

12-15-1992

California Supreme Court Survey - August 1991-May 1992

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Recommended Citation

Richard John Bergstrom III *California Supreme Court Survey - August 1991-May 1992*, 20 Pepp. L. Rev. Iss. 1 (1992)

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California Supreme Court Survey

August 1991 – May 1992

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

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I. CIVIL PROCEDURE

- A. *Under California Code of Civil Procedure section 904.1(a), a superior court's denial of a petition for a writ of certiorari directed at a municipal court contempt order is an appealable judgment: Bermudez v. Municipal Court.*

In *Bermudez v. Municipal Court*,¹ the California Supreme Court was faced with the issue of whether one may appeal a superior court's denial of a writ of certiorari addressed at a municipal court contempt order.² The court concluded that an appeal of the denial is a statutory right.³ An amendment to section 904.1(a) of the California Code of Civil Procedure,⁴ which limited the availability of appeals in similar actions, did not foreclose this right.⁵ Also, the nature of the underlying order does not affect the right to appeal the denial of a writ of certiorari.⁶

1. 1 Cal. 4th 855, 823 P.2d 1210, 4 Cal. Rptr. 2d 609 (1992). Chief Justice Lucas delivered the unanimous opinion of the court in which Justices Mosk, Panelli, Kennard, Arabian, Baxter, and George joined.

2. *Id.* at 856, 823 P.2d at 1210, 4 Cal. Rptr. 2d at 609. In *Bermudez*, a municipal court found a Los Angeles public defender in contempt when he was unable to make a scheduled appearance. The public defender, Gustavo Bermudez, filed a petition for a writ of certiorari in Los Angeles Superior Court, which was denied. Bermudez filed an appeal of the superior court judgment, which the court of appeal summarily dismissed. The California Supreme Court granted review.

3. *Id.* at 863, 823 P.2d at 1214, 4 Cal. Rptr. 2d at 613. *See* 9 B. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 78 (3d ed. 1985) ("When a municipal court makes an order in a contempt proceeding, that order is reviewable in the superior court by certiorari.").

4. Section 904.1 of the California Code of Civil Procedure states in pertinent part:

An appeal may be taken from a superior court in the following cases: (a) From a judgment, except (1) an interlocutory judgment . . . , (2) a judgment of contempt which is made final and conclusive by Section 1222, (3) a judgment on appeal from a municipal court . . . , or (4) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court . . . which relates to a matter pending in the municipal . . . court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition . . . upon petition for an extraordinary writ.

CAL. CIV. PROC. CODE § 904.1 (West Supp. 1992). Subsection (4) was added by amendment in July 1983.

5. *Bermudez*, 1 Cal. 4th at 863, 823 P.2d at 1214, 4 Cal. Rptr. 2d at 613. A July 1983 amendment to section 904.1(a) limited the types of judgments which one could appeal. *Id.*

6. *Id.* at 863, 823 P.2d at 1215, 4 Cal. Rptr. 2d at 614. The court cited *Burrus v. Municipal Court*, 36 Cal. App. 3d 233, 111 Cal. Rptr. 539 (1973), which discussed the problems of applying section 904.1. The *Burrus* court noted that there was a loop-

The supreme court rejected the decision of the court of appeal, which concluded that the general right to appeal does not apply when the underlying issue behind the writ of certiorari is a contempt order.⁷ The court held that the statutory designation of an order, rather than the trial court's characterization, controls when determining appealability.⁸ Because the appeal in this case was, on its face, an appeal from the denial of the writ of certiorari, rather than the contempt order, there was no statutory bar.⁹

The court also dismissed the respondent's arguments that an amendment to section 904.1(a) suggests that appeals of writs of certiorari were precluded.¹⁰ The court decided that the plain language of the statute did not allow for such an interpretation because it only mentioned writs of mandamus or prohibition.¹¹ Furthermore, the legislative history did not support the position urged by the respondent that the those writs were intended to be illustrative.¹²

This case allows for appeals in the narrow range of cases in which one seeks review by the court of appeals for contempt orders.¹³ It also dem-

hole in the statutes which allowed intermediate appeals of contempt-type orders through writs of mandate and prohibition. *Id.* at 239, 111 Cal. Rptr. at 547.

7. *Bermudez*, 1 Cal. 4th at 861, 823 P.2d at 1214, 4 Cal. Rptr. 2d at 613. Section 1222 of the California Civil Procedure Code states that "[t]he judgment and orders of the court or judge, made in cases of contempt, are final and conclusive." CAL. CIV. PROC. CODE § 1222 (West Supp. 1992). The court of appeal characterized *Bermudez*' appeal as an appeal of the contempt order rather than of the denial of the writ of certiorari. *Bermudez*, 1 Cal. 4th at 861, 823 P.2d at 1214, 4 Cal. Rptr. 2d at 613. See also Arthur B. Broadus, Note, *Scope of Review of Contempt Orders in California*, 37 CAL. L. REV. 301 (1949) (noting that writs of certiorari or habeas corpus are the only way in which to obtain review of contempt orders).

8. *Bermudez*, 1 Cal. 4th at 862, 823 P.2d at 1214, 4 Cal. Rptr. 2d at 613. The court cited *Peninsula Prop. Co. v. County of Santa Cruz*, 106 Cal. App. 2d 669, 235 P.2d 635 (1951), which held that the statutory designation of an order as "final" determined the appealability question.

9. *Bermudez*, 1 Cal. 4th at 862, 823 P.2d at 1214, 4 Cal. Rptr. 2d at 613. The court pointed out that the underlying order in *Burrus* was also not appealable as a matter of statutory right. *Id.* Therefore, the discussion in *Burrus* concerning the problems of 904.1 appeals would have been superfluous if the court of appeal was correct in its reasoning.

10. *Id.* at 863, 823 P.2d at 1215, 4 Cal. Rptr. 2d at 614. See 8 B. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* § 33 (3rd ed. 1985) (discussing the difference between writs of prohibition and mandamus from certiorari in the context of appeals).

11. *Bermudez*, 1 Cal. 4th at 863, 823 P.2d at 1215, 4 Cal. Rptr. 2d at 614.

12. *Id.* at 863-64, 823 P.2d at 1215, 4 Cal. Rptr. 2d at 614.

13. The court noted that there have been only nine reported decisions since 1925

onstrates the court's unwillingness to reach beyond a literal interpretation of a statute, even if the result would produce anomalies.¹⁴

DAVID KNOBLOCK

B. *A forum non conveniens motion successfully thwarts forum shopping by foreign plaintiffs against California corporations; courts should not consider an alternative forum's substantive law unless that forum provides no remedy: Stangvik v. Shiley, Inc.*

California corporations have won an important battle in the "forum shopping" war waged against foreign plaintiffs in the decision of *Stangvik v. Shiley, Inc.*¹ In *Stangvik*, the California Supreme Court held that the trial court did not abuse its discretion in its application of forum non conveniens in a prosthetic heart-valve tort liability case.² Hence, the order staying the case and forcing the foreign plaintiffs to sue a California corporate defendant in Scandinavia was upheld.³ The high court granted review⁴ to clarify the doctrine of forum non conveniens and to

involving this set of circumstances. *Id.* at 858, 823 P.2d at 1211-12, 4 Cal. Rptr. 2d at 610-11. Therefore, it does not appear that *Bernudez* will have a major impact on the courts of appeal.

14. The court indicated that the decision produced a scheme that allows appeal in municipal court contempt matters, but not in superior court contempt matters. *Id.* at 864, 823 P.2d at 1215, 4 Cal. Rptr. 2d at 614. The court seemed to suggest that the legislature close this "loophole." *Id.*

1. 54 Cal. 3d 744, 819 P.2d 14, 1 Cal. Rptr. 2d 556 (1991). Justice Mosk wrote for a unanimous court composed of Chief Justice Lucas and Justices Panelli, Kennard, Arabian, Baxter, and George. See 10:47 *Barclay's California Supreme Court Service*, Weekly Report, Nov. 26, 1991, at 507; 13:8 *CEB Civ. Litig. Rptr.* 390, Dec. 1991; 60 *U.S.L.W.* 2382, Dec. 17, 1991. See also Stacey A. Gordon, *California Ruling Limits Many Foreign Lawsuits*, *BUS. INS.*, Dec. 23, 1991, at 1; Philip Hagar, *Foreigners Limited in Ruling in State Courts*, *L.A. TIMES* (Home ed.), Nov. 22, 1991, at A3 (Home edition) (also reported as *Shiley Wins Case Limiting Foreigners' Right to Sue*, at D5 (Orange County ed.)); Leslie Berkman, *U.S. Lawsuits Against Shiley by Foreigners Denied*, *L.A. TIMES* (Orange County ed.), Sept. 18, 1990, at D5; Leslie Berkman, *Ruling May Partially Shield Maker of Heart Valve From Foreign Litigants*, *L.A. TIMES* (Orange County ed.), Aug. 30, 1988, at D9.

2. *Stangvik*, 54 Cal. 3d at 752, 819 P.2d at 18, 1 Cal. Rptr. 2d at 560.

3. *Id.* at 763, 819 P.2d at 26, 1 Cal. Rptr. 2d at 568.

4. *Stangvik v. Shiley, Inc.*, 800 P.2d 858, 275 Cal. Rptr. 380 (1990), *aff'd*, 54 Cal. 3d 744, 819 P.2d 14, 1 Cal. Rptr. 2d 556 (1991). Chief Justice Lucas and Justices Mosk, Broussard, Panelli, Kennard and Arabian voted to grant review. However, Justice Broussard retired from the court before the case was argued. Justice Eagleson did not sign the order to grant review because he planned to retire before

resolve the newly created conflict between the decision of the court of appeal below and two prior court of appeal decisions, *Corrigan v. Bjork Shiley Corp.* and *Holmes v. Syntex Laboratories, Inc.*⁵

Shiley Corporation has been plagued with products liability lawsuits in both state and federal courts ever since it recalled certain prosthetic heart valves manufactured in 1986.⁶ Shiley has often won these cases on

the case would be heard. His replacement, Justice Baxter, joined in the unanimous opinion. See Philip Carrizosa, *Heart-Valve Appeal to Get Hearing: California Supreme Court Will Consider Scandinavians' Venue Issue*, L.A. DAILY J., Nov. 30, 1990, at 5.

5. *Stangvik*, 54 Cal. 3d at 749, 819 P.2d at 16, 1 Cal. Rptr. 2d at 558. The court of appeal decision, 230 Cal. App. 3d 1688, 273 Cal. Rptr. 179 (1990), *rev'd and superseded by* 800 P.2d 858, 275 Cal. Rptr. 380, *aff'd*, 54 Cal. 3d 744, 819 P.2d 14, 1 Cal. Rptr. 2d 556 (1991), contradicted two other court of appeal cases: *Corrigan v. Bjork Shiley Corp.*, 182 Cal. App. 3d 166, 227 Cal. Rptr. 247 (1986), *cert. denied*, *Shiley, Inc. v. Corrigan*, 479 U.S. 1049 (1987) (holding that Australian plaintiffs could sue Shiley in California) and *Holmes v. Syntex Lab., Inc.*, 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984), *overruled by* *Stangvik v. Shiley*, 54 Cal. 3d 744, 819 P.2d 14, 1 Cal. Rptr. 2d 556 (1991) (holding that British plaintiffs could sue biomedical corporation in California for personal injuries allegedly caused by oral contraceptives). See Harry Litman, *Considerations of Choice of Law in the Doctrine of Forum Non Conveniens*, 74 CAL. L. REV. 565 (1986) (discussing all key California and federal forum non conveniens cases up to 1986, including *Corrigan* and *Holmes*).

Shiley previously attempted to reverse *Corrigan* and *Holmes* and to create other favorable changes in forum non conveniens law through intense political lobbying in the California Legislature and in the United States Senate and House of Representatives. Other multinational corporations and organizations that participated in Shiley's lobbying efforts include Genentech, AT&T, The California Manufacturers Association, and the California Chamber of Commerce. Shiley has also retained some of the largest law firms in the nation, including Hughes, Hubbard & Reed; Skadden, Arps, Slate, Meagher & Flom; and Pillsbury, Madison & Sutro, to draft proposed legislation and to defend its cases. Trial lawyer organizations and consumer groups opposed Shiley's proposed bills. Most of Shiley's lobbying failed to achieve the intended goals. See Tom Dresslar, *Companies Seek Different Forum for Valve Suits: Foreign Parties Involved*, L.A. DAILY J., June 11, 1990, at 1 (discussing SB 1735); Tom Dresslar, *Sentence in Bill Would Aid Pfizer in Valve Cases: Changes Forum for Suits*, L.A. DAILY J., Apr. 4, 1990, at 1 (discussing SB 1735; Pfizer Inc. bought Shiley Inc. in 1979); Tom Dresslar, *Pfizer Seeks Protection from Heart Valve Suits*, L.A. DAILY J., May 5, 1988, at 2 (discussing SB 2683); Leslie Berkman, *Shiley Seeks Law to Limit Damage Suits by Foreign Litigants Over Heart Valves*, L.A. TIMES, May 3, 1988, at D5 (Orange County edition); Greg Rushford, *Lacovara's Risky Cure for Pfizer's Heartburn*, LEGAL TIMES, Apr. 4, 1988, at 1 (discussing Shiley's federal lobbying).

6. A sampling of recent federal court of appeals cases includes the following unpublished memoranda dispositions: *Murphy v. Shiley, Inc.*, 940 F.2d 668 (9th Cir. 1991) (Table); *Pryor v. Shiley, Inc.*, 916 F.2d 716 (9th Cir. 1990) (Table) (consolidating 13 identical cases and granting summary judgment for Shiley); *Sill v. Shiley, Inc.*, 735 F. Supp. 337 (W.D. Mo. 1989), *aff'd*, 909 F.2d 508 (8th Cir. 1990) (Table);

summary judgment motions.⁷ The *Stangvik* case strongly resembles these other cases, with the exception that here Shiley prevailed on procedural, rather than substantive, grounds.

In *Stangvik*, relatives of two deceased Scandinavian men implanted with allegedly defective heart valves sued Shiley in California for wrongful death and a plethora of accompanying torts.⁸ Shiley moved to dismiss the suit based upon forum non conveniens.⁹ Although the trial

Brinkman v. Shiley, Inc., 732 F. Supp. 33 (M.D. Pa.), *aff'd*, 902 F.2d 1558 (3d Cir. 1989) (Table); Hagepanos v. Shiley, Inc., 846 F.2d 71 (4th Cir. 1988) (Table).

State cases include the following: Spuhl v. Shiley, Inc., 795 S.W.2d 573 (Mo. Ct. App. 1990); Khan v. Shiley, Inc., 217 Cal. App. 3d 848, 266 Cal. Rptr. 106 (1990); Cart v. Ducote, 490 So.2d 731 (La. Ct. App. 1986); Corrigan v. Bjork Shiley Corp., 182 Cal. App. 3d 166, 227 Cal. Rptr. 247 (1986), *cert. denied*, Shiley, Inc. v. Corrigan, 479 U.S. 1049 (1987), *overruled by* Stangvik v. Shiley, Inc., 54 Cal. 3d 744, 819 P.2d 14, 1 Cal. Rptr. 2d 556 (1991). The supreme court noted that approximately 235 cases regarding Shiley's prosthetic heart valve are pending in California courts. *Stangvik*, 54 Cal. 3d at 759, 818 P.2d at 28, 1 Cal. Rptr. at 565. For a criticism of the *Khan* case see Robert F. Hanley, *The Heart-Valve Cases: Is Pfizer the Next A. H. Robbins?*, Legal Backgrounder (Wash. Legal Found.), Feb. 15, 1991, arguing that *Khan* contradicts established precedent in California. *See also* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Torts § 1304 (9th ed. Supp. 1992) (discussing *Khan*).

7. *See supra* note 6. Many cases are brought by living plaintiffs who still have the valves implanted. American products liability law in nearly every state requires product failure, malfunction, or a product-caused accident in order to recover. Plaintiffs in the prosthetic implant situation argue that, in cases involving life-sustaining medical devices, the claimant must die, or at least risk death, before being able to sue. Shiley argues that while the patient is alive, the implanted heart valve is not harmful but rather keeps the patient alive, so there is no product failure, malfunction, or product-caused accident. Emotional distress alone does not usually suffice as damage in products cases. Plaintiffs counter that under this reasoning, a heart valve recipient must die in order to maintain his case, since even the slightest defect in such a device entails nearly instant death. Nevertheless, Shiley has precedent on its side and it appears unlikely that products liability law will become any more liberal than its present state. *Khan*, 217 Cal. App. 3d 848, 266 Cal. Rptr. 106, is one of the few cases that allowed a heart valve plaintiff to proceed substantively solely on grounds of emotional distress. *See also supra* note 6 for further information on *Khan*.

8. The plaintiffs consisted of the immediate families of the late Mr. Sigmund Stangvik, a Norwegian, and the late Mr. Mikael Karlsson, a Swede. Both men underwent Shiley artificial heart valve implant operations in their respective countries. Both men subsequently died from valve failure. Specifically, the plaintiffs in this suit, like the claimants in the other numerous suits against Shiley, alleged that strut fractures induced the artificial valve to collapse, causing death within minutes. The tort claims included negligence, strict liability, breach of warranty, fraud, loss of consortium, and negligent infliction of emotional distress. *Stangvik*, 54 Cal. 3d at 749, 819 P.2d at 16, 1 Cal. Rptr. 2d at 558.

9. Shiley based its forum non conveniens motion on section 410.30, subdivision (a), of the Code of Civil Procedure which provides:

When a court upon motion of a party of its own motion finds that in the interest of substantial justice an action should be heard in a forum outside

judge sympathized with Shiley's position, he felt constrained to deny the motion because of *Corrigan*.¹⁰ Shiley then filed writs for extraordinary relief. The court of appeal issued an order criticizing *Corrigan* as wrongly decided¹¹ and directing the trial court to reevaluate the motion. Upon reconsideration, the trial judge granted Shiley's motion. When Stangvik appealed, the court of appeal affirmed,¹² agreeing that California was an inconvenient forum. More than three years after the issue arose, a unani-

this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just.

CAL. CIV. PROC. CODE § 410.30(a) (Deering 1991).

At first glance, it seems ironic for Shiley to claim that courts in Scandinavia are more convenient than the Orange County Courthouse where the suit began, located a mere five miles from Shiley's headquarters. In support of the motion, Shiley argued that the courts in Sweden and Norway would be the most convenient forum, because the plaintiffs reside in Scandinavia, the valves were marketed and sold there, the decedents' received medical care there, and the alleged fraudulent misrepresentations were made there.

The plaintiffs countered that Shiley is incorporated in California; the valves in question were designed, manufactured, tested, and packaged in California; and that hundreds of key witnesses lived in California. Additionally, more than one million pertinent documents existed in California which might have to be translated. Both sides claimed their choice of forum contained a greater amount of relevant evidence.

10. *Shiley, Inc. v. Superior Court*, 250 Cal. Rptr. 793, 794-95 (1988) (Stangvik, real party in interest) (ordered not published under CALIFORNIA RULES OF COURT 976 (1977)). See 2 B. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 306 (3d ed. 1985 & Supp. 1992) (discussing *Holmes* and *Corrigan*).

11. "*Corrigan* and several of its antecedents represent an unwarranted digression from sound principles of the law of forum non conveniens and [we] direct the trial court to reconsider in light of the discussion following." *Shiley*, 250 Cal. Rptr. at 795. "We believe [*Corrigan* and *Holmes*] invite forum shopping, needlessly burden California taxpayers and litigants, and may encourage the flight of high technology manufacturers to friendlier jurisdictions." *Id.* at 796-97. Also, *Corrigan* and *Holmes* rely upon a Judicial Council comment written before the seminal federal cases. Justices Crosby, Sonenshine, and Seymour of the Fourth District Court of Appeal issued this order. Though these citations refer to the depublished opinion of 1988, the still valid precedent of the 1990 case repeats the same arguments. *Stangvik v. Shiley, Inc.*, 230 Cal. App. 3d 1688, 1703-04, 273 Cal. Rptr. 179, 190 (1990). Thus, this appellate court effectively circumvented the depublishment order by simply drafting a subsequent, but substantively identical, opinion.

12. *Stangvik v. Shiley*, 230 Cal. App. 3d 1688; 273 Cal. Rptr. 179 (1990) (original opinion previously reported at 223 Cal. App. 3d 1176). See 12:7 CEB CIV. LITIG. RPTR. 312, Nov. 1990 (discussing this court of appeal decision). Note that Justices Crosby and Sonenshine, both members of the panel which had decided to allow the trial judge to reconsider the case two years earlier, concurred in the opinion written by Acting Presiding Justice Moore.

mous supreme court upheld the decision of the court of appeal.¹³

After a brief history and definition of the forum non conveniens doctrine in California,¹⁴ the court set forth a two-part test to determine whether such a motion should be granted. First, a court must evaluate the "suitability" of the alternative forum. While the *Holmes* case addressed this issue as a balancing of conveniences, *Stangvik* reduces this element to a "threshold inquiry" of "whether an action may be commenced in the alternative jurisdiction and a valid judgment obtained there against the defendant."¹⁵ It seems this element has lost most of its significance, especially where the defendant requesting the transfer expresses a willingness to submit to foreign jurisdiction as Shiley did in this case.¹⁶

Second, and most crucial, a court must balance private and public interests¹⁷ and conclude that these concerns justify use of the doctrine under the given facts. The seminal federal authorities in this area are *Piper* and *Gulf Oil*,¹⁸ upon which the court in *Stangvik* and the courts

13. *Stangvik v. Shiley, Inc.*, 54 Cal. 3d at 751, 819 P.2d at 17, 1 Cal. Rptr. 2d at 559.

14. The first California case to employ forum non conveniens was *Price v. Atchison, T. & S.F. Ry. Co.*, 42 Cal. 2d 577, 268 P.2d 457, cert. denied, 348 U.S. 839 (1954). On the doctrine of forum non conveniens, see generally 16 CAL. JUR. 3D *Courts* § 67 (1983 & Supp. 1992); 2 B. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction*, §§ 303-308 (3d ed. 1985 & Supp. 1991); Martin J. McMahon, *Forum Non Conveniens Doctrine in State Court as Affected by Availability of Alternative Forum*, 57 A.L.R.4th 973 (1987 & Supp. 1992).

The court defines forum non conveniens as "an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere." *Stangvik*, 54 Cal. 3d at 751, 819 P.2d at 17, 1 Cal. Rptr. 2d at 559. As seen in the remainder of the opinion and result of *Stangvik*, the court strongly relied upon the equitable and discretionary nature of the definition.

15. *Stangvik*, 54 Cal. 3d at 752 n.3, 819 P.2d at 18 n.3, 1 Cal. Rptr. 2d at 560 n.3.

16. Among other conditions imposed by the trial court, Shiley consented to jurisdiction in Norway and Sweden, and agreed to comply with all discovery orders there (including the costs of transporting witnesses and documents).

17. Private interests include the ability to obtain an enforceable judgment quickly and economically, as well as the ability to conduct discovery. *Stangvik*, 54 Cal. 3d at 751, 819 P.2d at 17-18, 1 Cal. Rptr. 2d at 560-61 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 259-61; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1947)). Public interests include alleviating crowded court dockets, utilizing jurors to address cases concerning their community, and the stake that California has in the matter compared with the alternative forum. See also B. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction*, § 304 (3d ed. 1985).

See *supra* note 8 for the facts of the case. The supreme court held that the public interest factors undoubtedly favored Shiley. *Stangvik*, 54 Cal. 3d at 763, 819 P.2d at 26, 1 Cal. Rptr. 2d at 568.

18. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

below understandably relied. The key impetus to a forum non conveniens motion is forum shopping, or seeking to transfer a case to a jurisdiction with more favorable law.¹⁹ Because the California Supreme Court felt *Piper* ambiguously addressed the precise role that foreign substantive law should play,²⁰ the court could have included this as a factor to consider. Indeed, the "substantive law analysis" of *Holmes* declared that "substantial weight should be given to the fact that law in the forum state is more favorable to a plaintiff than in a foreign jurisdiction."²¹ However, the supreme court reasoned that "the fact that an alternative jurisdiction's law is less favorable . . . should not be accorded any weight . . . provided . . . some remedy is afforded."²² While this decision places California forum non conveniens law back into accord with the federal approach, it nevertheless seems ironic that courts will not consider as a major factor this crucial underlying motivation for forum non conveniens motions.²³ Moreover, given that nearly every "suitable" forum presumably has some remedy, this rule practically eliminates any consideration of substantive law.

The court also discussed the significance of residence to forum non conveniens. Traditionally, the plaintiff's choice of forum carried a strong presumption of convenience. The *Holmes* court then held that this deference applied to foreign plaintiffs as well as resident plaintiffs.²⁴ However, *Stangvik* modified this rule so that it now applies only to residents of the forum state.²⁵ In reaching this conclusion, the court gave great sig-

19. The court acknowledged that the plaintiffs probably selected California to "enhance the possibility of substantial recovery." *Stangvik*, 54 Cal. 301 at 761, 819 P.2d at 25, 1 Cal. Rptr. at 567. Neither Sweden nor Norway award punitive damages. Similarly, it seems likely that Shiley filed its forum non conveniens motion to avoid pro-plaintiff California substantive tort law and generous California juries. *Id.* See Philip Carrizosa, *Justices to Hear Forum Debate; Orange County Heart Valve Maker Wants Trial Moved to Scandinavia*, L.A. DAILY J., Oct. 9, 1991, at 3.

20. The court observed that *Piper* did not clearly indicate whether the law of the alternative forum should be given some weight or no weight. *Stangvik*, 54 Cal. 3d at 753-54 n.5, 819 P.2d at 19 n.5, 1 Cal. Rptr. 2d at 561 n.5. "The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." *Piper*, 454 U.S. at 247.

21. *Stangvik*, 54 Cal. 3d at 764, 819 P.2d at 26, 1 Cal. Rptr. at 568.

22. *Id.* at 754 n.5, 819 P.2d at 19 n.5, 1 Cal. Rptr. 2d at 561 n.5 (citing *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768-69 (9th Cir. 1991)).

23. See Litman, *supra* note 5.

24. *Holmes*, 156 Cal. App. 3d at 391, 202 Cal. Rptr. at 785.

25. *Stangvik*, 54 Cal. 3d at 754-55, 819 P.2d at 20, 1 Cal. Rptr. 2d at 562. Another traditional presumption of forum non conveniens asserts the convenience of the state

nificance to the fact that this case and many others like it would further congest the crowded dockets of California's courts.²⁶ Certainly this fact alone does not warrant a change of forum, but in light of the numerous heart valve suits brought by California residents, the court deemed these sufficient to castigate Shiley and deter future wrongful conduct.²⁷

Finally, while the supreme court acknowledged that the defendant as movant bears the burden of proof in a forum non conveniens motion, especially in light of the presumption of convenience for a defendant's state of incorporation, it also observed that a ruling on the motion rests within the trial court's discretion. Upon review, this decision deserves "substantial deference" to preserve the flexibility of the doctrine.²⁸

Stangvik disapproved of *Corrigan* and *Holmes*, and made clear that the principal underlying goal of the forum non conveniens doctrine is to assure trial in the most convenient forum *without* regard to substantive law.²⁹ However, as *Stangvik* illustrates, the doctrine serves as an indispensable tool in the battle to win a forum with the most advantageous law. Under the precedent of *Stangvik*,³⁰ California corporations have a potent weapon with which to fend off forum-shopping foreigners, and indeed, to "reverse forum shop" themselves.

BENJAMIN GROSS SHATZ

II. CONSTITUTIONAL LAW

- A. *A statutory voting plan that conditions the right to vote on commercial land ownership and allots votes and levies assessments on unequal bases upholds the constitutional assurances of equal protection where the voting plan is reasonably related to the purpose of the statute: Southern California Rapid Transit District v. Bolen.*

of incorporation or the principal place of business of a corporate defendant. The court of appeal maintained that a 1986 amendment to section 410.30 of the California Code of Civil Procedure nullified this rule, but the supreme court disagreed with this interpretation and reaffirmed the validity of the presumption. *Id.* at 755-56, 819 P.2d at 21, 1 Cal. Rptr. 2d at 563.

26. *Id.* at 758, 819 P.2d at 22-23, 1 Cal. Rptr. 2d at 564-65.

27. *Id.*

28. *Id.* at 751, 819 P.2d at 18, 1 Cal. Rptr. 2d at 560.

29. *Id.* at 763-64, 819 P.2d at 26-27, 1 Cal. Rptr. at 568-69.

30. Shiley's victory in *Stangvik* has carried over to other successful transfer motions. See *Pfizer Releases Statement on California Court of Appeal Decision*, PR Newswire (Fin. News), Mar. 10, 1992 (noting *Alsup v. Shiley* and *Moore v. Shiley*).

I. INTRODUCTION

In *Southern California Rapid Transit District v. Bolen*,¹ the California Supreme Court considered whether the equal protection assurances of the state and federal Constitutions² were preserved by a statute that made commercial land ownership a prerequisite to voting at a referendum regarding proposed "special benefit assessment districts"³ created by the Southern California Rapid Transit District (SCRTD).⁴ In addition, the court considered whether allotting votes based on assessed value and levying benefit assessments based on land size contravened the equal protection assurances.⁵ In a five-to-two decision, the court held that the voting plan complied with the constitutional guarantees of equal protection under the narrow facts presented in this case.⁶

1. 1 Cal. 4th 654, 822 P.2d 875, 3 Cal. Rptr. 2d 843 (1992), *cert. denied*, 112 S. Ct. 3031 (1992). Justice Arabian wrote the majority opinion, with Chief Justice Lucas and Justices Panelli, Baxter, and George concurring. Justice Kennard wrote a separate dissenting opinion with Justice Mosk concurring.

2. See 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 591, 593 (9th ed. 1988 & Supp. 1992) (United States Constitution's equal protection provision); 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 603 (9th ed. 1988 & Supp. 1992) (California Constitution's equal protection provision); see also 51 CAL. JUR. 3D *Public Improvements* § 10 (1979) (constitutional requirements of special assessments); 18A MCKINNEY, CALIFORNIA DIGEST OF OFFICIAL REPORTS, *Property Taxes* §§ 3, 36 (3d & 4th ed. 1992) (relevant authority defining special assessments and applying constitutional requirements of special assessments).

3. *Southern Cal. Rapid Transit Dist.*, 1 Cal. 4th at 660, 822 P. 2d at 877, 3 Cal. Rptr. 2d at 845; see CAL. PUB. UTIL. CODE §§ 33000-33020 (West Supp. 1992); see also 51 CAL. JUR. 3D *Public Improvements* §§ 47-51 (1979 & Supp. 1992) (background and source material on improvement and assessment districts); 19 MCKINNEY, CALIFORNIA DIGEST OF OFFICIAL REPORTS, *Public Improvements* §§ 1-9 (3d & 4th ed. 1992) (digesting relevant authority on improvement and assessment districts).

4. *Southern Cal. Rapid Transit Dist.*, 1 Cal. 4th at 659-60, 822 P. 2d at 877, 3 Cal. Rptr. 2d at 845-46. For a general discussion of transit districts and pertinent background information on the SCRTD, see 52 CAL. JUR. 3D *Public Transit* §§ 11-19 (1979 & Supp. 1992) and 19 MCKINNEY, CALIFORNIA DIGEST OF OFFICIAL REPORTS, *Public Transit* § 2 (3d & 4th ed. 1992).

5. *Southern Cal. Rapid Transit Dist.*, 1 Cal. 4th at 677, 822 P. 2d at 888-89, 3 Cal. Rptr. 2d at 856-57.

6. *Id.* at 681, 822 P.2d at 891, 3 Cal. Rptr. 2d at 860. See 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 225-26 (9th ed. 1988) (citing valid and invalid provisions of special benefit district elections and referenda).

II. STATEMENT OF THE CASE

The controversy in *Southern California Rapid Transit District v. Bolen* involved the SCRTD's statutorily authorized⁷ creation of two benefit assessment districts encompassing planned rail stations along the introductory segment of a proposed citywide mass transit system.⁸ The statute, which authorized the imposition of the benefit districts by the SCRTD, mandated that a "referendum must be held if requested by the owners of at least twenty-five percent of the assessed value of real property within a proposed assessment district."⁹ The statute limited voting at the referendum to the landowners who would be subject to the proposed assessment.¹⁰ Because residential property owners were exempt from the assessment,¹¹ residential landowners, as well as non-landowning residents, in the proposed benefit districts were denied the opportunity to vote at any referendum seeking approval of the benefit districts.¹²

Furthermore, the statute instructed that the number of votes a com-

7. See CAL. PUB. UTIL. CODE § 33000(b) (West Supp. 1992). That section provides in relevant part: "The Board of Directors of the [SCRTD] shall be the conclusive judge of the proportion of special and general benefits produced by the facilities and of the distribution of the special benefits among parcels of property within the benefit assessment district." *Id.*

8. *Southern Cal. Rapid Transit Dist.*, 1 Cal. 4th at 660, 832 P.2d at 877, 3 Cal. Rptr. 2d at 846. The citywide transit system is known as "Metro Rail." *Id.* The introductory segment is known as the "Red Line." *Id.* at 660 n.1, 822 P.2d at 877 n.1, 3 Cal. Rptr. 2d at 845 and n.1.

9. *Id.* at 660, 822 P.2d at 877, 3 Cal. Rptr. 2d at 845 (citing CAL. PUB. UTIL. CODE § 33002.2 (West Supp. 1992)).

10. *Id.* (citing CAL. PUB. UTIL. CODE § 33002.3(a) (West Supp. 1992)). Properties to be assessed include "improvements used as offices, commercial, retail, hotels, motels and free-standing commercial parking garages not used to meet zoning requirements." *RTD Board Approves Plan for Metro Rail Benefit Assessment Districts at Lower Rate; Hollywood Unit Split Into Two Parts*, PR NEWSWIRE, Mar. 12, 1990.

11. When the proposed benefit district was submitted to the Los Angeles City Council for approval pursuant to the statute, the city council amended SCRTD's original proposal and excluded residential property from assessment consistent with statutory authority. *Southern Cal. Rapid Transit Dist.*, 1 Cal. 4th at 662, 822 P.2d at 878-79, 3 Cal. Rptr. 2d at 846-47; see CAL. PUB. UTIL. CODE § 33001.5(b)-(d) (West Supp. 1992).

12. *Southern Cal. Rapid Transit Dist.*, 1 Cal. 4th at 660, 822 P.2d at 877, 3 Cal. Rptr. 2d at 845; see CAL. PUB. UTIL. CODE § 33002.3(a) (West Supp. 1992). Non-commercial properties excluded from assessment include "residential properties, including that portion of residential hotels, motels and other similar residential uses with long term residents . . . [and] property that is publicly or non profit-owned and publicly or nonprofit-used." *RTD Board Approves Plan for Metro Rail Benefit Assessment Districts at Lower Rate; Hollywood Unit Split Into Two Parts*, PR NEWSWIRE, Mar. 12, 1990.

mercial landowner would receive at the referendum was to be based on the assessed value of the landowner's property.¹³ However, if the proposed benefit districts were approved, any assessments actually levied would be calculated not according to land value, but would be based on the size of the land or whether the land was improved.¹⁴

The SCRTD brought suit against its secretary, Helen Bolen, seeking to judicially sanction its formation of two benefit districts prior to issuing bonds that would be secured by proceeds from the assessments.¹⁵ The trial court held that the voting plan's requirement of commercial land ownership did not violate equal protection guarantees.¹⁶ The appellate court reversed, citing two constitutional shortcomings in the statute.¹⁷ First, it proclaimed that the voting plan authorized by the statute infringed upon equal protection assurances by arbitrarily excluding non-landowners from the franchise.¹⁸ The appellate court reasoned that the costs and benefits of the assessments—without which the institution and upkeep of the mass transit system would not be possible—should be placed equally upon all citizens within the benefit districts because they all are affected by public transportation. The appellate court further reasoned that because the "one-person, one-vote"¹⁹ principle was triggered by the indiscriminate nature of the assessments, a compelling state interest (of which the court found none) warranted the inclusion of non-commercial landowners.²⁰ Second, the appellate court stated that

13. *Southern Cal. Rapid Transit Dist.*, 1 Cal. 4th at 660, 822 P.2d at 877, 3 Cal. Rptr. 2d at 845; see CAL. PUB. UTIL. CODE § 33002.3(b) (West Supp. 1992).

14. *Southern Cal. Rapid Transit Dist.*, 1 Cal. 4th at 660, 822 P.2d at 877, 3 Cal. Rptr. 2d at 845; see CAL. PUB. UTIL. CODE § 33002(a) (West Supp. 1992).

15. *Southern Cal. Rapid Transit Dist.*, 1 Cal. 4th at 663, 822 P.2d at 879, 3 Cal. Rptr. 2d at 847. A "few" commercial landowners and one commercial lessee were granted permission to intervene in the action on Bolen's side. *Id.* The board of directors of the SCRTD filed this suit in part to test the legal validity of collecting taxes from the assessment districts to secure a bond issue to finance the construction of Metro Rail. *California: Rail Line On Track Due to Court Ruling*, PUB. FIN.-WASH. WATCH, Feb. 10, 1992, at 2.

16. *Southern Cal. Rapid Transit Dist.*, 1 Cal. 4th at 663, 822 P.2d at 879, 3 Cal. Rptr. 2d at 847.

17. *Id.* at 663-64, 822 P.2d at 879-80, 3 Cal. Rptr. 2d at 847-48. In addition to its conclusion that the statute was constitutionally flawed, the appellate court further concluded that the statute authorizing the SCRTD to create the districts did not authorize the SCRTD to except residential property from assessment. *Id.*

18. *Id.*

19. *Id.* The principle of "one-person, one-vote" was espoused by the United States Supreme Court in *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that an equal voice in government is a fundamental right).

20. *Southern Cal. Rapid Transit Dist.*, 1 Cal. 4th at 663-64, 822 P.2d at 879-80, 3

the statute's disproportionate scheme of assigning votes according to assessment value while levying assessments according to size was fundamentally unfair and thus undermined the equal protection assurances.²¹ The appellate court insisted that in order to satisfy equal protection, the number of votes allotted to a landowner would need to be functionally tied to the assessment that would be imposed upon him.²² The court of appeals concluded that the statute was unconstitutional²³ and SCRTD appealed to the California Supreme Court.²⁴

III. TREATMENT OF THE CASE

A. *The Majority Opinion*

In determining whether equal protection assurances are undermined by a voting plan conditioned on land ownership, the court must first determine whether to apply the "one person, one vote" principle strictly or to apply a more moderate equal protection examination.²⁵ If the standard of "one-person, one-vote" applies to the assessment district referendum, the state needs to show a "compelling justification" for excluding a class of voters.²⁶ However, if an exception exists and the standard of "one-person, one-vote" does not apply, then one class of voters may be afforded greater influence in the election than other classes as long as the classification is not "wholly irrelevant" and is "reasonably related" to the purpose of the statute.²⁷ The moderate level of protection applies

Cal. Rptr. 2d at 847-48.

21. *Id.*

22. *Id.*

23. For a treatment of the appellate court decision, see 52 CAL. JUR. 3D *Public Transit* § 16 (Supp. 1992).

24. *Southern Cal. Rapid Transit Dist.*, 1 Cal. 4th at 664, 822 P.2d at 879-80, 3 Cal. Rptr. 2d at 857-48.

25. *Id.* at 664-65, 822 P.2d at 880, 3 Cal. Rptr. 2d at 848; see 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 602 (9th ed. 1988 & Supp. 1992) (explaining the "two-tier test of classification"); see also 4 MCKINNEY, CALIFORNIA DIGEST OF OFFICIAL REPORTS, *Constitutional Law* § 75 (3d ed. 1988) (digesting case authority that demonstrates application of both levels of the "two-tier test of classification" in equal protection inquiry).

26. *Southern Cal. Rapid Transit Dist.*, 1 Cal. 4th at 665, 822 P.2d at 880, 3 Cal. Rptr. 2d at 848; see *supra* notes 19-20 and accompanying text.

27. *Southern Cal. Rapid Transit Dist.*, 1 Cal. 4th at 665, 822 P.2d at 880, 3 Cal. Rptr. 2d at 848. This "narrow exception" was first formulated in *Avery v. Midland City*, 390 U.S. 474, 483-84 (1968) (providing an exception to the *Reynolds* standard of "one-person, one-vote" where "a special purpose unit of government [is] assigned the performance of functions affecting definable groups of constituents more than other[s]."); see also *Salyer Land Co. v. Tulare Water Dist.*, 410 U.S. 719, 728-30 (1973) (holding property-based voting plan not subject to the *Reynolds* standard of "one-person, one-vote" when "special purpose unit of government" is involved and its

when two requirements are satisfied.²⁸ First, the public entity must be created in order to carry out limited governmental tasks.²⁹ Second, the limited tasks that the public entity performs must affect voters' interests disproportionately.³⁰

First, the court considered the breadth of governmental authority vested in the benefit districts.³¹ The court held that the benefit districts possessed very little governmental authority and certainly not enough power to implicate the standard of "one-person, one-vote."³² It reasoned that the benefit districts' purpose was limited to defining the areas where land values were increased due to the proximity of the rail stations.³³ The court noted that the inherent limitations of the benefit districts were evidenced by the voting plan itself because only commercial landowners would be assessed and because they are the ones who would also reap the largest gains from the rail stations.³⁴ In light of the nexus between the voters who would reap the benefits and those who would be charged with the assessments, the court was satisfied that the benefit districts lacked the necessary authority to mandate the "one-person, one-vote" standard.³⁵ Thus the court deduced that the narrow circumstances of this case warranted the "reasonable relation" level of equal protection

decisions "primarily affect[] or interest[]" one class of voters more than others).

28. *Southern Cal. Rapid Transit Dist.*, 1 Cal. 4th at 665, 822 P.2d at 881, 3 Cal. Rptr. 2d at 849.

29. *Id.*

30. *Id.* at 666, 822 P.2d at 881, 3 Cal. Rptr. 2d at 849.

31. *Id.* at 665, 822 P.2d at 881, 3 Cal. Rptr. 2d at 849. The court emphasized that the public entity at issue was the benefit assessment district and not the SCRDT itself. *Id.* at 670, 822 P.2d at 884, 3 Cal. Rptr. 2d at 852.

32. *Id.* at 669, 822 P.2d at 883, 3 Cal. Rptr. 2d at 852.

33. *Id.* The purpose of the special benefit assessment is to compensate for the eventuating "windfall" that otherwise would be bestowed without cost upon commercial landowners in the districts where the subway stations would be located. The windfall is due to the influx of business activity that would result from the creation of the mass transit system compared with the system's huge start-up cost. The money received from the assessments levied on surrounding commercial landowners would be used to meet the principal and interest payments on bonds that the SCRDT issued to pay for constructing the mass transit system. *Id.* at 661, 822 P.2d at 878, 3 Cal. Rptr. 2d at 846. See also David J. Hayes, *Rapid Transit Financing: Use of the Special Assessment* 29 STAN. L. REV. 795 (1977) (discussing in depth the use of special assessment to finance rapid transit systems in California and other states).

34. *Southern Cal. Rapid Transit Dist.* at 670, 822 P.2d at 884, 3 Cal. Rptr. 2d at 852.

35. *Id.*

scrutiny.³⁶

The second requirement of the moderate level of equal protection scrutiny is met when the limited tasks that the public entity performs affect class interests disproportionately.³⁷ In determining whether the voting or non-voting constituents were disparately affected to a sufficient degree by the outcome of the referendum, the court considered the relationship between the voting and non-voting classes.³⁸

The court evaluated on the one hand whether the commercial landowners were affected more by the outcome of the referendum than those excluded by the voting plan, and on the other hand whether those excluded by the voting plan were considerably less interested in the outcome of the referendum.³⁹ The court decided that the benefit districts would impact the commercial landowner class more than the excluded class, and moreover, that the excluded class was less interested in the outcome of the referendum.⁴⁰ The court reasoned that while the commercial landowners would benefit in the form of increased land values and commercial activity,⁴¹ the beneficial impacts of the assessment district on the excluded class were no different than the benefits to people served by the mass-transit system citywide. Furthermore, affirmation of the benefit districts in the referendum would have a direct impact on the included class while having only an indirect or remote impact on the non-voting class.⁴² If the benefit assessment district were approved, the assessments would only be levied on the commercial landowners.⁴³ An affirmative vote by the excluded class would therefore carry no risk of assessment to that class, thereby rendering them substantially less interested in the outcome.⁴⁴ The court concluded that the classes were dissimilarly affected to a sufficiently substantial degree by the outcome of the referendum, thus the second requirement of the exception to the

36. *Id.*

37. *Id.*

38. *Id.* at 671, 822 P.2d at 884-85, 3 Cal. Rptr. 2d at 852-53.

39. *Id.*

40. *Id.* at 673-74, 822 P.2d at 886-87, 3 Cal. Rptr. 2d at 854-55.

41. *Id.* at 674, 822 P.2d at 887, 3 Cal. Rptr. 2d at 855. At this point the court acknowledged that commercial lessees would be affected by the assessments more than other non-landowning residents outside the districts because many of the leases in the districts contained "pass through" agreements which would hold the commercial landowner harmless in the event of any assessment placed on the land. However, the court disposed of this issue by determining that the commercial lessees were not affected to a "sufficiently substantial" degree to invoke the principle of "one-person, one-vote." *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

principle of "one-person, one-vote" was satisfied.⁴⁵ Since both requirements for the more moderate level of equal protection inquiry were met, the court concluded that the SCRTD did not need to show a "compelling justification" for the classification and exclusion of voters.⁴⁶

After the court determined the level of judicial inquiry to be the "wholly irrelevant" or "reasonably related" standard, the court applied this standard to the facts of the case.⁴⁷ The court noted that its task was not to determine whether it would have excluded the same voters under the voting plan.⁴⁸ Instead, the court was to determine whether any logical support existed for the statutory plan's classification and exclusion of voters, or conversely, whether the plan was wholly irrelevant to the legislative purpose.⁴⁹ The court found that the plan was reasonably related and not wholly irrelevant to the purpose of the statute.⁵⁰ The court reasoned that the Legislature could have reasonably determined that allowing one class of voters to endorse an assessment placing all of the financial burden of that endorsement on another class would be unfair.⁵¹ Likewise, the court reasoned, with regard to commercial lessees, the Legislature could have reasonably permitted their exclusion in light of the administrative difficulties that would have arisen if they were included.⁵² The court concluded that the exclusion of non-commercial landowners did not violate the equal protection requirement because the principle of "one-person, one-vote" did not apply, and the classification and exclusion of voters was reasonably related to the purpose of the statute.⁵³

The court then considered the second constitutional issue raised by the appellate court: whether equal protection was undermined by the statute's disproportionate scheme of assigning votes based on the tax-assessed value of land while actually assessing landowners based on the size and condition of the land.⁵⁴ The court held that while a more equi-

45. *Id.* at 675, 822 P.2d at 887, 3 Cal. Rptr. 2d at 855.

46. *Id.* at 675, 822 P.2d at 887-88, 3 Cal. Rptr. 2d at 855-56.

47. *Id.* at 675, 822 P.2d at 888, 3 Cal. Rptr. 2d at 856.

48. *Id.* at 675-76, 822 P.2d at 888, 3 Cal. Rptr. 2d at 856.

49. *Id.*

50. *Id.* at 677, 822 P.2d at 888, 3 Cal. Rptr. 2d at 856.

51. *Id.* at 676, 822 P.2d at 888, 3 Cal. Rptr. 2d at 856.

52. Some difficulties that the court listed include "identifying those commercial leases with 'pass through' provisions and those without, the percentage of the assessment passed to particular tenants, whether partial 'pass throughs' are permitted, the duration of the commercial leases, and other electoral minutiae which have not occurred to us." *Id.*

53. *Id.* at 675-77, 822 P.2d at 887-88, 3 Cal. Rptr. 2d at 855-56.

54. This was an ancillary claim brought by the interveners. *Id.* at 677, 822 P.2d at

table method of assigning votes and levying assessments may have been possible, the plan chosen by the Legislature did not infringe on equal protection assurances.⁵⁵ The court reasoned that the small size of the benefit districts made it reasonable for the Legislature to assume that the tax assessed value of the land would be fairly proportional to the land's size.⁵⁶ The court considered whether the different bases of vote and assessment calculation chosen by the Legislature were reasonably related to the voting plan.⁵⁷ The court maintained that the two different bases of calculation were reasonably related to the purpose of the statute, because the allocation of votes based on tax assessment value was more convenient, inexpensive and verifiable than an allocation based on size and condition.⁵⁸ The court reasoned that the approved voting scheme would allow benefit districts to be approved at referendum before undertaking the inconvenience, expense and difficulty of verifying calculations based on square footage necessary for assessment purposes.⁵⁹ Therefore, the court concluded that the two different bases used for allotting votes and charging assessments were neither unreasonably disproportionate to one another nor "wholly irrelevant" to the purpose of the statute and thus satisfied the court's more moderate level of equal protection inquiry.⁶⁰

888-89, 3 Cal. Rptr. 2d at 856-57.

55. *Id.* at 677-78, 822 P.2d at 889-90, 3 Cal. Rptr. 2d at 857.

56. *Id.*; see also CAL. PUB. UTIL. CODE § 33001(b) (West Supp. 1992) (defining the outer limits of any benefit district as not more than one mile from the centerpoint of an actual or proposed rail transit station within the central business district of the City of Los Angeles and not more than one-half mile from the center point of a rail station located anywhere else).

57. *Southern Cal. Rapid Transit Dist.*, 1 Cal. 4th at 678, 822 P.2d at 889, 3 Cal. Rptr. 2d at 857-58.

58. *Id.* at 679, 822 P.2d at 890, 3 Cal. Rptr. 2d at 858.

59. *Id.*

60. *Id.* at 678-79, 822 P.2d at 889-90, 3 Cal. Rptr. at 857-88; see *supra* note 18. The court also considered the appellate court's holding that the SCRTD lacked statutory authority to exempt residential landowners from assessment. The court based its conclusion on express statutory language supporting the residential landowner exemption. Section 33001.5(b) authorizes the Los Angeles city council to review the SCRTD plan with the ability to amend and approve it. CAL. PUB. UTIL. CODE § 33001.5(b) (West Supp. 1992). Section 33001.5(c) requires the SCRTD to approve or disapprove the plan with the city council revisions. CAL. PUB. UTIL. CODE § 33001.5(c) (West Supp. 1992). In this case, the city council insisted on the exemption of residential landowners and resubmitted the plan as amended to the SCRTD. Therefore, the court held that the exemption of residential landowners was expressly authorized by the legislature in the statute. *Southern Cal. Rapid Transit Dist.*, 1 Cal. 4th at 680-81, 822 P.2d at 891, 3 Cal. Rptr. 2d at 859.

B. The Dissenting Opinion

Justice Kennard maintained that the voting plan violated the equal protection assurances of the United States Constitution.⁶¹ Justice Kennard focused on the SCRTD and its purposes in contrast to the majority's focus on the benefit districts and their limited purposes.⁶² He found that although assessments would be imposed only on commercial landowners, this alone does not justify excluding all other potential voters.⁶³ All residents in the benefit districts would be affected by the rail stations.⁶⁴ Increased commercial activities would have an impact, be it positive or negative, on residential land values.⁶⁵ Whereas the increased commercial activity could raise the value of residential property, land values in an exclusively residential neighborhood might suffer.⁶⁶ Furthermore, Justice Kennard believed that the assessments would be redistributed throughout the benefit district because commercial landowners would increase rents to commercial lessees, who in turn would charge higher prices for goods, thereby impacting both commercial lessees and all residents who shop in their stores, both of whom were excluded by the voting plan.⁶⁷ Justice Kennard thus concluded that the SCRTD benefit district referendum was an election of general interest.⁶⁸ As an election of general interest, the principle of "one-person, one-vote" presumptively applied, and the SCRTD would need to show a compelling state interest for an exception.⁶⁹ Because Justice Kennard concluded the voting plan was constitutionally invalid on its face, the other challenges lacked merit.⁷⁰

61. *Id.* at 681, 822 P.2d at 892, 3 Cal. Rptr. 2d at 860 (Kennard, J., dissenting).

62. *Id.* at 685, 822 P.2d at 894, 3 Cal. Rptr. 2d at 862 (Kennard, J., dissenting); *see supra* note 32 (the majority noted that had the SCRTD been its focus, the plan would have failed the court's equal protection inquiry).

63. *Southern Calif. Rapid Transit Dist.* at 686, 822 P.2d at 894-95, 3 Cal. Rptr. 2d at 863 (Kennard, J., dissenting).

64. *Id.* at 687, 822 P.2d at 895, 3 Cal. Rptr. 2d at 863 (Kennard, J., dissenting).

65. *Id.* at 687 n.1, 822 P.2d at 896 n.1, 3 Cal. Rptr. 2d at 864 n.1 (Kennard, J., dissenting).

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

67. *Id.* at 687, 822 P.2d at 896, 3 Cal. Rptr. 2d at 864 (Kennard, J., dissenting).

68. *Id.* at 687-88, 822 P.2d at 896, 3 Cal. Rptr. 2d at 864 (Kennard, J., dissenting).

69. *Id.* at 688, 822 P.2d at 896, 3 Cal. Rptr. 2d at 864 (Kennard, J., dissenting).

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

III. CONCLUSION

In *Southern California Rapid Transit District v. Bolen*, the California Supreme Court considered whether the equal protection assurances of the state and federal Constitutions were respected by a statutory plan conditioning the right to vote on commercial land ownership. The court also considered the equal protection implications of the two different bases of vote and assessment calculations. The court, by focusing on the benefit district itself, concluded that the limited circumstances of this case preserved the equal protection assurances. Furthermore, the court concluded that the Legislature's different methods for allocating votes and levying assessments offended neither the state nor federal Constitutions' equal protection sensibilities. In her dissenting opinion, Justice Kennard maintained that the majority's focus on the benefit district was misplaced and instead focused on the Southern California Rapid Transit District, finding that the voting plan did violence to the equal protection guarantees.

The majority's focus on the benefit district itself rather than the SCRTD as a governing body permitted the court to declare that equal protection assurances had been satisfied by the plan, thus upholding the constitutionality of the special benefit assessment districts. This decision represents the California Supreme Court's determination to allow legislative bodies and local governments to use innovative methods to raise funds for development of public transit systems. Other transit districts may now seek private means of alternative financing for large projects that may otherwise have appeared unfeasible because of the districts' lack of available public funds. In return, commercial landowners in the areas benefited by the transit system will profit from greater accessibility and increased foot traffic. In terms of public policy, the majority's opinion seems appropriate and justified regarding emerging technologies in rail transit and the public's increasing need for these developments in everyday life.

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- B. *Statutes conditioning distribution of state benefits on California residency at a fixed point in the past violated federal constitutional right to equal protection; limiting benefits to veterans who were California residents at the time they entered active military service was not rationally related to legitimate state interest: Del Monte v. Wilson.*

I. INTRODUCTION

In *Del Monte v. Wilson*,¹ the California Supreme Court considered whether statutes requiring California residency at a fixed point in the past for distribution of state veterans' benefits violated the federal constitutional right to equal protection.² The court concluded that the laws violated the Equal Protection Clause when viewed in the light of the United States Supreme Court holdings.³

This action was brought by veterans of World War II, the Korean War, and the Vietnam War and their dependents.⁴ All of the veterans enlisted in military service while residents of other states and later moved to California.⁵ The state denied the plaintiffs benefits because they did not fall within the definition of "veteran" under California Military and Veterans Code section 980.⁶ The code cites the date of enlistment into military

1. 1 Cal. 4th 1009, 824 P.2d 632, 4 Cal. Rptr. 2d 826 (1992). Justice Mosk was joined in the unanimous opinion by Chief Justice Lucas, and Justices Panelli, Kennard, Arabian, Baxter, and George. This case was previously entitled *Del Monte v. Deukmejian*.

2. The statutes in question, from the California Military and Veterans Code, provided benefits for tuition and living expenses of students, farm and home loan assistance, and disaster indemnity. CAL. MIL. & VET. CODE §§ 980-980.5, 981-981.7, 985-989.5, 987.50, 989.4 (West 1988 & Supp. 1992). *Del Monte*, 1 Cal. 4th at 1011, 824 P.2d at 632-33, 4 Cal. Rptr. 2d at 826.

3. The language of the opinion indicates the court felt "constrained by recent decisions of the United States Supreme Court . . ." *Del Monte*, 1 Cal. 4th at 1011, 824 P.2d at 632, 4 Cal. Rptr. 2d at 826. However, the court declined to grant the defendant's rather extreme request to waive the "policy of stare decisis." *Id.* at 1023, 824 P.2d at 641, 4 Cal. Rptr. 2d at 835.

4. The plaintiffs were Charles Del Monte, a veteran of the Korean War, and his sons Nicholas and Andrew who applied for educational assistance; Michael Gureckas, a veteran of the Vietnam War, denied home purchase assistance; Clyde McCown, a World War II veteran, who was a resident of California since 1946; Karl Seuthe, a Korean War veteran, who moved to California in 1952; and John Rigney, a World War II veteran, who moved to California in 1950. *Del Monte v. Deukmejian*, 1 Cal. App. 4th 1213, 1217-18, 281 Cal. Rptr. 380, 382-83 (Cal. Ct. App. 1991).

5. Del Monte entered the service from New York. Gureckas entered the service from Connecticut. McCown entered the service from Louisiana. Seuthe entered the service from New York. Rigney entered the service from Georgia. *Id.*

6. Defining eligibility for benefits under the chapter as a whole, section 980 provides in pertinent part:

(a) As used in this chapter, 'veteran' means any of the following:

(1) Any citizen of the United States who served in the active military, naval, or air service of the United States on or after April 6, 1917, and

service as the fixed point in time for determining whether a person is eligible for state provided veterans' benefits.⁷

The trial court found that the plaintiffs had standing, but that the code sections in dispute were constitutional.⁸ The court of appeal reversed the trial court's decision because it concluded that precedents of the United States Supreme Court have established that conditioning state benefits on state residency at a fixed time violates the Equal Protection Clause.⁹ The supreme court affirmed.¹⁰

II. TREATMENT

The sole issue before the supreme court was whether the statutes in question violated the Equal Protection Clause of the Constitution.¹¹ Applying traditional notions of constitutionality, the court found that the

prior to November 12, 1918; received an honorable discharge or was released from active duty under honorable conditions; was, *at the time of entry into active duty, a native of or a bona fide resident of the state* or, if a minor at that time, entered active duty while in this state; and had lived in this state for six months immediately preceding entry into active duty.

(2) Any person who served in the active military, naval, or air service of the United States for a period of not less than 90 consecutive days or was discharged from the service due to a service-connected disability within that 90-day period; received an honorable discharge or was released from active duty under honorable conditions; *was at the time of entry into active duty a native of or bona fide resident of this state* or, if a minor at that time, entered active duty while in this state and had lived in this state for six months immediately preceding entry into active duty; . . .

(3) Any member of the reserves or National Guard who is called to, and released from, active duty, regardless of the number of days served; called during any period when a presidential executive order specifies the United States is engaged in combat; received an honorable discharge or was released from active duty under honorable conditions; *was at the time of entry into active duty a native of, or bona fide resident of this state* or, if a minor at that time, entered active duty while in this state and had lived in this state for six months immediately preceding entry into active duty.

CAL. MIL. & VET. CODE § 980 (West Supp. 1992) (emphasis added).

7. *Id.*

8. The trial court also held that the statutes did not violate the constitutional right to travel or the single-subject rule of the California Constitution. Due to these findings the trial court did not rule on plaintiffs' motion for class certification. *Del Monte v. Deukmejian*, 1 Cal. App. 4th at 1219, 281 Cal. Rptr. at 383.

9. *Id.* at 1229-30, 281 Cal. Rptr. at 390.

10. *Del Monte v. Wilson*, 1 Cal. 4th 1009, 1026, 824 P.2d 632, 643, 4 Cal. Rptr. 2d 826, 836-37 (1992).

11. *Id.* at 1014, 824 P.2d at 634, 4 Cal. Rptr. 2d at 828.

plaintiffs' claims involved no impairment of a fundamental right nor involved any inherently suspect classification.¹² The court acknowledged that in such cases the "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."¹³ Although this is normally a fairly easy standard for a legislative enactment to pass,¹⁴ there have been several recent United States Supreme Court cases which have struck down statutes that distinguish between short-term and long-term state residents. The court relied upon four Supreme Court cases, each of which found that statutes which discriminated on the basis of residency were unconstitutional because its very purpose of favoring established residents was not viewed as a legitimate state interest.¹⁵

The first case analyzed by the court was *Zobel v. Williams*.¹⁶ *Zobel* involved Alaska residents who challenged a state dividend distribution plan that distributed income from natural resources based on length of residency.¹⁷ The state argued that the statute served the legitimate objective of attracting potential new residents to Alaska.¹⁸ The Supreme Court found that such a purpose was not served by the statute since it gave greater benefits to those people who had migrated into the state twenty-one years before the statute was even enacted.¹⁹ The other significant argument advanced by the State of Alaska was that it awarded residents for past contributions.²⁰ The Burger Court rejected this argu-

12. *Id.* Later in the opinion, the court addressed the issue of the right to travel, a fundamental right, but did not base its decision on that ground. *Id.* at 1018, 824 P.2d at 637, 4 Cal. Rptr. 2d at 831.

13. *Id.* (quoting *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

14. See 13 CAL. JUR. 3D *Constitutional Law* § 45 (1981) (in general, laws are presumed to be constitutional).

15. *Del Monte*, 1 Cal. 4th at 1014-15, 824 P.2d at 635, 4 Cal. Rptr. 2d at 829.

16. 457 U.S. 55 (1982).

17. The dividend program was enacted in 1980 and distributed earnings to all residents over 18 years old. The distribution was based on a one share interest for each year of residency after 1959, when the state was incorporated into the union. *Id.* at 57.

18. *Id.* at 61.

19. "Even if we assume that the state interest is served by increasing the dividend for each year of residency beginning with the date of enactment, is it rationally served by granting greater dividends in varying amounts to those who resided in Alaska during the 21 years prior to enactment? We think not." *Id.* at 63.

20. Alaska also argued that the law ensured prudent management of the distribution funds and prevented newcomers from plundering the state's natural resources. The Court rejected this argument as well. *Id.* at 61.

ment as not being a legitimate state interest.²¹ Upon these determinations, the Court found that the dividend plan violated the Equal Protection Clause by granting different benefits based on the term of residency.²²

Next, the California Supreme Court turned to *Hooper v. Bernalillo County Assessor*.²³ In *Hooper*, the plaintiffs challenged the constitutionality of a New Mexico statute that granted a tax exemption to Vietnam veterans who resided in the state before a specified date.²⁴ New Mexico put forth two justifications for the statute. The first was that the statute encouraged veterans to settle in the state.²⁵ The Court countered that the statutory scheme was more likely to discourage veterans from settling in New Mexico because they would not be eligible for the benefits.²⁶ The second rationale was that it served "as an expression of the State's appreciation to its 'own citizens for honorable military service.'"²⁷ Burger's opinion did acknowledge the state's desire to assist veterans as a legitimate state interest and accepted the idea that awarding veterans certain benefits was consistent with this interest.²⁸ The problem with the statute resulted from the state's desire to give special treatment to "its own" established veterans, a goal which the Court did not consider

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If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence—or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible.

Id. at 64 (footnotes omitted).

22. *Id.* at 65. For an excellent discussion on the Burger Court's treatment of residency cases, see Kathryn D. Katz, *More Equal Than Others: The Burger Court and The Newly Arrived State Resident*, 19 N.M. L. REV. 329 (1989).

23. 472 U.S. 612 (1985).

24. *Id.* at 614-15 n.2.

25. *Id.* at 618.

26. *Id.* at 619-20.

27. *Id.* at 618-19 (quoting *Hooper v. Bernalillo County Assessor*, 679 P.2d 840, 844 (N.M. Ct. App. 1984)).

28. *Id.* at 620.

[T]he State may award certain benefits to all its bona fide veterans, because it then is making neither an invidious nor irrational distinction among its residents. Resident veterans, as a group, may well deserve preferential treatment, and such differential treatment vis-à-vis non-veterans does not offend the Equal Protection Clause.

Id. (footnotes omitted).

to be a legitimate state interest.²⁹ Thus, the New Mexico statute did not protect a legitimate state interest and was therefore in violation of the Equal Protection Clause.³⁰

The third case the court examined was *Williams v. Vermont*.³¹ Vermont law required car buyers who bought and registered vehicles outside of the state before becoming Vermont residents, to pay the full tax in order to register their car in Vermont.³² The stated purpose of the use tax was to "improve and maintain the state and interstate highway systems"³³ The Court first stated that a great deal of deference should be given to state taxation schemes.³⁴ However, the Court went on to find that the statute furthered no legitimate purpose since the distinction bears no rational relation to the purpose of raising revenue nor does it encourage business with local merchants.³⁵ Thus, Vermont followed Alaska and New Mexico in passing a law that violated the Equal Protection Clause.³⁶

The final and most recent case analyzed by the *Del Monte* court was *Attorney General of New York v. Soto-Lopez*.³⁷ In *Soto-Lopez*, New York established a system granting preference points to civil service employment examination scores to veterans who entered active military service while residents of the state, served during wartime, and received an honorable discharge.³⁸ New York presented four potentially legitimate state purposes for the statute.³⁹ The analysis by the court in *Del Monte* of the constitutionality of these interests was complicated by the fact that a higher standard of review was necessary since the plurality found that the statute violated the right to travel as well as the right of equal protec-

29. The Court noted that "[s]tripped of its asserted justifications, the New Mexico statute suffers from the same constitutional flaw as the Alaska statute in *Zobel*." *Id.* at 622.

30. *Id.* at 624.

31. 472 U.S. 14 (1985).

32. *Id.* at 15. Vermont would give credit towards use tax charged at the time of registration for sales tax paid on a car purchased in another state "if that state would afford credit for taxes paid to Vermont in similar circumstances," and if the owner was a resident of Vermont at the time the car was purchased. *Id.*

33. *Id.* at 18 (quoting VT. STAT. ANN. tit. 32, § 8901 (1981)).

34. *Id.* at 22 (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)).

35. *Id.* at 24-25.

36. *Id.* at 28.

37. 476 U.S. 898 (1986).

38. *Id.* at 900.

39. *Id.* at 909.

tion.⁴⁰ Burger and White concurred only on the basis of the equal protection issue.⁴¹ Since the court in *Del Monte* focused on the Equal Protection Clause, they looked to the Supreme Court's treatment of this area.

In *Soto-Lopez*, the Court rejected New York's argument that the statute served the purpose of encouraging residents to enlist in the armed services because the statute applied to both inductees and enlistees.⁴² New York also attempted to justify the statute as a means of compensating residents for service in time of war by helping them reestablish themselves at home.⁴³ The Court was not persuaded that the statute was intended to serve this purpose because the eligibility for bonus points was not limited to the period immediately following a veteran's return.⁴⁴ The state further argued that the law served the purpose of inducing veterans to return to New York after service, and of enabling the state to employ a "uniquely valuable class of public servants."⁴⁵ The Court conceded that rewarding veterans was a legitimate state interest; however, the Court felt that even if the state interest were compelling, no valid reason existed for distinguishing between long-term resident veterans and recent migrants to the state.⁴⁶ Thus, a divided court found that New York's statute violated the Equal Protection Clause.⁴⁷

After this detailed analysis of *Soto-Lopez*, the California Supreme Court in *Del Monte* turned to a determination of whether the residency classification in the California statutes was rationally related to a legitimate state purpose.⁴⁸ The first argument set forth by the respondents was that the state may choose to "take care of its own."⁴⁹ The court concluded that this is not a legitimate state purpose because "once a citizen becomes a bona fide resident of this state, he or she becomes the state's 'own' to the same extent as a longer-term resident."⁵⁰ Next, the respondent also asserted that the law was justified because it compensates

40. *Del Monte v. Wilson*, 1 Cal. 4th 1009, 1017-18, 824 P.2d 632, 637, 4 Cal. Rptr. 2d 826, 831 (1992).

41. *Soto-Lopez*, 476 U.S. at 912 (Burger, C.J., concurring); *id.* at 916 (White, J., concurring).

42. *Id.* at 910. Note, that the same criticism could be made of the California statutes in question. See *supra* note 6.

43. *Soto-Lopez*, 476 U.S. at 909.

44. *Id.* at 910.

45. *Id.* at 909.

46. *Id.* at 910-11.

47. *Id.* at 911-12.

48. *Del Monte v. Wilson*, 1 Cal. 4th 1009, 1020, 824 P.2d 632, 638, 4 Cal. Rptr. 2d 826, 832 (1992).

49. *Id.*

50. *Id.* at 1020, 824 P.2d at 639, 4 Cal. Rptr. 2d at 833 (citing *Soto-Lopez*, 476 U.S. at 911; and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (1985)).

those who were residents when they entered into military service.⁵¹ The court adopted the reasoning of the United States Supreme Court in *Hooper*, which was that no rational basis existed for finding that residents of other states at the time of entry into service suffered more than those who resided in the state at the time of entry. The Court further determined that the benefits provided by the law did not bear directly upon the problem of transition to civilian life.⁵² The defendant requested that the court give the state wide deference because the laws constituted economic legislation.⁵³ The court agreed that deference in matters of economic legislation was normally the case, but concluded that in residency cases the high court instead focuses upon the central objective of the statutes, which is to give illegitimate preference to long-term residents.⁵⁴ Finding that the same concerns were present in the instant case, the California court likewise rejected the defendant's argument in favor of deference for economic legislation.⁵⁵ California attempted to distinguish its laws from those in *Zobel* and *Hooper* on the basis of provisions that extend benefits to current and future residents who join the military, rather than limiting benefits to previous residents who provided past contributions.⁵⁶ Therefore, California argued that a veteran who entered service in another state could always reenter active service upon relocation to California, in order to avail himself of the veterans' benefits.⁵⁷ The court took a practical approach and pointed out that it would be absurd to suggest that a veteran of World War I or World War II would find it feasible to reenter the service in order to collect the benefits offered under the law.⁵⁸

51. The defendant's claim was that

the scheme compensates those whose careers and lives are disrupted "while they are working and living in the state, and who choose to return to their home state after their military service where they must begin the difficult task of resuming those interrupted careers and lives, ill-prepared and to begin anew in a society and economy which may have changed dramatically during their absence and which may have left them far behind."

Id. at 1020, 824 P.2d at 639, 4 Cal. Rptr. 2d at 833.

52. *Id.* at 1020-21, 824 P.2d at 639, 4 Cal. Rptr. at 833 (citing *Hooper*, 472 U.S. at 621-22).

53. *Id.* at 1022, 824 P.2d at 640, 4 Cal. Rptr. 2d at 834.

54. *Id.* See Bryan H. Wildenthal, Note, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557 (1989) (arguing for standardized treatment of cases based upon uniform standards of review).

55. *Del Monte*, 1 Cal. 4th at 1022, 824 P.2d at 640, 4 Cal. Rptr. 2d at 834.

56. *Id.* at 1022-23, 824 P.2d at 640, 4 Cal. Rptr. 2d at 834.

57. *Id.* at 1023, 824 P.2d at 640, 4 Cal. Rptr. 2d at 834.

58. As the court pointed out, this is particularly true when two of the plaintiffs

Since the California statutes were so closely analogous to those reviewed by the United States Supreme Court in *Hooper* and *Soto-Lopez*, and because in those cases the Court rejected the rationale set forth by the states, the California Supreme Court concluded that the California laws were not rationally related to a legitimate state interest, and thus, violated the Equal Protection Clause.⁵⁹

III. CONCLUSION

The most immediate impact of the holding in *Del Monte* will be upon veterans who were not formerly eligible for benefits. This means that approximately 300,000 veterans living in California will be eligible for new benefits.⁶⁰ The ruling should not affect the state's budget because the program is funded by special bonds.⁶¹ However, it is possible that the new broadening of benefits will cause these statutes to suffer the same fate as the property tax exemption previously granted to veterans under the California Constitution that was deleted by Proposition 93 because it violated the federal constitution.⁶²

Del Monte will have a more generalized impact on all California statutes that predicate benefits upon residency at a fixed point in time, or that discriminate in any other way against bona fide residents. As the court stated, "We can only conclude that it has been the role of the four Supreme Court cases discussed above to dismantle a provincial view of citizenship."⁶³ The significance of this case is amplified by the recent increase in migration to California. As a higher percentage of the population becomes first generation Californians, there will be greater conflicts over the distribution of the state's scarce resources. *Del Monte* makes it clear that the state will not be able to create a second class of newly arrived citizens in order to allocate those resources.

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and many other veterans had received debilitating injuries during their period of service. *Id.*

59. *Id.* at 1025, 824 P.2d at 642, 4 Cal. Rptr. 2d at 836.

60. Harriet Chiang, *Court Rules That All Veterans Are Eligible for State Benefits*, S.F. CHRON., Feb. 25, 1992, at A15.

61. *Id.*

62. *Del Monte*, 1 Cal. 4th at 1014 n.4, 824 P.2d at 634 n.4, 4 Cal. Rptr. 2d at 828 n.4. Note that the voters could have just as easily expanded the definition of veteran, but instead chose to eliminate the benefits altogether.

63. *Id.* at 1022, 824 P.2d at 640, 4 Cal. Rptr. 2d at 834.

- C. *Medically indigent adults lack standing under article XIII B, section 6, of the California Constitution to challenge the state's transfer of financial responsibility to counties for providing health care to medically indigent persons: Kinlaw v. State.*

I. INTRODUCTION

In *Kinlaw v. State*,¹ the California Supreme Court never reached the issue of whether the state was obligated to reimburse the County of Alameda for the cost of providing health care for medically indigent adults who had been included in the state Medi-Cal program until 1983, when the state transferred health care responsibility for these individuals to the counties.² The plaintiffs, medically indigent adults and taxpayers,³ were found to lack standing under section 6 of article XIII B of the California Constitution which provides that administrative procedures established by the legislature⁴ are the exclusive means by which the State's

1. 54 Cal. 3d 326, 814 P.2d 1308, 285 Cal. Rptr. 66 (1991). Justice Baxter delivered the majority opinion in which Chief Justice Lucas and Justices Panelli, Kennard, and Arabian concurred. Justice Broussard wrote a separate dissenting opinion, in which Justice Mosk concurred.

2. As a result of ASSEMBLY BILL NO. 799, which became effective January 1, 1983, Medi-Cal no longer covered medically indigent adults. A.B. 799, Reg. Sess. (1981-82), reprinted in 1982 Cal. Stat. 1568, ch. 328, §§ 1-64. Under Article XIII B, Section 3 of the California Constitution, the state may transfer the financial responsibility for a program to a county. CAL. CONST. art. XIII B, § 3. Under article XIII B, section 6 of the California Constitution, when a state agency or the legislature mandates a new program or responsibility on any local government, the state is obligated to reimburse the local agencies for the cost of those programs if the local government was not already bound to fund it under a pre-existing duty. CAL. CONST. art. XIII B, § 6. This provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill-equipped to handle the task. See *County of Los Angeles v. State*, 43 Cal. 3d 46, 729 P.2d 202, 233 Cal. Rptr. 38 (1987) (stating that article XIII A [proposition 13] severely restricted the taxing ability of local governments; hence, section 6 was included in article XIII B to protect local government revenues from state mandates).

3. *Kinlaw*, like similarly situated plaintiffs, is a 60-year-old woman with diabetes and hypertension who has no health insurance and who has allegedly received inadequate health care. *Kinlaw*, 54 Cal. 3d at 340-41, 814 P.2d at 1318, 285 Cal. Rptr. at 76 (Broussard, J., dissenting). In addition, plaintiff King is an epileptic who has not been able to acquire medication from county clinics. *Id.* at 341, 814 P.2d at 1318, 285 Cal. Rptr. at 76 (Broussard, J., dissenting).

4. Section 17551 of the Government Code provides: "The Commission . . . shall hear and decide upon a claim by a local agency or school district that the local

obligations under section 6 are to be scrutinized and enforced.⁵

The plaintiffs sought declaratory and injunctive relief compelling the state to restore coverage for medically indigent adults under Medi-Cal or to reimburse the County of Alameda for the cost of providing similar care to these persons.⁶ Although the superior court acknowledged that the plaintiffs had shown irreparable injury,⁷ the court denied their request for a preliminary injunction "on the grounds that they could not prevail in the action,"⁸ and subsequently granted summary judgment for the defendants solely on the issue of standing.⁹ The court of appeal held that the plaintiffs had standing independent of the administrative remedies prescribed by section 6, because shifting the responsibility for these services to Alameda County created a state-mandated program under the provisions of article XIII B, which, in turn, required state subsidization of those costs assumed by the county.¹⁰

The supreme court reversed, affirming the superior court's decision on the standing issue.¹¹ In addition, the supreme court noted that section 6 of article XIII B did not provide for the remedy of reinstatement of state funding for medically indigent adults to Medi-Cal.¹² Such a remedy was available only when there was a declaration that the state mandate was unenforceable based upon a finding that the legislature had failed to include its costs in a local government claims bill.¹³

II. TREATMENT OF THE CASE

A. *Majority Opinion*

The supreme court in *Kinlaw* stated that the legislature clearly expressed its intent that local agencies and school districts retain exclusive power to file claims for reimbursements of state-mandated costs.¹⁴

agency or school district is entitled to be reimbursed by the state for costs mandated by the state." CAL. GOV'T CODE § 17551 (West Supp. 1992).

5. *Kinlaw*, 54 Cal. 3d at 328, 814 P.2d at 1310, 285 Cal. Rptr. at 68. Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service . . ." CAL. CONST. art. XIII, § 6.

6. *Kinlaw*, 54 Cal. 3d at 330, 814 P.2d at 1310, 285 Cal. Rptr. at 68.

7. *Id.* at 338, 814 P.2d at 1316, 285 Cal. Rptr. at 74 (Broussard, J., dissenting).

8. *Id.* (Broussard, J., dissenting).

9. *Id.* at 328, 814 P.2d at 1309, 285 Cal. Rptr. at 67.

10. *Id.* at 338-39, 814 P.2d at 1316, 285 Cal. Rptr. at 74.

11. *Id.* at 328, 814 P.2d at 1310, 285 Cal. Rptr. at 68.

12. *Id.* at 335, 814 P.2d at 1314, 285 Cal. Rptr. at 72.

13. CAL. GOV'T CODE § 17612 (West Supp. 1991).

14. California Government Code section 17500 states that "[i]t is the intent of the Legislature in enacting this part to provide for the implementation of section 6 of

These procedures are only activated when the local agency or school district files a "test claim" for reimbursement of state-mandated costs with the Commission on State Mandates (hereinafter the Commission).¹⁵ The supreme court, relying on the specificity of legislative intent, concluded that the plaintiffs' attempt to circumvent the available procedures as independent individuals was unpersuasive.¹⁶

In the alternative, the plaintiffs sought reinstatement of the state-funded Medi-Cal program.¹⁷ The supreme court asserted that addressing the merits of the plaintiffs' claim in this proceeding would be procedurally inappropriate,¹⁸ because such relief can only follow a Commission determination that a mandate exists and that the legislature has failed to include the cost in a local government claims bill.¹⁹ An effective determination by the Commission requires the inclusion of the Controller, the Director of Finance, and the Treasurer and Director of the Office of Planning and Research, none of whom were included in plaintiffs' present cause of action.²⁰ Further, if the Commission determined that the state

article XIII B of the California Constitution and to consolidate the procedures for reimbursement of statutes specified in the Revenue and Taxation Code with those identified in the Constitution." CAL. GOV'T CODE § 17500 (West Supp. 1991). Additionally, section 17552 of the Government Code provides: "This chapter shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by section 6 of article XIII B of the California Constitution." CAL. GOV'T CODE § 17552 (West Supp. 1991).

15. *Kinlaw*, 54 Cal. 3d at 332, 814 P.2d at 1312, 285 Cal. Rptr. at 70. "Process" requires a prompt public hearing after such a filing, where the claimant along with any other department, agency, interested organization, or even interested individuals, may participate. CAL. GOV'T CODE § 17553 (West 1980). Section 17553 also designates the Sacramento County Superior Court as the venue for judicial actions to declare unfunded mandates invalid. When this opinion was handed down, a "test claim" filed by Los Angeles County on the same issue was before the court of appeal, which the majority determined to be evidence that the process was operative. Moreover, Los Angeles County refused to allow Alameda County to join in the action because the two counties' systems of documentation are so similar that the result would be cumulative. *Kinlaw*, 54 Cal. 3d at 332 n.4, 814 P.2d at 1312 n.4, 285 Cal. Rptr. at 70 n.4.

16. *Id.* at 334-35, 814 P.2d at 1314, 285 Cal. Rptr. at 72.

17. *Id.* at 335, 814 P.2d at 1314, 285 Cal. Rptr. at 72.

18. Sections 17500-17630 of the Government Code, enacted four years after article XIII B, created the Commission on State Mandates in order to implement section 6 of that article. *Kinlaw*, 54 Cal. 3d at 342, 814 P.2d at 1319, 285 Cal. Rptr. at 77. The Commission consists of the State Controller, State Treasurer, State Director of Finance, State Director of Planning and Research, and one member of the public. CAL. GOV'T CODE § 17525 (West Supp. 1991).

19. CAL. GOV'T CODE § 17525 (West Supp. 1991).

20. *Kinlaw*, 54 Cal. 3d at 336 n.9, 814 P.2d at 1315 n.9, 285 Cal. Rptr. at 73 n.9.

mandate was unenforceable, the subsequent judicial remedy to either pay the extant claims or include estimated costs in the state budget, would be derived from no source of funds other than the appropriations for the Department of Health Services (DHS).²¹ The concomitant payments would merely be at the expense of another program that DHS is obligated to fund, and thus, the court held that public policy did not support such a result.²²

B. *Dissenting Opinion*

In his dissenting opinion, Justice Broussard claimed that the plaintiffs had standing to challenge the state action as citizens, independent of the procedures provided in section 6, and that the supreme court had jurisdiction to reach and dispose of the merits of the plaintiffs' claim.²³ First, Justice Broussard noted that plaintiffs have traditionally been afforded standing when seeking a writ of mandate to compel public officials to perform their duties where plaintiffs are "beneficially interested" in the issuance of the writ.²⁴ Justice Broussard stressed the detrimental impact on the plaintiffs in the present action and, hence, their beneficial interest in the issue's resolution.²⁵ Second, relying on the supreme court's decision in *Common Cause v. Board of Supervisors*,²⁶ Justice Broussard

cf. Dix v. Superior Court, 53 Cal. 3d 442, 807 P.2d 1063, 279 Cal. Rptr. 834 (1991) (holding that only the prosecutor, not the victim of the crime, had standing to recall a sentence under Penal Code section 1170, but also considering and resolving the victim's questions concerning the trial court's authority to recall a sentence under Penal Code section 1170(d)). Justice Broussard, on the other hand, claimed that the issue in the present case deserved review because it was more important than the issue in *Dix* and merely asked for declaratory relief. *Kinlaw*, 54 Cal. 3d at 347, 814 P.2d at 1322, 285 Cal. Rptr. at 80 (Broussard, J., dissenting).

21. *Kinlaw*, 54 Cal. 3d at 336, 814 P.2d at 1315, 285 Cal. Rptr. at 73.

22. *Id.*

23. *Id.* at 337, 814 P.2d at 1315, 285 Cal. Rptr. at 73 (Broussard, J., dissenting).

24. *Id.* at 340, 814 P.2d at 1317, 285 Cal. Rptr. at 75 (Broussard, J., dissenting).

See CAL. CIV. PROC. CODE § 1086 (West 1980) (stating that a writ of mandate can be afforded to any person "beneficially interested"). See also *Carsten v. Psychology Examining Comm.*, 27 Cal. 3d 793, 614 P.2d 276, 166 Cal. Rptr. 844 (1980) (explaining that a person is "beneficially interested" in the writ if a special interest is served or a right is preserved).

25. *Kinlaw*, 54 Cal. 3d at 340-41, 814 P.2d at 1318, 285 Cal. Rptr. at 76 (Broussard, J., dissenting). Justice Broussard noted that all the plaintiffs are "personally dependent upon the quality of care of Alameda County's MIA [medically indigent adult] program." *Id.* at 341, 814 P.2d at 1318, 285 Cal. Rptr. at 76 (Broussard, J., dissenting).

26. 49 Cal. 3d 432, 777 P.2d 610, 261 Cal. Rptr. 574 (1989). In *Common Cause*, the court held that since section 304 of the California Elections Code provided the attorney general with the right of action, to infer a limitation on a citizen's remedy "would contradict our long-standing approval of citizen actions to require governmen-

claimed that section 6, on its face, placed no limitation on the right of private citizens to bring independent actions, and to construct such a limitation from the plain language would be contrary to the beneficially interested citizens' right to compel public duties.²⁷ Thus, Justice Broussard concluded that standing to compel such action should be given to those harmed by its violation, rather than to local agencies who have no personal interest at stake.²⁸

In addition to the resolution of the standing issue, Justice Broussard felt the court should have addressed the merits of the plaintiffs' claim.²⁹ Section 17000 of the Welfare and Institutions Code requires every county to "relieve and support" all indigent or incapacitated residents, except to the extent that such persons are supported or relieved by other means.³⁰ Justice Broussard found the critical question regarding the furnishing of health services for the medically indigent did not involve an analysis of the traditional and exclusive roles of the county and state, but rather an analysis of who was responsible for funding the program when article XIII B went into effect on November 6, 1979.³¹ Broussard concluded that section 17000 obligated the state to provide the necessary financial assistance for the medically indigent.³² Last, Justice Broussard cited the state's consistent use of approximately one billion dollars in spending

tal officials to follow the law." *Id.* at 440, 777 P.2d at 614, 261 Cal. Rptr. at 578.

27. *Kinlaw*, 54 Cal. 3d at 344, 814 P.2d at 1320, 285 Cal. Rptr. at 78 (Broussard, J., dissenting).

28. *Id.* at 346, 814 P.2d at 1321, 285 Cal. Rptr. at 79 (Broussard, J., dissenting).

29. *Id.* at 337, 814 P.2d at 1315, 285 Cal. Rptr. at 73 (Broussard, J., dissenting). The majority contended that if the county fails to provide adequate health care, the plaintiffs could compel compliance with the obligations imposed on the county by Welfare and Institutions Code sections 17000 and 17001. *Id.* at 336 n.8, 814 P.2d at 1314 n.8, 285 Cal. Rptr. at 72 n.8. However, Justice Broussard noted that the plaintiffs have already attempted to obtain such relief only to be met with the circular response that the county is unable to provide adequate health care because the state has provided inadequate subvention funds. *Id.* at 338 n.1, 814 P.2d at 1316 n.1, 285 Cal. Rptr. at 74 n.1 (Broussard, J., dissenting).

30. Welfare and Institutions Code section 17000 provides that "[e]very county . . . shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." CAL. WELF. & INST. CODE § 17000 (West 1991).

31. *Kinlaw*, 54 Cal. 3d at 351, 814 P.2d at 1325, 285 Cal. Rptr. at 83 (Broussard, J., dissenting).

32. *Id.* at 354, 814 P.2d at 1328, 285 Cal. Rptr. at 86 (Broussard, J., dissenting). See *supra* note 29-30 and accompanying text.

authority as a component of its spending limit under sections 1 and 3 of article XIII B, as additional support to hold the state accountable for the programs to which it ascribes dollar authority.³³

III. CONCLUSION

In *Kinlaw*, the supreme court gave great deference to the specificity with which the legislature outlined the available procedures involving reimbursement claims for state-mandated costs.³⁴ Thus, the court found that the state-to-county transfer of responsibility for medically indigent health services was not susceptible to attack from the medically indigent plaintiffs in this case,³⁵ because the prescribed remedy is expressly limited to local agencies and school districts.³⁶ Moreover, the court stated that the reinstatement of medically indigent health services to the state Medi-Cal program would be imprudent without a proper determination by the Commission.³⁷

Ultimately, as the court wrestled with the appropriate process to be afforded harmed individuals, the gravamen of *Kinlaw*, whether adequate health care is available to the medically needy, was lost. Quashing this action on procedural grounds sends a message to the people that solutions must travel through the legislatively prescribed channels, and the existence of alternative channels for such actions is a question for the ballot and not the bench.

DEAN THOMAS TRIGGS

III. COURTS AND PROCEDURE

Provided the parties agree to have their action heard by a temporary judge and the provisions of Article VI, Section 21 of the California Constitution are otherwise satisfied, the written stipulation required by California Rule of Court 244, is directory rather than mandatory: In re Richard S.

In *In re Richard S.*,¹ the California Supreme Court considered whether

33. *Kinlaw*, 54 Cal. 3d at 355, 814 P.2d at 1328, 285 Cal. Rptr. at 86 (Broussard, J., dissenting).

34. See *supra* note 13 and accompanying text.

35. *Kinlaw*, 54 Cal. 3d at 326, 814 P.2d at 1309, 285 Cal. Rptr. at 67.

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

37. *Kinlaw*, 54 Cal. 3d at 335, 814 P.2d at 1314, 285 Cal. Rptr. at 72.

1. *In re Richard S.*, 54 Cal. 3d 857, 819 P.2d 843, 2 Cal. Rptr. 2d 2 (1991). Jus-

a referee acting as a temporary judge lacked jurisdiction to enter a final order in superior court when the requirements of Article VI, Section 21, of the California Constitution are otherwise met,² but the provisions of Rule 244 of the California Rules of Court are not strictly followed.³ In this case, the parties agreed to have the action heard by a "Judge Pro Tempore," but the written stipulation required by rule 244 lacked a signature by a superior court judge approving the referee.⁴ Lori S., the mother of the minor, appealed the final order, which declared the child a ward of the court and gave custody to the father, claiming that noncompliance

tice Mosk wrote the opinion for a unanimous court, in which Chief Justice Lucas and Justices Panelli, Kennard, Arabian, Baxter, and George joined.

2. Article VI, Section 21 of the California Constitution provides: "On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause." CAL. CONST. art. VI, § 21. See generally 40 CAL. JUR. 3D *Judges* § 87 (1978 & Supp. 1992); 2 B. WITKIN, CALIFORNIA PROCEDURE, *Courts* §§ 278, 279, 282 & 284 (3d ed. 1985 & Supp. 1991).

3. Section 244, California Rules of Court provides in full:

The stipulation of the parties litigant that a case may be tried by a temporary judge shall be in writing and shall state the name and office address of the member of the State Bar agreed upon. It shall be submitted for approval to the presiding judge or to the supervising judge of a branch court. The order designating the temporary judge shall be endorsed upon the stipulation, which shall then be filed. The temporary judge shall take and subscribe the oath of office, which shall be attached to the stipulation and order of designation, and the case shall then be assigned to the temporary judge for trial. After the oath is filed, the temporary judge may proceed with the hearing, trial, and determination of the case. A filed oath and order, until revoked, may be used in any case in which the parties stipulate to the designated temporary judge. The stipulation shall specify the filing date of the oath and order.

CAL. R. CT. 244 (West 1991). See generally 40 CAL. JUR. 3D *Judges* §§ 87-88 (1978 & Supp. 1991); 2 B. WITKIN, CALIFORNIA PROCEDURE, *Courts* §§ 279, 283 (3d ed. 1985 & Supp. 1991).

4. *In re Richard S.*, 54 Cal. 3d at 860, 819 P.2d at 845, 2 Cal. Rptr. 2d at 3.

On May 20, 1988, counsel signed a form stipulation to allow referee McCarthy to hear the present action as "Judge Pro Tempore." McCarthy signed the stipulation that she subscribed to the oath of office. However, this stipulation did not contain the signature of a superior court judge approving the referee's appointment. On November 10, 1988, another form stipulation was signed by counsel, a superior court judge approving McCarthy's appointment, and McCarthy's signature indicating she had taken the oath of office. This form was stamped as filed on November 22, 1988, but the dispositional order was entered on November 21, 1988. *Id.* at 860-61, 819 P.2d at 844-45, 2 Cal. Rptr. 2d at 3-4.

with rule 244 was jurisdictional error.⁵ The California Court of Appeal for the Sixth Appellate District affirmed the holding of the superior court and concluded that the requirements of Article VI, Section 21 were met and that the lack of compliance with rule 244 was waived when not addressed during the proceedings below.⁶ The California Supreme Court affirmed, stating that, provided the constitutional requirements are met, the provisions of rule 244 are directory rather than mandatory.⁷

Initially, the court disposed of the mother's contention that the clerk's failure to file the written stipulation prior to the issuance of the jurisdictional order constituted constitutional error.⁸ The court reasoned that Article VI, Section 21 of the California Constitution permitting temporary judges to hear causes of action were satisfied when the parties agreed to allow the referee to act as a temporary judge and the court then assigned the cause of action to that judge.⁹ Further, the mother did not persuade the court that the use of the word "shall" in the rule constituted the requisite legislative intent to make the rule jurisdictional.¹⁰ They reasoned that one must examine the statute in its entirety to determine the actual legislative intent involved, rather than focusing on one word.¹¹ No

5. *Id.* at 862 n.4, 819 P.2d at 846 n.4, 2 Cal. Rptr. 2d at 4 n.4.

6. *In re Richard S.*, 229 Cal. App. 3d 1341, 1349, 270 Cal. Rptr. 411, 416 (1990), *aff'd*, 54 Cal. 3d at 866, 819 P.2d at 849, 2 Cal. Rptr. 2d at 7-8. There was a split between the appellate district courts as to whether noncompliance with rule 244 constituted jurisdictional error. Compare *In re Lamonica H.*, 220 Cal. App. 3d 634, 270 Cal. Rptr. 60 (1990) (fourth appellate district held that knowing participation in the proceedings without complying with the requirements of rule 244 did not constitute jurisdictional error), *In re P.L.*, 207 Cal. App. 3d 316, 254 Cal. Rptr. 774 (1989) (first appellate district held that objection must be at the trial level otherwise the error is not jurisdictional) and *In re Robert S.*, 197 Cal. App. 3d 1260, 243 Cal. Rptr. 459 (1988) (first appellate district held that express stipulation on the record was sufficient and the error not jurisdictional) with *In re Heather P.*, 203 Cal. App. 1214, 250 Cal. Rptr. 468 (1988) (fifth appellate district held that oral stipulation was not enough and the error was jurisdictional) and *In re Damian V.*, 197 Cal. App. 3d 933, 243 Cal. Rptr. 185 (1988) (the fifth appellate district held that the temporary judge's failure to subscribe to the oath of office constituted jurisdictional error).

7. *In re Richard S.*, 54 Cal. 3d at 865, 819 P.2d at 848, 2 Cal. Rptr. at 7.

8. *Id.* at 862, 819 P.2d at 846, 2 Cal. Rptr. at 5.

9. *Id.*

10. *Id.* at 863, 819 P.2d at 847, 2 Cal. Rptr. 2d at 5. *Contra* *Averill v. Lincoln*, 24 Cal. 2d 761, 764, 151 P.2d 119, 120-21 (1944) (noting that a rule stating that a party "shall" serve certain notice on appeal is not jurisdictional).

11. *In re Richard S.*, 54 Cal. 3d at 865-66, 819 P.2d at 848, 2 Cal. Rptr. 2d at 7.

In the absence of express language, the intent must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done and from the consequences which would follow the doing or failure to do the particular act at the required time.

Id. (quoting *Morris v. County of Marin*, 18 Cal. 3d 901, 909-10, 559 P.2d 606, 611-12, 136 Cal. Rptr. 251, 256 (1977)).

other authority was presented to indicate that rule 244 should be considered a jurisdictional requirement.¹² Additionally, the court noted that, while a statute can require the state to act in a certain way, noncompliance does not necessarily void the governmental action.¹³ By examining the appellate courts' decisions, the supreme court determined that the provisions of rule 244 were directory rather than mandatory to the extent that the rule imposes greater protection than the constitution.¹⁴ Moreover, the court noted that the purpose behind rule 244 is to prevent disagreement among the parties as to what was actually stipulated.¹⁵ The court then held that failure to strictly comply with the written stipulation requirement of rule 244 does not constitute jurisdictional error.¹⁶ Finally, the court dismissed the mother's assertion that the parties cannot consent to jurisdiction, by stating that the court had subject matter jurisdiction before the case proceeded with a temporary judge.¹⁷

Therefore, this decision eliminates the division among the appellate courts on whether noncompliance with rule 244 constitutes jurisdictional error and allows the courts to apply a uniform standard in the future.¹⁸ Moreover, the supreme court eliminated, as a ground for appeal, an error in the written stipulation explained in Rule 244 of the California Rules of Court as long as no constitutional rights are violated. In disposing of this

12. *Id.* at 863, 819 P.2d at 846, 2 Cal. Rptr. 2d at 5.

13. *Id.* at 865-66, 819 P.2d at 848, 2 Cal. Rptr. 2d at 7.

This distinction is generally expressed in terms of calling the duty 'mandatory' or 'directory.' [T]he 'directory' or 'mandatory' designation does not refer to whether a particular statutory requirement is 'permissive' or 'obligatory,' but instead simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates.

Id. (quoting *Morris v. County of Marin*, 18 Cal. 3d at 908, 559 P.2d at 610-11, 136 Cal. Rptr. at 255-56).

14. *In re Richard S.*, 54 Cal. 3d at 865, 819 P.2d at 848, 2 Cal. Rptr. 2d at 7. The court was persuaded by the reasoning of the first district in *In re Lamonica H.*, 220 Cal. App. 3d 634, 642, 270 Cal. Rptr. 60, 65 (1990).

15. *In re Richard S.*, 54 Cal. 3d at 866, 819 P.2d at 848, 2 Cal. Rptr. 2d at 7.

16. *Id.* at 866, 819 P.2d at 849, 2 Cal. Rptr. 2d at 7-8.

17. *Id.* at 866-67, 819 P.2d at 849, 2 Cal. Rptr. 2d at 8.

18. The supreme court agreed with the decisions in *In re Lamonica H.*, 220 Cal. App. 3d 634, 270 Cal. Rptr. 60 (1990), *In re P.I.*, 207 Cal. App. 3d 316, 254 Cal. Rptr. 774 (1989), and *In re Robert S.*, 197 Cal. App. 3d 1260, 243 Cal. Rptr. 459 (1988). However, the court disapproved of *In re Heather P.*, 203 Cal. App. 3d 1214, 250 Cal. Rptr. 468 (1988) and *In re Damian V.*, 197 Cal. App. 3d 933, 243 Cal. Rptr. 185 (1988).

issue, the supreme court has provided a forum in which temporary judges can perform their tasks effectively without the possibility of being overturned on a technicality.

CHAD JEFFERY FISCHER

IV. CRIMINAL LAW

- A. *A finding of gross negligence, required for conviction of gross vehicular manslaughter while intoxicated, may be based on overall circumstances of intoxication: People v. Bennett.*

In *People v. Bennett*,¹ the California Supreme Court once again declared its support for the nation's crackdown on drunk driving.² In a unanimous opinion,³ the court held that the finding of gross negligence⁴

1. 54 Cal. 3d 1032, 819 P.2d 849, 2 Cal. Rptr. 2d 8 (1991). Mr. Bennett was convicted of gross vehicular manslaughter while intoxicated, following an auto accident in which one passenger was killed. *Id.* at 1034, 819 P.2d at 851, 2 Cal. Rptr. 2d at 9-10. The afternoon of the accident, the defendant and two friends, who were minors, began drinking beer from a keg. *Id.* After about an hour, they drove to the beach in the defendant's pickup truck where they met another friend. *Id.* They finished the keg at the beach and then drove inland. *Id.* The defendant driver drifted off the road and over the center line a number of times, and eventually lost control of the truck at the bottom of a hill. *Id.* The truck rolled over five or six times, ejecting all three passengers, and killing one of them. Two hours after the accident the defendant's blood alcohol level was measured at 0.20 percent. *Id.*

2. The ruling in *Bennett* is consistent with the court's past anti-drunk driving decisions. *See, e.g.,* *Ingersoll v. Palmer*, 43 Cal. 3d 1321, 743 P.2d 1299, 241 Cal. Rptr. 42 (1987) (upholding the constitutionality of sobriety checkpoints); Anthony J. Ellrod, California Supreme Court Survey, *Ingersoll v. Palmer*, 15 PEPP. L. REV. 450 (1987). *See generally* James R. Acker, *A Report on America's War Against Drunk Driving*, 25 CRIM. L. BULL. 376, 376-94 (1989); H. Lawrence Ross, *The American War on Drunk Driving; A Constructionist Critique*, 18 CONTEMP. DRUG PROBS. 1, 1-8 (1987).

3. Justice Mosk wrote the unanimous opinion of the court in which Chief Justice Lucas, and Justices Panelli, Kennard, Arabian, Baxter, and George concurred.

4. "Gross negligence is the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences." *Bennett*, 54 Cal. 3d at 1036, 819 P.2d at 852, 2 Cal. Rptr. 2d at 10-11 (citing *People v. Watson*, 30 Cal. 3d 290, 637 P.2d 279, 179 Cal. Rptr. 43 (1981)). The defendant's state of mind is "I don't care what happens." *Id.* (citing *People v. Olivas*, 172 Cal. App. 3d 984, 988, 218 Cal. Rptr. 567, 569 (1985)). The consequences of the act must have been reasonably foreseeable, and not the result of inattention or mistake, but of a reckless act. 1 CALJIC 3.36 (5th ed. 1988); *People v. Watson*, 30 Cal. 3d 290, 637 P.2d 279, 179 Cal. Rptr. 43 (1981). *See generally* 1 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Elements of Crimes* § 113 (2d ed. 1988 & Supp. 1991) (criminal negligence); 17 CAL. JUR. 3D *Criminal Law* § 277 (1984 & Supp. 1991) (gross negligence); Annotation, *What*

required to convict a defendant of gross vehicular manslaughter while intoxicated⁵ may be based on the overall circumstances of the defendant's intoxication, without a showing that the defendant's driving itself was grossly negligent.⁶ The court reasoned that the circumstances surrounding a defendant's intoxication are an integral aspect of the "driving conduct" to which the element of gross negligence is related.⁷

In *Bennett*, the defendant was convicted of gross vehicular manslaughter while intoxicated. The only issue at trial was whether the defendant was grossly negligent. The trial court instructed the jury in accordance with CALJIC number 8.94, that gross negligence is "determine[d] from the overall circumstances of the defendant's intoxication or the manner in which he drove, or both."⁸ The defendant challenged the instruction on appeal claiming the instruction erroneously allowed a finding of gross negligence based on the circumstances of intoxication

Amounts to Negligence Within Meaning of Statutes Penalizing Negligent Homicide by Operation of a Motor Vehicle, 20 A.L.R.3D 473 (1968 & Supp. 1991); Annotation, *What Amounts to Reckless Driving of Motor Vehicle Within Statute Making Such a Criminal Offense* 52 A.L.R.2D 1337 (1957 & Supp. 1991); 57A AM. JUR. 2D *Negligence* §§ 243-54, 289 (1980 & Supp. 1991) (gross negligence in vehicular manslaughter context).

5. Section 191.5(a) of the Penal Code provides:

Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of section 23152 or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

CAL. PENAL CODE § 191.5(a) (West 1988 & Supp. 1992). The crime carries with it a penalty of four, six, or ten years' imprisonment. CAL. PENAL CODE § 191.5(c) (West 1988 & Supp. 1992). See generally CAL. VEH. CODE §§ 23152-53 (West 1988 & Supp. 1992) (establishing as unlawful a blood alcohol level of 0.08% while driving a vehicle); 1 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against the Person* § 528 (2d ed. 1988 & Supp. 1991) (gross vehicular manslaughter while intoxicated); 17 CAL. JUR. 3D *Criminal Law* §§ 247, 252, 276-77, 281 (1984 & Supp. 1991) (elements of gross vehicular manslaughter while intoxicated); Randy R. Koenders, Annotation, *Alcohol Related Vehicular Homicide: Nature and Elements of Offense*, 64 A.L.R. 4TH 166 (1988 & Supp. 1991); 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 330 (1980 & Supp. 1991) (driving while intoxicated).

6. *Bennett*, 54 Cal. 3d at 1040, 819 P.2d at 854, 2 Cal. Rptr. 2d 13.

7. *Id.* at 1038, 819 P.2d at 853, 2 Cal. Rptr. 2d at 12.

8. 1 CALJIC 8.94 (5th ed. 1988) (jury to consider overall circumstances—driving and intoxication).

alone, without regard to the defendant's manner of driving.⁹ The court of appeals held the instruction was correct.¹⁰

The supreme court upheld the instruction as valid, concluding that a finding of gross negligence from the overall evidence of the defendant's intoxication alone was consistent with legislative intent.¹¹ Early cases interpreted the gross vehicular manslaughter while intoxicated statute to require gross negligence in the manner of the defendant's operation of the vehicle itself.¹² However, *People v. Von Staden*,¹³ the case from which the challenged jury instruction was derived, suggested gross negligence could be shown by the level (as opposed to the mere fact) of the defendant's intoxication, since "one who drives with a very high level of intoxication is indeed more negligent, more dangerous, and thus more culpable."¹⁴ The supreme court in the instant case agreed, concluding the gross negligence finding is directed at the "driving conduct" of the defendant, and a driver's level of intoxication is an integral aspect of such conduct.¹⁵ This interpretation is consistent with the legislative intent to severely punish all drunk drivers, not only those who commit a reckless traffic violation.¹⁶ Thus, the jury instruction was not erroneous,

9. *Bennett*, 54 Cal. 3d at 1038, 819 P.2d at 853, 2 Cal. Rptr. 2d at 12.

10. *Id.* at 1035, 819 P.2d at 851, 2 Cal. Rptr. 2d at 10.

11. *Id.* at 1038-40, 819 P.2d at 853-54, 2 Cal. Rptr. 2d at 12-13.

12. The defendant relied on these cases in his attempt to establish error: *People v. McNiece*, 181 Cal. App. 3d 1048, 266 Cal. Rptr. 733 (1986) (finding of gross negligence may not be based solely on fact of driving under the influence), and *People v. Stanley*, 187 Cal. App. 3d 248, 253, 232 Cal. Rptr. 22, 25 (1986) (holding the degree of intoxication could not alone be used to establish gross negligence; the defendant must be grossly negligent "in the manner of his operation of the vehicle"). *Accord* *People v. Soledad*, 190 Cal. App. 3d 74, 235 Cal. Rptr. 208 (1987) (unlawful act must be in addition to driving under the influence).

The defendant had a strong argument, since states usually require both intoxication and reckless driving for a gross vehicular manslaughter felony. Gail Diane Cox, *No Proof of Recklessness is Needed; DUI Homicide*, NAT'L L.J., Dec. 23, 1991, at 3 (quoting Donald H. Nichols, editor of *Drinking/Driving Law Letter*).

13. 195 Cal. App. 3d 1423, 241 Cal. Rptr. 523 (1987). In *Von Staden*, the court agreed with *McNiece* that gross negligence could not be established by the mere fact of driving under the influence. *Id.* at 1428, 241 Cal. Rptr. at 527. However, the court concluded gross negligence could be shown by the overall circumstances of vehicle operation, including the level of the defendant's intoxication. *Id.* The evidence was sufficient to find gross negligence where the defendant's blood alcohol level was 0.22, he ignored host's urgings not to drive home, and he drove 30 miles over the speed limit in poor weather. *Id.*

14. *Id.*

15. *Bennett*, 54 Cal. 3d at 1038, 819 P.2d at 853, 2 Cal. Rptr. 2d at 12.

16. Section 1 of the act adding 191.5 stated there was a "compelling need for more effective methods to penalize" those who drink and drive. 1986 CAL. ADV. LEGIS. SERV. 1106, § 1 (Deering). The court determined the most effective means of carrying out this intent was to tie the gross negligence inquiry directly to the question of the

and the jury could have reasonably found that the defendant's high level of intoxication led to his grossly negligent driving conduct.¹⁷

To prevent future objections to the wording of the jury instruction, the court recommended that it should read: "You must determine gross negligence from the level of the defendant's intoxication, the manner of driving, or other relevant aspects of the defendant's conduct resulting in the fatal accident."¹⁸ This makes it clear that the trier of fact should consider all the relevant circumstances, including the level of intoxication, to determine whether the defendant acted with gross negligence.

The ruling is a victory for state prosecutors. It will allow prosecutors to proceed without having to make an evidentiary showing of traffic violations amounting to recklessness.¹⁹ It will also be easier to find negligence from the surrounding circumstances than from the driving itself.

However, intoxication alone cannot be the basis of the gross negligence finding. The prosecution must show reckless behavior beyond the mere fact of drinking and driving.²⁰ The manner of driving will remain an important element.²¹ In the future, the level of intoxication will become a focus when determining recklessness, since it alone may provide evidence of recklessness, as it did in *Bennett*. Overall, the ruling should aid greatly in the prosecution of drunk drivers involved in an accident resulting in the death of another. The increased prospect of punishment should also help discourage many from driving drunk in the first place.

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defendant's intoxication. *Bennett*, 54 Cal. 3d at 1039, 819 P.2d at 853-54, 2 Cal. Rptr. 2d at 12. This way the statute would encompass a greater number of drunk drivers, not only those who committed a reckless traffic offense.

17. *Bennett*, 54 Cal. 3d at 1040, 819 P.2d at 854, 2 Cal. Rptr. 2d at 13.

18. *Id.* at 1039, 819 P.2d at 854, 2 Cal. Rptr. 2d at 12-13.

19. *Cox*, *supra* note 12, at 3.

20. 1 CALJIC 8.94 (5th ed. 1988) ("The mere fact that a defendant drives a motor vehicle while under the influence of alcohol and violates a traffic law is insufficient in itself to constitute gross negligence"). But note that, as the court held in *Bennett*, the level of intoxication may constitute reckless behavior. See *Bennett*, 54 Cal. 3d at 1040, 819 P.2d at 854, 2 Cal. Rptr. 2d at 13.

21. Note that, in the present case, witnesses testified that the defendant was swerving and exceeding the speed limit by about 10 miles per hour. *Bennett*, 54 Cal. 3d at 1034, 819 P.2d at 851, 2 Cal. Rptr. 2d at 9-10.

- B. *Under the "good faith" exception to the exclusionary rule, if no reasonable police officer of reasonable competence would have believed that a search warrant established probable cause, then the court must exclude the resulting evidence regardless of the fact that a neutral magistrate issued the warrant: People v. Camarella.*

I. INTRODUCTION

In *People v. Camarella*,¹ the California Supreme Court resolved a split of authority in the courts of appeal regarding the appropriate interpretation of the "good faith" exception to the exclusionary rule as established by *United States v. Leon*.² In *Leon*, the high court announced the landmark exception to the Fourth Amendment exclusionary rule³ by

1. 54 Cal. 3d 592, 818 P.2d 63, 286 Cal. Rptr. 780 (1991). Chief Justice Lucas authored the majority opinion in which Justices Panelli, Arabian, Kennard, Baxter and George concurred. Justice Mosk issued a separate dissenting opinion. Defendant Camarella was arrested and charged with possessing cocaine for sale and possession of marijuana. Camarella sought to exclude the evidence, contending that sufficient probable cause had not been demonstrated to justify the issuance of a search warrant. A neutral magistrate issued the search warrant based upon an affidavit submitted by Detective Addoms. Addoms, a deputy sheriff for the past five years, had received an anonymous phone call in which the informant claimed that Camarella was selling cocaine. Based on this information, Addoms checked office records and discovered substantial corroborating evidence, including the fact that Camarella had previously been arrested for the possession of cocaine. Addoms believed the preceding information, coupled with his experience and training, gave him reasonable and probable cause to seek a warrant.

The superior court denied Camarella's motion to set aside the evidence; although probable cause was absent, the "good faith" exception was applicable because Addoms had reasonably relied on the warrant. *Id.* at 597-600, 818 P.2d at 65-67, 286 Cal. Rptr. at 782-84. The court of appeals reversed based on its conclusion that it was "objectively unreasonable" for Addoms to seek a warrant, and therefore the "good faith" exception was inapplicable. *Id.* The supreme court granted review. *Id.*

2. 468 U.S. 897 (1984). The *Leon* court held that "the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *Id.* at 900. For an overview of when the exclusionary rule is inapplicable, see 21 CAL. JUR. 3D *Criminal Law* § 3180 (1985). See generally Recent Case, 98 HARV. L. REV. 108 (1984) (discussing the implications of the *Leon* decision).

3. The Fourth Amendment states in pertinent part:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

permitting the prosecution to present evidence which was obtained by a search warrant unsupported by probable cause, so long as the officers were acting in reasonable reliance on the validity of the warrant.⁴ Problems arose, however, in determining what constituted "reasonable reliance" by the police and to what extent, if any, the issuance of the warrant by a neutral magistrate should impact the analysis.⁵ In *Camarella* the California Supreme Court confirmed its general acceptance of the "good faith" exception and clarified that in determining its applicability, the sole focus should be on the objective reasonableness of the police officer's conduct.⁶ Accordingly, the court concluded that if a police offi-

U.S. CONST. amend. IV. See also CAL. CONST. art. I, § 13 (providing similar protection from unreasonable searches and seizures as the Fourth Amendment). Interestingly, the Fourth Amendment makes no explicit reference to the exclusion of unconstitutionally obtained evidence. Therefore, the exclusionary rule is solely a judicial-based remedy. *Leon*, 468 U.S. at 906 (stating that the exclusionary rule is a judicial remedy designed to protect Fourth Amendment rights through its deterrent effect). However, although Justice Brennan acknowledged that the Fourth Amendment does not expressly grant the right to have illegally obtained evidence excluded from one's trial, he noted that "many of the Constitution's most vital imperatives are stated in general terms and the task of giving meaning to these precepts is therefore left to subsequent judicial decisionmaking in the context of concrete cases." *Id.* at 932 (Brennan, J., dissenting).

4. The *Leon* court noted four situations in which an officer's reliance on the validity of a warrant would not be justified:

- (1) the affidavit was misleading;
- (2) the magistrate "wholly abandoned his judicial role";
- (3) the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and
- (4) the warrant is so facially deficient that the officer cannot reasonably presume it to be valid.

Leon, 468 U.S. at 923. The *Camarella* court analyzed its decision based on the third factor.

5. Some courts have concluded that the mere fact that the magistrate signed the warrant should be a critical factor in determining whether an officer's conduct was reasonable. See, e.g., *People v. Brown*, 231 Cal. App. 3d 1201, 1210-11, 274 Cal. Rptr. 432, 438 (Ct. App. 1990) (holding that a magistrate's issuance of a warrant should be considered in determining reasonableness of officer); *United States v. Corral-Corral*, 899 F.2d 927, 939 (10th Cir. 1990) (stating that officers should be allowed "to rely upon the probable-cause determination of a neutral magistrate when defending an attack on their good faith for either seeking or executing a warrant"). Other courts have held to the contrary. See, e.g., *People v. Maestas*, 204 Cal. App. 3d 1208, 1215, 252 Cal. Rptr. 739, 743 (Ct. App. 1988) (holding that no consideration should be given to the fact that a magistrate signed the warrant in determining officer's reasonable conduct).

6. *Camarella*, 54 Cal. 3d at 605, 818 P.2d at 71, 286 Cal. Rptr. at 788.

cer should have known that his affidavit failed to establish probable cause, the court must exclude the resulting evidence regardless of the fact that a neutral magistrate issued the warrant.⁷

II. TREATMENT OF THE CASE

A. Majority Opinion

1. Probable Cause Analysis

The majority prefaced its opinion by noting that the "good faith" exception was solely an issue of federal constitutional law because California's exclusionary rule⁸ was effectively abrogated by Proposition 8.⁹ The court then began its analysis by setting forth the state of the law

7. *Id.*

8. CAL. PENAL CODE § 1538.5 (West Supp. 1992). The relevant portions of the California exclusionary rule provide as follows:

(a) *Grounds.* A defendant may move . . . to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

- (1) The search or seizure without a warrant was unreasonable.
- (2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; (v) there was any other violation of federal or state constitutional standards

(d) *Effect of granting motion.* If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the . . . evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section . . . are utilized by the people.

Id.

9. Proposition 8 added the "Right to Truth-in-Evidence" to article I, section 28, subdivision (d) of the California Constitution, which states in pertinent part:

Except as provided by statute hereafter enacted by a two thirds vote of the membership in each house of the Legislature, *relevant evidence shall not be excluded in any criminal proceeding*, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile conduct for a criminal offense, whether heard in juvenile or adult court.

CAL. CONST. art. I, § 28(d) (emphasis added). See *In re Lance W.*, 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985) (interpreting the Truth-in-Evidence provision of Proposition 8 to abrogate California's exclusionary rule). See also Mark Dyer Klein & Randall A. Cohen, Note, *Proposition 8: California Law after In re Lance W. and People v. Castro*, 12 PEPP. L. REV. 1059, 1064 (1985) ("The passage of Proposition 8 was therefore 'a clear repudiation by the people, of state law embellishments on federal decisions which operate to exclude relevant from criminal proceedings.'") (quoting *Wilson v. Superior Court*, 134 Cal. App. 3d 173, 212, 185 Cal. Rptr. 671, 699 (Ct. App. 1982),

regarding the establishment of probable cause.¹⁰ The court focused on the "totality of the circumstances" test adopted under *Illinois v. Gates*,¹¹ which listed several factors to be assessed in a probable cause analysis, such as the "informant's 'veracity,' 'reliability' and 'basis of knowledge.'"¹² Furthermore, the majority posited that the Fourth Amendment does not necessarily bar anonymous informants so long as there is "corroboration through other sources."¹³ Although the majority hesitated to accept the absence of probable cause in *Camarella*, they deferred to the superior court and court of appeal's finding that no "substantial basis" existed for issuing the search warrant.¹⁴

2. The "Good Faith" Exception Under *Leon*

The majority relied heavily on the rationale of *Leon* in reaching its conclusions.¹⁵ The *Leon* court proffered that because

rev'd, 34 Cal. 3d 777, 670 P.2d 325, 195 Cal. Rptr. 671 (1983)). However, the *In re Lance W.* court determined that section 28(d) did not repeal article I, section 13 of the California Constitution. Instead, it retained the "substantive" scope of these provisions and only eliminated the "remedy" of excluding evidence seized in violation of the California, but not the federal, Constitution. *In re Lance W.*, 37 Cal. 3d at 887, 694 P.2d at 752, 210 Cal. Rptr. at 639. Therefore, the court concluded that

although section 1538.5 [exclusionary rule] continues to provide the exclusive procedure by which a defendant may seek suppression of evidence obtained in a search or seizure that violates 'state constitutional standards,' a court may exclude the evidence on that basis only if exclusion is also mandated by the federal exclusionary rule applicable to evidence seized in violation of the Fourth Amendment.

Id. at 896, 694 P.2d at 759, 210 Cal. Rptr. at 646.

10. *Camarella*, 54 Cal. 3d at 600-01, 818 P.2d at 67, 254 Cal. Rptr. at 784.

11. 462 U.S. 213 (1983). *Gates* established a "fluid concept" of probable cause as opposed to the "two-pronged" test set forth in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). *Spinelli* held that a tip from an informant will support probable cause only if the police establish the informant's reliability and the informant discloses the basis for the information. *Spinelli*, 393 U.S. at 414-15.

12. *Camarella*, 54 Cal. 3d at 600-01, 818 P.2d at 67, 254 Cal. Rptr. at 784 (quoting *Gates*, 462 U.S. at 230). For a general discussion of probable cause, see 20 CAL. JUR. 3D *Criminal Law* § 2509 (1985).

13. *Camarella*, 54 Cal. 3d at 601, 818 P.2d at 68, 254 Cal. Rptr. at 785 (quoting *Gates*, 462 U.S. at 244-45).

14. *Id.* at 602, 818 P.2d at 68, 254 Cal. Rptr. at 785. The majority believed that at the time the warrant was issued there existed a "fair probability" that contraband would be discovered at *Camarella's* home. *Id.* (citing *Gates*, 462 U.S. at 239).

15. *Id.* at 602, 818 P.2d at 68-69, 286 Cal. Rptr. at 785-86.

"the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."¹⁶

In determining the standard by which courts should evaluate police conduct, the majority also considered the holding in *Malley v. Briggs*.¹⁷ The *Malley* court rejected the contention that an officer's conduct is "per se objectively reasonable" by virtue of the issuance of a warrant.¹⁸ Furthermore, the *Malley* court reasoned that because busy magistrates will inevitably make errors in issuing warrants, an officer should not simply be allowed to claim that a magistrate's mistake supersedes his own incompetence in seeking an unsupported warrant.¹⁹

The *Camarella* majority concluded that the mere issuance of a warrant was irrelevant, and the "good faith" exception should focus exclusively on the reasonableness of an officer's decision to submit an affidavit to a magistrate.²⁰ Using this guideline, the majority determined that the officer in *Camarella* did not act unreasonably in seeking a warrant because there was "a close or debatable question on the issue of probable cause."²¹ Although the court noted that a reasonable officer might have sought additional corroborating evidence, this was not the standard set forth in *Leon*.²² Instead, the majority concluded that in order to abrogate the "good faith" exception, it must be determined that no reasonable officer would have sought a warrant based on the information at the time he submitted his affidavit.²³

B. Dissenting Opinion

In his vocal dissent, Justice Mosk indicated his general disapproval of

16. *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 919 (1974)) (emphasis added). However, Justice Brennan argued in his dissent that the rationale behind the exclusionary rule was not merely to deter police misconduct, but to encourage the cooperation of the entire judicial system in upholding the Fourth Amendment. *Leon*, 468 U.S. at 923 (Brennan, J., dissenting).

17. 475 U.S. 335 (1986).

18. *Camarella*, 54 Cal. 3d at 604, 818 P.2d at 70, 286 Cal. Rptr. at 787 (quoting *Malley*, 475 U.S. at 345).

19. *Id.*

20. *Id.* at 605, 818 P.2d at 71, 286 Cal. Rptr. at 788. The majority reasoned that "[b]ecause issuance of a warrant is a constant factor in these cases, it cannot logically serve to distinguish among them." *Id.*

21. *Id.* at 606, 818 P.2d at 71, 286 Cal. Rptr. at 788 (citations omitted).

22. *Id.* But see *People v. Johnson*, 220 Cal. App. 3d 742, 750-51, 270 Cal. Rptr. 70, 74 (Ct. App. 1990) (intimating that an officer is required to exhaust every possible source of corroborating evidence in order to satisfy "good faith" reasonableness standard).

23. *Camarella*, 54 Cal. 3d at 606, 818 P.2d at 71, 286 Cal. Rptr. at 788.

the *Leon* decision and his prediction that it will inevitably be overturned.²⁴ To this end, he cited several state court decisions in which the courts refused to apply the *Leon* "good faith" exception.²⁵ Furthermore, Justice Mosk believed that even working within the ambit of *Leon*, the majority had improperly analyzed the reasonableness of the officer's conduct.²⁶ Justice Mosk reasoned that the presence of probable cause was not in doubt because "[t]here was no effective corroboration."²⁷ Therefore, he concluded that a reasonably well-trained officer should have known no adequate basis for a warrant existed, and thus the "good faith" exception was inapplicable.²⁸

III. CONCLUSION

Although the supreme court carefully worded the *Camarella* decision so as not to convey the court's unbridled support of the "good faith" exception to the exclusionary rule, this appears to be the majority's underlying philosophy. Ostensibly, the mere issuance of a warrant by a neutral magistrate fails to demonstrate an officer's objective reasonableness in seeking a warrant. However, realistically, it seems difficult to imagine many situations in which an officer's conduct will be deemed so unreasonable as to abrogate the "good faith" exception, considering that

24. *Id.* at 609, 818 P.2d at 73, 286 Cal. Rptr. at 790 (Mosk, J., dissenting). See generally Stephen Duke, Comment, *Making Leon Worse*, 95 YALE L. J. 1405 (1986) (criticizing *Leon* as a weak decision). It is interesting to note that one study concluded that the exclusionary rule has minimal costs in terms of lost indictments or convictions. Specifically, in California only 0.8% of all felony arrests do not lead to convictions because of an illegal search or seizure. See Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the Costs of the Exclusionary Rule: the NIJ Study and Other Studies of Lost Arrests*, 1983 AM. B. FOUND. RESEARCH J. 611, 617 (1983).

25. Specifically, Justice Mosk listed Connecticut, New Jersey, New York, North Carolina, and Pennsylvania as states that have not adopted the *Leon* rationale.

26. *Camarella*, 54 Cal. 3d at 609, 818 P.2d at 74, 286 Cal. Rptr. at 791 (Mosk, J., dissenting). Justice Mosk stressed that "[t]here was a bare accusation by an anonymous and untested tipster that defendant was then selling cocaine." *Id.* (Mosk, J., dissenting). Furthermore, he believed that "[t]he 15-month-old statement from the confidential and untested tipster and the 3-1/2-year-old crime report were stale." *Id.* (Mosk, J., dissenting).

27. *Id.* at 610, 818 P.2d at 74, 286 Cal. Rptr. at 791 (Mosk, J., dissenting).

28. *Id.* (Mosk, J., dissenting). Justice Mosk concluded by stating, "When constitutional rights are implicated, the end cannot justify the means." *Id.* at 611, 818 P.2d at 74, 286 Cal. Rptr. at 791 (Mosk, J., dissenting) (quoting *In re Lance W.*, 37 Cal. 3d 873, 910, 694 P.2d 744, 770, 210 Cal. Rptr. 631, 657 (1985) (Mosk, J., dissenting)).

a neutral magistrate has reviewed the evidence and concluded that probable cause exists.

Although Justice Mosk steadfastly opposes the "good faith" exception, the majority recognizes its necessity both practically and philosophically. From a practical standpoint, excluding evidence creates the likelihood that the guilty might go free. From a philosophical standpoint, penalizing an officer for his reasonable mistake cannot logically accomplish the goal of deterring Fourth Amendment violations.

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- C. *The reciprocal discovery provisions in criminal cases authorized by California Proposition 115 are valid under both the state and federal constitutions when properly construed and applied: Izazaga v. Superior Court.*

I. INTRODUCTION

In *Izazaga v. Superior Court*,¹ the California Supreme Court resolved interpretive issues presented by Proposition 115, the "Crime Victims Justice Reform Act."² Proposition 115 added language to the California Constitution authorizing reciprocity in the discovery process in criminal cases.³ In addition, Proposition 115 added a new chapter on discovery to

1. 54 Cal. 3d 356, 815 P.2d 304, 285 Cal. Rptr. 231 (1991). Chief Justice Lucas authored the opinion for the majority in which Justices Panelli, Arabian and Baxter concurred. Justice Kennard wrote a separate concurring opinion. Justice Mosk and Justice Broussard each wrote separate dissenting opinions.

2. *Id.* at 363, 815 P.2d at 308, 285 Cal. Rptr. at 235. Proposition 115 was enacted to provide "comprehensive reforms . . . in order to restore balance and fairness to the criminal justice system." Proposition 115, § 1(a) (1990).

California voters passed Proposition 115 on June 5, 1990, in the Primary Election. Section 23 of Proposition 115 added chapter 10 to title 6 of part 2 of the California Penal Code, entitled "Discovery," comprising Penal Code sections 1054 through 1054.7. *Id.* See Cal. Penal Code §§ 1054-7 (West Supp. 1991).

On June 6, 1990, Proposition 115 became effective. See CAL. CONST. art. II, § 10(a). Subsequently, the People charged petitioner Javier Izazaga and a co-defendant with two counts of forcible rape and one count of kidnapping. Pursuant to section 1054.5 of the California Penal Code, the People served Petitioner with an informal request for discovery. Izazaga refused the discovery request and the superior court granted the People's motion to compel. The court of appeal denied Petitioner's application for a writ of mandate or prohibition. The supreme court then stayed the discovery order and issued an alternative writ of mandate to consider important constitutional and interpretive questions. *Izazaga*, 54 Cal. 3d at 363-64, 815 P.2d at 308-09, 285 Cal. Rptr. at 235-36.

3. See CAL. CONST. art. II, § 10(a) (statutory provisions of Proposition 115); CAL. CONST. art. XVIII, § 4 (constitutional provisions of Proposition 115).

the Penal Code, which provides the framework for both defense and prosecutorial discovery⁴ as well as a mechanism for compelled discovery.⁵ Moreover, Proposition 115 repealed several discovery provisions which required prosecutors to furnish defendants with police and arrest reports.⁶ In *Izazaga*, the California Supreme Court analyzed the constitu-

4. See CAL. PENAL CODE § 1054.1 (West Supp. 1991). This section provides that:

The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

- (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
- (b) Statements of all defendants.
- (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
- (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
- (e) Any exculpatory evidence.
- (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

Id. California Penal Code section 1054.3 This section provides that:

The defendant and his or her attorney shall disclose to the prosecuting attorney:

- (a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.
- (b) Any real evidence which the defendant intends to offer in evidence at the trial.

Id.

5. See CAL. PENAL CODE § 1054.5 (West Supp. 1991) (providing mechanics for compelled discovery).

6. Proposition 115 repealed several discovery provisions, including former Penal Code section 1102.5 (compelling defendant to disclose witnesses' prior statements to defense counsel for impeachment purposes); former Penal Code section 1430 (requiring prosecutors to furnish defendants with police and arrest reports); and certain provisions in Penal Code section 859 (requiring prosecutors to furnish defendants with police and arrest reports).

tionality of Proposition 115 on three separate constitutional challenges: (1) the privilege against self-incrimination; (2) the right to due process of law; and (3) the right to effective assistance of counsel.⁷ Relying heavily on recent federal trends allowing broad prosecutorial discovery⁸ and on the intent of the California voters,⁹ a majority of the court concluded that Proposition 115 was valid under both the federal and state constitutions.¹⁰

II. TREATMENT OF THE CASE

A. *Majority Opinion*

1. Privilege Against Self-Incrimination

The court rejected the contention that the trial court violated Izazaga's Fifth Amendment privilege against self-incrimination by compelling the disclosure of witnesses' names and statements.¹¹ The court then set forth the four requisite elements that trigger the privilege: The requested disclosure must be (i) "incriminating"; (ii) "personal to the defendant"; (iii) "obtained by compulsion"; and (iv) "testimonial or communicative in nature."¹² The court then noted that because the mere absence of special state interests in disclosure affects none of the four requirements, that fact cannot in itself trigger the self-incrimination privilege.¹³ The

7. *Izazaga v. Superior Court*, 54 Cal. 3d 356, 365-82, 815 P.2d 304, 309-22, 285 Cal. Rptr. 231, 236-49 (1991). The court also analyzed the privilege against self-incrimination under the California Constitution. *Id.* at 369, 815 P.2d at 312, 285 Cal. Rptr. at 239.

8. *See* *United States v. Nobles*, 422 U.S. 225 (1975) (upholding a trial court order requiring the defense to disclose its investigator's records of statements made by prosecutorial witnesses once the defense called its investigator as a trial witness); *Williams v. Florida*, 399 U.S. 78 (1970) (holding that discovery of the names and addresses of a defendant's alibi witnesses does not implicate the self-incrimination clause).

9. *Izazaga*, 54 Cal. 3d at 372, 815 P.2d at 314, 285 Cal. Rptr. at 241 ("The manifest intent behind the measure was to reopen the two-way street of reciprocal discovery."). *See generally* 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 120-21 (9th ed. 1989 & Supp. 1990) (analyzing the initiative process in California); 15 MCKINNEY, CALIFORNIA DIGEST OF OFFICIAL REPORTS, *Initiative and Referendum* §§ 3, 6 (3d ed. 1989 & Supp. 1991) (same); Cynthia J. Emry, *California Supreme Court Survey*, 18 PEPP. L. REV. 1084 (1991) (same).

10. *Izazaga*, 54 Cal. 3d at 383, 815 P.2d at 322, 285 Cal. Rptr. at 249.

11. *Id.* at 366, 815 P.2d at 310, 285 Cal. Rptr. at 237. The Fifth Amendment provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

12. *Izazaga*, 54 Cal. 3d at 366, 815 P.2d at 310, 285 Cal. Rptr. at 237. The majority deduced that "conversely, discovery of evidence that does not meet each of these requirements is not barred by the self-incrimination clause." *Id.*

13. *Id.* *See also* *New Jersey v. Portash*, 440 U.S. 450 (1979) (holding that absence

court determined that the discovery requests mandated by Proposition 115 were not "compelled" because they merely accelerated the divulgence of information which would necessarily surface at trial.¹⁴ In addition, the court determined that compelled disclosure of the defendant's witnesses' statements did not implicate the Fifth Amendment because the statements were elicited from a third party and thus did not satisfy the "personal to the defendant" requirement.¹⁵

After determining that the compelled discovery enacted by Proposition 115 did not violate the defendant's Fifth Amendment privilege, the court measured Proposition 115 against the safeguards provided by the California Constitution.¹⁶ Similar to the Federal Constitution, the California Constitution also protects a defendant from compelled testimony against oneself.¹⁷ Prior to the enactment of Proposition 115, state law regarding prosecutorial discovery was "considerably more solicitous of the privilege against self-incrimination than federal law," as illustrated by the holding in *Prudhomme v. Superior Court*.¹⁸ In *Prudhomme*, the court determined that a discovery order requiring a defendant to divulge witness information to the prosecution was unconstitutional.¹⁹ Furthermore, the *Prudhomme* court announced that any compelled discovery which tended to ease the burden on the prosecution or served as "a link in the chain" was expressly forbidden.²⁰ Recognizing that the adoption

of special state interest is not sufficient in and of itself to trigger self-incrimination clause).

14. *Izazaga*, 54 Cal. 3d at 367, 815 P.2d at 310, 285 Cal. Rptr. at 237. However, the majority noted that the acceleration doctrine is not dispositive because "[s]ome statements of witnesses the defense intends to call might never be offered at trial by the defense." *Id.* at 367, 815 P.2d at 311, 285 Cal. Rptr. at 238.

15. *Id.* The majority relied on several high court decisions in which the application of the self-incrimination clause has been limited to statements made by the defendant. *See, e.g.,* *United States v. Nobles*, 422 U.S. 225, 234 (1975) ("[T]he [F]ifth [A]mendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial."); *Couch v. United States*, 409 U.S. 322 (1973) (holding that the privilege against self-incrimination "is a personal privilege: it adheres basically to the person, not to information that may incriminate him").

16. *Izazaga*, 54 Cal. 3d at 369, 815 P.2d at 312, 285 Cal. Rptr. at 239. Article I, section 15 of the California Constitution guarantees a defendant in a criminal case various safeguards, including the right not to be compelled to testify against oneself. CAL. CONST. art. I, § 15.

17. CAL. CONST. art. I, § 15.

18. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).

19. *Id.* at 327, 466 P.2d at 678, 85 Cal. Rptr. at 134.

20. *Id.*

of Proposition 115 was inherently inconsistent with the *Prudhomme* line of cases, the court in *Izazaga* concluded that it must interpret Proposition 115 as abrogating *Prudhomme* to the extent that it impedes reciprocal discovery in order to achieve the manifest intent of the California voters.²¹

2. Right to Due Process of Law

a. Reciprocity challenge

Although the court noted that the Fourteenth Amendment Due Process Clause²² does not directly address the constitutional requirements of discovery, the court emphasized that the due process clause does “speak to the balance of forces between the accused and his accuser.”²³ The court concluded that the addition of both article I, section 30(c) of the California Constitution²⁴ and Penal Code section 1054 satisfied this “balanced” discovery requirement.²⁵ The court further concluded that any imbalance in the discovery requirements properly favored the defendant.²⁶ The court readily dismissed *Izazaga*’s argument that his right to due process was violated because Proposition 115 does not require reciprocal discovery disclosure by the prosecution except “upon demand” by the defendant.²⁷ The court stated that Penal Code section 1054.5(b) requires either party to initially make an “informal request” to the opposing party for information.²⁸ Therefore, the court concluded that because the enforcement mechanism was identical for both the prosecution and the

21. *Izazaga V. Superior Court*, 54 Cal. 3d 356, 371, 815 P.2d 304, 314, 285 Cal. Rptr. 231, 241 (1991). The preamble of Proposition 115 states: “In order to address these concerns [balance and fairness in the criminal justice system] 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.” Proposition 115 § 1(b).

22. U.S. CONST. amend XIV. The Fourteenth Amendment provides in pertinent part: “No state shall . . . deprive any person of life, liberty, or property, without due process of law.” *Id.*

23. *Izazaga*, 54 Cal. 3d at 372, 815 P.2d at 315, 285 Cal. Rptr. at 242 (quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)).

24. *Id.* at 373, 815 P.2d at 315, 285 Cal. Rptr. at 242. Article I, section 30(c) states that “discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the people through the initiative process.” CAL. CONST. art. I § 30(c).

25. *Izazaga*, 54 Cal. 3d at 373, 815 P.2d at 315, 285 Cal. Rptr. at 242. See CAL. PENAL CODE § 1054(e) (West Supp. 1991), which provides that “no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.” *Id.*

26. *Izazaga*, 54 Cal. 3d at 374, 815 P.2d at 316, 285 Cal. Rptr. at 243.

27. *Id.*

28. *Id.*

defense, Proposition 115 did not offend the due process clause.²⁹

The court then refuted Izazaga's claim that Proposition 115 is insufficient because the prosecutor is not explicitly mandated to divulge any rebuttal witnesses he intends to call in response to the defendant's disclosure.³⁰ Although the court acknowledged that Penal Code Section 1054.1 does not specifically mention rebuttal witnesses, a "reasonable interpretation" of the section would logically include "all witnesses" that the prosecution "reasonably anticipates it is likely to call."³¹

Finally, the court dismissed Izazaga's claim that Proposition 115 violates the due process clause in that it does not require the prosecution to disclose *all* evidence it may use to refute the defense's evidence.³² Although the court agreed that Proposition 115 does not require such disclosure, it also concluded that due process does not demand such extensive disclosures, especially because the defense is not required to do the same.³³

b. "Brady" evidence challenge

Although the court acknowledged the validity of Izazaga's assertion that Proposition 115 does not require the prosecution to disclose all exculpatory evidence as mandated by *Brady v. Maryland*³⁴ and its progeny, it emphasized that "due process requirements are self-executing and need no statutory support to be effective."³⁵ Thus, because federal constitutional requirements would necessarily preempt any statutory mandates regarding the disclosure of exculpatory information, the fact that Proposition 115 does not address this issue is irrelevant.³⁶

3. Right to Effective Assistance of Counsel

The court also rejected Izazaga's final claim that a violation of his

29. *Id.* at 374, 815 P.2d at 315-16, 285 Cal. Rptr. at 242-43.

30. *Id.* at 375, 815 P.2d at 316, 285 Cal. Rptr. at 243.

31. *Id.* at 375, 815 P.2d at 316-17, 285 Cal. Rptr. at 243-44 ("A disclosure of witnesses under section 1054.3 thus triggers a defendant's right to discover rebuttal witnesses under section 1054.1.").

32. *Id.* at 376, 815 P.2d at 317, 285 Cal. Rptr. at 244.

33. *Id.* at 376-77, 815 P.2d at 317-18, 285 Cal. Rptr. at 244-45.

34. 373 U.S. 83 (1963).

35. *Izazaga*, 54 Cal. 3d at 378, 815 P.2d at 318-19, 285 Cal. Rptr. at 245-46.

36. *Id.*

Sixth Amendment right to effective assistance of counsel³⁷ occurred as a result of the prosecution's discovery of his witnesses' statements.³⁸ Initially, the California court noted that the United States Supreme Court never determined that a mere discovery request violated the right to effective assistance of counsel.³⁹ In addition, because Proposition 115 only requires the defendant to disclose those witnesses he intends to call at trial, it logically follows that he would list only those witnesses tending to help the defense.⁴⁰

Finally, the court rejected the claim that the compelled disclosure doctrine violates the attorney work-product privilege.⁴¹ The court firmly believed there was no basis for a constitutional challenge because "[t]here is no privilege for attorney work product in the California Constitution."⁴² Therefore, protection of attorney work product must be based on either state common law or a statutory provision.⁴³ The court determined that section 2018 of the California Code of Civil Procedure adequately protects attorney work product.⁴⁴ Furthermore, the court stated that Proposition 115 expressly provides for the protection of the attorney work product under Penal Code section 1054.6.⁴⁵

B. Justice Kennard's Concurring Opinion

In her concurring opinion, Justice Kennard disagreed with the majority's conclusion that attorney work product is not constitutionally protected.⁴⁶ Although Justice Kennard conceded that the United States

37. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." *Id.*

38. *Izazaga*, 54 Cal. 3d at 379, 815 P.2d at 319, 285 Cal. Rptr. at 246.

39. *Id.*

40. *Id.*

41. *Id.* at 380-81, 815 P.2d at 320-21, 285 Cal. Rptr. at 247-48.

42. *Id.*

43. *Id.* at 381, 815 P.2d at 321, 285 Cal. Rptr. at 248.

44. *Id.* (citing CAL. CIV. PROC. CODE § 2018 (West 1991)). Under this section, attorney work product is nondiscoverable unless the court determines that the denial of discovery will unfairly prejudice the party seeking discovery. CAL. CIV. PROC. CODE § 2018(b) (West 1987). In addition, section 2018 also states that "any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances." *Id.* § 2018(c).

45. *Izazaga*, 54 Cal. 3d at 381-82, 815 P.2d at 321, 285 Cal. Rptr. at 248. Penal Code section 1054.6 provides: "Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (c) of Section 2018 of the Code of Civil Procedure." CAL. PENAL CODE § 1054.6 (West Supp. 1991).

46. *Izazaga*, 54 Cal. 3d at 384, 815 P.2d at 323, 285 Cal. Rptr. at 250 (Kennard, J., concurring).

Supreme Court has never expressly determined whether the attorney work product privilege is constitutionally grounded, she believes that there exists a strong implication that the privilege is included in the Sixth Amendment right to counsel.⁴⁷ However, Justice Kennard reasoned that even if the protection afforded by the Sixth Amendment encompassed the attorney client privilege, in the present case the court would uphold the discovery order on the basis of voluntary waiver.⁴⁸ Justice Kennard determined that when a defendant calls witnesses to testify at trial, the defendant impliedly waives the right to assert the attorney work product privilege as to those witnesses' statements.⁴⁹

C. Justice Mosk's Dissenting Opinion

In his dissenting opinion, Justice Mosk believed that Proposition 115, specifically Penal Code Section 1054.3 allowing prosecutorial discovery,⁵⁰ violates the privilege against self-incrimination of article I, section 15 of the California Constitution.⁵¹ Justice Mosk stressed that the compelled discovery provision would undoubtedly lessen the prosecution's burden of proof, thus rendering it unconstitutional.⁵² Justice Mosk posited that even if Penal Code Section 1054.3 were severed, the discovery scheme "would be facially offensive to new section 301(c)"

47. *Id.* at 384-85, 815 P.2d at 323-24, 285 Cal. Rptr. at 250-51 (Kennard, J., concurring). Justice Kennard based this interpretation on her reading of *United States v. Nobles*, 422 U.S. 225 (1975) (emphasizing that the attorney work product privilege is an essential part of a criminal defendant's right to effective assistance of counsel). *Izazaga*, 54 Cal. 3d at 384-85, 815 P.2d at 323-24, 285 Cal. Rptr. at 250-51 (Kennard, J., concurring).

48. *Id.* at 386, 815 P.2d at 324, 285 Cal. Rptr. at 251 (Kennard, J., concurring). Justice Kennard reasoned that pretrial discovery is necessary in order to allow the prosecution to investigate and respond to the defense testimony. *Id.* (Kennard, J., concurring).

49. *Id.* (Kennard, J., concurring). Justice Kennard, however, believes that there must be a "limitation" to the waiver to ensure that the prosecution does not take advantage of this information at trial until the waiver actually occurs. *Id.* (Kennard, J., concurring).

50. *Id.* at 397, 815 P.2d at 331, 285 Cal. Rptr. at 258 (Mosk, J., dissenting). See CAL. PENAL CODE § 1054.3 (West Supp. 1991).

51. *Izazaga*, 54 Cal. 3d at 397, 815 P.2d at 331, 285 Cal. Rptr. at 258 (Mosk, J., dissenting). Article I, section 15 provides in pertinent part: "Persons may not . . . be compelled in a criminal case to be a witness against themselves." CAL. CONST. art. I, § 15.

52. *Izazaga*, 54 Cal. 3d at 397, 815 P.2d at 331, 285 Cal. Rptr. at 258 (Mosk, J., dissenting).

of Article I of the California Constitution, which mandates reciprocal discovery.⁵³

D. Justice Broussard's Dissenting Opinion

In his dissenting opinion, Justice Broussard expressed his belief that the majority misinterpreted the law regarding the constitutionality of compelled discovery provisions.⁵⁴ Consequently, Justice Broussard determined that Proposition 115 violates both the Fifth and Sixth Amendments of the United States Constitution.⁵⁵ Justice Broussard strongly disagreed with the majority's determination that the Fifth Amendment is not implicated when a compelled discovery order merely accelerates the disclosure of the defendant's evidence at trial.⁵⁶ In addition, Justice Broussard concluded that Proposition 115 violates the Sixth Amendment right to effective assistance of counsel because it has a chilling effect on a defense attorney's ability and motivation to present the most effective defense for his client.⁵⁷

III. CONCLUSION

The majority's construction of Proposition 115 has the practical effect of implementing reciprocal discovery in the California criminal justice system. In addition, the majority has demonstrated a readiness to abrogate existing case law precedent in favor of the voter's initiative power. The court's decision is desirable because it prevents a defendant from developing a last minute alibi for which the prosecution has no opportunity to present rebuttal evidence. By determining that the reciprocal provisions enacted by Proposition 115 are constitutionally valid, the Cali-

53. *Id.* at 401, 815 P.2d at 334, 285 Cal. Rptr. at 261 (Mosk, J., dissenting). Article I, section 30(c) provides: "[I]n order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the people through the initiative process." CAL. CONST. art. I, § 30(c).

54. *Izazaga*, 54 Cal. 3d at 402, 815 P.2d at 335, 285 Cal. Rptr. at 262 (Broussard, J., dissenting).

55. *Id.* (Broussard, J., dissenting).

56. *Id.* at 403, 815 P.2d at 335, 285 Cal. Rptr. at 262 (Broussard, J., dissenting). Justice Broussard relied on the holding in *Brooks v. Tennessee*, 406 U.S. 605 (1972) (establishing that a rule which requires a defendant to accelerate the disclosure of witnesses can trigger the self-incrimination clause). *Izazaga*, 54 Cal. 3d at 403, 815 P.2d at 335, 285 Cal. Rptr. at 262 (Broussard, J., dissenting).

57. *Id.* at 409-10, 815 P.2d at 340-41, 285 Cal. Rptr. at 267-68 (Broussard, J., dissenting).

California Supreme Court has definitively answered the public's request for the restoration of "balance and fairness" to a criminal justice system which too often fails in this objective.

ANDREA L. WILSON

- D. *In a prosecution for lewd conduct with a child under Penal Code section 288, a trial court does not abuse its discretion by admitting expert testimony that it is not unusual for a parent to refrain from reporting a known child molestation, and that there exists no recognized profile of a "typical" child molester. Furthermore, prejudicial error does not occur when the trial court excludes testimony that the defendant is not a "sexual deviant," has a reputation for "normalcy in his sexual tastes," and is a person of "high moral character": People v. McAlpin.*

I. INTRODUCTION

The sexual abuse of children is of paramount concern in contemporary society.¹ The increase in the awareness and reporting of this social problem has made this a critical matter that courts have had to address with greater frequency.² Unfortunately, difficulties with proof and credibility have often clouded the issues and stymied the judicial process.³ The California Supreme Court addressed these concerns in *People v. McAlpin*⁴ when it considered a number of controversial evidentiary rulings in a prosecution for lewd conduct with a child under Penal Code section 288, subdivision (a).⁵

1. See generally Michael Cerkovnik, *The Sexual Abuse of Children: Myths, Research, and Policy Implications*, 89 DICK. L. REV. 691 (1985); John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1 (1989).

2. Cerkovnik, *supra* note 1, at 691.

3. Myers, *supra* note 1, at 37.

4. 53 Cal. 3d 1289, 812 P.2d 563, 283 Cal. Rptr. 382 (1991). Justice Mosk authored the majority opinion in which Chief Justice Lucas and Justices Kennard, Arabian, and Baxter concurred. Justice Broussard authored a concurring and dissenting opinion, in which Justice Panelli concurred.

5. CAL. PENAL CODE § 288(a) (West 1988). Section 288(a) provides:

Any person who shall willfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1 of this code upon or with the body, or any part of member thereof, of a child

McAlpin was charged with lewd conduct with the eight-year-old daughter of a woman he had been dating.⁶ Although the daughter immediately reported the incident to her mother, the authorities were not contacted until a year later.⁷ The case became contingent upon the testimony of an expert witness for the prosecution, who dispelled some common myths concerning child molestation,⁸ and upon the admissibility of certain character evidence.⁹ McAlpin contended that the trial court had abused its discretion by allowing an expert witness to testify that (i) it is not unusual for a parent to refrain from reporting a known child moles-

under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the state prison for a term of three, six, or eight years.

Id.

6. *McAlpin*, 53 Cal. 3d at 1296, 812 P.2d at 566, 283 Cal. Rptr. at 385. Interestingly, a point of controversy for the prosecution arose because Anita (the victim's mother) dated the defendant on one occasion after the occurrence of the incident. *Id.* Anita also admitted to having further sexual relations with the defendant after the event happened. *Id.* at 1301, 812 P.2d at 570, 283 Cal. Rptr. at 389.

7. *Id.* at 1296, 812 P.2d at 566, 283 Cal. Rptr. at 385. The delay in reporting the incident also became a controversial issue in the case when the prosecution elicited expert testimony purporting that such a delay was not unusual. *Id.* at 1299, 812 P.2d at 568, 283 Cal. Rptr. at 387. See generally Kathy L. Hensley, *The Admissibility of "Child Sexual Abuse Accommodation Syndrome" in California Criminal Courts*, 17 PAC. L.J. 1361 (1986).

8. *McAlpin*, 53 Cal. 3d at 1302-03, 812 P.2d at 570-71, 283 Cal. Rptr. at 389-90. See also Cerkovnik, *supra* note 1, at 692-94. In his article, Cerkovnik lists 11 myths regarding the sex offender:

(1) Tens of thousands of homicidal sex fiends stalk the land (2) The victims of sexual attack are ruined for life (3) Sex offenders are usually recidivists (4) The minor offender, if unchecked, progresses to more serious types of crime (5) It is possible to predict the danger of serious crimes being committed by sex deviates (7) These individuals are lustful and oversexed (8) Reasonably effective treatment methods to cure deviated sex offenders are known and employed (9) The sex control laws passed are directed to the brutal and vicious sex criminal and should be adopted generally to wipe out sex crime (10) Civil adjudication of the sex offender does not involve human liberties or due process (11) The sex abuse problem can be solved merely by passing a law on it.

Id.

9. *McAlpin*, 53 Cal. 3d at 1304, 812 P.2d at 572, 283 Cal. Rptr. at 391. The defendant may introduce evidence of character traits inconsistent with those associated with the crime with which he is charged. *Id.* See also B. WITKIN, CALIFORNIA EVIDENCE, *Circumstantial Evidence* § 329 (2d ed. 1986). It has been recognized that certain crimes "lend themselves easily to trait analysis." Lester Rosen, *Have You Heard? Cross Examination of a Criminal Defendant's Good Character Witness: A Proposal for Reform*, 9 U.C. DAVIS L. REV. 365, 368-69 n.17 (1976). For example, "[m]orality, chastity and virtue are inconsistent with a sexual crime." *Id.*

tation¹⁰ and (ii) that no recognized profile exists of a "typical" child molester.¹¹ Additionally, McAlpin claimed that the trial court abused its discretion by excluding character evidence that would have demonstrated that he was not a "sexual deviant,"¹² that he had a reputation for "normalcy in his sexual tastes," and that he was a person of "high moral character."¹³

Due to widespread public misconception and confusion about child molestation,¹⁴ the supreme court determined that the opinion testimony

10. *McAlpin*, 53 Cal. 3d at 1299, 812 P.2d at 568, 283 Cal. Rptr. at 387. The prosecution's expert witness testified that a parent might delay reporting a case of child molestation for numerous reasons. *Id.* These reasons included:

the fear of breaking up the marriage or harming relations with other family members, a sense of shame or failure as a parent, a psychological refusal to accept the fact of the molestation, or a reluctance to damage the reputation of the alleged offender when the latter is someone of good standing in the community.

Id.

11. *Id.* at 1302-03, 812 P.2d at 570-71, 283 Cal. Rptr. at 389-90. The prosecutor's expert witness also testified that a child molester can be of any social or financial status, any age or race, any occupation or geographical area, and any religious belief or nonbelief. Furthermore, the expert testified that the child molester might have previously enjoyed an "impeccable" reputation. *Id.* at 1299, 812 P.2d at 568, 283 Cal. Rptr. at 387. *See also Myers, supra* note 1, at 142 (concluding that no profile exists of a "typical" child molester, given the most recent interpretation of scientific data).

12. *McAlpin*, 53 Cal. 3d at 1306, 812 P.2d at 573, 283 Cal. Rptr. at 392. The witnesses purported to show that the defendant was not a sexual deviant based on his normal sexual relations with women and upon the witnesses' observation of the defendant's conduct with children. *Id.* at 1306, 812 P.2d at 572, 283 Cal. Rptr. at 392. The trial court ruled that such testimony "violated the rule against proving a character trait of the accused by means of specific acts." *Id.* at 1308, 812 P.2d at 575, 283 Cal. Rptr. at 394. *See also* FED. R. EVID. 404 (stating that "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion"); B. WITKIN, CALIFORNIA EVIDENCE, *Circumstantial Evidence* § 339 (2d ed. 1986) (stating that specific acts are inadmissible to prove either defendant's good or bad behavior).

13. *McAlpin*, 53 Cal. 3d at 1310, 812 P.2d at 576, 283 Cal. Rptr. at 395. California Evidence Code section 1101(a) (West 1988) prohibits evidence of character as circumstantial evidence. Section 1101(a) states that "evidence of a person's character or a trait of his character . . . is inadmissible when offered to prove his conduct on a specified occasion." *Id.* Nevertheless, certain exceptions exist under California Evidence Code section 1102(a) (West 1988), which allows such evidence in a criminal action if it is "(a) offered by the defendant to prove his conduct in conformity with such character or trait of character, (b) offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)." *Id.*

14. *McAlpin*, 53 Cal. 3d at 1301-02, 812 P.2d at 570-71, 283 Cal. Rptr. at 389-90.

proffered by the prosecution's expert was admissible because it was not a topic of common knowledge and would have assisted the jury in its decision-making process.¹⁵ In addition, although the supreme court concluded that the trial court erred in excluding the relevant character evidence concerning the defendant's sexual nature,¹⁶ this exclusion did not constitute prejudicial error as prescribed by the California Constitution,¹⁷ by statute,¹⁸ and by controlling case law.¹⁹

II. TREATMENT OF THE CASE

A. *Majority Opinion*

1. Allowance of the Prosecution's Expert Opinion Testimony

Initially, the court found the prosecution's expert witness sufficiently qualified to give opinion evidence because of his extensive background in dealing with child molestation cases and their psychological ramifications.²⁰

See Cerkovnik, *supra* note 1, at 692-94.

15. *McAtpin*, 53 Cal. 3d at 1302, 812 P.2d at 570, 283 Cal. Rptr. at 389.

16. *Id.* at 1311, 812 P.2d at 577, 283 Cal. Rptr. at 396.

17. *Id.* at 1311 n.16, 812 P.2d at 577 n.16, 283 Cal. Rptr. at 396 n.16. Additionally, Article VI, section 13 of the California Constitution provides:

No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

CAL. CONST. art. VI, § 13

18. California Evidence Code section 354 (West 1966) provides:

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means; (b) The rulings of the court made compliance with subdivision (a) futile; or (c) The evidence was sought by questions asked during cross-examination or recross-examination.

Id.

19. *See* *People v. Stoll*, 49 Cal. 3d 1136, 1161-63, 783 P.2d 698, 714-15, 265 Cal. Rptr. 111, 127-28 (1989) (applying the *Watson* test of prejudicial error); *People v. Watson*, 46 Cal. 2d 828, 836, 299 P.2d 243, 249, 254 (1956) (holding that it must be reasonably probable that a verdict more favorable to the defendant would have been reached in the absence of this error). *Cf.* *People v. Jones*, 42 Cal. 2d 219, 226, 266 P.2d 38, 43 (1954) (holding that reversible error existed where victim had a bad reputation for truth and veracity).

20. *McAtpin*, 53 Cal. 3d at 1298, 812 P.2d at 567, 283 Cal. Rptr. at 386. The

a. *Testimony regarding a parent's reluctance to report a known child molestation*

In determining that the trial court did not abuse its discretion²¹ by allowing opinion testimony that it is not uncommon for a parent to refrain from reporting a known child molestation, the supreme court analogized to cases involving "rape trauma syndrome,"²² in which victims fail to give timely reports of their assault. The court noted that evidence of this syndrome is not admissible to prove that the victim had, indeed, been raped; rather, it is admissible to reestablish the victim's credibility.²³ Furthermore, the court explained that several court of appeal decisions had already extended the rule established in "rape trauma syndrome" cases to child molestation cases in which the child delays reporting the abuse ("child sexual abuse accommodation syndrome").²⁴ The court reasoned that "[s]uch expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior."²⁵ Although the case at bar did not deal with the child victim's failure to report the molestation, but rather with the parent's failure, the court determined the foregoing rules should still

prosecution's expert witness' qualifications included "from 350 to 400 hours of specialized training in such topics as juvenile and adolescent psychology, physical, sexual or emotional abuse of children, intervention in family crisis situations, investigation of child abuse charges, behavioral responses of child abuse victims, and the dynamics of child abuse offenders." *Id.* See generally 31 CAL. JUR. 3D *Evidence* §§ 489-516 (1976 & Supp. 1992) (providing an overview of expert testimony).

21. *McAlpin*, 53 Cal. 3d at 1299, 812 P.2d at 568, 283 Cal. Rptr. at 387. The court stated that the admission of expert testimony by a trial court would "not be disturbed on appeal unless a *manifest abuse of discretion* is shown." *Id.* (quoting *People v. Kelly*, 17 Cal. 3d 24, 39, 549 P.2d 1240, 1250, 130 Cal. Rptr. 144, 154 (1976)) (emphasis added).

22. See *People v. Bledsoe*, 36 Cal. 3d 236, 248-51, 681 P.2d 291, 298-301, 203 Cal. Rptr. 450, 458-60 (1984) (holding that expert testimony regarding the delay of reporting a rape charge is inadmissible to prove that the victim had actually been raped).

23. *McAlpin*, 53 Cal. 3d at 1300, 812 P.2d at 569, 283 Cal. Rptr. at 388. See also *supra* note 22.

24. See, e.g., *People v. Bowker*, 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (1988); *People v. Gray*, 187 Cal. App. 3d 213, 231 Cal. Rptr. 658 (1986); *People v. Roscoe*, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (1985).

25. *McAlpin*, 53 Cal. 3d at 1301, 812 P.2d at 569, 283 Cal. Rptr. at 388 (quoting *Myers*, *supra* note 1, at 89 (footnote omitted)).

apply.²⁶ Focusing on the typical juror's lack of personal experience in dealing with a sexually abused child, the supreme court concluded that expert testimony was needed to dispel the misconception that a parent would undoubtedly report the incident immediately had it actually occurred.²⁷

b. *Testimony regarding the nonexistence of a "typical" child molester*

In determining that the trial court did not err in allowing the prosecution's expert witness to testify that no profile exists of a "typical child molester," the court specified many commonly shared, but inaccurate or unsubstantiated, stereotypes of the child molester.²⁸ "The layperson imagines the child offender to be a stranger, an old man, insane or retarded, alcohol- or drug-addicted, sexually frustrated and impotent or sexually jaded, and looking for kicks."²⁹ Because the defendant did not conform to the aforementioned stereotypical profile, the court reasoned that the expert's testimony was relevant and would therefore assist the jury in its deliberations.³⁰ The court also noted that the trial court has broad discretion in determining relevancy.³¹

2. Exclusion of the Defendant's Character Evidence

In analyzing whether the exclusion of certain character evidence constituted prejudicial error, the court divided the defendant's offer of proof into the following categories: (1) Evidence that the defendant was not a "sexual deviant," (2) testimony that the defendant had a "reputation for normalcy in his sexual tastes," and (3) testimony that the defendant was a person of "high moral character."³²

26. *Id.*

27. *Id.* at 1302, 812 P.2d at 570, 283 Cal. Rptr. at 389.

28. *Id.*

29. *Id.* at 1302, 812 P.2d at 571, 213 Cal. Rptr. at 390 (quoting Groth, *Patterns of Sexual Assault Against Children and Adolescents*, in *SEXUAL ASSAULTS OF CHILDREN AND ADOLESCENTS* 3-4 (Burgess et al. eds. 1978)). According to the Groth report on child molesters, there was "no significant difference in intelligence between child offenders and the general population." *Id.* See also *supra* note 8.

30. *McAlpin*, 53 Cal. 3d at 1303, 818 P.2d at 571, 283 Cal. Rptr. at 390. See FED. R. EVID. 350 (testimony must be relevant to be admissible).

31. *McAlpin*, 53 Cal. 3d at 1303, 812 P.2d at 571, 283 Cal. Rptr. at 390 (citing *People v. Green*, 27 Cal. 3d 1, 19, 609 P.2d 468, 477, 164 Cal. Rptr. 1, 11 (1980)).

32. *Id.* at 1305, 1310, 812 P.2d at 572, 576, 283 Cal. Rptr. at 391, 395.

a. *Evidence that the defendant was not a "sexual deviant"*

The defendant's three character witnesses proposed to offer evidence that he was not a sexual deviant. The two female witnesses would have based their opinions on their own personal and sexual relationship with the defendant, and on their observance of the defendant's normal conduct with their own daughters.³³ The male witness would have based his testimony on his observance of the defendant's interaction with women in general.³⁴ The trial court rejected all evidence regarding the defendant's alleged lack of sexual deviance, reasoning that such a determination could only be rendered by an expert.³⁵

The supreme court stated, however, that a criminal defendant may introduce opinion or reputation evidence indicating that he defendant was unlikely to have committed the offense so long as the testimony is substantially related to the specific offense.³⁶ In addition, the court noted that *People v. Stoll*³⁷ allowed a defendant charged with child molestation to introduce expert opinion testimony regarding his lack of sexual deviance.³⁸ However, because *Stoll* did not limit such testimony to expert witnesses, the *McAlpin* court determined that lay opinion testimony was admissible if it satisfied Evidence Code section 800.³⁹ Accordingly,

33. *Id.* at 1305, 812 P.2d at 572, 283 Cal. Rptr. at 391.

34. *Id.* Defendant's character witnesses consisted of two women who had "dated the defendant for approximately six months, had been sexually intimate with him during that period, and thereafter had continued their friendship with him; each also had a daughter." *Id.* at 1304, 812 P.2d at 572, 283 Cal. Rptr. at 391. The defendant's third witness was a male college friend who had observed defendant's conduct on double-dates. *Id.*

35. *Id.* at 1304, 812 P.2d at 572, 283 Cal. Rptr. at 391.

36. *Id.* (citation omitted).

37. 49 Cal. 3d 1136, 783 P.2d 698, 265 Cal. Rptr. 111 (1989).

38. *McAlpin*, 53 Cal. 3d at 1305, 812 P.2d at 573, 283 Cal. Rptr. at 392. "[I]n a child molestation case (1) the fact that the defendant is not a sexual deviant is a relevant character trait within the meaning of section 1102, and (2) the statute allows a defendant to prove that trait by the opinion testimony of an expert witness." *Id.* at 1305-06, 812 P.2d at 573, 283 Cal. Rptr. at 392 (quoting *People v. Stoll*, 49 Cal. 3d 1136, 1152-55, 783 P.2d 698, 714-16, 265 Cal. Rptr. 111, 126-28 (1989)).

39. CAL. EVID. CODE § 800 (West 1988). Section 800 limits lay opinion testimony to an opinion that is "(a) [r]ationally based on the perception of the witness; and (b) [h]elpful to a clear understanding of his testimony." *McAlpin*, 53 Cal. 3d at 1306, 812 P.2d at 573, 283 Cal. Rptr. at 392. Many cases have admitted lay testimony when it is based on the witness' personal observation. *See, e.g.*, *People v. Ravey*, 122 Cal. App. 2d 699, 703, 265 P.2d 154, 157 (1954) (allowing testimony as to whether the defen-

the court stressed that the lay testimony must be based on personal perceptions of the defendant's conduct with children.⁴⁰ Therefore, the testimony of the male character witness was inadmissible because it was not based on his observation of the defendant's interaction with children.⁴¹ Likewise, the court limited the female character witnesses' testimony to direct observations of the defendant's behavior around their daughters, excluding testimony concerning their own sexual relationships with the defendant.⁴²

b. *Evidence that the defendant had a reputation for "normalcy in his sexual tastes" and was a person of "high moral character"*

In analyzing the relevance of the defendant's reputation for sexual normalcy, the court stated that "[e]vidence that a defendant does not have a bad reputation for a relevant character trait is admissible as tending to show that he has a good reputation for that trait."⁴³ In addition, because the definition of reputation testimony does not require that it be based on the witness' own perceptions, the supreme court asserted that the trial court should have admitted evidence concerning the defendant's reputation for sexual normalcy.⁴⁴ Similarly, the court determined that the trial court should have admitted evidence that the defendant was a person of high moral character; this evidence was relevant to the charge because the court interpreted the term "moral" as referring to sexual morality.⁴⁵

3. The Trial Court's Error in Excluding Certain Items of Good Character Evidence

The supreme court concluded that although the trial court erred in

dant was intoxicated); *Jordan v. Great Western Motorways*, 213 Cal. 606, 612, 2 P.2d 786, 791 (1931) (allowing plaintiff to testify as to the speed of a bus and her driver's car); *Kline v. Santa Barbara Consol. Ry. Co.*, 150 Cal. 741, 750, 90 P. 125, 129 (1907) (allowing witnesses to testify as to accident victim's pain and suffering); *People v. Manoogian*, 141 Cal. 592, 598, 75 P. 177, 179 (1904) (allowing witness to testify as to whether defendant was acting rationally).

40. *McAlpin*, 53 Cal. 3d at 1309, 812 P.2d at 575, 283 Cal. Rptr. at 394.

41. *Id.*

42. *Id.*

43. *Id.* at 1310, 812 P.2d at 576, 283 Cal. Rptr. at 395. See also 1 B. WITKIN, CALIFORNIA EVIDENCE, *Circumstantial Evidence* § 335 (2d ed. 1986).

44. *McAlpin*, 53 Cal. 3d at 1311, 812 P.2d at 576, 283 Cal. Rptr. at 395. ("The rule that lay opinion testimony must be based on the witness' personal observation thus does not apply to reputation testimony, and indeed the Evidence Code imposes no such requirement."). See generally 31 CAL. JUR. EVIDENCE § 306 (1976).

45. *McAlpin*, 53 Cal. 3d at 1311, 812 P.2d at 576-77, 283 Cal. Rptr. at 395-96.

excluding certain good character evidence relevant to the charge against the defendant, this exclusion did not constitute prejudicial error per se.⁴⁶ The court stated that an appropriate prejudice analysis for the exclusion of relevant character evidence includes a consideration of California constitutional provisions, the applicable statute, and controlling case law.⁴⁷ The court then determined that the exclusion of character evidence did not offend the California Constitution because the challenged exclusion did "not remotely approach the gravity" of offenses generally held to violate the constitution.⁴⁸ Furthermore, the court analogized the present case to the prejudice analysis set forth in *People v. Stoll*.⁴⁹ In *Stoll*, the court illustrated that under certain circumstances (contradictory testimony, motive to lie, et cetera), the exclusion of good character evidence might constitute prejudicial error.⁵⁰ However, the supreme court found that none of these circumstances was present in the instant case.⁵¹ Interestingly, the court never addressed the statutory concerns of excluding relevant character evidence.⁵²

B. *Concurring and Dissenting Opinion of Justice Broussard*

In his separate opinion, Justice Broussard agreed with the majority's conclusion that the testimony proffered by the prosecution's expert witness was admissible.⁵³ However, Justice Broussard strongly disagreed

46. *Id.* at 1313, 812 P.2d at 578, 283 Cal. Rptr. at 397.

47. *Id.* at 1311, 812 P.2d at 577, 283 Cal. Rptr. at 396. *See also supra* notes 17-19.

48. *Id.* at 1311 n.16, 812 P.2d at 577 n.16, 283 Cal. Rptr. at 396 n.16. *See People v. Bigelow*, 37 Cal. 3d 731, 744-46, 691 P.2d 994, 1001-02, 209 Cal. Rptr. 328, 335-36 (1984) (holding prejudicial error existed where court did not appoint counsel to incompetent defendant in a capital case); *People v. Joseph*, 34 Cal. 3d 936, 946-48, 671 P.2d 843, 849-50, 196 Cal. Rptr. 339, 347-49 (1983) (holding that prejudicial error existed where a defendant's motion to represent himself in a capital crime was denied).

49. 49 Cal. 3d 1136, 783 P.2d 698, 265 Cal. Rptr. 111 (1989).

50. *McAlpin*, 53 Cal. 3d at 1312, 812 P.2d at 577, 283 Cal. Rptr. at 396. The court noted that in *Stoll*, "four of the children contradicted key parts of each other's account of the event, four admitted they had lied at the preliminary hearing, two admitted they had lied at trial, and prior statements by five of the children contradicted parts of their testimony." *Id.* (citing *People v. Stoll*, 49 Cal. 3d 1136, 1162, 783 P.2d 699, 623, 265 Cal. Rptr. 111, 135 (1989)).

51. *Id.* ("In the case before us there were no such contradictions or admitted untruths in Stephanie's testimony, nor did the defense suggest any persuasive motive for Stephanie to lie repeatedly, over a period of more than two years, to her mother, to the police, and to the jury.")

52. *Id.* The court did note, however, that the Evidence Code recognizes reputation evidence as being inherently unreliable. *Id.*

53. *Id.* at 1313, 812 P.2d at 578, 283 Cal. Rptr. at 397 (Broussard, J., concurring in

with the majority's finding that the exclusion of good character evidence was not prejudicial.⁵⁴ Justice Broussard argued that in California "[t]he defendant . . . is specifically authorized by statute to present good character evidence in any criminal case."⁵⁵ Justice Broussard explained that important policy concerns permit a defendant to offer good character evidence because often the ultimate issue of guilt is contingent upon his credibility and character.⁵⁶ In addition, the mere introduction of good character evidence may be so convincing that it may "raise a reasonable doubt of guilt."⁵⁷ Furthermore, Justice Broussard stressed the importance of admitting good character evidence in a child molestation case because the very nature of the crime raises serious doubts as to the truth and veracity of the defendant's general character.⁵⁸

Justice Broussard was particularly critical of the majority's failure to consider the defendant's good character evidence as a whole rather than as separate and distinct offers of proof.⁵⁹ Justice Broussard believed that the court should have interpreted the defendant's good character evidence as a mere affirmation from close friends that "the defendant's

part and dissenting in part).

54. *Id.* (Broussard, J., concurring in part and dissenting in part) ("Given the nature of the trial court's error and the state of the evidence, I believe that reversal is clearly required.") *Id.*

55. *Id.* at 1314, 812 P.2d at 578, 283 Cal. Rptr. at 397 (Broussard, J., concurring in part and dissenting in part). The California Evidence Code allows the defendant to offer evidence of his "character or trait of his character," CAL. EVID. CODE § 1102 (West 1986), the Federal Evidence Code speaks more narrowly of "evidence of a pertinent trait of his character." FED. R. EVID. 404(a)(1).

56. *McAlpin*, 53 Cal. 3d at 1313, 812 P.2d at 578, 283 Cal. Rptr. at 397 (Broussard, J., concurring in part and dissenting in part). This is particularly true of cases involving only circumstantial evidence. *See, e.g.*, *People v. Jones*, 42 Cal. 2d 219, 266 P.2d 38 (1954); *People v. Anglopoulos*, 30 Cal. App. 2d 538, 86 P.2d 873 (1939).

57. *McAlpin*, 53 Cal. 3d at 1314, 812 P.2d at 579, 283 Cal. Rptr. at 398 (Broussard, J., concurring in part and dissenting in part) (quoting *Michelson v. United States*, 335 U.S. 469, 476 (1948)). Some modern federal decisions have held that the jury should not be instructed that the defendant's good character evidence "standing alone" may be enough to raise a reasonable doubt about the defendant's guilt. *See, e.g.*, *United States v. Marquardt*, 786 F.2d 771 (7th Cir. 1986).

58. *McAlpin*, 53 Cal. 3d at 1313, 812 P.2d at 578, 283 Cal. Rptr. at 397 (Broussard, J., concurring in part and dissenting in part). Good character evidence has been held to be of particular importance in cases involving lewd and lascivious behavior, where the defendant's denial along with the impeachment of the child's testimony is often the only defense. *See People v. Adams*, 14 Cal. 2d 154, 167-68, 93 P.2d 146, 158-59 (1939) (holding that errors which would ordinarily be trivial become of great importance in a child molestation case); *People v. Anthony*, 185 Cal. 152, 156, 196 P. 47, 49 (1921) (holding that a defendant's good character evidence may be the only defense to a charge of child molestation).

59. *McAlpin*, 53 Cal. 3d at 1319, 812 P.2d at 582, 283 Cal. Rptr. at 401 (Broussard, J., concurring in part and dissenting in part).

general character was inconsistent with having committed the sexual offense of which he was accused."⁶⁰ Furthermore, Justice Broussard contended that even if one applied the majority's approach to the defendant's good character evidence and interpreted the offers of proof as being separate entities, the evidence should still have been admissible because it was based on the witnesses' "own perception[s]."⁶¹

Finally, Justice Broussard argued that even if the majority's determination of the trial court's error was correct, the exclusion of certain good character evidence clearly constituted prejudicial error.⁶² Justice Broussard relied on several California Supreme Court decisions that emphasized the importance of good character evidence in a child molestation case because "in a sex case where the witness is the victim and his story is totally uncorroborated, almost any error is serious and is likely to be prejudicial."⁶³ Moreover, Justice Broussard found the exclusion of good character evidence even more disturbing when coupled with the "unusual" circumstances of this case.⁶⁴

III. CONCLUSION

In *McAlpin*, the California Supreme Court attempted to reconcile controversial evidentiary issues with the serious and disturbing crime of child molestation. By expanding the scope of admissible expert testimony that dispels common myths regarding child molestation, the court

60. *Id.* at 1318, 812 P.2d at 582, 283 Cal. Rptr. at 401 (Broussard, J., concurring in part and dissenting in part).

61. *Id.* (Broussard, J., concurring in part and dissenting in part). "Each of the witnesses had formed her or his opinion as to defendant's character on the basis of the witness's personal experience with defendant in different settings over a considerable period of time." *Id.* at 1319-20, 812 P.2d at 582, 283 Cal. Rptr. at 401 (Broussard, J., concurring in part and dissenting in part).

62. *Id.* at 1321, 812 P.2d at 583, 283 Cal. Rptr. at 402 (Broussard, J., concurring in part and dissenting in part).

63. *Id.* at 1322, 812 P.2d at 584, 283 Cal. Rptr. at 403 (Broussard, J., concurring in part and dissenting in part) (quoting *People v. Stanley*, 67 Cal. 2d 812, 820, 433 P.2d 913, 919, 63 Cal. Rptr. 825, 833 (1967)). See *supra* note 58 (citing cases in which the defendant's denial and impeachment of the child's testimony is often the only defense).

64. *Id.* at 1323, 812 P.2d at 584, 283 Cal. Rptr. at 404 (Broussard, J., concurring in part and dissenting in part). Justice Broussard illustrates several "unusual" circumstances surrounding the case: the fact that the molestation occurred in the mother's presence; the mother's refusal to report the molestation; and the mother's continued dating of and having sexual relations with the defendant. *Id.* (Broussard, J., concurring in part and dissenting in part).

demonstrated a desire to eradicate prevailing misperceptions and perhaps to diminish the social stigma inherently attached to this crime. Moreover, the court's conclusion that excluding certain good character evidence of the defendant's sexual nature does not constitute prejudicial error will increase the difficulty of defending against such accusations. A defendant's only viable defense is often his good reputation in the community; absent this defense, a person charged with child molestation might be at the mercy of the jury's interpretation of the child victim's credibility. Finally, *McAlpin* illustrates the California Supreme Court's growing trend of broadly interpreting the doctrine of harmless error, resulting in the reversal of fewer criminal convictions.

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- E. *Section 872(b) of the Penal Code, allowing police officers to relate hearsay evidence at a preliminary hearing, is constitutional, but does not allow a finding of probable cause based on a police report read by an officer on behalf of an investigating officer when the testifying officer was not involved in the case and had no personal knowledge regarding the investigation: Whitman v. Superior Court.*

I. INTRODUCTION

In *Whitman v. Superior Court*,¹ the supreme court once again addressed issues involving the constitutionality of Proposition 115,² one

1. 54 Cal. 3d 1063, 820 P.2d 262, 2 Cal. Rptr. 2d 160 (1991). Chief Justice Lucas wrote the majority opinion in which Justices Panelli, Arabian, Baxter, and George concurred. Justice Mosk wrote a separate concurring opinion, and Justice Kennard wrote a separate concurring and dissenting opinion.

2. Proposition 115, an initiative measure, was approved in the June 5, 1990 primary election and became operational June 6, 1990. Entitled the Crime Victims Justice Reform Act, it was intended to protect crime victims and accelerate the criminal justice process. It made numerous changes to the California Constitution and various codes. See generally 1 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Introduction to Crimes* § 10A (2d ed. 1988 & Supp. 1991) (discussing the principal changes made); *Special Alert, "Proposition 115: The Crime Victims Justice Reform Act,"* CAL. CENTER JUD. EDUC. & RES. J., June 1990 (setting out the changes in more detailed form); Deborah Glenn, *Proposition 115: The Crime Victims Justice Reform Act*, 22 PAC. L.J. 1010 (1991); Lisa A. Lunsman, *Proposition 115 - "The Crime Victims Justice Reform Act": Reformation of an Inept System or a Constitutional Disaster?*, 22 U. WEST L.A. L. REV. 59 (1991).

Prior to *Whitman*, the court dealt with a variety of constitutional challenges to Proposition 115. See, e.g., *Izazaga v. Superior Court*, 54 Cal. 3d 356, 815 P.2d 304, 285 Cal. Rptr. 231 (1991) (challenging reciprocal discovery provisions of Proposition 115);

provision of which added section 872(b) to the Penal Code, allowing hearsay testimony³ by qualified police officers at felony preliminary hearings.⁴ The court held that section 872(b) did not violate the defendant's right of confrontation, did not deny him due process, and did not violate the separation of powers doctrine.⁵ The court limited the applicability of 872(b), however, by holding that the provision did not authorize a finding of probable cause based on a police officer's report read by a fellow officer when the "reader" had no direct knowledge of the crime or circumstances so as to assist in assessing the reliability of the statements.⁶

This case arose out of an information that charged the defendant with drunk driving. At the preliminary hearing, the People called only one witness—a police officer who had not taken part in the arrest or investigation of the case and had no direct knowledge regarding the offense.⁷

Tapia v. Superior Court, 53 Cal. 3d 282, 807 P.2d 434, 279 Cal. Rptr. 592 (1991) (challenging retroactive application of Proposition 115); *Raven v. Deukmejian*, 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990) (challenging Proposition 115 on grounds that it violated single-subject and revision provisions of the California Constitution).

3. Hearsay testimony involves statements related by a second party, not the person who originally makes the statement. Section 1200 of the Evidence Code reads: "Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated." CAL. EVID. CODE § 1200 (West 1966 & Supp. 1991). Such evidence is inadmissible unless exceptions by law provide otherwise. *Id.* See generally 1 B. WITKIN, CALIFORNIA EVIDENCE, *The Hearsay Rule* § 558 (3d ed. 1986 & Supp. 1991) (discussing the California hearsay rule); 31 CAL. JUR. 3D *Evidence* §§ 215-26, 218 (1976 & Supp. 1991) (hearsay rule); 5 WIGMORE, EVIDENCE § 1362 (Chadbourn ed. 1974 & Supp. 1991) (discussing hearsay rule in broader Anglo-American context).

4. Section 872(b) of the Penal Code provides that at a felony preliminary hearing, a finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted. Any law enforcement officer testifying as to hearsay statements shall either have five years of law enforcement experience or have completed a training course certified by the Commission on Peace Officer Standards and Training which includes training in the investigation and reporting of cases and testifying at preliminary hearings.

CAL. PENAL CODE § 872(b) (West Supp. 1992). See generally 4 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Proceedings Before Trial* § 1982 (2d ed. 1988 & Supp. 1991) (discussing section 872 and other changes regarding admissibility of evidence at the preliminary examination).

5. *Whitman*, 54 Cal. 3d at 1071-83, 820 P.2d at 266-74, 2 Cal. Rptr. 2d at 164-72.

6. *Id.* at 1072-75, 820 P.2d at 266-68, 2 Cal. Rptr. 2d at 164-66.

7. In fact, the testifying officer had never even met the investigating officer, and

The officer simply read the report of the investigating officer to the court. The defendant made repeated objections to the testimony as hearsay. However, over such objections, and based on the information in the report, the defendant was held to answer on the counts charged.⁸

II. TREATMENT

Before addressing the constitutional issues, the court examined the defendant's argument that section 872(b) was not intended to allow the type of hearsay involved in this case. According to the statutory language and legislative materials,⁹ the provision was intended "to allow a properly qualified investigating officer to relate out of court statements by crime victims or witnesses, including other law enforcement personnel, without requiring victims' or witnesses' presence in court."¹⁰ The requirement that a *testifying* officer be properly qualified was intended to ensure the reliability of any out-of-court statements.¹¹ Since an officer who simply reads a report with no knowledge of the circumstances under which the statements were made cannot assist in determining the reliability of the statement,¹² such an officer's testimony is not autho-

first became aware of the investigation report the morning of the preliminary hearing when the district attorney handed him a copy. *Id.* at 1068, 820 P.2d at 642, 2 Cal. Rptr. 2d at 162.

8. *Id.* at 1068-70, 820 P.2d at 264-65, 2 Cal. Rptr. 2d at 162-63. The defendant applied to the court of appeal for a writ of mandate but was denied. The supreme court issued an alternative writ of mandate to resolve the constitutional and interpretive issues involved. *Id.*

9. The court examined the ballot pamphlet, prepared by the legislative analyst, which stated that the intent underlying the provision was to allow out of court statements to be "introduced through the testimony of certain trained and experienced law enforcement officers." BALLOT PAMPHLET, *Proposed Statutes and Amendments to California Constitution; With Arguments to Voters; Primary Election June 5, 1990* at 33.

10. *Whitman*, 54 Cal. 3d at 1072, 820 P.2d at 266-67, 2 Cal. Rptr. 2d at 164-65. Justice Kennard's concurring and dissenting opinion takes issue with the majority's inclusion of police officers in the class of those whose statements are admissible as hearsay. See *infra* notes 37-41 and accompanying text.

11. *Whitman*, 54 Cal. 3d at 1073, 820 P.2d at 267, 2 Cal. Rptr. 2d at 165. Justice Mosk's concurring opinion also focuses on the reliability of the evidence as disqualifying a reader, but bases his finding on the principles underlying the hearsay rule exceptions instead of the intent of the statute, upon which the majority relies. See *infra* notes 32-36 and accompanying text.

12. In the instant case, the testifying officer did not know the terms or circumstances of the report's preparation or precisely which sobriety tests were conducted. He was also unable to explain certain discrepancies in the report. For example, the report stated that the defendant's eyes were brown, but they were in fact green. The testifying officer was even unsure of the amount of the investigating officer's experience, and whether the officer was male or female. Such problems actually undercut the reliability of his testimony.

rized under the statute.

The court emphasized that the testimony of non-investigating readers could amount to double hearsay, since the reader might relate statements of witnesses based solely on the investigating officer's report.¹³ No amendment was made to the statute covering the admissibility of double hearsay, thereby suggesting that the legislature did not intend the provision to reach this type of hearsay.¹⁴ Additionally, allowing double hearsay would raise "constitutional questions," which the court could avoid by interpreting the statute as not encompassing such testimony.¹⁵

The first constitutional question the court dealt with was whether the admissibility of hearsay by a testifying officer violated the defendant's right to confront his accuser.¹⁶ Article I, Section 15 of the California Constitution guarantees the right "to be confronted with the witness against the defendant."¹⁷ However, as part of Proposition 115, Section 30 subdivision (b) was amended to specifically allow hearsay testimony at preliminary hearings.¹⁸ Thus, the only constitutional objection possible would be on federal constitutional grounds.

The federal constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

13. *Whitman*, 54 Cal. 3d at 1074, 820 P.2d at 267-68, 2 Cal. Rptr. 2d at 165-66.

14. *Id.* Section 872(b) created a specific exception to the basic hearsay rule in Evidence Code section 1200, but did not create a similar exception for the multiple hearsay rule of Evidence Code section 1201. *Id.* See CAL. EVID. CODE §§ 1200-1201 (West 1966 & Supp. 1991) (requiring both types of out-of-court statements to comply with hearsay rule exceptions to be admissible).

15. *Whitman*, 54 Cal. 3d at 1074, 820 P.2d at 267-68, 2 Cal. Rptr. 2d at 165-66. The "constitutional questions" would be those involving the right to confront and cross-examine witnesses. The court cited *People v. Smith* for the proposition that a court should adopt the interpretation of a statute which avoids conflict with the Constitution rather than raise a constitutional issue. *People v. Smith*, 34 Cal. 3d 251, 667 P.2d 149, 193 Cal. Rptr. 692 (1983) (interpreting Proposition 8, the "Victims Bill of Rights," to avoid constitutional conflict).

16. The defendant also challenged the amendment to Evidence Code section 1203.1, which exempts such hearsay testimony from cross-examination. CAL. EVID. CODE § 1203.1 (West Supp. 1991). The same arguments regarding confrontation apply to cross-examination, and the court in its opinion discusses confrontation as encompassing the cross-examination right.

17. CAL. CONST. art. I, § 15.

18. Article I, Section 30(b), added to the Constitution in 1990, provides: "In order to protect victims and witnesses in criminal cases, hearsay evidence shall be admissible at preliminary hearings as prescribed by the Legislature or by the people through the initiative process." CAL. CONST. art. I, § 30(b).

against him."¹⁹ The Supreme Court has repeatedly stated that "[t]he right to confrontation is basically a *trial* right."²⁰ The right does not require confrontation at a probable cause hearing to justify significant pretrial detention,²¹ and hearsay is admissible in federal indictment proceedings²² or in findings of probable cause in a federal preliminary examination.²³ A state preliminary hearing is sufficiently analogous to the federal procedures, and would not violate the federal confrontation clause because a preliminary hearing is not a "trial."²⁴

The rationale underlying the federal cases is that probable cause determinations do not require "the fine resolution of conflicting evidence that a reasonable-doubt . . . standard demands," and credibility determinations are not as crucial in reaching the reasonable belief standard.²⁵ Such confrontation might increase reliability of out-of-court statements, but the increase would be too slight to justify the inevitable increase in cost and delay.²⁶ The California requirement that an officer be qualified enhances such reliability even beyond federal guidelines.²⁷ In addition, the use of hearsay testimony applies only to the narrow probable cause determination that a felony has been committed, and not for purposes of discovery.²⁸

19. U.S. CONST. amend. VI.

20. *Whitman*, 54 Cal. 3d at 1079, 820 P.2d at 271, 2 Cal. Rptr. 2d at 169 (emphasis added) (citing *Barber v. Page*, 390 U.S. 719, 725 (1968)).

21. *Id.* (referring to *Gerstein v. Pugh*, 420 U.S. 103 (1975), which held that confrontation is not necessary for every pretrial probable cause hearing).

22. *Id.* (citing *Costello v. United States*, 350 U.S. 359, 363-64 (1956)).

23. *Id.* at 1081, 820 P.2d at 272, 2 Cal. Rptr. 2d at 170 (noting that Rule 5.1(a) of the Federal Rules of Criminal Procedure allows hearsay to support a finding of probable cause). See FED. R. CIV. P. 5.1(a). See generally WRIGHT, FEDERAL PRACTICE AND PROCEDURE, *Criminal* § 85 (2d ed. 1982 & Supp. 1991) (discussing the rules involved in federal preliminary hearings).

24. *Whitman*, 54 Cal. 3d at 1081-82, 820 P.2d at 273, 2 Cal. Rptr. 2d at 171.

25. *Id.* at 1080, 820 P.2d at 271, 2 Cal. Rptr. 2d at 169 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 121-23 (1975)).

26. *Id.* at 1080, 820 P.2d at 272, 2 Cal. Rptr. 2d at 170 (relying on *Gerstein v. Pugh*, 420 U.S. 103, 121-22 (1975)). The court noted that imposing the same rules of evidence at the preliminary hearing as the trial would in many respects allow the defendant a second trial, resulting in judicial waste and delay. *Id.* at 1081-82, 820 P.2d at 273, 2 Cal. Rptr. 2d at 171 (quoting *Wilson v. State*, 655 P.2d 1246, 1251 (Wyo. 1982)).

27. See *supra* notes 20-23 and accompanying text. There are no qualification requirements for hearsay testimony offered in the aforementioned federal procedures.

28. A further provision of Proposition 115, amending Penal Code section 866(b) provides that "the [preliminary] examination shall not be used for purposes of discovery." CAL. PENAL CODE § 866(b) (West Supp. 1992). Prior to the amendment, the preliminary hearing was used for trial preparation and discovery of witnesses, in addition to the probable cause determination. The narrowing of the applicability of the hearsay exception solely to the probable cause determination at preliminary hearings

Addressing the second constitutional issue, the court dismissed the defendant's contention that the hearsay exception denied him due process because, "impliedly," only the prosecutor is allowed to introduce hearsay. However, the defendant made no showing of unfairness since he did not seek to introduce hearsay testimony on his own behalf.²⁹ The court concluded that the provision was a limited exception to the exclusionary rule giving broad protection to the defendant, and that the prosecution still had to meet the burden of proof for probable cause.³⁰

The court discarded the defendant's argument that the hearsay exception violated the separation of powers doctrine by giving the prosecutor excessive power over the evidence admissible at the hearing. With the amendments, such power is specifically authorized by the California Constitution, and since the magistrate retained full authority to rule on the sufficiency of the evidence, there was no encroachment on the separation of powers.³¹

Justice Mosk's concurring opinion emphasized that the principles underlying the hearsay rule were supported by the court's broad interpretation of section 872(b) allowing hearsay by an officer who had investigated the case.³² The rule rejects out-of-court statements because they are not deemed sufficiently reliable for admission.³³ Exceptions are made for statements possessing indicia of trustworthiness.³⁴ The broad construction of section 872(b) requiring the testifying officer to actually investigate the case possesses such indicia, is reliable, and thus admissible.³⁵ Justice Mosk also cautioned that an officer who does not have

brings the exception in line with the federal cases, and ensures the constitutionality of the provisions.

29. Unfairness is an important element in such a due process claim, as is lack of reciprocity. See *Wardius v. Oregon*, 412 U.S. 470 (1973) (holding unfair a notice-of-alibi discovery allowance to the prosecution due to lack of reciprocity). In the instant case, the court left open whether the defendant could introduce hearsay testimony by a police officer under the hearsay exception. Since the defendant made no attempt to introduce such evidence, he did not demonstrate unfairness.

30. *Whitman*, 54 Cal. 3d at 1082, 820 P.2d at 273, 2 Cal. Rptr. 2d at 171.

31. *Id.* at 1082-83, 820 P.2d at 273-74, 2 Cal. Rptr. 2d at 171-72.

32. *Id.* at 1086, 820 P.2d at 275, 2 Cal. Rptr. 2d at 173 (Mosk, J., concurring). See generally *supra* note 3.

33. *Whitman*, 54 Cal. 3d at 1084, 820 P.2d at 275, 2 Cal. Rptr. 2d at 173 (Mosk, J., concurring).

34. *Id.* at 1085, 820 P.2d at 275, 2 Cal. Rptr. 2d at 173 (Mosk, J., concurring). See generally 5 WIGMORE, EVIDENCE § 1422 (Chadbourn ed. 1974 & Supp. 1991) (discussing trustworthiness as an essential element of hearsay exceptions).

35. *Whitman*, 54 Cal. 3d at 1085, 820 P.2d at 275, 2 Cal. Rptr. 2d at 173 (Mosk, J.,

direct knowledge of particular matters in an out-of-court statement should not be deemed to have fulfilled the actual-investigation requirement.³⁶

Justice Kennard, in her concurring and dissenting opinion, agreed that the provision did not violate the constitution, and that the defendant should not have been held to answer on the reader testimony.³⁷ However, Justice Kennard recommended that the hearsay exception should apply to the out-of-court statements of private citizens only, and not other police officers.³⁸ The argument was based on the express purpose of the Proposition 115 amendment to the California Constitution, Article 1 Section 30(b), "to protect victims and witnesses in criminal cases."³⁹ The hearsay exception allows victims to avoid undergoing the traumatic experience of testifying and the possibility of harassment. Testifying is part and parcel of an officer's job and officers do not require the same protection. This indicates that the exceptions should apply to private citizens only.⁴⁰ Justice Kennard stressed the practicality of a bright line rule over the difficulty in determining on a case-by-case basis whether an officer has sufficient knowledge of the crime or circumstances so as to assist the magistrate in determining reliability.⁴¹

III. CONCLUSION

The determination of whether an officer's outside knowledge is sufficient to aid in determining reliability will be a practical one, addressed on a case-by-case basis. Unfortunately the court provides no guidance other than stating that lack of outside knowledge disqualifies reader testimony. By not stating outright that reader testimony is always inadmissible,⁴² the court leaves open the question whether a testifying offi-

concurring).

36. *Id.* at 1085 n.2, 820 P.2d at 275 n.2, 2 Cal. Rptr. 2d at 173 n.2 (Mosk, J., concurring).

37. *Id.* at 1087, 820 P.2d at 276, 2 Cal. Rptr. 2d at 174 (Kennard, J., concurring and dissenting).

38. *Id.* at 1088-89, 820 P.2d at 277, 2 Cal. Rptr. 2d at 175 (Kennard, J., concurring and dissenting).

39. CAL. CONST. art. I, § 30(b) (1990).

40. *Whitman*, 54 Cal. 3d at 1088-89, 820 P.2d at 277, 2 Cal. Rptr. 2d at 175 (Kennard, J., concurring and dissenting).

41. *Id.* at 1089-90, 820 P.2d at 278, 2 Cal. Rptr. 2d at 176 (Kennard, J., concurring and dissenting). The majority, in response to this argument, pointed out that Kennard's rule would require a finding of the relationship between the officer and the out-of-court statement. *Id.* at 1075, 820 P.2d at 268, 2 Cal. Rptr. 2d at 166.

42. Most reviews of *Whitman* have implied that reader testimony is always inadmissible. See Richard Barbieri, *Hearsay Evidence Restricted*, THE RECORDER, December 10, 1991, at 15 ("the court . . . dispensed with the use of so-called reader officers"); William Carlsen, *State Top Court Upholds Key Portion of Prop. 115*, SAN

cer may relate parts of a report in which the investigating officer states events he witnessed himself.⁴³

The logical interpretation would be to allow statements by the investigating officer made in his capacity as a witness, and strike out any double hearsay. The court would presumably do this with civilian witnesses in any event. This interpretation is consistent with the rationale of the case, but it would complicate a procedure that Proposition 115 intended to simplify. Arguably, however, even a complex procedure is more efficient than doing without the hearsay exception at all.

ADAM L. JOHNSON

V. CRIMINAL PROCEDURE

- A. *Under Penal Code section 1538.5(i), the government may recall at a second hearing those prosecution witnesses who testified previously at a preliminary hearing even when the defendant has presented no new evidence: People v. Hansel.*

In *People v. Hansel*,¹ the California Supreme Court considered wheth-

FRANCISCO CHRON., Dec. 10, 1991, at A14 ("the police officer who testifies . . . cannot be simply a "reader" who relates what is in a police report"). *But see* Philip Hager, *Key Portion of Prop. 115 OK'd by High Court*, L.A. TIMES, December 10, 1991, at A3 (avoiding such implication by focusing on the requirement that the officer have sufficient outside knowledge to admit hearsay).

43. Justice Kennard's solution permitting a testifying officer to relate only out-of-court statements by civilians avoids such problems. However, it would also disqualify valuable evidence that the testifying officer could offer regarding out-of-court statements the investigating officer makes as a witness himself.

1. 1 Cal. 4th 1211, 824 P.2d 694, 4 Cal. Rptr. 2d 888 (1992). Justice Panelli wrote the opinion for a unanimous court consisting of Chief Justice Lucas and Justices Mosk, Kennard, Arabian, Baxter, and George. The defendants, charged with possession for sale of methamphetamine, possession of cocaine, and possession for sale of marijuana, moved to suppress evidence obtained by police officers under suspect circumstances. The sole witness testifying at the preliminary hearing was a police officer called by the people. Upon denial of the motion to suppress, the defendants renewed the motion at a special hearing before the superior court. The prosecution attempted to recall the officer as a witness, but was prohibited from doing so because the defendants had not presented any new evidence. The defendants' motion to suppress was granted and the court dismissed the case after the people expressed an inability to proceed without the suppressed evidence. *Id.* at 1214-16, 824 P.2d at 696, 4 Cal. Rptr. 2d at 890.

er, under Penal Code section 1538.5(i),² the prosecution may recall witnesses at a second hearing when the defendant has presented no new evidence.³ The court held that the statute imposed no limitation upon the people's right to recall prosecution witnesses at a renewed suppression hearing.⁴ The court adopted a literal interpretation of section 1538.5(i), reasoning that the statute's clear and unambiguous language precluded any need for extrinsic evidence of legislative intent.⁵

In ruling that the trial court had erred in refusing to allow the prosecution to recall witnesses when the defendants had presented no new evidence, the supreme court clarified the meaning of Penal Code section 1538.5(i).⁶ The court specifically declined to follow the statutory inter-

The court of appeal affirmed the dismissal and ruled that the prosecution could not recall a witness at the special hearing unless the defendant presented new evidence. *People v. Hansel*, 234 Cal. App. 3d 572, 577-78, 277 Cal. Rptr. 854, 857 (1991) (citing *People v. Anderson*, 210 Cal. App. 3d 24, 28, 258 Cal. Rptr. 125, 127 (1989) (interpreting Penal Code section 1538.5(i) as merely allowing the prosecution to recall witnesses who testified at the preliminary hearing in opposition to evidence which the defendant presented at trial)). The California Supreme Court reversed that holding. 1 Cal. 4th at 1224, 824 P.2d at 702, 4 Cal. Rptr. 2d at 896.

2. See generally Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 966 (1983) (describing the exclusionary rule and its effect on the prosecutor's role at trial).

3. CAL. PENAL CODE § 1538.5(i) (West Supp. 1992). The relevant part of this section states that "evidence presented at the special hearing shall be limited to the transcript of the preliminary hearing and to evidence which could not reasonably have been presented at the preliminary hearing, except that the people may recall witnesses who testified at the preliminary hearing." *Id.* See generally 4 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Exclusion Of Illegally Obtained Evidence* § 2255 (2d ed. 1989 & Supp. 1992) (discussing the effect of the 1986 amendment on the statute).

4. *Hansel*, 1 Cal. 4th at 1217, 824 P.2d at 697, 4 Cal. Rptr. 2d at 891.

5. *Id.* See also *Delaney v. Superior Court*, 50 Cal. 3d 785, 788, 789 P.2d 934, 940, 268 Cal. Rptr. 753, 760 (1990) (finding no need to resort to legislative intent when the statutory language is clear and unambiguous); *Solberg v. Superior Court*, 19 Cal. 3d 182, 198, 561 P.2d 1148, 1158, 137 Cal. Rptr. 460, 470 (1977) (same).

6. *Hansel*, 1 Cal. 4th at 1217, 824 P.2d at 697, 4 Cal. Rptr. 2d at 891 (interpreting the words "except that the people may recall witnesses who testified at the preliminary hearing" as modifying both the clause "limited to the transcript of the preliminary hearing" and the clause "evidence which could not reasonably have been presented at the preliminary hearing" in Penal Code section 1538.5(i)). The supreme court found that the statute's language was clear and unambiguous without requiring inquiry into construction or legislative intent. *Id.* at 1218, 824 P.2d at 698, 4 Cal. Rptr. 4th at 892. The court next addressed the defendants' contention that such a literal interpretation of the statute would lead to "absurd" results. *Id.* The court recognized that the statute's purpose was to substantially reduce the time expended on litigating suppression motions and concluded that a literal interpretation of the statute would be consistent with legislative intent. *Id.* See generally 21 CAL. JUR. 3D *Criminal Law* § 3184 (1985 & Supp. 1992) ("[T]he purpose of § 1538.5 subd. (i) . . . was

pretation set forth in *People v. Anderson*,⁷ as well as other evidence suggestive of legislative intent, upon which the court of appeal relied.⁸ Instead, the supreme court followed a literal interpretation of the statute and determined that recall of prosecution witnesses by the people should not be predicated upon the defendants' presentation of new evidence.⁹

While a literal reading of section 1538.5(i) may appear to convey a privilege upon the prosecution which is not similarly enjoyed by the defendants, the court found that under certain limited circumstances such inequity would not be unjust.¹⁰ The court reasoned that the defendants' opportunity to litigate for suppression of the evidence both at the preliminary hearing and in the superior court offset any potential advantage realized by the prosecution.¹¹

to eliminate duplicate litigation of issues and repeat testimony by restricting a defendant to only one full hearing on a suppression motion.") (citation omitted).

7. 210 Cal. App. 3d 24, 28, 258 Cal. Rptr. 125, 127 (1989). See *Hansel*, 1 Cal. 4th at 1216, 824 P.2d at 697, 4 Cal. Rptr. 2d at 891 (rejecting as mere dictum the opinion expressed in *Anderson* that the statute limits recall of prosecution witnesses to those witnesses who testified at the preliminary hearing in opposition to new evidence which a defendant presents in the superior court).

8. *Hansel*, 1 Cal. 4th at 1217-18, 824 P.2d at 697-98, 4 Cal. Rptr. 2d at 891-892.

9. *Hansel*, 1 Cal. 4th at 1218-19, 824 P.2d at 697-98, 4 Cal. 2d Rptr. at 891-92 ("[T]here is no need to construe the section or to look to external evidence of the intent of the Legislature."). The defendants argued that a literal reading of the statute would grant the people an unqualified right to recall witnesses without bestowing a reciprocal right upon the defendant. *Id.* at 1219, 824 P.2d at 698, 4 Cal. Rptr. 2d at 892. See, e.g., *Wardius v. Oregon*, 412 U.S. 470, 472 (1973) (finding that a statute which does not grant reciprocal discovery rights to the defendant is fundamentally unfair); *Evans v. Superior Court*, 11 Cal. 3d 617, 623, 522 P.2d 681, 685, 114 Cal. Rptr. 121, 125 (1974) (recognizing that discovery is a two-way street that should permit the defendant the same right to discover and utilize contrary evidence as the plaintiff). See generally Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85 HARV. L. REV. 994, 998-1001 (1972) (discussing balance between prosecutorial and defense discovery at trial).

10. *Hansel*, 1 Cal. 4th at 1221, 824 P.2d at 700, 4 Cal. Rptr. 2d at 894. See *Whitman v. Superior Court*, 54 Cal. 3d 1063, 1082, 820 P.2d 262, 273, 2 Cal. Rptr. 2d 160, 171 (1991) (finding that a limited exception to the general hearsay rule favoring the prosecution was not fundamentally unfair to the defendant).

11. *Hansel*, 1 Cal. 4th at 1222, 824 P.2d at 700-01, 4 Cal. Rptr. 2d at 894-95 (recognizing that the defendants had ample opportunity to cross-examine witnesses recalled by the prosecution and rebut any new evidence presented). Moreover, section 1538.5(i) neither requires the defendant to give the prosecution notice of the motion nor present a formal written motion at the preliminary hearing. See generally, 4 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Exclusion of Illegally Obtained Evidence* § 2254 (2d ed. 1989 & Supp. 1992); see, e.g., *People v. Ciraco*, 181 Cal. App. 3d 1142, 226 Cal. Rptr. 541 (1986) (holding that the defendant's motion to suppress at

The court, in addressing the defendants' due process argument, considered whether limiting the prosecution's right to recall witnesses at the special hearing absent new evidence violated the defendants' constitutional right to compulsory process.¹² The court viewed the process in its entirety to determine whether the defendants had ample opportunity to establish that the seizure was illegal.¹³ The court concluded that the process as a whole did not deny the defendants a meaningful opportunity to argue for suppression of the evidence, and affirmed the statute's constitutionality.¹⁴

The California Supreme Court's holding in *Hansel* serves to clarify Penal Code section 1538.5(i) by specifically allowing the state to recall prosecution witnesses at a second hearing regardless of whether the defendant has presented new evidence.¹⁵ The court's holding permits the prosecution to further clarify any prosecution witnesses' testimony which may have been unclear or misunderstood initially. Such ambiguities in witness testimony are likely to occur when the defendant unexpectedly moves to suppress evidence and the prosecution must call witnesses without extensive preparation.¹⁶ Therefore, by permitting the people to

a preliminary hearing may be oral and the defendant need not give prior written notice).

12. The defendants argued that such procedures violated both their federal and state constitutional rights to compulsory process. *Hansel*, 1 Cal. 4th at 1222, 824 P.2d at 701, 4 Cal. Rptr. 2d at 895. See U.S. CONST. amend. VI; U.S. CONST. amend. XIV; CAL. CONST. art. I, § 15 (1974) ("The defendant in a criminal case has the right . . . to compel attendance of witnesses in the defendant's behalf.").

13. See *Washington v. Texas*, 388 U.S. 14, 19 (1967) (recognizing that the defendant's right to present witnesses is a fundamental element of due process); see also *In re Martin*, 44 Cal. 3d 1, 29, 744 P.2d 374, 391, 241 Cal. Rptr. 263, 280-81 (1987) (acknowledging that the prosecution's interference with the defendant's presentation of witnesses would violate the defendant's constitutional right to compulsory process); *People v. Warren*, 161 Cal. App. 3d 961, 971, 207 Cal. Rptr. 912, 917 (1984) (explaining that the defendant's right to present witnesses is fundamental to establishing a defense).

14. *Hansel*, 1 Cal. 4th at 1223, 824 P.2d at 701, 4 Cal. Rptr. 2d at 895. The court recognized that the defendants had two opportunities to litigate the seizure's illegality, as well as the right to call rebuttal witnesses had the prosecution presented new evidence. *Id.* at 1222-23, 824 P.2d at 701, 4 Cal. Rptr. 2d at 895.

15. *Hansel*, 1 Cal. 4th at 1218, 824 P.2d at 698, 4 Cal. Rptr. 2d at 892 ("We understand the words of section 1538.5, subdivision (i), to mean . . . the People have an unqualified right to recall witnesses at the special hearing.")

16. The court's interpretation of the statute did not entail a full *de novo* hearing, thereby furthering the legislative goal behind Penal Code section 1538.5(i) to eliminate duplicate litigation of issues. *Id.* at 1218, 824 P.2d at 698, 4 Cal. Rptr. 2d at 892; see 21 CAL. JUR. 3D *Criminal Law* § 3184 (1985 & Supp. 1992). See generally Diann L. Smith & Kimberly A. Berger, Nineteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1988-1989, 78 GEO. L.J. 956 (1990) (discussing the constitutional complexities which the prosecutor faces during discovery in

recall prosecution witnesses, the court has refined the discovery process surrounding section 1538.5 and has advanced the legislative goal of reducing the judicial resources expended upon such litigation.

JAMES J. MOLONEY

- B. *Under Article I, Section 15 of the California Constitution, a criminal is denied the right to counsel when represented by an attorney who, unknown to the defendant, has been suspended from the practice of law and has resigned from the state bar while disciplinary charges are pending: In re Johnson.*

*In re Johnson*¹ presents the issue of whether a defendant is denied the constitutional right to counsel, as a matter of law, when represented by an attorney who, unknown to the defendant, has resigned from membership in the state bar with disciplinary charges pending.² The California

preliminary proceedings).

1. 1 Cal. 4th 689, 822 P.2d 1317, 4 Cal. Rptr. 2d 170 (1992). Justice Baxter wrote the majority opinion, in which Chief Justice Lucas and Justices Panelli, Arabian, and George joined. Justice Kennard wrote separately, concurring in part and dissenting in part, joined by Justice Mosk. The defendant, represented by Mr. Raymond E. Hane, was convicted of selling cocaine in violation of Health and Safety Code section 11352. See CAL. HEALTH & SAFETY CODE § 11352 (West 1991). Prior to the representation, and unknown to the defendant, the state bar had suspended Mr. Hane from the practice of law for conviction of lewd and lascivious conduct with a child, a crime of moral turpitude. See 1 B. WITKIN, CALIFORNIA PROCEDURE, *Attorneys* § 375 (3d ed. 1985) (describing crimes involving moral turpitude). See generally Linda Capel-Galiber, *Disciplinary Action Against Attorneys for Crimes of Moral Turpitude*, 31 How. L.J. 313, 322 (1988) (analyzing several jurisdictions' definitions of moral turpitude and concluding that they typically encompass crimes which involve fraud, deceit, dishonesty, depraved violation of an accepted or customary societal duty, or harm to another for personal gain). On appeal, the defendant filed a petition for writ of habeas corpus, arguing that he had been denied both his federal and state rights to competent counsel and due process. The defendant further contended that counsel's failure to inform him of the conviction and suspension from practice deprived him of the right to private counsel of choice. The court of appeal affirmed the judgment and denied the petition. *In re Johnson*, 231 Cal. App. 3d 1124, 1138, 273 Cal. Rptr. 446, 455 (1990). The California Supreme Court granted review only on the order denying the petition for writ of habeas corpus and reversed that denial. *In re Johnson*, 1 Cal. 4th at 702, 822 P.2d at 1324, 4 Cal. Rptr. 2d at 177.

2. *In re Johnson*, 1 Cal. 4th at 696, 822 P.2d at 1318, 4 Cal. Rptr. 2d at 169. Suspension at the time of representation, without more, does not warrant reversal of the

Supreme Court held that representation by an attorney who formerly resigned from the state bar, has disciplinary proceedings pending, and has been placed on "inactive status," denies the defendant his constitutional right to counsel.³ The court, however, stopped short of concluding that such conduct denied the defendant the right to counsel as a matter of law.⁴

Although the court recognized that holding oneself out as practicing law while under suspension is both unlawful and contemptuous,⁵ it recognized that suspension alone for such conduct does not create a presumption of incompetence under Business and Professions Code section 6102.⁶ In doing so, the court considered the legislative goal of subjecting

conviction as a matter of law. *See* *People v. Medler*, 177 Cal. App. 3d 927, 930, 223 Cal. Rptr. 401, 402 (1986) (reversal not warranted where state bar suspended attorney from practice for non-payment of state bar dues without an additional showing that representation was inadequate or ineffective). Courts may impose a per se rule of reversibility, however, when there is evidence calling into question an attorney's ability to provide effective assistance of counsel. *See* *People v. Hinkley*, 193 Cal. App. 3d 383, 392, 238 Cal. Rptr. 272, 277 (1987) (finding deprivation of Sixth Amendment right to counsel where suspension related to competency in representing clients or to personal qualities of attorney).

3. *In re Johnson*, 1 Cal. 4th at 693-94, 822 P.2d at 1318-19, 4 Cal. Rptr. 2d at 171-72.

4. *Id.* at 700, 822 P.2d at 1323, 4 Cal. Rptr. 2d at 176.

5. *Id.* at 697 n.2, 822 P.2d at 1320 n.2, 4 Cal. Rptr. 2d at 171 n.2. It is both unlawful and a contempt to hold oneself out as practicing or entitled to practice law while suspended from membership in the state bar or after resigning from the state bar with charges pending. *See* CAL. BUS. & PROF. CODE §§ 6126-6127 (West 1990 & Supp. 1992) (punishable by imprisonment in the state prison or county jail). *See generally* Robert L. Miller, "Beware of Coyotes": A Commentary on the Unauthorized Practice of Law, 47 CAL. ST. B.J. 237 (1972); John C. Toews, *Unauthorized Practice Statutes and the Rights of Out-of-State Attorneys*, 40 S. CAL. L. REV. 569 (1966-67) (discussing state interest in requiring practicing attorneys to be members of the state bar and analyzing the underlying policies of state attorney-licensing statutes).

6. *In re Johnson*, 1 Cal. 4th at 696, 822 P.2d at 1320, 4 Cal. Rptr. 2d at 173. "An attorney who is professionally competent does not become any less competent upon the filing of an order made pursuant to section 6102 suspending the attorney from practice." *Id.* at 697, 822 P.2d at 1321, 4 Cal. Rptr. 2d at 174. The supreme court retains the power to prescribe the rules for the practice and procedure governing suspension and disbarment proceedings pursuant to sections 6101 and 6102. CAL. BUS. & PROF. CODE § 6102(g) (West 1990). *See generally* Richard Green Wallace, Comment, *Attorney Discipline and the California Supreme Court: Transfer of Direct Review to the Courts of Appeal*, 72 CAL. L. REV. 252 (1984) (providing an overview of the current disciplinary system in California and outlining the supreme court's role in upholding the integrity of the bar). The supreme court has typically viewed the act of moral turpitude in the context of its surrounding facts and circumstances. *See In re Kristovich*, 18 Cal. 3d 468, 472, 556 P.2d 771, 773, 134 Cal. Rptr. 409, 411 (1976) (recognizing that a court is not restricted to the elements of the crime, but may look to the entire course of an attorney's conduct in evaluating his or her fitness to practice law); *In re Wright*, 10 Cal. 3d 374, 376, 515 P.2d 292, 293, 110 Cal. Rptr. 348,

attorneys to disciplinary action for criminal wrongdoing and violations of the Rules of Professional Conduct.⁷ The court evaluated whether counsel's conduct, which the court found to be an act of moral turpitude, accurately reflected the attorney's honesty and ability to carry out his professional duties.⁸ Further, the court recognized that while most crimes that call into question an attorney's competence and qualifications constitute an act of moral turpitude per se,⁹ the contrary proposition is not always true.¹⁰ Thus, the court reasoned that all acts of moral turpitude do not lead unequivocally to the conclusion that the individual is

349 (1973) (finding that facts and circumstances of conviction are relevant to the issue of discipline); *In re Bogart*, 9 Cal. 3d 743, 748, 511 P.2d 1167, 1171, 108 Cal. Rptr. 815, 819 (1973) (concluding that facts and circumstances of attorney's crime are admissible to determine appropriate discipline).

7. *In re Johnson*, 1 Cal. 4th at 697, 822 P.2d at 1321, 4 Cal. Rptr. 2d at 174. The court found that protecting the public from dishonest or corrupt attorneys and maintaining public confidence in the bar were the overall objectives in the discipline of attorney misconduct. *Id.* See *In re Ford*, 44 Cal. 3d 810, 816 n.6, 749 P.2d 1331, 1334 n.6, 244 Cal. Rptr. 476, 479 n.6 (1988) (quoting *In re Severo*, 41 Cal. 3d 493, 500, 714 P.2d 1244, 1247, 224 Cal. Rptr. 106, 109 (1986)) (noting that the primary purpose of attorney discipline is the protection of the public, the profession, and the courts, rather than punishment of the attorney); *In re Kristovich*, 18 Cal. 3d 468, 471-72, 556 P.2d 771, 773, 134 Cal. Rptr. 409, 411 (1976) (recognizing that the purpose of state bar disciplinary proceedings is to inquire into the moral integrity of an attorney in order to determine that individual's fitness to participate in the profession).

8. *In re Johnson*, 1 Cal. 4th at 700, 822 P.2d at 1323, 4 Cal. Rptr. 2d at 176 (finding that serious sexual offenses fall within the category of crimes involving moral turpitude, yet not necessarily determinative of one's lack of knowledge or ability). See generally Annotation, *Moral Delinquency or Other Conduct Not Affecting Court or Client as Ground for Disbarment or Suspension of Attorney*, 55 A.L.R. 1373 (1928).

9. *In re Johnson*, 1 Cal. 4th at 700, 822 P.2d at 1323, 4 Cal. Rptr. 2d at 76. Conviction of certain offenses may serve as conclusive proof of moral turpitude and has been recognized traditionally as calling into question an attorney's professional integrity. See, e.g., *In re Kristovich*, 18 Cal. 3d 468, 556 P.2d 771, 134 Cal. Rptr. 409 (1976) (perjury); *In re Dedman*, 17 Cal. 3d 229, 550 P.2d 1040, 130 Cal. Rptr. 504 (1976) (falsifying documents); *In re Fahey*, 8 Cal. 3d 842, 505 P.2d 1369, 106 Cal. Rptr. 313 (1973) (dishonesty for personal gain); *In re Bogart*, 9 Cal. 3d 743, 511 P.2d 1167, 108 Cal. Rptr. 815 (1973) (forgery); *In re Hallinan*, 43 Cal. 2d 243, 272 P.2d 768 (1954) (intent to defraud).

10. *In re Johnson*, 1 Cal. 4th at 698, 822 P.2d at 322, 4 Cal. Rptr. 2d at 175. Examination of the facts and circumstances of a case may be necessary to determine whether moral turpitude is involved. *In re Strick*, 34 Cal. 3d 891, 896, 671 P.2d 1251, 1253, 196 Cal. Rptr. 509, 511 (1983) (holding that a conviction for passing a forged prescription for a controlled substance was by itself insufficient to determine whether the offense involved moral turpitude warranting discipline).

unfit to practice law or lacks knowledge of the law.¹¹

Recognizing the inherent limitation of the inferences which may be drawn from acts of moral turpitude, the court turned to the defendant's right to counsel as guaranteed under the California Constitution, Article I, section 15.¹² Once an attorney resigns from membership in the state bar, the attorney is no longer licensed to practice law in that state.¹³ The court refrained from holding that the attorney's suspension alone was sufficient to establish incompetence as a matter of law.¹⁴ Instead, the court found that the defendant was denied the right to counsel because the defendant's attorney had submitted his resignation from state bar membership while charges were pending against him.¹⁵

Thus, the *Johnson* court held that an attorney's suspension from the bar alone does not establish the attorney's incompetence as a matter of law.¹⁶ Mere suspension from practice in conjunction with the representa-

11. *In re Johnson*, 1 Cal. 4th at 698, 822 P.2d at 1322, 4 Cal. Rptr. 2d at 175. "[T]he commission of some crimes, standing alone, [do] not implicate an attorney's fitness to practice law." *In re Strick*, 43 Cal. 3d 644, 653, 738 P.2d 743, 749, 238 Cal. Rptr. 397, 403 (1987). See *In re Higbie*, 6 Cal. 3d 562, 569-70, 493 P.2d 97, 101, 99 Cal. Rptr. 865, 869 (1972); *In re Rothrock*, 16 Cal. 2d 449, 453-54, 106 P.2d 907, 910 (1940). "Erring morally or by breach of professional ethics does not necessarily indicate a lack of knowledge of the law." *Friday v. State Bar*, 23 Cal. 2d 501, 508, 144 P.2d 564, 568 (1943).

12. *In re Johnson*, 1 Cal. 4th at 698, 822 P.2d at 1323, 4 Cal. Rptr. 2d at 176. See CAL. CONST. art. I, § 15 (1983).

13. *In re Johnson*, 1 Cal. 4th at 702, 822 P.2d at 1324, 4 Cal. Rptr. 2d at 177. See CAL. BUS. & PROF. CODE § 6117 (West 1990); 7 CAL. JUR. 3D *Attorneys at Law* § 66 (1989 & Supp. 1992). See generally Elizabeth Michelman, *Guiding the Invisible Hand: The Consumer Protection Function of Unauthorized Practice Regulation*, 12 PEPP. L. REV. 1 (1984) (discussing the regulation of the practice of law and the effort to ensure a high level of competence in the legal profession); Philbrick McCoy, *The Dilemma of Suspended and Disbarred Attorneys*, 15 L.A. B. BULL. 285 (1940) (outlining the traditionally permitted and prohibited activities of attorneys).

14. *In re Johnson*, 1 Cal. 4th at 702, 822 P.2d at 1324, 4 Cal. Rptr. 2d at 177.

15. *Id.* The court reversed the order denying the defendant's petition for writ of habeas corpus, vacated the judgment against the defendant, and remanded the case to the superior court for further proceedings. *Id.* Justice Kennard concurred with the result here, but disagreed with the majority's refusal to hold that the attorney's suspension for a crime of moral turpitude denied the defendant the right to qualified counsel. *Id.* at 705, 822 P.2d at 1326, 4 Cal. Rptr. 2d at 179 (Kennard, J., concurring and dissenting). Justice Kennard reasoned that conviction for a serious sexual offense was conclusive proof of moral turpitude and that suspension for such a crime was a substantive defect, thereby rendering the attorney unfit to practice law. *Id.* (Kennard, J., concurring and dissenting) (citing *In re Duggan*, 17 Cal. 3d 416, 422, 551 P.2d 19, 22, 130 Cal. Rptr. 715, 718 (1976)) (finding that conviction of certain crimes, such as those which necessarily involve an intent to defraud, intentional dishonesty for personal gain, murder, and serious sexual offenses, establishes moral turpitude as a matter of law).

16. *In re Johnson*, 1 Cal. 4th at 700, 822 P.2d at 1323, 4 Cal. Rptr. 2d at 176.

tion of a defendant will not constitute a per se denial of the defendant's constitutional right to counsel.¹⁷ In such circumstances, it is necessary for the defendant to show that the attorney's misconduct or act of moral turpitude reflects negatively upon the attorney's competence to practice law or otherwise calls into question the attorney's professional integrity.¹⁸

JAMES J. MOLONEY

- C. *When the court erroneously imposes a restitution fine by failing to advise of plea consequences or imposing punishment in excess of plea bargain terms, appropriate remedies are reducing the fine to the statutory minimum, or allowing the defendant to withdraw his plea, depending on the situation: People v. Walker.*

I. INTRODUCTION

The supreme court granted review in *People v. Walker*¹ to resolve a

17. *Id.* at 701, 822 P.2d at 1323, 4 Cal. Rptr. 2d at 176. Where, however, the attorney is no longer licensed to practice law in the state, the court need not weigh the attorney's competence, but instead may find that the right to counsel was violated. *Id.*

18. See *supra* note 6 (indicating that such an analysis should occur on a case-by-case basis, taking into consideration the surrounding facts and circumstances).

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

Walker was charged with two felony counts in connection with a bomb he allegedly placed in his ex-wife's car. Pursuant to a plea bargain, count one was dismissed, and Walker pleaded guilty to count two (attempted use of a destructive device with the intent to injure or intimidate, under California Penal Code § 12303.3). The probation report supplied to the defense recommended a \$7000 restitution fine in accordance with California Government Code § 13967(a), which requires a mandatory fine of \$100-\$10,000. See *infra* note 8. However, no other mention of a restitution fine was made prior to sentencing. *Walker*, 54 Cal. 3d at 1018-19, 819 P.2d at 683-84, 1 Cal. Rptr. 2d at 905. Upon entering his plea, the court advised Walker that the maximum penalty for the offense was a prison term and a fine of up to \$10,000. *Id.* Apparently the court was referring to a possible punitive fine. The court made no California Penal Code § 1192.5 advisements. *Id.* See *infra* note 17.

Walker was sentenced immediately after entering the guilty plea, in accordance with the terms of the plea bargain. *Walker*, 54 Cal. 3d at 1018-19, 819 P.2d at 683-84, 1 Cal. Rptr. 2d at 905. In addition, the court imposed a restitution fine of \$5000 that had not been part of the plea bargain. *Id.* Walker did not object to the fine at sentencing. *Id.*

conflict in the courts of appeal over the proper means of remedying the erroneous imposition of restitution fines. The confusion stemmed mainly from the difficulty of reconciling statutory requirements with certain principles regarding plea bargains.² The unanimous opinion stated the rules regarding such error and the remedies appropriate in each situation.³ In sum, when error in failing to advise of a mandatory restitution fine is not raised at or before sentencing, the error is waived.⁴ If the objection is timely and the defendant is prejudiced, the court must reduce the fine to the statutory minimum or allow the defendant to withdraw his plea.⁵ When a mandatory restitution fine significantly exceeds the terms of a plea agreement, and a California Penal Code Section 1192.5 admonition is not given, the error is not waived by acquiescence and may not be deemed harmless. In addition, the court must reduce the fine to the statutory minimum or allow the defendant to withdraw his plea.⁶ When such error is raised after sentencing, the proper remedy is to reduce the fine to the statutory minimum.⁷

When a person is convicted of a felony, the court can impose a punitive fine, a restitution fine, or both.⁸ Unlike the punitive fine, however, the restitution fine in felony cases is mandatory, ranging from one hundred to ten thousand dollars. The fine may only be waived if the court finds there are "compelling and extraordinary reasons" for doing so.⁹

Before a defendant pleads guilty, he must knowingly and intelligently waive his constitutional rights.¹⁰ The court must also question the defen-

Walker appealed on the ground that the fine was not part of the plea bargain and should be stricken. The court of appeal found error, but held that the only remedy was to allow Walker to withdraw his guilty plea and reinstate the dismissed count. *Id.* The supreme court granted review to determine which remedy was proper. *Id.*

2. *Id.* at 1019-20, 819 P.2d at 864, 1 Cal. Rptr. 2d at 906.

3. *Id.* Justice Arabian wrote the opinion of the court in which Chief Justice Lucas, and Justices Mosk, Panelli, Kennard, Baxter, and George concurred.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 1030, 819 P.2d at 871, 1 Cal. Rptr. 2d at 913.

8. *Id.* at 1019, 819 P.2d at 864, 1 Cal. Rptr. 2d at 905. See CAL. PENAL CODE §§ 672, 1202.4(a), 12303.3 (West 1982 & Supp. 1992) (penal fine of up to \$10,000 may be imposed); CAL. GOV'T CODE § 13967(a) (West Supp. 1992) (mandatory restitution fine of at least \$100 and no more than \$10,000); see generally 3 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crimes* §§ 1320, 1325 (2d ed. 1988) (fines, in general and restitution).

9. CAL. PENAL CODE § 1202.4(a) (West Supp. 1992) (stating that the court must record the reasons supporting the waiver).

10. *Walker*, 54 Cal. 3d at 1020, 819 P.2d at 864, 1 Cal. Rptr. 2d at 905 (citing *Boykin v. Alabama*, 395 U.S. 238 (1969); *In re Tahl*, 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969)). See generally 4 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL

dant to be sure the accused understands the plea and its consequences.¹¹ Admonition of one's constitutional rights is constitutionally mandated,¹² but advisement as to the consequences of a plea is a judicially declared rule of criminal procedure, with two consequences relevant here. A court's failure to explain the consequences of a plea is waived absent a timely objection. Furthermore, an uninformed waiver can only be set aside if the error is prejudicial to the defendant.¹³

The second maxim, distinct from advisement, is that the parties must be strictly held to the terms of a plea bargain.¹⁴ Adherence is mandated by due process.¹⁵ Thus, a constitutional right to a remedy exists when a state agent violates the terms of a plea bargain.¹⁶ This right may be waived, however, if no objection is made, and the trial court has complied with the requirements of section 1192.5 of the Penal Code.¹⁷ If the

LAW, *Proceedings Before Trial* §§ 2149-52, 2200 (2d ed. 1989) (specifying knowing and intelligent waiver of rights as requirement for valid plea; knowledge of rights in general); 21 CAL. JUR. 3D *Criminal Law* § 2816 (1985 & Supp. 1991) (waiver of constitutional rights); 22 C.J.S. *Criminal Law* § 403 (1989 & Supp. 1991) (court's duty to advise).

11. *Walker*, 54 Cal. 3d at 1022, 819 P.2d at 864, 1 Cal. Rptr. 2d at 905, 907. See generally 4 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Proceedings Before Trial* §§ 2159-60 (2d ed. 1989); 21 CAL. JUR. 3D *Criminal Law* § 2817 (1985 & Supp. 1991); 22 C.J.S. *Criminal Law* § 404 (1989 & Supp. 1991) (advisement as to consequences of plea).

12. A constitutionally mandated admonition differs from a judicially declared rule in that failure to admonish of constitutional rights requires the plea to be set aside. *Walker*, 54 Cal. 3d at 1020, 1022, 819 P.2d at 864, 866, 1 Cal. Rptr. 2d at 905, 907.

13. *Id.*

14. *Walker*, 54 Cal. 3d at 1020, 1024, 818 P.2d at 864, 1 Cal. Rptr. 2d at 906 (citing *People v. Mancheno*, 32 Cal. 3d 855, 654 P.2d 211, 187 Cal. Rptr. 441 (1982)). See also *People v. Glennon*, 225 Cal. App. 3d 101, 104, 276 Cal. Rptr. 1, 4 (1990). See generally 4 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Proceedings Before Trial* §§ 2179-80, 2212-16 (2d ed. 1989) (plea bargains in general, nonperformance of plea bargain, and remedies); 21 CAL. JUR. 3D *Criminal Law* § 2824 (1985 & Supp. 1991) (breach of agreement and remedies); 22 C.J.S. *Criminal Law* §§ 365, 368, 373-74 (1989 & Supp. 1991) (plea bargain in general, contractual nature, performance, breach, and remedies).

15. *Mancheno*, 32 Cal. 3d at 860, 654 P.2d at 214, 187 Cal. Rptr. at 444.

16. *Id.* See also *Glennon*, 225 Cal. App. 3d at 104, 276 Cal. Rptr. at 2. See generally Peter Westen & David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CAL. L. REV. 41, 474-75 n.10, 476 n.16 (1978).

17. CAL. PENAL CODE § 1192.5 (West 1982 & Supp. 1992). This section provides that when a plea bargain is accepted by the court, the defendant "cannot be sentenced on such a plea to a punishment more severe than that specified in the plea." In addition, when the court approves the plea, it must inform the defendant of the

trial court has not followed the requirements of section 1192.5, failure to object is not deemed to be a waiver of these rights.¹⁸ In addition, violation of a plea bargain is not subject to harmless error analysis because of the importance of the right breached.¹⁹

Appellate court cases leading up to *Walker* involved violations of advisement requirements, the plea bargain, or both. Typically, defendants were not advised of the mandatory fine until sentencing, claimed that it exceeded the terms of a plea bargain, and that they should therefore be entitled to a remedy. Confronted with this error, the courts have (1) granted no relief;²⁰ (2) ordered the fine stricken;²¹ and (3) allowed the defendant to withdraw his guilty plea.²² As discussed below, the California Supreme Court explained that "the proper remedy depends on the nature of the error, and the time and manner in which it is brought to the attention of the court."²³

II. TREATMENT

The court discussed the background of the case, the advisement issue, the violation of the plea bargain issue, the appropriate remedy, and then

following:

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

Id. Regarding uninformed waiver of the right to object, see *Walker*, 54 Cal. 3d at 1025-26, 819 P.2d at 868-69, 1 Cal. Rptr. 2d at 909-10.

18. *Walker*, 54 Cal. 3d at 1024-26, 819 P.2d at 867-69, 1 Cal. Rptr. 2d at 909-10.

19. *Id.* See also *Mancheno*, 32 Cal. 3d at 865, 654 P.2d at 218, 187 Cal. Rptr. at 448.

20. *People v. Melton*, 218 Cal. App. 3d 1406, 267 Cal. Rptr. 640 (1990) (holding defendant waived his right to challenge restitution fine on appeal since fine was mentioned in probation report); *People v. Davis*, 205 Cal. App. 3d 1305, 252 Cal. Rptr. 924 (1988) (recognizing violation of advisement requirement and plea bargain, but denying relief on grounds of public policy and no prejudice to defendant from the small \$100 fine).

21. *People v. Ross*, 217 Cal. App. 3d 879, 265 Cal. Rptr. 921 (1990) (reasoning that failure of advisement was a "compelling and extraordinary reason" for waiving the fine); *People v. Oberreuter*, 204 Cal. App. 3d 884, 251 Cal. Rptr. 522 (1988) (giving precedence to plea violation over mandatory restitution fine, and striking fine altogether); see *supra* note 9 and accompanying text; see also *People v. Williams*, 224 Cal. App. 3d 179, 273 Cal. Rptr. 526 (1990) (agreeing with both *Ross* and *Oberreuter*).

22. *People v. Glennon*, 225 Cal. App. 3d 101, 276 Cal. Rptr. 1 (1990) (noting that relief is only appropriate if the failure to advise is prejudicial to the defendant, but allowing the defendant to withdraw his plea, since the trial court advised the defendant he could withdraw if the indicated disposition was not the sentence imposed).

23. *Walker*, 54 Cal. 3d at 1022, 819 P.2d at 866, 1 Cal. Rptr. 2d at 907.

analyzed the situation. Regarding advisement of the consequences of the plea, the court stated that where failure to advise is the only error, the error is waived if not raised at or before sentencing.²⁴ If timely raised, "the sentencing court must determine whether the error prejudiced the defendant, i.e., whether it is reasonably probable the defendant would not have pleaded guilty if properly advised."²⁵ When there is no prejudice, the defendant is not entitled to relief. If the objection is timely and there is prejudice, the defendant is entitled to a remedy. The court analogized this result to the violation of a plea bargain which is brought to the attention of a court.²⁶

As discussed above, a defendant waives the right to object to punishment exceeding the terms of a plea bargain if section 1192.5 is complied with, and if no objection is made at or before sentencing. In such a case, the defendant is not entitled to relief. If the requirements of section 1192.5 are not complied with, or if the defendant objects to the violation of the plea bargain, the defendant is entitled to a remedy.²⁷

The court stated that in both cases the trial court must impose either the statutory minimum, or give the defendant the option to withdraw the plea.²⁸ The appellate court decisions granted no relief, struck the fine, or allowed the defendant to withdraw his guilty plea. The court cautioned that striking out the fine here, however, was not appropriate because the fine was mandatory.²⁹ Additionally, in many cases, allowing the defendant to withdraw his guilty plea is "undesirable."³⁰ The middle ground between these two extremes is to simply reduce the mandatory fine to the statutory minimum.

24. *Id.* at 1022-24, 819 P.2d at 866-67, 1 Cal. Rptr. 2d at 907-08.

25. *Id.* at 1022, 819 P.2d at 866, 1 Cal. Rptr. 2d at 907 (citing *Glennon*, 225 Cal. App. 3d at 105, 276 Cal. Rptr. at 3). "The court should consider the defendant's financial condition, the seriousness of the consequences of which the defendant was advised, the nature of the crimes charged, the punishment actually imposed, and the size of the restitution fine." *Id.* (citing *People v. Wright*, 43 Cal. 3d 487, 499, 729 P.2d 260, 267, 233 Cal. Rptr. 69, 76 (1987); *People v. Melton*, 218 Cal. App. 3d 1406, 1408 n.1, 267 Cal. Rptr. 640, 641 n.1 (1990)). The court emphasized that the size of the fine is particularly important. *Id.*

26. *Walker*, 54 Cal. 3d at 1022, 819 P.2d at 866, 1 Cal. Rptr. 2d at 907.

27. *Id.* at 1024-26, 819 P.2d at 867-69, 1 Cal. Rptr. 2d at 908-10.

28. *Id.* at 1026-29, 819 P.2d at 869-71, 1 Cal. Rptr. 2d at 910-12.

29. *Id.* at 1027, 819 P.2d at 869, 1 Cal. Rptr. 2d at 910.

30. *Id.* The court emphasized the important role plea bargains play in facilitating efficient disposition of cases, and in sparing victims the trauma and inconvenience of trial. It reasoned that the legislature could not have intended the fine to invalidate a plea where the victims could be harmed by such invalidation. *Id.*

Reduction of the fine to this negligible level would not violate a plea bargain since only a punishment *significantly* greater than that bargained for violates the plea bargain.³¹ Because of the serious nature of the felony crimes under which the mandatory fine obtains, the court ruled that a one-hundred-dollar fine is not, as a matter of law, significant.³² The result is substantial compliance with the terms of the plea bargain without violating the mandatory requirement of a fine. The court reasoned that the reduction would generally not prejudice the defendant or prosecution since a fine crucial to the plea bargain would not have been overlooked in negotiations.³³

The court went on to say that both reduction of the fine, and the option to withdraw the plea, were acceptable remedies within the court's discretion if violation of the plea bargain is raised at or before sentencing.³⁴ The appropriate remedy depends on the circumstances of each case.³⁵ However, if the breach of the plea bargain is first brought to the court's attention after sentencing, the proper remedy is generally to reduce the fine to the statutory minimum and leave the plea intact.³⁶ This is because after sentencing, the factors tilt heavily in favor of not disturbing the plea.³⁷

In the instant case, the trial court advised the defendant of the possibility of a punitive fine up to ten thousand dollars, but did not advise of the mandatory restitution fine between one hundred and ten thousand dollars. Since the defendant did not object at or before sentencing, however, he waived any objection to the error. In addition, because at sentencing the restitution fine was five thousand dollars and no punitive fine was imposed, making the total fine less than the possible punitive fine of

31. *Id.* at 1024, 819 P.2d at 867, 1 Cal. Rptr. 2d at 909. *See also* Santobello v. New York, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."). *See generally* 22 C.J.S. *Criminal Law* § 373 (1989 & Supp. 1991).

32. *Walker*, 54 Cal. 3d at 1027, 819 P.2d at 869, 1 Cal. Rptr. 2d at 911.

33. *Id.* at 1028, 819 P.2d at 870, 1 Cal. Rptr. 2d at 911.

34. *Id.*

35. *Id.* "Factors to be considered by the trial court [in determining the appropriate remedy] are the importance of imposing a greater restitution fine, the interests of the parties and victims, whether circumstances have changed between entry of the plea and the time of sentencing, and whether reducing the fine will constrain the court to a disposition that it determines to be inappropriate." *Id.* (citing *People v. Mancheno*, 32 Cal. 3d 855, 860, 654 P.2d 211, 214, 187 Cal. Rptr. 441, 444 (1982)).

36. *Id.*

37. The defendant may have completed a portion of his prison term or relied on the sentence in some other way. Victims' memories may have dimmed with the passage of time, or victims may be traumatized at the thought of a trial regarding a crime they thought had been resolved. In addition, a restitution fine may not even cover the costs of a new trial. *Id.* at 1028-29, 819 P.2d at 870, 1 Cal. Rptr. 2d at 912.

which the defendant was advised, the defendant was not prejudiced by the error.³⁸

However, the five-thousand-dollar fine was a significant deviation from the terms of the plea bargain. Since the court gave no section 1192.5 warning, the defendant did not waive his right to object to punishment greater than the plea bargain. It was acceptable to raise this objection on appeal, and since harmless error analysis did not apply, the defendant was entitled to the sole remedy for such error on appeal: the reduction of the fine to the statutory minimum of one hundred dollars.³⁹

The court stressed that the rules advanced only applied to judicial error.⁴⁰ The court admonished trial courts to always advise felony defendants of the mandatory fine, as well as comply with section 1192.5. It also approved appellate court dicta suggesting trial court judges should follow an informal "script" in taking pleas, or require defendants to sign forms specifying all the consequences of their pleas, so as to avoid the need for the rules.⁴¹

III. CONCLUSION

The court would rather have lower courts avoid error altogether than apply the remedies announced in this case. Trial courts should require the defendant to sign a form enumerating *all* the consequences of a plea, or develop a plea bargain acceptance "script." Failing that, the court has announced clear rules regarding the proper remedies to be applied.

When the error to advise of a mandatory fine is not raised at or before sentencing, the error is waived. If timely raised, and it has prejudiced the defendant, the court must reduce the fine to the statutory minimum, or allow the defendant to withdraw his plea.

When a mandatory fine significantly exceeds the terms of a plea agreement, and a section 1192.5 admonition is not given, the error is not waived by acquiescence and may not be deemed harmless. The trial court must reduce the fine or allow the defendant to withdraw his plea. When such error is raised after sentencing, the proper remedy is to re-

38. *Id.* at 1029-30, 819 P.2d at 871, 1 Cal. Rptr. 2d at 912.

39. *Id.*

40. *Id.* at 1030, 819 P.2d at 871, 1 Cal. Rptr. 2d at 913.

41. *Id.* (approving dicta in *People v. Melton*, 218 Cal. App. 3d 1406, 1409 n.2, 267 Cal. Rptr. 640, 642 n.2 (1990)). See *In re Ibarra*, 34 Cal. 3d 277, 285, 666 P.2d 980, 984, 193 Cal. Rptr. 538, 542 (1983) (suggesting written plea form or judicial script specifying all serious consequences of the plea).

duce the fine to the statutory minimum.

The court's decision should clear up the confusion in determining the appropriate remedy for the erroneous imposition of a restitution fine. The only "soft" areas of the rules are in determining prejudice when there is failure to advise the defendant, and in determining whether a fine significantly exceeds the terms of a plea bargain. The court has provided guidelines for determining prejudice and significance, but the standards will most likely be fleshed out on a case-by-case basis. The court has provided some guidance by concluding that five thousand dollars significantly exceeds a plea bargain's terms where no fine is mentioned, as well as holding that one hundred dollars is not, as a matter of law, significantly excessive. Furthermore, the court's dicta proposes that the excessiveness test is stricter than the prejudice test,⁴² indicating punishment that is not prejudicial may be significantly excessive in terms of a plea bargain. Beyond these problems, the rules are bright lines and should present little difficulty in application.

ADAM L. JOHNSON

VI. DAMAGES

Under California Civil Code section 1431.2, defendants' liability for non-economic damages is limited to their proportionate share of comparative fault regardless of whether other tortfeasors at fault are subject to suit: DaFonte v. Up-Right, Inc.

Section 1431.2 of the California Civil Code states that defendants are severally, but not jointly, liable for non-economic damages in personal injury, property damage, or wrongful death actions.¹ In addition, section

42. *Walker*, 54 Cal. 3d at 1027-28 n.3, 819 P.2d at 870 n.3, 1 Cal. Rptr. 2d at 911 n.3.

1. CAL. CIV. CODE § 1431.2 (West Supp. 1992). Section 1431.2 provides:

(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(b)(1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of

1431.2 limits the liability of each defendant to his or her own percentage of fault for non-economic damages.² In *DaFonte v. Up-Right, Inc.*³ the California Supreme Court addressed the issue of whether section 1431.2 makes a defendant only severally liable for non-economic damages in cases in which other parties at fault were immune from liability or otherwise not subject to suit.⁴ Finding no exceptions to the application of section 1431.2, the court held that a third party defendant was not liable to an injured employee for non-economic damages attributable to the employer, even though the employer was statutorily immune.⁵

The court began by analyzing the plain meaning of section 1431.2.⁶ The court rejected the plaintiff's argument that section 1431.2 applied only to

earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

Id.

2. *Id.*

3. 2 Cal. 4th 593, 828 P.2d 140, 7 Cal. Rptr. 2d 238 (1992). Justice Baxter authored the unanimous opinion of the court.

4. *Id.* at 605 n. 7, 828 P.2d at 147 n. 7, 7 Cal. Rptr. 2d at 245 n. 7. The plaintiff, Mark DaFonte, an employee of Van Erickson Ranches, was injured when his arm was drawn into the conveyor belt of a mechanical grape harvester. DaFonte received workers' compensation benefits from American Insurance Company for his injuries. DaFonte then sued the manufacturer of the grape harvester, Up-Right, Inc., for negligence and product defectiveness. This suit was joined with American's subrogation claim against Up-Right, Inc. for workers' compensation benefits. By special verdict, the jury found that DaFonte was 15% at fault, Van Erickson was 45% at fault, and Up-Right, Inc. was 40% at fault. The trial court reduced the award by 15%, which was attributable to the fault of DaFonte. The trial court followed section 1431.2 and reduced the judgment against Up-Right, Inc. by 45% of the non-economic damages, which were attributable to the fault of Van Erickson. The court of appeal ruled that the trial court had improperly applied section 1431.2, and reinstated the non-economic damages attributable to Van Erickson in the judgment against Up-Right, Inc. The supreme court reversed, holding that defendants' liability for non-economic damages is limited to their proportionate share of comparative fault regardless of whether other tortfeasors at fault are subject to suit. *Id.* at 596-97, 828 P.2d at 141-42, 7 Cal. Rptr. 2d at 239-40.

5. *Id.* at 596, 828 P.2d at 141, 7 Cal. Rptr. 2d at 239.

6. *Id.* at 601, 828 P.2d at 144, 7 Cal. Rptr. 2d at 242; see *Kimmel v. Goland*, 51 Cal. 3d 202, 208-09, 793 P.2d 524, 527, 271 Cal. Rptr. 191, 194 (1990) (stating that the court must first look at the language of a statute giving effect to its plain meaning to determine legislative intent).

defendants whose liability was mutually joint and several before the enactment of the statute.⁷ The court interpreted section 1431.2 as eliminating joint liability of all defendants for non-economic damages, finding that the statute neither stated nor implied any exceptions.⁸ The court then examined Proposition 51,⁹ which was the initiative measure responsible for the enactment of section 1431.2.¹⁰ The court noted that the express purpose of Proposition 51 was to prevent defendants who possessed only a fraction of the fault from being obligated for all of the damages.¹¹ It reasoned that the only interpretation of section 1431.2 supporting this purpose was the interpretation that limited liability for non-economic damages to defendant's proportionate share of fault.¹² The court relied lastly on its prior ruling concerning Proposition 51.¹³ It held that Proposition 51 limited the potential liability of all defendants for non-economic damages to a portion equal to their share of fault.¹⁴ The court emphasized that this holding does not imply that section 1431.2 is limited to insolvent tortfeasors, but rather, that there are no exceptions

7. *DaFonte*, 2 Cal. 4th at 600-01, 828 P.2d at 144, 7 Cal. Rptr. 2d at 242.

8. *Id.* at 604, 828 P.2d at 147, 7 Cal. Rptr. 2d at 245.

9. For an in-depth discussion and analysis of Proposition 51, see James A. Gash, *Rethinking Principles of Comparative Fault in Light of California's Proposition 51*, 19 Pepp. L. Rev. 1495 (1992).

10. *DaFonte* at 599, 828 P.2d at 143, 7 Cal. Rptr. 2d at 241. For further discussion of Proposition 51, also known as the Fair Responsibility Act of 1986, see generally CALIFORNIA TORTS §§ 9.04, 74.01(3)(c) (Neil M. Levy et al. eds., 1992); 19 ALLEN P. WILKINSON & EDWARD BARKER, CALIFORNIA PRACTICE, TORT LAW § 13.2 (1991); 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 51-55 (9th ed. 1988 & Supp. 1992); Robert N. Pafundi, *Proposition 51 Takes Hold*, CAL. LAW., July 1990, at 48.

11. *DaFonte*, 2 Cal. 4th at 603, 828 P.2d at 146, 7 Cal. Rptr. 2d at 244. The purpose of Proposition 51 is codified in section 1431.1 of the California Civil Code, which provides:

(b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People—taxpayers and consumers alike—ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

CAL. CIV. CODE § 1431.1(b) (West Supp. 1992).

12. *DaFonte*, 2 Cal. 4th at 603, 828 P.2d at 146, 7 Cal. Rptr. 2d at 244.

13. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 753 P.2d 585, 246 Cal. Rptr. 629 (1988). In *Evangelatos*, the plaintiff was injured by chemicals he was using to create fireworks and brought an action for personal injuries against the retailer and wholesale distributor. Before trial, however, Proposition 51 was enacted. The plaintiff alleged that Proposition 51 was unconstitutional in that it discriminated against persons injured by insolvent tortfeasors. The supreme court held that Proposition 51 did not violate equal protection guarantees. *Id.* at 1204, 753 P.2d at 594, 246 Cal. Rptr. at 638.

14. *Id.*

to its application.¹⁵

By holding that there are no exceptions to section 1431.2, the court shifted the risk of receiving non-economic damages from insolvent or unreachable tortfeasors from the defendants to the plaintiff.¹⁶ Employees as plaintiffs in personal injury, property damage, or wrongful death actions will now be unable to recover non-economic damages attributable to their employers from co-tortfeasors. This decision marks the latest effort in the attempt to cure the inequities suffered by deep-pocket defendants under the common law rule of joint and several liability.¹⁷

DAVID C. WRIGHT

VII. ELECTION LAW

The Proposition 140 political reform initiative to article IV of the California Constitution is constitutional in principal part, specifically section 2(a), which limits the number of terms that legislators may serve, and section 7.5, which limits state-financed incumbent staff and support services; but section 4.5, which restricts incumbent pensions, is unconstitutional and severable: Legislature of California v. Eu.

I. INTRODUCTION

I dislike, and greatly dislike [in the new Constitution] the abandonment in every instance of the principle of rotation in office.

—Thomas Jefferson, in a letter to James Madison, 1787

Ninety-two percent of all incumbents were reelected in California's November 6, 1990 general election.¹ On the same ballot, the people of

15. *DaFonte*, 2 Cal. 4th at 603, 828 P.2d at 146, 7 Cal. Rptr. 2d at 244.

16. *Id.* at 600, 828 P.2d at 144, 7 Cal. Rptr. 2d at 242.

17. For an overview of the development of California tort liability principles, see *Evangelatos*, 44 Cal. 3d at 1204, 753 P.2d at 595, 246 Cal. Rptr. at 1639 (1988) (any damages attributable to an insolvent tortfeasor can be apportioned among solvent co-tortfeasors); *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978) (defendants sued for personal injury can join co-tortfeasors in the original action or seek equitable indemnity from co-tortfeasors); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (replaced doctrine of contributory negligence with comparative negligence principles).

1. Bruce Fein, *Term Limits Offer False Security to Lazy Electorate*, N.J.L.J., Oct.

California passed Proposition 140, "The Political Reform Act," which restricted retirement benefits of legislators, limited state-funded incumbent staff and support services, and limited the maximum number of terms that legislators may serve.² In *Legislature v. Eu*,³ the California Supreme Court assumed original jurisdiction to consider whether Proposition 140 could withstand constitutional challenges.⁴ Although the supreme court held the pension restrictions to incumbent legislators unconstitutional, the court gave great deference to the voter's interests⁵ in finding the restrictions on support service funds and term limitations for

31, 1991, at 18.

2. Proposition 140 imposed limitations on legislators' pension rights such that the state would contribute the employer's share to the Federal Social Security system on behalf of participating legislators "elected to or serving in the Legislature on or after November 1, 1990," but "[n]o other pension or retirement benefit shall accrue as a result of service in the Legislature." CAL. CONST. ART. IV, § 4.5.

The measure also stated that "the total aggregate expenditures of the Legislature for the compensation of members and employees of, and the operating expenses and equipment for, the Legislature may not exceed" \$950,000 per member for that fiscal year, or 80% of the amount of money expended for such purposes in the preceding year, whichever is less. CAL. CONST. ART. IV, § 7.5.

Proposition 140 limited the following persons, elected or appointed on or after November 6, 1990, to two four-year terms: Governor (CAL. CONST. ART. V, § 2), Lieutenant Governor (CAL. CONST. ART. V, § 11), Attorney General (CAL. CONST. ART. V, § 11), Controller (CAL. CONST. ART. V, § 11), Secretary of State (CAL. CONST. ART. V, § 11), Treasurer (CAL. CONST. ART. V, § 11), Superintendent of Public Instruction (CAL. CONST. ART. IX, § 2), state senators (CAL. CONST. ART. IV, § 2(a)), and members of the State Board of Equalization (CAL. CONST. ART. XIII, § 17). The limit for members of the assembly is three terms. CAL. CONST. ART. IV, § 2(a).

3. 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991). Chief Justice Lucas wrote the majority opinion in which Justices Panelli, Kennard, Arabian, Baxter and George concurred. Justice Mosk wrote a separate opinion, concurring and dissenting in part.

At the time of this opinion, voters in three states had passed term limit measures: California, Colorado, and Oklahoma. Katherine Bishop, *California High Court Backs Law Limiting Term of State Officials*, N.Y. TIMES, Oct. 11, 1991, at 1. Ballot campaigns to the same effect were present in at least twelve states, and one such ballot measure was voted down in Washington State. So far, this California decision is the only term limitation initiative subject to judicial review. *Id.*

4. The supreme court determined that the issues were "of sufficient public importance to justify departing from the usual course" and using an extraordinary writ. *Eu*, 54 Cal. 3d at 497, 500, 816 P.2d at 1312, 286 Cal. Rptr. at 286; see *Raven v. Deukmejian*, 52 Cal. 3d 336, 340, 801 P.2d 1077, 1079, 276 Cal. Rptr. 326, 328 (1990) (reviewing the constitutionality of Proposition 115, adopted at the June 1990 Primary Election).

5. "[T]he people reserve to themselves the powers of initiative and referendum." CAL. CONST. ART. IV, § 1. "[A]ll presumptions favor the validity of initiative measures . . . ; such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." *Eu*, 54 Cal. 3d at 501, 816 P.2d at 1313, 286 Cal. Rptr. at 287.

legislators constitutionally sound.⁶

The stated purpose of Proposition 140 was to "restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office" by limiting "the powers of incumbency."⁷ The court cited the incumbent's generally superior fund raising ability, media coverage, experienced staffs, greater name recognition, and favorably drawn voting districts to evidence potential advantages over other candidates.⁸

II. TREATMENT OF THE CASE

A. *Majority Opinion*

1. Lifetime Ban or Limit on Consecutive Terms

Proposition 140 states, in part, that "[n]o [state] Senator may serve more than [two] terms" and "no member of the Assembly may serve more than [three] terms."⁹ The court found this language ambiguous on its face as to whether the term limits impose a lifetime ban on legislators who have served the specified maximum number of terms or merely restrict the number of consecutive terms the legislators may serve.¹⁰ Because no express language addresses the consecutive terms issue, the supreme court considered the indicia of the voters and found strong support in the voters' pamphlet that a lifetime ban was intended by the framers of, and voters for, Proposition 140.¹¹

2. Constitutional Revision or Amendment

A constitutional revision addresses "comprehensive changes" to the constitution and requires more formality, discussion and deliberation than is available through the initiative process.¹² A revision differs from

6. *Eu*, 54 Cal. 3d at 501, 816 P.2d at 1313, 286 Cal. Rptr. at 287.

7. CAL. CONST. ART. IV, §1.5.

8. *Eu*, 54 Cal. 3d at 501, 816 P.2d at 1313, 286 Cal. Rptr. at 287.

9. CAL. CONST. ART. IV, § 2(a).

10. *Eu*, 54 Cal. 3d at 503-04, 861 P.2d at 1314-15, 286 Cal. Rptr. 288-89.

11. *Id.* at 504-05, 816 P.2d at 1314, 286 Cal. Rptr. at 289. In the voter pamphlet, the legislative analyst described the term limitations as limiting "the number of terms that an elected state official can serve in the same office." CAL. GEN. ELECTION BALLOT PAMPHLET (Nov. 6, 1990), quoted in *Eu*, 54 Cal. 3d at 505, 816 P.2d at 1315, 286 Cal. Rptr. at 289. The opponents' ballot arguments against Proposition 140 made repeated reference to the measure's "lifetime ban." *Eu*, 54 Cal. 3d at 505, 816 P.2d at 1315, 286 Cal. Rptr. at 289.

12. *Raven v. Deukmejian*, 52 Cal. 3d 336, 349-50, 801 P.2d 1077, 1085, 276 Cal.

an amendment in that an amendment requires an initiative by the people, whereas a revision requires the consent of two-thirds of the legislature to convene a constitutional convention and obtain popular ratification.¹³

The petitioners argued that Proposition 140 results in a revision of the California Constitution because the subsequent effects of the measure are “comprehensive changes” to the state constitution.¹⁴ Proposition 140 virtually guarantees a new legislature every six years, where persons with minimal legislative experience will be chairing committees, forced to deal with the budget and with each other.¹⁵ Moreover, the measure’s thirty-eight percent reduction in funding for legislative staff and support services, at the time this opinion was handed down, had resulted in a loss of 640 jobs since the measure’s enactment.¹⁶ Finally, the petitioners warned that the legislators would possibly become “susceptible to the subtle pressures of gubernatorial powers of appointment” and lobbyist influence.¹⁷

The supreme court acknowledged these arguments but found no revision of the California Constitution because Proposition 140 did not substantially change the fundamental structure of the legislature as a representative body.¹⁸ The court conceded that term and budgetary limitations would affect the legislature and the staff members, but would not affect the essential process of legislators enacting laws they find appropriate.¹⁹ Further, because such a revision requires two-third legislature approval, and due to the sensitive issues of the legislature involved, the court determined the legislators should not be relied upon to convene a constitutional convention aimed at its own reform.²⁰ Hence, the court refused to find a constitutional revision where the measure effected no comprehensive changes to the constitution.²¹

3. Single-Subject Requirement

“An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.”²² However, an initiative does not violate the single-subject requirement if its relative parts are

Rptr. 326, 334 (1990).

13. CAL. CONST. ART. XVIII. This Article is entitled “Amending and Revising the Constitution.”

14. *Ev*, 54 Cal. 3d at 506, 816 P.2d at 1316, 286 Cal. Rptr. at 290.

15. *Id.* at 507, 816 P.2d at 1317, 286 Cal. Rptr. at 291.

16. *Id.* at 508, 816 P.2d at 1317, 286 Cal. Rptr. at 291.

17. *Id.* at 507, 816 P.2d at 1317, 286 Cal. Rptr. at 291.

18. *Id.* at 508, 816 P.2d at 1318, 286 Cal. Rptr. at 292.

19. *Id.* at 508-09, 816 P.2d. at 1318, 286 Cal. Rptr. at 292.

20. *Id.* at 511, 816 P.2d at 1320, 286 Cal. Rptr. at 293-94.

21. *Id.* at 512, 816 P.2d at 1320, 286 Cal. Rptr. at 294.

22. CAL. CONST. ART. II, §8(d).

reasonably germane.²³ The court compared Proposition 140 with prior measures upheld by the court²⁴ and found that Proposition 140's "incumbency reform" theme was not excessively general.²⁵

4. Voting and Candidacy Rights

Proposition 140 affects the incumbent's right to run for reelection and the voter's right to reelect the incumbent.²⁶ The California Supreme Court looked to the United States Supreme Court for guidance concerning the constitutionality of voting regulations.²⁷ The United States Supreme Court has generally placed these regulations under the equal protection laws,²⁸ but has not settled the standard of review for voting regulations cases.²⁹

The petitioners argued for the court to strictly scrutinize the measure,³⁰ thereby requiring a compelling state interest in retaining the legislation and no less restrictive means of accomplishing the measure's objectives.³¹ The California Supreme Court found that strictly scrutinized voting regulation cases have typically involved an impairment of First Amendment rights.³² The court distinguished those cases on the grounds that Proposition 140 did not affect First Amendment rights and applied evenhandedly to all political groups.³³

Consequently, the court rejected a strict scrutiny test and applied a mid-tier balancing test.³⁴ This test requires three distinct elements to

23. See *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982) (rejecting the argument that Proposition 8 involved improper constitutional revision).

24. See *supra* note 23.

25. *Eu*, 54 Cal. 3d at 512, 816 P.2d at 1321, 286 Cal. Rptr. at 295.

26. *Id.* at 514, 816 P.2d at 1322, 286 Cal. Rptr. at 296.

27. *Id.* at 515, 816 P.2d at 1322, 286 Cal. Rptr. at 296.

28. See *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 222 (1989) (invalidating California's prohibition on primary endorsements by political parties).

29. See *Munro v. Socialist Workers Party*, 479 U.S. 189, 200-01 (1986) (Marshall, J., dissenting) (noting the majority's failure to articulate the appropriate standard of review when appraising the validity of restrictions on ballot access).

30. *Eu*, 54 Cal. 3d at 515, 816 P.2d at 1322, 286 Cal. Rptr. at 296.

31. See *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that racial classifications are subject to strict scrutiny).

32. *Munro*, 479 U.S. at 225 (reasoning that "because a ban on endorsements burdened the appellees' right to free speech and free association, it can only survive constitutional scrutiny if it serves a compelling governmental interest").

33. *Eu*, 54 Cal. 3d at 515, 816 P.2d at 1322, 286 Cal. Rptr. at 296.

34. *Id.* at 517, 816 P.2d at 1324, 286 Cal. Rptr. at 298. The court extrapolated this

determine the constitutionality of ballot restrictions: a) the nature of the injury to protected rights, i.e., voters and incumbents, b) the interests of the state in permitting the injury, and c) the necessity of imposing the particular burden.³⁶

a. Nature of injury

Although Proposition 140 imposes a lifetime ban from the state senate or assembly, the incumbent is not barred from seeking public office elsewhere.³⁵ Moreover, the limitations are placed on the legislator after a significant period of time in office, and past terms are not calculated in the limitation.³⁷ Hence, these factors mitigate the injury to candidates.

The court noted that voters will be denied the right to vote for the incumbent who has reached the maximum term limit, but also asserted that voters have no clearly established constitutional right to vote for specific persons.³⁸ The voters still retain their right to vote for the candidate of their choice.³⁹ Also, since the people enacted Proposition 140, any subsequent injury to the voters as a result is self-inflicted and without constitutional protection.⁴⁰

b. Interests of the state

Proposition 140 strives to “restore free, fair, and competitive elections” to the political arena and thereby protect the people “against an entrenched, dynastic legislative bureaucracy.”⁴¹ States have a strong interest in preventing a “political machine” from emerging which could “effectively foreclose access to the political process.”⁴² Thus, the absence of such a “machine” would enhance the competitiveness in a meaningful election.⁴³

test from *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

35. *Celebrezze*, 460 U.S. at 796.

36. *Eu*, 54 Cal. 3d at 518, 816 P.2d at 1324, 286 Cal. Rptr. at 298.

37. *Id.*

38. *Id.* at 519, 816 P.2d at 1325, 286 Cal. Rptr. at 299. *See, e.g.*, *Burdick v. Takushi*, 927 F.2d 469, 473-74 (1991) (upholding Hawaii's complete ban on write-in voting).

39. *Eu*, 54 Cal. 3d at 519, 816 P.2d at 1325, 286 Cal. Rptr. at 299.

40. *Id.*

41. *Id.* at 520, 816 P.2d at 1325-26, 286 Cal. Rptr. at 299-300.

42. *Eu*, 54 Cal. 3d at 521, 816 P.2d at 1326, 286 Cal. Rptr. at 300 (quoting *State ex rel. Maloney v. McCartney*, 223 S.E.2d 607, 611 (W. Va. 1976)).

43. *Id.*

c. Necessity of restrictions

The petitioners argued that a lifetime ban on candidacy is drastic and that less restrictive alternatives are available—campaign contribution restrictions, decreased fringe and pension benefits, and incentives for early retirement, for instance.⁴⁴ The court found incumbency advantages at present were hegemonic and such narrow changes as the petitioners proffered would not serve to remedy the condition.⁴⁵ The court ultimately concluded that “[t]he legitimate and compelling interests” of Proposition 140 outweigh[ed] the candidates and voters’ wish “to perpetuate . . . incumbency,” and, hence, the restrictions were constitutionally valid.⁴⁶

5. Bill of Attainder

Bills of Attainder are constitutionally proscribed because they function as a legislative punishment of a specific person or group.⁴⁷ The petitioners argued that Proposition 140 was designed to punish the present incumbent legislators, particularly Assemblyman Willie Brown and Senator David Roberti.⁴⁸

The California Supreme Court applied three different tests under the federal constitution and concluded that the petitioners’ argument was without merit.⁴⁹ First, the “historical” test was unsuccessful because the court found no cases where term limits were imposed on legislators as a form of punishment.⁵⁰ Second, the “functional” test for the existence of actual punishment failed because the law was construed to be “non-punitive legislative policy-making.”⁵¹ Finally, the “motivational” test, looking at the intent of the legislation, failed because the court found no intent to punish legislators on the face of the initiative measure.⁵²

44. *Id.* at 522-23, 816 P.2d at 1327, 286 Cal. Rptr. at 301.

45. *Id.* at 524, 816 P.2d at 1328-29, 286 Cal. Rptr. at 302-03.

46. *Id.* at 525, 816 P.2d at 1329, 286 Cal. Rptr. at 303.

47. U.S. CONST. ART. I, § 10; *see* *United States v. Brown*, 381 U.S. 437, 447 (1965) (holding unconstitutional, as a bill of attainder, a federal law precluding Communist Party members from serving as union officers).

48. *Eu*, 54 Cal. 3d at 525, 816 P.2d at 1329, 286 Cal. Rptr. at 303.

49. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (describing the three tests to determine bills of attainder).

50. *Eu*, 54 Cal. 3d at 526, 816 P.2d at 1330, 286 Cal. Rptr. at 304.

51. *Id.*

52. *Id.* at 527, 816 P.2d at 1330, 286 Cal. Rptr. at 304.

6. Impairment of Contract

The federal constitution provides: "No State shall . . . pass any . . . law impairing the obligation of contracts."⁵³ Proposition 140 purported to terminate a legislator's right to accrue additional benefits through continued state services on or after November 1, 1990.⁵⁴

Although a pension modification is permitted as long as the employees recover "comparable new advantages in place of any lost,"⁵⁵ the court read this measure's restriction as an impairment of a legislator's pension rights.⁵⁶ The court found that incumbent legislators elected prior to Proposition 140's enactment were impliedly promised pension benefits when they first assumed office.⁵⁷ Because incumbent legislators retained a "vested" contractual (or statutory) right to participate in the Legislator's Retirement System,⁵⁸ this provision terminating pension rights for incumbent legislators was held invalid⁵⁹ and, consequently, severed.⁶⁰ Non-incumbent legislators, elected after the enactment of Proposition 140, acquired no vested pension rights.⁶¹

B. Dissenting Opinion

In his dissenting opinion, Justice Mosk took issue with the majority opinion on whether the measure violated the single-subject rule and constituted a revision of the state constitution.⁶² Mosk claimed that

53. U.S. CONST. ART. I, § 10.

54. CAL. CONST. ART. IV, § 4.5.

55. *Olson v. Cory*, 27 Cal. 3d 532, 541, 636 P.2d 532, 537, 178 Cal. Rptr. 568, 573 (1980).

56. *Eu*, 54 Cal. 3d at 534, 816 P.2d at 1335, 286 Cal. Rptr. at 309.

57. *Id.* at 530, 816 P.2d at 1332, 286 Cal. Rptr. at 306.

58. See CAL. GOV'T CODE § 9350 (West 1980).

59. *Eu*, 54 Cal. 3d at 534, 816 P.2d at 1335, 286 Cal. Rptr. at 309.

60. Proposition 140 contained a severance clause pertaining only to the pension obligations of the Legislative Retirement System rather than the entire initiative measure. CAL. CONST. ART. IV, § 11. The supreme court, however, found the pension rights provision severable under a three-prong test for severability. *Eu*, 54 Cal. 3d at 535, 816 P.2d at 1335-36, 286 Cal. Rptr. at 309-10. The invalid provision must be grammatically, functionally, and volitionally separable. *Id.* The provision here is grammatically severable by construing the pension restriction to apply only to non-incumbent legislators elected "on or after November 1, 1990." *Id.* (citing CAL. CONST. ART. IV, § 4.5). Functionally, the restriction can be severed because its removal would not affect the remaining valid provisions. *Id.* Finally, the invalid pension restriction is volitionally severable because the framers and voters would have wanted the remaining valid portions even in the absence of the invalid pension restriction. *Id.*

61. *Eu*, 54 Cal. 3d at 534, 816 P.2d at 1335, 286 Cal. Rptr. at 309.

62. *Id.* at 536, 816 P.2d at 1336, 286 Cal. Rptr. at 310 (Mosk, J., concurring and dissenting).

Proposition 140's purported "incumbency reform" was nothing more than "a seductive label of indefinite scope," which truncated the single-subject requirement.⁶³ Mosk pointed to the legislative analyst who described the initiative as making "three major changes to the California Constitution," and thereby failing the single-subject requirement."⁶⁴

Moreover, Mosk argued that Proposition 140 resulted in a revision of the California Constitution because it substantially changed the nature and character of the legislature.⁶⁵ Specifically, "politicians" would be replaced by "citizens."⁶⁶ In an extended analogy to *Raven v. Deukmejian*,⁶⁷ Mosk attempted to demonstrate that "citizens" in place of "politicians" in the legislature was similar to "laypersons" in place of "jurists" in the judiciary.⁶⁸ Such effects amount to significant changes in the nature of the legislature, and, thus, require the protections involved in a constitutional revision.⁶⁹

II. CONCLUSION

In *Legislature v. Eu*, the supreme court addressed the constitutionality of The Political Reform Act of 1990.⁷⁰ The court found constitutionally valid the restrictions on state-funded incumbent staffs and support services and the limitations on the maximum number of terms legislators may serve.⁷¹ But the court also found that incumbent legislators, upon election prior to Proposition 140's enactment, had acquired "vested"

63. *Id.* at 538, 816 P.2d at 1337-38, 286 Cal. Rptr. at 311-12 (Mosk, J., concurring and dissenting). See Marilyn E. Minger, Comment, *Putting the "Single" Back in the Single-Subject Rule: A Proposal for Initiative Reform in California*, 24 U.C. DAVIS L. REV. 879, 929 (1991) (stating that voters are often called upon to vote on a number of issues by casting a single ballot).

64. *Eu*, 54 Cal. 3d at 537, 816 P.2d at 1337, 286 Cal. Rptr. at 311 (Mosk, J., concurring and dissenting); see CAL. GEN. ELECTION BALLOT PAMPHLET (Nov. 6, 1990).

65. *Eu*, 54 Cal. 3d at 543, 816 P.2d at 1341, 286 Cal. Rptr. at 315.

66. *Id.* The model for this notion is Cincinnatus, the Roman who laid down his plow to save the state but returned home after the battles were won. He was not interested in being a dictator.

67. 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990).

68. *Eu*, 54 Cal. 3d at 543-44, 816 P.2d at 1341, 286 Cal. Rptr. at 315. In *Raven v. Deukmejian*, 52 Cal. 3d at 353, 801 P.2d at 1088, 276 Cal. Rptr. at 337, the provision in question would have restricted the power of state courts to interpret certain state constitutional rights of criminal defendants.

69. *Eu*, 54 Cal. 3d at 544, 816 P.2d at 1341, 286 Cal. Rptr. at 316.

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

71. *Eu*, 54 Cal. 3d at 536, 816 P.2d at 1336, 286 Cal. Rptr. at 310.

rights in the Legislators' Retirement System; thus, the measure's termination of those rights was invalid.⁷² However, legislators elected after the enactment of Proposition 140 were held subject to the measure's pension limitation.⁷³

Mosk dissented on state law grounds, specifically the single-subject violation and the constitutional revision.⁷⁴ The pivotal issue, however, whether the initiative infringes on candidates' federal constitutional rights to run for office and voters' federal constitutional rights to vote for the representative of their choice, has risen to the United States Supreme Court, where this decision was upheld.⁷⁵

Proposition 140 is no panacea. Running for state office will still be costly, with money dominating the process. There is no guarantee that the pool of willing candidates will be more qualified, or more representative, or less susceptible to the sometimes corruptible influence of special interest lobbyists. However, the measure may restore to the legislature the notions of free and fair self-government to which the framers held steadfast.

In free governments, the rulers are the servants, and the people their superiors For the former, to return among the latter [does] not degrade, but promote them.

—Benjamin Franklin

DEAN THOMAS TRIGGS

VIII. FAMILY LAW

An unwed father's parental interest is entitled to constitutional protection, regardless of the statutory scheme, if he promptly comes forward and demonstrates a full commitment to his parental responsibilities: Adoption of Kelsey S.

I. INTRODUCTION

In *Adoption of Kelsey S.*,¹ the California Supreme Court addressed two

72. *Id.* at 535, 816 P.2d at 1335-36, 286 Cal. Rptr. at 309-10.

73. *Id.* at 534, 816 P.2d at 1335, 286 Cal. 3d at 309.

74. *Id.* at 536, 816 P.2d at 1336, 286 Cal. Rptr. at 310.

75. Katherine Bishop, *California High Court Backs Law Limiting Terms of State Officials*, N.Y. TIMES, Oct. 11, 1991, at 1.

1. 1 Cal. 4th 816, 823 P.2d 1216, 4 Cal. Rptr. 2d 615 (1992). Justice Baxter authored the majority opinion, in which Justices Lucas, Panelli, Kennard, Arabian and

issues. First, the court decided whether the requirement under California Civil Code section 7004(a)² that a natural father must receive the child into his home to achieve "presumed father" status was satisfied by constructive receipt.³ The court determined that, based on the statutory language and legislative intent of section 7004(a)(4),⁴ actual receipt was required.⁵ Second, the court decided whether the natural father's federal constitutional rights to due process and equal protection were violated by the Code's distinction between natural and presumed fathers.⁶ The court held that this distinction violated the natural father's rights.⁷ The court concluded that the natural father should be treated as a presumed father if he exhibits his commitment toward rearing the child in a responsible manner, and he is not found to be unfit to parent the child.⁸

A. Background

Until 1975, a child born out of wedlock was considered to be illegitimate.⁹ Illegitimacy had strong negative implications for children, including placing a stigma on the child and resulting in unfavorable legal treatment.¹⁰ For example, illegitimate children were considered to be

George concurred. Justice Mosk filed a concurring and dissenting opinion.

2. Section 7004(a)(4) provides that "a man is presumed to be the natural father of a child if . . . [h]e receives the child into his home and openly holds out the child as his natural child." CAL. CIV. CODE § 7004(a)(4) (West 1983 & Supp. 1992).

3. *Kelsey S.*, 1 Cal. 4th at 825, 823 P.2d at 1220, 4 Cal. Rptr. 2d at 619.

4. See *infra* notes 38-41 and accompanying text.

5. *Kelsey S.*, 1 Cal. 4th at 829-30, 823 P.2d at 1223, 4 Cal. Rptr. 2d at 622.

6. *Id.* at 830, 823 P.2d at 1223, 4 Cal. Rptr. 2d at 622.

7. *Id.* at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635. "[S]ection 7004(a) . . . violates . . . constitutional guarantees . . . to the extent that [it] allow[s] a mother unilaterally to preclude her child's biological father from becoming a presumed father and thereby allowing the state to terminate his parental rights on . . . a showing of the child's best interest." *Id.* See generally William G. Phelps, *Protecting the Opportunity Interest of the Unwed Fathers of Newborn Infants Placed for Adoption: Does California's Statute Go Far Enough?*, 25 CAL. W. L. REV. 123, 124-25 (1988) (discussing the constitutionality of California Civil Code § 7017(d)(2) which allows an illegitimate child to be adopted over the objections of his or her father if the adoption is in the best interest of the child).

8. *Kelsey S.*, 1 Cal. 4th at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

9. Former California Civil Code section 230 provided the situation in which a child could be legitimated. *Id.* at 828, 823 P.2d at 1222, 4 Cal. Rptr. 2d at 621. See 10 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 422 (9th ed., 1989) (discussing former section 230 in depth).

10. *Kelsey S.*, 1 Cal. 4th at 828, 823 P.2d at 1222, 4 Cal. Rptr. 2d at 621. The stigma attached to illegitimacy created an interest in construing former Civil Code

without parents, and thus had no inheritance rights from their natural parents.¹¹

In order to mitigate some of the negative effects of being labeled illegitimate, the California Legislature enacted the Uniform Parentage Act in 1975,¹² which substituted the concept of illegitimacy with the concept of parentage.¹³ Section 7004(a)(4) of the Uniform Parentage Act provides that a natural father may achieve "presumed father" status¹⁴ by "receiv[ing] the child into his home and openly hold[ing] out the child as his natural child."¹⁵ The classification of a natural father as a "presumed father" is significant because, under section 221.20,¹⁶ either a presumed father or the natural mother can withhold consent to the child's adoption unless there is a showing by clear and convincing evidence that the pre-

section 230 broadly and in favor of legitimation. *Id.* However, with the enactment of the Uniform Parentage Act, this stigma has largely been mitigated. *Id.* Thus, the interest in a broad construction of the Code is less pervasive. *Id.* at 828-29, 823 P.2d at 1222, 4 Cal. Rptr. 2d at 621. See 10 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 422, 423 (9th ed., 1989) (discussing constructive receipt, and the effect of the Uniform Parentage Act); see also 4 JOHN LESLIE GODDARD, CALIFORNIA PRACTICE, *Parentage of Children* § 403 (3d ed., 1981) (stating that the Uniform Parentage Act provides a procedure to establish the parent-child relationship without regard to distinctions based on legitimacy). For a discussion of illegitimacy, see 10 C.J.S. *Bastards* § 3(a) (1937); 10 AM. JUR. 2D *Bastards* § 8 (1963 & Supp. 1992).

11. *Kelsey S.*, 1 Cal. 4th at 828, 823 P.2d at 1222, 4 Cal. Rptr. 2d at 621.

12. See generally CAL. CIV. CODE §§ 7000-7021 (West 1983 and Supp. 1992); 10 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 409-448 (9th ed., 1989).

13. *Kelsey S.*, 1 Cal. 4th at 828, 823 P.2d at 1222, 4 Cal. Rptr. 2d at 621.

14. The parental rights of a natural father who is a presumed father are greater than those of a natural father who is not a presumed father. *Id.* at 824-25, 823 P.2d at 1219, 4 Cal. Rptr. 2d at 618. A presumed father's parental rights are only revoked upon a showing of unfitness, whereas a mere natural father's rights may be revoked upon a showing that such revocation is in the best interest of the child. *Id.* at 824, 823 P.2d at 1219, 4 Cal. Rptr. 2d at 618.

15. CAL. CIV. CODE § 7004(a)(4) (West 1983 and Supp. 1992). For a discussion of section 7004(a)(4), see 10 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 423 (9th ed., 1989 & Supp. 1992); 32 CAL. JUR. 3D *Family Law* § 110 (1977 & Supp. 1992); 4 JOHN LESLIE GODDARD, CALIFORNIA PRACTICE, *Parentage of Children* §§ 402, 416 (3d ed., 1981).

16. CAL. CIV. CODE § 221.20 (West 1983).

Under section 221.20, either a mother or presumed father can withhold consent to the adoption except in certain specified and narrow circumstances: (1) if a noncustodial parent willfully fails for a year or more to communicate with and support the child; (2) a court has declared the child to be free of the parent's custody and control . . . or the parent has voluntarily relinquished his or her rights in a judicial proceeding; (3) the parent has deserted the child without provision for its identification; or (4) the parent has relinquished the child for adoption.

Kelsey S., 1 Cal. 4th at 824-25, 823 P.2d at 1219, 4 Cal. Rptr. 2d at 618.

sumed father is unfit, to parent the child.¹⁷ In contrast, Section 7017(d)(2)¹⁸ provides that a natural father who is not a presumed father under section 7004(a) may only retain his parental rights to the child if the court determines that it would be in the child's best interest.¹⁹ Effectively, the presumed father's rights rise to the level of the mother's rights, while the natural father's rights are protected at a lower level.

B. Statement of the Case

Kelsey S. was born on May 18, 1988 to Kari S., the natural mother and a respondent, and Rickie M., the natural father and the petitioner.²⁰ The petitioner and Kari S. have never been married to each other.²¹ In response to Kari's plan to place the child up for adoption, the petitioner filed an action on May 20, 1988 to establish his parental rights and obtain custody.²² The superior court issued a temporary restraining order granting the petitioner custody.²³

On May 24, Steven and Suzanne A., the prospective adoptive parents and respondents in this action, filed an adoption petition alleging that because there was no presumed father, only the mother's consent to the adoption was required.²⁴ On May 26, the superior court amended its May 20th order and gave Kari S. temporary custody of the child, provided that

17. *Id.* at 825, 823 P.2d at 1219, 4 Cal. Rptr. 2d at 618.

18. Section 7017(d)(2) provides in relevant part: "[T]he court shall determine if he is the father . . . [and] then determine if it is in the best interest of the child that the father retain his parental rights . . . if the court finds that it is in the best interest of the child . . . [i]t shall order that his consent is necessary for an adoption." CAL. CIV. CODE § 7017(d)(2) (West 1983 & Supp. 1992). Subdivision (d)(2) was added to section 7017 in 1986. The amendment removed application of section 4600 to the proceedings, effectively removing parental preference by no longer requiring that the trial court find that awarding the natural parent custody would be detrimental to the child. *Kelsey S.*, 1 Cal. 4th at 843, 823 P.2d at 1232, 4 Cal. Rptr. 2d at 631. See generally 10 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 441-445 (9th ed. 1989 & Supp. 1992) (discussing the 1986 amendment to section 7017).

19. *Kelsey S.*, 1 Cal. 4th at 824-25, 823 P.2d at 1219, 4 Cal. Rptr. 2d at 618.

20. *Id.* at 822, 823 P.2d at 1217, 4 Cal. Rptr. 2d at 616-17.

21. *Id.* at 822, 823 P.2d at 1217, 4 Cal. Rptr. 2d at 616.

22. *Id.* at 822, 823 P.2d at 1218-19, 4 Cal. Rptr. 2d at 616-17. The action was brought pursuant to section 7006. *Id.* Section 7006 provides in pertinent part "[a]ny interested party may bring an action . . . for . . . determining the existence . . . of the father and child relationship presumed under . . . section 7004[(a)(4)]." CAL. CIV. CODE § 7006(b) (West 1983 & Supp. 1992).

23. *Kelsey S.*, 1 Cal. 4th at 822, 823 P.2d at 1218, 4 Cal. Rptr. 2d at 617.

24. *Id.*

she live with the child in a shelter for unwed mothers, with no visitation by the petitioner or the prospective adoptive parents.²⁵ On May 31, the prospective adoptive parents initiated proceedings to terminate the petitioner's parental rights.²⁶ The court consolidated this proceeding with the adoption proceeding, granting supervised visitation rights to the petitioner, and unsupervised visitation rights to the prospective adoptive parents.²⁷

The superior court held that the petitioner was not a presumed father under section 7004(a)(4), because he did not receive the child into his home.²⁸ Furthermore, the court found by a preponderance of the evidence, under section 7017(d)(2), that it would be in the child's best interest to terminate the petitioner's parental rights.²⁹ The petitioner appealed, arguing that because he was prevented by the mother, the adoptive parents, and a court order from receiving the child into his home, he should be deemed a presumed father based on his efforts to receive the child into his home.³⁰ The court of appeal affirmed the judgment, holding that the trial court did not err in finding by a preponderance of the evidence that the petitioner was not a presumed father.³¹ The petitioner appealed again, and the California Supreme Court reversed, holding that the statutory scheme is unconstitutional to the extent that it permits the termination of an unwed father's parental rights without due process, at least where the father has demonstrated his commitment to his parental responsibilities.³²

II. TREATMENT

A. *The Majority Opinion*

1. Statutory Language and Legislative Intent

The first issue the court addressed was whether the petitioner satisfied the "receipt" requirement of section 7004(a)(4)³³ by constructive receipt,

25. *Id.*

26. *Id.*

27. *Id.* at 822-23, 823 P.2d at 1218, 4 Cal. Rptr. 2d at 617. Visitation was to take place at the shelter only. *Id.*

28. *Id.* at 823, 823 P.2d at 1218, 4 Cal. Rptr. 2d at 617. See *supra* note 2 and accompanying text.

29. *Kelsey S.*, 1 Cal. 4th at 823, 823 P.2d at 1218, 4 Cal. Rptr. 2d at 617.

30. *Id.* The petitioner's three contentions on appeal were that the court "erred by: (1) concluding that he was not the child's presumed father; (2) not granting him a parental placement preference; and (3) applying a preponderance-of-the-evidence standard of proof." *Id.*

31. *Id.*

32. *Id.* at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

33. For the relevant portion of section 7004(a)(4), see *supra* note 2.

even though he did not actually receive the child into his home.³⁴ After explaining why the classification of "presumed father" is crucial to the parental rights of the petitioner,³⁵ the court analyzed section 7004(a)(4) to determine whether it supported the use of constructive receipt to satisfy the requirements.³⁶ In examining the statutory language, the court determined that section 7004(a)(4) neither implicitly nor explicitly referred to constructive receipt.³⁷ In analyzing legislative intent, the court examined the 1986 amendment to section 7017, which made section 4600 inapplicable to proceedings under section 7017.³⁸ The court observed that by providing "the efforts made by the father to obtain custody" as one of the factors used to determine the natural father's rights, the legislature showed it was aware of the restrictions being placed on unwed fathers.³⁹ "The express statutory distinction between presumed fathers and fathers who attempt unsuccessfully to gain custody demonstrates that the members of the latter group are not presumed fathers within the Legislature's intent."⁴⁰ The court believed that the statutory language was a clear expression of the legislature's intent to require actual receipt.⁴¹ The court noted that to construe the statute as allowing constructive receipt would require insertion of words into the statute, which would go beyond the authority of the court.⁴²

The court surveyed prior decisions to determine whether section 7004(a)(4) has been construed as allowing constructive receipt.⁴³ The court observed that California Court of Appeal decisions clearly did not support the use of constructive receipt to satisfy section 7004(a)(4).⁴⁴

34. *Kelsey S.*, 1 Cal. 4th at 825, 823 P.2d at 1220, 4 Cal. Rptr. 2d at 619.

35. *Id.* at 824-25, 823 P.2d at 1218-19, 4 Cal. Rptr. 2d at 617-18. See *supra* notes 16-19 and accompanying text for an explanation of the statutory scheme giving a presumed father greater parental rights than a natural father who is not a presumed father.

36. *Kelsey S.*, 1 Cal. 4th at 825-30, 823 P.2d at 1220-23, 4 Cal. Rptr. 2d 619-22.

37. *Id.* at 826, 823 P.2d at 1220, 4 Cal. Rptr. 2d at 619.

38. *Id.* at 827, 823 P.2d at 1221, 4 Cal. Rptr. 2d at 620. See *supra* note 18.

39. *Kelsey S.*, 1 Cal. 4th at 827, 823 P.2d at 1221, 4 Cal. Rptr. 2d at 620.

40. *Id.*

41. *Id.* at 826, 823 P.2d at 1220, 4 Cal. Rptr. 2d at 619. The court did not find the statute to be ambiguous. The petitioner conceded this and made no argument that he was a presumed father based solely on the language of section 7004(a)(4). *Id.*

42. *Id.* at 827, 823 P.2d at 1220-21, 4 Cal. Rptr. 2d at 619-20.

43. *Id.* at 827-30, 823 P.2d at 1221, 4 Cal. Rptr. 2d at 620.

44. *Id.* at 827, 823 P.2d at 1221, 4 Cal. Rptr. 2d at 620. See *In re Adoption of Marie R.*, 79 Cal. App. 3d 624, 630, 145 Cal. Rptr. 122, 126 (Ct. App. 1978) (finding that despite a mother's rejections of a father's efforts to establish his relationship

The court further noted that its prior decisions provided little guidance on the issue at hand.⁴⁶ Not finding any support for allowing constructive receipt to satisfy the "receipt" requirement of section 7004(a)(4), the court held that the petitioner was not a presumed father under the statute.⁴⁶

2. Due Process and Equal Protection

a. Survey of the law

The court next addressed whether a natural father's federal constitutional rights of due process and equal protection are violated if the mother is allowed to unilaterally deny him the legal right a presumed father has to withhold consent for adoption.⁴⁷ The court first looked at the development of relevant United States Supreme Court cases for guidance.⁴⁸ The *Kelsey S.* court observed that the Supreme Court has held that conceiving and raising one's children is a protected and essential right, that an unwed father is entitled to a hearing on his fitness as a parent before any termination of his rights,⁴⁹ and that the relationship between a par-

with the child, he was not considered a presumed father, *overruled by Kelsey S.*, 1 Cal. 4th at 816, 823 P.2d at 1216, 4 Cal. Rptr. 2d at 615 (1992); *see also In re Sabrina H.*, 217 Cal. App. 3d 702, 710, 266 Cal. Rptr. 274, 278 (1990) (observing that since the passage of the Uniform Parentage Act, no cases have affirmed the doctrine of constructive receipt).

45. *Kelsey S.*, 1 Cal. 4th at 827, 823 P.2d at 1221, 4 Cal. Rptr. 2d at 620. In the case of *In re Richard M.*, 14 Cal. 3d 783, 537 P.2d 363, 122 Cal. Rptr. 531 (1975), the court upheld the doctrine of constructive receipt, but that decision came prior to the enactment of the Uniform Parentage Act. The court explained that it had a strong interest in a statutory scheme that favored legitimation due to the strong stigma associated with illegitimacy. *Id.* at 793, 537 P.2d at 369, 122 Cal. Rptr. at 537. According to the court in *Kelsey S.*, this policy interest is not as strong since the advent of the concept of parentage, and thus, the statute should not be construed as broadly in the present case. *Kelsey S.*, 1 Cal. 4th at 828-29, 823 P.2d at 1222, 4 Cal. Rptr. 2d at 621. *See also Michael U. v. Jamie B.*, 39 Cal. 3d 787, 791, 705 P.2d 362, 364, 218 Cal. Rptr. 39, 41 (1985) (holding that a natural father is not a presumed father if he has not received the child into his home); *see also Beth W. Kanik, Not Necessarily in the Best Interest of the Child: In Re Baby Girl M.*, 20 U.S.F. L. REV. 701, 715-17 (1985). The court in *Kelsey S.* explained that *Michael U.* did not resolve the matter at hand because constructive receipt was not at issue. *Kelsey S.*, 1 Cal. 4th at 829, 823 P.2d at 1222, 4 Cal. Rptr. 2d at 621.

46. *Kelsey S.*, 1 Cal. 4th at 829-30, 823 P.2d at 1222-23, 4 Cal. Rptr. 2d at 621-22.

47. *Id.* at 830, 823 P.2d at 1223, 4 Cal. Rptr. 2d at 622.

48. *Id.* at 830-37, 823 P.2d at 1223-28, 4 Cal. Rptr. 2d at 622-27.

49. *Id.* at 830-31, 823 P.2d at 1223-24, 4 Cal. Rptr. 2d at 622-23. *See Stanley v. Illinois*, 405 U.S. 645 (1972). In *Stanley*, the father had lived intermittently with the mother and children for 18 years and had developed a parental relationship with the children. *Id.* at 651. The court in *Kelsey S.* indicated that although *Stanley* is factually distinguishable from the present case, the rules and holding from *Stanley* were

ent and child is constitutionally protected.⁵⁰ The Supreme Court has also held that factors to be considered in the equal protection analysis include the natural father's attempt to rear and establish a relationship with the child, and the nature of the relationship between the child and the natural father.⁵¹

The court concluded that the general principle espoused by the United States Supreme Court is that "the biological connection between father and child is unique and worthy of constitutional protection if the father grasps the opportunity to develop that biological connection into a full and enduring relationship."⁵² The court based this conclusion both on relevant United States Supreme Court cases, and its analysis of recent decisions by both the New York Court of Appeals⁵³ and the Georgia Supreme Court.⁵⁴ Furthermore, the *Kelsey S.* court, noting the Supreme

instructive. The court noted that to the extent that *Stanley* requires a showing of unfitness to deny a father his parental rights, the California statutory scheme was in conflict with *Stanley*. *Kelsey S.*, 1 Cal. 4th at 831, 823 P.2d at 1223-24, 4 Cal. Rptr. 2d at 622-23.

50. *Kelsey S.*, 1 Cal. 4th at 831-32, 823 P.2d at 1224, 4 Cal. Rptr. 2d at 623. See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). Although the facts of *Quilloin* are analogous to the case at hand, in *Quilloin* the natural father never sought custody of the child, and waited 11 years to assert his visitation rights. The Court's holding that the father was not denied due process and equal protection rights was based on these key factual differences. *Id.* at 256. This suggests that if this factual difference had not existed, and the father had demonstrated an interest in the child, the *Quilloin* Court would have held that the father's constitutional rights were improperly denied. *Kelsey S.*, 1 Cal. 4th at 833, 823 P.2d at 1225, 4 Cal. Rptr. 2d at 624.

51. See *Caban v. Mohammed*, 441 U.S. 380, 392 (1978). "In those cases where the father never has come forward to participate in the rearing . . . nothing in the Equal Protection Clause precludes the state from withholding from him the privilege of vetoing the adoption of that child." *Id.* See also *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (holding that a significant factor in an action for a declaration of paternity and visitation rights was whether the natural father had attempted to establish a relationship with the child); *Lehr v. Robertson*, 463 U.S. 248, 267-68 (1983) (holding that because the father had not established a relationship with the child, he was not denied equal protection).

52. *Kelsey S.*, 1 Cal. 4th at 838, 823 P.2d at 1228, 4 Cal. Rptr. 2d at 627.

53. *Id.* at 838-39, 823 P.2d at 1228-29, 4 Cal. Rptr. 2d at 627-28. See *In re Raquel Marie X.*, 559 N.E.2d 418, 424, (N.Y. 1990), *rev'd*, 173 A.D.2d 709 (1992) (observing that the protection of a natural father's constitutional parental rights is dependent on his opportunity to develop a meaningful relationship with the child).

54. *Kelsey S.*, 1 Cal. 4th at 839, 823 P.2d at 1229, 4 Cal. Rptr. 2d at 628. See *In re Baby Girl Eason*, 296, 358 S.E.2d 459, 463 (Ga. 1987) (holding that a natural father who tries to develop a relationship with his children should be given the same rights as the mother).

Court's assertion that "[g]ender-based . . . distinctions must serve important governmental objectives and 'must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause,"⁵⁵ determined that intermediate scrutiny was appropriate in this case.⁵⁶

Although the United States Supreme Court cases generally supported the argument of the petitioner, the court also considered relevant California decisions regarding the rights of unwed fathers.⁵⁷ The court observed that its prior cases provided little aid to the present case, except for one finding that "the state may not deny biological parents the opportunity to establish a protected custodial relationship."⁵⁸ Similarly, relevant court of appeal cases were not instructive because they applied the statutory scheme with little constitutional analysis.⁵⁹ However, a recent court of appeal decision held that to the extent they violated a natural father's constitutional rights, state legislative enactments disallowing the use of the detriment standard were prohibited.⁶⁰ The court reiterated its belief that the legislature intended to create a distinction between the rights of a natural father and the rights of a mother and presumed father; the issue at hand was whether this statutory scheme was constitutional.⁶¹

55. *Kelsey S.*, 1 Cal. 4th at 834, 823 P.2d at 1226, 4 Cal. Rptr. 2d at 625 (quoting *Mohammed*, 441 U.S. at 388 (holding that the distinction between unwed mothers and unwed fathers is violative of equal protection because the distinction is not substantially related to the State's interest)). See generally Karen A. Koeppe, Comment, *The Rights of Unwed Fathers Are Being Violated Under California's Statutory Scheme in Light of the United States Supreme Court Decision in Caban v. Mohammed*, 23 SANTA CLARA L. REV. 899 (1983).

56. *Kelsey S.*, 1 Cal. 4th at 845, 823 P.2d at 1233, 4 Cal. Rptr. 2d at 632.

57. *Id.* at 839-44, 823 P.2d at 1229-34, 4 Cal. Rptr. 2d at 628-32.

58. *Id.* at 839-40, 823 P.2d at 1229-30, 4 Cal. Rptr. 2d at 628-29 (quoting Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313, 351 (1984)).

59. See *In re Adoption of Marie R.*, 79 Cal. App. 3d 624, 145 Cal. Rptr. 122 (Ct. App. 1978), overruled by 1 Cal. 4th 849 (1992); *W.E.J. v. Superior Court*, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979).

60. *Kelsey S.*, 1 Cal. 4th at 843, 823 P.2d at 1232, 4 Cal. Rptr. 2d at 631. See *Jermstad v. McNelis*, 210 Cal. App. 3d 528, 549-50, 258 Cal. Rptr. 519, 531-32 (Ct. App. 1989). The *Jermstad* court held that the legislature intended to preserve the detriment standard in cases where not doing so would deprive a parent the opportunity to establish a parental relationship—a requirement of the United States Supreme Court's construction of the Federal Constitution. *Id.* See *supra* note 18 and accompanying text for an explanation of the use of parental preference in section 7017 proceedings.

61. *Kelsey S.*, 1 Cal. 4th at 849-50, 823 P.2d at 1236-37, 4 Cal. Rptr. 2d at 635-36.

b. Application of the law to the present case

In deciding that the application of the statutory distinction between natural fathers and presumed fathers in this case was unconstitutional, the court applied the intermediate scrutiny test set forth by the United States Supreme Court that gender-based distinctions between a biological mother and father must serve important governmental objectives and be substantially related to achievement of those objectives.⁶² The court rejected the respondents' argument that an unwed mother's control over a natural father's rights furthers the state interest in adoption, and thus serves the child's best interest.⁶³ The court, however, asserted that the proper governmental objective was the well-being of the child, an objective not necessarily served by adoption.⁶⁴ The court posited that although at one time adoption might have been thought to be in the child's best interest due to a strong likelihood that an adoptive home would have two parents, the changing concept of family and the increasing number of single adoptive parents indicates that the overriding advantage and interest of adoption might no longer exist.⁶⁵

Next, the court rejected the respondents' argument that the statutes giving the mother control over the father's rights are substantially related to the child's best interest because they facilitate adoption.⁶⁶ The court asserted that this argument is flawed because it "assumes an unwed mother's decision to permit an immediate adoption of her newborn is always preferable to custody by the natural father, even when he is a demonstrably fit parent."⁶⁷

The court next observed that the two statutory alternatives by which a father could obtain presumed father status under section 7004—marrying the mother, or holding the child out as his own and receiving the child into his home—are both within the mother's control.⁶⁸ The court reasoned that because the mother can deny the father entrance to her home, and deny the father the right to take the child into his home, the father is forced to seek a court determination that he is a presumed

62. *Id.* at 845, 823 P.2d at 1232, 4 Cal. Rptr. 2d at 631. *See supra* note 55 and accompanying text.

63. *Kelsey S.*, 1 Cal. 4th at 845, 823 P.2d at 1234, 4 Cal. Rptr. 2d at 633.

64. *Id.*

65. *Id.*

66. *Id.* at 846, 823 P.2d at 1234, 4 Cal. Rptr. 2d at 633.

67. *Id.*

68. *Id.* at 847, 823 P.2d at 1235, 4 Cal. Rptr. 2d at 634.

father in order to obtain custody.⁶⁹ However, the statute prevents him from becoming a presumed father until he receives the child into his home, the very thing he was prevented from doing without the court order. Furthermore, a mere showing that adoption by third parties would be in the child's best interest was enough to terminate the father's rights.⁷⁰ Thus, a father who is "ready, willing, and able to exercise the full measure of his parental responsibilities" is left with no recourse.⁷¹ In contrast, the court observed that mothers, or natural fathers allowed by the mother to become a presumed father, even if "unready, unwilling, and unable," were entitled to protection of their parental rights short of a showing of unfitness, a much more difficult standard to prove than the best interest standard.⁷²

The court concluded that section 7004(a)(4) and the surrounding statutory framework were constitutionally unfair to both the child and the father.⁷³ The court reasoned that if a child whose mother wants to sever legal ties with him or her is fortunate enough to have a fit natural father who wants to rear him or her, the child should not be denied the advantage of being reared by a natural parent.⁷⁴ Furthermore, if a natural father is willing and fit to be a parent, and the mother is unwilling to rear the child, the father should not be denied the right to do so on a mere showing that it is not in the child's best interest.⁷⁵ The court then created a presumption that the child's well-being is "best served by continuation of the father's parental relationship."⁷⁶ If, after a consideration of all the relevant factors, the father is determined to be committed to his parental responsibilities, he should be afforded protection of his parental rights equal to that of the mother's rights regardless of whether he is a presumed father under the statutory scheme.⁷⁷

The court limited its holding by stating that the statutory distinction between natural and presumed fathers is unconstitutional "only to the extent that it is applied to an unwed father . . . demonstrat[ing] a full

69. *Id.*

70. *Id.* at 848, 823 P.2d at 1236-37, 4 Cal. Rptr. 2d at 634-35.

71. *Id.* at 847, 823 P.2d at 1235, 4 Cal. Rptr. 2d at 634.

72. *Id.*

73. *Id.* at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

74. *Id.* at 848, 823 P.2d at 1235, 4 Cal. Rptr. 2d at 634.

75. *Id.* at 848, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

76. *Id.* at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

77. *Id.* Some factors to be considered are the father's conduct before and since the child's birth, his efforts to assume his parental responsibilities, his "willingness . . . to assume full custody of the child—not merely to block adoption by others," the father's public acknowledgement that he is the natural father, and his financial aid to the mother with pregnancy and birth expenses. *Id.* at 849, 823 P.2d at 1236-37, 4 Cal. Rptr. 2d at 635-36.

commitment to his parental responsibilities.⁷⁸ The court remanded the case to the trial court to decide whether the petitioner demonstrated a full commitment to his parental responsibilities, instructing the trial court to consider the reasonableness of the petitioner's conduct since he learned that he was the child's father.⁷⁹ If the trial court answers this question in the affirmative, then a fitness standard must be applied, with a clear and convincing evidentiary standard, to determine whether the petitioner has the right under section 221.20 to withhold his consent to the adoption.⁸⁰ Finally, the court asserted that this decision shall be retroactive as to all cases not yet final.⁸¹

B. Justice Mosk's Concurring and Dissenting Opinion

Justice Mosk agreed with the majority that the natural father's parental rights should not have been terminated in this case.⁸² However, he dissented to the majority's use of constitutional analysis in reaching its decision expressing that such analysis was unnecessary and "create[d] needless uncertainty in the application of statutory categories that have been consistently employed for almost 20 years."⁸³

Justice Mosk asserted that the proper law upon which to base this decision was the doctrine of equitable estoppel.⁸⁴ According to Justice Mosk, the rule of estoppel provides the preclusion of a party's benefit from his own conduct when such conduct is "designed to prevent determination of the truth and a resolution based thereon."⁸⁵ Justice Mosk reasoned that the use of an estoppel theory rather than a constitutional theory would yield a just result in this case without creating a dangerously far-reaching precedent.⁸⁶ Justice Mosk would have remanded this

78. *Id.* at 849, 823 P.2d at 1237, 4 Cal. Rptr. 2d at 636.

79. *Id.* at 850, 823 P.2d at 1237, 4 Cal. Rptr. 2d at 636.

80. *Id.* at 851, 823 P.2d at 1238, 4 Cal. Rptr. 2d at 637.

81. *Id.*

82. *Id.* at 852, 823 P.2d at 1239, 4 Cal. Rptr. 2d at 638 (Mosk, J., concurring and dissenting).

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

84. *Id.* at 853, 823 P.2d at 1239, 4 Cal. Rptr. 2d at 638 (Mosk, J., concurring and dissenting).

85. *Id.* (Mosk, J., concurring and dissenting). Justice Mosk pointed out that the doctrine of equitable estoppel has been used in prior family law cases. For example, see *Guardianship of Ethan S.*, 221 Cal. App. 3d 1403, 1415, 271 Cal. Rptr. 121, 129 (Ct. App. 1990) (estopping the mother's husband, who had once admitted he was not the natural father, from relying on a presumption of paternity).

86. *Kelsey S.*, 1 Cal. 4th at 853-54, 823 P.2d at 1239-40, 4 Cal. Rptr. 2d at 638-39

case to the trial court to determine, based on the rule of equitable estoppel, whether the mother should be estopped from denying that the father had become a presumed father.⁸⁷

III. CONCLUSION

In *Adoption of Kelsey S.*, the court held that a biological father may be accorded parental rights when his attempt to achieve presumed father status is thwarted by the child's mother and he "promptly comes forward and demonstrates a full commitment to his parental responsibilities."⁸⁸ One probable effect of this decision will be a drop in the number of adoptions, at least where a natural parent wants custody of the child. Furthermore, this decision shows that California is willing to disaffirm statutes which are adverse to the rights of "thwarted fathers."⁸⁹ California trial courts will now be required in custody hearings to give consideration to a fit, committed, natural father equal to the consideration given to a presumed father.⁹⁰

The *Kelsey S.* holding might also give natural fathers a greater right to custody of their children than the mother's husband who rears the child on a daily basis. Unfortunately, this protection of the father's rights may often be at the expense of the child's best interest.⁹¹ The emphasis on whether a natural father is granted custody of his child has been shifted from his relationship with the mother to his relationship with the child.⁹² This may cause the mother to think more seriously about her decision of whether to relinquish her own custody of the child.⁹³

NANCY G. DRAGUTSKY

(Mosk, J., concurring and dissenting).

87. *Id.* at 854, 823 P.2d at 1240, 4 Cal. Rptr. 2d at 639 (Mosk, J., concurring and dissenting).

88. *Id.* at 849, 823 P.2d at 1237, 4 Cal. Rptr. 2d at 636.

89. Stephanie B. Goldberg, *Having My Baby, Unwed Fathers Score Victory in California*, 78 A.B.A. J. 84 (1992).

90. The following recent California Court of Appeal decisions have followed *Kelsey S.*: *In re Reylene A.*, 7 Cal. App. 4th 1822, 10 Cal. Rptr. 2d 121 (Ct. App. 1992); *In re Sarah C.*, 8 Cal. App. 4th 964, 11 Cal. Rptr. 2d 414 (Ct. App. 1992); *Adoption of Michael H.*, 8 Cal. App. 4th 1633, 11 Cal. Rptr. 2d 261 (Ct. App. 1992); *In re Heather B.*, NO. CO10299, 1992 WL 219227 (Cal. Ct. App. Sept. 14, 1992); *In re Cassandra V.*, NO. FO16248, 1992 WL 274741 (Cal. Ct. App. Oct. 9, 1992).

91. Goldberg, *supra* note 89.

92. Goldberg, *supra* note 89 (citing *In re Marie Raquel X*, 559 N.E.2d 418 (N.Y. 1990)).

93. Goldberg, *supra* note 89.

IX. LABOR LAW

- A. *The termination of an employee in retaliation for truthful testimony concerning a co-worker's sexual harassment claim is contrary to public policy, actionable, and neither preempted by the California Fair Employment and Housing Act nor barred by the exclusive remedy provision of the Workers' Compensation Act: Gantt v. Sentry Insurance.*

I. INTRODUCTION

In *Gantt v. Sentry Insurance*,¹ the California Supreme Court ruled that an employee can bring an action against an employer for wrongful termination in contravention of public policy.² Further, the court held

1. 1 Cal. 4th 1083, 824 P.2d 680, 4 Cal. Rptr. 2d 874 (1992). Justice Arabian wrote the majority opinion, in which Chief Justice Lucas and Justices Panelli, Baxter, and George joined. Justice Kennard wrote a separate opinion concurring in part and dissenting in part, in which Justice Mosk joined. *Id.*

2. *Id.* The plaintiff, Vincent A. Gantt, was a sales manager for the defendant, Sentry Insurance. Joyce Bruno, a co-worker who reported to Gantt, complained to him that she was being sexually harassed by another manager, Gary Desser. The plaintiff reported this to his supervisor and to an employee who was responsible for receiving sexual harassment complaints. The harassment continued and the plaintiff spoke with them a second time. Shortly thereafter, Bruno was transferred and then fired. Bruno filed a complaint with the Department of Fair Employment and Housing (DFEH), alleging harassment against Desser and failure of management to correct the problem. At this point, Caroline Fribance, Sentry's in-house counsel, began investigating the matter. Gantt spoke with Fribance, ultimately reporting that Fribance was pressuring him to retract his prior statement. Subsequently, Gantt's superiors cautioned him that he was disliked in the company, and lowered Gantt's performance rating.

When the DFEH investigation began, Gantt initially met with the investigator secretly, who promised him protection from retaliation for his unfavorable testimony. Prior to his official interview with DFEH, Gantt again spoke with Fribance, who repeatedly reminded him that he was Bruno's only support for Bruno's harassment claim. Fribance also informed Gantt of his ratings demotion. Following Gantt's DFEH interview, in which he continued to support Bruno's claim, Fribance suggested to the investigator that it was Gantt himself who had harassed Bruno and his testimony was merely a diversionary tactic.

Two months later, the company demoted Gantt and deprived him of the work materials necessary to function in his new job. During the next month, Gantt experienced a series of illnesses and took a vacation and sick leave. Gantt finally took a job with another company and then filed lawsuit. The jury returned a special verdict for Gantt, awarding him \$1.34 million. The court of appeals affirmed the judgment as to Sentry Insurance. The California Supreme Court affirmed the decision of the appel-

that the exclusive remedy provision of the Workers' Compensation Act³ does not grant an employer immunity for acts contrary to public policy and that the California Fair Employment and Housing Act⁴ did not preempt such a claim.⁵ In its holding, the court indicated that it must determine public policy by examining constitutional and statutory provisions.⁶ The court, relying primarily on its decision in *Tameny v. Atlantic Richfield Co.*,⁷ held that the employer's attempts to persuade the plaintiff to withhold information from state investigators constituted an act contrary to public policy, and, therefore, that plaintiff could maintain an action against the employer.⁸

II. TREATMENT OF THE CASE

The court began its analysis by examining the public policy exception to at-will employment.⁹ The public policy exception, first recognized in *Tameny*, provides that an at-will employee may bring a tort action when discharged for performing an act that public policy would encourage or failing to perform an act that public policy would discourage.¹⁰ For public policy to be the basis for such a claim, the policy must affect society and be "fundamental," "substantial" and "well established."¹¹ This vague definition gave the courts broad discretion to determine public policy.¹² However, in practice, only a small number of courts have found an act to be in violation of public policy absent statutory or constitutional provisions evidencing that policy.¹³ Based on that fact, in conjunction with the general presumption that courts should defer to the legislature in matters of public policy, the court ruled that a public policy exception

late court. *Id.* at 1087-89, 824 P.2d at 682-83, 4 Cal. Rptr. 2d at 876-77.

3. CAL. LAB. CODE § 3602 (West 1989).

4. CAL. GOV'T CODE § 12940 (West 1992).

5. *Gantt*, 1 Cal. 4th at 1086, 824 P.2d at 681, 4 Cal. Rptr. 2d at 875.

6. *Id.* at 1095, 824 P.2d at 688, 4 Cal. Rptr. 2d at 882.

7. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). The plaintiff-employee was wrongfully terminated for refusing to participate in an illegal price-fixing scheme. The supreme court held that the employee could maintain a tort action against the employer. *Id.* at 169-70.

8. *Gantt*, 1 Cal. 4th at 1097, 824 P.2d at 689, 4 Cal. Rptr. 2d at 883.

9. *Id.* at 1089, 824 P.2d at 683, 4 Cal. Rptr. 2d at 874. For information on public policy exceptions to at-will contracts, see 82 AM. JUR. 2D *Workers' Compensation* §§ 11-82 (1992); 20 ALLEN P. WILKINSON & EDWARD BARKER, CALIFORNIA PRACTICE, TORT LAW § 42.2 (1991); 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW §§ 167-170 (9th ed. 1987).

10. *Gantt*, 1 Cal. 4th at 1090, 824 P.2d at 683, 4 Cal. Rptr. 2d at 877.

11. *Id.* (quoting *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 670, 765 P.2d 373, 379, 254 Cal. Rptr. 211, 217 (1988)).

12. *Id.*

13. *Id.*

should be "carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions."¹⁴

The court next examined whether the defendant's actions were contrary to constitutional or legislative declarations.¹⁵ The legislature had specifically prohibited the obstruction of Department of Fair Employment and Housing (DFEH) investigations through the Fair Employment and Housing Act.¹⁶ As a result, the court held that any attempt by an employer to convince an employee to lie to a DFEH investigator was clearly against state public policy.¹⁷ Therefore, the court ruled that the plaintiff had established a valid claim under the public policy exception in *Tameny*.¹⁸

Having established the existence of a public policy exception and the validity of the plaintiff's claim under that exception, the court addressed whether the Workers' Compensation Act preempted the plaintiff's *Tameny* claim.¹⁹ The Workers' Compensation Act contains an exclusive remedy provision²⁰ for employee injuries in cases in which the employer's acts both caused the injury and were within the normal scope of the employment relationship.²¹ However, the court noted that the

14. *Id.* at 1095, 824 P.2d at 687-88, 4 Cal. Rptr. 2d at 881-82.

15. *Id.*

16. CAL GOV'T CODE § 12975 (West 1992). This section provides:

Any person who shall willfully resist, prevent, impede or interfere with any member of the department or the commission or any of its agents or employees in the performance of duties pursuant to the provisions of this part relating to employment discrimination, or who shall in any manner willfully violate an order of the commission relating to such matter, is guilty of a misdemeanor, punishable by imprisonment in a county jail, not exceeding six months, or by a fine not exceeding one thousand dollars (\$1000), or both.

Id.

17. *Gantt*, 1 Cal. 4th at 1097, 824 P.2d at 689, 4 Cal. Rptr. 2d at 883.

18. *Id.*

19. For a general overview of the Workers' Compensation Act, see 65 CAL. JUR. 3D, *Work Injury Compensation* §§ 1-16 (1981); 2 B. WITKIN, *SUMMARY OF CALIFORNIA LAW* §§ 5-11 (9th ed. 1987).

20. CAL. LAB. CODE § 3602 (West 1989). Section 3602(a) provides in pertinent part: "Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is . . . the sole and exclusive remedy of the employee or his or her dependents against the employer." *Id.*

21. *Gantt*, 1 Cal. 4th at 1099, 824 P.2d at 691, 4 Cal. Rptr. 2d at 885. For information on the exclusive remedy provision of the Worker's Compensation Act, see 82 AM. JUR. 2D *Workers' Compensation* §§ 62-115 (1992); 1 CAL. LAW OF EMP. INJ. § 11.01-11.02 (Warren L. Hanna ed., 2d ed. 1992); 65 CAL. JUR. 3D *Work Injury Compensation* §§ 22-28 (1981); 99 C.J.S. *Workmen's Compensation* §§ 918-935 (1960); 20

scope of the exclusive remedy of the Workers' Compensation Act is not universal, and that numerous situations are outside the exclusive remedy provision.²²

The defendant argued that it is improper to distinguish between employees who suffer injury from standard industrial causes and those who suffer injury from sexual or racial discrimination.²³ The court rejected this argument, however, stating that the distinction is made to preserve "public policy and sound morality."²⁴ The court reasoned that since the *Tameny* cause of action "reflects a duty imposed by law upon all employers in order to implement . . . fundamental public policies," it clearly falls outside of the exclusive remedy provision.²⁵ Therefore, the court concluded that the exclusive remedy provision of the Workers' Compensation Act does not preempt a *Tameny* action for tortious discharge in contravention of public policy.²⁶

Justice Kennard wrote a separate opinion, concurring in part and dissenting in part.²⁷ She agreed with the court's findings that the plaintiff was entitled to bring a *Tameny* cause of action, which did not conflict with the exclusive remedy provisions of the Workers' Compensation Act.²⁸ However, Justice Kennard dissented from the court's analysis of what constitutes public policy.²⁹ She noted that the court went beyond the facts of the case to create a definition of public policy because the plaintiff had not presented public policy that was not founded in statutory or constitutional provision; therefore, the holding as to this issue was mere dictum.³⁰ Further, she disagreed with the majority's view that only statutory or constitutionally based policies are firmly established and important.³¹ She suggested that there are other valid sources of public

ALLEN P. WILKINSON & EDWARD BARKER, CALIFORNIA PRACTICE, TORT LAW § 42.8 (1991);
2 B. WITKIN, SUMMARY OF CALIFORNIA LAW §§ 25-35 (9th ed. 1987).

22. *Gantt*, 1 Cal. 4th at 1100, 824 P.2d at 691, 4 Cal. Rptr. 2d at 885.

23. *Id.*

24. *Id.* at 1100-01, 824 P.2d at 691-92, 4 Cal. Rptr. 2d at 885-86.

25. *Id.* at 1098, 824 P.2d at 690, 4 Cal. Rptr. 2d at 884 (quoting *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 668, 765 P.2d 373, 378, 254 Cal. Rptr. 211, 216 (1988)).

26. *Id.* at 1101, 824 P.2d at 692, 4 Cal. Rptr. 2d at 886 (Kennard, J., concurring and dissenting).

27. *Id.* at 1101-04, 824 P.2d at 692-694, 4 Cal. Rptr. 2d at 886-88 (Kennard, J., concurring and dissenting).

28. *Id.* at 1101, 824 P.2d at 692, 4 Cal. Rptr. 2d at 886 (Kennard, J., concurring and dissenting).

29. *Id.* (Kennard, J., concurring and dissenting).

30. *Id.* at 1102, 824 P.2d at 692-93, 4 Cal. Rptr. 2d at 886-87 (Kennard, J., concurring and dissenting).

31. *Id.* at 1103, 824 P.2d at 693-94, 4 Cal. Rptr. 2d at 887-88 (Kennard, J., concurring and dissenting).

policy, such as judicial decisions and codes of professional ethics, which provide safeguards similar to statutory and constitutional provisions.³² Justice Kennard summarized by stating, "Courts should not be foreclosed from adjudicating wrongful discharge cases based on violations of public policy springing from nonstatutory and nonconstitutional sources."³³

III. CONCLUSION

By holding the exclusive remedy provision of the Workers' Compensation Act inapplicable to employers whose acts are contrary to public policy, the court acted in strict accordance with the line of cases starting with *Tameny* and continuing through *Foley*.³⁴ These cases have made it clear that the focus is on "the public interest in not permitting employers to impose as a condition of employment a requirement that an employee act in a manner contrary to fundamental public policy."³⁵

However, it is not the outcome of this case that is of particular interest. Rather, it is the route the majority chose to take in order to reach the outcome that is of particular interest. The majority went out of its way to create a rule limiting the available sources of public policy to statutory and constitutional provisions.³⁶ As Justice Kennard emphasized, the facts of this case did not demand that the court address the issue of defining public policy.³⁷ Apparently, the court was concerned with creating a consistent framework by which lower courts could analyze questions of public policy.³⁸

Even though the court may have overstepped its bounds in creating the rule, it is doubtful that the rule will have any substantial impact. Although California courts have differed on whether they should restrict public policy to statutory and constitutional authority, no cases have

32. *Id.* at 1103, 824 P.2d at 693, 4 Cal. Rptr. 2d at 887 (Kennard, J., concurring and dissenting).

33. *Id.* at 1104, 824 P.2d at 694, 4 Cal. Rptr. 2d at 888 (Kennard, J., concurring and dissenting).

34. *Id.* at 1101, 824 P.2d at 692, 4 Cal. Rptr. 2d at 886.

35. *Id.* (quoting *Foley*, 47 Cal. 3d at 667 n.7, 765 P.2d 377 n.7, 254 Cal. Rptr. 215 n.7).

36. *Id.* at 1103, 824 P.2d at 693, 4 Cal. Rptr. at 874 (Kennard, J., concurring and dissenting).

37. *Id.* at 1102, 824 P.2d at 692-93, 4 Cal. Rptr. at 886-87 (Kennard, J., concurring and dissenting).

38. *Id.* at 1092-93, 824 P.2d at 868, 4 Cal. Rptr. 2d at 880 (observing that the lower courts are divided as to how to determine public policy).

challenged this restriction on public policy. As a result, opinions advocating an expansion of public policy have all been limited to dicta.³⁰ Therefore, it is difficult to imagine a factual scenario upon which this holding will have any substantial impact.

DAVID C. WRIGHT

**B. Section 3601 of the California Labor Code prohibits injured employees from bringing actions against co-employees where the co-employees acted within the scope of their employment:
Hendy v. Losse.**

In *Hendy v. Losse*,¹ the California Supreme Court interpreted the effect of section 3601 of the California Labor Code² on the right of an employee to bring an action against a co-employee.³ The court concluded that when an employee is harmed by a co-employee acting within the scope of their employment, section 3601 bars the injured employee from bringing an action against the co-employee.⁴

39. *Id.* at 1093, 824 P.2d at 686, 4 Cal. Rptr. 2d at 880 (citing *Dabbs v. Cardiopulmonary Management Servs.*, 188 Cal. App. 3d 1437, 1443-44, 234 Cal. Rptr. 129, 133 (1987); *Garcia v. Rockwell Int'l Corp.*, 187 Cal. App. 3d 1556, 1561, 232 Cal. Rptr. 490, 492 (1986); *Koehrer v. Superior Court*, 181 Cal. App. 3d 1155, 1165-67, 226 Cal. Rptr. 820, 825-26 (1986)).

1. 54 Cal. 3d 723, 819 P.2d 1, 1 Cal. Rptr. 2d 543 (1991). In *Hendy*, John Hendy, a professional football player for the San Diego Chargers, brought a medical malpractice suit against the team's physician, Gary Losse. On August 11, 1986 and May 28, 1987, Hendy incurred injuries to his right knee. The injuries were the result of Hendy's employment by the Chargers. After both injuries, the defendant examined Hendy and advised him to continue playing football. As a result of the defendant's diagnoses, Hendy suffered irreparable injury to his right knee. Hendy brought actions against both the Chargers and Losse; the actions against the Chargers, however, were later dismissed. *Id.* at 728 n.3, 819 P.2d at 4 n.3, 1 Cal. Rptr. 2d at 546 n.3. The defendant demurred to the action for medical malpractice. The trial court sustained the demurrer without leave to amend, stating that section 3602 barred the action. *Id.* at 728, 819 P.2d at 4, 1 Cal. Rptr. 2d at 546. The court of appeal reversed. *Id.* The California Supreme Court reversed, sustaining the defendant's demurrer without leave to amend. *Id.* at 743, 819 P.2d at 14, 1 Cal. Rptr. 2d at 556.

2. Section 3601(a) states in pertinent part:

Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation, pursuant to the provisions of this division is, except as specifically provided in this section, the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or her employment

CAL. LAB. CODE § 3601(a) (West 1989).

3. *Hendy*, 54 Cal. 3d at 727, 819 P.2d at 2, 1 Cal. Rptr. 2d at 545.

4. *Id.* at 739, 819 P.2d at 11, 1 Cal. Rptr. 2d at 553. Justice Baxter authored the

The California Supreme Court noted that prior to the 1959 amendment of section 3601,⁵ co-employees possessed the common law right to sue one another.⁶ However, the court stated that following the amendments of section 3601 in 1959⁷ and 1982,⁸ an employee could not sue a co-employee unless the co-employee was acting beyond the scope of his employment.⁹ Therefore, because the defendant was acting within the scope of his employment,¹⁰ the court opined that section 3601 barred the plaintiff's action.¹¹

In light of the clear limitation established by section 3601, the ruling of the court appears to be reasonable. Moreover, through strict application of section 3601, the California Supreme Court has established a test for co-employee liability courts can easily apply.

RICHARD JOHN BERGSTROM III

unanimous opinion, in which Chief Justice Lucas and Justices Mosk, Panelli, Kennard, Arabian and George concurred.

5. For the original text of section 3601, see Act of Aug. 27, 1937, ch. 90, § 3601, 1937 Cal. Stat. 185, 269 (to be codified at CAL. LAB. CODE § 3601).

6. *Baugh v. Rodgers*, 24 Cal. 2d 200, 214, 148 P.2d 633, 641 (1944) (stating that workers' compensation laws did not prohibit an employee from suing another employee).

7. Act of Sept. 18, 1959, ch. 1189, § 1, 1959 Cal. Stat. 3275, 3275-76 (to be codified at CAL. LAB. CODE § 3601).

8. Act of Sept. 13, 1982, ch. 922, § 5, 1982 Cal. Stat. 3363, 3366 (to be codified at CAL. LAB. CODE § 3601). For the relevant portion of section 3601(a), see *supra* note 2.

9. *Hendy*, 54 Cal. 3d at 738-39, 819 P.2d at 10-11, 1 Cal. Rptr. 2d at 552-53. See generally 65 CAL. JUR. 3D *Work Injury Compensation* § 28 (1981); Annotation, *Right to Maintain Direct Action Against Fellow Employee For Injury or Death Covered by Workmen's Compensation*, 21 A.L.R. 3D 845 (1968); STANFORD D. HERLICK, CALIFORNIA WORKERS' COMPENSATION HANDBOOK 11TH § 12.10 (1991) (discussing the right of an employee to sue a fellow employee).

10. *Hendy*, 54 Cal. 3d at 740-41, 819 P.2d at 12, 1 Cal. Rptr. 2d at 554. Co-employees are within the scope of employment when "engaged in any active service for the employer." *Saala v. McFarland*, 63 Cal. 2d 124, 130, 403 P.2d 400, 404, 45 Cal. Rptr. 144, 148 (1965). See generally 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* §§ 63-64 (9th ed. 1987); Kent Frewing, Note, *Workmen's Compensation: Negligent Co-employee's Personal Liability Defined: Saala v. McFarland (Cal. 1965)*, 6 SANTA CLARA L. REV. 100 (1965) (discussing the meaning of the phrase "within the scope of employment").

11. *Hendy*, 54 Cal. 3d at 727, 819 P.2d at 3; 1 Cal. Rptr. 2d at 545.

X. PRODUCTS LIABILITY

Patrons harmed by a substance in served food, natural to that food, may state cause of action in negligence, but not under theory of strict liability, breach of implied warranty of merchantability, or fitness: Mexicali Rose v. Superior Court.

I. INTRODUCTION

In *Mexicali Rose v. Superior Court*,¹ the California Supreme Court held that a cause of action in negligence lay for throat injuries resulting from a chicken bone concealed in a chicken enchilada that was served to a patron.² The holding of *Mexicali Rose* partially overrules the fifty-year-old precedent of *Mix v. Ingersoll Candy Co.*,³ where the court held that a substance causing injury which is natural to the food served, such as a chicken bone in a chicken dish, can never lead to tort or implied warranty liability.⁴ The *Mexicali Rose* court, however, did reaffirm the ruling in *Mix* that an object foreign to the food, such as a piece of glass, wire, or a nail, gives rise to actions in strict liability, implied warranty, and negligence.⁵

The plaintiff in the instant case was served a chicken enchilada at the defendant restaurant. The plaintiff choked on a one-inch chicken bone concealed within the enchilada and sustained serious throat injuries.⁶ He

1. 1 Cal. 4th 617, 822 P.2d 1292, 4 Cal. Rptr. 2d 145 (1992); see also *New Court Decisions: Torts*, 60 U.S.C.W. 2508 (Feb. 18, 1992) (summary of opinion); *Reasonable Expectations of Restaurant Customer May Be Basis for Negligence Action for Injuries Caused by Object in Food*, Cal. Sup. Ct. Serv. (Barclay's Law Publishers) 28 (Jan. 28, 1992) (summary of opinion).

2. *Mexicali Rose*, 1 Cal. 4th at 634, 822 P.2d at 1304, 4 Cal. Rptr. 2d at 157. Chief Justice Lucas wrote the majority opinion in which Justices Panelli, Baxter, and George concurred. Justice Mosk wrote a dissenting opinion, joined by Justice Kennard. Justice Arabian wrote a separate dissenting opinion.

3. 6 Cal. 2d 674, 59 P.2d 144 (1936).

4. *Id.* at 682, 59 P.2d at 148.

5. *Id.* For discussion regarding products liability for served food, see 50 CAL. JUR. 3D *Products Liability* § 42 (1979 & Supp. 1992) (liability for food in general); 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Sales* §§ 101, 105 (9th ed. 1987 & Supp. 1992) (implied warranty with service of food and breach of warranty); 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 956 (9th ed. 1988 & Supp. 1992) (negligence liability for food); 35 AM. JUR. 2D *Food* §§ 84-106 (1967 & Supp. 1992) (civil liability); 63 AM. JUR. 2D *Products Liability* §§489, 497-99, 672-73 (1984 & Supp. 1992) (food); 36A C.J.S. *Food* §§ 57-71 (1961 & Supp. 1992) (liability in general); 77 C.J.S. *Sales* § 331 (1961 & Supp. 1992) (implied warranty).

6. The plaintiff underwent three throat operations and amassed medical bills in

sued under theories of strict liability, implied warranty, and negligence.⁷ The defendant demurred to the action, arguing that *Mix* precluded any of the stated causes of action since chicken bones were natural to the chicken dish.⁸ The trial court denied the demurrer on the grounds that *Mix* was more than fifty years old, and thus, did not express the present state of the law.⁹ The court of appeal disagreed with this reasoning, declaring that under *stare decisis*, *Mix* controlled.¹⁰ Thus, the court ordered that the demurrer be granted.¹¹ The supreme court granted review to consider the continuing validity of *Mix*.¹²

II. TREATMENT

Mix distinguished bones and other substances that are "natural" to certain kinds of foods from "foreign" substances, which cannot be anticipated by the reasonable consumer.¹³ In *Mix*, a consumer could not state a cause of action for injuries from a chicken bone in a chicken pot pie since the substance was natural to the dish.¹⁴ The court stated, "Bones which are natural to the type of meat served cannot legitimately be called a foreign substance, and a consumer who eats meat dishes ought to anticipate and be on his guard against such bones."¹⁵ Under the foreign-natural test, a substance natural to the type of food served could never lead to tort or implied warranty liability, whereas a foreign substance could.¹⁶

excess of \$25,000. Philip Hager, *Case Challenges Doctrine Protecting Restaurants*, L.A. TIMES, Nov. 3, 1991, at A3.

7. *Mexicali Rose*, 1 Cal. 4th at 620, 822 P.2d at 1294, 4 Cal. Rptr. 2d at 147.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 619, 822 P.2d at 1293, 4 Cal. Rptr. 2d at 146.

13. *Mix v. Ingersoll Candy Co.*, 6 Cal. 2d 674, 681-82, 59 P.2d 144, 148 (1936).

14. *Id.*

15. *Id.*

16. For discussion regarding foreign-natural and reasonable expectation tests, see generally 63 AM. JUR. 2D *Products Liability* § 227 (1984 & Supp. 1992); 3 RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE §§ 2-314:184 to 2-314:185 (3d ed. 1983 & Supp. 1991); 3 SAMUEL WILLISTON, WILLISTON ON SALES § 18-10, at 102-04 (Alphonse M. Squillante & John R. Fonseca, eds., 4th ed. 1974 & Supp. 1990); Charles R. Janes, Note, *Products Liability—The Test of Consumer Expectation for "Natural" Defects in Food Products*, 37 OHIO ST. L.J. 634 (1976); Mary Ann Luetto, Comment, *Attack of the Killer Enchilada: The Chicken Bone Law Revisited*, 17 W. ST. U. L. REV. 429 (1990); Stacy L. Mojica, Note, *Breach of Implied Warranty: Has the For-*

The *Mexicali Rose* court noted that the *Mix* ruling had been followed for thirty years in California¹⁷ and some other jurisdictions,¹⁸ but that courts had recently deviated from strict application of the ruling.¹⁹ These courts reasoned that ultimate liability should not rest on the foreign-natural distinction, but on "whether the consumer reasonably should have anticipated the natural injury-producing substance in the food."²⁰ Other courts abandoned the foreign-natural distinction entirely, basing liability solely on the reasonable expectation of the consumer.²¹ In this

eign/Natural Test Lost Its Bite?, 20 MEM. ST. U. L. REV. 377 (1990); Jane M. Draper, Annotation, *Liability for Injury or Death Allegedly Caused by Food Product Containing Object Related to, but Not Intended to Be in, Product*, 2 A.L.R.5TH 189 (1992).

17. See, e.g., Shapiro v. Hotel, 132 F. Supp. 891 (S.D. Cal. 1955) (fish bone in Hot Barquette of Seafood Mornay natural); *Evert v. Suli*, 211 Cal. App. 3d 605, 259 Cal. Rptr. 535 (1989) (requiring "natural" substance to be natural to dish and reasonably anticipated by consumer, and declaring bone in hamburger not reasonably expected); *Maiss v. Hatch*, 8 Cal. Rptr. 351 (Cal. App. Dep't Super. Ct. 1960) (beef bone in hamburger natural); *Lamb v. Hill*, 112 Cal. App. 2d 41, 245 P.2d 316 (1952) (chicken bone splinter in chicken pie natural); *Silva v. F.W. Woolworth Co.*, 28 Cal. App. 2d 649, 83 P.2d 76 (1938) (precluding recovery under *Mix* since bone in roast turkey dish natural).

18. See, e.g., *Adams v. Great Atlantic & Pacific Tea Co.*, 112 S.E.2d 92 (N.C. 1960) (grain of corn in corn flakes); *Norris v. Fig'n Whistle Sandwich Shop*, 53 S.E.2d 718 (Ga. Ct. App. 1949) (bone in barbecued pork sandwich); *Goodwin v. Country Club of Peoria*, 54 N.E.2d 612 (Ill. App. Ct. 1944) (chicken bone in creamed chicken); *Brown v. Nebiker*, 296 N.W. 366 (Iowa 1941) (sliver of bone in pork chop natural). *But see* *Jackson v. Nestle-Beigh, Inc.*, 569 N.E.2d 1119 (Ill. App. Ct. 1991), *aff'd*, 589 N.E.2d 587 (Ill. 1992) (specifically rejecting the foreign-natural doctrine adopted 47 years earlier); *Goodman v. Wenco Management*, 394 S.E.2d 832 (N.C. Ct. App. 1990) (allowing suit for sizable bone in hamburger patty). See generally *supra* note 15.

19. *Mexicali Rose*, 1 Cal. 4th at 625-31, 822 P.2d at 1297-1301, 4 Cal. Rptr. 2d at 150-54. The court cited a string of Louisiana cases and a lower California court decision to support this proposition. See *infra* note 25 for case citations. Justice Arabian in his dissent mocked the majority's representation of Louisiana's law as a "trend." *Id.* at 647, 822 P.2d at 1312, 4 Cal. Rptr. 2d at 165 (Arabian, J., dissenting). In addition, Justice Mosk noted that a California Court of Appeals decision held that a patron could sue for a bone fragment in a hamburger but never suggested the claim should be limited to proving negligence. *Id.* at 640, 822 P.2d at 1308, 4 Cal. Rptr. 2d at 161 (Mosk, J., dissenting). Thus, *Evert* implied that the test used was a reasonable expectation test. *Id.* See *Evert v. Suli*, 211 Cal. App. 3d 665, 259 Cal. Rptr. 535 (1989) (holding that substance must be natural as well as one not reasonably expected to preclude a cause of action).

20. *Mexicali Rose*, 1 Cal. 4th at 625, 822 P.2d at 1298, 4 Cal. Rptr. 2d at 151 (citing *Brown v. Nebiker*, 296 N.W. 366 (Iowa 1941) and *Allen v. Grafton*, 164 N.E.2d 167 (Ohio 1960)). *But see* *Thompson v. Lawson Milk Co.*, 356 N.E.2d 309 (Ohio Ct. App. 1976) (applying pure reasonable expectation test).

21. *Mexicali Rose*, 1 Cal. 4th at 641, 822 P.2d at 1308-09, 4 Cal. Rptr. 2d at 161-62 (Mosk, J., dissenting) (citing numerous cases following the reasonable expectation test); *Id.* at 651, 822 P.2d at 1315, 4 Cal. Rptr. 2d at 168 (Arabian, J., dissenting) (adding to Justice Mosk's list). E.g., *Zabner v. Howard Johnson's, Inc.*, 201 So. 2d 824 (Fla. Dist. Ct. App. 1967); *Phillips v. West Springfield*, 540 N.E.2d 1331 (Mass. 1989);

context, the naturalness of the substance is only important in determining whether the consumer might have reasonably expected to find such an object in the food served.²²

Critics of the foreign-natural test complain that it assumes that average consumers would anticipate finding any or all sorts of natural objects in their food.²³ Thus, some courts follow the "reasonable expectation" approach, arguing that some natural substances are just as unanticipated as foreign substances.²⁴

Many cases adopting a reasonable expectation test, however, did not reject completely the foreign-natural test when the injury was caused by a substance natural to the food served In these cases, the "naturalness" of the substance is used to determine which theory of recovery should be allowed—strict liability, implied warranty and/or negligence. When it is found that the injury-producing substance is natural to the food product, such as a chicken bone in a chicken pie, these courts have applied the *Mix* rule to hold an injured plaintiff cannot state a cause of action based on the breach of the implied warranty of merchantability or strict products liability, because it is a matter of common knowledge that the natural substance is occasionally found in the food served. These courts have departed from *Mix*, however, in holding that under the same facts, an action can be stated in negligence for the failure to exercise reasonable care in the food preparation.²⁵

Betehia v. Cape Cod Corp., 103 N.W.2d 64 (Wis. 1960). See generally *supra* note 16.

22. *Mexicali Rose*, 1 Cal. 4th at 649, 822 P.2d at 1316, 4 Cal. Rptr. 2d at 167 (Arabian, J., dissenting) (relying on language in *Zabner*, 201 So. 2d at 826).

23. *Id.* at 649, 822 P.2d at 1314, 4 Cal. Rptr. 2d at 167 (Arabian, J., dissenting) (quoting *Zabner*, 201 So. 2d at 826). For example, one does not expect to find bones in a hamburger, or pearls in processed oysters. *O'Dell v. DeJeans Packing Co.*, 585 P.2d 399, 402 (Okla. Ct. App. 1978).

The dissenters' frustrations stem from the difficulty in determining what is "natural" to the preparation of the dish. See *Mexicali Rose*, 1 Cal. 4th at 634-35, 822 P.2d at 1304, 4 Cal. Rptr. 2d at 157 (Mosk, J., dissenting); *id.* at 645 n.1, 822 P.2d at 1311 n.1, 4 Cal. Rptr. 2d at 164 n.1 (Arabian, J., dissenting). Justice Arabian pointed out that this approach could allow as "natural" a chicken beak in a chicken dish or a cow's eyeball in a hamburger. *Id.* However, the majority maintained that only substances natural to the preparation of the product will be considered natural to the product. *Id.* at 630 n.5, 822 P.2d at 1301 n.5, 4 Cal. Rptr. 2d at 154 n.5. Courts may apply the test so that *unanticipated* natural substances will not be considered natural to the preparation of the dish, thereby reaching a result similar to the reasonable expectation test under negligence. However, because a bone in a hamburger is considered "foreign" since it is not part of the dish's preparation, the majority would also allow causes of action under implied warranty and strict liability. See *id.* at 633, 822 P.2d at 1303, 4 Cal. Rptr. 2d at 156. See generally Janes, *supra* note 9, at 652 (criticizing the foreign-natural test for insulating food processors from liability even if the technology exists to remove injurious natural substances from food).

24. *Mexicali Rose*, 1 Cal. 4th at 638, 822 P.2d at 1306, 4 Cal. Rptr. 2d at 159 (Mosk, J., dissenting); Draper, *supra* note 16, at 202.

25. *Mexicali Rose*, 1 Cal. 4th at 626, 822 P.2d at 1298, 4 Cal. Rptr. 2d at 151. See

The court agreed with the defense that a patron could not reasonably expect a chicken pie to be free of all bones.²⁶ However, the court embraced the trend allowing an action in negligence for substances natural to the food.²⁷ The court reasoned that the duty of care to make a dish free of injury causing substances is not affected by whether the object is natural or foreign—the same danger of injury exists.²⁸ This new rule corresponds with modern developments in tort law that require persons to exercise ordinary care to prevent injuries when in a position to exercise control over another.²⁹ Yet even under this stricter approach, restaurant owners still retain traditional negligence defenses, including comparative negligence.³⁰

The court concluded that the *Mix* foreign-natural test “should be rejected as the exclusive test for determining liability when a substance natural to food injures a restaurant patron.”³¹ Instead, the court announced the following as the proper test for the trier of fact:

If the injury-producing substance is natural to the preparation of the food served, it can be said that it was reasonably expected by its very nature and the food cannot be determined unfit or defective. A plaintiff in such a case has no cause of action in strict liability or implied warranty. If, however, the presence of the natural substance is due to a restaurateur's failure to exercise due care in food preparation, the injured patron may sue under a negligence theory.

If the injury-causing substance is foreign to the food served, then the injured patron may also state a cause of action in implied warranty and strict liability, and the trier of fact will determine whether the substance (i) could be reasonably expected by the average consumer and (ii) rendered the food unfit or defective.³²

Justice Mosk, in a strong dissent, pointed out the difficulty of deter-

Musso v. Picadilly Cafeterias, Inc., 178 So. 2d 421, 425 (La. Ct. App. 1965) (allowing negligence claim when natural substance caused injury); Loyacano v. Continental Ins. Co., 283 So. 2d 302, 306 (La. Ct. App. 1973) (looking to patron's reasonable expectations in determining negligence liability); Title v. Pontchartrain Hotel, 449 So. 2d 677, 679 (La. Ct. App. 1984) (explaining two-tiered approach of natural/foreign test, followed by reasonable expectation to determine negligence); Evert v. Suli, 211 Cal. App. 3d 605, 259 Cal. Rptr. 535 (1989) (see *supra* note 17).

26. *Mexicali Rose*, 1 Cal. 4th at 631, 822 P.2d at 1302, 4 Cal. Rptr. 2d at 155.

27. *Id.* at 632, 822 P.2d at 1302-03, 4 Cal. Rptr. 2d at 155-56.

28. *See id.* at 632, 822 P.2d at 1303, 4 Cal. Rptr. 2d at 156. Justice Mosk cited this as another reason for eliminating the foreign-natural distinction. *Id.* at 635, 822 P.2d at 1304, 4 Cal. Rptr. 2d at 157 (Mosk, J., dissenting).

29. *Id.* at 632, 822 P.2d at 1303, 4 Cal. Rptr. 2d at 156. *See Brown v. Superior Court*, 44 Cal. 3d 1049, 251 P.2d 470, 245 Cal. Rptr. 412 (1988) (reviewing strict product liability law in California).

30. *Mexicali Rose*, 1 Cal. 4th at 633, 822 P.2d at 1303, 4 Cal. Rptr. 2d at 156. *See generally* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1082 (9th ed. 1988 & Supp. 1992) (discussing comparative negligence).

31. *Mexicali Rose*, 1 Cal. 4th at 633, 822 P.2d at 1303, 4 Cal. Rptr. 2d at 156.

32. *Mexicali Rose*, 1 Cal. 4th at 633, 822 P.2d at 1303, 4 Cal. Rptr. 2d at 156.

mining whether a substance is natural,³³ especially in reference to processed foods,³⁴ and the unfairness of burdening a consumer with costs against which she has no protection. He argued that the overriding concern in such cases is public health, and that the *Mix* rule did not serve this concern.³⁵ Furthermore, he stated, "A natural object may cause as much harm *and be just as unanticipated* as a foreign object in food, so that it is simply illogical to distinguish between the two solely on the basis of their provenance."³⁶

Justice Mosk claimed that a clear majority of courts have abandoned the foreign-natural distinction in favor of the reasonable expectation test.³⁷ He also argued that the foreign-natural test violates the intent behind the warranty provisions of the Uniform Commercial Code.³⁸

Justice Arabian also dissented, claiming that the majority's ruling was at odds with "fundamental fairness, public policy, and common sense."³⁹ Advocating adoption of the reasonable expectation test, Justice Arabian emphasized the principles underlying warranty and argued that because the seller was in the position to prevent the harm, "public health and consumer confidence mandate[d] . . . [an unaware] consumer be made whole."⁴⁰ Protecting the restaurateur from strict liability for natu-

33. *Id.* at 634-35, 822 P.2d at 1304, 4 Cal. Rptr. 2d at 157 (Mosk, J., dissenting).

34. *Id.* at 638, 822 P.2d at 1307, 4 Cal. Rptr. 2d at 160 (Mosk, J., dissenting).

35. *Id.* at 636-38, 822 P.2d at 1305-06, 4 Cal. Rptr. 2d at 158-59 (Mosk, J., dissenting) ("[T]here is no difference to public health whether the consumer is injured by an unanticipated bit of bone or an unexpected bit of wire.")

36. *Id.* at 638, 822 P.2d at 1306, 4 Cal. Rptr. 2d at 159 (Mosk, J., dissenting) (emphasis added).

37. *Id.* at 640-41, 822 P.2d at 1308-09, 4 Cal. Rptr. 2d at 161-62 (Mosk, J., dissenting). His claim is supported by a recent A.L.R. annotation. See Draper, *supra* note 16.

38. *Mexicali Rose*, 1 Cal. 4th at 642, 822 P.2d at 1309-10, 4 Cal. Rptr. 2d at 162-63 (Mosk, J., dissenting).

Application of the foreign/natural test rather than the reasonable expectations test evidences a misunderstanding of the nature of the implied warranty of merchantability with respect to food. The foreign/natural test presumes that the implied warranty refers to the absence of any foreign substances in the food. The true nature of the warranty, however, is that it guarantees that the food will be merchantable, implying that the food can be consumed without resulting injury or illness.

Id. (Mosk, J., dissenting) (quoting Mojica, *supra* note 16, at 407-08). See 3 ANDERSON, *supra* note 16, § 2-314:185 at 272 (preferring reasonable expectation test); Luetto, *supra* note 16, at 436, 439 (stating that pre-UCC courts apply foreign-natural test and post-UCC courts apply reasonable expectation test).

39. *Mexicali Rose*, 1 Cal. 4th at 645, 822 P.2d at 1311, 4 Cal. Rptr. 2d at 164 (Arabian, J., dissenting).

40. *Id.* at 645, 822 P.2d at 1311-12, 4 Cal. Rptr. 2d at 164-65 (Arabian, J., dissenting).

ral objects does not serve this policy.

In accord with Justice Mosk, Justice Arabian argued that the majority of courts have adopted the reasonable expectation test and rejected the foreign-natural distinction.⁴¹ He cited a variety of sources criticizing the *Mix* test as artificial, unworkable, and unsound.⁴² He also attacked the "ongoing vitality" of the *Mix* doctrine, concluding that only Georgia and Louisiana support it.⁴³ Justice Arabian criticized the majority for suggesting that California's legislative history supported incorporating the foreign-natural distinction into the California Uniform Commercial Code.⁴⁴ As he interpreted the legislative history, *Mix* was used only to establish the sale of food and drink as a "sale" under the UCC, and not for the purpose of supporting the natural-foreign distinction.⁴⁵

III. CONCLUSION

In *Mexicali Rose*, the majority of the California Supreme Court struck a precarious balance in substantially modifying, but not completely overruling *Mix*. This sharply divided decision, with its virulent dissents, as well as a nationwide split on the issue, indicates that the holding of *Mexicali Rose* rests upon unstable ground. Nonetheless, the ruling gives consumers some of the protection available in reasonable expectation jurisdictions by allowing negligence claims where the injury-causing substance is natural. This decision also protects restaurant owners by immunizing them against strict liability and warranty actions where a natural object causes injury.⁴⁶ With plaintiffs foreclosed from these causes of action, courts will likely see an increase in the number of negligence lawsuits for injuries caused by natural objects in food.⁴⁷

The negligence requirement should provide significant protection to restaurants against suits by patrons, since a plaintiff must prove all the elements of negligence.⁴⁸ Particularly distressing for restaurant owners, however, is the possible application of the *res ipsa loquitur* doctrine, since the injury-producing food is normally in the exclusive control of the restaurant.⁴⁹ While lower courts have applied the doctrine, the Cali-

ing).

41. *Id.* at 647, 822 P.2d at 1313, 4 Cal. Rptr. 2d at 165 (Arabian, J., dissenting).

42. *Id.* at 650, 822 P.2d at 1315, 4 Cal. Rptr. 2d at 168 (Arabian, J., dissenting).

43. *Id.* at 651, 822 P.2d at 1316, 4 Cal. Rptr. 2d at 169 (Arabian, J., dissenting).

44. *Id.* at 652, 822 P.2d at 1316, 4 Cal. Rptr. 2d at 169 (Arabian, J., dissenting).

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

46. The court emphasized that the foreign-natural test does not apply in express warranty situations. *Id.* at 631 n.6, 822 P.2d at 1301 n.6, 4 Cal. Rptr. 2d at 154 n.6.

47. Hager, *supra* note 6, at A3.

48. *Mexicali Rose*, 1 Cal. 4th at 633, 822 P.2d at 1303, 4 Cal. Rptr. 2d at 156; Hager, *supra* note 6, at A3.

49. See generally 1 B. WITKIN, CALIFORNIA EVIDENCE, *Burden of Proof and Pre-*

ifornia Supreme Court refrained from doing so in *Mexicali Rose*. Instead, it left the decision to the lower courts to treat on a case-by-case basis.⁵⁰

It is unlikely this ruling will appease critics of the foreign-natural test since the court did not overrule its fundamental distinction. The court has, however, taken some of the harshness out of the "natural" label by allowing negligence claims. Theoretically, this should mean that restaurants will take more care in the preparation of food. Airline food preparation companies have already begun to worry about increased liability.⁵¹ However, a diner must still be on guard against objects—especially ones "natural" to the preparation of foods. The best advice, as it has always been, is to chew one's food carefully and thoroughly before swallowing.

ADAM L. JOHNSON

XI. PROPERTY LAW

A sale of property with a simultaneous leaseback to a seller constitutes a change in ownership subjecting the property to reassessment: Pacific Southwest Realty Co. v. County of Los Angeles.

I. INTRODUCTION

Proposition 13,¹ enacted in 1978, provides that until a change in own-

sumptions §§ 272-273 (3d ed. 1986 & Supp. 1992) (*res ipsa loquitur*); 36A C.J.S. *Food* § 69(2) (1961 & Supp. 1992); 35 AM. JUR. 2D *Food* § 105 (1967 & Supp. 1992).

50. *Mexicali Rose*, 1 Cal. 4th at 633 n.9, 822 P.2d at 1303 n.9, 4 Cal. Rptr. 2d at 156 n.9.

51. *See Overturned Case in California Said to Have Airline Liability Implications*, 307 AVIATION DAILY 250 (Feb. 11, 1992).

1. CAL. CONST. art. XIII A (1978). Proposition 13 was a "tax revolt" initiative intended to lower property taxes which had quadrupled in the 16 years preceding the proposal. *Id.* It was adopted in the June 1978 primary election and added Article XIII A to the California Constitution. *Id.* Proposition 8 amended portions in the November 1978 general election. *Id.* *See generally* 1 KENNETH A. EHRMAN & SEAN FLAVIN, *TAXING CALIFORNIA PROPERTY*, §§ 2:01-40 (3d ed. 1988 & Supp. 1991) (Proposition 13); 9 B. WITKIN, *SUMMARY OF CALIFORNIA LAW, Taxation* §§ 107-123 (9th ed. 1989 & Supp. 1991) (Proposition 13 and its implementation); 51 CAL. JUR. 3D *Property Taxes* §§ 43-58 (1979 & Supp. 1992) (assessment generally); *Taxation; Implementation of*

ership occurs, real property is to be taxed at no more than one percent of its 1975-76 value, adjusted for inflation.² When ownership changes, however, the property is reassessed at its current market value.³ In *Pacific Southwest Realty Co. v. County of Los Angeles*,⁴ a unanimous⁵ supreme court determined that when a seller transfers a fee simple interest to a buyer and simultaneously acquires a leasehold interest in the property from the buyer, the property is subject to a real estate tax reassessment.⁶

The parties to the action agreed on the facts. The plaintiff conveyed title to an office building complex in fee simple absolute, while "excepting and reserving" a leasehold interest.⁷ One tower on the property was to be leased for at least sixty years and the other for at least twenty-one months. Both the seller and buyer treated the transaction as a sale and purchase, respectively, for federal and state income tax purposes. However, the seller claimed that since it retained exclusive use of the buildings under the lease, there was no change in ownership, and thus asserted that the property should not be subject to a real estate tax reassessment under Proposition 13. The trial court, relying on an exception in section 62(e) of the Revenue and Taxation Code⁸ held there was no

Proposition 13, 10 PAC. L.J. 573 (1979) (review of legislation); *Taxation; Property Tax Assessment and Collection Procedures*, 11 PAC. L.J. 625 (1979) (review of legislation and definition of change of ownership); Daniel G. Nauman, *Local Government Taxing Authority Under Proposition 13*, SW. U. L. REV. 795 (1978).

2. CAL. CONST., art. XIII A, §§ 1-2 (1978).

3. *Id.* See generally 9 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* §§ 112-114 (9th ed. & Supp. 1992) (change in ownership in general, inclusions, and exclusions).

4. 1 Cal. 4th 155, 820 P.2d 1046, 2 Cal. Rptr. 2d 536 (1991). See also *State Taxes—Sale and Leaseback Effects Change in Ownership Within Meaning of Prop. 13*, DAILY REP. FOR EXECUTIVES, Jan. 9, 1992, at K11 (summary and full text of decision).

5. *Pacific*, 1 Cal. 4th at 155, 820 P.2d at 1046, 2 Cal. Rptr. 2d at 536. Justice Mosk wrote the unanimous opinion in which Chief Justice Lucas, Justices Panelli, Kennard, Arabian, Baxter, and pro tem Justice Lillie concurred. *Id.* Justice Lillie of the Second District court of appeal sat in for Justice George who participated in the case at the appellate level. *Id.*

6. *Id.* at 159, 820 P.2d at 1048, 2 Cal. Rptr. 2d at 538.

7. *Id.* The court of appeal held that this express reservation of an estate of years was sufficient to exempt the transaction from a change of ownership under Revenue and Taxation Code section 62(e). *Id.* See *infra* notes 28-32 and accompanying text for the reasons why the supreme court disagreed. The court of appeal distinguished *Industrial Indemnity Co. v. City and County of San Francisco*, 218 Cal. App. 3d 999, 267 Cal. Rptr 445 (1990), which held that a sale-leaseback constituted a change in ownership, by pointing out that no express reservation of an estate of years was made in that case. *Pacific Southwest Realty Co. v. County of Los Angeles*, 235 Cal. App. 3d 1817, 1823, 280 Cal. Rptr. 155, 158 (Cal. Ct. App. 1991).

8. See notes 28-32 and accompanying text for the supreme court's analysis to the contrary.

change of ownership and entered judgment for the seller.⁹ The court of appeal affirmed.¹⁰

II. TREATMENT

The supreme court reversed the court of appeal, and held that the transaction was a change of ownership since it fulfilled the three-prong test in Revenue and Tax Code section 60.¹¹ Section 60 was intended to be the overarching definition of a change in ownership.¹² Under the test, a change of ownership occurs on "a transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the fee interest."¹³

The first prong was satisfied because the seller transferred the present interest of a fee title to the buyer.¹⁴ Moreover, the leasehold did not defeat the transfer of a present interest because a leasehold is an interest different in kind from a freehold.¹⁵

Next, the court determined the buyer had beneficial use of the property, since he was entitled to exact rent at the market rate from the seller.¹⁶ In addition, the presumption that the owner of legal title also has

9. *Pacific*, 1 Cal. 4th at 160, 820 P.2d at 1045, 2 Cal. Rptr. 2d at 535.

10. *Id.*

11. *Id.* at 162-66, 820 P.2d at 1050-53, 2 Cal. Rptr. 2d at 540-43.

12. *Id.* at 161-62, 820 P.2d at 1050, 2 Cal. Rptr. 2d at 540. The task force created to establish uniform guidelines for implementing Proposition 13's change in ownership provision specified the characteristics of a change in ownership in a single test. *Id.* (quoting the Task Force Report on Property Tax Administration submitted to the Assembly Committee on Revenue and Taxation on January 22, 1979). The task force recommended that the test "control *all* transfers, both foreseen and unforeseen." *Id.* Thus, the court declared it important that all statutory examples, including the exemptions, be interpreted consistent with the general test. *Id.* As applied in the instant case, the test even controls exemptions whose plain meanings encompass the instant transaction. *Id.* See *infra* notes 24-34 and accompanying text.

13. *Pacific*, 1 Cal. 4th at 161-66, 820 P.2d at 1050, 2 Cal. Rptr. 2d at 540. CAL. REV. & TAX. CODE § 60 (West 1987 & Supp. 1992).

14. *Pacific*, 1 Cal. 4th at 162-63, 820 P.2d at 1050-51, 2 Cal. Rptr. 2d at 540-41.

15. *Id.* An estate in fee simple is a freehold estate; a leasehold is not. See CAL. CIV. CODE §§ 762, 765 (1982 & Supp. 1992) (estate in fee and chattels real). A freehold is an ownership interest, whereas a leaseholder has a mere possessory interest in the land. *Pacific*, 1 Cal. 4th at 162-63, 820 P.2d at 1050-51, 2 Cal. Rptr. 2d at 540-41. The seller in the instant case was left with an interest different in kind than before the transaction. *Id.* The court held this sufficient to prove the transfer of a present interest.

16. *Id.* at 163-64, 820 P.2d at 1051-52, 2 Cal. Rptr. 2d at 541-42. See *Industrial In-*

beneficial title¹⁷ was not rebutted because the seller offered no evidence of a custodial or trust relationship.¹⁸ Furthermore, the fact that the buyer could not occupy the building as a result of the lease did not deprive the buyer of the right to collect the value of the beneficial title as rent from the seller.¹⁹

The third prong of the test was met because the value of the transferred interest was equivalent to the value of a fee interest.²⁰ The property was merely subject to the encumbrance of a leasehold interest.²¹ Moreover, if the property were resold, it would probably sell at the market price.²² Further, the third prong was intended to insulate from reassessment transfers of low value, such as a one-year lease.²³ Thus, the transfer of the full value of the fee interest satisfied the requirement that the substantial value of the fee interest pass.

After determining that the transfer resulted in a change of ownership under the three-part test, the court found that no part of section 62 exempted the conveyance from the change of ownership test.²⁴ Subdivision (g) of section 62 exempts "[a]ny transfer of a lessor's interest in taxable real property subject to a lease with a remaining term (including renewal options) of 35 years or more."²⁵ However, the exemption was not intended to apply to a sale and leaseback transaction.²⁶ Although the lease was

demnity Co. V. City and County of San Francisco, 218 Cal. App. 3d 999, 267 Cal. Rptr. 445 (Cal. Ct. App. 1990) (equating beneficial use with the right to receive rent).

17. *Pacific*, 1 Cal. 4th at 163-64, 820 P.2d at 1051-52, 2 Cal. Rptr. at 541-42. "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." *Id.* (citing CAL. EVID. CODE § 662 (West 1987 & Supp. 1992)).

18. *Pacific*, 1 Cal. 4th at 164, 820 P.2d at 1051-52, 2 Cal. Rptr. 2d at 541-52.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 166, 820 P.2d at 1053, 2 Cal. Rptr. 2d at 543.

23. *Id.* A one-year lease would not be considered a change in ownership since the value of the interest is not substantially equal to the fee interest. *Id.* By contrast, the creation of a 35-year lease would achieve a change in ownership because the value of the lease transferred is substantially equal to the fee value. *Id.* See CAL. REV. & TAX. CODE § 61(c)(1) (West 1987 & Supp. 1992) (specifically including lease of 35 years or more as change in ownership).

24. *Pacific*, 1 Cal. 4th at 166-71, 820 P.2d at 1053-55, 2 Cal. Rptr. 2d at 543-55.

25. CAL. REV. & TAX. CODE § 62(g) (West 1987 & Supp. 1992).

26. *Pacific*, 1 Cal. 4th at 167, 820 P.2d at 1054, 2 Cal. Rptr. 2d at 544. The exception was intended to apply when property is sold subject to a long-term lease. *Id.* It protects long-term lessees who are obligated to pay property taxes under lease agreements, because a sale by the lessor will not be considered a change in ownership. *Id.* It is consistent with the task force report that the party with the primary economic interest in the property control changes in ownership. *Id.* The sale-leaseback is too far removed from the intent behind the exception. *Id.* at 167-68, 820 P.2d at 1054-55, 2 Cal. Rptr. 2d at 544-45.

executed prior to the sale, it could not be considered a "remaining term" because it was not in existence at the time of the transaction.²⁷

The supreme court also found inapposite the exemption applied by the court of appeals.²⁸ Subdivision (e) of section 62 exempts "[a]ny transfer . . . whose terms reserve . . . an estate of years."²⁹ Although superficially the transaction fit under the language of the exemption, such an inclusion would be contrary to the finding that a sale-leaseback is not a change of ownership under section 60.³⁰ The 62(e) exception was intended to protect parents who commonly want to convey family property to their children, yet retain the right to live in the family home the rest of their lives.³¹ The legislature did not intend for a sale and leaseback transaction to fall within section 62(e).³²

Finally, the court stated that to the extent section 462(k)(4) of title 18 of the California Code of Regulations conflicted with the Revenue and Tax Code, its enforcement was proscribed.³³ The finding of a change in ownership under section 60 controlled over the rule as well as the exceptions above.³⁴

27. *Id.* at 167, 820 P.2d at 1054, 2 Cal. Rptr. 2d at 544.

28. *Id.*

29. CAL. REV. & TAX. CODE § 62(e) (West 1987 & Supp 1992).

30. *Id.*

31. *Pacific*, 1 Cal. 4th at 170, 820 P.2d at 1056, 2 Cal. Rptr. 2d at 546.

32. *Id.*

33. *Id.* Section 462, subdivision (k)(4) of title 18 of the California Code of Regulations provides: "Sale and leaseback. A sale of real property, coupled with a leaseback which is not reserved to the transferor by terms of the sale instrument, constitutes a change in ownership of such property." CAL. CODE REGS. tit. 18, § 462(k)(4) (1990). The trial court read the negative pregnant of the rule to say "a sale of real property, coupled with a lease-back, that is reserved to the transferor by the terms of the sale instrument does not constitute a change in ownership," thereby exempting the instant transaction. *Pacific*, 1 Cal. 4th at 170, 820 P.2d at 1056, 2 Cal. Rptr. 2d at 546. The court of appeal had reached the same conclusion. *Pacific Southwest Realty Co. v. County of Los Angeles*, 235 Cal. App. 3d 1817, 1823, 280 Cal. Rptr. 155, 159 (Cal. Ct. App. 1991).

Although this interpretation is consistent with the plain meaning of the rule, the supreme court once again determined it was superseded by the change of ownership finding under Revenue and Taxation Code 60. *Pacific*, 1 Cal. 4th at 171, 820 P.2d at 1056, 2 Cal. Rptr. 2d at 546.

34. *Pacific*, 1 Cal. 4th at 170, 820 P.2d at 1056, 2 Cal. Rptr. 2d at 546.

III. CONCLUSION

The supreme court's finding in the present case was a tax victory for cities and counties because real property involved in sale-leaseback transactions will now be reassessed at current market value. Moreover, the ruling in the instant case means an additional \$10 million in revenue for the county of Los Angeles. A similar case pending in San Francisco will generate an additional \$18 million in taxes for the city.³⁵

This decision, however, is a blow to banks and businesses that raise capital by using the confusion over whether a sale-leaseback constitutes a change of ownership.³⁶ The sale-leaseback transaction allows a seller to use his or her property to generate capital without relinquishing control. It also provides companies in need of depreciation deductions or investment opportunities a property in fee with a guarantee of a long-term lease. However, as a result of the court's holding, these transactions are not attractive because assessments will no longer be calculated at their 1975-76 rates.³⁷

It is unclear just how many banks and thrifts have raised capital through sale-leasebacks, but the practice is thought to be widespread.³⁸ Many sale-leasebacks have been challenged as changes in ownership by assessors.³⁹ The individual impact on institutions will depend on whether they paid the full tax and filed for a refund, or simply paid the lower rate.⁴⁰ Those that paid taxes assessed at the 1975-76 rate are in for the unpleasant surprise of an unexpected tax liability.

ADAM L. JOHNSON

XII. TORT LAW

When an on-duty police officer misuses his authority by raping a woman whom he has detained, (1) the officer's actions are within the course of his employment and (2) the public entity that employs the officer may be liable under the doctrine of respondeat superior: Mary M. v. City of Los Angeles.

35. *California Changes Tax Treatment of Leasebacks*, NAT'L MORTGAGE NEWS, Jan. 6, 1992, at 5.

36. *Id.*

37. *Justices See Through Sale-leaseback Gambit*, L.A. DAILY J., Jan. 13, 1992, at 6.

38. *California Changes Tax Treatment of Leasebacks*, *supra* note 35.

39. *Id.*

40. *Id.*

I. INTRODUCTION

The California Supreme Court's decision in *Mary M. v. City of Los Angeles*¹ addressed the issue of whether a government employer may be held liable under the doctrine of respondeat superior when an on-duty police officer rapes a woman after having detained her for erratic driving.² For the doctrine to apply, the court had to determine whether the officer's actions came within the scope of his employment.³ The five-justice majority⁴ held in the affirmative on substantive tort law principles,⁵ emphasizing the unique position of authority and trust that police officers occupy in our society.⁶

1. 54 Cal. 3d 202, 814 P.2d 1341, 285 Cal. Rptr. 99 (1991).

2. *Id.* at 207, 814 P.2d at 1342, 285 Cal. Rptr. at 100. See *infra* notes 21-32 and accompanying text.

3. *Mary M.*, 54 Cal. 3d at 209, 814 P.2d at 1344, 285 Cal. Rptr. at 102. See *infra* notes 33-45 and accompanying text.

4. *Mary M.*, 54 Cal. 3d at 202, 814 P.2d at 1341, 285 Cal. Rptr. at 99. Justice Kennard wrote the majority opinion in which Justices Mosk, Panelli, and Broussard concurred. Justice Arabian filed a concurring opinion. Justice Baxter, joined by Chief Justice Lucas, filed an opinion concurring only in the judgment.

5. *Id.* at 221, 814 P.2d at 1352, 285 Cal. Rptr. at 110. Justices Baxter and Lucas agreed with the majority that the city was liable in this case, but reached that conclusion using only the narrow procedural ground of the invited error doctrine. *Id.* at 225-28, 814 P.2d at 1354-57, 285 Cal. Rptr. at 112-15 (Baxter, J., concurring). Their intense disagreement with the majority's "vicarious liability" and "scope of employment" analysis makes Justice Baxter's opinion appear more like a dissent. Lisa Stansky, *Cities Can Face Liability In Cases of Police Rape*, THE RECORDER, Sept. 6, 1991, at 1. Basically, Justice Baxter disagreed with the majority's scope of employment and public employer liability analysis because such issues are governed by statute (namely, the California Tort Claims Act of 1963) which precludes judicial justification based solely on policy and case law. *Mary M.*, 54 Cal. 3d at 228-30, 814 P.2d at 1357-58, 285 Cal. Rptr. at 115-16 (Baxter, J., concurring). See *infra* note 51.

6. *Mary M.*, 54 Cal. 3d at 206, 814 P.2d at 1342, 285 Cal. Rptr. at 100. The court stated:

[S]ociety has granted police officers extraordinary power and authority over its citizenry. An officer who detains an individual is acting as the official representative of the state, with all of its coercive power. As visible symbols of that power, an officer is given a distinctively marked car, a uniform, a badge, and a gun Inherent in this formidable power is the potential for abuse.

Id. at 216-17, 814 P.2d at 1349, 285 Cal. Rptr. at 107.

II. STATEMENT OF THE CASE

The plaintiff, Mary M., was driving home by herself early in the morning of October 3, 1991.⁷ At about 2:30 a.m., Sergeant Schroyer of the Los Angeles Police Department stopped the plaintiff for erratic driving and administered a field sobriety test.⁸ Schroyer was wearing his badge and uniform, carrying a gun, and driving the traditional black-and-white patrol car.⁹

Not having performed the field sobriety test well, Mary M. began to cry, pleading with Schroyer not to take her to jail.¹⁰ Schroyer told her to get into his police car.¹¹ He then drove to the plaintiff's home where he told her he "expected payment" for not taking her to jail.¹² When Mary M. tried to escape from within her own house, Schroyer threatened to take her to jail. Once she stopped struggling, he raped her.¹³ This sequence of events led to the filing of criminal charges against Schroyer and a subsequent conviction of rape¹⁴ with a state prison sentence.¹⁵

The plaintiff then filed a civil action for damages against both Schroyer and the City of Los Angeles as his employer.¹⁶ The jury awarded the plaintiff \$150,000 in damages, for which the trial court held the officer and the City of Los Angeles jointly and severally liable.¹⁷ The appellate court reversed, holding that, as a matter of law, a police officer's act of rape was not within the scope of his employment.¹⁸ Granting review, the

7. *Id.* at 206-07, 814 P.2d at 1342, 285 Cal. Rptr. at 100.

8. *Id.* at 207, 814 P.2d at 1342, 285 Cal. Rptr. at 100.

9. *Id.*

10. *Id.*

11. *Id.* Schroyer never handcuffed the plaintiff. *Id.*

12. *Id.*

13. *Id.* at 207, 814 P.2d at 1342-43, 285 Cal. Rptr. at 100-01. When Schroyer had originally pulled the plaintiff's car over to the side of the road, he notified headquarters that he was "conducting an investigation." *Id.* at 207, 814 P.2d at 1343, 285 Cal. Rptr. at 101. Upon leaving the plaintiff's house, he called in again on his car radio, this time stating he was back from his "lunch break." *Id.* When the radio operator questioned the inconsistency between Schroyer's present and previous statements, Schroyer did not respond. *Id.*

14. See CAL. PENAL CODE § 261(a)(2) (West Supp. 1992).

15. *Mary M.*, 54 Cal. 3d at 207, 814 P.2d at 1343, 285 Cal. Rptr. at 101.

16. *Id.* at 208, 814 P.2d at 1343, 285 Cal. Rptr. at 101.

17. *Id.* at 208 n.1, 814 P.2d at 1343 n.1, 285 Cal. Rptr. at 101 n.1. See generally 57 C.J.S. *Master and Servant* § 579 (1948) (joint and several liability); 35 CAL. JUR. 3D *Government Tort Liability* § 134 (1988 & Supp. 1992) (payment of judgments against local public entities); 35 CAL. JUR. 3D *Government Tort Liability* § 135 (1988 & Supp. 1991) (providing funds to pay judgments). The trial court also assessed \$150,000 in punitive damages against Schroyer. *Mary M.*, 54 Cal. 3d at 208 n.1, 814 P.2d at 1343 n.1, 285 Cal. Rptr. at 101 n.1.

18. *Id.* at 208, 814 P.2d at 1343, 285 Cal. Rptr. at 101.

Supreme Court of California held that the officer's actions satisfied the scope of employment requirement of respondeat superior and that the city, as the officer's employer, was vicariously liable.¹⁹ The court also reinstated the \$150,000 jury award.²⁰

III. THE COURT'S OPINION

A. *Policy Goals Underlying the Doctrine of Respondeat Superior Are Furthered by Holding the Public Employer Vicariously Liable for a Police Officer's Sexual Assaults*

According to the doctrine of respondeat superior, an employer may be held vicariously liable for an employee's tortious conduct that occurs within the course and scope of employment.²¹ The theory creates an exception to the general tort concept that liability follows fault and represents a conscious allocation of risk.²² The doctrine pertains not only to private employers, but public employers as well.²³

Respondeat superior is based on three policy objectives, all of which, according to the majority, would be realized in the present situation where an on-duty peace officer exploits his police power to commit a rape. First, vicarious liability encourages the employer to take preventive measures, thereby reducing the likelihood of repeated tortious behavior.²⁴ In this regard, the court stated that the Los Angeles Police Department could adopt a rule requiring a male officer, whenever transporting a

19. *Id.* at 221, 814 P.2d at 1352, 285 Cal. Rptr. at 110.

20. Lisa Stansky, *Cities Can Face Liability In Cases of Police Rape*, THE RECORD-ER, Sept. 6, 1991, at 1.

21. *Mary M.*, 54 Cal. 3d at 208, 814 P.2d at 1343, 285 Cal. Rptr. at 101. See generally 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 115 (9th ed. 1987); 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 115 (9th ed. 1987 & Supp. 1992); 29 CAL. JUR. 3D *Employer and Employee* §§ 91, 95 (1986 & Supp. 1992); 3 CAL. JUR. 3D *Agency* § 131 (1973 & Supp. 1992); 57 C.J.S. *Master and Servant* §§ 561, 572-73 (1948).

22. *Mary M.*, 54 Cal. 3d at 208, 814 P.2d at 1343, 285 Cal. Rptr. at 101.

23. *Id.* at 209, 814 P.2d at 1344, 285 Cal. Rptr. at 102. Section 815.2(a) of the California Government Code provides:

A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

CAL. GOV'T CODE § 815.2(a) (West 1980) (emphasis added).

24. *Mary M.*, 54 Cal. 3d at 214, 814 P.2d at 1347, 285 Cal. Rptr. at 105.

female suspect, to report the time, location, and mileage before departing and again upon reaching his destination.²⁵ Such a preventive procedure would not impede the ability of police departments in carrying out their law enforcement responsibilities.²⁶ The second justification is to increase the certainty of compensation for the plaintiff,²⁷ an objective already recognized as legitimate through the Legislature's enactment of the California Tort Claims Act of 1963.²⁸ Acknowledging that courts have already interpreted the Act to hold governmental employers vicariously

25. *Id.* at 215 n.7, 814 P.2d at 1348 n.7, 285 Cal. Rptr. at 106 n.7. The San Francisco Police Department has already implemented such a rule. *Id.* The Los Angeles Police Department has a similar policy "which requires officers on duty who transport persons of the opposite sex to report the time and the mileage on the vehicle's odometer before and after the trip." *Id.* at 218 n.10, 814 P.2d at 1350 n.10, 285 Cal. Rptr. at 108 n.10.

Justice Baxter argued that the majority's premise that the City of Los Angeles could and should adopt further regulations defies statutory authority which provides that "[a] public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law." *Id.* at 237, 814 P.2d at 1363, 285 Cal. Rptr. at 121 (Baxter J., concurring) (quoting CAL. GOV'T CODE § 818.2 (West 1980 & Supp. 1992)). According to section 810.6 of the California Government Code, the term "enactment" includes regulations. *Id.* at 237, 814 P.2d at 1363, 285 Cal. Rptr. at 121 (Baxter, J., concurring) (citing CAL. GOV'T CODE § 818.2 (West 1980 & Supp. 1992)).

26. *Id.* at 215, 814 P.2d at 1348, 285 Cal. Rptr. at 106. *Cf.* John R. v. Oakland Unified Sch. Dist., 48 Cal. 3d 438, 769 P.2d 948, 256 Cal. Rptr. 766 (1989) (holding school district not liable for a teacher's sexual molestation of a junior high school student at the teacher's apartment during an authorized extracurricular program because any preventive measures implemented would probably inhibit extracurricular activities and one-on-one teacher-student contacts).

Justice Baxter disagreed, arguing that the principle underlying the Tort Claims Act of 1963 is to limit the liability of a public entity so that it need not implement preventive measures that are so "onerous, impossible, or impractical" as to impair its public functions. *Mary M.*, 54 Cal. 3d at 236-37, 814 P.2d at 1362-63, 285 Cal. Rptr. at 120-21 (Baxter, J., concurring). Justice Baxter argued that imposing vicarious liability in this case leaves the City of Los Angeles with two alternatives: (1) decide all reasonable precautionary steps have already been taken "and accept the fact that errant officers might on occasion rape citizens, thereby subjecting the City to vicarious liability," in which case no deterrent effect is achieved, or (2) implement additional measures, which might unduly interfere with the effectiveness of the City's police force. *Id.* at 238, 814 P.2d at 1364, 285 Cal. Rptr. at 122 (Baxter, J., concurring). Justice Baxter did not enumerate the ways in which the added policies would frustrate the city's responsibilities. *See id.*

27. *Id.* at 209, 814 P.2d at 1343, 285 Cal. Rptr. at 101.

28. CAL. GOV'T CODE §§ 810-997.6 (West 1980 & Supp. 1992). The California Tort Claims Act of 1963 makes all public entities liable in tort to the extent provided by statute, with certain statutory immunities and defenses. *See generally* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 129, 132-33 (1988 & Supp. 1992) (statutory liability); 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 136-40 (1988 & Supp. 1992) (immunities and defenses); 35 CAL. JUR. 3D *Government Tort Liability* §§ 1-9 (1988 & Supp. 1992).

liable for a police officer's assaultive conduct or use of excessive force,²⁹ and seeing little difference between police beatings and police rapes, the court reasoned that both types of assault victims deserve to be compensated.³⁰ The third and final justification for respondeat superior is that it effectively spreads the risk of loss.³¹ In this instance, the community should bear the cost of police power abuse because it is the community that derives substantial benefits from the lawful exercise of that authority.³²

29. *Mary M.*, 54 Cal. 3d at 215, 814 P.2d at 1348, 285 Cal. Rptr. at 106. The majority noted that the legislature "declin[ed] to grant immunity to public entities when their police officers engage in *violent conduct*." *Id.* (emphasis added). See, e.g., *Larson v. City of Oakland*, 17 Cal. App. 3d 91, 94 Cal. Rptr. 466 (1971) (holding city liable for policeman's assault and battery because plaintiff was not a prisoner within the meaning of the statute providing immunity); *Scruggs v. Haynes*, 252 Cal. App. 2d 256, 60 Cal. Rptr. 355 (1967) (holding city liable for policeman's use of excessive force while acting in the course and scope of employment); *Griffith v. City of Monrovia*, 134 Cal. App. 3d Supp. 6, 184 Cal. Rptr. 709 (1982) (holding that city was not immune from liability when a policeman sprayed the plaintiff with mace). See generally 35 CAL. JUR. 3D *Government Tort Liability* § 66 (assault and battery by policeman) (1988 & Supp. 1992); 3 C.J.S. *Agency* § 428 (use of excessive force) (1973 & Supp. 1992).

30. *Mary M.*, 54 Cal. 3d at 216, 814 P.2d at 1348-49, 285 Cal. Rptr. at 106-07. Disagreeing with the majority's goal of more adequately compensating the victim, Justice Baxter argued that holding cities liable for employee-committed rapes will simultaneously "increase the cost of insurance and . . . decrease its availability." *Id.* at 239, 814 P.2d at 1365, 285 Cal. Rptr. at 123 (Baxter, J., concurring). Furthermore, "[t]he public has equally compelling interests in adequate law enforcement and preservation of public funds." *Id.* at 240, 814 P.2d at 1365, 285 Cal. Rptr. at 123 (Baxter, J., concurring). Thus the decision is better left to the legislature. *Id.* (Baxter, J., concurring). See *infra* note 32.

31. *Mary M.*, Cal. 3d at 209, 814 P.2d at 1343, 285 Cal. Rptr. at 101. The rationale is that it is only fair to place the responsibility for the victim's losses on those who benefit from the activity that gave rise to the harm. *Id.*

32. *Id.* at 217, 814 P.2d at 1349, 285 Cal. Rptr. at 107. Justice Baxter disagreed, arguing that the evaluation of risk distribution for public entity torts is part of the legislature's budgetary function. *Id.* at 236, 814 P.2d at 1362, 285 Cal. Rptr. at 120 (Baxter, J., concurring). Moreover, the court lacks "sufficient empirical data on which to make the difficult choice between competing fiscal priorities." *Id.* (Baxter, J., concurring). The California Law Revision Commission's explanation, after extensive research and before enactment of the Tort Claims Act, is instructive:

The problems involved in drawing standards for governmental liability and governmental immunity are of immense difficulty. Government cannot merely be made liable as private persons are, for public entities are fundamentally different from private persons . . . Private persons do not prosecute and incarcerate violators of the law . . . Unlike many private persons, a public

B. The Scope of Employment Issue Was Properly Left to the Jury Because the Rape, When Considered in Context, Was Not Necessarily Dissociated from the Police Officer's Occupation

The standard for determining whether an employee's conduct falls outside the scope of employment is whether the employee's behavior, in the context of his particular line of work is so unusual or startling that requiring the employer to bear the loss would seem unfair.³³ A risk that arises out of the employment is one that is "typical of or broadly incidental to" the employer's operations.³⁴ Intentional acts, malicious acts, conduct contrary to an employee's authorized tasks or employer's explicit

entity often cannot reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency.

Id. at 235, 814 P.2d at 1362, 285 Cal. Rptr. at 120 (Baxter, J., concurring) (citation omitted).

33. *Id.* at 209, 214, 814 P.2d at 1344, 1347, 285 Cal. Rptr. at 102, 105. See generally, 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 126 (9th ed. 1987 & Supp. 1992); 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 150-51 (1987 & Supp. 1992); 29 CAL. JUR. 3D *Employer and Employee* § 107 (1986 & Supp. 1992) (scope of employment in general); 29 CAL. JUR. 3D *Employer and Employee* § 108 (1986 & Supp. 1992) (foreseeability); 29 CAL. JUR. 3D *Employer and Employee* § 110 (1986 & Supp. 1992) (departure from course of duty); 3 C.J.S. *Agency* § 424 (1973 & Supp. 1992) (tort within course of employment); 3 C.J.S. *Agency* § 426 (1973 & Supp. 1992) (tort outside course of employment); 57 C.J.S. *Master and Servant* § 570 (1948) (acts or omissions imposing liability in general); 30 C.J.S. *Employer-Employee Relationship* § 220 (1992) (criminal acts); 30 C.J.S. *Employer-Employee Relationship* § 223 (1992) (sexual misconduct); 30 C.J.S. *Employer-Employee Relationship* § 224 (1992) (assault by employee).

Compare *White v. County of Orange*, 166 Cal. App. 3d 566, 212 Cal. Rptr. 493 (1985) (holding that plaintiff stated a cause of action because the sheriff's wrongful conduct flowed directly from the use of his official authority when he detained a female motorist, driving her around for hours in the back of his patrol car while threatening to rape and kill her) and *Perez v. Van Groningen & Sons, Inc.*, 41 Cal. 3d 962, 719 P.2d 676, 227 Cal. Rptr. 106 (1986) (holding employer liable when an employee negligently allowed his nephew to ride on a tractor while employee drove it through an orchard pulling a disking attachment and a branch knocked the nephew off the tractor and into the disking attachment) with *Rita M. v. Roman Catholic Archbishop*, 187 Cal. App. 3d 1453, 232 Cal. Rptr. 685 (1986) (holding that sexual activity between priest and parishioner is outside the scope of employment because it is not characteristic of the church and, thus, not foreseeable) and *Alma W. v. Oakland Unified Sch. Dist.*, 123 Cal. App. 3d 133, 176 Cal. Rptr. 287 (1981) (holding school custodian's sexual molestation of an 11-year-old child on school grounds outside scope of employment because "there is no aspect of a janitor's duties that would make sexual assault anything other than highly unusual and very startling").

34. *Mary M.*, 54 Cal. 3d at 209, 814 P.2d at 1344, 285 Cal. Rptr. at 102.

directions, and even behavior that does *not* benefit the employer may still fall within the scope of employment.³⁵ A limited exception exists, however, when an employee deviates substantially from his employment obligations to pursue personal motivations.³⁶

The city argued that a police officer is outside the scope of his employment as a matter of law when he rapes a citizen, even if he asserts his government-conferred authority beforehand,³⁷ because of the tenuous connection between the criminal conduct and an officer's sanctioned police function.³⁸ However, the court disagreed, reasoning that "[i]n view of the considerable power and authority that police officers possess,³⁹] it is neither startling nor unexpected that on occasion an officer will misuse that authority by engaging in assaultive conduct The precise circumstances of the assault need not be anticipated, so long as the risk is one that is *reasonably foreseeable*."⁴⁰

35. *Id.* For background concerning liability for willful, malicious or criminal acts see *supra* note 33.

36. *Mary M.*, 54 Cal. 3d at 218, 814 P.2d at 1350, 285 Cal. Rptr. at 108. See generally 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 128 (9th ed. 1987 & Supp. 1992); 57 C.J.S. *Master and Servant* § 574 (1948).

37. *Mary M.*, 54 Cal. 3d at 211, 814 P.2d at 1345, 285 Cal. Rptr. at 103. Generally, the determination of whether an employee acted within the scope of employment embodies a question of fact, but becomes a question of law when no disputed facts or contradicting inferences exist. This occurs only when "the relationship between an employee's work and wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment." *Id.* at 213, 814 P.2d at 1347, 285 Cal. Rptr. at 105.

38. *Id.* at 217, 814 P.2d at 1349, 285 Cal. Rptr. at 107.

39. For example, police officers may detain criminal suspects "at gunpoint, place them in handcuffs, remove them from their residences, order them into police cars and, in some circumstances, . . . use deadly force." *Id.* at 217, 814 P.2d at 1349-50, 285 Cal. Rptr. at 107-08.

[T]he very nature of law enforcement employment requires exertion of physical control over persons whom an officer has detained or arrested That authority carries with it the risk of abuse. The danger that an officer will commit a sexual assault while on duty *arises from* the considerable authority and control inherent in the responsibilities of an officer in enforcing the law.

Id. at 218, 814 P.2d at 1350, 285 Cal. Rptr. at 108 (emphasis added).

40. *Id.* at 217-18, 814 P.2d at 1350, 285 Cal. Rptr. at 108 (emphasis added). The fact that the Los Angeles Police Department already has such a mileage recordation policy when officers transport members of the opposite sex tends so show that Shroyer's conduct was reasonably foreseeable. See *id.* at 218 n.10, 814 P.2d at 1350 n.10, 285 Cal. Rptr. at 108 n.10.

With regard to the limited exception for an employee who departs significantly from his employment obligations for personal purposes, the city argued that Schroyer was predominately pursuing his own interests when he committed the rape.⁴¹ However, the court stated that it is crucial to examine the employees' tortious conduct in context, not in isolation.⁴² Several factors led the court to conclude that Schroyer's acts were still within the scope of his employment. In the first place, Schroyer accomplished the detention through the direct exercise of his police authority when he "activat[ed] the red lights on his patrol car."⁴³ Thereafter, he *ordered* her to get out of her car, to perform a field sobriety test, and then to get into his police car.⁴⁴ Moreover, when the plaintiff tried to avoid the sexual assault, Schroyer "*continued to assert his authority* by threatening to take her to jail."⁴⁵

IV. IMPACT

The California Supreme Court's decision in *Mary M.* significantly expands governmental liability for police officer misconduct⁴⁶ and will certainly affect policies within police departments.⁴⁷ There are two concerns with the ruling, however. First is the possible transformation of "blameless public agencies into liability insurers for much, if not all, of the intentional misconduct committed by peace officers in their employ"⁴⁸ because the effect of imposing the doctrine of respondeat superior is to impose strict liability.⁴⁹ Second, there seems to be no limit on

41. *Id.* at 218, 814 P.2d at 1350, 285 Cal. Rptr. at 108. Justice Baxter agreed with the city's argument that for an on-duty police officer to commit a sexual assault for his own personal gratification constitutes a complete deviation from his work assignment that is both startling and unusual, finding that apart from the original detention, there is no connection whatsoever between a rape and a police officer's duties. *Id.* at 230, 814 P.2d at 1358, 285 Cal. Rptr. at 116. (Baxter, J., concurring). Indeed, "[n]o act can be more unrelated to the duties of a police officer than his rape of a member of the public he is sworn and paid to protect." *Id.* at 228, 814 P.2d at 1357, 285 Cal. Rptr. at 115 (Baxter, J., concurring).

42. *Id.* at 218-19, 814 P.2d at 1350, 285 Cal. Rptr. at 108.

43. *Id.* at 221, 814 P.2d at 1352, 285 Cal. Rptr. at 110. This is similar to the reasoning of the court in *White v. County of Orange*, 166 Cal. App. 3d 566, 212 Cal. Rptr. 493 (1985). *See supra* note 33.

44. *Mary M.*, 54 Cal. 3d at 219, 814 P.2d at 1351, 285 Cal. Rptr. at 109.

45. *Id.* (emphasis added).

46. Philip Hager, *L.A. is Liable in Rape by Officer, Court Rules*, L.A. TIMES, Sept. 6, 1991, at A1.

47. *City of Los Angeles Liable for Cop's Rape of "Mary M."*, PROPRIETARY TO THE UNITED PRESS INT'L, Sept. 5, 1991.

48. *See Hager, supra* note 46, at A1.

49. *Mary M.*, 54 Cal. 3d at 235, 814 P.2d at 1362, 285 Cal. Rptr. at 120 (Baxter, J., concurring). This is because it is an exception to the general tort principle that liability is based on fault. Justice Baxter "warn[s] that the court's unprecedented ex-

the amount of damages the public will have to pay.⁵⁰ The case also raised, but the court declined to resolve, the issue of whether sovereign immunity protects the city from liability for the trauma caused by the investigation and criminal prosecution of the rape.⁵¹ The court directed the court of appeals to examine this issue on remand.⁵²

In addition to imposing liability on cities, *Mary M.* marks a continuing trend toward reducing the obstacles that block women from pursuing actions related to sex crimes. Justice Arabian concurred with the majority but wrote separately to discuss the progress achieved through the *Mary M.* holding in rectifying "the historical imbalance between victim and accused in sexual assault prosecutions."⁵³

V. CONCLUSION

The outcome in this case turns on the abuse of coercive power of employees in a position of authority.⁵⁴ Employees without this power or authority may very well be acting outside the scope of their employment as a matter of law when they commit sexual assaults.⁵⁵ If the legislature

pansion of governmental liability would leave taxpayers responsible for 'almost any abuse of position' by an officer." *Id.* (Baxter, J., concurring).

50. See Hager, *supra* note 46, at A1. Considering the co-existing scarcity and high cost of municipal liability insurance, damage awards could seriously deplete public funds. *Mary M.*, 54 Cal. 3d at 236, 814 P.2d at 1362, 285 Cal. Rptr. at 120 (Baxter, J., concurring).

51. California Government Code section 815.2(b) states that "[e]xcept as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." CAL. GOV'T CODE § 815.2(b) (West 1980) (emphasis added). The comment to this section states that it "abolishes all common law or judicially declared forms of liability." *Id.* In other words, sovereign immunity is the rule in California and governmental liability is limited to exceptions specifically set forth by *statute* or required by the federal or state *constitutions*. See generally 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 129 (1988 & Supp. 1992). For background on governmental liability for police activities and correctional facilities, see generally 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 198-216 (1988 & Supp. 1992).

52. *Mary M.*, 54 Cal. 3d at 221 n.12, 814 P.2d at 1352 n.12, 285 Cal. Rptr. at 110 n.12.

53. *Id.* at 222, 814 P.2d at 1353, 285 Cal. Rptr. at 111 (Arabian, J., concurring).

54. *For the Record*, THE NAT'L L.J., Sept. 16, 1991, at 6. In a case involving a job counselor at the State Employment Security office who raped two Laotian refugees when they contacted him about obtaining employment, the Ninth Circuit reached the same conclusion (that vicarious liability can be imposed on local governments when employees on duty perpetrate rapes) for the same reason (the coercive power that authority figures possess). *Id.* (citing *Vang v. Toyed*, 944 F.2d 476 (9th Cir. 1991)).

55. *Mary M.*, 54 Cal. 3d at 218 n.11, 814 P.2d at 1350 n.11, 285 Cal. Rptr. at 108

is dissatisfied with the court of appeals' decision on remand regarding the municipality's liability,⁵⁶ it could extend immunity to police officer assaults, sexual or otherwise.⁵⁷

LORRAINE A. MUSKO

n.11.

56. See *infra* notes 51-52 and accompanying text.

57. *Mary M.*, 54 Cal. 3d at 216 n.9, 814 P.2d at 1348 n.9, 285 Cal. Rptr. at 106 n.9.