application of the reciprocal discovery provisions mandated by Proposition 115, the court held that prosecutorial discovery applies to both the guilt phase as well as the penalty phase in a capital trial.[8]

II. TREATMENT OF THE CASE

The court first addressed the defendant's contention that section 190.3 involved a nonreciprocal discovery provision that would preclude prosecutorial discovery for the penalty phase as established under section 1054.3.[9] The court rejected that argument, reasoning that nothing in section 190.3 would preclude adoption of a reciprocal form of discovery.[10] As a result, the reciprocal discovery provisions of Proposition 115 remained applicable to the penalty phase.[11]

Second, the court addressed the defendant's assertion that the penalty phase of a capital case is not part of the trial for purposes of section 1054.3 discovery.[12] The court dismissed this reasoning, noting that "the penalty phase of a capital trial is merely part of a single, unitary criminal proceeding."[13] Accordingly, the court reasoned that the regulation of discovery imposed by Proposition 115 applied not only to the guilt phase, but to the penalty phase as well.[14]

B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2498F (2d ed. Supp. 1993) (outlining defense disclosure obligations pursuant to § 1054.3).

6. Section 190.3 states, in relevant part:

> Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time . . . prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

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

7. *Mitchell*, 5 Cal. 4th at 1233, 859 P.2d at 105, 23 Cal. Rptr. 2d at 406.
8. *Mitchell*, 5 Cal. 4th at 1239, 859 P.2d at 109, 23 Cal. Rptr. 2d at 410.
9. *Id.* at 1232, 859 P.2d at 105, 23 Cal. Rptr. 2d at 406.
10. *Id.* at 1232-33, 859 P.2d at 105, 23 Cal. Rptr. 2d at 406.
11. *Id.* at 1233, 859 P.2d at 105, 23 Cal. Rptr. 2d at 406.
12. *Id.*
13. *Id.* (citing People v. Robertson, 48 Cal. 3d 18, 45-46, 767 P.2d 1109, 1123, 255 Cal. Rptr. 631, 645 (1989)).
14. *Mitchell*, 5 Cal. 4th at 1234, 859 P.2d at 106, 23 Cal. Rptr. 2d at 407.

Next, the court rejected the defendant's argument that reciprocal discovery during the penalty phase would violate his right to equal protection.[15] The defendant's position rested upon the premise that sentencing in non-capital cases did not require reciprocal discovery.[16] The court reasoned that even if sentencing in non-capital cases remained exempt from reciprocal discovery provisions, capital cases involve entirely different considerations than that of typical criminal sentencing.[17] Thus, the court found the defendant's equal protection claim meritless.[18]

Finally, the court addressed the defendant's argument that reciprocal discovery in penalty phase proceedings would constitute cruel and unusual punishment in violation of the Eighth Amendment.[19] Although limitations on mitigating evidence may violate due process, disclosure through discovery does not limit the substantive evidence which may be presented.[20] Furthermore, procedural requirements have never been construed as "punishment" with regard to Eighth Amendment analysis.[21] Thus, such reciprocal discovery remains applicable to penalty phase evidence.[22]

Nevertheless, recognizing the potential conflict between prosecutorial discovery of penalty phase evidence and the defendant's right against self-incrimination,[23] the court acknowledged that under appropriate cir-

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> [U]nder the plain language of the statutory scheme in place when Proposition 115 was enacted, the jury's penalty determination was part of the trial. Moreover, the stated purpose of Proposition 115 is 'to restore balance to our criminal justice system.' To accomplish that goal to the greatest extent possible in a capital case, the penalty phase would have to be included in the reciprocal discovery provision.

Id. (quoting People v. Superior Court (Sturm), 9 Cal. App. 4th 172, 179, 11 Cal. Rptr. 2d 652, 655 (1992) (holding that Proposition 115 required defense disclosure of penalty phase evidence)).

15. *Id.* at 1234-35, 859 P.2d at 106, 23 Cal. Rptr. 2d at 407.

16. *Id.*

17. *Id.*

18. *Id.* at 1235, 859 P.2d at 106, 23 Cal. Rptr. 2d at 407. Similarly, the court rejected the defendant's contention that penalty phase evidence should be considered privileged and confidential, and therefore, exempt from reciprocal discovery under § 1054.6. *Id.* at 1235, 859 P.2d at 107, 23 Cal. Rptr. 2d at 408. The court noted that the defendant had not raised any specific claim of confidentiality regarding any materials subject to disclosure. *Id.*

19. *Mitchell*, 5 Cal. 4th at 1235, 859 P.2d at 106, 23 Cal. Rptr. 2d at 407.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 1237, 859 P.2d at 108, 23 Cal. Rptr. 2d at 409. Justice Mosk, in his dissenting opinion, reasserted his position that reciprocal discovery provisions, as enacted by Proposition 115, infringe upon the criminal defendant's privilege against self-incrimination under article I, § 15 of the California Constitution. *Id.* at 1239, 859 P.2d

cumstances, the trial court may properly order a general continuance of the prosecutor's discovery request.[24] In other words, trial courts retain the discretion to postpone prosecutorial discovery of penalty phase evidence until the conclusion of the guilt phase.[25]

III. CONCLUSION

The *Mitchell* decision accomplishes the goals upon which Proposition 115 was premised.[26] Continuing the precedent established in *Izazaga v. Superior Court*,[27] and *In re Littlefield*,[28] the opinion delineates the

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at 110, 23 Cal. Rptr. 2d at 411 (Mosk, J., dissenting). *See In re* Littlefield, 5 Cal. 4th 122, 140-41, 851 P.2d 42, 54-55, 19 Cal. Rptr. 2d 248, 260-61 (1993) (Mosk, J., concurring and dissenting) (objecting to majority's reaffirmation of constitutionality of prosecutorial discovery); Izazaga v. Superior Court, 54 Cal. 3d 356, 401, 815 P.2d 304, 334, 285 Cal. Rptr. 231, 261 (1991) (Mosk, J., dissenting) (rejecting the majority's confirmation of the constitutionality of reciprocal discovery provisions established by Proposition 115). *See generally* Steven Holden, Note, Izazaga v. Superior Court: *Affirming the Public's Cry to Unshackle the Criminal Prosecution System*, 23 PAC. L.J. 1721 (1992); Michael A. Miller, *California Supreme Court Survey*, 21 PEPP. L. REV. 320 (1994) (analyzing holding and impact of *Littlefield* decision); Andrea L. Wilson, *California Supreme Court Survey*, 20 PEPP. L. REV. 308 (1992) (analyzing holding and impact of *Izazaga* decision).

24. *Mitchell*, 5 Cal. 4th at 1237-38, 859 P.2d at 109, 23 Cal. Rptr. 2d at 410.

25. *Id.*

26. The preamble to Proposition 115 provides:

> We the people of the State of California hereby find that the rights of crime victims are too often ignored by our courts and our State Legislature . . . and that comprehensive reforms are needed in order to restore balance and fairness to our criminal justice system . . . . In order to address these concerns and to accomplish these goals, we the people further find that it is necessary to reform the law as developed in numerous California Supreme Court decisions and as set forth in the statutes of this state. These decisions and statutes have unnecessarily expanded the rights of accused criminals far beyond that which is required by the United States Constitution, thereby . . . diverting the judicial process from its function as a quest for truth.

Proposition 115 § 1(a)-(b) (1990), *reprinted in* CAL. CONST. art. I, § 14.1 (Deering Supp. 1994); *see also* 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Introduction to Crimes* § 10C (2d ed. Supp. 1993).

27. 54 Cal. 3d 356, 815 P.2d 304, 285 Cal. Rptr. 231 (1991) (upholding constitutionality of reciprocal discovery provisions under Proposition 115). *See also* Wilson, *supra* note 23.

28. 5 Cal. 4th 122, 851 P.2d 42, 19 Cal. Rptr. 2d 248 (1993) (holding that reciprocal discovery under Proposition 115 required defense disclosure of all "reasonably accessible" information regarding potential trial witnesses). *See also* Miller, *supra*,

scope of permissible prosecutorial discovery. By subjecting penalty phase evidence in capital cases to the reciprocal discovery provision of Proposition 115, *Mitchell* enables the prosecution to secure the proper sentence in the most serious of cases—those exposing the defendant to a possible sentence of death.

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note 23.

B. *Under Penal Code section 1203.1, a criminal defendant's failure to challenge the reasonableness of a probation condition at sentencing constitutes a waiver of that claim on appeal:* **People v. Welch.**

I. INTRODUCTION

In *People v. Welch*,[1] the California Supreme Court considered whether a criminal defendant, who failed to challenge the reasonableness of a probation condition at the sentencing hearing[2] under Penal Code section 1203.1, could raise such a challenge on appeal.[3] The court held that the failure to object to the fairness of the condition at the sentencing hearing constituted waiver of the claim, and thus, was not a viable argument on appeal.[4]

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1. 5 Cal. 4th 228, 851 P.2d 802, 19 Cal. Rptr. 2d 520 (1993). Justice Baxter wrote the majority opinion, in which Chief Justice Lucas and Justices Mosk, Panelli, and George concurred. Justice Arabian wrote a separate concurring opinion in which Justice Kennard concurred.

The defendant, convicted of welfare fraud, was sentenced to probation consistent with the recommendations of her probation report. *Id.* at 231, 851 P.2d at 804, 19 Cal. Rptr. 2d at 522. The defendant did not object to the reasonableness of the recommendations at the sentencing hearing, but later challenged them on appeal. *Id.* at 232, 851 P.2d at 805, 19 Cal. Rptr. 2d at 523. The court of appeal affirmed the holding stating that the defendant had waived any claims that the probation conditions were unreasonable or overbroad in failing to object to them at the sentencing hearing. People v. Welch, 13 Cal. App. 4th 1277, 1358-59, 3 Cal. Rptr. 2d 636, 637 (1992).

The California Supreme Court, while agreeing with the reasoning and the holding of the court of appeal, reversed stating that it would be unfair to retroactively apply an objection and waiver rule that was not in existence at the time of the sentencing hearing. Thus, the court excused the defendant in this case for failing to make a timely objection. 5 Cal. 4th at 237, 851 P.2d at 808-09, 19 Cal. Rptr. 2d at 526-27.

2. *See generally* David H. Melnick, Comment, *Probation in California: Penal Code Section 1203*, 50 CAL. L. REV. 651 (1962) (thoroughly analyzing the discretion of the court to impose probation conditions).

3. CAL. PENAL CODE § 1203.1(j) (West 1982 & Supp. 1994). The relevant portion of this section states that "[t]he court may impose and require any or all of the above-mentioned terms of imprisonment, fine, and conditions, and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done . . . ." *Id. See generally* 22 CAL. JUR. 3D *Criminal Law* § 3640 (1985 & Supp. 1993) (noting that failure to object to allegedly improper entries in the probation report precludes raising of the issue on appeal).

4. *Welch*, 5 Cal. 4th at 237, 851 P.2d at 808, 19 Cal. Rptr. 2d at 526.

II. TREATMENT

In ruling that the failure to object to probation conditions waives any future claim challenging the reasonableness of those conditions, the court relied primarily on the established rule that failure to object to the findings of the probation report at the sentencing hearing waives the claim on appeal.[5] The court reasoned that "[n]o different rule should generally apply to probation conditions under consideration at the same time."[6]

In its reasoning, the court emphasized the importance of reducing costly appeals while simultaneously discouraging invalid probation conditions at the sentencing hearing.[7] The court specifically rejected the defendant's interpretation of *In re Bushman*,[8] as well as other lower court holdings which state that the defendant does not have to object to probation conditions in order to preserve the claim on appeal.[9] In essence, the supreme court was unwilling to compromise the sentencing court's statutory exercise of discretion by permitting a criminal defendant to raise the issue on appeal for the first time.[10]

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5. *See generally* People v. Jarvis, 135 Cal. App. 3d 154, 157-58, 185 Cal. Rptr. 16, 17-18 (1982) (finding that failure to object to the court's characterization of entries in the probation report constituted waiver of the issue on appeal); People v. Medina, 78 Cal. App. 3d 1000, 1007, 144 Cal. Rptr. 581, 585 (1978) (finding that no objection on the record of allegedly improper probation report entries precluded litigation of the issue on appeal); People v. Chi Ko Wong, 18 Cal. 3d 698, 725, 557 P.2d 976, 993, 135 Cal. Rptr. 392, 409 (1976) (finding that the defendant could not raise the issue of improper allegations in a probation report after failing to address them at trial).

6. *Welch*, 5 Cal. 4th at 234-35, 851 P.2d at 805-06, 19 Cal. Rptr. 2d at 524-25. *See generally* 24 C.J.S. *Criminal Law* § 1556(a) (1989) ("Failure to object or except to the imposition of the condition implies acceptance thereof.").

7. *Welch*, 5 Cal. 4th at 235, 851 P.2d at 806-07, 19 Cal. Rptr. 2d at 524-25; *see* People v. Walker, 54 Cal. 3d 1013, 1023, 819 P.2d 861, 866, 1 Cal. Rptr. 2d 902, 908 (1991) (finding that in order to maintain a fair trial, failure to object to an error at sentencing constituted waiver).

8. 1 Cal. 3d 767, 463 P.2d 727, 83 Cal. Rptr. 375 (1970).

9. *See generally* People v. Patillo, 4 Cal. App. 4th 1576, 1579-80, 6 Cal. Rptr. 2d 456, 458-59 (1992) (finding that failure to object to probation condition of enrollment in AIDS education program at sentencing hearing did not preclude the defendant from raising the issue on appeal); People v. Kiddoo, 225 Cal. App. 3d 922, 925-27, 275 Cal. Rptr. 298, 300-01 (1990) (holding that defendant did not waive his right to challenge a probation condition prohibiting the use of alcohol where the defendant failed to raise the issue at sentencing); *In re* Mannino, 14 Cal. App. 3d 953, 958-59 & n.3, 92 Cal. Rptr. 880, 882-83 & n.3 (1971) (finding that the defendant may attack an improper term of probation despite failing to object at sentencing hearing).

10. *Welch*, 5 Cal. 4th at 237, 851 P.2d at 808, 19 Cal. Rptr. 2d at 526; *see generally* 22 CAL. JUR. 3D *Criminal Law* § 3444 (1985 & Supp. 1993) ("The court may impose reasonable conditions other than those specifically set out in the Penal Code.").

III. CONCLUSION

The impact of the California Supreme Court's holding in *People v. Welch* serves to increase judicial efficiency at both the trial and appellate court levels. Requiring criminal defendants to challenge all issues regarding the reasonableness of probation conditions at the sentencing hearing encourages dialogue at the trial court level and reduces the number of potential issues that the appellate courts must review.[11]

Therefore, this holding will likely alleviate the burden on the appellate courts by eliminating from possible review issues regarding the suitability of probation conditions not already on the record.[12] Moreover, by affirming the trial judge's exercise of discretion, this holding places additional significance on the individual conditions relating to probation imposed at the sentencing hearing.

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11. *Welch*, 5 Cal. 4th at 236, 851 P.2d at 807, 19 Cal. Rptr. 2d at 525 ("[T]he appellate court is not best suited to determining how such an outcome might affect the defendant's suitability for probation. Traditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court."); *see generally* 9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 311 (3d ed. 1985 & Supp. 1993) ("The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain . . . the result would be that few judgments would stand the test of an appeal.") (quoting Sommer v. Martin, 55 Cal. App. 603, 610, 204 P. 33, 36 (1921)).

12. The court further stressed that conditions of probation regulating conduct which is not criminal in itself, must be "reasonably related to the crime of which the defendant was convicted or to future criminality." *Welch*, 5 Cal. 4th at 233-34, 851 P.2d 806, 19 Cal. Rptr. 2d 523 (quoting People v. Lent, 15 Cal. 3d 481, 486, 451 P.2d 545, 548, 124 Cal. Rptr. 905, 908 (1975)). *See generally* 22 CAL. JUR. 3D *Criminal Law* § 3444 (1985 & Supp. 1993) ("[W]here a condition of probation impinges upon the exercise of a fundamental right and is challenged on constitutional grounds, an appellate court must additionally determine whether the condition is impermissibly overbroad.").

V. ELECTION LAW

A project purportedly designed to educate voters can result in illegal electioneering, and thus, result in annulment of the targeted election if clear and convincing evidence shows that allegedly illegal votes affected the outcome of the election; notwithstanding identification of the recipients of the illegal votes: **Gooch v. Hendrix.**

I. INTRODUCTION

In *Gooch v. Hendrix*,[1] the California Supreme Court considered whether California Elections Code section 20024[2] authorizes the annulment of a contested election where it appears by clear and convincing evidence that illegal voting affected the outcome of the election, but it is unclear for whom the illegal votes were cast.[3]

Plaintiffs[4] challenged the validity of school board elections under Elections Codes section 20021,[5] alleging that: "(1) appellants had given or

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1. 5 Cal. 4th 266, 851 P.2d 1321, 19 Cal. Rptr. 2d 712 (1993). Chief Justice Lucas wrote the majority opinion, in which Justices Mosk, Panelli, Arabian, Baxter, and George concurred. Justice Kennard wrote a dissenting opinion.

2. Section 20024 states:

> An election shall not be set aside on account of illegal votes, unless it appears that a number of illegal votes has been given to the person whose right to the office is contested or who has been certified as having tied for first place, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to that other person.

CAL. ELEC. CODE § 20024 (West 1989). *See generally* 17 CAL. PRACTICE, *Primary & General Election Contests* § 332:36 (1970 & Supp. 1992) (discussing the setting aside of election results due to illegal votes).

3. *Gooch*, 5 Cal. 4th at 269, 851 P.2d at 1322, 19 Cal. Rptr. 2d at 713.

4. The plaintiffs were a group of unsuccessful candidates in a school board election. *Id.* at 273, 851 P.2d at 1325, 19 Cal. Rptr. 2d at 716.

5. Section 20021 states in pertinent part:

> Any elector of a county, city, or of any political subdivision of either may contest any election held therein, for any of the following causes: . . . . (c) That the defendant has given to any elector or member of a precinct board any bribe or reward, or has offered any bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise . . . ; (d) That illegal votes were cast.

CAL. ELEC. CODE § 20021 (West 1989 & Supp. 1993). *See generally* 28 CAL. JUR. 3D *Elections* § 224 (1986 & Supp. 1993) (discussing grounds for contesting election); 17 CAL. PRACTICE, *Primary & General Election Contests* § 332:36 (1970 & Supp. 1992)

offered bribes to electors; (2) appellants had committed offenses against the elective franchise; and (3) illegal votes were cast sufficient to change the results of the elections."[6] The trial court found several violations of the election process, and concluded that votes cast could not count in the election.[7] Thus, the court ordered new elections.[8] The court of appeal agreed with the trial court regarding the illegal ballots, but reversed the trial court's decision because it could not be determined for whom the illegal votes were cast.[9] The California Supreme Court granted review.[10]

(discussing right to contest elections).

The consolidated school board elections were held on November 5, 1991, in Fresno County. One high school and four elementary school districts had open positions.

6. *Gooch*, 5 Cal. 4th at 273, 851 P.2d at 1325, 19 Cal. Rptr. 2d at 716.

In July of 1991, before the elections at issue, the Fresno Chapter of the Black American Political Association of California ("BAPAC") began its Voter Education Project ("VEP"). *Id.* at 271, 851 P.2d at 1323, 19 Cal. Rptr. 2d at 714. The trial court determined that BAPAC members asked registered and unregistered voters to sign registration affidavits and absentee ballots. *Id.* BAPAC members told voters that BAPAC would mail their documents and deliver their ballots personally when they were received. *Id.* BAPAC members, rather than the voters themselves, usually filled in BAPAC's address as the address to which the ballot was to be sent. *Id.* at 272, 851 P.2d at 1324, 19 Cal. Rptr. 2d at 714. After receipt by BAPAC, members of BAPAC, VEP workers, or candidates in the election delivered them to voters' homes and encouraged them to vote in their presence, often offering some guidance regarding issues and candidates. *Id.* at 272, 851 P.2d at 1324, 19 Cal. Rptr. 2d at 715. Each voter then signed and sealed the ballot and returned it to the person who had delivered it. *Id.* BAPAC mailed a total of 1,023 ballots to the Fresno County Elections Department, 93 of which were later disqualified. *Id.* at 276, 851 P.2d at 1326, 19 Cal. Rptr. 2d at 717. The trial court found this peculiar because the County Clerk had sent a total of 1,292 absentee ballots to BAPAC's address, leaving 269 ballots unaccounted for. *Id.* at 275, 851 P.2d at 1326, 19 Cal. Rptr. 2d at 717. The remaining 930 ballots were placed with the other ballots and counted. *Id.* at 276, 851 P.2d at 1326, 19 Cal. Rptr. 2d at 717.

7. *Id.* at 276, 851 P.2d at 1326-27, 19 Cal. Rptr. 2d at 717-18.

8. *Id.* at 276, 851 P.2d at 1327, 19 Cal. Rptr. 2d at 718. The trial court stated that "'anything less, under these facts, would result in a loss of public respect for and diminution of the integrity of the absentee ballot process' and would 'tend to encourage even greater abuse of the process in future elections.'" *Id.*

9. *Id.* at 277, 851 P.2d at 1327, 19 Cal. Rptr. 2d at 718. This decision was based on the court of appeal's interpretation of § 20024 of the Elections Code. *Id. See generally* 28 CAL. JUR. 3D *Elections* § 256 (1986 & Supp. 1993) (discussing the appropriateness of setting aside an election for illegal votes or malconduct of election officials).

10. *Gooch*, 5 Cal. 4th at 277, 851 P.2d 1327, 19 Cal. Rptr. 2d 718.

II. TREATMENT

A. *Majority Opinion*

1. Standard of Review

The Elections Code contains "strict rules" controlling judicial review of any contested election.[11] Based on these rules, the supreme court determined that an election is valid unless it appears "plainly illegal."[12] However, the court also recognized that the "preservation of the integrity of the election process" is more important than "the resolution of any one election."[13] This policy is often stated in conjunction with the rule that "'[t]echnical errors or irregularities arising in carrying out directory provisions which do not affect the result will not [void] the election.'"[14]

The court also distinguished "mandatory" from "directory" provisions[15] in election laws.[16] The court further explained that modern election code provisions often state which category the rule falls under, and usually provide legislative intent as well.[17]

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11. *Id.* at 277, 851 P.2d at 1327, 19 Cal. Rptr. 2d at 718.

12. *Id.* The court stated that "'it is a primary principle of law as applied to election contests that it is the duty of the court to validate the election if possible.'" *Id.* (quoting Wilks v. Mouton, 42 Cal. 3d 400, 404, 722 P.2d 187, 189, 229 Cal. Rptr. 1, 3 (1986)). *See* 28 CAL. JUR. 3D *Elections* § 263 (1986 & Supp. 1993) (discussing a court's scope of review in an election contest).

13. *Gooch*, 5 Cal. 4th at 278, 851 P.2d at 1328, 19 Cal. Rptr. 2d at 719 (quoting Fair v. Hernandez, 116 Cal. App. 3d 868, 881, 172 Cal. Rptr. 379, 385 (1981)).

14. *Id.* (quoting Davis v. County of Los Angeles, 12 Cal. 2d 412, 426, 84 P.2d 1034, 1042 (1938)). "Both the policy and the rule manifest the fact that '[c]ourts are reluctant to defeat the fair expression of popular will in elections.'" *Id.* (quoting Simpson v. City of Los Angeles, 40 Cal. 2d 271, 277, 253 P.2d 464, 468 (1953)).

15. In Rideout v. City of Los Angeles, 185 Cal. 426, 197 P. 74 (1921), the court stated:

> a violation of a mandatory provision vitiates the election, whereas a departure from a directory provision does not render the election void if there is a substantial observance of the law and no showing that the result of the election has been changed or the rights of the voters injuriously affected by the deviation.

Id. at 430, 197 P. at 75. The court explained that "[i]f the act enjoined goes to the substance or necessarily affects the merits or results of the election, it is mandatory; otherwise [it is] directory." *Id.* at 431, 197 P. at 76. *See generally* 28 CAL. JUR. 3D *Elections* §§ 124, 139 (1986) (discussing the difference between mandatory and directory provisions and the effects of irregularities in election contests).

16. *Gooch*, 5 Cal. 4th at 278 n.7, 851 P.2d at 1328 n.7, 19 Cal. Rptr. 2d at 719 n.7.

17. *Id.* "For example, section 1013, which prescribes the manner in which absentee ballots are to be returned to election officials, states: 'The provisions of this section are mandatory, not directory, and no ballot shall be counted if it is not delivered in compliance with this section.'" *Id.*

The court concluded that the proper standard of review for an election contest is the same as in other cases.[18] The complaining party maintains the burden of proving an election defect by "clear and convincing evidence."[19] However, the court must view the evidence in "the light most favorable to the prevailing party."[20] Furthermore, the court explained that it is bound by the trial court's findings of fact "except to the extent that they are not supported by substantial evidence."[21]

2. Section 1013

After explaining the proper standard of review, the court enumerated the specific violations alleged by the plaintiffs, beginning with the alleged violations of section 1013 of the Elections Code.[22] The court upheld the

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18. *Id.* at 278, 851 P.2d at 1328, 19 Cal. Rptr. 2d at 719. The court proclaimed that "[w]here the evidence is in conflict, [the appellate court] will defer to the trial court where events at trial and demeanor of the witnesses play an important part in the decision." *Id.* at 278-79, 851 P.2d at 1328, 19 Cal. Rptr. 2d at 719 (quoting Escalante v. City of Hermosa Beach, 195 Cal. App. 3d 1009, 1014, 241 Cal. Rptr. 199, 201 (1987)). *See also* Hardeman v. Thomas, 208 Cal. App. 3d 153, 166, 256 Cal. Rptr. 158, 166 (1989) (court bound by finding of trial court); 28 CAL. JUR. 3D *Elections* § 263 (1986 & Supp. 1993) (discussing scope of review when evidence is in conflict).

19. *Gooch*, 5 Cal. 4th at 279, 851 P.2d at 1328, 19 Cal. Rptr. 2d at 719 (quoting Wilks v. Mouton, 42 Cal. 3d 400, 404, 722 P.2d 187, 190, 229 Cal. Rptr. 1, 3 (1986)). *See also* Smith v. Thomas, 121 Cal. 533, 536, 54 P. 71, 72 (1898) (requiring clear evidence before court will deduct vote); Hawkins v. Sanguinetti, 98 Cal. App. 2d 278, 283, 220 P.2d 58, 62 (1950) (evidence insufficient to disturb lower court's ruling); Wilburn v. Wixson, 37 Cal. App. 3d 730, 737, 112 Cal. Rptr. 620, 625 (1974) (proof offered by contestant did not meet clear and convincing standard); 9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 278 (3d ed. 1985 & Supp. 1993) (discussing when clear and convincing evidence is required); 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *Burden of Proof and Presumptions* §§ 160-62 (3d ed. 1986 & Supp. 1993) (discussing when the clear and convincing test is appropriate).

20. *Gooch*, 5 Cal. 4th at 279, 851 P.2d at 1328, 19 Cal. Rptr. 2d at 719 (quoting *Wilks*, 42 Cal. 3d at 408 n.7, 722 P.2d at 193 n.7, 229 Cal. Rptr. at 6 n.7 (1986)). *See generally* 9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 268 (3d ed. 1985 & Supp. 1993) (lower court's judgment presumed correct).

21. *Gooch*, 5 Cal. 4th at 279, 851 P.2d at 1328, 19 Cal. Rptr. 2d at 719 (quoting *Wilks*, 42 Cal. 3d at 404, 722 P.2d at 190, 229 Cal. Rptr. at 3). *See generally* 9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 278 (3d ed. 1985 & Supp. 1993) (discussing conduct of court when conflicting evidence is presented); 26 AM. JUR. 2D *Elections* § 359 (1966 & Supp. 1993) (discussing appellate court's scope of review).

22. *Gooch*, 5 Cal. 4th at 279, 851 P.2d at 1329, 19 Cal. Rptr. 2d at 720. Section 1013 provides in pertinent part:

> All absentee ballots cast . . . shall be voted on or before the day of the election. After marking the ballot, the absent voter shall either: (1) return the

trial court's findings that the 930 absentee ballots collected by BAPAC were illegal,[23] and should not have been counted.[24]

3. Section 1006

With respect to the alleged violations of section 1006 of the Elections Code,[25] the court agreed with the trial court that "BAPAC was engaged in a political campaign through VEP" and "entering BAPAC's address as the address to which the ballot was to be sent violated section 1006(b)(2)"[26] and that "in the majority of cases, the VEP 'solicitor' filled in the information regarding the address to which the absentee ballot was to be sent for the voter, and that the address provided was that of

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> ballot by mail or in person to the official from whom it came or (2) return the ballot in person to any member of a precinct board at any polling place within the jurisdiction. However, an absent voter who, because of illness or other physical disability, is unable to return the ballot, may designate his or her spouse, child, parent, grandparent, grandchild, brother, or sister to return the ballot to the official from whom it came or to the precinct board at any polling place within the jurisdiction . . . The provisions of this section are mandatory, not directory, and no ballot shall be counted if it is not delivered in compliance with this section.

CAL. ELEC. CODE § 1013 (West 1977 & Supp. 1993).

The legislature amended § 1013 in response to *Wilks*, and clearly stated their intent was that the provisions of § 1013 be mandatory, contrary to the holding in *Wilks*. *Gooch*, 5 Cal. 4th at 280 n.8, 851 P.2d at 1329 n.8, 19 Cal. Rptr. 2d at 720 n.8.

23. "Illegal votes are votes which have not been cast in the manner provided by law." *Id.* at 279, 851 P.2d at 1329, 19 Cal. Rptr. 2d at 720 (citing Bush v. Head, 154 Cal. 277, 281-82, 97 P.2d 512, 514 (1908)). "Illegal votes include votes by persons receiving their absentee ballots in a manner that violates election laws governing absentee balloting." *Id.* (citing Hardeman v. Thomas, 208 Cal. App. 3d 153, 168, 256 Cal. Rptr. 158, 166-67 (1989)).

24. *Id.* at 280, 851 P.2d at 1329, 19 Cal. Rptr. 2d at 720. *See* Escalante v. City of Hermosa Beach, 195 Cal. App. 3d 1009, 1019-21, 241 Cal. Rptr. 199, 204-05 (1987) (absentee referendum ballot returned by third party with permission of voter could not be counted). The court noted that the fact that BAPAC might have been given permission to collect these ballots is irrelevant under § 1013. *Gooch*, 5 Cal. 4th at 280, 851 P.2d at 1329, 19 Cal. Rptr. 2d at 720. *See* 26 AM. JUR. 2D *Elections* § 240 (1966 & Supp. 1993) (discussing who may render assistance to voters). *See supra* note 22 for the relevant portion of section 1013.

25. *Gooch*, 5 Cal. 4th at 280, 851 P.2d at 1329, 19 Cal. Rptr. 2d at 720. Section 1006(a)(2) states that an application for an absentee ballot must provide a space for the address to which the ballot is to be sent. CAL. ELEC. CODE § 1006(a)(2) (West 1977 & Supp. 1993). Subdivision (b)(1) requires that this information "be personally affixed by the voter." CAL. ELEC. CODE § 1006(b)(1) (West 1977 & Supp. 1993). Subdivision (b)(2) prohibits an applicant from entering the address of a political campaign headquarters as the address to which the absentee ballot is to be sent. CAL. ELEC. CODE § 1006(b)(2) (West 1977 & Supp. 1993).

26. *Gooch*, 5 Cal. 4th at 280-81, 851 P.2d at 1330, 19 Cal. Rptr. 2d at 721.

BAPAC."[27] The court stated that section 1006's failure to state whether its provisions were mandatory or directory was irrelevant because the 930 BAPAC ballots were cast illegally under the mandatory provisions of section 1013.[28]

4. The Remedy

Having determined that the 930 ballots collected by BAPAC were illegal, the court faced the question of whether the election results should be set aside and new elections held.[29] The court found that it was impossible to separate the illegal ballots from the valid ballots,[30] and thus, it was impossible to determine exactly how the results were influenced by the illegal votes.[31]

The supreme court first noted that in reading section 20024,[32] the court of appeal overlooked the premise that "a court must not 'sacrifice the integrity of the [elective] process on the altar of electoral finality.'"[33] The court surmised that the state legislature did not intend to leave the trial court without power to set aside an election in situations where it appears, through clear and convincing evidence, that illegal votes affected the outcome of the election, although it cannot be determined precisely for whom the illegal votes were cast.[34] Noting that section 20024

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27. *Id.* at 280, 851 P.2d at 1329-30, 19 Cal. Rptr. 2d at 720-21.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* Despite this dilemma, the trial court concluded that "'in light of the wholesale violation' of the absentee voting laws in this case . . . the evidence showed the great majority of illegal-but-counted BAPAC ballots were voted for the defendant-candidates, and were sufficient to affect the election of many of them." *Id.* Therefore, the trial court annulled the election results and ordered new elections. *Id.* The court of appeal overruled this decision, reasoning that "[e]ven assuming in these circumstances it could be calculated how many votes were cast on each illegal ballot, in what district they were cast and in what proportion they were cast, any attempt to apportion pro rata must still meet the test of section 20024" which requires proof that the illegal votes benefitted the winner of the election. The court of appeal held that "it would be impossible in any multi-issue or multi-candidate primary or general election to determine the effect of illegal voting of the type and extent at issue here." *Id.* at 281-82, 851 P.2d at 1330, 19 Cal. Rptr. 2d at 721.

32. *See supra* note 2 for the pertinent language of section 20024.

33. *Gooch*, 5 Cal. 4th at 282, 851 P.2d at 1330, 19 Cal. Rptr. 2d at 721 (quoting Hardeman v. Thomas, 208 Cal. App. 3d 153, 167, 256 Cal. Rptr. 158, 166 (1989)).

34. *Id.* at 282, 851 P.2d at 1330-31, 19 Cal. Rptr. 2d at 721-22. The court stressed that when determining legislative intent, the court first must look to the "words of

states that "an election shall not be set aside on account of illegal votes unless 'it appears' a number of illegal votes were given to the election winner," the court construed the phrase "it appears" liberally.[35] The court concluded that the legislature intended the statute to apply in circumstances such as the one at hand, where the illegal votes cannot be directly attributed to any one candidate, but nevertheless "'appear' sufficient in number or effect to have altered the outcome of the election."[36]

The court then cited its decision in *Canales v. City of Alviso*,[37] for further support of its interpretation of section 20024.[38] In *Canales*, electors contested an election held to determine whether the city of Alviso should be consolidated with the city of San Jose.[39] The electors alleged that the consolidation was approved only because: "(i) the election board committed various acts of misconduct under section 20021, (ii) voters of Alviso were thereby induced to vote in favor of consolidation, and (iii) several illegal votes were cast for consolidation."[40] In reversing the trial court's judgment, the supreme court acknowledged that section 20024 requires a showing that "illegal votes were sufficient in number to account for the result but also that illegal votes were cast in such a manner as in fact to determine the result."[41]

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the statute themselves." *Id.* at 282, 851 P.2d at 1331, 19 Cal. Rptr. 2d at 722. *See* People v. Woodhead, 43 Cal. 3d 1002, 1007, 741 P.2d 154, 156, 239 Cal. Rptr. 656, 658 (1987) (commenting that analysis of statutory intent begins with the words of the statute); People v. Overstreet, 42 Cal. 3d 891, 895, 726 P.2d 1288, 1289, 231 Cal. Rptr. 213, 214 (1986) (stating that when determining intent, the court should turn to the words of the statute); People *ex rel.* Younger v. Superior Court, 16 Cal. 3d 30, 40, 544 P.2d 1322, 1328, 127 Cal. Rptr. 122, 128 (1976) (interpreting statutes by using the "language employed in framing them"); 58 CAL. JUR. 3D *Statutes* §§ 82-95 (1980 & Supp. 1993) (discussing generally the interpretation of statutes by courts).

35. *Gooch*, 5 Cal. 4th at 282, 851 P.2d 1331, 19 Cal. Rptr. at 722.

36. *Id.*

37. 3 Cal. 3d 118, 474 P.2d 417, 89 Cal. Rptr. 601 (1970).

38. *Gooch*, 5 Cal. 4th at 283, 851 P.2d at 1331, 19 Cal. Rptr. 2d at 722.

39. *Canales*, 3 Cal. 3d at 123, 474 P.2d at 419, 89 Cal. Rptr. at 722.

40. *Gooch*, 5 Cal. 4th at 283, 851 P.2d at 1331, 19 Cal. Rptr. 2d at 727. The final vote count was 189 votes for consolidation, and 180 against. *Canales*, 3 Cal. 3d at 123, 474 P.2d at 419, 89 Cal. Rptr. at 603. The trial court determined that of the 21 challenged voters, 11 should have been disqualified for various reasons. *Id.* at 125, 474 P.2d at 420, 89 Cal. Rptr. at 604. Of these 11 voters, one vote was cast in favor of consolidation, one vote was cast against, and the rest were unclear. *Id.* at 125, 474 P.2d at 420-21, 89 Cal. Rptr. at 604-05. In upholding the election, the trial court decided to split the remaining votes using a pro rata system of distribution, thereby making the final vote 183 1/2 to 174 1/2 in favor of consolidation. *Id.* at 125, 474 P.2d at 421, 89 Cal. Rptr. at 605.

41. *Id.* at 126, 474 P.2d at 421, 89 Cal. Rptr. at 605.

> "Nonetheless, after noting that the only evidence as to how the remaining nine illegal votes were cast were the signatures of the voters on the 'petition by virtue of which the election was held,' [the court] concluded such evi-

The *Gooch* Court was confident that the plaintiffs had made a stronger evidentiary showing that illegal votes had influenced the final outcome of the contested election than that in *Canales*.[42] According to the court, the clear violations of sections 1006 and 1013, combined with the other violations committed by BAPAC and its members, "furnished . . . uncontroverted circumstantial evidence in support of the conclusion that 'it appear[ed]' the illegal votes affected the outcomes of the consolidated elections."[43] Thus, the court reversed the judgment of the court of appeal.[44]

B. Dissenting Opinion

Justice Kennard began her dissenting opinion by questioning the majority's understanding of section 20024.[45] She cited *Canales v. City of Alviso*,[46] for the proposition that an election may only be set aside under section 20024 if the challenger establishes "'not only that illegal votes were sufficient in number to account for the result but also that illegal votes were cast in such a manner as in fact to determine the result.'"[47] Justice Kennard asserted that the contestants failed to show that the outcome of the election was in fact altered by the illegal votes, and therefore, they failed to meet the burden of proof required by section 20024.[48]

Justice Kennard attacked the majority's interpretation of the word "ap-

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> dence, albeit circumstantial, was admissible on the question that 'the contestants met their burden as to the crucial nine votes,' and that 'in the absence of any contrary evidence, the trial court erred in refusing to so find."

Gooch, 5 Cal. 4th at 283-84, 851 P.2d at 1332, 19 Cal. Rptr. 2d at 723 (quoting *Canales*, 3 Cal. 3d at 126, 474 P.2d at 421, 89 Cal. Rptr. at 605). *See* 26 AM. JUR. 2D *Elections* § 348 (1966) (discussing the use of circumstantial evidence to prove for whom illegal votes were cast).

42. *Gooch*, 5 Cal. 4th at 284, 851 P.2d at 1332, 19 Cal. Rptr. 2d at 723.

43. *Id.* at 285, 851 P.2d at 1332, 19 Cal. Rptr. 2d at 723.

44. *Id.* at 285, 851 P.2d at 1333, 19 Cal. Rptr. 2d at 724.

45. *Id.* at 288-89, 851 P.2d at 1335, 19 Cal. Rptr. 2d at 726 (Kennard, J., dissenting).

46. 3 Cal. 3d 118, 474 P.2d 417, 89 Cal. Rptr. 601 (1970).

47. *Gooch*, 5 Cal. 4th at 289, 851 P.2d at 1335, 19 Cal. Rptr. 2d at 726 (Kennard, J., dissenting) (quoting *Canales*, 3 Cal. 3d at 126, 474 P.2d at 421, 89 Cal. Rptr. at 605).

48. *Id.* at 289-90, 851 P.2d at 1336, 19 Cal. Rptr. 2d at 727 (Kennard, J., dissenting). Justice Kennard emphasized that the plaintiffs could have called a "representative sample" of those who cast illegal ballots to determine how they voted. *Id.* at 289, 851 P.2d at 1335-36, 19 Cal. Rptr. 2d at 726-27 (Kennard, J., dissenting). *See generally* 28 CAL. JUR. 3D *Elections* § 251 (1986) (discussing testimony allowed to prove how a voter actually voted).

pear."[49] Moreover, Justice Kennard found the majority's reliance on *Canales* misplaced.[50] Finally, Justice Kennard rejected the majority's decision to invalidate the election absent a showing for whom the illegal ballots were cast.[51]

While Justice Kennard disagreed with the majority decision, she did not believe that the contestant's challenge should necessarily fail.[52] In support of her position, she pointed to the plaintiff's challenge under section 20021(c).[53] Because section 20021(c) dictates no limitation on the court's power to invalidate an election, Justice Kennard emphasized that the complainants could succeed in setting aside certain elections if they were able to show that a particular candidate was a party to the Elections Code violations.[54] While Justice Kennard did not state an opinion on whether these particular elections should be set aside, she recommended that the court of appeal be directed to remand the case to the trial court to determine which parties were part of the violations.[55] In conclusion, she advocated that this, rather than the path taken by the

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49. *Gooch*, 5 Cal. 4th at 291, 851 P.2d at 1337, 19 Cal. Rptr. 2d at 728 (Kennard, J., dissenting). Justice Kennard commented that while § 20024 "certainly indicates a legislative conclusion that the trial court need not determine with absolute certainty for whom the illegal votes were cast before it may invalidate the election . . . the trial court must still decide, based on evidence presented, how the votes were cast. Such was not the case here." *Id.* (Kennard, J., dissenting).

50. *Id.* (Kennard, J., dissenting). According to Justice Kennard, *Canales* allows the use of circumstantial evidence to show how an illegal vote was cast, but does not authorize the invalidation of an election when the plaintiffs produce little evidence as to how individual ballots were cast. *Id.* (Kennard, J., dissenting).

51. *Id.* at 292, 851 P.2d at 1337-38, 19 Cal. Rptr. 2d at 728-29 (Kennard, J., dissenting). While these practices "may well independently require the invalidation of the election in this case," they do not, according to Justice Kennard, allow the court to invalidate the election based on the fact that illegal ballots were cast. *Id.* To do so, Justice Kennard stated, "requires, under section 20024, evidence showing for whom the illegal ballots were cast, and evidence that a sufficient number of them were cast for the prevailing candidate so that the outcome of the election would be affected." *Id.* at 292, 851 P.2d at 1338, 19 Cal. Rptr. 2d at 729 (Kennard, J., dissenting). Justice Kennard also noted that if the majority found it appropriate, they could have set aside the election and declared a new winner, rather than holding new elections altogether. *Id.* at 292 n.6, 851 P.2d at 1338 n.6, 19 Cal. Rptr. 2d at 729 n.6 (Kennard, J., dissenting).

52. *Id.* at 293, 851 P.2d at 1338, 19 Cal. Rptr. 2d at 729 (Kennard, J., dissenting).

53. *Id.* (Kennard, J., dissenting). *See supra* note 5 for the pertinent part of § 20021(c).

54. *Gooch*, 5 Cal. 4th at 293-94, 851 P.2d at 1338, 19 Cal. Rptr. 2d at 729 (Kennard, J., dissenting).

55. *Id.* at 294, 851 P.2d at 1338-39, 19 Cal. Rptr. 2d at 729-30 (Kennard, J., dissenting).

majority, would be "the best means of preserving the democratic electoral process."[56]

III. CONCLUSION

The California Supreme Court has taken a stand against illegal voting and election fraud. Its interpretation of section 20024 and its restatement of *Canales* support the idea that an election should be set aside when it is clear that there has been illegal voting, even if it remains unclear for whom the illegal votes were cast. In so ruling, the court appears to have lowered the level of proof required to successfully contest an election in which illegal votes were cast, and has thus shown clear concern for maintaining the integrity of the democratic process in California.

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56. *Id.* at 294, 851 P.2d 1339, 19 Cal. Rptr. 2d at 730 (Kennard, J., dissenting).

VI. MUNICIPALITIES LAW

State law governing sales of aerosol paint to minors and requiring posted notices of the legal punishments for illegal use of the paint does not preempt a Los Angeles city ordinance regulating the accessibility of aerosol paint containers in retail stores:

Sherwin-Williams Co. v. City of Los Angeles.

In *Sherwin-Williams Co. v. City of Los Angeles*[1] the California Supreme Court found that a municipal code provision regulating aerosol paint sales[2] was not preempted by a state statute mandating other restrictions on such paint sales.[3] Upon reviewing the law governing preemption, the court observed that generally state law will preempt local laws when the state law conflicts with local legislation.[4] Furthermore, courts will find a conflict when the local law "duplicates, contradicts or enters an area fully occupied by general law, either expressly or by legislative implication."[5]

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1. 4 Cal. 4th 893, 844 P.2d 534, 16 Cal. Rptr. 2d 215 (1993). Justice Mosk wrote the majority opinion, with Justices Kennard, Arabian, Baxter, and George concurring. Chief Justice Lucas wrote the dissenting opinion. *Id.* at 907, 844 P.2d at 542, 16 Cal. Rptr. 2d at 223.

2. The City of Los Angeles Municipal Code § 47.11 requires retail sellers of aerosol paint and broad-tipped markers to stock the items so that they are inaccessible to the public without assistance from a sales person. *Id.* at 901, 844 P.2d at 539, 16 Cal. Rptr. 2d at 220.

3. California Penal Code § 594.1 makes it a misdemeanor for anyone to furnish aerosol paints to a minor and for anyone to carry aerosol paint in a "designated posted public area." CAL. PENAL CODE §§ 594.1(a), (d) (West 1981 & Supp. 1994). Additionally, the law requires retailers who sell the paint to post a notice that "malicious defacing" of property is punishable by imprisonment or fine or both. CAL. PENAL CODE § 594.1(c) (West 1981 & Supp. 1994).

4. *Sherwin Williams Co.*, 4 Cal. 4th at 897, 844 P.2d at 536, 16 Cal. Rptr. 2d at 217 (citing Candid Enter., Inc. v. Grossmont Union High Sch. Dist., 39 Cal. 3d 878, 705 P.2d 876, 218 Cal. Rptr. 303 (1985). *See also* 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 445-46 (8th ed. 1974 & Supp. 1984); 34 CAL. JUR. 2D *Municipal Corporations* §§ 159-60 (1957 & Supp. 1978) (describing when a general law preempts a municipal ordinance).

5. *Sherwin Williams Co.*, 4 Cal. 4th at 898, 844 P.2d at 537, 16 Cal. Rptr. 2d at 218 (quoting *Candid Enter., Inc.*, 39 Cal. 3d at 885, 705 P.2d at 882, 218 Cal. Rptr. at 309). Legislative intent is found when: 1) the subject matter is completely covered by state law; 2) the subject matter is partially covered by state legislation but the language of the legislation clearly indicates that the area is exclusively that of the state; or 3) the area is partially covered by state law and local regulation of the area would severely affect transient state citizens. *Id.* (citing *In re* Hubbard, 62 Cal. 2d 119, 128, 396 P.2d 809, 814-15, 41 Cal. Rptr. 393, 398-99 (1964), *overruled on other*

After noting the history of the two laws, the court found that the local ordinance did not duplicate or conflict with the state law. The court determined that both laws covered different issues in their breadth and matter.[6] Additionally, the court decided that the local ordinance did not address an area of the law which the state legislature had evidenced an intent to fully occupy.[7] Here the majority could not glean anything from the local ordinance which contradicted the state statute, and thus, upheld the local law as valid.

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grounds by Bishop v. City of San Jose, 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969)). *See generally* Western Oil & Gas Ass'n v. Monterey Bay Air Pollution Control Dist., 49 Cal. 3d 408, 411, 777 P.2d 157, 158, 261 Cal. Rptr. 384, 385 (1989) (holding state law does not preclude local law regulating toxic substances); People *ex rel.* Deukmejian v. County of Mendicino, 36 Cal. 3d 476, 488, 683 P.2d 1150, 1157, 204 Cal. Rptr. 897, 904 (1984) (holding local law regulating pesticides not preempted by state law); Lancaster v. Municipal Court, 6 Cal. 3d 805, 810, 494 P.2d 681, 684, 100 Cal. Rptr. 609, 612 (1972) (holding local law addressing sexual conduct preempted by state law).

"Duplicative" local law occurs when the "general law is coextensive therewith." *Id.* at 897, 844 P.2d at 536, 16 Cal. Rptr. 2d at 217 (citing *In re* Portnay, 21 Cal. 2d 237, 240, 131 P.2d 1, 2 (1942)).

"Contradictory" laws are those that are "inimical" to the state law. *Id.* (citing *Ex parte* Daniels, 183 Cal. 636, 641-48, 192 P. 442, 445-48 (1920)).

6. *Sherwin Williams Co.*, 4 Cal. 4th at 902, 844 P.2d at 539-40, 16 Cal. Rptr. 2d at 220-21. Specifically, the court viewed the state law as defining the "transfer and possession of aerosol paint," whereas the local ordinance merely regulates the "retail display of aerosol paint." *Id.*

7. *Id.* at 902-03, 844 P.2d at 540, 16 Cal. Rptr. 2d at 221. Although the California Legislature, in a 1981 Act regarding this topic, expressly stated an intent to preempt, later revisions of the law did not include such express language. Therefore, the majority believed this intent was not present. The dissenting opinion, on the other hand, found that the legislature intended, by implication, for the preemption's continuation. Therefore, the local law should have been preempted. *Id.* at 909, 844 P.2d at 544, 16 Cal. Rptr. 2d at 225 (Lucas, C.J., dissenting).

VII. PARENT & CHILD LAW

The 1988 amendment to Penal Code section 272 subjecting parents to criminal liability if they fail to exercise reasonable care, supervision, protection, and control over their children is constitutional as it is neither vague nor overbroad: **Williams v. Garcetti.**

In Williams v. Garcetti,[1] the California Supreme Court unanimously held that a 1988 amendment to section 272 of the California Penal Code passed the constitutional due process test.[2] Section 272 states that any person who causes, encourages, or contributes to the delinquency of a minor is guilty of a misdemeanor.[3] The amendment added that parents or legal guardians have an affirmative duty to "exercise reasonable care, supervision, protection, and control" over their children.[4] The plaintiffs, a group of taxpayers,[5] challenged the amendment as being unconstitutionally vague and overbroad. The court addressed each assertion separately.

The court first addressed the issue of vagueness. It noted that laws must not be so vague as to deny a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[6] Pursuant to this premise, the court concluded that the amendment would not be too vague if a parent of regular intelligence

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1. 5 Cal. 4th 561, 853 P.2d 507, 20 Cal. Rptr. 2d 341 (1993). Justice Mosk wrote the opinion, joined by Chief Justice Lucas and Justices Panelli, Kennard, Arabian, Baxter, and George.

2. *Id.* at 566, 853 P.2d at 508, 20 Cal. Rptr. 2d at 342. The trial court granted summary judgment in favor of the defendants, but the court of appeal found the amendment unconstitutionally vague. *Id.* at 567, 853 P.2d at 509, 20 Cal. Rptr. 2d at 343. In so finding, the appellate court expressly declined to decide the overbreadth issue. *Id.*

3. Specifically, the statute provides:

> Every person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 18 years to come within the provisions of Section 300, 601, or 602 of the Welfare and Institutions Code or which act or omission contributes thereto . . . is guilty of a misdemeanor.

CAL. PENAL CODE § 272 (Deering 1994).

4. CAL. PENAL CODE § 272 (Deering 1994).

5. The trial court found that the plaintiffs lacked standing to challenge the amendment, but this conclusion was overturned by the court of appeal. *Williams*, 5 Cal. 4th at 567, 853 P.2d at 509, 20 Cal. Rptr. 2d at 343.

6. *Id.* at 567, 853 P.2d at 509, 20 Cal. Rptr. 2d at 343. *See also* 13 CAL. JUR. 3D *Constitutional Law* § 294 (1989).

could understand their duty of "reasonable care, supervision, protection and control."[7] The defendants argued that the amendment merely served to clarify a pre-existing duty,[8] while the plaintiffs contended that it established a new standard for liability.[9] The court stated that it was irrelevant whether the new language changed the standard provided the statute, as amended, was not vague or overbroad.[10] Furthermore, the court found that the duty imposed by the amendment was not vague because it incorporated definitions and rules that have long been part of California dependency and tort law.[11]

The first two requirements of the amendment relate to the well-established parental duties of "care" and "protection."[12] Both of these terms are specifically defined in section 300 of the Welfare and Institutions Code and were not contested by the plaintiffs as being too vague.[13] The remaining terms, "supervision" and "control," were not as specific, so the court looked to legislative intent and tort law to determine if they were sufficiently well-defined to satisfy the constitutional standard.[14] Examining the pre-amendment language, the court found an implicit duty on the part of parents to make reasonable efforts to prevent their minor children from becoming delinquent.[15] Once such an implied duty was found, the court concluded that the legislature "must have intended the 'supervision' and 'control' elements of the amendment to *describe* parents' duty to reasonably supervise and control their children . . . ."[16]

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7. *Williams*, 5 Cal. 4th at 568, 853 P.2d at 509, 20 Cal. Rptr. 2d at 343.

8. The court noted that a parent's duty to take responsibility for their child is not new; parents have long been liable for any delinquent behavior to which they contributed. *See, e.g.*, *In re* Sing, 14 Cal. App. 512, 112 P. 582 (1910).

9. *Williams*, 5 Cal. 4th at 568, 853 P.2d at 509, 20 Cal. Rptr. 2d at 343.

10. *Id.* at 578, 853 P.2d at 517, 20 Cal. Rptr. 2d at 350.

11. *Williams*, 5 Cal. 4th at 570, 853 P.2d at 511, 20 Cal. Rptr. 2d at 345. Additionally, the court noted that it is possible for an amendment to be passed simply to clarify the meaning of a statute. *Id.* The court refused to decide the issue on this matter, however, because the legislative intent was not clear enough on the history of the amendment. *Id.*

12. *Id.* at 569, 853 P.2d at 511, 20 Cal. Rptr. 2d at 345.

13. CAL. WELF. & INST. CODE § 300 (West 1984).

14. *Williams*, 5 Cal. 4th at 570, 853 P.2d at 511, 20 Cal. Rptr. 2d at 345.

15. *Id.* at 571, 853 P.2d at 511-12, 20 Cal. Rptr. 2d at 345-46. This implied duty is derived from the language imposing misdemeanor liability on any person whose acts or omissions encourage delinquency as defined in §§ 601 and 602 of the Welfare and Institutions Code. These sections define delinquency as, among other things, violating a set curfew, being habitually truant, or committing any crime. CAL. WELF. & INST. CODE §§ 601-602 (West 1984).

16. *Williams*, 5 Cal. 4th at 571, 853 P.2d at 512, 20 Cal. Rptr. 2d at 346 (emphasis

Furthermore, the court found that because there is well-established tort law finding parental liability to supervise and control children,[17] the new language used by the amendment was not imposing a new duty but incorporating the definition and limits of an old duty.[18] Finally, the court noted that "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language."[19]

The standard for breach of the parental duty under this amendment is criminal negligence, and the court found this to be sufficiently high to allay any fears that the "reasonableness" standard is too uncertain.[20] This standard provides a cushion for parents because they will not be held criminally negligent if they do not have actual or constructive knowledge of the risk or if they reasonably try but fail, to control their children.[21] Liability is only found when parents are grossly negligent in failing to supervise and control their children.[22]

A statute can also be impermissibly vague if it allows for discriminatory or arbitrary application and enforcement.[23] In this case, the court found that the amendment was clear enough for policemen, judges, and juries to enforce because it incorporates the aforementioned tort law definitions.[24] Additionally, the court noted that the causation element provided further clarity of the proper application of the law.[25] Because a criminal standard of negligence sets a high standard for breach, the causal link will most likely be clear in cases where section 272 applies.[26]

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added).

17. *See, e.g.*, Singer v. Marx, 144 Cal. App. 2d 637, 301 P.2d 440 (1956). Additionally, the court noted that California follows the Restatement rule of parental liability, which places a duty on the parent to:

> [E]xercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.

Williams, 5 Cal. 4th at 572, 853 P.2d at 512, 20 Cal. Rptr. 2d at 346 (quoting Robertson v. Wentz, 187 Cal. App. 3d 1281, 232 Cal. Rptr. 634 (1986)).

18. *Williams*, 5 Cal. 4th at 572, 853 P.2d at 512, 20 Cal. Rptr. 2d at 346.

19. *Id.* at 573, 853 P.2d at 513, 20 Cal. Rptr. 2d at 347 (quoting United States v. National Prod. Dairy Corp., 372 U.S. 29, 32 (1963)).

20. *Id.* at 574, 853 P.2d at 513, 20 Cal. Rptr. 2d at 347.

21. *Id.* at 574, 853 P.2d at 514, 20 Cal. Rptr. 2d at 348.

22. *Id.*

23. *Id.* at 575, 853 P.2d at 515, 20 Cal. Rptr. 2d at 349. (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)).

24. *Id.* at 576, 853 P.2d at 515, 20 Cal. Rptr. 2d at 349.

25. *Id.*

26. *Id.*

Finally, the court addressed the overbreadth issue.[27] The plaintiffs contended that the amendment made a "standardless intrusion . . . into the intimate area of parent-child relationships."[28] The court recognized the fundamental nature of the rights involved but found that the plaintiffs failed to show that the amendment was substantially overbroad.[29] It noted that the overbreadth doctrine is "strong medicine" and is employed "only as a last resort."[30] Finally, the court concluded that the plaintiffs' general assertions lacked the kind of particularity required to apply the overbreadth doctrine.[31] In this case, the plaintiffs failed to show specific and numerous instances proving that the amendment was overbroad. As a result, the court upheld the statute as constitutional.[32]

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27. "An overbreadth challenge is based on the ground that legislation, even if lacking either clarity or precision, . . . may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of freedom protected by the First Amendment." 13 CAL. JUR. 3D *Constitutional Law* § 265 (1989).

28. Williams, 5 Cal. 4th at 578, 853 P.2d at 516, 20 Cal. Rptr. 2d at 350.

29. *Id.* at 577-78, 853 P.2d at 516, 20 Cal. Rptr. 2d at 350.

30. *Id.* at 577, 853 P.2d at 516, 20 Cal. Rptr. 2d at 350 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

31. *Id.* at 577-78, 853 P.2d at 516, 20 Cal. Rptr. 2d at 350 (citing New York State Club Ass'n v. New York City, 487 U.S. 1 (1988)).

32. *Id.*

VIII. RECORDS LAW

Police records of discipline imposed on an arresting officer are discoverable in juvenile proceedings pursuant to sections 1043 and 1046 of the Evidence Code:
City of San Jose v. Superior Court.

I. INTRODUCTION

The California Supreme Court in *City of San Jose v. Superior Court*[1] held that a minor in a juvenile proceeding may, upon a showing of good cause, discover the outcome of any internal police investigation of prior complaints made against an arresting officer.[2]

Justice Panelli, writing for a unanimous court, held that Evidence Code section 1045(b)(2), which conditions the discovery of police personnel records in an adult criminal proceeding upon a determination of relevance by the trial court, applies to juvenile proceedings.[3] Instead of accepting a literal interpretation of section 1045(b)(2) which limited the statute's applicability to criminal proceedings,[4] the court focused on the legislative intent of Penal Code section 832.5: to keep police personnel records confidential[5] unless judged necessary to the litigation.[6]

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1. 5 Cal. 4th 47, 850 P.2d 621, 19 Cal. Rptr. 2d 73 (1993).

2. *Id.* at 55, 850 P.2d at 625, 19 Cal. Rptr. at 77. The state charged minor Michael B. with assault on an officer and resisting arrest under Welfare and Institutions Code § 602. *Id.* at 50, 850 P.2d at 621-22, 19 Cal. Rptr. 2d at 73-74. Claiming that any force used in resisting the officer was necessary to counter the excessive force employed, the minor sought to discover the officers' police personnel records. *Id.* at 50, 850 P.2d at 622, 19 Cal. Rptr. 2d at 74. After a review of the records, the trial court ordered the disclosure of 11 complaints that alleged incidents of racial prejudice and excessive force. *Id.* However, the court limited the discovery to the final results of the investigations, thereby excluding the conclusions of the individual investigating officers. *Id.*

3. *Id.* at 54, 850 P.2d at 624, 19 Cal. Rptr. 2d at 76.

4. Welfare and Institutions Code § 203 distinguishes between criminal and juvenile proceedings in stating, "[a]n order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding." CAL. WELF. & INST. CODE § 203 (Deering 1993).

5. Penal Code § 832.7 provides in relevant part:

> "Peace officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code."

CAL. PENAL CODE § 832.7 (Deering 1993).

6. *San Jose*, 5 Cal. 4th at 51-54, 850 P.2d at 623-24, 19 Cal. Rptr. 2d at 75-76.

The court also held that records discoverable under section 1045 may include records of discipline imposed on the arresting officers.[7] Rejecting the argument that section 1045 prevents discovery of disciplinary action against a police officer, the court distinguished the discovery of an investigating officer's conclusions, prohibited under the statute, from the discovery of disciplinary measures applied.[8]

II. TREATMENT

In *Pitchess v. Superior Court*,[9] the court held that a criminal defendant's fundamental right to a fair trial permitted discovery of any police officer personnel records relevant and necessary to the defense.[10] The California Legislature, in 1978, codified the *Pitchess* provisions into Penal Code sections 832.7 and 832.8, and Evidence Code sections 1043 through 1045.[11]

The *Pitchess* legislation provides that police officer personnel records are confidential and not subject to disclosure unless required by applicable discovery rules.[12] A party may discover personnel records by filing a motion with the court, provided notice is given to the governmental agency controlling such records.[13] The motion must specify the information that is sought to be discovered and show good cause for its discovery.[14] The court will then review, in camera, the material and exclude from discovery any complaints more than five years old, conclusions of investigating officers of a complaint, and facts too remote to have any practical benefit.[15] The court may then, in the interests of justice, refuse to permit discovery in order to protect the officer of the agency from

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The movant must issue to the court an affidavit showing, among other things, good cause requiring the discovery. CAL. EVID. CODE § 1043(b)(3) (Deering 1993).

7. *San Jose*, 5 Cal. 4th at 55, 850 P.2d at 625, 19 Cal. Rptr. 2d at 77.
8. *Id.* at 55-56, 850 P.2d at 625-26, 19 Cal. Rptr. 2d at 77-78.
9. 11 Cal. 3d 531, 522 P.2d 305, 113 Cal. Rptr. 897 (1974).
10. *Id.* at 536-38, 522 P.2d at 308-09, 113 Cal. Rptr. at 900-01.
11. *San Jose*, 5 Cal. 4th at 50-51, 850 P.2d at 622, 19 Cal. Rptr. 2d at 74.
12. CAL. PENAL CODE § 832.7(a) (Deering 1993).
13. CAL. EVID. CODE § 1043(a) (Deering 1993). Prior to disclosing the records, the governmental agency must contact the individual whose records are being sought for discovery. *Id.*
14. CAL. EVID. CODE § 1043(b)(3) (Deering Supp. 1993).
15. CAL. EVID. CODE § 1045(b) (Deering 1986).

"unnecessary annoyance, embarrassment, or oppression."[16] Finally, the court must order the discovering party not to use the material for any purpose other than a court proceeding.[17]

In *San Jose*, the court determined that Evidence Code section 1045(b)(2), which excludes from discovery "in any criminal proceeding the conclusions of any officer investigating a complaint,"[18] applied to juvenile as well as criminal proceedings.[19] Rejecting a statutory distinction between the two types of proceedings, the court pointed to the "quasi-criminal nature of juvenile proceedings"[20] and held that "the same considerations that operate to protect the confidentiality of peace officer personnel records from disclosure in the adult context similarly govern their disclosure in delinquency cases."[21] In support of its holding the court cited a line of cases affirming the proposition that discovery rules are applicable to such proceedings.[22]

Next, the court examined whether records of disciplinary action against officers are excluded from discovery under section 1045(b)(2).[23] The court pointed to the language of section 1045(a), which states in part that "[n]othing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of such investigations . . . ."[24] Seeking an interpretation which would reconcile the two statutes, the court rejected San Jose's argument that section 1045(b)(2) prohibited the discovery of disciplinary action on the ground that "[i]f the City's interpretation were correct, the exception provided by subdivision (b)(2) would swallow the rule permitting disclosure as established in subdivision (a)."[25] The court

16. CAL. EVID. CODE § 1045(d) (Deering 1986).

17. CAL. EVID. CODE § 1045(e) (Deering 1986).

18. CAL. EVID. CODE § 1045(b)(2) (Deering 1986).

19. *San Jose*, 5 Cal. 4th at 54, 850 P.2d at 624, 19 Cal. Rptr. 2d at 76.

20. *Id.* at 53, 850 P.2d at 624, 19 Cal. Rptr. 2d at 76 (quoting Joe Z. v. Superior Court, 3 Cal. 3d 797, 801, 478 P.2d 26, 28, 91 Cal. Rptr. 594, 596 (1970)). *See generally* Ralph E. Boches, *Juvenile Justice in California: A Re-evaluation*, 19 HAST. L.J. 47 (1967-68) (discussing the nature of juvenile proceedings in California).

21. *San Jose*, 5 Cal. 4th at 54, 850 P.2d at 624, 19 Cal. Rptr. 2d at 76.

22. *Id.* at 53-54, 850 P.2d at 624, 19 Cal. Rptr. 2d at 76 (citing *In re* Gault, 387 U.S. 1 (1967); Joe Z. v. Superior Court, 3 Cal. 3d 797, 478 P.2d 26, 91 Cal. Rptr. 594 (1970); Larry E. v. Superior Court, 194 Cal. App. 3d 25, 239 Cal. Rptr. 264 (1987); Pierre C. v. Superior Court, 159 Cal. App. 3d 1120, 206 Cal. Rptr. 82 (1984)).

23. Evidence Code § 1045(b)(2) provides that "[i]n determining relevance the court shall examine the information in chambers in conformity with Section 915, and shall exclude from disclosure . . . [i]n any criminal proceeding the conclusions of any officer investigating a complaint . . . ." CAL EVID. CODE § 1045(b)(2) (Deering 1986).

24. CAL. EVID. CODE § 1045(a) (Deering 1986).

25. *San Jose*, 5 Cal. 4th at 55, 850 P.2d at 625, 19 Cal. Rptr. 2d at 77.

opined that it preferred to adopt a construction "giving every word some significance."[26]

Turning to an analysis of the legislative intent of the *Pitchess* provisions, the court looked to the legislative committee staff report accompanying the amendment which added the phrase "conclusions of any officer investigating a complaint" to the bill.[27] Relying on a passage which states that the purpose of the amendment is "to protect the officers whose files are sought from discovery of what are unsubstantiated comments of another officer,"[28] the court determined that the intent of the legislature was "to prevent the disclosure not of the final outcome of a disciplinary process, but of preliminary determinations untested by the full panoply of investigative procedures."[29] Thus, the court held that records of disciplinary measures taken against police officers were open to discovery.[30]

III. CONCLUSION

The California Supreme Court's decision in *City of San Jose v. Superior Court* attempts to balance the interests of the defendant in presenting his case with the interests of police officers and police agencies in keeping their official records confidential. The court accomplished this goal by holding that the *Pitchess* legislation permits the discovery of records of discipline imposed on an officer, but not the conclusions of an investigating officer.[31] The procedure for discovering such material in juvenile proceedings is the same as in criminal proceedings.[32]

The overall impact of this decision on police officers and police conduct should be minimal. First, any requests for discovery of police records will still require a showing of "good cause."[33] Even upon such a showing, a judge retains the authority to deny such a request if disclo-

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26. *Id.*

27. *Id.* at 55-56, 850 P.2d at 625, 19 Cal. Rptr. 2d at 77. *See generally Selected 1978 California Legislation*, 10 PAC. L.J. 431 (1979) (discussing peace officers' records).

28. ASSEM. COMM. ON CRIMINAL JUSTICE, ANALYSIS OF SEN. BILL NO. 1436, 95th Cong., Reg. Sess. 4 (1978).

29. *San Jose*, 5 Cal. 4th at 56, 850 P.2d at 626, 19 Cal. Rptr. 2d at 78.

30. *Id.* at 55, 850 P.2d at 625, 19 Cal. Rptr. 2d at 77.

31. *Id.*

32. *Id.* at 54, 850 P.2d at 624, 19 Cal. Rptr. 2d at 76.

33. *See* CAL. EVID. CODE § 1043(c) (Deering 1993).

sure would subject the officer to "unnecessary annoyance, embarrassment, or oppression."[34] Accordingly, the court found that with the proper safeguards in place,[35] a defendant has the right under statute to discover relevant records of discipline imposed on an arresting officer.[36]

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34. CAL. EVID. CODE § 1045(d) (Deering 1986).

35. *See generally* 21 CAL. JUR. 3D *Criminal Law* § 2851 (1985) (summarizing various procedural safeguards including mandatory in camera review and the court's power to order that the information be used only for trial purposes).

36. *San Jose*, 5 Cal. 4th at 54-55, 850 P.2d at 624-25, 19 Cal. Rptr. 2d at 76-77.

IX. TORT LAW

A. *The provisions for advertising injury in a standard comprehensive general liability insurance policy do not encompass claims for losses arising under the Unfair Business Practices Act:* **Bank of the West v. Superior Court.**

In *Bank of the West v. Superior Court*,[1] the California Supreme Court determined the scope of coverage provided by a comprehensive general liability insurance policy with an advertising injury provision.[2] The court held that the language of the policy referred to the common law tort of unfair competition and not to the conduct prohibited by the Unfair Business Practices Act.[3] Specifically, the court ruled that an insured is not entitled to make a claim for settlements with consumers who are injured by an illegal scheme of the insured.[4]

The court's opinion began with a comprehensive summary of the facts of the case.[5] Originally, a consumer class action suit was filed against the Bank of the West for violating the federal Truth-in-Lending Act,[6] the Unruh Act,[7] and the Unfair Business Practices Act[8] ("UBPA").[9] However,

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1. 2 Cal. 4th 1254, 833 P.2d 545, 10 Cal. Rptr. 2d 538 (1992). Justice Panelli delivered the opinion of the court with Chief Justice Lucas, and Justices Arabian, Baxter and George concurring. *Id.* at 1258-78, 833 P.2d at 547-61, 10 Cal. Rptr. 2d at 540-54. Justice Mosk delivered a separate concurring opinion which was joined by Justice Kennard. *Id.* at 1278, 833 P.2d at 561, 10 Cal. Rptr. 2d at 554.

2. *Id.* at 1258, 833 P.2d at 547, 10 Cal. Rptr. 2d at 540.

3. *Id.*

4. *Id.* at 1269, 833 P.2d at 555, 10 Cal. Rptr. 2d at 548.

5. *Id.* at 1258-62, 833 P.2d at 547-50, 10 Cal. Rptr. 2d at 540-43.

6. The federal Truth-in-Lending Act describes the required procedures for disclosing loan information to consumers. *See* 15 U.S.C. § 1601-93 (1982).

7. The Unruh Act closely resembles the federal Truth-in-Lending Act and affects retail installment contracts in California. CAL. CIV. CODE § 1801-1812.20 (West 1985).

8. The Unfair Business Practices Act begins in California Business and Professions Code § 17200 which reads:

> As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

CAL. BUS. & PROF. CODE § 17200 (West 1987 & Supp. 1994).

9. *Bank of the West*, 2 Cal. 4th at 1258, 833 P.2d at 547, 10 Cal. Rptr. 2d at 540.

by the time Bank of the West settled the suit, only the UBPA claims remained.[10] Bank of the West then brought suit to determine whether their insurance policy covered the settlement.[11]

The court noted precedents for denying coverage,[12] but analyzed this dispute as a matter of contractual interpretation.[13] As such, the court examined whether the coverage would be consistent with the insured's objective reasonable expectations.[14] Noting that a dictionary definition of "unfair competition" might cover the type of practices at issue,[15] the court decided that the term must be read within the context of the policy.[16] The policy covered damages arising from unfair competition.[17] The

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Bank of the West developed a program to finance auto insurance premiums for consumers desiring to pay in installments. The Bank informed only insurance agents of this plan. When a consumer expressed a desire to extend payments made to his insurance agent, the agent would apply for a loan from Bank of the West in the customer's name. As the Bank had no direct contact with the consumers, many were unaware of the terms of the loan, which were far from favorable. *Id.* at 1260, 833 P.2d at 548, 10 Cal. Rptr. 2d at 541.

10. *Id.* Some of the issues in the complaint were removed to federal court and adjudicated. Others were disposed of on summary judgment. *Id.* at 1259, 833 P.2d at 548, 10 Cal. Rptr. 2d at 541. The remaining UBPA claims were settled for $500,000. plus attorneys' fees. *Id.* at 1260, 833 P.2d at 548, 10 Cal. Rptr. 2d at 541.

11. *Id.* at 1260-61, 833 P.2d at 549, 10 Cal. Rptr. 2d at 541-42. At the superior court level, Industrial prevailed on a summary adjudication of the issues. *Id.* at 1261, 833 P.2d at 549, 10 Cal. Rptr. 2d at 542. The Bank challenged this ruling by filing a petition for writ of mandate. *Id.* The court of appeal vacated the trial court's order and found that the Bank had made a valid claim for coverage. *Id.* The California Supreme Court granted review of that decision. Bank of the West v. Superior Court, 807 P.2d 1006, 279 Cal. Rptr. 777 (1991).

12. *Bank of the West*, 2 Cal. 4th at 1263, 833 P.2d at 550, 10 Cal. Rptr. 2d at 543. The court cited, among other cases, Nationwide Mut. Ins. Co. v. Dynasty Solar, Inc., 753 F. Supp. 853, 855 (N.D. Cal. 1990) (stating that the UBPA's definition of unfair competition differs from common law definition referred to in a standard insurance policy); Ruder & Finn, Inc. v. Seaboard Sur. Co., 422 N.E. 2d 518, 521 (N.Y. 1981). Seaboard Sur. Co. v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 504 P.2d 1139, 1143 (Wash. 1973) (holding that a statute similar to UBPA does not authorize coverage under standard insurance policy language covering "unfair competition").

13. *Bank of the West*, 2 Cal. 4th at 1264, 833 P.2d at 551-52, 10 Cal. Rptr. 2d at 544-45.

14. *Id. See also* AIU Ins. Co. v. Superior Court, 51 Cal. 3d 807, 814, 799 P.2d 1253, 1259, 274 Cal. Rptr. 820, 826 (1990) (finding that the ordinary rules of contractual interpretation apply to insurance contracts).

15. *Bank of the West*, 2 Cal. 4th at 1265, 833 P.2d at 552, 10 Cal. Rptr. 2d at 545. Webster's Third New International Dictionary defines "unfair competition" as "business competition effected by an act that is deceptive and in effect a fraud on the public or that otherwise violates the legal and equitable rights of a competitor or the public." *Id.* (citing WEBSTER'S INT'L DICTIONARY (unabridged ed. 1961)).

16. *Id.*

17. *Id.* The court understood this language to mean that unfair competition must refer to conduct which could cause "damages."

court pointed out that damages are not available under the UBPA, which allows only restitution.[18] Thus, the court reasoned that "unfair competition" had a different meaning under the policy.

The court then discussed the implications of the bank's argument that damages should include all monetary relief.[19] The court examined the deterrent effect intended by the UBPA,[20] and opined that deterrence would be lost if an insured could shift the burden of restoring wrongfully obtained funds to the insurer.[21] This result would undermine strong public policy against allowing a wrongdoer to transfer the cost of violating the law to an insurer.[22]

The court dismissed the bank's contention that the settlement of the underlying action did not constitute disgorgement under the UBPA,[23] by stressing the inconsistency of the bank's argument that:[24] (1) the bank sought coverage for unfair competition damages under the definition of the UBPA, but then (2) claimed that the settlement was not for a violation of the Act.[25]

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18. *Id.* at 1266, 833 P.2d at 552-53, 10 Cal. Rptr. 2d at 545-46. The section of the UBPA dealing with remedies reads in pertinent part:

> Any person who engages, has engaged, or proposes to engage in unfair competition within this state may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments . . . to *restore* to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

CAL. BUS. & PROF. CODE § 17203 (West 1987 & Supp. 1994) (emphasis added).

19. *Bank of the West*, 2 Cal. 4th at 1267, 833 P.2d at 553-54, 10 Cal. Rptr. 2d at 546-47.

20. *Id.* Jaffe v. Cranford Ins. Co., 168 Cal. App. 3d 930, 214 Cal. Rptr. 567 (1985), is the leading California case expressing this policy. The court pointed out that this decision followed the reasoning of Seaboard Sur. Co. v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 540 P.2d 1139 (Wash. 1975), where Washington's unfair competition act was found to authorize only restitutionary relief. *Bank of the West*, 2 Cal. 4th at 1268, 833 P.2d at 554, 10 Cal. Rptr. 2d at 548.

21. *Bank of the West*, 2 Cal. 4th at 1267, 833 P.2d at 553, 10 Cal. Rptr. 2d at 546.

22. *Id.* In *Jaffe*, the court opined that "[a]t least absent demonstrably unusual circumstances, we have doubts whether an insurance policy which purported to insure a party against payments of a restitutionary nature would comport with public policy." *Jaffe*, 168 Cal. App. 3d at 935, 214 Cal. Rptr. at 570.

23. *Bank of the West*, 2 Cal. 4th at 1271-72, 833 P.2d at 557, 10 Cal. Rptr. 2d at 550. *See supra* note 9.

24. *Id.* at 1271-72, 833 P.2d at 557, 10 Cal. Rptr. 2d at 550.

25. *Id.*

Although the foregoing conclusions were dispositive on the issue, the majority further analyzed a separate reason for denying coverage.[26] The standard comprehensive general liability policy covered damages for conduct which occurred "in the course of" the insured's advertising activities.[27] The majority decided that such language requires a causal connection between the loss and the advertising.[28] Under the present facts, the court could not find such a connection.[29] Thus, coverage would be denied on this basis as well. Justice Mosk's concurring opinion declined to address this issue, calling it "unnecessary."[30]

The decision in *Bank of the West* represents a reaffirmation of public policy concerns in the insurance context.[31] It may also be the beginning of a trend toward limiting insurance coverage. Finally, it evidences the significance of interpretation of policy language, and how such a narrow interpretation may better reflect business in the current marketplace.

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26. *Id.* at 1273, 833 P.2d at 558, 10 Cal. Rptr. 2d at 551.

27. *Id.* It was argued that the unlawful practices alleged by the consumers in the *Fallat* action did not occur in the course of the Bank's advertising activities because the Bank had never advertised its plan to the consumers. *Id.*

28. *Bank of the West*, 2 Cal. 4th at 1274-75, 833 P.2d at 558-59, 10 Cal. Rptr. 2d at 551-52. The Bank argued that if any connection existed between the Bank's advertisements and the illegal lending practices, then coverage was mandated, even if the advertisements did not cause the harm. *Id.*

29. *Id.* at 1277, 833 P.2d at 560, 10 Cal. Rptr. 2d at 553. The court noted that the only claims still present at the time of settlement were restoration claims based upon the UBPA. *Id.* These claims were based on the inadequate disclosures to consumers, and the illegal terms of the loans. The court found that the Bank's advertising to the insurance agents had no causal connection with these injuries. *Id.*

30. *Id.* at 1278, 833 P.2d at 561, 10 Cal. Rptr. 2d at 554. Justice Mosk, with Justice Kennard concurring, expressed no opinion as to the validity of the majority's position on causal connection. *Id.*

31. The court's approval of *Jaffe*, in which very broad language was used to show the preeminence of public policy concerns within insurance contracts, indicates that this decision could serve as a precedent for other insurance cases with similar policy concerns. *See supra* note 22.

B. *Under Civil Code section 846, the class of activities that may constitute a "recreational activity" is not limited solely to the activities bearing a resemblance to those listed in the statute and the immunity granted by the statute is not limited to real property that is "suitable" for recreational use:* **Ornelas v. Randolph.**

I. INTRODUCTION

In *Ornelas v. Randolph*,[1] The California Supreme Court considered whether injuries sustained as a result of playing near farm equipment located on the defendant's property could be classified as a recreational activity, and thus, fall within the Civil Code section 846 immunity provision.[2] In deciding this issue, the court considered whether the legislature adopted the judicially created "suitability exception."[3]

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1. 4 Cal. 4th 1095, 847 P.2d 560, 17 Cal. Rptr. 2d 594 (1993). Justice Arabian wrote the majority opinion, in which Chief Justice Lucas and Justices Baxter and George concurred. Justice George also wrote a separate concurring opinion. *Id.* at 1109, 847 P.2d at 569, 17 Cal. Rptr. 2d at 603. Justice Panelli wrote the dissenting opinion with Justices Mosk and Kennard concurring. *Id.* at 1110, 847 P.2d at 570, 17 Cal. Rptr. 2d at 604.

While playing with friends on a farm owned by the defendant, the plaintiff suffered injuries from the impact of a falling metal pipe. *Id.* at 1098, 847 P.2d at 561, 17 Cal. Rptr. 2d at 595. The trial court granted summary judgment for the defendant under the immunity privilege of § 846 (all further references to the code herein pertain to Civil Code § 846). *Id.* at 1098-99, 847 P.2d at 561-62, 17 Cal. Rptr. 2d at 595-96. The court of appeal reversed the judgment declaring § 846 inapplicable to the plaintiff's claim because the defendant's property lacked the requisite recreational use. 12 Cal. App. 4th 1017, 1024, 8 Cal. Rptr. 2d 214, 218 (1992).

The California Supreme Court reversed stating that the legislature's definition of recreational purpose was broad enough to include the plaintiff's conduct in the instant case. *Ornelas*, 4 Cal. 4th at 1098, 847 P.2d at 561, 17 Cal. Rptr. 2d at 595. In doing so, the court rejected the proposition held by numerous lower courts that the property in question must be suitable for recreational use in order to qualify for the immunity provided by § 846. *Id.* at 1106-07, 847 P.2d at 567-69, 17 Cal. Rptr. at 601-03.

2. *See generally* 50 CAL. JUR 3D *Premises Liability* § 32 (1979 & Supp. 1993). "The statute was enacted to encourage property owners to allow the general public to engage in recreational activities free of charge on privately owned property." *Id.* Section 846 sought to limit the growing tendency of private landowners to exclude the public from their land for recreational uses based on the fear of tort liability. *Id.*

3. *Ornelas*, 4 Cal. App. 4th at 1103, 847 P.2d at 565, 17 Cal. Rptr. 2d at 599. The suitability exception applies when a recreationist enters the defendant's land to partic-

II. TREATMENT OF THE CASE

A. *The Majority Opinion*

The majority prefaced its opinion by enumerating the statutory elements of section 846 enabling a private landowner to avoid liability for injuries incurred by the plaintiff as a result of the plaintiff's recreational use of the land.[4] The majority opinion stressed that before the defendant can obtain section 846 immunity, the defendant must be an "owner of an estate or any other interest in real property" and the plaintiff's injury must be the result of entering the property for a recreational purpose.[5] The court dismissed the proposition that the defendant could not obtain immunity because the plaintiff's conduct fell outside of the statute.[6] The court reasoned that the list of activities provided in section 846 was not intended to be exhaustive.[7] Furthermore, the court noted that the diverse activities listed in section 846 lacked any unifying trait.[8] Thus, the

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ipate in one of the activities listed in § 846 and the land is inappropriate for that use. The landowner does not qualify for immunity should the recreationist suffer injury. *Id. See generally* Myers v. Atchison, Topeka & Santa Fe Ry. Co., 224 Cal. App. 3d 752, 760-62, 274 Cal. Rptr. 122, 127-28 (1990)(reasoning that the suitability requirement was appropriate for the determination of whether a railroad right-of-way can have a recreational use); Paige v. North Oaks Partners, 134 Cal. App. 3d 860, 184 Cal. Rptr. 867 (1982)(recognizing the existence of the suitability requirement).

4. *Ornelas*, 4 Cal. App. 4th at 1099-1100, 847 P.2d at 562-63, 17 Cal. Rptr. 2d at 596-97. *See* CAL. CIV. CODE § 846 (West 1982 & Supp. 1994)(providing that "[a]n owner of any estate or any other interest in real property . . . owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions"). *Id. See generally* 50 CAL. JUR. 3D *Premises Liability* § 36 (1979 & Supp. 1993). "[T]he legislature intended to broaden the scope of the section so as to immunize the owner of any interest in real property, regardless of whether the interest included the right of exclusive possession." *Id.* (citation omitted).

5. *Ornelas*, 4 Cal. 4th at 1100, 847 P.2d at 563, 17 Cal. Rptr. 2d at 597. *See generally*, B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 912 (9th ed. 1988 & Supp. 1993) (stating that an owner "owes no duty to keep his premises safe or to warn of hazards as to persons entering with permission for any recreational purpose").

6. *Ornelas*, 4 Cal. App. 4th at 1100, 847 P.2d at 563, 17 Cal. Rptr. 2d at 597.

7. *Id.* Section 846 defines recreational purposes to include:

> fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

CAL. CIV. CODE § 846 (West 1982 & Supp. 1994).

8. *Ornelas*, 4 Cal. 4th 1101, 847 P.2d at 563-64, 17 Cal. Rptr. 2d at 597-98. "Accordingly, because the list of examples does not effectively limit the meaning of 'recreational purpose,' we conclude that entering and using the defendant's property to play on farm equipment invokes the immunity provisions of section 846." *Id.* at 1101,

court concluded that the plaintiff's conduct merited classification as a recreational activity triggering application of section 846.[9]

The court then addressed the plaintiff's contention that the defendant failed to qualify for section 846 immunity because the defendant's property was not suitable for recreational use.[10] The court, in rejecting this suitability requirement, reasoned that the legislature did not intend to make the suitability of the property an element of section 846.[11]

First, the court noted that the suitability requirement is a judicially created concept.[12] Next, the court reasoned that the suitability requirement is impractical due to the difficulty in classifying what type of land accommodates recreational usage.[13] Furthermore, the court stated that the suitability requirement could actually adversely affect landowners who attempt to safeguard their property because such action would amount to an admission that the property is not suitable for recreational use.[14]

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847 P.2d at 564, 17 Cal. Rptr. 2d at 598.

9. *Id.* The court noted that the definition of a recreational purpose stated in § 846 begins with the word "includes," which implies that the list is not necessarily confined to the activities stated. *Id.* at 1101, 847 P.2d at 563, 17 Cal. Rptr. 2d at 597. The court also noted that the examples of activities listed within § 846 range from relatively dangerous activities, such as hang gliding, to less risky pursuits, such as rock collecting and picnicking. *Id.*

10. *Ornelas*, 4 Cal. 4th at 1103, 847 P.2d at 565, 17 Cal. Rptr. 2d at 599. The courts of appeal previously adhered to a third, unwritten requirement of § 846 "that the property . . . must be 'suitable' for a recreational pursuit in order to qualify for the immunity. *Id.* *See supra* note 3 and accompanying text.

11. *Id.* at 1106, 847 P.2d at 567, 17 Cal. Rptr. 2d at 601.

12. *Id.* "[W]e conclude that the so-called 'suitability' exception to section 846 is not compelled by law or logic." *Id.* at 1108, 847 P.2d at 569, 17 Cal. Rptr. 2d at 603.

13. *Id.* at 1106, 847 P.2d at 567, 17 Cal. Rptr. 2d at 601. The court noted the disparate results from various applications of the suitability requirement. "As the instant case illustrates, the concept of 'suitability' is elusive and unpredictable. As a purely judicial construct it has engendered disparate application." *Id.* *See* Valladares v. Stone, 218 Cal. App. 3d 362, 369-70, 267 Cal. Rptr. 57, 61 (1990)(noting that a vacant lot adjacent to a residential center was suitable for recreation). *But see* Domingue v. Presley of S. Cal., 197 Cal. App. 3d 1060, 1067-70, 243 Cal. Rptr. 312, 315-18 (1988) (holding that § 846 does not apply to activities on construction sites because they are not suitable for recreation).

14. *Ornelas*, 4 Cal. 4th at 1107, 847 P.2d at 568, 17 Cal. Rptr. 2d at 602. The suitability requirement punishes landowners who erect warning signs on their land because these landowners are unlikely to qualify for immunity under § 846 as their property is obviously not fit for recreational use. *See, e.g.*, Wineinger v. Bear Brand Ranch, 204 Cal. App. 3d 1003, 1008-09, 251 Cal. Rptr. 681, 684 (1988) (holding that property owner who erected barricades and "no trespassing" signs had acknowledged that the property was unsuitable for recreational use, and therefore outside the scope

Finally, the court rejected the defendant's argument that the legislature had impliedly adopted the suitability requirement by not specifically excluding it when amending section 846.[15] Rather, the court concluded that the suitability requirement is not an element of section 846 because the legislature expressly declined to include it within the statute.[16]

B. Justice George's Concurring Opinion

Although Justice George concurred in the majority opinion, he found it unfortunate that the defendant could obtain immunity for injuries incurred by the child plaintiff, but would not come to the same conclusion for an adult plaintiff who entered the defendant's land for a non-recreational, illegal purpose.[17] Justice George commented that this incongruity lies not with the majority opinion, but "from within the statute itself."[18] Justice George concluded that such a contradictory result develops unavoidably from the manner in which the legislature drafted section 846.[19]

C. Justice Panelli's Dissent

Justice Panelli, in support of his dissenting opinion,[20] argued that the legislature impliedly adopted the suitability requirement through the

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of § 846 immunity). "The injustice of such a result is evident. The statute reasonably applies to lands that are fenced as readily as those that are open." *Ornelas*, 4 Cal. 4th at 1107, 847 P.2d at 568, 17 Cal. Rptr. 2d at 602.

15. *Id.* "In the area of statutory construction, an examination of what the Legislature has done (as opposed to what it has left undone) is generally the more fruitful inquiry." *Id.* at 1108, 847 P.2d at 568, 17 Cal. Rptr. 2d at 602.

16. *Id.* at 1108, 847 P.2d at 569, 17 Cal. Rptr. 2d at 603. "In enacting section 846, the Legislature plainly extended recreational use immunity to a broad class of land owners. It did not limit the statute to agricultural or rural land, to land in an undeveloped or natural condition, or to land otherwise 'suitable' for recreation." *Id.* at 1109, 847 P.2d at 569, 17 Cal. Rptr. 2d at 603.

17. *Id.* (George, J., concurring). This result occurs because § 846 immunizes land owners for injuries to those who enter the land for a recreational purpose. If a person enters the land for a purpose other than recreation, the landowner fails to qualify for immunity under § 846. *Id.*

18. *Id.* "For example, a child who enters property deemed suitable for recreation and is injured falling from an apple tree would be precluded from recovering for his or her injuries, but section 846 would not apply to a thief who enters such property to steal apples and is injured in the same manner." *Id.* at 1110, 847 P.2d at 570, 17 Cal. Rptr. 2d at 604 (George, J., concurring).

19. *Id.* (George, J., concurring). "The unfortunate result in this case is mandated by the manner in which Civil Code section 846 has been drafted. We may not rewrite the statute; that power is reserved to the Legislature." *Id.* (George, J., concurring).

20. *Id.* at 1110, 847 P.2d at 570, 17 Cal. Rptr. at 604 (Panelli, J., dissenting).

doctrine of legislative acquiescence.[21] Despite the fact that many lower court decisions had interpreted section 846 to include a suitability element,[22] the legislature amended section 846 without altering the judicially construed suitability exception.[23] Thus, the legislature impliedly adopted this requirement under the doctrine of legislative acquiescence.[24]

Justice Panelli also maintained that the majority erred in concluding that the plaintiff engaged in a recreational activity when he suffered his injuries because section 846 does not specifically list the plaintiff's activity in this case.[25] Justice Panelli stated that the phrase "any recreational purpose" in section 846 should be construed to include only those activities similar in nature to the activities listed in the statute.[26] Justice Panelli concluded that the plaintiff's activity failed to resemble the recreational activities listed in section 846, and therefore, the defendant should not qualify for immunity.[27]

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21. Id. at 1109-10, 847 P.2d at 569-70, 17 Cal. Rptr. 2d at 569-70 (Panelli, J., dissenting).

22. *Id.* at 1110-11, 847 P.2d at 570, 17 Cal. Rptr. 2d at 604 (Panelli, J., dissenting). *See, e.g.*, Domingue v. Presley of Southern California, 197 Cal. App. 3d 1060, 243 Cal. Rptr. 312 (1988)(recognizing the suitability exception); Nazar v. Rodeffer, 184 Cal. App. 3d 546, 229 Cal. Rptr. 209 (1986)(examining the suitability of land for recreation use before applying section 846); Potts v. Halsted Financial Corp., 142 Cal. App. 3d 727, 191 Cal. Rptr. 160 (1983)(employing the suitability exception); Paige v. North Oaks Partners, 134 Cal. App. 3d 860, 184 Cal. Rptr. 867 (1982)(utilizing suitability in determining immunity).

23. *Ornelas*, 4 Cal. 4th at 1111, 847 P.2d at 571, 17 Cal. Rptr. 2d at 605 (Panelli, J., dissenting). Justice Panelli noted that the court amended § 846 in 1988 to include hang gliding in the list of recreational activities. "Since the suitability exception serves to limit the scope of the immunity provided by the statute, it would have been logical for the Legislature to abrogate this exception if it wished to do so at the same time it was expanding the immunity provided by the statute to include a new recreational activity." *Id.* (Panelli, J., dissenting).

24. *Id.*

25. *Id.* at 1113-14, 847 P.2d at 572-73, 17 Cal. Rptr. 2d at 606-07 (Panelli, J., dissenting).

26. *Id.* at 1114, 847 P.2d at 573, 17 Cal. Rptr. 2d at 607 (Panelli, J., dissenting). Justice Panelli noted that because the legislature expanded the scope of the activities within § 846 to include hang gliding and sport parachuting, the phrase "any recreational purpose" should only be applied to activities that are similar to those enumerated in the statute. *Id.* (Panelli, J., dissenting). Justice Panelli reasoned that had the legislature intended "any recreational purpose" to include activities that were not comparable to the activities listed in the statute, there would have been no reason for the legislature to amend the statute. *Id.* (Panelli, J., dissenting).

27. *Id.* at 1114-15, 847 P.2d at 573, 17 Cal. Rptr. 2d at 607. Justice Panelli noted

III. CONCLUSION

The impact of the California Supreme Court's decision in *Ornelas v. Randolph* broadens the scope of "recreational activities" under section 846. The decision also clearly rejects the proposition that land must be suitable for recreational use in order to qualify for section 846 immunity. Thus, *Ornelas* ultimately narrows the scope of tort liability for landowners.

First, the court has significantly broadened the applicability of section 846 by classifying the plaintiff's conduct as recreational activity. By designating children playing on farm equipment as a recreational activity, the court has increased the types of conduct which may be classified as recreational. Activities previously not classifiable as recreational, either because they exemplify untraditional recreational pursuits or because they bear no sufficient resemblance to the activities listed in section 846, may now qualify for section 846 immunity.[28]

Secondly, the court summarily abolished the suitability exception that previously had been a prerequisite to section 846 immunity.[29] The impact of this change will serve to lessen the burden of landowners in qualifying for immunity under the statute. In rejecting the suitability requirement, the court in essence permits landowners to maintain unsuitable property for recreational use, while still qualifying for section 846 immunity.

The *Ornelas* decision may also be viewed as easing landowner tort liability. By eliminating the suitability exception, the decision specifically removes a major obstacle in qualifying for immunity. Additionally, the definition of a recreational activity appears even less clear due to the broadening of its scope.

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that the doctrine of *ejusdem generis* should apply in the instant case. This doctrine states that "where specific words follow general words in a statute or vice versa, 'the general words will be construed as applicable only to persons or things of the same nature or class as those enumerated.'" *Id.* at 1114, 847 P.2d at 573, 17 Cal. Rptr. 2d at 607 (Panelli, J., dissenting) (citations omitted).

28. *Id.* at 1101, 847 P.2d at 564, 17 Cal. Rptr. 2d at 598.

29. *Id. at* 1108, 847 P.2d at 569, 17 Cal. Rptr. 2d at 603.

IX. WORKERS' COMPENSATION

A. *When the California Uninsured Employers Fund unreasonably delays benefit payments to an injured worker, it is not subject to penalty pursuant to section 5814 of the Labor Code:* **DuBois v. Workers' Compensation Appeals Board.**

I. INTRODUCTION

In *DuBois v. Workers' Compensation Appeals Board*,[1] the California Supreme Court considered whether the Uninsured Employers Fund ("UEF")[2] can be penalized pursuant to Labor Code section 5814[3] for its unreasonable delay in making benefit payments to an injured worker.[4] The court concluded that the UEF is not subject to penalty for failure to make timely payments.[5] In reaching this decision, the court relied on the

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1. 5 Cal. 4th 382, 853 P.2d 978, 20 Cal. Rptr. 2d 523 (1993). Justice George wrote the majority opinion, joined by Chief Justice Lucas and Justices Panelli, Kennard, Arabian, and Baxter. *Id.* at 385-99, 853 P.2d at 979-89, 20 Cal. Rptr. 2d at 524-34. Justice Mosk presented a dissenting opinion. *Id.* at 399-404, 853 P.2d at 989-92, 20 Cal. Rptr. 2d at 534-37.

2. Section 3716 of the California Labor Code establishes the UEF and provides that in the event an employer fails to satisfy a workers' compensation claim as required by § 3715, the UEF shall satisfy such claim. CAL. LAB. CODE § 3716(a) (West 1989). Thus, the function of the UEF is "to ensure that workers who happen to be employed by illegally uninsured employers are not deprived of workers' compensation benefits." *Id.* at (b). The legislature created the UEF as a way to cope with employers who fail to obtain workers' compensation insurance coverage for their workers. *Dubois*, 5 Cal. 4th at 388-89, 853 P.2d at 981, 20 Cal. Rptr. 2d at 526 (citing CAL. LAB. CODE § 3716(b) (West 1989)). It is financed by tax revenues and monetary penalties which may be imposed against an uninsured employer. *Id.* at 389, 853 P.2d at 981, 20 Cal. Rptr. 2d at 526 (quoting 1 STANFORD D. HERLICK, CALIFORNIA WORKER'S COMPENSATION LAW § 3.20 (4th ed. 1990)). The UEF, in turn, may seek recovery from the employer. CAL. LAB. CODE § 3717(a) (West 1989).

3. Labor Code § 5814 provides: "When payment of compensation has been unreasonably delayed or refused . . . the full amount of the order, decision or award shall be increased by 10 percent." CAL. LAB. CODE § 5814 (West 1989). For a discussion of penalties imposed for delay or refusal to pay, see generally 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 408 (9th ed. 1987); 65 CAL. JUR. 3D *Work Injury Compensation* § 318 (1981 & Supp. 1993).

4. *DuBois*, 5 Cal. 4th at 385, 853 P.2d at 979, 20 Cal. Rptr. 2d at 524.

5. *Id. See generally* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* §§ 141, 142 (9th ed. 1987)(discussing payment from Uninsured Employers

statutory language as well as legislative history.[6]

In *Dubois*, Scott R. DuBois suffered neck injuries while working for Rohrer Trucking.[7] The Workers' Compensation Appeals Board determined that the employer was "willfully uninsured for its liability to pay workers' compensation."[8] When the employer failed to make payments, as required by the Rehabilitation Bureau of the Division of Industrial Accidents ("Rehabilitation Bureau"), DuBois requested payment from the UEF.[9] The UEF agreed to provide the unpaid balance of the benefits owed to DuBois and continue to make future payments.[10] When the UEF failed to make any payments after two months, DuBois petitioned the workers' compensation judge, requesting that a ten percent penalty be issued against the UEF in accordance with section 5814.[11] The judge granted the penalty, but the Workers' Compensation Appeals Board held that section 3716.2 exempted the UEF from any assessment of penalties.[12] The court of appeal reversed, concluding that the language of section 3716.2 does not preclude the UEF from the penalty assessment due to its own unreasonable delay in administering workers' compensation benefits.[13] The California Supreme Court reversed the court of appeal.[14]

Fund); 65 CAL. JUR. 3D *Work Injury Compensation* § 26 (1981 & Supp. 1993)(discussing the right to bring an action against an uninsured employer).

6. *DuBois*, 5 Cal. 4th at 387-98, 853 P.2d at 980-88, 20 Cal. Rptr. 2d at 525-33.

7. *Id.* at 385, 853 P.2d at 979, 20 Cal. Rptr. 2d at 524.

8. *Id.* at 385-86, 853 P.2d at 979, 20 Cal. Rptr. 2d at 524; *see* CAL. LAB. CODE § 3700 (West 1989)(requiring private employers to secure the payment of compensation to injured workers by obtaining insurance coverage or "a certificate of consent to self-insurer").

9. *Dubois*, 5 Cal. 4th at 386, 853 P.2d at 979, 20 Cal. Rptr. 2d at 524. The Rehabilitation Bureau awarded DuBois temporary disability benefits. *Id.* Even though Rohrer Trucking had no insurance, it made payments to DuBois until the worker's compensation judge officially declared an award for benefit payments. *Id.* When the employer failed to provide the ordered payments, DuBois sought payments from the UEF. *Id.*

For an overview of California's workers' compensation system, see generally 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* §§ 1, 16, 18 (9th ed. 1987 & Supp. 1993); 65 CAL. JUR. 3D *Work Injury Compensation* §§ 1, 21 (1981 & Supp. 1993); Richard A. Bancroft, *Some Procedural Aspects of the California Workmen's Compensation Law*, 40 CAL. L. REV. 378 (1952); Mark C. Zebrowski, Comment, *Indemnity Clauses and Workers' Compensation: A Proposal for Preserving the Employer's Limited Liability*, 70 CAL. L. REV. 1421, 1422-24 (1982).

10. *DuBois*, 5 Cal. 4th at 386, 853 P.2d at 979-80, 20 Cal. Rptr. 2d at 524-25.

11. *Id.* at 386, 853 P.2d at 980, 20 Cal. Rptr. 2d at 525. For the statutory text of § 5814, see *supra* note 3.

12. *DuBois*, 5 Cal. 4th at 387, 853 P.2d at 980, 20 Cal. Rptr. 2d at 525.

13. *Id.*

14. *Id.* at 385, 853 P.2d at 979, 20 Cal. Rptr. 2d at 524.

II. TREATMENT

A. Majority Opinion

In determining whether section 5814 applied to the UEF, the supreme court began its analysis by focusing upon section 3716, which provides that when an employer fails to pay worker's compensation, the injured employee may seek payment from the UEF.[15] The court noted the absence of any statutory language delineating the scope of the UEF's liability and the lack of any set time limit by which the UEF must commence making payments.[16] Thus, the court stated that there is no statutory support for imposing a penalty against the UEF due to its own delay in making payments.[17]

Next, the court considered section 3716.2[18] which provides in part: "[T]he Uninsured Employers Fund, shall pay the claimant only such benefits allowed . . . that would have accrued against an employer properly insured for workers' compensation liability. The [UEF] shall not be liable for any penalties or for the payments of interest on any awards."[19] Interpreting section 3716.2 as a clear legislative attempt to limit the UEF's liability, the court stated that the assessment of a penalty against the UEF would be "inconsistent with the express limitation placed upon its liability."[20]

The supreme court then determined the applicability of the penalty provision in section 5814.[21] The court first noted that upon enacting sec-

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15. *Id.* at 389, 853 P.2d at 982, 20 Cal. Rptr. 2d at 527. Section 3716 provides in pertinent part: "If the employer fails to pay the compensation . . . within a period of 10 days after notification of the award, the award, upon application by the person entitled thereto, shall be paid by the director from the Uninsured Employers Fund . . . ." CAL. LAB. CODE § 3716 (West 1989).

16. *Dubois*, 5 Cal. 4th at 390, 853 P.2d at 982, 20 Cal. Rptr. 2d at 527.

17. *Id.*

18. *Id.* at 392, 853 P.2d at 984, 20 Cal. Rptr. 2d at 529.

19. CAL. LAB. CODE § 3716.2 (West 1989). The California Legislature enacted § 3716.2 in the wake of Flores v. Workmen's Compensation Appeals Board, 11 Cal. 3d 171, 520 P.2d 1033, 113 Cal. Rptr. 217 (1974), which held that the UEF was liable for the 10% penalty assessed against an employer who wilfully failed to provide workers' compensation. *Id.* at 175-78, 520 P.2d at 1036-38, 113 Cal. Rptr. at 220-22. In 1976, the legislature responded by enacting § 3716.2 which limits the UEF's liability to payment of only those benefits that are due from a properly insured employer. *DuBois*, 5 Cal. 4th at 391-92, 853 P.2d at 983, 20 Cal. Rptr. 2d at 528.

20. *Dubois*, 5 Cal. 4th at 391-92, 853 P.2d at 984, 20 Cal. Rptr. 2d at 528.

21. *Id.* at 395-99, 853 P.2d at 986-89, 20 Cal. Rptr. 2d at 531-34. For the statutory text of § 5814, see *supra* note 3.

tion 5814, the legislature did not intend to apply it to the UEF because at the time of its enactment, the UEF was not yet in existence.[22] The court further stated that the purpose of section 5814, was to discourage employers and insurers from delaying payments, and does not apply to the UEF because as a government entity, the UEF would gain no economic benefit from any delayed payments.[23] Furthermore, the court observed that Government Code section 818 provides the UEF with the general immunity granted to government entities.[24] Therefore, the court concluded that the UEF was not liable for section 5814 penalties arising from its own unreasonable delay.[25]

B. Dissenting Opinion

In his dissenting opinion, Justice Mosk contended that section 5814, which encourages timely compensation payments to injured workers, should apply to the UEF.[26] Unlike the majority view that section 3716.2 excludes the UEF from the section 5814 penalty, Justice Mosk argued that, at best, section 3716.2 left the legislature's intent unclear.[27] Thus, Justice Mosk concluded that when the UEF unreasonably delays in making payments,[28] the UEF should be penalized pursuant to section 5814.[29]

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22. *Id.* at 395, 853 P.2d at 986, 20 Cal. Rptr. 2d at 531. Section 5814 was first enacted in 1945, whereas the UEF was founded in 1971. *Id.*

23. *Id.* at 397, 853 P.2d at 987, 20 Cal. Rptr. 2d at 532 (citing Isaacson v. California Ins. Guarantee Ass'n, 44 Cal. 3d 775, 785-88, 750 P.2d 297, 303-06, 244 Cal. Rptr. 655, 662-64 (1988) (concluding that a government agency that is established to provide coverage in case of insurer insolvency is not liable pursuant to a statutory provision imposing liability upon an insurer for unreasonable refusal to settle a case because the agency would not profit from such a refusal)). The Workers' Compensation Appeals Board has also held that the UEF is exempt from the penalties under § 5814. *See* Nickelsberg v. Workers' Comp. Appeals Bd., 54 Cal. 3d 288, 299-300, 814 P.2d 1328, 1335-36, 285 Cal. Rptr. 86, 93-94 (1991); Judson Steel Corp. v. Workmen's Compensation Appeals Board, 22 Cal. 3d 658, 668-69, 586 P.2d 564, 570-71, 150 Cal. Rptr. 250, 256-57 (1978).

24. *DuBois*, 5 Cal. 4th at 398, 853 P.2d at 988, 20 Cal. Rptr. 2d at 533. California Government Code § 818 provides: "Notwithstanding any other provision of law, a public entity is not liable for damages awarded under section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant." CAL. GOV'T. CODE § 818 (West 1980).

25. *DuBois*, 5 Cal. 4th at 399, 853 P.2d at 988-89, 20 Cal. Rptr. 2d at 533-34.

26. *Id.* at 400-01, 853 P.2d at 989-90, 20 Cal. Rptr. 2d at 534-35 (Mosk, J., dissenting).

27. *Id.* at 402, 853 P.2d at 990, 20 Cal. Rptr. 2d at 535 (Mosk, J., dissenting). Justice Mosk interpreted § 3716.2 as a provision limiting the UEF's liability regarding the employers' delinquency. *Id.* (Mosk, J., dissenting). He contended that the UEF is still liable for its own misconduct when making payments. *Id.* (Mosk, J., dissenting).

28. *Id.* at 403, 853 P.2d at 991, 20 Cal. Rptr. 2d at 536 (Mosk, J., dissenting). In *DuBois*, the UEF made no statements at the trial hearing indicating that the UEF

III. CONCLUSION

Under *DuBois*, a worker, who is injured while working for an uninsured employer and is seeking legal recourse, may face further delays in receiving benefit payments from the UEF. With no penalty available for these delays and no set deadline for the benefit payments, a worker may be placed in a very difficult situation. Although the California Supreme Court recognized this problem it determined that the issue was better suited for the legislature to resolve.[30]

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had initiated any action to make payments to DuBois nor was there any indication that the UEF had investigated the case to see if any payments were made to the claimant. *Id.* at 404, 853 P.2d at 992, 20 Cal. Rptr. 2d at 537 (Mosk, J., dissenting).

29. *Id.* at 404, 853 P.2d at 992, 20 Cal. Rptr. 2d at 537 (Mosk, J., dissenting).

30. *Dubois*, 5 Cal. 4th at 399, 853 P.2d at 989, 20 Cal. Rptr. 2d at 534.

B. *When an employer unreasonably delays payment of workers' compensation benefits to an injured employee, the full amount of the award to the employee is increased by 10 percent as a penalty without deduction for pre-award payments under Labor Code section 5814:*
Rhiner v. Workers' Compensation Appeals Board.

I. INTRODUCTION

In *Rhiner v. Workers' Comp. Appeals Bd.*,[1] the California Supreme Court addressed the issue of the proper calculation of Labor Code section 5814[2] penalties which imposes a 10 percent increase in the amount of the award when an employer unreasonably delays payment to an injured employee.[3] The court held that the penalty applied to the entire amount of the award owed to the injured employee, without allowances for timely payments already made to the employee.[4] In reaching this conclusion, the court looked to the plain language of the statute,[5] its legislative history,[6] and prior case law.[7]

This action was brought by an injured worker when his employer discontinued payments for his medical treatments.[8] The workers' compen-

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1. 4 Cal. 4th 1213, 848 P.2d 244, 18 Cal. Rptr. 2d 129 (1993). Justice Kennard authored the majority opinion, in which Chief Justice Lucas and Justices Mosk, Panelli, Baxter, and George concurred. Justice Arabian issued a separate concurring opinion.

2. Labor Code § 5814 provides, in pertinent part: "[W]hen payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the full amount of the order, decision or award shall be increased by 10 percent." CAL. LAB. CODE § 5814 (West 1989).

3. *Rhiner*, 4 Cal. 4th at 1217, 848 P.2d at 246, 18 Cal. Rptr. 2d at 131. *See generally* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 408 (9th ed. 1981); 65 CAL. JUR. 3D *Work Injury Compensation* § 318 (1981 & Supp. 1993).

4. *Rhiner*, 4 Cal. 4th at 1227, 848 P.2d at 253, 18 Cal. Rptr. 2d at 138.

5. *Id.* at 1217, 848 P.2d at 246, 18 Cal. Rptr. 2d at 131.

6. *Id.* at 1218-19, 848 P.2d at 246-47, 18 Cal. Rptr. 2d at 131-32.

7. *Id.* at 1219-23, 848 P.2d at 247-50, 18 Cal. Rptr. 2d at 132-35.

8. *Id.* at 1216, 848 P.2d at 245, 18 Cal. Rptr. 2d at 130. A workers' compensation judge had previously determined that the plaintiff was entitled to compensation for injuries resulting from a fall. *Id.* The plaintiff received medical treatment at the University of California at Los Angeles ("UCLA"). *Id.* A psychiatrist at UCLA, who later treated the plaintiff, referred him to a clinical psychologist practicing medicine near the plaintiff's home. *Id.* The defendant, arguing that this treatment was duplicative of the plaintiff's treatment at UCLA, refused to pay. *Id. See generally* Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457 (1992) (providing a general discussion of the workers' compensation system).

sation judge found that the defendant was unreasonable in withholding payment and imposed a section 5814 penalty[9] on the defendant of 10 percent of the entire amount of treatment for the plaintiff including prior payments.[10] The Workers' Compensation Appeals Board ("WCAB") affirmed the holding, but ruled that the penalty should be applied against the unpaid and future medical payments, deducting any amounts already paid to the plaintiff.[11] The court of appeal concluded that the method of calculation used by the workers' compensation judge, in which penalties were assessed against the amount of all past, present, and future payments, was the correct method.[12] The California Supreme Court affirmed.[13]

II. TREATMENT

A. *The Majority Opinion*

The sole issue the supreme court decided was whether or not the 10 percent penalty imposed by section 5814 should be assessed on the entire amount of the award, without a deduction for the amount already paid by the employer, either pre-award or post-judgment.[14] The court held that the 10 percent penalty should be levied against the full amount of the award to serve as penalty against the delinquent employer who unreasonably delayed payments to an injured employee.[15] In arriving at this conclusion, the supreme court first looked to the words of section 5814.[16] Noting that the statutory language is "the best tool in gauging

9. CAL. LAB. CODE § 5814 (West 1989). *See supra* note 2 for the statutory text.
10. *Rhiner*, 4 Cal. 4th at 1216, 848 P.2d at 245, 18 Cal. Rptr. 2d at 130.
11. *Id.* at 1216-17, 848 P.2d at 245-46, 18 Cal. Rptr. 2d at 130-31.
12. *Id.* at 1217, 848 P.2d at 246, 18 Cal. Rptr. 2d at 131.
13. *Id.* at 1228, 848 P.2d at 254, 18 Cal. Rptr. 2d at 139.
14. *Id.* at 1215-16, 848 P.2d at 245, 18 Cal. Rptr. 2d at 130. *See generally* Wendell J. Kiser, *Bad Faith Handling of Workers' Compensation Cases: Can It Give Rise to a Separate Tort Action Against Employers, Carriers, or Self-Insureds?*, 23 TORT & INS. L.J. 147 (1987) (reviewing the general application of the statutory penalty provisions and the possibility of a tort cause of action for employer's bad faith delay or refusal to make compensation payments); Jean C. Love, *Actions for Nonphysical Harm: The Relationship Between the Tort System and No-Fault Compensation (With an Emphasis on Workers' Compensation)*, 73 CAL. L. REV. 857, 892 (1985)(stating that several states have enacted statutes imposing a penalty for delayed payments).
15. *Rhiner*, 4 Cal. 4th at 1216, 848 P.2d at 245, 18 Cal. Rptr. 2d at 130.
16. *Id.* at 1217-18, 848 P.2d at 246, 18 Cal. Rptr. 2d at 131.

legislative intent,"[17] the court stated that section 5814 expressly mandates that the penalty be assessed against the "full amount of the order, decision, or award."[18] Thus, the plain words of the statute, the court reasoned, clearly indicate the legislature's intent to apply the penalty to the full amount of the award, without permitting a deduction for the employer's timely prior payments.[19]

The court found additional support for this view in section 5814's legislative history.[20] Before section 5814 was enacted, section 5811[21] addressed the situation of an employer's unreasonable delay in issuing compensation to the injured worker[22] giving discretionary power to the Industrial Accident Commission (predecessor to the WCAB) to award interest on the delayed payments only.[23] Section 5814 was enacted in 1945 to change the law with respect to delinquent workers' compensation payments.[24] It imposed a 10 percent increase on the total amount of the award, not just the delayed compensation.[25] The court found that the specific language and the legislative history of section 5814 called for the conclusion that the penalty be imposed on the entire amount of the award, without deducting previous payments.[26]

Next, the court turned to its prior holding in *Gallamore v. Workers' Comp. Appeals Bd.*[27] which specifically addressed the issue at hand.[28] In *Gallamore*, the court held that the 10 percent penalty should be imposed solely upon the amount awarded in the particular class of benefits in which the employer delayed payments.[29] The *Gallamore* court then found that the 10 percent surcharge is appropriately levied against the

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17. *Id.* at 1217, 848 P.2d at 246, 18 Cal. Rptr. 2d at 131 (quoting *In re* Kelsey S., 1 Cal. 4th 816, 826, 823 P.2d 1216, 1220, 4 Cal. Rptr. 2d 615, 619 (1992)).

18. *Id.* at 1218, 848 P.2d at 246, 18 Cal. Rptr. 2d at 131; *see* CAL. LAB. CODE § 5814 (West 1989).

19. *Rhiner*, 4 Cal. 4th at 1218, 848 P.2d at 246, 18 Cal. Rptr. 2d at 131.

20. *Id.* at 1218, 848 P.2d at 246-47, 18 Cal. Rptr. 2d at 131-32.

21. When § 5811 was enacted in 1917 (later amended in 1937 without substantive change) it read in pertinent part: "Where payments of compensation have been unreasonably delayed, the commission may allow the beneficiary thereof interest thereon, at not to exceed one and one-half per cent per month, during such period of delay." *Id.* at 1218 n.4, 848 P.2d at 247 n.4, 18 Cal. Rptr. 2d at 132 n.4.

22. *Id.* at 1218, 848 P.2d at 246, 18 Cal. Rptr. 2d at 131.

23. *Id.* at 1218, 848 P.2d at 246-47, 18 Cal. Rptr. 2d at 131-32.

24. *Id.* at 1218, 848 P.2d at 247, 18 Cal. Rptr. 2d at 132.

25. *Id.*

26. *Id.* at 1218-19, 848 P.2d at 247, 18 Cal. Rptr. 2d at 132.

27. 23 Cal. 3d 815, 591 P.2d 1242, 153 Cal. Rptr. 590 (1979).

28. *Rhiner*, 4 Cal. 4th at 1219, 848 P.2d at 247, 18 Cal. Rptr. 2d at 132.

29. *Id.* at 1220, 848 P.2d at 248, 18 Cal. Rptr. 2d at 133.

total amount of the award for that particular class of benefits,[30] with no allowance made for timely payments already made by the employer.[31]

The supreme court next turned its attention to two court of appeal decisions that were inconsistent with its ruling in *Gallamore*.[32] In *County of Los Angeles v. Workers' Comp. Appeals Bd. (Crowe)*,[33] the court of appeal held that section 5814 penalties applied only to payments actually delayed.[34] The supreme court wrote that the court of appeal erroneously interpreted *Gallamore* by relying on two cases cited in *Gallamore*. The two cases, *Daniels v. Workmen's Comp. Appeals Bd.*[35] and *State Comp. Ins. Fund v. Workmen's Comp. Appeals Bd. (Sturm)*,[36] held that the penalty should be assessed against only those payments that were actually unreasonably delayed.[37] The court explained that the *Gallamore* court cited to these cases for the proposition that the penalty should apply only to the *class* of benefits in which the employer was untimely in making a payment.[38] In citing these two cases, the supreme court did not intend to endorse their opinion regarding the assessment of a section 5814 penalty.[39] Thus, the court reasoned that *Crowe* was not controlling in that it misapplied *Gallamore* in reaching its conclusion.[40]

Similarly, in *Kaminski v. Workers' Comp. Appeals Bd.*,[41] the court of appeal presumed that because *Gallamore* cited to *Ramsey v. Workmen's Comp. Appeals Bd.*,[42] the *Gallamore* court reaffirmed the holding in *Ramsey* that pre-award payments must be excluded from the penalty assessment.[43] This assumption was also found to be erroneous, the

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30. *Id.*

31. *Id.*

32. *Id.* at 1221-22, 848 P.2d at 249-50, 18 Cal. Rptr. 2d at 134-35.

33. 103 Cal. App. 3d 877, 163 Cal. Rptr. 246 (1980). In *Crowe*, the employer was late in making pre-award payments for permanent disability but had made all required payments before the hearing and award. *Rhiner*, 4 Cal. 4th at 1221, 848 P.2d at 249, 18 Cal. Rptr. 2d at 134.

34. *Id.*

35. 27 Cal. App. 3d 504, 104 Cal. Rptr. 129 (1972).

36. 35 Cal. App. 3d 374, 110 Cal. Rptr. 757 (1973); *Rhiner*, 4 Cal. 4th at 1221-22, 848 P.2d at 249, 18 Cal. Rptr. 2d at 134.

37. *Id.* at 1222, 848 P.2d at 248, 18 Cal. Rptr. 2d at 134.

38. *Id.* at 1222, 848 P.2d at 249, 18 Cal. Rptr. 2d at 134.

39. *Id.*

40. *Id.*

41. 126 Cal. App. 3d 778, 179 Cal. Rptr. 125 (1981) (holding that pre-award payments are excluded in calculating the penalty).

42. 2 Cal. App. 3d 693, 83 Cal. Rptr. 51 (1969).

43. *Rhiner*, 4 Cal. 4th at 1222, 848 P.2d at 250, 18 Cal. Rptr. 2d at 135.

court held, because the *Gallamore* court cited to *Ramsey* solely for the limited proposition that the computation of section 5814 penalties include post-award payments.[44]

Subsequently, the supreme court reviewed two court of appeal cases which correctly applied *Gallamore*.[45] In *Toccalino v. Workers' Comp. Appeals Bd.*,[46] the court of appeal concluded that section 5814 penalties applied to the full amount of the award for the class of benefits, without deductions for "amounts previously paid, and irrespective of whether or not the prior payments were timely, preaward, or predelinquency."[47] A subsequent case, *Consani v. Workers' Comp. Appeals Bd.*,[48] reached a similar result.[49]

B. Justice Arabian's Concurring Opinion

In his concurring opinion, Justice Arabian vigorously criticized section 5814 for creating "a harsh and unreasonable result."[50] Although the purpose of the rule was to prevent untimely payment of compensation, he voiced his concern that the rule failed to achieve such a goal because employers would face a of penalty in the same amount whether they continued to delay a payment or not.[51] Justice Arabian called upon the legislature to review section 5814, and make appropriate amendments.[52]

III. CONCLUSION

The holding in *Rhiner* should make employers think twice before delaying workers' compensation benefits to injured employees. Because the penalty is based on a percentage of the entire compensation award, the impact of a single late payment could be devastating.[53] However, as Jus-

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44. *Id. Crow, Kaminski, Sturm, Daniels,* and *Ramsey,* to the extent that they were inconsistent with the holding in the instant case, were overruled. Other cases that were disapproved include: Garcia v. Workmen's Comp. Appeals Bd., 6 Cal. 3d 687, 493 P.2d 877, 100 Cal. Rptr. 149 (1972); Manning v. Workmen's Comp. Appeals Bd., 10 Cal. App. 2d 655, 89 Cal. Rptr. 76 (1970); Vogh v. Workmen's Comp. Appeals Bd., 264 Cal. App. 2d 724, 70 Cal. Rptr. 722 (1968); Langer v. Workmen's Comp. Appeals Bd., 258 Cal. App. 2d 400, 65 Cal. Rptr. 588 (1968).

45. *Rhiner*, 4 Cal. 4th at 1223, 848 P.2d at 250, 18 Cal. Rptr. 2d at 134.

46. 128 Cal. App. 3d 543, 180 Cal. Rptr. 427 (1982).

47. *Rhiner*, 4 Cal. 4th at 1223, 848 P.2d at 250, 18 Cal. Rptr. 2d at 135.

48. 227 Cal. App. 3d 12, 277 Cal. Rptr. 619 (1991).

49. *Rhiner*, 4 Cal. 4th at 1223, 848 P.2d at 250, 18 Cal. Rptr. 2d at 135.

50. *Id.* at 1231, 848 P.2d at 256, 18 Cal. Rptr. 2d at 141 (Arabian, J., concurring).

51. *Id.* (Arabian, J., concurring).

52. *Id.* at 1232, 848 P.2d at 256, 18 Cal. Rptr. 2d at 141 (Arabian, J., concurring).

53. *See supra* note 14 and accompanying text.

tice Arabian observed, this method of calculation provides no incentive for employers to make prompt payments once a delay has already occurred.[54] Whether the employer has made one late payment or several, the penalty will be the same. As such, it would behoove the California Legislature to review the statute in order to lessen the resulting burdensome penalty while maintaining its original goal of assuring timely payments of compensation to injured workers.

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54. *Id.* at 1231, 848 P.2d at 256, 18 Cal. Rptr. 2d at 141 (Arabian, J., concurring).