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California Supreme Court Survey - A Review of Decisions: June 1991-November 1991

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

I. ADMINISTRATIVE LAW

The Governor's appointment calendars and schedules are within the scope of the public interest exemption from the disclosure requirements of the Public Records Act because disclosure would jeopardize the Governor's deliberative process and would pose a threat to the Governor's physical security: **Times Mirror v. Superior Court.**

I. INTRODUCTION

In *Times Mirror Co. v. Superior Court*,[1] the California Supreme Court considered whether the Governor properly refused a newspaper's request pursuant to the Public Records Act ("The Act") to disclose "appointment schedules, calendars, notebooks, and any documents that would list [the Governor's] daily activities as governor from [his] inauguration in 1983 to the present."[2] The records requested were exhaustive itineraries of the governor's daily activities.[3] The Times Mirror sought injunctive and declaratory relief on the grounds that the information requested was within the purview of the Act,[4] and hence, subject to public scrutiny.[5] In opposition, the Governor asserted the requested documents fell within the Act's correspondence and public interest exemptions.[6]

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1. 53 Cal. 3d 1325, 813 P.2d 240, 283 Cal. Rptr. 893 (1991). Justice Arabian wrote the majority opinion with Chief Justice Lucas, Justice Panelli and Justice Baxter concurring. Justices Mosk and Kennard wrote separate dissenting opinions with Justice Broussard joining in both.

2. *Id.* at 1329, 813 P.2d at 241, 283 Cal. Rptr. at 894. The Act declares that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." CAL. GOV'T CODE § 6250 (West 1980 & Supp. 1992). The governor concedes that his appointment calendars and schedules are "public records" under the Act. Section 6252 of the Act defines public records to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." CAL. GOV'T. CODE § 6252(d) (West 1980 & Supp. 1992). The Governor did not contend his documents were outside the scope of the Act, but rather that they were exempt from disclosure. *Times Mirror*, 53 Cal. 3d at 1329, 813 P.2d at 241, 283 Cal. Rptr. at 894.

3. *Times Mirror*, 53 Cal. 3d at 1330-31, 813 P.2d at 241, 283 Cal. Rptr. at 895.

4. *Id.* at 1329, 813 P.2d at 241, 283 Cal. Rptr. at 894.

5. *See supra* note 2. The purpose of the Act is to make public information available "to permit the public to decide for itself whether government action is proper." Washington Post Co. v. United States Dept. of Health and Human Serv., 690 F.2d 252, 264 (D.C. Cir. 1982).

6. *Times Mirror*, 53 Cal. 3d at 1329, 813 P.2d at 241, 283 Cal. Rptr. at 894. The correspondence exemption to the Act provides:

> Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's legal affairs secretary, provided that public records shall not be transferred to the custody of the Governor's legal affairs secretary to evade the disclosure provisions of this chapter.

The court of appeal held the documents were accessible, as strict factual accounts of the Governor's past meetings.[7] The supreme court reversed, finding no correspondence exemption,[8] but holding the records fell within the public interest exemption because they implicated the Governor's deliberative process[9] and represented a possible threat to the Governor's physical security.[10]

II. TREATMENT OF THE CASE

In *Times Mirror*, the supreme court found California Government Code Section 6255, the "catchall" public interest exemption, dispositive.[11] Section 6255 provides: "The agency shall justify withholding any record by demonstrating . . . that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."[12] The majority's two-fold analysis addressed both the deliberative process privilege and security risks.

First, the supreme court found a patent intrusion into the governor's deliberative process.[13] The deliberative process privilege exempts documents from public scrutiny if the disclosure exposes the policy-formulation process, thereby inhibiting the flow of candid information to the Governor.[14] The majority equated disclosing the

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CAL. GOV'T CODE § 6254(*l*) (West 1980 & Supp. 1992).

The public interest exemption to the Act provides:

> The agency shall justify withholding any record by demonstrating that the record in question is exempt under the express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.

CAL. GOV'T CODE § 6255 (West 1980 & Supp. 1992).

7. *Times Mirror*, 53 Cal. 3d at 1332, 813 P.2d at 243, 283 Cal. Rptr. at 896.

8. *Id.* at 1337, 813 P.2d at 247, 283 Cal. Rptr. at 900. The correspondence exemption was limited to the governor's letters; however, the governor's appointment calendars and schedules were outside of this exemption. *Id.*

9. *Id.* at 1343, 813 P.2d at 250, 283 Cal. Rptr. at 903.

10. *Id.* at 1329, 813 P.2d at 252-53, 283 Cal. Rptr. at 904-06. Once the court determined the records fell within the public interest exception, a balancing of interests was required. *Id.*

11. *Id.* at 1338-39, 813 P.2d at 247, 283 Cal. Rptr. at 901. Section 6255 aims to balance the competing interests of disclosure. *Id.* "Nothing in the text or history of section 6255 limits its scope to specific categories," and each case must be considered on its own particular facts. *Id.* at 1339, 813 P.2d at 248, 283 Cal. Rptr. at 901.

12. CAL. GOV'T CODE § 6255 (West 1980 & Supp. 1992). *See supra* note 6.

13. *Times Mirror*, 52 Cal. 3d at 1343, 813 P.2d at 251, 283 Cal. Rptr. at 904.

14. *Id.* at 1342, 813 P.2d at 251, 283 Cal. Rptr. at 903. *See* Dudman Communications v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987) (disclosure of materials exposing decision-making process undermines the agency's ability to perform

identity of persons with whom the Governor has met with "revealing the substance or direction of the Governor's judgment and mental processes."[15] This information, according to the court, reflects the individuals and interests the Governor considered important.[16] The court hypothesized that a meeting between the Governor and a politically unpopular group, for example, or even routine meetings between the Governor and legislators, might be discouraged if the information were regularly revealed to the public. Such revelations, therefore, would disrupt the Governor's deliberative process.[17]

Second, the court believed disclosure of the requested documents could pose a threat to the Governor's physical security.[18] The reports detailed the Governor's duties, companions, aircraft and ground transportation, essentially detailing every event in the course of his day, including times the Governor "is likely to be alone."[19] The court reasoned such schedules and calendars could allow a reader to identify patterns of behavior indicating the times and places where the Governor is particularly vulnerable.[20]

In her dissent, Justice Kennard outlined the history and purpose of the Act.[21] She argued that to qualify under the Section 6255 deliberative process privilege, the "document must be both predecisional and deliberative,"[22] and that in this case, neither element was satisfied.[23] The documents were not predecisional because the Governor

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its functions); Jordan v. United States Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978) (even if content of document is factual, it remains exempt from public view if it is related to the policy formulating process).

15. *Times Mirror*, 52 Cal. 3d at 1343, 813 P.2d at 251, 283 Cal. Rptr. at 904.

16. *Id.*

17. *Id.* at 1344, 813 P.2d at 251, 283 Cal. Rptr. at 904. The court found the factual content of the records essentially deliberative, noting that the Governor's strategies on continuing policies might be prematurely revealed. *Id.*

18. *Id.* at 1346, 813 P.2d at 253, 283 Cal. Rptr. at 906. The Times' argument that the Governor waived his security interest by providing "public schedules" of the times and places the Governor is scheduled to speak, was dismissed. These itineraries do not contain the specific details of the schedules and calendars requested. *Id.*

19. *Id.* at 1330-31, 813 P.2d at 242, 283 Cal. Rptr. at 895.

20. *Id.* at 1346, 813 P.2d at 253, 283 Cal. Rptr. at 906.

21. *Id.* at 1350, 813 P.2d at 255, 283 Cal. Rptr. at 909 (Kennard, J., dissenting). Justice Kennard traced the origin of the Act from its model, the federal Freedom of Information Act (FOIA). 5 U.S.C. § 552 (1988). She noted that FOIA's exemption 5, which is similar to the public interest exemption, was termed by the United States Supreme Court to be a "somewhat Delphic provision." *Times Mirror*, 53 Cal. 3d at 1351 n.4, 813 P.2d at 256 n.4, 283 Cal. Rptr. at 910 n.4 (quoting United States Dep't of Justice v. Julian, 486 U.S. 1, 11 (1988)). Justice Mosk's dissent was written to amplify Justice Kennard's and, therefore, is treated second.

22. *Times Mirror*, 53 Cal. 3d at 1352, 813 P.2d at 257, 283 Cal. Rptr. at 910 (Kennard, J., dissenting). *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151-54 (1975).

23. *Times Mirror*, 53 Cal. 3d at 1352, 813 P.2d at 257, 283 Cal. Rptr. at 910 (Kennard, J., dissenting).

did not prove they contributed to an agency decision or policy.[24] Further, they were not deliberative because they merely named persons who met with the Governor, without revealing the substance of those meetings.[25] Governors do not meet with only those whose views they are inclined to favor.[26] Moreover, she recognized a substantial public interest in knowing who "seek[s] to influence the Governor's decisions on critical issues."[27]

Furthermore, Justice Kennard dismissed the potential security threat argument as inapt, because disclosing these records would not elevate the risk to the Governor above that normally accepted by public officials.[28] She emphasized that any information in the requested materials capable of invoking the Governor's deliberative process privilege or leading to a potential security risk could be easily segregated from the bulk of the documents. The schedules and calendars would thus be accessible to public scrutiny.[29]

Justice Mosk's dissent heralded Justice Kennard's opinion as "irrefutable" and questioned the majority's public policy analysis.[30] Proclaiming secrecy as anathema to democracy, Justice Mosk challenged the governor's secrecy as legally unjustifiable.[31] The President of the United States releases a daily schedule to the media in advance of events, and hence, Justice Mosk asked whether the governor's activities require more protection from public scrutiny than the President's.[32] Justice Mosk asserted that no statutory or constitu-

24. *Id.* (Kennard, J., dissenting). This privilege does not protect "post decisional or non-decisional meetings." *Id.* (Kennard, J., dissenting).

25. *Id.* at 1352, 813 P.2d at 257-58, 283 Cal. Rptr. at 910-11 (Kennard, J., dissenting). *See* Note, *The Freedom of Information Act and the Exemption for Intra-agency Memoranda*, 86 HARV. L. REV. 1047, 1065-66 (1973) (names are factual material that fall outside the exemption).

26. *Times Mirror*, 53 Cal. 3d at 1354, 813 P.2d at 258, 283 Cal. Rptr. at 911 (Kennard, J., dissenting).

27. *Id.* at 1354, 813 P.2d at 258, 283 Cal. Rptr. at 911 (Kennard, J., dissenting). *See* Van Bourg, Allen, Weinberg & Roger v. NLRB, 751 F.2d 982, 985 (9th Cir. 1985) (the deliberative process privilege does not protect records of parties seeking to influence government decisions). *See generally* Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 300 (1989).

28. *Times Mirror*, 53 Cal. 3d at 1357-58, 813 P.2d at 261, 283 Cal. Rptr. at 913-14 (Kennard, J., dissenting). Justice Kennard cited legislators in public session and judges in public hearings as examples of ordinarily accepted risks. *Id.* (Kennard, J., dissenting).

29. *Id.* at 1349-50, 813 P.2d at 255, 283 Cal. Rptr. at 908 (Kennard, J., dissenting).

30. *Id.* at 1347, 813 P.2d at 254, 283 Cal. Rptr. at 907 (Mosk, J., dissenting).

31. *Id.* at 1347-48, 813 P.2d at 254, 283 Cal. Rptr. at 907 (Mosk, J., dissenting).

32. *Id.* at 1348, 813 P.2d at 254-55, 283 Cal. Rptr. at 907-08 (Mosk, J., dissenting).

tional provision provides the governor with the right of secrecy.[33]

III. CONCLUSION

A representative democracy recognizes the need not only for the free flow of information to an enlightened electorate, but also the leader's need for a certain level of confidentiality to ensure a candid exchange of critical information.[34] The Public Records Act requires that public business fall under "the hard light of full public scrutiny."[35] The supreme court, in *Times Mirror*, determined that the Governor's schedules and calendars dating back five years were public records, but were exempt from disclosure because the public interest in the Governor's deliberative processes and physical safety clearly outweighed the public interest in disclosure.[36] Further, whatever merit existed in disclosure was crushed under the massive weight of requests for literally thousands of documents.[37]

Although the majority found the Times Mirror request unfeasible, the dissenting opinions are noteworthy. Secret government activities breed distrust and derision between the governed and those who govern,[38] while the free flow of information to the electorate ensures healthy self-government.[39] Citizens must hold their governors and other public officers accountable for their time and activities. The extent to which *Times Mirror* expands the deliberative process privilege, protecting the identity of persons with whom a governor has met, raises privilege issues affecting all levels of responsible public officials.

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33. *Id.* at 1349, 813 P.2d at 255, 283 Cal. Rptr. at 908 (Mosk, J., dissenting). Mosk cited Justice Kennard's dissent as authority for this assertion. *Id.* (Mosk, J., dissenting).

34. *Id.* at 1328-29, 813 P.2d at 241, 283 Cal. Rptr. at 894.

35. Tennessean Newspapers, Inc. v. Federal Hous. Admin., 464 F.2d 657, 660 (6th Cir. 1972). *See supra* notes 2 and 20.

36. *Times Mirror*, 53 Cal. 3d at 1344-45, 813 P.2d at 252-53, 283 Cal. Rptr. at 905-06.

37. *Id.* at 1345, 813 P.2d at 252, 283 Cal. Rptr. at 905.

38. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (discussing the importance of open proceedings in criminal cases).

39. John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989) (access to information provides a check on government abuse and corruption).

II. CIVIL RIGHTS

Under the California Fair Employment and Housing Act, the Fair Employment and Housing Commission may not grant a victim of discrimination compensatory damages for emotional distress, and must limit the victim's award of punitive damages to $1000: **Walnut Creek v. Fair Employment and Housing Commission.**

I. INTRODUCTION

In *Walnut Creek v. Fair Employment & Housing Commission*,[1] the California Supreme Court[2] held the Fair Employment and Housing Commission violated the judicial powers clause of the California Constitution[3] by awarding a victim of racial discrimination compensatory damages for emotional distress. The court also limited the victim's punitive damage award against apartment complex operators, responsible for multiple acts of racial discrimination, to $1000—the maximum amount recoverable for a single discriminatory act.[4] The case presented the supreme court with its first opportunity to review the constitutionality of an administrative agency's award of "general" compensatory damages.[5]

Section 12987 of the Fair Employment and Housing Act[6] authorizes the Fair Employment and Housing Commission ["Commission"] to order a respondent found in violation of the act's housing provisions

1. 54 Cal. 3d 245, 814 P.2d 704, 284 Cal. Rptr. 718 (1991).

2. Justice Panelli wrote the majority opinion in which Chief Justice Lucas and Justices Mosk, Arabian, and Baxter concurred. Justice Kennard dissented in an opinion in which Justice Broussard joined.

3. CAL. CONST. art. VI, § 1.

4. *Walnut Creek*, 54 Cal. 3d at 270, 814 P.2d at 719, 284 Cal. Rptr. at 733.

5. *Id.* at 256, 814 P.2d at 709, 284 Cal. Rptr. at 723. The court stated it had set out the approach for resolving questions of an administrative agency's authority to award compensatory damages in McHugh v. Santa Monica Rent Control Bd., 49 Cal. 3d 348, 371-74, 777 P.2d 91, 106-08, 261 Cal. Rptr. 318, 332-35 (1989). *Walnut Creek*, 54 Cal. 3d at 256, 814 P.2d at 709, 284 Cal. Rptr. at 723. In *McHugh* the court held that the Fair Employment and Housing Commission, in awarding treble damages against landlords who had charged excess rent, violated the judicial powers doctrine, stating:

> [W]e believe that the power to award treble damages in the present context poses a risk of producing arbitrary, disproportionate results that magnify, beyond acceptable risks, the possibility of arbitrariness inherent in any scheme of administrative adjudication.

McHugh, 49 Cal. 3d at 378, 777 P.2d at 111, 261 Cal. Rptr. at 338 (citing 2 AREEDA & TURNER, ANTITRUST LAW 150 (1978); Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1062 (1952) (discussing policy reasons against private actions for treble damages)).

6. CAL. GOV'T CODE §§ 12900-12999 (West 1980 & Supp. 1992).

to pay "punitive damages in an amount not to exceed one thousand dollars ($1000) . . . and the payment of actual damages."[7] In 1979, Robert Cannon, an African-American, applied to rent an apartment at the 418 unit Walnut Creek Manor complex.[8] The apartment manager told Cannon he would place Cannon on a waiting list and that Cannon should check back periodically.[9] In 1982, the manager repeatedly thwarted Cannon's attempts to obtain an apartment in the complex or learn his position on the waiting list. Cannon later spoke with a non-African-American who told Cannon that he had applied to Walnut Creek Manor a few months ago and had moved in the same month.[10] Cannon thereupon filed a complaint with the Commission.[11] The Commission determined that Walnut Creek Manor, its owner, and its manager had discriminated against Cannon on the basis of his race and awarded him $50,000 in compensatory damages for emotional distress and $40,635 in punitive damages (calculated at $1000 for each of 35 apartment rentals to people who applied after Cannon, plus interest).[12] Reviewing the trial court's decision to remand to the Commission, the California Court of Appeal struck the $50,000 emotional distress compensatory damage award, but upheld the punitive damage award.[13]

The supreme court accepted the Court of Appeal's determination that the defendants had committed unlawful racial discrimination;[14] however, it reversed the punitive damages award and modified the Court of Appeal's judgment to strike the $50,000 emotional distress compensatory damages award.[15]

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7. CAL. GOV'T CODE § 12987 (West 1980 & Supp. 1992). *See generally* 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 764 (9th ed. 1988) (explaining the goal and scope of the Fair Employment and Housing Act and declaring that "[l]iberal construction is required").

8. *Walnut Creek*, 54 Cal. 3d at 252, 814 P.2d at 706, 284 Cal. Rptr. at 720.

9. *Id.*

10. *Id.* at 253, 814 P.2d at 707, 284 Cal. Rptr. at 721.

11. *Id.*

12. *Id.* The Commission decided to impose significant punitive damages after learning the apartment manager of Walnut Creek Manor apartments had discussed Cannon with the apartment complex owner and received information from the owner's lawyer on "how to treat" Cannon and how to refuse to rent to "undesirable" applicants. *Id.* at 252-53, 814 P.2d at 707, 284 Cal. Rptr. at 721. Based on the lawyer's opinion letter, the manager requested that Cannon fill out a questionnaire, even though no such request was made to anyone else on the waiting list. *Id.* at 253, 814 P.2d at 707, 284 Cal. Rptr. at 721. *See also* infra note 40 and accompanying text.

13. *Walnut Creek*, 54 Cal. 3d at 254, 814 P.2d at 707-08, 284 Cal. Rptr. at 721-22.

14. *Id.* at 254-55 n.3, 814 P.2d at 708 n.3, 284 Cal. Rptr. at 722 n.3.

15. *Id.* at 273, 814 P.2d at 721, 284 Cal. Rptr. at 735.

II. TREATMENT OF THE CASE

A. Compensatory Damages for Emotional Distress

In *Walnut Creek*, the Commission argued that the supreme court should not substitute its judgment for the legislature's by allowing an agency to award compensatory damages for emotional distress.[16] The Commission cited cases holding that due process requires that when the legislature allows an administrative agency to award monetary damages pursuant to the agency's express purpose, courts should limit their inquiry to whether the agency's specific remedy is procedurally fair and relates to the legislative goal.[17] The Commission insisted that the Fair Employment and Housing Act clearly authorized the Commission to award compensatory damages to further the legitimate purpose of eradicating housing discrimination.[18] The supreme court rejected the Commission's due process analysis[19] and instead implemented a judicial powers inquiry. Relying on *McHugh v. Santa Monica Rent Control Board*,[20] the court outlined a two-prong test for determining whether an agency's action violates the judicial powers clause of the California Constitution.[21] The court first determined whether the compensatory damage award for emotional distress[22] was " 'reasonably necessary' to accomplish the commission's legiti-

16. *Id.* at 257, 814 P.2d at 709, 284 Cal. Rptr. at 723.

17. *Id. See, e.g.*, Hale v. Morgan, 22 Cal. 3d 388, 397-98, 584 P.2d 512, 518, 149 Cal. Rptr. 375, 380-81 (1978) (interpreting due process principles as limiting court's inquiry into agency's actions to the determination of procedural and purpose propriety).

18. *Walnut Creek*, 54 Cal. 3d at 257, 814 P.2d at 709, 284 Cal. Rptr. at 723. *See supra* note 7.

19. *Walnut Creek*, 54 Cal. 3d at 257, 814 P.2d 709-10, 284 Cal. Rptr. 723-24.

20. 49 Cal. 3d 348, 371-73, 777 P.2d 91, 106-08, 261 Cal. Rptr. 318, 332-35 (1989). *See supra* note 5.

21. *Walnut Creek*, 54 Cal. 3d at 256, 814 P.2d at 709, 284 Cal. Rptr. at 723. The *McHugh* court based its judicial powers test on tests used in other states, finding no modern California decision on the precise question. *McHugh*, 49 Cal. 3d at 374-75, 777 P.2d at 107-08, 261 Cal. Rptr. at 335.

22. The court analyzed the Government Code section 12987 remedy of awarding "actual damages" to determine whether to give the term abnormal meaning. *Walnut Creek*, 54 Cal. 3d at 255, 814 P.2d at 708-09, 284 Cal. Rptr. at 722-23 (citing OLECK, DAMAGES TO PERSON AND PROPERTY 22 (1961)). *See* 22 AM. JUR. 2D *Damages* § 24 (1961); 23 CAL. JUR. 3D *Damages* §§ 12-18 (1975 & Supp. 1991) (discussing the general meaning of "actual damages" in the common law context). The court found nothing in the Fair Employment and Housing Act to suggest it should give the term "actual damages" any meaning contrary to its common law definition. *Walnut Creek*, 54 Cal. 3d at 255, 814 P.2d at 708, 284 Cal. Rptr. at 722. *See also* Hess v. Fair Empl. & Hous. Comm'n., 138 Cal. App 232, 237, 187 Cal. Rptr. 712, 715 (1982). *Cf.* Morehead v. Lewis, 432 F. Supp. 674, 678 (N.D. Ill. 1977) (construing the damages provision of the federal fair housing act); Weider v. Hoffman 238 F. Supp. 437, 445 (M.D. Pa. 1965) (citing 25 C.J.S. *Damages* § 2 (1952)).

mate regulatory purposes."[23] The court articulated the Fair Employment and Housing Act's purpose as primarily "to prevent and eliminate specified discriminatory practices in the sale or rental of housing."[24] The court then noted that historically, cease and desist orders[25] and corrective reimbursement relief had predominantly, and effectively, enforced the act's purposes.[26] Accordingly, it concluded the availability of compensatory damages for emotional distress was an unnecessary additional remedy which failed the first prong of the judicial powers test.[27]

In applying the second prong, the court assessed "whether the challenged remedial power is merely incidental to a proper, primary regulatory purpose."[28] The court found that the Commission's power to compensate for emotional harm was incidental to the Commission's primary goal of insuring the same or comparable housing.[29] Thus, the court held the Commission's emotional distress award failed both prongs of the judicial powers test.[30] Accordingly, the court indicated the Commission must limit awards to verifiable out-of-pocket compensatory damages, such as increased rent and utilities.[31]

B. Punitive Damages

Section 12920 of the Fair Housing and Employment Act authorizes the Commission to order payment of $1000 in punitive damages for

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23. *Walnut Creek*, 54 Cal. 3d at 258-59, 814 P.2d at 711, 284 Cal. Rptr. at 725.

24. *Id.* at 257, 814 P.2d at 710, 284 Cal. Rptr. at 724 (citing Peralta Community College Dist. v. Fair Empl. and Hous. Comm'n., 52 Cal. 3d 40, 48, 801 P.2d 357, 362, 276 Cal. Rptr. 114, 118-19 (1990)). *See generally* 51 CAL. JUR. 3D §§ 60-61 (1979 & Supp. 1991) (discussing policy against housing accommodation discrimination).

25. *See* CAL. GOV'T CODE § 12987 (West 1980 & Supp. 1992) (explaining cease and desist procedures). *See generally* 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 770 (9th ed. 1988) (explaining hearing and enforcement stages).

26. *Walnut Creek*, 54 Cal. 3d at 260-61, 814 P.2d at 712, 284 Cal. Rptr. at 726.

27. *Id.* at 261, 814 P.2d at 713, 284 Cal. Rptr. at 727. The court warned that allowing unbridled damage awards could potentially cause the damages issue to dominate the administrative hearing. *Id.* at 261-62, 814 P.2d at 713, 284 Cal. Rptr. at 727.

28. *Id.* at 262, 814 P.2d at 713, 284 Cal. Rptr. at 727. *See supra* notes 7 and 24 and accompanying text (discussing purposes of the Fair Employment and Housing Act).

29. *Walnut Creek*, 54 Cal. 3d at 262, 814 P.2d at 713, 284 Cal. Rptr. at 727. The court noted that it had previously held that " '[t]he power to award compensatory and punitive tort damages to an injured party is a judicial function.' " *Id.* (quoting Youst v. Longo, 43 Cal. 3d 64, 80, 729 P.2d 728, 738-39, 233 Cal. Rptr. 294, 304-05 (1987)). *Accord* Curtis v. Loether, 415 U.S. 189, 196 (1974). Further, the court noted that general compensatory damages for emotional distress are difficult to fix; therefore, courts have traditionally left their quantification to the trier of fact. *Walnut Creek*, 54 Cal. 3d at 263, 814 P.2d at 714, 284 Cal. Rptr. at 728. *See generally* Robert G. Schwemm, *Compensatory Damages in Federal Fair Housing Cases*, 16 HARV. C.R.-C.L. L. REV. 83 (1981) (noting difficulty of fixing discrimination damages).

30. *Walnut Creek*, 54 Cal. 3d at 265, 814 P.2d at 716, 284 Cal. Rptr. at 730.

31. *Id.* at 266, 814 P.2d at 716, 284 Cal. Rptr. at 730.

"discrimination because of race, color," or other unlawful grounds.[32] Under this section, the Commission argued that each of the 35 times Walnut Creek chose a more recent non-Black applicant over Cannon constituted a separate discriminatory act.[33] The supreme court declined the Commission's interpretation; instead, it concentrated on the wording of section 12987(2) which allows the Commission to order punitive damages upon a finding of any "unlawful practice."[34] The court contended that it must interpret the word "practice" to mean a course of conduct, encompassing an act which may be performed often, customarily, or habitually.[35] Thus, the court held that where one individual is victim to multiple acts of any one form of discriminatory conduct at the hands of a single perpetrator, the victim has established only one unlawful practice, punishable by a maximum of $1000 in punitive damages.[36]

C. *Dissenting Opinion*

In dissent, Justice Kennard argued the majority decision severely impairs the Fair Employment and Housing Act's administrative en-

32. CAL. GOV'T CODE § 12920 (West 1980 & Supp. 1992).

33. *Walnut Creek*, 54 Cal. 3d at 267-68, 814 P.2d at 717, 284 Cal. Rptr. at 731. The court of appeal agreed with the Commission's calculations of punitive damages and interest costs. *See supra* note 13 and accompanying text.

34. *Walnut Creek*, 54 Cal. 3d at 269, 814 P.2d at 704, 284 Cal. Rptr. at 718. The court noted that the act allowed the Commission, upon finding any "unlawful practice," to award punitive damages. *Id. See* CAL. GOV'T CODE § 12987(2) (West 1980 & Supp. 1992). The Fair Employment and Housing Act interfaces with other California civil rights provisions. Section 12955(a), which enumerates unlawful practices, prohibits "any person subject to the provisions of Section 51 of the Civil Code, as that section applies to housing accommodations, . . . [from discriminating] against any person because of race . . . ." CAL. GOV'T CODE § 12955(a) (West 1980). Civil Code section 51, commonly called the Unruh Civil Rights Act, guarantees equal accommodations in business facilities. CAL. CIV. CODE § 51 (West 1982 & Supp. 1991). *See generally* 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 748 (9th ed. 1988).

35. *Walnut Creek*, 54 Cal. 3d at 269, 814 P.2d at 704, 284 Cal. Rptr. at 718. The court observed that although section 12987 enumerates unlawful practices, it does not define the term "practice." *Id.* The court found, however, that the term "practice" is defined unambiguously as " '[r]epeated or customary action; habitual performance; a succession of acts of similar kind; custom; usage.' " *Id.* (quoting BLACK'S LAW DICTIONARY 1172 (6th ed. 1990)). *See also* CAL. GOV'T CODE § 12955(g) (West 1980) (connecting unlawful "acts" with unlawful "practices").

36. *Walnut Creek*, 54 Cal. 3d at 270, 814 P.2d at 719, 284 Cal. Rptr. at 733. The court cited federal fair housing act cases holding that plaintiffs could receive no more than $1000, regardless of repeated acts of discriminatory conduct. *Id.* at 270, 814 P.2d at 718, 284 Cal. Rptr. at 732. *See, e.g.*, Fountila v. Carter, 571 F.2d 487, 494 (9th Cir. 1978); Steele v. Title Realty Co., 478 F.2d 380, 384 (10th Cir. 1973).

forcement ability.[37] She asserted the holding was neither faithful to the act's purpose nor compelled by the California Constitution.[38] Addressing the majority's judicial powers analysis, Justice Kennard assailed the majority's conclusion that compensatory damages were not "reasonably necessary" to effectuate the act's purpose.[39] She emphasized that victims of housing discrimination are often unable or unwilling to undertake the costly burden of prosecuting a civil suit, even where their emotional distress is severe.[40] Further, out of pocket damages in such cases are usually de minimis.[41] Therefore, to achieve the act's express purpose of providing effective remedies to eliminate discriminatory housing practices, Justice Kennard asserted that compensatory relief for a victim's emotional distress is not only necessary, but essential.[42]

Justice Kennard also dissented to the majority's decision that punitive damages must be limited to $1000.[43] Interpreting "unlawful practice" in light of legislative intent, Justice Kennard asserted that the phrase means any single act in violation of the Fair Employment and Housing Act.[44] Accordingly, each instance in which Walnut Creek Manor rented to non-African-American applicants while Can-

37. *Walnut Creek*, 54 Cal. 3d at 274, 814 P.2d at 722, 284 Cal. Rptr. at 736 (Kennard, J., dissenting). *See supra* note 24 and accompanying text.

38. *Walnut Creek*, 54 Cal. 3d at 275-76, 814 P.2d at 722-23, 284 Cal. Rptr. at 718-19 (Kennard, J., dissenting).

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

40. *Id.* at 278, 814 P.2d at 724, 284 Cal. Rptr. at 738 (Kennard, J., dissenting). *See generally* Robert G. Schwemm, *Private Enforcement and the Federal Fair Housing Act*, 6 YALE L. & POL'Y REV. 375, 380 (1988). Justice Kennard emphasized the fact that Cannon had friends living at Walnut Creek Manor who supported his claim of severe humiliation and embarrassment. *Walnut Creek*, 54 Cal. 3d at 274, 814 P.2d at 722, 284 Cal. Rptr. at 736 (Kennard, J., dissenting).

41. *Walnut Creek*, 54 Cal. 3d at 280, 814 P.2d 725, 284 Cal. Rptr. 739 (Kennard, J., dissenting) (quoting Schwemm, *supra* note 40, at 380). *See also* notes 7 and 24 and accompanying text.

42. *Walnut Creek*, 54 Cal. 3d at 275, 814 P.2d at 722-23, 284 Cal. Rptr. at 736-37 (Kennard, J., dissenting). Justice Kennard ultimately concluded that an administrative system to combat housing discrimination that relies on private enforcement while prohibiting administrative agencies from awarding compensatory damages for emotional distress is "doomed to fail." *Id. Accord*, James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 YALE L. & POL'Y REV. 348, 354 (1988) (criticizing limitations on agency authority). *See generally* Marshall Kaplan, *Discrimination in California Housing: The Need for Additional Legislation*, 50 CAL. L. REV. 635, 643 (1962) (emphasizing the negative societal effects of housing discrimination).

43. *Walnut Creek*, 54 Cal. 3d at 282-83, 814 P.2d at 727-28, 284 Cal. Rptr. at 741-42 (Kennard, J., dissenting).

44. *Id.* at 283, 814 P.2d at 728, 284 Cal. Rptr. at 742 (Kennard, J., dissenting). Justice Kennard asserted that the legislative purpose of punitive damages in housing discrimination is punishment and deterrence. *Id.* at 284, 814 P.2d at 728, 284 Cal. Rptr. at 742 (Kennard, J., dissenting) (citing Dyna-Med v. Fair Empl. & Hous. Com., 43 Cal. 3d 1379, 1389-90, 743 P.2d 1323, 1330-32, 241 Cal. Rptr. 67, 72 (1987)). Thus, Justice Kennard argued that a liberal approach to punitive damages is appropriate. *Id.* (Kennard, J., dissenting).

non's application was pending constituted a punishable violation.[45]

III. CONCLUSION

This case constricts the adjudicative and enforcement authority of the Fair Employment and Housing Commission. The court leaves the Commission power to grant injunctive and out-of-pocket compensatory relief, but it instructs the Commission to refrain from awarding general compensatory damages, and requires the Commission to limit awards of punitive damages for any one form of discrimination to $1000.[46] Although the decision does not strip the Commission of its ability to compensate victims and punish violators, the ultimate recovery of the plaintiff in the instant case indicates the decision's practical effect. After 35 instances of discrimination over a two-year period by operators of a 418 unit apartment complex, the Commission could require damages totalling only $3800.[47] While this decision clearly protects judicial prerogatives under the California Constitution, it is less clear whether the magnitude of damages it endorses can effectively punish violators or compensate victims of housing discrimination.

KURT M. LANGKOW

III. CONSTITUTIONAL LAW

The inclusion of religious invocations and benedictions at public high school graduation ceremonies violates the First Amendment of the United States Constitution: **Sands v. Morongo Unified School District**

I. INTRODUCTION

Although the United States Supreme Court has interpreted the Establishment Clause[1] in the public school setting,[2] the Court has yet to

45. *Id.* at 286, 814 P.2d at 730, 284 Cal. Rptr. at 744 (Kennard, J., dissenting).

46. *Id.* at 273, 814 P.2d at 721, 284 Cal. Rptr. at 735.

47. The court ultimately endorsed a punitive damages award of $1000 plus interest. *Id.* at 252, 814 P.2d at 706, 284 Cal. Rptr. at 720. The court also awarded out-of-pocket expenses totalling $2724.50. *Id.* at 275 n.2, 814 P.2d at 723 n.2, 284 Cal. Rptr. at 737 n.2 (Kennard, J., dissenting).

1. The Establishment Clause provides that the government shall "make no law respecting an establishment of religion." U.S. CONST. amend I.

2. *See, e.g.*, Abington Sch. Dist. v. Schempp, 374 U.S. 203, 205 (1963) (concluding that daily Bible reading and prayer recitation in public school, although voluntary, violated the Establishment Clause); Engel v. Vitale, 370 U.S. 421, 424 (1962) (holding that

resolve whether invocations and benedictions at public high school graduation ceremonies are constitutional. In *Sands v. Morongo Unified School District*,[3] a bitterly divided California Supreme Court held that invocations at public high school graduations violated separation of church and state as mandated by the United States Constitution.[4]

The United States Supreme Court has been inconsistent in its opinions regarding religion because of the First Amendment's breadth and imprecision.[5] The Court has attempted to clarify the Establishment Clause by providing the three-prong *Lemon* test.[6] To pass constitutional muster, government activity must have a secular purpose, must have a primary effect which neither advances nor inhibits religion, and cannot potentially cause excessive government entanglement with religion.[7] In *Sands*, the California Supreme Court used the *Lemon* test to evaluate whether invocations and benedictions at public high school graduation ceremonies violate the Establishment Clause.[8]

In *Sands*, the trial court enjoined the Morongo Unified School District from conducting religious invocations at its ceremonies.[9] The District appealed, and the court of appeal held these invocations to be constitutionally valid, reversing the trial court decision.[10] Because of the highly controversial nature of this question, the California Supreme Court reviewed the case and reversed the judgment of the court of appeal.[11] The opinion of the court reflects its adherence to the separation of church and state, which it considers vital to the preservation of religious diversity inherent in American culture.[12] In addition, *Sands* demonstrated the court's continuing commitment to

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public school district's daily practice requiring each class to recite a state-composed prayer acknowledging "Almighty god" was unconstitutional); Everson v. Board of Educ., 330 U.S. 1, 17 (1947) (finding that a New Jersey statute, authorizing local school districts to reimburse parents of sectarian and public school students for transportation fares to and from school, did not violate the Establishment Clause).

3. 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991). Justice Kennard wrote the majority opinion; Chief Justice Lucas and Justice Arabian wrote concurring opinions; Justice Mosk wrote a concurring opinion in which Justice Broussard joined; and Justices Panelli and Baxter wrote dissenting opinions.

4. *Id.* at 867, 809 P.2d at 810, 281 Cal. Rptr. at 35.

5. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

6. Lemon v. Kurtzman, 403 U.S. 602 (1971).

7. *Id.* at 612-13.

8. *Sands*, 53 Cal. 3d at 872-73, 809 P.2d at 813, 281 Cal. Rptr. at 38.

9. *Id.* at 870, 809 P.2d at 811, 281 Cal. Rptr. at 36. The trial court in *Sands* relied on Bennett v. Livermore Unified Sch. Dist., 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987), a California Court of Appeal case which held that religious invocations at public school graduations violated state and federal constitutions.

10. Sands v. Morongo Unified Sch. Dist., 225 Cal. App. 3d 1385, 1395, 262 Cal. Rptr. 452, 461 (1989), *rev'd*, 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991).

11. *Sands*, 53 Cal. 3d at 881, 809 P.2d at 819, 281 Cal. Rptr. at 44.

12. *Id.* at 867, 809 P.2d at 810, 281 Cal. Rptr. at 35.

the *Lemon* test in evaluating Establishment Clause issues.[13]

This survey begins with an overview of the historical background of the Establishment Clause, summarizing relevant case history which interprets this constitutional provision.[14] Next, it summarizes the facts and procedural history of *Sands v. Morongo Unified School District*.[15] The analysis of the majority opinion, the concurring opinions, and the dissenting opinions follow the statement of the case.[16] Finally, this survey examines the impact *Sands* may have on future Establishment Clause cases in the public school context, as well as its precedential value in light of the United States Supreme Court decision in *Lee v. Weisman*.[17]

II. HISTORICAL BACKGROUND

A. *The Meaning of the Establishment Clause*

The First Amendment of the United States Constitution requires that government "make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."[18] This provision, known as the Establishment Clause, is designed to prevent the intrusion of church or state into the confines of the other.[19] The Due Process Clause of the Fourteenth Amendment extends the Establishment Clause to the states.[20] The framers of the Constitution, who themselves had recently attained religious freedom, recognized that "freedom of religion flourishes only when the government observes strict adherence to the principle of separation of religion

13. *Id.* at 872, 809 P.2d at 813, 281 Cal. Rptr. at 38.

14. *See infra* notes 18-44 and accompanying text.

15. *See infra* notes 45-58 and accompanying text.

16. *See infra* notes 59-159 and accompanying text.

17. Weisman v. Lee, 728 F. Supp. 68, 72-73 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991) (holding that prayer at a high school graduation ceremony is unconstitutional because nonadherents to the religions endorsed may perceive the government as preferring certain beliefs). *See infra* notes 160-173 and accompanying text.

18. U.S. CONST. amend. I. *See generally* 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 371 (9th ed. 1988).

19. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). *See also* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963) (arguing that it is not within the power of government to invade the precinct of religion, "whether its purpose or effect be to aid or oppose, to advance or retard.") *See generally* JOHN NOWAK, RONALD ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW § 17.3 (3d ed. 1986).

20. California Educ. Facilities Auth. v. Priest, 12 Cal. 3d 593, 599 n.6, 526 P.2d 513, 516 n.6, 116 Cal. Rptr. 361, 364 n.6 (1974) (citing Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 760 n.3 (1973)).

and state authority."[21] Consequently, our diverse nation is founded on this principle of government neutrality in the religious forum.[22]

The Supreme Court first defined the Establishment Clause in *Everson v. Board of Education*,[23] where it stated:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'[24]

Although the Constitution mandates strict separation of church and state, the Supreme Court has recognized that complete separation is not possible.[25] An inflexible division would be counterproductive, resulting in "state and religion [being] aliens to each other — hostile, suspicious, and even unfriendly."[26]

Nevertheless, the Supreme Court has urged a continued separation between church and state, and declared that "[i]n the relationship between man and religion, the State is firmly committed to a position of neutrality."[27] If federal and state courts chip away the "wall of separation" between church and state, they jeopardize the religious diversity and freedom so unique to our country.[28]

B. Case History Regarding the Establishment Clause

In *Everson v. Board of Education*,[29] the Supreme Court held that governmental payment for student transportation in both public and sectarian schools was constitutional.[30] The Court did not articulate a

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21. *Sands*, 53 Cal. 3d at 868, 809 P.2d at 810, 281 Cal. Rptr. at 35.

22. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 610 (1989) (concluding that the United States Constitution requires government to remain secular to avoid religious discrimination).

23. 330 U.S. 1 (1947).

24. *Id.* at 15-16.

25. *See* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (emphasizing that there cannot be absolute separation of church and state for a relationship between the two is inevitable); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (explaining that the Establishment Clause does not require rigid constitutional neutrality); Zorach v. Clauson, 343 U.S. 306, 312 (1952) (finding that the First Amendment does not mandate that there shall be separation of church and state in all respects).

26. *Zorach*, 343 U.S. at 312-13. For example, the absolutist approach to separation of church and state would not allow police or fire departments to service religious organizations, would render the governmental recognition of Thanksgiving Day as a holiday unconstitutional, and would declare courtroom oaths uttering "so help me God" violative of the First Amendment. *Id.*

27. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963).

28. *Id.* at 225. In *Abington*, the Court stressed the vital importance of the separation of church and state in maintaining liberty of religion. It emphasized that "[t]he great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action. Religion is eminently one of these interests, lying outside the true and legitimate province of government." *Id.* at 214 n.7 (quoting Board of Educ. v. Minor, 23 Ohio St. 211, 253 (1872)).

29. 330 U.S. 1 (1947).

30. *Id.* at 17 (comparing this state action to police monitoring traffic for students

clear test to determine whether a challenged state practice violated the Establishment Clause, however, until *Abington School District v. Schempp*.[31] In that case, the Court declared that, to pass constitutional scrutiny, a state practice must have a "secular legislative purpose and a primary effect that neither advances nor inhibits religion."[32] The Court modified this test, and articulated a third prong in *Walz v. Tax Commission*,[33] namely, that the practice must also avoid excessive government entanglement with religion.[34] Finally, in *Lemon v. Kurtzman*,[35] the Supreme Court instructed that courts should consistently apply these three tests, now known as the *Lemon* test, in evaluating an alleged Establishment Clause violation.[36] The *Lemon* test remains the controlling analysis in this area of law.[37]

The Supreme Court's sole departure from the *Lemon* test occurred in *Marsh v. Chambers*,[38] where the Court held that legislative prayer did not violate the Constitution. The Court relied on the "unambiguous and unbroken history of more than 200 years" of legislative prayer which "has become part of the fabric of our society."[39] The Court reaffirmed its commitment to the *Lemon* test, however, in *County of Allegheny v. American Civil Liberties Union* ["*ACLU*"].[40]

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traveling to and from church, both actions being constitutional because of the valid secular purpose of promoting the school children's welfare and safety).

31. 374 U.S. at 222.

32. *Id.* (citing Everson v. Board of Educ., 303 U.S. 1 (1947); McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

33. 397 U.S. 664 (1970).

34. *Id.* at 674. The Court expounded on the entanglement test, stating that the issue is "whether [there] is a continuing [practice] calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Id.* at 675.

35. 403 U.S. 602 (1971).

36. *Id.* at 615.

37. The California Supreme Court observed that the *Lemon* test had been consistently applied in all cases except Marsh v. Chambers, 463 U.S. 783 (1983). Sands v. Morongo Unified Sch. Dist., 53 Cal. 3d 863, 871, 809 P.2d 809, 812, 281 Cal. Rptr. 34, 37 (1991) (citing Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987)).

38. 463 U.S. 783 (1983).

39. *Id.* at 792.

40. 492 U.S. 573 (1989). The Court applied the *Lemon* test, refining the "primary effect" prong by specifying that the questioned practice cannot have the primary effect of endorsing religion. It stated that "[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *Id.* at 593-94 (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

Applying the *Lemon* test, the Court held that a nativity scene displayed in a county courthouse had the effect of endorsing religion, and violated the First Amendment. *Id.* at 602. It also held that a menorah displayed outside government buildings was consti-

Lemon "has remained controlling law for twenty years," and must be applied in all Establishment cases.[41]

Thus, the Supremacy Clause of the United States Constitution required the California Supreme Court to apply the *Lemon* test in *Sands*.[42] Although the United States Supreme Court had not yet addressed the issue presented in *Sands*,[43] the *Lemon* analysis resulted in the California Supreme Court's holding that invocations and benedictions at public high school graduations violated the federal Constitution.[44]

III. STATEMENT OF THE CASE

A. *Facts*

The plaintiffs, James Sands and Jean Bartolette, were taxpayers residing in the Morongo Unified School District, which operated four high schools: Yucca Valley High School, Twenty-Nine Palms High School, Sky High School, and Monument High School. At each of these schools, the District included religious invocations and benedictions at graduation ceremonies.[45] At two of the schools, the adminis-

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tutional because it did not endorse religious beliefs, but instead had the secular purpose of governmental recognition of cultural diversity. *Id.* at 620-21.

41. *Sands*, 53 Cal. 3d at 872, 809 P.2d at 813, 281 Cal. Rptr. at 38 (footnote omitted). In addition, the Court has urged that the Establishment Clause be applied with greater sensitivity in the public school setting. Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987). *See generally* Julie K. Underwood, *Establishment of Religion in Primary and Secondary Schools*, 55 WEST'S EDUC. LAW REP. 807, 809 (1990) (concluding that in the primary and secondary school environment, the wall of separation between church and state must be very high considering "the impressionability of the young children involved").

42. *Sands*, 53 Cal. 3d at 884, 809 P.2d at 821, 281 Cal. Rptr. at 46 (Lucas, J., concurring).

43. Another California decision is directly on point. *See* Bennett v. Livermore Unified Sch. Dist., 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987). In *Bennett*, the court held that a government practice of including religious invocations at public high school graduations violated both the United States and California Constitutions. *Id.* at 1024, 238 Cal. Rptr. at 826.

44. *Sands*, 53 Cal. 3d at 864, 809 P.2d at 810, 281 Cal. Rptr. at 35.

45. *Id.* at 868, 809 P.2d at 810-11, 281 Cal. Rptr. at 35-36. All of the invocations and benedictions, with the exception of one, were expressly religious. For example, one of the benedictions read:

> Will the audience please stand and join us in prayer. Dear Father, we thank You for these graduates who have meant so much to us. We thank You for their energy, their enthusiasm, their sense of humor and their sense for life .... We ask Your guidance as these graduates try to meet the many challenges of their future years. Grant them the strength to meet these challenges with courage, confidence and faith. We ask Your blessings so that their lives will brim with happiness and good health .... We ask for these in Your name, amen.

Id. at 869, 809 P.2d at 811, 281 Cal. Rptr. at 36.

Likewise, one invocation speaker concluded as follows:

> Heavenly father, I thank you for the privilege it is to see these graduates going forth receiving their diplomas this evening. To celebrate this time, I pray

tration either initially chose the speaker, or ultimately approved of the students' choice of speaker.[46] In the remaining two schools, the selection process was not revealed.[47] The plaintiffs sued to enjoin the District from further inclusion of the religious invocations and benedictions at public school ceremonies, claiming that the prayers violated both the United States and California Constitutions.[48]

B. Procedural History

While this case was pending in the district court, the court of appeal held in *Bennett v. Livermore Unified School District*,[49] that including religious invocations and benedictions at public high school graduations violated both the state and federal constitutions.[50] Consequently, the trial court granted the plaintiffs' motion for summary judgment, and entered a judgment prohibiting the District from including religious invocations and benedictions at *any* public school ceremonies.[51]

The District appealed, and the court of appeal reversed the trial court's decision.[52] The court of appeal applied the *Lemon* test in determining whether the invocations violated the Establishment Clause. First, the court decided that the prayers had the secular purpose of adding dignity and decorum to the ceremony, and served to

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that you would give them that blessing, that confidence, courage, vision, hope, peace and gladness, and looking forward to the days to come, the years to come being confident of what they have already been able to do in receiving this diploma. Now I pray your blessing upon them, in the name of our Lord, amen.

Id.

46. *Id.* at 868, 809 P.2d at 810, 281 Cal. Rptr. at 35. At Yucca Valley High School, the graduating class president chose the speaker subject to the approval of the vice-principal. In 1985, a Protestant minister gave the invocation; in 1986, a Protestant minister (selected by the vice-principal alone) delivered the invocation. *Id.*

At Twenty-Nine Palms High School, a student committee initially chose the graduation speakers. In 1985, a Presbyterian minister delivered the opening invocation, while a Catholic priest delivered the closing benediction. In both cases, the students' choice of speakers required the administration's final approval. *Id.*

47. *Id.* At the two schools where the record did not reveal the speaker selection process, religious figures also delivered the prayers. For example, at one school, a Protestant minister delivered both the invocation and the benediction in 1985. At the other school, the same Methodist pastor had delivered every invocation and benediction since the school's first graduation ceremony in 1977. *Id.*

48. *Id.* at 869, 809 P.2d at 811, 281 Cal. Rptr. at 36.

49. Bennett v. Livermore Unified Sch. Dist., 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987).

50. *Id.* at 1014, 238 Cal. Rptr. at 826.

51. *Sands*, 53 Cal. 3d at 869-70, 809 P.2d at 811, 281 Cal. Rptr. at 36.

52. *Id.* at 870, 809 P.2d at 811, 281 Cal. Rptr. at 36.

focus audience attention.[53] Second, it held that the primary effect of the invocations neither advanced nor inhibited religion, but instead had an incidental religious effect.[54] Third, the court determined that the prayers did not produce excessive government entanglement with religion, because the District did not fund the prayers; the ceremony was in a non-sectarian setting; and the invocations did not require continuing state supervision.[55] Thus, the court of appeal held that invocations and benedictions did not violate the state or federal constitutions.[56]

The California Supreme Court granted review to hear this case of first impression. The court overturned the court of appeal's ruling, affirming the district court's decision.[57] Applying the *Lemon* test, the California Supreme Court held that invocations and benedictions at public high school graduation ceremonies violated the Establishment Clause of the United States Constitution.[58]

IV. ANALYSIS

A. Majority Opinion

At the outset of the opinion, Justice Kennard emphasized that the cultural diversity of our nation is vital to our heritage, and is the foundation of the religion clauses of the First Amendment of the Constitution.[59] Embodied in the Establishment Clause is "the fundamental wisdom that freedom of religion flourishes only when government observes strict adherence to the principle of separation of religion and state authority."[60]

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53. Sands v. Morongo Unified Sch. Dist., 225 Cal. App. 3d 1385, 1397, 262 Cal. Rptr. 452, 459 (1989), *rev'd*, 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991).

54. *Id.* at 1399, 262 Cal Rptr. 461.

55. *Id.* at 1400, 262 Cal. Rptr. 461.

56. *Id.* at 1397-1402, 262 Cal. Rptr. at 459-62.

57. *Id.* The California Constitution contains a provision almost identical to the Establishment Clause of the federal Constitution. It mandates that "[t]he Legislature shall make no law respecting an establishment of religion." CAL. CONST. art. I, § 4.

The California Constitution provides further guarantees of separation of church and state in addition to those found in the United States Constitution. It provides that "[n]either the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall *ever* make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose . . . ." CAL. CONST. art. XVI, § 5 (emphasis added). This provision "prohibits not only material aid to religion, but *any* official involvement that promotes religion." *Sands*, 53 Cal. 3d at 883, 809 P.2d at 820, 281 Cal. Rptr. at 45 (emphasis in original) (citing California Educ. Facilities Auth. v. Priest, 12 Cal. 3d 593, 605 n.12, 526 P.2d 513, 521 n.12, 116 Cal. Rptr. 361, 369 n.12 (1974)). *See generally* B. WITKIN, *supra* note 18; 13 CAL. JUR. 3D, *Constitutional Law* §§ 246-48 (1989 & Supp. 1991).

58. Sands v. Morongo Unified Sch. Dist., 53 Cal. 3d 863, 867, 809 P.2d 809, 810, 281 Cal. Rptr. 34, 35 (1991).

59. *Id.* at 870, 809 P.2d at 811-12, 281 Cal. Rptr. at 35-37.

60. *Sands*, 53 Cal. 3d at 867-68, 809 P.2d at 810, 281 Cal. Rptr. at 35. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963). The Court stressed that:

1. The *Lemon* Test

a. "Secular Purpose" Prong

The opinion recognized that the *Lemon* test controlled Establishment Clause cases.[61] The majority did not apply the secular purpose prong of the test, however, noting that the challenged government practice must violate only one prong to establish its unconstitutionality.[62]

b. "Primary Effect" Prong

The court applied the second prong of the *Lemon* test, the primary effect test, to decide "whether, irrespective of the government's actual objective, the practice in question conveys a message of endorsement or disapproval."[63] The court reasoned that because the government controlled the graduation ceremony, there was an inevitable appearance of government endorsement. Therefore, a religious invocation sends "a powerful message that [the government] approves of the prayer's religious content."[64] Although the graduation

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> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of the government to invade the citadel . . . .

Id. at 226. *But see* Lynch v. Donnelly, 465 U.S. 668, 672 (1984) (noting that total separation of church and state is not realistically possible).

61. *Sands*, 53 Cal. 3d at 872, 809 P.2d at 813, 281 Cal. Rptr. at 38. Although the Supreme Court departed from the *Lemon* test in Marsh v. Chambers, 463 U.S. 783, 790 (1983), it utilized *Lemon* in its most recent establishment clause analysis in County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989). *See supra* notes 38-41 and accompanying text.

62. *Sands*, 53 Cal. 3d at 872, 809 P.2d at 813, 281 Cal. Rptr. at 32. Although this may be viewed as an incomplete analysis, the Supreme Court did not apply the primary effect prong in *Lemon* either. *See* Lemon v. Kurtzman, 403 U.S. 602, 613 (1971). Moreover, even if the majority had applied the secular purpose test, it would likely have found there was no primary secular purpose because of the primarily religious purpose of prayers. *See, e.g.*, Bennett v. Livermore Unified School Dist., 193 Cal. App. 3d 1012, 1020, 238 Cal. Rptr. 819, 823 (1987) (holding that religious invocations at public high school graduations violated the secular purpose prong of the *Lemon* test).

63. *Sands*, 53 Cal. 3d at 872-73, 809 P.2d at 813, 281 Cal. Rptr. at 38 (citing Wallace v. Jaffree, 472 U.S. 38, 56 n.42 (1985); County of Allegheny V. ACLU, 492 U.S. 573, 593-94 (1989)).

64. *Id.* at 872-74, 809 P.2d at 814, 281 Cal. Rptr. at 39 (footnote omitted). Justice Kennard explained that through the inclusion of religious invocations and benedictions, "the government appears to prefer religion over nonreligion; appears to prefer religions that acknowledge the practice of petitionary prayer over religions that do not recognize such prayer; . . . and implicitly endorses religions that address a single, anthropomorphic, and male deity over those that do not." *Id.* at 874, 809 P.2d at 814, 281 Cal. Rptr. at 39. *See also* Jager v. Douglas County Sch. Dist., 862 F.2d 824, 831 (11th

ceremony occurred only once a year, the significance of this event to the graduate is not reduced, as it signifies a great academic achievement as well as the passing from childhood to adulthood. The court noted that "[e]ven when such a milestone in the lives of participants is not involved, courts have invalidated annual government practices of a religious nature."[65] In addition, it pointed out that the brevity of the invocation cannot vindicate an unconstitutional government practice; the focus must instead be on the religious character of the act.[66]

Justice Kennard proposed that the overall secular nature of the invocation did not dispel the government endorsement of religion.[67] She reasoned that viewing the challenged practice in the context of the physical setting is an inappropriate analysis of graduation prayers and cannot eliminate the "symbolic union" of church and state.[68] Although the United States Supreme Court has considered *context* in evaluating Establishment Clause cases, it has limited this approach to government displays of religious symbols.[69] Unlike these passive displays of religious objects, invocations and benedictions are active exercises which encourage audience participation in prayer. Therefore, the Court did not consider the prayers in the context of the secular graduation ceremony.[70]

The majority asserted that the challenged government action could not be justified as an accommodation of religion. Although the United States Supreme Court has approved of an accommodation[71] of

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Cir. 1989) (concluding that religious invocations preceding public high school football games conveyed a message of government endorsement of religion); *See generally* James J. Dean, Comment, *Ceremonial Invocations at Public High School Events and the Establishment Clause*, 16 FLA. ST. U. L. REV. 1001 (1989) (evaluating recent court application of the *Lemon* test in the public school context).

65. *Sands*, 53 Cal. 3d at 875, 809 P.2d at 815, 281 Cal. Rptr. at 40 (citing County of Allegheny v. ACLU, 492 U.S. at 598, 602 (1989) (annual creche display); Fox v. City of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978) (annual display of lighted cross)).

66. *Sands*, 53 Cal. 3d at 875, 809 P.2d at 815, 281 Cal. Rptr. at 40. *See also Bennett*, 193 Cal. App. 3d at 1021, 238 Cal. Rptr. at 824 (1987) (finding that prayer's duration is irrelevant to the determination of an Establishment Clause violation).

67. *Sands*, 53 Cal. 3d at 876, 809 P.2d at 816, 281 Cal. Rptr. at 41.

68. *Id.* at 876, 809 P.2d at 815-16, 281 Cal. Rptr. at 40-41.

69. *Id. See* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (inquiring into the constitutionality of a creche in the context of the Christmas season); *County of Allegheny*, 492 U.S. at 597 (determining the constitutionality of the government's annual display of both a creche and a menorah by considering the physical setting of these displays).

70. *Sands*, 53 Cal. 3d at 876, 809 P.2d at 816, 281 Cal. Rptr. at 41. The court further reasoned that, according to the context approach, "prayers at the beginning of the public school day would be constitutionally unobjectionable solely because they would be part of an educational experience that is predominantly nonreligious. Yet prayers at the beginning of the school day have long been held unconstitutional." *Id.*

71. The accommodation approach recognizes that religion pervades our culture, and therefore the First Amendment permits some government accommodation of public expression of religious belief. *See Sands*, 53 Cal. 3d at 921-25, 809 P.2d at 846-49, 281 Cal. Rptr. at 71-74 (Pannelli, J., dissenting) (noting that the Supreme Court has inter-

religion, it has done so only where government action "remove[s] burdens on the free exercise of religion."[72] Here, the court noted that including prayers at public school ceremonies did not remove any burden on the free exercise of religion; there existed no free exercise right for school administrators to include invocations at public school ceremonies, and thus the government lifted no burden by allowing these prayers.[73] Therefore, the District could not validate its actions as accommodating religion.

The court concluded that including invocations and benedictions at public high school graduations violated the "primary effect" prong of the *Lemon* test, because the practice "inevitably conveys a message that the District favors or prefers the religious beliefs expressed by the invocation and benediction speakers."[74]

c. *"Excessive Entanglement" Prong*

The majority next decided whether the government practice impermissibly entangled government with religion. The court concluded that the District's action impermissibly entangled government with religion in both the selection of speakers and the approval of prayer content.[75] First, the District controlled the selection of the speaker, because school administrators either chose the graduation speaker or gave final approval to the students' choice of religious speakers.[76] Second, the practice of including religious invocations would require the government to monitor the content of the prayers to ensure against endorsement of specific religions.[77] As the court

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preted the Establishment Clause as permitting the government to accommodate religion in public life). *See infra* notes 138-41 and accompanying text.

72. *County of Allegheny*, 492 U.S. at 601 n.51.

73. *Sands*, 53 Cal. 3d at 876-77, 809 P.2d at 816, 281 Cal. Rptr. at 41. *Cf.* Zorach v. Clauson, 343 U.S. 306, 313 (1952) (upholding state law permitting release of public school students to go to religious centers because the law accommodated religion, thus removing the burden on the student's right to free exercise of religion).

74. *Sands*, 53 Cal. 3d at 876-77, 809 P.2d at 816, 281 Cal. Rptr. at 41.

75. *Id.* at 879-81, 809 P.2d at 817-17, 281 Cal. Rptr. at 42-43.

76. *Id.* Justice Kennard further explained the way in which the speaker selection process fostered excessive entanglement with religion. The court stated that "[b]ecause the tendency is great to make such choices dependent on the religious preference of the school official, or on the religious preferences of the majority of the school community, the degree of entanglement is unacceptably high." *Id.*

77. *Id. Cf.* Lemon v. Kurtzman, 403 U.S. 602, 619 (1971) (holding that continuing state surveillance of subsidized teachers to ensure that they do not inculcate religion involves excessive entanglement between government and religion). Justice Kennard warned that this "preventive monitoring by the state of the content of religious speech inevitably leads to gradual official development of what is acceptable public prayer,"

noted, "Such prophylactic government monitoring of religious speech is constitutionally impermissible."[78] Therefore, the court concluded that including religious prayers at public high school graduation ceremonies fostered excessive government entanglement with religion, and was thus unconstitutional.[79]

3. The Applicability of *Marsh v. Chambers*

The majority then considered whether *Marsh v. Chambers*[80] applied to the facts of *Sands*. In *Marsh*, the United States Supreme Court did not apply *Lemon* to decide whether beginning legislative sessions with prayer violated the Establishment Clause. Instead, the Court held that because of legislative prayer's "unique history" of 200 years, the practice was constitutionally justified.[81] In *Sands*, the majority concluded that the court could not use *Marsh* to determine the constitutionality of religious invocations in the public school setting, because the public school system was not in existence 200 years ago.[82] Moreover, the court declared that "*Marsh* plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today . . . . [This] reading of *Marsh* would gut the core of the Establishment Clause, as this Court understands it."[83] Therefore the majority concluded that *Marsh* was inapplicable to the instant case, and instead based its holding on the *Lemon* test.

4. The California Constitution

The majority held that including prayers at public high school graduation ceremonies also violated the Establishment Clause of the California Constitution, which is almost identical to the correspond-

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which violates the Establishment Clause. *Sands*, 53 Cal. 3d at 880, 809 P.2d at 818, 281 Cal. Rptr. at 43.

78. *Sands*, 53 Cal. 3d at 880, 804 P.2d at 818, 281 Cal. Rptr. at 43.

79. *Id.* at 881, 809 P.2d at 819, 281 Cal. Rptr. at 44.

80. 463 U.S. 783 (1983).

81. *Id.* at 790-92. *See supra* notes 38-41 and accompanying text.

82. *Sands*, 53 Cal. 3d at 881, 809 P.2d at 819, 281 Cal. Rptr. at 44. *See* Edwards v. Aguillard, 482 U.S. 578, 583 (1987) (concluding that *Marsh* is not useful in the public school setting because free public education did not exist when the Constitution was adopted); Lemon v. Kurtzman, 403 U.S. 602, 624 (1971) (finding that the Court could not rely on history in deciding the constitutionality of state aid to religious-affiliated schools because this type of aid did not exist 200 years ago).

In *Sands*, the court declined to consider history as a factor in its evaluation. History, however, can facilitate in court interpretation, and has been used by the United States Supreme Court to decide whether a challenged government practice violates the Establishment Clause. *See generally* Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) (noting in an evaluation of a church tax exemption that "an unbroken practice according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside").

83. *Sands*, 53 Cal. 3d at 881, 809 P.2d at 819, 281 Cal. Rptr. at 44 (citations omitted).

ing federal provision.[84] The state constitution provides even greater church and state separation than does the United States Constitution, as it prohibits both material aid to religion and any government involvement which promotes religion.[85] Therefore, Justice Kennard concluded that the government practice in *Sands* violated the religion clauses of the California Constitution.[86]

B. Justice Lucas' Concurring Opinion

Chief Justice Lucas reluctantly concurred with the majority, agreeing that the religious invocations had the primary effect of advancing religion, thus violating the second prong of the *Lemon* test.[87] However, Justice Lucas admitted he would have upheld the challenged government practice if the Supreme Court precedent from *Lemon* had not bound the court.[88] Justice Lucas focused on the integral role of history in constitutional analysis.[89] History reveals that absolute separation of church and state is unreasonable,[90] because "benign recognition" of religion is "a consistent element of American culture, specifically endorsed by the framers and upheld in the traditions of both state and national governments since the founding of the republic."[91] Therefore, Justice Lucas evaluated the instant case through a historical approach, emphasizing the importance of *Marsh v. Chambers* in his constitutional analysis.[92]

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84. *Id.* at 882-83, 809 P.2d at 820, 281 Cal. Rptr. at 44. *See supra* note 57.

85. CAL. CONST. art. XVI, § 5. *See supra* note 57.

86. *Sands*, 53 Cal. 3d at 883, 809 P.2d at 818, 281 Cal. Rptr. at 44.

87. *Id.* at 884-85, 809 P.2d at 819, 281 Cal. Rptr. at 44 (Lucas, C.J., concurring).

88. *Id.* at 884-85, 809 P.2d at 821-22, 281 Cal. Rptr. at 46-47 (Lucas, C.J., concurring).

89. *Id.* at 886, 809 P.2d at 822, 281 Cal. Rptr. at 47 (Lucas, C.J., concurring). Justice Lucas asserted that history reveals the core principles underlying the Constitution, what evils it meant to prevent, and what benefits it sought to promote. In addition, history demonstrates whether a challenged government practice has "enhanced or inhibited basic constitutional values and principles over time." *Id.* (Lucas, C.J., concurring).

90. *Id.* (Lucas, C.J., concurring). Instead of a "wall of separation" between church and state, Justice Lucas suggested a "permeable membrane [which] allows the free flow of government action, based on a historical tradition that recognizes . . . the civic importance of religion . . . ." *Id.* at 891-92, 809 P.2d at 827, 281 Cal. Rptr. at 51-52 (Lucas, C.J., concurring).

91. *Sands*, 53 Cal. 3d at 890, 809 P.2d at 825, 281 Cal. Rptr. at 50 (Lucas, C.J., concurring). Justice Lucas used examples of intermingling of church and state in our culture to demonstrate that benign recognition of religion comports with the Establishment Clause.

92. *Id.* at 897-901, 809 P.2d at 830-33, 281 Cal. Rptr. at 54-58 (Lucas, C.J., concurring).

He began his analysis by stressing the importance of *context* in assessing constitutionality. First, he emphasized the high degree of audience freedom at the graduation ceremony.[93] Participation was voluntary and references to God were broad symbols which could easily accommodate individual interpretation.[94] Second, the invocations served an important secular function of "solemnizing" the occasion and unifying the community.[95] Third, the District did not evidence religious bias in its purpose or effect.[96] Thus, considering the context of the invocations, Justice Lucas concluded that the government practice was constitutional.

Justice Lucas also analogized *Marsh* to the instant case by showing the similarity of the prayers in both cases. He stressed that courts must consider *Marsh*'s historical analysis in evaluating whether a government action violates the Establishment Clause.[97] Although public school graduation ceremonies did not exist 200 years ago, comparable civic ceremonies that contained religious invocations were in existence.[98] The tradition of opening and closing prayers at these civic ceremonies, he argued, validated the graduation prayers in this case. He opined that *Marsh* is not "an aberration in the mainstream of constitutional decisionmaking . . . [and] is not an historical

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93. *Id.* at 895, 809, P.2d at 828, 281 Cal. Rptr. at 53 (Lucas, C.J., concurring).

94. *Id.* at 895, 809 P.2d at 828-29, 281 Cal. Rptr. at 53-54 (Lucas, C.J., concurring). Justice Lucas explained that the individual who did not wish to participate could view the prayers as a "cultural phenomenon." It may be argued, however, that impressionable young graduates and their younger siblings in the audience might not view the prayers in such a mature manner. Unlike adults, children are highly impressionable. *See* Lemon c. Kurtzman, 403 U.S. 602, 616-17 (1971) (stressing that students are very impressionable, enhancing government's imparting of religion).

95. *Sands*, 53 Cal. 3d at 896, 809 P.2d at 829, 281 Cal. Rptr. at 54 (Lucas, C.J., concurring). However, a majority of the United States Supreme Court did not adopt the "solemnizing" approach presented by Justice O'Connor in *Lynch v. Donnelly*. *Id.* (citing Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring); County of Allegheny v. ACLU, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring)).

In *County of Allegheny*, the Supreme Court also considered the availability of secular alternatives in evaluating the constitutionality of a challenged religious practice. *County of Allegheny*, 492 U.S. at 618 n.67. Using this analysis, the wide array of secular alternatives to religious invocations in the present case demonstrates a considerable degree of government involvement in and endorsement of religion.

96. *Sands*, 53 Cal. 3d at 896-97, 809 P.2d at 829-30, 281 Cal. Rptr. at 54-55 (Lucas, C.J., concurring). Justice Lucas indicated that the selection of speakers involved student choice. Although the District was required to give its final approval of the speaker, there was no evidence of religious favoritism. Further, the content of the prayers made only general references to God and did not "promote favoritism or factionalism among churches." *Id.* (Lucas, C.J., concurring).

97. *Id.* at 898-901, 809 P.2d at 831-33, 281 Cal. Rptr. at 56-58 (Lucas, C.J., concurring). However, as the majority states, *Marsh* does not apply in the public school setting. *See supra* note 82 and accompanying text.

98. *Sands*, 53 Cal. 3d at 901, 809 P.2d at 831, 281 Cal. Rptr. at 56 (Lucas, C.J., concurring). *But see* Bennett v. Livermore Unified Sch. Dist., 193 Cal. App. 3d 1012, 1022, 238 Cal. Rptr. 819, 825 (1987).

artifact."[99]

Finally, Justice Lucas addressed the California constitutional issue, which he felt should not be resolved in this case.[100] He explained that California is part of a federal system and must defer to the supreme law of the land. In addition, these constitutional issues are "daily grist for the mill of the Supreme Court."[101] Justice Lucas thus preferred to await Supreme Court guidance on the graduation invocation issue.[102]

C. Justice Mosk's Concurring Opinion

Justice Mosk began by emphasizing that the California Supreme Court owes its primary duty to the state constitution, and should only resort to the Federal Constitution where the court cannot resolve the issue on independent and adequate state grounds.[103] This reliance on the California Constitution in decision-making allows the court to render a final judgment quickly and avoid the time and costs of duplicative proceedings.[104] Using this approach, Justice Mosk concluded that while the invocations at issue did violate the Federal Constitution, they independently violated the stricter state constitution.[105]

1. Increased Protection Under the California Constitution

Justice Mosk indicated that the framers of the state constitution

99. *Sands*, 53 Cal. 3d at 901, 809 P.2d at 832, 281 Cal. Rptr. at 57 (Lucas, C.J., concurring).

100. *Id.* at 902, 809 P.2d at 833, 281 Cal. Rptr. at 58 (Lucas, C.J., concurring).

101. *Id.* at 904, 809 P.2d at 834, 281 Cal. Rptr. at 59 (Lucas, C.J., concurring).

102. *Id.* at 905, 809 P.2d at 834-35, 281 Cal. Rptr. at 59-60 (Lucas, C.J., concurring).

103. *Id.* at 906, 809 P.2d at 836, 281 Cal. Rptr. at 61 (Mosk, J., concurring).

104. *Id.* (Mosk, J., concurring). Justice Mosk referred to State v. Hershberger, 462 N.W.2d 393 (Minn. 1990), where the Minnesota Supreme Court underwent unnecessary cost and delay. After the initial state determination, State v. Hershinger, 444 N.W.2d 282 (Minn. 1989), the United States Supreme Court heard the case on certiorari, and remanded the case for consideration in light of a prior Supreme Court decision. On remand, the Minnesota court did not follow the Supreme Court precedent, but instead based on its final holding on the state constitution, reaffirming its initial decision. *Hershberger*, 462 N.W.2d at 396-97. Justice Mosk urged the California Supreme Court to learn from this case and avoid future delay and cost by relying on the state constitution if possible.

105. *Sands*, 53 Cal. 3d at 905, 809 P.2d at 835-36, 281 Cal. Rptr. at 61-62 (Mosk, J., concurring). Although Justice Mosk felt that the court was not bound by application of federal authority, he agreed with the majority's reliance on the *Lemon* test in concluding that the prayers violated the California Constitution. *Id.* at 910 n.3, 809 P.2d at 839 n.3, 281 Cal. Rptr. at 64 n.3 (Mosk, J., concurring). *See supra* notes 61-86 and accompanying text.

intended to have absolute separation of church and state. First, the delegates stressed the word "preference" in adopting article 1, section 4, prohibiting governmental preference of religion.[106] Second, the framers amended article 1, section 4, and "guaranteed" free exercise of religion instead of merely "allowing" it.[107] Finally, the delegates adopted article XIV, section 5, further grounding government neutrality in religious matters.[108] These examples strongly demonstrate that the framers of the state constitution "carefully selected the language that provided the greatest level of protection to California citizens."[109]

2. Application of the California Constitution to Religious Invocations

Justice Mosk next applied the state constitution to the case at hand, and found that the invocations violated both article 1, section 4, and article XVI, section 5[110] of the constitution.

a. Article 1, Section 4

Although the Establishment Clause of the state and federal constitutions are almost identical, Justice Mosk stated that the California Constitution provides for heightened government neutrality in religious matters through the Preference Clause. The Preference Clause of article 1, section 4, forbids any government preference of religion, even where there has been no discrimination.[111] Thus, Justice Mosk

106. *Id.* at 907, 809 P.2d at 837, 281 Cal. Rptr. at 62 (Mosk, J., concurring). *See supra* note 57 and accompanying text.

107. *Id.* at 907, 809 P.2d at 838, 281 Cal. Rptr. at 63 (Mosk, J., concurring).

108. *Id.* (Mosk, J., concurring). *See supra* note 57 and accompanying text.

109. *Id.* at 907, 809 P.2d at 837, 281 Cal. Rptr. at 61 (Mosk, J., concurring). In addition to recognizing the intent of the framers, Justice Mosk referred to early California case law that recognized the separation of church and state. *See, e.g., Ex Parte* Newman, 9 Cal. 502, 506-07 (1858) (holding that a legislative enactment which required observance of the Sabbath violated Article 1 of the California Constitution).

110. *Sands*, 53 Cal. 3d at 910, 809 P.2d at 838, 281 Cal. Rptr. at 63 (Mosk, J., concurring). The California Constitution provides a more stringent separation of church and state than does the United States Constitution, particularly in the public school setting. Bennett v. Livermore Unified School Dist., 193 Cal. App. 3d 1012, 1016, 238 Cal. Rptr. 819, 821 (1987) (citing Fox v. City of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978)). *See supra* note 57 and accompanying text.

111. *Sands*, 53 Cal. 3d at 910, 809 P.2d at 839, 281 Cal. Rptr. at 64 (Mosk, J., concurring). *See supra* note 57. Justice Mosk demonstrated that California courts have utilized the Preference Clause to find government practices unconstitutional. *See, e.g., Fox*, 22 Cal. 3d at 797, 587 P.2d at 665, 150 Cal. Rptr. at 87 (finding that a display of a lighted Latin cross on city hall was unconstitutional, partly because it seemed to prefer one religion); Feminist Women's Health Ctr. v. Philobosian, 157 Cal. App. 3d 1076, 1090-92, 203 Cal. Rptr. 918, 926-27 (1984) (holding that city district attorney's plan to bury aborted fetuses, where one religious organization would hold a memorial ceremony, was unconstitutional partly because the plan would prefer a religion); Mandel v. Hodges, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976) (holding that government order

believed the relevant inquiry in determining a Preference Clause violation was "whether government has granted a benefit to a religion or religion in general that is not granted to society at large."[112]

Justice Mosk applied this inquiry to the case at hand, and concluded that the invocations were unconstitutional under article 1, section 4.[113] First, Justice Mosk reasoned that the government conferred a benefit on religion by including religious prayers at an important secular function. He noted that "[t]his form of prayer, and the religious world view that underlies it, is . . . invested with the prestige with which the importance of the occasion endows it."[114] Second, the government's selection of clergy members to deliver these prayers also granted a preferential benefit to religion.[115] Therefore, Justice Mosk found the District's inclusion of invocations unconstitutional under the Preference Clause of the California Constitution.[116]

b. Article XVI, Section 5

Article XVI, section 5, provides further guarantees against the intrusion of government into religious matters, banning any government aid "which has the direct, immediate, and substantial effect of promoting religious purposes."[117] Justice Mosk set forth a two-pronged analysis in evaluating the validity of government aid: (1) whether the benefit is direct or indirect; and (2) whether the aid is substantial or incidental.[118] Justice Mosk then applied this analysis to the instant case. First, he believed that choosing Christian clergy to deliver religious prayers at an important secular function provided a direct benefit to one particular religion.[119] Second, this benefit was not incidental, because the government objectively appeared to en-

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to close state offices for three hours on Good Friday was unconstitutional because it discriminated against non-Christians and preferred Christian employees).

112. *Sands*, 53 Cal. 3d at 912, 809 P.2d at 840, 281 Cal. Rptr. at 65 (Mosk, J., concurring).

113. *Id.* (Mosk, J., concurring).

114. *Id.* (Mosk, J., concurring). *See supra* note 64 and accompanying text.

115. *Id.* (Mosk, J., concurring). *See supra* note 47 and accompanying text.

116. *Id.* (Mosk, J., concurring).

117. California Ed. Facilities Auth. v. Priest, 12 Cal. 3d 593, 605 n.12, 526 P.2d 513, 521 n.12, 116 Cal. Rptr. 361, 369 n.12 (1974).

118. *Sands*, 53 Cal. 3d at 913, 809 P.2d at 841, 281 Cal. Rptr. at 66 (Mosk, J., concurring) (citing California Teachers Ass'n v. Riles, 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981)).

119. *Sands*, 53 Cal. 3d at 913, 809 P.2d at 840, 281 Cal. Rptr. at 66 (Mosk, J., concurring).

dorse the religious views espoused in the prayers, while implicitly rejecting contrary views.[120] Justice Mosk found, therefore, that the invocations at issue violated article XVI, section 5 of the California Constitution.[121]

D. Justice Arabian's Concurring Opinion

Justice Arabian concurred reluctantly with the majority based upon the *Lemon* test, and emphasized the inapplicability of *Marsh* to the instant case.[122] Although Justice Arabian found the invocations to be unconstitutional, he recognized that public prayer reinforces religious diversity and is thus vital to our country.[123] Therefore, Justice Arabian expressed his hope that the high court would soon decide to uphold invocations at public high school graduations.[124]

1. The *Lemon* Test

Justice Arabian found that the prayers violated the second prong of *Lemon*, the "primary effect" test, because they conveyed an appearance of government endorsement of religion.[125] Yet he reformulated this part of *Lemon*, and stated the relevant inquiry as "whether . . . the prayers in question, though seemingly innocuous to the majority of citizens, nevertheless offend" the *minority* of non-adherents.[126] Justice Arabian concluded that the prayers were

120. *Id.* at 912-13, 809 P.2d at 840-41, 281 Cal. Rptr. at 65-66 (Mosk, J., concurring). The second part of the analysis proposed by Justice Mosk mirrors the second prong of the *Lemon* test, the "primary effect" test. This test prohibits government endorsement of religion, banning the government "from appearing to take a position on questions of religious belief." County of Allegheny v. ACLU, 492 U.S. 573, 594 (1989). *See supra* notes 63-66 and accompanying text.

121. *Sands*, 53 Cal. 3d at 914, 809 P.2d at 842, 281 Cal. Rptr. at 67 (Mosk, J., concurring).

122. *Id.* at 914-16, 809 P.2d at 842-44, 281 Cal. Rptr. at 67-69 (Arabian, J., concurring). Justice Arabian based his opinion solely on the federal Constitution stating he did not find it necessary to look to the California Constitution. He, therefore, joined in neither the portion of the majority which addressed the state constitution, nor in Justice Mosk's concurring opinion. *Id.* at 914, 809 P.2d at 842, 281 Cal. Rptr. at 67 (Arabian, J., concurring). *See supra* notes 84-86 and notes 103-21 and accompanying text.

123. *Sands*, 53 Cal. 3d at 918, 809 P.2d at 844, 281 Cal. Rptr. at 69 (Arabian, J., concurring).

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

125. *Id.* at 916-17, 809 P.2d at 843, 281 Cal. Rptr. at 68 (Arabian, J., concurring).

126. *Id.* at 915, 809 P.2d at 842, 281 Cal. Rptr. at 67 (Arabian, J., concurring). Justice Arabian found it critical to view the endorsement issue from the minority perspective because "they [the minority] compose a large segment of the symphony which is America." *Id.* Justice O'Connor also recognized this reformulation of *Lemon*'s second prong, finding government endorsement of religion where a challenged practice sends "a message to non-adherents that they are outsiders, not full members of the political community." Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). *See also Lynch*, 465 U.S. at 701 (Brennan, J., dissenting) (characterizing the relevant inquiry as whether the government action conveys a message to minority religious groups and those that recognize no religion, "that their views are not similarly worthy

unconstitutional according to this part of *Lemon*, because the minority perceived them as a government endorsement of religion.[127]

2. The Inapplicability of *Marsh v. Chambers*

Justice Arabian next analyzed whether the religious practice of invocations "has a legitimate constitutional place in a public high school graduation ceremony."[128] Justice Arabian noted that religion and prayer have historically been significant to public ceremonies, including presidential inaugurals and legislative prayers like those addressed in *Marsh*.[129] Yet, he found those 18th century invocations historically distinct from the invocations in the instant case; inaugurals and legislative sessions have basically remained the same in the past 200 years, while "public education has experienced a continuous revolution."[130] Therefore, Justice Arabian concluded that the legislative prayers in *Marsh* could not guide the court in its determination.[131]

Although Justice Arabian found that *Marsh* was not determinative of the case at bar, he stated that an historical analysis provides a useful perspective.[132] History indicates that public prayer is an American tradition which enhances religious diversity and freedom in our country.[133] Therefore, Justice Arabian would have preferred to find the invocations constitutional, because they allow Americans to "reinforce and celebrate the rich diversity that has made us a great and

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of public recognition nor entitled to public support."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1284, 1293 (2d ed. 1988) (urging courts to adopt the perspective of a non-adherent in deciding whether government action has conveyed a message of religious endorsement). *See generally* Dean, *supra* note 64, at 1-26 (analyzing Justice O'Connor's reforumulation of *Lemon*'s second prong).

127. *Sands*, 53 Cal. 3d at 916, 809 P.2d at 843, 281 Cal. Rptr. at 68 (Arabian, J., concurring).

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

129. *Id. See* Marsh v. Chambers, 463 U.S. 783, 792 (1983) (concluding that legislative prayer has been part of our society for 200 years); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 213 (1963) (demonstrating prevalence of prayer in public life). *Cf.* Zorach v. Clauson, 343 U.S. 306, 312-13 (1952) (listing numerous examples of the inevitable concert of church and state in our society).

130. *Sands*, 53 Cal. 3d at 917, 809 P.2d at 843, 281 Cal. Rptr. at 68 (Arabian, J., concurring). *See supra* note 82 and accompanying text.

131. *Sands*, 53 Cal. 3d at 917, 809 P.2d at 844, 281 Cal. Rptr. at 69 (Arabian, J., concurring). *See supra* note 82 and accompanying text.

132. *See generally Marsh*, 463 U.S. 783 (utilizing a historical analysis to find whether a governmental practice violated the Establishment Clause).

133. *Sands*, 53 Cal. 3d at 918, 809 P.2d at 844, 281 Cal. Rptr. at 844 (Arabian, J., concurring).

noble people."[134]

E. Justice Panelli's Dissenting Opinion

Justice Panelli primarily stressed that courts are not restricted to any one test in an Establishment Clause analysis.[135] Therefore, his opinion used both an accommodation[136] as well as a *Lemon* analysis. This broadened analysis compelled Justice Panelli to conclude that religious invocations at graduation ceremonies are not unconstitutional.[137]

1. Accommodation of Religion

Justice Panelli applied an accommodation approach to the present case,[138] recognizing that the United States Supreme Court interpreted the Establishment Clause to allow government *accommodation* of religion in *Marsh*.[139] Furthermore, in *Lynch*, the Court recognized that because religion pervades our history, it requires accommodation of all religions with hostility toward none.[140] This line of authority led Justice Panelli to conclude, irrespective of *Lemon*, that the District's practice did not violate the Establishment Clause; rather, brief prayers at public high school graduation were permissible as government accommodation of religion.[141]

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

135. *Id.* at 920, 809 P.2d at 845, 281 Cal. Rptr. at 70 (Panelli, J., dissenting). *See* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (noting that the Court will not limit itself to one criterion in this area of the law). Justice Panelli asserted that the danger in using only one test is that the test chosen often determines the outcome. For instance, of the courts that have applied the *Lemon* test, only two have found religious invocations constitutional; yet *all* courts applying other tests have found religious invocations constitutional. *Sands*, 53 Cal. 3d at 920-21, 809 P.2d at 846, 281 Cal. Rptr. at 71 (1991) (Panelli, J., dissenting). Thus, Justice Panelli preferred considering other approaches in addition to *Lemon*.

136. *See supra* note 71 and accompanying text.

137. *Sands*, 53 Cal. 3d at 939, 809 P.2d at 859, 281 Cal. Rptr. at 84 (Panelli, J., dissenting) (Panelli, J., dissenting) (Panelli, J., dissenting) (Panelli, J., dissenting) (Panelli, J., dissenting).

138. *Id.* at 921, 809 P.2d at 846, 281 Cal. Rptr. at 71 (Panelli, J., dissenting). *See Lynch*, 465 U.S. at 672-78 (emphasizing that the Constitution affirmatively authorizes government accommodation of religion); *Marsh*, 463 U.S. at 792 (finding that government activity is not barred solely because it "harmonizes" with religious beliefs); *Zorach*, 343 U.S. at 312-14 (concluding that government need not be hostile toward religion, because church and state cannot be separated in all respects). *But see County of Allegheny*, 492 U.S. at 601 n.51 (explaining that accommodation is allowed only where the government practice unburdens the right to free exercise of religion).

139. *Sands*, 53 Cal. 3d at 923, 809 P.2d at 848, 281 Cal. Rptr. at 73 (Panelli, J., dissenting).

140. *Id.* (Panelli, J., dissenting). *But see Bennett*, 193 Cal. 3d at 1022, 238 Cal. Rptr. at 825 (citing *Lynch*, 465 U.S. at 682-83) (distinguishing *Lynch* from similar public school cases).

141. *Sands*, 53 Cal. 3d at 923-25, 809 P.2d at 848-49, 281 Cal. Rptr. at 73-74 (Panelli, J., dissenting).

2. The *Lemon* Test

Justice Panelli also applied the *Lemon* test to further his analysis.[142] First, he found that the prayers had a valid secular purpose, adding ceremony and solemnity to the occasion.[143] Justice Panelli explained that secular and religious purposes coexist, and that the state can use religion to achieve a state interest.[144] Second, Justice Panelli found that the graduation invocations did not significantly benefit religion because the prayers were brief, the ceremony was voluntary, and the graduates were mature and intelligent young adults.[145] Therefore, one could not view the invocations as a government endorsement of religion. Finally, he noted that the invocations did not excessively entangle government with religion; the government would not have needed to censor the prayers, considering there was no "realistic risk that a private speaker's use of religious language will be seen as an official endorsement of religion."[146]

3. The California Constitution

Justice Panelli indicated that the challenged government practice did not violate the California Constitution.[147] First, he declared that the framers of the state constitution did not intend to proscribe ceremonial prayer. It is counterintuitive, Panelli argued, to believe that the delegates who began each day with a religious invocation, and who included a religious invocation in the preamble, would have intended to ban religious invocations at graduation ceremonies.[148] Sec-

142. *Id.* at 925, 809 P.2d at 849, 281 Cal. Rptr. at 74 (Panelli, J., dissenting).

143. *Id.* at 926, 809 P.2d at 849-50, 281 Cal. Rptr. at 74-75 (Panelli, J., dissenting).

144. *Id.* at 926, 809 P.2d at 850, 281 Cal. Rptr. at 75 (Panelli, J., dissenting). *See* Lynch v. Donnelly, 465 U.S. 668, 683 (1984) (explaining that although government action may advance religion, it is not constitutionally invalid for this reason alone).

145. *Sands*, 53 Cal. 3d at 929, 809 P.2d at 851-52, 281 Cal. Rptr. at 76-77 (Panelli, J., dissenting). Although Justice Panelli classified high school graduates as mature, some, in fact, are insecure and impressionable, and perhaps quite influenced by religious inculcation. *See supra* note 90 and accompanying text.

In addition, Justice Panelli dismissed rather quickly the availability of secular alternatives as a factor in Establishment Clause analysis, as suggested by the United States Supreme Court. *Sands*, 53 Cal. 3d at 927-28, 809 P.2d at 851, 281 Cal. Rptr. at 76 (Panelli, J., dissenting). *See* County of Allegheny v. ACLU, 492 U.S. 573, 618 n.67 (1989). When government uses religious means when valid secular alternatives exist, government endorsement of religion is unavoidable because "the religious medium becomes the state's message." TRIBE, *supra* note 126, at 1283.

146. *Sands*, 53 Cal. 3d at 931, 809 P.2d at 853, 281 Cal. Rptr. at 78 (Panelli, J., dissenting).

147. *Id.* (Panelli, J., dissenting).

148. *Id.* at 931-33, 809 P.2d at 853-54, 281 Cal. Rptr. at 78-79 (Panelli, J., dissenting). Article I, § 4 of the California Constitution, known as the "discrimination or prefer-

ond, the framers of the California Constitution did not intend to erect a higher "wall of separation" between church and state than did the Federal Constitution.[149] As Justice Panelli reasoned, the wall "has always had holes large enough to permit state aid to religious institutions, religious instruction in such institutions, ceremonial prayer in the state constitutional convention, and a religious invocation in the Constitution . . . ."[150] Therefore, because the religious guarantees of the state and federal constitutions are equal, he concluded that the invocation here did not violate either constitution.

F. Justice Baxter's Dissenting Opinion

Justice Baxter dissented because he felt that the injunction banning the inclusion of religious prayer in all public high school graduations was overly broad.[151] Although he found that two of the graduation invocations were constitutionally suspect under *Lemon*'s second prong, he argued that the court should not enjoin invocations at public school graduations in general.[152]

Justice Baxter found that the *Lemon* test was the appropriate analysis because of its second prong, which asks "whether 'the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as a disapproval, of their individual religious choices.' "[153] Justice Baxter stressed that the court must apply this "endorsement" test by considering the context in which the conduct occurs.[154] Therefore, using the second prong of *Lemon*, Justice Baxter found that two of the invocations at issue were unconstitutional because the speaker selection process resulted in the appearance of

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ence" provision, prevents the state from discriminating against or preferring a particular religious sect. *Id.* at 933, 809 P.2d at 856, 281 Cal. Rptr. at 79 (Panelli, J., dissenting). *See supra* note 57. Justice Panelli suggested that the District could meet this standard by requiring a rotation of speakers representing different religious beliefs. *Sands*, 53 Cal. 3d at 935, 809 P.2d at 856, 281 Cal. Rptr. at 81 (Panelli, J., dissenting). Yet, Justice Panelli's suggestion of speaker rotation would violate the third prong of *Lemon*. The District would be forced to survey the selection process to ensure that various religions were represented, excessively entangling government with religion. *See supra* notes 76-77 and accompanying text.

149. *Sands*, 53 Cal. 3d at 933-34, 809 P.2d at 855, 281 Cal. Rptr. at 80 (Panelli, J., dissenting). *But see supra* note 57 and accompanying text.

150. *Sands*, 53 Cal. 3d at 937, 809 P.2d at 857, 281 Cal. Rptr. at 82 (Panelli, J., dissenting).

151. *Id.* at 939-40, 809 P.2d at 859, 281 Cal. Rptr. at 84 (Baxter, J., dissenting).

152. *Id.* at 943, 809 P.2d at 862, 281 Cal. Rptr. at 87 (Baxter, J., dissenting).

153. *Id.* at 940, 809 P.2d at 859-60, 281 Cal. Rptr. at 84 (Baxter, J., dissenting) (quoting County of Allegheny v. ACLU, 492 U.S. 573, 597 (1989)). *See supra* notes 63-66 and 125-27 and accompanying text.

154. *Sands*, 53 Cal. 3d at 941, 809 P.2d at 860, 281 Cal. Rptr. at 85 (Baxter, J., dissenting). *But see supra* notes 67-70 and accompanying text.

government endorsement of religion.[155] Justice Baxter emphasized that while the court must ban such speaker selection practices, it is unnecessary to ban all invocations at public high school graduations, because "recitation need not be viewed in all cases as reflecting state endorsement or support of the religious views of the speaker . . . ."[156]

Justice Baxter found that the invocations did not independently violate the California Constitution. First, the invocations did not violate article 1, section 4, except where the speaker selection process implied government preference of religion.[157] Second, the invocations did not violate article XVI, section 5, because the benefit to religion was incidental, considering the de minimus expenditure of government funds on the prayers.[158] Therefore, Justice Baxter concluded that the District's practice was permissible on state constitutional grounds as well.[159]

V. IMPACT OF THE COURT'S DECISION

Sands v. Morongo Unified School District is a valuable constitutional decision, upholding government neutrality on religious matters "[i]n a world frequently torn by religious factionalism and the violence tragically associated with political division along religious lines . . . ."[160] It appears, however, that because of the increased conservatism of the both United States Supreme Court[161] and the California

155. *Id.* at 943, 809 P.2d at 861, 281 Cal. Rptr. at 86 (Baxter, J., dissenting). At Yucca Valley High School, the vice principal alone chose the speaker; and at Sky High School, the school had chosen the same Protestant minister to speak since the first graduation in 1977. Therefore, "[i]n the absence of guidelines adequate to ensure a diversity of views," the speaker selection process resulted in the appearance of government sponsorship of religion. *Id.* (Baxter, J., dissenting).

Justice Baxter felt that invocations need not be banned because the court could provide guidelines for speaker selection and prayer censorship, thus eliminating government endorsement of religion. Yet, because Justice Baxter failed to suggest any guidelines, his proposed limited injunction would not adequately prevent government sponsorship of religion.

156. *Id.* at 947, 809 P.2d at 864, 281 Cal. Rptr. at 89 (Baxter, J., dissenting).

157. *Id.* at 945-46, 809 P.2d at 863, 281 Cal. Rptr. at 88 (Baxter, J., dissenting). *But see supra* notes 111-16 and accompanying text.

158. *Id.* at 947, 809 P.2d at 863-64, 281 Cal. Rptr. at 89 (Baxter, J., dissenting). *But see supra* notes 117-21 and accompanying text.

159. *Id.* at 947, 809 P.2d at 864, 281 Cal. Rptr. at 89 (Baxter, J., dissenting).

160. *Id.* at 821, 809 P.2d at 821, 281 Cal. Rptr. at 46.

161. The Bush Administration urged the Supreme Court to hear Weisman v. Lee, 728 F. Supp. 68 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991), so it could adopt a less stringent standard, allowing for increased government accommodation of religion. David G. Savage, *Courts May Ease Church-State Separation*, L.A. TIMES, March 19, 1991, at A1. Chief Justice Rehnquist, Justice Scalia,

Supreme Court,[162] the *Sands* decision may not ban this type of government involvement in the religious arena for long. The United States Supreme Court will decide upon the constitutionality of religious invocations at public high school graduation ceremonies in *Lee v. Weisman*,[163] and will most likely approve of the invocations.[164]

A. The Temporary Effect of Sands

In the meantime, *Sands* will impact Establishment Clause decisions in California by maintaining a strong distinction between government activity and religious practice. Under the majority's "broad" injunction, religious invocations at any public school function will likely violate separation of the church and state.[165] The court affirmed that the public school system is an inappropriate forum for religious instruction because of the constitutional mandate that "religion . . . be a private matter for the individual, the family, and the institutions of private choice . . . ."[166] Yet, government invocations in non-school settings may be constitutional notwithstanding *Sands*, considering that the Establishment Clause is applied with more vigilance in the public school context.[167] In any case, the *Sands* decision will at least temporarily prevent government endorsement of prayer in the public school system, which is extremely important to those who fear the ease with which government can establish religion in schools.[168]

Justice Kennedy, and Justice White all support increased government support of religion. *Id.* Justice O'Connor, however, has refused to support this type of change and insists that government endorsement of religion is unconstitutional. *Id.* Justice Souter's stance is unknown. However, as New Hampshire's state attorney general, Souter defended the reinstatement of the Lord's Prayer in schools and flying flags at half-mast on Good Friday " 'to memorialize the death of Christ on the Cross.' " *Id.* In addition, recent Supreme Court appointee Clarence Thomas is a conservative and may support a relaxed Establishment Clause standard as well. Thus, it appears that five of the Justices will most likely approve of invocations at public high school graduations.

162. Former Republican Governor George Deukmejian appointed the newest conservative justices to the California Supreme Court, changing the court from liberal to conservative. Philip Hager, *Justice Prohibits Prayer at Public School Rites*, L.A. TIMES, May 7, 1991, at A1.

163. 728 F. Supp. 68 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991).

164. In a brief to the Supreme Court, Bush Administration attorneys stressed that they wanted to clarify First Amendment confusion by obtaining a Court ruling that would forbid only " 'religious coercion' " by the government. Therefore, they stated that a public school ceremony referring to God would not be unconstitutional. Savage, *supra* note 161.

165. *Sands*, 53 Cal. 3d at 863, 809 P.2d at 858, 281 Cal. Rptr. at 83 (Panelli, J., dissenting).

166. Lemon v. Kurtzman, 403 U.S. 602, 625 (1981).

167. *See supra* note 41.

168. Underwood, *supra* note 41. There is an increased risk that the government will establish religion in the schools, even with slight religious favoritism, "[b]ecause the school's role is to educate students and inculate values." *Id.* at 817-18.

Sands reinforced the importance of the *Lemon* test in constitutional analysis,[169] concluding that the historical approach set forth in *Marsh v. Chambers* is inappropriate in the public school context.[170] Through this affirmation of the more stringent *Lemon* test, the court demonstrated its commitment to separation of church and state, which it found necessary to enhance religious diversity and freedom.[171]

B. The Future of the Sands' Decision

If the United States Supreme Court holds religious invocations at public high school ceremonies to be constitutional, a change in state law is also highly likely. Although the *Sands* majority held that religious invocations violate the federal Constitution, only three justices held that the invocations independently violated the state constitution.[172] Thus, the California Supreme Court is likely to re-examine whether religious invocations violate the state constitution, and will probably permit invocations on state grounds.[173] This state approval of graduation prayer, in conjunction with the likely federal approval, will establish the constitutionality of religious invocations at public school graduations in California.

VI. CONCLUSION

The divisiveness reflected in the majority, concurring, and dissenting opinions reveals the gradual change from a complete "wall of separation" between church and state to a "blurred, indistinct, and variable barrier."[174] Although the United States Supreme Court's probable approval of graduation invocations seems insignificant, "[t]he breach of neutrality that is today a trickling stream may all too soon become a raging torrent,"[175] resulting in further intermingling

169. *Sands*, 53 Cal. 3d at 930-31, 809 P.2d at 853, 281 Cal. Rptr. at 78 (Panelli, J., dissenting).

170. *Id.* at 882, 809 P.2d at 819-20, 281 Cal. Rptr. at 44-45.

171. *Id.* at 883-84, 809 P.2d at 821, 281 Cal. Rptr. at 46.

172. *Sands*, 53 Cal. 3d at 931, 809 P.2d at 853, 281 Cal. Rptr. at 78 (Panelli, J., dissenting).

173. In May 1990, State Attorney General Daniel Lungren asked the California Supreme Court to reconsider its holding in *Sands* after the United States Supreme Court rules on invocations in Lee v. Weisman, 728 F. Supp. 68 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991), in early 1992. Phillip Hager, *Court is Asked to Set Aside Its Graduation Prayer Ruling*, L.A. TIMES, May 24, 1991, at A41.

174. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

175. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963).

of church and state through prayer in schools or other forms of integration. Courts considering Establishment Clause issues may wish to revisit the admonition from *Lemon* that "[a] certain momentum develops in constitutional theory . . . [which] can be a 'downhill thrust' easily set in motion but difficult to retard or stop."[176] Thus, government infringements on religious freedom which remain unchecked today may result in insurmountable government infringements in the future.

CHRISTINA KATRIS

IV. CORPORATION LAW

A dissolved corporation remains subject to suit for harm resulting from the corporation's predissolution activities discovered after dissolution: **Penasquitos, Inc. v. Superior Court**

In *Penasquitos, Inc. v. Superior Court*,[1] the California Supreme Court unanimously held that plaintiffs may bring suit against a dissolved corporation for defect or harm that is caused by the corporation's predissolution actions but is discovered after statutory dissolution.[2] The court interpreted California Corporations Code section 2010(a),[3] which provides that "a corporation which is dissolved, nevertheless continues to exist for the defending of actions by or against it,"[4] to eliminate any distinction between pre- and post-dissolution causes of action against a dissolved corporation.[5]

176. *Lemon*, 403 U.S. at 624.

1. 53 Cal. 3d 1180, 812 P.2d 154, 283 Cal. Rptr. 135 (1991). Homeowners brought actions for construction defects against Penasquitos, Inc. and Crow Pacific Development Corporation. Crow Pacific built homes on lots graded by Penasquitos. The earliest damages were discovered more than three years after both Penasquitos and Crow Pacific's statutory dissolution. The trial court overruled Penasquitos' demurrer and denied Crow Pacific's motion for judgment on the pleadings. Both Penasquitos and Crow Pacific petitioned the court of appeal for a writ of mandamus. The court of appeal consolidated the two actions and granted the petition, holding that a dissolved corporation could not be sued on claims that arose after dissolution. *Id.* at 1183, 812 P.2d at 155, 283 Cal. Rptr. at 136.

2. Justice Kennard authored the opinion, in which Chief Justice Lucas and Justices Mosk, Broussard, Panelli, Arabian and Baxter concurred.

3. CAL. CORP. CODE § 2010(a) (West 1990).

4. CAL. CORP. CODE § 2011(a) (West 1990). The court articulated this point by referencing California Corporations Code section 2011(b), which provides for the service of summons on a dissolved corporation. *Penasquitos*, 53 Cal. 3d at 1185-86, 812 P.2d at 157, 283 Cal. Rptr. at 138. *See generally* Robert Morrow, *Comment on Recent Cases*, 4 CAL. L. REV. 409 (1916) (regarding Lewelly Iron Works v. Kinney, 51 Cal. 287, 155 P. 986 (1916)). *See also* 19 AM. JUR. 2D *Corporations* §§ 2882, 2905-07 (1986).

5. *Penasquitos*, 53 Cal. 3d at 1185, 812 P.2d at 157, 283 Cal. Rptr. at 138. The court commented, "[i]t would be incongruous to allow a corporation that exists for purposes of defending actions and discharging obligations to defend a lawsuit on the basis that it did not exist." *Id.* at 1186, 812 P.2d at 157, Cal. Rptr. at 138.

The court set forth three reasons for its literal construction of the statutory phrase: (1) plaintiff's suit against a dissolved corporation on a post-dissolution claim does not disrupt the distribution of assets to shareholders;[6] (2) courts have repeatedly construed the phrase to permit parties to bring suit against dissolved corporations;[7] and (3) evidence of the legislature's intent to literally interpret the phrase is available, as illustrated by contrasting section 2010's lack of distinction between pre- and post-dissolution claims[8] and section 2011(a),[9] which limits post-dissolution actions against dissolved corporations' shareholders to those claims filed prior to the corporation's dissolution.[10]

In its reading of the phrase, "a dissolved corporation continues to exist," the court demonstrated that a corporation's dissolution is more a change in its business activities than a change in its "status."[11] It is likely, however, that many plaintiffs' claims against dissolved

6. *Id.* at 1191, 812 P.2d at 160-61, 283 Cal. Rptr. at 141-42. The dissolved corporation's shareholders have a right in finality and repose after they recover their investments. *Id.* Their right is respected in this and similar cases because the distribution of a corporation's assets occurs before dissolution. *Id.* Also, once the shareholders recover their investments, the assets are outside the reach of claims arising after dissolution. CAL. CORP. CODE § 2011(a) (West 1990). *See also* 9 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Corporations* §§ 214, 222 (9th ed. 1989).

7. The supreme court noted two court of appeal cases in its analysis: *North American Asbestos Corp. v. Superior Court*, 180 Cal. App. 3d 902, 225 Cal. Rptr. 887 (1986), and *Allen v. Southland Plumbing, Inc.*, 201 Cal. App. 3d 60, 246 Cal. Rptr. 860 (1988). In *North American Asbestos*, the court held that under California Corporations Code section 2010, the plaintiffs' asbestos-related claims, which arose after the defendant's dissolution, could not be barred by any time limitation other than the applicable statute of limitations. *North American Asbestos Corp.*, 180 Cal. App. 3d at 904, 179 Cal. Rptr. at 877. In *Allen*, a dissolved corporation was subject to suit on a cross-complaint filed after the corporation's dissolution. *Allen*, 201 Cal. App. 3d at 63, 246 Cal. Rptr. at 862. Based on these two cases, the supreme court stated that section 2010 enabled parties to sue dissolved corporations. *Penasquitos*, 53 Cal. 3d at 1188, 812 P.2d at 159, 283 Cal. Rptr. at 140.

8. *See* CAL. CORP. CODE § 2010 (West 1990).

9. Section 2011(a) provides:

> In all cases where a corporation has been dissolved, the shareholders may be sued in the corporate name of such corporation upon any cause of action against the corporation arising prior to dissolution.

CAL. CORP. CODE § 2011(a)(West 1990).

10. Thus, the court construed the legislature's use and subsequent omission of this restrictive language, in sections 2011 and 2010 respectively, as an intention to allow suit against dissolved corporations on both pre- and post-dissolution activities. *Penasquitos*, 53 Cal. 3d at 1188, 812 P.2d at 159, 283 Cal. Rptr. at 140. *See also* People v. Valentine, 28 Cal. 2d 121, 142, 169 P.2d 1, 14 (1946) ("where a statute with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show a different intention existed").

11. *Penasquitos*, 53 Cal. 3d at 1190, 812 P.2d at 160, 283 Cal. Rptr. at 141.

corporations will prove pyrrhic because the corporation's assets will have been distributed to the shareholders upon the corporation's dissolution.[12] Thus, post-dissolution actions will most likely prove successful where there is potential "recovery from the dissolved corporation's liability insurance,[13] from undistributed assets, or from the corporation's assets discovered after dissolution."[14] The extent to which a dissolved corporation remains subject to suit on post-dissolution claims arising from pre-dissolution activites is, presently, well-prescribed and not soon to be revisited.[15]

DEAN THOMAS TRIGGS

V. CRIMINAL LAW

A. *A person's driver's license may not be suspended or revoked for refusing to submit to chemical testing following an arrest for driving under the influence of drugs or alcohol unless the arresting officer observed volitional movement of the vehicle:* Mercer v. Department of Motor Vehicles.

In *Mercer v. Department* of Motor Vehicles,[1] the California Supreme Court resolved a conflict between the courts of appeal[2] re-

12. *See supra* note 6. The court also discounted a possible equitable trust-fund claim against shareholders of a dissolved corporation, observing, "by enacting [section]. . . .2011, subsection (a), the Legislature has occupied the field of creditors' remedies against the shareholders of the dissolved corporations, to the exclusion of the equitable trust fund doctrine." *Id.* at 1193, 812 P.2d at 162, 283 Cal. Rptr. 143.

13. *Id.* at 1192, 283 Cal. Rptr. at 142, 283 P.2d at 161. The argument that corporate dissolution provides a reason to excuse the insurer from defending the action was dismissed, because a corporation's insolvency or bankruptcy does not excuse the insurer from paying subsequent money damages. *Id. See* CAL. INS. CODE § 11580(b)(1) (West 1988).

14. *Penasquitos*, 53 Cal. 3d at 1191, 812 P.2d at 161, 283 Cal. Rptr. at 142.

15. *See generally* 3 HAROLD MARSCH JR., CALIFORNIA CORPORATION LAW § 21.31 (3d ed. 1990).

1. 53 Cal. 3d 753, 809 P.2d 404, 280 Cal. Rptr. 745 (1991). A police officer found Barrie Gray Mercer in the driver's seat of a legally parked car with the engine running and the headlights on. Although Mercer attempted to put the car into gear, the vehicle did not move in the officer's presence. The officer arrested Mercer for driving under the influence of alcohol and informed him that he was obligated to take a chemical test under the implied consent law. Mercer refused to submit to any chemical testing, thereby incurring the statutory penalty of driver's license revocation.

The trial court granted Mercer's petition for a writ of mandate, reversing the revocation order on the ground that Mercer's arrest was unlawful because the officer did not see Mercer's vehicle move and therefore Mercer was not driving while intoxicated. The court of appeal reversed and ordered reinstatement of the revocation order. The California Supreme Court granted review. Mercer v. Department of Motor Vehicles, 798 P.2d 1212, 274 Cal. Rptr. 369 (1990). Chief Justice Lucas wrote the opinion for the court, in which Justices Mosk, Panelli, Kennard, Arabian, and Baxter concurred. Justice Broussard, without writing separately, concurred in the judgment.

2. *Compare* Music v. Department of Motor Vehicles, 221 Cal. App. 3d 840, 270 Cal. Rptr. 692 (1990) (finding observed volitional movement of a vehicle necessary for

garding interpretation of the implied consent statute[3] and associated license revocation statutes[4] by construing the phrase "to drive a vehicle" within sections 23152(a)[5] and 23153[6] of the Vehicle Code as requiring evidence of volitional vehicular movement by the driver.[7] The court emphasized that, pursuant to section 836, subdivision 1, of the Penal Code,[8] lawful arrest for a misdemeanor offense, such as driving under the influence, requires that the arresting officer perceive or witness the commission of the crime.[9] Because the peti-

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valid license suspension or revocation for failure to submit to chemical testing) *and* Padilla v. Meese, 184 Cal. App. 3d 1022, 229 Cal. Rptr. 310 (1986) (holding that arrest pursuant to section 23152(a) of the Vehicle Code for driving under the influence is unlawful unless the vehicle moves in the arresting officer's presence) *with* Mercer v. Department of Motor Vehicles, 222 Cal. App. 3d 823, 271 Cal. Rptr. 885 (1990) (interpreting the term "drive" within the meaning of the implied consent statute as encompassing acts of vehicular manipulation without actual movement), *rev'd*, 53 Cal. 3d 753, 809 P.2d 404, 280 Cal. Rptr. 745 (1991).

3. CAL. VEH. CODE § 23157 (West Supp. 1991). Section 23157(a)(1) provides in relevant part:

> Any person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood, breath, or urine for the purpose of determining the alcoholic [or drug] content of his or her blood . . . if lawfully arrested for any offense allegedly committed in violation of Section 23152 or 23153.

4. California's driver's license suspension and revocation provisions are located in sections 13353 and 23157 of the Vehicle Code. CAL. VEH. CODE §§ 13353, 23157 (West Supp. 1991). Both sections allow the Department of Motor Vehicles to suspend or revoke a driver's license for various periods of time, depending upon prior drunk driving offenses, after refusal to submit to, or failure to complete, chemical testing under the implied consent law, if the officer had "reasonable cause to believe the person was driving a motor vehicle in violation of Section 23152 or 23153." CAL. VEH. CODE § 23157(a)(1). *See also* § 13353. *See generally* 60 C.J.S. *Motor Vehicles* § 164.16 (1969 & Supp. 1990) (discussion of implied consent and license revocation statutes).

5. CAL. VEH. CODE § 23152(a) (West Supp. 1991). Section 23152, subdivision (a), provides: "It is unlawful for any person who is under the influence of an alcoholic beverage [and/]or any drug . . . *to drive a vehicle*." (Emphasis added).

6. CAL. VEH. CODE § 23153 (West Supp. 1991). Section 23153, subdivision (a) states:

> It is unlawful for any person, while under the influence of . . . [intoxicants], *to drive a vehicle* and, when so driving, do any act forbidden by law or neglect any duty imposed by law in the driving of the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

Id. at § 23153(a) (emphasis added).

7. Mercer v. Department of Motor Vehicles, 53 Cal. 3d 753, 768, 809 P.2d 404, 414, 280 Cal. Rptr. 745, 755 (1991).

8. CAL. PENAL CODE § 836(1) (West 1985). *See generally* 5 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Proceedings Before Trial* 1928 (2d ed. 1988 & Supp. 1991) (discussing the "presence" requirement of section 836, subdivision 1). *See also infra* note 9 (additional sources).

9. *Mercer*, 53 Cal. 3d at 761, 809 P.2d at 408, 280 Cal. Rptr. at 749. *See generally* 20 CAL. JUR. 3D *Criminal Law* § 2462 (1985) (discussing section 836, subdivision 1, of the Penal Code); Annotation, *What Amounts to Violation of Drunken Driving Statute*

tioner's car remained stationary in the arresting officer's presence, the court concluded that his arrest for drunk driving under section 23152(a) was unlawful and, consequently, the revocation of his driver's license for noncompliance with the implied consent law was improper.[10]

The court set forth three reasons for its narrow construction of the statutory phrase: (1) the traditional and ordinary understanding of the term "drive" necessarily entails vehicular movement;[11] (2) the use of the word "drive" and like terms in related statutes evidences the legislature's intent to distinguish the act of driving from operating or physically controlling a vehicle;[12] and (3) numerous court decisions in other states have interpreted the term "drive" and similar words in drunk driving statutes as requiring a defendant's volitional movement of the vehicle.[13]

By defining the phrase "to drive a vehicle" as requiring evidence of observed volitional movement of a vehicle, the court restricted the utility of the license revocation provisions as used in conjunction with

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in Officer's "Presence" or "View" so as to Permit Warrantless Arrest, 74 A.L.R. 3D 1138 (1976) (discussing "presence" requirement).

10. *Mercer*, 53 Cal. 3d at 769, 809 P.2d at 414, 280 Cal. Rptr. at 755. The court stated that application of the license suspension or revocation provisions within sections 13353 and 23157 of the Vehicle Code is conditioned upon a lawful arrest for driving while intoxicated. *Id.* at 760, 809 P.2d at 408, 280 Cal. Rptr. at 749 (citing Music v. Department of Motor Vehicles, 221 Cal. App. 3d 841, 847, 270 Cal. Rptr. 692, 696 (1990); Padilla v. Meese, 184 Cal. App. 3d 1022, 1026, 229 Cal. Rptr. 310, 312 (1986); Henslee v. Department of Motor Vehicles, 168 Cal. App. 3d 445, 451, 214 Cal. Rptr. 249, 252 (1985); Mueller v. Department of Motor Vehicles, 163 Cal. App. 3d 681, 684, 210 Cal. Rptr. 14, 15 (1985); Buttimer v. Alexis, 146 Cal. App. 3d 754, 758, 194 Cal. Rptr. 603, 605 (1983); CAL. VEH. CODE § 13353(a) (West Supp. 1991)). *See also* Behan v. Alexis, 116 Cal. App. 3d 403, 172 Cal. Rptr. 132, 133 (1981); Shackelton v. Department of Motor Vehicles, 46 Cal. App. 3d 327, 330-31, 119 Cal. Rptr. 921, 923 (1975).

11. *Mercer*, 53 Cal. 3d at 763, 809 P.2d at 410, 280 Cal. Rptr. at 751. The supreme court observed that because the drunk driving statutes are penal in nature, the phrase "to drive a vehicle" must be given a narrow interpretation. *Id. See generally* 8 CAL. JUR. 3D *Automobiles* § 309 at 298 (1973) (discussion of the term "driving" and its narrow interpretation); 2 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Public Peace and Welfare*, § 918 (2d ed. 1988) (discussing "driving" within drunk driving statutes).

12. *Mercer*, 53 Cal. 3d at 763-64, 809 P.2d at 410, 280 Cal. Rptr. at 751. The court noted several statutes in which the legislature used the disjunctive "or" to differentiate between driving and other acts of vehicular manipulation. *Id.* (citing CAL. VEH. CODE §§ 305, 13353.2, 12501(b)-(c) (West Supp. 1991)).

13. The court relied primarily upon the South Carolina case State v. Graves, 269 S.C. 356, 237 S.E.2d 584 (1977). The *Graves* court reasoned that the word "drive" in South Carolina's drunk driving statutes requires observed vehicular movement for the offense to be committed because the overwhelming majority of states have either retained the single prohibition of "driving," interpreting the term as requiring evidence of vehicular movement, or have broadened their statute to include "operating" or "being in physical control" of a vehicle. *Mercer*, 53 Cal. 3d at 764-68, 809 P.2d at 410-14, 280 Cal. Rptr. at 751-55. *See generally* Annotation, *What Constitutes Driving, Operating or Being in Control of Motor Vehicle for Purposes of Driving While Intoxicated Statute or Ordinance*, 93 A.L.R. 3D 7 (1979 & Supp. 1990).

California's implied consent law. The court's decision indicates its unwillingness to interpret broadly a penal statute even where public policy favoring deterrence militates otherwise.[14] The statutory construction provided by the court may, however, trigger prompt legislative revision of the relevant statutes to allow the mere operation of a vehicle to constitute a violation of drunk driving law.[15]

SUSAN L. SPARKS

B. *In determining liability as an aider and abettor to robbery, a robbery is not confined to a fixed place or time but continues so long as the stolen property is being carried away to a place of temporary safety:* People v. Cooper.

I. INTRODUCTION

In *People v. Cooper*,[1] the California Supreme Court addressed whether a "getaway" driver in a robbery was culpable as a principal rather than accessory, where the driver had not formed the requisite intent to facilitate or encourage commission of the robbery prior to the robber's flight with the stolen property.[2] The court held that the driver may be convicted of aiding and abetting the robbery,[3] and thus

14. *Mercer*, 53 Cal. 3d at 768-69, 809 P.2d at 414, 280 Cal. Rptr. at 755. *See supra* note 11.

15. The court invited the legislature to revise the drunk driving laws and even supplied several options for broadening the offense of driving while intoxicated to include situations in which an officer does not see the arrestee's vehicle move. *See Mercer*, 53 Cal. 3d at 769 & n.24, 809 P.2d at 414 & n.24, 280 Cal. Rptr. at 755 & n.24.

1. 53 Cal. 3d 1158, 811 P.2d 742, 282 Cal. Rptr. 450 (1991). Chief Justice Lucas authored the majority opinion in which Justices Panelli, Arabian and Baxter concurred. Justice Kennard wrote a dissenting opinion in which Justices Mosk and Broussard joined.

2. Defendant Cooper drove his two codefendants to a shopping mall where he waited several minutes while the codefendants stole a wallet from a shopper. The codefendants ran with the stolen property and entered Cooper's car which was moving with its two right doors open. Cooper was charged as a principal in the robbery based on an aiding and abetting theory. Cooper claimed he was an accessory after the fact. Defendant Cooper was found guilty as a principal at the trial level, but this decision was reversed by the Court of Appeal which determined that the trial court had erred in instructing that a robbery was ongoing until the perpetrator had effected an escape.

The California Supreme Court granted review to resolve a conflict in the courts of appeal regarding the duration of the commission of robbery. *Id.* at 1161-62, 811 P.2d at 745-46, 282 Cal. Rptr. at 453-54.

3. *Id.* at 1161, 811 P.2d at 745, 282 Cal. Rptr. at 453. *See* People v. Beeman, 35 Cal. 3d 547, 561, 674 P.2d 1318, 1326, 199 Cal. Rptr. 60, 68 (1984). In *Beeman*, the California Supreme Court determined that a person aids and abets the commission of a crime when that person, "acting with (1) knowledge of the unlawful purpose of the perpetra-

may be considered a principal[4] rather than a mere accessory after the fact.[5] In reaching this conclusion, the court focused on the durational aspect of robbery[6] and concluded that the commission of a robbery is not confined to a fixed place or a limited period of time.[7] Instead, the crime of robbery continues so long as the stolen property is being carried away to a place of "temporary safety."[8] Therefore, a getaway driver may be held liable for aiding and abetting a robbery if he forms the requisite intent either before or during the asportation of the stolen property to a place of temporary safety.[9]

II. TREATMENT OF THE CASE

A. Majority Opinion

1. Duration of the Commission of Robbery

The court prefaced its analysis by stating that the question had earlier been "expressly left open" as to the culpability of a getaway driver who formed the requisite intent to aid and abet *after* the robbers' entry into the getaway car.[10] The court then applied the ele-

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tor; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of a crime." *Id.* For a discussion of this topic, see Westerfield, *The Mens Rea Requirement of Accomplice Liability in American Criminal Law — Knowledge or Intent*, 51 MISS. L.J. 155 (1980). *See also* 17 CAL. JUR. 3D Criminal Law § 105 (1980).

4. California Penal Code section 31 defines principals as:

> "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime. . . ."

CAL. PENAL CODE § 31 (West 1988). *See also* 17 CAL. JUR. 3D *Criminal Law* §§ 104-04 (1985).

5. *Cooper*, 53 Cal, 3d at 1165, 811 P.2d at 748, 282 Cal. Rptr. at 456. California Penal Code section 32 defines an accessory as:

> "Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such a felony, or convicted thereof. . . ."

CAL. PENAL CODE § 32 (West 1988). For an overview of party liability, see generally W. LA FAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW §§ 63-66 (1972). *See also* 17 CAL. JUR. 3D Criminal Law § 110 (1980).

6. *Cooper*, 53 Cal. 3d at 1164, 811 P.2d at 747, 282 Cal. Rptr. at 455. Although the court recognized that a robbery has been "committed" for purposes of "guilt establishment" once the requisite elements have been met, it distinguishes this from the actual "commission" of robbery which is ongoing until all acts have "ceased." *Id.*

7. Id. at 1165, 811 P.2d at 748, 282 Cal. Rptr. at 456. *See infra* note 16 and accompanying text.

8. *Id.*

9. *Id.*

10. *Id.* at 1164, 811 P.2d at 747, 282 Cal. Rptr. at 455 (citing *People v. Croy*, 41 Cal.

ments of aiding and abetting[11] to the commission of robbery and determined that a robbery is ongoing until every individual element has "ceased."[12] Although the crime of robbery has two requisite elements, (1) the actual gaining of possession of the stolen property; and (2) the carrying away of that property,[13] the court enunciated that the focus for determining the duration of the robbery must necessarily be on the asportation element.[14] Relying on a line of undisturbed courts of appeal cases dealing with the durational concepts of robbery,[15] the court concluded that asportation does not end merely upon "slight movement,"[16] but rather continues while the stolen property is being carried away.[17]

2. Definition of "Immediate Presence"

The court determined that the use of "immediate presence" in sec-

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3d 1, 15 n.9, 710 P.2d 392, 400 n.9, 221 Cal. Rptr. 592, 600 n.9 (1985) (raising whether a person may be classified as an aider and abettor where there was no prior knowledge of robbery)).

11. *Id. See supra* note 3.

12. *Cooper*, 53 Cal. 3d at 1164, 811 P.2d at 747, 282 Cal. Rptr. at 455. To distinguish between "committed" and "commission," the majority set forth the following illustration:

> The rape victim, for example, would not agree that the crime was completed once the crime was initially committed (i.e., at the point of initial penetration). Rather, the offense does not end until all of the acts that constitute the rape have ceased. Furthermore, the unknowing defendant who happens on the scene of a rape after the rape has been initially *committed* and aids the perpetrator in the continuing criminal acts is an accomplice under this concept of 'commission,' because he formed his intent to facilitate the commission of the rape *during its commission*.

Id. at 1164 n.7, 811 P.2d at 747 n.7, 282 Cal. Rptr. at 455 n.7.

13. *Id.* at 1165, 811 P.2d at 747, 282 Cal. Rptr. at 455. California Penal Code section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." CAL. PENAL CODE § 211 (West 1988).

14. *Cooper*, 53 Cal. 3d at 1165, 811 P.2d at 747-48, 282 Cal. Rptr. at 455-56. *See generally* B. WITKIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Property* § 641 (2nd ed. 1988).

15. *See, e.g.*, People v. Estes, 147 Cal. App. 3d 23, 194 Cal. Rptr. 909 (1983) (robbery continues until perpetrator reaches "temporary safety"); People v. Kent, 125 Cal. App. 3d 207, 178 Cal. Rptr. 28 (1981) (striking victim following taking); People v. Perhab, 92 Cal. App. 2d 430 (1949) (escape achieved by force or fear).

16. *Cooper*, 53 Cal. 3d at 1165, 811 P.2d at 748, 282 Cal. Rptr. at 456. Although the majority acknowledged that "slight movement" satisfies the asportation element of robbery, it is not definitive as to the duration of the commission of the crime. *Id.* Compare *People v. Beal*, 3 Cal. App. 2d 251, 253, 39 P.2d 504, 506 (holding that a robbery is complete upon the unlawful gaining of possession of personal property). *See also* People v. Scott, 170 Cal. App. 3d 267, 215 Cal. Rptr. 618 (1985); People v. Gordon, 136 Cal. App. 3d 519, 186 Cal. Rptr. 373 (1982).

17. *Cooper*, 53 Cal. 3d at 1165, 811 P.2d at 748, 282 Cal. Rptr. at 456.

tion 211[18] does not imply that a robbery ends once the stolen property is removed from the victim.[19] The court reasoned that section 211 is "spatially rather than temporally, descriptive."[20] Therefore, the court determined that the "immediate presence" language of section 211 is applicable only to the first element of robbery and not to the asportation component.[21]

3. Rejection of the "Escape Rule"

The majority also refused to extend the "escape rule" for the purpose of establishing aider and abettor liability.[22] Although the escape rule originated with the felony-murder doctrine, the court noted that it has also been applied "to several other ancillary consequences of robbery."[23] The court rationalized, however, that the policy of deterrence would not be advanced by imposing aider and abettor liability to a getaway driver where that driver had no previous knowledge of the robbery.[24] Moreover, because escape is not a requisite element of robbery, it should not be considered in a durational analysis for establishing aider and abettor liability.[25] Finally, the court warned against an overly broad application of the escape rule and emphasized several courts of appeal decisions that refused to adopt the escape rule in determining aider and abettor liability.[26]

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18. *Id.* at 1166, 811 P.2d at 749, 282 Cal. Rptr. at 457. *See supra* note 13.

19. *Id.*

20. *Id. See, e.g.*, People v. Hayes, 52 Cal. 3d 577, 802 P.2d 376, 276 Cal. Rptr. 874 (1990) (immediate presence is area over which victim has control); People v. Bauer, 241 Cal. App. 2d 632, 50 Cal. Rptr. 687 (1966) (immediate presence found where robber took keys from victim inside house, then went outside and took car).

21. *Cooper*, 53 Cal. 3d at 1166, 811 P.2d at 748, 282 Cal. Rptr. at 456.

22. *Id.* Although the majority admitted that the commission of a robbery could overlap with escape to a safe place, this will not always be the case. For example, stolen property might be abandoned before the escape is effected or an alternative getaway car could be employed. *Id.*

23. *Cooper*, 53 Cal. 3d at 1166, 811 P.2d at 749, 282 Cal. Rptr. at 457. *See, e.g.*, People v. Laursen, 8 Cal. 3d 192, 200, 501 P.2d 1145, 1152, 104 Cal. Rptr. 425, 431 (1972) (robbery is ongoing during "the robber's escape to a place of temporary safety"); People v. Carroll, 1 Cal. 3d 581, 586, 463 P.2d 400, 405, 83 Cal. Rptr. 176, 181 (1970) (robbery does not end with merely gaining possession of the stolen property).

24. *Cooper*, 53 Cal. 3d at 1167-68, 811 P.2d at 749, 282 Cal. Rptr. at 457 ("A getaway driver, whose intent to aid in the escape is formed after asportation has ceased, cannot facilitate or encourage commission of the robbery.") *Id.* at 1168, 811 P.2d at 750, 282 Cal. Rptr. at 458. The court, however, noted that the situation would be different if the getaway driver had agreed to be the driver prior to the commission of the robbery. *Id.*

25. *Id.* at 1169, 811 P.2d at 750, 242 Cal. Rptr. at 458.

26. *Id.* The court analogized robbery with burglary for purposes of applying the escape rule, asserting that "one who forms the intent to aid a burglar after the acts constituting the burglary have ceased cannot be liable as an aider and abettor to the burglary." *Id.* (citing People v. Macedo, 213 Cal. App. 3d 554, 261 Cal. Rptr. 754 (1989); People v. Brady, 190 Cal. App. 3d 124, 235 Cal. Rptr. 248 (1987)).

B. Dissenting Opinion

In her dissent, Justice Kennard criticized the majority for ignoring the time honored legislative intent of assigning less culpability to one who merely aids the perpetrator after the offense.[27] Justice Kennard stressed that the majority's adoption of the "temporary safety" test had no basis in law.[28] She questioned the majority's analysis, noting that the effect of the "temporary safety" test closely resembled that of the "escape rule" which the majority soundly rejected.[29] Moreover, Justice Kennard asserted that case law has held that "only slight asportation is necessary to make the crime of robbery complete."[30] Finally, Justice Kennard set forth several hypothetical situations to illustrate the inherent "anomalies" that might occur as a result of the majority's holding.[31]

III. CONCLUSION

By determining that the crime of robbery continues so long as the stolen property is being carried away to a place of temporary safety, the California Supreme Court has taken a significant step in enlarging the scope of aider and abettor liability. The majority's premise that the commission of robbery must be viewed as a temporal continuum is logical; however, the practical effect may lead to inconsistent determinations of the accused's culpability.

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27. *Cooper*, 53 Cal. 3d at 1171, 811 P.2d at 752, 242 Cal. Rptr. at 459 (Kennard, J., dissenting). "Merely aiding in the escape of a principal does not result in liability as a principal, but only as an accessory under Penal Code sections 32 and 33." *Id.* at 1172, 811 P.2d at 753, 242 Cal. Rptr. at 461 (Kennard, J., dissenting) (citing People v. Hoover, 12 Cal. 3d 875, 879, 528 P.2d 760, 763, 117 Cal. Rptr. 672, 675 (1974)). *See supra* notes 3-5 and accompanying text.

28. *Cooper*, 53 Cal. 3d at 1173-74, 811 P.2d at 753-54, 242 Cal. Rptr. at 461-62 (Kennard, J., dissenting). *See* People v. Tewksbury, 15 Cal. 3d 953, 957-58, 544 P.2d 1335, 1338, 127 Cal. Rptr. 135, 138 (1976) (a person who aids the escape of a robbery is merely an accessory after the fact, even if the perpetrator had possession of the stolen goods at the time the aid was given).

29. *Cooper*, 53 Cal. 3d at 1173, 811 P.2d at 753, 242 Cal. Rptr. at 461 (Kennard, J., dissenting). Justice Kennard asserted there is no tangible difference between the "escape" rule and the majority's wording of "a place of temporary safety." Consequently, she argued that "[a]n escaping felon who is carrying stolen property is still an escaping felon, and a person who aids an escaping felon is an accessory after the fact." *Id.*

30. *Id.* at 1174, 811 P.2d at 755, 242 Cal. Rptr. at 462 (Kennard, J., dissenting). *See also supra* note 16.

31. *Cooper*, 53 Cal. 3d at 1176-77, 811 P.2d at 756, 242 Cal. Rptr. at 463 (Kennard, J., dissenting).

C. *A patient found not guilty by reason of insanity and committed to a state hospital may not demand a jury trial to determine whether the patient is eligible for supervised outpatient placement in a community mental health program:* **People v. Tilbury.**

I. INTRODUCTION

In *People v. Tilbury*,[1] the California Supreme Court held that a patient found not guilty by reason of insanity is entitled to a jury trial only at the second stage sanity-restoration hearing, not at the first stage outpatient placement hearing. Section 1026.2(e) of the California Penal Code requires that a patient committed to a state hospital after being found not guilty by reason of insanity must be adjudged no longer dangerous in a superior court hearing and must spend a year in an approved community mental health program as a supervised outpatient before the patient may apply for a sanity restoration trial.[2] Although the court affirmed its prior holding in *In re Franklin*[3] that the sanity restoration hearing, where the patient's recovery is pronounced and unconditional release is granted, must be by jury unless waived, the *Tilbury* court held that neither the legislature nor constitutional principles mandate a jury trial at the antecedent outpatient placement hearing.[4]

In April 1984, appellant Michael Tilbury, a former mental hospital patient, engaged in a shooting spree while under delusions that he was being attacked by secret organizations, microwaves, and poisoned water supplies.[5] Tilbury plead guilty to six counts of attempted murder, three counts of assault with a firearm, and three counts of assaulting a police officer with a firearm,[6] but maintained that he was

1. 54 Cal. 3d 56, 813 P.2d 1318, 284 Cal. Rptr. 288 (1991). Justice Panelli authored the majority opinion in which Chief Justice Lucas and Justices Broussard, Arabian and Baxter concurred. Justice Mosk dissented in an opinion in which Justice Kennard joined in part.

2. CAL. PENAL CODE § 1026.2(e) (West 1985 & Supp. 1991). *See also* 41 AM. JUR. 2D *Incompetent Persons* § 39 (1968) (discussing proceedings for commitment and noting that such proceedings are not designed to be adversarial to the extent of criminal proceedings).

3. 7 Cal. 3d 126, 148, 496 P.2d 465, 479, 101 Cal. Rptr. 553, 567 (1972).

4. *Tilbury*, 54 Cal. 3d at 70, 813 P.2d at 1327, 284 Cal. Rptr. at 297. Section 1026.2(e) of the California Penal Code provides, in pertinent part:

> The court shall hold a *hearing* to determine if the person applying for restoration of sanity would no longer be a danger to the health and safety of others, including himself or herself, if under supervision and treatment in the community. If the court at the hearing determines the applicant [meets this standard], the court shall order the applicant placed with an appropriate local mental health program for one year.

CAL. PENAL CODE § 1026.2(e) (West 1985 & Supp. 1991) (emphasis added).

5. *Tilbury*, 54 Cal. 3d at 59, 813 P.2d at 1319, 284 Cal. Rptr. at 289.

6. *Id.* Tilbury attempted to kill several people, including police officers, with a .22-caliber rifle, but fortunately succeeded in injuring only one person. *Id.*

insane at the time of the incidents.[7] The court found him not guilty by reason of insanity and sentenced him to serve a maximum term of 23 years and 8 months at Patton State Hospital.[8] Three times in 1986 and 1987 the director of the hospital recommended that Tilbury was ready for supervised outpatient treatment, but each time the county mental health director refused to endorse the recommendation to the court.[9] Accordingly, outpatient placement was denied in each instance.[10] Finally, Tilbury applied for supervised outpatient placement on his own behalf, and requested a jury trial on the issue.[11] The trial court judge denied Tilbury's request for a jury trial, and based upon Tilbury's testimony that he had recently experienced a delusion similar to one which preceded his 1984 shooting binge, the judge denied Tilbury's application for supervised outpatient treatment.[12]

The court of appeal reversed the decision and remanded the matter for a jury trial.[13] The supreme court reversed, superseding the court of appeal's decision.[14]

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7. Tilbury bore the burden of raising the question of, and proving, his insanity. *See* People v. Baker, 42 Cal. 2d 550, 564, 268 P.2d 705, 714 (1954); People v. Daugherty, 40 Cal. 2d 876, 900-01, 256 P.2d 911, 925 (1953). *See also* 44 C.J.S. *Insane Persons* § 4 (1945) (discussing general rule that the party alleging insanity bears the burden of proving it). *See generally* Michelle M. Gee, Annotation, *Modern Status of Test of Criminal Responsibility—State Cases*, 9 A.L.R. 4TH 526 (1981) (discussing the theory of insanity as an excuse for conduct which would otherwise constitute a crime).

8. *Tilbury*, 54 Cal. 3d at 59, 813 P.2d at 1319, 284 Cal. Rptr. at 289. Based on psychiatric evaluations, the trial court determined Tilbury's insanity at the time of the crimes without submitting the question to a jury since Tilbury waived his right. *Id.* Approximately a month and a half later, the court reviewed further psychiatric reports and determined that Tilbury had not regained sanity. *Id.* The court's 23-year and eight-month maximum term of commitment represented the longest term of imprisonment which could have been imposed for the offenses committed by Tilbury. *See* CAL. PENAL CODE § 1026.5(a)(1) (West 1985 & Supp. 1991). *See In re* Moye, 22 Cal. 3d 457, 584 P.2d 1097, 149 Cal. Rptr. 491 (1978) (recommitment is required if the insane offender is to be kept in confinement past the maximum term for underlying offense). However, if Tilbury recovered his sanity he need not remain confined for the maximum term. Tilbury could be released any time after a mandatory 180-day commitment period, if he demonstrated his fitness for release during one year spent in a supervised community mental health program and then in a sanity restoration trial. CAL. PENAL CODE § 1026(d)&(e) (West 1985 & Supp. 1991).

9. *Tilbury*, 54 Cal. 3d at 59-60, 813 P.2d at 1319, 284 Cal. Rptr. at 289.

10. Section 1602 of the California Penal Code requires that the court disapprove outpatient status in situations where the county mental health director does not advise the court that the patient will benefit from the status. *See* CAL. PENAL CODE §§ 1601(a), 1602(a)(2) (West 1985 & Supp. 1991).

11. *Tilbury*, 54 Cal. 3d at 60, 813 P.2d at 1319, 284 Cal. Rptr. at 289.

12. *Id.* at 60, 813 P.2d at 1319-20, 284 Cal. Rptr. at 289-90.

13. *Id.* at 60, 813 P.2d at 1318, 284 Cal. Rptr. 288.

14. *Id.* at 70, 813 P.2d at 1327, 284 Cal. Rptr. at 297.

II. TREATMENT OF THE CASE

Respondent Tilbury argued that although the legislature did not explicitly provide for jury trials on the issue of outpatient placement, its intent to grant the right should be implicitly inferred.[15] Tilbury noted that in the 1972 case *In re Franklin*[16] the California Supreme Court held, under a previous section 1026 which used the word "hearing," a patient could require jury adjudication of sanity-restoration.[17] Tilbury argued the term "hearing" used by the legislature in the 1984 amendment to section 1026, which created the outpatient phase, should accordingly be interpreted to mean "jury trial."[18] The supreme court rejected Tilbury's reasoning.[19] The court characterized the term "hearing" as "generic" and maintained that it could find no compelling evidence that the legislature intended the term to read as a requirement for a jury trial at the outpatient placement phase.[20] The court argued that had the legislature intended jury trials at the outpatient placement phase "it knew how to say so clearly."[21]

The supreme court next addressed whether constitutional law gave Tilbury the right to a jury trial at the outpatient phase. Examining the equal protection concern that criminal patients receive comparable treatment to civil patients, the court held that equal protection

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15. *Id.* at 61, 813 P.2d at 1321, 284 Cal. Rptr. at 291.

16. 7 Cal. 3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972). The court in *Franklin* held that committed persons had a constitutional right to require jury adjudication of sanity restoration under the then ambiguous wording of section 1026, stating in pertinent part:

> [W]e are convinced . . . that petitioner is constitutionally entitled to a jury trial on the question of his [sanity restoration] release, should he request it. It is noteworthy that section 1026a does not, by its terms, preclude a jury trial, and at least one court has assumed that [the section provides for constitutional rights at the section 1026a hearing.]

Franklin, 7 Cal. 3d at 149, 496 P.2d at 479, 101 Cal. Rptr. at 567 (citing *In re* Jones, 260 Cal. App. 2d 906, 911 n.3, 68 Cal. Rptr. 32, 36 n.3 (1968)).

17. *Tilbury*, 54 Cal. 3d at 61, 813 P.2d at 1321, 284 Cal. Rptr. at 291.

18. *Id.*

19. *Id.* at 62, 813 P.2d at 1321, 284 Cal. Rptr. at 291. The court found Tilbury's reasoning defective because the *Franklin* decision rested solely on a due process analysis, rather than interpretation of the statutory term "hearing." *Id. See Franklin*, 7 Cal. 3d at 148-49, 496 P.2d at 479-80, 101 Cal. Rptr. 567-68.

20. *Tilbury*, 54 Cal. 3d at 62, 813 P.2d at 1321, 284 Cal. Rptr. at 291.

21. *Id.* at 61, 813 P.2d at 1320, 284 Cal. Rptr. at 290. The court also stated that the 1984 legislative amendment of section 1026 attempted to make release requirements "stricter." *Id.* at 62-63, 813 P.2d at 1321, 284 Cal. Rptr. at 291. The court thus viewed its position as consistent with the apparent legislative attitude. *Id. Accord* James W. Ellis, *The Consequences of the Insanity Defense: Proposals to Reform Post-acquittal Commitment Laws*, 35 CATH. U. L. REV. 961, 961-62 (1986); Janet L. Polstein, Note, *Throwing Away The Key: Due Process Rights Of Insanity Acquittees in* Jones v. United States, 34 AM. U. L. REV. 479, 479-80 (1985) (describing widespread attempts to reform and constrict the insanity defense in the wake of the acquittal of John Hinkley Jr. for the attempted assassination of President Reagan).

principles did not require jury trials since both "civil and criminal committees enjoy the right to jury trials at the same stages of the commitment process."[22] Similarly, the court examined Tilbury's rights under due process principles, weighing three factors: (1) whether the private interest in liberty required a jury trial,[23] (2) whether the risk of erroneous decision by a judge required a jury trial, and (3) whether the government's interest in avoiding the burden of a jury trial was significant.[24] The court concluded that a judge would be capable of reliably protecting a patient's interest in liberty while protecting the state's valid interest in avoiding the cost of unnecessary jury trials.[25] In the remote chance that a superior court judge unfairly extended a patient's commitment, the court noted the patient would retain the recourse of direct appeal and writ of habeas corpus.[26] Thus, denying Tilbury jury trial did not offend due process.[27]

In dissent, Justice Mosk agreed with the majority that the use of the term "hearing" in section 1026 is generic in the sense that it does not specify whether a jury or a judge is to adjudicate the proceeding.[28] However, using the same logic as the majority, he argued that had the legislature intended that only a judge should hear petitions for outpatient placement it could have expressly "specified that only a judge would hear the case."[29] Justice Mosk further argued that Til-

22. *Tilbury*, 54 Cal. 3d at 68, 813 P.2d at 1325, 284 Cal. Rptr. at 295. *See also* Jones v. United States, 463 U.S. 354, 363 n.10 (1983) (equal protection was not offended where an insanity acquittee enjoyed the right to jury trials in both the criminal trial and civil commitment hearings).

23. *Tilbury*, 54 Cal. 3d at 69, 813 P.2d at 1326, 284 Cal. Rptr. at 296. On this point the court noted that juries have been found unnecessary in analogous proceedings having the potential to remove liberty. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 488-89 (1972) (discussing the due process requirements in parole revocation hearings); McKeiver v. Pennsylvania, 403 U.S. 528, 541-51 (1971) (juries not required in juvenile proceedings).

24. *Tilbury*, 54 Cal. 3d at 69, 813 P.2d at 1326, 284 Cal. Rptr. at 296.

25. *Id.*

26. *Id.* at 70 n.11, 813 P.2d at 1327 n.11, 284 Cal. Rptr. 297 n.11. The court emphasized that there is no reason to believe that judges will maliciously manipulate the commitment proceedings. *Id.* The court labeled a comparison of California's commitment system to a "gulag," as "vastly overstated" in light of the inherent mechanisms to ensure procedural integrity. *Id.* (citing Barnes v. Superior Court, 186 Cal. App. 3d 969, 977, 231 Cal. Rptr. 158, 163 (1986)) (Poche, J., dissenting).

27. *Id.* at 70, 813 P.2d at 1326-27, 284 Cal. Rptr. at 296-97.

28. *Id.* at 75-76, 813 P.2d at 1330-31, 284 Cal. Rptr. at 300-01 (Mosk, J., dissenting).

29. *Id.* at 76, 813 P.2d at 1331, 54 Cal. Rptr. at 301 (Mosk, J., dissenting). Justice Mosk supported his position by stating that the legislature was aware of the supreme court's decision in *Franklin* that section 1026(a) did not preclude a jury trial. Further, the legislature knew that *Franklin* required a jury trial at the sanity-restoration

bury had a constitutional right to a jury trial, declaring the majority opinion offended equal protection principles because a criminally committed patient may be required to wait decades[30] for jury determination of outpatient placement, while a civilly committed patient may be entitled to a jury trial in a matter of months.[31] He also asserted the majority opinion offended due process principles because it supported jury adjudication at the sanity-restoration stage while, ironically, making the ability to reach the sanity-restoration stage depend upon a judge's decision at the antecedent outpatient stage.[32] Consequently, Justice Mosk contended the decision "arbitrarily" denied Tilbury the right to a jury trial at the most critical point on the road to his freedom.[33]

III. CONCLUSION

This decision indicates that since a criminal committee is given the right to jury trial at the ultimate sanity-restoration hearing, the California Supreme Court is willing to grant the legislature wide license to decide proper collateral procedures for evaluating sanity. Where the legislature has indicated unwillingness to allow a patient to obtain a jury at a placement hearing, the court announced it will re-

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phase. Thus, the legislature's refusal to modify its wording in its 1984 amendment of section 1026 means at least that it had no intention of requiring that a judge "necessarily" decide a patient's sanity at an outpatient placement hearing. *Id.*

30. Justice Mosk poetically described the plight of Tilbury waiting for a chance to a jury trial, saying that "[a] becalmed ship sails not a league closer to land because the winds may someday blow; nor does Tilbury move an inch closer to freedom because a jury may theoretically hear him out someday during his 23-plus-year sentence." *Id.* at 80, 813 P.2d at 1333-34, 284 Cal. Rptr. 303-04 (Mosk, J. dissenting).

31. *See* CAL. WELF. & INST. CODE §§ 5302-5304 (West Supp. 1991). Justice Mosk declared that unless criminally committed patients can be shown less able to attain restoration of sanity than civilly committed patients, it offends equal protection principles to treat them differently. *Tilbury*, 54 Cal. 3d at 78, 813 P.2d at 1332, 284 Cal. Rptr. at 302 (Mosk, J. dissenting). *See also* 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 678 (9th ed. 1988) (criticizing the rationality of treating civilly and criminally committed patients differently when "the issue is whether the person is mentally ill at all").

32. Justice Mosk described as "Kafkaesque" the patient's "[i]nability to reach a jury because a judge declines to advance the case." *Tilbury*, 54 Cal. 3d at 79, 813 P.2d at 1333, 284 Cal. Rptr. at 303 (Mosk, J. dissenting). Similarly, the court of appeal criticized as a "classic Catch-22 situation" the fact a patient must satisfy a judge that he or she is no longer dangerous to qualify for first stage outpatient status; a patient may progress to the second stage sanity-restoration hearing, where a jury trial is allowed, only after completing the first stage. Thus, reaching a jury depends on a judge's decision. People v. Tilbury, 225 Cal. App. 3d 1426, 1431, 263 Cal. Rptr. 173, 175-6 (1989).

33. Justice Mosk further argued that the current system arbitrarily conditions freedom not on the current dangerousness of a patient, but instead on the nature of the criminal act committed. *Tilbury*, 54 Cal. 3d at 78, 813 P.2d at 1333, 284 Cal. Rptr. at 303 (Mosk, J., dissenting). Thus, although Tilbury might regain sanity at the same time as a fellow patient, he could be forced to wait decades for a jury determination, while the fellow patient receives a jury decision immediately. *Id.* at 78-79, 813 P.2d at 1333, 284 Cal. Rptr. at 303 (Mosk, J. dissenting).

frain from requiring one unless it finds "the clearest constitutional necessity."[34] This vow of judicial self-restraint in the area of insanity commitment seems to reflect the court's view that the legislature is better equipped to decide issues of proper treatment of the mentally ill, because such issues involve evaluations of medical opinions, scientific uncertainties, and empirical data.[35] The decision also reveals the court's deference to the legislature's apparent attempts to stiffen the burden of proving sanity and increase the actual length of an acquittee's mandatory commitment.[36]

KURT M. LANGKOW

VI. DEATH PENALTY LAW

This survey provides an analysis of the California Supreme Court's automatic review of cases imposing the death penalty. Rather than a case-by-case approach, this section focuses on the key issues under review by the court and identifies trends and shifts in the court's rationale.

I. INTRODUCTION

Between December 1990 and June 1991, the California Supreme Court decided sixteen death penalty cases.[1] The Lucas court upheld

34. *Id.* at 70, 813 P.2d at 1327, 284 Cal. Rptr. at 297.

35. The court noted that the United States Supreme Court has acknowledged the need for judicial restraint in deciding issues of criminal commitment in areas where the legislature has spoken, saying " 'When [a legislative body] undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.' " *Id.* at 70, 813 P.2d at 1327, 284 Cal. Rptr. at 297 (quoting Jones v. United States, 463 U.S. 354, 370 (1983) (quoting Marshall v. United States, 414 U.S. 417, 427 (1974))).

36. *See supra* note 22 and accompanying text.

1. This survey addresses death penalty opinions rendered between December 20, 1990 through June 27, 1991. The survey includes the following case, listed alphabetically by the defendant's name: People v. Beardslee, 53 Cal. 3d 68, 806 P.2d 1311, 279 Cal. Rptr. 276 (1991), *cert. denied*, 112 S. Ct. 449 (1991); People v. Benson, 52 Cal. 3d 754, 802 P.2d 330, 276 Cal. Rptr. 827 (1990), *cert. denied*, 112 S. Ct. 336 (1991); People v. Cooper, 53 Cal. 3d 771, 809 P.2d 865, 281 Cal. Rptr. 90 (1991), *cert. denied*, 112 S. Ct. 664 (1991); People v. Cox, 53 Cal. 3d 618, 809 P.2d 351, 280 Cal. Rptr. 692 (1991), *cert. denied*, 112 S. Ct. 945 (1992); People v. Daniels, 52 Cal. 3d 815, 802 P.2d 906, 277 Cal. Rptr. 122 (1991), *cert. denied*, 112 S. Ct. 145 (1991); People v. Deere, 53 Cal. 3d 705, 808 P.2d 1181, 280 Cal. Rptr. 424 (1991), *cert. denied*, 112 S. Ct. 954 (1992); People v. Duncan, 53 Cal. 3d 955, 810 P.2d 131, 281 Cal. Rptr. 273 (1991), *cert. denied*, No. 91-6690, 1991 WL 277S92 (U.S. Mar. 2, 1991); People v. Frierson, 53 Cal. 3d 730, 808 P.2d 1197, 280 Cal. Rptr. 440 (1991), *cert. denied*, 112 S. Ct. 994 (1992); People v. Gallego, 52 Cal. 3d 115, 802 P.2d 169, 276 Cal. Rptr. 679 (1990), *cert. denied*, 112 S. Ct. 337 (1991); People v. Has-

each of the sixteen convictions, generally finding either no error or harmless error in the trial court proceedings.[2] The lack of reversal in this six month period is characteristic of the Lucas Court, which has the highest death penalty affirmance rate of any state court in the nation.[3]

The court continues to face the challenges of an ever-increasing backlog of death penalty cases.[4] This forced preoccupation with the death penalty results in an unproductive use of judicial resources.[5] Some observers feel that the overwhelming volume of death penalty cases paralyzes the supreme court, and prevents efficient manage-

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kett, 52 Cal. 3d 323, 801 P.2d 210, 276 Cal. Rptr. 80 (1990), *cert. denied*, 112 S. Ct. 83 (1991); People v. Jennings, 53 Cal. 3d 334, 807 P.2d 1009, 279 Cal. Rptr. 780 (1991), *cert. denied*, 112 S. Ct. 443 (1991); People v. Jones, 53 Cal. 3d 1115, 811 P.2d 757, 282 Cal. Rptr. 465 (1991), *petition for cert. filed*, (Jan. 17, 1992) (No. 91-7037); People v. Mason, 52 Cal. 3d 909, 802 P.2d 950, 277 Cal. Rptr. 166 (1991), *cert. denied*, 112 S. Ct. 225 (1991); People v. Morris, 53 Cal. 3d 152, 807 P.2d 949, 279 Cal. Rptr. 720 (1991), *cert. denied*, 112 S. Ct. 421 (1991); People v. Pensinger, 52 Cal. 3d 1210, 805 P.2d 899, 278 Cal. Rptr. 640 (1991), *cert. denied*, 112 S. Ct. 351 (1991); People v. Wharton, 53 Cal. 3d 522, 809 P.2d 290, 280 Cal. Rptr. 631 (1991), *cert. denied*, 112 S. Ct. 887 (1992). For ease of reference, subsequent histories are hereinafter omitted.

2. Because of the harmless error doctrine, the Lucas court rarely overturns death sentences, focusing "on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." People v. Dyer, 45 Cal. 3d 26, 47, 753 P.2d 1, 11, 246 Cal. Rptr. 209, 220 (1988). The court will reverse a conviction only where the error clearly resulted in prejudice. *See* Howard S. Fallman & Charles Eskridge, *California Supreme Court Survey — Death Penalty Law*, 16 PEPP. L. REV. 451 (1989); John A. Mayers & Susan S. Seemiller *California Supreme Court Survey — Death Penalty Law*, 16 PEPP. L. REV. 1165 (1989); James D. McGinley, *California Supreme Court Survey—Death Penalty Law*, 17 PEPP. L. REV. 537 (1990); Stathy Pamopolous & Robert J. Mills, *California Supreme Court Survey — Death Penalty Law*, 17 PEPP. L. REV. 1095 (1990); Cori L. MacDonneil, *California Supreme Court Survey — Death Penalty Law*, 18 PEPP. L. REV. 716 (1990); Denise R. Harrington, *California Supreme Court Survey — Death Penalty Law*, 18 PEPP. L. REV. 690 (1990) [hereinafter *Death Penalty Law I, II, III, IV, V & VI*, respectively]; *see generally* 9 B. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 324 (1985) (discussing the harmless error approach); 6 B.WITKIN, CALIFORNIA CRIMINAL LAW, *Reversible Error* §§ 3279-80 (1989) (summarizing the history of the harmless error doctrine); TRAYNOR, THE RIDDLE OF HARMLESS ERROR (1970).

3. Gerald F. Uelmen, *The Disappearing Dissenters*, CAL. LAW., June 1991, at 35, 37. This astounding affirmance rate indicates a potential for unfair results for the defendant, where the court gives "short shrift . . . to very substantial claims of error." *Id.* As one observer noted, the Lucas court " 'has clearly reflected what may be a national conservative mood of downplaying the procedural rights of criminal defendants and emphasizing the interests of society in efficiency and certainty and relying heavily upon notions of harmless error to affirm convictions . . . .' " Bill Blum, *Toward a Radical Middle: Has a Great Court Become Mediocre*, A.B.A. J., Jan. 1991, at 48, 50. In addition, the great amount of unanimity definitive of the Lucas court has perhaps created "an anemic institution that rarely reexamines its assumptions." Uelman, *supra*, at 39.

4. From 1987 through 1990, the Lucas court's backlog of death penalty cases has gradually increased from 187 to 193. Uelman, *supra* note 3, at 37. While the court needs to decide approximately 40 cases each year to prevent an increase in its backlog, the court decided only 30 death penalty appeal cases in 1990. *Id. See also Death Penalty V, supra* note 2, at 715 (discussing the court's backlog of death penalty cases).

5. Blum, *supra* note 3, at 51.

ment of its remaining caseload.[6] Nevertheless, the justices have yet to support the constitutional amendment presented by Senator Ken Maddy (R-Morro Bay), which would route death penalty cases through the courts of appeal rather than referring them automatically to the supreme court.[7] The court seems resigned to continue spending much of its time dealing with the growing pool of death penalty cases.[8]

This survey will address the significant defense arguments raised on automatic appeal, focusing on new developments in death penalty law. For ease of reference, this survey is divided into the following categories: Guilt Phase,[9] Special Circumstances,[10] Penalty Phase,[11] Issues Relating to Counsel,[12] and Proportionality Review.[13]

II. GUILT PHASE ISSUES

Exhibiting great deference to the trial court's discretion, the Supreme Court of California resolved all guilt phase issues in favor of the People during this period. The court grounded its position in the "harmless error doctrine"[14] and the "unlikely change in verdict" test.[15] The court also continued to follow the rule announced in

6. The observers include former Justice Otto Kaus and Gerald Uelman, Dean of Santa Clara University School of Law. Blum, *supra* note 3, at 51.

7. Uelmen, *supra* note 3, at 116. Uelmen proposes a similar reform, which would randomly allocate death penalty cases to various courts of appeal, rather than concentrating death penalty review at the supreme court level. Gerald F. Uelmen, *Losing Steam*, CAL. LAW., June 1990, at 44, 116. The supreme court would maintain discretionary review over guilt and special circumstances determinations, and would continue to review the proportionality of the death sentence. *Id.* at 116. *See* Gerald F. Uelmen, *Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts*, 23 LOY. L.A. L. REV. 237, 292-95 (1989) (discussing a reform of the automatic review of death penalty judgments in California); *see also Death Penalty VI*, *supra* note 2, at 718-19 (summarizing the supreme court's proportionality review).

8. Chief Justice Lucas denies that the supreme court is overburdened by the death penalty backlog. *Death Penalty V*, *supra* note 2, at 717 (citing *The Exodus of California's High Court*, NAT'L L.J., May 14, 1990, at 29).

9. *See infra* notes 14 to 65 and accompanying text.

10. *See infra* notes 66 to 71 and accompanying text.

11. *See infra* notes 72 to 99 and accompanying text.

12. *See infra* notes 100 to 122 and accompanying text.

13. *See infra* notes 123 to 127 and accompanying text.

14. Chapman v. California, 386 U.S. 18, 23 (1966) (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)) ("whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction"). *See* TRAYNOR, *supra* note 2. James C. Scoville, Comment, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. CHI. L. REV. 740 (1987). *See also Death Penalty I*, *supra* note 2, at p.452 nn.5-9.

15. People v. Watson, 46 Cal. 2d 818, 836, 299 P.2d 243, 255 (1956) ("whether it is reasonably probable that a result more favorable to defendant would have been

People v. Green,[16] that if the defendant failed to object to any error that the trial judge could have cured by an admonition, the defendant waived all claims of that error on appeal. The Lucas court continues to espouse the position that no trial proceeds error-free. In order to reverse a first degree murder verdict, the court must find substantive violations of a defendant's rights rather than technical misapplication.

A. Pre-trial Issues

In four of the sixteen cases, appellant claimed error for failure to change venue.[17] The court used the *Williams*[18] standard as the framework for determining whether the defendant is entitled to a change in venue.[19] Under the *Williams* standard, when the defendant shows a reasonable likelihood that, in the absence of a change in venue, he cannot receive a fair trial, the trial court must move the trial to another jurisdiction.[20] In each instance, the court found that the appellant's right to a fair trial was sufficiently protected without moving the trial.[21]

In two cases the appellant claimed *Miranda*[22] violations.[23] The court dismissed these allegations with little discussion.[24] The court

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reached in the absence of error"). *See generally* 9 B. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 324 (1985). *See Death Penalty I*, *supra* note 2, at p.452 n.11.

16. 27 Cal. 3d 1, 33, 609 P.2d 468, 488, 164 Cal. Rptr. 1, 20 (1980). *See* B.L GERSHMAN, PROSECUTORIAL MISCONDUCT, § 13.2(b) (1988).

17. People v. Cooper, 53 Cal. 3d 771, 802-07, 809 P.2d 865, 880-84, 281 Cal. Rptr. 90, 105-09 (1991); People v. Jennings, 53 Cal. 3d 334, 359-63, 807 P.2d. 1009, 1024-27, 279 Cal. Rptr. 780, 795-98 (1991); People v. Daniels, 52 Cal. 3d 815, 802 P.2d 906, 919-22, 277 Cal. Rptr. 122, 135-38 (1991); People v. Gallego, 52 Cal. 3d 115, 166-68, 802 P.2d 169, 192-93, 276 Cal. Rptr. 679, 702-03 (1990).

18. People v. Williams, 48 Cal. 3d 1112, 1125, 774 P.2d 146, 153, 259 Cal. Rptr. 473, 480 (1989)(trial court erred in failing to grant change of venue).

19. *Id.* The court reviews five factors in making its determination, 1) the nature and gravity of the offense, 2) the nature and extent of the news coverage, 3) the size of the community, 4) the status of the defendant in the community and 5) the popularity and prominence of the victim.

20. *Williams*, 48 Cal. 3d at 1125, 774 P.2d at 152, 259 Cal. Rptr. at 479.

21. *Cooper*, 53 Cal. 3d at 807, 809 P.2d at 884, 281 Cal. Rptr. at 109; *Jennings*, 53 Cal. 3d at 363, 807 P.2d. at 1027, 279 Cal. Rptr. at 798; *Daniels*, 52 Cal. 3d at 854, 802 P.2d at 922, 277 Cal. Rptr. at 138; *Gallego*, 52 Cal. 3d at 168, 802 P.2d at 202, 276 Cal. Rptr. at 703.

22. Miranda v. Arizona, 384 U.S. 436, 473-75 (1966) (fifth amendment requires an interrogating officer to inform a person in custody prior to interrogation that he has the right to remain silent, that anything said can be used against him in court, that he has the right to consult with a lawyer, and that if he is indigent, he has the right to an appointed lawyer). *See Death Penalty III*, *supra* note 2, at 541-42 nn.32-35, *Death Penalty V*, *supra* note 2, at 717-18 nn.10-18, *Death Penalty VI*, *supra* note 2, at 702-03 nn.89-95. *See generally* 5 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, § 2679 (2d ed. 1989).

23. People v. Morris, 53 Cal. 3d 152, 807 P.2d 949, 279 Cal. Rptr. 720 (1991); People v. Benson, 52 Cal. 3d 754, 802 P.2d 330, 278 Cal. Rptr. 827 (1991).

24. In *Morris*, the court found the appellant's statement in part pre-custodial and,

also dismissed the additional claimed pre-trial errors of failure to order a competency hearing[25] and failure to order the severance of multiple murders.[26]

B. Jury Issues

1. *Witherspoon/Witt* Error

In three of sixteen cases,[27] the appellant claimed *Witherspoon/Witt* error.[28] The court found no error in dismissing a juror for his views on capital punishment that would conflict with the juror's duties.[29] Furthermore, the court summarily dismissed claims of a biased jury as a result of this dismissal.[30]

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thus, not subject to *Miranda*. *Morris*, 53 Cal. 3d at 198, 807 P.2d at 974-75, 279 Cal. Rptr. at 745-46. The rest of the statements were subject to a valid waiver of *Miranda* rights. *Id.* at 200, 807 P.2d at 975-76, 279 Cal. Rptr. at 746-47, or harmless beyond a reasonable doubt. *Id.* at 203, 807 P.2d at 978, 279 Cal. Rptr. at 749.

In *Benson*, the defendant claimed the confession was coerced. *Benson*, 52 Cal. 3d at 770, 802 P.2d at 339, 276 Cal. Rptr. at 836. The court found the confessions voluntary beyond a reasonable doubt. *Id.* at 780, 802 P.2d at 345, 276 Cal. Rptr. at 842.

25. *Gallego*, 52 Cal. 3d at 162, 802 P.2d at 189, 276 Cal. Rptr. at 699. In *Gallego*, the trial court expressed some concern about the defendant's competency to stand trial. Because there was no substantial evidence of the defendant's incompetence, determination was properly left to the trial court's discretion. *See Death Penalty II*, *supra* note 2, at 1199 nn. 230-33. *See also* 21 CAL. JUR. 3D *Criminal Law* § 2888 (1988).

26. People v. Mason, 52 Cal. 3d 909, 933, 802 P.2d 950, 962, 277 Cal. Rptr. 166, 178 (1991). Multiple offenses in the same class meet the statutory requirement for joinder. CAL. PENAL CODE § 954 (West 1985). The defendant can defeat consolidation "only on clear showing of prejudice." Williams v. Superior Court, 36 Cal. 3d 441, 447, 683 P.2d 699, 702, 204 Cal. Rptr. 700, 703 (1984) (jury may have viewed evidence of two separate murder charges cumulatively). In *Mason*, the court dismissed all defendant's contentions out of hand. 52 Cal. 3d at 935, 802 P.2d at 964, 277 Cal. Rptr. at 180.

27. People v. Cooper, 53 Cal. 3d 771, 809-10, 809 P.2d 865, 884-85, 281 Cal. Rptr. 90, 109-10 (1991); People v. Frierson, 53 Cal. 3d 730, 742-43, 808 P.2d 1187, 1203, 280 Cal. Rptr. 440, 446 (1991); People v. Pensinger, 52 Cal. 3d 1210, 1254, 805 P.2d 899, 278 Cal. Rptr. 640, 661 (1991).

28. In Wainright v. Witt, 469 U.S. 412 (1985), the United States Supreme Court refined its earlier decision in Witherspoon v. Illinois, 391 U.S. 510 (1968). Under *Witt*, a prospective juror may be excused for cause if that juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a jury in accordance with his instructions and his oath." 469 U.S. at 424.

29. *Cooper*, 53 Cal. 3d at 809, 809 P.2d at 885, 281 Cal. Rptr. at 110; *Frierson*, 53 Cal. 3d at 743, 808 P.2d 1203, 280 Cal. Rptr. at 446. For an in-depth look at the *Witt/Witherspoon* analysis, see sources at DEATH PENALTY II, *supra* note 2, at 1182 n.104. *See also*, *Death Penalty VI*, *supra* note 2, at 697-98 nn.50-63. *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, §§ 331, 398-405, 412 (1963 & Supp. 1985); 21 CAL. JUR. 3D, *Criminal Law* §§ 2998, 3004, 3009, 3020 (1985 & Supp. 1988); 22 CAL. JUR. 3D, *Criminal Law* § 3345 (1985 & Supp. 1988); 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE, §§ 81.01(1), 87.05(1)(b) (Supp. 1988).

30. *Pensinger*, 53 Cal. 3d at 1254, 805 P.2d at 920, 278 Cal. Rptr. at 661.

2. Denial of Challenge for Cause

In three of sixteen cases,[31] the appellant claimed error for the court's failure to accept a defendant's challenge to a prospective juror for cause.[32] In all three cases, the defendant failed to support any claim of prejudice.[33] The court noted in two cases that the defendant failed to exhaust his available peremptory challenges thus refuting any possible claim of prejudice.[34]

3. Additional Jury Issues

Two of the cases reviewed claimed *Wheeler*[35] error, a denial of the right to a jury composed of a representative cross-section of the community.[36] In both cases, counsel for the defense failed to establish a *prima facie* case for error.[37] The court summarily dismissed a claim of impermissible restrictions on the content of voir dire.[38] Finally, the court dismissed the single claim of error as a result of jury

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31. People v. Cooper, 53 Cal. 3d 771, 808, 809 P.2d 865, 884, 281 Cal. Rptr. 90, 109 (1991); People v. Cox, 53 Cal. 3d 618, 648-89, 809 P.2d 351, 364-65, 280 Cal. Rptr. 692, 705-06 (1991); People v. Morris, 53 Cal. 3d 152, 184-86, 807 P.2d 949, 965-66, 279 Cal. Rptr. 720, 736-37 (1991).

32. In order to claim error on a trial court ruling denying a challenge for cause, a defendant must show: "1) he used a peremptory challenge to remove the juror in question; 2) he exhausted his peremptory challenges or can justify his failure to do so; and 3) he was dissatisfied with the jury as selected." *Morris*, 53 Cal. 3d at 184, 807 P.2d at 965, 279 Cal. Rptr. at 736. *See also* Ross v. Oklahoma, 487 U.S. 81 (1988) (no error when counsel fails to challenge empaneled juror for cause).

33. *Cooper*, 53 Cal. 3d at 808, 809 P.2d at 884, 289 Cal. Rptr. 104; *Cox*, 53 Cal. 3d at 648, 809 P.2d at 365, 280 Cal. Rptr. at 706; *Morris*, 53 Cal. 3d 184, 807 P.2d at 965, 279 Cal. Rptr. 736.

34. *Cooper*, 53 Cal. 3d at 808, 809 P.2d at 884, 281 Cal. Rptr. at 109; *Morris*, 53 Cal. 3d at 184, 807 P.2d at 965, 279 Cal. Rptr. at 736.

35. People v. Wheeler, 22 Cal. 3d 258, 276, 583 P.2d 748, 761, 148 Cal. Rptr. 890, 902 (1978). See *Death Penalty IV*, *supra* note 2, at 1100 nn.42-49 and *Death Penalty VI*, *supra* note 2, at 695-96 nn.37-49 for an expanded discussion of *Wheeler* error.

36. People v. Mason, 52 Cal. 3d 909, 802 P.2d 950, 277 Cal. Rptr. 166 (1991); People v. Gallego, 52 Cal. 3d 115, 802 P.2d 169, 276 Cal. Rptr. 679 (1990). The *prima facie* case for systematic exclusion of a certain subsection of the community is determined using the three-prong *Duren* test:

> 1) that the group alleged to be excluded is a "distinctive" group in the community; 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the members of such persons in the community; and 3) that this under representation is due to the systematic exclusion of the group in the jury selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979). *See generally* Batson v. Kentucky, 476 U.S. 79 (1986) (jury discrimination based on race unconstitutional).

37. *Mason*, 52 Cal. 3d at 936-39, 802 P.2d at 964-66, 277 Cal. Rptr. at 180-82; Gallego, 52 Cal. 3d at 166, 802 P.2d at 192, 276 Cal. Rptr. at 702. In *Gallego*, the court noted that the defendant had failed to raise the issue at trial and was, thus, precluded from raising the issue on appeal. *Id.*

38. *Mason*, 52 Cal. 3d at 939, 802 P.2d at 966, 277 Cal. Rptr. at 182. *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 410-415 (1963 & Supp. 1985); 21 CAL. JUR. 3D *Criminal Law*, §§ 2997-2998 (1985); 22 CAL. JUR 3D *Criminal Law*, pt. 1, § 3345 (1985); 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE § 87.05(1)(b), (c) (Supp. 1988).

misconduct.[39]

C. Evidentiary Issues

In three of the sixteen cases, appellant claimed that the prosecution produced insufficient information to support the verdict of first degree murder.[40] In each instance, the court found sufficient information for a rational jury to find the defendant guilty beyond a reasonable doubt.[41] Other claimed evidentiary error included spoliation of evidence by the State,[42] admission of jailhouse tape recordings,[43] admission of photos of the victim while alive,[44] and admission of evi-

39. A juror's proved misconduct raises a rebuttable presumption of prejudice. The State must rebut the presumption or lose the verdict. *See generally* 6 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, § 3069 (2d ed. 1989); 2 STANDARDS FOR CRIMINAL JUSTICE, § 8-3.7, comments at 8.58 (2d ed. 1980).

In People v. Daniels, the court stated that in the case of serious and wilful juror misconduct, the trial court may exercise its discretion and substitute an alternate juror. 52 Cal. 3d 815, 864, 802 P.2d 906, 928, 277 Cal. Rptr. 122, 144. The court specifically disapproved dicta in People v. Hamilton, 60 Cal. 2d 105, 383 P.2d 412, 32 Cal. Rptr. 4 (1963), which stated that the only remedy for juror misconduct was a mistrial. *Daniels*, 52 Cal. 3d at 866, 802 P.2d at 931, 277 Cal. Rptr. 147. *See also Death Penalty I, supra* note 2, at 454 n.19; *Death Penalty II, supra* note 2, at 1182-84 nn.105-21; *Death Penalty V, supra* note 2, at 726-28 nn.85-107; *Death Penalty VI, supra* note 2, at 699 nn.68-69.

40. People v. Wharton, 53 Cal. 3d 522, 546, 809 P.2d 290, 302-03, 280 Cal. Rptr. 631, 643-44 (1991); People v. Pensinger, 52 Cal. 3d 1210, 1236-37, 805 P.2d 899, 908, 278 Cal. Rptr. 640, 649 (1991); People v. Gallego, 52 Cal. 3d 115, 802 P.2d 169, 207-208, 276 Cal. Rptr. 679, 717-18 (1991).

41. *Id.* The court will "view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence." *Pensinger*, 52 Cal. 3d at 1236-37, 805 P.2d at 908-09, 278 Cal. Rptr. at 649-50 (quoting People v. Mosher, 1 Cal. 3d 379, 395, 461 P.2d 659, 669, 82 Cal. Rptr. 379, 389 (1969)). *See Death Penalty I, supra* note 2, at 455 n.22, *Death Penalty II, supra* note 2, at 1184-86 n.122-36. *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, §§ 683-685 (1963 & Supp. 1985); 21 CAL. JUR. 3D *Criminal Law* §§ 3248-3268 (1985 & Supp 1988).

42. People v. Cooper, 53 Cal. 3d 771, 810-12, 809 P.2d 865, 885-86, 281 Cal. Rptr. 90, 110-11 (1991)(finding no error); People v. Daniels, 52 Cal. 3d 815, 855, 802 P.2d 906, 923, 277 Cal. Rptr. 122, 139-40 (1991)(same). Destruction of material evidence requires that the additional evidence 1) would have served more to exculpate than to inculpate the defendant, and 2) that the investigators had acted in bad faith. *See* California v. Trombetta, 467 U.S. 479, 488-89 (1984) (police acted in good faith in failing to preserve breath samples); and Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (no bad faith in failing to preserve semen samples).

43. People v. Gallego, 52 Cal. 3d 115, 169-70, 802 P.2d 169, 194, 276 Cal. Rptr. 679, 704 (1990) (finding no error). In *Gallego*, the defendant's status as a jailhouse security risk warranted the recordings. *Id.*

44. *Cooper*, 53 Cal. 3d 771, 821, 809 P.2d 865, 893, 281 Cal. Rptr. 90, 118 (finding no error); People v. Cox, 53 Cal. 3d 618, 663-64, 809 P.2d 351, 375, 280 Cal. Rptr. 692, 716 (1991)(finding harmless error; photos not prejudicial).

dence of prior killings.[45] In every instance, the court found no error, harmless error, lack of prejudice, or waiver by virtue of failure to preserve an objection.[46]

D. Instructional Error

In nine of sixteen cases the appellant claimed guilt phase instructional error.[47] The claims covered a broad range of purportedly improper instructions including: failure to instruct on lesser included offenses,[48] the anti-sympathy instruction,[49] the pre-meditation instruction,[50] the malice instruction,[51] the jury notetaking instruction,[52] the flight instruction,[53] the mental condition instruction,[54] the "theory of defense" instruction,[55] and the aiding and abetting instruc-

45. *Gallego*, 52 Cal. 3d 115, 171-72, 802 P.2d 169, 195-96, 276 Cal. Rptr. 679, 705-06 (finding no prejudice; proof of additional crimes necessary to prove intent).

46. *See supra* notes 40-45 and accompanying text.

47. People v. Jones, 53 Cal. 3d 1115, 811 P.2d 157, 282 Cal. Rptr. 465 (1991); People v. Duncan, 53 Cal. 3d 955, 810 P.2d 131, 281 Cal. Rptr. 273 (1991); People v. Cooper, 53 Cal. 3d 771, 809 P.2d 865, 281 Cal. Rptr. 90 (1991); People v. Cox, 53 Cal. 3d 618, 809 P.2d 351, 280 Cal. Rptr. 692 (1991); People v. Wharton, 53 Cal. 3d 522, 809 P.2d 290, 280 Cal. Rptr. 631 (1991); People v. Morris, 53 Cal. 3d 152, 807 P.2d 949, 279 Cal. Rptr. 720 (1991); People v. Beardslee, 53 Cal. 3d 68, 806 P.2d 1311, 279 Cal. Rptr. 276 (1991); People v. Pensinger, 52 Cal. 3d 1210, 805 P.2d 899, 278 Cal. Rptr. 640 (1991); People v. Daniels, 52 Cal. 3d 815, 802 P.2d 906, 277 Cal. Rptr. 122 (1991); People v. Gallego, 52 Cal. 3d 115, 802 P.2d 169, 276 Cal. Rptr. 679 (1990).

48. *Cooper*, 53 Cal. 3d at 825-32, 809 P.2d at 896-901, 281 Cal. Rptr. at 121-26; *Duncan*, 53 Cal. 3d at 968-971, 810 P.2d at 137-39, 281 Cal. Rptr. at 279-81 (failure to ask for instructions on lesser included offenses a tactical choice).

49. *Duncan*, 53 Cal. 3d at 972, 810 P.2d at 139, 281 Cal. Rptr. at 281 ("not reasonably probable that a result more favorable to defendant would have been reached in the absence of error").

50. *Daniels*, 52 Cal. 3d at 869-70, 802 P.2d at 933-34, 277 Cal. Rptr. at 149-50 (jury instructions based on People v. Anderson, 70 Cal. 2d 15, 26-27, 447 P.2d 942, 949, 73 Cal. Rptr. 550, 557 (1968) analysis for premeditation unwarranted).

51. *Duncan*, 53 Cal. 3d at 973-74, 810 P.2d at 140-41, 281 Cal. Rptr. at 282-83 (instructions viewed together were clear); *Wharton*, 53 Cal. 3d at 574-75, 809 P.2d at 322, 280 Cal. Rptr. at 633 (read together instructions were adequate); *Pensinger*, 52 Cal. 3d at 1215-16, 805 P.2d at 914-15, 278 Cal. Rptr. at 655-56 (instruction "as a whole" was proper).

52. People v. Jennings, 53 Cal. 3d 334, 381-82, 807 P.2d 1009, 1039, 279 Cal. Rptr. 780, 810 (1991) (instruction not required absent request); People v. Morris, 53 Cal. 3d 152, 214-15, 807 P.2d 949, 985, 279 Cal. Rptr. 720, 756 (1991) (no prejudice).

53. People v. Jones, 53 Cal. 3d 1115, 1144-45, 811 P.2d 757, 775, 282 Cal. Rptr. 465, 483 (1991) (instruction proper if flight relied on as tending to show guilt); *Pensinger*, 52 Cal. 3d at 1243-45, 805 P.2d at 913-14, 278 Cal. Rptr. at 654-55 (jury could legitimately infer consciousness of guilt by defendant's flight).

54. *Jones*, 53 Cal. 3d at 1145, 811 P.2d at 775, 282 Cal. Rptr. at 483 (instructions proper if mental state and specific intent an element of the crime); *Wharton*, 53 Cal. 3d at 573-74, 809 P.2d at 320-22, 280 Cal. Rptr. at 662-63 (considering instructions as a whole, error was "manifestly harmless").

55. *Wharton*, 53 Cal. 3d at 571, 809 P.2d at 320, 280 Cal. Rptr. at 661 (finding instructional harmless error); People v. Daniels, 52 Cal. 3d 815, 870-71, 802 P.2d 906, 933, 277 Cal. Rptr. 122, 149 (1991) (finding no error; specific factors do not equate to theory of defense).

tion.[56] In each of these instances, the court found harmless error or the reasonable likelihood of a similar verdict in spite of the error.[57]

E. Defendant's Absence from Proceedings

In five of sixteen cases, the appellant claimed error because the trial judge did not include him at side-bar or in-chamber discussions.[58] The court noted that the appellant carried the burden of demonstrating prejudice and that he had failed to do so in each instance he alleged the error.[59]

F. Prosecutorial Misconduct

The appellant alleged prosecutorial misconduct in seven of the sixteen cases reviewed. In four of the cases, the alleged misconduct took place during the body of the trial.[60] In three of the cases the alleged misconduct took place during the prosecution's closing argument.[61] The court found no substance to any of these claims.[62] The

56. People v. Cox, 53 Cal. 3d 618, 668-69, 809 P.2d 351, 378-79, 280 Cal. Rptr. 692, 719-20 (1991) (murder was a natural consequence of contemplated crime); People v. Beardslee, 53 Cal. 3d 68, 91, 806 P.2d 1311, 1322, 279 Cal. Rptr. 276, 287 (1991) ("instructions given covered any valid defense along these lines"); *Daniels*, 52 Cal. 3d at 871-72, 802 P.2d at 935, 277 Cal. Rptr. at 151 (no error as defendant was sole perpetrator); People v. Gallego, 52 Cal. 3d 115, 181-82, 802 P.2d 169, 202, 276 Cal. Rptr. 679, 712 (1990) (defendant's intent established beyond a reasonable doubt). *See Death Penalty II*, *supra* note 2 at 1176-79 nn.74-79.

57. *See supra* notes 53-61 and accompanying text.

58. *Jones*, 53 Cal. 3d at 1140-41, 811 P.2d at 772, 282 Cal. Rptr. at 480-81 (in-chambers discussion of attorney compensation); People v. Duncan, 53 Cal. 3d 955, 974-76, 810 P.2d 131, 141-42, 281 Cal. Rptr. 273, 283-84 (1991) (jury selection streamlining procedures); People v. Morris, 53 Cal. 3d 152, 210, 807 P.2d 949, 982-83, 279 Cal. Rptr. 720, 753-54 (1991) (informal instructions conference preceding formal instructions hearing); *Gallego*, 52 Cal. 3d at 165-66, 802 P.2d at 191, 276 Cal. Rptr. at 701-02 (court's informal discussion with defendant's previous attorney). *See generally* B.WITKIN, CALIFORNIA CRIMINAL PROCEDURE, §§ 388-392 (1963 & Supp.1985); 19 CAL. JUR. 3D *Criminal Law* §§ 2095-2109 (1985 & Supp. 1988).

59. *Jones*, 53 Cal. 3d at 1140-41, 811 P.2d at 772, 282 Cal. Rptr. at 480-81; *Duncan*, 53 Cal. 3d at 975-76, 810 P.2d 141-42, 281 Cal. Rptr. at 283-84 ; *Morris*, 53 Cal. 3d 152, 210, 807 P.2d 949, 982-83, 279 Cal. Rptr. 720, 753-54 ; *Gallego*, 52 Cal. 3d at 165-66, 802 P.2d at 191, 276 Cal. Rptr. at 701-02.

60. *Jones*, 53 Cal. 3d at 1145, 811 P.2d at 774, 282 Cal. Rptr. at 482 (failure to object waives the issue on appeal); People v. Cooper, 53 Cal. 3d 771, 822-23, 809 P.2d 865, 893-95, 281 Cal. Rptr. 90, 118-20 (1991) (prosecutor's cross-examination fell within the very wide scope permissible); People v. Mason, 52 Cal. 3d 909, 945-47, 802 P.2d 950, 970-71, 277 Cal. Rptr. 166, 186-88 (1991) (prosecutor's diligent efforts insured no prejudice arose); *Gallego*, 52 Cal. 3d at 187, 802 P.2d at 206, 276 Cal. Rptr. at 716 (failure to object waives the issue on appeal).

61. *Duncan*, 53 Cal. 3d at 976-77, 810 P.2d at 142-43, 281 Cal. Rptr. 284-85; People v. Wharton, 53 Cal. 3d 522, 566, 809 P.2d 290, 316, 280 Cal. Rptr. 631, 657 (1991) (failure to

court supported its position by finding either no error or waiver on the part of the defense by failing to object during the trial.[63]

The court also dismissed other claims of error including physical restraint during trial,[64] and the assertion of psychotherapist-patient privilege.[65]

III. SPECIAL CIRCUMSTANCES ISSUES

At the guilt stage, the State must prove one or more of the statutorily enumerated special circumstances along with first-degree murder, in order for a defendant to be eligible for the death penalty.[66] Appellants argued trial court error in the special circumstances determinations in seven of the sixteen cases.[67] Appellants enjoyed some success in this line of argument, with the court reversing individual trial court determinations of special circumstances in four of the seven cases.[68] However, none of the special circumstances errors required reversal of the death penalty. In each case the court found one or more additional special circumstances to support the death penalty.[69]

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object waives the issue on appeal). *See Death Penalty II*, *supra* note 2, nn.158-80; *Death Penalty IV*, *supra* note 2, nn.56-59, 69-70; *Death Penalty VI*, *supra* note 2, nn.72-79.

62. *See supra* notes 60-61 and accompanying text.

63. *Id. See Death Penalty II*, *supra* note 2, at 1188-90 nn.158-169; *Death Penalty III*, *supra* note 2, at 1101-03 nn.56-70; *Death Penalty VI*, *supra* note 2, at 699-700 nn.72-79. *See generally* F. LAWLESS, PROSECUTORIAL MISCONDUCT (1985).

64. People v. Cox, 53 Cal. 3d 618, 651, 809 P.2d 351, 366, 280 Cal. Rptr 692, 707 (1991) (harmless error in spite of lack of record showing necessity for shackles). *See Death Penalty V*, *supra* note 2, nn.96-99.

65. *Wharton*, 53 Cal. 3d at 552-53, 809 P.2d at 306-07, 280 Cal. Rptr. at 647-48 (defendant waived the psychotherapist-patient privilege by placing his mental state at issue).

66. CAL. PENAL CODE § 190.2(a) (West 1988 & Supp. 1991). Special circumstances which satisfy the statute include: multiple murder, murder-robbery, murder-arson, murder-burglary, and murder-rape. *Id. See also* 2 B. WITKIN, CALIFORNIA CRIMES § 1026C (Supp. 1985); *Death Penalty IV*, *supra* note 2, at 543-44.

67. *See* People v. Jones, 53 Cal. 3d 1115, 1147, 811 P.2d 757, 777, 282 Cal. Rptr. 465, 485 (1991); People v. Jennings, 53 Cal. 3d 334, 386, 807 P.2d 1009, 1042, 279 Cal. Rptr. 780, 813 (1991); People v. Beardslee, 53 Cal. 3d 68, 95-96, 806 P.2d 1311, 1325, 279 Cal. Rptr. 276, 290 (1991); People v. Pensinger, 52 Cal. 3d 1210, 1254, 805 P.2d 899, 921, 278 Cal. Rptr. 640, 662 (1991); People v. Daniels, 52 Cal. 3d 815, 876, 802 P.2d 906, 938, 277 Cal. Rptr. 122, 154 (1991); People v. Benson, 52 Cal. 3d 754, 784-85, 802 P.2d 330, 348, 276 Cal. Rptr. 827, 845 (1990); People v. Gallego, 52 Cal. 3d 115, 191, 802 P.2d 169, 208, 276 Cal. Rptr. 679, 718 (1990).

68. *See Jones*, 53 Cal. 3d at 1147-49, 811 P.2d at 777-78, 282 Cal. Rptr. at 465-66 (vacating one of two multiple-murder special circumstances findings); *Pensinger*, 52 Cal. 3d at 1255, 805 P.2d at 921, 278 Cal. Rptr. at 662 (reversing torture-murder special circumstance finding); *Benson*, 52 Cal. 3d at 785, 802 P.2d at 348, 276 Cal. Rptr. at 845 (reversing finding of two witness killing special circumstances); *Gallego*, 52 Cal. 3d at 202, 802 P.2d at 215, 276 Cal. Rptr. at 725 (setting aside multiple-murder special circumstance).

69. Only one special circumstance must be upheld on appeal to support affirmation of the death penalty. *See generally* 3 B. WITKIN, CALIFORNIA CRIMINAL LAW, § 1566 (1989).

In *Gallego* and *Jones*, the court clarified that it is always error to charge a defendant with two multiple-murder special circumstances where the defendant has only killed two people.[70] The court reasoned that using two special circumstance allegations in such situations "artificially inflates the seriousness of the defendant's conduct."[71]

IV. PENALTY PHASE ISSUES

A. Factor (k) Error

At the penalty phase, the same jury that determined guilt usually decides whether a defendant will receive a sentence of death or life in prison without the possibility of parole.[72] The court instructs the jury to evaluate[73] certain aggravating and mitigating factors enumerated in Section 190.3 of the California Penal Code.[74] In the penalty

70. *See Jones*, 53 Cal. 3d at 1145, 811 P.2d at 777, 282 Cal. Rptr. at 485 (citing *Gallego*, 52 Cal. 3d at 201, 802 P.2d at 215, 276 Cal. Rptr. at 725; People v. Caro 46 Cal. 3d 1035, 1051, 761 P.2d 680, 689, 251 Cal. Rptr. 757, 767 (1988) ; People v. Allen, 42 Cal. 3d 1222, 1273, 729 P.2d 115, 146, 232 Cal. Rptr. 849, 880 (1986)).

71. The defendant in *Jones* argued that the trial court's error in charging him with two double-murder special circumstances prejudicially affected the outcome of the penalty determination, but the court deemed the error harmless. *Jones* at 1146, 811 P.2d at 779, 282 Cal. Rptr. at 486 (citing *Gallego*, 52 Cal. 3d at 201, 802 P.2d at 215, 276 Cal. Rptr. at 725).

72. In just one of the sixteen cases surveyed did the court empanel a different jury for the penalty phase based on a pretrial stipulated arrangement. *See* People v. Beardslee, 53 Cal. 3d 68, 98, 806 P.2d 1311, 1326-27, 279 Cal. Rptr. 276, 291-92 (1991).

73. The jury's evaluation of aggravating and mitigating factors must not be a mathematical tally. In People v. Brown, 40 Cal. 3d 512, 541, 726 P.2d 516, 531-32, 230 Cal. Rptr. 834, 849-50 (1985), the court held that error will be found where a jury believes it can simply count and add the factors. In *Brown*, CALJIC 8.84.2 (West 4th ed. 1979) provided the jury instruction: "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole." *Id.*

74. CAL. PENAL CODE § 190.3 (West 1988). Section 190.3, which provides the framework for penalty phase jury instructions, provides:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
> (c) The presence or absence of any prior felony conviction.
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

phase, the defense commonly argues that the court improperly instructed the jury in accordance with section 190.3.

In five of the cases surveyed, appellants unsuccessfully asserted error based on claims that the trial judge issued overly narrow factor (k) instructions.[75] Factor (k) of section 190.3, along with the concomitant jury instruction CALJIC number 8.85(k), allows a jury to take into account unenumerated mitigating evidence of character or record which a defendant may assert "as a basis for a sentence less than death."[76] In each case reviewed, if the court found that the trial judge gave improperly narrow factor (k) instructions, it looked to the presence of other properly given instructions and counsel's arguments as a whole to find that the jury was not misled as to its ability to consider and act on defendants mitigating evidence.[77]

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, . . . the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

Id. *See generally* 3 B. WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW, § 1597 (2d ed. 1989).

75. *See* People v. Pensinger, 52 Cal. 3d 1219, 1263, 805 P.2d 899, 927, 278 Cal. Rptr. 640, 668; *Jones*, 53 Cal. 3d at 1146, 811 P.2d at 776, 282 Cal. Rptr. at 484; People v. Cox, 53 Cal. 3d 618, 673-74, 809 P.2d 351, 376, 280 Cal. Rptr. 692, 723 (1991); People v. Mason, 52 Cal. 3d 909, 965, 802 P.2d 909, 933, 277 Cal. Rptr. 166, 200 (1991); *Gallego*, 52 Cal. 3d at 199, 802 P.2d at 213, 276 Cal. Rptr. at 723.

76. CALJIC No. 8.85(k) (5th ed. 1988). This instruction expands the litigating factors of California Penal Code section 193.3(k), including "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* CALJIC No. 8.85(k) was derived from language in People v. Easley, 34 Cal. 3d 858, 878 n.10, 671 P.2d 813, 825 n.10, 196 Cal. Rptr. 309, 321 n.10 (1983) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)), where the California Supreme Court held that to avoid confusion the trial court should instruct a jury that it may consider as mitigating " 'any aspect of [the] defendant's character . . . .' "

77. *See supra* note 75, and cases cited therein.

B. Factor (b) and (c) Error

Similarly, in five cases where defendants alleged factor (b) or factor (c) error, the court found no reversible impropriety.[78] Factor (b) allows the jury to consider prior criminal conduct involving the use or threat of force, and factor (c) allows the jury to consider any prior felony convictions in making the penalty decision.[79] In general, the court quickly dismissed each factor (b) and (c) claim based on a broad concept of the admissibility of prior violent acts or felony convictions, regardless of contrary considerations such as the length of time passed since the criminal act.[80]

C. Victim and Family Impact Evidence

Under the Eighth Amendment's Cruel and Unusual Punishment Clause, the United States Supreme Court in *Booth v. Maryland* and *South Carolina v. Gathers* held that introducing evidence regarding such matters as the victim's personal characteristics, or the impact of the crime on the victim's family, generally violates a defendant's rights.[81] In five cases where the court discussed victim and family

78. People v. Wharton, 53 Cal. 3d 522, 595-96, 802 P.2d 290, 336, 280 Cal. Rptr. 631, 677 (1991) (harmless error to allow doctor's improper opinion as to factor (b) eligibility); People v. Jennings, 53 Cal. 3d 334, 388, 807 P.2d 1009, 1043, 279 Cal. Rptr. 780, 814 (1991) (no error under factor (b) to allow jury to hear evidence of crime for which statute of limitations on prosecution has run); People v. Morris, 53 Cal. 3d 152, 224, 807 P.2d 949, 992, 279 Cal. Rptr. 720, 763 (1991) (no error to reject request by defendant to omit factor (a) instruction); *Pensinger*, 52 Cal. 3d at 1258-60, 805 P.2d at 924-26, 278 Cal. Rptr. at 665-67 (no error to allow crimes of other jurisdictions for factor (b) purposes); People v. Benson, 52 Cal. 3d 754, 787, 802 P.2d 330, 349, 276 Cal. Rptr. 827, 846 (1990) (no error under factors (a) and (b) to allow jury to hear evidence of conduct underlying felony convictions). *See also Death Penalty VI*, *supra* note 2, at 713-14 (discussing in more detail factors (a) and (b)).

79. Section 190.3 provides in relevant part:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: . . . (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. (c) The presence or absence of any prior felony conviction.

CAL. PENAL CODE § 190.3 (West 1988).

80. *See, e.g.*, *Pensinger*, 52 Cal. 3d at 1258-60, 805 P.2d at 924-26, 278 Cal. Rptr. at 665-67. The court in *Pensinger* cursorily dispensed with a potentially complex argument regarding admissibility of an Oregon crime under factor (b) when the Oregon crime would not have qualified as a crime in California. *Id.* at 1260, 805 P.2d at 926, 278 Cal. Rptr. at 667. The court summarily observed "[n]othing in the language of Penal Code section 190.3, factor (b) suggests that violation of a penal statute of another state . . . should be inadmissable as a factor in aggravation." *Id.*

81. Booth v. Maryland, 482 U.S. 496, 502-509 (1987) (victim and family impact information is irrelevant to jury's decision on death penalty); South Carolina v. Gathers,

impact evidence objections, it found either no violation of the *Booth/Gathers* standard, or harmless error in admitting victim and family evidence.[82] In *People v. Mason*,[83] the court held that the prosecutor's comment that the jury members should "put [themselves] behind the eyes and in the mind and in the memories of the [victim's] relatives and friends" offended the *Booth/Gathers* rule. However, in view of the number and nature of defendant's crimes, the court considered the error harmless.[84] In the sixteen cases surveyed here, the evidence consisted primarily of testimony of the victim's relatives or friends, although commonly victim and family impact appeals also address the introduction of photographs of the victim while alive, the victim's corpse, and the crime scene.[85]

D. Prosecutorial Misconduct

The court discussed contentions of prosecutorial misconduct at the penalty phase in eleven of the sixteen cases surveyed.[86] Prosecutorial misconduct arises as one of the most commonly claimed errors in the penalty phase.[87] But as with most other penalty

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490 U.S. 805, 810-11 (1989) (case following *Booth* concluding prosecution's presentation of argument is violative).

82. *See* People v. Duncan, 53 Cal. 3d 955, 298, 810 P.2d 131, 145-46, 281 Cal. Rptr. 273, 287-88 (1991) (no prejudicial error to allow victim's friend to testify after motion for modification of verdict had been made by defendant); *Morris*, 53 Cal. 3d at 221-22, 807 P.2d at 990-91, 279 Cal. Rptr. at 720-21 (statements by prosecutor that one surviving victim lived with "anguish and emotional scars" and that another victim's mother "felt her son did not deserve the death penalty" harmless beyond a reasonable doubt); People v. Beardslee, 53 Cal. 3d 68, 113-14, 806 P.2d 1311, 1337, 279 Cal. Rptr. 276, 302 (1991) ("fleeting" remarks about "unbearable pain" inflicted on friends and relatives of victim harmless beyond a reasonable doubt); People v. Mason, 52 Cal. 3d 909 931-32, 802 P.2d at 963-65, 277 Cal. Rptr. 166, 198-99 (requesting jury to empathize with the victim's friends and family was error, but harmless in light of the overwhelming callousness of defendant's crimes); *Benson*, 52 Cal. 3d at 796-98, 802 P.2d at 356-55, 276 Cal. Rptr. at 853-54 (no error for prosecutor to say "I can't prove . . . [victim's] pain").

83. 52 Cal. 3d 909, 963-64, 802 P.2d 950, 982-83, 277 Cal. Rptr. 166, 198-99 (1991).

84. *Id.* at 964, 802 P.2d at 983, 277 Cal. Rptr. at 199.

85. *See Death Penalty VI*, *supra* note 2, at 715 (citing People v. Gonzales, 51 Cal. 3d 1179, 1236-37, 800 P.2d 1159, 1189-90, 275 Cal. Rptr. 372, 759-60 (1990) (photographs of victim's corpse) and People v. Kelly, 51 Cal. 3d 931, 962-63, 800 P.2d 516, 535-36, 275 Cal. Rptr. 160, 179 (1990) (photographs of crime scene and victim)).

86. *See Duncan*, 53 Cal. 3d at 976-977, 810 P.2d at 142, 281 Cal. Rptr. at 284 (1991); People v. Cooper, 53 Cal. 3d 771, 841, 809 P.2d 865, 906, 281 Cal. Rptr. 90, 133 (1991); People v. Frierson, 53 Cal. 3d 730, 748, 808 P.2d 1197, 1206, 280 Cal. Rptr. 440, 450 (1991); People v. Cox, 53 Cal. 3d 618, 682, 809 P.2d 351, 382, 280 Cal. Rptr. 692, 729 (1991); People v. Wharton, 53 Cal. 3d 523, 595, 809 P.2d 290, 326, 280 Cal. Rptr. 631, 677 (1991); *Beardslee*, 53 Cal. 3d at 113, 806 P.2d at 137, 279 Cal. Rptr. at 302; People v. Pensinger, 52 Cal. 3d 1210, 1269-70, 805 P.2d 899, 931-32, 278 Cal. Rptr. 640, 672-73 (1991); *Mason*, 52 Cal. 3d at 965, 802 P.2d at 943, 277 Cal. Rptr. at 200; People v. Daniels, 52 Cal. 3d 815, 888-89, 802 P.2d 906, 946-47, 277 Cal. Rptr. 122 162-63 (1991); *Benson*, 52 Cal. 3d at 793-94, 802 P.2d at 354, 276 Cal. Rptr. at 851; People v. Haskett, 52 Cal. 3d 210, 244, 801 P.2d 210, 230, 276 Cal. Rptr. 80, 100 (1990).

87. *See Death Penalty II*, *supra* note 2, at 1188 (discussing prosecutorial misconduct arguments made in 21 of the 26 death penalty cases surveyed in the article).

phase contentions, the Lucas court rarely rewards such allegations with reversible error.[88] Generally, the court disposes of claims of prosecutorial misconduct by failing to find the alleged misconduct,[89] finding that the defendant waived objections to prosecutorial misconduct by failing to object at trial,[90] or finding any harmless error.[91] In one instance the prosecutor made several questionable comments including: "[t]his crime is perhaps the most brutal, atrocious, heinous crime certainly that's been committed in San Luis Obispo County . . . and very likely this state."[92] The court remarked that such sweeping statements "should be avoided in the future," but in light of the actual crimes committed, the statement was reasonable.[93]

E. Motion for Modification of the Verdict

In all cases resulting in a death sentence, section 190.4(e) of the Penal Code requires the court to consider, *sua sponte*, a motion to modify the verdict.[94] Section 1385(a) of the Penal Code empowers the court to render a modification.[95] The court must review the application for modification, weigh the mitigating and aggravating circumstances, and render a modification if it holds the jury's finding "contrary to law or the evidence presented."[96] Of the cases surveyed,

88. *See, e.g., id.* (only one of the 21 allegations of prosecutorial misconduct resulted in reversal). None of the eleven allegations of prosecutorial misconduct made in the cases surveyed resulted in reversal.

89. *See, e.g., Pensinger*, 52 Cal. 3d at 1270, 805 P.2d at 932, 278 Cal. Rptr. at 673 (no misconduct error in allowing prosecutor to argue "where's the remorse [by defendant]?" as counter to defense request for pity).

90. *See, e.g., Wharton*, 53 Cal. 3d at 595, 809 P.2d at 336, 280 Cal. Rptr. at 677 (stating "[b]ecause defendant failed to object to the questions he now condemns, he waived the issues for appeal").

91. *See, e.g., Daniels*, 52 Cal. 3d at 889-90, 802 P.2d at 941, 722 Cal. Rptr. at 163 (harmless error that "prosecutor's argument improperly weighted the penalty calculation in favor of a death verdict" when overall weakness of mitigating evidence and defendant's many prior convictions for assault are considered).

92. People v. Benson, 52 Cal. 3d 754, 794, 802 P.2d 330, 354, 276 Cal. Rptr. 827, 851 (1990).

93. *Id.* at 795, 802 P.2d at 355, 276 Cal. Rptr. at 852.

94. CAL. PENAL CODE § 190.4(e) (West 1988). Section 190.4(e) provides in pertinent part that "[i]n every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant *shall be deemed to have made an application for modification of such verdict* . . . ." *Id.* (emphasis added). *See generally* 3 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, § 1618 (2d ed. 1989).

95. CAL. PENAL CODE § 1385(a) (West Supp. 1991). Section 1385(a) provides in pertinent part, "[t]he judge or magistrate may, . . . in furtherance of justice, order an action be dismissed." *Id.*

96. CAL. PENAL CODE § 190.4(e) (West 1988). *See also Death Penalty VI*, *supra* note 2, at 717.

only three appeals claimed improper consideration of the motion for modification.[97] In two cases where the court agreed with the appellant that consideration error existed, the court declined to reverse the trial court's ruling by quickly finding no reasonable probability that the error affected the ruling.[98]

V. ISSUES RELATING TO DEFENSE COUNSEL

A. *Effective Assistance of Counsel*

In eleven cases of sixteen cases, the appellant claimed that ineffective assistance of counsel at various phases of trial warranted reversal.[99] To determine the adequacy of counsel's performance,[100] the court applied the *Strickland*[101] standard, requiring the appellant to demonstrate that counsel's performance fell below an objective standard of reasonableness,[102] and that counsel's actions resulted in prej-

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97. *See* People v. Cooper, 53 Cal. 3d 771, 844-45, 809 P.2d 865, 909-10, 281 Cal. Rptr. 90, 136-37 (1991); People v. Frierson, 53 Cal. 3d 739, 751-52, 808 P.2d 1197, 1209-10, 280 Cal. Rptr. 440, 452-53 (1991); *Benson*, 52 Cal. 3d at 811-13, 802 P.2d 366-67, 276 Cal. Rptr. 863-64.

98. *See Benson*, 52 Cal. 3d at 813, 802 P.2d 367, 276 Cal. Rptr. 864 (improbable that court took into account improperly introduced evidence in its decision on verdict modification; assuming it did, it "was not a reasonable probability that the error affected the ruling"); *Frierson*, 53 Cal. 3d at 752, 808 P.2d at 1210, 280 Cal. Rtpr. at 453 (same).

99. People v. Jones, 53 Cal. 3d 1115, 1130-41, 1149-52, 811 P.2d 757, 765-72, 778-80, 282 Cal. Rptr. 465, 472-79, 486-88 (1991); People v. Duncan, 53 Cal. 3d 955, 966-68, 810 P.2d 131, 135-37, 281 Cal. Rptr. 273, 277-279 (1991); *Cooper*, 53 Cal. 3d 771, 824, 809 P.2d 865, 895-96, 281 Cal. Rptr. 90, 120-21 (1991); *Frierson*, 53 Cal. 3d 730, 746-49, 808 P.2d 1197, 1206-08, 280 Cal. Rptr. 440, 449-51 (1991); People v. Deere, 53 Cal. 3d 705, 713-17, 808 P.2d 1181, 1185-89, 280 Cal. Rptr. 424, 428-32 (1991); People v. Cox, 53 Cal. 3d 618, 653-63, 808 P.2d 351, 368-374, 280 Cal. Rptr. 692, 709-15 (1991); People v. Jennings, 53 Cal. 3d 334, 375-81, 391, 807 P.2d 1009, 1034-39, 1045-46, 279 Cal. Rptr. 780, 805-10, 816-17 (1991); People v. Pensinger, 52 Cal. 3d 1210, 1251-53, 1271, 1275-81, 805 P.2d 899, 919-20, 932, 935-39, 278 Cal. Rptr. 640, 660-61, 673, 676-80 (1991); People v. Daniels, 52 Cal. 3d 815, 841-45, 874, 802 P.2d 906, 914-16, 936, 277 Cal. Rptr. 122, 130-32, 152 (1991); People v. Haskett, 52 Cal. 3d 210, 248-51, 801 P.2d 210, 232-34, 276 Cal. Rptr. 80, 102-04 (1990); People v. Gallego, 52 Cal. 3d 115, 205-07, 802 P.2d 169, 218-19, 276 Cal. Rptr. 679, 728-29 (1990).

100. The Sixth Amendment of the United States Constitution creates the right to effective assistance of counsel for the accused during trial. U.S. CONST. amend. VI. *See* Gideon v. Wainright, 372 U.S. 335 (1963) (states must afford the defendant the right to effective assistance of counsel); *see generally* 19 CAL. JUR. 3D *Criminal Law* § 2167 (1985 & Supp. 1991) (explaining the right to effective assistance of counsel).

101. Strickland v. Washington, 466 U.S. 668 (1984). In *Strickland*, the United States Supreme Court created the standard for determining whether counsel's performance was inadequate, resulting in a violation of defendant's constitutional right to counsel. *Id.* at 687-88. For an ineffective assistance of counsel claim to prevail, Strickland requires that the lawyer's performance fell below a reasonable professional standard, and that this inadequate performance prejudiced the defendant. *Id.* For a thorough discussion of the California Supreme Court's evaluation of effective assistance of counsel claims, see *Death Penalty II*, *supra* note 2, at 1191-96.

102. *Cox*, 53 Cal. 3d at 656, 808 P.2d at 369-70, 280 Cal. Rptr. at 710-11 (citing People v. Pope, 23 Cal. 3d 412, 425, 590 P.2d 859, 866, 152 Cal. Rptr. 732, 739 (1979)). *See* 2 A.L.R. 4TH 1.

udice.[103] Applying this standard, the court found that the appellant failed to meet this burden in every case.[104] In general, the court demonstrated great deference to trial counsel's decisions, attempting "to avoid second-guessing his or her tactical choices and to avoid discouraging vigorous advocacy."[105]

B. Conflict of Interest

The constitutional right to effective assistance of counsel includes the right to conflict-free counsel.[106] In two cases, the appellant sought reversal based on ineffective assistance of counsel resulting

103. *Cox*, 53 Cal. 3d at 656, 808 P.2d at 370, 280 Cal. Rptr. at 711 (citing People v. Ledesma, 43 Cal. 3d 171, 216-17, 729 P.2d 839, 867-68, 233 Cal. Rptr. 404, 432-33 (1987) (citing *Strickland*, 466 U.S. at 687-88)). To demonstrate that counsel's actions resulted in prejudice, defendant must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Strickland*, 466 U.S. at 694.

104. People v. Jones, 53 Cal. 3d 1115, 1134-36, 1149-52, 811 P.2d 757, 768-69, 778-80, 282 Cal. Rptr. 465, 476-77, 486-88 (1991); People v. Duncan, 53 Cal. 3d 955, 968, 810 P.2d 131, 136-37, 281 Cal. Rptr. 273, 278-79 (1991); People v. Cooper, 53 Cal. 3d 771, 824-25, 809 P.2d 865, 895-96, 281 Cal. Rptr. 90, 120-21 (1991); People v. Frierson, 53 Cal. 3d 730, 747, 749, 808 P.2d 1197, 1206, 1207, 280 Cal. Rptr. 440, 449, 450 (1991); People v. Deere, 53 Cal. 3d 705, 717, 808 P.2d 1181, 1189, 280 Cal. Rptr. 424, 432 (1991); *Cox*, 53 Cal. 3d 618, 662, 808 P.2d 351, 374, 280 Cal. Rptr. 692, 715 (1991); People v. Jennings, 53 Cal. 3d 334, 375-81, 391, 807 P.2d 1009, 1034-39,1046, 279 Cal. Rptr. 780, 805-10, 817 (1991); People v. Pensinger, 52 Cal. 3d 1210, 1251-53, 1271, 1275, 805 P.2d 899, 919-20, 932, 935-36, 278 Cal. Rptr. 640, 660-61, 673, 676-77 (1991); People v. Daniels, 52 Cal. 3d 815, 874, 802 P.2d 906, 936, 277 Cal. Rptr. 122, 152 (1991); People v. Haskett, 52 Cal. 3d 210, 249-51, 801 P.2d 210, 231-34, 276 Cal. Rptr. 80, 103-04 (1990); People v. Gallego, 52 Cal. 3d 115, 205-07, 802 P.2d 169, 218-19, 276 Cal. Rptr. 679, 728-29 (1990).

105. *Pensinger*, 52 Cal. 3d at 1275, 805 P.2d at 936, 278 Cal. Rptr. at 677 (1991). *See also Jones*, 53 Cal. 3d at 1149-51, 811 P.2d at 778-79, 282 Cal. Rptr. at 486-87 (noting that reasonable trial tactics support counsel's alleged inadequacy); *Duncan*, 53 Cal. 3d at 966, 810 P.2d at 135, 281 Cal. Rptr. at 277 (noting that court must give great deference to trial counsel's actions); *Frierson*, 53 Cal. 3d at 749, 808 P.2d at 1207-08, 280 Cal. Rptr. at 451-52 (stressing that trial counsel can best determine the appropriate tactics because of the jury's presence); *Cox*, 53 Cal. 3d at 656, 808 P.2d at 370, 280 Cal. Rptr. at 711 (stating that tactical errors alone are not grounds for reversal); *cf.* Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 343 (1983) (demonstrating that one can provide effective assistance of counsel in many different ways); *see generally* 19 CAL. JUR. 3D *Criminal Law* § 2171 (1985 & Supp. 1991) (summarizing the treatment of tactical decisions with respect to effective assistance of counsel).

106. *Jones*, 53 Cal. 3d at 1134, 811 P.2d at 767, 282 Cal. Rptr. at 475 (citing Wood v. Georgia, 450 U.S. 261, 271 (1981); People v. Bonin, 47 Cal. 3d 808, 834, 765 P.2d 460, 474, 254 Cal. Rptr. 298, 312 (1989)). *See Death Penalty II*, *supra* note 2, at 1192 (summarizing the right to counsel free from conflict of interest); *see generally* 19 CAL. JUR. 3D *Criminal Law* § 2179 (1985 & Supp. 1991) (explaining conflict of interest between the defendant and his counsel).

from conflict of interest.[107] The court required a showing that a potential or actual conflict of interest existed which negatively affected counsel's performance.[108] In addressing the conflict of interest claims, the court found that neither case warranted reversal because the records did not indicate a conflict of interest between defendant and counsel.[109]

C. Faretta *Issues*

The criminal defendant has a constitutional right to self-representation,[110] and must explicitly waive his right to counsel before the court grants a motion for self-representation.[111] The strict waiver standard, known as the *Faretta* standard, ensures that the defendant " 'knows what he is doing and his choice is made with eyes open.' "[112] In one case, the court rejected the appellant's claim that denial of his motion for self-representation was error, deferring to the trial court's broad discretion to refuse an untimely *Faretta* motion.[113] In two cases, the appellant unsuccessfully argued that inadequate waiver of

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107. *Jones*, 53 Cal. 3d at 1133-39, 811 P.2d at 767-71, 282 Cal. Rptr. at 475-79. *See Cox*, 53 Cal. 3d at 653-55, 808 P.2d at 368-69, 280 Cal. Rptr. at 709-10.

108. *Cox*, 53 Cal. 3d at 653-54, 808 P.2d at 368, 280 Cal. Rptr. at 709 (citing Cuyler v. Sullivan, 446 U.S. 335, 348 (1980); People v. Mroczko, 35 Cal. 3d 86, 105, 672 P.2d 835, 846, 197 Cal. Rptr. 52, 63 (1983)). Typically, conflicts of interest arise where "an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests." *Jones*, 53 Cal. 3d at 1134, 811 P.2d at 768, 282 Cal. Rptr. at 476 (citing *Bonin*, 47 Cal. 3d at 835, 765 P.2d at 475, 254 Cal. Rptr. at 313).

109. *See Cox*, 53 Cal. 3d at 654, 808 P.2d at 368-69, 280 Cal. Rptr. at 709-10; *Jones*, 53 Cal. 3d at 1134-36, 811 P.2d at 768-69, 282 Cal. Rptr. at 476-77.

110. Faretta v. California, 422 U.S. 806 (1989). *See Jones*, 53 Cal. 3d at 1141, 811 P.2d at 765, 282 Cal. Rptr. at 473 (discussing defendant's right to self-representation).

111. *Faretta*, 422 U.S. at 835. For a waiver to be effective, the accused must knowingly and intelligently renounce the benefits of right to competent counsel. *Id.* There is a burden on the trial judge to make the defendant "aware of the dangers and disadvantages of self-representation" and then to inquire into the defendant's awareness of the disadvantages of waiving right to counsel. *Id. See generally* 5 B. WITKIN, CALIFORNIA CRIMINAL LAW, *Trial* §§ 2816-19 (2d ed. 1989 & Supp. 1991) (summarizing the constitutional right to self-representation established in *Faretta*).

112. *Faretta*, 422 U.S. at 835 (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 270, 279 (1942)).

113. People v. Frierson, 53 Cal. 3d 730, 742, 808 P.2d 1197, 1202-03, 280 Cal. Rptr. 440, 445-46 (1991). The court reemphasized that the defendant's right to self-representation, in order to be unconditional, must be invoked "within a reasonable time prior to the commencement of trial." *Id. See generally* People v. Burton, 48 Cal. 3d 843, 771 P.2d 1270, 258 Cal. Rptr. 184 (1989).

Additionally, a request for self-representation need not be treated automatically as a motion for substitution of counsel. People v. Gallego, 52 Cal. 3d 115, 802 P.2d 169, 276 Cal. Rptr. 679 (1990). *See* People v. Marsden, 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970) (a defendant who wishes to replace appointed counsel on the grounds of inadequate representation must be given adequate opportunity to present evidence in support of the claim). Finally, a complaint about counsel's performance without a request for replacement counsel is insufficient to trigger a *Marsden* hearing. *Frierson*, 53 Cal. 3d at 741, 808 P.2d at 1202, 280 Cal. Rptr. at 445.

right to counsel warranted reversal.[114]

Most notably, the court held that the trial court need not procure a *Faretta* waiver prior to granting the defendant co-counsel status.[115] The court reasoned that where the defendant has limited co-counsel status, he has not waived his right to counsel because his "attorney retains control over the case and can prevent the defendant from taking actions that may seriously harm the defense."[116] Therefore, because the defendant is still represented by counsel, the trial court is not required to give *Faretta* warnings.[117]

D. Change from Self-representation to Counsel Representation

In *Gallego*, the court formulated the inquiry required when a self-represented defendant requests appointed counsel at mid-trial.[118] The court adopted a multi-factored approach,[119] and added that " 'in the final analysis it is the totality of the facts and circumstances which the trial court must consider in exercising its discretion as to whether or not to permit a defendant to again change his mind regarding representation mid-trial.' "[120] After applying this new stan-

114. People v. Jones, 53 Cal. 3d at 1143, 811 P.2d at 774, 282 Cal. Rptr. at 482; People v. Gallego, 52 Cal. 3d 115, 161, 802 P.2d 169, 188-89, 276 Cal. Rptr. 679, 698-99 (1990).

115. *Jones*, 53 Cal. 3d at 1142, 811 P.2d at 773, 282 Cal. Rptr. at 481. The California Supreme Court had never before determined whether a defendant must be given *Faretta* warnings prior to assuming a limited co-counsel status. *Id.* at 1141, 811 P.2d at 773, 282 Cal. Rptr. at 481.

116. *Id.* at 1142, 811 P.2d at 773, 282 Cal. Rptr. at 481.

117. *Id.*

118. *Gallego*, 52 Cal. 3d at 163-65, 802 P.2d at 190-91, 276 Cal. Rptr. 700-01.

119. *Id.* at 163-64, 802 P.2d at 190, 276 Cal. Rptr. at 700. The court first adopted this multi-factored approach in People v. Windham, where the court addressed the opposite issue of a change from counsel-representation to self-representation mid-trial. *Id.* at 163, 802 P.2d at 190, 276 Cal. Rptr. at 700 (citing People v. Windham, 19 Cal. 3d 121, 128, 560 P.2d 1187, 1191-92, 137 Cal. Rptr. 8, 12-13 (1977)). A court of appeal decision addressed the issue in the instant case, and enumerated relevant factors to be considered in a request to change from self-representation to counsel-representation mid-trial. *Id.* at 163-64, 802 P.2d at 190, 276 Cal. Rptr. at 700 (citing People v. Elliott, 70 Cal. App. 3d 984, 993-94, 139 Cal. Rptr. 205, 211 (1977)). The factors include:

> (1) defendant's prior history in the substitution of counsel and the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney . . . .

Id. at 164, 802 P.2d at 190, 276 Cal. Rptr. at 700 (quoting *Elliott*, 70 Cal. App. 3d at 993-94, 139 Cal. Rptr. at 211).

120. *Id.* at 164, 802 P.2d at 190, 276 Cal. Rptr. at 700 (quoting People v. Smith, 109 Cal. App. 3d 476, 484, 167 Cal. Rptr. 303, 306 (1980)).

dard, the court held that the trial court did not abuse its discretion in denying the defendant's request.[121]

VI. PROPORTIONALITY REVIEW

The United States Supreme Court definitively established that the Eighth Amendment does not require intercase proportionality review, or comparison of the death penalty imposed in a particular case to penalties imposed in similar cases.[122] However, three defendants raised the issue on appeal.[123] The court quickly disposed of all three claims, stating that the federal Constitution does not mandate intercase proportionality review.[124]

Additionally, the court addressed the claim of intracase proportionality review; the disproportionality of the death penalty to the defendant's individual culpability.[125] The court summarily rejected all three claims because in each case, the record substantiated a sentence of death.[126]

VII. CONCLUSION

During the period covered in this survey, the California Supreme Court affirmed all sixteen death sentences. This evidences the Lucas court's continued reluctance to overturn a conviction absent actual prejudicial error. Yet, this high affirmance rate, in conjunction with the large volume of death penalty decisions, exposes potential problems associated with automatic death penalty appeals.

Death penalty cases have placed an unmanageable burden on the

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121. *Id.* at 165, 802 P.2d at 191, 276 Cal. Rptr. at 701.

122. Pulley v. Harris, 465 U.S. 37, 50-54 (1984). The Court explained that intercase proportionality review may ensure against an arbitrary death sentence, yet is not constitutionally mandated. *Id.* at 50. *See Death Penalty V*, *supra* note 2, at 741-42 (explaining proportionality review); *Death Penalty VI*, *supra* note 2, at 718-19 (same).

123. People v. Jones, 53 Cal. 3d 1115, 1155, 811 P.2d 757, 782, 282 Cal. Rptr. 465, 490 (1991); People v. Cox, 53 Cal. 3d 618, 690, 808 P.2d 351, 394, 280 Cal. Rptr. 692, 735 (1991); People v. Gallego, 52 Cal. 3d 115, 203, 802 P.2d 169, 216, 276 Cal. Rptr. 679, 726 (1990).

124. *Id.*

125. The supreme court defined intracase proportionality review in People v. Dillon, where the death sentence imposed was disproportionate to the defendant's individual culpability because he was "an immature 17-year-old . . . who shot and killed his victim out of fear and panic." *Cox*, 53 Cal. 3d at 691, 808 P.2d at 395, 280 Cal. Rptr. at 736 (citing People v. Dillon, 34 Cal. 3d 441, 482-90, 668 P.2d 697, 722-27, 194 Cal. Rptr. 390, 415-20 (1983)). The court has acknowledged that the death penalty may violate the state constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." *In re* Lynch, 8 Cal. 3d 410, 424, 503 P.2d 921, 930, 105 Cal. Rptr. 217, 226 (1972) (required felony holding on second conviction for indecent exposure is cruel and unusual punishment).

126. *Cox*, 53 Cal. 3d at 690, 808 P.2d at 394, 280 Cal. Rptr. at 735; *Jones*, 53 Cal. 3d at 1155, 811 P.2d at 782, 282 Cal. Rptr. at 490; *Gallego*, 52 Cal. 3d at 203, 802 P.2d at 216-17, 276 Cal. Rptr. at 726-27.

supreme court. The court has foresworn all notions of judicial efficiency in order to afford the death penalty cases appropriate due process. Presumably, the appellant's constitutional rights require a meticulous review of the record. However, the court must efficiently dispose of death penalty cases in an attempt to reduce an extensive backlog and manage its remaining caseload. This demanding schedule may force the court to compromise the appellant's due process rights, as well as leaving important questions in other areas of law unanswered.[127]

Nevertheless, the supreme court refuses to seriously consider allowing the courts of appeal to review capital cases.[128] As one observer noted, "[p]erhaps the greatest failing of the Lucas Court to date is its unwillingness to acknowledge that a serious problem exists and to put court reform at the top of its agenda."[129] Until there is a reformation of the death penalty system, one can expect a continued backlog of death penalty appeals, to the detriment of the court's treatment of non-capital issues.[130] Thus, it is urgent that the state remedy the situation immediately, because " 'the state undertakes no more awesome a responsibility than when it deliberately sets about to excise the life of one of its citizens. Every protection must be accorded innocent and guilty alike, regardless of delay, lest a mistake be made for which there can be no remedy.' "[131]

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127. *See* Uelmen, *supra* note 3, at 38. Uelman notes that the overwhelming pace of death penalty cases facing the court raises concern. "Does the rate [of death penalty cases] evoke confidence in the fairness of the results? And does it allow the court sufficient time to address the other pressing issues of civil and criminal law that demand resolution? Many observers of the court, including former justices, are ready to answer no to both questions." *Id.*

128. *See supra* note 7 and accompanying text (discussing rerouting death penalty cases through the courts of appeal to relieve the overwhelming caseload of the supreme court).

129. Uelmen, *supra* note 7, at 116.

130. Uelmen argues that "death penalty cases usurp the docket of the supreme court, reducing the justices to performing like a badly overworked intermediate appellate court, unable to give other issues the attention they deserve." Gerald F. Uelmen, *Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts*, 23 LOY. L.A. L. REV. 237, 295 (1989).

131. *Id.* at 239-40 (quoting BARRETT PRETTYMAN, DEATH AND THE SUPREME COURT 251 (1961)).

VII. FAMILY LAW

In a child support enforcement action brought by the district attorney on behalf of the custodial parent, a trial court may allocate the federal tax dependency exemption to the noncustodial parent. This procedure does not violate the custodial parent's due process rights, even though that parent is not a party to the proceeding: **Monterey County v. Cornejo.**

I. INTRODUCTION

In *Monterey County v. Cornejo*,[1] the California Supreme Court addressed whether a trial court may give the tax dependency exemption to a noncustodial parent in a child support modification proceeding initiated by the district attorney on behalf of the custodial parent.[2] The majority based its analysis on two findings. First, the court found that the amended section 152(3) of the Internal Revenue Code[3] confers jurisdiction on a state court to allocate the dependency exemption to the noncustodial parent by ordering the custodial parent to waive the exemption.[4] Second, the court held that the trial court's allocation of the exemption did not violate the custodial parent's due process rights, even where the custodial parent was not a party to the action.[5] The court concluded that the trial court's allocation of the dependency exemption to the noncustodial parent was proper in a child support enforcement action brought by the district attorney.[6]

A. Background

Congress amended the Federal Tax Dependency exemption, section 152(e) of the Internal Revenue Code,[7] to its present form in 1984. The pre-1985 version of section 152(e)[8] allocated the dependency exemption to the noncustodial parent where that parent paid child support exceeding the threshold amount, if the custodial parent did not provide more child support than the non-custodial parent in that year.[9] Although it did not preclude courts from allocating the

1. 53 Cal. 3d 1271, 812 P.2d 586, 283 Cal. Rptr. 405 (1991). Justice Arabian authored the majority opinion, in which Justices Lucas, Broussard, Panelli, and Baxter concurred. Justice Mosk filed a dissenting opinion in which Justice Kennard joined.
2. *Id.* at 1273, 812 P.2d at 587, 283 Cal. Rptr. at 406.
3. I.R.C. § 152 (West 1986 & Supp. 1991) (amending I.R.C. § 152 (1982)).
4. *Cornejo*, 53 Cal. 3d at 1280, 812 P.2d at 592, 283 Cal. Rptr. at 411.
5. *Id.* at 1285, 812 P.2d at 595, 283 Cal. Rptr. at 414.
6. *Id.* at 1273, 812 P.2d at 587, 283 Cal. Rptr. at 406.
7. I.R.C. § 152(e) (West 1986).
8. I.R.C. § 152(e) (West 1982), *amended by* I.R.C. § 152(e) (West 1986).
9. *Cornejo*, 53 Cal. 3d at 1275, 812 P.2d at 588, 283 Cal. Rptr. at 407 (citing I.R.C. § 152(e)(2)(B) (West 1982)). Prior to January 1, 1985, a noncustodial parent could

exemption to noncustodial parents,[10] this pre-1985 section caused great problems for the IRS where it attempted to determine which parent deserved the exemption.[11] This administrative inconvenience caused the IRS to modify the dependency tax exemption section.[12] As amended, section 152(e) basically provides that "the custodial parent is always entitled to the exemption unless he or she signs a written declaration disclaiming the child as an exemption and the noncustodial parent attaches the declaration to his or her return."[13]

B. Statement of the Case

The respondent, Robin Joseph Cornejo, was the natural father of Jason A. Dina G., the natural mother, and the respondent never married, and the respondent separated from Dina prior to the birth of their child.[14] Dina began receiving welfare benefits in January, 1980, through Aid to Families with Dependent Children (AFDC).[15] In April, 1980, the district attorney of Monterey County (County) filed an action on behalf of the mother and child for child support

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claim the exemption if 1) he or she paid more than $1,200 in child support in a given year, 2) the custodial parent did not give more child support than the noncustodial parent, and 3) there was neither an alternate agreement between the parties nor a contrary court decree. *Id.*

10. *Id.* The following cases concluded that state courts have jurisdiction to allocate the dependency exemption under the pre-1985 version of section 152(e): Grider v. Grider, 376 So. 2d 1103, 1105 (Ala. Civ. App. 1979); Pettitt v. Pettitt, 261 So. 2d 687, 690 (La. Ct. App. 1972); Westerhof v. Westerhof, 357 N.W.2d 820, 823 (Mich. Ct. App. 1984); Greeler v. Greeler, 368 N.W.2d 2, 4-5 (Minn. Ct. App. 1985); Niederkorn v. Niederkorn, 616 S.W.2d 529, 533 (Mo. Ct. App. 1981); MacDonald v. MacDonald, 443 A.2d 1017, 1018-19 (N.H. 1982).

11. *Cornejo*, 53 Cal. 3d at 1275, 812 P.2d at 588, 283 Cal. Rptr. at 407. The pre-1985 exemption forced the IRS to become highly involved in dependency exemption actions because of proof problems regarding child support. *Id.* at 1276, 812 P.2d at 589, 283 Cal. Rptr. at 408. This extensive involvement of the IRS increased costs to both the government and the parties, while the tax revenue in question was de minimus. *Id.* (quoting H.R. REP. No. 432, 98th Cong., 2d Sess., pt. 2 at 1498-99 (1984), *reprinted in* 1984 U.S.C.C.A.N. 697, 1140).

12. *Id.* at 1275-76, 812 P.2d at 588-89, 283 Cal. Rptr. at 407-08.

13. *Id. See* 33 AM. JUR. 2D *Federal Taxation* § 1147 (1991) (explaining the release of the dependency exemption by the custodial parent). The present version of § 152(e) removes the IRS from the dependency exemption dispute, providing " 'more certainty by allowing the custodial spouse the exemption unless the spouse waives his or her right to claim the exemption.' " *Cornejo*, 53 Cal. 3d at 1276, 812 P.2d at 589, 283 Cal. Rptr. at 408 (quoting H.R. REP. No. 432, 98th Cong., 2d Sess., pt. 2 at 1498-99 (1984), *reprinted in* 1984 U.S.C.C.A.N. 697, 1140).

14. *Cornejo*, 53 Cal. 3d 1271, 1273-74, 812 P.2d 586, 587, 283 Cal. Rptr. 405, 406.

15. *Id.* at 1274, 812 P.2d at 587, 283 Cal. Rptr. at 406.

and public assistance reimbursement.[16] The respondent agreed to pay child support,[17] and stipulated that Dina retain full custody of Jason. In 1983, the district attorney brought two more actions seeking to modify child support.[18]

The district attorney initiated the present case in 1988, seeking yet another child support modification.[19] At this proceeding, the respondent prayed for the dependency exemption. After the parents agreed on child support modification, the trial court granted the dependency exemption to the respondent.[20] The court of appeal affirmed, finding that the trial court "possessed the statutory authority to allocate the tax deduction, and that Dina's interests were adequately protected in the enforcement proceeding."[21] The California Attorney General sought review on behalf of the County based on the statutory and due process claims which the court of appeal addressed. In addition, the attorney general alleged that the new exemption section stripped the trial court of its jurisdiction to assign the deduction to the noncustodial spouse.[22] The California Supreme Court granted review because of the "important jurisdictional issue of first impression in this state."[23] The supreme court affirmed and modified the court of appeal's ruling, specifying that on remand the superior court must condition child support on the custodial parent's waiver of the dependency exemption.[24]

II. TREATMENT

A. The Majority Opinion

1. State Court Allocation of the Dependency Exemption

The first issue the majority addressed was whether state courts have jurisdiction to allocate the dependency exemption to a noncustodial parent under the new version of section 152(e).[25] The court noted that most courts interpreted the pre-1985 exemption section as

16. *Id. See infra* notes 46-49 and accompanying text for an explanation the procedure involved in child support enforcement actions which the County initiates.

17. *Cornejo*, 53 Cal. 3d at 1247, 812 P.2d at 587, 283 Cal. Rptr. at 406. The father initially agreed to pay $100 each month in child support. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 1274, 812 P.2d at 588, 283 Cal. Rptr. at 407. According to the new agreement, the father would pay $272 each month in child support and arrearages totaling $2,546.32. *Id.*

21. *Id.*

22. *Id.* at 1275, 812 P.2d at 588, 283 Cal. Rptr. at 407.

23. *Id.*

24. *Id.*

25. *Id.* at 1275-81, 812 P.2d at 588-92, 283 Cal. Rptr. at 407-11.

giving state courts the equitable power to do so.[26] In addition, a great majority of courts have interpreted the present section 152(e) as allowing state courts to allocate the exemption to the noncustodial parent.[27] The court stressed that " 'the amendment was merely intended to enhance the administrative convenience of the IRS, not to interfere with state court prerogatives.' "[28] In addition, the court noted that the majority of courts acknowledge that they themselves may not allocate the exemption through court order, but instead may accomplish the allocation by requiring the custodial parent to waive his or her right to the exemption.[29]

The court observed that the intent of Congress in amending the tax code was to decrease litigation for the IRS, rather than to limit

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26. *Id.* at 1275, 812 P.2d at 588, 283 Cal. Rptr. at 407. *See supra* note 10 and accompanying text.

27. *Cornejo*, 53 Cal. 3d at 1276-77, 812 P.2d at 589, 283 Cal. Rptr. at 408. The following cases concluded that state courts have the power to allocate the dependency exemption under the present version of section 152(e): Gamble v. Gamble, 562 So. 2d 1343, 1346 (Ala. Civ. App. 1990); Lincoln v. Lincoln, 746 P.2d 13, 17 (Ariz. Ct. App. 1987); Serrano v. Serrano, 566 A.2d 413, 418 (Conn. 1989); *In re* Einhorn, 533 N.E.2d 29, 37 (Ill. App. Ct. 1988); Ritchey v. Ritchey, 556 N.E.2d 1376, 1379 (Ind. Ct. App. 1990); *In re* Kerber, 433 N.W.2d 53, 55 (Iowa Ct. App. 1988); Hart v. Hart, 774 S.W.2d 455, 457 (Ky. Ct. App. 1989); Rovira v. Rovira, 550 So. 2d 1237, 1242 (La. Ct. App. 1989); Wassif v. Wassif, 551 A.2d 935, 940 (Md. Ct. Spec. App. 1989); Bailey v. Bailey, 540 N.E.2d 187, 188-89 (Mass. App. Ct. 1989); Fudenberg v. Molstad, 390 N.W.2d 19, 21 (Minn. Ct. App. 1986); Nichols v. Tedder, 547 So. 2d 766, 779 (Miss. 1989); Corey v. Corey, 712 S.W.2d 708, 711 (Mo. Ct. App. 1986); *In re* Milesnick, 765 P.2d 751, 754 (Mont. 1988); Babka v. Babka, 452 N.W.2d 286, 289 (Neb. 1990); Gwodz v. Gwodz, 560 A.2d 85, 88 (N.J. Super Ct. App. Div. 1989); Zogby v. Zogby, 158 A.D.2d 974, 974, 551 N.Y.S.2d 126, 127 (1990); Cohen v. Cohen, 396 S.E.2d 344, 352 (N.C. Ct. App. 1990); Fleck v. Fleck, 427 N.W.2d 355, 359 (N.D. 1988); Hughes v. Hughes, 518 N.E.2d 1213, 1216 (1988), *cert. denied*, 488 U.S. 846 (Ohio 1988); Motes v. Motes, 786 P.2d 232, 237 (Utah Ct. App. 1989), *cert. denied*, 795 P.2d 1138 (Utah 1990); *In re* Peacock, 771 P.2d 767, 769 (Wash. Ct. App. 1989); Cross v. Cross, 363 S.E.2d 449, 459 (W. Va. 1987); Pergolski v. Pergolski, 420 N.W.2d 414, 417 (Wis. Ct. App. 1988).

28. *Cornejo*, 53 Cal. 3d at 1277, 812 P.2d at 589, 283 Cal. Rptr. at 408 (quoting Motes v. Motes, 786 P.2d 232, 237 (Utah Ct. App. 1989)). *See also* Fudenberg v. Molstad, 390 N.W.2d 19, 21 (Minn. Ct. App. 1986) (state court allocation of the dependency exemption is not contrary to congressional intent because it does not increase IRS involvement in the determination).

29. *Cornejo*, 53 Cal. 3d 1277-78, 812 P.2d at 590, 283 Cal. Rptr. at 409. *See, e.g.*, Lincoln v. Lincoln, 746 P.2d 13, 17 (Ariz. Ct. App. 1987); *In re* Einhorn, 533 N.E.2d 29, 37 (Ill. App. Ct. 1988); Wassiff v. Wassiff, 551 A.2d 935, 940 (Md. Ct. Spec. App. 1989); Fudenberg v. Molstad, 390 N.W.2d 19, 21 (Minn. Ct. App. 1986); Nichols v. Tedder, 547 So. 2d 766, 772-80 (Miss. 1989); *In re* Milesnick, 765 P.2d 751, 754 (Mont. 1988); Motes v. Motes, 786 P.2d 232, 236-39 (Utah Ct. App. 1989); Cross v. Cross, 363 S.E.2d 449, 457 (W. Va. 1987); Pergloski v. Pergolski, 420 N.W.2d 414, 417 (Wis. Ct. App. 1988). *Cf.* Jensen v. Jensen, 753 P.2d 342, 345 (Nev. 1988) (the court may order the custodial spouse to execute the waiver only if modifying alimony and child support will not achieve a similar economic result).

state courts' ability to require the noncustodial parent to waive the exemption.[30] The court concluded that "it is eminently reasonable to infer that if Congress had intended to forbid state courts from allocating the exemptions by ordering the waiver to be signed, it would plainly have 'said so.' "[31] Thus, the absence of any contrary statutory language convinced the court that section 152(e) allowed state courts to allocate the dependency exemption through their traditional equitable power.[32]

The supreme court emphasized that only a small minority of courts have ruled that the new tax code prevents state courts from ordering custodial parents to involuntarily waive the exemption.[33] The court stated that these decisions were without merit.[34] Yet, the court noted that section 152(d) "is absolutely *silent* as to whether or not a state court may direct the custodial parent to execute the declaration"[35] waiving the dependency exemption.

The court demonstrated the reasonableness of allowing a state court to allocate the dependency exemption by directing a waiver.[36] The court explained that the exemption is more valuable to those taxpayers with a higher income, because it gives them greater income tax reduction.[37] Therefore, where the noncustodial parent has a

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30. *Cornejo*, 53 Cal. 3d at 1278, 812 P.2d at 590, 283 Cal. Rptr. at 409 (citing *Cross*, 363 S.E.2d at 457).

31. *Id.* (quoting *Cross*, 363 S.E.2d at 458).

32. *Id.* at 1280, 812 P.2d at 592, 283 Cal. Rptr. at 411.

33. *Id.* at 1278, 812 P.2d at 590-91, 283 Cal. Rptr. at 409-10 (citing McKenzie v. Kinsey, 532 So. 2d 98 (Fla. Dist. Ct. App. 1988); Sarver v. Dathe, 439 N.W.2d 548 (S.D. 1989); Brandriet v. Larsen, 442 N.W.2d 455 (S.D. 1989)). The court also noted that only one court held that the new dependency exemption section totally divested trial courts of their jurisdiction to allocate the exemption. *Id.* at 1279, 812 P.2d at 591, 283 Cal. Rptr. at 410. *See* Lorenz v. Lorenz, 419 N.W.2d 770, 771 (Mich. Ct. App. 1988). The court discredited this opinion, stating that the opinion lacked analysis and relied on the mere fact that no express statutory language authorized state jurisdiction. *Cornejo*, 53 Cal. 2d at 1279, 812 P.2d at 591, 283 Cal. Rptr. at 410. The court noted that as long as "the federal goal of administrative clarity and convenience is served, the statute manifests utter indifference to whether the declaration was signed voluntarily or pursuant to court order." *Id.*

34. *Cornejo*, 53 Cal. 3d at 1279, 812 P.2d at 591, 283 Cal. Rptr. at 410 (citing *McKenzie*, 532 So. 2d at 100 n.3; *Brandriet*, 444 N.W.2d at 459). In *McKenzie*, the Florida District Court of Appeal held that section 152(e) precluded state courts from procuring an involuntary waiver from the custodial parent because this action exceeded the language of the code. *McKenzie*, 532 So. 2d at 100 n.3. In *Brandriet*, the South Dakota Supreme Court reached a similar conclusion based on its opinion that section 152(e) intends a voluntary waiver. *Brandriet*, 444 N.W.2d at 459.

35. *Cornejo*, 53 Cal. 3d at 1279, 812 P.2d at 591, 283 Cal. Rptr. at 410 (emphasis in original). *See supra* notes 31-33 and accompanying text.

36. *Cornejo*, 53 Cal. 3d at 1279-80, 812 P.2d at 591-92, 283 Cal. Rptr. at 410-11.

37. *Id.* at 1280, 812 P.2d at 592, 283 Cal. Rptr. at 411 (citing Cross v. Cross, 363 S.E.2d 449, 459 (W. Va. 1987) (the progressivity of federal income tax causes the exemption to be more valuable to a person with a higher income)). *Accord* Nichols v. Tedder, 547 So. 2d 766, 766-77 (Miss. 1989); Motes v. Motes, 786 P.2d 232, 239 (Utah Ct. App. 1989).

higher adjusted gross income than the custodial parent,[38] "the effect of awarding the exemption to the noncustodial parent is to increase the after-tax spendable income of the family as a whole, which may then be channeled into child support or other payments."[39] Thus, the court concluded that the minority decisions were without merit, and held that section 152(e) does not preclude state courts from allocating the exemption to the noncustodial parent by directing the custodial parent to waive the exemption.[40]

2. Due Process

The court next addressed whether the trial court's allocation of the dependency exemption to the noncustodial parent violated the custodial parent's due process rights, where the custodial parent was not a party to the proceeding.[41] The County initiated the proceeding on behalf of the custodial parent according to sections 11475.1[42] and 11350.1[43] of the California Welfare and Institutions Code. Section 11475.1(a) provides that the district attorney must enforce child support obligations through appropriate judicial action,[44] while section 11350.1 limits the actionable issues in these proceedings to paternity

38. The court noted that the noncustodial parent often has a higher adjusted gross income than the custodial parent. *Cornejo*, 53 Cal. 3d at 1280, 812 P.2d at 592, 283 Cal. Rptr. at 411. *See Nichols*, 547 So. 2d at 775 (the court's allocation of the exemption to the noncustodial parent is logical because that parent usually has the higher income).

39. *Cornejo*, 53 Cal. 3d at 1280, 812 P.2d at 592, 283 Cal. Rptr. at 411 (citing *Nichols*, 547 So. 2d at 774-75).

40. *Id.* at 1280-81, 812 P.2d at 592, 283 Cal. Rptr. at 411. The court remanded the present case, allowing the trial court to order the custodial parent to waive the exemption in exchange for increased child support. *Id.* at 1281, 812 P.2d at 592, 283 Cal. Rptr. at 411.

41. *Id.*

42. CAL. WELF. & INST. CODE § 11475.1 (West 1991). This provision carries out the federal mandate requiring a state to provide child support collection services to all individuals prior to participating in the federal AFDC program. *Cornejo*, 53 Cal. 3d 1271, 1281, 812 P.2d 586, 592-93, 283 Cal. Rptr. 405, 411-12 (citing 42 U.S.C. § 654(6)(A) (1988)). *See generally* 10 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 300, 306 (9th ed. 1989 & Supp. 1991) (explaining the duty of the district attorney to initiate child support enforcement proceedings on behalf of the custodial parent according to section 11475.1); 4 JOHN L. GODDARD, CALIFORNIA PRACTICE, *Family Law Practice* § 323, at 534-39 (3d ed. 1981 & Supp. 1991) (discussing the procedural aspects of child support enforcement proceedings which the government brings on behalf of the custodial parent).

43. CAL. WELF. & INST. CODE § 11350.1 (West 1991 & Supp. 1991). *See generally*, 4 JOHN L. GODDARD, CALIFORNIA PRACTICE, *Family Law Practice* § 323 at 533-34 (3d ed. 1981 & Supp. 1991) (summarizing section 11350.1).

44. *Cornejo*, 53 Cal. 3d at 1281, 812 P.2d at 593, 283 Cal. Rptr. at 412 (citing § 11475.1(a)). *See supra* note 42.

and child support.[45] Considering these limits, the court first determined whether the trial court appropriately addressed the allocation of the dependency exemption.[46] The court noted that section 11476.1(g) allows courts to consider any of the factors listed in California Civil Code section 246[47] in determining child support, including earning capacity, obligations of the parents, and "any other factors the court deems just and equitable."[48] The court found that income tax was an obligation of the parents, and that allocation of the dependency exemption was a "just and equitable" factor in discerning child support.[49] Therefore, the court concluded that the trial court properly considered allocation of the exemption according to the limits of section 11350.1, because " '[d]ependency deductions are connected directly with the requirements of a noncustodial parent to provide support and the allocation of the allowance has a direct effect on the financial resources available to the child.' "[50]

The court held that the child support enforcement action did not violate the custodial mother's due process rights, even though she was not a party to the action.[51] First, the custodial mother assisted

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45. *Cornejo*, 53 Cal. 3d at 1282, 812 P.2d at 593, 283 Cal. Rptr. at 412. *See supra* note 47.

46. *Cornejo*, 53 Cal. 3d at 1282, 812 P.2d at 593, 283 Cal. Rptr. at 412.

47. CAL. CIV. CODE § 246 (West 1982 & Supp. 1991). Section 246 provides that:

> [w]hen determining the amount due for support the court shall consider the following circumstances of the respective parties:
>
> (a) The earning capacity and needs of each party.
>
> (b) The obligations and assets, including the separate property, of each.
>
> (c) The duration of the marriage.
>
> (d) The ability of the obligee to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the obligee.
>
> (e) The time required for the obligee to acquire appropriate education, training, and employment.
>
> (f) The age and health of the parties.
>
> (g) The standard of living of the parties.
>
> (h) Any other factors which it deems just and equitable.

Id.

48. *Cornejo*, 53 Cal. 3d at 1282, 812 P.2d at 593, 283 Cal. Rptr. at 412 (citing CAL. CIV. CODE § 246). *See* Van Diest v. Van Diest, 266 Cal. App. 2d 541, 545, 72 Cal. Rptr. 304, 307 (1968) (enumerating factors the trial judge considers in child support determinations).

49. *Cornejo*, 53 Cal. 3d at 1282, 812 P.2d at 593, 283 Cal. Rptr. at 412 (citing CAL. CIV. CODE § 246; *In re* Neal, 92 Cal. App. 3d 834, 847, 155 Cal. Rptr. 157, 165 (1979) (income tax is an obligation of the parents which courts can consider in determining child support); Fuller v. Fuller, 89 Cal. App. 3d 405, 409, 152 Cal. Rptr. 467, 469 (1979) (dependency exemption is a "just and equitable" factor)).

50. *Cornejo*, 53 Cal. 3d at 1282-83, 812 P.2d at 593-94, 283 Cal. Rptr. at 412-13 (quoting *In re* Lovetinsky, 418 N.W.2d 88, 90 (Iowa Ct. App. 1987)). *See also* Baird v. Baird, 760 S.W.2d 571, 573 (Mo. Ct. App. 1988) (the allocation of the exemption may have has a direct financial effect on the parties); Sarver v. Dathe, 439 N.W.2d 548, 551 (S.D. 1989) (noting that the allocation of the exemption factors into the determination of child support because of its financial effect on the family).

51. *Cornejo*, 53 Cal. 3d at 1283, 812 P.2d at 594, 283 Cal. Rptr. at 413.

the district attorney by providing financial statements and availing herself as a witness.[52] Second, she presented evidence concerning the exemption through the district attorney's argument.[53] This participation convinced the court that the trial court had not violated the custodial mother's due process rights in allocating the exemption.[54]

B. Justice Mosk's Dissenting Opinion

Justice Mosk agreed with the majority that section 152(e) does not surrender state courts' equitable powers to allocate the dependency exemption by requiring the custodial parent to waive the exemption.[55] He dissented, however, stating that the trial court should not allocate the exemption without affording the custodial parent notice and an opportunity to be heard.[56] Justice Mosk believed that the custodial parent in this case did not receive due process under Article I, section 7(a) of the state constitution,[57] although she cooperated in the proceeding and could have later brought an independent action concerning the exemption.[58]

Justice Mosk relied upon the analysis set forth in *Anderson v. Superior Court*.[59] In that case, the California Court of Appeal ap-

52. *Id.*

53. *Id.*

54. *Id.* Further, the court emphasized that the custodial mother could initiate an independent action regarding the exemption under section 11350.1, and that decision would substitute the former court order. *Id.* at 1283-84, 812 P.2d at 594, 283 Cal. Rptr. at 413. Section 11350.1 states: "[n]othing contained in this section shall be construed to prevent the parties from bringing an independent action. . . . In that event, the court in those proceedings shall make an independent determination on the issue of support which shall supersede the support order made pursuant to this section." CAL. WELF. & INST. CODE § 11350.1 (West 1991 & Supp. 1991). *See* 10 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 339 (9th ed. 1989 & Supp. 1991) (a custodial parent can initiate an independent action).

55. *Cornejo*, 53 Cal. 3d at 1285, 812 P.2d at 595, 283 Cal. Rptr. at 414 (Mosk, J., dissenting).

56. *Id.* (Mosk, J., dissenting). Justice Mosk argued that because a court cannot order the noncustodial parent to pay child support without notice and an opportunity to be heard, then it equally cannot order the custodial parent to waive the exemption without the same due process requirements. *Id.* (Mosk, J., dissenting). It should be noted, however, that the exemption itself may not be a constitutionally protected interest. *See* Nichols v. Tedder, 547 So. 2d 766, 773 (Miss. 1989) (the dependency exemption is not a constitutionally guaranteed property right). Thus, it may be argued that deprivation of the exemption does not require due process.

57. CAL. CONST. art. I, § 7(a). This section states that "[a] person may not be deprived of life, liberty, or property without due process of law." *Id.*

58. *Cornejo*, 53 Cal. 3d at 1285, 812 P.2d at 595, 283 Cal. Rptr. at 414 (Mosk, J., dissenting) (citing CAL. CONST. art. I, § 7(a)). *See supra* notes 51-54 and accompanying text.

59. *Id.* at 1285-86, 812 P.2d at 595-96, 283 Cal. Rptr. at 414-15 (Mosk, J., dissenting)

plied a four-pronged analysis to determine whether the trial court had violated a custodial parent's due process rights.[60] The court considered:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[61]

The fourth consideration was "that persons subjected to deprivatory governmental action be treated with respect and dignity."[62]

Justice Mosk applied this analysis to the case at hand, and found that the trial court deprived the custodial parent of her due process rights.[63] First, the action of allocating the exemption affected her private economic interest.[64] Second, because the district attorney had not represented the custodial parent, there was a threat of erroneously depriving the parent of this private economic interest.[65] In fact, the district attorney argued that the court need not consider the allocation issue in the enforcement proceeding, and never presented the custodial parent's position against the reallocation.[66] Third, allowing a custodial parent an opportunity to be heard would not burden the government interest in providing adequate child support and

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(citing Anderson v. Superior Court, 213 Cal. App. 3d 1321, 262 Cal. Rptr. 405 (1989)). In *Anderson*, the California Court of Appeal considered whether the trial court violated a custodial parent's due process rights, where the custodial parent served as a witness without counsel in a child support reimbursement action brought by the county against the custodial parent's spouse. *Id.* (Mosk, J., dissenting) (citing *Anderson*, 213 Cal. App. 3d at 1323-27, 262 Cal. Rptr. at 407-09). Because of this testimony, the trial court found that the custodial parent's child support payments were deficient and threatened to reduce the AFDC benefits. *Id.* at 1286, 812 P.2d at 596, 283 Cal. Rptr. at 415 (Mosk, J., dissenting) (citing *Anderson*, 213 Cal. App. 3d at 1324-27, 262 Cal. Rptr. at 407-09).

60. *Anderson*, 213 Cal. App. 3d at 1329-31, 262 Cal. Rptr. at 411-12.

61. *Cornejo*, 53 Cal. 3d at 1286, 812 P.2d at 596, 283 Cal. Rptr. at 415 (Mosk, J., dissenting) (citing *Anderson*, 213 Cal. App. 3d at 1330, 262 Cal. Rptr. at 405 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976))).

62. *Id.* at 1286, 812 P.2d at 596, 283 Cal. Rptr. at 415 (Mosk, J., dissenting) (citing *Anderson*, 213 Cal. App. 3d at 1330, 262 Cal. Rptr. at 405 (citing People v. Ramirez, 25 Cal. 3d 260, 267-68, 599 P.2d 622, 626, 158 Cal. Rptr. 316, 320 (1979))). In *Anderson*, the court of appeal held that the trial court had violated the custodial mother's due process rights where it had not required notice of the family law procedure which jeopardized her welfare benefits. *Id.* (Mosk, J., dissenting) (citing *Anderson*, 213 Cal. App. 3d at 1331, 262 Cal. Rptr. at 412).

63. *Id.* at 1288, 812 P.2d at 597, 283 Cal. Rptr. at 416 (Mosk, J., dissenting).

64. *Id.* at 1286, 812 P.2d at 596, 283 Cal. Rptr. at 415 (Mosk, J., dissenting). Justice Mosk stressed the majority's clear statement that the exemption affects the financial position of the family as a whole. *Id.* (Mosk, J., dissenting). *See supra* notes 38-43 and accompanying text. Therefore, there is a property interest at stake where the trial court allocates the dependency exemption. *Id.* at 1286, 812 P.2d at 596, 283 Cal. Rptr. at 415 (Mosk, J., dissenting).

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

66. *Id.* at 1286-87, 812 P.2d at 596, 283 Cal. Rptr. at 415 (Mosk, J., dissenting).

reimbursement to the county.[67] The trial court could have allowed the district attorney or the custodial parent to present the argument on the exemption issue without undue burden.[68] Fourth, by depriving the custodial parent of the exemption without an opportunity to be heard, the trial court treated her with neither respect nor dignity.[69] Therefore, Justice Mosk concluded that the trial court's reallocation of the dependency exemption violated the custodial parent's due process rights.[70]

III. CONCLUSION

The *Cornejo* decision complements the intent of Congress in its amendment of the pre-1985 dependency tax exemption section.[71] *Cornejo* removes the IRS from dependency disputes by allowing trial courts to allocate the exemption to the noncustodial parent and modify child support payments accordingly. This implementation of section 152(d) "provide[s] admirable simplicity, if not 'equity' "[72] in determining which parent is entitled to the exemption, while avoiding "considerable controversy, litigation, and uncertainty."[73] In addition, by allowing the court to compel the custodial parent to waive the exemption, *Cornejo* will aid higher-income noncustodial parents, who "may not be able to persuade former spouses to sign waivers."[74]

Yet, while *Cornejo* eases the administrative burden on the IRS caused by divorce disputes, it may increase due process violations by depriving custodial parents of an opportunity to be heard. Accordingly, California trial courts must proceed cautiously in allocating the dependency exemption, and must not "lightly allow a summary deprivation of [a custodial parent's] interests"[75] by allocating the exemption without affording that parent such opportunity to be heard.[76]

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67. *Id.* at 1287, 312 P.2d at 596-97, 283 Cal. Rptr. at 415-16 (Mosk, J., dissenting).
68. *Id.* at 1287, 312 P.2d at 597, 283 Cal. Rptr. at 416 (Mosk, J., dissenting).
69. *Id.* (Mosk, J., dissenting).
70. *Id.* at 1288, 312 P.2d at 597, 283 Cal. Rptr. at 416 (Mosk, J., dissenting).
71. *See supra* notes 11-13 and accompanying text.
72. Patricia L. Lewis & Julie W. Davis, *Act Alters Tax Provisions for Divorcing Couples*, LEGAL TIMES, Aug. 27, 1984, at 19.
73. *Id. See supra* notes 10-12 & 28 and accompanying text.
74. Laurie Cohen, *Few Shake-ups in '85 Rules*, CHI. TRIB., March 9, 1986 at 4.
75. *Cornejo*, 53 Cal. 3d 1271, 1287, 812 P.2d 586, 597, 283 Cal. Rptr. 405, 416 (Mosk, J., dissenting).
76. In Solberg v. Wenker, the California Court of Appeal suggested that courts can ensure due process by voiding judgments where both the district attorney failed to

VIII. LABOR LAW

A. *The explicit language, structure and purpose of the Employee Retirement Security Act of 1974 (ERISA) demonstrates a congressional intent to preempt Civil Code section 3111, which creates liens on property in favor of trust funds established pursuant to collective bargaining agreements:* Carpenters Southern California Administrative Corporation v. El Capitan Development Corporation.

The Employee Retirement Security Act of 1974 (ERISA),[1] is a comprehensive federal statute designed to promote the interest of employers and their beneficiaries in employee benefit plans.[2] Congress created many safeguards to preclude interference with rights protected by ERISA.[3] One prominent safeguard is ERISA's broad preemption provision,[4] which supersedes all state laws insofar as they "relate to any employee benefit plan."[5]

In *Carpenters v. El Capitan*,[6] the California Supreme Court addressed whether the preemption provision of ERISA applies to state lien laws, specifically California Civil Code section 3111 [hereinafter section 3111].[7] Section 3111 allows a trust fund to record a lien

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inform an unrepresented parent of the right to trial on certain issues, and where the parent establishes that he or she would not have executed a child support agreement absent this failure to inform. 163 Cal. App. 3d 475, 478-79, 209 Cal. Rptr. 545, 548 (1985). This approach could be effective if applied to dependency exemption proceedings, and would ensure that the custodial parent received due process where the court reallocated the exemption in that parent's absence.

1. 29 U.S.C. § 1001. *See generally* 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 341 (9th ed. 1987).

2. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). "The statute imposes participation, funding, and vesting requirements on pension plans. It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans." *Id.* at 91.

3. *See* Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 482 (1990). "As part of this closely integrated regulatory system Congress included various safeguards to preclude abuse and 'to completely secure the rights and expectations brought into being by this landmark reform legislation.' " *Id.* (quoting S. Rep. No. 93-127, at 36 (1973)).

4. 29 U.S.C. § 1144(a) (1988). In the preemption provision of ERISA, Congress provided: "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." *Id.*

5. 29 U.S.C. § 1144(a) (1988). Section 1144(c) defines the terms used in section 1144(a). To emphasize its intent that courts liberally apply ERISA's preemption provision, Congress used broad language in defining "state law." Such laws include "all laws, decisions, rules, regulations, or other state action having the effect of law." 29 U.S.C. § 1144(c)(1) (1988).

6. 53 Cal. 3d 1041, 811 P.2d 296, 282 Cal. Rptr. 277, *cert. denied*, 112 S. Ct. 430 (1991). Justice Panelli authored the opinion of the court in which Chief Justice Lucas and Justices Kennard, Arabian and Baxter concurred. Justice Broussard wrote a dissenting opinion in which Justice Mosk joined.

7. *Id.* at 1045, 811 P.2d at 297, 282 Cal. Rptr. at 278 (citing CAL. CIV. CODE § 3111

against real property if an employer fails to make the requisite contributions.[8] The court followed a trend of recent United States Supreme Court decisions dealing with ERISA's preemption provision applicability to various state laws[9] by deferring to the federal statute's perceived congressional intent.[10] By analyzing the explicit language, structure and purpose of ERISA, the court held that ERISA preempted section 3111.[11]

II. TREATMENT OF THE CASE

A. Majority Opinion

In his majority opinion, Justice Panelli stressed that ERISA expressly preempts all state laws that "relate" to employee benefit plans,[12] as opposed to the petitioner's contention that a state law must "regulate" an ERISA plan in order to be preempted.[13] The court held that section 3111 is not only "specifically designed to affect

(West 1974 & Supp. 1992)). Section 3111 provides that: "[A]n express trust fund established pursuant to a collective bargaining agreement to which payments are required to be made on account of fringe benefits supplemental to a wage agreement for the benefit of a claimant on particular real property shall have a lien on such property in the amount of the supplemental fringe benefit payments owing to it pursuant to the collective bargaining agreement." *Id.*

8. *Carpenters*, 53 Cal. 3d at 1046, 811 P.2d at 298, 282 Cal. Rptr. at 279. *See supra* note 7. *See also* 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 340 (9th ed. 1987).

9. *See, e.g.*, Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987) (a state law relates to a benefit plan if it has a connection or reference with the plan); Ingersoll Rand Co. v. McClendon, 111 S. Ct. 478, 482 (1990) ("[t]he key to § 514(a) is found in the words 'relate to' "); Franchise Tax Board v. Laborers Vacation Trust, 463 U.S. 1, 24, n.26 (1988) (describing section 514(a) of ERISA as a "virtually unique preemption provision"); FMC Corp. v. Holliday, 111 S. Ct. 403, 407 (1990) (describing ERISA's preemption provision as being "conspicuous for its breadth").

10. *Carpenters*, 53 Cal. 2d at 1048-49, 811 P.2d at 299-300, 282 Cal. Rptr. at 280-81 (1991). The California Supreme Court granted review of *Carpenters* in light of the decision in *Pilot Life*. *Id.* at 1046, 811 P.2d at 298, 282 Cal. Rptr. at 279 (citing *Pilot Life*, 481 U.S. 41). In *Pilot Life*, the Supreme Court held that ERISA's preemption provision was designed to "establish pension plan regulation as exclusively a federal concern." *Pilot Life*, 481 U.S. at 46 (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981).

11. *Carpenters*, 53 Cal. 3d at 1056, 811 P.2d at 305, 282 Cal. Rptr. at 286.

12. *Id.* at 1049, 811 P.2d at 300, 282 Cal. Rptr. at 281. *See also supra* note 9.

13. *Carpenters*, 53 Cal. 3d at 1050, 811 P.2d at 300, 282 Cal. Rptr. at 281. Petitioner's argument was based on 29 U.S.C. § 1144(c)(2), which preempts laws which "[purport] to regulate" plans. *Id.* (quoting 42 U.S.C § 1144(c)(2)). *See also* Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 484 (1990) (if congressional intent were to preempt only those state laws that "regulate" plan terms, then Congress would not have placed this restriction in an obscure section while using "relate to" language in the preemption section itself).

employee benefit plans,"[14] it also regulates ERISA plans by providing an additional method of funding, which ERISA does not allow.[15] The majority rejected the argument that section 3111 merely provided an additional enforcement method.[16] Instead, the court determined that section 3111 creates new substantive rights by allowing a trust fund to enforce a debt against a third party not a party to the original collective bargaining agreement.[17] The court reasoned that if state-based actions were allowed to develop different substantive standards than those provided under ERISA, then consistent application of ERISA might be undermined.[18]

The court also dismissed the petitioner's claim that ERISA should not preempt section 3111 because section 3111 embodied a traditionally recognized state power.[19] To avoid preemption, it must be established that section 3111 merely affects ERISA plans in a "tenuous, remote, or peripheral" manner,[20] rather than having a substantive effect.[21] Finally, the court concluded that even if section 3111 provided an additional remedy consistent with ERISA'S requirements, this is irrelevant in a federal preemption analysis.[22]

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14. *Carpenters*, 53 Cal. 3d at 1049, 811 P.2d at 300, 282 Cal. Rptr. at 281.

15. *Id.* at 1051, 811 P.2d at 301, 282 Cal. Rptr. at 282. The court stated that because section 3111 creates an additional funding mechanism, it "regulates" ERISA plans, and consequently "relates to" ERISA plans, which constitutes grounds for preemption. *Id.* *See also* Iron Workers Pension Fund v. Terotechnology, 891 F.2d 548, 549 (5th Cir.), *cert. denied*, 110 S. Ct. 3272 (1990) (because a Louisiana state law created an additional method of enforcing funding requirements of employee benefit plans, it was preempted by ERISA).

16. *Carpenters*, 53 Cal. 3d at 1054-55, 811 P.2d at 304, 282 Cal. Rptr. at 285. Petitioners relied on the decision in *Mackey* that "state law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA." Mackey v. Lanier Collections Agency and Serv., 486 U.S. 825, 834 (1988). However, the California Supreme Court rejected this analysis because ERISA "expressly provides remedies for recovery of delinquent contributions to employee benefit plans." *Carpenters*, 53 Cal. 3d at 1055, 811 P.2d at 304, 282 Cal. Rptr. at 285.

17. *Carpenters*, 53 Cal. 3d at 1055, 811 P.2d at 304, 282 Cal. Rptr. at 285.

18. *Id.* at 1053, 811 P.2d at 303, 282 Cal. Rptr. at 284. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54-55 (1987) (ERISA remedies are exclusive and override state laws which purport to create similar remedies). In his dissent, Justice Broussard argued that section 3111 did not create substantive rights because the lien did not create personal liability of the owner. *Carpenters*, 53 Cal. 3d at 1065-66, 811 P.2d at 311, 282 Cal. Rptr. at 292.

19. *Id.* at 1055-56, 811 P.2d at 304-05, 282 Cal. Rptr. at 285-86.

20. *Id.* at 1056, 811 P.2d at 304-05, 282 Cal. Rptr. at 285-86.

21. *Id.* "[T]he strength of the state interest is of no consequence where the state law clearly 'purports to regulate' an employee benefit plan." *Id.* at 1056, 811 P.2d at 304, 282 Cal. Rptr. at 285.

22. *Id.* *See* Mackey v. Lanier Collections Agency & Serv., 486 U.S. 825, 829-30 (1988) (ERISA's preemption provision overrides even state laws consistent with ERISA's substantive requirements); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985) (state legislative "good intentions" do not immunize state laws from ERISA's broad preemption provision).

B. Dissenting Opinion

Justice Broussard's dissent recognized ERISA's broad preemption clause but admonished the majority for failing to recognize preemption's necessary limitations.[23] He argued that the majority misinterpreted the congressional intent of ERISA by relying on a preemption provision which was not part of ERISA as was originally enacted.[24] Moreover, Justice Broussard asserted that Congress clearly intended for state law to apply in certain types of delinquency actions.[25] The majority's holding would ultimately violate the rule prohibiting special treatment of ERISA plans.[26] Finally, Justice Broussard concluded that ERISA, as originally enacted, did not provide a federal mechanism for recovering delinquent payments,[27] and therefore, if state actions were preempted, congressional intent would be stymied.[28]

III. CONCLUSION

In *Carpenters*, the California Supreme Court stated that ERISA need only "relate" to a state law to validly preempt that law. The decision should lead to consistency where future courts apply ERISA

23. *Carpenters*, 53 Cal. 3d at 1057, 811 P.2d at 305, 282 Cal. Rptr. at 286 (Broussard, J., dissenting).

24. *Id.* at 1059, 811 P.2d at 307, 282 Cal. Rptr. at 288 (Broussard, J., dissenting) (" 'It is the intent of the Congress that enacted [the section] . . . that controls.' "). *Id.* (quoting International Brotherhood of Teamsters v. United States, 431 U.S. 324, 354 (1977)). Justice Broussard believed that because the provisions of 29 U.S.C. 1145 were added to ERISA in 1980, they do not reflect the original congressional intent. *Id.* The majority argued, however, that even in 1974, ERISA contained a cause of action for the enforcement of collecting delinquent contributions, namely 29 U.S.C. section 1132. *Id.* at 1053, n.8, 811 P.2d at 302, n.8, 282 Cal. Rptr. at 283, n.8.

25. *Id.* at 1059, 811 P.2d at 307, 282 Cal. Rptr. at 288 (Broussard, J., dissenting). Justice Broussard argued that ERISA section 1132(g) expressly provided for state based actions for the recovery of delinquent contributions. *Id. See also* 29 U.S.C. § 1132(g); *Mackey*, 486 U.S. 825 (establishing three classes of state law not preempted).

26. *Carpenters*, 53 Cal. 3d at 1060, 811 P.2d at 307-08, 282 Cal. Rptr. at 288-289 (Broussard, J., dissenting). Justice Broussard argued that those employees who are not members of ERISA can obtain liens for the entire amount of unpaid compensation while ERISA members can obtain a lien for only part of their compensation, because they initially received partial compensation from ERISA. *Id. See also* CAL. CIV. CODE § 3110 (West 1974) (describing persons entitled to lien).

27. *Carpenters*, 53 Cal. 3d at 1067, 811 P.2d at 312, 282 Cal. Rptr. at 293 (Broussard, J., dissenting). Justice Broussard concluded that the 29 U.S.C. § 1132 (civil enforcement of ERISA) only provides for equitable relief and not for the recovery of money judgments. In addition, he argued that Congress's later enactment of 29 U.S.C. § 1145 illustrates that, as originally enacted, ERISA did not provide federal enforcement remedies. *Id.*

28. *Id.*

provisions to state laws, and will prevent conflicts of interest from divergent state and federal substantive standards. It is still unanswered, however, whether ERISA can be used to enforce money judgment collection. If future courts determine that state law liens cannot be enforced through ERISA, substantial funding invested in ERISA plans will be seriously jeopardized. Moreover, a lack of enforcement power by ERISA would discriminate against employees belonging to ERISA plans by denying them lien rights, which contradicts the congressional intent of protecting plan employees.

ANDREA L. WILSON

B. *Under the National Bank Act, a terminated national bank officer is precluded from filing a state law action for wrongful termination only where the board of directors removed the officer or the directors approved or ratified the removal:* Wells Fargo Bank v. Superior Court.

I. INTRODUCTION

The National Bank Act[1] (hereinafter NBA) was enacted in 1864.[2] Title 12, section 24, paragraph 5 of the NBA (hereinafter section 24) authorizes a national banking association "[t]o elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and *other officers*."[3] Moreover, directors may "dismiss such officers or any of them *at pleasure*."[4] Where a national banking association terminates an employee within the scope of section 24, the NBA preempts all other state law actions for breach of an employment contract.[5]

In *Wells Fargo Bank v. Superior Court*,[6] the California Supreme Court interpreted section 24 of the NBA. The court established a four-part test[7] to determine when branch managers and other employees of national banking associations qualify as "other officers" under section 24.[8] The court opined that a national bank may termi-

1. 12 U.S.C. § 21 (1988).
2. 12 U.S.C. § 38 (1988).
3. 12 U.S.C. § 24, ¶ 5 (1988) (emphasis added). *See generally* Robert H. Platt, *Wrongful Termination in the Banking Industry*, 34 DEPAUL L. REV. 971 (1985) (discussing wrongful termination in light of the National Bank Act).
4. 12 U.S.C. § 24, ¶ 5 (1988) (emphasis added).
5. Mackey v. Pioneer Nat'l Bank, 867 F.2d 520, 524-26 (9th Cir. 1989).
6. 53 Cal. 3d 1082, 811 P.2d 1025, 282 Cal. Rptr. 841 (1991). Chief Justice Lucas wrote the majority opinion with Justices Panelli, Arabian and Puglia concurring. Justice Puglia, of the Third District Court of Appeal, was sitting under assignment. Justice Kennard wrote a separate concurring opinion which was joined by Justice Broussard. In a separate concurring opinion, Justice Mosk joined Justice Kennard's concurring opinion by reference.
7. *See infra* notes 28-31 and accompanying text.
8. *Wells Fargo*, 53 Cal. 3d at 1091, 811 P.2d at 1030, 282 Cal. Rptr. at 846.

nate a branch manager at pleasure where the manager meets the four-part definition of "other officers."[9] In addition, the court determined that the NBA preempts state law actions for wrongful termination[10] only where a board of directors terminates an officer or directors approve or ratify a termination.[11]

In *Wells Fargo*, Barbara Wertz, Wilma Botelho, and Thomas Moore were employed by Wells Fargo, a national banking association. Each employee held both branch manager and vice-president positions. In 1985, a senior vice-president discharged all three employees[12] without approval or ratification by the board of directors. Botelho and Moore filed a joint action,[13] and Wertz filed an action on her own behalf. Both suits alleged various common law actions including wrongful termination based on age discrimination.[14] Wells Fargo moved for summary judgment in both suits, asserting that all state common law causes of action were preempted by the NBA.[15] The trial court denied the motion.[16] Subsequently, the two actions were consolidated and heard by the court of appeal pursuant to a writ of mandate.[17] The court of appeal affirmed the trial court's ruling because the employees were not discharged by the board of

9. *Id.* at 1094, 811 P.2d at 1032, 282 Cal. Rptr. at 848.

10. *See generally* 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* § 163 (9th ed. 1987); 29 CAL. JUR. 3D *Employer and Employee* §§ 62-65 (1986 & Supp. 1991); Michael A. DiSabatino, Annotation, *Modern Status of Rule That Employer May Discharge At-Will Employee For Any Reason*, 12 A.L.R. 4TH 544 (1982) (discussing state law actions for wrongful termination).

11. *Wells Fargo*, 53 Cal. 3d at 1103, 811 P.2d at 1038, 282 Cal. Rptr. at 854.

12. *Id.* at 1086-87, 811 P.2d at 1027, 282 Cal. Rptr. at 843. Wells Fargo's bylaws authorized the directors to delegate the power to discharge "other officers" at pleasure. The directors delegated this power to the chief executive officer, who in turn delegated the power to the executive vice-president. *Id.*

13. *Id.* at 1087, 811 P.2d at 1027, 282 Cal. Rptr. at 843. Botelho and Moore filed an action with ten other Wells Fargo branch managers. However, at the time of trial, only Botelho and Moore remained. *Id.*

14. *Id.* The plaintiffs also alleged breach of an implied agreement, breach of the implied covenant of good faith and fair dealing, and intentional infliction of emotional distress. *Id.* *See generally* 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* §§ 171-77 (9th ed. 1987); 29 CAL. JUR. 2D *Employer and Employee* §§ 72-73 (1986 & Supp. 1991); 53 AM. JUR. 2D *Master and Servant* § 60 (1970 & Supp. 1991) (discussing specific wrongful termination actions).

15. *Wells Fargo*, 53 Cal. 3d at 1087, 811 P.2d at 1027, 282 Cal. Rptr. at 843.

16. *Id.* The trial court held, however, that Wells Fargo was entitled to summary judgment on the issue of intentional infliction of emotional distress. *Id.* Moreover, the court granted summary judgment to Wells Fargo on the age discrimination claim filed by Wertz. *Id.* Therefore, the remaining actions were for breach of an implied agreement and breach of the implied covenant of good faith and fair dealing. In addition, Botelho and Moore retained their claims for age discrimination. *Id.*

17. *Id.* at 1087, 811 P.2d at 1028, 282 Cal. Rptr. at 844.

directors.[18]

The supreme court faced two issues: (1) whether the term "other officers" in section 24 of the NBA includes branch managers;[19] and (2) whether the NBA permits directors to delegate the power to terminate officers.[20] The court held that although the branch managers were "other officers," the NBA did not authorize the directors to delegate the power to terminate at pleasure.[21] Therefore, the termination of the plaintiffs was not within the scope of the NBA, and the state law actions were not barred.[22]

II. TREATMENT

A. Majority Opinion

The California Supreme Court first interpreted the definition of "other officers." The court noted that the purpose of the NBA is to promote stability,[23] safety,[24] and public trust[25] among national banking associations.[26] Thus, the court argued that to accomplish this purpose, officers who possess great authority within a national banking association must be removable at pleasure.[27]

The court set forth a four-part test to determine which employees qualify as "other officers." The employee must: (1) hold "an office created by the board of directors and listed in the bank's bylaws[;]"[28] (2) be "appointed by the board of directors, either directly or pursuant to a delegation of board authority set forth in the bylaws[;]"[29] (3) have "express legal authority to bind the bank in its transactions . . . [;]"[30] and (4) have "decision-making authority . . . [which] relates to fundamental banking operations . . . ."[31] The court held that the plaintiffs, who were branch managers, met the above-mentioned test,[32] and therefore, were within the section 24 meaning of "other

18. Wells Fargo Bank v. Superior Court, 288 Cal. App. 3d 288, 291, 267 Cal. Rptr. 49, 50 (1990).

19. *Wells Fargo*, 53 Cal. 3d at 1086, 811 P.2d at 1026, 282 Cal. Rptr. at 842.

20. *Id.* at 1086, 811 P.2d at 1026-27, 282 Cal. Rptr. at 842-43.

21. *Id.* at 1086, 811 P.2d at 1027, 282 Cal. Rptr. at 843.

22. *Id.* at 1103, 811 P.2d at 1038, 282 Cal. Rptr. at 854.

23. *Id.* at 1089, 811 P.2d at 1029, 282 Cal. Rptr. at 845 (citing Alegria v. Idaho First Nat'l Bank, 111 Idaho 314, 316, 723 P.2d 858, 860 (1986)).

24. *Id.* at 1089, 811 P.2d at 1029, 282 Cal.Rptr. at 845 (citing Werstervelt v. Mohrenstecher, 76 F. 118, 122 (8th Cir. 1896)).

25. *Id.* (citing Mackey v. Pioneer Nat'l Bank, 867 F.2d 520, 529 (9th Cir. 1989)).

26. *Id.*

27. *Id.* (citing Westervelt v. Mohrenstecher, 76 F. 118, 122).

28. *Id.* at 1091, 811 P.2d at 1030, 282 Cal. Rptr. at 846 (citing 12 U.S.C. § 24 (1988)).

29. *Id.*

30. *Id.* (citing Minor v. Mechanics' Bank, 26 U.S. (1 Pet.) 46, 70 (1828)).

31. *Id.* (citing Westervelt v. Mohrenstecher, 76 F. 118, 122).

32. *Id.* The court noted that the position of branch manager was created by the directors and listed in the bylaws. Moreover, the plaintiffs were authorized to act on

officers."[33]

The court then analyzed the authority of the board of directors to delegate their power to terminate an officer at pleasure.[34] The court noted that directors cannot usually delegate authority given by a statute,[35] unless statutory law expressly provides for such delegation.[36] Accordingly, the court explained that because the NBA does not expressly grant directors the authority to delegate their power to terminate at pleasure,[37] this power is not delegable.[38]

B. Concurring Opinion

Justice Kennard agreed with the majority that directors may not delegate their power to terminate at pleasure.[39] Contrary to the majority, however, Kennard argued that branch managers are not within the section 24 definition of "other officers."[40] One basis for her conclusion was that the position of branch manager was not sufficiently similar to those expressly stated in section 24 of the NBA.[41] Justice Kennard's opinion emphasized that branch managers are not engaged in critical day-to-day management.[42] Kennard concluded, therefore, that allowing directors to remove branch managers at plea-

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the bank's behalf. Last, the plaintiffs were engaged in fundamental banking operations. *Id.*

33. *Id.* at 1094, 811 P.2d at 1032, 282 Cal. Rptr. at 848.

34. *Id.* The power of directors to terminate "other officers" at pleasure is derived from the NBA. 12 U.S.C. § 24 (1988). *See supra* note 3 and accompanying text.

35. *Wells Fargo*, 53 Cal. 3d at 1095, 811 P.2d at 1033, 282 Cal. Rptr. at 849 (citing MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 248 (1982)).

36. *Id.* at 1095-96, 811 P.2d at 1033, 282 Cal. Rptr. at 849 (citing CAL. CORP. CODE §§ 300, 309, 311 (West 1990) (examples of statutes which expressly authorize the delegation of power given by statute)).

37. *Id.* at 1096, 811 P.2d at 1033, 282 Cal. Rptr. at 849. *See also* 12 U.S.C. 24 (1988).

38. *Wells Fargo*, 53 Cal. 3d at 1095, 811 P.2d at 1032, 282 Cal. Rptr. at 848. The court did not address whether delegations under Wells Fargo regulations were permissible. *Id.* at 1096, 811 P.2d at 1032-33, 282 Cal. Rptr. at 848-49.

39. *Id.* at 1105, 811 P.2d at 1039, 282 Cal. Rptr. at 855 (Kennard, J., concurring).

40. *Id.* (Kennard, J., concurring). Justice Kennard also asserted that the majority's conclusion violated "basic principles of federal preemption law." *Id.* at 1106, 811 P.2d at 1039-40, 282 Cal. Rptr. at 855-56 (Kennard, J., concurring).

41. *Id.* at 1106-07 811 P.2d at 1040-41, 282 Cal. Rptr. at 856-57 (Kennard, J., concurring). *See generally* 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 94, 96 (1988); 73 AM. JUR. 2D *Statutes* §§ 155-60 (1974); Romualdo D. Eclavea, Annotation, *Supreme Court's Application of the Rules of Ejusdem Generis and Noscitur A Sociis*, 46 L. ED. 2D 879 (1977) (discussing the doctrine of *ejusdem generis*).

42. *Wells Fargo*, 53 Cal. 3d at 1108, 811 P.2d at 1041-42, 282 Cal. Rptr. at 857-58 (Kennard, J., concurring). Additionally, branch managers do not create policy, they merely apply it. *Id.* (Kennard, J., concurring). Finally, branch managers are not the "critical control" employees targeted by the statute. *Id.* (Kennard, J., concurring).

sure is beyond the scope of the NBA.[43]

III. CONCLUSION

In *Wells Fargo*, the court held that although branch managers qualify as "other officers," the NBA does not authorize directors to delegate their power to terminate at pleasure.[44] Therefore, the plaintiffs' state law actions for wrongful termination were not barred because the directors did not authorize or ratify the plaintiffs' removal.[45] The court did not rule whether the NBA would bar a state cause of action for wrongful termination based on age discrimination.[46] Thus, where directors terminate an officer at pleasure, the association may remain liable for age discrimination, notwithstanding the NBA.[47]

If the situation in *Wells Fargo* is indicative of the number of branch managers who are terminated by national banking associations, then requiring directors to approve the discharge of "other officers" under section 24 should not be overly burdensome.[48] Accordingly, banking associations should attempt to take advantage of section 24's broad protection[49] by requiring directors to approve an employee's removal if the employee might meet the court's definition of "other officers."[50]

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43. *Id.* at 1114, 811 P.2d at 1046, 282 Cal. Rptr. at 862 (Kennard, J., concurring).

44. *Id.* at 1086, 811 P.2d at 1027, 282 Cal. Rptr. at 843.

45. *Id.* at 1103, 811 P.2d at 1038, 282 Cal. Rptr. at 854.

46. *Id.* at 1104, 811 P.2d at 1039, 282 Cal. Rptr. at 855.

47. *Id. But see* Aalgaard v. Merchants Nat'l Bank, Inc., 224 Cal. App. 3d 674, 686-95, 274 Cal. Rptr. 81, 87-94, *cert. denied*, 112 S. Ct. 278 (1990) (wrongful termination claim based on age discrimination is preempted by the NBA).

48. *Wells Fargo*, 53 Cal. 3d at 1099-100, 811 P.2d at 1036, 282 Cal. Rptr. at 852. The court noted that from 1984 through 1985, thirteen branch managers were terminated. Hence, the court concluded that requiring directors to review thirteen dismissals was not overly burdensome. *Id.*

49. *See supra* notes 28-33 and accompanying text.

50. The court indicated that employees such as janitors and tellers do not come within section 24's scope. *Wells Fargo*, 53 Cal. 3d at 1094, 811 P.2d at 1032, 282 Cal. Rptr. at 848.

IX. PROPERTY LAW

A. *After spousal separation but before dissolution proceedings, because the marriage is still in effect, the character of community property remains unchanged. During this period (1) both spouses must consent to any sale, conveyance, encumbrance or lease greater than one year involving community property, and (2) a nonconsenting spouse, who brings suit during the marriage, may invalidate the transfer in its entirety:* **Droeger v. Friedman, Sloan & Ross**

I. INTRODUCTION

In *Droeger v. Friedman, Sloan & Ross*,[1] the California Supreme Court addressed two community property issues: (1) whether section 5127 of the California Civil Code[2] allows a spouse to encumber a one-half interest in community property without the other spouse's consent,[3] and (2) if the approval of the other spouse is required and if the transfer is challenged during the marriage, whether the appropriate remedy is voiding the entire transfer or only the nonconsenting spouse's one-half interest?[4]

Confusion over these issues resulted from legislative reforms in 1975, giving spouses equal managerial rights in community property.[5] Formerly, the nonconsenting spouse's remedy was clear and depended upon when the suit was initiated. If a suit were brought after the dissolution of the marriage or after the transferor-spouse's death, the court would set aside the transfer only as to the nonconsenting spouse's one-half interest.[6] On the other hand, if a suit were brought

1. 54 Cal. 3d 26, 812 P.2d 931, 283 Cal. Rptr. 584 (1991). Justice Panelli wrote the majority opinion in which Justices Lucas, Mosk, Broussard, Arabian and Baxter concurred. Justice Kennard dissented.

2. Section 5127 provides, in pertinent part, as follows:

> Except as provided in Sections 5110.150 and 5128, either spouse has the management and control of the community real property, . . . but both spouses . . . must join in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered.

CAL CIV. CODE § 5127 (West Supp. 1991). For convenience, the actions to which section 5127 applies (leases greater than one year, sales, conveyances, and encumbrances) are collectively referred to in this article as "transactions" or "transfers."

3. *Droeger*, 54 Cal. 3d at 30 n.3, 812 P.2d at 932 n. 3, 283 Cal. Rptr. at 585 n. 3.

4. *Id.* at 35-36, 812 P.2d at 936, 283 Cal. Rptr. at 589.

5. *Id.* at 35, 812 P.2d at 936, 283 Cal. Rptr. at 589. *See infra* notes 20-27 and accompanying text.

6. For suits brought after the divorce, see Pretzer v. Pretzer, 215 Cal. 659, 12 P.2d

during the marriage, the court would void the transfer in its entirety.[7] After the statutory amendments of 1975, however, one line of cases limited the nonconsenting spouse's remedy to voiding a one-half interest, regardless of the action's timing.[8] Another line of cases permitted the entire transfer to be set aside if the action was brought during the marriage.[9] To resolve this conflict, the California Supreme Court held in *Droeger* that a community property transfer pursuant to section 5127 requires the consent of both spouses, and the nonconsenting spouse can void the transaction in its entirety.[10]

II. STATEMENT OF THE CASE

Joanna Droeger retained the law firm of Friedman, Sloan & Ross (appellees) to file an action dissolving her marriage with John Droeger (appellant).[11] After the family law court granted only part of her pendente lite motion for attorneys fees and costs,[12] Joanna unilaterally executed a promissory note payable to the appellees, secured by a deed of trust on her interest in two parcels of community real property.[13] Before the dissolution proceedings were complete, however,[14] John brought suit in Superior Court for quiet title in the encumbered community realty,[15] arguing he had not joined in executing the note or deed of trust.

The Superior Court sustained appellee's demurrer, finding the deed of trust enforceable as to Joanna's one-half interest in the community property,[16] and denied John's motion for reconsideration.[17]

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429 (1932) and Heuer v. Heuer, 33 Cal. 2d 268, 201 P.2d 385 (1949). For suits brought after the transferor-spouse's death, see Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477 (1933) and Lahaney v. Lahaney, 208 Cal. 323, 281 P. 67 (1929). The rationale for a suit brought after death is the decedent spouse's right to testamentary disposition of a one-half interest.

7. *Droeger*, 54 Cal. 3d at 35, 812 P.2d at 936, 283 Cal. Rptr. at 589. The main pre-1975 authority for voiding transfers completely when the nonconsenting spouse sues during the marriage is Britton v. Hammell, 4 Cal. 2d 690, 52 P.2d 221 (1936). *See infra* notes 35-38 and accompanying text.

8. *See, e.g.*, Mitchell v. American Reserve Ins. Co., 110 Cal. App. 3d 220, 167 Cal. Rptr. 760 (1980). *See infra* notes 28-33 and accompanying text.

9. *See, e.g.*, Andrade Dev. Co. v. Martin, 138 Cal. App. 3d 330, 187 Cal. Rptr. 863 (1983). *See infra* notes 34-38 and accompanying text.

10. *Droeger*, 54 Cal. 3d at 30, 812 P.2d at 932, 283 Cal. Rptr. 585.

11. *Id.*

12. *Id.* at 30, 812 P.2d at 932-33, 283 Cal. Rptr. at 585-86. The pendente lite motion requested an award of attorneys fees and costs in the amount of $50,000. The court awarded only $9,600, retaining the right to consider the issue further at trial. *See generally* 11 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Husband and Wife* §§ 82, 185-95 (9th ed. 1990).

13. *Droeger*, 54 Cal. 3d at 47-48, 812 P.2d at 945, 283 Cal. Rptr. at 598 (Kennard, J., dissenting).

14. *Id.* at 30, 812 P.2d at 933, 283 Cal. Rptr. at 586.

15. *Id.*

16. *Id.* at 31, 812 P.2d at 933, 283 Cal. Rptr. at 586. Appellees relied on Mitchell v.

The Court of Appeal reversed, holding that section 5127 prevented division of community real property except by marital dissolution, or upon one spouse's death, or upon both spouses' agreement.[18] The California Supreme Court granted review.[19]

III. THE COURT'S OPINION

A. Justice Panelli's Majority Opinion

1. Legislative History

The legislative history of section 5127 reveals the development of California community property law in acknowledging the equal status of husband and wife.[20] In 1917, the legislature enacted the predecessor of section 5127[21] which continued to give husbands sole management and control of community real property, but also required the wives' signatures on instruments which "sold, conveyed or encumbered" community real property or created a lease for longer than a one-year period.[22] In 1927, the legislature (without augmenting the managerial power of wives) gave wives a "present, existing, and equal interest."[23] Finally, in 1975, the legislature gave spouses identical rights to manage and control community property[24]

American Reserve Ins. Co., 110 Cal. App. 3d 220, 167 Cal. Rptr. 760 (1980). *See infra* notes 28-33 and accompanying text.

17. *Droeger*, 54 Cal. 3d at 31, 812 P.2d at 933, 283 Cal. Rptr. at 586.

18. Droeger v. Friedman, Sloan & Ross, 228 Cal. App. 3d 301, 305, 267 Cal. Rptr. 178, 181 (1990), *certified for partial publication*. In reaching its conclusion, the appellate court relied on *Andrade*, discussed *infra* notes 34-38. *Droeger*, 228 Cal. App. 3d at 305, 267 Cal. Rptr. at 180-181.

19. Droeger v. Friedman, Sloan & Ross, 269 Cal. Rptr 767, 791 P.2d 337 (1990)

20. *Droeger*, 54 Cal. 3d at 31, 812 P.2d at 933, 283 Cal. Rptr. at 586. *See generally* 11 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* §§ 1-2 (9th ed. 1990 & Supp. 1991).

21. 1917 Cal. Stat. 829.

22. *Droeger*, 54 Cal. 3d at 33, 812 P.2d at 934, 283 Cal. Rptr. at 587.

23. *Id.* (citing 1927 Cal. Stat. 484; Byrd v. Blanton, 149 Cal. App. 3d 987, 992, 197 Cal. Rptr 190, 193 (1983), *reh'g denied*, 210 Cal. Rptr. 458, (1984)). This abrogated the concept of a wife's having no more than a mere expectancy in community property. For instance, that a wife's rights would not accrue unless "she survived the termination of the marriage." *Id.* at 812 P.2d at 933, 283 Cal. Rptr. at 586 (citations omitted). *See generally* 11 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* §§ 103-04 (9th ed. 1990).

24. CAL. CIV. CODE § 5125 (West Supp. 1991). *See generally* 11 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* §§ 105-06 (9th ed. 1990 & Supp. 1991); 32 CAL. JUR. 3D *Family Law* § 454 (1977 & Supp. 1991). This general rule is subject to a limited number of exceptions and restrictions. *See generally* 32 CAL. JUR. 3D *Family Law* § 455 (1977 & Supp. 1991).

and made section 5127 equally applicable to both spouses.[25] Although the rights and remedies of nonconsenting spouses were clear before the statutory amendments of 1975, thereafter, a split of authority developed in the California Courts of Appeal.[26]

2. Interpretive decisions

a. Transfer void as to nonconsenting spouse's one-half interest

The leading post-1975 appellate case holding that nonconsenting spouses who sue during the marriage can free only a one-half interest in community property encumbered in violation of section 5127 is *Mitchell v. American Reserve Insurance Company*.[27] The *Mitchell* court reasoned that because the community is liable for both spouses' contracts made after marriage, debts contracted during marriage can also be satisfied with community realty.[28] However, the *Droeger* court criticized the *Mitchell* court's reliance on *Gantner v. Johnson*,[29] which was premised on the husband's being the sole manager of community property.[30] Since the 1975 reforms to section 5127 gave both spouses equal managerial control, this premise was no longer valid[31] and the court overruled *Mitchell* and its progeny.[32]

b. Transfer void in its entirety

In the second line of post-1975 cases, the leading authority for the nonconsenting spouse's ability to void transfers entirely was *Andrade Development Company v. Martin*.[33] *Andrade* relied on the pre-1975 California Supreme Court case *Britton v. Hammell*.[34] The *Britton*

25. *Droeger*, 54 Cal. 3d at 35, 812 P.2d at 936, 283 Cal. Rptr. at 589 (citing 1974 Cal. Stat. 2610).

26. Both lines of appellate court cases agreed that one spouse, acting alone, cannot create a valid lien on the entire property. *Droeger*, 54 Cal. 3d at 31, 812 P.2d at 933, 283 Cal. Rptr. at 586.

27. 110 Cal. App. 3d 220, 167 Cal. Rptr. 760 (1980) (husband executed a promissory note secured by a trust deed in order to obtain a bail bond for a third party). *Id.* at 222, 167 Cal. Rptr. 760.

28. *Id.* at 223, 167 Cal. Rptr. at 761.

29. 274 Cal. App. 2d 869, 79 Cal. Rptr. 381 (1969).

30. *Id.* at 876-877, 79 Cal. Rptr. at 386.

31. *Droeger*, 54 Cal. 3d at 37, 812 P.2d at 937, 283 Cal. Rptr. at 590 (quoting *Andrade*, 138 Cal. App. 3d at 337, 187 Cal. Rptr. at 863).

32. *Id.* at 37, 812 P.2d at 937, 283 Cal. Rptr. at 590. Even before the state supreme court decided *Droeger*, at least two commentators asserted that the *Mitchell* decision was incorrect. *See* WILLIAM M. BASSETT, CALIFORNIA COMMUNITY PROPERTY LAW § 8.03[A](7) (1988); *William A. Reppy, Jr., Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management and Invalid Marriage*, 18 SAN DIEGO L. REV. 143 (1981).

33. 138 Cal. App. 3d 330, 187 Cal. Rptr. 863 (1982). In this case, a wife nullified a contract between her husband and a buyer of certain community property because only her husband had signed the contract. *Id.* at 332, 335, 187 Cal. Rptr. at 864, 866.

34. 4 Cal. 2d 690, 52 P.2d 221 (1935). *Britton* involved property transfers from a husband to his purported second wife, from the second wife back to her husband, and

holding was preserved because the 1975 reforms brought only one of the *Britton* rationales into question without invalidating it[35] and because the remaining three rationales survived the 1975 reforms intact.[36] The state high court concluded that *Britton* was still good law and controlled the present situation. The court then reaffirmed the entire *Andrade* line of cases.[37]

3. Policy Considerations

Two policy arguments were explored concerning the "economically weak spouse."[38] First, a spouse who lacks liquid funds or separate property to sell or mortgage may be able to pay legal fees only by using an interest in the community property.[39] The court pointed out, however, that statutory provisions, however imperfect, already existed to protect spouses in such situations.[40]

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then from the husband to a third party. However, because (1) the first marriage still existed at the time of the conveyances, and (2) the first wife brought suit before the husband's death, she was able to void the transfers completely. *Id.* at 691-92, 52 P.2d 222. *See supra* note 6 for cases brought after divorce or death.

The complexity of the present case arises from the fact that, although a marriage continues until entry of a dissolution judgement, separation changes the nature of the parties' relationship in that they live apart and are legal adversaries. *Droeger*, 54 Cal. 3d at 52, 812 P.2d at 949, 283 Cal. Rptr. at 602 (Kennard, J., dissenting) (citing CAL. CIV. CODE §§ 4501 & 5125(e)(West 1987)). *See generally* 33 CAL. JUR. 3D *Family Law* § 560 (termination of marriage in general), § 668 (effect of interlocutory judgment), § 670 (separation of parties), and § 691 (effect of final judgment) (1977 & Supp. 1991).

35. At the time of the *Britton* decision, a court could award an innocent wife more than one-half the community property where the husband's extreme cruelty or adultery led to the divorce. *Droeger*, 54 Cal. 3d at 34, 37-38, 812 P.2d at 935, 937, 283 Cal. Rptr. at 588, 590. A wife was able, therefore, to get an entire transaction set aside. *Id.*

36. The remaining three rationales were: (1) the husband retained complete control of the community property, therefore, recovery of only one-half would not protect the wife's interests; (2) if one-half the community property was made the wife's separate property, it would lead to the undesirable partition of the community property *during* the marriage; and (3) all cases allowing recovery of only one-half the community property involved suits brought *after* the marriage and were based on the husband's right to testamentary disposition. *Id.* at 34, 812 P.2d at 935, 283 Cal. Rptr. at 590.

37. *Id.* at 36, 812 P.2d at 937, 283 Cal. Rptr. at 590.

38. *Id.* at 40, 812 P.2d at 939, 283 Cal. Rptr. at 592.

39. *Id.*

40. *Id.* at 40-41, 812 P.2d at 939-40, 283 Cal. Rptr. at 592-93 (noting CAL. CIV. CODE §§ 4370, 4370.5 & 5125.1(e)). Section 4370 authorizes pendente lite orders for costs and attorneys fees and section 4370.5 states that in apportioning the litigation costs *equitably* between the parties, the court must consider the "*relative* circumstances" of the parties. Moreover, the fact that a party has the financial resources to pay attorneys fees does not automatically prohibit a court award; it is only a factor to consider. CAL. CIV. CODE §§ 4370-4370.5 (West Supp. 1991). Section 5125.1(e) provides, in pertinent part, that

[i]n any transaction affecting the community property in which the consent of

Second, section 412.21(a)(2) of the Code of Civil Procedure[41] creates an exception to Civil Code section 5127,[42] eliminating the need for the other spouse's consent where community property is used to pay attorney fees. Noting, however, that the wife in this case executed the trust deeds encumbering the community property more than three years before the effective date of section 412.21(a)(2),[43] the court reasoned the provision was inapplicable.[44] Moreover, according to the majority,

> section 412.21(a)(2) . . . merely frees a party from the prohibitions of the *automatic* restraining order [of section 412.21] so that community property *may be* used to pay reasonable attorney's fees. The statute does not . . . address the substantive issue of the legality of unilateral sales, leases, conveyances, or encumbrances of community real property.[45]

Thus, section 412.21(a)(2) may apply only to liquid community property, such as a bank account, rather than realty.[46]

B. Justice Kennard's Dissenting Opinion

After noting the disadvantaged position in which the majority opin-

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> both spouses is required, the court may, upon the motion of a spouse, dispense with the requirement of the other spouse's consent if . . . (1) The proposed transaction is in the best interest of the community, [and] (2) Consent has been arbitrarily refused or cannot be obtained due to the physical incapacity, mental incapacity or prolonged absence of the nonconsenting spouse.

CAL. CIV. CODE § 5125.1(e) (West Supp. 1991).

The majority acknowledged, however, that these statutes may be illusory remedies in that the spouse may have difficulty hiring an attorney to enforce such rights. *Droeger*, 54 Cal. 3d at 41, 812 P.2d at 940, 283 Cal. Rptr. at 593.

41. The relevant portion of section 412.21(a) provides that "in an action for dissolution of marriage, . . . the summons shall . . . contain temporary restraining orders set forth in this section. However, nothing in the restraining order shall preclude the parties from using community property to pay reasonable attorney's fees in order to retain legal counsel in the action." CAL. CIV. PROC. CODE § 412.21(a) (West Supp. 1991).

42. *Droeger*, 54 Cal. 3d at 40, 812 P.2d at 939, 283 Cal. Rptr. at 592.

43. Section 412.21(a)(2) became effective July 1, 1990. *Id.* at 42-43, 812 P.2d at 941, 283 Cal. Rptr. at 594.

44. *Id.* Statutes are not retroactive unless explicitly stated. CAL. CIV. PROC. CODE § 3 (West 1982). The dissent argued, however, that section 412.21(a)(2) reveals the legislature's understanding of the statutory limitations on community real property transactions. *Droeger*, 54 Cal. 3d at 55, 812 P.2d at 949, 283 Cal. Rptr. at 602 (Kennard, J., dissenting). But the majority rebutted, "[a] subsequent expression of the legislature as to the intent of a prior statute is not binding." *Id.* at 44 n.14, 812 P.2d at 942 n.14, 283 Cal. Rptr. at 595 n.14 (citations omitted).

45. *Droeger*, 54 Cal. 3d at 43, 812 P.2d at 941, 283 Cal. Rptr. at 594 (emphasis added). Additional reasons why section 412.21 does not create an express or implied exception to section 5127 are that (1) section 412.21 pertains to *procedure* while section 5127 pertains to *substantive* law, and (2) neither section 412.21 nor its legislative history refers to section 5127. *Id.* at 43-44, 812 P.2d at 941-42, 283 Cal. Rptr. at 594-95.

46. *Id.* Justice Kennard disagreed that section 412.21(a)(2) pertains only to personal property stating that if the legislature wanted to distinguish personal from real property, it would have done so expressly. *Id.* at 51-52, 812 P.2d at 600, 283 Cal. Rptr. at 947. (Kennard, J., dissenting) (comparing the first sentence in section 412(a)(2), which refers to both real and personal property, with the second sentence, which refers to community property in general).

ion placed spouses who do not have substantial funds,[47] Justice Kennard argued that the plain meaning rule[48] is not the only tool for interpreting statutes.[49] Another canon of statutory construction is that statutes relating to the same subject should be construed together.[50] Since both California Civil Procedure Code section 412.21(a)(2)[51] and California Civil Code section 5127[52] relate to community property, the court should read them together when ascertaining legislative intent.[53] Justice Kennard then reasoned that the last sentence in section 412.21(a)(2), which expressly approves the use of community property to secure attorneys' fees in dissolution cases, would be pointless unless the legislature specifically intended to give spouses the power to encumber community real property to the extent of their interests in such circumstances.[54] Under this reasoning, the encumbrance would be valid as to the wife's interest.[55]

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47. The only alternative for such spouses may well be to proceed without any legal representation whatsoever, especially in cases that normally require substantial legal work, such as contested child custody or property valuations, both of which typically require extensive discovery and motion work. *Id.* at 48-49, 812 P.2d at 945, 283 Cal. Rptr. at 598. Furthermore, a survey conducted in 21 California counties revealed that court-ordered attorney fees in marital dissolution proceedings are often inadequate. This, in turn, handicaps the spouse with little or no income, most often women, in retaining counsel. *Id.* at 49, 812 P.2d at 946, 283 Cal. Rptr. at 599.

48. *See generally* 58 CAL. JUR. 3D *Statutes* §§ 123, 125, 133 (1980) (concerning plain meaning, technical meaning and legislative intent); 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 94 (9th ed. 1990 & Supp. 1991) (general rules of statutory interpretation).

49. *Droeger*, 54 Cal. 3d at 50, 812 P.2d at 946, 283 Cal. Rptr. at 599 (Kennard, J., dissenting). Husband-Appellant relied on the plain meaning rule when arguing that the term "any interest" in section 5127 means that "both spouses must join in an instrument encumbering that interest, or the instrument is entirely void." *Id.* The majority agreed with this argument. *Id.* at 38, 812 P.2d at 938, 283 Cal. Rptr. at 591.

50. *Id.* at 50, 812 P.2d at 946-947, 283 Cal. Rptr. at 599-600 (Kennard, J., dissenting) (citing Hunstock v. Estate Dev. Corp., 22 Cal. 2d 205, 210, 138 P.2d 1, 4 (1943)). *See generally* 58 CAL. JUR. 3D *Statutes* §§ 108, 109, 124, 127, 160 (1980).

> One who questions the application of the plain meaning rule to the provision of an act must show either that some other section of the act expands or restricts its meaning, that the provision itself is repugnant to the general purview of the act, or that the act considered in pari materia with other acts, or with the legislative history of the subject matter, imports a different meaning.

2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.01 (5th ed. 1992) (footnote omitted). *Compare* Great Lakes Properties, Inc. v. City of El Segundo, 19 Cal. 3d 152, 561 P.2d 244, 137 Cal. Rptr. 154 (1974) (plain meaning rule) *with* Leroy T. v. Workmen's Comp. Appeals. Bd., 12 Cal. 3d 434, 525 P.2d 665, 115 Cal. Rptr. 761 (1974) (act considered *in pari materia* with other acts).

51. *See supra* note 41 for statutory text.

52. *See supra* note 2 for statutory text.

53. *Droeger*, 54 Cal. 3d at 52, 812 P.2d at 949, 283 Cal. Rptr. at 599.

54. *Id.* at 51, 812 P.2d at 947, 283 Cal. Rptr. at 600 (Kennard, J., dissenting).

55. *Id.* at 54, 812 P.2d at 949, 283 Cal. Rptr. at 602. *Accord* CALIFORNIA FAMILY

IV. IMPACT

As a result of the decision in *Droeger*, economically weak spouses are not able to encumber their one-half interest in community *real* property for any reason, including the need to pay attorneys fees and costs associated with a marital dissolution proceeding. The majority did leave spouses the ability to unilaterally encumber interests in community *personal* property pursuant to section 412.21.[56] However, the impact of this decision is not limited to economically weak spouses.[57] The entire real estate industry is affected,[58] including buyers, real estate brokers and escrow companies[59] in addition to anyone who takes a deed of trust to secure a debt.[60] Thus, even debt collection from married persons is affected.[61] The debt remains valid, but the mortgagee will not able to satisfy that debt by going against the property itself.

It appears the majority treats gifts of community real property the same as transactions for consideration.[62] There are a few issues which the court did not address. One is waiver or estoppel as a bar to a nonconsenting spouse's challenge to set aside the transfer.[63] Another is whether a bona fide purchaser's[64] rights prevail over those of the nonconsenting spouse. If prior law remains valid, the noncon-

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LAW SERVICE, TERMINATION OF MARITAL RELATIONSHIP § 21:18 (1986) ("[T]he right to place a lien on the client's property [in dissolution actions] is often created in the fee agreement to provide security for the payment of fees. Typically, such a lien may be in the form of a second deed of trust on the client's real property"); 3 CHRISTIAN E. MARKEY, JR., CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE § 40.32[4] (rev. ed. 1991) ("If the money [to pay the attorney a retainer in a dissolution proceeding] cannot be obtained from community bank accounts, the spouse should consider borrowing the money using community property as security").

56. *See infra* notes 45-46 and accompanying text.

57. According to the dissent, the majority opinion makes it "virtually impossible for many economically weaker spouses to obtain adequate legal representation in contested divorce proceedings." *Droeger*, 54 Cal. 3d at 47, 812 P.2d at 944, 283 Cal. Rptr. at 597 (Kennard, J., dissenting).

58. *Firm Picks Top Real Estate Cases for the Year; Environmental Issues Dominate Legal Decisions on Real Estate in 1990*, BUSINESS WIRE, Jan. 4, 1991, *available in* LEXIS, NEXIS Library, CURRNT File.

59. *See, e.g., Andrade*, 187 Cal. Rptr. 863, 138 Cal. App. 3d 330 (1987) (buyer, real estate broker and escrow company involved).

60. For example, institutional banks and attorneys.

61. REPPY, *supra* note 32 at 204-05.

62. Presumably, this remains unchanged from pre-1975 cases involving inter vivos gifts. *See, e.g.*, Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477 (1933); Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537 (1916); Lahaney v. Lahaney, 208 Cal. 323, 281 P. 67 (1929). *See generally* 11 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* §§ 112-114, 118 (9th ed. 1990 & Supp. 1991). The outcome would still depend upon when the nonconsenting spouse initiated the action. *See infra* notes 6-7 and accompanying text.

63. *See generally* 11 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 113 (1990); 32 CAL. JUR. 3D *Family Law* § 426 (1977). Since these are equitable remedies, they would still appear to be valid.

64. *Andrade* did not involve a bona fide purchaser. The buyer had knowledge of

senting spouse would still be able to recover, but only if the action were brought within one year.[65] An innocent purchaser would then be entitled to restoration of consideration[66] and married persons who concealed their married status would be subject to criminal liability.[67] *Droeger* also did not address the one-year statute of limitations, which appears to operate when (1) the transaction involves a bona fide purchaser, or (2) the instrument is recorded in the name of only one spouse.[68]

V. CONCLUSION

Neither the majority nor the dissent diminishes the effect of the last sentence in section 412.21(a)(2). The disagreement concerns interpretation. Courts can only construe statutes; they cannot create them. The legislature is free to create exceptions if it chooses.[69] For example, it could treat the separation period differently from an ongoing marriage for purposes of spousal consent concerning community property. This would destroy the premise that the character of community real property remains unchanged between separation and entry of final dissolution judgment.[70] Another option is to expressly provide that section 412.21(a)(2) pertain to both personal *and* real property.[71] In the meantime, both spouses must sign the trust deed.[72]

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the seller's marriage because the contract had a signature line for the wife. *Andrade*, 138 Cal. App. 3d at 332, 187 Cal. Rptr. at 864.

65. Mark v. Title Guar. & Trust Co., 122 Cal. App. 301, 9 P.2d 839 (1932). *See generally* 11 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 124 (1990).

66. *Mark*, 112 Cal. App. 301, 9 P.2d 839.

67. CAL. PENAL CODE § 534 (West 1988) (wilfully entering transaction with false representation is a felony). *See generally* 32 CAL. JUR. 3D *Family Law* § 470 (1977).

68. *See generally* 11 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* §§ 123-24 (1990).

69. *Droeger*, 54 Cal. 3d at 41, 812 P.2d at 940, 283 Cal. Rptr. at 593.

70. The legislature has done exactly this in California Civil Code sections 5118 (providing that the earnings and accumulations of either spouse during separation are the separate property of that spouse), 5120.140(a)(2) (providing debts incurred after separation, other than debts for the necessaries of life, are the separate obligation of the spouse who incurred the debt) and 4359(a) (providing that during the pendency of a dissolution proceeding, the court may issue ex parte protective orders restraining any person from transferring, encumbering, hypothecating, concealing or disposing of any property, real or personal, whether community, quasi-community, or separate). CAL. CIV. CODE §§ 5118, 5120.140(a)(2) and 4359(a)(West 1988 & Supp. 1991).

71. *See supra* note 46 and accompanying text.

72. Because it is retroactive, section 5127 pertains to *all* transactions, regardless of

B. *In an action against a title insurer for breach of the duty to defend, the limitation period provided in section 339(1) of the Civil Procedure Code accrues upon discovery of loss or harm, but is equitably tolled until entry of final judgment in the underlying action:* **Lambert v. Commonwealth Land Title Insurance Company**

I. INTRODUCTION

In *Lambert v. Commonwealth Land Title Insurance Company*,[1] the California Supreme Court resolved a split in the courts of appeal[2] regarding the effect of section 339(1) of the Code of Civil Procedure (hereinafter section 339(1)).[3] The court concluded that in an action against a title insurer for breach of the duty to defend,[4] the two-year limitation period provided in section 339(1) commences upon discovery of loss or harm,[5] but is equitably tolled[6] until entry of a final

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when the property was transferred. *See generally* 11 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 123 (1990).

1. 53 Cal. 3d 1072, 811 P.2d 737, 282 Cal. Rptr. 445 (1991). In *Lambert*, Commonwealth Land Title Insurance Company [hereinafter Commonwealth] issued a title insurance policy to Lambert covering a purchase of real property. Thereafter, a neighboring property owner instituted a claim against Lambert, asserting an easement by implication. On April 26, 1985, Commonwealth refused to defend the third-party claim and denied coverage under the title insurance policy. Lambert subsequently successfully defended the claim, and judgment was entered for Lambert on October 26, 1987. On October 24, 1988, Lambert instituted a claim against Commonwealth for breach of the duty to defend. The trial court sustained Commonwealth's demurrer without leave to amend and the court of appeal affirmed, holding that the action was barred under the Code of Civil Procedure section 339(1). *Id.* at 1075, 811 P.2d at 738, 282 Cal. Rptr. at 446. *See infra* note 3.

2. *Compare* Central Bank v. Transamerica Title Ins. Co., 85 Cal. App. 3d 859, 866, 149 Cal. Rptr. 822, 826 (1978) (the two-year limitation period of section 339(1) accrues after the insured incurs attorneys' fees) *with* Israelsky v. Title Ins. Co. of Minn., 212 Cal. App. 3d 611, 623, 261 Cal. Rptr. 72, 80 (1989) (the two-year limitation period of section 339(1) accrues after entry of final judgment on the underlying litigation.) For an historical perspective, see HOSACK, CALIFORNIA TITLE INSURANCE PRACTICE § 5.11 (Supp. 1990).

3. Section 339(1) states that a two-year limitation period will be applied to actions involving title insurance, "provided[] that the cause of action upon a . . . policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder." CAL. CIV. PROC. CODE § 339(1) (West 1982 & Supp. 1991).

4. *See generally* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 1136, 1140 (9th ed. 1988); 1 CAL. JUR. 3D *Abstracters and Title Insurers* §§ 22, 25 (1972 & Supp. 1991); Annotation, *Limitation of Action Against Insurer for Breach of Contract to Defend*, 96 A.L.R. 2D 1193 (1979).

5. Lambert v. Commonwealth Land Title Ins. Co., 53 Cal. 3d 1072, 1077, 811 P.2d 737, 739, 282 Cal. Rptr. 445, 447 (1991). The court indicated that discovery of loss or harm occurs when the insurer refuses to defend an insured in the underlying litigation. *Id. See generally* 3 B. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 351 (3rd ed. 1985 & Supp. 1991); 1 CAL. JUR. 3D *Abstracters and Title Insurers* § 25 (1972 & Supp. 1991); 51 AM. JUR. 2D *Limitation of Actions* § 107 (1970 & Supp. 1991).

6. *Lambert*, 53 Cal. 3d at 1077-78, 811 P.2d at 739-40, 282 Cal. Rptr. at 447-48. Courts may apply the doctrine of equitable tolling to statutory limitations to avoid un-

judgment in the underlying litigation.[7]

II. ANALYSIS

The court stated three reasons for equitably tolling the statutory limitation period in the present case: (1) the duty to defend is a continuing obligation;[8] (2) inequity results when the underlying litigation proceeds beyond the two-year limitation period of section 339(1);[9] and (3) the insurer is not prejudiced by tolling the statutory limitation period.[10]

III. CONCLUSION

By equitably tolling the statutory period in actions for breach of the duty to defend, the court allows the insured the option of immediately pursuing an action against a title insurer or waiting until the duty to defend expires.[11] This application of the equitable tolling doctrine is reasonable since other courts have applied the doctrine to

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fair technical forfeitures. 54 C.J.S. *Limitations of Actions* § 86 (1987). *See* Prudential-LMI Commercial Ins. v. Superior Court, 51 Cal. 3d 674, 687-93, 798 P.2d 1230, 1238-42, 274 Cal. Rptr. 387, 395-99 (1990) (discussing policy and application of the equitable tolling doctrine).

7. *Lambert*, 53 Cal. 3d at 1080, 811 P.2d at 741-42, 282 Cal. Rptr. at 449-50. Justice Arabian authored the unanimous opinion.

8. *Id.* at 1077-78, 811 P.2d at 739-40, 282 Cal. Rptr. at 447-48. The court noted that where a continuing obligation had been breached, California courts consistently allowed plaintiffs the option of filing actions after the duty had expired. *Id. See* Israelsky v. Title Ins. Co. of Minn., 212 Cal. App. 3d 611, 261 Cal. Rptr. 72 (1989) (insurer's duty to defend); Union Sugar Co. v. Hollister Estate Co., 3 Cal. 2d 740, 47 P.2d 273 (1935) (continuing beet farming contract); Horacek v. Smith, 33 Cal. 2d 186, 199 P.2d 929 (1948) (contract for services over fifteen years); Brooks v. Van Winkle, 161 Cal. App. 2d 734, 327 P.2d 151 (1958) (services of attorney). *See generally* 3 B. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 376, 441 (3rd ed. 1985 & Supp. 1990).

9. *Lambert*, 53 Cal. 3d at 1077-78, 811 P.2d at 739-40, 282 Cal. Rptr. at 447-48. The court indicated that where the underlying action continues beyond two years, the insured must either defend the underlying litigation and institute an action against the insurer or forfeit his right to bring an action against the insurer. *Id.* at 1077, 811 P.2d at 739, 282 Cal. Rptr. at 447. It is unfair to require the insured to simultaneously bear the cost of proceeding with both actions. *Id.* at 1078, 811 P.2d at 740, 282 Cal. Rptr. at 448. *See also Israelsky*, 212 Cal. App. 3d at 619, 261 Cal. Rptr. at 77.

10. *Lambert*, 53 Cal. 3d at 1079, 811 P.2d at 740-41, 282 Cal. Rptr. at 448-49. The court noted that when an insured submits a third-party action to an insurer, the insurer becomes aware of a potential duty to defend and must preserve records to prepare for subsequent litigation with the insured. *Id. See also Prudential*, 51 Cal. 3d at 691, 798 P.2d at 1231, 274 Cal. Rptr. at 398. *See generally* 54 C.J.S. *Limitations of Actions* § 86 (1987) (discussing prejudice as a factor for application of the equitable tolling doctrine).

11. *Lambert*, 53 Cal. 3d at 1080, 811 P.2d at 741, 282 Cal. Rptr. at 449.

similar actions involving a continuing obligation.[12]

RICHARD JOHN BERGSTROM III

X. TAX LAW

Charter city taxation of financial corporations is a matter of statewide concern, cannot be considered a "municipal affair," and is subject to preemption by the State: **California Federal Savings and Loan Association v. City of Los Angeles.**

I. INTRODUCTION

In *California Federal Savings and Loan Association V. City of Los Angeles*[1] (hereinafter *CalFed*), the city challenged the constitutionality of Revenue and Taxation Code section 23182[2] which created a statewide unitary tax regime for all financial corporations[3] and removed financial corporations from municipal tax rolls. The city claimed this violated its express right as a charter city[4] to raise local

12. *See supra* note 8.

1. 54 Cal. 3d 1, 812 P.2d 916, 283 Cal. Rptr. 569 (1991). Justice Arabian wrote the majority opinion in which Chief Justice Lucas, and Justices Broussard, Panelli, Kennard, and Baxter concurred. Justice Mosk concurred in the judgment.

2. Revenue and Taxation Code § 23182 states, in pertinent part, "The tax imposed under this part upon banks and financial corporations is in lieu of all other taxes and licenses, state, county and municipal, upon the said banks and financial corporations. . . ." CAL. REV. & TAX. CODE § 23182 (West Supp. 1991). This effectively extended the "in lieu" taxation shield, formerly available only to commercial banks, to all financial corporations. *See* 9 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* § 267 (9th ed. 1989 and Supp. 1991). Unless otherwise noted, all statutory references in the text are to the Revenue and Taxation Code.

3. Under the California Revenue and Taxation Code, there is no statutory definition of "financial corporations." However, the California Supreme Court recognized the federal definition of financial corporations as those corporations dealing in "moneyed capital." Crown Fin. Corp. v. McColgan Washington Fin. Co., 23 Cal. 2d 280, 284-85, 144 P.2d 331, 333 (1943). *See also* Marble Mortgage Co. v. Franchise Tax Bd., 241 Cal. App. 2d 26, 31-34, 50 Cal. Rptr. 345, 348-51 (1966). *See generally* Roger J. Traynor and Frank M. Keesling, *Recent Changes in Franchise Tax Act*, 22 CAL. L. REV. 499, 509-25 (1934).

Revenue and Taxation Code section 23183(b) exempts leasing companies from assessment as "financial corporations," stating "[T]he term 'financial corporation' does not include any corporation, including any wholly owned subsidiary of a bank or bank holding company, if the principal business activity of such entity consists of leasing tangible personal property." CAL. REV. & TAX. CODE § 23183(b) (West Supp. 1991).

4. The 1896 amendment to the California Constitution provided for municipal home rule. The state constitution now states:

> It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

revenue under the "municipal affairs" clause of the California Constitution.[5] Adding another dimension to the "municipal affairs" doctrine,[6] the California Supreme Court held that the Legislature's preemption of municipal taxes was, in this instance, entirely constitutional.[7] The court reasoned that the taxation of financial corporations had acquired a " 'supramunicipal' dimension," and was a matter of "statewide concern," rather than a "municipal affair."[8]

In *CalFed*, the petitioner paid its city business license tax for 1982-84 under protest and filed a refund action citing section 23182. The Court of Appeal rejected the trial court finding that taxation of financial corporations was a subject of "statewide concern," and held that charter city tax measures were immune from state legislative enactment.[9] The Supreme Court of California reversed the appellate court, stating that the perceived distinction between charter city regulatory enactments and taxation measures was "illusory."[10] The issue became one of defining "municipal affairs."

II. TREATMENT OF THE CASE

The court began its analysis by reviewing California's tax treatment of commercial banks and savings banks.[11] State taxation of national commercial banks was dictated, in great part, by a number of United States Supreme Court holdings in the 1920s.[12] Responding to

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CAL. CONST. art. XI, § 5(a).

5. *CalFed*, 54 Cal. 3d at 6, 812 P.2d at 918, 288 Cal. Rptr. at 571. *See supra* note 4. *See also Ex Parte* Braun, 141 Cal. 204, 209, 74 P. 780, 782 (1903) ("That the power of taxation is a power appropriate for a municipality to possess is too obvious to merit discussion.")

6. For an exhaustive study of the development of home rule in California, see Sho Sato, *"Municipal Affairs" in California*, 60 CAL. L. REV. 1055 (1972).

7. *CalFed*, 54 Cal. 3d at 7, 812 P.2d at 918, 288 Cal. Rptr. at 571.

8. *Id.*

9. *Id.* at 6, 812 P.2d at 918, 288 Cal. Rptr. at 571. In holding that the tax measures were immune from legislative enactment, the appellate court relied heavily on the taxation/regulatory distinction first enunciated in Weeks v. City of Oakland, 21 Cal. 3d 386, 398-409, 579 P.2d 449, 455-463, 146 Cal. Rptr. 558, 564-572 (1978) (Richardson, J., concurring).

10. *CalFed*, 54 Cal. 3d at 14, 812 P.2d at 923, 283 Cal. Rptr. at 576.

11. *CalFed*, 54 Cal. 3d at 7-10, 812 P.2d at 918-921, 283 Cal. Rptr. at 571-74. The petitioner, a federally chartered thrift institution, was chartered under the Home Owners' Loan Act, 12 U.S.C. 1461-70 (1978). *See generally* 13 AM. JUR. 2D *Building and Loan Associations* §§ 10, 88 (1986). Commercial banks are chartered nationally under the National Bank Act, 12 U.S.C. § 21-42 (1978). *See generally* 19 AM. JUR. 2D *Corporations* § 151 (1986); 9 CAL. JUR. 3D *Banks and other Financial Institutions* §§ 46-48 (1974 & Supp. 1991).

12. *CalFed*, 54 Cal. 3d at 8, 19 & n.14, 812 P.2d at 919, 926 & n.14, 283 Cal. Rptr. at

this framework, California created an "in lieu" tax on net income applicable to both state and nationally chartered commercial banks.[13] To keep state and federal savings banks competitive with commercial banks, California implemented an "offset system" where municipal taxes were credited against a savings bank's net state tax.[14]

The Court of Appeal relied heavily on *Ex Parte Braun*,[15] a seminal home rule case, to support its position that taxation, as a municipal power, was "beyond the reach of legislative enactment."[16] Rejecting the appellate court's distinction between municipal regulatory enactments and municipal tax concerns, the supreme court revisited *Ex Parte Braun*. While reaffirming the soundness of the *Braun* holding, the court noted that *Braun* was an incomplete analysis that could not reflect the development of the "municipal affairs" doctrine over the past 75 years.[17]

In its affirmation of charter city sovereignty over matters conceded to be "municipal affairs," *Braun* implicitly recognized the legislature's right to dictate matters falling outside the "municipal affairs" schemes.[18] To address those areas that had not been reserved to the state by statute, the courts developed "statewide concern" doctrines. This "statewide concern" analysis is used to determine whether the subject of conflicting state and municipal enactments is properly a "municipal affair."[19]

The breadth of "municipal affairs" has been determined on a case by case basis with little guidance from the supreme court.[20] In *CalFed*, the court provided an analytical framework for resolving the

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572, 579 & n.14. *See* Western States Bankcard Assoc. v. City and County of San Francisco, 19 Cal. 3d 208, 215-16, 561 P.2d 273, 277, 137 Cal. Rptr. 183, 187 (1977). *See also* 9 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* §§ 265-68 (9th ed. 1989 & Supp. 1991); 11 CAL. JUR. 3D *Business and Occupation Licenses* § 40 (1974 & Supp. 1991).

13. *CalFed*, 54 Cal. 3d at 8, 812 P.2d at 919, 283 Cal. Rptr. at 572. The "in lieu" tax was a statewide unitary tax which preempted all other taxation of national and state banks. *Id.*

14. *Id.*

15. 141 Cal. 204, 74 P. 780 (1903).

16. *Braun*, 141 Cal. at 207, 74 P. at 781. *Braun* and its companion case, *Ex Parte* Helm, 143 Cal. 553, 77 P. 453 (1904), put to rest the notion of state control of a charter city's power to tax "municipal affairs." *See* 11 CAL. JUR. 3D *Business and Occupation Licenses* §§ 18, 19, 21, 34 (1974).

17. *CalFed*, 54 Cal. 3d at 13, 812 P.2d at 922-23, 283 Cal. Rptr. at 575-76. *See* 9 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation*, §§ 265-67 (9th ed. 1989 & Supp. 1991).

18. *CalFed*, 54 Cal. 3d at 13, 812 P.2d at 922, 283 Cal. Rptr. at 575.

19. *Id.* at 14 n.12, 812 P.2d at 923 n.12, 283 Cal. Rptr. at 576 n.12. *See* Richard I. Hiscocks and Marie Backes, *Charter City Financing in California—A Growing 'Statewide Concern'?* 16 U.S.F. L. REV. 603 (1982); Sato, *supra* note 5.

20. *CalFed*, 54 Cal. 3d at 6, 812 P.2d at 917, 283 Cal. Rptr. at 570. "Although this court and the Court of Appeal have parsed that cryptic phrase in literally scores of cases . . . those 'wild words' have defeated efforts at a defining formulation of the content of "municipal affairs." *Id. See also* Pacific Tel. and Tel. Co. v. City and County of San Francisco, 51 Cal. 2d 766, 771, 336 P.2d 514, 517 (1959).

dispute between a "municipal affair" and a "statewide concern." First, the case must present an "actual conflict" between the competing claims of the state and the charter city.[21] Second, the focus of the inquiry must be whether the subject matter falls within the ambit of a legitimate statewide concern.[22]

In *CalFed*, the potential multiple taxation of the savings bank in the face of section 23182 fulfills the "actual conflict" requirement. Attempting to divine the legitimacy of the statewide concern, the court noted that the legislature had actively attempted to place all financial and non-financial corporations on an equal tax footing for over 60 years.[23] During that period, the state had the exclusive power to tax commercial banks. When major federal legislation of the 1970s and 1980s expanded both the investment powers and the services that savings banks could provide,[24] thrift institutions were transformed into something resembling their commercial counterparts. The current statewide deterioration of financial health in the savings and loan industry weighed heavily in favor of declaring all regulation of the industry a "statewide concern."[25]

The regulatory aspects of taxation were also addressed.[26] The court noted that the sole issue was whether the income tax burden on financial corporations "is of sufficient extramural dimensions to support legislative measures reasonably related to its regulation."[27] The court cited the legislative history[28] and the expressed legislative intent[29] of section 23182 in support of its deference to this current legislative intrusion into "municipal affairs."[30] The limited incursion

21. *CalFed*, 54 Cal. 3d at 16, 812 P.2d at 925, 283 Cal. Rptr. at 578.

22. *Id.* at 17, 812 P.2d at 925, 283 Cal. Rptr. at 578. *See supra* note 19 and accompanying text.

23. *CalFed*, 54 Cal. 3d at 18-19, 812 P.2d at 926-27, 281 Cal. Rptr. 579-80. The court noted that the United States Supreme Court decisions of the 1920s forced national bank taxation into the realm of a "statewide concern." By extension, the legislature's attempt to maintain competition throughout the financial services industry must also be construed as a "statewide concern." *Id.*

24. *Id.* at 22 n.18, 812 P.2d at 928 n.18, 283 Cal. Rptr. 581 n.18.

25. *Id.* at 22-23, 812 P.2d at 929, 283 Cal. Rptr. at 582.

26. *Id.*

27. *Id.* at 23-24, 812 P.2d at 930, 283 Cal. Rptr. at 583. *See generally* Ronald Hansen, *The Municipal Income Tax and State Preemption in California*, 11 SANTA CLARA L. REV. 343 (1971).

28. *CalFed*, 54 Cal. 3d at 10 n.9, 812 P.2d at 921 n.9, 283 Cal. Rptr. at 574 n.9. *See supra* note 19 and 22 and accompanying text. *Cf.* CAL. REV. & TAX. CODE § 23184.5 (West Supp. 1991).

29. *CalFed*, 54 Cal. 3d at 9-10 nn.7&8, 812 P.2d at 920 nn.7&8, 283 Cal. Rptr. at 573 nn. 7&8.

30. *Id.* at 24, 812 P.2d at 930, 283 Cal. Rptr. at 583. *See* Baggett v. Gates, 32 Cal. 3d

into the taxing powers of the municipalities lent additional weight to the court's belief that the taxation of financial corporations was a statewide concern[31] which could be preempted by the legislature.

III. IMPACT

Perhaps as important for its analysis as for its holding, *CalFed* provides a framework for resolving future "municipal affairs" cases.[32] As the economic and political interests of California's charter cities become increasingly intertwined with state interests, *CalFed*'s broad definition of the term "statewide concern" foreshadows further limitation of municipal sovereignty. Those areas that are truly "municipal affairs" will remain under the purview of the charter city. Governmental areas that assume "supramunicipal dimensions"[33] will fall within the everexpanding ambit of "statewide concern."

ARTHUR S. MOREAU III

XI. TORT LAW

A. *To obtain an award of punitive damages, a plaintiff must introduce evidence of a defendant's financial status:* Adams v. Murakami.

I. INTRODUCTION

In *Adams v. Murakami*,[1] the California Supreme Court resolved a split in the courts of appeal regarding: (1) whether presentation of a defendant's financial status is a prerequisite to obtaining a punitive damages award; and (2) whether the plaintiff or the defendant bears the burden of introducing evidence of the defendant's financial condition.[2] The court determined that in order to obtain an award of puni-

128, 140, 649 P.2d 874, 881, 185 Cal. Rptr. 232, 239 (1982) (doubt as to legitimacy of intrusion into municipal affairs must be resolved in favor of the state). *But see* Bishop v. City of San Jose, 1 Cal. 3d 56, 61-63, 460 P.2d 137, 140-41, 81 Cal. Rptr. 465, 468-70 (1969) (legislative attempts to deal with an issue are not dispositive as to whether it is a state or municipal affair).

31. *CalFed*, 54 Cal. 3d at 24-25, 812 P.2d at 930, 283 Cal. Rptr. at 583.

32. *See supra* note 20-22 and accompanying text. The court provided an analytical framework for state preemption of certain elements of local taxation in *In re Hubbard*, 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964). However, the limited scope of this analysis has made it inapplicable to many "muncipal affairs" questions.

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

1. 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991).

2. *Id.* at 108-09, 813 P.2d at 1349, 284 Cal. Rptr. at 319. *Compare* Dumas v. Stocker, 262 Cal. App. 3d 1262, 1267, 213 Cal. Rptr. 311, 314-15 (1989) (an award of punitive damages is unsupported where plaintiff does not introduce enough evidence of defendant's financial condition) *with* Hanley v. Lund, 218 Cal. App. 2d 633, 645-46, 32 Cal. Rptr. 733, 740 (1963) (introduction of the defendant's financial condition is not a prerequisite to punitive damages award). *See also* Barragan v. Banco BCH, 188 Cal. App. 3d 283, 302, 232 Cal. Rptr. 758, 769-70 (1986) (award of punitive damages was re-

tive damages, the plaintiff must introduce evidence of the defendant's financial condition.[3]

In *Adams*, Lonetta Ree Adams lived in a convalescent home while suffering from schizophrenia. While at the home, she became pregnant and gave birth to an autistic baby. Ms. Adams' conservator brought an action against Adams' doctor, Clifford Murakami, and the convalescent home, alleging both parties failed to prevent a patient of the home from impregnating Adams.[4]

Although the claim against the convalescent home was settled, the claim against Dr. Murakami proceeded to trial. During the trial, the plaintiff did not introduce evidence of the defendant's financial condition. Judgment was entered in favor of the plaintiff, and the jury awarded Adams $750,000 in punitive damages and $274,266 in actual damages.[5] The defendant appealed,[6] and the court of appeal affirmed.[7] The supreme court reversed the award of punitive damages and stated that to obtain punitive damages, a plaintiff must introduce evidence of the defendant's financial status.[8]

II. TREATMENT

A. Majority Opinion

The California Supreme Court first analyzed the need to introduce evidence of the defendant's financial condition before punitive damages[9] may be awarded. The court noted that the purpose of punitive damages is to deter and punish improper behavior by the defend-

versed where there was insufficient evidence of the defendant's financial state); Fenlon v. Block, 216 Cal. App. 3d 1174, 1179-83, 265 Cal. Rptr. 324, 326 (1989) (evidence of the defendant's financial condition is not a prerequisite to an award of punitive damages).

3. *Adams*, 54 Cal. 3d at 109, 813 P.2d at 1349, 284 Cal. Rptr. at 319. Justice Baxter wrote the majority opinion with Chief Justice Lucas and Justices Panelli and Arabian concurring. Justice Kennard wrote a separate concurring opinion. Justice Mosk dissented in a separate opinion in which Justice Stone joined. Justice Stone, of the Second District Court of Appeal, sat under assignment.

4. *Id.* at 109, 813 P.2d at 1349-50, 284 Cal. Rptr. at 319-20. The causes of action asserted were medical malpractice, battery, and intentional infliction of emotional distress. *Id.*

5. *Id.* at 109, 813 P.2d at 1350, 284 Cal. Rptr. at 320.

6. *Id.* The defendant claimed that a plaintiff must introduce evidence of a defendant's financial status before punitive damages may be properly awarded. *Id.*

7. *Id.*

8. *Id.* at 109, 813 P.2d at 1349, 284 Cal. Rptr. at 319. The supreme court ordered the court of appeal to remand the action to the trial court for further proceedings. *Id.* at 123-24, 813 P.2d at 1360, 284 Cal. Rptr. at 330.

9. *See generally* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 1378-79

ant,[10] not to destroy the defendant.[11] Furthermore, the court stated that without information regarding a defendant's financial state, neither a jury[12] nor a court of appeal[13] could determine the amount of punitive damages which would deter and punish, but not destroy.[14] Therefore, the court held that evidence of a defendant's financial status must be introduced before punitive damages may be awarded.[15]

The court then determined that a plaintiff bears the burden of introducing evidence of a defendant's financial condition.[16] The court stated three reasons for this conclusion: (1) evidence of the defendant's financial condition is *"essential to the claim for relief"*[17] of a plaintiff requesting punitive damages;[18] (2) requiring a defendant to introduce evidence of his own financial condition suggests that the defendant believes he is culpable;[19] and (3) a plaintiff has the ability to acquire evidence of a defendant's financial information.[20]

(9th ed. 1988) (examples of punitive damage awards which were upheld or overturned).

10. *Adams*, 54 Cal. 3d at 110, 813 P.2d at 1350, 284 Cal. Rptr. at 320 (citing Neal v. Farmers Ins. Exchange, 21 Cal. 3d 910, 928, 582 P.2d 980, 990, 148 Cal. Rptr. 389, 399 (1978)). *See generally* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 1327-28 (9th ed. 1988); 23 CAL. JUR. 3D *Damages* §§ 116-17 (1976 & Supp. 1991); 22 AM. JUR. 2D *Damages* §§ 731-33 (1988); Carl W. Chamberlin, Comment, *Punitive Damages in California: The Drunken Driver*, 36 HASTINGS L.J. 793, 793-804 (1985) (discussing the definition and purpose of punitive damages).

11. *Adams*, 54 Cal. 3d at 112, 813 P.2d at 1352, 284 Cal. Rptr. at 322.

12. *Id.* at 114, 813 P.2d at 1353-54, 284 Cal. Rptr. at 323-24. A jury should not speculate on issues related to the awarding of punitive damages. *Id.* (citing Dumas v. Stocker, 213 Cal. App. 3d 1262, 1269, 262 Cal. Rptr. 311, 316 (1989)). *See generally* BAJI, *California Jury Instructions*, Civil No. 14.71 (7th ed. 1986) (the standard punitive damage jury instructions direct a jury to evaluate the defendant's financial status).

13. *Adams*, 54 Cal. 3d at 112, 813 P.2d at 1351, 284 Cal. Rptr. at 321. The court of appeal will reverse a punitive damages award where the record indicates that the award was the result of "passion and prejudice." Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 926-27, 582 P.2d 980, 989, 148 Cal. Rptr. 389, 398 (1978). In determining whether a punitive damage award was the result of "passion and prejudice," the reviewing court must consider: (1) the type of offense committed by the defendant; (2) the award of compensatory damages; and (3) *the financial condition of the defendant. Id.* at 928, 582 P.2d at 990, 148 Cal. Rptr. at 399. *See generally* 9 B. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 287 (3rd ed. 1985) (discussing the review process for punitive damage awards); 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1353 (9th ed. 1988) (discussing *Neal v. Farmers Ins. Exchange*).

14. *Adams*, 54 Cal. 3d at 112, 813 P.2d at 1352, 284 Cal. Rptr. at 322.

15. *Id.* at 119, 813 P.2d at 1357, 284 Cal. Rptr. at 327.

16. *Id.*

17. CAL. EVID. CODE § 500 (West 1966) (emphasis added). "[A] party has the burden of proof as to each fact, the existence or non-existence of which is essential to the claims for relief or defense that he is asserting." *Id.*

18. *Adams*, 54 Cal. 3d at 119, 813 P.2d at 1357, 284 Cal. Rptr. at 327. The court reasoned that evidence of the defendant's financial status is *essential* because a punitive damage award cannot be sustained without this information. *Id.*

19. *Id.* at 120-21, 813 P.2d at 1358, 284 Cal. Rptr. at 328. The court stated this result would be unfair. *Id.* at 121, 813 P.2d at 1358, 284 Cal. Rptr. at 328.

20. *Id.* at 122, 813 P.2d at 1359, 284 Cal. Rptr. at 329 (citing CAL. CIV. CODE § 3295(c) (West Supp. 1991)). Civil Code section 3295 states that after a proper showing, a plaintiff may "subpoena documents or witnesses to be available at the trial for

B. Dissenting Opinion

In his dissent, Justice Mosk argued that introducing the defendant's financial state should not be a prerequisite to an award of punitive damages.[21] Mosk noted that the legislature permits a plaintiff to introduce a defendant's financial information; however, this is not required.[22] The focus of Justice Mosk's concern was that requiring a plaintiff to introduce this evidence may be both costly and unnecessary.[23]

III. CONCLUSION

In *Adams*, the court concluded that a plaintiff must introduce evidence of the defendant's financial condition in order to obtain punitive damages.[24] The court did not rule, however, whether California's current system of review for punitive damages is constitutionally adequate.[25] This case may indicate only the beginning of larger changes to come in the area of punitive damages.[26]

Requiring a plaintiff to introduce evidence of a defendant's financial status may be prejudicial to both parties.[27] As noted by the court, however, considering a defendant's financial status is vital to enabling a jury and court of appeal to render an equitable decision.[28] Requiring a plaintiff to introduce a defendant's financial condition, therefore, may insure that a more equitable resolution will be reached.

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the purpose of establishing the profits or financial condition" of the defendant. CAL. CIV. CODE § 3295 (West Supp. 1991). In addition, the court noted that plaintiffs may use pretrial discovery to obtain defendant's financial information. *Adams*, 54 Cal. 3d at 122, 813 P.2d at 1359, 284 Cal. Rptr. at 329.

21. *Adams*, 54 Cal. 3d at 128, 813 P.2d at 1363, 284 Cal. Rptr. at 333 (Mosk, J., dissenting).

22. *Id.* at 126-27, 813 P.2d at 1362, 284 Cal. Rptr. at 332 (Mosk, J., dissenting). *See, e.g.*, CAL. CIV. CODE § 3295 (West Supp. 1991).

23. *Adams*, 54 Cal. 3d at 125-26, 813 P.2d at 1361, 284 Cal. Rptr. at 331 (Mosk, J., dissenting) (citing Rawnsley v. Superior Court, 183 Cal. App. 3d 86, 91, 227 Cal. Rptr. 806, 808-09 (1986)).

24. *Id.* at 109, 813 P.2d at 1349, 284 Cal. Rptr. at 319.

25. *Id.* at 120 n.9, 813 P.2d at 1356 n.9, 284 Cal. Rptr. at 326 n.9. *See* Pacific Mutual Life Ins. Co. v. Haslip, — U.S. —, 111 S. Ct. 1032 (1991) (examining the constitutionality of Alabama's review system of punitive damages awards).

26. Stacy Adler, *Financial Data Required for Punitive Damages*, BUSINESS INSURANCE, Sept. 2, 1991.

27. *Id.*

28. *See supra* note 11-13 and accompanying text.

B. *In a failure to warn cause of action, under strict liability, state of the art evidence is admissible as a relevant defense:* Anderson v. Owens-Corning Fiberglass Corporation.

INTRODUCTION

In *Anderson v. Owens-Corning Fiberglass Corporation*,[1] the California Supreme Court granted review to resolve a conflict in the courts of appeal[2] as to whether a failure to warn cause of action, under strict liability, necessarily invokes the manufacturer's knowledge or knowability of risk at the time of manufacture as a factor in imposing liability, thereby permitting state of the art evidence to be admitted as a relevant defense.[3] The First Appellate District in *Vermeulen v. Superior Court* held that determining the manufacturer's knowledge, actual or constructive, of a product's potential risk involves state of the art information.[4] In the present case, the Second Appellate District held state of the art evidence is not admissible in failure to warn cases because it speaks to the reasonableness of the defendant's conduct, which is irrelevant in strict liability.[5] The supreme court declined to follow the Second District, holding instead that without the knowledge or knowability element in strict liability cases, the manufacturer would be the virtual insurer of its product's safe use,[6] which is inconsistent with the tenets of strict liability.[7] Thus, state of the art evidence, subject to the California rules of evi-

1. 53 Cal. 3d 987, 810 P.2d 549, 281 Cal. Rptr. 528 (1991). The original complaint stated causes of action for negligence, breach of warranty, and strict liability. At the time of trial, the plaintiff proceeded on only a strict liability action including manufacturing- and design-defect and failure to warn allegations. The defendant's pleadings raised a state of the art defense, i.e., that scientific knowledge at the time the product was sold could not identify the product as dangerous to the consumer. At trial, the court permitted the plaintiffs to proceed on the design-defect claim, but with no statement of reasons, refused the plaintiff's request that the jury be instructed on the grounds for failure to warn. The jury found for the defendant, but the plaintiff successfully moved for a new trial asserting the trial court erred in precluding proof of liability on a failure to warn theory. The court of appeal upheld the new trial order, adding however, that "in strict liability asbestos cases, including those prosecuted on a failure to warn theory, state of the art evidence is not admissible since it focuses on the reasonableness of defendant's conduct." *Id.*

2. California Rules of Court, rule 29(a)(1) provides: "Review by the supreme court of a decision of a court of appeal will be ordered where it appears necessary to secure uniformity of decision or settle important questions of law." CAL. R. CT. 29(a)(1) (Deering 1991).

3. *Anderson*, 53 Cal. 3d at 990, 810 P.2d at 550, 281 Cal. Rptr. at 529.

4. Vermeulen v. Superior Court, 204 Cal. App. 3d 1192, 251 Cal. Rptr. 805 (1988) (asbestos litigation).

5. *Anderson*, 53 Cal. 3d at 993, 810 P.2d at 552, 281 Cal. Rptr. at 531. *See supra* note 1.

6. *Id.*

7. *See* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 573 P.2d 897, 27 Cal. Rptr. 335 (1963). *See also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965).

dence, is admissible in failure to warn cases.[8]

II. TREATMENT OF THE CASE

California courts have never construed strict liability to make the manufacturer the absolute insurer of a product's safe use.[9] In *Anderson* the supreme court noted that in *Canifax v. Hercules*, the court of appeal held that a product may be defective under strict liability, even though faultlessly constructed, if it is unreasonably dangerous and supplied to the consumer without adequate warning.[10] In post-*Canifax* failure to warn cases,[11] the manufacturer's knowledge or knowability of risk was an implicit condition[12] and was at issue only when the product's danger was found to be unknowable at time of manufacture.[13] The supreme court therefore reasoned that excluding state of the art evidence at the time of manufacture, and holding the manufacturer liable for risks not yet scientifically known, would be anomalous and effectively would make the manufacturer its insurer.[14] Because such a result is not consonant with the tenets of strict liability,[15] the court found it necessary to scrutinize state of the art evidence in failure to warn cases, which has the effect of casting negligence principles into the strict liability arena.[16]

The supreme court noted in *Anderson* that even where a particular action "rings of" negligence it is not necessarily precluded from strict liability.[17] The court also acknowledged that failure to warn cases

8. *Anderson*, 53 Cal. 3d at 990, 810 P.2d at 550, 281 Cal. Rptr. at 529.

9. *See* Daly v. General Motors Corp., 20 Cal. 3d 725, 773, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (car door opened upon impact with wall); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) (bread racks in delivery truck broke free during accident, injuring driver). For a comprehensive historical review, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 98-9, at 694-702 (5th ed. 1984) and 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 1241-44 (9th ed. 1988).

10. Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965) (no warning for burn rate of dynamite fuse). *See* 63 AM. JUR. 2D *Products Liability* § 545 (1984).

11. *See* Gonzales v. Carmenita Ford Truck Sales, Inc., 192 Cal. App. 3d 1143, 238 Cal. Rptr. 18 (1987) (failure to warn about the need to adjust air brakes); Rosburg v. Minnesota Mining & Mfg. Co., 181 Cal. App. 3d 726, 226 Cal. Rptr. 299 (1986) (deflated breast implant).

12. *Anderson*, 53 Cal. 3d at 997, 810 P.2d at 554, 281 Cal. Rptr. at 533.

13. *Id.* at 997, 810 P.2d at 555, 281 Cal. Rptr. at 534.

14. *Id.* at 998, 810 P.2d at 555, 281 Cal. Rptr. at 534.

15. *Id.* at 991, 810 P.2d at 550, 281 Cal. Rptr. at 529. *See supra* note 9.

16. *Anderson*, 53 Cal. 3d at 1002, 810 P.2d at 557, 281 Cal. Rptr. at 536.

17. *Id. See also* Daly v. General Motors Corp., 20 Cal. 3d at 734, 575 P.2d at 1167, 144 Cal. Rptr. at 385 (strict liability is a judicial invention and a blend of "theoretical

are more deeply rooted in negligence than other strict liability theories,[18] because unlike manufacturing- or design-defect cases,[19] the defective warning implicates the manufacturer's conduct.[20] However, the manufacturer's standard of due care and reasonableness are not at issue in strict liability failure to warn cases.[21] Instead, a plaintiff is required to prove merely that the manufacturer failed to give an appropriate warning of dangers that were scientifically knowable at the time of manufacture.[22]

In a concurring opinion, Justice Broussard emphasized that the issue of whether state of the art evidence is admissible in manufacturing- and design-defect analysis is left undecided.[23] He asserted that strict liability manufacturing- and design-defect actions are decided without regard to whether the manufacturer knew or could have known of the specific danger at the time of manufacture.[24] Consequently, the court should expressly hold state of the art evidence irrelevant in those instances.[25]

Justice Mosk agreed with the majority's decision to grant a new trial in order to include a failure to warn cause of action.[26] Contrary to the majority, however, he rejected incorporating negligence principles into strict liability doctrine.[27] He asserted that failure to warn actions should sound in negligence alone.[28] In the alternative, however, he argued that the court should draw a distinction between evidence proving the defendant's actual knowledge of an unreasonable danger at time of manufacture, which renders any state of the art evidence irrelevant because the manufacturer has acted negligently, and evidence proving a defendant should have known of an unrea-

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and semantic distinctions between the twin principles of strict products liability and traditional negligence").

18. *Anderson*, 53 Cal. 3d at 1002, 810 P.2d at 558, 281 Cal. Rptr. at 537.

19. *See* Barker v. Lull Eng. Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

20. *See* Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965). *See also* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 1265-70 (9th ed. 1988).

21. *Anderson*, 53 Cal. 3d at 1002-03, 810 P.2d at 558-59, 281 Cal. Rptr. at 537-38.

22. *Id.*

23. *Id.* at 1004-05, 810 P.2d at 560, 281 Cal. Rptr. at 539 (Broussard, J., concurring).

24. *See generally* Geenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 573 P.2d 897, 27 Cal. Rptr. 335 (1963). *See also* Barker v. Lull Eng. Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

25. *Anderson*, 53 Cal. 3d at 1005, 810 P.2d at 560, 281 Cal. Rptr. at 539 (Broussard, J., concurring).

26. *Id.* at 1005, 810 P.2d at 561, 281 Cal. Rptr. at 540 (Mosk, J., concurring and dissenting). *See supra* note 1 (trial court, without a statement of reasons, refused to instruct the jury on a failure to warn cause of action).

27. 53 Cal. 3d at 1006, 810 P.2d at 561-62, 281 Cal. Rptr. at 540-41 (Mosk, J., concurring and dissenting).

28. *Id.* at 1008, 810 P.2d 563, 281 Cal. Rptr. at 542 (Mosk, J., concurring and dissenting).

sonable danger at time of manufacture, which should allow state of the art evidence to be admitted.[29]

III. CONCLUSION

In *Anderson*, the supreme court concluded that state of the art evidence is admissible as a relevant defense in strict products liability failure to warn actions. The majority found it axiomatic that eliminating the knowledge component, i.e., state of the art evidence, "had the effect of turning strict liability into absolute liability."[30] Although state of the art evidence implicates the manufacturer's conduct and consequently invokes negligence principles, these notions do not preclude a strict liability cause of action because scientific knowledge of risk at time of manufacture determines the manufacturer's liability without regard to the manufacturer's standard of duty or reasonableness.[31]

Although the majority asserted this opinion does not create a pure negligence failure to warn cause of action, Justice Mosk's dissent is noteworthy. His distinction between actual and constructive knowledge of risk, against the breadth of the *Anderson* holding, may compel a closer examination of strict liability objectives.

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29. *Id.* at 1008-09, 810 P.2d at 563, 281 Cal. Rptr. at 542 (Mosk, J., concurring and dissenting).
30. *Id.* at 1004, 810 P.2d at 599, 281 Cal. Rptr. at 538.
31. *Id.*