

4-15-1991

California Supreme Court Survey - A Review of Decisions: January 1990-September 1990

James Duff McGinley

Robert Jay Mills

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Courts Commons](#)

Recommended Citation

James Duff McGinley and Robert Jay Mills *California Supreme Court Survey - A Review of Decisions: January 1990-September 1990*, 18 Pepp. L. Rev. Iss. 3 (1991)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol18/iss3/7>

This Survey is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

California Supreme Court Survey

January 1990-September 1990

The California Supreme Court Survey is 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.....	628
	<i>The attorney-client privilege applies in Public Utilities Commission proceedings and is not waived when a utility states that its attorneys believe a contract is valid and enforceable: Southern California Gas Company v. Public Utilities Commission.....</i>	628
II.	CIVIL PROCEDURE.....	630
	A. <i>A good faith settlement precludes the nonsettling defendant from pursuing an indemnity action against the settling defendant on the basis of implied contractual indemnity. An order from the court of appeal setting a case for oral argument is to be treated as "an alternative writ or order to show cause" as required for a final decision under the California Rules of Court: Bay Development, Ltd. v. Superior Court.....</i>	630
	B. <i>An otherwise privileged communication made in connection with a judicial or legislative proceeding need not have been made in the "interest of justice" in order to invoke the protection of California Civil Code section 47, subdivision 2: Silberg v. Anderson...</i>	645
III.	CONSTITUTIONAL LAW.....	648
	A. <i>Voter approval of a ballot measure specifying the maximum number of low income housing units to be built, but providing no other details regarding the proposed housing project, satisfies the requirements of article XXXIV of the California Constitution: Davis v. City of Berkeley.....</i>	648
	B. <i>A newsperson, called as a witness in a criminal</i>	623

	<i>proceeding, can be held in contempt for failing to reveal unpublished information pertinent to the defense if the criminal defendant's right to a fair trial outweighs the newsperson's interests in nondisclosure: Delaney v. Superior Court</i>	655
C.	<i>The California shield law provides nonparty reporters with absolute immunity from contempt in a civil case for refusing to produce unpublished photos received from a nonconfidential source. However, a reporter may be subject to sanctions other than contempt: New York Times v. Superior Court</i>	675
D.	<i>Article I, section 28, subdivision 8 of the California Constitution is not limited by the double base term rule where enhancements based on prior felony convictions are applied including lesser felony convictions involving imprisonment: People v. Prather</i>	682
IV.	CRIMINAL LAW	685
	<i>The California Supreme Court found that, in child molestation cases, a young victim's testimony that is unspecific with regard to the time, place, or other particulars of the alleged sexual assault is sufficient to support a conviction from both an evidentiary and constitutional standpoint: People v. Jones</i>	685
V.	CRIMINAL PROCEDURE	700
	<i>A criminal defendant may obtain discovery of information in police possession regarding an unidentified informant for purposes of challenging the veracity of statements made in an affidavit supporting a search warrant only upon a preliminary showing of reasonable doubt as to the accuracy of material statements made by the informant: People v. Luttenberger</i>	700
VI.	DEATH PENALTY LAW	716
	<i>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>	716
VII.	FAMILY LAW	743
	<i>A transmutation of property between husband and wife under California Civil Code section 5110.730,</i>	

subdivision (a), must be evidenced by an express declaration containing language that explicitly acknowledges the spouses' intent to change the "ownership or control" of the property: Estate of MacDonald v. MacDonald..... 743

VIII. EMPLOYMENT LAW 750

The cost of providing unemployment insurance coverage on behalf of local government employees is not subject to subvention under the California Constitution, article XIII B, or parallel statutes. However, local governments may tax and spend as required to effect the legislation: City of Sacramento v. State 750

IX. ENVIRONMENTAL LAW 762

A project for the increase or initiation of passenger services on a rail line is exempt from regulation in the California Environmental Quality Act requiring an environmental impact report where the rail line has already been constructed along the rail right-of-way and the rail operator has not obtained a certificate of abandonment: Napa Valley Wine Train, Inc. v. Public Utilities Comm'n..... 762

X. HEALTH LAW 777

Acute care hospitals with clinical psychologists on staff may give those psychologists primary responsibility for the admission, diagnosis, treatment and discharge of mental patients: California Association of Psychology Providers v. Rank 777

XI. INSURANCE LAW 793

A. *A stipulation of an insured's liability signed by the insured, insurer and third party claimant, and entered as a judgment, constitutes a final judicial determination requisite for a third party claimant to sue an insurer for unfair practices under section 790.03(h) of the California Insurance Code: California State Automobile Ass'n Inter-Insurance Bureau v. Superior Court 793*

B. *Proposition 103's mandatory renewal provision does not apply to nonrenewal notices sent by insurers*

	<i>who have complied with statutory withdrawal application requirements: Travelers Indemnity Co. v. Gillespie</i>	796
XII.	JUVENILE LAW	812
	<i>Welfare and Institutions Code section 281 and California Rule of Court 1450(c) create exceptions to the hearsay rule for social studies that are admitted into evidence and relied on by a juvenile court in determining the court's jurisdiction over a minor under Welfare and Institutions Code section 300: In re Malinda S.</i>	812
XIII.	PRIVACY	818
	<i>No judicial proceedings privilege exists for either litigants or attorneys to record private conversations for use in anticipated litigation: Kimmel v. Goland</i>	818
XIV.	PROPERTY LAW	822
	A. <i>No joint tenant in personal property may unilaterally sever his or her interest in the joint tenancy and nullify the other joint tenant's survivorship interest in the absence of a prior agreement to the contrary: Estate of Propst</i>	822
	B. <i>A federal grazing permit is an interest in real property sufficient to qualify its holder for tort immunity under Civil Code section 846: Hubbard v. Brown</i>	826
XV.	TAX LAW	828
	<i>The California Constitution provides that insurance companies are subject to a gross premiums tax precluding the state or its subdivisions from exacting any other taxes except local taxes on real estate: Mutual Life Ins. Co. v. City of Los Angeles</i>	828
XVI.	TORT LAW	831
	A. <i>Negligent misrepresentations involving risk of physical harm are now a separate and distinct cause of action in tort to the exclusion of an action premised on ordinary negligence. Accordingly, plaintiffs must now establish that they reasonably relied on the defendant's misstatements in order to recover damages: Garcia v. Superior Court</i>	831
	B. <i>A plaintiff seeking to state a claim for intentional interference with contract or intentional interference with prospective economic advantage, due to a defendant inducing a contracting party to</i>	

undertake litigation to terminate the contract according to its terms, must allege that the party brought the litigation without probable cause and that the litigation concluded in the plaintiff's favor:
Pacific Gas & Electric Company v. Bear Stearns & Company 843

I. ADMINISTRATIVE LAW

The attorney-client privilege applies in Public Utilities Commission proceedings and is not waived when a utility states that its attorneys believe a contract is valid and enforceable: Southern California Gas Company v. Public Utilities Commission.

In *Southern California Gas Company v. Public Utilities Commission*,¹ Southern California Gas Co. (SoCal) requested and received permission from the Public Utilities Commission (PUC) to negotiate the buyout of an undesirable long-term gas contract with Getty Synthetic Fuels Inc. (Getty).² Later, the PUC refused to approve the 17.4 million dollar buyout without first reviewing confidential documents concerning the negotiations, leading SoCal to abandon its attempt for informal PUC approval. Instead, SoCal applied for a formal consolidated adjustment mechanism (CAM) proceeding³ requesting authorization to recover the costs of the buyout and a finding that the gas purchases were reasonable.⁴ The PUC suggested that the gas contract had been breached by Getty and that a buyout by SoCal was therefore unnecessary⁵ and again requested the confidential documents. SoCal continued to resist production stating that the documents were protected by the attorney-client privilege.⁶

The presiding administrative law judge ordered production of the documents and the PUC upheld the order, ruling that SoCal had implicitly waived its attorney-client privilege by statements in its CAM application indicating that SoCal attorneys believed the contract was enforceable and could not be unilaterally terminated.⁷ The Califor-

1. 50 Cal. 3d 31, 784 P.2d 1373, 265 Cal. Rptr. 801 (1990). The unanimous decision was delivered by Justice Broussard with Chief Justice Lucas and Justices Mosk, Panelli, Eagleson, Kaufman, and Kennard concurring.

2. In August 1984, SoCal had entered into a long-term gas supply contract with Getty. The purchase price was based on a "cost-plus" formula which made the Getty price much higher than other available sources. In March 1984, during an informal phone conversation with the PUC, SoCal stated that its attorneys had looked over the contract and found no way it could be unilaterally terminated without a buyout. In response, the PUC's Division of Ratepayer Advocates requested the identities of staff members consulted, the basis of the staff's concurrence and copies of the notes and memoranda regarding the buyout negotiations. *Id.* at 35, 784 P.2d at 1374, 265 Cal. Rptr. at 802.

3. In a CAM proceeding the PUC determines whether costs incurred by a utility were reasonable and prudent and whether they may therefore be passed on to utility users through a rate increase. *Id.* at 35 n.3, 784 P.2d at 1375 n.3, 265 Cal. Rptr. at 803 n.3. For a discussion of public utility regulatory procedures, see generally B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 889-914 (1990); 53 CAL. JUR. 3D *Public Utilities* §§ 80-104 (1987).

4. *Southern Calif. Gas Co.*, 50 Cal. 3d at 35, 784 P.2d at 1374, 265 Cal. Rptr. at 802.

5. *Id.* at 36 n.4, 784 P.2d at 1375 n.4, 265 Cal. Rptr. at 803 n.4.

6. *Id.* at 36, 784 P.2d at 1375, 265 Cal. Rptr. at 803.

7. *Id.*

nia Supreme Court granted review to determine whether the attorney-client privilege applies in PUC proceedings and whether SoCal had waived the privilege.⁸

In its decision, the court first held that the attorney-client privilege⁹ applies in the regulatory setting¹⁰ stating "the policy underlying the privilege rules requires their recognition in all proceedings of any nature in which testimony can be compelled by law to be given."¹¹ Additionally, the court held that SoCal had not waived its privilege in the CAM proceedings.¹² SoCal had not put the advice of counsel directly at issue by arguing that its attorney's support for the plan was evidence that the buyout agreement was reasonable.¹³ Further, the court held that the information requested was not vital to the PUC's determination as to whether or not the buyout agreement was reasonable, and thus overruled the PUC's decision.¹⁴

8. *Id.* at 36, 784 P.2d at 1375, 265 Cal. Rptr. at 803.

9. The attorney-client privilege is codified in section 954 of the California Evidence Code, which states in pertinent part: "the client . . . has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer . . ." CAL. EVID. CODE § 954 (West Supp. 1990). See also J. WIGMORE, WIGMORE ON EVIDENCE, *Attorney-Client Privilege* §§ 2290-2329 (1985); 27 CAL. JUR. 3D *Discovery and Depositions* § 24 (1987) (attorney-client privilege).

10. *Southern Calif. Gas Co.*, 50 Cal. 3d at 38, 784 P.2d at 1376, 265 Cal. Rptr. at 804. The court cited the United States Supreme Court's holding in *United States v. Louisville & Nashville Railroad Co.*, 236 U.S. 318, 336 (1915) (holding that the privilege applies in proceedings with the Interstate Commerce Commission and denying the commission's argument that its investigatory powers permit it to examine confidential communications between a regulated company and its attorneys).

11. *Southern Calif. Gas Co.*, 50 Cal. 3d at 38 n.8, 784 P.2d at 1376 n.8, 265 Cal. Rptr. at 804 n.8.

12. *Id.* at 42, 784 P.2d at 1379, 265 Cal. Rptr. at 807. For information regarding the waiver of the attorney-client privilege, see generally 31 CAL. JUR. 3D *Evidence* § 442 (1987) (discussing claim of privilege and waiver). See also *Merritt v. Superior Court*, 9 Cal. App. 3d 721, 731, 88 Cal. Rptr. 337, 343 (1970) (in a suit for wrongful failure to settle a claim where a plaintiff contends that the defendant confused his attorney, that attorney's state of mind has been put in issue and is discoverable despite the attorney-client privilege). But see *Mitchell v. Superior Court*, 37 Cal. 3d 591, 609, 691 P.2d 642, 653, 208 Cal. Rptr. 886, 897 (1984) (information was not put directly in issue where the substance of the protected communication is only one of many forms of evidence available to solve an issue).

13. *Southern Calif. Gas Co.*, 50 Cal. 3d at 42, 784 P.2d at 1379, 265 Cal. Rptr. at 807. SoCal had expressly stated it would not rely on this argument. *Id.* The court also discussed the possibility of a statutory or express waiver of the right. *Id.* An express waiver is possible where "[the] holder of the privilege, without coercion, had disclosed a significant part of the communication or has consented to such disclosure made by anyone. . . ." CAL. EVID. CODE § 912(a) (West 1966). See also 31 CAL. JUR. 3D, *Evidence* §§ 432 & 442 n.6 (1987) (discussing waiver of the attorney-client privilege). See generally B. WITKIN, SUMMARY OF CALIFORNIA EVIDENCE, *Witnesses* § 794 (1966 & Supp. 1984).

14. *Southern Calif. Gas Co.*, 50 Cal. 3d at 43, 784 P.2d at 1380, 265 Cal. Rptr. at 808.

In upholding the attorney-client privilege, the court sought to protect the ability of regulated companies to obtain adequate legal advice without fear that information divulged to attorneys would later be discoverable by the PUC.¹⁵ The *SoCal* decision rejects the PUC's ability to deny regulated companies the protection of evidentiary privileges, thereby preserving the companies' rights to fully and openly discuss matters with their attorneys.

MATTHEW J. STEPOVICH

II. CIVIL PROCEDURE

A. *A good faith settlement precludes the nonsettling defendant from pursuing an indemnity action against the settling defendant on the basis of implied contractual indemnity. An order from the court of appeal setting a case for oral argument is to be treated as "an alternative writ or order to show cause" as required for a final decision under the California Rules of Court: Bay Development, Ltd. v. Superior Court.*

I. INTRODUCTION

In 1980, the California Legislature codified the good faith settlement bar to further litigation in California Civil Procedure Code section 877.6.¹ Since 1980 the California Supreme Court has reviewed and explained the application of section 877.6 on four occasions.² In

The first California case to recognize the implied waiver of the attorney-client privilege was *Fremont Indemnity Co. v. Superior Court*, 137 Cal. App. 3d 554, 187 Cal. Rptr. 137 (1982), where a civil suit was brought to recover under a fire insurance policy where the plaintiff had been indicted for arson. That court held that the discovery of the information was essential for a fair resolution of the case because a conviction for arson would be a complete defense to the claim and thus, the privilege did not apply to prevent the plaintiff's deposition from being taken. *Id.* at 560, 187 Cal. Rptr. at 140.

15. *Southern Calif. Gas Co.*, 50 Cal. 3d at 45, 784 P.2d at 1381, 265 Cal. Rptr. at 809.

1. See CAL. CIV. PROC. CODE § 877.6 (West Supp. 1991) [hereinafter section 877.6]. Two years after the California Supreme Court decided *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), the Legislature added section 877.6 to the Code. California Civil Procedure Code section 877.6 codified the supreme court's decision in *American Motorcycle* that a tortfeasor who enters into a good faith settlement "must be discharged from any claim for partial or comparative indemnity that may be pressed by a concurrent tortfeasor." *American Motorcycle*, 20 Cal. 3d at 604, 578 P.2d at 915, 146 Cal. Rptr. at 198.

2. See *Far West Financial Corp. v. D & S Co., Inc.*, 46 Cal. 3d 796, 817, 760 P.2d 399, 413, 251 Cal. Rptr. 202, 216 (1988) (under § 877.6, a good faith settlement precludes subsequent actions for total equitable indemnity); *Abbott Ford, Inc. v. Superior Court*, 43 Cal. 3d 858, 875, 741 P.2d 124, 134, 239 Cal. Rptr. 626, 637 (1987) (good faith settlement standards apply to a sliding scale settlement); *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 499, 698 P.2d 159, 166, 213 Cal. Rptr. 256, 263 (1985) (a good faith settlement must be in the "reasonable range of the settling tortfeasor's proportional share of comparative liability").

its most recent decision, *Bay Development, Ltd. v. Superior Court*,³ the supreme court defined and broadened the concept of good faith settlement by including implied contractual indemnity claims in the category of equitable indemnity claims subject to section 877.6. The court's decision in *Bay Development* extends the bar against a non-settling defendant seeking damages from a settling defendant to implied contractual indemnity where there has been a good faith settlement.⁴

Prior to *Bay Development*, the lower courts were divided in applying the good faith provision to settlements involving implied contractual indemnity.⁵ Justice Kennard, writing for the majority in *Bay Development*, resolved the lower courts' inconsistencies and recognized that a party is more likely to settle when assured there will be no further litigation involving liability to other defendants.⁶ She affirmed the court's desire to encourage settlements and protect the interests of all parties in an action.⁷ The court denied the nonsettling defendant the ability to seek indemnity from a settling defendant absent an express contractual provision, where the settlement was deemed in good faith.⁸

Bay Development, Ltd., ("Bay Development") initially sought relief from the dismissal of their indemnity claim by extraordinary writ. Before addressing the substantive issue in this case, the court decided the question of jurisdiction raised by the interpretation of

3. 50 Cal. 3d 1012, 791 P.2d 290, 269 Cal. Rptr. 720 (1990). Justice Kennard wrote the majority opinion with Justices Mosk, Broussard and Panelli concurring. Chief Justice Lucas wrote the concurring opinion joined by Justice Arabian and in part by Justice Eagleson. Justice Eagleson wrote a separate dissent.

4. *Id.* at 1032, 791 P.2d at 302, 269 Cal. Rptr. at 732. The settlement was determined to be in good faith where the settling defendant paid \$30,000 on a potential liability of \$75,000 to \$1,000,000. *Id.* at 1028, 791 P.2d at 299, 269 Cal. Rptr. at 729.

5. Compare *Stratton v. Peat, Marwick, Mitchell & Co.*, 190 Cal. App. 3d 286, 291, 235 Cal. Rptr. 374, 376-77 (1987) (implied contractual indemnity claim barred by good faith settlement); *IRM Corp. v. Carlson*, 179 Cal. App. 3d 94, 100, 224 Cal. Rptr. 438, 440 (1986) (good faith settlement precludes action based on implied contractual indemnity) with *County of Los Angeles v. Superior Court*, 155 Cal. App. 3d 798, 803, 202 Cal. Rptr. 444, 447 (1984) (good faith settlement is not a bar to a claim based on implied contractual indemnity); *Bear Creek Planning Comm. v. Title Ins. & Trust Co.*, 164 Cal. App. 3d 1227, 1238-39, 211 Cal. Rptr. 172, 179 (1985) (action for implied contractual indemnity is not a claim for contribution).

6. *Bay Development*, 50 Cal. 3d at 1019, 791 P.2d at 292, 269 Cal. Rptr. at 722.

7. *Id.* at 1019-20, 791 P.2d at 293, 269 Cal. Rptr. at 723. The courts' "good faith determination plays a key role in harmonizing the objective of encouraging settlement with the objective of promoting a fair apportionment of loss among multiple tortfeasors." *Id.* (citations omitted).

8. *Id.* at 1032, 791 P.2d at 302, 269 Cal. Rptr. at 732.

California Rules of Court 24(a).⁹ Generally, a court of appeal decision becomes final thirty days after filing.¹⁰ However, rule 24(a) contains an exception that makes a decision final “immediately after filing upon the denial of a petition for a writ . . . without issuance of an alternative writ or order to show cause.”¹¹ A party must file its petition for review in the supreme court within ten days after the decision becomes final in the court of appeal.¹² In *Bay Development*, the court of appeal set the writ for oral argument, and after hearing oral argument issued a written opinion. The lower court did not issue an alternative writ or order to show cause. Had the exception to rule 24(a) been applied literally, Bay Development’s petition for review would have been filed too late and the supreme court would not have had jurisdiction. The court did not, however, interpret the rule so restrictively. It decided the exception was applicable to “summary denials of writ petitions,” and not where “the Court of Appeal sets a writ matter for oral argument, hears oral argument and resolves the

9. CAL. R. CT. 24(a) (West 1990) [hereinafter Rule 24]. This rule states:

[WHEN DECISIONS BECOME FINAL] All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties.

A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30 day period or any extension, orders one or more additional periods not to exceed a total of 60 additional days.

A decision of a Court of Appeal becomes final as to that court 30 days after filing, except that the decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction or a writ of supersedeas, without issuance of an alternative writ or order to show cause, or the denial of an application for bail or to reduce bail pending appeal, or the denial of a transfer to a Court of Appeal in a case within the original jurisdiction of a municipal or justice court; but the denial of a petition for a writ of habeas corpus that is filed on the same day as the decision in a related appeal becomes final as to the Court of Appeal at the same time as the related appeal.

When a decision of a reviewing court is final as to that court, it is not thereafter subject to modification or rehearing by that court, except that when the date of finality falls on a holiday or other day the clerk’s office is closed, the decision may be modified or rehearing granted or denied until the close of business on the next day the clerk’s office is open. If an opinion is modified without change in the judgment, during the time allowed for rehearing, the modification shall not postpone the time that the decision becomes final as provided above; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the day of modification.

Id.

10. *Id.*

11. *Id.*

12. California Rules of Court 28(b) states in pertinent part:

TIME FOR FILING PETITION A party seeking review must serve and file a petition within 10 days after the decision of the Court of Appeal becomes final as to that court, but a petition may not be filed after denial of a transfer to a Court of Appeal in a case within the original jurisdiction of a municipal or justice court.

CAL. R. CT. 28(b) (West 1990).

matter by full written opinion."¹³

II. HISTORICAL BACKGROUND

A. Procedural Issue Under California Rules of Court 24(a)

The California Supreme Court, court of appeal and superior courts all have original jurisdiction over petitions for writs of mandate.¹⁴ Rule 24(a) governs writs and dictates when the decision of a court becomes final.¹⁵ Rule 24(a) was amended to make a court's decision final immediately where the court denied a writ without issuing an alternative writ or an order to show cause.¹⁶ The impetus behind the change was to allow a party to immediately file a petition for review, where the writ had been denied, without waiting thirty days for the order to become final.¹⁷ The California Supreme Court considered rule 24(a) further in *Palma v. United States Industrial Fasteners, Inc.*¹⁸ The *Palma* decision allows the court of appeal to issue a peremptory writ instead of an alternative writ.¹⁹ However, the Fourth

13. *Bay Development*, 50 Cal. 3d at 1024, 791 P.2d at 296, 269 Cal. Rptr. at 726.

14. CAL. CONST. art VI, § 10. This section states in part: "The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition."

15. Rule 24(a), *supra* note 9.

16. 8 B. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs*, § 213 (3d ed. 1985). Rule 24(a) was further amended in 1989 to state that "the denial of a petition for a writ of habeas corpus that is filed on the same day as the decision in a related appeal becomes final as to the Court of Appeal at the same time as the related appeal." Rule 24(a), *supra* note 9.

Section 1087 of the California Civil Procedure Code states:

The writ may be either alternative or peremptory. The alternative writ must command the party to whom it is directed immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court at a time and place then or thereafter specified by court order why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted.

CAL. CIV. PROC. CODE § 1087 (West 1990).

17. 8 B. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* § 213(b) (3d ed. 1985).

18. *Palma v. United States Indus. Fasteners, Inc.*, 36 Cal. 3d 171, 681 P.2d 893, 203 Cal. Rptr. 626 (1984). The *Palma* decision discussed notice procedure and approved the practice of "routinely request[ing] informal opposition prior to the issuance of an alternative or peremptory writ." *Id.* at 180, 681 P.2d at 898, 203 Cal. Rptr. at 631.

19. *Id.* at 178, 681 P.2d at 897, 203 Cal. Rptr. at 630. See section 1088 of the California Civil Procedure Code which states:

When the application to the court is made without notice to the adverse party, and the writ is allowed, the alternative must be first issued; but if the application is upon due notice and the writ is allowed, the peremptory may be issued

Appellate District has contrary rules that are at issue in *Bay Development*.²⁰ In *Bay Development*, the court of appeal calendared the case for oral argument without issuing a writ or an order to show cause in contravention of rule 24(a) and the *Palma* decision.

B. The Implied Contractual Indemnity Issue Under California Civil Procedure Code Section 877.6

The California Supreme Court first established the concept of partial equitable indemnity among concurrent tortfeasors in the landmark decision of *American Motorcycle Ass'n v. Superior Court*.²¹ In *American Motorcycle*, the court reconciled "a common law partial indemnity doctrine" with the "strong public policy in favor of settlement" exhibited in California Civil Procedure Code section 877.²² In 1980, the Legislature changed the partial indemnity doctrine from common law to statutory law by codifying the holding of *American Motorcycle*.²³ Section 877.6 of the California Civil Procedure Code gives the settling party a "substantive right of discharge from liability."²⁴ The section allows a settling party to seek a decree from the court stating that the settlement is in good faith.²⁵ After a settle-

in the first instance. With the alternative writ and also with any notice of an intention to apply for the writ, there must be served on each person against whom the writ is sought a copy of the petition. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appears or not.

CAL. CIV. PROC. CODE § 1088 (West 1980).

20. *Bay Development*, 50 Cal. 3d at 1036-37 n.1, 791 P.2d at 305 n.1, 269 Cal. Rptr. at 735 n.1 (Lucas, C.J., concurring). Chief Justice Lucas explained:

[R]eading the two applicable local rules together leaves one to ponder what purpose is served by a refusal to accept petitions requesting alternative writs. It appears from its internal operating procedures that the court contemplates issuing alternative writs and holding argument when it wishes to consider matters fully on their merits before deciding whether or not to issue a writ.

Id. (Lucas, C.J., concurring).

21. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

22. *Id.* at 603-04, 578 P.2d at 915, 146 Cal. Rptr. at 198.

23. CAL. CIV. PROC. CODE § 877.6, *supra* note 1. See also Note, *Far West Financial Corp. v. D. & S. Co. and the Abolition of Total Equitable Indemnity: What A Long, Strange Trip It's Been*, 21 PAC. L.J. 147, 162 (1989).

24. 5 B. WITKIN, SUMM. OF CAL. LAW, *Torts* § 71 (9th ed. 1988).

25. Section 877.6 states in pertinent part:

(a) Any party to an action wherein it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors . . .

(b) The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counteraffidavits filed in response thereto, or the court may, in its discretion, receive other evidence at the hearing.

(c) A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contri-

ment is judged "in good faith," the nonsettling party is blocked from seeking redress against the settling party.²⁶ This result encourages settlements by allowing a party peace of mind after entering into a settlement and protects the parties remaining in the action against unfairness by allowing a court review of the settlement.

1. *E. L. White, Inc. v. City of Huntington Beach*²⁷

In *E. L. White, Inc. v. City of Huntington Beach*, the plaintiff sought "indemnity and equitable contribution" from the City of Huntington Beach for the city's negligence notwithstanding a general, albeit express, contractual indemnity provision.²⁸ In its discussion of that case, the supreme court distinguished two sources of indemnity. First, an express contractual provision creates an obligation to indemnify a party where the duty is based "upon the occurrence of specified circumstances."²⁹ Second, indemnity may be founded in "equitable considerations" suggested by contractual language "or by the equities of the particular case."³⁰ The court went on

tribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.

CAL. CIV. PROC. CODE § 877.6 (West Supp. 1991).

26. *Id.* The California Supreme Court laid out the factors to be considered in determining whether a settlement is in good faith in *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 499, 698 P.2d 159, 166-67, 213 Cal. Rptr. 256, 263 (1985). These factors include:

[A] rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants.

Id.

27. *E. L. White, Inc. v. City of Huntington Beach*, 21 Cal. 3d 497, 579 P.2d 505, 146 Cal. Rptr. 614 (1978).

28. *Id.* at 503, 579 P.2d at 508, 146 Cal. Rptr. at 617. In *E. L. White* there was an express indemnity provision in the contract that stated White would indemnify the City "from, any suits, claims, or actions brought by any person or persons for or on account of any injuries or damages sustained because of or arising out of the work." *Id.* at 507, 579 P.2d at 510, 146 Cal. Rptr. at 619. The court concluded that absent "sufficiently specific" language an express provision "will be construed to provide indemnity to the indemnitee only if he has been no more than *passively* negligent." *Id.* at 507, 579 P.2d at 511, 146 Cal. Rptr. at 620. The contract provision in *E. L. White* did not meet the test of "sufficiently specific" language. *Id.*

29. *Id.* at 506, 579 P.2d at 510, 146 Cal. Rptr. at 619.

30. *Id.* at 507, 579 P.2d at 510, 146 Cal. Rptr. at 619. Notably, the majority opinion in *Bay Development* refers to "contractual language not specifically dealing with indemnification" as "*implied contractual indemnity*." *Bay Development*, 50 Cal. 3d at 1029, 791 P.2d at 300, 269 Cal. Rptr. at 730 (emphasis in original).

to state that absent explicit contractual language governing indemnity, a party's right to indemnify emanates from "the independent doctrine of equitable indemnity."³¹ In summary, the court suggested that implied contractual indemnity is in essence a form of equitable indemnity.³²

2. The Courts of Appeal's Divided Interpretation of Implied Contractual Indemnity

Appellate decisions are divided on whether implied contractual indemnity is a bar to further litigation after a good faith settlement is recognized by the court.³³ In *County of Los Angeles v. Superior Court*,³⁴ the Second Appellate District held that California Civil Procedure Code sections 877³⁵ and 877.6³⁶ did not preclude a cause of action for indemnity arising out of express or implied contractual provisions.³⁷ Similarly, the Third Appellate District concluded in *Bear Creek Planning v. Title Ins. & Trust Co.*³⁸ that implied contractual indemnity was not a form of equitable indemnity and by implication would not bar litigation to recover damages after a good faith settlement.³⁹ However, in two separate decisions, *IRM Corp. v. Carlson*⁴⁰ and *Stratton v. Peat, Marwick, Mitchell & Co.*,⁴¹ the First Appellate District reached an opposite conclusion, holding that a good faith settlement precluded a cross-complaint for indemnity on a theory of implied contractual indemnity.⁴²

31. *E.L. White*, 31 Cal. 3d at 508, 579 P.2d at 511, 146 Cal. Rptr at 620.

32. *Id.* at 508, 579 P.2d at 511-12, 146 Cal. Rptr. at 620-21.

33. See *supra* note 5 and accompanying text.

34. *County of Los Angeles v. Superior Court*, 155 Cal. App. 3d 798, 202 Cal. Rptr. 444 (1984).

35. In pertinent part California Civil Procedure Code section 877 reads:

Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgement is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect:

(a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater.

(b) It shall discharge the party to whom it is given from all liability for any contribution to any other parties.

CAL. CIV. PROC. CODE § 877 (West Supp. 1991).

36. CAL. CIV. PROC. CODE § 877.6 *supra* note 25.

37. *County of Los Angeles*, 155 Cal. App. 3d at 803, 202 Cal. Rptr at 447, *supra* note 5.

38. *Bear Creek Planning Comm. v. Title Ins. & Trust Co.*, 164 Cal. App. 3d 1227, 1238-39, 211 Cal. Rptr. 172, 179 (1985).

39. See *id.*

40. *IRM Corp. v. Carlson*, 179 Cal. App. 3d 94, 224 Cal. Rptr. 438 (1986).

41. *Stratton v. Peat, Marwick, Mitchell & Co.*, 190 Cal. App. 3d 286, 235 Cal. Rptr. 374 (1987).

42. See *IRM Corp. v. Carlson*, 179 Cal. App. 3d 94, 100, 224 Cal. Rptr. 438, 440

It was in this atmosphere of differing opinions that the Fourth Appellate District decided that the good faith settlement provision of California Civil Procedure Code section 877.6 blocked an action for indemnity where a party entered into a good faith settlement. This led to the California Supreme Court's review of this issue in *Bay Development*.

III. STATEMENT OF THE CASE

Bay Development, Ltd., a limited partnership, and Bowen Company, the general partner, (hereinafter collectively referred to as "Bay") purchased a condominium development from Home Capital Corporation ("Home").⁴³ Bay subsequently marketed the 251 units to various buyers. The condominium owners, past and present, filed a complaint against Bay alleging the partnership misrepresented the number of parking spaces in the development and sought damages for the decrease in value.⁴⁴ Bay cross-complained against Home and claimed Home was responsible for the original misrepresentation. Bay asserted that it was entitled to indemnification from Home on theories of equitable indemnity and implied contractual indemnity.⁴⁵ The condominium owners then amended their complaint to include Home as a defendant.

Home settled with the condominium owners prior to trial. Home then filed a motion for a determination that the settlement was in good faith as allowed by section 877.6, and asked for an order of summary judgment on Bay's cross-complaint for indemnity. The trial court found the settlement to be in good faith and found that Bay was barred from seeking indemnity from Home under California Civil Procedure Code section 877.6.⁴⁶

Bay petitioned the court of appeal for extraordinary writ relief, ultimately contending that "their claim for implied contractual indemnity should . . . be equated with a claim for express contractual indemnity,"⁴⁷ which is not precluded by a good faith settlement.⁴⁸

(1986); *Stratton v. Peat, Marwick, Mitchell & Co.*, 190 Cal. App. 3d 286, 291, 235 Cal. Rptr. 374, 376-77 (1987), *supra* note 6.

43. Bay Development, Ltd. and Bowen Company will hereinafter be referred to as "Bay." Home Capital Corporation will hereinafter be referred to as "Home."

44. *Bay Development*, 50 Cal. 3d at 1020, 791 P.2d at 293, 269 Cal. Rptr. at 723.

45. *Id.* at 1035, P.2d at 1021, 791 P.2d at 294, 269 Cal. Rptr. at 724.

46. *Id.* at 1023, 791 P.2d at 296, 269 Cal. Rptr. at 725.

47. *Id.* at 1029, 791 P.2d at 299, 269 Cal. Rptr. at 729.

48. See *C.L. Peck Contractors v. Superior Court*, 159 Cal. App. 3d 828, 205 Cal. Rptr. 754 (1984) (finding an express contractual indemnity enforceable notwithstanding

The court of appeal calendared and heard oral argument and denied the writ, upholding the trial court.⁴⁹ The California Supreme Court granted review.⁵⁰

IV. THE COURT'S DECISION

A. *The Majority Opinion — Procedural Issue Under California Rules of Court 24(a)*

The supreme court raised the issue of jurisdiction on its own initiative.⁵¹ The court of appeal issued its written decision in this case on March 31, 1987 and Bay filed a petition for review in the supreme court on May 8, 1987. The petition was timely filed if the general thirty day and ten day time limits of rule 24(a) and rule 28(b) apply.⁵² However, the supreme court questioned whether the exception to the general rule applied where the court of appeal did not issue either an alternative writ or order to show cause, but did schedule the writ for oral argument.⁵³ Rule 24(a) states "that the decision becomes final as to that court immediately after filing upon the denial of a petition for a writ without issuance of an alternative writ or order to show cause."⁵⁴ Further, under Rule 28(b) a party must file a petition for review by the supreme court within ten days of a final order.⁵⁵

The statutory construction suggests three courses of action when a court of appeal reviews a petition for an extraordinary writ. "[T]he

ing a good faith settlement). The court in *C. L. Peck* stated, "the law permits people to voluntarily order their affairs in a manner agreeable to them and equity rarely interferes with a contract knowledgeably executed." *Id.* at 834, 205 Cal. Rptr. at 757.

49. *Bay Development*, 50 Cal. 3d at 1023, 791 P.2d at 295, 269 Cal. Rptr. at 725.

50. *Id.*

51. *Id.* at 1024, 791 P.2d at 296, 269 Cal. Rptr. at 726. The court also addressed the issue of mootness. The parties continued to litigate the underlying complaint during appeal of the application of the good faith settlement preclusion of § 877.6. The jury found in favor of Bay before the appeal was heard. The supreme court agreed the issue was not moot because Bay was asking for recovery of attorney's fees associated with the underlying cause of action. *Bay Development*, 50 Cal. 3d at 1026, 791 P.2d at 297-98, 269 Cal. Rptr. at 727-28.

Section 1021.6 of the California Civil Procedure Code allows an indemnitee to recover attorney's fees. It states in part:

Upon motion, a court . . . may award attorney's fees to a person who prevails on a claim for implied indemnity if the court finds (a) that the indemnitee through the tort of the indemnitor has been required to act in the protection of the indemnitee's interest by . . . defending an action by a third person and . . . (c) that the trier of fact determined that the indemnitee was without fault in the principal case. . . ."

CAL. CIV. PROC. CODE § 1021.6 (West Supp. 1991).

52. *Bay Development*, 50 Cal. 3d at 1023-24, 791 P.2d at 295-96, 269 Cal. Rptr. at 725-26. See CAL. R. CT. 24(a), *supra* note 9, and CAL. R. CT. 28(b), *supra* note 12.

53. *Bay Development* at 1023-26, 791 P.2d at 295-97, 269 Cal. Rptr. at 725-27.

54. CAL. R. CT. 24(a), *supra* note 9; *Bay Development*, 50 Cal. 3d at 1023 n.5, 791 P.2d at 295 n.5, 269 Cal. Rptr. at 726 n.5.

55. CAL. R. CT. 28(b), *supra* note 12.

court will either (1) deny the petition summarily; (2) grant a peremptory writ in the first instance without a hearing . . . ; or (3) grant a hearing on the merits by issuing an alternative writ or order to show cause.”⁵⁶

In this case the California Supreme Court decided that the order setting the writ for oral argument was tantamount to issuing “an alternative writ or order to show cause.”⁵⁷ The supreme court reached this conclusion to prevent “the rule’s exception from becoming an unconscionable trap for the unwary.”⁵⁸ However, the court cautioned the courts of appeal to follow the “statutory procedure” in the future.⁵⁹

B. The Concurring Opinion

Chief Justice Lucas wrote a concurring opinion, joining in the results but criticizing the majority’s treatment of the jurisdiction issue.⁶⁰ Justice Lucas reasoned that the plain language of Rule 24(a) is not the source of the confusion in this case; rather, the contradictory local rules at the Fourth Appellate District create a conflict with the California Rules of Court and statutory provisions.⁶¹ Justice Lucas suggested two reasonable remedies. First, the Legislature could amend Rule 24 to state that the decision is final thirty days after an opinion is filed where the court of appeal hears arguments and issues a written opinion. Second, the rule could be amended to require lower court rules to comply with Rule 24(a).⁶²

C. The Majority Opinion — Good Faith Settlement and Implied Contractual Indemnity Issue Under California Code of Civil Procedure Section 877.6

Justice Kennard relied heavily on the principles proffered in *E. L. White, Inc. v. City of Huntington Beach*⁶³ in writing the *Bay Development* majority opinion. The *E. L. White* court distinguished be-

56. *Bay Development*, 50 Cal. 3d at 1024, 791 P.2d at 296, 269 Cal. Rptr. at 726.
57. *Id.*
58. *Id.*
59. *Id.* at 1025 n.8, 791 P.2d at 297 n.8, 269 Cal. Rptr. at 727 n.8.
60. *Id.* at 304, 269 Cal. Rptr. at 734 (Lucas, C.J. concurring).
61. *Id.* at 1035-36, 791 P.2d at 304-05, 269 Cal. Rptr. at 734-35 (Lucas, C.J. concurring).
62. *Id.* at 1037 n.2, 719 P.2d at 306 n.2, 269 Cal. Rptr. at 736 n.2 (Lucas, C.J., concurring).
63. *E. L. White, Inc. v. City of Huntington Beach*, 21 Cal. 3d 497, 579 P.2d 505, 146 Cal. Rptr. 614 (1978).

tween two sources of indemnity claims.⁶⁴ First, there can be an indemnity claim based on an express contractual provision; and, second there can be an indemnity claim based on an implicit contractual provision.⁶⁵ The *Bay Development* court took this one step further by declaring “implied contractual indemnity [is] a form of equitable indemnity,”⁶⁶ governed by the comparative rules established in *American Motorcycle*, and codified in California Code of Civil Procedure section 877.6.⁶⁷ Subsequently, the court held that an implied contractual indemnity claim, “like other equitable indemnity claims, may not be pursued by a party who has entered into a good faith settlement.”⁶⁸

The court explained that this rule governed implied contractual language but was not a bar to indemnity claims based on an express indemnity agreement between the parties.⁶⁹ Parties are free to contract regarding indemnity or apportionment. A party cannot circumvent the terms of an agreement by offering a good faith settlement where such an express agreement exists and the other party has reasonably relied upon it.⁷⁰ However, based on the decision in *E. L. White*, the parties must ensure that the language of the indemnity agreement explicitly informs the indemnitor of his commitment.⁷¹ If the language is not specific, the court will deny indemnification where the indemnitee was actively negligent.⁷²

64. *Id.* at 506-07, 579 P.2d at 510, 146 Cal. Rptr. at 619.

65. *Bay Development*, 50 Cal. 3d at 1029, 791 P.2d at 300, 269 Cal. Rptr. at 730 (citing *E. L. White*, 21 Cal. 3d at 506-07, 579 P.2d at 510, 146 Cal. Rptr. at 619).

66. *Bay Development* at 1030, 791 P.2d at 300, 269 Cal. Rptr. at 730.

67. *Id.* at 1031, 791 P.2d at 301, 269 Cal. Rptr. at 731. The court stated that “[w]hen parties have not entered into an express indemnification agreement specifying that one party will bear all of the liability for a loss for which both parties may be partially responsible, the principles of *American Motorcycle* support an apportionment of the loss under comparative indemnity principles.” *Id.* at 1029-30 n.10, 791 P.2d at 300 n.10, 269 Cal. Rptr. at 730 n.10.

68. *Id.* at 1031, 791 P.2d at 301, 269 Cal. Rptr. at 731. The court disapproved *County of Los Angeles v. Superior Court*, 155 Cal. App. 3d 798, 202 Cal. Rptr. 444 (1984) and *Bear Creek Planning Comm. v. Title Ins. & Trust Co.*, 164 Cal. App. 3d 1227, 211 Cal. Rptr. 172 (1985) to the extent that they were inconsistent with *Bay Development*. *Bay Development* at 1032 n.12, 791 P.2d at 302 n.12, 269 Cal. Rptr. at 732 n.12.

69. *Bay Development*, 50 Cal. 3d at 1032, 791 P.2d at 302, 269 Cal. Rptr. at 732.

70. *Id.*

71. *E. L. White*, 21 Cal. 3d at 507, 579 P.2d at 511, 146 Cal. Rptr. at 620. Where the language of the contract is “sufficiently specific,” an indemnitee may be held harmless even from active negligence. But where the language lacks such specificity, then the indemnitee will be held harmless only for passive negligence. Further, if the language provides for indemnification only from the acts of the indemnitor and not acts of others, the passively negligent indemnitee may be barred from indemnification. *Id.*; *Bay Development* at 1033, 791 P.2d at 302, 269 Cal. Rptr. at 732.

72. *Bay Development*, 50 Cal. 3d at 1033, 791 P.2d at 302, 269 Cal. Rptr. at 732. An indemnitee’s degree of negligence impacts enforcement of an express indemnification provision where the language is not specific. “[I]n the absence of [specific language] a provision will be construed to provide indemnity to the indemnitee only if he has been no more than passively negligent.” *Id.*

The court reasoned that it would be inequitable to give the same force allowed express contractual indemnity to implied contractual indemnity.⁷³ An express provision may result in limited indemnification based on the language, however, there is no limiting language in an implied provision. This could result in greater rights to the indemnitee under implied contractual indemnity.⁷⁴ Finally, the majority concluded that the nonsettling party was adequately protected from a disproportionate risk when another party settles by the good faith requirement of section 877.6.⁷⁵

D. *The Dissenting Opinion*

Justice Eagleson concurred with Chief Justice Lucas' opinion on the jurisdiction issue, but disagreed with the majority opinion about the indemnity issue.⁷⁶ Justice Eagleson proposed that the question was one of statutory construction.⁷⁷ Section 877.6 "applies to contribution and indemnity claims *'based on comparative negligence or comparative fault.'*"⁷⁸ He considered the language of the statute unambiguous and inapplicable to the indemnity issue in *Bay Development*.⁷⁹ Bay's indemnity claim was grounded on an alleged breach of contract, and Justice Eagleson concluded that section 877.6 is not applicable to contract issues.⁸⁰

The dissent reasoned that applying section 877.6 to claims arising under an alleged breach of contract contradicts California Civil Code section 3300 governing damages as a result of breach of contract.⁸¹ Under Civil Code section 3300, a party injured by a breach of contract

73. *Id.* at 1033, 791 P.2d at 303, 269 Cal. Rptr. 733.

74. *Id.*

75. *Id.* at 1021, 791 P.2d at 294, 269 Cal. Rptr. at 724. Home's settlement in *Bay Development* was considered to be in good faith. The court applied the factors delineated in *Tech-Bilt*, *supra* note 26. Bay's experts valued the claim at \$75,000, and Home's settlement of \$30,000 was considered proportionate. Further, the evidence indicated that Bay was also responsible for the misrepresentation at the heart of the litigation. *Bay Development* at 1021, 791 P.2d at 294, 269 Cal. Rptr. at 724.

76. *Bay Development*, 50 Cal. 3d at 1038, 791 P.2d at 307, 269 Cal. Rptr. at 736 (Eagleson, J., dissenting).

77. *Id.* at 1039, 791 P.2d at 308, 269 Cal. Rptr. at 737 (Eagleson, J., dissenting).

78. *Id.* (Eagleson, J., dissenting) (emphasis in original).

79. *Id.* (Eagleson, J., dissenting).

80. *Id.* Justice Eagleson stated that an action for breach of contract could not be "properly characterized as being a claim based on 'comparative fault.'" *Id.*

81. *Bay Development*, 50 Cal. 3d at 1042, 791 P.2d at 309, 269 Cal. Rptr. at 739. The majority opinion pointed out that Bay did not seek relief under California Civil Code § 3300. *Id.* at 1033, 791 P.2d at 303, 269 Cal. Rptr. at 733.

“is entitled to *all damages* proximately caused by the breach.”⁸² Justice Eagleson concluded that given the majority’s broad application of section 877.6 to implied contractual indemnity, a breaching party could avoid the liability under Civil Code section 3300 by entering into a good faith settlement with an injured party.⁸³ Further, the dissent raised the question of the constitutionality of the majority’s application of section 877.6 to existing contracts.⁸⁴ The California Constitution provides that, “[a] bill of attainder . . . or law impairing the obligation of contracts may not be passed.”⁸⁵ Justice Eagleson construed the majority opinion as an impairment of contract, and should therefore be precluded from application to the existing underlying contract in *Bay Development*.⁸⁶

V. IMPACT

A. *The Procedural Issue Under California Rules of Court 24(a)*

The majority opinion in *Bay Development* gave a liberal interpretation to the thirty day exception of Rule 24(a). The majority concluded that a court of appeal order setting a case for oral argument is the same as issuing an alternative writ or order to show cause, and does not trigger the immediately final exception of Rule 24(a) even though technically within the language of the exception.⁸⁷

The majority opinion missed an opportunity to encourage the various appellate districts to change their internal operating rules to comport with the California Rules of Court. For instance, the Fourth Appellate District has conflicting rules. One rule provides that the District will only accept petitions for writs that ask “solely” for a peremptory writ.⁸⁸ A second rule provides that a writ matter will be calendared only after it has become a cause, and the matter does not become a cause until an alternative writ or order to show cause is issued.⁸⁹ Yet, Bay’s writ request was calendared without either an alternative writ or order to show cause. The concurring opinion suggested that since calendaring the matter indicated the writ matter had become a cause, then “it would have been futile, if not fatal, . . . to have filed a request for issuance of an alternative writ or order to

82. *Id.* at 1043, 791 P.2d at 310, 269 Cal. Rptr. at 740-42 (Eagleson, J., dissenting) (emphasis added).

83. *Id.* (Eagleson, J., dissenting).

84. *Id.* at 1044, 791 P.2d at 310-11, 269 Cal. Rptr. at 740-41 (Eagleson, J., dissenting).

85. *Id.* (quoting CAL. CONST. art. I, § 9).

86. *Bay Development*, 50 Cal. 3d at 1044, 791 P.2d at 310-11, 269 Cal. Rptr. at 740-41 (Eagleson, J., dissenting).

87. *Id.* at 1024-25, 791 P.2d at 295-97, 269 Cal. Rptr. at 725-27.

88. *Id.* at 1036, 791 P.2d at 304, 269 Cal. Rptr. at 734 (Lucas, C.J., concurring).

89. *Id.*

show cause."⁹⁰ By not deciding that the plain meaning of Rule 24(a) should be applied, the majority opinion opens the door to further discrepancies within the appellate divisions. This results in confusion and the potential for inequitable results among divisions. Chief Justice Lucas opined that, "[a]ppellants who seek extraordinary relief in the Fourth Appellate District thus enter a separate land with independent rules whose singular nature causes the very problem with which we are here confronted."⁹¹ While the majority opinion suggests that, "in the future all Courts of Appeal *should* follow the contemplated statutory procedure,"⁹² the courts of appeal do not appear to be precluded from continuing to create their own "separate land," allowing the question of jurisdiction to arise whenever an appellate district's rules differ from the California Rules of Court.

*B. Implied Contractual Indemnity and Good Faith Settlement
Under California Code of Civil Procedure Section 877.6*

Encouraging settlement is the overwhelming motivation behind section 877.6 which precludes a nonsettling party from pursuing a claim for indemnity against a settling party. A party who is inclined to offer a settlement has the assurance that once the court labels the settlement in good faith he is protected from further litigation on the issue. In today's congested court system, public policy favors a ruling that promotes out-of-court settlements.⁹³ On its face, the decision in *Bay Development* does just that.

The majority opinion in *Bay Development* adds a new dimension to good faith settlement under California Code of Civil Procedure section 877.6. While the California Supreme Court has dealt with issues of good faith settlement in a number of cases,⁹⁴ *Bay Development* presents the first time the court applied these principles to an injury arising from an arguable breach of contract. This decision thus supports the policy goal of encouraging out of court settlements by adding a new category of settlement cases protected from further litigation under California Code of Civil Procedure section 877.6.

90. *Id.* at 1037, 791 P.2d at 305, 269 Cal. Rptr. at 735 (Lucas, C.J., concurring).

91. *Id.* at 1036, 791 P.2d at 305, 269 Cal. Rptr. at 735 (Lucas, C.J., concurring).

92. *Id.* at 1025 n.8, 791 P.2d at 297 n.8, 269 Cal. Rptr. at 727 n.8.

93. See Comment, *California Code of Civil Procedure Sections 877, 877.5 and 877.6: The Settlement Game in the Ballpark that Tech-Bilt*, 13 PEPPERDINE L. REV. 823, 828 (1986).

94. See *Far West Financial Corp. v. D & S Co.*, 46 Cal. 3d 796, 760 P.2d 399, 251 Cal. Rptr. 202 (1988); *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d. 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

However, the number of “minitrials” required to determine whether a settlement is in good faith will necessarily increase commensurate with the increase in settlements involving implied contractual indemnity.⁹⁵ While deciding whether a settlement is in good faith is far less complex than a full fledged trial, the potential impact cannot be ignored.

In general, parties may voluntarily enter into indemnity agreements that are controlling between them. The majority opinion in *Bay Development* muddies the waters when deciding whether the wording of an explicit contractual indemnity provision meets the test of “sufficiently specific language.”⁹⁶ Even when the parties have decided on what they regard as an equitable indemnity scheme, the courts may decide otherwise. The *Bay Development* court stated that “even when parties have entered into an express indemnification agreement, an indemnitee’s culpability may still affect its right to obtain indemnity.”⁹⁷ This aspect of the court’s decision, at the worst, could result in litigation over the “sufficiency” of the language alone. At best, some parties will not receive the benefit of their bargain.

The dissent proposed a harsher result from the *Bay Development* majority decision. Justice Eagleson concluded that section 877.6 now precludes recovery for breach of contract where a good faith settlement between the breaching party and an injured party has occurred.⁹⁸ Where there are several parties to a contract and one party’s breach subjects the other party to a lawsuit, the breaching party can avoid liability for the breach simply by settling with the injured party.⁹⁹ Here, the nonbreaching party could ultimately pay damages when there is little or no fault.¹⁰⁰ The decision has the potential to

95. Note, *Far West Financial Corp. v. D & S Co. and the Abolition of Total Equitable Indemnity: What a Long, Strange Trip It’s Been*, 21 PAC. L.J. 147, 189-90 (1989).

96. *Bay Development*, 50 Cal. 3d at 1033, 791 P.2d at 302, 269 Cal. Rptr. at 732.

97. *Id.*

98. *Id.* at 1043, 791 P.2d at 310, 269 Cal. Rptr. at 740 (Eagleson, J., dissenting).

99. Justice Eagleson offers the following illustration:

A bolt maker contracts with an aircraft manufacturer to supply bolts. This contract expressly requires that the bolts be of a certain specification. The manufacturer, in turn, contracts with an airline company to deliver an aircraft that meets certain specifications contained in their contract. The bolt maker breaches its contract by supplying nonconforming bolts. The manufacturer incorporates them into an aircraft. As a result, the plane crashes. The victims sue the airline, the manufacturer, and the bolt maker. If the bolt maker enters into a good faith settlement with the victims under section 877.6, the majority opinion will preclude the manufacturer from recovering for the bolt maker’s breach of contract.

Id. at 1043, 791 P.2d at 310, 269 Cal. Rptr. at 740 (Eagleson, J., dissenting).

On the other hand, if the aircraft manufacturer discovered the defective bolts, before the fatal crash, then the manufacturer could recover damages caused by the breach of contract even where there is no express contract provision. *Id.* at 1046, 791 P.2d at 312, 269 Cal. Rptr. at 742 (Eagleson, J., dissenting).

100. “Faced with even a remotely colorable claim of good faith, many trial courts

produce "grossly unfair results"¹⁰¹ where the parties relied on implied contractual indemnity and now find that indemnity gone.

VI. CONCLUSION

Barring a nonsettling party from seeking indemnity from a settling party on the basis of implied contractual indemnification is a reasonable way to encourage settlement and reduce traffic in a congested court system. But the benefits do not come without risks. The *Bay Development* decision impacts the nature of contracts. A party's expectations will be frustrated where a party to a contract relies on indemnity based on implied contractual indemnification. Results can be grossly unfair where a breaching party is able to use a good faith settlement as a shield against a more substantial liability based on breach of contract. In the future, when parties to a contract intend to provide for indemnification, they must be certain to include an explicit indemnification provision in their contract.

LOYE M. BARTON

- B. *An otherwise privileged communication made in connection with a judicial or legislative proceeding need not have been made in the "interest of justice" in order to invoke the protection of California Civil Code section 47, subdivision 2: Silberg v. Anderson*

With its decision in *Silberg v. Anderson*,¹ the California Supreme Court unanimously upheld the broad immunity from civil lawsuits

will be disposed to view it favorably and approve settlement under section 877.6." *Id.* at 1045, 791 P.2d at 311, 269 Cal. Rptr. at 741 (Eagleson, J., dissenting).

101. *Id.*

1. 50 Cal. 3d 205, 786 P.2d 365, 266 Cal. Rptr. 638 (1990). Plaintiff brought suit for breach of contract, negligence, and "intentional tort" against his former wife's attorney for allegedly seeking an unfair advantage for her client by recommending a psychologist, with whom she had an "undisclosed relationship," to provide evaluations used in determining a child custody arrangement. The plaintiff claimed that the attorney used her influence to procure a report which was inaccurate, defamatory and highly biased against him. The trial court sustained the defendant's demurrer, finding that the plaintiff had failed to state facts sufficient to constitute a cause of action because the defendant's statements during litigation were privileged under section 47, subdivision 2 of the California Civil Code. *See infra* note 2.

The court of appeals affirmed the dismissal of all causes of action other than "intentional tort," which the court reversed and remanded to the trial court with an order sustaining the demurrer with leave to amend. The court of appeals concluded that the "litigation privilege" does not apply to publications made for reasons other than the promotion of the "interest of justice."

that has historically protected attorneys, judges, witnesses and litigants for all statements made in connection with litigation. The court held that the litigation privilege, codified by section 47(2) of the California Civil Code,² is an absolute privilege applicable to all tort actions, except malicious prosecution,³ without regard to the participant's "motives, morals, ethics, or intent."⁴ In so holding, the court overruled a 17-year-old line of appellate cases⁵ that had carved out an exception for statements which, though made in connection with litigation, do not promote the interest of justice.

As a launching point for its discussion, the court identified the policies furthered by section 47(2),⁶ and emphasized the necessity of an absolute privilege in order to effectuate those policies.⁷ After reiterating the traditional four-pronged formulation of the litigation privilege,⁸ the court focused its attention on the validity of the "interest of

2. Section 47(2) provides, in pertinent part: "A privileged publication or broadcast is one made . . . in any . . . (2) judicial proceeding . . . provided, that an allegation of averment contained in any pleading or affidavit filed in an action for divorce . . . made of or concerning a person by or against whom no affirmative relief is prayed in such action shall not be a privileged publication or broadcast as to the person making said allegation or averment within the meaning of this section unless such pleading be verified or affidavit sworn to, and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation or averment and unless such allegation or averment be material and relevant to the issues in such action." CAL. CIV. CODE § 47(2) (West 1982). For an in depth discussion of the development of this section, see Comment, *Absolute Privilege and California Civil Code Section 47(2): A Need for Consistency*, 14 PAC. L.J. 105 (1982); 6 CAL. JUR. 3D *Assault and Other Willful Torts* § 214 (1988); 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 504 *et. seq.* (9th ed. 1988).

3. See *infra* note 7.

4. *Silberg*, 50 Cal. 3d at 220, 786 P.2d at 374, 266 Cal. Rptr. at 647.

5. See, e.g., *Bradley v. Hartford Acc. & Indem. Co.*, 30 Cal. App. 3d 818, 106 Cal. Rptr. 718 (1973); *Kinnamon v. Staitman & Snyder*, 66 Cal. App. 3d 893, 136 Cal. Rptr. 321 (1977); *Earp v. Nobmann*, 122 Cal. App. 3d 270, 175 Cal. Rptr. 767 (1981); *Barbary Coast Furniture Co. v. Sjolie*, 167 Cal. App. 3d 319, 213 Cal. Rptr. 168 (1985); *McKnight v. Faber*, 185 Cal. App. 3d 639, 230 Cal. Rptr. 57 (1986); *Fuhrman v. California Satellite Sys.*, 179 Cal. App. 3d 408, 231 Cal. Rptr. 113 (1986).

6. The policies identified by the court included ensuring free access to the courts, encouraging zealous advocacy, promoting truthful testimony, enhancing finality of judgments and avoiding an unending series of derivative suits. *Silberg*, 50 Cal. 3d at 213-14, 786 P.2d at 369-70, 266 Cal. Rptr. at 642-43.

7. The only exception to the absolute nature of the litigation privilege is its inapplicability to statements made in connection with malicious prosecution suits. See *Ribas v. Clark*, 38 Cal. 3d 355, 696 P.2d 637, 212 Cal. Rptr. 143 (1985); *Kilgore v. Younger*, 30 Cal. 3d 770, 640 P.2d 793, 180 Cal. Rptr. 657 (1982). The court noted that, in such cases, "the policy of encouraging free access to the courts . . . is outweighed by the policy of affording redress for individual wrongs . . ." *Silberg*, 50 Cal. 3d at 216, 786 P.2d 371, 266 Cal. Rptr. at 644 (quoting *Albertson v. Raboff*, 46 Cal. 2d 375, 382, 295 P.2d 405, 410 (1956)).

8. The privilege has traditionally been held to apply to all statements (1) made in connection with either judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that bear a logical relationship to the action. *Silberg*, 50 Cal. 3d at 212, 786 P.2d at 369, 266 Cal. Rptr. at 642. See also 6 CAL. JUR. 3D *Assault and Other Willful Torts* § 214 (1988).

justice" test, a fifth requirement added by an appellate court in *Bradley v. Hartford Accident & Indemnity Co.*⁹ This test, the supreme court held, was both incorrectly¹⁰ and unnecessarily¹¹ devised. While recognizing the attractiveness of the moral element added by *Bradley*, the court cautioned that an interest of justice requirement would potentially defeat the purpose of the litigation privilege by allowing derivative suits to go forward on the easily averred grounds that the communication was not made in the interest of justice.¹² Moreover, the court noted that the interest of justice test is blatantly inconsistent with numerous cases that have upheld the privilege in instances of both perjury¹³ and abuse of process.¹⁴ In fact, because tortious conduct is, by definition, antithetical to the interest of justice, the test would necessarily exclude all tortious publications from protection by section 47(2). Accordingly, the exception would swallow the rule.¹⁵

The *Silberg* decision highlights the tension between the need to ensure free and vigorous legal proceedings without fear of civil liability and the need to deter unethical or illegal trial tactics. By broadly construing the parameters of the litigation privilege, the supreme court has effectively foreclosed the possibility of civil recovery for defamatory statements made in connection with legal proceedings.

9. 30 Cal. App. 3d 818, 106 Cal. Rptr. 718 (1973).

10. The *Bradley* court mistakenly construed the accepted requirement that the communication be made to "achieve the objects of litigation" as containing the additional limitation that the communication must also have been made in the "interest of justice." *Silberg*, 50 Cal. 3d at 217, 786 P.2d at 372, 266 Cal. Rptr. at 645. The *Bradley* court stated, "[S]pecial emphasis must be laid on the requirement that [the defamatory statement] be made in furtherance of the litigation and to promote the interest of justice." *Bradley*, 30 Cal. App. 3d at 826, 106 Cal. Rptr. at 723 (emphasis in original).

11. The court emphasized that *Bradley* and a number of cases which purport to have followed the "interest of justice" test could have reached the same conclusion on the basis of the absence of one or more of the four traditional factors without resort to an "interest of justice" test. *Silberg*, 50 Cal. 3d at 217, 786 P.2d at 372-73, 266 Cal. Rptr. at 645-46 (citing *McKnight v. Faber*, 185 Cal. App. 3d 639, 650, 230 Cal. Rptr. 57, 62 (1986)); *Fuhrman v. California Satellite Sys.*, 179 Cal. App. 3d 408, 231 Cal. Rptr. 113 (1986); *Earp v. Nobmann*, 122 Cal. App. 3d 270, 175 Cal. Rptr. 767 (1981).

12. *Silberg*, 50 Cal. 3d at 217, 786 P.2d at 372, 266 Cal. Rptr. at 645.

13. *Id.* at 218, 786 P.2d at 373, 266 Cal. Rptr. at 646. See, e.g., *Carden v. Getzoff*, 190 Cal. App. 3d 907, 235 Cal. Rptr. 698 (1987); *Steiner v. Eikerling*, 181 Cal. App. 3d 639, 226 Cal. Rptr. 694 (1986).

14. *Silberg*, 50 Cal. 3d at 218, 786 P.2d at 373, 266 Cal. Rptr. at 646. See, e.g., *Drasin v. Jacoby & Myers*, 150 Cal. App. 3d 481, 197 Cal. Rptr. 768 (1984); *Rosenthal v. Irell & Manella*, 135 Cal. App. 3d 121, 185 Cal. Rptr. 92 (1982); *Asia Investment v. Borowski*, 133 Cal. App. 3d 832, 184 Cal. Rptr. 317 (1982); *Umansky v. Urquhart*, 84 Cal. App. 3d 368, 148 Cal. Rptr. 547 (1978); *Twyford v. Twyford*, 63 Cal. App. 3d 916, 134 Cal. Rptr. 145 (1976).

15. *Silberg*, 50 Cal. 3d at 218, 786 P.2d at 373, 266 Cal. Rptr. at 646.

Nonetheless, the decision leaves open the avenues of redress offered through criminal proceedings for perjury and disciplinary proceedings by the state bar. Because these options offer moral rather than economic victories for injured parties, however, and in spite of the many beneficial policies which the decision protects, it is likely that the impact of the *Silberg* decision will be seen most visibly in the community at large, where negative notions about the integrity of the legal profession will be reinforced.

LORI L. SWAFFORD

III. CONSTITUTIONAL LAW

- A. *Voter approval of a ballot measure specifying the maximum number of low income housing units to be built, but providing no other details regarding the proposed housing project, satisfies the requirements of article XXXIV of the California Constitution: Davis v. City of Berkeley.*

I. INTRODUCTION

Article XXXIV of the California Constitution requires voter approval before any low rent housing project is developed, constructed, or acquired by any state public body.¹ In *Davis v. City of Berkeley*,² the court was confronted with the issue of whether this constitutional requirement was satisfied when voters approved a ballot measure specifying the maximum number of low income housing units to be built, but failing to provide other details about the proposed project.³ In a six to one decision, the court concluded that this constitu-

1. CAL. CONST. art. XXXIV, § 1. Article XXXIV, section 1 provides in relevant part:

No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

Id. The term "state public body" is defined to include the State, "or any city, city and county, county, district, authority, agency, or any other subdivision or public body of this State." *Id.*

The process of passing laws and amending constitutions through ballot measures is called "direct democracy." Fountaine, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733, 735 (1988). For a discussion and analysis of "direct democracy," see *id.* at 733-76.

2. 51 Cal. 3d 227, 794 P.2d 897, 272 Cal. Rptr. 139 (1990) (en banc). Justice Kennard wrote the majority opinion, with Chief Justice Lucas and Justices Broussard, Panelli, Eagleson, and Arabian concurring. Justice Mosk wrote a separate dissenting opinion.

3. *Id.* at 230-31, 794 P.2d at 898, 272 Cal. Rptr. at 140.

tional requirement was satisfied.⁴

This case concerned two ballot measures submitted by the City of Berkeley to its voters.⁵ One measure, submitted in 1977, provided that any public entity could construct a maximum of 200 low to moderate income housing units in the city, provided that funding was secured through local, state, federal or private sources.⁶ The second measure, submitted in 1981, was identical to the 1977 measure except that it provided for a maximum of 300 units.⁷ Although the ballot measures failed to provide specific details as to the location, type of project, or other particulars,⁸ both measures were approved by the city's electorate.⁹

Two housing projects were developed in Berkeley in 1982 and 1983 pursuant to the authority allegedly provided by the 1977 and 1981 ballot measures.¹⁰ In 1984, the United States Department of Housing and Urban Development (HUD) announced that it would provide federal funding for eligible public housing authorities to build a maximum of seventy-five low income housing units.¹¹ The Berkeley Housing Authority applied for and was granted preliminary funding, which was used to identify possible sites for the project, develop preliminary plans, and comply with zoning and environmental requirements.¹² In July, 1985, the Berkeley Housing Authority submitted a final proposal specifying the project's location and design.¹³ HUD approved the proposal.¹⁴

4. *Id.* at 244, 794 P.2d at 907, 272 Cal. Rptr. at 149.

5. For an analysis and discussion of land use regulation by initiative and the procedural requirements, see Nitikman, *Instant Planning — Land Use Regulation by Initiative in California*, 61 S. CAL. L. REV. 497 (1988).

6. *Davis*, 51 Cal. 3d at 231-32, 794 P.2d at 899, 272 Cal. Rptr. at 141.

7. *Id.* at 232, 794 P.2d at 899, 272 Cal. Rptr. at 141.

8. *Id.*

9. *Id.* at 231, 794 P.2d at 899, 272 Cal. Rptr. at 141.

10. A fourteen unit project, funded by the California Department of Housing and Community Development, was constructed in 1982, and a sixty-two unit project was completed in 1983. *Id.* at 232, 794 P.2d at 899, 272 Cal. Rptr. at 141.

11. Funds were made available for 489 units to be built throughout the region, limiting each local housing authority to seventy-five units. *Id.*

12. *Id.* Federal policy dictates that an application for funding projects in California must be accompanied by a certificate attesting that the requirements of article XXXIV have been met. In its certificate, the Berkeley Housing Authority reported that Berkeley's electorate had approved 500 low and moderate income housing units, and only seventy-six had been developed pursuant to that approval. *Id.* at 233, 794 P.2d at 900, 272 Cal. Rptr. at 142.

13. *Id.*

14. *Id.* at 234 n.2, 794 P.2d at 900 n.2, 272 Cal. Rptr. at 142 n.2. By the time this case was reheard by the California Supreme Court, construction of the project had been completed. However, the court maintained that its discussion was not moot, be-

Five Berkeley residents brought suit, alleging that because the ballot measures did not specifically identify the seventy-five unit project, the requirements of the California Constitution had not been met.¹⁵ The court disagreed, finding that by the passage of the 1977 and 1981 ballot measures, the project had been approved by the city's electorate as required by Article XXXIV of the California Constitution.¹⁶

II. TREATMENT OF THE CASE

A. *The Majority Opinion*

In construing a constitutional provision, the court must first look to the language of the provision to determine its plain meaning.¹⁷ Thus, the *Davis* court looked first to the language of article XXXIV to determine what information must be placed in a ballot measure dealing with low income housing projects.¹⁸

Although article XXXIV provides that voter approval is required prior to the development, construction, or acquisition of a low rent housing project,¹⁹ the term "project" was not clearly defined.²⁰ The court found that a "project" encompassed a progression ranging from planning to completion.²¹ Article XXXIV does not specify at which point along the progression a vote must be taken. However, the court concluded that a vote was intended to be taken in the early stages, and thus, the use of nonspecific ballot measures was not inconsistent

cause if the city were found to have acted improperly, there would have been remedies available to the plaintiffs. *Id.*

15. *Id.* at 233-34, 794 P.2d at 900, 272 Cal. Rptr. at 142. The city was joined by two indigent residents of Berkeley who claimed to be potential beneficiaries of the project. *Id.* at 234, 794 P.2d at 900, 272 Cal. Rptr. at 142.

16. *Id.* at 244, 794 P.2d at 907, 272 Cal. Rptr. at 149.

17. *In Re Lance W.*, 37 Cal. 3d 873, 886, 694 P.2d 744, 752, 210 Cal. Rptr. 631, 639 (1985) (en banc). For a discussion on the construction of constitutions, see generally 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* §§ 92-100 (9th ed. 1988); 13 CAL. JUR. 3D *Constitutional Law* §§ 25-44 (1989).

18. *Davis*, 51 Cal. 3d at 234, 794 P.2d at 900-01, 272 Cal. Rptr. at 142-43.

19. *See supra* note 1.

20. The constitutional provision does provide:

[f]or the purposes of this article the term "low rent housing project" shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise.

CAL. CONST. art. XXXIV, § 1. However, this definition is not very helpful in the context of the instant case.

21. *Davis*, 51 Cal. 3d at 235, 794 P.2d at 901, 272 Cal. Rptr. at 143. The court maintained that the term "has a variety of meanings, ranging from a 'plan' or 'mental conception, idea, or notion' to a 'government-subsidized block of houses or apartments available at low rents.'" *Id.* (citing 12 OXFORD ENGLISH DICTIONARY 597 (2d ed. 1989)). *See also*, RANDOM HOUSE DICTIONARY 1546 (2d ed. 1987) (defining a project as "something that is contemplated, devised, or planned").

with the language of article XXXIV.²² The court based this decision on the use of the word "developed" in the constitutional provision, together with its finding that the term "development" generally includes planning.²³

When the language of a constitutional provision is not clear, the court may use extrinsic aids to determine the voters' intent in adopting that provision.²⁴ One such extrinsic aid is the provision's historical background.²⁵ Article XXXIV was adopted in 1950, in response to *Housing Authority of Eureka v. Superior Court*,²⁶ in which Eureka's electorate sought and was refused the opportunity to vote regarding the city council's decision to apply for federal funding to develop low rent housing in the community.²⁷ Public housing raised two major concerns: the drain on the community's finances from the construction of low income housing projects, and the projects' aesthetic effect on the community.²⁸ The *Davis* court noted that because Eureka's electorate desired to vote on a project no more specific than the ballot measures at issue in the present case, there was no indication that the approval required under article XXXIV was intended to be based on details more specific than the number of units.²⁹

Additionally, the *Davis* court examined the ballot arguments made in support of article XXXIV.³⁰ The provision's proponents argued that the city's decision to develop low income housing projects was similar to a city's decision to issue revenue bonds, in that both required a substantial fiscal commitment.³¹ Moreover, because the issuance of revenue bonds required voter approval, public housing should also require voter approval.³² The court found nothing in the

22. *Davis*, 51 Cal. 3d at 235, 794 P.2d at 901, 272 Cal. Rptr. at 143.

23. *Id.* (citing *Drake v. City of Los Angeles*, 38 Cal. 2d 872, 876, 243 P.2d 525, 527 (1952); *Blodget v. Housing Auth.*, 111 Cal. App. 2d 45, 51, 243 P.2d 897, 901 (1952)).

24. 13 CAL. JUR. 3D *Constitutional Law* §§ 38-44 (1989); 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* §§ 96-100 (9th ed. 1988).

25. *California Hous. Fin. Agency v. Patitucci*, 22 Cal. 3d 171, 177, 583 P.2d 729, 733, 148 Cal. Rptr. 875, 879 (1978) (en banc). See also sources cited *supra* note 23.

26. 35 Cal. 2d 550, 219 P.2d 457 (1950). See also *James v. Valtierra*, 402 U.S. 137, 138-39 (1971).

27. *Housing Auth.*, 35 Cal. 2d at 559, 219 P.2d at 462.

28. *Patitucci*, 22 Cal. 3d at 178, 583 P.2d at 733, 148 Cal. Rptr. at 879.

29. *Davis v. City of Berkeley*, 51 Cal. 3d 227, 237, 794 P.2d 897, 902, 272 Cal. Rptr. 139, 144 (1990).

30. *Id.* In construing a constitutional provision, the court may consider arguments presented to the voters regarding the proposed constitutional amendment. 13 CAL. JUR. 3D *Constitutional Law* § 41 (1989); 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* § 96 (9th ed. 1988).

31. *Davis*, 51 Cal. 3d at 237-38, 794 P.2d at 902-03, 272 Cal. Rptr. at 144-45.

32. *Id.* See also GENERAL ELECTRIC, PROPOSED AMENDMENTS TO CALIFORNIA CON-

ballot pamphlet's arguments to suggest that voter approval of only the number of proposed units was insufficient to fulfill article XXXIV's purposes.³³

The court also looked at the derivation of article XXXIV's language to determine what specificity was required in order for voter approval of a housing project to be sufficient.³⁴ The court found that the language of article XXXIV was based in part on section 8(b) of the 1950 Housing Authorities Law,³⁵ which required every low rent housing project to be approved by resolution of the city's or county's governing body.³⁶ At the time article XXXIV was drafted, courts were regularly approving nonspecific proposals which stated only the maximum number of low rent units to be built.³⁷ The *Davis* court found no indication that the drafters of article XXXIV intended to require any more specificity than the number of proposed units to be built.³⁸

Finally, the court noted how article XXXIV had been implemented over the past forty years.³⁹ The court found that since article XXXIV's enactment, local governments have repeatedly used nonspecific ballot measures to obtain the required voter approval.⁴⁰ None of these ballot measures were held to be inadequate.⁴¹ In fact, the validity of these measures has consistently been upheld.⁴²

STITUTION WITH ARGUMENTS TO VOTERS 12-13 (Nov. 7, 1950) (ballot pamphlet), *quoted in Davis v. City of Berkeley*, 51 Cal. 3d at 237-38 n.5, 794 P.2d at 903 n.5, 272 Cal. Rptr. at 145 n.5 [hereinafter Ballot Pamphlet].

33. *Davis*, 51 Cal. 3d at 237-38, 794 P.2d at 903, 272 Cal. Rptr. at 145.

34. *Id.* at 238-39, 794 P.2d at 903-04, 272 Cal. Rptr. at 145-46.

35. Section 8(b) was codified in 1951 with minor changes in section 34313 of the California Health & Safety Code. *Id.* at 238 n.6, 794 P.2d at 903 n.6, 272 Cal. Rptr. at 145 n.6.

36. *Id.* at 238, 794 P.2d at 903, 272 Cal. Rptr. at 145.

37. *See, e.g., Blodget v. Housing Auth.*, 111 Cal. App. 2d 45, 48, 243 P.2d 897, 899 (1952) (Kern County Board of Supervisors adopted a resolution authorizing and approving an application by the Housing Authority for preliminary funding to cover the cost of surveys and planning in connection with 750 low rent housing units); *Housing Auth. v. City of Los Angeles*, 38 Cal. 2d 853, 857-58, 243 P.2d 515, 516 (1952) (city council adopted an ordinance approving the development, construction, and operation of a low rent housing project consisting of approximately 10,000 dwelling units).

38. *Davis*, 51 Cal. 3d at 239, 794 P.2d at 904, 272 Cal. Rptr. at 146.

39. *Id.* at 239-43, 794 P.2d at 904-07, 272 Cal. Rptr. at 146-49.

40. *Id.* at 239-40 & n.7, 794 P.2d at 904-05 & n.7, 272 Cal. Rptr. at 146-47 & n.7. The court listed a dozen such ballot measures, spanning from 1951 through 1984.

41. *Id.* at 241, 794 P.2d at 905, 272 Cal. Rptr. at 147. The court stated that considerations of maintaining public confidence suggest that well established practices among local governments should not be deemed unconstitutional. *Id.*

42. *Id.* Among those upholding the validity of nonspecific ballot measures were the following: (1) the California Department of Housing and Community Development, which specifically authorizes the ballot form used by the city of Berkeley in 1977 and 1981, *see id.* at 241, 794 P.2d at 905, 272 Cal. Rptr. at 147 (citing CAL. DEPT. OF HOUS. & COMMUNITY DEV., LEGAL ISSUES AND BALLOT MEASURES 18-19 (1980 rev.)); (2) the California Attorney General, who specifically authorized a city's voters to give the city blanket authority to build a specified number of low rent housing units, *see* 59

The court concluded by emphasizing that its holding would not diminish voters' ability to affect housing project decisions.⁴³ Voters could vote against a particular measure and insist on the submission of a more detailed proposal.⁴⁴ Additionally, they could refuse to vote for proposals which did not contain time limitations,⁴⁵ and could seek to rescind any previously approved proposal that had not yet been relied upon and that was no longer warranted.⁴⁶

B. *The Dissenting Opinion*

Justice Mosk maintained that the majority's holding was inconsistent with the purpose, language, and history of article XXXIV.⁴⁷ He pointed out that a municipality could "stockpile" previously authorized housing units indefinitely, for use in future developments when, due to changed financial circumstances, voters would not approve a public housing project.⁴⁸ Thus, one of the purposes of article XXXIV, the voters' ability to assess the fiscal impact of a housing project, was defeated. Additionally, Justice Mosk argued that the second purpose of article XXXIV, protection of the community's aesthetic environment, could not be served when the public did not know the location, size, or other particulars of a proposed housing project.⁴⁹

Moreover, Justice Mosk asserted that the majority's interpretation

Op. Cal. Att'y Gen. 211, 212-13 (1976), *cited in Davis*, 51 Cal. 3d at 241, 794 P.2d at 906, 272 Cal. Rptr. at 148; (3) the legislature, which, by adding sections 36000-36005 to the California Health & Safety Code, anticipated that a municipality would seek and obtain voter approval for a housing project *before* applying for funding, *see Davis*, 51 Cal. 3d at 242, 794 P.2d at 906, 272 Cal. Rptr. at 148; CAL. HEALTH & SAFETY CODE §§ 36000-36005 (Deering Supp. 1990) (authorizing the commencement of a validation action to determine whether proper voter authorization for low income housing has been obtained, but limiting the time period in which such an action may be brought); and (4) the courts, which have upheld the validity of nonspecific ballot measures without questioning their constitutionality, *see e.g.*, Housing Auth. of Monterey County v. Monterey Senior Citizen Park, 164 Cal. App. 3d 348, 355, 210 Cal. Rptr. 497, 501 (1985) (upholding ballot measure adopted by voters of the City of Monterey "permitting the Housing Authority to acquire 150 low-rent housing units . . . for senior citizens and handicapped persons of low income."); Housing Auth. v. Peden, 212 Cal. App. 2d 276, 281, 28 Cal. Rptr. 11, 14 (1963) (upholding ballot measure requesting approval to "develop, construct, and acquire . . . a low-rent housing project or projects . . . not to exceed two hundred and seventy five (275) dwelling units").

43. *Davis*, 51 Cal. 3d at 243, 794 P.2d at 907, 272 Cal. Rptr. at 149.

44. *Id.*

45. *Id.* at 243-44, 794 P.2d at 907, 272 Cal. Rptr. at 149.

46. *Id.* at 244, 794 P.2d at 907, 272 Cal. Rptr. at 149.

47. *Id.* at 244, 794 P.2d at 907-08, 272 Cal. Rptr. at 149-50 (Mosk, J., dissenting).

48. *Id.* at 245, 794 P.2d at 908, 272 Cal. Rptr. at 150 (Mosk, J., dissenting).

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

of the term "project" was incorrect. He maintained that any definition of the term "project" must involve "some isolable undertaking that has been more or less concretely realized."⁵⁰ Mosk also disagreed with the majority's interpretation of the term "any development," finding that the term suggested a degree of concreteness and not merely a general plan.⁵¹ Justice Mosk concluded that "the ordinary meaning of the language used in article XXXIV contemplates voter approval of specific housing projects rather than the prospective authority of a locality to broadly formulate public housing policy."⁵²

Justice Mosk also criticized the majority's discussion of the historical background of article XXXIV.⁵³ First, he found that since the provision's proponents were concerned with the financial impact of housing projects, the ballot arguments supported the plaintiff's position rather than the city's position.⁵⁴ In order to fully evaluate a proposal's financial impact, a voter would need more specific information regarding the location, type of development, and the time period in which it was to be constructed.⁵⁵

Additionally, Mosk emphasized the proponents' analogy between revenue bonds and public housing projects.⁵⁶ Just as bond elections require the disclosure of specific details regarding the amount of the bond and its general purpose, ballot measures under article XXXIV should require a degree of specificity.⁵⁷

Justice Mosk also challenged the majority's conclusion that because article XXXIV was based on section 8(b) of the Housing Authorities Law, and because it was common practice for cities to adopt resolutions which specified only the maximum number of housing units to be developed, the drafters of article XXXIV intended to authorize that practice. He claimed that the cases cited by the majority failed to demonstrate that these practices were commonplace.⁵⁸ Further, even if this was a common practice, there was no evidence that

50. *Id.* at 246, 794 P.2d at 908-09, 272 Cal. Rptr. at 150-51 (Mosk, J., dissenting).

51. *Id.* at 246-47, 794 P.2d at 909, 272 Cal. Rptr. at 151 (Mosk, J., dissenting).

52. *Id.* at 247, 794 P.2d at 909, 272 Cal. Rptr. at 151 (Mosk, J., dissenting).

53. *Id.* at 247-50, 794 P.2d at 909-11, 272 Cal. Rptr. at 151-53 (Mosk, J., dissenting).

54. *Id.* at 247-48, 794 P.2d at 909-10, 272 Cal. Rptr. at 151-52 (Mosk, J., dissenting).

55. *Id.* (Mosk, J., dissenting). For the arguments set forth by the proponents of article XXXIV see Ballot Pamphlet, *supra* note 31.

56. See Ballot Pamphlet, *supra* note 31.

57. *Davis*, 51 Cal. 3d at 248, 794 P.2d at 909-10, 272 Cal. Rptr. at 151-52 (Mosk, J., dissenting).

58. For example, Justice Mosk emphasized that in *Housing Auth. v. City of Los Angeles*, 38 Cal. 2d 853, 243 P.2d 515 (1952), the city agreed to build the 10,000 housing units within a specific period of time. *Davis*, 51 Cal. 3d at 248-49, 794 P.2d at 910-11, 272 Cal. Rptr. at 152-53 (Mosk, J., dissenting).

the drafters of article XXXIV were aware of it.⁵⁹

In sum, Justice Mosk concluded that article XXXIV requires more specific language in ballot measures than that used in the present case. However, he maintained that such a ruling should be prospective only, so that, while further constitutional violations would be avoided, projects already approved could proceed.⁶⁰

III. CONCLUSION

In *Davis v. City of Berkeley*, the court was faced with the issue of whether voter approval of a ballot measure specifying only the maximum number of housing units to be developed satisfied the requirements of article XXXIV of the California Constitution. The court, relying on the language, purpose, and historical background of the constitutional provision, found that the requirements of article XXXIV had been satisfied. In a dissenting opinion, Justice Mosk maintained that neither the language, purpose, nor historical background of article XXXIV supported the majority's holding.

This ruling is of critical importance to cities throughout California that are attempting to develop low-income housing projects. It would be difficult and costly for a municipality to first buy property, develop a preliminary plan, and obtain permits, prior to submitting the proposal to its voters for authorization. Thus, the court's ruling facilitates the development of low income housing projects.

IRIS WEINMANN

- B. *A newsperson, called as a witness in a criminal proceeding, can be held in contempt for failing to reveal unpublished information pertinent to the defense if the criminal defendant's right to a fair trial outweighs the newsperson's interests in nondisclosure: Delaney v. Superior Court*

I. INTRODUCTION

"The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know."¹

59. *Davis*, 51 Cal. 3d at 248-49, 794 P.2d at 910-11, 272 Cal. Rptr. at 152-53 (Mosk, J., dissenting).

60. *Id.* at 250, 794 P.2d at 911, 272 Cal. Rptr. at 153 (Mosk, J., dissenting).

1. *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting).

In California, the newsmen's shield law is embodied in the California Constitution² and is codified at section 1070 of the California Evidence Code.³ The newsmen's⁴ shield law was created to foster the free flow of information to the public.⁵ By protecting a nonparty⁶ newsmen from being coerced into revealing unpublished, nonconfidential information or the identity of confidential sources, the shield law protects the autonomy of the press⁷ and prevents the "drying-up" of sources who fear revelation of their identity or of information given on an off-the-record basis.⁸

In *Delaney v. Superior Court*,⁹ the California Supreme Court addressed the scope of the California newsmen's shield law. There was conflict in the lower courts as to whether the shield law's reference to "unpublished information" included a newsmen's nonconfidential, eyewitness observations.¹⁰ The opinion in *Delaney*, written by Justice Eagleson, resolved the conflict by holding that nonconfidential, eyewitness observations of a newsmen are protected by the shield law.¹¹ The opinion, however, went on to promulgate a balanc-

2. CAL. CONST. art. I, § 2(b).

3. CAL. EVID. CODE § 1070 (West Supp. 1990).

4. For convenience the term "newsmen" is used to refer to all media employees protected by the shield law.

5. See *infra* notes 15-19 and accompanying text. For the legislative intent behind Evidence Code section 1070, see *Liggett v. Superior Court*, 211 Cal. App. 3d 1461, 1470-71, 260 Cal. Rptr. 161, 166 (1989), *overruled on other grounds*, *Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990). For quotation and judicial interpretation of the ballot argument for Proposition 5 which created CAL. CONST. art. I, section 2(b), see *Delaney*, 50 Cal. 3d at 801-03 & n.13, 789 P.2d at 943-44 & n.13, 268 Cal. Rptr. at 762-63 & n.13.

6. Both California Evidence Code section 1070 and article I, section 2(b) of the California Constitution state that a newsmen "shall not be adjudged in contempt." The contempt power enables the judiciary to punish those who disobey the court's orders. The contempt power is generally the only effective power a deciding body has over a nonparty witness. The shield law's grant of immunity from this power gives nonparty witnesses virtually absolute protection from forced disclosure. The shield law also protects a party from being held in contempt, however, a party remains subject to a variety of other sanctions, such as fines or an adverse judgment. See *Mitchell v. Superior Court*, 37 Cal. 3d 268, 274, 690 P.2d 625, 628, 208 Cal. Rptr. 152, 155 (1984).

7. See *Delaney v. Superior Court*, 50 Cal. 3d 785, 820-21, 789 P.2d 934, 956-57, 268 Cal. Rptr. 753, 775-76 (1990) (Mosk, J., concurring).

8. See *Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 396, 153 Cal. Rptr. 608, 612 (1979), *overruled on other grounds*, *Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

9. 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

10. *Compare*, *New York Times Co. v. Superior Court*, 215 Cal. App. 3d 672, 248 Cal. Rptr. 426 (1988) (holding the shield law protected all information gathered by a newsmen), *aff'd*, 51 Cal. 3d 453, 796 P.2d 811, 273 Cal. Rptr. 98 (1990) with *Liggett v. Superior Court*, 211 Cal. App. 3d 1461, 260 Cal. Rptr. 161 (1989) (holding the shield law did not protect information gathered from newsmen's happenstance observations), *overruled*, *Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

11. *Delaney*, 50 Cal. 3d 785, 805, 789 P.2d 934, 945, 268 Cal. Rptr. 753, 764 (1990).

ing test¹² pursuant to which a newsperson can be held in contempt for refusing to reveal information when called as a witness in a criminal proceeding.¹³

This note begins by providing an historical overview of the California shield law. Next, the factual and procedural history of *Delaney v. Superior Court* will be traced from its inception at the municipal court level to its resolution in the California Supreme Court. Further, this note will analyze the majority and separate concurring opinions of the supreme court. Finally, this note will examine the impact that *Delaney* may have on the free flow of information and the continued existence of a newsperson's privilege in California.

II. HISTORICAL BACKGROUND

A. *The California Newsperson's Shield Law*

In California, there is no common law privilege or immunity allowing a newsperson to refuse to disclose information, even if such information is confidential.¹⁴

In 1935, to protect newspaper employees from being coerced into revealing their confidential sources, the California legislature enacted its first newsperson's shield law.¹⁵ Amendments to the code section expanded the shield law's protection to other media employees.¹⁶ In 1965, the provision was transferred from the code of civil

12. *Id.* at 805-13, 789 P.2d at 945-51, 268 Cal. Rptr. at 764-70. In an effort to balance the newsperson's interest in nondisclosure with a defendant's right to a fair trial, many courts have applied some type of balancing test. See *Mitchell v. Superior Court*, 37 Cal. 3d 268, 279-83, 690 P.2d 625, 632-34, 208 Cal. Rptr. 152, 159-61 (1984) (promulgating an extensive five part test for balancing both parties' interests in a civil action); *Hammarley*, 89 Cal. App. 3d at 399, 153 Cal. Rptr. at 614 (creating a four part test for overriding the shield law in a criminal case). *But see New York Times Co.*, 215 Cal. App. 3d at 679, 248 Cal. Rptr. at 429 (rejecting the use of a balancing test in a civil suit); *Playboy Enterprises, Inc. v. Superior Court*, 154 Cal. App. 3d 14, 28, 201 Cal. Rptr. 207, 218 (1984) (balancing unnecessary where civil litigants failed to demonstrate an interest sufficient to create a conflict with the shield law).

13. *Delaney*, 50 Cal. 3d at 815-16, 789 P.2d at 953, 268 Cal. Rptr. at 772.

14. *Id.* at 794-95, 789 P.2d at 938, 268 Cal. Rptr. at 757 (citations omitted); 6 CAL. LAW REVISION COMM'N, REPORTS AND RECOMMENDATIONS AND STUDIES 481, at 488-95 (1964).

15. *Delaney*, 50 Cal. 3d at 795, 789 P.2d at 938, 268 Cal. Rptr. at 757. See generally, 6 CAL. LAW REVISION COMM'N, REPORTS AND RECOMMENDATIONS AND STUDIES 481, at 483-85 (1964) (historical development of shield law in California).

16. *Delaney*, 50 Cal. 3d at 795, 789 P.2d at 938, 268 Cal. Rptr. at 757. A 1961 amendment extended the protection to employees of radio and television stations, press associations, and wire services. *Id.*

procedure to section 1070 of the California Evidence Code.¹⁷ In 1974, the California Legislature amended section 1070 to include protection of “any unpublished material” gathered by a newsperson.¹⁸

The most recent event in the evolution of the California shield law occurred in 1980 when California voters approved Proposition 5. As proposed by the assembly and approved by the voters, Proposition 5 amended the California Constitution to include language virtually identical to section 1070, thus, giving constitutional proportion to the newsperson’s shield law. This constitutional provision is embodied in article I, section 2(b).¹⁹

B. Judicial Interpretation of the California Newsperson’s Shield Law

Initially the shield law protected the identity of only confidential sources.²⁰ The 1974 amendment to the statute extended its protec-

17. *Id.* Initially, the shield law was codified at section 1881 of the California Code of Civil Procedure. The 1965 transfer to Evidence Code section 1070 became effective in 1967. *Id.* All subsequent references shall be to the California Evidence Code unless otherwise specified.

18. CAL. EVID. CODE § 1070 (West Supp. 1990) (Historical Note). This amendment was apparently in response to the decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972). *Delaney*, 50 Cal. 3d at 796, 789 P.2d at 939, 68 Cal. Rptr. at 758. The shield law currently states:

(a) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(b) Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(c) As used in this section, “unpublished information” includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

CAL. EVID. CODE § 1070 (West Supp. 1990).

19. *Delaney*, 50 Cal. 3d at 796, 789 P.2d at 939, 68 Cal. Rptr. at 758. See CAL. CONST. art. I, § 2(b). This constitutional provision will be referred to as article I, section 2(b) for convenience and brevity.

20. *Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 396 & n.3, 153 Cal. Rptr. 608, 612 & n.3 (1979), *overruled on other grounds*, *Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

tion to include "any unpublished information," not just source identities.²¹ The legislative intent in enacting the 1974 amendment was to protect background information gathered from confidential sources.²² By including as protected "any unpublished information," the 1974 amendment engendered confusion as to whether the new provision protected any confidential, unpublished information, as the legislative intent would suggest, or whether it protected literally any unpublished information, as the plain meaning of the words would seem to indicate.²³ The purpose of judicial statutory interpretation is to determine the lawmakers' intent.²⁴ The "plain meaning" rule is the most basic rule for determining such intent.²⁵ However, as the California Supreme Court stated in *Lungren v. Deukmejian*,²⁶ "the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute."²⁷

Given the conflict between the legislative history and the literal construction of the shield law, the *ad hoc* implementation of a particular rule of statutory interpretation has greatly affected the outcome of court of appeal cases. In the 1990 decision in *CBS, Inc. v. Superior Court*,²⁸ the court of appeal immediately rejected a newsperson's claim of privilege under section 1070 because there was no confidentiality interest in the unpublished information.²⁹ The opposite conclusion was reached by the court of appeal in the 1979 case of

21. CAL. EVID. CODE § 1070 (West Supp. 1990) (Historical Note).

22. *Liggett v. Superior Court*, 211 Cal. App. 3d 1461, 1470-71, 260 Cal. Rptr. 161, 166 (1989) (legislative history of the 1974 amendment to section 1070 examined), *overruled on other grounds*, *Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

23. *See supra* note 10.

24. *Delaney*, 50 Cal. 3d at 798, 789 P.2d at 940, 268 Cal. Rptr. at 759 (citing *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 724, 771 P.2d 406, 412, 257 Cal. Rptr. 708, 714 (1989)).

25. If the language is clear and unambiguous then the "plain meaning" rule requires that intent be determined from the words utilizing ordinary meaning. In such a situation there is no need for construction, nor for "resort to indicia of the intent of the Legislature [in the case of a statute] or of the voters [in the case of a provision adopted by the voters]." *Id.* (citing *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735, 755 P.2d 299, 303-04, 248 Cal. Rptr. 115, 120 (1988)).

26. 45 Cal. 3d 727, 755 P.2d 299, 248 Cal. Rptr. 115 (1988).

27. *Id.* at 735, 755 P.2d at 304, 248 Cal. Rptr. at 120.

28. 85 Cal. App. 3d 241, 149 Cal. Rptr. 421 (1978), *overruled*, *Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

29. *Id.* at 250, 149 Cal. Rptr. at 426.

Hammarley v. Superior Court.³⁰ In *Hammarley*, the court looked to the plain meaning of the statute and found none of the words to be meaningless or surplusage. Since it found that the statute was unambiguous, the court held that the shield law protected a newsgroup's unpublished information, even if the information was not from a confidential source.³¹

The incorporation of the shield law into the California Constitution did not end this interpretation dispute.³² For most of the 1980's, there was substantial agreement among the courts that the shield law protected all unpublished information regardless of the nature of its source.³³ However, recent cases evidenced a dispute as to whether non-confidential unpublished information was protected by the shield law.³⁴ Here, some courts turned away from the plain meaning rule and used legislative or voter intent to find the information unprotected.³⁵ At the time *Delaney* came before the California Supreme Court there was great disparity in the decisions of the courts of appeal regarding interpretation of the shield law.³⁶

30. *Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979), *overruled in part*, *Delaney v. Superior Court*, 50 Cal. 3d 785, 813 n.29, 789 P.2d 934, 951 n.29, 268 Cal. Rptr. 753, 770 n.29 (1990).

31. *Id.* at 396-98, 153 Cal. Rptr. at 612-13.

32. The ballot argument in support of Proposition 5 indicates that the voters intended to enhance the protection of a newsgroup's confidential sources by preventing the disclosure of confidential background information. See *Delaney v. Superior Court*, 50 Cal. 3d 785, 801-03 & n.13, 789 P.2d 934, 943-44 & n.13, 268 Cal. Rptr. 753, 762-63 & n.13 (1990). The ballot argument differs substantially from the express language of the constitutional provision, which says nothing about confidentiality. See CAL. CONST. art. I, § 2(b). This disparity may be attributable to poor drafting, but the courts would be acting beyond their powers if they employed such a conclusion to resolve the conflict. *Delaney*, 50 Cal. 3d at 805, 789 P.2d at 945, 268 Cal. Rptr. at 764.

33. *Delaney*, 50 Cal. 3d at 803, 789 P.2d at 944, 268 Cal. Rptr. at 763. See *Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 395-98, 153 Cal. Rptr. 608, 612-13 (1979), *overruled in part*, *Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 688 Cal. Rptr. 753 (1990); *Playboy Enterprises, Inc. v. Superior Court*, 154 Cal. App. 3d 14, 20-22, 201 Cal. Rptr. 207, 212-14 (1984); *Hallissy v. Superior Court*, 200 Cal. App. 3d 1041, 248 Cal. Rptr. 635 (1988). *But see* *CBS, Inc. v. Superior Court*, 85 Cal. App. 3d 241, 250, 149 Cal. Rptr. 421, 425 (1978), *overruled*, *Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

34. See *Delaney v. Superior Court*, 215 Cal. App. 3d 681, 249 Cal. Rptr. 60 (1988) (eyewitness observations of an event in public, nonconfidential context held not covered by shield law's "unpublished information"); *New York Times v. Superior Court*, 215 Cal. App. 3d 672, 248 Cal. Rptr. 426 (1988) (nonconfidential, unpublished photographs taken by a nonparty newsgroup protected by shield law); *Liggett v. Superior Court*, 211 Cal. App. 3d 1461, 220 Cal. Rptr. 161 (1989) (happenstance observations of newsgroup held not protected by shield law) *overruled*, *Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

35. See *Liggett v. Superior Court*, 211 Cal. App. 3d 1461, 260 Cal. Rptr. 161 (1989) (holding that newsgroup had no right to refuse to testify about an accident he witnessed while he was reporting on another accident), *overruled*, *Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990); *Delaney v. Superior Court*, 215 Cal. App. 3d 681, 249 Cal. Rptr. 60 (1988) (newsgroup's eyewitness observation of a nonconfidential event in a public place not covered by shield law).

36. See, e.g., *supra* note 10. The California Supreme Court in *Delaney* recognized

C. Past Judicial Application of the Shield Law

Neither the Supreme Court's invitation in *Branzburg v. Hayes*,³⁷ nor the legislature's 1974 amendment to the shield law,³⁸ prevented California courts from forcing newsmen to disclose their sources and unpublished information.³⁹

The voters reacted to this judicial threat to the free flow of information by incorporating the newsmen's shield law into article I, section 2(b) of the California Constitution.⁴⁰ It was hoped that by giving the shield law constitutional status, the courts would recognize the public's strong interest in preserving the free flow of information by protecting newsmen from judicial coercion.⁴¹

As a result of the amendment, additional protection was achieved for newsmen, particularly in civil proceedings.⁴² The courts of appeal have given effect to the constitutional provision by balancing the civil litigant's discovery rights against the newsmen's interests in nondisclosure. Balancing the interests affords the newsmen an advantage since a civil litigant's discovery rights are statutory and limited,⁴³ while a newsmen's protection under the shield law is express and constitutional. Thus, the balance of interests will gener-

this decisional disparity. *Delaney*, 50 Cal. 3d at 803-04, 789 P.2d at 944-45, 268 Cal. Rptr. at 763-64.

37. 408 U.S. 665, 706 (1972). In *Branzburg*, the Court held that under the first amendment to the United States Constitution, newsmen do not have a privilege to refuse to appear and testify before a grand jury with regard to any pertinent information, even if the newsmen must breach a confidence. *Id.* at 679-709. However, the Supreme Court invited state legislatures to enact their own newsmen shield laws. *Id.* at 706. See, *Delaney v. Superior Court*, 50 Cal. 3d 785, 795, 789 P.2d 934, 939, 268 Cal. Rptr. 753, 758 (1990).

38. See *supra* note 18 and accompanying text.

39. See, e.g., *Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 399-402, 153 Cal. Rptr. 608, 614-16 (1979) (although requested information was protected under shield law, constitutional right of defendant to fair trial outweighed newsmen's interest in statutory privilege), *overruled in part*, *Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

40. *Delaney*, 50 Cal. 3d at 802 n.13, 789 P.2d at 943-44 n.13, 268 Cal. Rptr. at 762 n.13 (ballot argument).

41. *Id.*

42. See *Playboy Enterprises, Inc. v. Superior Court*, 154 Cal. App. 3d 14, 28, 201 Cal. Rptr. 207, 218 (1984) (discovery interests of state and civil litigants held not to outweigh constitutional protection given nonparty newsmen by article I, section 2(b)); *Mitchell v. Superior Court*, 37 Cal. 3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (1984) (holding that newsmen who is a party to a civil action has qualified testimonial privilege, and balancing the interests in favor of nondisclosure).

43. *Playboy Enterprises, Inc. v. Superior Court*, 154 Cal. App. 3d 14, 25, 201 Cal. Rptr. 207, 216 (1984). See CAL. CIV. PROC. CODE §§ 2016-36 (West 1983) (authorization for civil discovery); CAL. CIV. PROC. CODE §§ 900-1034 (limitations on civil discovery).

ally weigh in favor of newsmen in civil suits.⁴⁴

The balancing test does not favor a newsmen's nondisclosure interests, however, when the party seeking disclosure is a criminal defendant. In fact, the balance of interests is more likely to tip in favor of disclosure since a criminal defendant's constitutional right to a fair trial is equally as compelling as a newsmen's interest in nondisclosure.⁴⁵

III. STATEMENT OF THE CASE

A. Underlying Facts

Roxana Kopetman, a Los Angeles Times reporter, and her photographer, Roberto Santiago Bertero (hereinafter "the reporters") were accompanying a Long Beach police task force on a routine patrol of the Long Beach Plaza Mall when the officers encountered Sean Patrick Delaney.⁴⁶ The officers questioned Delaney and requested some identification. As Delaney reached for his jacket, ostensibly to retrieve his wallet, the officers allegedly asked Delaney if they could search the jacket for weapons first. Delaney, however, maintains that the officers took his jacket and searched it without permission. The officers' search of the jacket revealed a set of brass knuckles which constituted an illegal, concealed weapon.⁴⁷

The reporters published an article on the task force and the incident with Delaney in the *Los Angeles Times*. The article did not mention whether Delaney had consented to the search of his

44. See *Playboy Enterprises, Inc. v. Superior Court*, 154 Cal. App. 3d 14, 28, 201 Cal. Rptr. 207, 218 (1984) (interest of civil litigants held not to outweigh newsmen's constitutionally protected interest in nondisclosure); *New York Times Co. v. Superior Court*, 215 Cal. App. 3d 672, 248 Cal. Rptr. 426 (1988) (nonparty newsmen in civil suit held to have absolute privilege against compelled disclosure), *aff'd*, 51 Cal. 3d 453, 796 P.2d 811, 273 Cal. Rptr. 98 (1990); *Mitchell v. Superior Court*, 37 Cal. 3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (1984) (in libel action, party newsmen's qualified privilege to withhold outweighed plaintiffs' discovery interests).

45. The California Supreme Court noted that "[i]n criminal proceedings, both the interest of the state in law enforcement . . . and the interest of the defendant in discovering exonerating evidence outweigh any interest asserted in ordinary civil litigation." *Delaney*, 50 Cal. 3d at 807, 789 P.2d at 947, 268 Cal. Rptr. at 766 (citing *Mitchell v. Superior Court*, 37 Cal. 3d 268, 278, 690 P.2d 625, 631, 208 Cal. Rptr. 152, 158 (1984)). Neither a statute nor a state constitutional provision can deny a criminal defendant his federal constitutional right to a fair trial. *Id.* at 805-06, 789 P.2d at 946, 268 Cal. Rptr. at 765. "Such result would violate the supremacy clauses of the federal and state constitutions." *Id.* at 806, 789 P.2d at 946, 268 Cal. Rptr. at 765.

46. Delaney and a friend were sitting on a bench in a mall when the police officers noticed a bag, allegedly similar to that used to hold drugs, protruding from Delaney's shirt pocket. The officers asked to see the contents of this bag. In response, Delaney removed the bag from his pocket which revealed a piece of gold and a piece of jewelry. *Id.* at 793, 789 P.2d at 937, 268 Cal. Rptr. at 756.

47. *Id.* At the time of his arrest, Delaney claimed that the brass knuckles were a key chain. *Id.*

jacket.⁴⁸

B. Procedural History

Delaney was arrested and charged with unlawful carrying and possession of a concealed weapon, a misdemeanor.⁴⁹ Delaney filed a motion pursuant to section 1538.5 of the California Penal Code to suppress evidence of the brass knuckles.⁵⁰ Here, Delaney argued that his suppression motion should be granted because the police lacked his consent to search the jacket and did not have a reasonable suspicion that Delaney was armed.⁵¹

The reporters were subpoenaed by Delaney to testify at the suppression hearing as to whether he had consented to the search of his jacket.⁵² The reporters moved to quash the subpoenas claiming that what they had observed was protected under the California shield law as "unpublished information."⁵³ The motions to quash were denied and the reporters appeared, but they refused to testify as to whether Delaney consented to the search.⁵⁴

The municipal court determined that the shield law did not apply to the reporters' nonconfidential, percipient observations of the public incident and held the reporters in contempt.⁵⁵ The court further noted that even if the shield law did apply, its protection would be overcome by Delaney's right to a fair trial.⁵⁶

The reporters sought writs of habeas corpus to free them from the contempt order. The superior court granted the petitions for writs of habeas corpus holding that the shield law protected the reporters from being forced to reveal the information.⁵⁷

Delaney and the state filed a joint petition to vacate the superior

48. *Id.*

49. *Id.* See CAL. PENAL CODE § 12020(a) (West Supp. 1990).

50. *Delaney*, 50 Cal. 3d at 793, 789 P.2d at 937, 268 Cal. Rptr. at 756; *Delaney v. Superior Court*, 215 Cal. App. 3d 681, 685, 249 Cal. Rptr. 60, 62 (1988).

51. *Delaney*, 50 Cal. 3d at 793-94, 789 P.2d at 937, 268 Cal. Rptr. at 756. See *Cunha v. Superior Court*, 2 Cal. 3d 352, 356, 466 P.2d 704, 707, 85 Cal. Rptr. 160, 163 (1970); see also *Terry v. Ohio*, 392 U.S. 1 (1968) (illegally seized evidence is subject to exclusionary rule whereby it will not be admitted into evidence).

52. *Delaney*, 50 Cal. 3d at 794, 789 P.2d at 937, 268 Cal. Rptr. at 756. In this case, the reporters were the only disinterested witnesses to the incident. *Id.* at 815-16, 789 P.2d at 953, 268 Cal. Rptr. at 772.

53. *Id.* at 794, 789 P.2d at 937, 268 Cal. Rptr. at 756.

54. *Id.*

55. *Id.* at 794, 789 P.2d at 937-38, 268 Cal. Rptr. at 756-57.

56. *Id.*

57. *Id.* at 794, 789 P.2d at 938, 268 Cal. Rptr. at 757.

court decision.⁵⁸ Justice Robert R. Devich, writing for the court of appeal, held that the shield law did not protect a newsgroup's observation of a public event.⁵⁹ Justice Devich reasoned that "[b]ecause in such a situation the subject matter of the testimony is not dependent upon anyone's trust being placed in the newsgroup, there is no basis to differentiate the newsgroup's observation of the event from that of any other citizen."⁶⁰

On appeal, the California Supreme Court held that the shield law was unambiguous and, according to its plain meaning, protected a newsgroup's nonconfidential, eyewitness observations of a public incident.⁶¹ However, the court further held that because: (1) Delaney showed a reasonable possibility that disclosure would aid his case, and (2) Delaney's constitutional right to a fair trial outweighed the reporters' interests,⁶² the shield law was inapplicable and the reporters could be held in contempt for refusing to reveal what they had observed.⁶³

IV. THE COURT'S DECISION

A. *Majority Opinion*

Justice Eagleson, writing for the court, presented a two part analysis: first, he interpreted the shield law to discover what was protected by the term "unpublished information," and second, he tried to harmonize the parties' interests through the creation of threshold and balancing tests.⁶⁴

1. Interpretation of the Shield Law

Justice Eagleson found the language of the shield law⁶⁵ unambiguous, and interpreted it according to the "plain meaning" rule.⁶⁶ The majority focused on the language "any unpublished information,"⁶⁷

58. *Id.*

59. *Id.*; *Delaney v. Superior Court*, 215 Cal. App. 3d 681, 692, 249 Cal. Rptr. 60, 66 (1988).

60. *Delaney*, 215 Cal. App. 3d at 691, 249 Cal. Rptr. at 66. *See also* L.A. Times, July 20, 1988, § 2 (Metro), at 6, col. 1.

61. *Delaney*, 50 Cal. 3d at 804-05, 789 P.2d at 945, 268 Cal. Rptr. at 764.

62. *Id.* at 814-16, 789 P.2d at 952-53, 268 Cal. Rptr. at 771-72.

63. *Id.* at 817, 789 P.2d at 954, 260 Cal. Rptr. at 773.

64. The court's decision was unanimous. Justices Panelli, Kennard and Kremer concurred with Justice Eagleson's majority opinion. Justices Mosk and Broussard, each writing separately, concurred with the majority opinion. Chief Justice Lucas concurred as to part I of Justice Broussard's opinion and as to Part III of the majority opinion.

65. The term "shield law" is used to refer to both California Evidence Code section 1070 and article I, section 2(b) of the California constitution.

66. *See supra* notes 25-27 and accompanying text; *Delaney*, 50 Cal. 3d at 798-800, 789 P.2d at 940-42, 268 Cal. Rptr. at 759-61.

67. *See supra* notes 20-21 and accompanying text.

and determined that "any" meant "without limit." Thus, the information protected by the shield law was not limited by a confidentiality requirement.⁶⁸

The majority refused to consider the legislative intent behind section 1070. Justice Eagleson justified this refusal by pointing out that the court was construing only the constitutional provision, article I, section 2(b).⁶⁹ In examining article I, section 2(b), Justice Eagleson noted that under the "plain meaning" rule, it was unnecessary to engage in construction or resort to legislative intent.⁷⁰ Despite this finding, the court did examine the ballot argument for Proposition 5 to discover the voters' intent behind article I, section 2(b), but rejected it as being too equivocal to overcome the shield law's clear definition of "any unpublished information."⁷¹

Firmly adhering to the plain meaning of article I, section 2(b), the majority concluded that a newsperson's nonconfidential, happenstance observations of a public event fell within the broad scope of "any unpublished information" and was protected under the shield law.⁷² This determination resolved the conflict that had developed in the lower courts,⁷³ and allowed the court to disapprove all California appellate court decisions that found that the shield law protected only confidential information.⁷⁴

2. Balancing the Interests

Having determined the scope of the shield law, Justice Eagleson went on to consider Delaney's federal constitutional rights to due

68. *Delaney*, 50 Cal. 3d at 798-800, 789 P.2d at 941-42, 268 Cal. Rptr. at 760-61 (citing CAL. CONST. art. I, § 2(b)).

69. *Id.* at 800-01, 789 P.2d at 942, 268 Cal. Rptr. at 761.

70. *Id.* at 798, 789 P.2d at 940, 268 Cal. Rptr. at 759 (citing *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735, 755 P.2d 299, 303-04, 248 Cal. Rptr. 115, 120 (1988)). See also *supra* notes 25-27 and accompanying text.

71. *Delaney*, 50 Cal. 3d at 801-03, 789 P.2d at 943-44, 268 Cal. Rptr. at 762-63.

72. *Id.* at 805, 789 P.2d at 945, 268 Cal. Rptr. at 764.

73. Compare *New York Times v. Superior Court*, 215 Cal. App. 3d 672, 248 Cal. Rptr. 426 (1988) (shield law applies to all unpublished information) with *Hallissy v. Superior Court*, 200 Cal. App. 3d 1041, 248 Cal. Rptr. 635 (1988); *Playboy Enterprises, Inc. v. Superior Court*, 154 Cal. App. 3d 14, 201 Cal. Rptr. 207 (1984); *Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979) with *Liggett v. Superior Court*, 211 Cal. App. 3d 1461, 260 Cal. Rptr. 161 (1989) (shield law only applies to confidential information); *Delaney v. Superior Court*, 215 Cal. App. 3d 681, 249 Cal. Rptr. 60 (1988); *CBS, Inc. v. Superior Court*, 85 Cal. App. 3d 241, 149 Cal. Rptr. 421 (1978).

74. 50 Cal. 3d at 804, 789 P.2d at 945, 268 Cal. Rptr. at 764 (disapproving *CBS, Inc. v. Superior Court*, 85 Cal. App. 3d 241, 149 Cal. Rptr. 421 (1978); *Liggett v. Superior Court*, 211 Cal. App. 3d 1461, 260 Cal. Rptr. 161 (1989)).

process and a fair trial. At the outset, the court recognized the criminal defendant's right to a fair trial, and that fulfillment of the right depends on full disclosure of " 'all relevant and reasonably accessible information.' "75 The court noted that the "shield law's protection is overcome in a criminal proceeding on a showing that non-disclosure would deprive the defendant of his federal constitutional right to a fair trial."76

The court explained that once the newsperson has satisfied the requirements of the shield law,77 the burden shifts to the criminal defendant to satisfy a threshold test.78 This threshold test requires a criminal defendant to show that there is a "reasonable possibility" that the information sought will materially assist his defense.79 Here, the court rejected the reporters' claim that their testimony must go to the heart of Delaney's case.80 The court found that the government has a constitutionally imposed duty to assist the criminal defendant to obtain information likely to help his defense rather than just that information that would lead to exoneration.81 The court also found the "reasonable possibility" requirement more workable than the "heart of the case" test.82

Justice Eagleson made satisfaction of the defendant's burden a threshold test because he wanted the court to consider the effect disclosure would have on the newsperson's first amendment rights.83 The majority listed four factors, none conclusive, for consideration:84 (1) whether the unpublished information is confidential or sensitive,85 (2) the interests sought to be protected by the shield law,86 (3)

75. *Id.* at 805-08, 789 P.2d at 946-48, 268 Cal. Rptr. at 765-67 (citations omitted).

76. *Id.* at 805, 789 P.2d at 946, 268 Cal. Rptr. at 765 (citations omitted).

77. The shield law has three requirements that the newsperson must satisfy to be protected: (1) the person claiming protection must be a newsperson, (2) the information to be protected must be unpublished, and (3) the information to be protected must have been acquired by the newsperson while he was acting within the scope of his employment. CAL. CONST. art I, § 2(b); CAL. EVID. CODE § 1070 (West Supp. 1990). See also *supra* note 18 (text of Section 1070).

78. *Delaney*, 50 Cal. 3d at 806 n.20, 789 P.2d at 946 n.20, 268 Cal. Rptr. at 765 n.20. See also *Hallissy v. Superior Court*, 200 Cal. App. 3d 1038, 1045, 248 Cal. Rptr. 635, 639 (1988).

79. *Delaney*, 50 Cal. 3d at 808, 789 P.2d at 948, 268 Cal. Rptr. at 767.

80. *Id.* at 807, 789 P.2d at 947, 268 Cal. Rptr. at 766. See *Mitchell v. Superior Court*, 37 Cal. 3d 268, 280-82, 690 P.2d 625, 632-34, 208 Cal. Rptr. 152, 159-61 (1984) (heart of the case requirement in civil suit).

81. *Id.* at 808, 789 P.2d at 948, 268 Cal. Rptr. at 767.

82. *Id.*

83. See *Delaney*, 50 Cal. 3d at 809 & n.24, 789 P.2d at 949 & n.24, 268 Cal. Rptr. at 768 & n.24.

84. *Delaney*, 50 Cal. 3d at 810-13, 789 P.2d at 949-51, 268 Cal. Rptr. at 768-70.

85. The less sensitive or confidential the information, the less effect its disclosure will have on the newsperson's future ability to gather information. Thus, nonconfidential information is less worthy of protection. *Id.* at 810, 789 P.2d at 949, 268 Cal. Rptr. at 768.

86. The majority wants future courts to consider the policy behind the shield law

the importance of the information to the criminal defendant,⁸⁷ and (4) whether there is an alternative source for the unpublished information.⁸⁸

When the court applied the threshold test it concluded that Delaney far exceeded the required showing.⁸⁹ The court was equally enthusiastic with the balancing test, finding that Delaney prevailed on each factor. The court concluded that Delaney's due process interest in obtaining the nonconfidential, nonsensitive information outweighed the reporters' interest in nondisclosure because disclosure would not hamper their future ability to gather news.⁹⁰

B. Justice Mosk's Concurring Opinion

Justice Mosk agreed with the majority's holding, but found the four part balancing test conceptually flawed.⁹¹ Justice Mosk argued that the court's duty was to determine whether the shield law's protection would deny a criminal defendant his right to due process. If such deprivation existed, as shown by satisfaction of the court's threshold test, Justice Mosk believed the fifth and sixth amendments required the court to order disclosure.⁹²

Justice Mosk, however, would add a second part to the threshold test. He would require that the criminal defendant show that the information cannot be obtained from an alternative source.⁹³ This requirement protects the integrity of the shield law and satisfies the defendant's rights. If the information can be obtained elsewhere,

and determine whether it will be undermined by disclosure. *Id.* at 810-11, 789 P.2d at 949-50, 268 Cal. Rptr. at 768-69.

87. If the defendant is able to exceed the threshold requirement then that excess is to be weighed in favor of disclosure. *Id.* at 811, 789 P.2d at 950, 268 Cal. Rptr. at 769.

88. In other cases this consideration had been a part of the threshold test. The majority, however, found that an inflexible alternative source requirement was inappropriate in a criminal case. The court reasoned that when information is nonconfidential or nonsensitive, there is no primary reason why a reporter should not be compelled to disclose the information even if it is available from another source. *Delaney*, 50 Cal. 3d at 811-12 & n.29, 789 P.2d at 950-51 & n.29, 268 Cal. Rptr. at 769-70 & n.29 (disapproving of *Hammarley v. Superior Court*, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979); *Hallissy v. Superior Court*, 200 Cal. App. 3d 1038, 248 Cal. Rptr. 635 (1988)).

89. Not only would the information assist Delaney's defense, it would either seal his guilt or mandate the dismissal of the charges against him. *Delaney*, 50 Cal. 3d at 814-15, 789 P.2d at 952, 268 Cal. Rptr. at 771.

90. *Id.* at 815-16, 789 P.2d at 953, 268 Cal. Rptr. at 772.

91. *Id.* at 817-18 & n.1, 789 P.2d at 954-55 & n.1, 268 Cal. Rptr. at 773-74 & n.1 (Mosk, J., concurring).

92. *Id.* at 817-20, 789 P.2d at 954-56, 268 Cal. Rptr. at 773-75 (Mosk, J., concurring).

93. *Delaney*, 50 Cal. 3d at 818, 789 P.2d at 955, 268 Cal. Rptr. at 774 (Mosk, J., concurring).

then the shield law will not have to be violated to ensure the defendant a fair trial.⁹⁴

C. *Justice Broussard's Concurring Opinion*

While agreeing with the majority that the shield law protected literally any unpublished information, Justice Broussard argued that the court's sole reliance on the plain meaning rule was inappropriate and contradicted established interpretation rules.⁹⁵ Justice Broussard found that the court's conclusion could have, and should have been reached by examining the legislative history behind section 1070 and article I, section 2(b).⁹⁶

Justice Broussard analyzed the majority's four part balancing test and Justice Mosk's reasons for rejecting it and concluded that he agreed with the majority's approach to the federal constitutional issue.⁹⁷ Justice Broussard reasoned that federal rights are not absolute.⁹⁸ When a state has a compelling interest in protecting the free flow of information, that interest must not be inhibited by a defendant's fifth and sixth amendment interests. Justice Broussard concluded that the test proposed by the majority would protect important state interests more effectively than the double threshold test proposed by Justice Mosk.⁹⁹

V. ANALYSIS OF THE OPINIONS

A. *Analysis of the Majority Opinion*

1. The Interpretation Issue

The majority's determination that the shield law was clear and unambiguous was not a first step in the interpretation process, but rather a conclusion which resolved the entire issue. Relying on the "clear definition" of unpublished information, the majority was able

94. Justice Mosk argued that the "alternative-source rule" gives maximum protection to the shield law while at the same time ensuring the due process rights of a criminal defendant. If an alternative source is available there is no reason to threaten the autonomy of the press by denying the protection of the shield law. *Id.* at 818-21, 789 P.2d at 955-57, 268 Cal. Rptr. at 774-76 (Mosk, J., concurring). Justice Mosk concurred in the court's judgment because he found "that the alternative source rule is inapplicable when the information sought is the reporter's own observations as a percipient witness of a transitory event." *Id.* at 821, 789 P.2d at 957, 268 Cal. Rptr. at 776 (Mosk, J., concurring).

95. *Id.* at 822-23, 789 P.2d at 958, 268 Cal. Rptr. at 777 (Broussard, J., concurring).

96. *Id.*

97. *Delaney*, 50 Cal. 3d at 823-25, 789 P.2d at 958-59, 268 Cal. Rptr. at 777-78 (Broussard, J., concurring).

98. *Id.* at 824, 789 P.2d at 959, 268 Cal. Rptr. at 778 (Broussard, J., concurring) (citing *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)).

99. *Id.* (Broussard, J., concurring).

to summarily dismiss the ballot argument for Proposition 5¹⁰⁰ and avoid dealing with a legislative history which presented an intent different from the one the court wanted to find.¹⁰¹

The court quoted its own language from *Lungren v. Deukmejian*,¹⁰² to support its refusal to look at legislative intent.¹⁰³ The court's reliance on *Lungren* is curious, if not misleading, because in that case the court also stated,

[T]he "plain meaning" rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose The meaning of a statute may not be determined from a single word or sentence Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. . . . [E]ach sentence must be read not in isolation but in the light of the statutory scheme.¹⁰⁴

According to the court's own interpretation rules, the majority's method of interpreting the shield law was incorrect. The court used one word to determine the shield law's meaning,¹⁰⁵ ignored the fact that the statute's literal meaning did not comport with the legislative intent,¹⁰⁶ and failed to interpret the shield law in light of its statu-

100. *Delaney*, 50 Cal. 3d at 801-03, 789 P.2d at 943-44, 268 Cal. Rptr. at 762-63. "[A] possible inference based on the ballot argument is an insufficient basis on which to ignore the unrestricted and unambiguous language of the measure itself." *Id.* at 803, 789 P.2d at 944, 268 Cal. Rptr. at 763. *See id.* at 802 n.13, 789 P.2d at 943-44 n.13, 268 Cal. Rptr. at 762-63 n.13 (text of ballot argument).

101. *Delaney*, 50 Cal. 3d at 800-01 & n.12, 789 P.2d at 942-43 & n.12, 268 Cal. Rptr. at 761-62 & n.12. "Article I, section 2(b) is plain on its face, and we need not — indeed, should not — search for external indicia of the voters' intent." *Delaney*, 50 Cal. 3d at 801, 789 P.2d at 942, 268 Cal. Rptr. at 761 (citing *Lungren v. Deukmejian*, 45 Cal. 3d 727, 755 P.2d 299, 248 Cal. Rptr. 115 (1988)).

102. *Lungren v. Deukmejian*, 45 Cal. 3d 727, 755 P.2d 299, 248 Cal. Rptr. 115 (1988).

103. *Delaney*, 50 Cal. 3d at 800-01, 789 P.2d at 942-43, 268 Cal. Rptr. at 761-62 (citing *Lungren v. Deukmejian*, 45 Cal. 3d 727, 755 P.2d 299, 248 Cal. Rptr. 115 (1988)).

104. *Lungren*, 45 Cal. 3d at 735, 755 P.2d at 304, 248 Cal. Rptr. at 120 (citations omitted).

105. Instead of focusing on the definition of the word "any" to determine the shield law's meaning, the court could have analyzed all of the words of the shield law as was done in *Playboy Enterprises, Inc. v. Superior Court*, 154 Cal. App. 3d 14, 201 Cal. Rptr. 207 (1984).

106. The majority should not have ignored the clear legislative history behind section 1070, particularly when the literal meaning of the shield law was contrary to that history. The majority reasoned in part that section 1070 did not have to be construed due to the incorporation of its language into article I, section 2(b). This rationale is confusing since the court had already stated that its discussion of article I, section 2(b) would apply with equal force to section 1070. *Delaney*, 50 Cal. 3d at 796-97 n.5, 789 P.2d at 939 n.5, 268 Cal. Rptr. at 758 n.5. Concedingly, the court may have just been interpreting the constitutional provision. However, its conclusions were being applied to section 1070. More importantly, when the text of a statute has served as the source of the constitutional provision being interpreted, and the two are virtually identical in

tory scheme.¹⁰⁷ Although the court resolved the interpretation argument, its failure to consider the legislative history of section 1070 renders its analysis unconvincing.

2. The Threshold and Balancing Tests

The majority's threshold test places only a slight burden on the criminal defendant.¹⁰⁸ The lower courts' requirement that the information "possibly lead to exoneration" is a difficult standard to satisfy. Its purpose is to give effect to the shield law, except in the most compelling situations.¹⁰⁹ The majority's desire to afford the criminal defendant all of his evidentiary rights¹¹⁰ is understandable, but the court may have gone too far. A requirement that the defendant show a reasonable possibility that the information will materially assist his defense encompasses a broad range of evidence.¹¹¹ This range is so broad that it may enable a resourceful defendant to satisfy the threshold test with regard to any evidence.¹¹²

The court's four factor balancing test is problematic in two respects. First, the court determined that the shield law protected all unpublished information,¹¹³ yet by finding nonconfidential or non-sensitive information less worthy of protection,¹¹⁴ the court has rendered its interpretation of the shield law meaningless.¹¹⁵

language, the legislative history of the statute should be used as an aid in interpreting the constitutional provision. See *Delaney*, 50 Cal. 3d at 823, 789 P.2d at 958, 268 Cal. Rptr. at 777 (Broussard, J., concurring).

107. The statutory scheme was meant to protect source confidentiality in order to encourage the free flow of information. Every amendment to the shield law was aimed at accomplishing this goal. The 1974 amendment was no exception. It was adopted to encourage the free flow of information by protecting background information. The incorporation of section 1070 into article I, section 2(b) of the California Constitution was an effort to show how important it was to achieve these goals. See *supra* notes 15-22 and accompanying text.

108. The majority's threshold test requires only that the criminal defendant "show a reasonable possibility that the information will materially assist his defense." *Delaney*, 50 Cal. 3d at 808, 789 P.2d at 948, 268 Cal. Rptr. at 767.

109. See *CBS, Inc. v. Superior Court*, 85 Cal. App. 3d 241, 251, 149 Cal. Rptr. 421, 426-27 (1978), (criminal defendant must demonstrate a reasonable possibility that sought evidence will result in his exoneration) *overruled*, *Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990).

110. See *Delaney*, 50 Cal. 3d at 808, 789 P.2d at 948, 268 Cal. Rptr. at 767.

111. For the court's examples of how evidence may materially assist a defense, see *Delaney*, 50 Cal. 3d at 809 & n.23, 789 P.2d at 948-49 & n.23, 268 Cal. Rptr. at 767-68 & n.23.

112. A defendant will generally seek evidence from only a newsperson that the defendant believes will help his case. To elevate the evidence from helpful, to materially helpful, the defendant merely has to find an imperfect defense, a lesser included offense, or impeaching purpose which the evidence helps to establish. See *Delaney*, 50 Cal. 3d at 809, 789 P.2d at 948-49, 268 Cal. Rptr. at 767-68.

113. *Delaney*, 50 Cal. 3d at 805, 789 P.2d at 945, 268 Cal. Rptr. at 764.

114. *Id.* at 810, 789 P.2d at 949, 268 Cal. Rptr. at 768.

115. See *id.* at 818, 789 P.2d at 995, 268 Cal. Rptr. at 774 (Mosk, J., concurring). The court did try to soften the impact of its view by noting that nonconfidential informa-

Nonconfidential information will seldom, if ever, be protected because of the way that the four factors of the balancing test interrelate.¹¹⁶ The second problem with the court's balancing test is that by making the alternative source rule a flexible factor, the shield law's protection may be overcome by the compelling interests of a criminal defendant, although the defendant could have obtained the same information from another source.¹¹⁷

B. Analysis of Justice Mosk's Concurring Opinion

Justice Mosk's treatment of the shield law as a state law privilege¹¹⁸ was more realistic than the majority's unyielding view that it is a mere grant of immunity from contempt.¹¹⁹ Even a non-traditional state law privilege deserves to be recognized as that state's attempt to protect a certain interest, and Justice Mosk gave the shield law that recognition. Justice Mosk rejected the majority's perversion of the alternative source rule and restored it to its absolute form as part of the threshold test.¹²⁰ Justice Mosk's acceptance of the major-

tion is entitled to some protection. *Id.* at 810 n.26, 789 P.2d at 949 n.26, 268 Cal. Rptr. at 768 n.26. However, by ranking types of information, the court has effectively neutralized any advantage the shield law gave to newsmen.

116. Under each prong of the majority's four part balancing test, the balance weighs toward disclosure of nonconfidential material. Under the first prong, "[w]hether the unpublished information is confidential or sensitive," the disclosure of nonconfidential information will not have a significant effect on the newsmen's ability to gather news. Under the second prong, "[t]he interests sought to be protected by the shield law," disclosure is not likely to thwart any policy behind the shield law. The third prong, "[t]he importance of the information to the criminal defendant," serves merely to add more strength to the defendant seeking disclosure. Under the fourth prong, "[w]hether there is an alternative source for the unpublished information," the existence of an alternative source is irrelevant since no confidentiality interest will be harmed by the refusal to apply the shield law to nonconfidential information. *See Delaney*, 50 Cal. 3d at 810-12, 789 P.2d at 949-51, 268 Cal. Rptr. at 768-70 (outlining four factors to be balanced).

117. *Delaney*, 50 Cal. 3d at 811-13 & n.29, 789 P.2d at 950-51 & n.29, 268 Cal. Rptr. at 769-70 & n.29. The court did not consider whether a lack of an alternative source was required in *Delaney's* case because he had made such a showing at the trial court level. *Id.* at 815-16, 789 P.2d at 953, 268 Cal. Rptr. at 772. *See id.* at 817-22, 789 P.2d at 954-58, 268 Cal. Rptr. at 773-77 (Mosk, J., concurring) (advocating a rigid alternative source rule).

118. *Id.* at 818-20, 789 P.2d at 955-56, 268 Cal. Rptr. at 774-75 (Mosk, J., concurring).

119. *Delaney*, 50 Cal. 3d at 797 n.6, 789 P.2d at 939-40 n.6, 268 Cal. Rptr. at 758-59 n.6.

120. *Delaney*, 50 Cal. 3d at 818, 789 P.2d at 955, 268 Cal. Rptr. at 774 (Mosk, J., concurring). "The legislative establishment of a privilege should make the privilege-holder a disfavored source of information." *Delaney*, 50 Cal. 3d at 820, 789 P.2d at 956, 268 Cal. Rptr. at 775 (Mosk, J., concurring) (quoting Note, *Defendant v. Witness: Mea-*

ity's simplified "reasonable possibility"¹²¹ threshold requirement is the only flaw in his two part threshold test.¹²² The potential ease of passing that test¹²³ threatens the potency of the shield law as a state testimonial privilege.

C. *Analysis of Justice Broussard's Concurring Opinion*

Justice Broussard cited strong authority to support his view that the court should have referred to the shield law's legislative history. However, his agreement with the court's interpretation of the shield law and his belief that the majority could find support for its conclusions in the legislative history were left unexplained and remain unclear.¹²⁴

Justice Broussard's support for the majority's threshold test and four factor balancing test¹²⁵ is somewhat misplaced. While Justice Broussard made it clear that a defendant's due process rights are not absolute and can be constitutionally overcome by a state's compelling interests,¹²⁶ the cases cited by Justice Broussard never went so far as to deny a criminal defendant evidence that went to the heart of his case.¹²⁷ Under the majority's test, it is conceivable that evidence going to the heart of a defendant's case can be overcome by a compelling state interest.¹²⁸ Such a result would be offensive to the notions of due process.¹²⁹

VI. IMPACT

A. *Effect on the Free Flow of Information*

The California Supreme Court interpreted the shield law as protecting all unpublished information,¹³⁰ yet the court also determined that a balancing of interests could require the removal of this protec-

uring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges, 30 STAN. L. REV. 935, 966 (1978) (italics added)).

121. See *supra* note 108.

122. *Delaney*, 50 Cal. 3d at 818, 789 P.2d at 955, 268 Cal. Rptr. at 774 (Mosk, J., concurring).

123. See *supra* notes 108-112 and accompanying text.

124. *Delaney*, 50 Cal. 3d at 822-23, 789 P.2d at 958, 268 Cal. Rptr. at 777 (Broussard, J., concurring).

125. *Id.* at 823-25, 789 P.2d at 958-59, 268 Cal. Rptr. at 777-78 (Broussard, J., concurring).

126. *Id.* at 824, 789 P.2d at 959, 268 Cal. Rptr. at 778 (Broussard, J., concurring).

127. See *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *United States v. Nixon*, 418 U.S. 683 (1974).

128. See *Delaney*, 50 Cal. 3d at 811, 789 P.2d at 850, 268 Cal. Rptr. at 769 ("heart of the case" showing weighs heavily in favor of disclosure but is not dispositive).

129. See *supra* notes 108-117 and accompanying text for other problems with the majority's test for accommodating the conflicting constitutional rights.

130. *Delaney*, 50 Cal. 3d at 800, 789 P.2d at 942, 268 Cal. Rptr. at 761.

tion in order to protect a criminal defendant's right to a fair trial.¹³¹ Thus, there is no piece of information that a newsperson can gather with the knowledge that the shield law will prevent its forced disclosure. There is always the risk that a court may order disclosure, even if the newsperson received the information in confidence.¹³²

This insecurity places the newsperson in the difficult position of choosing beforehand what information she would wish to protect. Thus, a newsperson may refuse to hear sources because she does not feel she can protect the source or does not think the information is worth going to jail for in the event she is held in contempt.¹³³ Putting a newsperson in a situation where she feels that she must carefully choose the information she is going to receive because of possible future court decisions has an obvious negative effect on the news gathering process and the free flow of information. Unfortunately, this is exactly the effect that the *Delaney* decision may produce.

The criminal defendant's ability to compel a newsperson to disclose information — despite the existence of an alternative source — is a serious threat to the autonomy of the press.¹³⁴ A criminal defendant may decide to use the press as his personal investigative service by subpoenaing the press to reveal all the information it has on the case, even though other sources of the information are available. This would result in time and resources being diverted from the news-gathering process and a potential breach of confidentiality by the newsgatherer. The free flow of information would again be impeded.¹³⁵

B. *Existence of the Newsperson's Privilege*

The court expressly stated that the shield law does not create a privilege for newspersons but only provides an immunity from con-

131. *Id.* at 809, 789 P.2d at 949, 268 Cal. Rptr. at 768.

132. *Id.* at 810, 789 P.2d at 949-50, 268 Cal. Rptr. at 768-69.

133. The newsperson's code of ethics requires that a newsperson refuse to disclose confidential sources or information even if it means going to jail. *See generally* 6 CAL. LAW REVISION COMM'N, REPORTS AND RECOMMENDATIONS AND STUDIES 481-508 (1964). Now that ordered disclosure is more likely, newspersons may decrease their chances of having to go to jail by refusing to hear confidential information or by declining to publish confidential information in order to conceal their knowledge.

134. *See Delaney*, 50 Cal. 3d at 820-21, 789 P.2d at 956-57, 268 Cal. Rptr. at 775-76 (Mosk, J., concurring).

135. *See id.* at 821, 789 P.2d at 957, 268 Cal. Rptr. at 776 (Mosk, J., concurring).

tempt.¹³⁶ The court disapproved of all cases which suggested that there was a privilege.¹³⁷ Accordingly, the California Supreme Court has determined that a newsmen's privilege does not exist under the shield law. This means that the rules developed for privileges, which give privileges the utmost protection from usurpation,¹³⁸ will no longer be applied to criminal cases involving the shield law. An immunity from contempt, no matter how absolute, does not require the scrupulous protection demanded by a privilege. In this way, *Delaney* has officially emasculated the protections of the newsmen's shield law.¹³⁹

VII. CONCLUSION

Through its decision in *Delaney v. Superior Court*, the California Supreme Court has not only settled the lower courts' interpretation conflict, it has officially denied that the shield law gives newsmen a testimonial privilege in criminal cases.

The shield law's protection extends to all unpublished information, but a criminal defendant can now overcome that protection by showing that the information might help his defense. The court believes its four part test will fairly balance a newsmen's first amendment rights with a criminal defendant's sixth amendment right to a fair trial. What the court has failed to realize, because it refused to consider the shield law's legislative history or voter intent, is that the people of California intended the shield law to protect more than just the freedom of the press, the people wanted to protect the free flow of information. However, through a careful use of the judicial rules of statutory interpretation, the court avoided addressing the legislative history and voter intent behind the shield law. By so doing, the decision in *Delaney* appears to ignore the California electorate's intent to create a shield law that would preserve the freedom of the press by protecting the free flow of information.

JOYCE HETTENBACH

136. *Delaney*, 50 Cal. 3d at 797 n.6, 789 P.2d at 939-40 n.6, 268 Cal. Rptr. at 758-59 n.6.

137. *Id.*

138. For an informative analysis of testimonial privileges including alternatives to the invalidation of a privilege when it threatens constitutional rights, see Hill, *Testimonial Privilege and Fair Trial*, 80 COLUM. J.L. & SOC. PROBS. 1173 (1980).

139. "It would be a disastrous turn of affairs if the appeal [sic] court ruling were upheld . . . [I]t would mean reporters would be subject to subpoenas at the whim of any party that wanted their unpublished information." L.A. Times, Oct. 28, 1988, § 1, at 3, col. 1 (quoting interview with Rex S. Heinke, Attorney for the Los Angeles Times (Oct. 28, 1988)).

- C. *The California shield law provides nonparty reporters with absolute immunity from contempt in a civil case for refusing to produce unpublished photos received from a nonconfidential source. However, a reporter may be subject to sanctions other than contempt: New York Times v. Superior Court.*

I. INTRODUCTION

*New York Times v. Superior Court*¹ (*Sortomme*) provided a bitter-sweet victory for news reporters. The California Supreme Court held that, in a civil case, the state shield law² protects nonparty reporters from being held in contempt for refusing to disclose unpublished information received from a nonconfidential source.³ However, in

1. 51 Cal. 3d 453, 796 P.2d 811, 273 Cal. Rptr. 98 (1990). *Delaney v. Superior Court*, 50 Cal. 3d 785, 789 P.2d 934, 268 Cal. Rptr. 753 (1990), includes an extensive history of the shield law. *Id.* at 794-803, 789 P.2d at 938-44, 268 Cal. Rptr. at 757-63. See also *KSDO v. Superior Court*, 136 Cal. App. 3d 375, 379-82, 186 Cal. Rptr. 211, 213-15 (1982) (history of California shield law dating back to 1935); *Mitchell v. Superior Court* (Synanon Church), 37 Cal. 3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (1984), cert. denied, 478 U.S. 1009 (1986) (reporter has "qualified privilege" to withhold disclosure in civil action); see generally 2 B. WITKIN, CALIFORNIA EVIDENCE §§ 287-96 (9th ed. 1986 & Supp. 1990); 31 CAL. JUR. 3D Evidence §§ 473-74 (1976 & Supp. 1990); Comment, *The Newsgatherer's Shield — Why Waste Space in the California Constitution?* 15 SW. U.L. REV. 527 (1985); Comment, *Newsman's Shield Law: California Approach*, 3 PEPPERDINE L. REV. 313 (1976).

2. CAL. CONST. art. I, § 2(b) (1879, amended 1980). The 1980 amendment to the constitution reads in pertinent part:

A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wires service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

As used in this subdivision, 'unpublished information' includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based on or related to such material has been disseminated.

Id. The amendment, which repeats the previously existing language of California Evidence Code § 1070, was adopted by voters in 1980. *Id.*; CAL. EVID. CODE § 1070 (West Supp. 1991).

3. 51 Cal. 3d at 462, 796 P.2d at 816, 273 Cal. Rptr. at 103. While the California shield law only provides immunity from contempt, others states' shield laws include a qualified privilege which encompasses protection from *all* sanctions. See REPORTER'S

some circumstances a nonparty reporter who disobeys a subpoena requiring disclosure of information may still have to answer with monetary sanctions.⁴ As to the procedural ramifications of the shield law, the court concluded that a reporter in a civil case may not seek appellate review of a trial court subpoena ordering disclosure of unpublished information until the reporter has been held in contempt.⁵ Once a contempt order has been issued, the reporter must make a showing that the shield law's immunity is applicable.⁶ Then, only after the trial court rules on the immunity issue, may the reporter seek appellate review.⁷

II. STATEMENT OF THE CASE

In the present case, two reporters from the Santa Barbara News-Press sought relief from the trial court's order for an *in camera* inspection of photos which the reporters had taken of an accident scene. The plaintiffs wanted the pictures for evidence to bolster their products liability claim against Volkswagen. In response to a motion to compel, the trial court ordered an *in camera* inspection to decide whether there was a valid claim of privilege. As a result of this inspection, the court found that the photos went "to the heart of the plaintiff's claim," and, hence, ordered disclosure of the photos.⁸ Subsequently, the News-Press successfully petitioned the court of appeal for an extraordinary writ and a stay of the trial court's order.

III. MAJORITY OPINION

In *New York Times*, Justice Eagleson, writing for the majority in a 6-1 decision,⁹ addressed four key issues regarding the shield law. First, the majority considered whether a reporter may seek ex-

PRIVILEGE CASES, PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY COURSE HANDBOOK SERIES, COMMUNICATIONS LAW (1988) (analysis of recent state shield law decisions).

4. 51 Cal. 3d at 464, 796 P.2d at 818, 273 Cal. Rptr. at 105. If a reporter disobeys a subpoena ordering disclosure of the protected information, the reporter would still be liable for \$500 or other damages pursuant to California Code of Civil Procedure, section 1992 which reads as follows:

A witness disobeying a subpoena also forfeits to the party aggrieved the sum of five hundred dollars (\$500), and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action.

CAL. CIV. PROC. CODE § 1992 (West 1990).

5. 51 Cal. 3d at 460, 796 P.2d at 815, 273 Cal. Rptr. at 102 (disapproving *CBS, Inc. v. Superior Court*, 85 Cal. App. 3d 241, 247, 149 Cal. Rptr. 421, 424 (1978)).

6. *Id.* at 459, 796 P.2d at 814, 273 Cal. Rptr. at 101. The reporter must demonstrate that the requirements of the shield law are satisfied. *See supra* note 2.

7. 51 Cal. 3d at 459, 796 P.2d at 814, 273 Cal. Rptr. at 101.

8. *Id.* at 457 n.3, 796 P.2d at 813 n.3, 273 Cal. Rptr. at 100 n.3.

9. Justice Mosk concurred and dissented. *See infra* notes 27-47 and accompanying text.

traordinary writ relief from an adverse ruling before an order of contempt has been entered. Next, after briefly dealing with whether "unpublished information" includes information not obtained by a reporter in confidence, Justice Eagleson discussed whether the shield law provided a privilege or immunity. Last, the court answered the question of whether the court may impose sanctions other than contempt under the shield laws.

Justice Eagleson allocated the bulk of his opinion to the procedural issue of whether a newsperson must first be found in contempt before having the right to seek appellate review. In *New York Times*, the appeal had been attempted before an order of contempt was adjudicated.¹⁰ The court held that the shield law applies only after an order of contempt has been entered because it provides immunity from contempt; it is not a privilege.¹¹ The court reasoned that normally a newsperson claiming immunity under the shield law must make a showing that all of the law's requirements are satisfied. In doing so, a factual record is established which allows the reviewing court to make an informed decision. However, if precontempt relief were allowed, there would be an insufficient record for the appellate court to review.¹²

Moreover, the court feared that if an order of contempt were not required, newsmen would be allowed to "avoid the responsibility of choosing between disclosing information or being held in contempt."¹³ Furthermore, to mollify the possible consequences to the reporter of being held in contempt and jailed, the majority recommended that trial courts stay their judgment of contempt during the review process.¹⁴ Where the trial court refuses to stay its judgment, the appellate court should do so.¹⁵ The court also briefly stated that

10. 51 Cal. 3d at 458, 796 P.2d at 813, 273 Cal. Rptr. at 100.

11. *Id.* at 458-59, 796 P.2d at 813-14, 273 Cal. Rptr. at 100-01.

12. *Id.* at 459, 796 P.2d at 814, 273 Cal. Rptr. at 101. The dissent pointed out that the majority of the time, an adequate factual record is established during the process of making motions to compel discovery. Thus, precontempt review should normally be permitted except in the unusual cases where the record is incomplete. *Id.* at 468, 796 P.2d at 821, 273 Cal. Rptr. at 108.

13. *Id.* at 459-60, 796 P.2d at 814-15, 273 Cal. Rptr. at 101-02. The dissent voiced extreme dissatisfaction with the majority's reasoning. If the purpose of the shield law is to protect reporters from the effects of contempt, then it should not be necessary for them to first be held in contempt and possibly to suffer the embarrassment and injury of being arrested while the issue of immunity is argued in the courts. The dissent proposed that precontempt review be allowed. *Id.* at 468-69, 796 P.2d at 820-21, 273 Cal. Rptr. at 107-08.

14. *Id.* at 460, 796 P.2d at 815, 273 Cal. Rptr. at 102.

15. *Id.*

it would follow its precedent in *Delaney* in holding that the phrase "unpublished information" as used in the shield law includes nonconfidential information received by the reporter.¹⁶

Next, the court contrasted the immunity of the California shield law with the qualified privilege of shield laws in other states.¹⁷ The court noted that the qualified privilege of other states' shield laws provides a reporter with protection from any type of penalty including contempt *and* sanctions, while the immunity of the California shield law only offers protection from contempt.¹⁸ Furthermore, in some states where there is a qualified privilege, a balancing test is used to decide whether the privilege applies.¹⁹ In contrast, California's absolute immunity involves no balancing test. Instead, the immunity is always applicable unless there is an overriding federal constitutional issue to be decided.²⁰ The court concluded that because Volkswagen failed to raise a claim of violation of an applicable state or federal constitutional right, the absolute immunity applied, and no contempt order could be issued.²¹

In the last part of his opinion, Justice Eagleson ruled that the shield law does not preclude monetary sanctions against an uncooperative reporter who disobeys a civil subpoena by refusing to disclose the requested information.²² Volkswagen had invoked section 1992 of the Code of Civil Procedure in an attempt to procure monetary sanctions from the News-Press for failing to obey a subpoena requiring disclosure of the photos.²³ In rebuttal, the News-Press contended that, as a policy matter, the immunity of the shield law should in-

16. *Id.* at 461, 796 P.2d at 815, 273 Cal. Rptr. at 102 (citing *Delaney v. Superior Court* (Kopetman), 50 Cal. 3d 785, 805, 789 P.2d 934, 945, 268 Cal. Rptr. 753, 764 (1990)).

17. *Id.* See also *KSDO v. Superior Court*, 136 Cal. App. 3d 375, 385, 186 Cal. Rptr. 211, 216 (holding that the shield law provides immunity from contempt for refusal to disclose; it is not a privilege).

18. *Id.* at 459 n.5, 796 P.2d at 814 n.5, 273 Cal. Rptr. at 101 n.5.

19. *Id.* at 461 n.10, 796 P.2d at 103 n.10, 273 Cal. Rptr. at 103 n.10.

20. *Id.* at 461-62, 796 P.2d at 816, 273 Cal. Rptr. at 103. In contrast to the present case, the *Delaney* court found that there was an overriding federal constitutional right to a fair trial. 50 Cal. 3d 785, 805-06, 789 P.2d 934, 946, 268 Cal. Rptr. 753, 765. Although there was no occasion for a balancing test in *New York Times*, the court did concede that, had the reporters invoked their first amendment right to freedom of the press, a qualified privilege may have existed, thus necessitating a balancing test analysis which could have been reviewed by an appellate court prior to a contempt order. Nonetheless, since the reporters did not make such a claim, the court refused to discuss the possibility of a precontempt review, stating that it would be mere dictum. 51 Cal. 3d at 460 n.8, 796 P.2d at 815 n.8, 273 Cal. Rptr. at 102 n.8. See Comment, *California's "New" Newsmen's Shield Law and the Criminal Defendant's Right to a Fair Trial*, 26 SANTA CLARA L. REV. 219 (1986).

21. 51 Cal. 3d at 462, 796 P.2d at 816, 273 Cal. Rptr. at 103. Although Volkswagen did ask the court to create a germane constitutional right which would have allowed them access to the photos, the court refused to do so. *Id.*

22. *Id.* at 464, 796 P.2d at 818, 273 Cal. Rptr. at 105.

23. *Id.* at 462, 796 P.2d at 816, 273 Cal. Rptr. at 103. See CAL. CIV. PROC. CODE § 1992 (West 1990).

clude immunity from all penalties, including sanctions.²⁴ However, the court chose to apply a literal reading of the amendment, providing immunity only from contempt.²⁵ The court went on to explain that the actual payment of the sanctions would almost never occur because the cost of the independent suit necessary to procure such sanctions would inevitably be greater than the amount of the sanctions themselves.²⁶

IV. JUSTICE MOSK'S CONCURRING AND DISSENTING OPINION

Justice Mosk concurred in sections B and C of the majority opinion which held that the shield law provides absolute immunity from contempt, but no protection from monetary sanctions.²⁷ However, Mosk was concerned with the majority's ruling that reporters may not obtain precontempt review as to the applicability of the immunity afforded by the shield law.²⁸

Mosk first pointed out that although the shield law specifically enumerates the kind of relief (i.e. immunity), it says nothing about the timing of that relief.²⁹ Therefore, based on the policy behind the shield law, that of protecting reporters from penalties for refusal to disclose information, precontempt review should be allowed where certain conditions are demonstrated.³⁰

In an attempt to provide an avenue for reporters to have access to the courts of appeal before being found in contempt, Mosk first analogized the present case to a challenge of a criminal statute.³¹ Then,

24. 51 Cal. 3d at 464, 796 P.2d at 817, 273 Cal. Rptr. at 104.

25. *Id.* at 463, 796 P.2d at 817, 273 Cal. Rptr. at 104. The court commented that while the News-Press wanted a strict reading of the shield law to include nonconfidential material in the phrase "unpublished information," they wanted a liberal reading to construe immunity from contempt as including immunity from all sanctions. The court chose to be consistent in its strict reading of the text. *Id.* at 463 n.13, 796 P.2d at 817 n.13, 273 Cal. Rptr. at 104 n.13.

26. *Id.* at 464, 796 P.2d at 817-18, 273 Cal. Rptr. at 104-05. The court noted that the aggrieved party seeking sanctions would have difficulty proving any "substantial damages" caused by the news organization's failure to disclose information. Section 1992 provides for only the nominal amount of \$500 in addition to actual damages. *Id.*

27. *Id.* at 464, 796 P.2d at 818, 273 Cal. Rptr. at 105.

28. *Id.*

29. *Id.* at 465, 796 P.2d at 819, 273 Cal. Rptr. at 106.

30. *Id.* at 465, 796 P.2d at 818, 273 Cal. Rptr. at 105.

31. *Id.* at 466-67, 796 P.2d at 819-20, 273 Cal. Rptr. at 106-07. Mosk referred to two cases in developing his three-prong test. In *Steffel v. Thompson*, 415 U.S. 452 (1974), a person who alleged an intention to engage in first amendment activities proscribed by statute was allowed to challenge the statute. Moreover, in *Babbitt v. Farm Workers*, 442 U.S. 289 (1979), the United Farm Workers (UFW) was allowed to challenge a statute prohibiting them from engaging in publicity campaigns.

appealing to the doctrines of standing and ripeness, Mosk developed a three-prong test to be used to decide whether a reporter may seek precontempt review in determining the applicability of the shield law in each case.³² The three-prong test, acting as an exception to the general rule opposing precontempt review, stated that the shield law may be invoked prior to the issuance of a contempt order when:

- (1) an important constitutional right is at stake that would benefit from early adjudication;
- (2) a prosecution or other sanction is 'certainly impending'; and
- (3) at the point at which the adjudication occurs, there is either a sufficient record of how the challenged law would apply to the plaintiff, or a colorable claim that the law is substantially overboard and therefore invalid on its face.³³

In applying his three-prong test to the present case, Mosk determined that precontempt review should be permitted.³⁴ First, an important constitutional right is at stake, namely that of a reporter's right to be free from contempt and ultimately to be free from confinement.³⁵ Second, once a reporter decides to disobey a subpoena which the court has refused to quash, the judge has the power to immediately enter a contempt order.³⁶ At that point, the sanction of imprisonment is "certainly impending."³⁷

Third, Mosk examined the need for an adequate factual record.³⁸ The majority's concern was that before an order of contempt is issued, the reviewing court does not have enough facts to make an adequate analysis of the trial court's decision.³⁹ However, Mosk pointed out that during the process of determining the applicability of the shield law, several motions are litigated, such as motions to compel discovery and motions to quash the subpoena.⁴⁰ It is normal, Mosk explained, that during the course of arguing these motions, a sufficient factual record is developed.⁴¹ Thus, only in those exceptional cases in which the factual record is not adequate should review be denied.⁴²

The dissent then concluded by mentioning policy considerations of review and discussing the common occurrence of a case which in-

32. 51 Cal. 3d at 466-67, 796 P.2d at 819-20, 273 Cal. Rptr. at 106-07.

33. *Id.* at 467, 796 P.2d at 819-20, 273 Cal. Rptr. at 107 (citations omitted).

34. *Id.* at 467-69, 796 P.2d at 820-21, 273 Cal. Rptr. at 107-08.

35. 51 Cal. 3d at 467-68, 796 P.2d at 820, 273 Cal. Rptr. at 107. Mosk argued that just as a precontempt writ review is permissible to protect the psychotherapist-patient privilege from improper discovery, a similar review should be admissible in the present case where there is the possibility of imprisonment for the reporter. *Id.*

36. *Id.* at 468, 796 P.2d at 820-21, 273 Cal. Rptr. at 108.

37. *Id.* at 467, 796 P.2d at 819-20, 273 Cal. Rptr. at 107.

38. *Id.* at 468-69, 796 P.2d at 821, 273 Cal. Rptr. at 108.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

cludes both a qualified first amendment privilege and a claim of immunity under the California shield law.⁴³ First, Mosk took issue with the majority's assertion that newsmen should not be allowed to avoid the responsibility of refusing to disclose information and thus being adjudged in contempt.⁴⁴ In balancing the possible imprisonment of reporters with the "minuscule" increased workload of reviewing courts,⁴⁵ Mosk argued that the policy behind the shield laws, that of providing protection to reporters, mandates review in virtually all cases.⁴⁶

Last, Mosk noted that in most cases, a claim of immunity from the state shield law is combined with the assertion of a first amendment privilege of freedom of the press.⁴⁷ In such cases, because the federal analysis involves a qualified privilege which, if successfully asserted, would preclude a party from even making a discovery request, first amendment review always occurs before a contempt order is ever issued. Accordingly, in those cases which involve both federal and state analysis, two separate determinations must be made: 1) a determination of privilege and 2) a determination of immunity. Usually, the determination of a privilege is decided before a contempt order, while a determination of immunity is decided after a contempt order. Instead, Mosk suggested that both of these determinations should be combined into one precontempt review in an effort to conserve judicial resources.⁴⁸

V. CONCLUSION

Reporters and news reporting agencies in California may now engage in news gathering and reporting without being in danger of civil contempt, even though the information they gather may later be subpoenaed for a civil trial.⁴⁹ On the other hand, civil plaintiffs who need information gathered by reporters to prove their case will no

43. *Id.* at 469, 796 P.2d at 821, 273 Cal. Rptr. at 108.

44. *Id.*

45. Mosk acknowledged that refusing precontempt review would remove an additional burden on reviewing courts because many times reporters would simply avoid being held in contempt by succumbing to the discovery request. However, he argued that this reduced burden on the reviewing courts would be "minuscule at best." *Id.* at 469, 796 P.2d at 821, 273 Cal. Rptr. at 108.

46. *Id.*

47. See Protecting Sources and Defending Libel Actions, 227 PLI/Pat 63, Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series — Libel Litigation (explaining first amendment analysis of federal shield laws).

48. 51 Cal. 3d at 469, 796 P.2d at 821, 273 Cal. Rptr. at 108.

49. See generally 16A AM. JUR. 2D *Constitutional Law* § 504 (1979 & Supp. 1990);

longer have access to such information. This restriction extends even to information which would not impose any harm on the reporter to release.

Reporters argue that if the court had refrained from giving them protection under the law, they would constantly be under the threat of imprisonment for justifiably refusing to participate into a civil action between two private parties. This argument certainly has merit as reflected in the court's decision. However, the court's ruling does not prevent reporters from freely yielding information to civil plaintiffs. Hopefully, reporters will not abuse their immunity by refusing to release information in every situation, especially in those circumstances where a severely injured plaintiff requires the nonconfidential unpublished information in order to receive relief.

BRADLEY R. KIRK

D. *Article I, section 28, subdivision 8 of the California Constitution is not limited by the double base term rule where enhancements based on prior felony convictions are applied, including lesser felony convictions involving imprisonment: People v. Prather.*

In *People v. Prather*,¹ the supreme court held that the defendant's one-year sentence enhancement, pursuant to section 667.5(b) of the Penal Code² (hereinafter section 667.5(b)), was not subject to the double base term limitation of section 1170.1(g) of the Code³ (herein-

13 CAL. JUR. 3D *Constitutional Law* §§ 250-66 (1989 & Supp. 1990); 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* §§ 231-370 (9th ed. 1988 & Supp. 1990).

1. 50 Cal. 3d 428, 787 P.2d 1012, 267 Cal. Rptr. 605 (1990). Chief Justice Lucas authored the majority opinion, with Justices Panelli, Kennard, and Kaufman concurring. Justice Eagleson concurred in the judgment. Justice Mosk dissented in an opinion in which Justice Broussard concurred.

2. CAL. PENAL CODE § 667.5(b) (Deering 1983 & Supp. 1990). The text of section 667.5(b) states in pertinent part: "[W]here the new offense is any felony for which a prison sentence is imposed . . . the court shall impose a one-year term for each prior separate prison term served for any felony . . ." See generally 22 CAL. JUR. 3D *Criminal Law* § 3367 (1985 & Supp. 1990); 3 B. WITKIN, CALIFORNIA CRIMINAL LAW, *Punishments for Crimes* §§ 1509-1514 (2d ed. 1989 & Supp. 1990).

3. CAL. PENAL CODE § 1170.1(g) (Deering 1983 & Supp. 1990). Section 1170.1(g) provides:

The term of imprisonment shall not exceed twice the number of years imposed by the trial court as the base term pursuant to subdivision (b) of Section 1170 unless the defendant stands convicted of a "violent felony" as defined in subdivision (c) of Section 667.5, or a consecutive sentence is being imposed pursuant to subdivision (b) or (c) of this section, or an enhancement is imposed pursuant to Section 667, 677.5, 667.8, 667.85, 12022.2, 12022.4, 12022.5, 12022.55, 12022.6, 12022.7, 12022.75, or 12022.9, or an enhancement is being imposed pursuant to Section 11370.2, 11370.4, or 11379.8 of the Health and Safety Code, or the defendant stands convicted of a felony escape from an institution in which he or she is lawfully confined.

after section 1170.1(g).⁴ The court found that the enhancement arose out of a felony conviction within the meaning of article I, section 28, subdivision (f) of the California Constitution⁵ (hereinafter section 28), which could be imposed without regard to general time limitations.⁶ The court further stated that the "prior felony convictions" within section 28 included not only felony convictions but also those felonies which the sentencing court deemed serious enough to impose *prison terms*.⁷

The court reasoned that although section 1170.1(g) did not likely contemplate an exclusion for section 667.5(b),⁸ the constitution itself barred application of the section insofar as prior felony convictions were concerned.⁹ Because of a lack of conflicting constitutional provisions,¹⁰ the court concluded that it was able to give effect to the

See generally 3 B. WITKIN, CALIFORNIA CRIMINAL LAW, *Punishments for Crimes* § 1474 (2d ed. 1989 & Supp. 1990).

4. The defendant was charged with and pleaded guilty to offenses of burglary and prohibited possession of a concealable firearm pursuant to CAL. PENAL CODE §§ 459 & 12021 (Deering 1983 & Supp. 1990) respectively. The trial court enhanced the defendant's sentence based on the fact that the firearm possession occurred while the defendant was released from custody and based on a previous term of imprisonment for a felony conviction. CAL. PENAL CODE §§ 12022.1(b) & 667.5(b) (Deering 1983 & Supp. 1990). Base sentence for the offenses imposed was two years, with a total sentence after enhancement of six years and four months.

The defendant appealed the sentence asserting that it was in violation of the double base term limitation of section 1170.1(g). The court of appeal agreed and modified the sentence accordingly. The state then sought review of the ruling as it pertained to section 667.5(b) only. *Prather*, 50 Cal. 3d at 431-32, 787 P.2d at 1013-14, 267 Cal. Rptr. at 606-07.

5. CAL. CONST. art I, § 28(f). The relevant portion of subdivision (f) states that "[a]ny prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding." *Id.*

6. *Prather*, 50 Cal. 3d at 440, 787 P.2d at 1020, 267 Cal. Rptr. at 613.

7. *Id.*

8. *Id.* at 433-34, 787 P.2d at 1015, 267 Cal. Rptr. at 608. In *People v. Jackson*, 37 Cal. 3d 826, 694 P.2d 736, 210 Cal. Rptr. 623 (1985), the supreme court held that section 667.5(a), imposing five-year enhancements for prior *serious felonies*, was excluded from the double base term limitation of section 1170.1(g). The court reasoned that the failure to include the five-year enhancements as an exception to the limitation was a mere "draftsman's oversight." This reasoning was subsequently confirmed when, in 1988, the legislature amended section 1170.1(g) to list as exceptions from its provision, among others, violent felonies covered in section 667.5(a).

However, the legislature did not include other felonies provided for in section 667.5(b) which was in existence at the time of the amendment. Thus, the court in the instant case stated that the legislature "may have intended no similar exclusion for section 667.5(b)." *Prather*, 50 Cal. 3d at 434, 787 P.2d at 1015, 267 Cal. Rptr. at 608.

9. *Prather*, 50 Cal. 3d at 437, 787 P.2d at 1017, 267 Cal. Rptr. at 610.

10. In prior rulings, the court dealt with the issue of whether the "without limitation" language allowed for unlimited use of prior felony convictions for purposes of im-

“clear and absolute” meaning of section 28.¹¹ The court found additional support in the legislative history of Proposition 8,¹² from which section 28 was derived.

The court stated that the language of section 28 did not preclude all limitations on the ability to use prior convictions to enhance sentences. Although the court failed to conclusively define what limitations were applicable to section 28, it did find that “general caps or ceilings on overall length of sentence” could not be used to prohibit enhancement where prior felony convictions were involved.¹³

Finally, the court rejected the defendant’s argument that even if section 28 was effective in barring limitations on “prior felony convictions,” these limitations were still applicable to “prior prison terms”

peachment. *See, e.g.,* *People v. Castro*, 38 Cal. 3d 301, 696 P.2d 111, 211 Cal. Rptr. 719 (1985) (section 28 does not abrogate trial court’s discretion to disallow prior felony conviction to impeach); *People v. Collins*, 42 Cal. 3d 378, 722 P.2d 173, 228 Cal. Rptr. 899 (1986) (trial court must determine if prior convictions were admitted pursuant to section 28 in violation of the Evidence Code for purposes of impeachment, and if erroneous, was the harm prejudicial). The “without limitation” language was found to be in conflict with section 28, subdivision (d) of the California Constitution which provides that the Evidence Code § 352 shall remain unaffected. CAL. CONST. art. I, § 29(d). *See generally* Letwin, *Impeaching Defendants With Their Prior Convictions: Reconsidering the Dangerous Propensities of Character Evidence after People v. Castro*, 18 U.C. DAVIS L. REV. 681 (1985). However, the court found no similar conflicting provisions with regard to enhancement sentences. *Prather*, 50 Cal. 3d at 434-35, 787 P.2d at 1016, 267 Cal. Rptr. at 609.

11. *Prather*, 50 Cal. 3d at 435, 787 P.2d at 1016, 267 Cal. Rptr. at 609.

12. Proposition 8 was enacted by referendum on June 8, 1982. Dubbed the “Victims’ Bill of Rights,” Proposition 8 created “broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons.” CAL. CONST. art I, § 28(a).

In support of its position, the court cited to information contained in Proposition 8’s Ballot Pamphlet which stated that, under the law as it then existed, there were limitations as to the possible enhancement of sentence terms. The Pamphlet continued that under the proposed measure, “any prior felony conviction could be used without limitation in calculating longer prison terms.” *Prather*, 50 Cal. 3d at 436, 787 P.2d at 1017, 267 Cal. Rptr. at 610 (citing *Analysis by the Legis. Analyst, Ballot Pamp., Proposed Stats. & Amends. to Cal. Const. Primary Election* (1982)) (emphasis added by court). The majority looked to this wording as an expression of the voters’ intent to apply prior felony enhancements without limitation.

To the contrary, the dissent believed that this language provided no guidance whatsoever in the interpretation of the intent of the voters. The dissent stated that the analysis did “little more than paraphrase article I, section 28(f) . . . [a]nd it [d]id absolutely nothing more than quote (without quotation marks) the phrase whose meaning must here be determined.” *Prather*, 50 Cal. 3d at 444, 787 P.2d at 1022-23, 267 Cal. Rptr. at 615-16 (Mosk, J., dissenting).

For a discussion of interpretation of Proposition 8, see generally Note, *Proposition 8 and the California Supreme Court: Interpretation Run Riot?*, 60 S. CAL. L. REV. 540 (1987).

13. *Prather*, 50 Cal. 3d at 437-39, 787 P.2d at 1017-19, 267 Cal. Rptr. at 610-12. The dissent, on the other hand, felt that the legislature could impose general caps on the length of sentences and that the only limitations that the voters intended to bar by use of the phrase “without limitation” were judicially created limitations. *Id.* at 445, 787 P.2d at 1023, 267 Cal. Rptr. at 616.

included in section 667.5(b).¹⁴ The court reasoned that constitutional language necessarily employed general terminology which should be broadly interpreted. Section 667.5(b) should therefore be interpreted to include the subset of prior felony convictions requiring actual imprisonment. Thus, section 28 bars limitations on prior felony convictions inclusive of those for which imprisonment was required.¹⁵

In reaching this decision, the California Supreme Court adopted the opinion of many lower state courts.¹⁶ In doing so, it has continued to chip away at the double base term rule of section 1170.1(g), finding yet another implied exception. It is not clear whether the legislature will again follow suit and amend the statute to add validity to the court's decision.

SUE ELLEN DIEB

IV. CRIMINAL LAW

In child molestation cases, a young victim's testimony that is unspecific with regard to the time, place, or other particulars of the alleged sexual assault is sufficient to support a conviction from both an evidentiary and constitutional standpoint: People v. Jones.

I. INTRODUCTION

The problem of child sexual abuse has grown over the past several years. Approximately 22,000 cases of child sexual abuse were reported in 1988.¹ Of these, a large number are "resident child molester" cases, in which a child is subject to prolonged abuse by a molester who resides with or has recurring access to the child.² Often, the child, because of age or frequency of assaults is unable to distinguish one incident from another in terms of time, place, or

14. *Id.* at 439, 787 P.2d at 1019, 267 Cal. Rptr. at 612. The defendant based this argument on the reasoning of the court in *People v. Rodriguez*, 205 Cal. App. 3d 1487, 1494, 253 Cal. Rptr. 306, 311 (1988) wherein the court distinguished the terms "conviction" and "prison term" as different legal terms of art.

15. *Prather*, 50 Cal. 3d at 440, 787 P.2d at 1020, 267 Cal. Rptr. at 613.

16. See generally *People v. Doane*, 200 Cal. App. 3d 852, 246 Cal. Rptr. 366 (1988); *People v. Poole*, 168 Cal. App. 3d 516, 214 Cal. Rptr. 502 (1985); *People v. Hall*, 168 Cal. App. 3d 624, 214 Cal. Rptr. 289 (1985).

1. *People v. Jones*, 51 Cal. 3d 34, 39-40, 792 P.2d 643, 645, 270 Cal. Rptr. 611, 613 (1990) (citing CAL. DEPT. JUSTICE, CHILD ABUSE CENTRAL INDEX, CHILD ABUSE INVESTIGATION REPORTS, (1988)), modified, 51 Cal. 3d 294 (1990).

2. 1989 CAL. LEGIS. SERV. ch. 1402, sec. 1(a) (West). See *infra* note 90.

other particulars.³ When a child witness is unable to give specific details about the sexual assault, an issue arises as to whether the child's testimony is sufficient to convict a defendant, and if so, whether the defendant's due process rights are violated. It is this issue that faced the California Supreme Court in *People v. Jones*.⁴ The court held that such generic testimony⁵ was sufficient to sustain a conviction, from both an evidentiary and constitutional standpoint.⁶

The defendant in *Jones* was convicted by a jury of twelve counts of lewd and lascivious conduct under California Penal Code section 288.⁷ Six of those counts related to acts against his adopted son, Sammy.⁸ The court of appeal reversed four of the counts relating to Sammy, finding that the boy's failure to specify dates or other distinguishing characteristics of the individual acts prevented the jury from differentiating between the acts.⁹

Upon review, the California Supreme Court confronted two competing interests. On one hand, the public has a strong interest in convicting child molesters. However, disallowing generic testimony to support a conviction would virtually immunize a resident child molester from prosecution, since a child subject to continued sexual assaults over a prolonged period of time will usually be unable to give specific details regarding the acts. This public policy interest must be balanced against the accused's due process rights. The court found the public policy interest to prevail, concluding that generic testimony is sufficient to sustain a conviction, and that such testimony does not deprive a defendant of his constitutional rights.¹⁰

3. 1989 CAL. LEGIS. SERV. ch. 1402, sec. 1(a) (West). Recognizing the unique problems associated with resident child molester cases, the California Legislature enacted Penal Code section 288.5, which establishes a new crime of continuing sexual abuse of a child under circumstances where there have been repeated acts of molestation over a period of time, and where the perpetrator either resides with or has recurring access to the child. CAL. PENAL CODE § 288.5 (West Supp. 1990).

4. Chief Justice Lucas wrote the majority opinion, with which Justices Panelli, Eagleson, Kennard, and Arabian concurred. Justice Mosk wrote a dissenting opinion, with which Justice Broussard concurred.

5. The term "generic testimony" refers to a child's testimony that does not distinguish one incident of molestation from another in terms of time, place, or other particulars. See *People v. Vargas*, 206 Cal. App. 3d 831, 845, 253 Cal. Rptr. 894, 901 (1988) ("For example, the victim testifies the defendant had sexual intercourse with her every other day in her bedroom . . . or did the same thing over and over").

6. *Jones*, 51 Cal. 3d at 60, 792 P.2d at 659, 270 Cal. Rptr. at 627.

7. For a discussion of lewd conduct with children, see generally 17 CAL. JUR. 3D *Criminal Law* §§ 771-819 (1981); 2 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW §§ 786-92 (2d ed. 1988).

8. *Jones*, 51 Cal. 3d at 43, 792 P.2d at 647, 270 Cal. Rptr. at 615. The six counts involved the following time periods: Count 18 - September 1, 1983 to October 31, 1983; Count 19 - November 1, 1983 to December 31, 1983; Count 20 - January 1, 1984 to February 29, 1984; Count 22 - May 1, 1984 to June 30, 1984; Count 23 - July 1, 1984 to August 30, 1984; Count 28 - May 1, 1985 to June 30, 1985. *Id.*

9. *Id.*

10. *Id.* at 60, 792 P.2d at 659, 270 Cal. Rptr. at 627.

II. BACKGROUND OF THE CASE

The California Courts of Appeal disagree as to the proper effect of generic testimony in cases of child molestation. Two cases decided by the California Supreme Court in 1901 have greatly shaped the treatment of this subject.¹¹ *People v. Castro*¹² was a rape case in which the defendant was charged with committing an act of sexual intercourse on a specific date with a girl who had not yet attained the age of consent.¹³ Although the information charged only one offense, it contained evidence of four separate acts of sexual intercourse committed by the defendant with the victim. None of these acts were proven to have occurred on the date specified in the information. After the jury convicted the defendant, the superior court granted a motion for a new trial.

The California Supreme Court affirmed, holding that "the defendant was not called upon to defend himself against all of these respective acts of intercourse, extending over a period of several months. The information only charged one act, and upon that allegation the case must stand or fall."¹⁴ The court further held that the State should have been required to choose the specific act upon which it relied to prove the charges against the defendant,¹⁵ and that the trial court should have instructed the jury to focus on the one specific act that the State had to prove.¹⁶

*People v. Williams*¹⁷ also involved a defendant charged with committing sexual intercourse with a minor under the age of consent.¹⁸ As in *Castro*, the State had alleged only one offense in the indictment, but the victim testified that acts of sexual intercourse had occurred almost daily for a period of about four months. The court reversed the conviction, concluding that

[e]ach of these acts was a separate offense, and the defendant could not be tried for either, and separately for each of them. The jury were not even told that they must all agree that some specifically described act had been performed. A verdict of guilty could have been rendered under such an instruction, although no two jurors were convinced beyond a reasonable doubt, or at

11. See *People v. Castro*, 133 Cal. 11, 65 P. 13 (1901); *People v. Williams*, 133 Cal. 165, 65 P. 323 (1901).

12. 133 Cal. 11, 65 P. 13 (1901).

13. *Id.*

14. *Id.* at 13, 65 P. at 14.

15. *Id.*

16. *Id.*

17. 133 Cal. 165, 65 P. 323 (1901).

18. *Id.*

all, of the truth of the charge, as to any one of these separate offenses.¹⁹

Furthermore, the court found that the defendant was denied an opportunity to present a defense because of the State's failure to inform him as to which particular offense he was being tried.²⁰

After *Castro* and *Williams*, the courts developed an "either/or" rule to resolve the due process concerns raised in those early cases.²¹ This rule applies where one single criminal act is charged in the pleadings, but evidence of more than one illegal act is introduced. In such a case, "either the prosecution must select the specific act relied upon to prove the charge or the jury must be instructed in the words of CALJIC No. 17.01²² or 4.71.5,²³ or their equivalent, that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act."²⁴

The "either/or" rule effectively cures the due process concerns enumerated in *Castro* and *Williams* in cases where one specific act is charged and evidence of other distinct acts are introduced. However, an election or unanimity instruction does not meet these due process concerns where the testimony establishes numerous indistinguishable acts of molestation.²⁵ Where the acts are not distinguishable from one another, the prosecution cannot "select the specific act relied

19. *Id.* at 168, 65 P. at 324.

20. *Id.* at 168-69, 65 P. at 324-25.

21. The due process concerns were notice, opportunity to present a defense, and jury unanimity. *People v. Vargas*, 206 Cal. App. 3d 831, 844, 253 Cal. Rptr. 894, 900 (1988).

22. CALJIC No. 17.01 provides:

The defendant is accused of having committed the crime of — [in Count — —]. The prosecution has introduced evidence tending to prove that there is more than one [act] [or] [omission] upon which a conviction [on Count —] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of such [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count —], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict.

CALJIC 17.01 (5th ed. 1988).

23. CALJIC No. 4.71.5 provides:

Defendant is accused in [Count[s] — of] the information of having committed the crime of —, a violation of Section — of the Penal Code, on or about a period of time between — and —.

In order to find the defendant guilty, it is necessary for the prosecution to prove beyond a reasonable doubt the commission of a specific act [or acts] constituting that crime within the period alleged.

And, in order to find the defendant guilty, you must unanimously agree upon the commission of the same specific act [or acts] constituting the crime within the period alleged.

It is not necessary that the particular act or acts committed so agreed upon be stated in the verdict.

CALJIC 4.71.5 (5th ed. 1988).

24. *People v. Gordon*, 165 Cal. App. 3d 839, 853, 212 Cal. Rptr. 174, 183 (1985) (emphasis in original). See *Vargas*, 206 Cal. App. 3d at 844, 253 Cal. Rptr. at 900; *People v. Van Hoek*, 200 Cal. App. 3d 811, 816, 246 Cal. Rptr. 352, 355 (1988).

25. *Van Hoek*, 200 Cal. App. 3d at 816, 246 Cal. Rptr. at 355-56.

upon to prove the charge,"²⁶ and the jury cannot "unanimously agree beyond a reasonable doubt that the defendant committed the same specific criminal act."²⁷ Thus, generic testimony presents a unique problem that is not adequately resolved through application of the "either/or" rule.

Two lines of cases have arisen in California with regard to the treatment of generic testimony. Some courts have concluded that the defendant's due process rights are violated when his conviction rests on a child's unspecific testimony.²⁸ In *People v. Van Hoek*,²⁹ for example, the defendant was accused of molesting his minor daughter for approximately ten years.³⁰ The victim testified that these acts occurred from the time she was three years old until she was thirteen, but she could not give specific dates or tie the acts to a holiday, birthday, or other significant event. The court reversed the conviction, finding that the accused's defense was severely hampered by the lack of specificity because he could not present an alibi defense without knowing when the act charged was alleged to have occurred.³¹ Additionally, since there were no specific details to attack, he could not undermine her credibility.³² Moreover, the court concluded that the jury could not unanimously agree that the same specific criminal act had occurred, because no specific act was charged.³³ Many similar cases also attack unspecific testimony on evidentiary grounds, finding generic testimony to be insufficient evidence to support a conviction.³⁴

26. *Id.* (quoting *Williams*, 133 Cal. at 168-69, 65 P. at 324).

27. *Id.*

28. See, e.g., *Vargas*, 206 Cal. App. 3d at 846, 253 Cal. Rptr. at 901 (holding that "[w]here evidence of several acts is presented, any one of which could constitute the crime or crimes charged, due process requires that a distinguishing characteristic be presented of one or more of the acts"); *People v. Atkins*, 203 Cal. App. 3d 15, 19-23, 249 Cal. Rptr. 863, 865-68 (1988) (finding that in cases where the child's unspecific testimony is virtually uncorroborated, a "defendant's rights to due process are seriously violated"); *Van Hoek*, 200 Cal. App. 3d at 818, 246 Cal. Rptr. at 357 (holding that in cases based on generic testimony "the defendant's rights to due process are seriously violated").

29. 200 Cal. App. 3d 811, 246 Cal. Rptr. 352 (1988).

30. *Id.*

31. *Id.* at 817-18, 246 Cal. Rptr. at 356.

32. *Id.*

33. *Id.*

34. See, e.g., *People v. Luna*, 204 Cal. App. 3d 726, 737-49, 250 Cal. Rptr. 878, 884-91 (1988) (reversing a defendant's conviction for three counts of sexually molesting his minor stepdaughter, finding the child's generic testimony to be insufficient to support the conviction as to those counts); *Atkins*, 203 Cal. App. 3d at 19-23, 249 Cal. Rptr. at 865-68 (finding insufficient evidence to support two counts of child molestation against

Other courts disagree with the *Van Hoek* line of reasoning that generic testimony violates a defendant's due process rights, instead finding that criminal defendants today have procedural protections available to them that were not present when *Castro* and *Williams* were decided.³⁵ Additionally, these cases recognize that defendants in resident child molestation cases are less likely to rely on alibi or misidentification defenses, with the real issue being credibility.³⁶ This line of cases also rejects the argument that a child victim's failure to distinguish between various acts renders the evidence insufficient to support a conviction.³⁷

Recognizing this split of authority in the lower courts, and recognizing the societal concern with convicting resident child molesters, the California Supreme Court granted the petition for certiorari in *People v. Jones*.³⁸

III. STATEMENT OF THE CASE

Mark E. Jones, a public schoolteacher living in Mira Mesa, California was charged with twenty-eight counts of sexually molesting his two adopted sons and two neighborhood boys. He was convicted by a jury of twelve counts of lewd conduct, and was sentenced to prison for fifteen years.³⁹ This appeal addressed the six counts relating to Jones' adopted son, Sammy.

Sammy was able to recall being molested in a similar manner (oral copulation by the defendant) at five different locations (in the room he shared with his brother; in Sammy's own bedroom; in the shower or bathroom; and on camping trips). However, he was not able to recall specific dates upon which the molestations occurred, nor could

the defendant because of the prosecutor's failure to provide a specific offense). *But see Vargas*, 206 Cal. App. 3d at 847-54, 253 Cal. Rptr. at 902-07 (following the precedents set in *Luna* and *Atkins*, but maintaining that those cases were incorrectly decided with respect to their conclusions regarding the sufficiency of generic testimony).

35. *See, e.g.*, *People v. Jeff*, 204 Cal. App. 3d 309, 341-42, 251 Cal. Rptr. 135, 155 (1988); *People v. Gordon*, 165 Cal. App. 3d at 868-73, 212 Cal. Rptr. at 194-98 (Sims, J., concurring).

36. *See People v. Obremski*, 207 Cal. App. 3d 1346, 1353, 255 Cal. Rptr. 715, 719-20 (1989); *People v. Avina*, 211 Cal. App. 3d 48, 54-55, 259 Cal. Rptr. 178, 182-83 (1989); *People v. Moreno*, 211 Cal. App. 3d 776, 787-88, 259 Cal. Rptr. 800, 807-08 (1989).

37. *See, e.g., Avina*, 211 Cal. App. 3d at 56, 259 Cal. Rptr. at 184 (holding that "[c]ourts should not require that a child victim of sexual abuse be able to testify about the time of the offense with more precision than the victims of other types of crimes"); *Vargas*, 206 Cal. App. 3d at 851, 253 Cal. Rptr. at 905 (maintaining that "[b]ecause the distinguishing characteristic is not a statutory element of the crime and because this court cannot create an element, failure to provide evidence of a distinguishing characteristic does not render the evidence insufficient as to defendant's commission of each of the elements of the crime").

38. *Jones*, 51 Cal. 3d at 47, 792 P.2d at 650, 270 Cal. Rptr. at 618.

39. *Id.* at 40, 792 P.2d at 645-46, 270 Cal. Rptr. at 613-14.

he remember other specific details.⁴⁰ Sammy testified that the molestations began approximately one month after he came to live with the defendant in August 1983, and that the molestations continued once or twice each month until June 1985.⁴¹ He testified that there were some breaks when the molestations ceased for more than one month, and believed that one such "break" occurred during March and April of 1984.⁴²

The court of appeal found sufficient testimony to uphold count 18, in light of Sammy's testimony that he was molested approximately one month after moving in with the defendant.⁴³ Similarly, count 28 was also upheld based on Sammy's testimony that he was molested on a camping trip over the Memorial Day weekend.⁴⁴ However, the court found insufficient evidence to support the other four counts, and therefore reversed those counts.⁴⁵

IV. THE COURT'S OPINION

The defendant in *Jones* raised two issues on appeal. First, he argued that because Sammy could not testify with sufficient specificity to allow the jury to distinguish the various incidents, there was insufficient evidence to support the conviction.⁴⁶ Additionally, Jones argued that the unspecific testimony prevented him from adequately preparing and presenting a defense, prevented the jury from reaching a unanimous verdict,⁴⁷ and therefore violated his due process rights. The court addressed each of these issues in turn.

A. *Insufficiency of the Evidence*⁴⁸

The court agreed with the line of cases finding generic testimony substantial from an evidentiary standpoint.⁴⁹ In its analysis, the court began by pointing out that "even generic testimony (*e.g.*, an act of intercourse 'once a month for three years') outlines a series of *specific*, albeit undifferentiated, incidents *each* of which amounts to a separate offense, and *each* of which could support a separate criminal

40. *Id.* at 41-42, 792 P.2d at 646-47, 270 Cal. Rptr. at 614-15.

41. *Id.*

42. *Id.*

43. *Id.* at 43, 792 P.2d at 647-48, 270 Cal. Rptr. at 615-16.

44. *Id.* at 43, 792 P.2d at 647-48, 270 Cal. Rptr. at 615-16.

45. *Id.*

46. *Id.* at 43, 792 P.2d at 647, 270 Cal. Rptr. at 615.

47. *Id.* at 44, 792 P.2d at 647-48, 270 Cal. Rptr. at 615-16.

48. *See generally* 17 CAL. JUR. 3D *Criminal Law* §§ 805-811 (1981).

49. *Jones*, 51 Cal. 3d at 53, 792 P.2d at 654, 270 Cal. Rptr. at 622.

sanction.”⁵⁰ Thus, the court began to question how much proof is needed to support a conviction based on such generic testimony.⁵¹

On appeal, the court was required to review the evidence in the light most favorable to the prosecution.⁵² If the court concluded that a rational trier of fact could have found the defendant guilty beyond a reasonable doubt, the evidence was sufficient to support the conviction.⁵³ In reviewing the record, the court emphasized that children are considered to be just as competent as adults to testify.⁵⁴ Therefore, in determining whether the generic testimony was sufficient, the court focused on factors other than the age of the testifying victim.⁵⁵

The court concluded that while particular details regarding the time, place, or other circumstances of an alleged assault might enhance the child witness' credibility, these details are not elements of child molestation offenses and are therefore not necessary to sustain a conviction.⁵⁶ The victim is only required to describe three things: the kind of act or acts committed, in order to assure that some unlawful conduct has occurred and to differentiate between the various types of proscribed conduct;⁵⁷ the number of acts committed, to support the counts alleged in the information or indictment;⁵⁸ and the general time period in which these acts occurred, in order to assure that the acts were committed within the applicable limitation period.⁵⁹

Under the foregoing analysis, Sammy's testimony was sufficient to support a conviction against Jones on all six counts alleged.⁶⁰ Sammy

50. *Id.* (emphasis in original).

51. *Id.*

52. *People v. Trevino*, 39 Cal. 3d 667, 695, 704 P.2d 719, 735, 217 Cal. Rptr. 652, 668 (1985); *People v. Johnson*, 26 Cal. 3d 557, 578, 606 P.2d 738, 750-51, 162 Cal. Rptr. 431, 443-44 (1985).

53. *People v. Barnes*, 42 Cal. 3d 284, 303, 721 P.2d 110, 122, 228 Cal. Rptr. 228, 240 (1986); *Trevino*, 39 Cal. 3d at 695, 704 P.2d at 735, 217 Cal. Rptr. at 668; *Johnson*, 26 Cal. 3d at 576-78, 606 P.2d at 750-51, 162 Cal. Rptr. at 443-44.

54. *Jones*, 51 Cal. 3d at 54, 792 P.2d at 655, 270 Cal. Rptr. at 623. For an example of the modern view of the competence of children to testify, see CAL. PENAL CODE § 1127f (West 1988), which provides for a jury instruction stating that a child's testimony should not be discounted or distrusted simply on the basis of age. See also Fote, *Child Witnesses in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems & Proposals for Reform*, 13 PEPPERDINE L. REV. 157, 157-60 (1986) (citing empirical studies showing that traditional assumptions concerning the unreliability of child witnesses are unfounded). For a discussion of the examination of a child who is the prosecuting witness in a case involving lewd conduct with children, see 17 CAL. JUR. 3D *Criminal Law* § 790 (1981).

55. *Jones*, 51 Cal. 3d at 54-55, 792 P.2d at 655, 270 Cal. Rptr. at 623.

56. *Id.*

57. *Id.* The types of proscribed conduct include lewd conduct, sodomy, oral copulation, and intercourse. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 55, 792 P.2d at 656, 270 Cal. Rptr. at 624.

testified as to the type of act (oral copulation), the number of acts (once or twice a month over a two year period), and the general time period in which the acts occurred, which was within the applicable limitation period (between August 1983 and June 1985). Therefore, although Sammy could not give additional specific details regarding the time, place or circumstances of the assaults, his testimony was sufficient from an evidentiary standpoint to support Jones' conviction.

B. Due Process Concerns

In many child molestation cases, two due process rights are implicated: (1) the right to prepare and present a defense, and (2) the right to a unanimous jury verdict.⁶¹ The court discussed each of these rights in turn.

1. The Right to Defend

The right to defend encompasses two distinct rights: the right to notice of the charges alleged and the right to present a defense to those charges.⁶² Neither of these rights is violated by virtue of the prosecution's introduction of generic testimony.⁶³

In arguing that the prosecution of child molestation charges based on generic testimony does not result in a denial of the defendant's due process right to fair notice of the charges against him, the *Jones* court relied on Justice Sims' concurring opinion in *Gordon*. In that opinion, Justice Sims explained that "modern procedures in criminal cases have eroded if not eliminated *Williams*' concerns about fair notice in the indictment process."⁶⁴

At the time *Castro* and *Williams* were decided, many of the procedural protections modernly afforded criminal defendants were not available.⁶⁵ Present day defendants receive notice of the charges against them not only from the information or indictment, but also from evidence introduced at the preliminary hearing, through demurrers to the complaint and pretrial discovery procedures.⁶⁶

61. *Id.* at 55-56, 792 P.2d at 656, 270 Cal. Rptr. at 624.

62. *Id.* at 56, 792 P.2d at 656, 270 Cal. Rptr. at 624.

63. *Id.*

64. *People v. Gordon*, 165 Cal. App. 3d 839, 868, 212 Cal. Rptr. 174, 194 (1985) (Sims, J., concurring).

65. *Id.* at 868-70, 212 Cal. Rptr. at 194-95.

66. *Id.* See also *Jones*, 51 Cal. 3d at 56-57, 792 P.2d at 657, 270 Cal. Rptr. at 625; *People v. Jeff*, 204 Cal. App. 3d 309, 342, 251 Cal. Rptr. 135, 155 (1983); *People v. Luna*,

Furthermore, the child's failure to recall specific dates, locations, or other particulars of the assault do not inevitably preclude a defense.⁶⁷ In cases involving resident child molesters, neither alibi nor wrongful identification is likely to be a reasonable defense.⁶⁸ The true issue in these cases is credibility.⁶⁹ The victim testifies as to a series of sexual assaults, and the defendant denies that any wrongful conduct occurred.⁷⁰

Additionally, the court recognized that the defendant, despite the lack of specificity of the young victim's testimony, has other defense techniques available.⁷¹ The defendant may take the stand and deny any wrongdoing, allowing the jury to determine his credibility. The defense can cross-examine the child to expose weaknesses in the child's testimony, and can introduce evidence of past fabrications by the child to undermine his or her credibility. Additionally, the defendant can offer expert testimony refuting the physical evidence or establishing that the defendant's personality profile is inconsistent with the behavior alleged.

Based on the foregoing, the *Jones* court concluded that generic testimony does not deprive a defendant of his due process right to defend himself against the charges alleged.⁷²

2. Right to Unanimous Jury

The *Jones* court also rejected the defendant's contention that generic testimony necessarily prevents the jury from reaching a unanimous verdict.⁷³ In cases where testimony regarding repeated, identical offenses is presented, "although the jury may not be able to readily distinguish between the various acts, it is certainly capable of unanimously agreeing that they took place in the number and manner described."⁷⁴ The unanimity instruction serves to focus the jury's attention on each act related by the victim and charged by the People.⁷⁵ Thus, "if the victim testified that an act of oral copulation oc-

204 Cal. App. 3d 726, 748, 250 Cal. Rptr. 878, 890 (1983) (holding that "[s]o long as the evidence presented at the preliminary hearing supports the number of offenses charged against a defendant and covers the time frame or time frames charged in the information, a defendant has all the notice the Constitution requires").

67. *Jones*, 51 Cal. 3d at 57-58, 792 P.2d at 657-58, 270 Cal. Rptr. at 625-26.

68. *Id.* See also *People v. Avina*, 211 Cal. App. 3d 48, 54-56, 259 Cal. Rptr. 178, 182-83 (1989); *People v. Moreno*, 211 Cal. App. 3d 776, 787-99, 259 Cal. Rptr. 800, 807-08 (1989).

69. *Avina*, 211 Cal. App. 3d at 54-56, 259 Cal. Rptr. at 182-83; *Moreno*, 211 Cal. App. 3d at 787-88, 259 Cal. Rptr. at 807-08.

70. See, e.g., *Avina*, 211 Cal. App. 3d at 54-56, 259 Cal. Rptr. at 182-83.

71. *Jones*, 51 Cal. 3d at 57-58, 792 P.2d at 657-58, 270 Cal. Rptr. at 625-26.

72. *Id.* at 58, 792 P.2d at 658, 270 Cal. Rptr. at 625.

73. *Id.*

74. *Id.* at 58-59, 792 P.2d at 658, 270 Cal. Rptr. at 626.

75. *Id.* at 59, 792 P.2d at 658, 270 Cal. Rptr. at 626.

curred once each month for the first three months of 1990, and the People charge three counts of molestation, the jury's unanimous conclusion that these three acts took place would satisfy the constitutional requirement of unanimity."⁷⁶

In the present case, the jury was given an unqualified unanimity instruction.⁷⁷ Sammy testified that the molestations occurred once or twice a month, beginning about one month after he moved in with the defendant in August of 1983, and continued until June of 1985.⁷⁸ He also testified that there may have been some breaks when no molestations occurred for more than a month, including March and April of 1984. This testimony was sufficient to allow the jury to unanimously conclude that at least one act of molestation occurred during each time period alleged in the information, and that no act of molestation occurred during March and April of 1984.⁷⁹

The *Jones* court went on to hold that

when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim.⁸⁰

The court presumed that because credibility is the main issue in these cases, it is likely that if the jury believed the child's entire testimony as to one act of molestation, it believed the child's entire testimony and agreed that the defendant committed all the acts to which the victim testified. If the jury agreed that the defendant committed all the acts testified to, it necessarily agreed that he committed the single act or acts charged.⁸¹

Thus, the court concluded that jury unanimity is attainable in cases

76. *Id.*

77. The jury was given CALJIC 4.71.5, which states in pertinent part: "In order to find the defendant guilty, it is necessary for the prosecution to prove beyond a reasonable doubt the commission of a specific act constituting the crime within the period alleged.

And, in order to find the defendant guilty, you must unanimously agree upon the commission of the same specific act constituting the crime within the person alleged." CALJIC 4.71.5 (5th ed.) (West 1988). See *supra* note 16.

78. *Jones*, 51 Cal. 3d at 41, 792 P.2d at 646, 270 Cal. Rptr. at 614.

79. *Id.* at 60, 792 P.2d at 659, 270 Cal. Rptr. at 627.

80. *Id.* at 59, 792 P.2d at 659, 270 Cal. Rptr. at 626-27.

81. See *People v. Moreno*, 211 Cal. App. 3d 776, 790, 259 Cal. Rptr. 800, 809 (1989) (maintaining that "if the jury considered [the victim's] testimony credible, as apparently it did, there would be no reason for it to conclude appellant had molested her only once, while she was in kindergarten, when she asserted it happened more than one time").

where testimony is unspecific regarding the time, place, or other circumstances of the alleged assaults.⁸² In sum, the court found that such generic testimony does not violate a defendant's due process rights.⁸³

V. JUSTICE MOSK'S DISSENT

Justice Mosk disagreed with the majority's conclusion, finding that the majority did not adequately address the due process concerns raised in the case. Justice Mosk asserted that he would require a greater degree of specificity with regard to the time, place, or other circumstances of an alleged assault, so as to differentiate each criminal act before allowing a conviction under Penal Code section 288.⁸⁴ He emphasized that Penal Code section 288.5 is available to prosecute resident child molestation cases, where the child is unable to recall specific details.⁸⁵

Mosk's strongest point of disagreement was with the majority's discussion of the right to a unanimous verdict. Mosk contended that the jury unanimity requirement does not exist only "to preclude the possibility that jurors presented with multiple acts in support of a single criminal charge might actually disagree,"⁸⁶ rather, unanimity is required to remind the jurors of the necessity that their decision be free from doubt.⁸⁷ In order to determine whether the defendant is guilty, the jury must decide what the defendant did.⁸⁸ Allowing the jurors to rely on generic testimony would mean that "they would only need to agree that the defendant committed some lewd or lascivious act, somewhere, at some time."⁸⁹ Mosk maintained that the acts must be distinguishable to allow unanimity. "[I]ndistinguishable acts cannot serve as the tangible core around which twelve minds dedicated to finding specific-act guilt beyond a reasonable doubt can form agreement."⁹⁰

Furthermore, Justice Mosk contended that the modified unanimity instruction proposed by the majority would not solve the problems of generic testimony.⁹¹ However, he argued that even if such a modified

82. *Jones*, 51 Cal. 3d at 58-59, 792 P.2d at 658-59, 270 Cal. Rptr. at 626-27.

83. *Id.* at 57, 792 P.2d at 657, 270 Cal. Rptr. at 625.

84. *Id.* at 61, 792 P.2d at 660, 270 Cal. Rptr. at 628 (Mosk, J., dissenting).

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

86. *Id.* at 64-65, 792 P.2d at 662, 270 Cal. Rptr. at 630 (Mosk, J., dissenting).

87. Mosk maintains that the unanimity requirement is needed "to impress on the trier of fact the necessity of reaching a subjective state of certitude on the facts at issue." *Id.* at 65, 792 P.2d at 662, 270 Cal. Rptr. at 630 (quoting *United States v. Gipson*, 553 F.2d 453, 457 (5th Cir. 1977)) (Mosk, J., dissenting).

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

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

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

91. Mosk asserts that "[t]he subjective certitude that jurors lack in deciding whether defendant committed a single act does not magically appear when jurors are

instruction were to be accepted as a means of removing the problems associated with generic testimony, such an instruction was not given in this case, and therefore the conviction could not be upheld.⁹²

The solution to this due process problem, according to Mosk, is to disallow a conviction under Penal Code section 288 when the prosecution's case is based on generic testimony. Instead, the prosecution may rely on section 288.5 which exists specifically to deal with these types of cases.⁹³ Under section 288.5, the jury need only unanimously agree that the defendant engaged in a criminal course of conduct in order to convict him.⁹⁴ Mosk maintained that section 288.5 contains procedural safeguards to protect the defendant's rights.⁹⁵ For example, under this section, a defendant can be charged with only one count per victim.⁹⁶ He is protected from "overzealous prosecutors, who may be tempted to compile a multitude of convictions based on potentially exaggerated estimates of the frequency of the criminal conduct by victims concededly unable to recall specifics."⁹⁷

In addition to disagreeing with the majority's conclusion regarding the unanimous jury requirement, Mosk also disagreed with the majority's discussion regarding the defendant's right to prepare a defense. Mosk concluded that a defendant faced with generic testimony is unable to present an effective credibility defense, since he cannot cross-examine the witness regarding specific details of the alleged

considering the totality of his acts." *Id.* at 65-66, 792 P.2d at 663, 270 Cal. Rptr. at 631 (Mosk, J., dissenting).

92. *Id.* at 65-66, 792 P.2d at 663, 270 Cal. Rptr. at 631 (Mosk, J., dissenting). Additionally, Mosk notes that since the jury acquitted the defendant on 5 counts, they obviously did not agree that he committed all the acts with which he was charged.

93. Chief Justice Lucas acknowledged the existence of Penal Code section 788.5 and asserted that its enactment did not render moot the Court's discussion, because "if the constitutional impediments discerned by *Van Hoek, et. al.*, are valid, this statute may face similar due process challenges." *Jones*, 51 Cal. 3d at 50, 792 P.2d at 652, 270 Cal. Rptr. at 620.

94. The "continuous course of conduct" crime is an exception to the "either/or" rule. See *Jones*, 51 Cal. 3d at 63, 792 P.2d at 661-62, 270 Cal. Rptr. at 629-30 (Mosk, J., dissenting); *Gordon*, 165 Cal. App. 3d at 854-55, 212 Cal. Rptr. at 184-85. This exception arises when the criminal acts are so closely related in time that they constitute one offense, or when the criminal activity is continuous, committed against one victim, and described in terms of cumulative injury to the victim. *Jones*, 51 Cal. 3d at 63-64, 792 P.2d at 661-62, 270 Cal. Rptr. at 629-30 (Mosk, J., dissenting).

95. *Jones*, 51 Cal. 3d at 61, 792 P.2d at 660, 270 Cal. Rptr. at 628 (Mosk, J., dissenting).

96. However, the penalties are more severe. A defendant convicted under section 288.5 may be subject to a six, twelve, or sixteen year sentence. CAL. PENAL CODE § 288.5 (West Supp. 1990).

97. *Jones*, 51 Cal. 3d at 67, 792 P.2d at 664, 270 Cal. Rptr. at 632 (Mosk, J., dissenting).

assault.⁹⁸

Finally, Mosk criticized the majority's conclusion that generic testimony is sufficient from an evidentiary standpoint to sustain a conviction. Mosk argued that generic testimony is insufficient as a matter of law, because it does not allow a jury to reach a unanimous verdict regarding specific acts.⁹⁹ Thus, Mosk maintained that he would affirm the court of appeal's judgment reversing the conviction on counts 19, 20, 22, and 23.¹⁰⁰

VI. IMPACT

The decision in *People v. Jones* settles a conflict that has existed in California courts regarding the role of generic testimony in child molestation cases. In concluding that a child's unspecific testimony relating to the details of sexual abuse is sufficient both from an evidentiary and constitutional standpoint, the court removes significant obstacles from the path of prosecutors attempting to convict resident child molesters.¹⁰¹ Since the prosecution of resident child molesters generally involves generic testimony, the number of convictions obtained under Penal Code section 288 is likely to increase.

However, while resolving some conflicts, this decision raises some new questions. The respective roles to be played by Penal Code sections 288 and 288.5 in prosecuting child molestation cases are unclear. Although Penal Code section 288.5 was enacted to deal with the problems involved in convicting resident child molesters under section 288,¹⁰² these problems are greatly diminished after *Jones*. A

98. *Id.* at 68, 792 P.2d at 664-65, 270 Cal. Rptr. at 632-33. *Accord. Van Hoek*, 200 Cal. App. 3d at 817-18, 246 Cal. Rptr. at 356.

99. *Jones*, 51 Cal. 3d at 70, 792 P.2d at 666, 270 Cal. Rptr. at 634 (Mosk, J., dissenting).

100. *Id.* at 71, 792 P.2d at 666-67, 270 Cal. Rptr. at 634-35.

101. *See* L.A. Times, June 29, 1990, at A3, col. 1.

102. Section 1 of chapter 1402 of Stats. 1989 provides the Legislature's reasons for enacting section 288.5:

Section 1. (a) The legislature finds and declares that because of the court's decision in *People v. Van Hoek*, 200 Cal. App. 3d 811, there is an immediate need for additional statutory protection for the most vulnerable among our children, those of tender years, some of whom are being subjected to continuing sexual abuse by those commonly referred to as 'resident child molesters.' These molesters reside with, or have recurring access to, a child and repeatedly molest the child over a prolonged period of time but the child, because of age or the frequency of the molestations, or both, often is unable to distinguish one incident from another in terms of time, place, or other particulars, and as a consequence prosecutors are unable to provide the specificity of charges necessary to overcome the constitutional due process problems raised in the *Van Hoek* case within the framework of existing statutory law. As a consequence, some of our most vulnerable children continue to be a risk and some of our worst offenders continue to go unpunished.

(b) It is the intent of the Legislature in enacting this act to provide additional protection for children subjected to continuing sexual abuse and certain punishment for persons referred to as 'resident child molesters' by establish-

young victim's inability to recall specific details about the alleged molestations will not render the evidence insufficient to convict the accused. Additionally, a defendant faced with such generic testimony will no longer be able to successfully assert that a violation of his due process rights has occurred.

Because section 288.5 limits the number of counts against a defendant to one per victim,¹⁰³ a prosecutor may have an incentive to bring charges under section 288, under which multiple counts may be charged against a defendant. Thus, although section 288.5 provides for a jail sentence of up to sixteen years, it is possible for a defendant to obtain a harsher sentence under section 288 if the jury convicts him of multiple counts.¹⁰⁴ Regardless of the statute used, however, it is clear that this decision facilitates the prosecution and conviction of resident child molesters.

VII. CONCLUSION

In *People v. Jones*, the court was faced with the issue of whether a child's generic testimony regarding alleged acts of sexual abuse is sufficient to uphold a conviction against the accused under Penal Code section 288, and, if so, whether the use of such testimony that is un-specific with regard to the time, place, or other circumstances of the alleged acts of molestation violates the defendant's constitutional rights. The court concluded that such testimony is sufficient from an

ing a new crime of continuing sexual abuse of a child under circumstances where there have been repeated acts of molestation over a period of time, and the perpetrator either resides with or has recurring access to the child. It is the further intent of the Legislature that the penalty for this crime shall be greater than the maximum penalty under existing law for any single felony sex offense.

1989 CAL. LEGIS. SERV. ch. 1402, sec. 1 (West).

103. CAL. PENAL CODE § 288.5(c) (West Supp. 1990).

104. Justice Mosk noted that:

[b]ecause the number of charges on which a defendant is convicted will strongly influence the length of his sentence, the majority's approach creates a serious risk of arbitrary and disproportionate sentencing

The majority's only response to this dilemma is to admonish prosecutors, parenthetically, to 'exercise discretion in limiting the number of separate counts charged.' The exhortation neither provides prosecutors with any guidelines as to what a reasonable exercise of discretion would be, nor establishes any standard for abuse of discretion that would be reviewable by an appellate court. While most prosecutors will doubtless exercise restraint, the few who do not, for whatever mixture of self-seeking and misguidedly altruistic motives, will be undeterred by the majority's admonition.

Jones, 51 Cal. 3d at 70-71, 792 P.2d at 666, 270 Cal. Rptr. at 634 (Mosk, J., dissenting) (citation omitted).

evidentiary standpoint to uphold a conviction, and that the use of such testimony does not violate a defendant's due process rights.

In his dissenting opinion, Justice Mosk disagreed with the majority's conclusions and argued that in cases where a child is unable to recall specific details regarding the alleged sexual assaults, the defendant should be charged under Penal Code section 288.5, a statute specifically enacted to deal with ongoing and indistinguishable abusive conduct.

The court's ruling in *Jones* settles a conflict that has existed in the California courts, and makes it easier for prosecutors to convict resident child molesters. The decision thus upholds the state's strong interest in fully prosecuting and convicting child molesters.

IRIS WEINMANN

V. CRIMINAL PROCEDURE

*A criminal defendant may obtain discovery of information in police possession regarding an unidentified informant for purposes of challenging the veracity of statements made in an affidavit supporting a search warrant only upon a preliminary showing of reasonable doubt as to the accuracy of material statements made by the informant: People v. Luttenberger.*¹

I. INTRODUCTION

In a 5-2 decision emerging from a legal battle that pitted the confidential informant's right to anonymity against the defendant's right to challenge the search warrant leading to his arrest, the California Supreme Court limited the criminal defendant's access to information in the hands of law enforcement officials regarding the reliability of confidential informants.² Pursuant to the court's ruling, an accused must now make a preliminary showing of evidence sufficient to cast "reasonable doubt" upon the reliability of the informant in order to gain an *in camera* review and discovery of police records.³

Discovery of such information is often helpful to criminal defendants who, under federal law, must make a substantial showing of inaccuracy within an affidavit before being granted a hearing where

1. 50 Cal. 3d 1, 784 P.2d 633, 265 Cal. Rptr. 690 (1990). Chief Justice Lucas' opinion for the court was joined by Justices Panelli, Eagleson, and Kennard. Justice Kaufman concurred in a separate opinion. Justice Mosk's dissenting opinion was joined by Justice Broussard.

2. *Id.* at 20-24, 784 P.2d at 645-48, 265 Cal. Rptr. at 702-05.

3. *Id.* at 21-22, 784 P.2d at 646, 265 Cal. Rptr. at 703.

they can challenge a facially valid search warrant.⁴ Not surprisingly, criminal defendants often encounter difficulty in meeting this burden when the search warrant affidavit is based on information supplied by a confidential informant.⁵ Defendants in California have attempted to remedy that problem by requesting discovery of police records. By comparing the affidavit to the police files, the defendant hopes to find sufficient inaccuracies to meet the substantial showing required for a traversal hearing.

Prior to the *Luttenberger* decision, the propriety of granting these motions for discovery had become a source of great controversy and confusion among the various courts of appeal.⁶ With its decision in *Luttenberger*, the court substantially modified a 1985 court of appeal decision that had given criminal defendants wide latitude to procure information in police records provided that the contents were prescreened and edited by the court to protect the informant's identity.⁷ By establishing the reasonable doubt requirements, the court hoped to limit "fishing expeditions" by defense attorneys which the 1985 decision had allegedly fostered.⁸ While acknowledging the dilemma faced by defendants when warrants are based on information obtained from confidential sources, the court nonetheless agreed that the 1985 ruling was "inappropriately broad" and should be curtailed.⁹

II. HISTORICAL BACKGROUND

A. Theodor v. Superior Court

In *Theodor v. Superior Court*,¹⁰ the California Supreme Court upheld the statutory right of a criminal defendant to challenge a facially valid search warrant by challenging the veracity of the affidavit supporting the warrant.¹¹ However, the court placed upon the defendant the burden of making a preliminary showing, requiring some

4. See *infra* notes 15-20 and accompanying text.

5. See *People v. Rivas*, 170 Cal. App. 3d 312, 318, 216 Cal. Rptr. 477, 480 (1985). See *infra* notes 26-37 and accompanying text (discussing *Rivas*). See also Comment, *The Rivas Motion: The Creative Defense Attorney's Attempt to Circumvent Franks v. Delaware and the Informer's Privilege Rule*, 20 PAC. L.J. 1207 (1989) (advocating reversal of *Rivas*).

6. See *infra* notes 26-42 and accompanying text.

7. *Rivas*, 170 Cal. App. 3d at 319-22, 216 Cal. Rptr. at 481-83.

8. *Luttenberger*, 50 Cal. 3d at 20-21, 784 P.2d at 645, 265 Cal. Rptr. at 702.

9. *Id.* at 7, 784 P.2d at 636, 265 Cal. Rptr. at 693.

10. 8 Cal. 2d 77, 501 P.2d 234, 104 Cal. Rptr. 226 (1972).

11. *Id.* at 100-01, 501 P.2d at 251, 104 Cal. Rptr. at 243.

degree of specificity, material inaccuracies within the affidavit.¹² If the challenged assertion in the affidavit was the result of negligence, the inaccuracy was to be corrected and the affidavit reinstated if sufficient probable cause remained.¹³ On the other hand, in cases subsequent to *Theodor*, the California Supreme Court held that, where an assertion was made in bad faith, the rationale of *Theodor* mandated that the warrant be quashed and the evidence obtained pursuant to the warrant be suppressed.¹⁴

Thus, by 1980, the law regarding challenges to facially valid search warrant affidavits was firmly established in California. Meanwhile, the federal courts were grappling with the same issue, but formulating a significantly different standard.

B. *Franks v. Delaware*

The United States Supreme Court did not squarely confront the question of a defendant's right to challenge the truth of statements made by law enforcement officials in affidavits used to support search warrants until 1978,¹⁵ in the case of *Franks v. Delaware*.¹⁶ The *Franks* Court recognized that the answer to that question was necessarily a function of several competing interests.¹⁷ After weighing those interests, the Court concluded that a total ban on challenges to search warrants was not a tenable solution,¹⁸ and that a criminal defendant must have a limited right to challenge the validity of a search warrant. Thus, the Supreme Court held that a defend-

12. See 4 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Exclusion of Illegally Obtained Evidence* § 2439 (2d ed. 1989).

13. *Theodor*, 8 Cal. 2d at 100-01, 501 P.2d at 251, 104 Cal. Rptr. at 243.

14. See *People v. Kurland*, 28 Cal. 3d 376, 390, 618 P.2d 213, 221-22, 168 Cal. Rptr. 667, 676 (1980), cert. denied, 451 U.S. 987 (1981); *People v. Cook*, 22 Cal. 3d 67, 74-75, 583 P.2d 130, 133, 148 Cal. Rptr. 605, 608 (1978). See also 20 CAL. JUR. 3D *Criminal Law* § 2526 (1985 & Supp. 1990); 4 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Exclusion of Illegally Obtained Evidence* § 2439 (1989).

15. The issue of a defendant's right to traverse a facially valid search warrant affidavit was tangentially addressed by the Supreme Court in a case predating *Franks*, but the Court merely presumed, without deciding, that such a right existed. See *Rugendorf v. United States*, 376 U.S. 528, 531-32 (1964). See also Note, *Franks v. Delaware*, 7 AM. J. CRIM. L. 67, 72 (1979).

16. 438 U.S. 154 (1978). For an in depth analysis of the *Franks* decision, see Note, *Franks v. Delaware: A Proposed Interpretation and Application*, 1980 U. ILL. L.F. 601. See also Note, *supra* note 15.

17. *Franks*, 438 U.S. at 164. The Court noted that allowing challenges to facially valid search warrants and excluding otherwise relevant evidence would exact a cost on society by preventing some criminal convictions and overburdening the criminal docket with postsearch evidentiary hearings. However, the Court also recognized that these factors must be weighed against the possibility that, by precluding such hearings, searches based on false allegations by police officers would be allowed to go unchallenged. *Id.* at 167-68.

18. "[A] flat ban on impeachment of veracity could denude the probable-cause requirement of all real meaning." *Id.* at 168.

ant is entitled to an evidentiary hearing on the veracity of an affidavit only after making a "substantial preliminary showing" that (1) a false statement was knowingly or recklessly included in the affidavit, and (2) that the alleged misstatement was material to the finding of probable cause.¹⁹

In contrast to *Theodor*, the Court also held that the fourth amendment imposes no sanctions for negligent misstatements contained in affidavits and requires mere deletion of those inaccuracies which are falsely or recklessly caused.²⁰

C. Proposition 8

Faced with an obvious conflict between both the procedures and remedies afforded a criminal defendant under the California search and seizure statute²¹ and those granted by the fourth amendment after *Franks*, the California Supreme Court chose to rely solely on California law in holding that intentional or reckless misstatements require automatic invalidation of the warrant.²² However, this practice of autonomy came to a sudden halt in June of 1982 when the California electorate passed Proposition 8, an initiative measure which added article I, section 28 to the California Constitution.²³

Under subdivision (d) of this enactment, California state courts are required to apply federal standards in determining whether relevant evidence seized pursuant to a facially valid search warrant must be excluded.²⁴ Less clear, and a source of conflict among the courts of

19. *Id.* at 155-56.

20. *Id.* at 171.

21. "A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds: . . . (2) The search or seizure with a warrant was unreasonable because . . . (iii) there was not probable cause for the issuance of the warrant; [or] . . . (v) there was any other violation of federal or state constitutional standards." CAL. PENAL CODE § 1538.5(a) (West 1982 & Supp. 1991).

22. See *People v. Broome*, 201 Cal. App. 3d 1479, 1490-91, 247 Cal. Rptr. 854, 860 (1988) (citing *People v. Kurland*, 28 Cal. 3d 376, 383 n.2, 618 P.2d 213, 217 n.2, 168 Cal. Rptr. 667, 671 n.2 (1980), cert. denied, 451 U.S. 987 (1981)).

23. Proposition 8, The Victim's Bill of Rights § 1, 1982 Cal. Stat. A-186, A-187 (enacting CAL. CONST. art. I, § 28).

24. Section 28(d), entitled "Right to Truth-in-Evidence," states in pertinent part: "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings." CAL. CONST. art. I, § 28(d). See also *Broome*, 201 Cal. App. 3d at 1491, 247 Cal. Rptr. at 860. Because section 28(d) forbids the exclusion of evidence except when mandated by the federal constitution, "even if affiants run afoul of *Kurland*, *Cook*, and *Theodor*, there is no remedy for mere negligence, and the remedy for perjury or reckless indif-

appeal, is whether section 28(d) requires California state courts to adopt the federal threshold for granting the defendant a traversal hearing and subsequently compelling discovery.²⁵ Prior to *Luttenberger*, three California courts of appeal had considered this issue in the context of motions for discovery of police records containing information about confidential informants but were unable to reach a consensus.

D. The California Courts of Appeal

1. *People v. Rivas*

In *People v. Rivas*,²⁶ the California Court of Appeal for the Fifth District stated that "under both the state and federal standards, a defendant's opportunity to secure a hearing rests in large part upon his ability to discover whether the affidavit contains inaccuracies, in order that he may make a sufficient preliminary showing of same."²⁷ Accordingly, the court was sympathetic to the plight of defendants who must challenge the accuracy of affidavits which are based upon information obtained from confidential informants. However, the court also recognized the importance of protecting the identity of those informants.²⁸ Reconciling these competing interests, the *Rivas* court held that a defendant is entitled to the discovery of information relevant to the accuracy of an affidavit, provided that the documents are prescreened *in camera* to protect the identity of the confidential informant.²⁹

Significantly, the *Rivas* court did not require the defendant to make a preliminary showing under *Franks* before being granted an *in camera* hearing.³⁰ In fact, the defendant apparently made no

ference is to correct the misinformation and retest the warrant—the warrant is no longer peremptorily quashed." *Id.*

25. For a general discussion of Proposition 8 and its effect on traversal hearings, see 4 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Exclusion of Illegally Obtained Evidence* § 2442 (2d ed. 1989 & Supp. 1990).

26. 170 Cal. App. 3d 312, 216 Cal. Rptr. 477 (1985).

27. *Id.* at 320, 216 Cal. Rptr. at 482.

28. The *Rivas* court stated that "[c]ourts have long approved the government's contention that informants are necessary and would not remain an available source of assistance to law enforcement if not provided anonymity." *Id.* at 321, 216 Cal. Rptr. at 482.

29. *Id.* at 322, 216 Cal. Rptr. at 483. Several other courts support the use of the *in camera* hearing procedure to protect the identity of confidential informants. See, e.g., *United States v. Moore*, 522 F.2d 1068, 1072 (9th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976) ("in camera procedure provides an equally-acceptable accommodation of the competing interests of the Government and the accused . . . [where] the question is whether a law enforcement officer has lied."); *Kurland*, 28 Cal. 3d at 394-95 nn.11-12, 168 Cal. Rptr. at 678-79 nn.11-12.

30. *Rivas*, 170 Cal. App. 3d at 321-22, 216 Cal. Rptr. at 482-83. *Rivas* failed to specify any preliminary standard of its own or another court's creation. Instead, it stated simply that *in camera* hearings should not be granted "as a matter of routine," but

showing whatsoever of inconsistencies in the affidavit but simply asserted the necessity of discovery in order to exercise his right to challenge the affidavit.³¹ Nonetheless, the *Rivas* court found the preliminary showing made by the defendant sufficient to merit discovery of police records.³² Thus, *Rivas* appears to hold that a mere conclusory challenge to the veracity of the affidavit constitutes a sufficient preliminary showing. Notably, the court failed to discuss section 28(d) and its impact, if any, on the court's analysis.

2. *People v. Crabb*

Confronted with the same issue, the Sixth District Court of Appeal flatly rejected the *Rivas* decision in *People v. Crabb*.³³ The court noted that section 28(d) mandates the application of federal law in all challenges to the admissibility of evidence.³⁴ Because a defendant seeks discovery in order to challenge the warrant and eventually exclude all evidence obtained pursuant to that warrant, the *Crabb* court reasoned that section 28(d) requires the application of federal law in discovery motions as well as motions to suppress.³⁵

Therefore, the court concluded that the *Rivas* decision was inconsistent with the Supreme Court's ruling in *Franks v. Delaware*.³⁶ Moreover, the *Crabb* court stated that the standard announced by *Rivas* constituted "unfettered police record discovery."³⁷ Thus, the

that "it should not take much to prompt the suppression hearing judge to order such a hearing" if the defendant "has fairly put in issue" the existence or reliability of the informant. *Id.* at 322, 216 Cal. Rptr. at 483 (quoting 1 LAFAVE, SEARCH AND SEIZURE § 3.3 at 585-86 (1978)).

31. *Luttenberger*, 50 Cal. 3d at 14, 784 P.2d at 641, 265 Cal. Rptr. at 698 (Lucas, C.J., commenting on *Rivas*).

32. *Rivas*, 170 Cal. App. 3d at 322, 216 Cal. Rptr. at 483.

33. 191 Cal. App. 3d 390, 236 Cal. Rptr. 385 (1987). In *Crabb*, the defendant was convicted of possession of illegal drugs after a search of his home, conducted pursuant to a search warrant, uncovered evidence of his guilt. The defendant sought discovery of police records concerning the confidential informant whose statements supported the search warrant. The trial court denied the motion. The defendant claimed that the denial of his motion was improper because it precluded him from assembling the necessary evidence of inaccuracies within the affidavit as required by *Franks*. *Id.* at 392-93, 236 Cal. Rptr. at 385-86.

34. *Id.* at 393, 236 Cal. Rptr. at 385.

35. *Id.* at 395-96, 236 Cal. Rptr. at 387-88.

36. The court characterized the defendant's discovery motion as "a random search for evidence that the affiant might have misstated or omitted facts which might then have cast doubt upon the affiant's veracity." *Id.* at 395, 236 Cal. Rptr. at 388. Thus, the court concluded that the motion constituted the type of "fishing expedition" that *Franks* was designed to preclude. *Id.* at 395, 236 Cal. Rptr. at 387-88.

37. *Id.* at 395, 236 Cal. Rptr. at 387.

court held that a defendant is not entitled to a suppression hearing absent a preliminary showing required by *Franks*.³⁸

3. *People v. Broome*

Finally, the Third District Court of Appeal, in *People v. Broome*, addressed the issue, and, in turn, rejected *Crabb*.³⁹ The *Broome* court drew a distinction between an evidentiary hearing to controvert the veracity of statements in an affidavit and the defendant's right to discovery.⁴⁰ Section 28(d), it explained, requires California courts to follow federal law only in the direct context of excluding relevant evidence.⁴¹ Thus, the court found "absolutely no basis . . . [for concluding that] the *Franks* standard of a 'preliminary substantial showing' must be grafted on the California law of discovery."⁴²

It was against this analytical background that the California Supreme Court decided *People v. Luttenberger*.

III. STATEMENT OF THE CASE

A warrant authorizing the search of the defendant's home was issued pursuant to the affidavit of a police officer whose source was a confidential informant.⁴³ The affidavit stated that previous information given by the informant had proven reliable; however, it did not contain any additional facts pertaining to the informant's background or reliability.⁴⁴ A search conducted pursuant to the warrant uncovered methamphetamine, marijuana, drug paraphernalia, cash, and a loaded handgun in the defendant's home. Consequently, the defendant was arrested and charged with possession of illegal drugs.⁴⁵

Prior to his preliminary hearing, the defendant moved for discovery of information in police possession which he sought to support a "sub-facial" challenge of the warrant by disputing the accuracy of statements contained within the affidavit.⁴⁶ The defendant did not

38. *Id.* at 396, 236 Cal. Rptr. at 388.

39. *People v. Broome*, 201 Cal. App. 3d 1479, 1495, 247 Cal. Rptr. 854, 863 (1988). In *Broome*, the district attorney refused to comply with an order to turn over a drug sample allegedly purchased from the defendant during a "controlled buy," contending that the court order was allowing discovery of evidence without the required showing by the defendant under *Franks*. *Id.* at 1485-88, 247 Cal. Rptr. at 856-57. The trial court dismissed the charges on the basis of the prosecutor's failure to comply with the order. *Id.* at 1486-87, 247 Cal. Rptr. at 857.

40. *Id.* at 1491-92, 247 Cal. Rptr. at 860-61.

41. *Id.*

42. *Id.* at 1491, 247 Cal. Rptr. at 860.

43. *People v. Luttenberger*, 50 Cal. 3d 1, 7, 784 P.2d 633, 636, 265 Cal. Rptr. 690, 693 (1990).

44. *Id.*

45. *Id.*

46. *Id.* at 7-8, 784 P.2d at 636, 265 Cal. Rptr. at 693. The defendant's request sought *in camera* review and discovery of any existing information pertaining to the inform-

request disclosure of the informant's identity at that time.⁴⁷

The magistrate denied the motion, and an information was filed.⁴⁸ The defendant then made a pretrial motion to dismiss the charges.⁴⁹ The superior court granted the defendant's motion to dismiss on the grounds that the magistrate erred in failing to conduct an *in camera* review of the requested information as required by *People v. Rivas*.⁵⁰ The court of appeal affirmed.

The California Supreme Court granted review in order to determine whether the *in camera* screening procedure authorized by *Rivas* is consistent with section 28(d), and if so, what preliminary showing is required in order to justify such *in camera* review and discovery of information in police records concerning confidential informants.⁵¹

IV. THE COURT'S DECISION

A. *The Majority Opinion*

The majority prefaced their discussion of the right to discovery of information concerning confidential informants with a comprehensive survey of legal authority pertaining to that issue.⁵² Then, in resolving the growing fissure between the courts of appeal, the majority rejected the contention that section 28(d) requires state courts to apply the *Franks* "substantial preliminary showing" standard in conjunction with discovery.⁵³ The court stressed that section 28(d) controls only the admissibility of evidence in criminal hearings⁵⁴ and

ant's past involvement with illegal drugs, police reports concerning the informant, pay vouchers issued or promises made to the defendant by the police in compensation for his services. *Id.*

47. *Id.* at 8, 784 P.2d at 636, 265 Cal. Rptr. at 693. Although the defendant's written motion sought disclosure of the informant's identity, the defendant modified that request at the hearing on the motion, stating that he was not requesting such disclosure pending the outcome of the discovery motion. Upon denial of the motion, the defendant filed a second motion which included a request for disclosure of the informant's identity. This motion was likewise denied. *Id.* at 8 n.2, 784 P.2d at 636 n.2, 265 Cal. Rptr. at 693 n.2.

48. *Luttenberger*, 50 Cal. 3d at 8, 784 P.2d at 637, 265 Cal. Rptr. at 694.

49. *Id.*

50. *Id.*

51. *Id.* at 6, 784 P.2d at 635, 265 Cal. Rptr. at 692.

52. *Id.* at 9-16, 784 P.2d at 637-42, 265 Cal. Rptr. at 694-99.

53. *Luttenberger*, 50 Cal. 3d at 16-17, 784 P.2d at 642-43, 265 Cal. Rptr. at 699-700.

See *supra* notes 15-20 and accompanying text.

54. *Id.* See *People v. May*, 44 Cal. 3d 309, 748 P.2d 307, 243 Cal. Rptr. 369 (1988); *In re Lance W.*, 37 Cal. 3d 873, 886-88, 694 P.2d 744, 752-53, 210 Cal. Rptr. 631, 639-40 (1985).

does not find application to discovery procedures.⁵⁵ A defendant's right to discovery, the court held, emanates from the fundamental principle that an accused is entitled to a "fair trial and an intelligent defense in light of all relevant and reasonably accessible information."⁵⁶

While the court adamantly professed state autonomy in regard to matters of discovery, it nonetheless sought guidance from the *Franks* decision in evaluating the appropriateness of the *Rivas* standard for discovery. The court noted that the purpose of the *Franks* requirement of a substantial preliminary showing was to avoid misuse of the evidentiary hearing as a tool for discovery.⁵⁷ However, the majority also stressed that the *Franks* court was not faced with the dilemma that exists when an affidavit relies upon information given by a confidential source.⁵⁸ In such cases, the majority theorized, the *Franks* court would not have intended its substantial showing threshold to bar challenges to warrant affidavits.⁵⁹

Moreover, the court stated that preliminary discovery may, in fact,

55. *Luttenberger*, 50 Cal. 3d at 16-17, 784 P.2d at 642-43, 265 Cal. Rptr. at 699-700. See *Broome*, 201 Cal. App. 3d at 1491-92, 247 Cal. Rptr. at 860-61. "Proposition 8 . . . did not adopt the Federal Rules of Criminal Procedure, the United States Code, or the federal common law. Consequently, [California] criminal courts did not become federalized by its enactment." *Id.* at 1492, 247 Cal. Rptr. at 861.

56. *Luttenberger*, 50 Cal. 3d at 17, 784 P.2d at 643, 265 Cal. Rptr. at 700 (quoting *Santa Cruz v. Municipal Court*, 49 Cal. 3d 74, 84, 776 P.2d 222, 228, 260 Cal. Rptr. 520, 526 (1989)). The court stated that granting criminal defendants reasonable access to information bearing on the validity of a search warrant is consistent with the holding of *Santa Cruz*. *Id.* See also *Holman v. Superior Court*, 29 Cal. 3d 480, 485-86, 629 P.2d 14, 17, 174 Cal. Rptr. 506, 509 (1981) (holding that defendants are entitled to "reasonable, limited" discovery prior to preliminary hearing upon a showing that such discovery is "reasonably necessary" and will not cause undue delay).

57. *Luttenberger*, 50 Cal. 3d at 17, 784 P.2d at 643, 265 Cal. Rptr. at 701. See *Franks*, 438 U.S. at 170 (preliminary showing "should suffice to prevent the misuse of a veracity hearing for purposes of discovery or obstruction"). But see *Broome*, 201 Cal. App. 3d at 1493, 247 Cal. Rptr. at 861 (holding that the discovery prohibited by *Franks* was general in nature as opposed to discovery aimed at gathering facts for a traversal hearing).

58. *Luttenberger*, 50 Cal. 3d at 11, 18, 784 P.2d at 638, 643, 265 Cal. Rptr. 695, 700. The Court in *Franks* was faced with an affidavit containing information from two named informants whom the defendant had been able to contact. *Franks*, 438 U.S. at 157. Thus, the facts of *Franks* did not require and the Court did not decide the issue of how a defendant could meet the required substantial preliminary showing when confronted with an affidavit based on information derived from an unidentified source. *Luttenberger*, 50 Cal. 3d at 18, 784 P.2d at 643, 265 Cal. Rptr. at 700.

59. *Luttenberger*, 50 Cal. 3d at 18, 784 P.2d at 643, 265 Cal. Rptr. at 700. On the federal level, several courts applying *Franks* have acknowledged the difficulty of amassing sufficient information to make a substantial preliminary showing in situations involving confidential informants. See, e.g., *People v. Lucente*, 116 Ill. 2d 133, 506 N.E.2d 1269 (1987) (the *Franks* requirement must not be applied in such a manner as to preclude all possibility of a traversal hearing). See also Comment, *supra* note 5, at n.147 and accompanying text (citing cases which highlight the problems associated with confidential informants and call for a lower standard of preliminary showing in such instances).

have the effect of reducing the number of *Franks* veracity hearings because many defendants will find little or no helpful information in police records and will forgo making a *Franks* motion.⁶⁰ Given these factors, the majority concluded that the *in camera* review and discovery procedures sanctioned by *Rivas* do not conflict with, but rather complement, the stated purpose of *Franks*.⁶¹ Thus, the court held that neither section 28(d) nor *Franks* requires criminal defendants to make a substantial preliminary showing in order to obtain discovery of information relevant to the traversal of a warrant.⁶² However, the majority qualified this pronouncement, stating that the appropriate threshold must be higher than the general allegations made by Luttenberger.⁶³

The majority endorsed the use of *in camera* screening as proposed by *Rivas*, noting that the devise accommodates the conflicting interests of the state and the defendant while safeguarding the informant's identity.⁶⁴ However, the court found fault with the *Rivas* decision to the extent that it allowed an *in camera* discovery hearing to go forward on the basis of a conclusory assertion of necessity.⁶⁵ This liberal approach, the majority stated, would constitute an "unjustifiable burden on our trial courts and an unwarranted invasion of police files."⁶⁶ Citing several supreme court cases as authority, the majority concluded that an appropriate standard would require that a discovery motion be "sustained by plausible justification"⁶⁷ and requested "with adequate specificity to preclude the possibility that defendant is engaging in a 'fishing expedition.'"⁶⁸ Moreover, the court stressed that under *Franks*, a warrant affidavit is presumed truth-

60. *Luttenberger*, 50 Cal. 3d at 18, 784 P.2d at 643, 265 Cal. Rptr. at 700.

61. *Id.*

62. *Id.* at 18-19, 784 P.2d at 644, 265 Cal. Rptr. at 701.

63. *Id.*

64. The majority noted that the *in camera* procedure has been employed by numerous courts and administrative bodies in a variety of contexts. *Id.* at 19, 784 P.2d at 644, 265 Cal. Rptr. at 701. See, e.g., CAL. EVID. CODE § 1042(d) (West 1966) (mandating *in camera* review at prosecutor's request in order to determine whether an informant's identity should be disclosed because he is a material witness on the issue of guilt); CAL. EVID. CODE § 915(b) (West 1966) (approving *in camera* proceeding to determine whether information is privileged); see generally *People v. Brown*, 207 Cal. App. 3d 1541, 256 Cal. Rptr. 11 (1989) (denying open evidentiary hearing based upon results of *in camera* examination of confidential informants).

65. *Luttenberger*, 50 Cal. 3d at 20, 784 P.2d at 645, 265 Cal. Rptr. at 702.

66. *Id.*

67. *Id.* (citing *Ballard v. Superior Court*, 64 Cal. 2d 159, 167, 410 P.2d 838, 843, 49 Cal. Rptr. 302, 307 (1966)).

68. *Id.* at 20-21, 784 P.2d at 645, 265 Cal. Rptr. at 702.

ful.⁶⁹ Thus, a defendant should not be entitled to an *in camera* review of documents absent a showing that the warrant affidavit is in some way inaccurate.⁷⁰

In light of these criteria, but with an understanding of the difficulty of proving inaccuracies in an affidavit that relies on information from a confidential informant, the majority felt the need for a preliminary showing requirement that is "somewhat less demanding than the 'substantial showing of material falsity' required by *Franks*," and yet more demanding than the general allegation of necessity required by *Rivas*.⁷¹ Therefore, the majority fashioned a three-pronged approach to obtaining discovery. Under this approach, a criminal defendant may obtain discovery of information in police possession regarding a confidential informant for purposes of challenging the accuracy of an affidavit supporting a search warrant only: (1) upon a showing that there is reasonable doubt as to the veracity of the statements made by the affiant;⁷² (2) after specifying, if possible, the information sought, his basis for believing such information exists, and his reasons for requesting access to that information;⁷³ and (3) after raising a substantial possibility that the allegedly untrue statements were material to the finding of probable cause.⁷⁴

Once this preliminary showing is made, the trial court must satisfy itself that the allegations of material misrepresentation are supported by the information to be discovered. If such a determination is made, the court shall delete all references to the informant's identity and

69. *Luttenberger*, 50 Cal. 3d at 21, 784 P.2d at 645, 265 Cal. Rptr. at 702. See *Franks v. Delaware: A Proposed Interpretation and Application*, *supra* note 16, at nn.86-95 and accompanying text.

70. *Luttenberger*, 50 Cal. 3d at 21, 784 P.2d at 645, 265 Cal. Rptr. at 702.

71. *Id.* at 21-22, 784 P.2d at 646-47, 265 Cal. Rptr. at 702-03.

72. *Id.* at 22, 784 P.2d at 646, 265 Cal. Rptr. at 703. The court noted that the newly formulated standard of reasonable doubt was similar to the requirements of other jurisdictions faced with analogous issues. *Id.* (citing *People v. Poindexter*, 90 Mich. App. 599, 282 N.W.2d 411, 416 (1979) (allowing *in camera* examination of informant after defendant has "raised a legitimate question" regarding the veracity of the affidavit and the court concludes there is "some doubt" as to the affiant's reliability)); *United States v. Brian*, 507 F. Supp. 761, 765 (D.R.I. 1981) (authorizing *in camera* review upon a minimal showing of inconsistency on the face of the affidavit which substantiates the defendant's assertion of falsehood).

73. *Luttenberger*, 50 Cal. 3d at 22, 784 P.2d at 646-47, 265 Cal. Rptr. at 703-04. The majority reiterated that conclusory statements averring the necessity of discovery will not entitle the defendant to an *in camera* hearing, even in circumstances involving confidential informants. *Id.* The majority contemplated that, in such cases, a defendant could still meet his burden by either contradicting statements in the affidavit or pointing to inconsistencies on the face of the affidavit. *Id.*

74. *Id.* at 23, 784 P.2d at 647, 265 Cal. Rptr. at 704. Following the adoption of section 28(d), materiality is judged by the federal standard as set forth in *Illinois v. Gates*, 462 U.S. 213 (1983), which evaluates the existence of good cause for a search in terms of the totality of the circumstances. *Id.* See also *People v. Gesner*, 202 Cal. App. 3d 581, 590, 248 Cal. Rptr. 324, 328-29 (1988).

order the disclosure of the documents to the defendant.⁷⁵

Having set forth a new standard for obtaining *in camera* review, the court applied the test for the first time, holding that in this case, the defendant had not met that standard.⁷⁶

B. *The Concurring Opinion*

In his concurrence, Justice Kaufman advocated the reasonable doubt standard formulated by the majority, emphasizing that this higher threshold requirement facilitates the policy of discovery while offering protection to the confidential informant.⁷⁷ Justice Kaufman stated that, because the need for discovery is far less compelling when sought for purposes of attacking an affidavit than for use in preparing a substantive defense, a requirement of a preliminary showing of reasonable doubt is therefore appropriate.⁷⁸

While approving of the reasonable doubt standard itself, Justice Kaufman wrote separately to call attention to a problem associated with the application of that test in circumstances where the only statement in the affidavit concerning the confidential informant consists of a mere conclusion without further facts. Justice Kaufman agreed with the dissent that, under such circumstances, it would be extremely difficult, if not impossible, for a defendant to successfully raise reasonable doubt as to the veracity of the conclusory statement.⁷⁹ However, Justice Kaufman stressed that the proper remedy for this problem lies not in requiring less of the defendant who seeks discovery, as the dissent advocates, but rather in requiring more factual detail to be included in affidavits concerning the reliability of confidential informants.⁸⁰ Thus, in the defendant's case, Justice Kaufman indicated that he would have found the affidavit insufficient on its face to establish the reliability of the informant had the defendant filed a motion challenging the sufficiency of the affidavit

75. *Luttenberger*, 50 Cal. 3d at 24, 784 P.2d at 647, 265 Cal. Rptr. at 705.

76. The court found that the defendant's motion "was based entirely on conclusory assertions, unsupported by affidavits, and he failed to raise any doubt regarding the truthfulness of the warrant affidavit." *Id.* at 24-25, 784 P.2d at 648, 265 Cal. Rptr. at 705. Thus, the court reversed the judgment of the court of appeal and remanded the case to the trial court for further proceedings. *Id.*

77. *Id.* at 25, 784 P.2d at 648, 265 Cal. Rptr. at 705 (Kaufman, J., concurring).

78. *Id.* at 25, 784 P.2d at 648-49, 265 Cal. Rptr. at 705-06 (Kaufman, J., concurring).

79. *Id.* at 25, 784 P.2d at 649, 265 Cal. Rptr. at 706 (Kaufman, J., concurring).

80. *Luttenberger*, 50 Cal. 3d at 25-26, 784 P.2d at 649, 265 Cal. Rptr. at 706 (Kaufman, J., concurring).

in this regard.⁸¹

C. *The Dissenting Opinion*

Justice Mosk, joined in dissent by Justice Broussard, prefaced his criticisms of the majority opinion with an acknowledgment of two areas of common ground. First, he supported the majority's conclusion that matters of criminal discovery are outside the scope of section 28(d) and thus are not confined by the parameters of federal protection.⁸² Moreover, Justice Mosk agreed that, even if section 28(d) does apply to discovery, the liberal standard set forth in *People v. Rivas* does not conflict with the threshold test formulated by the United States Supreme Court in *Franks v. Delaware*.⁸³

However, Justice Mosk parted company with the majority at this juncture, finding fault with their modification of *Rivas*. He stated that the heightened requirement of reasonable doubt is out of line with previous holdings of the court.⁸⁴ He further stated that the new preliminary standard places an "unrealistic" burden on defendants and is the product of "ill defined" rationale.⁸⁵

In defense of this position, Justice Mosk reviewed several recent supreme court decisions which indicate that the liberal rule announced by *Rivas* is entirely appropriate for purposes of discovery. Quoting from *Pitchess v. Superior Court*,⁸⁶ Justice Mosk emphasized that discovery has been allowed upon a showing of "general allegations which establish some cause for discovery."⁸⁷ Additionally, Justice Mosk drew attention to the case of *Santa Cruz v. Municipal Court*, in which the court held that discovery of police records was proper upon allegations set forth in an affidavit of information and belief.⁸⁸

At the heart of Justice Mosk's dissent was his concern that the reasonable doubt standard imposes an unreasonable burden on criminal defendants, often placing them in a "Catch-22" predicament. Justice Mosk expressed this concern in the words of *United States v. Brian*, stating, "when an affidavit relies for its assertion of probable cause

81. *Id.* at 26, 784 P.2d at 649, 265 Cal. Rptr. at 706 (Kaufman, J., concurring). In *Luttenberger*, the "[d]efendant did not contend the affidavit was facially insufficient to establish probable cause for issuing a search warrant." *Id.* at 8, 784 P.2d at 636, 265 Cal. Rptr. at 693.

82. *Id.* at 26, 784 P.2d at 649, 265 Cal. Rptr. at 706 (Mosk, J., dissenting). See *supra* notes 53-56 and accompanying text.

83. *Id.* (Mosk, J., dissenting). See *supra* notes 61-62 and accompanying text.

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

85. *Luttenberger*, 50 Cal. 3d at 26 (Mosk, J., dissenting).

86. 11 Cal. 3d 531, 522 P.2d 305, 113 Cal. Rptr. 897 (1974).

87. *Luttenberger*, 50 Cal. 3d at 27, 784 P.2d at 650, 265 Cal. Rptr. at 707 (Mosk, J., dissenting) (quoting *Pitchess*, 11 Cal. 3d at 537, 522 P.2d at 309, 113 Cal. Rptr. at 901).

88. *Id.* (Mosk, J., dissenting) (citing *Santa Cruz*, 49 Cal. 3d at 89, 776 P.2d at 231, 260 Cal. Rptr. at 529).

upon facts attributable to *confidential* informants, defendants have no way to obtain the very information they need to assert their entitlement to a *Franks* hearing.⁸⁹ Moreover, Justice Mosk argued that this basic problem is further complicated by the possibility of fabrication by police to make the informant's statement consistent with the corroborating information.⁹⁰ In such situations, he claimed, a defendant would be unable to raise a reasonable doubt concerning the veracity of the affidavit by pointing to inconsistencies on the face of the warrant.

Finally, Justice Mosk analyzed each of the items put forth by the majority as justifications for the adoption of the heightened requirement of a preliminary showing of reasonable doubt. He dismissed the majority's concern for maintaining the court's discretion to preserve the confidentiality of the informant's identity, stating that the *Rivas* pre-screening procedure already serves that function.⁹¹ Justice Mosk also noted the maxim advanced by the majority — that a warrant, under *Franks*, is presumed to be truthful. In response, Justice Mosk stated that while a warrant may be presumed truthful, it should not be granted immunity from challenge by denying discovery.⁹² Justice Mosk also attacked the reasonable doubt standard on grounds of judicial inefficiency, charging that the new standard "substitute[s] a less expensive procedure — the grant of discovery upon a minimal showing, with a more costly procedure — a hearing to determine whether reasonable doubt and materiality standards had been satisfied."⁹³ Lastly, Justice Mosk labeled the majority's concern over "fishing expeditions," unwarranted.⁹⁴ Justice Mosk stated that, so

89. *Id.* (Mosk, J., dissenting) (quoting *Brian*, 507 F. Supp. at 765).

90. *Id.* at 28, 784 P.2d at 650, 265 Cal. Rptr. at 707 (Mosk, J., dissenting). The pervasive nature of police perjury has been the subject of several commentaries. See, e.g., Herman, *Warrants for Arrest or Search: Impeaching the Allegations of a Facially Sufficient Affidavit*, 36 OHIO ST. L.J. 721 (1975); Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 U. ILL. L.F. 405; Comment, *The Outwardly Sufficient Search Warrant Affidavit: What if It's False?*, 19 UCLA L. REV. 96 (1971). See also *Franks v. Delaware: A Proposed Interpretation and Application*, *supra* note 16, at nn.96-112 and accompanying text.

91. *Luttenberger*, 50 Cal. 3d at 28, 784 P.2d at 651, 265 Cal. Rptr. at 708 (Mosk, J., dissenting).

92. *Id.* at 28-29, 784 P.2d at 651, 265 Cal. Rptr. at 708 (Mosk, J., dissenting). See *Franks v. Delaware: A Proposed Interpretation and Application*, *supra* note 16, at 622-23 (noting that "the *Franks* opinion confirms that the mere fact that a search was made incident to a warrant does not preclude review of the veracity of warrant affiants").

93. *Luttenberger*, 50 Cal. 3d at 29, 784 P.2d at 651, 265 Cal. Rptr. at 708 (Mosk, J., dissenting) (emphasis in original).

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

long as the requests for discovery are somewhat specific and narrow in scope, the *Rivas* standard provides adequate protection against overly broad discovery.⁹⁵

In conclusion, Justice Mosk called for the rejection of the proposed reasonable doubt standard and, in its place, the adoption of a standard based on either "general allegations" or "information and belief."⁹⁶

V. IMPACT

The *Luttenberger* decision is a clear triumph for prosecutors, as the foreseeable impact of the case will be a substantial reduction in the number of defendants who will be able to obtain discovery of information contained in police records which they could ultimately use to meet the substantial preliminary showing required for an exclusionary hearing pursuant to *Franks*.

By establishing a requirement of reasonable doubt as a prerequisite to *in camera* review and discovery, the majority professes to have created a sanctuary of middle ground between the negligible preliminary showing embraced by *Rivas* and the substantial preliminary showing delineated by *Franks*.⁹⁷ Admittedly, a showing of reasonable doubt is logically a compromise between the two standards. However, for all practical purposes, a defendant confronted with a conclusory statement in an affidavit based on information derived from a confidential informant can no more reach a standard of reasonable doubt than he can make a substantial showing.⁹⁸ Perhaps the realization of this truism will prompt the introduction of more stringent requirements for the amount of information to be included in affidavits.⁹⁹

The *Luttenberger* decision naturally impacts confidential informants as well as defendants. When viewed from the perspective of the confidential informant, the decision represents a qualified victory. *Luttenberger* adopts the *in camera* procedures of *Rivas*, allowing discovery of information concerning confidential informants only after the requested documents are prescreened by the court and purged of all references to the identity of the informant.¹⁰⁰ While

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

96. *Id.* at 29, 784 P.2d at 651-52, 265 Cal. Rptr. at 709 (Mosk, J., dissenting).

97. *Id.* at 21, 784 P.2d at 646, 265 Cal. Rptr. at 703.

98. This is especially true in situations such as the *Luttenberger* case where the affidavit read in its entirety: "Within the past ten days, I met with an informant who has, in the recent past, given me information about drug dealers which later proved to be reliable." *Id.* at 25, 784 P.2d at 649, 265 Cal. Rptr. at 706 (Kaufman, J., concurring). Given such conclusory language, there is little chance that a defendant could point to inaccuracies on the face of the affidavit, as contemplated by the majority. *Id.*

99. See *supra* notes 79-80 and accompanying text.

100. See *supra* note 66 and accompanying text.

confidential informants argue that such measures are largely ineffective due to judicial time constraints and inadvertent disclosures of information pertinent to the informant's identity,¹⁰¹ the *Luttenberger* decision should nonetheless provide some additional degree of comfort. Due to its imposition of a reasonable doubt standard, fewer defendants will gain access to such information.

The *Luttenberger* decision is unlikely to satisfy critics of *Rivas* who charged that the prehearing discovery authorized by *Rivas* imposed a substantial burden on an already overburdened judicial system.¹⁰² These critics argue that motions for discovery pursuant to *Rivas* often result in continuances, thereby adding to the congestion of the courts.¹⁰³ Moreover, it is feared that such motions for discovery will likely become routine, adding, in effect, a whole new layer to the judicial process in all cases involving search warrants based on information from confidential informants.¹⁰⁴

Luttenberger, like *Rivas*, embraces the use of the *in camera* hearing. Granted, *Luttenberger's* imposition of a preliminary showing of reasonable doubt will surely prevent most unmeritorious, and arguably some meritorious, claims from reaching the *in camera* review. However, even in those instances, *Luttenberger* merely substitutes a reasonable doubt hearing in the place of the *in camera* review. Furthermore, where the defendant meets the burden of demonstrating reasonable doubt as to the veracity of the affidavit, an *in camera* review will follow. Thus, the *Luttenberger* decision potentially adds a procedural layer of its own in cases involving confidential informants.

With its decision in *Luttenberger*, the California Supreme Court has altered the status quo for criminal defendants, confidential informants, and the judicial system. Whatever the additional consequences of *Luttenberger* may be, it seems clear that the practical effect of the decision will be to bring the California courts of appeal in line with one another.

101. See Comment, *supra* note 5, at 1231 (noting that informants and defendants frequently move in the same social circles — hence, details remaining in documents purged of the informant's name may nonetheless lead a defendant to the identity of the informant). *Id.*

102. *Id.* at 1232.

103. *Id.*

104. *Id.* (citing Grano, *supra* note 90 at 407) (stating that criminal defense counsel's only available option to exclude evidence may be a *Rivas* motion).

VI. CONCLUSION

The *Luttenberger* court was faced with the task of balancing the defendant's right to be secure in his home against the confidential informant's right to anonymity. While not perfect, the reasonable doubt standard is the court's attempt to provide judicial equality between the two. Naturally, when dealing with two diametrically opposed interests, a concession to one cannot be granted without cost to the other.

LORI SWAFFORD

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 January and June of 1990, the California Supreme Court decided ten death penalty cases.¹ During this period, the Lucas court continued its policy of reversing only upon an actual finding of prejudicial error.² Out of the ten cases decided, the court reversed the death penalty in only one case and vacated another with the possibility of reinstatement.³

1. This survey covers the death penalty cases decided between February 8, 1990 and June 14, 1990. The following cases, listed alphabetically by the defendant's name, form the basis for this survey: *People v. Clark*, 50 Cal. 3d 583, 789 P.2d 127, 268 Cal. Rptr. 399, *cert. denied*, 111 S. Ct. 442 (1990); *People v. Douglas*, 50 Cal. 3d 468, 788 P.2d 640, 268 Cal. Rptr. 126 (1990); *People v. Holloway*, 50 Cal. 3d 1098, 790 P.2d 1327, 269 Cal. Rptr. 530 (1990); *People v. Lewis*, 50 Cal. 3d 262, 786 P.2d 892, 266 Cal. Rptr. 834 (1990); *People v. Marshall*, 50 Cal. 3d 907, 790 P.2d 676, 269 Cal. Rptr. 269 (1990); *People v. Mattson*, 50 Cal. 3d 826, 789 P.2d 983, 268 Cal. Rptr. 802, *cert. denied*, 111 S. Ct. 591 (1990); *People v. Miller*, 50 Cal. 3d 954, 790 P.2d 1289, 269 Cal. Rptr. 492 (1990), *cert. denied*, 111 S. Ct. 713 (1991); *People v. Ramirez*, 50 Cal. 3d 1158, 791 P.2d 965, 270 Cal. Rptr. 286 (1990); *People v. Thompson*, 50 Cal. 3d 134, 785 P.2d 857, 266 Cal. Rptr. 309, *cert. denied*, 111 S. Ct. 226 (1990); *People v. Turner*, 50 Cal. 3d 668, 789 P.2d 887, 268 Cal. Rptr. 706 (1990), *cert. denied*, 111 S. Ct. 768 (1991). For ease of reference, subsequent histories are hereinafter omitted.

2. See *California Supreme Court Survey — Death Penalty Law*, 16 PEPPERDINE L. REV. 451 (1989); *California Supreme Court Survey — Death Penalty Law*, 16 PEPPERDINE L. REV. 1165 (1989); *California Supreme Court Survey — Death Penalty Law*, 17 PEPPERDINE L. REV. 537 (1990); *California Supreme Court Survey — Death Penalty Law*, 17 PEPPERDINE L. REV. 1095 (1990) [hereinafter *Death Penalty Law I, II, III & IV* respectively].

3. The death penalty was reversed in *Holloway*, 50 Cal. 3d at 1117, 790 P.2d at 1338, 269 Cal. Rptr. at 541, and vacated with the possibility of reinstatement in *Lewis*, 50 Cal. 3d at 292, 786 P.2d at 910, 266 Cal. Rptr. at 852.

Significant in this survey period is the continuing decrease in the number of cases decided.⁴ Statistics show a current backlog of 180 death penalty cases.⁵ Although the court must dispose of about forty cases annually to stay even, the output of the court dropped from fifty-five cases decided from May 1988 to May 1989, to nineteen cases decided between May 1989 and May 1990.⁶ Chief Justice Malcolm Lucas claims that the court is not overwhelmed with death penalty cases.⁷ However, observers remain unconvinced.⁸

This survey will address the issues causing reversal of death penalties, and will highlight recent clarifications in death penalty law and trial court errors. Because death penalty law appears to be more settled in light of the United States Supreme Court's recent affirmance of California's death penalty statute, several of the decisions turned on fundamental issues.⁹

II. GUILT PHASE

A. *Miranda*

In six of the ten cases decided, the supreme court confronted fifth amendment¹⁰ challenges based on alleged *Miranda*¹¹ violations.¹² In

4. See *Death Penalty Law IV*, *supra* note 2, at 1095-96 (discussing the court's reduced output of death penalty cases).

5. *The Exodus of California's High Court*, NAT'L. L. J., May 14, 1990, at 29.

6. *Id.* These statistics are from the Santa Clara University School of Law.

7. *Id.*

8. The observers include Stephen R. Barnett and Preble Stolz of the University of California at Berkeley School of Law, and John Poulos at the University of California at Davis School of Law. *Id.*

9. The United States Supreme Court decision in *Boyde v. California*, 110 S. Ct. 1190 (1990), *aff'g* *People v. Boyde*, 46 Cal. 3d 212, 758 P.2d 25, 250 Cal. Rptr. 83 (1988), has been heralded as the final constitutional obstacle for the California death penalty statute. See *Death Penalty IV*, *supra* note 2, at 1107 (discussing *Boyde*).

10. The fifth amendment provides in pertinent part, that "[n]o person shall be . . . deprived of life, liberty or property without due process of law." U.S. CONST. amend. V.

11. *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that the fifth amendment requires the interrogating officer to inform the person in custody prior to interrogation that he has the right to remain silent; that anything he says will 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 generally 5 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW § 2679 (2d ed. 1989).

12. See *People v. Thompson*, 50 Cal. 3d 134, 785 P.2d 857, 266 Cal. Rptr. 309 (1990); *People v. Lewis*, 50 Cal. 3d 262, 786 P.2d 892, 266 Cal. Rptr. 834 (1990); *People v. Douglas*, 50 Cal. 3d 468, 788 P.2d 640, 268 Cal. Rptr. 126 (1990); *People v. Mattson*, 50 Cal. 3d 826, 789 P.2d 983, 268 Cal. Rptr. 802 (1990); *People v. Marshall*, 50 Cal. 3d 907, 790 P.2d 676, 269 Cal. Rptr. 269 (1990); *People v. Holloway*, 50 Cal. 3d 1058, 790 P.2d 1327, 269 Cal. Rptr. 530 (1990).

analyzing the claims, the court continued its policy of distinguishing crimes that occurred prior to the enactment of Proposition 8.¹³ Proposition 8,¹⁴ entitled the "Truth-in-evidence" provision, was enacted in 1984 to curtail the exclusion of relevant evidence based upon independent state grounds.¹⁵ Thus, in determining whether an accused has voluntarily waived his *Miranda* rights, the prosecution no longer has the burden of proving the voluntariness of an admission or confession beyond a reasonable doubt.¹⁶ Instead, the accused is protected only by the United States Constitution, which requires the lesser standard of proof, by a preponderance of the evidence.¹⁷ However, crimes that occurred prior to the effective date of Proposition 8 are governed by the proof beyond a reasonable doubt standard.¹⁸

Under the appropriate standard, the court found in four cases that the defendants had waived their rights to counsel and to silence.¹⁹ In *People v. Thompson*, *People v. Mattson*, and *People v. Marshall*, the waiver issue arose pursuant to alleged *Edwards*²⁰ errors.²¹ Following the analysis of *Oregon v. Bradshaw*,²² the court found that the de-

13. *Thompson*, 50 Cal. 3d at 170, 785 P.2d at 877, 266 Cal. Rptr. at 329; *Lewis*, 50 Cal. 3d at 274-76, 786 P.2d at 898-99, 266 Cal. Rptr. at 840-41; *Douglas*, 50 Cal. 3d at 499, 788 P.2d at 654, 268 Cal. Rptr. at 140; *Marshall*, 50 Cal. 3d at 924 n.1, 790 P.2d at 683 n.1, 269 Cal. Rptr. at 276 n.1.

14. Proposition 8 as enacted provides that "relevant evidence shall not be excluded in any criminal proceeding." CAL. CONST. art. I, § 28(d). See generally 1 B. WITKIN, CALIFORNIA EVIDENCE §§ 8-9 (3d ed. 1986).

15. *People v. Markham*, 49 Cal. 3d 63, 71, 775 P.2d 1042, 1047, 260 Cal. Rptr. 273, 278 (1989). See also *In re Lance W.*, 37 Cal. 3d 873, 887, 694 P.2d 744, 752, 210 Cal. Rptr. 631, 639 (1985).

16. *Markham*, 49 Cal. 3d at 71, 775 P.2d at 1047, 260 Cal. Rptr. at 278.

17. *Id.*

18. *People v. Howard*, 44 Cal. 3d 375, 394, 749 P.2d 279, 288, 243 Cal. Rptr. 842, 851 (1988).

19. *Thompson*, 50 Cal. 3d at 159-66, 785 P.2d at 874-77, 266 Cal. Rptr. at 326-29; *Lewis*, 50 Cal. 3d at 274-76, 786 P.2d at 898-99, 266 Cal. Rptr. at 840-41; *Mattson*, Cal. 3d at 862, 789 P.2d at 1008, 268 Cal. Rptr. at 827; *Marshall*, 50 Cal. 3d at 925-26, 790 P.2d at 684, 269 Cal. Rptr. at 277.

Although the United States Supreme Court may limit its inquiry into whether there was a valid waiver of the defendant's *Miranda*-based right to counsel, the California Supreme Court considers whether the defendant waived both his right to counsel and his right to silence. *Mattson*, 50 Cal. 3d at 862 n.20, 789 P.2d at 1008 n.20, 268 Cal. Rptr. at 827 n.20. See generally *People v. Boyer*, 48 Cal. 3d 247, 273 n.14, 768 P.2d 610, 623 n.14, 256 Cal. Rptr. 96, 109 n.14 (1989).

20. *Edwards v. Arizona*, 451 U.S. 477 (1981). In *Edwards*, the United States Supreme Court held that once an accused has invoked his right to counsel, he "is not subject to further interrogation until counsel has been made available to him, unless the accused himself initiates further communication, exchange or conversations with the police." *Id.* at 481-85.

21. *Thompson*, 50 Cal. 3d at 162-64, 785 P.2d at 871-74, 266 Cal. Rptr. at 323-26; *Mattson*, 50 Cal. 3d at 858-62, 789 P.2d at 1005-08, 268 Cal. Rptr. at 824-27; *Marshall*, 50 Cal. 3d at 926, 790 P.2d at 684, 269 Cal. Rptr. at 277.

22. 462 U.S. 1039 (1983). The plurality opinion in *Bradshaw* acknowledged that some inquiries by an accused, "such as a request for a drink of water or a request to use a telephone," are routine statements that do not indicate a desire to open up a general conversation. Such statements generally do not constitute an "initiation" of a con-

defendants had initiated conversations, and had thus waived their *Miranda* rights.²³

The court also suggested in *Mattson* that the reasoning of Justice Powell's concurring opinion in *Bradshaw* is now the standard for determining whether an accused has initiated a conversation.²⁴ The crucial question in Justice Powell's concurrence was whether based upon the "totality of the circumstances," the accused made a knowing and intelligent waiver of his right to counsel and right to silence.²⁵ In applying both the two-step standard of the plurality and Justice Powell's totality of the circumstances test, the California high court found a valid waiver in all four cases.²⁶

Another *Miranda* issue that the court addressed was the propriety of relitigation on retrial of a motion to suppress admissions and confessions under section 1538.5 of the Penal Code.²⁷ Section 1538.5 was enacted to exclude evidence obtained in violation of a defendant's fourth amendment right to be free from unreasonable searches and seizures.²⁸ This statute has been expanded to exclude confessions

versation in the sense in which that word was used in *Edwards. Id.* at 1045. Hence, the analysis must determine: 1) whether the accused initiated the conversation; and 2) whether a valid waiver of the accused's rights to silence and counsel has occurred. *Id.* at 1044.

23. *Thompson*, 50 Cal. 3d at 162-64, 785 P.2d at 871-72, 266 Cal. Rptr. at 323-24; *Mattson*, 50 Cal. 3d at 858-62, 789 P.2d at 1004-08, 268 Cal. Rptr. at 824-27; *Marshall*, 50 Cal. 3d at 926, 790 P.2d at 684, 260 Cal. Rptr. at 277.

24. *Mattson*, 50 Cal. 3d at 861 n.19, 789 P.2d at 1007 n.19, 268 Cal. Rptr. at 826 n.19 (citing *Michigan v. Harvey*, 110 S. Ct. 1176, 1182 (1990) (Supreme Court ruled that "if all circumstances in a particular case show that the police have engaged in a course of conduct which would render the waiver involuntary, the burden [of establishing voluntariness] will not be satisfied.")).

25. *Bradshaw*, 162 U.S. at 1047-51 (Powell, J., concurring).

26. See *People v. Thompson*, 50 Cal. 3d 134, 785 P.2d 857, 266 Cal. Rptr. 309 (1990); *People v. Lewis*, 50 Cal. 3d 262, 786 P.2d 892, 266 Cal. Rptr. 834 (1990); *People v. Douglas*, 50 Cal. 3d 468, 788 P.2d 640, 268 Cal. Rptr. 126 (1990); *People v. Mattson*, 50 Cal. 3d 826, 789 P.2d 983, 268 Cal. Rptr. 802 (1990); *People v. Marshall*, 50 Cal. 3d 907, 790 P.2d 676, 269 Cal. Rptr. 269 (1990); *People v. Holloway*, 50 Cal. 3d 1058, 790 P.2d 1327, 269 Cal. Rptr. 530 (1990).

27. *Mattson*, 50 Cal. 3d at 848-53, 789 P.2d at 998-1001, 268 Cal. Rptr. at 817-20.

Penal Code section 1538.5 provides in pertinent part:

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

(1) The search or seizure without a warrant was unreasonable.

(2) The search or seizure with a warrant was unreasonable

CAL. PENAL CODE § 1538.5 (West Supp. 1990). See generally 4 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW §§ 2253-2268, 2461 (2d ed. 1989).

28. *People v. Superior Court (Smith)*, 70 Cal. 2d 123, 128, 449 P.2d 230, 234, 74 Cal. Rptr. 294, 298 (1969).

that result from unlawful searches or seizures.²⁹

In the first trial of *Mattson*,³⁰ the trial court had allowed the defendant to litigate both the admissibility of his statement and the suppression of evidence obtained as a result of an alleged illegal search under a section 1538.5 motion.³¹ The trial court denied the defendant's motion. The supreme court overturned the trial court's denial of the defendant's motion and found that his *Miranda* rights had been violated due to illegally obtained statements, and therefore reversed the judgment.³²

On retrial, the supreme court permitted relitigation of the *Miranda* issues.³³ It concluded that section 1538.5 was not a proper motion for the defendant's fifth and sixth amendment claims,³⁴ and that the law-of-the-case doctrine was inapplicable to the determination of questions of fact on the basis of new or different evidence in a new trial following reversal.³⁵ The court reasoned that section 1538.5 applies only to fourth amendment violations, and the defendant asserted fifth and sixth amendment violations.³⁶ Hence, the court implied that the defendant must make both a section 1538.5 motion to exclude the physical evidence, and an Evidence Code section 402 motion to exclude the confession.³⁷

Three justices disagreed with the majority opinion's application of section 1538.5 to the alleged *Miranda* violation.³⁸ Instead, they con-

29. *People v. Superior Court (Zolnay)*, 15 Cal. 3d 729, 735, 542 P.2d 1390, 1393-94, 125 Cal. Rptr. 798, 801-02 (1975).

30. 37 Cal. 3d 85, 688 P.2d 887, 207 Cal. Rptr. 278 (1984).

31. *Id.* at 91, 688 P.2d at 890-91, 207 Cal. Rptr. at 281-82.

32. *Id.*

33. *Mattson*, 50 Cal. 3d at 850-53, 789 P.2d at 999-1001, 268 Cal. Rptr. at 818-20.

34. *Id.*

35. *Id.* The law-of-the-case doctrine provides that when the supreme court, in deciding an appeal, "states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal . . . [and] in any subsequent suit for the same cause of action." *Tally v. Ganahl*, 151 Cal. 418, 421, 90 P. 1049, 1050 (1907). The doctrine does not apply to issues of fact. *People v. Shuey*, 13 Cal. 3d 835, 842, 533 P.2d 211, 216, 120 Cal. Rptr. 83, 88 (1975).

36. *Mattson*, 50 Cal. 3d at 850-53, 789 P.2d at 999-1001, 268 Cal. Rptr. at 818-20.

37. CAL. EVID. CODE § 402 (West 1990). Section 402 provides in relevant part: "(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article. (b) [T]he court shall hear and determine the question of admissibility of a confession or admission of the defendant . . ." *Id.*

38. Justice Kennard's concurring opinion stated that the majority's analysis was squarely inconsistent with the holding in *People v. Zolnay*. *Mattson*, 50 Cal. 3d at 881-82, 789 P.2d at 1021-22, 268 Cal. Rptr. at 840-42 (Kennard, J., concurring). Because the *Zolnay* court had acknowledged the propriety of the combined motion, Justice Kennard accused the majority of mischaracterizing the nature of the defendant's motion to require both a section 1538.5 motion to exclude the physical evidence and an Evidence Code section 402 motion to suppress the confessions. *Id.* Thus, she concluded that the majority skirted the most important issue: whether the prosecution may relitigate the motion on retrial based on the presentation of new evidence. *Id.* at 882, 789 P.2d at

cluded that the defendant's motion under section 1538.5 was proper.³⁹

Notwithstanding the result in *Mattson*, the court in *Holloway* continued to resolve the *Miranda* claims even though the case was reversed due to jury misconduct.⁴⁰ Justice Mosk critically noted in a concurring opinion that the court's findings would not be binding on retrial because of the holding in *Mattson*.⁴¹

During the guilt phase, the court also addressed issues concerning the lack of territorial jurisdiction,⁴² and the admission of post-hypnotic testimony.⁴³

B. Special Circumstance Issues

In general, if a defendant is found guilty of first degree murder and one or more of the statutory special circumstances is charged and found to be true at the guilt phase of the trial, the penalty shall be death or life imprisonment without the possibility of parole.⁴⁴ The use of a jury is strictly limited to cases in which one or more of the statutorily enumerated special circumstances is alleged and proven during the guilt phase.⁴⁵

1022, 268 Cal. Rptr. at 841 (Kennard, J., concurring). Justice Kennard goes on to conclude, however, that relitigation would be permissible. *Id.* at 884-85, 789 P.2d at 1023-24, 268 Cal. Rptr. at 842-43 (Kennard, J., concurring).

Justices Mosk and Broussard both would reverse the judgment because: 1) the defendant's section 1538.5 motion was proper; 2) the prosecution did not introduce new facts; and 3) the policy of section 1538.5 is to require full and final litigation, and thus the prosecution is bound by the judgment of the reviewing court. *Id.* at 885-88, 789 P.2d at 1024-26, 268 Cal. Rptr. at 843-45 (Mosk, J., dissenting & Broussard, J., dissenting).

39. *Id.*

40. *Holloway*, 50 Cal. 3d 1098, 1112-17, 790 P.2d 1327, 1335-38, 269 Cal. Rptr. 530, 538-41.

41. *Id.* at 1117, 790 P.2d at 1338, 269 Cal. Rptr. at 541.

42. *People v. Douglas*, 50 Cal. 3d 468, 493-94, 788 P.2d 640, 650-51, 268 Cal. Rptr. 126, 136-37 (1990). The court did not lack territorial jurisdiction although the crime occurred outside of the county, because the defendant had met the victims within the boundaries of the county. Moreover, the trial court's denial of a motion for change of venue on account of the publicity was correct based on the county's large size and the time period that had lapsed. *Id.* at 495-96, 788 P.2d at 651-52, 268 Cal. Rptr. at 137-38.

43. *People v. Miller*, 50 Cal. 3d 954, 982-86, 790 P.2d 1289, 1302-04, 269 Cal. Rptr. 492, 505-08 (1990). The court found it was error to admit posthypnotic testimony under *People v. Shirley*, 31 Cal. 3d 18, 723 P.2d 1354, 181 Cal. Rptr. 243 (1982); however, the error was deemed harmless because the court found that it was not "reasonably possible" that exclusion of this testimony would have caused a more favorable outcome for the defendant. *Miller*, 50 Cal. 3d at 986, 790 P.2d at 1035, 269 Cal. Rptr. at 508.

44. CAL. PENAL CODE § 190.2(a) (West 1988 & Supp. 1991). For a general discussion, see *Death Penalty Law III*, *supra* note 2, at 543.

45. *People v. Green*, 27 Cal. 3d 1, 48-49, 609 P.2d 468, 496-97, 164 Cal. Rptr. 1, 29-30

During the guilt phase of each of the ten death penalty trials, the court affirmed the findings of special circumstances. The special circumstances included: robbery/murder,⁴⁶ multiple murder/murder,⁴⁷ arson/murder,⁴⁸ sodomy/murder,⁴⁹ lewd and lascivious conduct on a child under the age of fourteen/murder,⁵⁰ and rape/murder.⁵¹

In *People v. Clark*,⁵² the court addressed as first impression the issue of whether gasoline constitutes an "explosive" within the meaning of section 190.2(a)(6) of the Penal Code.⁵³ The defendant in *Clark* carried gasoline in two five-gallon buckets into the victims'

(1980). See 3 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW § 1569 (2d. ed. 1989).

46. *People v. Lewis*, 50 Cal. 3d 262, 277-78, 786 P.2d 892, 900-01, 266 Cal. Rptr. 834, 842-43 (1990); *People v. Turner*, 50 Cal. 3d 668, 701, 789 P.2d 887, 904, 268 Cal. Rptr. 706, 723. The robbery special circumstance attaches to the underlying first degree murder when "the defendant was engaged in, or was an accomplice in, the commission of, or attempted commission of a robbery in violation of Penal Code section 211." CAL. PENAL CODE § 190.2(a)(17)(i) (West 1988).

47. *Miller*, 50 Cal. 3d at 1001-02, 790 P.2d at 1315-16, 269 Cal. Rptr. at 519. "The prosecution erred in charging twelve multiple-murder special circumstances on the basis of four homicides;" however, the jury was not influenced by the number, and thus the verdict was unaffected. *Id.* See also *People v. Mattson*, 50 Cal. 3d 826, 875, 789 P.2d 983, 1017, 268 Cal. Rptr. 802, 836 (1990); *People v. Douglas*, 50 Cal. 3d 468, 486, 788 P.2d 640, 646, 268 Cal. Rptr. 126, 132 (1990). The multiple murder special circumstance attaches when the defendant has either: 1) been "previously convicted of murder in the first or second degree," or 2) in the current proceeding has been convicted of more than one offense of first or second degree murder. CAL. PENAL CODE § 190.2(a)(2)-(3) (West 1988).

48. *People v. Clark*, 50 Cal. 3d 583, 609, 789 P.2d 127, 144, 268 Cal. Rptr. 399, 416 (1990). The arson special circumstance attaches to the underlying first degree murder when "the murder was committed while the defendant was engaged in or was an accomplice in the commission of [or] attempted commission of . . . arson in violation of [Penal Code Sections 451 & 452]." CAL. PENAL CODE § 190.2(a)(17)(viii) (West 1988).

49. *People v. Ramirez*, 50 Cal. 3d 1158, 1175-77, 791 P.2d 965, 975-76, 270 Cal. Rptr. 286, 296-97 (1990); *People v. Thompson*, 50 Cal. 3d 134, 170-73, 785 P.2d 857, 877-78, 266 Cal. Rptr. 309, 329-30 (1990). The sodomy special circumstance attaches to the underlying first degree murder when "the murder was committed while the defendant was engaged in or was an accomplice in the commission of, [or] attempted commission of, . . . sodomy in violation of [Penal Code] Section 286." CAL. PENAL CODE § 190.2(a)(17)(iv) (West 1988).

50. *Thompson*, 50 Cal. 3d at 170-73, 785 P.2d at 877-78, 266 Cal. Rptr. at 329-30. *Mattson*, 50 Cal. 3d at 838-39, 789 P.2d at 991, 268 Cal. Rptr. at 811. This special circumstance attaches to the first degree murder when "the murder was committed while the defendant was engaged in or was an accomplice in the commission of, [or] attempted commission of, . . . the performance of a lewd or lascivious act upon the person of a child under the age of fourteen in violation of [Penal Code] Section 288." CAL. PENAL CODE § 190.2(a)(17)(v) (West 1988).

51. *Mattson*, 50 Cal. 3d at 838-39, 789 P.2d at 991-92, 268 Cal. Rptr. at 811. The rape/murder special circumstance attaches when "the murder was committed while the defendant was engaged in or was an accomplice in the commission of, or the immediate flight after committing or attempting to commit . . . rape in violation of Section 261." CAL. PENAL CODE § 190.2(a)(17)(iii) (West 1988).

52. 50 Cal. 3d 583, 789 P.2d 127, 268 Cal. Rptr. 399 (1990).

53. Section 190.2(a)(6) provides in relevant part: "The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered . . ." CAL. PENAL CODE § 190.2(a)(6) (West 1988).

home. As the vapor rising from the gasoline mixed with the air, the defendant ignited the mixture with lighted highway flares. This created an explosion causing burn injuries that led to the death of one of the victims.⁵⁴

The trial court determined that the gasoline fell within the parameters of the delivery-of-explosive special circumstance.⁵⁵ The supreme court disagreed and concluded that gasoline vapor was not an "explosive" for purposes of the section 190.2(a)(6).⁵⁶ The court based its reasoning on the legislative history of the definition of "explosive" as it was defined in Health and Safety Code section 12000⁵⁷ and applied to Penal Code section 189.⁵⁸ Since the legislature used the definition of the Health and Safety Code section 12000 in Penal Code section 189, the court presumed that the same definition would apply for purposes of section 190.2(a)(6).⁵⁹

Furthermore, the Legislative Analyst's statement made prior to the modification of section 190.2(a)(6) in 1978 provided that the revised measure would include in the list of special circumstances "murder involving concealed explosives or explosives that are mailed or delivered."⁶⁰ Thus, the court concluded that the legislative intent of section 190.2(a)(6) did not include gasoline.⁶¹ Moreover, the court concluded that the defendant's "delivery" of the gas vapors was not within the context of section 190.2(6).⁶²

Still, the court found the defendant guilty of first degree murder

54. *Clark*, 50 Cal. 3d at 594, 789 P.2d at 134, 268 Cal. Rptr. at 406.

55. *Id.*

56. *Id.* at 602, 789 P.2d at 139, 268 Cal. Rptr. at 411.

57. Section 12000 of the Health and Safety Code provides in relevant part:

'[E]xplosives' shall mean any substance, or combination of substances, the primary or common purpose of which is detonation or rapid combustion and which is capable of a relatively instantaneous or rapid release of gas and heat, or . . . when combined with others, [is used] to form a substance capable of a relatively instantaneous or rapid release of gas and heat.

CAL. HEALTH & SAFETY CODE § 12000 (West 1988).

58. Section 189 provides in relevant part: "[E]xplosive' shall mean any explosive as defined in Section 12000 of the Health and Safety Code." CAL. PENAL CODE § 189 (West 1988).

59. *Clark*, 50 Cal. 3d at 602, 789 P.2d at 139-40, 268 Cal. Rptr. at 411-12.

60. *Id.* at 602-03, 789 P.2d at 140, 268 Cal. Rptr. at 412 (quoting *BALLOT PAMP. GEN. ELECTION* 32 (Nov. 7, 1978)).

61. *Id.*

62. *Id.* at 608, 789 P.2d at 144, 268 Cal. Rptr. at 416. "The gasoline vapor was not 'delivered.' It arose by an independent physical process after the gasoline was thrown into the home. And the vapor alone was not explosive until it combined with air in the required proportion. Manifestly, defendant did not deliver the air that was already present in the victim's home." *Id.* at 605, 789 P.2d at 141, 268 Cal. Rptr. at 413.

with the special circumstance of arson.⁶³ This conclusion was dependent upon a derivative finding that the defendant entertained an independent felonious intent separate from the intent to set the fire. The defense counsel argued that the objective in committing the arson was to drive the victim out of the house and then the murder was to follow. Thus, the arson was incidental to the murder and the trial court was required to give the *Green* instruction.⁶⁴ The supreme court rejected the argument and stated that the relation between the murder and the defendant's intent to burn the home "would not invoke the *Green* rule since the defendant had independent, albeit concurrent, goals."⁶⁵ However, based on the prosecutor's contentions and the jury's agreement that such an intent was possible, the court found that the failure to instruct pursuant to *Green* was error, although harmless.⁶⁶ The court stated that the defendant's "belated realization that the [victim's] bedroom was occupied, and his resolution to proceed with his plan" did not negate the possibility of an independent purpose causing the death of the victim in the commission of the arson.⁶⁷

C. *Voir Dire*

The *Witherspoon-Witt* error was the most common allegation during the death penalty voir dire proceedings.⁶⁸ This error occurs when a member is excluded from the jury panel in a death penalty case because of his general objections to the death penalty, or his conscientious or religious scruples against its infliction.⁶⁹ A prospective juror may be excluded when his views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."⁷⁰ Accordingly, a juror may be dismissed when "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law."⁷¹

63. *Id.* at 609, 789 P.2d at 144, 268 Cal. Rptr. at 416.

64. The *Green* instruction is required when the evidence indicates that the defendant intended to commit the murder and only incidentally committed one of the specified felonies while doing so. See *People v. Green*, 27 Cal. 3d 1, 61-62, 609 P.2d 468, 505-06, 164 Cal. Rptr. 1, 38-39 (1980).

65. *Clark*, 50 Cal. 3d at 608-09, 789 P.2d at 144, 268 Cal. Rptr. at 416.

66. *Id.* at 609, 789 P.2d at 144, 268 Cal. Rptr. at 416.

67. *Id.*

68. *People v. Marshall*, 50 Cal. 3d 907, 926-27, 790 P.2d 676, 684-85, 269 Cal. Rptr. 269, 277-78 (1990); *People v. Mattson*, 50 Cal. 3d 826, 844-47, 789 P.2d 983, 995-97, 268 Cal. Rptr. 802, 814-16 (1990); *People v. Clark*, 50 Cal. 3d 583, 596-98, 789 P.2d 127, 135-36, 268 Cal. Rptr. 399, 407-08; *People v. Lewis*, 50 Cal. 3d 262, 289-91, 786 P.2d 892, 908-09, 266 Cal. Rptr. 834, 850-51 (1990); *People v. Thompson*, 50 Cal. 3d 134, 157-59, 785 P.2d 857, 868-69, 266 Cal. Rptr. 309, 320-21 (1990).

69. *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968).

70. *Adams v. Texas*, 448 U.S. 38, 45 (1980).

71. *Wainwright v. Witt*, 469 U.S. 412, 426 (1985). This is also applicable in deter-

In *People v. Mattson*,⁷² the defendant alleged that the trial court erred in restricting his efforts to "rehabilitate" (by further examination) prospective jurors whose responses led the court to excuse them for cause. Although the defendant did not directly allege *Witherspoon-Witt* error, he claimed that the trial court unreasonably denied his sixth amendment rights by disallowing further examination after the excused jurors expressed their reservations. The supreme court disagreed and concluded that although counsel has the right to a "reasonable opportunity to examine the prospective jurors," the ultimate duty "to select a fair and impartial jury is . . . imposed on the court."⁷³ Therefore, "when a juror has clearly expressed an inability to vote for the death penalty . . . the court has discretion to limit further voir dire."⁷⁴

Throughout the remaining cases, the court consistently applied this analysis. In *People v. Clark*,⁷⁵ during sequestered voir dire, the court refused the defendant's request to ask the prospective jurors whether evidence of serious burn injuries suffered by the surviving victims would automatically cause them to vote for the death penalty.⁷⁶ The court explained that the *Witherspoon-Witt* voir dire seeks to determine only the views of the prospective jurors in the abstract as to whether they "would vote against the death penalty without regard to the evidence produced at trial."⁷⁷ Hence, the power of the judge to control the voir dire proceedings included the power to control the manner in which they would be conducted.⁷⁸

mining the propriety of an excuse for cause under article I, section 16 of the California Constitution. See *People v. Hamilton*, 48 Cal. 3d 1142, 1165, 259 P.2d 730, 743, 774 Cal. Rptr. 701, 714 (1989).

72. 50 Cal. 3d 826, 789 P.2d 983, 268 Cal. Rptr. 802 (1990).

73. *Mattson*, 50 Cal. 3d at 845, 789 P.2d at 996, 268 Cal. Rptr. at 815. See CAL. CIV. PROC. CODE § 223(a) (West Supp. 1990) ("It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury . . . [T]he trial court shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant, such examination to be conducted orally and directly by counsel"). See also CAL. CIV. PROC. CODE § 223(c) (West Supp. 1990) ("[T]he court shall have discretion and control with respect to the form and subject matter and duration of voir dire examination").

74. *Id.* at 846, 789 P.2d at 997, 268 Cal. Rptr. at 816. Additionally, the court denied the defendant's request for funds in order to hire an expert to conduct the voir dire proceedings. *Id.* at 847, 789 P.2d at 998, 268 Cal. Rptr. at 817.

75. 50 Cal. 3d 583, 789 P.2d 127, 268 Cal. Rptr. 399 (1990).

76. *Id.* at 596-97, 789 P.2d at 135-36, 268 Cal. Rptr. at 407-08.

77. *Id.* (citing *People v. Adcox*, 47 Cal. 3d 207, 250, 763 P.2d 906, 931, 253 Cal. Rptr. 55, 78 (1988)).

78. *Id.* at 597, 789 P.2d at 136, 268 Cal. Rptr. at 408. See also *People v. Lewis*, 50 Cal. 3d 262, 289-90, 786 P.2d 892, 908-09, 266 Cal. Rptr. 834, 850-51 (wherein the court

The court addressed other jury issues in *People v. Thompson*.⁷⁹ The defendant in *Thompson* first alleged that exclusion of the public from voir dire proceedings was a violation of his constitutional right to a public trial.⁸⁰ Because the contention focused on the defendant's right and not that of the media or the public,⁸¹ the court found that the defendant had waived his right by failing to assert it in a timely fashion.⁸² Additionally, the court rejected the defendant's claim that the "exclusion of persons who would automatically vote against the death penalty denied him a representative jury."⁸³ Finally, the court approved the trial court's hardship exemptions on certain jurors based upon the trial's lengthy duration.⁸⁴

D. Jury Misconduct

In *People v. Marshall*,⁸⁵ during penalty deliberations, a juror "informed the jury that he had a background in law enforcement, and that lack of evidence did not mean that the defendant had no criminal background, because juvenile records are automatically sealed at age eighteen."⁸⁶ Because of these declarations, the court concluded that the juror had introduced into the jury room both extraneous and erroneous law, which, whether erroneous or not, constituted misconduct.⁸⁷ The court then addressed whether or not the presumption of

rejected the defendant's contention that limiting voir dire to the four standard *Witherspoon* questions was ineffective assistance of counsel).

79. 50 Cal. 3d 134, 785 P.2d 857, 266 Cal. Rptr. 309.

80. *Id.* at 156-57, 785 P.2d at 867-68, 266 Cal. Rptr. at 319-20. A defendant has both a constitutional and statutory right to a public trial. CAL. CONST. art. I, § 15; CAL. PENAL CODE § 686(1) (West 1988).

81. The sequestered voir dire has its origins in *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980). There, the court concluded that the death-qualification portion of voir dire should be done in sequestration in order to avoid publicity that could cause jurors to anticipate guilt. *Id.* at 80-81, 616 P.2d at 1354-55, 28 Cal. Rptr. at 181-82. Thereafter, the United States Supreme Court held that there is a presumption that jury voir dire is to be conducted in open court, and this presumption "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984). The effect of this case has not been resolved in California. See *People v. Turner*, 37 Cal. 3d 302, 316 n.4, 690 P.2d 669, 677 n.4, 208 Cal. Rptr. 196, 204 n.4 (1984). See also 5 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW § 2850 (2d ed. 1989).

82. *Thompson*, 50 Cal. 3d at 157, 785 P.2d at 867-68, 266 Cal. Rptr. at 319-20.

83. *Id.* at 157, 785 P.2d at 868, 266 Cal. Rptr. at 320. See *People v. Fields*, 35 Cal. 3d 329, 353, 673 P.2d 680, 695, 197 Cal. Rptr. 803, 818 (1983) ("[P]ersons who would automatically vote against death at the penalty phase . . . are not a cognizable group, the exclusion of which makes a jury unrepresentative and unconstitutional").

84. *Thompson*, 50 Cal. 3d at 158, 785 P.2d at 869, 266 Cal. Rptr. at 321.

85. 50 Cal. 3d 907, 790 P.2d 676, 269 Cal. Rptr. 269 (1990).

86. *Id.* at 949, 790 P.2d at 699, 269 Cal. Rptr. at 292.

87. *Id.* at 949-50, 790 P.2d at 699, 269 Cal. Rptr. at 292. The information was erroneous under Penal Code section 190.3, factor (b), which includes criminal activity of juveniles. CAL. PENAL CODE § 190.3(b) (West 1988). See *infra* note 108 (text of section 190.3).

prejudice raised by the misconduct had been rebutted.⁸⁸

In its analysis, the court introduced a set of criteria based primarily on the American Bar Association Standards for Criminal Justice that must be met in order to overcome the presumption.⁸⁹ This standard, approved by the court, states that a judgment adverse to the defendant must be reversed "whenever . . . the court finds a substantial likelihood that the vote of one or more jurors was influenced by exposure to prejudicial matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury."⁹⁰ Using an objective "substantial likelihood" standard, the court adopted a two-step procedure.⁹¹ The first step required the court to examine the extrajudicial material. Next, the court had to judge whether such material was inherently likely to have influenced the jury.⁹² The court deemed "[s]uch prejudice analysis" as less tolerant than the "harmless-error analysis" for ordinary error at trial.⁹³

Following these guidelines, the court found that the presumption of prejudice was rebutted.⁹⁴ The court reasoned that the jury instructions informed the jurors that there was no evidence that the defendant had a criminal background, and therefore it was a mitigating factor. Also, the trial court clarified the instruction stating that both the prosecution and the defense could have brought in aggravating or mitigating circumstances if such evidence existed.⁹⁵ Thus, based on the clarity of the instructions and the absence of further aggravating circumstances, the supreme court concluded that the jury would have understood the words of the instructions as they were written, and therefore the misconduct was nonprejudicial.⁹⁶

In *People v. Holloway*,⁹⁷ the court found otherwise. In *Holloway*,

88. When misconduct has been shown on the part of a juror, prejudice is presumed; the state must then rebut the presumption or lose the verdict. See, e.g., *In re Stankewitz*, 40 Cal. 3d 391, 396-402, 708 P.2d 1260, 1266, 220 Cal. Rptr. 382, 388 (1985). See generally 6 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW § 3069 (2d ed. 1989).

89. *Marshall*, 50 Cal. 3d at 950-51, 790 P.2d at 700, 269 Cal. Rptr. at 293. (citing 2 STANDARDS FOR CRIMINAL JUSTICE § 8-3.7 (2d ed. 1980)).

90. *Id.*

91. *Id.* at 951, 790 P.2d at 700, 269 Cal. Rptr. at 293.

92. *Id.* (citing 2 STANDARDS FOR CRIMINAL JUSTICE § 8-3.7 commentary at 8.58 (2d ed. 1980)).

93. *Id.*

94. *Id.*

95. *Id.* at 952, 790 P.2d at 701, 269 Cal. Rptr. at 294.

96. *Id.*

97. 50 Cal. 3d 1098, 790 P.2d 1327, 269 Cal. Rptr. 530 (1990).

despite the trial court's efforts to caution the jurors against reading newspaper articles or listening to other media reports about the case, the court discovered shortly after the jury had returned its verdicts in the guilt phase that one of the jurors had read a newspaper article the second day of trial. The article stated that the defendant was on parole from prison after having served time for assaulting a woman with a hammer. The juror did not expose his information until after the verdict forms had been signed by all jurors. The trial court denied the defendant's motion for a mistrial and then considered a motion for a new trial.⁹⁸ In its discussion, the trial court focused on the minimal impact of the juror's communication to the rest of the jury. Also, the trial court stated that it had found no cases or statutes prohibiting the inadvertent reading of a newspaper. Hence, the trial court found neither misconduct nor prejudice to the defendant and refused the motion for a new trial.⁹⁹

The supreme court reluctantly disagreed.¹⁰⁰ The court noted the clarity of the law declaring that it is misconduct for a juror to read newspaper accounts of a case on which he is sitting.¹⁰¹ Such juror misconduct raises a presumption of prejudice that can only be rebutted by proof that no prejudice *actually* occurred.¹⁰² Following the guidelines set forth in *Marshall*,¹⁰³ the court found that the content of the article was extremely prejudicial because it revealed information about the defendant's prior criminal conduct that the court had ruled inadmissible.¹⁰⁴ Moreover, the court struck down the prosecutor's argument that the failure of the juror to disclose the offending information precluded the contamination of the eleven remaining jurors.¹⁰⁵ Criticizing the contention as missing the point, the court explained that the fact that one juror went through the entire guilt phase with outside knowledge of inadmissible evidence, exacerbated by his failure to disclose this information, was sufficient to require reversal.¹⁰⁶ Accordingly, the court held that the conviction could not stand "if even a single juror had been improperly influenced."¹⁰⁷

98. *Id.* at 1107, 790 P.2d at 1331, 269 Cal. Rptr. at 534.

99. *Id.* at 1107-08, 790 P.2d at 1331-32, 269 Cal. Rptr. at 534-35.

100. *Id.* at 1106, 790 P.2d at 1330, 269 Cal. Rptr. at 533.

101. *Id.* at 1108, 790 P.2d at 1332, 269 Cal. Rptr. at 535 (citing *People v. Lambright*, 61 Cal. 2d 482, 393 P.2d 409, 39 Cal. Rptr. 209 (1964); *People v. Wong Loung*, 159 Cal. 520, 114 P. 829 (1911); *People v. Stokes*, 103 Cal. 193, 37 P. 207 (1894); *People v. McCoy*, 71 Cal. 395, 12 P. 272 (1886)).

102. *Id.* (emphasis added).

103. See *supra* notes 85-96 and accompanying text.

104. *Holloway*, 50 Cal. 3d at 1110, 790 P.2d at 1333, 269 Cal. Rptr. at 536.

105. *Id.* at 1111, 790 P.2d at 1334, 269 Cal. Rptr. at 537.

106. *Id.* On the other hand, the court implied that had the information been less prejudicial and had the misconduct been revealed earlier, corrective steps could have been taken to avoid a reversal. *Id.* at 1111-12, 790 P.2d at 1334, 269 Cal. Rptr. at 537.

107. *Id.* at 1112, 790 P.2d at 1335, 269 Cal. Rptr. at 538 (quoting *People v. Pierce*, 24 Cal. 3d 199, 595 P.2d 91, 155 Cal. Rptr. 657 (1979)).

III. PENALTY PHASE ISSUES

In determining whether to impose the death penalty or a sentence of life imprisonment without the possibility of parole upon the defendant, the jury must consider certain aggravating and mitigating factors.¹⁰⁸ The prosecutor is limited to the factors listed in section 190.3 of the penal code, unless evidence is offered in the form of a rebuttal.¹⁰⁹ The following portion of this survey will highlight the factors utilized most frequently in the supreme court's decisions.

108. CAL. PENAL CODE § 190.3 (West 1988). 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:

(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.

(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 [the] 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 & N. EPSTEIN, CALIFORNIA CRIMINAL LAW § 1597 (2d ed. 1989).

109. See, e.g., *People v. Boyd*, 38 Cal. 3d 762, 773-74, 700 P.2d 782, 791, 215 Cal. Rptr. 1, 9 (1985) ("Since the jury must decide the question of penalty on the basis of the specific factors listed in the statute, the quoted language must refer to evidence relevant to those factors").

A. Factor (b) and Factor (c) of Penal Code section 190.3

In general, factor (b) allows the trier of fact to consider prior criminal conduct involving the use or attempted use of force or violence.¹¹⁰ Factor (c) allows the consideration of the presence or absence of any prior felony conviction.¹¹¹ In *People v. Boyd*, the court clarified the distinction between factors (b) and (c) by permitting the jury to consider under factor (b) any violent criminal activity whether or not it led to conviction, and under factor (c) any prior felony conviction whether or not it was violent.¹¹² Thus, offenses which qualify under both factors (b) and (c) may properly be considered under both or either.¹¹³

The court continued this distinction in *People v. Ramirez*.¹¹⁴ There, the prosecutor introduced evidence of the defendant's prior felony conviction for possessing a concealed weapon under factors (b) and (c). The defendant argued that because his conduct did not involve the use, or attempted use, of force or violence, or the threat of violence, his conduct did not fall under factor (b). The court rejected the argument, stating that possession of a concealed weapon while in jail involved an implied threat to use force or violence, declaring that it is a "classic instrument of violence . . . normally used only for criminal purposes."¹¹⁵ Therefore, the evidence was properly admitted under both factors.¹¹⁶

Another issue related to evidence introduced under factors (b) and (c) arises when the evidence is not probative of either factor and thus is irrelevant to aggravation.¹¹⁷ In *People v. Douglas*,¹¹⁸ the prosecutor introduced evidence of alleged prior criminal conduct involving

110. Section 190.3 provides in pertinent 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." CAL. PENAL CODE § 190.3.

111. Penal Code section 190.3 provides in pertinent part: "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: . . . (c) The presence or absence of any prior felony conviction." CAL. PENAL CODE § 190.3 (West 1988).

112. *Boyd*, 38 Cal. 3d 762, 773-76, 700 P.2d 782, 791-93, 215 Cal. Rptr. 1, 9-11 (1985). See also *Douglas*, 50 Cal. 3d at 525, 788 P.2d at 673, 268 Cal. Rptr. at 159.

113. *People v. Melton*, 44 Cal. 3d 713, 764-65, 750 P.2d 741, 771-72, 244 Cal. Rptr. 867, 895-97 (1988).

114. 50 Cal. 3d 1158, 1186, 791 P.2d 965, 983, 270 Cal. Rptr. 286, 304 (1990).

115. *Id.* at 1186-87, 791 P.2d at 983, 270 Cal. Rptr. at 304 (quoting *People v. Grubb*, 63 Cal. 2d 614, 620, 408 P.2d 100, 47 Cal. Rptr. 772 (1965); *People v. Wasley*, 245 Cal. App. 2d 383, 386, 53 Cal. Rptr. 877, 879 (1966)).

116. *Id.* See also *Miller*, 50 Cal. 3d at 1009, 790 P.2d at 1321, 269 Cal. Rptr. at 524 (where the court rejected the defendant's argument that the jury misunderstood factors (b) and (c) as applying to the crimes for which he was being tried).

117. See *People v. Boyd*, 38 Cal. 3d 762, 773-76, 700 P.2d 762, 791-93, 215 Cal. Rptr. 1, 9-11 (1985).

118. 50 Cal. 3d 468, 788 P.2d 640, 268 Cal. Rptr. 126 (1990).

violence or force under factor (b).¹¹⁹ The defendant argued that he had not been criminally charged for the conduct, that the conduct did not involve violence, and therefore was not probative of any specifically listed factor. The court rejected the defendant's contentions by finding that criminal acts need not be charged to merit the jury's consideration, and that the conduct in question involved an implied threat of force or violence; the evidence thus fell within factor (b).¹²⁰

The court has also addressed the question of whether the elimination of factor (b) from the list of aggravating and mitigating circumstances read to the jury constitutes prejudicial error. In *People v. Turner*,¹²¹ the trial court eliminated factor (b) from the jury instructions and set forth only the defendant's other felony convictions under factor (c). The defendant claimed that this was prejudicial error in that it prevented the jury from realizing that the lack of other crimes under factor (b) constituted a mitigating factor. The supreme court disagreed on two grounds. First, the defense counsel, not counsel for the prosecution, submitted the instruction form, so any error was invited.¹²² Second, the decision had the desired result, because the defendant's prior robbery conviction was within the meaning of factor (b), and had it been included in the instruction, the prosecutor would have used it as an aggravating factor.¹²³

Finally, the court addressed the issue of whether double jeopardy applies when a prior offense is used as an aggravating circumstance under factor (b) when the defendant withdraws a plea of nolo contendere and enters a plea of not guilty under section 1203.4 of the Penal code.¹²⁴ In *People v. Douglas*,¹²⁵ the court determined that the

119. The prosecutor claimed that the defendant had twice forced young women to pose for photographs depicting nudity and sexual acts.

120. *Douglas*, 50 Cal. 3d at 526, 788 P.2d at 673, 268 Cal. Rptr. at 159. See also *Clark*, 50 Cal. 3d at 624, 789 P.2d at 154-55, 268 Cal. Rptr. at 426-27 (where the court found a possible *Boyd* error because the prosecution introduced evidence of prior unadjudicated criminal conduct which did not involve violence; however, consideration of the claim was precluded by the defendant's failure to object).

121. 50 Cal. 3d 668, 789 P.2d 887, 268 Cal. Rptr. 706 (1990).

122. *Id.* at 712-13, 789 P.2d at 911-12, 268 Cal. Rptr. at 730-31. A tactical decision on the part of counsel prevents a contention on appeal that any resulting error is grounds for reversal. *People v. Avalos*, 37 Cal. 3d 216, 228-29, 689 P.2d 121, 129, 207 Cal. Rptr. 549, 557 (1984).

123. *Turner*, 50 Cal. 3d at 713, 789 P.2d at 912, 268 Cal. Rptr. at 731.

124. Section 1203.4 provides in pertinent part:

(a) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation . . . or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall . . . be

defendant's plea bargain was not an acquittal under section 190.3.¹²⁶ Based on the absence of an acquittal, the court concluded that nothing in section 1203.4 prohibits the jury from considering the facts of the crime that gave rise to the offense.¹²⁷

B. Factor (k) of Penal Code Section 190.3

Section 190.3(k) lists as the final factor for the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."¹²⁸ In order to ensure the statute's constitutionality under the United States Supreme Court decisions of *Lockett v. Ohio*¹²⁹ and *Eddings v. Oklahoma*,¹³⁰ the trial court must also instruct the jury that it may consider as a mitigating factor "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."¹³¹ This expanded factor (k) instruction is now embodied in section 8.85 of the California Jury Instructions.¹³² In cases predating the current instruction, the court must determine whether failure to give the expanded instruction was prejudicial in light of the evidence, arguments, and instructions as a whole.¹³³

The defendants asserted factor (k) error in only two cases during the period of this survey. In *People v. Douglas*,¹³⁴ the jury was properly given the expanded factor (k) instruction similar to the one prescribed in *Easley*.¹³⁵ Additionally, the trial court read to the jury a "sympathy instruction" that allowed the jury to consider "pity, sym-

permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty

CAL. PENAL CODE § 1203.4 (West 1988).

125. 50 Cal. 3d 468, 788 P.2d 640, 268 Cal. Rptr. 126 (1990).

126. *Id.* at 528-29, 788 P.2d at 674-75, 268 Cal. Rptr. at 160-61.

127. *Id.* at 529, 788 P.2d at 675, 268 Cal. Rptr. at 161.

128. CAL. PENAL CODE § 190.3(k) (West 1988). See generally 3 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW § 1608 (2d ed. 1989).

129. 438 U.S. 586 (1978).

130. 455 U.S. 104 (1982).

131. *People v. Easley*, 34 Cal. 3d 858, 878, 671 P.2d 813, 825, 196 Cal. Rptr. 309, 321 (1983) (emphasis omitted) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

132. *Id.* See CALJIC No. 8.85 (k) (5th ed. 1988).

133. See, e.g., *People v. Ghent*, 43 Cal. 3d 739, 777, 739 P.2d 1250, 1275, 239 Cal. Rptr. 82, 107 (1987). In upholding the constitutional adequacy of factor (k), the court must "analyz[e] the record in each case to determine whether the jury instructions, taken as a whole, and read in conjunction with the prosecutor's arguments, adequately informed the jury of its responsibility to consider all of the mitigating evidence in the case." *Id.*

134. 50 Cal. 3d 468, 788 P.2d 640, 268 Cal. Rptr. 126 (1990).

135. *Douglas*, 50 Cal. 3d at 534-35, 788 P.2d at 679, 268 Cal. Rptr. at 165. The jury was instructed to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any other factor proffered by the defendant as a factor in mitigation of the penalty, including his character." *Id.* at 50 Cal. 3d at 534, 788 P.2d at 679, 268 Cal. Rptr. at 165.

pathy and mercy for the defendant in deciding the appropriate penalty."¹³⁶ The defendant claimed that the prosecution's argument misled the jury into believing that it was not permitted to assign mitigating weight to the defendant's character. The court rejected the argument on the grounds that the expanded factor (k) instruction in conjunction with the "sympathy" instruction was sufficient to avoid the possibility of misleading a reasonable juror in his duty to consider the defendant's character and background as mitigating evidence.¹³⁷

The second factor (k) error was asserted in the context of an alleged *Boyd* error.¹³⁸ In *People v. Ramirez*,¹³⁹ the defense introduced mitigating evidence based on the defendant's background and character through the testimony of the defendant's mother. During cross-examination, the prosecution questioned the mother about the defendant's criminal conduct while a juvenile. On appeal, the defendant contended that the evidence of his earlier non-violent criminal activity elicited during cross-examination was inadmissible under any statutory factor to be considered in aggravation.¹⁴⁰ The prosecution responded that once the defense introduced evidence of the defendant's background and character for consideration by the jury as factor (k) mitigating evidence, the prosecutor was permitted to rebut this evidence in order to develop an accurate picture of the defendant's background and character.

In addressing the issue, the court first noted the propriety of a prosecutorial rebuttal when the defense presents evidence in mitigation under factor (k) as evidence tending to disprove any disputed fact relevant to the action.¹⁴¹ The court went on to state, however, that "the scope of rebuttal must be *specific*, and . . . *relate directly* to a particular incident or character trait" that the defendant had offered as mitigation.¹⁴² Because much of the evidence solicited by the prosecution was not responsive to evidence presented by the defense,

136. *Id.* at 535, 788 P.2d at 679, 268 Cal. Rptr. at 165.

137. *Id.*

138. *Boyd* error occurs when the trier of fact considers factors in aggravation that are not specifically enumerated in section 190.3. *People v. Boyd*, 38 Cal. 3d 762, 775, 700 P.2d 782, 791-92, 215 Cal. Rptr. 1, 10-11. See *supra* note 108 and accompanying text (describing section 190.3). See generally *Death Penalty III*, *supra* note 2, at 553-56.

139. 50 Cal. 3d 1158, 791 P.2d 965, 270 Cal. Rptr. 286 (1990).

140. *Id.* at 1191-92, 791 P.2d at 987, 270 Cal. Rptr. at 308. The defense specifically argued that the evidence was "inadmissible under factor (b) or any other factor" because the evidence elicited was of non-violent conduct. *Id.* at 1191, 791 P.2d at 987, 270 Cal. Rptr. at 308.

141. *Id.* at 1192, 791 P.2d at 987, 270 Cal. Rptr. at 308.

142. *Id.* at 1193, 791 P.2d at 987, 270 Cal. Rptr. at 308 (emphasis added).

the court concluded that the trial court erred in permitting the prosecution to question the defendant's mother regarding the criminal incidents.¹⁴³ However, since the incidents were relatively innocuous in comparison to properly admitted evidence, the court concluded that the error was harmless and did not require reversal.¹⁴⁴

C. *Victim and Family Impact Evidence*

In five cases the court affirmed the admissibility of victim photographs and prosecutorial statements concerning the victims' emotions at the time of the crimes and the impact of the victims' deaths on relatives.¹⁴⁵ With respect to the admission of photographs depicting the death of the victim, the court in *People v. Thompson*¹⁴⁶ rejected the defendant's contention that the photographs were erroneously admitted solely to create an adverse emotional impact on the jury.¹⁴⁷ The court reasoned that the photographs tended to show the defendant's intent to kill the victim with malice — a factor which the jury could consider in aggravation.¹⁴⁸ The court also determined that the photographs were relevant to show the extreme callousness and cruelty with which the victim was killed.¹⁴⁹ Finally, the court stated that, although the trial court did not expressly weigh undue prejudice against the probative value before admitting the photographs,¹⁵⁰ the "overwhelming probative value on the question of penalty" was manifest.¹⁵¹

On the issues concerning victim and family impact statements, the court referred to the United States Supreme Court decisions in *Booth v. Maryland*¹⁵² and *South Carolina v. Gathers*.¹⁵³ In *Booth* and *Gath-*

143. *Id.* at 1193, 791 P.2d at 988, 270 Cal. Rptr. at 309.

144. *Id.* at 1193-94, 791 P.2d at 988, 270 Cal. Rptr. at 309.

145. *People v. Clark*, 50 Cal. 3d 583, 789 P.2d 127, 268 Cal. Rptr. 399 (1990); *People v. Douglas*, 50 Cal. 3d 468, 788 P.2d 640, 268 Cal. Rptr. 126 (1990); *People v. Louis*, 50 Cal. 3d 262, 786 P.2d 892, 266 Cal. Rptr. 834 (1990); *People v. Marshall*, 50 Cal. 3d 907, 790 P.2d 676, 269 Cal. Rptr. 269 (1990); *People v. Thompson*, 50 Cal. 3d 134, 785 P.2d 857, 266 Cal. Rptr. 309 (1990).

146. 50 Cal. 3d 134, 785 P.2d 857, 266 Cal. Rptr. 309.

147. *Id.* at 181, 785 P.2d at 884, 266 Cal. Rptr. at 336.

148. *Id.* at 182, 785 P.2d at 884-85, 266 Cal. Rptr. at 336-37.

149. *Id.* at 182, 785 P.2d at 885, 266 Cal. Rptr. at 337. One photograph depicted a rope wrapped around the victim's neck, and others showed where the rope cut into the victim's neck. *Id.* at 181, 785 P.2d at 884, 266 Cal. Rptr. at 336.

150. Generally, in admitting photographs depicting the death of the victim, the record must affirmatively show the actual weighing of undue prejudice against probative value by the trial judge. See *People v. Green*, 27 Cal. 3d 1, 24-25, 609 P.2d 468, 481-82, 164 Cal. Rptr. 1, 14 (1980).

151. *Thompson*, 50 Cal. 3d at 183, 785 P.2d at 885, 266 Cal. Rptr. at 337. The court also pointed out the fact that the trial judge had excluded one photograph from admission, thus implying that the trial court did in fact weigh undue prejudice against probative value. *Id.*

152. 482 U.S. 496 (1987).

153. 490 U.S. 805 (1989).

ers, the Supreme Court determined that it was generally violative of a criminal defendant's rights under the eighth amendment¹⁵⁴ in a capital case to present argument concerning such matters as the "victims' personal characteristics, . . . the emotional impact of the crime on the victims' family, and the family members' opinions about the crime."¹⁵⁵

Applying these rules, the California Supreme Court found either that the holdings in *Booth* and *Gathers* were not violated, or that the error in admitting such statements was harmless beyond a reasonable doubt. In *People v. Lewis*,¹⁵⁶ the court found that the statements were more "fleeting and restrained" than those criticized in *Booth* and *Gathers*.¹⁵⁷ It further determined that even if the comments constituted error under *Booth* and *Gathers*, the error was not per se reversible.¹⁵⁸ Instead, the standard to apply is whether the comments were harmless beyond a reasonable doubt.¹⁵⁹ The court thus concluded that the impropriety was nonprejudicial based on the relative

154. The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

155. *Gathers*, 490 U.S. at 810-11; see also *Booth*, 482 U.S. at 502-07. See also *Death Penalty I*, *supra* note 2, at 473-74 and accompanying sources cited.

156. 50 Cal. 3d 262, 786 P.2d 892, 266 Cal. Rptr. 834 (1990). Although the supreme court considered this issue in the context of a motion for modification of the verdict under section 190.4(e), the consideration of the victim impact statements are treated in this portion of the survey. For a discussion of section 190.4(e), see *infra* notes 190-209 and accompanying text.

157. *Lewis*, 50 Cal. 3d at 284, 786 P.2d at 905, 266 Cal. Rptr. at 847. In *Booth*, the prosecution's statements concerned: 1) the emotional impact on the family; 2) the personal character of the victim; and 3) the family's opinions and characterizations of the defendant. *Booth*, 482 U.S. at 502. In *Gathers*, there were extensive references during closing argument to the victim's religious articles that had been strewn about during the attack, which had no relevance to the circumstances of the crime. *Gathers*, 490 U.S. at 808. In *Lewis*, the prosecutor stated:

[T]he impact is more than just the death of Milton Estell. The impact is more than that because that death affects the people who were close to Milton Estell, the concerned neighbors, the family, and more. . . . [The defendant] robbed him of the chance to see his kids grow up, go to school, get married. To ever hold his grandkids, if there were any. . . . [Y]ou have to think about the impact of the defendant's actions upon these children. These children never again will have an opportunity to sit on their father's knee, to talk to the father, to ask those questions of a father that only a father can answer. That is part of the impact of the defendant's actions.

Lewis, 50 Cal. 3d at 294, 786 P.2d at 911-12, 266 Cal. Rptr. at 853-54.

158. *Lewis*, 50 Cal. 3d at 284-85, 786 P.2d at 905, 266 Cal. Rptr. at 847 (citing *Rose v. Clark* 478 U.S. 570, 576 (1986) (errors of federal constitutional magnitude generally are subject to a harmless-error analysis under the beyond a reasonable doubt standard test of *Chapman v. California*, 386 U.S. 18, 24 (1967))).

159. *Id.* at 285, 786 P.2d at 905, 266 Cal. Rptr. at 847.

brevity of the material in the context of the entire argument, and the insignificance of the statements in light of the lack of any mitigating evidence.¹⁶⁰ Two justices disagreed with the majority's decision in *Lewis*, concluding the statements were strikingly prejudicial.¹⁶¹ They believed that the comments were relatively extensive, emotional and emphatic, "[causing] at least a reasonable possibility that they contributed to the outcome, i.e., the difference between life and death."¹⁶²

In *People v. Clark*,¹⁶³ the prosecution's evidence in aggravation included a graphic description by the attending physician of the burn victims' injuries from the fire set by the defendant. The evidence also included a description of the impact on the victim's surviving spouse, who would require extensive rehabilitation due to the injuries sustained in the fire, and brief testimony by the victim's father about the effect of the defendant's acts on the victim's family. In considering the propriety of the admitted statements, the court determined that *Booth* and *Gathers* indicated that any evidence of the impact of the defendant's criminal conduct on persons other than the victim could be relevant if it was directly related to the circumstances of the specific crime.¹⁶⁴ Because the victim impact evidence was almost exclusively related to the injuries causing the victim's death and to the injuries suffered by the victim's spouse, the court concluded that the conduct was relevant to the penalty decision.¹⁶⁵ The court thus found beyond a reasonable doubt that any error was harmless.¹⁶⁶

D. Jury Instructions — Brown Error

The final paragraph of section 190.3 provides that "the trier of fact shall . . . impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circum-

160. *Id.* at 285, 786 P.2d at 905, 266 Cal. Rptr. at 847-48. *See also Marshall*, 50 Cal. 3d at 928-29, 790 P.2d at 685-86, 269 Cal. Rptr. at 278-79 (court found comments regarding impact of the victim's death on the family were nonprejudicial based on the "relatively brief and unemphatic" context in which the statements were made and the insignificance "within the penalty phase as a whole").

161. Justice Mosk, joined by Justice Broussard, concurred in the guilt phase and death eligibility judgments but dissented from the majority's conclusion regarding the victim impact statements. *Lewis*, 50 Cal. 3d at 292-93, 786 P.2d at 911-12, 266 Cal. Rptr. at 853-54 (Mosk, J., concurring & dissenting).

162. *Id.* at 296, 786 P.2d at 913, 266 Cal. Rptr. at 855 (Mosk, J., concurring & dissenting). *See supra* note 158 (description of the prosecutor's comments).

163. 50 Cal. 3d 583, 789 P.2d 127, 268 Cal. Rptr. 399 (1990).

164. *Id.* at 629, 789 P.2d at 158, 268 Cal. Rptr. at 430.

165. *Id.*

166. *Id.*

stances."¹⁶⁷ This statutory requirement was given to the jury in the cases analyzed in this survey under the unmodified version of section 8.842.2 of the California Jury Instructions.¹⁶⁸

In *People v. Brown*,¹⁶⁹ the supreme court recognized the possibility that a juror may apply a "mere mechanical counting of factors on each side of the imaginary 'scale'."¹⁷⁰ Specifically, the court was concerned that a juror might understand the language to require him to vote for the death penalty if he mathematically finds that aggravating circumstances outnumber the mitigating circumstances, even if he determines that death is not an appropriate punishment.¹⁷¹ Therefore, in order to ensure that a defendant is protected by the eighth amendment, *Brown* requires that the jury make a moral assessment of the facts as they relate to the appropriateness of the death penalty.¹⁷² Rather than applying an arithmetic formula, the

167. CAL. PENAL CODE § 190.3 (West 1988 & Supp. 1991). See *supra* note 108 (list of the statutory aggravating and mitigating circumstances).

168. CALJIC 8.84.2. This instruction provided in relevant part:

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without the possibility of parole, shall be imposed on [each] defendant. . . . After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

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.

CALJIC No. 8.84.2 (West 4th ed. 1979) (emphasis added). Currently, CALJIC 8.88 provides the so-called *Brown* instruction. This instruction states in pertinent part:

After having heard all of the evidence, . . . you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. . . . [Y]ou determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

CALJIC No. 8.88 (West 5th ed. & Supp. 1990).

169. 40 Cal. 3d 512, 726 P.2d 516, 230 Cal. Rptr. 834 (1985).

170. *Id.* at 541, 726 P.2d at 532, 230 Cal. Rptr. at 850.

171. *Id.*

172. *Id.*

jury must apply a balancing test that weighs as a whole the aggravating and mitigating factors, and decide whether the death penalty is proper based on the results.¹⁷³

The United States Supreme Court recently confirmed the California Supreme Court's analysis of the eighth amendment protections in *Penry v. Lynaugh*.¹⁷⁴ Essentially, the instruction must inform the jury that it may consider and give treatment to any mitigating evidence regarding the defendant's background and circumstances of the crime regardless of the statutory language.¹⁷⁵ Hence, the jury must understand that it is free to give a "reasoned moral response" to the evidence in determining whether death is the appropriate punishment.¹⁷⁶

Brown error was alleged in each of the death penalty cases, and the supreme court rejected all of the claims. In determining whether the jury instruction adequately informed the jurors of the scope of mitigating evidence, the court applied the standard set forth in *Boyde v. California*.¹⁷⁷ Under *Boyde*, the proper inquiry is "whether there is a reasonable likelihood that the jury has applied the instruction in a way that prevents the consideration of constitutionally relevant evidence."¹⁷⁸

In *People v. Clark*,¹⁷⁹ the trial court instructed the jury pursuant to section 8.84.2 of the California Jury Instructions,¹⁸⁰ which declared that jurors "shall" impose a sentence of death if they concluded that the aggravating circumstances outweighed the mitigating circumstances. The supreme court concluded that a juror might reasonably have understood the instruction to limit the jury's function to a mechanical computation of factors. This would have compelled a death penalty if the number of factors in aggravation was greater than those in mitigation.¹⁸¹ However, the court ultimately determined that the jury had not been misled, based on the instructions as a whole and the arguments of counsel.¹⁸² The error thus was not

173. *Id.*

174. 109 S. Ct. 2934 (1989). *See, e.g.*, *People v. Marshall*, 50 Cal. 3d 907, 934, 790 P.2d 676, 689, 269 Cal. Rptr. 269, 282 (1990).

175. *Penry*, 109 S. Ct. at 2952. In *Penry*, the jury instructions asked only three questions: "1) Did Penry [the defendant] act deliberately when he murdered Pamela Carpenter [the victim]? 2) Is there a probability that he will be dangerous in the future? 3) Did he act unreasonably in response to provocation?" *Id.* at 2947.

176. *Id.* at 2948.

177. 110 S. Ct. 1190 (1990). *See, e.g.*, *Marshall*, 50 Cal. 3d at 933 n.5, 790 P.2d at 688 n.5, 269 Cal. Rptr. at 281 n.5.

178. *Boyde*, 110 S. Ct. at 1193. *See also Death Penalty IV, supra* note 2, at 1107.

179. 50 Cal. 3d 583, 789 P.2d 127, 268 Cal. Rptr. 399 (1990).

180. *See supra* note 169 (text of CALJIC 8.84.2).

181. 50 Cal. 3d at 632, 789 P.2d at 160, 268 Cal. Rptr. at 432.

182. *Id.* The trial court had further instructed the jurors: "You are the sole judges of the respective weight to be given the evidence in aggravation and mitigation presented to you during this trial."

prejudicial.¹⁸³

In the remaining cases, *Brown* error allegations were not so compelling. Although the jury may have received the instruction "shall," it also received additional instructions with respect to the normative nature of the weighing process.¹⁸⁴ For example, in *People v. Douglas*,¹⁸⁵ the defense counsel's clarification to the jury that it was to "weigh the factors, not count them" in addition to the prosecutor's explanation of the weighing process were sufficient guidance for the jury.¹⁸⁶ Similarly, in *People v. Thompson*,¹⁸⁷ the court concluded that the further instruction not to count the factors, but rather to weigh their respective combination in aggravation against mitigation, favored the defendant more than any other death penalty case based on 1978 law seen by the court.¹⁸⁸

E. Motion for Modification of the Verdict

In every capital case resulting in a death sentence, section 190.4(e) of the Penal Code requires the trial judge to assume that the defendant has sought a modification of the verdict.¹⁸⁹ The judge must independently determine if the death penalty was warranted by the evidence, in light of the aggravating and mitigating factors to be considered under section 190.3.¹⁹⁰ The judge then must set forth the reasons for his ruling in the clerk's minutes.¹⁹¹ This decision is automatically reviewed on appeal.¹⁹²

In *People v. Lewis*,¹⁹³ the trial court considered matters from a probation report that had not been presented to the jury. The supreme court on appeal concluded that references to the probation report

183. *Id.*

184. 50 Cal. 3d 468, 533, 788 P.2d 640, 678, 268 Cal. Rptr. 126, 164 (1990) (court noted that the jury was also instructed that any mitigation factor "could, standing alone, be sufficient to justify a sentence of life imprisonment without the possibility of parole.").

185. 50 Cal. 3d 468, 788 P.2d 640, 268 Cal. Rptr. 126 (1990).

186. *Id.*

187. 50 Cal. 3d 134, 785 P.2d 857, 266 Cal. Rptr. 309 (1990).

188. *Id.* at 184-85, 785 P.2d at 886, 266 Cal. Rptr. at 388.

189. CAL. PENAL CODE § 190.4(e) (West 1988). See generally 3 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, § 1618 (2d ed. 1989).

190. CAL. PENAL CODE § 190.4(e). See *supra* note 108 (list of the factors contained in section 190.3). See also *People v. Rodriguez*, 42 Cal. 3d 730, 793, 726 P.2d 113, 154, 230 Cal. Rptr. 667, 708 (1986) ("[S]ection 190.4, subdivision (e) . . . requires that the trial judge make an independent determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence and the applicable law").

191. CAL. PENAL CODE § 190.4(e).

192. *Id.*

193. 50 Cal. 3d 262, 786 P.2d 892, 266 Cal. Rptr. 834 (1990).

were improper in ruling on the application for modification of the verdict, because under section 190.4(e), the judge's independent determination must be based solely on evidence heard by the jury.¹⁹⁴ Moreover, the defendant's report contained prejudicial information regarding his past criminal conduct, including a homicide which would not otherwise have been known. The supreme court therefore concluded that the trial judge's actions caused prejudice to the defendant, requiring the court to vacate the judgment of death and remand the case for proper consideration under section 190.4(e).¹⁹⁵

Conversely, the court declined to find prejudice when the trial court referred to the defendant's probation report in *People v. Clark*.¹⁹⁶ Unlike the defendant in *Lewis*,¹⁹⁷ the aspects of the report to which the judge referred were ones favorable to the defendant's position.¹⁹⁸ Therefore, the supreme court affirmed the trial court's denial for verdict modification.¹⁹⁹

Another issue the supreme court has addressed under section 190.4(e) concerns the adequacy of evaluating the factors contained in the California Rules of Court, division III, Sentencing Rules for the Superior Courts (hereinafter Sentencing Rules), rather than those in section 190.3.²⁰⁰ In *People v. Turner*,²⁰¹ the trial judge evaluated the circumstances of the crime in terms derived from the aggravating and mitigating circumstances found in the Sentencing Rules, rather than those listed in section 190.3 as required by section 190.4(e).²⁰²

194. *Id.* at 287, 786 P.2d at 907, 266 Cal. Rptr. at 849 (citing *People v. Williams*, 45 Cal. 3d 1268, 1329, 756 P.2d 221, 257, 248 Cal. Rptr. 834, 870 (1988)).

195. *Id.* at 292, 786 P.2d at 910, 266 Cal. Rptr. at 852.

196. 50 Cal. 3d 583, 635, 789 P.2d 127, 162, 268 Cal. Rptr. 399, 434 (1990).

197. *Supra* notes 192-94 and accompanying text (discussing *Lewis*).

198. *Clark*, 50 Cal. 3d at 635, 789 P.2d at 162, 268 Cal. Rptr. at 434. The trial judge noted that the defendant had promptly confessed and had no prior criminal record. Also, the judge noted that the defendant "felt a certain justification for his conduct." *Id.*

199. *Id.* See also *People v. Douglas*, 50 Cal. 3d 468, 539, 788 P.2d 640, 682-83, 268 Cal. Rptr. 126, 168-69 (1990) (supreme court failed to find prejudice as a result of the trial court's references to the defendant's probation report, because the trial court did not indicate that it relied on the record for its determination under section 190.4(e)).

200. CAL. RULES OF COURT, Rules 401-490 (West 1990). These provisions provide the sentencing rules for the California Superior Courts.

201. 50 Cal. 3d 668, 789 P.2d 887, 268 Cal. Rptr. 706 (1990).

202. *Supra* note 108 (list of the factors contained in section 190.3). The rules the trial court noted were located in Rule 421(a) which provides in pertinent part: Circumstances in aggravation include:

(a)(1) The crime involved great violence, great bodily harm, or other acts disclosing a high degree of cruelty . . . (a)(2) The defendant . . . used a weapon . . . (3) The victim was particularly vulnerable. (4) The crime involved multiple victims. (5) The defendant . . . occupied a position of leadership or dominance of other participants . . . (8) The planning, sophistication or professionalism . . . or other facts indicat[ing] premeditation. . . . (10) The crime involved . . . a taking . . . of great monetary value . . . (12) The defendant took a position of trust or confidence to commit the offense.

CAL. RULES OF COURT, Rule 421 (West 1990). The trial judge also referred to Rule

The defendant contended that the judge's reference to the Sentencing Rules constituted improper consideration of nonstatutory aggravating factors in violation of *People v. Boyd*.²⁰³ The supreme court disagreed.²⁰⁴ First, the court pointed to the fact that the judge indicated his understanding that section 190.3 contained the pertinent sentencing factors.²⁰⁵ Secondly, the relevant factors utilized in the Sentencing Rules were almost rephrasings of those set forth in section 190.3.²⁰⁶ Finally, the court declared that no *Boyd* error occurred, because section 190.3(a) permits the sentencer to weigh any constitutionally permissible aspect of the offense in addition to the aspects which the law deems specifically pertinent to the penalty determination.²⁰⁷ Accordingly, the particular provisions of the Sentencing Rules evaluated by the trial judge were an adequate "normative framework" under which to consider the defendant's section 190.4(e) application.²⁰⁸

F. Proportionality Review

In 1984, the United States Supreme Court rejected the contention that the eighth amendment requires the sentencing court to conduct an intercase comparative proportionality review.²⁰⁹ Nevertheless, in five cases the defendants claimed a constitutional right to a determination of whether the imposition of the death penalty in their cases was disproportionate to the penalties imposed in other similar offenses. The California Supreme Court summarily disposed of all five claims.²¹⁰

421(b)(3) (prior prison record as aggravating circumstance), Rule 423(b)(1) (absence of significant prior criminal record as mitigating circumstance), Rule 423(a)(1) (being a passive actor as a mitigating circumstance), Rule 423(a)(7) (mistaken belief in right to commit crime as mitigating circumstance), and Rule 423(b)(3) (the defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process). *Turner*, 50 Cal. 3d at 715-16, 789 P.2d at 914, 268 Cal. Rptr. at 733. See CAL. RULES OF COURT, Rules 421-423 (West 1990).

203. See *supra* note 138 (discussion of *Boyd* error).

204. *Turner*, 50 Cal. 3d at 716, 789 P.2d at 914, 268 Cal. Rptr. at 733.

205. *Id.*

206. *Id.*

207. *Id.* at 715-16, 789 P.2d at 914-15, 268 Cal. Rptr. at 733-34.

208. *Id.* See also *People v. Mattson*, 50 Cal. 3d 826, 879-80, 789 P.2d 983, 1019-20, 268 Cal. Rptr. 802, 838-40 (1990) (while the judge considered the circumstances "under a normative framework for the imposition of determinate sentences, the factors considered were relevant to capital sentencing").

209. *Pulley v. Harris*, 465 U.S. 37, 50-54 (1984).

210. *People v. Miller*, 50 Cal. 3d 954, 1010, 790 P.2d 1289, 1321, 269 Cal. Rptr. 492, 524 (1990); *People v. Marshall*, 50 Cal. 3d 907, 938, 790 P.2d 676, 692, 269 Cal. Rptr. 269, 285 (1990); *People v. Lewis*, 50 Cal. 3d 262, 285-86, 786 P.2d 892, 906, 266 Cal. Rptr. 834,

However, the state court continued to conduct an *intracase* proportionality review.²¹¹ This review determines whether the punishment is proportionate to the defendant's individual culpability.²¹² In *People v. Thompson*,²¹³ the defendant claimed that his sentence was disproportionate to his individual culpability on the grounds that he was a pedophile. The court responded that despite his disease, the jury found the aggravating circumstances to outweigh the mitigating circumstances.²¹⁴ Moreover, the court declared that society is not required to endure the acts of a pedophile and that the defendant had the alternative of seeking treatment in a psychiatric facility.²¹⁵

In the remaining cases, the court failed to find *intracase* disproportional sentences based primarily on the weight of the evidence and the defendant's culpability.²¹⁶

IV. CONCLUSION

As the Lucas court's application of the death penalty statute continues to settle, the asserted errors are considered a matter of routine. This is partly because a majority of the cases were tried prior to

848 (1990); *People v. Thompson*, 50 Cal. 3d 134, 185, 785 P.2d 857, 887, 266 Cal. Rptr. 309, 339 (1990); *People v. Turner*, 50 Cal. 3d 668, 718, 789 P.2d 887, 916, 268 Cal. Rptr. 706, 735 (1990).

211. It appears that the trial court is not required to conduct an *intracase* proportionality review. See *People v. Lang*, 49 Cal. 3d 991, 1043, 782 P.2d 627, 662, 264 Cal. Rptr. 386, 421 (1989) ("trial courts have discretion to determine *intracase* proportionality — i.e., to determine whether the sentence imposed is proportionate to the individual culpability of the defendant, irrespective of the punishment imposed on others"). Yet, the supreme court acknowledged the necessity for *intracase* review on appeal. See *Turner*, 50 Cal. 3d at 718, 789 P.2d at 916, 268 Cal. Rptr. at 735 ("However, the Eighth Amendment . . . and article I, section 17 of the California Constitution preclude the imposition of punishment that is not proportionate to the defendant's individual culpability").

212. *People v. Dillon*, 34 Cal. 3d 441, 482-90, 668 P.2d 697, 722-27, 194 Cal. Rptr. 390, 415-20 (1983). The supreme court found that a punishment for first degree murder was disproportionate to the defendant's individual culpability based on his being a minor. *Id.* See also *In re Lynch*, 8 Cal. 3d 410, 424, 503 P.2d 921, 930, 105 Cal. Rptr. 217, 226 (1972) (punishment may violate the California Constitution "if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity").

213. 50 Cal. 3d 134, 785 P.2d 857, 266 Cal. Rptr. 309 (1990).

214. *Id.* at 186, 785 P.2d at 887, 266 Cal. Rptr. at 339.

215. *Id.* at 186-87, 785 P.2d at 888, 266 Cal. Rptr. at 340 (citing *Penry v. Lynaugh*, 109 S. Ct. 2934, 2956 (1989)).

216. *People v. Miller*, 50 Cal. 3d 954, 1010-11, 790 P.2d 1289, 1321-22, 269 Cal. Rptr. 492, 524-25 (1990) ("Defendant was found to have personally committed four murders. . . . Nothing in the prior decisions of this court, or of the federal courts, suggests that his punishment, as the actual killer, is constitutionally disproportionate to the offense . . ."); *People v. Lewis*, 50 Cal. 3d 262, 286, 786 P.2d 892, 906, 266 Cal. Rptr. 834, 848 (1990) ("We do not find the death penalty disproportionate to [the] defendant's culpability."); *People v. Turner*, 50 Cal. 3d 668, 717, 789 P.2d 887, 916, 268 Cal. Rptr. 706, 735 (1990) ("[W]e cannot conclude that the death penalty is disproportionate to [the] defendant's . . . culpability.").

the modifications of the CALJIC pattern jury instructions. The court will continue to consider retroactively these issues under the harmless error analysis and will only reverse upon a finding that the error prejudicially affected the ultimate outcome of the trial.

Most noteworthy is that none of the cases reviewed were reversed due to the misapplication of the death penalty statute. Although the trial courts may not have utilized the precise statutory procedures, the supreme court found that the substitute procedures and language in the jury instructions provided the defendants with adequate constitutional protections. This flexibility implies that given the deplorable nature of the underlying crimes, the court will permit deviations from the statutory requirements so long as the trial is fair in its totality.

Therefore, due to the more established posture of the death penalty statute, the fundamental issues appeared to predominate. These issues generally were outside the context of the death penalty statute and focused on unique circumstances of a particular case in all phases of the trial. Thus, in future death penalty cases, the court will most likely continue to emphasize the gravity of the crimes involved with respect to a defendant's individual constitutional rights rather than the ambiguities elicited from the trial court's application of the death penalty statute.

CORI LYNN MACDONNEIL

VII. FAMILY LAW

A transmutation of property between husband and wife under California Civil Code section 5110.730, subdivision (a), must be evidenced by an express declaration containing language that explicitly acknowledges the spouses' intent to change the "ownership or control" of the property: Estate of MacDonald v. MacDonald.

I. INTRODUCTION

Just six years ago a husband or wife in California could transmute community property into separate property or vice versa with an oral declaration of his or her desire to change the property classification.¹

1. Before 1985, a married person could change the character of his or her separate property or share of community property by an oral agreement or conduct that implied a transmutation. Reppy, *Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 SAN

Not even a hand shake was necessary. Then, effective January 1, 1985, the California Legislature enacted California Civil Code section 5110.730 requiring that a transmutation of real or personal property between spouses be evidenced by an express written declaration.² In August 1990, the California Supreme Court decided, in *Estate of MacDonald v. MacDonald*,³ that a writing must explicitly proclaim an intent to change the character or ownership of the property in order for the writing to be valid and effective under section 5110.730, subdivision (a).⁴

In *Estate of MacDonald*, both Mr. and Mrs. MacDonald had children from a previous marriage.⁵ When Mrs. MacDonald learned she had terminal cancer, she and Mr. MacDonald divided their community property into separate property to facilitate Mrs. MacDonald's desire to leave the bulk of her estate to her own children and to avoid conflict after her death. All such real and personal property was successfully divided with the exception of Mr. MacDonald's three IRA accounts which were not included in the accounting and reclassification of property.⁶ The IRA accounts were solely in Mr.

DIEGO L. REV. 143, 157 (1981) [hereinafter Reppy]. See also 11 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 125 (9th ed. 1990) (a change in property classification "did not require a writing"); 33 CAL. JUR. 3D *Family Law* § 508 (1977) (no formality required to transmute property). According to Professor William A. Reppy, Jr., California gave "great freedom to alter the nature of the proprietary interests in assets owned or even yet to be acquired." Reppy at 168.

2. The Civil Code states in part:

(a) A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in property is adversely affected.

(b) A transmutation of real property is not effective as to third parties without notice thereof unless recorded.

(c) This section does not apply to a gift between the spouses . . . that is not substantial in value taking into account the circumstances of the marriage.

CAL. CIV. CODE § 5110.730 (West 1990). The California Legislature adopted the suggestions of the 1983 Law Revision Commission and required that transmutations between spouses be in writing. 11 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 126 (9th ed. 1990).

3. 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153, *modified*, 51 Cal. 3d 452A (1990).

4. *Id.* at 262, 794 P.2d 911, 272 Cal. Rptr. 153. Justice Panelli wrote the majority opinion of the court and Justice Mosk wrote an opinion concurring with the majority conclusion. The modification made textual changes in Justice Arabian's dissenting opinion and did not impact the substantive nature of the decision.

5. Margery and Robert MacDonald were married in 1973 and Margery died on June 17, 1985. Mrs. MacDonald had four children by a previous marriage.

6. The funds in the IRA accounts originated from Mr. MacDonald's pension plan which originally designated a revocable living trust as beneficiary with Mr. MacDonald's children receiving the majority of the corpus. The pension plan was created on January 1, 1977, and generated \$266,577.90 on March 21, 1985. The IRA accounts were funded with the money from the pension plan and were opened solely in Mr. MacDonald's name. *Estate of MacDonald*, 51 Cal. 3d at 265, 794 P.2d at 913, 272 Cal. Rptr. at 155. The dissenting opinion points out that while the pension plan funds were accumulated during marriage, the pension funds were actually a result of Mr. MacDonald's 35

MacDonald's name and designated a revocable living trust as the beneficiary. Mrs. MacDonald signed a consent paragraph acknowledging her understanding of the beneficiary designation.⁷

The MacDonald's acquired the IRA accounts during marriage and the IRA funds were presumptively community property.⁸ However, spouses may transmute community property into separate property⁹ by an express written declaration.¹⁰ Mr. MacDonald claimed that the signed consent form should be construed as such a written declaration. After Mrs. MacDonald's death, the estate executrix filed a petition to establish a community property interest in the IRA funds, asserting the consent paragraph was insufficient to effect a transmutation.¹¹ The classification of the IRA accounts as community or separate property became the focus of the *MacDonald* case and provided the California Supreme Court the opportunity to construe section 5110.730 subdivision (a).¹²

II. TREATMENT

California Civil Code section 5110.730 subdivision (a) states that "[a] transmutation . . . is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest . . . is adversely affected."¹³ In *Estate of*

years in business, and the majority of that time was prior to his marriage to Margery MacDonald. *Id.* at 281 n.3, 794 P.2d at 924 n.3, 272 Cal. Rptr. at 166-67 n.3 (Arabian, J., dissenting). The majority emphasized that the funds came into existence during the marriage. *Id.* at 265, 794 P.2d at 913, 272 Cal. Rptr. at 155.

7. The IRA agreements each contained a signature line for a spouse not designated as the sole primary beneficiary that is evidence of the spouse's agreement to the designation. In this case the consent agreements contained the following wording: "If participant's spouse is not designated as the sole primary beneficiary, spouse must sign consent. Consent of Spouse: Being the participant's spouse, I hereby consent to the above designation." *Id.* at 265 n.2, 794 P.2d at 913 n.2, 272 Cal. Rptr. at 155 n.2. Mrs. MacDonald signed the consent paragraph.

8. "[A]ll real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state, . . . is community property . . ." CAL. CIV. CODE § 5110 (West 1983).

9. Subject to sections 5110.720 to 5110.740, inclusive, married persons may by agreement or transfer, with or without consideration, do any of the following:

- (a) Transmute community property to separate property of either spouse.
- (b) Transmute separate property of either spouse to community property.
- (c) Transmute separate property of one spouse to separate property of the other spouse.

CAL. CIV. CODE § 5110.710 (West 1990).

10. See CAL. CIV. CODE § 5110.730 (a), *supra* note 2.

11. *Estate of MacDonald*, 51 Cal. 3d at 265-66, 794 P.2d at 914, 272 Cal. Rptr. at 156.

12. *Id.* at 266, 794 P.2d at 914, 272 Cal. Rptr. at 156.

13. CAL. CIV. CODE § 5110.730 (a) (West 1990).

MacDonald, the California Supreme Court held that a writing must contain language that "expressly states that a change in the characterization or ownership of the property is being made," in order to satisfy the "express declaration" requirement of section 5110.730 subdivision (a).¹⁴ The party's intent is not determinative if the words fail to effectuate an express declaration.¹⁵ The court concluded that the standard bank form executed by Mrs. MacDonald was insufficient to be a valid transmutation as required by section 5110.730 subdivision (a).¹⁶

The *MacDonald* majority relied on the Legislature's intent to define the term "express declaration."¹⁷ The California Law Revision Commission¹⁸ had several goals in mind when issuing the report that was eventually codified as California Civil Code section 5110.730. California court decisions are replete with examples of questionable transmutations.¹⁹ To avoid loosely defined transmutations, the Commission attempted to insure better that the parties actually intended a transmutation by imposing formal requirements.²⁰ The Commission hoped to reduce dissolution litigation by abandoning the "easy transmutation" rule that invited a party "to transform a passing comment into an 'agreement' or even to commit perjury by manufacturing an oral or implied transmutation."²¹ The *MacDonald* majority reasoned that the language of the Commission report indicated that

14. *Estate of MacDonald*, 51 Cal. 3d at 264, 794 P.2d at 913, 272 Cal. Rptr. at 155.

15. *Id.* at 267, 794 P.2d at 915, 272 Cal. Rptr. at 157.

16. The majority in *Estate of MacDonald* concluded that there was no evidence that Mrs. MacDonald intended a transmutation nor that she knew of her community property interest in the pension plan that was the source of Mr. MacDonald's IRA funds. *Id.* at 267 n.4, 794 P.2d at 914 n.4, 272 Cal. Rptr. at 156 n.4.

17. Referring to California Civil Code section 5110.730(a), the majority found the term "express declaration" to be ambiguous and unclear which caused them to explore the legislative history and intent. *Id.* at 268, 794 P.2d at 915, 272 Cal. Rptr. at 157.

18. *Recommendation Relating to Marital Property Presumptions and Transmutations*, 17 CAL. LAW REVISION COMM'N REPORTS 205 (1984) [hereinafter "the Commission" or "the Commission Report"].

19. For example, in *Pacific Mutual Life Ins. Co. v. Cleverdon*, 16 Cal. 2d 788, 108 P.2d 405 (1940), the court found that the husband gave up rights to the wife's earnings by his conduct. The wife put her earnings in a bank account in her own name and the husband deposited sums in the same account from time to time. However, when the husband made withdrawals from the account, he did so with the intent to pay back the borrowed amount. The court deemed this a transmutation of the husband's community property interest in the wife's earnings from community property to the wife's separate property. In another more recent case, the court found that the husband made a gift of his community property interest in a motor home because he did not object to the wife putting title in her name alone. *In Re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980). The Commission Report, *supra* note 17 at 210-12, cites the result of *Lucas* as one of the factors motivating a change in the statute requiring a written transmutation.

20. The Commission Report, *supra* note 17 at 214. See also *supra* note 18.

21. The Commission Report, *supra* note 17 at 214. Professor Reppy stated that "this state of the law invites litigation and tends to encourage perjury." Reppy, *supra* note 1, at 168.

the Legislature did not mean that "any signed writing" would create a transmutation.²²

The California Supreme Court objected to classifying the MacDonald IRA beneficiary consent form as a sufficient writing. The form did not indicate that Mrs. MacDonald was aware she was changing the character of the IRA funds from community property to separate property, nor that she was relinquishing her rights to the funds.²³ In order to satisfy the "express declaration" test, the court explained that the writing must state the adversely affected party is "effecting a change in the character or ownership" of the property.²⁴ However, the writing need not include the term "transmutation" nor refer to community or separate property.²⁵ The *MacDonald* court would have found the beneficiary consent form a sufficient writing if it had contained another sentence: "I give to the account holder any interest I have in the funds deposited in this account."²⁶

In addition, where the writing is insufficient to create a transmutation, the court will not allow extrinsic evidence to prove intent to effect a transmutation.²⁷ The majority suggested that this would defeat the purpose of the Legislature and would still allow an ill motivated spouse or heir to create a transmutation where none was intended.²⁸

Justice Mosk concurred with the majority's conclusion that the writing in this case was insufficient. However, Justice Mosk disagreed with the majority's construction of section 5110.730, subdivision (a). Justice Mosk found the language of the statute requiring "definite content,"²⁹ to be clear and disapproved of interpreting the statute as one requiring proof of a transmutation.³⁰

Justice Arabian disagreed with the majority's interpretation of section 5110.730, subdivision (a). Justice Arabian contended that Mrs.

22. *Estate of MacDonald*, 51 Cal. 3d at 269, 794 P.2d at 916, 272 Cal. Rptr. at 158 (emphasis in original). The court discussed the sufficiency of a writing in general in *Estate of Blair*, 199 Cal. App. 3d 161, 167-68, 244 Cal. Rptr. 627, 630-31 (1988). In *Estate of Blair*, the court found that a statement in the wife's Petition for Legal Separation listing a house as community property, and the husband's deposition declaration stating a belief that the property was community property were not sufficient to constitute a written transmutation. *Id.*

23. See *supra* note 6.

24. *Estate of MacDonald*, 51 Cal. 3d at 273, 794 P.2d at 919, 272 Cal. Rptr. at 161.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 269, 794 P.2d at 916, 272 Cal. Rptr. at 158.

29. *Id.* at 274, 794 P.2d at 919, 272 Cal. Rptr. at 161 (Mosk, J., concurring).

30. *Id.*

McDonald was sophisticated in the financial affairs of the marriage, was aware of Mr. MacDonald's pension plan that eventually became the disputed IRA accounts, and by her actions and conduct intended to waive any rights to the funds in the IRA accounts.³¹ Justice Arabian interpreted the Legislative intent, as found in the Commission Report, as a desire to require a writing like the statute of frauds.³² Further, Justice Arabian would allow extrinsic evidence to show meaning or intent.³³ He asserted that the Legislature's goal was to overrule those cases that allowed oral transmutations or transmutations based on conduct, and the Legislature meant to "create a simple writing requirement."³⁴

III. CONCLUSION

Estate of MacDonald mandates that any transmutation requires a clear and express writing in order to insure the transmutation will be effective if challenged. After *Estate of MacDonald*, many of the forms and writings used by businesses, banks and estate planners to transmute property will not be sufficient to insure that the intent of the parties is realized. To protect their clients and employees, attorneys, accountants, and personnel departments will have to modify a mountain of forms if the party's intent was to effectuate a transmutation.

On the other hand, the history of transmutations in California suggests that the intent of the parties was often broadly interpreted. For instance, the court of appeals found that real estate purchased with community funds could be transmuted to separate property by inferring a gift where one spouse disclaimed an interest in the property.³⁵ The *Estate of MacDonald* ruling will make it more certain that the spouse who is giving up rights in community property or changing the nature of separate property does so with full knowledge of the

31. *Estate of MacDonald*, 51 Cal. 3d at 280-81, 794 P.2d at 924, 272 Cal. Rptr. at 166 (Arabian, J., dissenting).

32. *Id.* at 277-78, 794 P.2d at 922, 272 Cal. Rptr. at 164 (Arabian, J., dissenting) (citing the Commission Report, *supra* note 17 at 213-15).

33. *Id.* at 280, 794 P.2d at 923, 272 Cal. Rptr. at 165 (Arabian, J., dissenting).

34. *Id.* at 278, 794 P.2d at 922, 272 Cal. Rptr. at 164 (Arabian, J., dissenting).

35. *In Re Marriage of Ashodian*, 96 Cal. App. 3d 43, 157 Cal. Rptr. 555 (1979). In this case, the wife bought and sold property that was titled in her name alone. Since the transactions occurred before 1975, and the property was titled in the wife's name alone, the property was presumed to be her separate property. See CAL. CIV. CODE § 5110 (West 1983). The husband was unable to rebut the presumption even though he testified that he intended no gift and, in fact, was unaware of the transactions. The court ruled the husband intended to make a gift by "abandoning" his wife to practice real estate. *Ashodian*, 96 Cal. App. 3d at 49, 157 Cal. Rptr. at 560. The decision was bolstered by the fact that the husband signed two grant deeds and made no inquiry into the income tax consequences of the real estate transactions.

consequences of his or her actions.³⁶

It is clear that the majority ruling in *Estate of MacDonald* will have far reaching consequences.³⁷ Questionable consent forms will have to be amended if the consent form was also intended to act as a transmutation. Estate planners will have to obtain express declarations from clients if transmuted property enters into the estate plan. Further, transmutations before 1985 may also come into question.³⁸ California Civil Code section 5110.730 is applied prospectively. With the California Supreme Court's clear expression of distrust for oral transmutations or transmutations implied from conduct, it is likely that a spouse or heir who wished to rely on such a form of transmutation that occurred before January 1, 1985, will need to present convincing proof.

In *Estate of MacDonald*, the dissent believed that Mrs. MacDonald's intent to give up her share of the IRA funds was an express declaration, and her intent was denied by the majority's holding. This result, if correct, is all the more unfortunate because it negates the wishes of a person who can no longer defend her intentions. On the other hand, Mrs. MacDonald's possible misfortune will help to protect those spouses who are not sophisticated in the mechanisms of the community property system by insuring, at a minimum, that the spouse who is adversely affected by a transmutation has an opportunity to learn of the consequences.

LOYE M. BARTON

36. *Estate of MacDonald*, 51 Cal. 3d at 273, 794 P.2d at 919, 272 Cal. Rptr. at 161.

37. The *Estate of MacDonald* case found its way into a weekly update on family law. *Transmutation of Property Requires Express Writing*, The Nat'l Law. J., Sept. 10, 1990, at 40. The impact of the case was also discussed at the Sixteenth Annual U.S.C. Probate and Trust Conference on October 26, 1990. A summary of the *Estate of MacDonald* can be found in *Summary of Recent Developments* at 37.

38. Cal. Civ. Code § 5110.730(e) states: "This section does not apply to or affect a transmutation of property made before January 1, 1985, and the law that would otherwise be applicable to such a transmutation shall continue to apply." CAL. CIV. CODE § 5110.730(e) (West 1990).

VIII. EMPLOYMENT LAW

The cost of providing unemployment insurance coverage on behalf of local government employees is not subject to subvention under the California Constitution, article XIII B, or parallel statutes. However, local governments may tax and spend as required to effect the legislation: City of Sacramento v. State.

I. INTRODUCTION

The supreme court unanimously found that costs charged to governments under the 1978 state unemployment insurance legislation, chapter 2 of the Statutes of 1978 ("chapter 2/78"), were not constitutionally required to be reimbursed by the state because the legislation was not a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution.¹ This standard for subvention² of funds was explained in the recent decision of *County of Los Angeles v. State*.³ However, in *City of Sacramento v. State*,⁴ the supreme court determined, with one justice dissenting,⁵ that because the unemployment insurance legislation was a federally mandated program within the meaning of the constitutional article, the local governments were not limited in their ability to appropriate funds through taxation to meet the costs of the program, even if the standards for subvention were not met.⁶

II. FACTUAL AND HISTORICAL BACKGROUND

The Federal Unemployment Tax Act ("FUTA") mandates that unemployment taxes be levied upon employers nationwide based on gross wages paid to employees.⁷ In states where there is a federally certified unemployment insurance program,⁸ however, employers

1. *City of Sacramento v. State*, 50 Cal. 3d 51, 785 P.2d 522, 266 Cal. Rptr. 139 (1990). The majority opinion was authored by Justice Eagleson, with Chief Justice Lucas and Justices Mosk, Broussard, Panelli and Kennard concurring. A separate opinion was submitted by Justice Kaufman, who concurred that the costs charged were not subject to subvention by the state. *Id.* at 77, 785 P.2d at 537, 266 Cal. Rptr. at 154 (Kaufman, J., concurring and dissenting).

2. Subvention is "the provision of assistance or financial support" such as "a subsidy from a government." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1177 (9th ed. 1988). In this case, "subvention" refers to reimbursement sought from the state by local and county governments.

3. 43 Cal. 3d 46, 729 P.2d 202, 233 Cal. Rptr. 38 (1987).

4. 50 Cal. 3d 51, 785 P.2d 522, 266 Cal. Rptr. 139 (1990).

5. *City of Sacramento* at 77, 785 P.2d at 537, 266 Cal. Rptr. at 154 (Kaufman, J., concurring and dissenting).

6. *Id.* at 57, 785 P.2d at 524, 266 Cal. Rptr. at 141.

7. Federal Unemployment Tax Act, 26 U.S.C.A. §§ 3301-11 (West 1989 & Supp. 1990).

8. *Id.* § 3301. The Secretary of Labor is responsible for certifying state programs that meet the enumerated requirements of the Act. *Id.* § 3304(a).

may credit their state contributions almost fully against the federally imposed tax.⁹ States with certified programs also qualify to receive federal administrative funds.¹⁰ Every state, including California, has now adopted a federally certified program.¹¹

In 1976, Congress enacted Public Law 94-566 which required that coverage for employees of public agencies be a part of the unemployment insurance program of the state in order to maintain certified status.¹² To comply with Public Law 94-566, California passed chapter 2/78.¹³ Chapter 2/78 mandated that the state, as well as local governments, include unemployment insurance coverage on behalf of their employees as of January 1, 1978.¹⁴

The City of Sacramento ("City") and the County of Los Angeles ("County") sought state subvention for costs incurred as a result of the requirements of chapter 2/78 for the years 1978 and 1979, based originally on applicable Revenue and Taxation Code sections.¹⁵ The State Board of Control ("Board"), with whom the claims were filed, denied them, holding that chapter 2/78 was not a reimbursable state mandate.¹⁶ In 1979, while an appeal on the claims was pending in the Sacramento Superior Court, article XIII B of the California Constitu-

9. *Id.* §§ 3302-03. Employers may currently obtain credit for up to 90% of the federally imposed tax. *Id.* § 3302(c)(1).

10. 42 U.S.C. §§ 501-03 (West 1989 & Supp. 1990). Payment is made to states with certified programs in an amount which the Secretary of Labor, taking several objective and quantifiable factors into account, has deemed "necessary for the proper and efficient administration of such law." *Id.* § 502(a) (explaining that such factors include the population of the state and the estimated cost of administering the law).

11. *City of Sacramento*, 50 Cal. 3d at 58, 785 P.2d at 524, 266 Cal. Rptr. at 141. The court noted that a state which fails to meet the requirements of a federally certified program has two unfathomable choices: the state could either eliminate its existing unemployment tax so that employers would not be double taxed, or it could do nothing, and thereby subject resident businesses to both federal and state unemployment tax. *Id.* at 74, 785 P.2d at 535, 266 Cal. Rptr. at 152. Adoption of the latter opinion would force businesses to either leave the state or lose significant competitive advantages. *Id.*

12. Pub. L. No. 94-566, § 115(a), 90 Stat. 2607, 2670 (1976) (amending FUTA's certification requirements).

13. Act of Jan. 1, 1978, ch. 2, §§ 12, 24, 31, 36.5, 58-61, 1978 Cal. Stat. 12-14, 16, 18, 24-27; CAL. UNEMP. INS. CODE §§ 135(a), 605, 634.5 (West 1986).

14. *Id.*

15. CAL. REV. & TAX. CODE §§ 2201-7.5 (West 1989 & Supp. 1990) (Sections 2207 and 2207.5 were repealed in 1989). The Revenue and Taxation Code embodies what was California's original state reimbursement statute requiring subvention by the state for "any new state-mandated program or any increased level of service of an existing mandated program." Property Tax Relief Act of 1972, ch. 1406, § 14.7, 1972 Cal. Stat. 2961, 2962. The statute was subsequently amended, but the subvention requirement remained the same. See *City of Sacramento*, 50 Cal. 3d at 57, 785 P.2d at 524, 266 Cal. Rptr. at 141.

16. 50 Cal. 3d at 59, 785 P.2d at 525, 266 Cal. Rptr. at 142.

tion was enacted. The City's and County's petitions were then amended to include the Article as a basis for relief.¹⁷

Article XIII B was adopted by the electorate as an amendment to the state constitution.¹⁸ The Article limits the ability of state and local governments to appropriate and spend funds, but excludes from this limit any "[a]ppropriations required to comply with mandates of the courts or the *federal government* which, *without discretion*, require an expenditure for additional services or which *unavoidably* make the provision of existing services more costly."¹⁹ Additionally, the Article requires the state to reimburse the local government "[w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government."²⁰

The superior court overruled the Board and the court of appeal affirmed ("*Sacramento I*").²¹ The court of appeal concluded that, contrary to the Board's ruling, chapter 2/78 involved state mandated costs which were reimbursable under article XIII B.²² The supreme court denied review and the case was remanded to the Board for determination of amounts due.²³

Despite the ruling of the court of appeal and the subsequent guidelines for reimbursement developed by the Board, the Legislature failed to introduce bills to either reimburse costs already paid by the local governments or to fund future costs. Thus, in reliance on the ruling in *Sacramento I*, the City initially paid its quarterly billings under protest and then began to return the bills unpaid when no action was taken.²⁴ The instant class action suit was subsequently filed in Sacramento Superior Court on behalf of all local governments in the state, seeking, among other things, "injunctive and declaratory relief barring enforcement of chapter 2/78 in the absence of state subvention . . . [and] . . . a writ of mandate directing that past, current, and future subvention funds be . . . disbursed."²⁵

In the interim, the Legislature appropriated funds for fiscal years 1984-85 and also approved limited funds for 1986.²⁶ The trial court dismissed the plaintiffs' claims from these legislatively funded peri-

17. *Id.* at n.2.

18. CAL. CONST. art. XIII B. *See generally* 9 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* § 123 (9th ed. 1989).

19. CAL. CONST. art. XIII B, § 9(b) (emphasis added).

20. *Id.* § 6.

21. *City of Sacramento*, 50 Cal. 3d at 59, 785 P.2d at 525, 266 Cal. Rptr. at 142.

22. *City of Sacramento v. State*, 156 Cal. App. 3d 182, 199, 203 Cal. Rptr. 258, 268 (1984). The supreme court expressly disapproved of this portion of the opinion in *County of Los Angeles v. State*, 43 Cal. 3d 46, 58 n.10, 729 P.2d 202, 209 n.10, 233 Cal. Rptr. 38, 44 n.10 (1987).

23. 50 Cal. 3d at 60, 785 P.2d at 525, 266 Cal. Rptr. at 142.

24. *Id.* at 60, 785 P.2d at 526, 266 Cal. Rptr. at 143.

25. *Id.*

26. *Id.*

ods, certified the suit as a class action, and granted a motion for summary adjudication.²⁷ While the case was pending, the supreme court decided *County of Los Angeles*, holding that article XIII B and parallel statutes did not call for subvention where general increases in workers compensation benefits were imposed on local agencies by the state. The court reasoned that these were not unique local requirements, but requirements that applied generally to the public.²⁸ Based on this holding, the defendants in *City of Sacramento* moved for summary judgment which the trial court granted.²⁹

The court of appeal reversed, finding that the defendants were collaterally estopped by the ruling in *Sacramento I* and that chapter 2/78 did in fact impose a unique requirement on local governments within the meaning of *County of Los Angeles*.³⁰ The California Supreme Court granted review.

III. MAJORITY OPINION

A. Jurisdiction

The supreme court first addressed jurisdictional concerns. Specifically, the court focused on whether the plaintiffs had appropriately exhausted all of their remedies.³¹ The State contended that although

27. *Id.*

28. *County of Los Angeles v. State*, 43 Cal. 3d 46, 56, 729 P.2d 202, 208, 233 Cal. Rptr. 38, 43 (1987).

29. *City of Sacramento*, 50 Cal. 3d at 61, 785 P.2d at 526, 266 Cal. Rptr. at 143.

30. *Id.*

31. *Id.* Reimbursement procedures in effect during the applicable period have since been repealed and are now codified, but essentially remain the same. *Id.* at 62 n.5, 785 P.2d at 527 n.5, 266 Cal. Rptr. at 144 n.5; see CAL. GOV'T CODE §§ 17500-630 (West Supp. 1991) (which sets forth the procedures for implementation of article XIII B). As one commentator has observed, the California reimbursement process is "long and complex." Comment, *Unfunded Mandates: A Continuing Source of Intergovernmental Discord*, 17 FLA. ST. U.L. REV. 591, 599 (1990) [hereinafter *Unfunded Mandates*]. First, the local government or agency must file a test claim with the Commissioner on State Mandates [hereinafter CSM]. The claim must state that costs imposed on the agency are eligible for reimbursement by the state. The CSM then makes findings as to the merits, eligibility of agencies, and total statewide costs. Upon approval of a claim, the CSM submits a "local government claims bill" to the Legislature. At this point, the Legislature has the option of denying the claims bill or reducing the amount. The Governor must also approve the claim and has the same options available as the Legislature. Finally, the bill is received by the State Controller, who in turn informs the local agencies how to obtain the reimbursement. *Id.* at 599-600 (citing CALIFORNIA COMM'N ON STATE MANDATES, LOCAL GOVERNMENT GUIDE TO THE MANDATE PROCESS 1 (Dec. 1987)). Should the Legislature deny the bill, enforcement of the state mandate may be enjoined by a claimant in an action for declaratory relief. *Lucia Mar Unified School Dist. v. Honig*, 44 Cal. 3d 830, 833, 750 P.2d 318, 321, 244 Cal.

the plaintiffs had exhausted all administrative remedies applicable to subvention of costs, the plaintiffs had failed to satisfy the procedures applicable to resolution of tax cases.³² The State asserted that the California Constitution prohibited claims for injunctive or declaratory relief against tax collection.³³ Thus, in order to pursue the claim, the plaintiffs must first pay their unemployment taxes and then seek a refund under the procedures established in the Unemployment Insurance Code.³⁴ To the extent that plaintiffs had sought a refund, the State claimed that they did not follow proper procedures.³⁵

The court found, however, that the plaintiffs were not attempting to challenge the validity of the unemployment insurance law or the resulting tax, but were asserting that the related costs required state subvention.³⁶ The court stated that the fact that the costs may include "taxes" was merely incidental.³⁷ Further, the claim for a refund involved subvention issues and not disputes over taxes contemplated in the Unemployment Insurance Code.³⁸ Thus, plaintiffs were entitled to bring suit to retrieve past unreimbursed expenses as well as to declare present unfunded mandates unenforceable. The court concluded that it had jurisdiction to resolve "whether chapter 2/78 constitute[d] a reimbursable mandate."³⁹

B. Collateral Estoppel and Res Judicata

The court next discussed the doctrines of collateral estoppel and res judicata to determine whether the issues presented were precluded by the decision in *Sacramento I*. The plaintiffs claimed that both doctrines applied, and the court of appeal agreed that the State was collaterally estopped from litigating the characterization of chapter 2/78 as a state mandate.⁴⁰

1. Collateral Estoppel

The plaintiffs asserted that *Sacramento I* finally decided that chap-

Rptr. 677, 679 (1988) (school districts providing special education sought declaratory relief).

32. *City of Sacramento*, 50 Cal. 3d at 62, 785 P.2d at 527, 266 Cal. Rptr. at 144.

33. *Id.*

34. *Id.* (citing CAL. UNEMP. INS. CODE §§ 1176-81, 1241(a) (West 1986)).

35. *Id.*

36. *Id.* at 63, 785 P.2d at 527, 266 Cal. Rptr. at 144. The plaintiffs had pursued all of the appropriate avenues relating to the issue of subvention. The Board approved their claims bill but the Legislature rejected it. Thus, the appropriate procedure was to bring an action for declaratory relief. The court therefore found it difficult to countenance the State's claim that the City was seeking resolution of a tax issue. *Id.*

37. *Id.* at 63, 785 P.2d at 527, 266 Cal. Rptr. at 144.

38. *Id.* at 63-64, 785 P.2d at 528, 266 Cal. Rptr. at 145.

39. *Id.* at 63, 785 P.2d at 528, 266 Cal. Rptr. at 145.

40. *Id.* at 64, 785 P.2d at 528, 266 Cal. Rptr. at 145.

ter 2/78 was a state mandated cost, and thus collateral estoppel barred the State from relitigating the issue. The court explained that, as here, where the issue involves a question of law rather than a question of fact, collateral estoppel does not bar relitigation "if injustice would result or if the public interest requires that relitigation not be foreclosed."⁴¹ According to the supreme court, even if collateral estoppel was suggested by the circumstances, the public interest exception required that relitigation be allowed or else the consequences of any error in the judgment of *Sacramento I* would be pervasive, exceeding the consequences of litigation between mere private parties.⁴² On one hand, if *Sacramento I* was incorrectly decided and not reviewable, taxpayers would suffer because the state would have a continuing obligation to fund chapter 2/78 costs. Alternatively, California employers may suffer great financial losses if the state does not collect the funds necessary to enforce chapter 2/78, resulting in a violation of federal law.⁴³

2. Res Judicata

The plaintiffs also argued that all claims involving the instant parties were decided in *Sacramento I*; thus res judicata prohibited further review. The court stated that although it would be precluded by res judicata from upsetting "individual claims or causes of action . . . which have been finally adjudicated," the issues in the instant case were "not limited to the validity of any such finally adjudicated claims" but involved subvention "*in general*."⁴⁴

41. *Id.*

42. The court noted that collateral estoppel would bar the relitigation of this pure question of law:

The state was the losing party in *Sacramento I*, and also the only entity legally affected by that decision. Thus, strict application of collateral estoppel would foreclose any reexamination of the holding of that case. The state would remain bound, and no other person would have occasion to challenge the precedent.

Id. (emphasis in original).

43. *Id.* at 64-65, 785 P.2d at 529, 266 Cal. Rptr. at 146.

44. *Id.* at 65, 785 P.2d at 529, 266 Cal. Rptr. at 146 (emphasis in original). According to the court, the test claim procedure culminating in *Sacramento I* was merely a procedure to address the question of law as to whether enacted state legislation amounted to a reimbursable state mandate. As res judicata only precludes upsetting of individual claims, it would only bar relitigation of the test claims actually adjudicated and not "all claims by all local agencies for all years." *Id.* at 65 n.10, 785 P.2d at 529 n.10, 266 Cal. Rptr. at 146 n.10 (emphasis in original).

C. "New Program" or "Increased Service?"

In reaching the merits of the case, the supreme court held that chapter 2/78 did not impose any reimbursable costs on local governments under article XIII B.⁴⁵ Its decision was controlled by the holding of *County of Los Angeles*.⁴⁶ In *County of Los Angeles*, the court reasoned that the key phrases in article XIII B, "new program" and "higher level of service," were meant to convey their ordinary meaning — "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."⁴⁷ *County of Los Angeles* held that the costs associated with a general increase in workers' compensation benefits did not qualify as a reimbursable state mandate under the standards of article XIII B.⁴⁸ Local agencies were merely being put on par with their private employer counterparts.⁴⁹

The court in *City of Sacramento* then analogized the workers' compensation benefits in *County of Los Angeles* to the unemployment compensation coverage in the instant case. The court found that the new provision requiring unemployment compensation coverage for public employees likewise did not amount to a new or increased service to the public or to a uniquely imposed state policy because "[e]xtension of this requirement to local governments . . . merely makes the local agencies 'indistinguishable in this respect from private employers.'"⁵⁰

The court discounted each of the plaintiffs' attempts to distinguish *County of Los Angeles*. First, the plaintiffs claimed that the expressed purpose behind article XIII B was to prevent new costs, such as the one in the instant case, from being forced onto local agencies

45. *Id.* at 66, 785 P.2d at 530, 266 Cal. Rptr. at 147.

46. *Id.*

47. *County of Los Angeles*, 43 Cal. 3d at 56, 729 P.2d at 208, 233 Cal. Rptr. at 43 (emphasis added). In *County of Los Angeles*, the court rejected the appellant/city's definition of "higher level of service." *Id.* Appellants in that case contended that the appropriate definition was included within the Revenue and Taxation Code, Section 2164.3 (part of the Property Tax Relief Act of 1972) which had been repealed prior to *County of Los Angeles*. The definition therein stated that "[i]ncreased level of service' means any requirement mandated by state law or executive regulation . . . which makes necessary expanded or additional costs to a county, city and county, city, or special district." CAL. REV. & TAX. CODE § 2164.3, repealed by ch. 358, § 2, 1973 Cal. Stat. 779 (West 1991). The court held that the Legislature intended a change in the definition by deleting its presence from the superceding statute, section 2207 of the Revenue and Taxation Code. 43 Cal. 3d at 55, 729 P.2d at 206, 233 Cal. Rptr. at 42.

48. *Id.*

49. 43 Cal. 3d at 57-58, 729 P.2d at 208, 233 Cal. Rptr. at 44.

50. *City of Sacramento*, 50 Cal. 3d at 67, 785 P.2d at 530-31, 266 Cal. Rptr. at 147-48 (quoting *County of Los Angeles v. State*, 43 Cal. 3d 46, 58, 729 P.2d 202, 209, 233 Cal. Rptr. 38, 44 (1987)).

without subvention from the state.⁵¹ The court found this argument unmeritorious because the language of the Article does not support the contention that any new law of general application which incidentally affects local governments necessitates reimbursement.⁵²

The court next rejected the contention that chapter 2/78 imposed a unique requirement within the meaning of *County of Los Angeles*.⁵³ The City urged the court to find the unemployment insurance to be a unique cost, as in *Lucia Mar Unified School District v. Honig*.⁵⁴ *Lucia Mar* involved legislation requiring local school districts to fund the education of their handicapped students. The court in *Lucia Mar* found that this requirement qualified as a new program for local government because the state "shifted" the cost of a public service that had traditionally been funded by the state to local school districts.⁵⁵

In *City of Sacramento* the court distinguished *Lucia Mar*, finding that in the instant case the issue was "whether costs *unrelated* to the provision of public services are *nonetheless* reimbursable costs of government, because they are imposed on local governments 'unique[ly],' and not merely as an incident of compliance with general laws."⁵⁶ The court noted that the previous exemption enjoyed by the state and local governments was merely eliminated by chapter 2/78, and

51. *Id.* at 67, 785 P.2d at 531, 266 Cal. Rptr. at 148. The plaintiffs referred to the ballot materials available when the voters approved article XIII B. The pamphlet stated that "this measure . . . [w]ill not allow the state government to force programs on local governments without the state paying for them." *County of Los Angeles*, 43 Cal. 3d at 56, 729 P.2d at 208, 233 Cal. Rptr. at 43 (citing Ballot Pamphlet, Proposed Amend. to Cal. Const., Spec. Statewide Elec., p. 18 (Nov. 6, 1979)). According to the court in *County of Los Angeles*, the voters were concerned with preventing the state from passing costs along to local agencies which should be provided to the public by the state. *Id.* However, the concern was not related to costs applicable to all state residents in general. "Laws of general applicability are not passed by the Legislature to 'force' programs on localities." *Id.* at 56-57, 729 P.2d at 207-08, 233 Cal. Rptr. at 43-44.

52. *City of Sacramento*, 50 Cal. 3d at 67-68, 785 P.2d at 531, 266 Cal. Rptr. at 148.

53. *Id.* at 68, 785 P.2d at 531, 266 Cal. Rptr. at 148.

54. *Lucia Mar Unified School Dist. v. Honig*, 44 Cal. 3d 830, 750 P.2d 318, 244 Cal. Rptr. 677 (1988).

55. *Id.* at 835-36, 750 P.2d at 321-22, 244 Cal. Rptr. at 680-81. In *Lucia Mar*, the court stated that there was no issue as to whether the education of the children was a program within the meaning of article XIII B because "the education of handicapped children is clearly a governmental function providing a service to the public." *Id.* at 835, 750 P.2d at 322, 244 Cal. Rptr. at 680. Further, the shifting of these costs to the school districts would impose costs on the local agency that are not borne by the general public. In the case of unemployment insurance costs, both private employers statewide and state and local governments are required to incur the same costs after enactment of chapter 2/78.

56. *City of Sacramento*, 50 Cal. 3d at 68, 785 P.2d at 531, 255 Cal. Rptr. at 148 (emphasis in original).

the government was made subject to costs which have always been borne by other employers.⁵⁷ Thus, the requirement was *new* to the local governments but not *unique*.

The court then addressed the plaintiffs' claim that the costs imposed were not "incidental" within the meaning of *County of Los Angeles*. According to the plaintiffs, the cost of the unemployment insurance coverage charged to local governments was too high to be considered incidental and therefore required subvention. However, the court responded that, by employing the term "incidental," the court in *County of Los Angeles* did not mean to refer to insignificant amounts.⁵⁸ To the contrary, expenses imposed primarily on the private sector and incidentally on the public sector may be quite substantial.⁵⁹

Finally, the court rejected the plaintiffs' request to overrule *County of Los Angeles*.⁶⁰ The plaintiffs argued that the "program" and "service" limitation of *County of Los Angeles* conflicted with the language of article XIII B that enumerates an all-inclusive list of nonreimbursable state mandates. Further, plaintiffs asserted that the limitation was incongruous with the intent and purpose of the Article because it allowed the state to "force" upon the local governments costs not intended by the voters to be nonreimbursable state mandates.⁶¹

The court rejected the contention that the Article purported to limit nonreimbursable mandates to those specifically listed. According to the court, the listed exceptions were merely meant to encompass those programs which would not be reimbursable regardless of whether they met the "new program" or "increased level of service" language of the Article.⁶²

Additionally, the court stated that the standards set forth in *County of Los Angeles* did not conflict with those of the Article. Rather than allowing states to "force" programs on local governments, the standards require subvention "whenever the state freely

57. *Id.*

58. *Id.* at 69, 785 P.2d at 532, 266 Cal. Rptr. at 149.

59. *Id.*

60. *Id.*

61. *Id.* at 69, 785 P.2d at 532, 266 Cal. Rptr. at 149. Article XIII B reads, in pertinent part, that the Legislature may, but need not, provide subvention of funds for the following mandates:

- (a) Legislative mandates requested by the local agency affected;
- (b) Legislation defining a new crime or changing an existing definition of a crime; or
- (c) Legislative mandates enacted prior to January 1, 1975 or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

CAL. CONST. art. XIII B, § 6.

62. *City of Sacramento*, 50 Cal. 3d at 69-70, 785 P.2d at 532, 266 Cal. Rptr. at 149.

chooses to impose on local agencies *any* peculiarly 'governmental' costs which they were not previously required to absorb."⁶³ As such, the standards do not create a risk that local agencies will bear the cost of state mandated programs in contravention of article XIII B.⁶⁴

D. Federal Mandate

Finally, the supreme court initiated a reexamination of the "federal mandate" holding in *Sacramento I*. In *Sacramento I*, the court of appeal held that chapter 2/78 did not qualify as a federal mandate,⁶⁵ thus the outcome of the case rested on whether chapter 2/78 was a reimbursable state mandate. Because the federal versus state classification has fiscal ramifications beyond the issue of subvention,⁶⁶ the supreme court rejected the finding that chapter 2/78 was a state mandate.⁶⁷

Under article XIII B, federally mandated appropriations are imposed "without discretion" and "unavoidably" increase the costs of providing services currently offered.⁶⁸ The plaintiffs contended that unless Public Law 94-566 legally dictated coverage of public employees, then the language of article XIII B would not be satisfied. The State countered that the issue was more appropriately couched in terms of "realistic 'discretion' to refuse."⁶⁹

The court rejected the plaintiffs' restrictive view of legal compulsion, listing several factors to be considered on a case by case basis in determining whether a program was mandatory or optional upon a state. Among the relevant inquires are

- the nature and purpose of the federal program; whether its design suggests an intent to coerce; when the state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or

63. *Id.* at 70, 785 P.2d at 532, 266 Cal. Rptr. at 149.

64. *Id.*

65. *City of Sacramento v. State*, 156 Cal. App. 3d 182, 194, 203 Cal. Rptr. 258, 265 (1984). The court of appeal held that financial and political coercion, no matter how great, were not the equivalent of a statutory mandate. *Id.* at 196, 203 Cal. Rptr. at 266. Justice Kaufman found the same in his dissent. 50 Cal. 3d at 80, 785 P.2d at 540, 266 Cal. Rptr. at 157 (Kaufman, J., concurring and dissenting).

66. 50 Cal. 3d at 70, 785 P.2d at 533, 266 Cal. Rptr. at 150. Under the Revenue and Taxation Code, a local government is not limited in its ability to tax in order to meet the costs of federal mandates. CAL. REV. & TAX. CODE § 2271 (West 1989 & Supp. 1990). Additionally, article XIII B section 9 exempts federal mandates from the constitutional spending limit. CAL. CONST. art. XIII B, § 9.

67. 50 Cal. 3d at 71, 785 P.2d at 533, 266 Cal. Rptr. at 150.

68. CAL. CONST. art. XIII B, § 9(b).

69. *City of Sacramento*, 50 Cal. 3d at 71, 785 P.2d at 533, 266 Cal. Rptr. at 150.

withdrawal.⁷⁰

Here, the court looked to the prevailing legal environment at the time article XIII B was enacted⁷¹ and the Legislature's subsequent adoption of amendments to the statutory definition of federally mandated costs.⁷² These groups agreed with the more liberal construction. The court concluded that Public Law 94-566 and resulting chapter 2/78 effected a federal mandate as defined by article XIII B.⁷³ Thus, state and local governments were not limited in their ability to tax and spend to comply with chapter 2/78.⁷⁴

IV. THE CONCURRENCE AND DISSENT

Justice Kaufman concurred in the judgment of the court that under the reasoning of *County of Los Angeles*, chapter 2/78 was not a "new program or higher level of service."⁷⁵ Nevertheless, Justice Kaufman dissented from the majority in both its view of chapter 2/78 as a federal mandate and in its decision to raise the issue altogether.⁷⁶

According to the dissent, the majority exceeded the bounds of judicial restraint in deciding the constitutional issue. "A court will not decide a constitutional question unless such construction is absolutely necessary."⁷⁷ Here, neither of the parties actively sought determination of nor vigorously argued the issue.⁷⁸ Further, the outcome of

70. *Id.* at 76, 785 P.2d at 537, 266 Cal. Rptr. at 154.

71. *Id.* at 72-73, 785 P.2d at 534-35, 266 Cal. Rptr. at 151-52. During the latter part of the 1970's, the time period in which article XIII B was enacted, the concept of federalism was popular, leaving doubt as to Congress' otherwise plenary power to impose its will on state and local governments. As a result, the federal government was much more inclined to utilize incentives than statutory directives. Thus, to conclude that the drafters of the article intended the "federal mandate" requirement to mean actual statutory compulsion would have rendered the amendment meaningless given the prevailing attitude at the time of its adoption. *Id.* at 73, 785 P.2d at 535, 266 Cal. Rptr. at 152.

72. *Id.* at 75, 785 P.2d at 536, 266 Cal. Rptr. at 153. Subsequent to the adoption of article XIII B, the Revenue and Taxation Code was amended. Among the changes was an amendment to the definition of "costs mandated by the federal government." *Id.* The amended code defines federal mandates as "costs resulting from enactment of a state law or regulation where failure to enact such law or regulation to meet specific federal program or service requirements would result in *substantial monetary penalties or loss of funds to public or private persons in the State.*" *Id.* (citing CAL. REV. & TAX. CODE § 2206 (West 1989 & Supp. 1990))(emphasis supplied by court).

73. *Id.* at 76, 785 P.2d at 537, 266 Cal. Rptr. at 154.

74. 50 Cal. 3d at 76, 785 P.2d at 537, 266 Cal. Rptr. at 154.

75. *Id.* at 77, 785 P.2d at 537, 266 Cal. Rptr. at 154 (Kaufman, J., concurring and dissenting).

76. *Id.* (Kaufman, J., concurring and dissenting).

77. *Id.* at 77, 785 P.2d at 538, 266 Cal. Rptr. at 155 (Kaufman, J., concurring and dissenting) (quoting *Estate of Johnson*, 139 Cal. 532, 534, 73 P. 424, 425 (1903)).

78. *Id.* at 77, 785 P.2d at 538, 266 Cal. Rptr. at 155 (Kaufman, J., concurring and dissenting). Indeed, the court itself requested additional briefing. As the majority even noted, it was odd that the plaintiffs chose to argue that chapter 2/78 was *not* a

this issue was not necessary as a ground for the court's ultimate holding, and the only reason for revisiting the issue was its "important implications," a justification that Justice Kaufman felt to be wholly indefensible.⁷⁹

Presented in an appropriate case, Justice Kaufman would have found that the chapter 2/78 costs imposed were clearly state mandated.⁸⁰ He believed the usual and ordinary meaning should be accorded to the term, "mandate," therefore requiring "obligations compelled by force of law" instead of coercive use of economic or political inducements.⁸¹

Justice Kaufman proceeded to attack the majority's test for discerning those enactments which were mandatory and those which were optional. Because the inquiry proposed by the majority involved burdensome fact finding and unpredictable outcomes, Justice Kaufman concluded that the holding was bound "to generate more difficulties than it resolves."⁸²

V. CONCLUSION

Tension between the state and local governments resulting from unfunded mandates is a problem that has touched every state.⁸³ As each state considers how best to resolve the problem, California must reexamine its chosen solution. As one commentator has noted, although the state constitution now dictates subvention by the state for state mandates, the effectiveness of this constitutional amendment has been limited by the complicated reimbursement proceedings and by holdings of the court which have "essentially gutted the mandate provision."⁸⁴

federal mandate because a finding that the statute constituted a federally imposed mandate would lift the local agency's taxing and spending limits. The presumed reason for such a stance was that the classifications are mutually exclusive, and thus classification as a federal mandate would eliminate the possibility of state subvention. *Id.* at 71 n.17, 785 P.2d at 533 n.17, 266 Cal. Rptr. at 150 n.17. However, the majority did not preclude the possibility of a mandate that was both federally and state mandated for the purposes of subvention. *Id.* at 71 n.16, 785 P.2d at 533 n.16, 266 Cal. Rptr. at 150 n.16.

79. *City of Sacramento*, 50 Cal. 3d at 78, 785 P.2d at 538, 266 Cal. Rptr. at 155 (Kaufman, J., concurring and dissenting).

80. *Id.*

81. *Id.* at 79, 785 P.2d at 539, 266 Cal. Rptr. at 156 (Kaufman, J., concurring and dissenting).

82. *Id.* at 81, 785 P.2d at 540, 266 Cal. Rptr. at 157 (Kaufman, J., concurring and dissenting).

83. See *Unfunded Mandates*, *supra* note 31, at 592.

84. *Id.* at 600. See, e.g., *City of Anaheim v. State*, 189 Cal. App. 3d 1478, 225 Cal.

The ruling in *City of Sacramento* continues the precedent set by the supreme court and followed by lower state courts in narrowly interpreting the constitutional language of article XIII B insofar as it defines "new program" and "higher level of service." It can be expected that only a small number of state mandates will continue to be reimbursed by the state.⁸⁵ However, the factual inquiry set forth by the majority in determining whether a program is federally mandated may open more possibilities as to classification as a federal mandate, thus lifting the limits of taxing and spending to meet the costs of programs thrust upon local agencies.

SUE ELLEN DIEB

IX. ENVIRONMENTAL LAW

A project for the increase or initiation of passenger services on a rail line is exempt from regulation in the California Environmental Quality Act requiring an environmental impact report where the rail line has already been constructed along the rail right-of-way and the rail operator has not obtained a certificate of abandonment. Napa Valley Wine Train, Inc. v. Public Utilities Comm'n.

I. INTRODUCTION

The California Environmental Quality Act (CEQA)¹ enables public agencies to oversee projects that may have a significant effect on the environment. Within the CEQA, however, there is a list of projects that the legislature has designated as exempt from such environmental review.² In *Napa Valley Wine Train, Inc. v. Public Utilities Commission*,³ the California Supreme Court considered the application of one such exemption to a railroad company that planned to institute passenger service on a rail line that had not operated for two

Rptr. 101 (1987) (holding that an increase in pension payments to retired employees does not require reimbursement by the state under article XIII B); *Contra Costa County v. State*, 177 Cal. App. 3d 62, 222 Cal. Rptr. 750 (1986) (holding that requirement that condemnor in eminent domain action pay for business goodwill not a state mandate); 63 Op. Att'y Gen. 700 (1980) (deciding that requirement for municipal county districts to increase number of judges does not result in reimbursable costs).

85. See *Unfunded Mandates*, *supra* note 31, at 599. The comment cites to a General Accounting Office Report finding that over a 10 year period, out of 4100 state mandates, only 124 were funded at the time of passage. *Id.* at n.47 (citing GENERAL ACCOUNTING OFFICE, LEGISLATIVE MANDATES: STATE EXPERIENCES OFFER INSIGHT FOR FEDERAL ACTION 3 (Sept. 1988)).

1. CAL. PUB. RES. CODE §§ 21000-21177 (West 1986 and Supp. 1991).

2. CAL. PUB. RES. CODE § 21080(b) (West 1986).

3. 50 Cal. 3d 370, 787 P.2d 976, 267 Cal. Rptr. 569 (1990) (abrogated by the California Legislature's changes to Public Resources Code Section 21080.04).

and one half years. The particular exemption applies only to rail rights-of-way if considered already in use. Thus, the Supreme Court had to consider the legislative intent behind the language "rail rights-of-way already in use" and whether, under the facts of *Napa Valley Wine Train, Inc.*, the rail right-of-way was "already in use."

In a concise opinion written by Justice Panelli,⁴ the majority held that a rail right-of-way is in use where the rail line has been constructed on the right-of-way, and the operator of the rail line has not intentionally abandoned the right-of-way.⁵ Because the rail line in question had already been constructed and no certificate of abandonment had been issued by the Interstate Commerce Commission (ICC), the court concluded that the exemption applied.⁶

This article begins by examining CEQA and other relevant statutes. Next, the article summarizes the factual and procedural history of *Napa Valley Wine Train, Inc.*. Additionally, this article analyzes the majority and dissenting opinions, and ultimately concludes with a discussion of the case's impact on CEQA and the environment.

II. BACKGROUND

A. Application of CEQA

In 1970, the California Legislature enacted CEQA.⁷ The legislative intent behind CEQA was to ensure

that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.⁸

The Act declares a state policy requiring all government agencies to, among other things, do the following: (1) develop standards and pro-

4. Chief Justice Lucas and Justices Eagleson and Kennard concurred with Justice Panelli's majority opinion. Justices Mosk and Kaufman filed separate dissenting opinions with Justice Broussard concurring as to each. Justice Kaufman was retired sitting under assignment by the Acting Chairperson of the Judicial Council.

5. *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 380, 787 P.2d at 981, 267 Cal. Rptr. at 574.

6. *Id.* at 383, 787 P.2d at 983-84, 267 Cal. Rptr. at 576-77.

7. CAL. PUB. RES. CODE §§ 21000-21177 (West 1986 and Supp. 1991). See generally B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §§ 58-66 (9th ed. 1987) (providing an overview of CEQA); Comment, *Substantive Enforcement of the California Environmental Quality Act*, 69 CAL. L. REV. 112 (1981) (considering possible means of enforcing CEQA). The California Legislature also mandated the promulgation of administrative regulations for the implementation of CEQA. CAL. CODE REAS. tit. 14, §§ 15000-15387 (1983) [formerly CAL. ADMIN. CODE] [hereinafter *CEQA Guidelines*].

8. CAL. PUB. RES. CODE § 21000(g) (West 1986).

cedures to protect the environment; (2) consider qualitative, economic, and technical factors affecting the environment; (3) consider the long and short term benefits and costs that the proposed project would cause to the environment; and (4) consider alternatives to proposed actions affecting the environment.⁹

To enable the agencies to accomplish these four requirements, CEQA requires that an environmental impact report be prepared for all projects¹⁰ that may have a significant effect on the environment.¹¹ The legislature hoped that by requiring an impact report, government agencies and the general public would be informed of the proposed project's environmental impact, and that concerned citizens would be comforted knowing that the ecological implications of a project had been analyzed and taken into consideration.¹²

CEQA, as originally enacted, clearly applied to public projects, but application to private projects was unclear. The California Supreme Court, in *Friends of Mammoth v. City of Los Angeles*,¹³ examined the legislative history of CEQA and determined that the legislature intended the Act to include private projects having a significant effect on the environment and at least a minimal link to a government agency.¹⁴ In 1972, the legislature recognized ambiguity in the language of CEQA and amended the Act to clarify the inclusion of private projects under its provisions.¹⁵

9. CAL. PUB. RES. CODE § 21001(f)-(g) (West 1986).

10. A "project" is defined as any of the following:

(a) Activities directly undertaken by any public agency.

(b) Activities undertaken by a person which are supported in whole or in part through contracts, grants, loans, or other forms of assistance from one or more public agencies.

(c) Activities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

CAL. PUB. RES. CODE § 21065 (West 1986). See generally, Comment, *Probable Future Projects: Their Role in Environmental Assessment under the California Environmental Quality Act*, 21 SANTA CLARA L. REV. 727 (1981) (examining the projects to which CEQA applies).

11. "Significant effect on the environment means a substantial, or potentially substantial, adverse change in the environment." CAL. PUB. RES. CODE § 21068 (West 1986).

12. *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 86, 529 P.2d 66, 78, 118 Cal. Rptr. 34, 46 (1974).

13. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

14. *Id.* at 262-63, 502 P.2d at 1059, 104 Cal. Rptr. at 771.

15. Section 21151 was amended to require the preparation of an impact report whenever a public agency approves a private project that may have a significant effect on the environment. CAL. PUB. RES. CODE § 21151 (West 1986). The legislature also added section 21065, defining "project," to clarify that CEQA extends to private projects with which a public agency has some minimal link. The "minimal line" is satisfied by an agency's direct proprietary interest in the project or by the agency permitting, regulating, or funding the private activity. CAL. PUB. RES. CODE § 21065 (West 1986). See *Natural Resources Defense Council, Inc. v. Arcata Nat'l Corp.*, 59 Cal. App. 3d 959, 966-67, 131 Cal. Rptr. 172, 176-77 (1976) (acknowledging the broad definition of "project"); See also *No Oil, Inc.*, 13 Cal. 3d at 82 n.13, 529 P.2d at 75 n.13, 118 Cal. Rptr.

Though CEQA's main policy concern is the maintenance of environmental quality, the legislature has recognized the existence of other state policy interests that outweigh the environmental concern.¹⁶ The legislature expressly set forth these alternative policy interests in a list of project categories that are exempt from CEQA requirements.¹⁷

In 1978, the legislature included in this list an exemption for "project[s] for the institution or increase of passenger or commuter service on *rail lines already in use*, including the modernization of existing stations and parking facilities."¹⁸ In 1982, this section was amended to read, "a project for the institution or increase of passenger or commuter services on *rail or highway rights-of-way already in use*, including modernization of existing stations and parking facilities."¹⁹ The change from "rail line"²⁰ to "rail right-of-way"²¹ created ambiguity. It was unclear whether this change was meant to be substantive or merely procedural. The California Supreme Court had to confront and resolve this ambiguity in *Napa Valley Wine Train, Inc.*²² The court's resolution, however, was immediately and expressly abrogated by the California legislature in Public Resources Code Section 21080.04.

III. FACTUAL AND PROCEDURAL HISTORY

Napa Valley Wine Train, Inc. involves the Rocktram-Krug line, a

at 43 n.13 (pointing out that Public Resources Code section 21151 codifies the holding in *Mammoth*).

16. See *Napa Valley Wine Train, Inc. v. Public Utilities Comm'n*, 50 Cal. 3d 370, 376, 787 P.2d 976, 978-79, 267 Cal. Rptr. 569, 571-72 (1990).

17. CAL. PUB. RES. CODE § 21080(b) (West 1986). The list of exemptions now includes rail lines such as the track at issue in *Napa Valley Wine Train, Inc.* CAL. PUB. RES. CODE § 21080.04. See Comment, *The Application of Emergency Exemptions under CEQA: Loopholes in Need of Amendment?*, 15 PAC. L. J. 1089 (1984) (criticizing the exemptions to CEQA).

18. 1978 Cal. Stat. 791 (emphasis added) (re-enacted by 1979 Cal. Stat. 2171 and formerly codified as § 21085.5).

19. CAL. PUB. RES. CODE § 21080(b)(11) (West 1986) (emphasis added).

20. A rail line is a line of track or rails providing a runway for wheels. WEBSTER'S NEW COLLEGIATE DICTIONARY 972-73 (9th ed. 1983).

21. A right-of-way is a property right, which is described as a servitude that "may be granted and held, though not attached to land." CAL. CIV. CODE § 802 (West 1982). In the same bill that amended the passenger service exemption, the legislature added to the Civil Code's section on servitudes a definition of the legal attributes of rail rights-of-way. CAL. CIV. CODE § 801.7(a) (West Supp. 1991).

22. The passenger service exemption was a matter of first impression, leaving the court with only the legislative intent and normal interpretation procedures to determine its amended meaning.

railroad line that runs through California's Napa Valley.²³ This line was built over one hundred years ago to carry passengers to Calistoga, and for most of that time the line has belonged to the Southern Pacific Transportation Company (Southern Pacific). Southern Pacific ceased transporting passengers around 1940, and began transporting only freight.²⁴ In late 1984, Southern Pacific ceased transporting freight and applied to the Interstate Commerce Commission (ICC) for permission to abandon the line.²⁵

The ICC conducted an abandonment investigation to determine if present and future public convenience and necessity would permit the abandonment, if rural and community development would be seriously impacted, and if the quality of the human environment or energy conservation would be significantly affected.²⁶ Several petitions arguing *against* abandonment were filed,²⁷ but the ICC rejected them all, concluding that abandonment would not negatively impact the area.²⁸ The ICC, however, conditioned issuance of the abandonment certificate on Southern Pacific keeping the right-of-way underlying the track intact for a period of 180 days. Furthermore, a certificate would only be issued if "no offer for continued rail operation [was] received [by Southern Pacific] during the 180 day period."²⁹

Napa Valley Wine Train, Inc. (Wine Train) offered to buy the Rocktram-Krug line from Southern Pacific within the 180 day period, intending to continue rail service. Southern Pacific agreed to the sale. The ICC approved the transfer and dismissed Southern Pacific's application for abandonment.³⁰

23. The Rocktram-Krug line runs 21 miles through the heart of California's wine country, past many wineries, and through the cities of Napa, St. Helena, and Yountville.

24. *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 374, 787 P.2d at 977, 267 Cal. Rptr. at 570.

25. Southern Pacific originally filed the application to abandon on November 16, 1984, but it was dismissed for failure to comply with notice requirements. The application was properly refiled on April 18, 1985. See Southern Pac. Transp. Co., Doc. No. AB-12 (Sub-No. 79) (I.C.C. Oct. 9, 1985) (abandonment hearing) (LEXIS, Trans library, ICC file). See generally *Woodruff v. United States*, 40 F. Supp. 949 (D. Conn. 1941) (discussing the ICC's authority to grant abandonments); 65 AM. JUR. 2D *Railroads* §§ 189-193 (1972).

26. Southern Pac. Transp. Co., Doc. No. AB-12 (Sub-No. 79) (I.C.C. Oct. 9, 1985) (abandonment hearing) (LEXIS, Trans library, ICC file). See generally 65 AM. JUR. 2D *Railroads* §§ 185-87 (1972) (discussing abandonment).

27. The cities of Napa and St. Helena, the town of Yountville, the County of Napa, and the Napa Valley Vinters Association filed petitions *against* abandonment. The town of Yountville argued that the line should not be abandoned because "the potential for passenger services merits preservation." Southern Pac. Transp. Co., Doc. No. AB-12 (Sub-No. 79) (I.C.C. Oct. 9, 1985) (abandonment hearing) (LEXIS, Trans library, ICC file).

28. *Id.*

29. *Id.*

30. Under 49 U.S.C. section 10905(e) "[i]f the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the

Upon acquisition of the line, Wine Train proceeded to refurbish it for the commencement of freight and passenger service.³¹ Wine Train planned to use the line primarily for passenger service by offering tourists the option of taking the train to see the Napa Valley and visit its many wineries.³² Wine Train also planned to continue freight service as a means of generating additional revenue.³³ The passenger service plan provoked objections by Napa Valley residents who feared a tourist invasion.

The objectors filed a complaint with the Public Utilities Commission (PUC) claiming the proposed passenger service was subject to the PUC's regulatory jurisdiction, and therefore, that Wine Train was subject to CEQA provisions.³⁴ Wine Train had already filed a petition with the ICC, requesting that the commission declare Wine Train subject to ICC jurisdiction and the proposed passenger service exempt from CEQA under the passenger service exemption.³⁵

The ICC issued a declaratory order finding as follows: (1) that Wine Train was an interstate carrier;³⁶ (2) Wine Train needed no ad-

Commission *shall* approve the transaction and dismiss the application for abandonment." 49 U.S.C. § 10905(e) (1982) (emphasis added). Application of this section means that the line was never abandoned by Southern Pacific's license. *Napa Valley Wine Train, Inc. v. Public Utilities Comm'n*, 50 Cal. 3d 370, 374, 787 P.2d 976, 977, 267 Cal. Rptr. 569, 570 (1990). The decision authorizing Wine Train's acquisition of the line was served December 5, 1985 and contained an environmental finding that the acquisition would "not significantly affect either the quality of the human environment or energy conservation." *Napa Valley Wine Train, Inc.*, 4 I.C.C.2d 720, 724-25 (1988) (petition for declaratory order). It is important to note that once parties agree on the financial terms of the transfer, the nondiscretionary nature of section 10905 prevents the commission from denying the transfer on environmental grounds. *Id.* at 717.

31. Between 1985 and 1987, Southern Pacific neglected the line and let it fall into disrepair. Wine Train was able to reinstitute freight service on January 10, 1988. *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 375, 787 P.2d at 977, 267 Cal. Rptr. at 570.

32. *Id.* at 387, 787 P.2d at 986, 267 Cal. Rptr. at 579 (Kaufman, J., dissenting).

33. Because the transfer occurred under section 10905, Wine Train was required to continue rail service for at least two years. 49 U.S.C. § 10905(f)(4) (1982); *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 374-75 n.5, 787 P.2d at 977 n.5, 267 Cal. Rptr. at 570 n.5.

34. *City of St. Helena v. Napa Valley Wine Train, Inc.*, 28 Cal. P.U.C.2d 2 (1988).

35. *Napa Valley Wine Train, Inc.*, 4 I.C.C.2d 720 (1988) (declaratory order).

36. Wine Train planned to instigate freight service in conjunction with Southern Pacific and to instigate passenger service in conjunction with the National Railroad Passenger Corporation (Amtrak), Greyhound Lines, Inc. and others. Because jointly offered freight service is an interstate operation, the freight service connects the passenger service to the national rail system, making it not purely a local line. This connection results in federal pre-emption of the state's ability to regulate the proposed passenger service, and makes Wine Train an interstate carrier under the jurisdiction of the ICC and subject to its economic regulation. *Napa Valley Wine Train, Inc.*, 4 I.C.C.2d 720, 732-33 n.5 (1988) (declaratory order). See also 53 CAL. JUR. 3D *Public Utilities* § 43 (1979) (explaining division of jurisdiction between ICC and PUC).

ditional authority to institute passenger service because it was the successor in interest to Southern Pacific's license to operate the Rocktram-Krug line;³⁷ and (3) the PUC did not have jurisdiction over Wine Train because the Staggers Rail Act of 1980³⁸ requires ICC certification of the PUC in order to retain any jurisdiction to impose economic regulation over intrastate transportation provided by interstate carriers which California had failed to request.³⁹ The PUC, however, held that the Staggers Act only applies to economic regulation of freight service, not passenger service, and that, therefore, the proposed passenger operations would be subject to economic regulation by the PUC.⁴⁰ Furthermore, the PUC held that its jurisdiction over Wine Train made the proposed passenger service a "project" subject to the requirements of CEQA, and that Wine Train was not exempt from environmental review because the line was not "already in use," as required for application of the passenger service exemption.⁴¹ The contradictory holdings of the ICC and the California PUC prompted the California Supreme Court to issue a writ of re-

37. The ICC's decision authorizing the transfer of the Rocktram-Krug line from Southern Pacific to Wine Train did not limit the type of service that Wine Train could provide, and, in fact, the decision anticipated Wine Train's instigation of passenger service. Though Southern Pacific had only freight service, it could have added passenger service at any time without obtaining any regulatory approval. Thus, Wine Train, as Southern Pacific's successor in interest, needed no additional grant of authority from either the PUC or the ICC, to instigate the passenger service. *Napa Valley Wine Train, Inc.*, 4 I.C.C.2d 720, 731-32 (1988) (declaratory order). The CEQA requires state agencies to take account of environmental considerations in their decision making process, but because the PUC has no role in licensing Wine Train's instigation of passenger service, the PUC cannot "condition the commencement of such operations on the prior completion of an environmental impact report under CEQA." *Napa Valley Wine Train, Inc.*, Fin. Doc. No. 31156 (I.C.C. Jan. 9, 1989) (Petition for declaratory order) (LEXIS, Trans library, ICC file).

38. The Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1981) (codified in various sections of 49 U.S.C.) [hereinafter referred to as the Staggers Act]. See also Birkholz, *The Staggers Rail Act of 1980, Deregulations and Reregulation: A Railroad Perspective*, 17 FORUM 850 (1982) (a brief look at the effects of the Staggers Act).

39. [The Staggers Act provides that a state authority can only exercise jurisdiction over intrastate rail transportation by an interstate rail carrier covered by the Act, if the state is certified by the ICC. 49 U.S.C. § 11501(b)(1) & (2) (1982). "All rail transportation in an uncertified state is "deemed" interstate and is subject to the [ICC's] economic regulation, not that of the state." *Napa Valley Wine Train, Inc.*, 4 I.C.C.2d 720, 734 (1988) (declaratory order) (citing 49 U.S.C. § 11501(b)(4)(B)). California has not been certified under the Staggers Act; therefore, it cannot impose any economic regulation over Wine Train, such as conditioning funds on compliance with CEQA. This means that the ICC has exclusive jurisdiction to impose economic regulation over Wine Train's proposed passenger and freight service, limiting California authorities to enforcing railroad compliance with local safety, zoning, land use and other non-economic regulation within its powers. *Napa Valley Wine Train, Inc.*, 4 I.C.C.2d 720, 734 (1988) (declaratory order); *Napa Valley Wine Train, Inc.*, Fin. Doc. No. 31156 (I.C.C. Jan. 9, 1989) (petition for declaratory order) (LEXIS, Trans library, ICC file).

40. *City of St. Helena v. Napa Valley Wine Train, Inc.*, 28 Cal. P.U.C.2d 352, 362-63 (1988).

41. *Napa Valley Wine Train, Inc. v. Public Utilities Comm'n*, 50 Cal. 3d 370, 388, 787 P.2d 976, 987, 267 Cal. Rptr. 569, 580 (1990) (Kaufman, J., dissenting).

view to resolve the conflict.⁴²

IV. THE OPINION OF THE COURT

A. *The Majority's Opinion*

Justice Panelli, writing for the majority, addressed whether CEQA's passenger-service exemption applied to Wine Train's activities. He phrased the court's task as having to "determine what it means for a right-of-way to be 'already in use.'"⁴³

The legislature's decision to change the exemption's language from "rail line" to "rail rights-of-way" was viewed by the majority as an intentional broadening of the exemption.⁴⁴ Justice Panelli noted that a rail line is merely the tracks on which a train runs,⁴⁵ and, thus, the old language could have been interpreted as requiring actual rail traffic for the rail line to be considered "in use."⁴⁶ The current language of the statute uses the term "rail rights-of-way," which the court viewed as distinctly broader in meaning than "rail line" because a right-of-way is a property interest: the easement on which the rail line is built.⁴⁷ The majority concluded that the term "rail rights-of-way" should be read in its technical, real property sense because, in the same bill, the legislature added a section to the servitude chapter of the Civil Code defining the legal attributes of a rail right-of-way.⁴⁸

42. The clash between the ICC and the PUC largely derives from the ICC's reliance on *Mendocino Coast*, and its broad interpretation of the Staggers Act. *Mendocino* held the Staggers Act's pre-emption provision applied not only state economic regulation of freight services, but to state economic regulation of passenger services as well. *Mendocino Coast Ry., Inc.*, 4 I.C.C.2d 71 (1987). The recent federal court decision in *Illinois Commerce Comm'n v. ICC*, overturned the *Mendocino* holding. *Illinois Commerce Comm'n v. ICC*, 879 F.2d 917 (D.C. Cir. 1989). The ICC has requested the court of appeals to remand the *Illinois Commerce* case to the ICC for reopening and further consideration of the ICC declaratory order in *Napa Valley Wine Train, Inc.* *Napa Valley Wine Train, Inc.*, Fin. Doc. No. 31156 (I.C.C. Oct. 27, 1989) (LEXIS, Trans library, ICC file). The reconsideration is currently still pending. *Napa Valley Wine Train, Inc.*, Fin. Doc. No. 31156 (I.C.C. Mar. 29, 1990) (LEXIS, Trans library, ICC file).

43. *Napa Valley Wine Train, Inc. v. Public Utilities Comm'n*, 50 Cal. 3d 370, 377, 787 P.2d 976, 979, 267 Cal. Rptr. 569, 572 (1990).

44. *Id.* at 378, 787 P.2d at 980, 267 Cal. Rptr. at 573.

45. *Id.*

46. *Id.* at 380 n.15, 787 P.2d at 981 n.15, 267 Cal. Rptr. at 574 n.15. Under the old language, the Rocktram-Krug line would not be considered "already in use," because Southern Pacific had ceased running traffic on the line.

47. See CAL. CIV. CODE §§ 801 & 802 (West 1982 & Supp. 1990) (defining a right-of-way as an easement and a servitude).

48. See CAL. CIV. CODE § 801.7(a) (West Supp. 1990). The court summarized its opinion by saying, "if the legislature had wanted the application of the exemption to turn on traffic statistics rather than on the status of rail 'rights-of-way,' there would

Justice Panelli, then went on to consider when a rail right-of-way is in use, and what constitutes abandonment of that use. He noted that a railroad company is considered to have made use of its right-of-way when it constructs the rail line.⁴⁹ The court reasoned that the existence of a rail line shows a dedication of the land for the purpose of rail transportation and while "a railroad's tearing up of its tracks may raise a question of fact about the destruction of its right-of-way, a decrease in traffic or a change in passenger to freight service does not."⁵⁰ Justice Panelli emphasized that rail rights-of-way could not be lost simply because rail traffic had temporarily lapsed.⁵¹

The majority concluded that "real property law preserves a rail right-of-way from destruction so long as it has been put into use by the construction of a rail line, and so long as the operator has not intentionally abandoned it."⁵² Application of this test to Wine Train revealed that even though Southern Pacific had ceased rail service and had let the track fall into disrepair, the track still existed and, thus, the rail right-of-way, which had been put into use by the construction of the track a century before, was still in use at the time Wine Train acquired the Rocktram-Krug line.⁵³

The PUC argued that the legislature's use of the term "rail rights-of-way" was not meant to be substantive. Justice Panelli dismissed this argument stating that the PUC did not "purport to find any support for their argument in the language or legislative history of the statute."⁵⁴ The majority viewed the PUC's argument as nothing more than a challenge of the legislature's wisdom which the majority

have been no need to amend the language of the exemption to refer to such easements or to define them in the same bill." *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 379, 787 P.2d at 980, 267 Cal. Rptr. at 573.

49. *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 379-80, 787 P.2d at 980-81, 267 Cal. Rptr. at 573-74.

50. *Id.* (citing *Tamalpais Land and Water Co. v. Northwestern Pac. R.R. Co.*, 73 Cal. App. 2d 917, 927, 167 P.2d 825, 830 (1946)).

51. *Id.*

52. *Id.*

53. The majority noted that the Rocktram-Krug line had not been intentionally abandoned as a matter of law because of the ICC's exclusive jurisdiction to authorize abandonments, and the fact that no certificate of abandonment has been issued. *Id.* at 380 n.15, 787 P.2d at 981 n.15, 267 Cal. Rptr. at 574 n.15; See *supra* note 25 and accompanying text. See also 65 AM. JUR. 2D *Railroads* §§ 82-83 (1972) (analysis of abandonment); 53 CAL. JUR. 3D *Railroads* § 62 (1979) (same); 74 C.J.S. *Railroads* §§ 67, 117, 392 (1951) (same); Comment, *Railroad Line Abandonment and Opportunity Cost*, 14 CREIGHTON L. REV. 979 (1981) (allowable evidence in railway line abandonment proceedings under the ICC). Because the PUC misinterpreted the passenger-service exemption, the court held that the PUC had not "regularly pursued its authority," thus, the PUC's decision was annulled. *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 383-84, 787 P.2d at 983-84, 267 Cal. Rptr. at 576-77.

54. *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 381, 787 P.2d at 982, 267 Cal. Rptr. at 575.

had already refused to challenge.⁵⁵

The PUC also argued that the amendment should not be treated as substantive because that would produce a result inconsistent with CEQA goals. Rejecting this argument, the court pointed out that while the legislature enacted CEQA to protect the environment, the legislature also purposefully exempted the increase or institution of passenger service from environmental review under CEQA.⁵⁶ The majority supported its view with an examination of the exemption's legislative history which showed that the legislature weighed the benefits of environmental review against the benefit of increased passenger service and clearly chose to forego environmental review.⁵⁷

The court's conclusion that CEQA's passenger-service exemption applied to Wine Train's activities enabled the court to avoid the jurisdiction issue. Determining which commission had jurisdiction over Wine Train's activities would make no difference with respect to application of CEQA requirements because the exemption freed Wine Train's activities from environmental review, regardless of which commission had jurisdiction.⁵⁸

While the court's conclusion is a correct literal interpretation of the exemption, a lingering question is whether the court should have treated the language of the exemption so literally in resolving this case.

The temptation to lean more towards legislative intent is especially strong in this case because Wine Train's operations could have an extremely significant environmental impact on a very important region of California.⁵⁹

The question that the majority had to answer was simple: should the legislature's wisdom in amending the passenger-service exemp-

55. In this regard the majority expressly pointed out that [t]his court does not sit in review of the Legislature's wisdom in balancing these policies against the goal of environmental protection because, no matter how important its original purpose, CEQA remains a legislative act, subject to legislative limitation and legislative amendment.

Id. at 376, 787 P.2d at 978-79, 267 Cal. Rptr. at 572.

56. See *supra* notes 16-17 and accompanying text. The existence of an exemption naturally means a certain amount of disharmony. *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 381, 787 P.2d at 982, 267 Cal. Rptr. at 575.

57. *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 381-82, 787 P.2d at 982-83, 267 Cal. Rptr. 575-76.

58. Though the ICC is reconsidering its jurisdictional decision, such reconsideration will not subject Wine Train to CEQA, because the passenger service exemption applies. *Id.* at 373-74 n.2, 787 P.2d at 976-77 n.2, 267 Cal. Rptr. at 569-70 n.2.

59. *Id.* at 392, 787 P.2d at 989-90, 267 Cal. Rptr. at 582-83 (Kaufman, J., dissenting).

tion to refer to rail rights-of-way be challenged? Justice Panelli answered no. The effect of that answer is to limit environmental review of a railroad company's increase or institution of passenger service on a rail line unless that line is being newly built or is an abandoned line being reactivated. Thus, no matter how seriously the environment will be affected by an increase or institution of passenger service on a line already in use, the project will be exempted from CEQA review. Such disregard for the environment is clearly contrary to the legislative purpose behind CEQA,⁶⁰ but it is exactly the result contemplated by the legislature when it enacted the passenger-service exemption.⁶¹

B. Dissenting Opinion of Justice Mosk

In his dissent, Justice Mosk expressed "incredulity" at the majority's opinion and his utmost agreement with Justice Kaufman's dissent. Protecting the broad objectives of CEQA was foremost in Justice Mosk's opinion. He reminded the court of its holding in *Friends of Mammoth*; CEQA must "be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."⁶² For Justice Mosk, this meant interpreting the legislature's amendment of the passenger-service exemption as purely technical with no substantive change intended.

Further, Justice Mosk would have given much greater deference to the PUC's decision. Accordingly, Justice Mosk stated that if the PUC's "findings [were] supported by any evidence, they may not be set aside."⁶³

C. Dissenting Opinion of Justice Kaufman⁶⁴

Justice Kaufman framed the issue in this case as whether the PUC regularly pursued its authority in ordering Wine Train to comply

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

61. See *supra* note 57 and accompanying text. If Wine Train's proposed passenger service was not likely to have a significant effect on the environment, then the exemption would not have been needed because only projects that potentially have a significant impact on the environment are subject to CEQA. See CAL. PUB. UTIL. CODE § 21082.2(a) (West 1986). See also *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 381, 787 P.2d at 982, 267 Cal. Rptr. at 575.

62. *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 384, 787 P.2d at 984, 267 Cal. Rptr. at 577 (Mosk, J., dissenting) (quoting *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 259, 502 P.2d 1049, 1056, 104 Cal. Rptr. 761, 768 (1972) (majority opinion written by Justice Mosk)).

63. *Id.* at 385, 787 P.2d at 984, 267 Cal. Rptr. at 577 (citing *Yucaipa Water Co. No. 1 v. Public Utility Comm'n*, 54 Cal. 2d 823, 828, 357 P.2d 295, 297, 9 Cal. Rptr. 239, 241 (1960)).

64. Justice Marcus M. Kaufman is a retired Associate Justice of the supreme court sitting under assignment by the Acting Chairperson of the Judicial Council.

with the requirements of CEQA.⁶⁵ To resolve this issue Justice Kaufman first addressed what the passenger-service exemption meant by "in use."

Through an examination of several cases,⁶⁶ Justice Kaufman contended that the test for abandonment of a rail right-of-way was *non-use* coupled with an intent to abandon.⁶⁷ Because nonuse was a part of the test for abandonment, Justice Kaufman believed that the majority had confused the concept of nonuse with abandonment, and that the two were actually clearly separate concepts, with nonuse, not abandonment, being the test set forth in the exemption.⁶⁸ Justice Kaufman concluded that, because nonuse meant not operating trains,⁶⁹ for a right-of-way to be "in use," trains had to actually be running on the line.⁷⁰

For the rail line to have been "already in use," Justice Kaufman agreed with the majority arguing that the point in time wherein the rail line must be "already in use" is when the responsible agency must determine whether to require CEQA compliance.⁷¹ To resolve the question of when an agency had to make such a determination, the dissent first had to resolve the question of whether Wine Train's operations constituted a project subject to CEQA review.⁷²

Justice Kaufman believed the proposed passenger service constituted such a project because the PUC had control over certain safety

65. *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 385, 787 P.2d at 985, 267 Cal. Rptr. at 578 (Kaufman, J., dissenting).

66. The cases Justice Kaufman examined were *Home R.E. Co. v. Los Angeles Pac. Co.*, 163 Cal. 710, 126 P. 972 (1912), and *Lake Merced Golf & Country Club v. Ocean Shore R.R. Co.*, 206 Cal. App. 2d 421, 23 Cal. Rptr. 881 (1962). See *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 390, 787 P.2d at 988, 267 Cal. Rptr. at 581 (Kaufman, J., dissenting).

67. *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 390, 787 P.2d at 988, 267 Cal. Rptr. at 581 (Kaufman, J., dissenting). See, e.g., *People v. Southern Pac. Co.*, 172 Cal. 692, 700-01, 158 P. 177, 180 (1916).

68. The crux of Justice Kaufman's position is that "if nonuse *plus* the removal of tracks may constitute an abandonment of a railroad right-of-way, then nonuse cannot be the *equivalent* of the removal of tracks, and the opposite must be true as well; *the existence of tracks on a railroad right-of-way does not, ipso facto, mean that it is in use.*" *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 390, 787 P.2d at 988, 267 Cal. Rptr. at 581 (Kaufman, J., dissenting) (emphasis in original).

69. This definition derives from Justice Kaufman's presumption that when the cases he quoted referred to the term "use" they were referring to the use of the right-of-way and that "use" meant there had to be actual operation of the rail line. *Id.* at 391, 787 P.2d at 988-89, 267 Cal. Rptr. at 581-82 (Kaufman, J., dissenting).

70. *Id.* at 389, 787 P.2d at 987, 267 Cal. Rptr. at 580 (Kaufman, J., dissenting).

71. *Id.* at 391-92, 787 P.2d at 989, 267 Cal. Rptr. at 582 (Kaufman, J., dissenting).

72. *Id.* See also *supra* notes 10 & 15.

aspects of Wine Train's operations⁷³ and Wine Train had requested financial assistance from the PUC for maintenance of cross warning devices.⁷⁴ Based on these facts, Justice Kaufman argued that the PUC was authorized to compel CEQA compliance,⁷⁵ and that the time for requiring such compliance would be at the point early enough in the proposed project's development to enable the PUC to influence future development,⁷⁶ but late enough to ensure a meaningful review.⁷⁷

Having resolved all the preliminary questions, Justice Kaufman finally addressed the key question of whether the Rocktram-Krug line had been already in use? The PUC determined that it was not, because Southern Pacific had ceased operating the line and had let it fall into a state of disrepair and disuse that lasted for nearly three years.⁷⁸ Justice Kaufman concluded the passenger-service exemption did not apply in this case because, as he had defined the test, Southern Pacific's failure to maintain or operate the Rocktram-Krug line and Wine Train's inability to operate the line until 1988, meant that the right-of-way was not "already in use" when Wine Train requested financial assistance from the PUC in 1987.⁷⁹ Based on the foregoing, Justice Kaufman felt the record fully supported the PUC's decision because the PUC regularly pursued its authority.⁸⁰

Justice Kaufman admitted that if the passenger-service exemption applied to this case, Wine Train's operation would be exempt from

73. *Id.* at 396-98, 787 P.2d at 992-93, 267 Cal. Rptr. at 585-86 (Kaufman, J., dissenting). See *supra* notes 15 & 39. See also CAL. PUB. UTIL. CODE §§ 1202, 768 & 7607 (West 1975) (defining safety measures over which the PUC has exclusive plenary power); *Breidert v. Southern Pac. Co.*, 272 Cal. App. 2d 398, 406-07, 77 Cal. Rptr. 262, 267 (1969) (showing the power which the PUC has over local railroad safety measures).

74. *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 394-95, 787 P.2d 991-92, 267 Cal. Rptr. 584-85 (Kaufman, J., dissenting). Wine Train requested that the PUC reimburse it for funds it spent altering and maintaining cross warning devices. This request was made under a PUC rule which allows reimbursement for such expenses and which exempts from CEQA compliance installation of new signals or signs. *CEQA Guidelines* § 15300.4. This exemption, however, is not applicable applying when the activity could have a significant impact on the environment due to unusual circumstances. *CEQA Guidelines* § 15300.2.

75. *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 398, 787 P.2d at 993-94, 267 Cal. Rptr. at 586-87 (Kaufman, J., dissenting).

76. See *County of Inyo v. Yorty*, 32 Cal. App. 3d 795, 810, 108 Cal. Rptr. 377, 388 (1973) (early review is necessary because it acts as an "alarm bell" for the public and the responsible public agency).

77. *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 398-400, 787 P.2d at 994-95, 267 Cal. Rptr. at 587-88 (Kaufman, J., dissenting). See *CEQA Guidelines* § 15004(b); See also *Laurel Heights Improvement Ass'n v. Regents of University of California*, 47 Cal. 3d 376, 395, 764 P.2d 278, 284, 253 Cal. Rptr. 426, 432 (1988).

78. *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 400, 787 P.2d at 995, 267 Cal. Rptr. at 589 (Kaufman, J., dissenting).

79. *Id.* See also *supra* notes 31, 72 and accompanying text.

80. *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 401, 787 P.2d at 996, 267 Cal. Rptr. at 589 (Kaufman, J., dissenting).

environmental review under CEQA. Consequently, the PUC's authority over various safety features of Wine Train's operations become irrelevant, and the PUC could not require CEQA compliance.⁸¹

Justice Kaufman's examination of case law resulted in a definitional mistake. The cases cited in the dissent⁸² referred to abandonment as consisting of nonuse plus an intent to abandon; Justice Kaufman immediately focused on the word "nonuse" without fully considering what the cases were referring to. The cases were referring to nonuse of the rail line rather than the nonuse of the right-of-way.

The cases cited by Justice Kaufman never defined what it meant for a *rail right-of-way* to be in use. The cases only proposed that a *rail line* could not be abandoned⁸³ unless there was nonuse (of the rail line) and an intent to abandon.

Justice Kaufman, however, raises the point that an intent to abandon does not necessarily have to come from an ICC certificate of abandonment. Such intent can be shown by the removal of tracks or the selling of parts of the right-of-way.⁸⁴

Justice Kaufman also found that the PUC has jurisdiction over Wine Train's activities because the PUC has power over certain safety aspects of the operations and Wine Train requested reimbursement of funds from the PUC.⁸⁵ Justice Kaufman would let these two facts, relating to only minor parts of Wine Train's activities, bootstrap the entire operation into CEQA's environmental regulation.

If part of a project may have a significant effect on the environment, such bootstrapping should be allowed. So long as no exemption applies to the project, the entire project should be subject to environmental review because there is no reason not to give full force to the policies of the CEQA.⁸⁶ This view also prevents the fractionalization of a project, which is consistent with the CEQA's

81. *Id.* at 396 n.15, 787 P.2d at 981 n.15, 267 Cal. Rptr. at 574 n.15 (Kaufman, J., dissenting).

82. *See supra* note 67 and case cited therein.

83. The majority defined nonuse as abandonment or nonconstruction, thus, these cases could be read as supporting the majority's position — that the line was in use because it was constructed and had not been abandoned. *See supra* notes 49-53 and accompanying text.

84. *See Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 390, 787 P.2d at 988, 267 Cal. Rptr. at 581 (Kaufman, J., dissenting).

85. *See supra* notes 74-76 and accompanying text.

86. As Justice Kaufman pointed out in his dissent, Wine Train's activities would be subject to CEQA requirements if the exemption did not apply, and where no exemption applies, the full force of CEQA should be used to accomplish its goals. *Napa*

“whole of an action” policy.⁸⁷

V. IMPACT

The majority’s conclusion that the construction of a rail line puts a rail right-of-way in use and that it remains in use so long as the operator does not intentionally abandon it, makes the passenger-service exemption extremely broad. Consequently, the impact on the environment of any increase or institution of passenger service on a constructed rail line, including increased rail traffic, increased use of cross warning devices, increased whistle blasts and increased parking and station facilities, will be exempt from review and challenge.

The most significant impact of the majority opinion will be on the definition of a railroad’s abandonment. The court did not fully explore what was required for a rail line to be intentionally abandoned by its operator. However, the court did say that “[t]here was no abandonment in this case as a matter of law because the ICC never issued a certificate of abandonment.”⁸⁸ This could be taken to mean that, for application of the passenger-service exemption, intentional abandonment could only exist if the ICC had issued a certificate of abandonment. Such strict construction of an intentional abandonment makes the passenger-service exemption even broader.⁸⁹

The holding results from giving further deference to the legislative intent behind the exemption while ignoring the intent behind CEQA. Maintaining this policy balance is what the dissent urged the court to do, but the majority decided to leave it to the legislature.⁹⁰ If the passenger-service exemption is widely used by railroad companies, the majority’s decision could result in great harm to the environment. Specifically the decision in this case may result in transforming the Napa Valley into an amusement park.⁹¹

Valley Wine Train, Inc., 50 Cal. 3d at 393, 787 P.2d at 990, 267 Cal. Rptr. at 583 (Kaufman, J., dissenting).

87. See *CEQA Guidelines* § 15378. Allowing fractionalization would result in the production of warped and misleading reports that fail to accurately reflect the real impact being felt by the environment. *Bozung v. Local Agency Formation Comm’n*, 13 Cal. 3d 263, 283-84, 529 P.2d 1017, 1031, 118 Cal. Rptr. 249, 263 (1975).

88. *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 380 n.15, 787 P.2d at 981 n.15, 267 Cal. Rptr. at 574 n.15.

89. A railroad company could cease using a track without ever applying for an abandonment certificate and then, several years later, it could refurbish the decaying line and institute passenger service without ever having to submit an environmental impact report on the effect of such restoration and institution.

90. See *supra* note 55. This result has been deemed unfortunate but legally proper. *Napa Valley Wine Train, Inc.*, Fin. Doc. No. 31156 (I.C.C. Jan. 9, 1989) (declaratory order) (Phillips, Comm’r, concurring) (LEXIS, Trans library, ICC file). The only hope that remains after this decision is that the legislature will enable the courts to avoid this result in future cases.

91. See *Napa Valley Wine Train, Inc.*, 50 Cal. 3d at 375, 787 P.2d at 977, 267 Cal. Rptr. at 571.

VI. CONCLUSION

Through its decision in *Napa Valley Wine Train, Inc. v. Public Utilities Comm'n*, the California Supreme Court has broadly defined the passenger-service exemption of CEQA. As so construed, the exemption now makes the institution or increase of passenger service on any rail line that has already been constructed, exempt from environmental review.

Passenger service operations on a rail line will remain exempt so long as the right-of-way is not intentionally abandoned by the line operator. Under the court's opinion, this means the passenger-service exemption could have an even broader application if, as the court seems to imply, intentional abandonment can only occur when the ICC issues a certificate of abandonment.

Even though the jurisdiction question was never resolved by the majority, if the PUC or the ICC is deemed to have jurisdiction, both the majority and the dissent agree that application of the passenger-service exemption in this case means that Wine Train's institution of passenger service cannot be subjected to environmental review under CEQA.

JOYCE HETTENBACH

X. HEALTH LAW

Acute care hospitals with clinical psychologists on staff may give those psychologists primary responsibility for the admission, diagnosis, treatment and discharge of mental patients: California Association of Psychology Providers v. Rank

I. INTRODUCTION

After a decade of tension, the California Supreme Court has finally resolved the controversy concerning the determination of who has "primary responsibility" over mental patients in America's hospitals. Hailed as a "victory for patient's rights,"¹ the court, in *California Association of Psychology Providers v. Rank*,² held that psychologists and psychiatrists may stand on equal footing in admitting and treat-

1. *California Supreme Court Decision is Victory for Patients' Rights says American Psychological Association*. PR Newswire (June 26, 1990) (LEXIS, Nexis library, Omni file).

2. 51 Cal. 3d 1, 793 P.2d 2, 270 Cal. Rptr. 796 (1990).

ing mental patients in inpatient facilities.³

Prescribing the majority view, in a 4-3 decision, Justice Broussard stated the court's ruling, which nullified departmental regulations of the Department of Health Services (hereinafter DHS) giving psychiatrists the exclusive responsibility for the admission, diagnosis and treatment of hospital mental patients.⁴

In defending its decision, the court relied primarily on the "plain meaning" of two California statutes. Business and Professional Code section 2903 defines the practice of psychology as including the "diagnosis, prevention, treatment and amelioration of psychological problems."⁵ Moreover, section 1316.5 of the Health and Safety Code states that in hospitals, psychologists may perform all medical services within the scope of their licensure, without discrimination.⁶ Simply put, because psychologists have the right to act within their licensure without discrimination, and because the practice of psychology includes diagnostic treatment, psychologists may not be precluded from assuming primary responsibility for the diagnosis and treatment of mental patients in acute care hospitals.

II. HISTORICAL BACKGROUND

Prior to 1978, organized hospital staffs primarily consisted of physicians, dentists, and podiatrists.⁷ Psychologists were often given little, if any, substantial input as to the procedures or policies of the hospital and received few privileges.⁸ Moreover, in many cases, mere access to health care facilities was refused to qualified clinical psychologists.⁹ This resulted in hospitalized mental patients being precluded from receiving care from their personal psychologists. In an effort to remedy this situation, the California legislature, in 1978, enacted section 1316.5 of the Health and Safety Code.¹⁰ Its purpose was to provide licensed psychologists with uninhibited access to, and utilization of, health care facilities, complete with the privileges and responsibilities of a staff member.¹¹

Although the new legislation solved many problems, the relation-

3. *Id.* at 21, 793 P.2d at 14, 270 Cal. Rptr. at 808.

4. *Id.* at 21-22, 793 P.2d at 14, 270 Cal. Rptr. at 808.

5. CAL. BUS. & PROF. CODE § 2903 (West 1990). *See generally* 36 CAL. JUR. 3d *Healing Arts and Institutions* § 10 (1977 & Supp. 1990).

6. CAL. HEALTH & SAFETY CODE § 1316.5 (West 1990).

7. CAL. CODE REGS. tit. 22, § 70703(b) (1990) (formerly CAL. ADMIN. CODE). The regulation states: "The medical staff shall be composed of physicians and, where dental or podiatric services are provided, dentists or podiatrists." *See generally* 36 CAL. JUR. 3d *Healing Arts and Institutions* §§ 1-197 (1977 & Supp. 1990).

8. *Rank*, 51 Cal. 3d at 30, 793 P.2d at 19, 270 Cal. Rptr. at 813.

9. *Id.*

10. CAL. HEALTH & SAFETY CODE § 1316.5 (West 1990).

11. 1978 Cal. Stat. 285-86.

ship between psychiatrists and psychologists was still significantly strained. Psychiatrists were trained as medical doctors and could therefore perform surgery, prescribe drugs, and administer shock treatment.¹² Psychologists, on the other hand, were not trained medical doctors and therefore were legally prohibited from performing such services.¹³ The controversy specifically focused on the allocation of power pursuant to the admission, diagnosis and treatment of mental patients. Psychologists claimed to be as qualified as their medically trained counterparts to admit mental patients and to maintain primary responsibility over their care and treatment.

III. STATEMENT OF THE CASE

In an attempt to clarify further the meaning and implementation of section 1316.5, the DHS enacted regulations, within its statutory authority, precluding hospitals from allowing psychologists to take the leading role in the initial admission and diagnosis of mental patients.¹⁴ This was an attempt to assign primary responsibility to the medically trained psychiatrists. Upon admission, and after the psychiatrist made an initial diagnosis, the patient would be assigned to the proper health care worker for treatment, be it a physician or psychologist. However, the psychiatrist would maintain ultimate control over the treatment plan. Looming in the shadows of section 1316.5 was the fear that psychologists were simply not qualified to handle the initial determination and treatment of a patient's medical condition.

The California Association of Psychology Providers (hereinafter CAPP) brought an action against the DHS asking the court to declare the departmental regulations invalid as violative of statutory

12. CAL. BUS. & PROF. CODE § 2038 (West 1990).

13. Compare CAL. BUS. & PROF. CODE §§ 2903, 2038 (West 1990).

14. CAL. CODE REGS. tit. 22, §§ 70577(d)(1), 71203(a)(1)(A) (1990) (formerly CAL. ADMIN. CODE). The regulations both read as follows: "A psychiatrist shall be responsible for the diagnostic formulation for each patient and the development and implementation of the individual patient's treatment plan." It is significant to note that only acute psychiatric hospitals (§ 71203(a)(1)(A)) and general acute care hospitals with psychiatric departments (§ 70577(d)(1)) are affected by the regulations and the court's decision. Thus, general acute care hospitals without psychiatric departments are not governed by the regulations. Psychologists practicing at such hospitals do so merely as consultants, and thus, their ability to admit and treat patients is not addressed by the court's decision. HANSON, BRIDGETT, MARCUS, VLAHOS OF RUDY, *California Supreme Court Confirms Decision Concerning Clinical Psychologists' Rights in Psychiatric Hospitals*, in UPDATE, A REPORT ON RECENT LEGAL DEVELOPMENTS (September 24, 1990) (newsletter from the firm's San Francisco office to clients) [hereinafter UPDATE].

law.¹⁵ In granting CAPP's motion for summary judgment, the trial court ruled that the challenged regulations were invalid.¹⁶ However, this ruling was overturned when the court of appeals held that statutory law did not necessitate a repeal of the departmental regulations.¹⁷ The California Supreme Court subsequently granted certiorari to the court of appeals to consider the case.¹⁸

IV. THE COURT'S DECISION

A. *The Majority Opinion*

After deciding preliminary procedural issues, the court proceeded to address the viability of the regulations.¹⁹ The court's analysis consisted primarily of four sections: (1) the scope of review; (2) the "plain meaning" of 1316.5; (3) the legislative intent behind the statute; and (4) the statute's anti-discrimination provision.

The court first considered the scope of review.²⁰ It is undisputed that the accepted standard of review for a regulation enacted by an administrative agency dictates that a court may only strike down the regulation when it is "arbitrary or capricious."²¹ However, the ma-

15. California Ass'n of Psychology Providers v. Rank, No. C 502929 (Super. Ct. Apr. 11, 1986).

16. *Id.*

17. California Ass'n of Psychology Providers v. Rank, 214 Cal. App. 3d 1207, 247 Cal. Rptr. 641 (1988).

18. California Ass'n of Psychology Providers v. Rank, 758 P.2d 623, 250 Cal. Rptr. 295 (1988).

19. *Rank*, 51 Cal. 3d at 9-10, 793 P.2d at 5-6, 270 Cal. Rptr. at 799-800. The court addressed three procedural questions: appealability, standing to appeal and mootness. Originally, the plaintiffs brought seven causes of action. Because the trial court only granted summary judgment on the seventh cause of action, there was a question as to whether there was a final judgment. However, because the seventh cause of action, a declaratory judgment action to render the regulations void, was determinative of the case, the court held that there was a final judgment. *Id.* at 9, 793 P.2d at 5, 270 Cal. Rptr. at 799.

The court also determined that the California Hospital Association had standing as it was directly affected by the invalidation of the regulations because it was a member hospital of the DHS and subject to the Departments' regulation. *Id.* at 10, 793 P.2d at 6, 270 Cal. Rptr. at 800. However, there was a question of standing pursuant to two other appellants, the California Medical Association and the California Psychiatric Association. Nevertheless, the court held that they were sufficiently affected since the ruling narrowed the scope of responsibilities of all physicians, particularly psychiatrists. *Id.*

Lastly, the court considered mootness because the DHS amended the regulations and removed the requirement that psychiatrists have primary responsibility for patients after the trial court's ruling which invalidated the regulations. *Id.* However, because the DHS only amended the regulations pursuant to a court order, the court held that the issue was not moot. *Id.* This was most likely due to the fact that if the Supreme Court decided the case in favor of the appellants, the DHS would change the regulations back. *Id.* at 9-10, 793 P.2d at 5-6, 270 Cal. Rptr. at 799-800.

20. *Id.* at 11, 793 P.2d at 6-7, 270 Cal. Rptr. at 800-01.

21. *Pitts v. Perluss*, 58 Cal. 2d 824, 377 P.2d 83, 27 Cal. Rptr. 19 (1962) (noting that the court did not substitute its own judgment for that of the regulating body). The

majority argued that where a regulation threatens to alter, amend or impair the scope of a statute, the regulation can be invalidated simply if it "transgresses statutory power."²²

Next, the court considered the "plain meaning" of the statute. Section 1316.5 states that in hospitals which appoint psychologists to their staff, the psychologists may perform all medical services within the scope of their licensure.²³ The statute goes on to say that where a health service can legally be performed by both a psychiatrist and a psychologist, the service may be performed by either, without discrimination.²⁴ Additionally, in clarifying the "scope of licensure" for a psychologist, the court looked to the Business and Professional Code section 2903, which defines the practice of psychology as including the "diagnosis, prevention, treatment and amelioration of psychological problems."²⁵ The court reasoned that because psychologists have the right to act within their licensure, and since the practice of psychology includes diagnostic treatment, psychologists may not be precluded from diagnosing and treating mental patients in acute care hospitals.²⁶ However, the challenged regulation specifically referred to the exclusive authority of a psychiatrist in *admitting* mental patients, while the statute was silent as to that authority. Thus, in a footnote, the court expanded the meaning of the statute by ruling

dissent points out that the regulations were not challenged as being arbitrary or capricious. *Rank*, 51 Cal. 3d at 23, 793 P.2d at 15, 270 Cal. Rptr. at 809.

22. *Rank*, 51 Cal. 3d at 11-12, 793 P.2d at 6-7, 270 Cal. Rptr. at 800-01. *But see infra* notes 58 and 83 and accompanying text for a discussion of the dissent's criticism on this point. In the duration of its argument, the majority does not give the departmental regulations any deference or weight. Generally, the burden is on the complaining party to prove that the regulations are unreasonable. *See* 70 C.J.S. *Physicians and Surgeons* § 54 (1987). Yet, the court seems to take the stance that the regulations must prove themselves before being acceptable. It could be argued that the only statutory authority which the regulations "transgress" is that which the majority implies from section 1316.5. *See Rank*, 51 Cal. 3d at 13 n.7, 793 P.2d at 8 n.7, 270 Cal. Rptr. at 802 n.7.

23. CAL. HEALTH & SAFETY CODE § 1316.5 (West 1990). It is important to note that the court's holding does not require hospitals to allow psychologists on their medical staffs. Moreover, hospitals who do appoint psychologists to their staff have the power to determine the terms and conditions governing such appointments. *See* Letter from Ellingsen, Christensen & Van Hall to Clients and Friends (July 2, 1990) (regarding the California Supreme Court's decision in *CAPP v. Rank*).

24. CAL. HEALTH & SAFETY CODE § 1316.5 (West 1990). In its conclusion, the majority states that hospitals may adopt non-discriminatory rules governing their psychologists, scope of authority. However, the court gives no direction as to what a non-discriminatory rule would entail. *Rank*, 51 Cal. 3d at 21, 793 P.2d at 13-14, 270 Cal. Rptr. at 807-808.

25. *See supra* note 5 and accompanying text.

26. *Rank*, 51 Cal. 3d at 13, 793 P.2d at 8, 270 Cal. Rptr. at 802. *See also* CAL. BUS. PROF. CODE § 2903 (West 1990).

that "the psychologist's statutory authority to carry the responsibility of diagnosis and treatment *implies* the authority to admit patients for these purposes."²⁷

Because of the deficiency of case law on this issue, the court turned to an examination of the legislative history of section 1316.5. The court first analyzed several previous bills which were rejected by the legislature — Senate Bill numbers 259, 1443 and 181, and Assembly Bill number 3592.²⁸ Next, the declaration of findings and purpose that accompanied the statute were discussed.²⁹ Then, the court looked at an opinion by the Legislative Counsel and an opinion of the Attorney General.³⁰

When Senate Bill number 259 was originally introduced, it contained a subdivision which specifically gave primary responsibility for a patient's care to the psychologist who admitted the patient.³¹ However, this subdivision was deleted before the bill was passed.³² Likewise, when an amendment to Senate Bill number 1443 was contemplated, giving psychologists exclusive authority over patients, the proposed language was deleted before the bill was passed.³³ Finally, the 1983 Legislature defeated Senate Bill number 181³⁴ which attempted to implement language giving psychologists primary responsibility for diagnosing and treating patients.³⁵ The implication of these proposals was that the legislature clearly communicated three times that it did not approve of apportioning such authority to psychologists.

To rebut this line of argument, the court turned to Assembly Bill number 3592 and to the declaration of findings and purpose in conjunction with section 1316.5.³⁶ The court first evaluated the legisla-

27. *Rank*, 51 Cal. 3d at 13 n.7, 793 P.2d at 8 n.7, 270 Cal. Rptr. at 802 n.7 (emphasis added). It should be noted that the authority to admit patients is not mentioned in either the statute or the legislative committee notes after the statute. In effect, the court has added to the statute.

28. *Rank*, 51 Cal. 3d at 14-15, 793 P.2d at 9, 270 Cal. Rptr. at 803. The senate bills included language similar to that contained in the more recent court ordered regulations. Thus, because all three of the senate bills were defeated in the legislature, the dissent argued that this was evidence of legislative intent to deny imparting this additional power on the psychologists. *Id.* at 29, 793 P.2d at 19, 270 Cal. Rptr. at 813 (Kenard, J., dissenting). Similarly, the majority argued that because the legislature rejected the assembly bill, which contained language similar to the old DHS regulations, the legislative intent was to confer upon the psychologists the authority to admit and diagnose mental inpatients. *Id.* at 15, 793 P.2d at 9, 270 Cal. Rptr. at 803.

29. *Id.* at 16, 793 P.2d at 10-11, 270 Cal. Rptr. at 804-05.

30. *Id.* at 17, 793 P.2d at 11, 270 Cal. Rptr. at 805.

31. Cal. S. 259, 1977-78 Reg. Sess. § 2 (1978).

32. Cal. S. 259, 1977-78 Reg. Sess. (1978) (as amended Jan. 19, 1978).

33. Cal. S. 1443, 1979-80 Reg. Sess. § 1 (1980) (as amended May 7, 1980); 1980 Cal. Stat. 2178.

34. 5 CAL. ASSEMBLY DAILY J. p. 9356-57 (Sept. 14, 1983).

35. Cal. S. 181, 1983-84 Reg. Sess. (1984).

36. The court never rebutted the dissent's argument that in deleting these provi-

tive action pursuant to Assembly Bill number 3592 which stated that "a psychiatrist shall be responsible for the diagnostic formulation and the development and implementation of the treatment plan."³⁷ In arguing that the wording of this bill was almost identical to the wording of the DHS regulation, the court reasoned that because the bill was rejected by the legislature, the DHS regulations must also be rejected as being contrary to legislative intent.³⁸

In order to clarify its position, the court next turned to the declaration of the legislature's findings and purpose which accompanied the statute. The court pointed out that in enacting this statute, the legislature specifically stated its purpose to provide "greater availability of licensed psychologists within health facilities," and to allow patients to continue to receive care from their own psychologist after being admitted to a hospital.³⁹ Thus, the court focused on the language in the declaration stating that by giving psychologists greater access to hospitals, the legislature intended to change "present law."⁴⁰ Since no germane laws existed at the time, the court posited that the legislature, in referring to "present law," must have been alluding to the DHS regulations.⁴¹

Lastly, the court sought approval from the opinions of the Attorney General and Legislative Counsel to give weight to its position. After section 1316.5 was enacted in 1978, the Attorney General responded to the statute in an unpublished opinion.⁴² Moreover, the Legislative Counsel also reacted in a written opinion.⁴³ Both opinions state that under section 1316.5, a psychologist may exercise primary responsibility for the admission, referral and treatment of

sions in Bills 259, 1443, and 181, the legislature intended to prevent psychologists from having primary responsibility for patients. See *Rank*, 51 Cal. 3d at 30, 793 P.2d at 19, 270 Cal. Rptr. at 813 (Kennard, J., dissenting).

37. Cal. A. 3592, 1985-86 Reg. Sess. (1986).

38. *Rank*, 51 Cal. 3d at 15, 793 P.2d at 9, 270 Cal. Rptr. at 803. The dissent, however, pointed out that the legislature never actually defeated this bill: "That bill, however, was never addressed by the Legislature or even by a legislative committee." *Id.* at 29, 793 P.2d at 19, 270 Cal. Rptr. at 813 (Kennard, J., dissenting). According to the Assembly Final History of the California legislature, this bill was dismissed from the Committee on Health "without further action." See [1985-86 Reg. Sess.] 2 CAL. ASSEMBLY FINAL HISTORY 2273.

39. 1978 Cal. Stat. 286.

40. *Rank*, 51 Cal. 3d at 16, 793 P.2d at 10, 270 Cal. Rptr. at 804.

41. *Id.*

42. *Id.* (quoting Letter from California Attorney General to Sen. Paul B. Carpenter (Mar. 15, 1979) (regarding opinion of California Legislative Counsel, No. 16615)).

43. *Id.* (quoting opinion of California Legislative Counsel, No. 16615 (Jan. 4, 1979) (regarding psychologists' use of health facilities)).

patients in acute care hospitals.⁴⁴ The court argued that if either of these opinions misconstrued the law, the legislature could have clarified their intent when they amended section 1316.5 in 1980.⁴⁵ The majority inferred that by not taking such measures, the legislature was, in effect, communicating that they agreed with the opinions.⁴⁶ As to the legal authority of the Attorney General and Legislative Counsel opinions, the court argued that while they are not binding, they are persuasive.⁴⁷

The court next argued that in order to ascertain the true meaning

44. It is quite interesting that the court does not refer to another attorney general opinion reflecting a different demeanor toward the issue that was published *after* the letter to Senator Carpenter. On September 29, 1983, John Van De Kamp responded to a question posed by Senator Carpenter. The question pertained to sections 1288 and 1242 of the Business and Professions Code which provided that clinical laboratories may provide medical testing services for licensed practitioners of the healing arts. See CAL. BUS. & PROF. CODE §§ 1288, 1242 (West 1990). Carpenter asked whether psychologists fall within the category of practitioners under the statute. The answer of the attorney general was a resounding "no." Although psychologists were judged to be licentiates of the "healing arts," because of their legal impotence to puncture the skin, they were not permitted to perform or authorize skin tests. In responding to this question, Van De Kamp included a poignant analysis of section 2903. He stated,

By its terms psychologists therefore are licensed to render *psychological* services involving the application of *psychological* principles, methods and procedures including administering and interpreting *mental* tests. Not surprisingly, the key word in the statutory description of their practice is "psychological." That of course is defined as of or pertaining to "psychology," which in turn is defined as "the science of the *mind* or of *mental phenomena and activities*"; "a method of obtaining knowledge about mental processes." (WEBSTERS THIRD NEW INTERNAT. DICT. (1971 ed. at 1833) . . . Accordingly, we do not believe the Legislature ever intended the practice of licensed psychology to include the diagnosis and treatment of either (1) physical or organic disorders by means of physical or nonphysical instrumentalities; or (2) mental disorders by investigations and analyses of the body's organic as opposed to mental processes. Those endeavors, which would construe the practice of medicine, would have to be performed by licensed physicians and surgeons."

66 Op. Att'y. Gen 308-09 (1983) (emphasis in original).

45. *Rank*, 51 Cal. 3d at 17, 793 P.2d at 10, 270 Cal. Rptr. at 804-05.

46. *Id.* at 17, 793 P.2d at 10, 270 Cal. Rptr. at 805. To support its contention of legislative acquiescence, the court cites two cases, *Meyer v. Board of Trustees*, 195 Cal. App. 2d 420, 15 Cal. Rptr. 717 (1961) (emphasizing the deference to be given to attorney general opinions) and *Ventura v. City of San Jose*, 151 Cal. App. 3d 1076, 199 Cal. Rptr. 216 (1984) (noting that the legislature would have acted affirmatively on the opinion if it was not accurate). However, in both of these cases, the opinions of the attorney general, which were presumed to be known to the legislature, were both *published*. The majority takes some liberty in analogizing these two cases to the present case because, here, the attorney general opinion was not published. An unpublished opinion has a lower probability of being seen by the legislature. In the case of unpublished opinions, a better rule would be a presumption that the legislature has not seen the opinion. This presumption would then have to be overcome by the party invoking the authority of the attorney general opinion. Nonetheless, as the dissent points out, the rule of legislative inaction is a "slim reed upon which to lean" particularly where it is applied to non-binding authority. See *Rank*, 51 Cal. 3d at 32, 793 P.2d at 21, 270 Cal. Rptr. at 815 (quoting *Quinn v. State of California*, 15 Cal. 3d 162, 175, 539 P.2d 761, 769, 124 Cal. Rptr. 1, 9 (1975)).

47. *Rank*, 51 Cal. 3d at 17, 793 P.2d at 11, 270 Cal. Rptr. at 805. The court, however, neither offered evidence to show that the legislature was aware of either opinion,

of a statute, one must look to the statute as a whole, and in determining legislative intent, the entire statute must be examined.⁴⁸ Although the first line of section 1316.5 clearly gives hospitals the prerogative to admit psychologists to hospital staffs, the statute goes on to give psychologists the *right* to perform duties within the scope of their licensure and to not be discriminated against regarding services that can be legally performed by both psychologists and psychiatrists.⁴⁹ The court propounded that the statutory language prohibiting discrimination between psychiatrists and psychologists in areas where both are equally qualified undermines any kind of hospital hierarchy where psychiatrists have authority over psychologists in the admission and diagnosis of patients.⁵⁰

Justice Broussard concluded his opinion with an analysis of the opinion of the court of appeals. Broussard rejected the argument of the lower court that a physician must first "[rule] out a medical basis for the patient's mental disorder" before transferring control over the patient to a psychologist.⁵¹ Appellants argued that because hospitalized patients usually have more severe disorders than would normally be treated by a psychologist on an outpatient basis, a medical doctor should initially be required to screen the patient for any medical problems.⁵² However, the court called attention to the fact that in defining the scope of licensure of a psychologist, section 2903 does not delineate between inpatient or outpatient care.⁵³ Moreover, because section 1316.5 gives individual hospitals the right to determine the extent to which they will allow psychologists to exercise authority, the court should not abrogate the hospital's power by legislating

nor law which mandates the presumption that legislatures are aware of attorney general opinions or legislative opinions.

48. *Id.* at 18, 793 P.2d at 11, 270 Cal. Rptr. at 805. See also *Weber v. County of Santa Barbara*, 15 Cal. 2d 82, 86, 98 P.2d 492, 494 (1940); *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 23 Cal. 3d 458, 478, 595 P.2d 592, 604, 156 Cal. Rptr. 14, 26 (1979).

49. *Rank*, 51 Cal. 3d at 18, 793 P.2d at 12, 270 Cal. Rptr. at 806. However, the psychologist's authority does not include the diagnosis and treatment of organic medical conditions. Thus, a psychologist may be "discriminated against" in these areas, just as a family doctor may be "discriminated against" when it comes to performing brain surgery. In these areas there really is no discrimination at all. It is merely a question of qualifications and training.

50. *Id.*

51. *Id.* at 19, 793 P.2d at 12, 270 Cal. Rptr. at 806.

52. *Id.* Appellant's argument was in response to appellee's claim that psychologists regularly diagnose patients in their offices. Therefore, they are often called to recognize organic medical disorders and refer patients to medical doctors. See *infra* note 60 and accompanying text.

53. *Id.*

any such restrictions.⁵⁴

The court then addressed the lower court's ruling that before a psychologist is assigned a patient, a physician must first rule out any medical problem. Here, the court identified the difficulty in distinguishing between "organic" and "psychological" sicknesses, and declared that because the distinction is blurred, there is no reason to elevate one profession over another in apportioning power, particularly in the face of an "anti-discrimination" clause.⁵⁵

In conclusion, the court held that the legislature chose to prohibit discrimination against psychologists, and vested hospitals with the authority to determine regulations on hospital practice.⁵⁶ Section 1316.5 has given hospitals the freedom to determine the degree of authority to be given to psychologists. Consequently, the DHS regulations prohibiting a psychologist from exercising primary responsibility over the admission, diagnosis, treatment and discharge of patients at an inpatient hospital are invalid.⁵⁷

B. *The Dissent*

In her dissent, Justice Kennard chastised the majority for "grant[ing] by litigation what could not be achieved by legislation."⁵⁸ She argued that the majority dodged appropriate standards of judicial review, flouted the authoritative DHS regulations, and performed juridical gymnastics in analyzing the legislative history.⁵⁹ Kennard concluded that by enacting the regulations, the DHS was well within the bounds of its authority.⁶⁰

Pursuant to the scope of review, Kennard agreed with the majority that in order for the regulations to be invalid they must "transgress statutory power."⁶¹ However, she claimed that the majority did not give the required deference and weight to the DHS's interpretation of section 1316.5.⁶²

54. *Id.*

55. *Id.* at 20, 793 P.2d at 12-13, 270 Cal. Rptr. at 806-07.

56. *Id.* at 21, 793 P.2d at 13, 270 Cal. Rptr. at 807.

57. *Id.*

58. *Id.* at 22, 793 P.2d at 14, 270 Cal. Rptr. at 808.

59. *Id.*

60. *Id.* at 33, 793 P.2d at 21, 270 Cal. Rptr. at 815.

61. *Id.* at 22, 793 P.2d at 14, 270 Cal. Rptr. at 808.

62. *Id.* at 23, 793 P.2d at 15, 270 Cal. Rptr. at 809. The majority cited several cases giving authority to this proposition. See *Morris v. Williams*, 67 Cal. 2d 733, 433 P.2d 697, 63 Cal. Rptr. 689 (1967); *Dyna-Med, Inc. v. Fair Employment & Housing Comm'n*, 43 Cal. 3d 1379, 743 P.2d 1323, 241 Cal. Rptr. 67 (1987); *Hittle v. Santa Barbara County Employees Retirement Ass'n*, 39 Cal. 3d 374, 703 P.2d 73, 216 Cal. Rptr. 733 (1985). The majority's reliance on *Morris v. Williams* is persuasive. In *Morris*, the court held that "[a]dministrative regulations that alter or amend the statute or *enlarge or impair its scope* are void and courts not only may, but *it is their obligation* to strike down such regulations." *Morris*, 67 Cal. 2d at 748, 433 P.2d at 707, 63 Cal. Rptr. at 699 (emphasis added). Here, the regulations go beyond the scope of the statute by prohibiting hospi-

In beginning its statutory analysis, the dissent briefly pointed out that nowhere in the statute is there any express language giving psychologists primary responsibility for the admission, diagnosis or treatment of mental patients.⁶³

Next, in response to the majority's contention that the definition of "scope of licensure" under section 2903 includes diagnosis of mental patients, Kennard argued that the section was intended to apply only to outpatient offices, not to inpatient hospitals.⁶⁴ Moreover, section 2903 specifically states that the scope of licensure only includes the diagnosis of "psychological" problems, and consequently does not include the diagnosis of medical problems which can only be legally treated by a medical doctor.⁶⁵ Simply put, because a psychiatrist's training is more comprehensive than that of a psychologist, including organic medicine *and* psychology, it is only logical to have psychiatrists make the initial determination as to whether a patient needs medical or psychological treatment, or both.⁶⁶ After the initial diagnosis, the patient can then be effectively assigned to the appropriate health care professional.

To demonstrate the legal distinctions between psychiatrists and psychologists, the dissent referred to the State Medical Practices Act which states that only doctors, including psychiatrists, may legally diagnose physical and mental disorders.⁶⁷ Psychiatrists, unlike psychologists, may legally perform surgery, prescribe drugs, and administer electroconvulsive therapy.⁶⁸ In contrast, a psychologist is allowed only to diagnose and treat mental and emotional disorders, and psychological problems.⁶⁹ Further, because section 1316.5 says nothing about the authority of psychologists to admit patients into

tals from giving primary responsibility to psychologists. In so restricting the hospitals, the regulations inhibit hospitals in a way not contemplated by the statute. In that sense, they enlarge the statute. It also could be argued that because the aim of the statute is to give hospitals broad discretion in their utilization of psychologists, the regulations impair the scope of the statute by taking the power away from the hospitals.

63. *Rank*, 51 Cal. 3d at 24, 793 P.2d at 15, 270 Cal. Rptr. at 809.

64. *Id.* The majority responded to this contention by asserting that in their definition of "scope of licensure," the statutes made no distinction between inpatient and outpatient facilities. In their private outpatient offices, psychologists must daily diagnose mental patients and refer them to physicians when appropriate. The majority would argue that hospitals are no different. If a physician is needed, the psychologist can always refer the patient to one. *Id.* at 12-13, 793 P.2d at 8, 270 Cal. Rptr. at 802.

65. *Id.* at 24, 793 P.2d at 15, 270 Cal. Rptr. at 809.

66. *Id.* at 25, 793 P.2d at 16, 270 Cal. Rptr. at 810.

67. CAL. BUS. & PROF. CODE §§ 2900-18 (West 1990).

68. Compare CAL. BUS. & PROF. CODE §§ 2038, 2903, & 2904 (West 1990).

69. See CAL. BUS. & PROF. CODE § 2903 (West 1990).

hospitals or the power of psychologists to have primary responsibility over patients, the appropriate governing department, the DHS, should have the final say, not the courts.⁷⁰

The dissent next responded to the majority's interpretation of the "anti-discrimination" clause of section 1316.5. This clause states that regarding services which a psychiatrist and a psychologist are both authorized to perform, the service may be discharged by either, without discrimination.⁷¹ However, the statute does not even address the issue of who will have "primary responsibility" over the patient.⁷² Discussing the assertion of section 1316.5 that psychologists must be given membership on hospital staffs, Kennard contended that the section goes no further than merely allowing health facilities to permit psychologists to be on hospital staffs and to have a voice in the policy-making procedure.⁷³ Moreover, because the anti-discrimination rule does not apply to the exercise of primary responsibility over patients or to the admission of patients, the statute is consistent with the DHS regulations.⁷⁴

Next, the dissent addressed the legislative history of section 1316.5. Senate Bill No. 259, introduced by Senator Carpenter in 1978, provided that a psychologist may not be precluded from exercising primary responsibility over a patient admitted to a hospital upon referral of a licensed psychologist.⁷⁵ This provision, however, was deleted before the bill, containing the current section 1316.5, was passed.⁷⁶ Moreover, in 1980, Senator Carpenter introduced Senate Bill No. 1443 which would have given psychologists primary responsibility for the admission and diagnosis of mental patients in acute care facilities.⁷⁷ Once again, this provision was deleted before the bill was passed.⁷⁸ Kennard argued that the deletion of these provisions was evidence that the Legislature did not intend such an interpretation of section 1316.5.⁷⁹

70. *Rank*, 51 Cal. 3d at 33, 793 P.2d at 21, 270 Cal. Rptr. at 815.

71. CAL. HEALTH & SAFETY CODE § 1316.5 (West 1990).

72. *Rank*, 51 Cal. 3d at 24, 793 P.2d at 15, 270 Cal. Rptr. at 809. In addition, the statute does not mention anything pertaining to the admission or diagnosis of a patient. It merely discusses treatment. Furthermore, as the clause only applies to treatments which can legally be performed by a psychiatrist or a psychologist, it does not address the diagnosis or treatment of medical problems which can legally be administered only by a medical doctor. Evidently, the majority infers all of this from the statute. See CAL. HEALTH & SAFETY CODE, § 1316.5 (West 1990).

73. *Rank*, 51 Cal. 3d at 27, 793 P.2d at 18, 270 Cal. Rptr. at 812.

74. *Id.*

75. Cal. S. 259, 1977-78 Reg. Sess. § 2 (1978).

76. Cal. S. 259 1977-78 Reg. Sess. (1978) (as amended Jan. 19, 1978).

77. Cal. S. 1443, 1979-80 Reg. Sess. § 1 (1980).

78. Cal. S. 1443, 1979-80 Reg. Sess. (1980) (as amended May 7, 1980).

79. *Rank*, 51 Cal. 3d at 29, 793 P.2d at 18, 270 Cal. Rptr. at 812. To support this proposition, the dissent cited *United States v. Security Industrial Bank*, 459 U.S. 70, 81-82 (1982). It is significant that the majority never attempts to refute this argument.

April of 1983 brought yet another attempt by Senator Carpenter to get his interpretation of section 1316.5 enacted into law. Senate Bill No. 181, amended in April of 1983, proposed that 1316.5 be amended to give psychologists diagnostic responsibilities and authority over their own patients or patients referred to them.⁸⁰ On September 14, 1983, the assembly rejected this bill.⁸¹

To explain its position further, the dissent recounted the historical background of section 1316.5. When the section was enacted, psychologists were greatly restricted in their participation in, and access to, hospitals.⁸² This was a problem for hospitalized patients who wanted to continue to receive care from their personal psychologists.⁸³ Therefore, section 1316.5 was an attempt to give psychologists free access to hospitals and to afford them positions on hospital staffs.⁸⁴

The dissent expressed disnay at the majority's use of the opinions of the Attorney General and Legislative Counsel. To begin, Kennard reiterated that the opinions of an attorney general or a legislative counsel are not binding.⁸⁵ Furthermore, not only were the opinions to which the majority referred never published, they were written in 1979, four years before the court even considered amending section 1316.5.⁸⁶ The dissent also pointed out that the majority proffered no evidence to show that the opinions of the Attorney General or the Legislative Counsel were known to the legislature, and the court set forth no rule of law stating that such knowledge must be presumed.⁸⁷ The dissent concluded this portion of its opinion by pointing out that while the majority heavily relied on unpublished unauthoritative opinions of the Attorney General and the Legislative Counsel, they gave very little deference to the published regulations of the DHS which legally should be given great weight.⁸⁸

80. Cal. S. 181, 1983-84 Reg. Sess. (1984) (as amended Apr. 13, 1983).

81. 5 CAL. ASSEMBLY DAILY J. 9356-57 (Sept. 14, 1983). This was the third attempt to pass through the legislature giving psychologists primary authority over patients. Incidentally, nine months after this third attempt failed, the plaintiffs filed the present lawsuit. *Rank*, 51 Cal. 3d at 29, 793 P.2d at 19, 270 Cal. Rptr. at 813.

82. *Rank*, 51 Cal. 3d at 30, 793 P.2d at 19, 270 Cal. Rptr. at 813. See also *supra* note 7 and accompanying text.

83. *Rank*, 51 Cal. 3d at 31, 793 P.2d at 20, 270 Cal. Rptr. at 814.

84. *Id.* However, the statute does not go so far as to determine the authority of psychologists pursuant to the admission or diagnosis of patients. See CAL. HEALTH & SAFETY CODE § 1316.5 (West 1990).

85. *Rank*, 51 Cal. 3d at 31, 793 P.2d at 20, 270 Cal. Rptr. at 814.

86. *Id.* However, earlier in its argument, the dissent implied that only the attorney general opinion was unpublished. *Id.* at 31, 793 P.2d at 20, 270 Cal. Rptr. at 814.

87. *Id.* at 32, 793 P.2d at 20, 270 Cal. Rptr. at 814.

88. *Id.* at 33, 793 P.2d at 21, 270 Cal. Rptr. at 815.

In conclusion, the dissent claimed that by ignoring the DHS's interpretation of the statute and by obscuring the plain message of the legislative history, the majority "succumbed to the temptation to substitute its judgment for that of the legislature and the [DHS]."⁸⁹

V. IMPACT

Surprisingly, the immediate impact of *CAPP v. Rank* in the medical community will be nominal. It is true that by striking down the DHS regulations, the court substantially altered the roles of psychologists and psychiatrists in hospitals. However, in 1986, the trial court ruled in favor of the psychologists, and pursuant to the resulting court order, the DHS amended the disputed regulations to reflect increased authority for psychologists. These amended regulations have been in effect for over four years, thus, the court's ruling will not affect the legality of these new regulations. Moreover, the DHS regulations that were struck down only applied to free standing psychiatrists' hospitals and general acute care hospitals with psychiatric departments, which constitute only 20% of all California hospitals.⁹⁰

Additionally, although it was not given substantial consideration by the court's opinion, the role of psychotropic drugs seems to be a major factor in the controversy. Evidently, 90-98% of all mental patients admitted to hospitals received drugs.⁹¹ Thus, in virtually every case, psychiatrists will be required to examine the patient in order to prescribe the drugs.

This high proportion of drug prescriptions for mental patients presents two problems. Financially, patients will be required to pay two doctors instead of one; one doctor to prescribe the drugs and another doctor to administer treatment. Moreover, this could present legal problems for hospitals and staff psychologists with regard to possible malpractice exposure.

Where at one time only one doctor could both diagnose and treat mental patients and prescribe drugs, now two health professionals may be required: one for the mental diagnosis and one to prescribe the drugs. Where there are two doctors, there are two salaries and two bills to be paid, resulting in higher costs to the patient. Moreover, as to liability, under the old regulations, psychologists were never allowed to admit, diagnose or maintain primary responsibility

89. *Id.*

90. Telephone interview with Pat Keith, Department of Health Services (Nov. 13, 1990). Telephone interview with Bonnie Darwin, California Hospital Association (Nov. 12, 1990).

91. Telephone interview with Collette Hughes, Protection and Advocacy, San Francisco (November 14, 1990).

over patients with possible organic medical conditions. In contrast, hospitals now have broad discretion over the admission of psychologists to hospital staffs, as well as the duties assigned to the psychologists. However, with broad discretion comes broad possibilities that psychologists will negligently prescribe or fail to prescribe an appropriate treatment. Hospitals and staff psychologists could open themselves up to malpractice suits for negligence by failing to properly diagnose and treat a mental patient's adverse organic medical condition.⁹²

One commentator has suggested that hospitals could give the added authority to the psychologists and still avoid liability by implementing a set of guidelines designed to educate and train psychologists in the area of organic medical conditions. Possible policies could be (1) to require psychologists to demonstrate the ability to recognize medical conditions compelling the intervention of a psychiatrist; (2) to set guidelines which mandate the circumstances in which a psychologist must request a psychiatrist for consultation; and (3) to provide regular evaluations of each psychologist to ensure their continued conformity to hospital practices governing admission and treatment of mental patients.⁹³

VI. CONCLUSION

In *CAPP v. Rank*, the California Supreme Court ruled that acute care hospitals may not be compelled to require a psychiatrist to maintain primary responsibility for the admission, diagnosis and treatment of mental patients. After a grueling struggle in the courts and the legislature between psychiatrists and psychologists, the court's decision represents a victory for clinical psychologists who now have the opportunity to stand on equal footing with their psychiatric counterparts.

As a result of *CAPP*, hospitals, not the courts or the DHS, will make the decision as to the amount of responsibility given to psychologists in acute care facilities. Although hospitals are not required to allow psychologists on staff, once they choose to do so, section 1316.5 causes certain rights to flow to psychologists. These include the right to hold membership and serve on committees, the right to carry pro-

92. See generally 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 222-25 (9th ed. 1988 & Supp. 1990); 36 CAL. JUR. 3D *Healing Arts and Institutions* §§ 136-96 (1977 & Supp. 1990).

93. See UPDATE, *supra* note 14, at 2.

fessional responsibilities within the scope of their licensure, and the right to perform services offered by the facility, which the psychologists are legally permitted to perform, without discrimination. Moreover, the court held that psychologists may also admit, diagnose and treat mental patients on an equal basis with psychiatrists.

In reaching their decision, the court struck down two regulations enacted by the Department of Health Services in 1978 and amended in 1980 which mandated that in acute care hospitals psychiatrists must exercise primary authority over the admission, diagnosis and treatment of mental patients.

The psychiatrists argue that because psychologists have no organic medical training, they should not be the ones to initially diagnose or direct the treatment of patients who may have an organic medical problem. After all, patients could suffer extreme consequences if a psychologist gave an incorrect medical diagnosis.

On the other hand, psychologists argue that if they are not given primary responsibility for patients, then patients will be deprived from the care of their personal psychologist when they enter the hospital. Moreover, the overbearing psychiatrists might commandeer the treatment plan and may even force mental patients to take harmful drugs against their own personal psychologists' judgment.

As a result of *CAPP*, hospitals can now allow psychologists to be the "captain of the ship." Whether they actually will do that is yet to be seen. On the other hand, perhaps hospitals will shed the authoritarian model altogether and try the team approach where each health care professional performs his or her job efficiently, competently, and equally.

In the future there will most certainly be a continuing battle in the legislature for control of mental patient facilities, resulting in increased litigation and still more court decisions. Unfortunately, if psychiatrists and psychologists in our society who are supposed to be experts in human relations and conflict management cannot overcome the lure of money and power and arrive at some amiable compromise themselves, what does that say for the rest of us?

BRADLEY R. KIRK

XI. INSURANCE LAW

- A. *A stipulation of an insured's liability signed by the insured, insurer and third party claimant, and entered as a judgment, constitutes a final judicial determination requisite for a third party claimant to sue an insurer for unfair practices under Section 790.03(h) of the California Insurance Code. California State Automobile Association Inter-Insurance Bureau v. Superior Court.*

In *California State Automobile Association Inter-Insurance Bureau v. Superior Court*,¹ the California Supreme Court² held that a stipulation of an insured's liability which is signed by the insurer and later entered as a judgment, constitutes a final judicial determination requisite to bring an unfair practice claim against the insurer pursuant to section 790.03(h) of the California Insurance Code.³ In reach-

1. 50 Cal. 3d 658, 788 P.2d 1156, 268 Cal. Rptr. 284 (1990). Third-party claimant brought a personal injury action against the insured as a result of a March 1983 automobile versus automobile accident, in which the insured allegedly drove down a one-way street while intoxicated and struck claimant. In May 1987, the insured, his insurer and the third-party claimant stipulated to the following: the insured admitted liability, the insured agreed to pay claimant \$175,000 in damages, and the claimant reserved her rights against the insurer. The trial court entered judgment in accordance with this signed stipulation. Thereafter, the claimant brought suit against the insurer alleging that the insurer had committed unfair practices in violation of Insurance Code section 790.03(h) in the course of settling the personal injury suit. The insurer, petitioner in the case at bar, moved for judgment on the pleadings. Petitioner argued that a stipulated judgment does not satisfy the judicial determination of an insured's liability mandated by *Moradi-Shalal Fireman's Fund Ins. Co.*, 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988), as a requisite to pursuing a Section 790.03(h) claim. The trial court denied the motion. The Prerequisite court of appeal issued a peremptory writ of mandate to petitioner, and directed the trial court to vacate its order and enter a new order granting petitioner's motion for judgment on the pleadings. In a unanimous decision, the California Supreme Court reversed. *California State Auto Inter-Ins. Ass'n*, 50 Cal. 3d at 662, 788 P.2d at 1157-58, 268 Cal. Rptr. at 285-86.

2. The opinion was written by Chief Justice Lucas with Justices Mosk, Panelli, Eagleson, Kennard and Klein concurring. Justice Broussard wrote a separate concurring opinion.

3. In *Royal Globe Ins. Co. v. Superior Court*, 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979), the California Supreme Court held that a private party may pursue an unfair practice claim against an insurance company pursuant to section 790.03(h) of the California Insurance Code. In 1988, the California Supreme Court *prospectively* overruled its decision in *Royal Globe*, and held that Insurance Code section 790.03(h) does not confer a statutory cause of action upon private parties to sue insurance companies for unfair practices. *Moradi-Shalal*, 46 Cal. 3d at 287, 758 P.2d at 58, 250 Cal. Rptr. at 116. Respondent, a third-party claimant, brought a section 790.03(h) unfair practice suit against petitioner, an insurer, before the *Moradi-Shalal* decision was final and thus her claim was not barred by the *Moradi-Shalal* decision.

Insurance Code section 790.03, subdivision (h) prohibits sixteen unfair and deceptive acts or practices. CAL. INS. CODE § 790.03(h) (West Supp. 1991).

ing this conclusion, the court reiterated its holding in *Moradi-Shalal v. Fireman's Fund Insurance Company*⁴ that "a conclusive judicial determination of the insured's liability"⁵ is a condition precedent to a section 790.03(h) unfair practice cause of action.

In *Moradi-Shalal*, the California Supreme Court decided that a settlement was an "insufficient conclusion of the underlying action"⁶ for purposes of pending *Royal Globe* third-party section 790.03(h) suits.⁷ Thus, the issue before the court in *California State Automobile Association* was whether a settlement which is incorporated into a stipulated judgment is likewise insufficient.⁸ Ultimately, the court found that it was not.⁹

In *California State Automobile Association*, the court explained that an enforceable claim against an insurance company does not arise until liability of its insured is established.¹⁰ In a settlement, liability of an insured is not established. Thus, a post-settlement third-party claimant would need to establish the liability of the insured within the section 790.03(h) action itself in order to obligate the insurer.¹¹ Further, the incentive of settlement would dissipate since the insurer and third party would be required to litigate the issue of liability despite the settlement.¹² Post-settlement protection of insurers serves as an incentive to settle.¹³ The court found that it was these considerations which prompted the court in *Moradi-Shalal* to

4. See *supra* note 3.

5. *Moradi-Shalal*, 46 Cal. 3d at 306, 758 P.2d at 69, 250 Cal. Rptr. at 127 (defining *Royal Globe's* requirement of a "conclusion" of the action for surviving *Royal Globe* cause of actions).

6. *Id.* at 306, 758 P.2d at 69-70, 250 Cal. Rptr. at 127-28. See *id.* at 304, 758 P.2d at 69-70, 250 Cal. Rptr. at 126-27, for a review of post-*Moradi* remedies. See also Note, *Loosing the Fox Amongst the Chickens: The California Supreme Court Overrules Royal Globe in Moradi Shalal v. Fireman's Fund Insurance Company*, 22 LOY. L. REV. 1267 (1989); California Practicum, *The Overruling of Royal Globe: A "Royal Bonanza" for Insurance Companies, But What Happens Now?*, 16 PEPPERDINE L. REV. 763 (1989); Note, *Compromising Position: Moradi-Shalal v. Fireman's Fund Insurance Company — Insured's Liability as a Bad Suit Requisite*, 17 SW. U.L. REV. 707 (1988).

7. *Moradi-Shalal*, 46 Cal. 3d at 306, 758 P.2d at 69-70, 250 Cal. Rptr. at 127-28. See generally 11 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* § 94 (1990); 39 CAL. JUR. 3D *Insurance Companies* § 40 (1977 & Supp. 1990); 39 CAL. JUR. 3D *Insurance Contracts and Coverage* §§ 410-413, 426-31, 498 (1977 & Supp. 1990).

8. *California State Auto. Ass'n Inter-Ins. Bureau v. Superior Court*, 50 Cal. 3d 658, 661-62, 788 P.2d 1156, 1156-57, 268 Cal. Rptr. 284, 284-85 (1990).

9. *Id.* at 665, 788 P.2d at 1160, 268 Cal. Rptr. at 288.

10. *Id.* at 663, 788 P.2d at 1158, 268 Cal. Rptr. at 286 (citing *Moradi-Shalal*, 46 Cal. 3d at 306, 758 P.2d at 70, 250 Cal. Rptr. at 128). "Under an insurance contract, the insurer's obligation is to indemnify the insured to the extent of the insured's liability to the third party." *Id.*

11. *Id.* at 663, 788 P.2d at 1158, 268 Cal. Rptr. at 286 (citing *Moradi-Shalal*, 46 Cal. 3d at 311-12, 758 P.2d at 73-75, 250 Cal. Rptr. at 131-33).

12. *Id.*

13. *Id.*

find settlement an insufficient conclusion.¹⁴

However, the court found a stipulated judgment to be distinguishable from a settlement.¹⁵ First, a stipulated judgment is indeed a judgment in that it requires a judicial act and utilizes judicial discretion.¹⁶ Second, a stipulated judgment is given collateral estoppel effect if the parties manifest this intention.¹⁷ On this latter point, the court found that the insured, insurer and third-party claimant intended the stipulated judgment to have collateral estoppel effect as to the issue of the insured's liability.¹⁸ Finally, the serious practical and policy problems delineated by the court in *Moradi-Shalal* in its consideration of the finality of a settlement agreement are not implicated.¹⁹

Specifically, the issue of liability would not have to be litigated within the section 790.03(h) suit due to the collateral estoppel effect given to the stipulation of insured liability.²⁰ Furthermore, the advantage of settlement would be sustained since the parties would not be forced to relitigate a settled issue.²¹ Accordingly, the court re-

14. *California State Auto. Inter-Ins. Ass'n*, 50 Cal. 3d at 663, 788 P.2d at 1158, 268 Cal. Rptr. at 286.

15. *Id.* at 663-65, 788 P.2d at 1158-60, 268 Cal. Rptr. at 286-88. "In a stipulated judgment, or consent decree, litigants voluntarily terminate a lawsuit by assenting to specified terms, which the court agrees to enforce as a judgment." *Id.* at 663, 788 P.2d at 1158, 268 Cal. Rptr. at 286. See Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 325 (1988).

16. *California State Auto Inter-Ins. Ass'n*, 50 Cal. 3d at 663-64, 788 P.2d at 1158-59, 268 Cal. Rptr. at 286-87. "If parties to pending litigation stipulate . . . for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." CAL. CIV. PROC. CODE § 664.6 (West 1987) (emphasis added).

17. In a footnote, the court explained that the states are split as to whether a stipulated judgment should be given collateral estoppel effect. *California State Auto Inter-Ins. Ass'n*, 50 Cal. 3d at 664-65 n.2, 788 P.2d at 1159 n.2, 268 Cal. Rptr. at 287 n.2. Furthermore, the case law in California is split on this issue. *Id.* See, e.g., *Gates v. Superior Court*, 178 Cal. App. 3d 301, 223 Cal. Rptr. 678 (1986) (stipulated judgment given collateral estoppel effect). *But see, e.g., Travelers Indemnity Co. v. State Farm Mutual Auto. Ins. Co.*, 330 F.2d 250, 262 (9th Cir. 1964) (stipulated judgment not given collateral estoppel effect). The court declined to rule on the issue. Instead, the court ruled that where the parties have evidenced an intent to be collaterally bound, that intent will be upheld. *California State Auto Inter-Ins. Ass'n*, 50 Cal. 3d at 664-65 n.2, 788 P.2d at 1159 n.2, 268 Cal. Rptr. at 287 n.2.

18. *Id.* at 664-65 & n.2, 788 P.2d at 1159 & n.2, 268 Cal. Rptr. at 287 & n.2.

19. *Id.* at 665, 788 P.2d at 1160, 268 Cal. Rptr. at 288 (citing *Moradi-Shalal*, 46 Cal. 3d at 311, 758 P.2d at 73, 250 Cal. Rptr. at 131). See *supra* notes 11-13 and accompanying text.

20. *California State Auto Inter-Ins. Ass'n*, 50 Cal. 3d at 665, 788 P.2d at 1160, 268 Cal. Rptr. at 288. See *supra* notes 11-13 and accompanying text.

21. *California State Auto Inter-Ins. Ass'n*, 50 Cal. 3d at 665, 788 P.2d at 1160, 268 Cal. Rptr. at 288.

versed the court of appeal and held that a stipulation of an insured's liability which is signed by the insurer and entered as a judgment will be treated as a final judgment for purposes of pre-*Moradi-Shalal* section 790.03(h) unfair practice lawsuits.²²

ERIN E. NUGENT

- B. *Proposition 103's mandatory renewal provision does not apply to nonrenewal notices sent by insurers who have complied with statutory withdrawal application requirements: Travelers Indemnity Co. v. Gillespie.*

I. INTRODUCTION

*Travelers Indemnity Company v. Gillespie*¹ confronted the California Supreme Court with the issue of whether insurers who had applied for withdrawal and submitted their certificates of authority for cancellation could issue notices of nonrenewal to California policyholders contrary to Proposition 103's mandatory renewal provision.² In deciding that they could, the supreme court held the mandatory renewal provision inapplicable to insurers engaged in statutory withdrawal from the California insurance market.³

The mandatory renewal provision, adopted as part of the Proposition 103 insurance initiative⁴ and embodied in section 1861.03(c) of the California Insurance Code, provides that a notice of nonrenewal or cancellation will be effective only if based on certain specified grounds.⁵ Typically, an insurer who wishes to withdraw from the California insurance market will attempt to "run-off"⁶ as many of its existing automobile policies as possible in order to avoid reinsuring such policies.⁷ The mandatory renewal provision assured California

22. *Id.*

1. 50 Cal. 3d 82, 785 P.2d 500, 266 Cal. Rptr. 117 (1990) (en banc).

2. *Id.* at 85, 785 P.2d at 501, 266 Cal. Rptr. at 118.

3. *Id.* at 103, 785 P.2d at 514, 266 Cal. Rptr. at 131.

4. CAL. GEN. ELECTION BALLOT PAMPHLET, Proposition 103 (Nov. 8, 1988) (ballot included five different initiatives). See generally CAL. CONST. art. II, § 8(d) (California initiative process); 38 CAL. JUR. 3D *Initiative and Referendum* §§ 1-34 (1977 & Supp. 1990); 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 120-125 (9th ed. 1988 & Supp. 1990); Comment, *New Limits on the California Initiative: An Analysis and Critique*, 19 LOY. L.A.L. REV. 1045 (1986).

5. CAL. INS. CODE § 1861.03(c) (West Supp. 1991). The statute provides: "[A] notice of cancellation or nonrenewal of a policy for automobile insurance shall be effective only if it is based on one or more of the following reasons: (A) nonpayment of premium; (B) fraud or material misrepresentation affecting the policy or insured; (C) a substantial increase in the hazard insured against." *Id.*

6. The term "run-off" refers to the "orderly termination of existing policies over a period of time by cancellation and/or nonrenewal." *Travelers Indem. Co.*, 50 Cal. 3d at 88 n.8, 785 P.2d at 503 n.8, 266 Cal. Rptr. at 120 n.8.

7. *Id.* at 108, 785 P.2d at 517, 266 Cal. Rptr. at 134 (Broussard, J., dissenting). Section 1071.5 of the California Insurance Code imposes a reinsurance and assumption ob-

insureds that no "run-offs" would occur before initiation of the withdrawal process.⁸

The majority in *Travelers*, however, was unwilling to grant that protection during the pendency of a withdrawal application. The court reasoned that insurers had the right to discontinue California business and that "nonrenewal of existing automobile policies is a logical and integral part of the orderly winding up of a withdrawing insurer's affairs."⁹

II. HISTORICAL BACKGROUND

A. California Withdrawal Provisions

Sections 1070 through 1076 of the California Insurance Code govern the process of insurer withdrawal from the California insurance market.¹⁰ Section 1070 sets forth the requirements of a withdrawal application: (1) payment of fees, (2) surrender of certificate of authority to commissioner, (3) executed application to withdraw, and (4) affidavit submitting authority for such execution.¹¹

Before an insurer will be allowed to withdraw, liabilities to California residents must be discharged pursuant to the terms of Insurance Code section 1071.5 (the "discharge/reinsurance provision").¹² "In the case of its policies insuring residents of this State it shall cause

ligation upon insurers who wish to withdraw. See *infra* notes 12-14 and accompanying text for an explanation and the text of section 1071.5.

8. Before enactment of Proposition 103's mandatory renewal provision, an insurer could run-off its business by cancellation or nonrenewals at any time and for any reason. *Travelers Indem. Co.*, 50 Cal. 3d at 109, 785 P.2d at 518, 266 Cal. Rptr. at 134-35 (Broussard, J., dissenting).

9. *Id.* at 103, 785 P.2d at 514, 266 Cal. Rptr. at 131.

10. The withdrawal statutes, enacted in 1935, remain essentially unchanged. CAL. INS. CODE § 1070 (West 1972) (citing Stats. 1935, c. 145, p. 557 & historical note). See generally 39 CAL. JUR. 3D *Insurance Companies* § 152 (1977 & Supp. 1990) (withdrawal of insurers from state).

11. "Any insurer, upon payment of the fees and costs therefor and surrender to the commissioner of its certificate of authority, may apply to withdraw from this State. Such application shall be in writing, duly executed, accompanied by evidence of due authority for such execution, and properly acknowledged." CAL. INS. CODE § 1070 (West 1972).

12. Every insurer which withdraws as an insurer, or is required to withdraw as an insurer, from this State shall, prior to such withdrawal, discharge its liabilities to residents of this State. In the case of its policies insuring residents of this State it shall cause the primary liabilities under such policies to be reinsured and assumed by another admitted insurer. In the case of such policies as are subject to cancellation by the insurer, it may cancel such policies pursuant to the terms thereof in lieu of such reinsurance and assumption.

CAL. INS. CODE § 1071.5 (West 1972).

the primary liabilities under such policies to be reinsured and assumed by another admitted insurer.”¹³ In lieu of reinsurance and assumption, an insurer may cancel those policies subject to cancellation.¹⁴

Thereafter, the Insurance Commissioner will examine the books and records of an insurer who has applied to withdraw to ensure compliance with section 1071.5.¹⁵ If the insurer does comply, the commissioner “shall” cancel the insurer’s certificate of authority and grant the insurer’s application to withdraw.¹⁶ Significantly, the California ballot initiative, Proposition 103,¹⁷ did not alter the withdrawal provisions.¹⁸

B. Calfarm Insurance Co. v. Deukmejian

In *Calfarm Insurance Company v. Deukmejian*,¹⁹ the California Supreme Court assumed original jurisdiction and issued an alternative writ in order to promptly consider various challenges made to the validity of Proposition 103.²⁰ The supreme court unanimously held most of Proposition 103’s provisions facially constitutional.²¹ Those provisions deemed unconstitutional²² did not defeat Proposi-

13. *Id.*

14. *Id.*

15. CAL. INS. CODE § 1072 (West 1972). Section 1072 provides in pertinent part: The commissioner shall make, or cause to be made by the insurance authority of the State where the insurer is organized, an examination of the books and records of the insurer. If, upon such examination, he finds that the insurer has no outstanding liabilities to residents of this State and no policies in favor of the residents of this State uncanceled or the primary liabilities under which have not been reinsured and assumed by another admitted insurer, as required by Section 1071.5, he shall cancel the insurer’s certificates of authority, if unexpired, and he shall permit the insurer to withdraw.

Id.

16. *Id.*

17. CAL. GEN. ELECTION BALLOT PAMPHLET, Proposition 103 (Nov. 8, 1988). See generally *California Supreme Court Survey*, 17 PEPPERDINE L. REV. 561 (1990) (background of the Proposition 103 insurance rate reduction and control initiative).

18. *Travelers Indem. Co.*, 50 Cal. 3d at 93, 785 P.2d at 507, 266 Cal. Rptr. at 124.

19. 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989). For complete coverage of the *Calfarm* decision, see *California Supreme Court Survey*, 17 PEPPERDINE L. REV. 561 (1990).

20. *Calfarm Ins. Co.*, 48 Cal. 3d at 812, 771 P.2d at 1249, 258 Cal. Rptr. at 163. See *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982); *Hardie v. Eu*, 18 Cal. 3d 371, 556 P.2d 301, 134 Cal. Rptr. 201 (1976).

21. *Calfarm Ins. Co.*, 48 Cal. 3d at 842, 771 P.2d at 1270, 258 Cal. Rptr. at 184.

22. The *Calfarm* court held that the insolvency standard embodied in Insurance Code section 1861.01(b) violated the due process clauses of the state and federal constitutions. *Calfarm Ins. Co.*, 48 Cal. 3d at 821, 771 P.2d at 1256, 258 Cal. Rptr. at 170 (referring to CAL. INS. CODE § 1861.01(b) (West Supp. 1990)). The court further held that section 1861.10’s consumer advocacy provision violated the California Constitution. *Id.* at 832, 771 P.2d at 1263, 258 Cal. Rptr. at 177 (referring to CAL. INS. CODE § 1861.10 (West Supp. 1990)). The court refrained from deciding the constitutionality of section 12202.1 of the Revenue and Taxation Code, which imposed increased tax rates upon

tion 103 because the court found them severable from the rest of the initiative.²³

Most importantly, the *Calfarm* court held that the mandatory renewal provision was applicable to all policies in force on Proposition 103's effective date.²⁴ In reaching this conclusion, the court considered both the language and purpose of the mandatory renewal provision. The court explained that the language of the mandatory renewal provision did not limit its applicability to post-Proposition 103 policies, whereas other provisions did state such a limitation.²⁵ Furthermore, the policy behind the mandatory renewal provision, assuring Californians continued coverage and preventing a mass of responsive nonrenewals, mandated this retrospective application.²⁶

The court further held that the retrospective application of the mandatory renewal provision to existing policies did not unconstitutionally impair the obligations of contract.²⁷ The court reasoned that the mandatory renewal provision's moderate restrictions on nonrenewal were more than justified by strong policy interests including the assurance of insurance affordability and availability to Californians.²⁸

insurers, as no such taxes had yet been collected. *Id.* at 815, 771 P.2d at 1251-52, 258 Cal. Rptr. at 166.

23. *Id.* at 842, 771 P.2d at 1270, 258 Cal. Rptr. at 184. There are three criteria for severability; "the invalid provision must be grammatically, functionally, and volitionally separable." *Id.* at 821-22, 771 P.2d at 1256, 258 Cal. Rptr. at 170. See *Santa Barbara School Dist. v. Superior Court*, 13 Cal. 3d 315, 530 P.2d 605, 118 Cal. Rptr. 637 (1975); *People's Advocate, Inc. v. Superior Court*, 181 Cal. App. 3d 316, 226 Cal. Rptr. 640 (1986).

24. *Calfarm Ins. Co.*, 48 Cal. 3d at 827, 771 P.2d at 1260, 258 Cal. Rptr. at 174. See *supra* note 5 (text of mandatory renewal provision). "Before enactment of Proposition 103 insurers had an unfettered right to refuse to renew policies." *Calfarm Ins. Co.*, 48 Cal. 3d at 826, 771 P.2d at 1259, 258 Cal. Rptr. at 173. See *Greene v. Safeco Ins. Co.*, 140 Cal. App. 3d 535, 538, 189 Cal. Rptr. 616, 618 (1983) (insurance company under no obligation to renew policy).

25. *Calfarm Ins. Co.*, 48 Cal. 3d at 827, 771 P.2d at 1260, 258 Cal. Rptr. at 174.

26. *Id.*

27. *Id.* at 831, 771 P.2d at 1263, 258 Cal. Rptr. at 177. See U.S. CONST. art. II, § 10; CAL. CONST. art. I, § 9. See also 39 CAL. JUR. 3D *Insurance Contracts* § 6 (1977 & Supp. 1990); 16A C.J.S. *Constitutional Law* §§ 283, 356, 362 (1984 & Supp. 1990).

28. *Calfarm Ins. Co.*, 48 Cal. 3d at 831, 771 P.2d at 1262-63, 258 Cal. Rptr. at 176-77. The court also found that public safety can warrant state interference with existing contract rights pursuant to the state's police powers. *Id.* at 828-30, 771 P.2d at 1260-62, 258 Cal. Rptr. at 174-76. See *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *Hinckley v. Bechtel Corp.*, 41 Cal. App. 3d 206, 116 Cal. Rptr. 33 (1974).

III. STATEMENT OF THE CASE

A. *Factual Background*

Five related insurance companies (the “applicants”) jointly applied to withdraw from the California insurance market on November 7, 1988.²⁹ Californians were to vote on the infamous Proposition 103 the very next day.³⁰ This joint application was sent to the Department of Insurance (the “Department”) and contained each insurer’s certificate of authority, applications to withdraw, and statutory filing fees.³¹ In accordance with the discharge/reinsurance provision,³² each application provided that The Travelers Indemnity Company of Illinois would assume the primary liabilities of their California policies with the exception of automobile policies.³³ Correspondingly, the applicants gave oral notice to the Department that it was their intention to not renew their automobile policies.³⁴

The cover letter accompanying the withdrawal applications specified that the applications were contingent upon passage of Proposition 103.³⁵ On November 8, 1988, California voters approved Proposition 103.³⁶ Proposition 103 contained a mandatory renewal provision which delineated the circumstances in which an insurer can cancel or refuse to renew a policy.³⁷ The applicants began to issue notices of nonrenewal to their automobile insurance policyholders on November 9, 1988.³⁸ The basis for these nonrenewals was not among the grounds specified in Proposition 103’s mandatory renewal provision.³⁹

On November 17, 1988, the applicants sent the Department a proposed plan for their withdrawal.⁴⁰ Twelve days later, the Department formally acknowledged the withdrawal applications but found

29. *Travelers Indem. Co. v. Gillespie*, 50 Cal. 3d 82, 87, 785 P.2d 500, 502-03, 266 Cal. Rptr. 117, 119-20 (1990). The insurance companies included The Travelers Indemnity Company, The Charter Oak Fire Insurance Company, The Travelers Indemnity Company of America, The Travelers Indemnity Company of Rhode Island, and the Phoenix Insurance Company. *Id.*

30. *Id.* See *supra* notes 4-5 and accompanying text.

31. *Travelers Indem. Co.*, 50 Cal. 3d at 87, 785 P.2d at 502-03, 266 Cal. Rptr. at 119-20.

32. See *supra* note 12.

33. *Travelers Indem. Co.*, 50 Cal. 3d at 87, 785 P.2d at 503, 266 Cal. Rptr. at 120.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 88, 785 P.2d at 503, 266 Cal. Rptr. at 120 (citing CAL. INS. CODE § 1861.03(c) (West Supp. 1990)). See *supra* note 5 for text of code.

38. *Travelers Indem. Co.*, 50 Cal. 3d at 88, 785 P.2d at 503, 266 Cal. Rptr. at 120.

39. *Id.*

40. *Id.* Pursuant to this plan, the applicants would eliminate most of their California insurance business over a period of time by cancellation and nonrenewal and would reinsure their group disability policies. To this end, the applicants requested the Insurance Commissioner to waive the discharge/reinsurance provision as applied to ex-

fault with the proposed plan.⁴¹ On December 12, 1988, the applicants proposed two alternative plans and requested that the Department approve one of them.⁴²

Instead of approving a plan, on December 23, 1988, the Department notified the applicants of noncompliance with the mandatory renewal provision of Insurance Code section 1858.1.⁴³ The nonrenewal notices issued by the applicants after Proposition 103's effective date formed the basis of this alleged violation. The applicants responded to the notices the same day and agreed to a public hearing.⁴⁴

The public hearing was conducted on January 4, 1989.⁴⁵ The hearing officer was the Department's chief counsel.⁴⁶ At the hearing,⁴⁷ the applicants argued that the notices of nonrenewal did not violate the mandatory renewal provision,⁴⁸ while the Department contended precisely the opposite.

After a review of the entire record, which included the hearing officer's unpublished decision, the Commissioner concluded that the mandatory renewal provision applied to all policies active on Proposition 103's effective date.⁴⁹ Furthermore, an insurer's actions to withdraw from the California insurance market did not alter this result, although the mandatory renewal provision would not apply in in-

isting automobile policies. This request was denied. *Id.* at 88-89, 785 P.2d at 503-04, 266 Cal. Rptr. at 120-21.

41. *Id.* at 88-89, 785 P.2d at 503-04, 266 Cal. Rptr. at 120-21.

42. *Id.* at 89, 785 P.2d at 504, 266 Cal. Rptr. at 121. The Travelers Indemnity Company of Rhode Island rescinded its application to withdraw. *Id.* Purportedly, neither of the two newly proposed plans necessitated a waiver of the discharge/reinsurance provision. *Id.*

43. *Id.* (citing CAL. INS. CODE § 1858.1 (West 1972) (notice to correct noncompliance)).

44. *Id.* at 90, 785 P.2d at 504, 266 Cal. Rptr. at 121.

45. *Id.*

46. *Id.* at 90, 785 P.2d at 505, 266 Cal. Rptr. at 122.

47. The Department argued that the scope of the hearing inquiry should be confined to the fact that the applicants issued notices of nonrenewal after the effective date of Proposition 103 which were in violation of its mandatory renewal provision. The Department's attempt to exclude evidence pertaining to the applicants withdrawal efforts was rejected by the hearing officer. *Id.*

48. *Id.* at 91, 785 P.2d at 505, 266 Cal. Rptr. at 122. Petitioners argued that:

(1) the mandatory renewal provision applied only to policies issued or renewed on or after the effective date of Proposition 103, and (2) the mandatory renewal provision did not apply to insurers who had submitted applications to withdraw from the California insurance market and tendered their certificates of authority for cancellation.

Id.

49. *Id.* at 91, 785 P.2d at 505, 266 Cal. Rptr. at 122.

stances where withdrawal was formally effective.⁵⁰

The applicants petitioned the Supreme Court of California for a writ of mandate in order to obtain a review of the Commissioner's decision.⁵¹ The petition presented, and the supreme court addressed, three issues:

(1) whether the mandatory renewal provision applies to all policies in force on November 9, 1988; (2) whether the mandatory renewal provision applies to insurers who have submitted applications to withdraw as insurers in California and have tendered their certificates of authority for cancellation; and (3) whether the Commissioner is required to disclose the hearing officer's decision.⁵²

IV. CASE ANALYSIS

A. *Majority Opinion*

In an opinion written by Justice Kaufman, the California Supreme Court reaffirmed that the mandatory renewal provision applied to all policies in force on Proposition 103's effective date.⁵³ The court also held that the mandatory renewal provision does not apply to nonrenewal notices sent by insurers engaged in statutory withdrawal and that the Commissioner did not have to disclose the hearing officer's decision.⁵⁴

1. The mandatory renewal provision applies to all policies in force on the effective date of Proposition 103.

In *Calfarm Insurance Company v. Deukmejian*,⁵⁵ the California Supreme Court held that Proposition 103's mandatory renewal provision constitutionally applied to all policies in force on its effective date.⁵⁶ Petitioners conceded this, and the court summarily noted that the first issue had been resolved.⁵⁷

50. *Id.* Accordingly, the Commissioner ordered the insurers to renew their automobile policies and to rescind the previously issued notices of nonrenewal that did not comply with the mandatory renewal provision. *Id.* at 91, 785 P.2d at 505, 266 Cal. Rptr. at 123.

51. *Id.* at 91, 785 P.2d at 506, 266 Cal. Rptr. at 123. See CAL. INS. CODE § 1858.6 (West 1972); CAL. CIV. PROC. CODE § 1094.5 (West 1980 & Supp. 1991).

52. *Travelers Indem. Co.*, 50 Cal. 3d at 91-92, 785 P.2d at 506, 266 Cal. Rptr. at 123. The Commissioner argued, and the court agreed, that whether petitioners were presently entitled to withdraw was not at issue. However, the withdrawal steps undertaken by petitioners were relevant in determining the validity of the nonrenewals issued by petitioners. *Id.* at 92, 785 P.2d at 506, 266 Cal. Rptr. at 123.

53. *Id.* at 92, 785 P.2d at 506, 266 Cal. Rptr. at 123.

54. *Id.* at 103, 785 P.2d at 514, 266 Cal. Rptr. at 131.

55. *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989). See *supra* text accompanying notes 19-28.

56. *Id.* at 826-31, 771 P.2d at 1259-63, 258 Cal. Rptr. at 173-77.

57. *Travelers Indem. Co.*, 50 Cal. 3d at 92, 785 P.2d at 506, 266 Cal. Rptr. at 123.

2. The mandatory renewal provision does not apply to insurers who have complied with statutory withdrawal application requirements, including insurers who surrender their certificates of authority.

The court considered the legislative history and statutory language of the withdrawal statutes and Proposition 103, as well as pertinent case law, in concluding that the mandatory renewal provision did not apply to "withdrawing" insurers.⁵⁸ Significantly, the mandatory renewal provision of Proposition 103 does not purport to alter the efficacy of the withdrawal statutes.⁵⁹

The court found that the language and rationale in *Calfarm* confirmed that the mandatory renewal provision does not apply to insurers who employ the statutory withdrawal mechanism.⁶⁰ In *Calfarm*, the supreme court upheld the constitutionality of Proposition 103's mandatory renewal provision.⁶¹ In so holding, the *Calfarm* court relied on the fact that Proposition 103 did not prevent an insurer from withdrawing, but, instead, recognized that disconcerted insurers had the option to withdraw.⁶² The only means by which an insurer can discontinue active policies is by cancellation or expiration.⁶³ Since an insurer would be unable to discontinue its California business if required to comply with the mandatory renewal provision, *Calfarm* implied that a withdrawing insurer would not be bound by this provision.⁶⁴

According to the court, the language of Proposition 103 supports the conclusion that the mandatory renewal provision does not apply to a withdrawing insurer.⁶⁵ In so finding, the court pointed to section 1861.11 of the California Insurance Code, added by Proposition 103.⁶⁶

58. *Id.* at 92-98, 785 P.2d at 506-10, 266 Cal. Rptr. at 123-27.

59. *Id.* at 93, 785 P.2d at 507, 266 Cal. Rptr. at 124.

60. *Id.* at 93-94, 785 P.2d at 507, 266 Cal. Rptr. at 124.

61. *Calfarm Ins. Co. v. Dukemajian*, 48 Cal. 3d 805, 826-31, 771 P.2d 1247, 1259-63, 258 Cal. Rptr. 161, 173-77 (1989). See also *supra* text accompanying notes 19-28.

62. *Id.* at 831, 771 P.2d at 1262-63, 258 Cal. Rptr. at 176-77.

63. *Travelers Indem. Co.*, 50 Cal. 3d at 93-94, 785 P.2d at 507, 266 Cal. Rptr. at 123-24.

64. *Id.* at 94, 785 P.2d at 507-08, 266 Cal. Rptr. at 123-24.

65. *Id.* at 94, 785 P.2d at 507-08, 266 Cal. Rptr. at 124-25.

66. *Id.* (citing CAL. INS. CODE § 1861.11 (West 1990)). The court interpreted section 1861.11 to provide:

In the event that the commissioner finds that (a) insurers have substantially withdrawn from any insurance market covered by this article, including insurance described by Section 660 [automobile insurance], and (b) a market assist-

This section authorizes the establishment of a joint underwriting authority in instances where an insurer has substantially withdrawn from the California insurance market.⁶⁷ The court reasoned that this section necessarily contemplated a lapse of coverage.⁶⁸ Such lapse would not occur if withdrawing insurers were forced to comply with the mandatory renewal provision.⁶⁹ Thus, Proposition 103 itself recognized that the mandatory renewal provision would not apply to a withdrawing insurer.⁷⁰

The Commissioner claimed that insurers who complied with the mandatory renewal provision would be able to terminate California business by utilizing the reinsurance/assumption provision of the withdrawal statutes.⁷¹ The court found that this argument was premised on a misconception of the purpose and effects of a reinsurance and assumption agreement.⁷²

The court explained that a reinsurance and assumption agreement, whereby a reinsurer assumes the policy obligations of an insurer, results in joint liability of reinsurer and insurer.⁷³ Furthermore, the purpose of requiring withdrawing insurers to reinsure their policies was *not* to aid insurers by providing them with a release from liability, but rather to protect Californians.⁷⁴ Thus, the reinsurance/assumption provision was not intended to, and does not, enable an insurer to terminate his California insurance business.⁷⁵

The court went on to reject another plausible argument on the

ance plan would not be sufficient to make insurance available, the commissioner shall establish a joint underwriting authority in the manner set forth by Section 11891, without the prior creation of a market assistance plan.

Id. at 94 n.12, 785 P.2d at 507 n.12, 266 Cal. Rptr. at 124 n.12.

67. *Id.* at 94, 785 P.2d at 507-08, 266 Cal. Rptr. at 124-25 (citing CAL. INS. CODE § 1861.11 (West Supp. 1990)).

68. *Travelers Indem. Co.*, 50 Cal. 3d at 94, 785 P.2d at 507-08, 266 Cal. Rptr. at 125.

69. *Id.* at 94, 785 P.2d at 508, 266 Cal. Rptr. at 125.

70. *Id.*

71. *Id.* at 95, 785 P.2d at 508, 266 Cal. Rptr. at 125. The requirement of reinsurance and assumption embodied in section 1071.5 of the California Insurance Code is generally referred to as the discharge/reinsurance provision. *See supra* note 12 (text of discharge/reinsurance provision).

72. *Id.* at 95-98, 785 P.2d at 508-10, 266 Cal. Rptr. at 125-27.

73. *Id.* at 95-96, 785 P.2d at 508, 266 Cal. Rptr. at 125-26 (citing *Sawyer v. Sunset Mut. Life Ins. Co.*, 8 Cal. 2d 492, 496, 499, 66 P.2d 641, 644 (1937)); *Baer v. Associated Life Ins. Co.*, 202 Cal. App. 3d 117, 123, 248 Cal. Rptr. 236, 239 (1988) (direct liability of reinsurer to insureds). A reinsurance and assumption agreement is distinguishable from a pure reinsurance agreement. "A reinsurance contract is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance" and the original insured, thus, has no interest in it. *Travelers Indem. Co.*, 50 Cal. 3d at 95, 785 P.2d at 508, 266 Cal. Rptr. at 125 (citing CAL. INS. CODE §§ 620 & 623 (West 1972), respectively). *See also* *Ascherman v. General Reinsurance Corp.*, 183 Cal. App. 3d 307, 311-12, 228 Cal. Rptr. 1, 3 (1986) (insured has no interest or rights in reinsurance agreement).

74. *Travelers Indem. Co.*, 50 Cal. 3d at 97, 785 P.2d at 509, 266 Cal. Rptr. at 126.

75. *Id.* at 95-96, 785 P.2d at 508-09, 266 Cal. Rptr. at 125-26.

Commissioner's side: the insurer and reinsurer's joint obligation includes compliance with the mandatory renewal provision, but this obligation ceases to bind the insurer when withdrawal becomes final, although it continues to bind the reinsurer.⁷⁶ The court rejected this argument on several grounds. First, because Section 660(e) of the California Insurance Code does not allow a reinsurer to "renew" a policy, it would therefore be unreasonable to impose a renewal obligation upon reinsurers.⁷⁷ Second, since insurers could issue effective cancellations after their withdrawal was finalized, there would be no need to reinsure their automobile policies.⁷⁸ Third, the enactment of Proposition 103's joint underwriting provision reflects legislative recognition that Californians whose insurers withdrew would face a *laspe* in coverage. The court, therefore, found the Commissioner's argument inconsistent with this judicial interpretation of the joint underwriting provision.⁷⁹

In Part V of its opinion, the court refused to distinguish between an insurer whose withdrawal application has been approved and certificate of authority cancelled, and an insurer who has fulfilled the statutory withdrawal requirements but is awaiting Commissioner approval.⁸⁰ According to the court, such a distinction is necessarily premised on the theory that before cancellation of an insurer's certificate of authority, the insurer must be an "admitted insurer" bound by California statutory law, including the mandatory renewal provision.⁸¹ After an insurer's certificate is cancelled, an insurer becomes a "nonadmitted insurer" who can no longer service California policies.⁸²

The court discredited such a theory on several grounds. Foremost, the court noted that such an interpretation effectively eliminates the possibility of an insurer withdrawing from the California market.

76. *Id.* at 96, 785 P.2d at 509, 266 Cal. Rptr. at 126.

77. *Id.* at 97, 785 P.2d at 509-10, 266 Cal. Rptr. at 126-27 (citing CAL. INS. CODE § 660(e) (West 1972)). Section 660(e) of the California Insurance Code provides: "Renewal" or "to renew" means to continue coverage with either the insurer which issued the policy or an affiliated insurer . . . for an additional policy period upon expiration of the current policy period." CAL. INS. CODE § 660(e) (West Supp. 1991).

78. *Travelers Indem. Co.*, 50 Cal. 3d at 97, 785 P.2d at 510, 266 Cal. Rptr. at 127.

79. *Id.* at 97-98, 785 P.2d at 510, 266 Cal. Rptr. at 127. See *supra* note 64 for text of section 1861.11's joint underwriting provision.

80. *Id.* at 98-102, 785 P.2d at 510-13, 266 Cal. Rptr. at 127-30. California Insurance Code section 1070 delineates the requirements of a withdrawal application. See *supra* note 11 for the text of section 1070.

81. *Id.* at 98, 785 P.2d at 511, 266 Cal. Rptr. at 128.

82. *Id.*

This would result in an anomalous situation where the mandatory renewal provision would preclude an admitted insurer from making a "run-off"⁸³ of his automobile policies. Once that insurer is "nonadmitted," it would be unable to legally service the policies that it was forced to retain.⁸⁴ Second, the court explained that there are instances in which a nonadmitted insurer may service California policies.⁸⁵ Third, the court objected to the decisive use of "admitted" and "nonadmitted" in determining the applicability of the mandatory renewal provision. To this end, the court explained that not all of the Insurance Code provisions apply to all admitted insurers.⁸⁶

The court concluded that in order to ascertain whether a particular statute is applicable to an insurer, one must examine and "harmonize" the entire rubric of insurance law in order to discover the most reasonable interpretation.⁸⁷ The court reasoned that Proposition 103 did not overtly or impliedly alter the longstanding withdrawal statutes.⁸⁸ However, Proposition 103 would drastically affect the withdrawal statutes if its mandatory renewal provision was deemed applicable to insurers engaged in the process of withdrawal.⁸⁹ Enforcing the mandatory renewal provision upon withdrawing insurers would result in a greater amount of outstanding liability.⁹⁰ Such liability would be more difficult to reinsure and would substantially increase the burden upon the Commissioner.⁹¹ Furthermore, the court found renewing automobile policies fundamentally inconsistent with withdrawal. The court concluded that the most reasonable interpretation of the mandatory renewal provision was that it was not intended to apply, and did not apply, to withdrawing insurers.⁹²

The court went on to distinguish an insurer who had fulfilled the

83. See *supra* note 6.

84. *Travelers Indem. Co.*, 50 Cal. 3d at 99, 785 P.2d at 511, 266 Cal. Rptr. at 128.

85. *Id.* (citing CAL. INS. CODE § 1070.5 (West 1972)).

86. *Id.* at 99 n.17, 785 P.2d at 511 n.17, 266 Cal. Rptr. at 128 n.17. See CAL. INS. CODE § 700(b) (West Supp. 1991) (applicable to nonadmitted insurers); CAL. INS. CODE §§ 250-87, 331, 352 (West & Supp. 1991) (applicable to both admitted and nonadmitted insurers); CAL. INS. CODE §§ 1100.1, 1150, 1210, 1211.5 (Deering 1991) (applicable to some admitted insurers but not others).

87. *Id.* at 99-100, 785 P.2d at 511, 266 Cal. Rptr. at 128 (citing *Bowland v. Municipal Court*, 18 Cal. 3d 479, 489, 556 P.2d 1081, 1085, 134 Cal. Rptr. 630, 634 (1976)); see also *Select Base Materials, Inc. v. Board of Equal.*, 51 Cal. 2d 640, 645, 335 P.2d 672, 676 (1959).

88. *Travelers Indem. Co.*, 50 Cal. 3d at 100, 785 P.2d at 512, 266 Cal. Rptr. at 129.

89. *Id.* at 100, 785 P.2d at 512, 266 Cal. Rptr. at 129.

90. *Id.* "The liabilities it would be required to reinsure would be not merely those remaining after termination of its automobile policies, but all its automobile policies in force and each future policy resulting from compelled renewal during the pendency of its withdrawal application." *Id.*

91. *Id.*

92. *Id.* at 100-01, 785 P.2d at 512, 266 Cal. Rptr. at 129.

statutory requisites for withdrawal from other admitted insurers.⁹³ The withdrawing insurer, unlike other admitted insurers, may not write new business in California.⁹⁴ Furthermore, the surrender of its certificate of authority effects this change in status and evidences a commitment to the orderly winding down of business.⁹⁵ The court accordingly held that the mandatory renewal provision does not apply to insurers who withdraw, or who are withdrawing (*i.e.*, those who have complied with the statutory requirements for withdrawal).⁹⁶

3. The Commissioner was not required to reveal the hearing officer's decision.

Petitioners argued that "traditional notions of fair play and substantial justice" compel the Commissioner to disclose the hearing officer's decision.⁹⁷ The court rejected this contention on two grounds.

First, since there is no legal authority for compelling disclosure of a section 1858.1 proceeding,⁹⁸ the case was decided on stipulated facts and documentary evidence.⁹⁹ Thus, the hearing officer did not make any factual determinations, such as credibility of witnesses, that arguably would be accorded "great weight" upon review.¹⁰⁰ In fact, the hearing officer's decision ceased to have any legal relevance once it was rejected by the Commissioner.¹⁰¹

Second, although it is customary to disclose the hearing officer's decision in order to give parties an opportunity to comment before the agency renders its decision, this purpose is not served after the agency has rendered its decision, as in the instant case.¹⁰² Accordingly, the court held that the petitioners were not presently entitled to disclosure of the hearing officer's decision since there was no rec-

93. *Id.* at 101, 785 P.2d at 512-13, 266 Cal. Rptr. at 129-30. *See supra* note 11 (text of section 1070 which outlines the statutory withdrawal requirements).

94. *Travelers Indem. Co.*, 50 Cal. 3d at 101, 785 P.2d at 513, 266 Cal. Rptr. at 130.

95. *Id.* at 101, 785 P.2d at 512-13, 266 Cal. Rptr. at 129-30. Here, the court drew an analogy to a voluntary proceeding for winding up a corporation. *Id.* (citing CAL. CORP. CODE §§ 1900, 1901, 1903 (West 1977 & Supp. 1991)).

96. *Id.* at 101, 785 P.2d at 513, 266 Cal. Rptr. at 130.

97. *Id.* at 102, 785 P.2d at 513, 266 Cal. Rptr. at 130.

98. *Id.* at 102-03, 785 P.2d at 513-14, 266 Cal. Rptr. at 130-31. *See supra* note 41 and accompanying text.

99. *Travelers Indem. Co.*, 50 Cal. 3d at 102, 785 P.2d at 513, 266 Cal. Rptr. at 130.

100. *Id.* at 102-03, 785 P.2d at 513, 266 Cal. Rptr. at 130-31 (quoting *Garza v. Workmen's Comp. App. Bd.*, 3 Cal. 3d 312, 318-19, 475 P.2d 451, 456, 90 Cal. Rptr. 355, 360 (1970)).

101. *Id.* at 103, 785 P.2d at 514, 266 Cal. Rptr. at 131.

102. *Id.*

ognized authority to compel such a result, and there was no longer a useful purpose for such information.¹⁰³

4. Conclusion

In summary, the California Supreme Court held that the mandatory renewal provision does not apply to insurers who have completed the statutory requisites for withdrawal, including surrender of the certificate of authority.¹⁰⁴ The court further held that the petitioners had no present right to compel disclosure of the hearing officer's decision because it would serve no purpose in this case.¹⁰⁵ The supreme court ordered a writ of mandate directing the Commissioner to set aside her decision and issue another decision consistent with the court's opinion in this case.¹⁰⁶

B. Concurring and Dissenting Opinion

Justice Kennard concurred in the majority's conclusion that the mandatory renewal provision did not apply to insurers whose applications to withdraw had been approved by the Commissioner.¹⁰⁷ She agreed that, in the interests of certainty in the law and upholding Proposition 103's validity, it was appropriate for the court to rule on this issue even though it was not the factual scenario which confronted the court.¹⁰⁸

Justice Kennard, however, dissented to the majority's opinion that the mandatory renewal provision did not apply to insurers whose withdrawal applications had not yet been approved.¹⁰⁹ On this issue, Justice Kennard agreed with Justice Broussard's dissenting opinion.¹¹⁰

C. Dissenting Opinion

Justice Broussard was joined by Justice Mosk in his appraisal that insurers who have merely applied for withdrawal are subject to the mandatory renewal provision.¹¹¹ Justice Broussard noted that whether insurers whose withdrawal applications have been approved

103. *Id.* at 103, 785 P.2d at 514, 266 Cal. Rptr. at 131.

104. *Id.*

105. *Id.*

106. *Id.* at 103-04, 785 P.2d at 514, 266 Cal. Rptr. at 131.

107. *Id.* at 104, 785 P.2d at 514, 266 Cal. Rptr. at 131 (Kennard, J., concurring and dissenting).

108. *Id.* at 104, 785 P.2d at 514, 266 Cal. Rptr. at 131 (Kennard, J., concurring and dissenting) (citing *Sokol v. Public Utils. Comm'n*, 65 Cal. 2d 247, 257, 418 P.2d 265, 271, 53 Cal. Rptr. 673, 679 (1966)).

109. *Id.* (Kennard, J., concurring and dissenting).

110. *Id.* (Kennard, J., concurring and dissenting).

111. *Id.* at 114-15, 785 P.2d at 522, 266 Cal. Rptr. at 139 (Broussard, J., dissenting) (advocating support of Commissioner's ruling).

are subject to the mandatory renewal provision was not an issue before the court.¹¹² Accordingly, he found that the issue should not have been addressed and resolved by the majority.¹¹³

Justice Broussard argued that the purpose of Proposition 103 and the import of *Calfarm* support the conclusion that the mere act of applying for withdrawal should not entitle an insurer to issue nonrenewals.¹¹⁴ He noted that the express purpose of Proposition 103 was to provide Californians with insurance that was "fair, available, and affordable."¹¹⁵ This express purpose and the post-Proposition 103 danger of mass nonrenewals were cited by the court in *Calfarm* in upholding the retrospective application of the mandatory renewal provision.¹¹⁶ Justice Broussard remarked that allowing insurers to issue notices of nonrenewal before they have permission to withdraw adversely impacts the "availability" of insurance and facilitates mass exodus.¹¹⁷

Justice Broussard found the majority's decision to have a number of "pernicious effects."¹¹⁸ An applicant insurer that has issued nonrenewal notices can be denied withdrawal or may decide to retract her application.¹¹⁹ Under the majority view, many insureds will thus face a temporary lapse in coverage.¹²⁰ Similarly, he determined that the majority permits insurers that submit *conditional* withdrawal applications to immediately issue nonrenewals.¹²¹ Justice Broussard emphasized that all the problems of attempting to rectify a large

112. *Id.* at 105, 785 P.2d at 515, 266 Cal. Rptr. at 132 (Broussard, J., dissenting). The Commissioner had not yet approved The Travelers' application to withdraw. *See supra* text accompanying notes 38-42.

113. *Travelers Indem. Co.*, 50 Cal. 3d at 105, 785 P.2d at 515, 266 Cal. Rptr. at 132 (Broussard, J., dissenting).

114. *Id.* at 106, 785 P.2d at 516, 266 Cal. Rptr. at 133 (Broussard, J., dissenting).

115. *Id.* (Broussard, J., dissenting) (quoting *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 813, 771 P.2d 1247, 1250, 258 Cal. Rptr. 161, 164 (1989)).

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

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

118. *Id.* at 106-08, 785 P.2d at 516, 266 Cal. Rptr. at 133 (Broussard, J., dissenting).

119. *Id.* at 106-07, 785 P.2d at 516, 266 Cal. Rptr. at 133 (Broussard, J., dissenting).

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

121. *Id.* at 107, 785 P.2d at 516, 266 Cal. Rptr. at 134 (Broussard, J., dissenting). Justice Broussard criticized Travelers whose withdrawal application expressly reserved the right to withdraw in the event that Proposition 103 did not pass or was subsequently declared invalid. *Id.* Travelers issued its notices of nonrenewal immediately after Proposition 103 was adopted and did not wait to see if its second condition was fulfilled. *Id.* *See supra* text accompanying notes 35-37.

In addition, Justice Broussard questioned whether a conditional application satisfied section 1070's application requirements. *Travelers Indem. Co.*, 50 Cal. 3d at 107 n.4, 785 P.2d at 516 n.4, 266 Cal. Rptr. at 133 n.4 (Broussard, J., dissenting).

scale refusal to renew may be avoided by simply requiring insurers who submit withdrawal applications to comply with the mandatory renewal provision.¹²² Furthermore, Justice Broussard noted that the Commissioner had not yet fixed rates under Proposition 103.¹²³ When she does so, Justice Broussard commented that the majority's decision will enable insurers to withdraw from the state with great ease. These "pernicious effect[s]" further diminish Proposition 103's intended assurance of coverage.¹²⁴

Justice Broussard's interpretation of the language and purpose of the withdrawal statutes led him to conclude that Commissioner *approval* of a withdrawal application was the required, legally significant act.¹²⁵ Justice Broussard viewed the use of the word "withdrawal" in the withdrawal statutes as signifying the period of time after which the Commissioner had cancelled the certificate of authority.¹²⁶ The purpose of the withdrawal statutes, according to Justice Broussard, is to ensure the protection of California insureds.¹²⁷ This purpose is evidenced in part by the requirement that insurers discharge or reinsure their obligations before withdrawal.¹²⁸ Justice Broussard concluded that permitting insurers, who merely submit applications to withdraw, to issue nonrenewals is inconsistent with the language and purpose of the withdrawal statutes.¹²⁹

Justice Broussard noted that an insurer is deemed "admitted" until such time as the Commissioner approves the withdrawal application and cancels the insurer's certificate of authority.¹³⁰ Logically, an admitted insurer is bound to comply with the laws that govern admitted insurers, which include the mandatory renewal provision.¹³¹ Justice Broussard criticized the majority for creating a new type of insurer: an admitted insurer who is bound to all the laws governing

122. *Id.* at 112, 785 P.2d at 520, 266 Cal. Rptr. at 137 ("this whole can of worms can be avoided").

123. *Id.* at 107, 785 P.2d at 516, 266 Cal. Rptr. at 133 (Broussard, J., dissenting).

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

125. *Id.* at 109, 785 P.2d at 518, 266 Cal. Rptr. at 135 (Broussard, J., dissenting). *See supra* notes 10-17 and accompanying text (overview of the withdrawal statutes).

126. *Travelers Indem. Co.*, 50 Cal. 3d at 109, 785 P.2d at 518, 266 Cal. Rptr. at 135 (Broussard, J., dissenting).

127. *Id.* at 110, 785 P.2d at 518, 266 Cal. Rptr. at 135 (Broussard, J., dissenting) (citing *Baer v. Associated Life Ins. Co.*, 202 Cal. App. 3d 117, 123, 248 Cal. Rptr. 236, 239 (1988)).

128. *Id.* at 110, 785 P.2d at 518, 266 Cal. Rptr. at 135 (Broussard, J., dissenting) (citing CAL. INS. CODE § 1071.5 (West 1972)).

129. *Id.* at 110-11, 785 P.2d at 519, 266 Cal. Rptr. at 136 (Broussard, J., dissenting). Justice Broussard characterized the withdrawal statutes as remedial and advocated that they be liberally construed. *Id.* at 111, 785 P.2d at 519, 266 Cal. Rptr. at 136 (Broussard, J., dissenting) (citing *Bunner v. Imperial Ins. Co.*, 181 Cal. App. 3d 14, 21, 225 Cal. Rptr. 912, 915-16 (1986)).

130. *Id.* at 112, 785 P.2d at 520, 266 Cal. Rptr. at 137 (Broussard, J., dissenting).

131. *Id.* at 112-13, 785 P.2d at 520-21, 266 Cal. Rptr. at 137-38 (Broussard, J., dissenting).

admitted insurers *except* for the mandatory renewal provision and who can not issue new policies.¹³² He found that there was no statutory or decisional basis for this categorical distinction.¹³³

Justice Broussard concluded that Travelers, which had merely applied for withdrawal, was an admitted insurer who was bound by all the laws governing admitted insurers including the mandatory renewal provision.¹³⁴ Thus, he supported the Commissioner in her finding that the nonrenewal notices issued by Travelers were ineffective under California law.¹³⁵

V. IMPACT

The immediate impact of the California Supreme Court's decision in *Travelers Indemnity Company v. Gillespie* was that Travelers did not have to renew or reinsure its approximately 22,000 automobile insurance policies.¹³⁶ Undisputably, *Travelers* greatly eased the way for insurers wishing to withdraw from the California insurance market to do so.¹³⁷ Commentators aligned with insurers praised the decision as reaffirming basic principles of free enterprise: the right to quit.¹³⁸

Despite the ease with which an insurer may now leave the California market, no market change is expected. Commentators agree that a mass exodus from the California is unlikely,¹³⁹ because California, the largest insurance market in the world, retains the promise of great profits to be reaped by insurers. *Calfarm's* guarantee of a fair rate of return will curtail the number of withdrawals.¹⁴⁰ In addition,

132. *Id.* at 113, 785 P.2d at 521, 266 Cal. Rptr. at 138 (Broussard, J., dissenting).

133. *Id.* at 113-14, 785 P.2d at 521-22, 266 Cal. Rptr. at 138-39 (Broussard, J., dissenting).

134. *Id.* at 114, 785 P.2d at 522, 266 Cal. Rptr. at 139 (Broussard, J., dissenting).

135. *Id.* at 115, 785 P.2d at 522, 266 Cal. Rptr. at 139 (Broussard, J., dissenting).

136. DiBlase, *Insurer can Withdraw from California*, BUS. INS., Feb. 5, 1990, at 2; BNA, Daily Report for Executives, Feb. 1, 1990, at A8.

137. See, e.g., DiBlase, *supra* note 136, at 2; L.A. Times, Jan. 30, 1990, at A1, col. 5 (Home ed.); San Francisco Chron., Jan. 30, 1990, at A1; BNA, Daily Report for Executives, Jan. 31, 1990, at A10; Haggerty, *Prop. 103 Provisions on Renewal Overruled*, National Underwriter, Feb. 5, 1990, at 1.

138. See DiBlase, *supra* note 136, at 2 (quoting spokesman for the Alliance of American Insurers in San Francisco); Haggerty, *supra* note 134, at 1 (quoting Kent Keller of Barger & Wolen, Los Angeles).

139. See, e.g., DiBlase, *supra* note 133, at 2. L.A. Times, Jan. 30 1990, at A1, col. 5 (Home ed.); San Francisco Chron., Jan. 30, 1990, at A1; BNA, Daily Report for Executives, Jan. 31, 1990, at A10; Haggerty, *supra* note 137, at 1.

140. DiBlase, *supra* note 136, at 2 (citing James Holmes, California Insurance Department and referring to the California Supreme Court's holding in *Calfarm Ins. Co.*

as of this opinion, former Insurance Commissioner Roxani Gillespie had not yet established Proposition 103's "fair rate of return." Insurers are expected to await the results of the "fair-rate" administrative hearings before making any withdrawal decisions.¹⁴¹

Several commentators have speculated that the *Travelers* decision will give insurers an upper hand in the fair-rate hearings.¹⁴² Since statutory withdrawal was rendered relatively painless by *Travelers*, insurers are expected to threaten withdrawal in order to obtain a favorable rate of return.

The long term impact of *Travelers* is contingent upon the outcome of the fair-rate hearings.¹⁴³ If insurers are unsatisfied with the rate or become impatient with the temporary freeze on automobile insurance rates, *Travelers* has paved the way for an easy withdrawal.¹⁴⁴

VI. CONCLUSION

The California Supreme Court's holding in *Travelers* signals a green light for insurers to withdraw from the California insurance market. Whether a significant number of insurers will do so remains to be seen. The outcome of the Proposition 103 "fair rate of return" hearings will be determinative.

ERIN NUGENT

XII. JUVENILE LAW

Welfare and Institutions Code section 281 and California Rule of Court 1450(c) create exceptions to the hearsay rule for social studies that are admitted into evidence and relied on by a juvenile court in determining the court's jurisdiction over a minor under Welfare and Institutions Code section 300: In re Malinda S.

I. INTRODUCTION

In *In re Malinda S.*,¹ the California Supreme Court considered whether a juvenile court could admit into evidence original and sup-

v. Deukmejian, 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989)). See *supra* notes 20-28 and accompanying text.

141. See L.A. Times, Jan. 30 1990, at A1, col. 5 (Home ed.); San Francisco Chron., Jan. 30, 1990, at A1; Haggerty, *supra* note 137, at 1.

142. L.A. Times, Jan. 30, 1990, at A1, col. 5 (Home ed.); San Francisco Chron., Jan. 30, 1990, at A1; Haggerty, *supra* note 137, at 1.

143. L.A. Times, Jan. 30, 1990, at A1, col. 5 (Home ed.); San Francisco Chron., Jan. 30, 1990, at A1; Haggerty, *supra* note 137, at 1.

144. L.A. Times, Jan. 30, 1990, at A1, col. 5 (Home ed.).

1. *In re Malinda S.*, 51 Cal. 3d 368, 795 P.2d 1244, 272 Cal. Rptr. 787 (1990). Chief Justice Lucas wrote the majority opinion in which Justices Panelli, Eagleson, Ken-

plemental social studies,² prepared by a social worker, and specifically rely on those social studies in finding jurisdiction over a minor under Welfare and Institutions Code section 300,³ even though the social studies contained hearsay and multiple hearsay.

In 1987, Carol S., mother of the minor Malinda S., filed a complaint with the San Diego County Department of Social Services (DSS) claiming that Malinda's father, Russell S., had sexually abused Malinda. DSS petitioned the juvenile court to find Malinda a dependent of the court because of her father's sexual and emotional abuse. Social workers interviewed Malinda and compiled original and supplemental social studies which were admitted at the jurisdiction hearing pursuant to section 355.⁴ Russell claimed that the social studies were incompetent to support a finding of jurisdiction, and he repeatedly objected to their admission on that basis.⁵ The juvenile

nard, and Arabian concurred. Justice Broussard wrote a dissenting opinion in which Justice Mosk joined.

2. The supreme court defined social studies as:

written reports prepared by probation officers upon court order in any matter involving the custody, status, or welfare of a minor. The reports must include the probation officer's investigation of appropriate facts and a recommendation to the court. As in the present case, the board of supervisors may delegate to the county welfare department the duty of the probation officer to prepare such reports.

Id. at 372 n.1, 795 P.2d at 1245 n.1, 272 Cal. Rptr. at 788 n.1 (citations omitted).

3. CAL. WELF. & INST. CODE § 300(d) (West 1984). In 1987, this section provided that any person under 18 years of age "whose home is an unfit place for him by reason of neglect, cruelty, depravity, or physical abuse of either of his parents, or of his guardian or other person in whose custody or care he is" could come within the jurisdiction of the juvenile court which could then declare the minor a dependent of the court. *In re Malinda S.*, 51 Cal. 3d at 373 n.3, 795 P.2d at 1245 n.3, 272 Cal. Rptr. at 788 n.3. See also 10 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Parent and Child* §§ 648-724 (9th ed. 1989) (an overview of the operation of section 300); 27 CAL. JUR. 3D *Delinquent and Dependent Children* § 44 (3rd ed. 1987) (discussion of juveniles that are subject to dependency proceedings); Legislation Review, *Juveniles; Custody and Control*, 19 PAC. L.J. 650 (1988) (a brief look at section 1485 and dependency adjudication).

4. CAL. WELF. & INST. CODE § 355 (West Supp. 1990). Section 355 establishes the evidentiary standards for juvenile hearings. The section in pertinent part says:

At the [jurisdictional] hearing, the court shall first consider only the question whether the minor is a person described by Section 300, and for this purpose any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, proof by a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by Section 300.

Id. See also 10 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Parent and Child* § 687 (9th ed. 1989) (evidence in dependency hearings); Patton, *Forever Torn Asunder*, 27 SANTA CLARA L. REV. 299 (1987) (a look at parental rights in dependency hearings).

5. Russell argued that the court could not rely solely on the social studies in finding jurisdiction because they contained inadmissible hearsay, and section 355 requires

court overruled Russell's objections. It admitted and specifically relied on the social studies in finding jurisdiction under section 300. The court of appeal affirmed, finding no error in the trial court's admission of, and reliance on, the social studies.⁶ The appellate court also rejected the holding in *In re Donald R.*⁷ to the extent that it held a juvenile court could not rely solely on social studies in making a jurisdictional determination.⁸

The California Supreme Court affirmed, holding that, under the language of section 355, the social studies were admissible because of their relevance to a section 300 determination.⁹ The court also affirmed the appellate court's rejection of *In re Donald R.*,¹⁰ and concluded that the social studies were competent evidence to support a finding of section 300 jurisdiction. Although the studies included multiple hearsay, section 281¹¹ and rule 1450(c) of the California Rules of Court¹² create exceptions to the hearsay rule for social studies.¹³

that the finding of jurisdiction be based on proof by a preponderance of evidence ordinarily admissible in a civil trial. Thus, the social studies were not competent evidence to support the determination. *In re Malinda S.*, 51 Cal. 3d at 375, 795 P.2d at 1246, 272 Cal. Rptr. at 790.

6. *In re Malinda S.*, 51 Cal. 3d at 375, 795 P.2d at 1246, 272 Cal. Rptr. at 790.

7. *In re Donald R.*, 195 Cal. App. 3d 703, 240 Cal. Rptr. 821 (1987).

8. *In re Malinda S.*, 51 Cal. 3d at 375, 795 P.2d at 1246, 272 Cal. Rptr. at 790. *See In re Donald R.*, 195 Cal. App. 3d at 714-16, 240 Cal. Rptr. at 827-28.

9. Section 355 provides that any relevant and material evidence is admissible. CAL. WELF. & INST. CODE § 355 (West Supp. 1990). The social studies are relevant and material because they provide "the court with a coherent picture of the child's situation." *In re Rose Lynn G.*, 57 Cal. App. 3d 406, 426, 129 Cal. Rptr. 338, 350 (1976). Furthermore, in a section 300 proceeding "the jurisdictional fact is the lack of parental control and the unfitness of the minor's home. The social study report is directly relevant to the issue to be determined by the juvenile court at the adjudication hearing." *In re Biggs*, 17 Cal. App. 3d 337, 345, 94 Cal. Rptr. 519, 524 (1971). *See also* Legislation Review, *Juvenile Law; Dependency Hearings*, 8 PAC. L.J. 425 (1978) (a brief look at burdens of proof in dependency hearings).

10. *In re Malinda S.*, 51 Cal. 3d at 381-82, 795 P.2d at 1250-51, 272 Cal. Rptr. at 794-95.

11. CAL. WELF. & INST. CODE § 281 (West 1984). Section 281 says that the probation officer shall upon order of any court in any matter involving the custody, status, or welfare of a minor or minors, make an investigation of appropriate facts and circumstances and prepare and file with the court written reports and a written recommendation in reference to such matters. *Id.* The court is authorized to receive and consider the reports and recommendations of the probation officer in determining any such matter. *Id.*

12. CAL. R. CT. 1450. At the time of this jurisdictional hearing, rule 1450, subdivision (c) was codified as rule 1365 subdivision (d). Because there was only a renumbering and no substantive change, the court looked to rule 1450(c) which says, "[A] social worker's report that contains information relevant to the jurisdiction hearing shall be admissible if, on request of the parent or guardian, the probation officer or social worker is made available to be cross-examined on the contents of the report." *Id.*

13. *In re Malinda S.*, 51 Cal. 3d at 376-82, 795 P.2d at 1247-51, 272 Cal. Rptr. at 791-95. The Senate Committee on the Judiciary specifically stated, in its comment to the hearsay rule, that exceptions to the hearsay rule were not limited to those set out in the evidence code, but "may be found in other statutes or decisional law." *Id.* *See also*

II. TREATMENT OF THE CASE

The majority opinion distinguished section 281 and rule 1450(c) from other code sections that the court had previously found not to create hearsay exceptions.¹⁴ The court noted that social studies prepared by disinterested parties in the regular course of their professional duties contain the elements of competency, reliability, and trustworthiness that are necessary to exempt them from the hearsay rule.¹⁵ Furthermore, the statutory scheme for dependency proceedings complies with the cross-examination requirement for hearsay exceptions by requiring that the parent¹⁶ be given a meaningful opportunity to cross-examine the social worker who prepared the report and controvert the contents of the social study.¹⁷

The court bolstered its opinion by presenting code sections which, when compared with the language of section 281 and rule 1450(c), suggest the Legislature never intended to limit a juvenile court's use of social studies in making section 300 determinations.¹⁸ The court also pointed out similarities between the language of section 281 and other code sections that create exceptions to the hearsay rule.¹⁹ Based upon such distinctions and comparisons, the California

CAL. EVID. CODE § 1200 (West 1966) (comment by the Senate Committee on the Judiciary); Tuerkheimer, *Conviction Through Hearsay in Child Sexual Abuse Cases: a Logical Progression Back to Square One*, 72 MARQ. L. REV. 47 (1988) (an examination of the use of hearsay evidence in child abuse cases).

14. While there are many dependency hearing cases that address this issue favorably for the majority, see, e.g., *In re Jose M.*, 206 Cal. App. 3d 1098, 1105, 254 Cal. Rptr. 364, 368 (1988), the court chose to focus on distinguishing section 281 and rule 1450 from a section of the Vehicle Code and conservatorship proceedings. *In re Malinda S.*, 51 Cal. 3d at 377-78, 795 P.2d at 1247-49, 272 Cal. Rptr. at 791-92 (citing *Daniels v. Dept. of Motor Vehicles*, 33 Cal. 3d 532, 658 P.2d 1313, 189 Cal. Rptr. 512 (1983) and *Conservatorship of Manton*, 39 Cal. 3d 645, 703 P.2d 1147, 217 Cal. Rptr. 253 (1985)).

15. *In re Malinda S.*, 51 Cal. 3d at 377, 795 P.2d at 1247-48, 272 Cal. Rptr. at 791. Competency and trustworthiness are requirements of traditionally recognized hearsay exceptions. An example, and further statement of such requirements, can be found in section 803(24) of the Federal Rules of Evidence. FED. R. EVID. 803(24).

16. The term "parent" is used for convenience and refers to any person, such as a guardian, who would oppose a finding of jurisdiction under section 300.

17. *In re Malinda S.*, 51 Cal. 3d at 378, 382-85, 795 P.2d at 1248, 1251-53, 272 Cal. Rptr. at 792, 795-97.

18. *Id.* at 377-81, 795 P.2d at 1247-50, 272 Cal. Rptr. at 791-94. The court stated that the broad language of section 281 and rule 1450(c), authorizing a juvenile court to not only admit social studies, but to consider those studies in making its determination, indicated a legislative intent that the studies were "not merely to be used as background consideration, but may form the basis of the jurisdictional determination itself." *Id.* at 377-78, 795 P.2d at 1248, 272 Cal. Rptr. at 792.

19. *Id.* at 379-81, 795 P.2d at 1249-50, 272 Cal. Rptr. at 792-94 (comparing section 281 with section 233 and equating it with section 701).

Supreme Court concluded that section 281 and rule 1450(c) implicitly create hearsay exceptions for social studies.²⁰

In construing section 355, the California Supreme Court rejected the contrary language in *In re Donald R.*²¹ The court determined that the second sentence of the section allows a juvenile court to base its decision only on evidence that would be admissible in any civil case, independent of the section's first sentence.²² This means information that is admissible because of the broad admissibility standard of section 355's first sentence can also be the basis for the court's decision if the information is also admissible under some other section, such as section 281.²³

Through an examination of actual legislative history and intent, rather than implied indicia of such,²⁴ Justice Broussard, in his dissenting opinion, agreed that the social studies could be admitted into evidence and that they could be relied on by a juvenile court in making a section 300 determination.²⁵ However, Broussard disagreed with the majority's conclusion that a juvenile court could make a finding of jurisdiction based solely on social studies that contained hearsay.²⁶

Justice Broussard pointed out that section 281 says basically the same thing as section 355: that a juvenile court can *admit and consider* social studies. However, neither of these sections say that the court can solely rely on the social studies, he argued.²⁷ Broussard accepted the majority's conclusion that section 355 requires a finding of jurisdiction based on evidence admissible in a civil trial and that the broad admissibility standard allowed by section 355 is not to be considered in identifying such admissible evidence. But, he countered, that a section such as 281, which creates the same broad admissibility standard as section 355 and does so for the same policy reasons, should not be allowed to nullify section 355's evidence limitation. Just because section 281 makes social studies containing hearsay ad-

20. *Id.* at 382, 795 P.2d at 1251, 272 Cal. Rptr. at 794.

21. *In re Donald R.*, 195 Cal. App. 3d 703, 240 Cal. Rptr. 821 (1987). *In re Donald R.* said that evidence admitted under the broader admissibility standard for dependency cases is not evidence admissible in a "civil case" within the meaning of section 355. Therefore, the only evidence a juvenile court could rely on in finding section 300 jurisdiction is evidence legally admissible in ordinary civil cases. *Id.* at 715, 240 Cal. Rptr. at 827.

22. *In re Malinda S.*, 51 Cal. 3d at 381, 795 P.2d at 1251, 272 Cal. Rptr. at 794.

23. *Id.* at 381-82, 795 P.2d at 1250-51, 272 Cal. Rptr. at 794-95.

24. *See supra* note 18 and accompanying text.

25. *In re Malinda S.*, 51 Cal. 3d at 386-90, 795 P.2d at 1254-57, 272 Cal. Rptr. at 798-800 (Broussard, J., dissenting) (citing *Walker v. City of San Gabriel*, 20 Cal. 2d 879, 129 P.2d 349 (1942) and REP. OF THE GOVERNOR'S SPECIAL STUDY COM. ON JUVENILE JUSTICE, pt. I, 29-30 (1960)).

26. *In re Malinda S.*, 51 Cal. 3d at 390, 795 P.2d at 1257, 272 Cal. Rptr. at 800 (Broussard, J., dissenting).

27. *Id.* at 391, 795 P.2d at 1257-58, 272 Cal. Rptr. at 801 (Broussard, J., dissenting).

missible in civil dependency hearings does not mean they should be construed as making social studies ordinarily admissible as evidence in civil cases.²⁸ Justice Broussard viewed section 281 as a repetition of the first sentence of section 355. Because that first sentence is limited by the evidentiary requirements of the second sentence, section 281 should also be limited,²⁹ according to Broussard.

III. CONCLUSION

The court's construction of an exception to the hearsay rule for social studies reduces the government's burden in a section 300 jurisdiction hearing to merely submitting the social studies and showing that the studies contain indicia of reliability and trustworthiness.³⁰ So long as those two preliminary points are satisfied and the parent is given a meaningful opportunity to cross-examine the investigating officer and to subpoena and examine persons whose hearsay statements are contained in the social studies, such studies constitute sufficient evidence on which the juvenile court can base a finding of jurisdiction.³¹ This places the full burden on the parent to seek out and subpoena witnesses mentioned in the report in order to elicit favorable testimony or at least discredit the witnesses' adverse statements.³² The majority's reasoning for placing the burden on the parent was that it would be a waste of time to require the government to call *all* the witnesses mentioned in a social study.³³ This places the parent in a virtually impossible situation. As the supreme court admitted, it may be more advantageous to the parent not to elicit live testimony.³⁴ However, by allowing the state and the juvenile court to rely solely on the social studies without having to call witnesses, the parent is forced to call adverse witnesses or lose control over his

28. *Id.* at 391-93, 795 P.2d at 1257-59, 272 Cal. Rptr. at 801-02 (Broussard, J., dissenting).

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

30. See *supra* note 14 and accompanying text. *In re Malinda S.*, 51 Cal. 3d at 384, 795 P.2d at 1253, 272 Cal. Rptr. at 796.

31. See *Long v. Long*, 251 Cal. App. 2d 732, 59 Cal. Rptr. 790 (1967); *In re Jose M.*, 206 Cal. App. 3d 1098, 254 Cal. Rptr. 364 (1988).

32. In his argument, Russell pointed out, and the court agreed, that this is an unenviable task given the time constraints inherent in juvenile dependency hearings. However, the court determined that the hardship to parents did not amount to a due process violation. *In re Malinda S.*, 51 Cal. 3d at 382-83, 795 P.2d at 1252, 272 Cal. Rptr. at 795-96.

33. *In re Malinda S.*, 51 Cal. 3d at 385, 795 P.2d at 1253, 272 Cal. Rptr. at 796-97.

34. *Id.* at 385 n.20, 795 P.2d at 1253 n.20, 272 Cal. Rptr. at 797 n.20.

child based on nothing more than hearsay.³⁵

The California Supreme Court says that it is legally permissible to put a parent in this awkward situation because dependency hearings are "designed not to prosecute the parent, but to protect the child."³⁶ By creating a hearsay exception for social studies, the court is just enhancing the juvenile court's ability to "protect the child."³⁷ Because a juvenile court must be allowed to consider social studies to obtain a coherent picture of the child's situation, the court must also be able to rely solely on the study in finding jurisdiction if the child's situation so demands. This interpretation may not be what the actual language of section 355 says, but it is now what that section means.

JOYCE HETTENBACH

XIII. PRIVACY

No judicial proceedings privilege exists for either litigants or attorneys to record private conversations for use in anticipated litigation: Kimmel v. Goland.

In *Kimmel v. Goland*,¹ the California Supreme Court unanimously² ruled that neither litigants nor their attorneys may avoid civil liability for illegal recording of private telephone conversations. Justice Arabian, authoring the court's opinion, expressly rejected petitioner's claim that the privilege embodied in California Civil Code section 47, subdivision 2,³ which protects the disclosure of information in judicial proceedings, also protects the act of unlawfully recording conversations for evidence in an anticipated lawsuit.

This case arose from a variety of tort charges, including intentional infliction of emotional distress,⁴ brought against the management of a

35. See *In re Malinda S.*, 51 Cal. 3d at 382-85, 795 P.2d at 1251-53, 272 Cal. Rptr. at 795-97.

36. *Id.*

37. *Id.* at 384, 795 P.2d at 1253, 272 Cal. Rptr. at 796 (quoting *In re Mary S.*, 186 Cal. App. 3d 414, 418-19, 230 Cal. Rptr. 726, 728 (1986)).

1. 51 Cal. 3d 202, 793 P.2d 524, 271 Cal. Rptr. 191 (1990). See B. WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS § 581 (9th ed. 1988 & Supp. 1990) (discussing *Kimmel*).

2. Chief Justice Lucas, and Associate Justices Mosk, Broussard, Panelli, Eagleson and Kennard concurred with Associate Justice Arabian's opinion.

3. CAL. CIV. CODE § 47, subdivision 2 (West 1990) [hereinafter section 47(2)] provides, "A privileged publication or broadcast is one made . . .

2. In any . . . (2) judicial proceeding . . ." See generally 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 505(a), 505(f), 506, 667 (9th ed. 1988 & Supp. 1990); 6 CAL. JUR. 3D *Assault & Other Wilful Torts* § 212 (1988 & Supp. 1990).

4. The complaint also alleged interference with prospective economic advantage, bad faith, and unlawful business practices. *Kimmel*, 51 Cal. 3d at 207, 793 P.2d at 526, 271 Cal. Rptr. at 193. The underlying dispute concerned whether repairs or modifications of certain mobilehomes were required before they could be sold. Park management asserted that such repairs were necessary, while the home owners contended

mobilehome park⁵ by several residents.⁶ Fearing they lacked enough hard evidence to prove their claims in court, the residents clandestinely recorded their telephone conversations with management representatives.⁷ The residents then transferred these recordings to their attorney, Richard Farnell, who had the tapes transcribed.⁸ Despite objections raised by the park management, the trial court ultimately received these transcriptions into evidence.⁹

A cross-complaint by the park management sought damages from both the residents and Farnell for invasion of privacy.¹⁰ The superior court dismissed these charges on the pleadings, persuaded by Farnell's argument that because recording and transcribing served to gather evidence for litigation, the privilege of section 47(2) afforded protection.¹¹ The court of appeal reversed, holding that the civil code privilege did not create any form of immunity which would bar an invasion of privacy suit.¹² The court reasoned that the "interest of justice" would not allow a civil code privilege to shield against a pe-

that their mobilehomes satisfied current standards and that any restraint of alienation by the park would violate CAL. CIV. CODE § 798.73. *Id.* at 206, 793 P.2d at 525-26, 271 Cal. Rptr. at 192-93.

5. The mobilehome park in question was Country Club Mobile Manor in Santa Ana, California. George Brooks and Vaughn Drage were the park management representatives who spoke with the residents regarding the sale of their mobilehomes. *Id.* at 205-06, 793 P.2d at 525-26, 271 Cal. Rptr. at 192-93.

6. Daniel Kimmel, his wife Elizabeth Kimmel, and Diane Vollrath, plaintiffs in the original action, were the residents who desired to sell their mobilehomes. *Id.* at 205-06, 793 P.2d at 525, 271 Cal. Rptr. at 192.

7. *Id.* at 206, 793 P.2d at 526, 271 Cal. Rptr. at 193. Mr. Kimmel and his sister, Annette Brown, who posed as a potential purchaser of the Kimmel's mobilehome, each recorded telephone conversations with Drage. Similarly, Vollrath taped conversations with both Drage and Brooks. These incidents occurred during the first four months of 1983. *Id.* at 206-07, 793 P.2d at 526-27, 271 Cal. Rptr. at 193-94.

8. Tapes were delivered to Farnell on five different occasions. *Id.* at 207, 793 P.2d at 527, 271 Cal. Rptr. at 194.

9. *Kimmel*, 51 Cal. 3d 208, 793 P.2d at 527, 271 Cal. Rptr. at 194. A jury verdict from this trial in the Superior Court of Orange County (Case No. OSC 40 22 18, Judge Jerrold S. Oliver presiding) awarded the residents \$75,000 actual damages, plus \$495,000 punitive damages. *Id.*

10. *Id.* at 207, 793 P.2d at 526, 271 Cal. Rptr. at 193. Specifically, the park management sued under California's Invasion of Privacy Act § 632(a), codified as CAL. PENAL CODE §§ 630-637.5 (West 1990), which prohibits intentional recording of confidential telephone communications. *Id.* Damages were claimed under section 637.2, which provides for recovery of at least \$3,000 for such a privacy violation. *Id.* See generally 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 11, 581 (9th ed. & Supp. 1990); 19 CAL. JUR. 3D *Criminal Law* §§ 1981-85 (1984 & Supp. 1990).

11. *Kimmel*, 51 Cal. 3d at 208, 793 P.2d at 527, 271 Cal. Rptr. at 194. See *supra* note 3, which quotes the relevant statutory language.

12. *Kimmel*, 51 Cal. 3d at 208, 793 P.2d at 527, 271 Cal. Rptr. at 194.

nal code violation.¹³

The supreme court explained that while the civil code did protect the residents and Farnell from liability for broadcasting the information in a judicial or quasi-judicial proceeding, liability remained for the actual covert tape recording of the conversations.¹⁴ An act of recording a conversation without the consent or knowledge of the other party creates an instantaneous right to recovery.¹⁵ The court emphasized the difference between the illegal recording, a noncommunicative act, and subsequent use of the material obtained by such recording, a communicative act. The privilege granted by the civil code protects communicative conduct only.¹⁶ Hence, liability exists for noncommunicative acts regardless of the intended purpose of the invasion.

The supreme court based its decision upon several important policy considerations relevant to the practicing attorney. First, this ruling once again highlighted the California right to privacy embodied in the state constitution.¹⁷ Next, simple considerations of reason and justice dictate liability. Justice Arabian illustrated the court's rejection of petitioner's privilege argument with an example of the extreme consequences this theory implies.¹⁸ For instance, a burglar could escape punishment for criminal conduct merely by asserting a need in future litigation for the materials stolen.¹⁹

13. The court of appeal remarked that "[R]ecordings made in violation of the Penal Code could hardly be said to be in furtherance of the litigation or to promote the interest of justice." *Id.*

14. *Id.* at 205, 793 P.2d at 525, 271 Cal. Rptr. at 192.

15. *Id.* at 212, 793 P.2d at 529-30, 271 Cal. Rptr. at 196-97.

16. See the recently decided cases of *Doctors' Co. v. Superior Court*, 225 Cal. App. 3d 1284, 1298-99, 275 Cal. Rptr. 674, 682-83 (1990) (citing and discussing *Kimmel* for the proposition that section 47(2) applies to communicative conduct only) and *Howard v. Drapkin*, 222 Cal. App. 3d 843, 850-51 n.2, 271 Cal. Rptr. 893, 896 n.2 (1990) (same).

Also, the supreme court noted that every successful application of the privilege outlined in California Civil Code section 47(2) involves damages claimed for the publication, not the acquisition, of information. *Kimmel*, 51 Cal. 3d at 211, 793 P.2d at 529, 271 Cal. Rptr. at 191. See, e.g., *Ribas v. Clark*, 38 Cal. 3d 355, 696 P.2d 637, 212 Cal. Rptr. 143 (1985); *Carden v. Getzoff*, 190 Cal. App. 3d 907, 235 Cal. Rptr. 698 (1987); *Steiner v. Eikerling*, 181 Cal. App. 3d 639, 226 Cal. Rptr. 694 (1986); *Rosenthal v. Irell & Manella*, 135 Cal. App. 3d 121, 185 Cal. Rptr. 92 (1982); *Asia Inv. v. Borowski*, 133 Cal. App. 3d 832, 184 Cal. Rptr. 317 (1982); *Portman v. George McDonald Law Corp.*, 99 Cal. App. 3d 988, 160 Cal. Rptr. 505 (1979) *rev'd on other grounds*, *Silberg v. Anderson*, 50 Cal. 3d 205, 786 P.2d 265, 266 Cal. Rptr. 638 (1990); *Umansky v. Urguhart*, 84 Cal. App. 3d 368, 148 Cal. Rptr. 547 (1978); *Lerette v. Dean Witter Org., Inc.*, 60 Cal. App. 3d 573, 131 Cal. Rptr. 592 (1976); *Pettitt v. Levy*, 28 Cal. App. 3d 484, 104 Cal. Rptr. 650 (1972) *rev'd on other grounds*, *Silberg v. Anderson*, 50 Cal. 3d 205, 786 P.2d 365, 266 Cal. Rptr. 638 (1990); *Kachig v. Boothe*, 22 Cal. App. 3d 626, 99 Cal. Rptr. 393 (1971); *Agostini v. Strycula*, 231 Cal. App. 2d 804, 42 Cal. Rptr. 314 (1965).

17. CAL. CONST. art. 1, § 1 (privacy is an inalienable right). See generally 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 454 (9th ed. 1988 & Supp. 1990); 13 CAL. JUR. 3D *Constitutional Law* § 237 (1989 & Supp. 1990).

18. *Kimmel*, 51 Cal. 3d at 212, 793 P.2d at 530, 271 Cal. Rptr. at 197.

19. *Id.*

Most importantly, the court rejected Farnell's contention that as an attorney he should escape liability.²⁰ Farnell proposed that attorneys deserve special immunity with regard to illegal or tortious actions like the invasion of privacy in *Kimmel*. The Court rebuffed this argument, responding that "[N]othing in the text of section 47(2) suggests the existence of . . . an 'attorney exception.'" ²¹

Civil liability imposed upon a litigant for invasion of privacy startles no one. Likewise, a great need for evidence at trial furnishes no justification for its acquisition by illegal means. However, this decision, which holds the attorney liable in addition to the clients, sends a strong message to practicing lawyers. Increasingly, the court considers issues of professional responsibility when ruling on attorney liability. Given the professional duties regulating an attorney's behavior and the power an attorney possesses in the discovery process, the court concluded that to allow Farnell to escape responsibility for his role²² would unacceptably place the bounds of zealous advocacy beyond the limits of tortious liability.²³

The supreme court makes clear that taping confidential telephone conversations as a means of discovery for a lawsuit comprises tortious, non-communicative conduct. Thus, since the litigation privilege of section 47(2) applies only to communicative acts within a judicial or quasi-judicial setting, it provides no immunity to the tortfeasor.

Furthermore, the court emphasizes that as figures of public trust,

20. *Id.* at 213, 793 P.2d at 530-31, 271 Cal. Rptr. at 197-98.

21. *Id.* at 212, 793 P.2d at 530, 271 Cal. Rptr. at 197.

22. The park management charged Farnell with civil conspiracy as well as aiding and abetting a violation of the penal code's privacy act. *See supra* note 10. *Id.* at 207-08, 793 P.2d at 527, 271 Cal. Rptr. at 914. The supreme court did make clear, however, that Farnell's liability rested on his aiding and abetting, and encouraging his clients, rather than his communicative acts of counseling or advising them. *Id.* at 208 n.6, 793 P.2d at 527 n.6, 271 Cal. Rptr. at 194 n.6.

23. In response to Farnell's argument that the lower court's ruling would impair the zealotry with which an attorney could promote the cause of a client, the supreme court stated that the hinderance in this case "is, in fact, healthy [because] it inhibits an attorney from assisting clients in the commission of crimes." *Kimmel*, 51 Cal. 3d at 213, 793 P.2d at 531, 271 Cal. Rptr. at 198. *Cf. Silverberg v. Anderson*, 50 Cal. 3d 205, 213, 786 P.2d 365, 369, 266 Cal. Rptr. 638, 643, *modified*, 50 Cal. 3d 343A (1990) (privilege of civil code section 47(2) designed to encourage attorneys to zealously protect client's interests); *Long v. Pinto*, 126 Cal. App. 3d 946, 179 Cal. Rptr. 182 (1981) (purpose to promote justice, even if this allows the immunity to be abused or misused). Regarding the purpose behind section 47(2); *see also Lerette v. Dean Witter Org. Inc.*, 60 Cal. App. 3d 573, 131 Cal. Rptr. 592 (1976) (purpose to protect attorneys while representing clients).

lawyers should behave with the highest degree of professionalism.²⁴ In *Kimmel*, an attorney attempted to protect himself not only with section 47(2), but also with defensive claims of attorney-client privilege,²⁵ work product protection,²⁶ and allegedly similar case law.²⁷ None of these doctrines sheltered him.

Therefore, in what appears as an effort to further the respectability of the profession, the court refuses to grant any special form of immunity to attorneys seeking to avert responsibility for client misconduct they prompted or aided.

BENJAMIN GROSS SHATZ

XIV. PROPERTY LAW

- A. *A joint tenant in personal property may unilaterally sever his or her interest in the joint tenancy and nullify the other joint tenant's survivorship interest in the absence of a prior agreement to the contrary: Estate of Propst.*

In *Estate of Propst*,¹ the California Supreme Court overruled seventy-five years of precedent when it held that a joint tenant may unilaterally sever his or her interest in joint tenancy property, thereby

24. Justice Arabian's conclusion emphasizes the ethical responsibilities incumbent upon practicing attorneys. *Kimmel*, 51 Cal. 3d at 214, 793 P.2d at 531, 271 Cal. Rptr. at 198.

25. The court dismissed Farnell's claim of attorney-client privilege using CAL. EVID. CODE § 956 (West 1990) which states "There is no Privilege . . . if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud." *Id.* at 213, 793 P.2d at 530, 271 Cal. Rptr. at 197. *See*, 2 B. WITKIN, CALIFORNIA EVIDENCE, § 1153 (3d ed. 1986).

Regarding the attorney-client privilege, *see generally* 31 CAL. JUR. 3D *Evidence* §§ 433-442 (1976 & Supp. 1990); 27 CAL. JUR. 3D *Discovery & Depositions* § 24 (1976 & Supp. 1990).

26. The court found no basis for a work product defense. *Kimmel*, 51 Cal. 3d at 213, 793 P.2d at 530, 271 Cal. Rptr. at 197. Regarding work product, *see generally* 27 CAL. JUR. 3D *Discovery & Depositions* § 33 (1976 & Supp. 1990).

27. *Commercial Standard Title Co. v. Superior Court*, 92 Cal. App. 3d 934, 155 Cal. Rptr. 393 (1979) (joint tortfeasor status required to hold attorney liable). The supreme court ruled that Farnell's alleged active participation invalidated this line of defense as his "liability proceeds directly from the same course of conduct as his clients." *Kimmel*, 51 Cal. 3d at 213, 793 P.2d at 530-31, 271 Cal. Rptr. at 197-98.

1. 50 Cal. 3d 448, 788 P.2d 628, 268 Cal. Rptr. 114 (1990). In *Propst*, a husband and his wife held several bank accounts in joint tenancy. During his lifetime, the husband closed some of the accounts and deposited the funds in new accounts bearing only his name. His intent was to sever the joint tenancy status of the funds and cut off his wife's right of survivorship. He then named his daughter as the residual beneficiary of his estate. Following the husband's death, his wife challenged the transfer of funds to the new accounts and claimed she was entitled to the withdrawn amounts since the transfers had occurred without her consent or knowledge. The court of appeal "reluctantly" affirmed the trial court's decision in the wife's favor. *Id.* at 453-54, 788 P.2d at 629-30, 268 Cal. Rptr. at 115-16.

nullifying the right of survivorship held by the other joint tenant.² Although the common law was to the contrary,³ a line of cases in California had established that personal property held in joint tenancy retained the characteristics of a joint tenancy even when the property was held in the name of only one joint tenant.⁴ Thus, a joint tenant was "powerless to defeat the right of survivorship . . . unilaterally."⁵ This line of cases was based upon an incorrect interpretation of the leading case, *Estate of Harris (Harris I)*.⁶ "[S]ubsequent decisions interpreted *Harris I* as establishing a rule—contrary to the common law—that the proceeds of a joint tenancy in personal property retain their joint tenancy character unless there is an agreement to the contrary."⁷

A joint tenant could unilaterally sever the joint tenancy status of real or personal property under the common law.⁸ This had the effect of converting a joint tenancy into a tenancy in common.⁹ California applied this common law principle to joint tenancies consisting of real property, but not personal property.¹⁰ Although this applica-

2. *Id.* at 461-62, 788 P.2d at 636, 268 Cal. Rptr. at 122. Justice Kennard wrote the majority opinion joined by Chief Justice Lucas and Justices Panelli, Eagleson, and Kaufman. Justices Mosk and Broussard wrote separate concurring and dissenting opinions.

3. See *infra* notes 8-9 and accompanying text.

4. *Propst*, 50 Cal. 3d at 451-52, 788 P.2d at 629, 268 Cal. Rptr. at 115 (citing *Fish v. Security-First Nat'l Bank*, 31 Cal. 2d 378, 387, 189 P.2d 10, 15 (1948)).

5. *Id.* at 452, 788 P.2d at 629, 268 Cal. Rptr. at 115.

6. 169 Cal. 725, 147 P. 967 (1915). In *Harris I*, a husband and wife orally agreed that any property they acquired would be held in joint tenancy. They then opened a joint bank account and, with funds from the account, purchased stock. Following the husband's death, a relative challenged the joint tenancy status of the stock. The supreme court ruled that the stock retained its joint tenancy character since there was no agreement to the contrary. *Id.* at 728, 147 P. at 968. It was this ruling which courts misapplied for seventy-five years in California.

The court in *Propst* overruled the erroneous interpretation and distinguished the facts before it from those in *Harris I*. Nothing in the facts cited from *Harris I* indicated an intent by the decedent to sever the joint tenancy; the facts in *Propst*, however, indicated otherwise. *Propst*, 50 Cal. 3d at 457, 788 P.2d at 632, 268 Cal. Rptr. at 118.

7. *Propst*, 50 Cal. 3d at 457, 788 P.2d at 632, 268 Cal. Rptr. at 118 (citing *In re Kessler*, 217 Cal. 32, 17 P.2d 117 (1932); *Estate of McCoin*, 9 Cal. App. 2d 480, 50 P.2d 114 (1935); *Young v. Young*, 126 Cal. App. 306, 14 P.2d 580 (1932)).

8. *Id.* at 451, 788 P.2d at 629, 268 Cal. Rptr. at 115.

9. *Id.* at 455, 788 P.2d at 631, 268 Cal. Rptr. at 117. The significant differences between a joint tenancy and a tenancy in common are: (1) only a joint tenancy requires the existence of the four unities, see *infra* note 15; and (2) only a joint tenant has the right of survivorship. 16 CAL. JUR. 3D *Cotenancy and Joint Ownership* §§ 5, 18 (1983 & Supp. 1990). When one joint tenant dies, his or her part of the estate is automatically divided among the surviving joint tenants. *Id.* § 5.

10. *Id.* at 456, 788 P.2d at 632, 268 Cal. Rptr. at 118.

tion was contrary to common law notions, the court continued to uphold the application since it had become “the recognized and established law of [California], and ha[d] been followed in numerous recent decisions.’”¹¹ Thus, before *Propst*, California law did not follow the common law. Instead, a line of cases in California held that, “in the absence of a contrary agreement, the proceeds of *personal* property held in joint tenancy retain their joint tenancy character even when held in the name of only one joint tenant.”¹²

The majority in *Estate of Propst* overruled previous holdings to the contrary¹³ and returned to follow the common law principle that a joint tenancy in personal property can be unilaterally severed. The majority reasoned that there is no logical grounds for treating personal property differently from real property.¹⁴ Furthermore, the majority recognized that the right of survivorship established under a joint tenancy is extinguished by the destruction of one of the essential unities.¹⁵ Thus, since unilateral action by a joint tenant intended to sever the joint tenancy would result in the destruction of one of the unities, there should be no corresponding right of survivorship. Finally, the majority stated that there had been no widespread reliance on a right of survivorship to personal property held in joint tenancy, and the layman’s expectation would be that a joint tenancy in personal property could be severed unilaterally.¹⁶ They felt that a rule contrary to general expectations would have adverse consequences.¹⁷ For example, the clearly expressed desires of a testator might not be followed.¹⁸

Joint tenants in personal property may now unilaterally sever

11. *Id.* at 457, 788 P.2d at 633, 268 Cal. Rptr. at 119 (citing *Estate of Harris*, 9 Cal. 2d 649, 655, 72 P.2d 873, 876 (1937) (*Harris II*)).

12. *Id.* at 452, 788 P.2d at 629, 268 Cal. Rptr. at 115 (emphasis in original). See generally 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Personal Property* § 22A (9th ed. Supp. 1990).

13. *Propst*, 50 Cal. 3d at 462, 788 P.2d at 636, 268 Cal. Rptr. at 122 (overruling *Fish v. Security-First Nat’l Bank*, 31 Cal. 2d 378, 189 P.2d 10 (1948); *Estate of Harris*, 9 Cal. 2d 649, 72 P.2d 873 (1937); and *In re Kessler*, 217 Cal. 32, 17 P.2d 117 (1932)).

14. *Id.* at 458, 788 P.2d at 633, 268 Cal. Rptr. at 119.

15. *Id.* at 455-56, 788 P.2d at 631-32, 268 Cal. Rptr. at 117-18. To possess the requisite “essential unities,” “the tenants must have: (1) the same and equivalent interests (2) created under a single or identical instrument or conveyance (3) to commence at the same time and (4) entitling them to have and to hold undivided possession simultaneously.” 16 CAL. JUR. 3D *Cotenancy and Joint Ownership* § 4 (1985). Simply stated, there must be unity of “interest, title, time and possession.” *Id.*

16. *Propst*, 50 Cal. 3d at 458, 788 P.2d at 633-34, 268 Cal. Rptr. at 119-20.

17. *Id.*

18. *Id.* at 459, 788 P.2d at 634, 268 Cal. Rptr. at 120. “It is highly possible . . . that an entire estate may go through [a joint tenancy] account, and if a testator in his will leaves to his children corporate stocks or bonds or other personal property acquired with funds from the account, his plainly expressed desire would go for naught.” *Id.* (quoting Note, *Joint Tenancy: Character of Personal Property Acquired with Withdrawals from Joint Bank Accounts*, 28 CALIF. L. REV. 224, 226 (1940)).

their joint tenancy arrangements. This new rule will be more in accord with laymen's expectations since the average person would not expect to be forever bound by an agreement to enter a joint tenancy.¹⁹ Furthermore, the old rule often resulted in the unfortunate situation where a joint tenant clearly intended to sever his or her interest and took steps to do so, believing the interest would be severed, leaving the estate to find that legally, the joint tenancy had remained intact. The new rule will, therefore, permit property owners to more easily execute their wishes.

The court's bold step in overruling a line of cases which originated seventy-five years ago was warranted. There is no rational reason for treating joint tenancies in personal property differently from those in real property. The court had most likely strayed from its original, rational position when it misinterpreted *Harris I*.²⁰ Hence, contemporary courts had been forced to follow precedent while disagreeing with the principles underlying the old rule.²¹ The new rule is in accord with both the common law²² and the California legislature's wishes.²³ The rule of *Propst*, held retroactive in effect,²⁴ thus allows a joint tenant in personal property, like a joint tenant in real property, to unilaterally sever the joint tenancy in the absence of a prior agreement to the contrary.

CALIFORNIA SURVEY STAFF

19. *Id.* at 458, 788 P.2d at 633-34, 268 Cal. Rptr. at 119-20. Therefore, the majority ruled that its holding was to be applied retroactively, except in two situations: where a prior judgment had enforced a right of survivorship based on the erroneous line of cases, or where a party could show his or her reliance on the old rule. *Id.* at 462-63, 788 P.2d at 636-37, 268 Cal. Rptr. at 122-23.

Justices Mosk and Broussard, while agreeing that the old rule was erroneous, disagreed with the majority's retroactive application of the new rule. *Id.* at 464, 467, 788 P.2d at 638-39, 268 Cal. Rptr. at 124-25 (Mosk and Broussard, J.J., concurring and dissenting).

20. *See id.* at 456, 788 P.2d at 732, 268 Cal. Rptr. at 117.

21. *See id.* at 452, 788 P.2d at 729, 268 Cal. Rptr. at 115.

22. *See supra* notes 8-9 and accompanying text.

23. *Propst*, 50 Cal. 3d at 461, 788 P.2d at 635, 268 Cal. Rptr. at 121.

24. *See supra* note 19.

- B. *A federal grazing permit is an interest in real property sufficient to qualify its holder for tort immunity under Civil Code section 846: Hubbard v. Brown.*

I. INTRODUCTION

In *Hubbard v. Brown*,¹ the California Supreme Court considered whether a federal grazing permit was an interest in real property sufficient to qualify its holder for tort immunity under California Civil Code section 846.² Section 846 provides that “[A]n owner of any estate or any other real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose”³ In *Hubbard*, the plaintiff was injured while riding a motorcycle in a national forest when he collided with a barbed wire gate which had been erected across a road by the defendant.⁴ The defendant held a federal grazing permit and had erected the fence in order to control the movement of his cattle.⁵ The defendant claimed immunity under section 846.⁶ The plaintiff maintained, however, that the defendant did not have immunity under section 846 because the defendant possessed no “right, title, or interest” in the property.⁷

The trial court granted summary judgment for the holder of the grazing permit based on section 846 immunity.⁸ The court of appeal reversed, holding that the defendant was not immunized because the grazing permit was not a sufficient property interest.⁹ The California Supreme Court reversed, holding that a federal grazing permit falls within the “exceptionally broad definition of the types of ‘interest’ in property which will trigger immunity.”¹⁰

1. 50 Cal. 3d 189, 785 P.2d 1183, 266 Cal. Rptr. 491 (1990). Justice Panelli wrote the majority opinion in which Chief Justice Lucas and Justices Broussard, Eagleson, Kennard and Kaufman concurred. Justice Mosk wrote a dissenting opinion.

2. *Id.* at 191, 785 P.2d at 1183, 266 Cal. Rptr. at 491. Note, however, that Civil Code § 846 immunity applies only to private landowners, not to public entities. 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 163 (9th ed. 1988) (citing *Nelsen v. Gridley*, 113 Cal. App. 3d 87, 91, 169 Cal. Rptr. 757, 759 (1980)).

3. CAL. CIV. CODE § 846 (West 1988). The 1980 amendment used broad language — “owner of any estate or any other interest in real property.” This had been applied liberally. 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 913 (9th ed. 1988). For a general discussion of liability for torts occurring on the land of another party, see 50 CAL. JUR. 3D *Premises Liability* § 2 (1979).

4. *Hubbard v. Brown*, 50 Cal. 3d at 191, 785 P.2d at 1183, 266 Cal. Rptr. at 491.

5. *Id.*

6. *Id.* at 192, 785 P.2d at 1183, 266 Cal. Rptr. 491.

7. *Id.* at 191-92, 785 P.2d at 1183, 266 Cal. Rptr. 491.

8. *Id.* at 191, 785 P.2d at 1183, 266 Cal. Rptr. 491.

9. *Id.*

10. *Id.* at 192, 785 P.2d at 1183, 266 Cal. Rptr. at 491.

II. TREATMENT OF THE CASE

In order to determine the breadth with which section 846 immunity should be applied, the supreme court examined the legislative history of the section. Initially, section 846 only immunized "[a]n owner of any estate real property."¹¹ In 1980, however, section 846 was amended by the insertion of "or any other interest . . . whether possessory or nonpossessory."¹² This amendment was enacted to overcome the judicially created limitations placed on section 846 immunity.¹³ The Legislature intended to broaden the application of section 846 by immunizing the owner of any interest in real property.¹⁴

The supreme court found unconvincing the argument that a federal grazing permit is not an interest in property since the federal government, the entity that issued the permit, does not recognize the permit as an interest in eminent domain proceedings. "[T]he limitation of an interest in federal lands for purposes of avoiding compensation in eminent domain need not be extended to preclude finding a property interest for purposes of a state immunity statute."¹⁵ The supreme court based its broad reading of "interest" on the strong policy expressed by the Californian Legislature that land should be open to recreational users.¹⁶ "Section 846 accomplishes this purpose by immunizing persons with interests in property from tort liability to recreational users, thus making recreational users responsible for their own safety and eliminating the financial risk that had kept land closed."¹⁷ By including a federal grazing permit in the section 846 definition of "interest," the supreme court ensured that land covered by federal grazing permits would be kept open to recreational users, furthering the California Legislature's objective.

11. *Id.* at 194, 785 P.2d 1185, 266 Cal. Rptr. at 493 (quoting 1963 Cal. Stat. 1959). For a general discussion of who is an owner for purposes of tort liability, see Comment, *Should Landowners Have Tort Immunity From Recreational Users?*, W. ST. L. REV. 201, 213-15 (1988).

12. *Hubbard*, 50 Cal. 3d at 194, 785 P.2d at 1185, 266 Cal. Rptr. at 493 (quoting CAL. CIV. CODE § 846 (West 1988)).

13. *Id.* at 195, 785 P.2d at 1186, 266 Cal. Rptr. at 493.

14. *Id.* at 194-95, 785 P.2d at 1185-86, 266 Cal. Rptr. at 493-94.

15. *Id.* at 195-96, 785 P.2d at 1186, 266 Cal. Rptr. at 494.

16. *Id.* at 192, 785 P.2d at 1183, 266 Cal. Rptr. at 491.

17. *Id.* Further support for the position that landowners should be immunized from tort liability in order to make their land accessible for recreational use is found in a California court of appeals decision, which held that the immunity still applies even if the public has an easement to use the land. See *Collins v. Tippett*, 156 Cal. App. 3d 1017, 203 Cal. Rptr. 366 (1984). In this case, the land is still private property and the owner is still protected by Civil Code § 846.

Justice Mosk dissented, agreeing with the analysis made by the majority of the court of appeal.¹⁸ Justice Mosk quoted extensively from Justice Sparks' appellate court opinion which characterized the federal grazing permit as a license.¹⁹ Justice Mosk stated that such a revocable license created no interest in National Forest property.²⁰

III. CONCLUSION

A "holder of a permit to graze livestock on federal lands in California is an owner of an interest in real property sufficient to come within the immunity afforded by section 846."²¹ This holding broadens the definition of interest in property and bolsters the California Legislature's policy of keeping land open for recreational use. This holding may also indicate that other types of interests in real property, not previously believed to be sufficient for tort immunity under section 846, may fit within the broad definition of "interest" as used in that section.

CALIFORNIA SURVEY STAFF

XV. TAX LAW

The California Constitution provides that insurance companies are subject to a gross premiums tax precluding the state or its subdivisions from exacting any other taxes except local taxes on real estate: Mutual Life Insurance Co. v. City of Los Angeles.

I. INTRODUCTION

In *Mutual Life Insurance Co. v. City of Los Angeles*,¹ the California Supreme Court considered whether, under the provisions of section 28 of Article XIII of the California Constitution, insurance company income from investments is subject to local taxation.² Mutual Life Insurance Company of New York (Mutual Life) brought

18. *Hubbard*, 50 Cal. 3d at 198, 785 P.2d at 1188, 266 Cal. Rptr. at 496 (Mosk, J., dissenting).

19. *Id.* at 201, 785 P.2d at 1190, 266 Cal. Rptr. at 498 (Mosk, J., dissenting).

20. *Id.*

21. *Id.* at 197, 785 P.2d at 1187, 266 Cal. Rptr. at 495.

1. 50 Cal. 3d 402, 787 P.2d 996, 267 Cal. Rptr. 589 (1990). Justice Panelli delivered the majority's opinion in which Chief Justice Lucas, and Justices Eagleson and Kaufman concurred. Justice Mosk wrote a separate dissenting opinion in which Justice Broussard and Kennard concurred.

2. Sections 28(a) and (b) of Article XIII of the California Constitution impose an annual tax on all insurers "doing business" in the state based on the amount of gross premiums they receive. This is referred to as the "gross premiums tax." Section 28(f) states, "[t]he tax imposed on insurers by this section is in lieu of all other taxes and licenses, state, county, and municipal, upon such insurers *and their property . . .*" CAL. CONST. art. XIII, § 28 (West Supp. 1990) (emphasis added).

suit for the refund of rental revenue taxes, parking lot fee taxes and utility users taxes, which had been paid to the City of Los Angeles (the City) pursuant to provisions of the Los Angeles Municipal Code.³

The trial court ruled in favor of Mutual Life and the court of appeal affirmed, holding that the insurance company was not liable for local taxes.⁴ The California Supreme Court upheld the court of appeal decision and, in doing so, reinforced the rule that insurance companies, which are subject to a gross premiums tax, are entitled to a broad exemption from all other state and local taxes.⁵

II. TREATMENT OF THE CASE

The court stated that its sole task in deciding the issue in *Mutual Life* was to determine the meaning of section 28 which provides that the gross premiums tax is imposed "in lieu of all other taxes and licenses, state, county, and municipal, upon . . . insurers and their property."⁶ The City argued that the statute was ambiguous and that the court should look to the legislative history and intent in determining whether the taxes it had imposed on Mutual should be exempted.⁷ The court, however, stated that the language was so clear that it was unnecessary and improper to look beyond the plain mean-

3. *Mutual Life*, 50 Cal. 3d at 406, 787 P.2d at 998, 267 Cal. Rptr. at 591. Mutual Life owned two office buildings in Los Angeles which produced rental revenues and income from parking facilities located in the buildings. Mutual Life paid revenue taxes on both of these and a utility users tax for electricity used in the rented offices. *Id.*

4. In reaching its decision, the court of appeal refused to follow the decision in *Massachusetts Mutual Life Ins. Co. v. City and County of San Francisco*, 129 Cal. App. 3d 876, 181 Cal. Rptr. 370 (1982). In that case, an insurance company owned a hotel in downtown San Francisco and received eighty percent of the profits from its operation. The court of appeal held that the "in lieu" provision of section 28 did not apply to taxes imposed on insurance company properties which were not used in the insurance business. *Id.* at 886, 181 Cal. Rptr. at 375. *Mutual Life* explicitly disapproves of *Massachusetts Mutual Life*. *Mutual Life*, 50 Cal. 3d at 416, 787 P.2d at 1005, 267 Cal. Rptr. at 598.

5. *Id.*

6. *Id.* at 407, 787 P.2d at 998, 267 Cal. Rptr. at 591. See *supra* note 2.

7. The City contended that the various uses of the term "business" in the statute created a question of whether or not insurers were meant to be exempted from all taxes or only those directly related to the conduct of their insurance business. *Id.* at 408, 787 P.2d 999, 267 Cal. Rptr. 592. In *Massachusetts Mutual*, the court of appeal apparently agreed with the City's argument and sought to interpret the statute in light of its intent rather than by the plain meaning of its language. *Massachusetts Mutual*, 129 Cal. App. 3d at 881, 181 Cal. Rptr. at 372 (citing *People v. Davis*, 85 Cal. App. 3d 916, 149 Cal. Rptr. 777 (1978) (holding that intent should prevail over plain meaning in statutory construction)).

ing of the language to determine the issue.⁸ Since the authors of section 28 had declared that the gross tax was in lieu of *all* other taxes and licenses, the “in lieu” provision simply could not be interpreted to apply the exemption for some taxes but not for others.⁹

In his dissenting opinion, Justice Mosk did not address this argument, but rather, contended that the negative consequences of such a broad exemption are so great that they could not have been intended by the authors.¹⁰ He argued that *Mutual Life* gives insurance companies an enormously lucrative loophole whereby California insurers operate a limitless variety of businesses wholly unrelated to the business of insurance, yet remain free of all taxes on their profits.¹¹

The majority, however, wrote that these potential abuses are limited by the fact that the insurance companies are highly regulated and strictly limited in the types of investments they are permitted to make.¹² Further, insurance companies must be allowed to re-invest premiums in a variety of ventures in order to maintain an adequate capital stock with which to pay off claims.¹³ In exchange for the broad exemption of section 28, the gross premiums tax imposed on insurance companies is fixed at a higher rate than it otherwise would be.¹⁴ Further, if it is perceived that insurance companies are not bearing their fair share of the tax burden, the legislature can easily increase the rate of taxation on gross premiums.¹⁵

8. The *Mutual Life* court stated:

[i]t is a prime rule of construction that the legislative intent underlying a statute must be ascertained from its language; if the language is clear, there can be no room for interpretation, and effect must be given to its plain meaning The courts may not speculate that the legislature meant something other than what it said. Nor may they rewrite a statute to make it express an intention not expressed therein.

Mutual Life, 50 Cal. 3d at 412, 787 P.2d at 1002, 267 Cal. Rptr. at 595 (quoting *Hennigan v. United Pacific Ins. Co.*, 53 Cal. App. 3d 1, 7, 125 Cal. Rptr. 408, 412 (1975)).

9. *Id.* at 408, 787 P.2d at 999, 267 Cal. Rptr. at 592. The court stated “[i]f argument is required upon the meaning of plain words so clearly expressing an obvious idea, it can only be because of an utter breakdown in our written language in its ability to convey thought.” *Id.* (quoting *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 143 P. 700 (1914) (in which the court interpreted a similar “in lieu” provision of a gross earnings tax on utilities companies)). See also *Hartford Fire Ins. Co. v. Jordan*, 168 Cal. 270, 142 P. 839 (1914) (holding that an “in lieu” provision superseded a prior state licensing fee for insurance companies).

10. *Mutual Life*, 50 Cal. 3d at 418, 787 P.2d at 1006, 267 Cal. Rptr. at 599, (Mosk, J., dissenting).

11. *Id.*

12. See CAL. INS. CODE §§ 1142-1150 (Deering 1876 and Supp. 1990) (restricting investment activities of California insurance companies).

13. *Mutual Life*, 50 Cal. 3d at 413, 787 P.2d at 1002-03, 267 Cal. Rptr. at 595-96 (citing *United States v. Atlas Ins. Co.*, 381 U.S. 233, 247 (1965) (insurance company obligated to maintain reserves, which, if they are to be adequate to pay claims, must grow at a sufficient rate each year).

14. *Id.* at 410, 787 P.2d at 1000, 267 Cal. Rptr. at 593.

15. *Id.* at 413, 787 P.2d at 1003, 267 Cal. Rptr. at 596.

III. CONCLUSION

The decision to uphold the broadest possible exemption from taxation under section 28 is a victory for insurance companies which, assuming claims of poor profitability are true, may need to invest premiums in businesses which are highly profitable, even though they are not directly related to the business of insurance. However, the celebration should be tempered by the court's statement that section 28's provisions apply only to companies whose *primary purpose* is insurance; an implicit warning that the exemption will be lost by companies which attempt to become tax-free business conglomerates with only a secondary focus on insurance.

MATTHEW J. STEPOVICH

XVI. TORT LAW

- A. *Negligent misrepresentations involving risk of physical harm are now a separate and distinct cause of action in tort to the exclusion of an action premised on ordinary negligence. Accordingly, plaintiffs must now establish that they reasonably relied on the defendant's misstatements in order to recover damages: Garcia v. Superior Court.*

I. INTRODUCTION

In *Garcia v. Superior Court*,¹ a divided California Supreme Court declared that negligent misrepresentations involving risk of physical injury are a separate and distinct tort and thus actionable.² In so doing, the court decisively defined the scope of recovery for injuries based on negligent misrepresentations. Traditionally, recovery was allowed only for injuries which were solely commercial or financial in nature.³ Now damages may be sought for injuries resulting in physical harm.⁴ Moreover, future actions premised on negligent mis-

1. *Garcia v. Superior Court*, 50 Cal. 3d 728, 789 P.2d 960, 268 Cal. Rptr. 779 (1990). Justice Panelli wrote the majority opinion in which Chief Justice Lucas and Justices Eagleson and Kennard concurred. Chief Justice Lucas also wrote a separate concurring opinion in which Justice Eagleson concurred. Justice Mosk wrote a separate dissenting opinion in which Justices Broussard and White (Presiding Justice, Court of Appeal, First Appellate District, Division Three, sitting under assignment by the Chairperson of the Judicial Council) concurred.

2. *Id.* at 734, 789 P.2d at 963, 268 Cal. Rptr. at 782.

3. See *infra* notes 12-18, 53 and accompanying text.

4. See *infra* note 40 and accompanying text.

representation require a plaintiff's reliance on the misstatement;⁵ a claim based on "ordinary negligence" will no longer be actionable.⁶

In *Garcia*, a woman was kidnapped and murdered by a parolee with whom she cohabitated. Her children filed a wrongful death action against the state and the killer's parole officer. The plaintiffs alleged that the parole officer negligently misrepresented that the decedent had nothing to worry about and that the killer was not going to come looking for her.

Writing for the majority, Justice Panelli recognized that negligent misrepresentations involving risk of physical harm are an exception to the general rule. Usually, liability may be imposed only on those misrepresenting information for business purposes in the course and scope of business.⁷ Nevertheless, the majority strongly asserted that plaintiffs may recover for negligent misrepresentations which involve risk of physical harm because "the duty to use reasonable care in giving information applies *more broadly* when physical safety is involved."⁸

II. HISTORICAL BACKGROUND

A look at the development of the law of negligent misrepresentation in California reveals inconsistency in that there have been no less than three views regarding when and how the tort applies. The traditional view is that it only applies in instances where a defendant supplies information in the *course of business* which results in losses that are solely *pecuniary* in nature.⁹ A second view establishes a cognizable, separate and distinct tort action for negligent misrepresentations which result in physical harm.¹⁰ A third view recognizes that

5. See *infra* note 44 and accompanying text.

6. See *infra* notes 20, 52-58 and accompanying text.

7. *Garcia*, 50 Cal. 3d at 735, 789 P.2d at 964, 268 Cal. Rptr. at 783.

8. *Id.* (emphasis added).

9. *Johnson v. State*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); *Connelly v. State*, 3 Cal. App. 3d 744, 84 Cal. Rptr. 257 (1970). See 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 721 (9th ed. 1988); see also *Hartwell Corp. v. Bumb*, 345 F.2d 453 (9th Cir. 1965). The tort of negligent misrepresentation "developed to protect a purchaser injured by a misrepresentation . . .," in a commercial transaction. *Id.* at 455-56 (emphasis added). Note, *Torts — Fraud and Deceit — Negligence — Negligent Misrepresentation Resulting in Bodily Harm*, 22 S. CAL. L. REV. 77, 78 (1948); RESTATEMENT (SECOND) OF TORTS § 551 (1965). One reason supporting the "course of business" limitation is that a plaintiff, in more casual settings, cannot expect a defendant "to exercise the same degree of care [in his communications] as he would when acting in a business or professional capacity." 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 721 (9th ed. 1988). Also, when the harm is only pecuniary, the magnitude of loss is unforeseeable due to the uncertainty of who will receive the information. RESTATEMENT (SECOND) OF TORTS § 552 (1965). However, courts that bar negligent misrepresentation for personal injuries as a cause of action have permitted an action under "ordinary negligence." See *infra* note 11.

10. *Finney v. Curtis*, 78 Cal. 498, 21 P. 440 (1889); *Yanase v. Automobile Club*, 212 Cal. App. 2d 468, 260 Cal. Rptr. 513 (1989); *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d

negligent misrepresentations resulting in physical harm are actionable, but that they are premised on an action in *ordinary negligence*.¹¹

A. Case Law Dealing With Negligent Misrepresentations Resulting In Physical Harm

1. The Traditional View

The California Supreme Court, in *Johnson v. State*¹² asserted that "‘misrepresentation,’ as a tort distinct from the general milieu of negligent and intentional wrongs, applies to interferences with *financial or commercial interest[s]*."¹³

In *Connelly v. State*,¹⁴ the Court of Appeal for the Fifth District followed the traditional view put forth in *Johnson*. The *Connelly* court acknowledged "the Supreme Court's definitive analysis and exposition of the term 'misrepresentation' . . ."¹⁵ and reasserted that the tort of misrepresentation applies only "to *interferences with financial or commercial interest[s]*."¹⁶

In addition, the Court of Appeal for the Second District followed *Johnson's* traditional view in *Bastian v. San Luis Obispo*.¹⁷ In *Bastian*, the court declared that "[m]isrepresentation or concealment is commonly a distinct cause of action only where the relationship between the parties is *financial or commercial*."¹⁸

680, 81 Cal. Rptr. 519 (1969). See RESTATEMENT (SECOND) OF TORTS § 311 (1965) (actionable negligent misrepresentation involving risk of physical harm) (hereinafter "section 311"). See *infra* note 46. There has been considerable confusion regarding the application of this tort. It is usually used under the guise of "ordinary negligence." W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 33, at 205 (5th ed. 1984). See also *Garcia*, 50 Cal. 3d at 745, 789 P.2d at 971, 268 Cal. Rptr. at 790 (Mosk, J., dissenting).

11. *Johnson v. State*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); *Fidelity and Casualty Co. v. Paraffine Paint Co.* 188 Cal. 184, 204 P. 1076 (1922). Courts that assert tort based on ordinary negligence often require *reliance*, an element of misrepresentation, not ordinary negligence. See *infra* notes 52 & 64.

12. *Johnson v. State*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

13. *Id.* at 800, 447 P.2d at 365, 73 Cal. Rptr. at 253 (emphasis added). For a contrary interpretation of the holding in *Johnson*, see *Garcia*, 50 Cal. 3d at 738 n.8, 789 P.2d at 965-66 n.8, 268 Cal. Rptr. at 784-85 n.8.

14. *Connelly v. State*, 3 Cal. App. 3d 744, 84 Cal. Rptr. 257 (1970).

15. *Id.* at 752, 84 Cal. Rptr. at 262.

16. *Id.* (quoting *Johnson v. California*, 69 Cal. 2d at 800, 447 P.2d at 365, 73 Cal. Rptr. at 253) (emphasis in original).

17. *Bastian v. San Luis Obispo*, 199 Cal. App. 3d 520, 245 Cal. Rptr. 78 (1988).

18. *Id.* at 531, 245 Cal. Rptr. at 83 (emphasis added). The Second District asserted that liability for negligent misrepresentations resulting in physical harm is limited to commercial or financial interests. *Michael v. Los Angeles County Dept. of Adoptions*, 201 Cal. App. 3d 859, 868, 247 Cal. Rptr. 504, 508 (1988). See also Note, *Torts — Fraud*

2. Negligent Misrepresentations Resulting In Physical Harm As A Separate And Distinct Tort Action

In 1889, the California Supreme Court, in *Finney v. Curtis*,¹⁹ recognized that an action may lie for negligent misrepresentation resulting in physical harm.²⁰ While the court in *Finney* did not specifically label the tort action an action for negligent misrepresentation, it nevertheless asserted that the defendant would be liable, "if in ignorance of the fact whether the horse . . . was gentle or not, he *carelessly represented* to plaintiff that he was gentle, and the plaintiff *relied* on such representation, and acting on it, *received an injury*."²¹

The Court of Appeal for the Fourth District also recognized a distinct cause of action for negligent misrepresentation resulting in physical harm. In *Hanberry v. Hearst Corporation*,²² the court, relying on section 311 of the Restatement (Second) of Torts ("section 311:), declared that the "respondent . . . is still subject to full liability for [personal] injury resulting from tortious negligent misrepresentation."²³ Accordingly, the court asserted "we . . . [hold] appellant has stated a *cause of action for negligent misrepresentation*."²⁴

3. Negligent Misrepresentations Resulting In Physical Harm Premised On Ordinary Negligence Principles

In *Johnson v. State*,²⁵ the plaintiff received personal injuries due to the defendant's negligent misrepresentations.²⁶ Though the court asserted that "'misrepresentation,' as a tort . . . applies to interferences

and Deceit — Negligence — Negligent Misrepresentation Resulting in Bodily Harm, 22 S. CAL. L. REV. 77, 78 (1948); see generally RESTATEMENT (SECOND) OF TORTS § 551 (1965) (liability imposed for negligent misrepresentation where losses were pecuniary); 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 721 (9th ed. 1988) ("liability is imposed only on those who supply information for business purposes in the course of a business or profession").

19. *Finney v. Curtis*, 78 Cal. 498, 21 P. 120 (1889).

20. *Id.* at 503, 21 P. at 121 (Thornton, J., concurring).

21. *Id.* (emphasis added).

22. *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969).

23. *Id.* at 686, 81 Cal. Rptr. at 523.

24. *Id.* at 687, 81 Cal. Rptr. at 524 (emphasis added). The Fourth District recognized a separate and distinct cause of action for negligent misrepresentation resulting in physical harm in *Yanase v. Automobile Club*, 212 Cal. App. 3d 468, 260 Cal. Rptr. 513 (1989). In *Yanase*, the decedent's estate sued the automobile club for negligent misrepresentation resulting in physical harm. The court impliedly acknowledged that negligent misrepresentation is a separate and distinct cause of action by asserting that "the third amended complaint does not state facts sufficient to constitute a cause of action in negligent misrepresentation." *Id.* at 473, 260 Cal. Rptr. at 516. The court cited section 1710 of the California Civil Code which recognizes negligent misrepresentation resulting in physical harm. *Id.* at 472-73, 260 Cal. Rptr. at 516. See *infra* note 29 and accompanying text.

25. *Johnson v. State*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

26. *Id.* at 785, 447 P.2d at 354, 73 Cal. Rptr. at 242.

with financial or commercial interest[s],”²⁷ it nevertheless reversed a summary judgment in favor of the defendant, asserting that the plaintiff should be allowed to proceed to trial on the merits of her *negligence* claim.²⁸

B. Statutory Provisions Regarding Negligent Misrepresentation Resulting In Physical Harm

By statutory definition, California law permits a cause of action for negligent misrepresentation resulting in physical harm.²⁹ Section 1709 of the California Civil Code (“section 1709) puts forth the *prima facie* case for negligent misrepresentation as:

[D]efendant must have made a representation as to a past or existing material fact; representation must have been untrue; regardless of his actual belief defendant must have made representation without any reasonable ground for believing it to be true; representation must have been made with intent to induce plaintiff to rely on it; plaintiff must have been unaware of falsity of representation and must have acted in *reliance* upon its truth and must have been *justified* in relying upon it; and, as a result of that reliance, plaintiff must have sustained damage.³⁰

Section 1709 “does not limit recovery to pecuniary loss . . . action may be maintained to recover for physical harm proximately caused by a defendant’s deceit.”³¹

III. STATEMENT OF THE CASE

In 1974, Johnson was imprisoned for the murder of his wife. In August 1985, he was released on parole and Ybarra, the defendant in

27. *Id.* at 800, 447 P.2d at 365, 73 Cal. Rptr. at 253.

28. *Id.* at 786, 447 P.2d at 355, 73 Cal. Rptr. at 243.

See also *Fidelity and Cas. Co. v. Paraffine Paint Co.*, 188 Cal. 184, 204 P. 1076 (1922). In *Fidelity*, the defendants allegedly informed the deceased that roofing coating he purchased was nonflammable, however it exploded when the deceased and another party were working with the coating and struck a match. One of the plaintiffs’ causes of action was for negligent misrepresentation resulting in physical harm. The court declared that “if any of . . . [the respondents were] *negligent* in the manner alleged in the complaint, then respondents would be liable. The *negligence* alleged in the complaint was in the making of *representations* as to the explosibility [sic] of the roof coating.” *Id.* at 195, 204 P. at 1081 (emphasis added).

29. CAL. CIV. CODE § 1709 (West 1985) [hereinafter “section 1709”]. This section is another basis for many misrepresentation actions. See also CAL. CIV. CODE § 1710 (West 1985) and *supra* note 24.

30. CAL. CIV. CODE § 1709(11) (West 1985) (emphasis added). See also 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 722(a) (9th ed. 1988). Witkin also refers to section 1572(2) of the California Civil Code as providing a cause of action for negligent misrepresentation. However, because section 1572 refers to contract actions it is excluded from discussion here.

31. CAL. CIV. CODE § 1709(50) (West 1988).

this action, became his parole agent. While on parole, Johnson began cohabitating with Morales, the plaintiffs' mother. In March 1986, Johnson moved out of Morales' home due to domestic problems. During this time, Johnson "began a campaign of violence . . . which included attempted stabbings, repeated death threats at knife point, forced sexual relationships at knife point and false imprisonment."³² Sometime later, Johnson, Morales and Ybarra met to discuss these threats. Johnson denied making the threats and Ybarra concluded no threats had been made. One week after the meeting, however, Johnson told Ybarra that he was looking for Morales and that if he found her he would kill her.³³

Ybarra had Johnson placed in seventy-two hour custody for psychiatric observation. Upon his release, Ybarra instructed Johnson to continue treatment with the parole department's staff psychologist. Later, during a telephone conversation, Morales told Ybarra that she was afraid Johnson would harm her. Ybarra responded by saying "I don't think you have anything to worry about. He's not going to come looking for you."³⁴ In addition, Ybarra informed Morales that Johnson was still in love with her. Johnson subsequently kidnapped, shot and killed Morales.

The children of the decedent filed a wrongful death action against the state and the parole officer alleging that Ybarra knew about Johnson's threats but negligently informed the decedent that Johnson would not come looking for her.³⁵

The superior court sustained demurrers by the state and the parole officer to the first amended complaint without leave to amend because the plaintiffs failed to state a cause of action.³⁶ The court of appeal denied the plaintiffs' petition for writ of mandate.³⁷ The supreme court agreed that the plaintiffs had failed to state a cause of action. The court asserted, however, that the plaintiffs were entitled to leave to amend because the lower courts did not address the theory on which the plaintiffs now rely.³⁸

IV. THE COURT'S DECISION

A. *The Majority Opinion*

The majority addressed whether the tort of negligent misrepresentation applied to injuries resulting from physical harm. In so doing,

32. *Garcia v. Superior Court*, 50 Cal. 3d 728, 732, 789 P.2d 960, 962, 268 Cal. Rptr. 779, 781 (1990).

33. *Id.*

34. *Id.* at 733, 789 P.2d at 962, 268 Cal. Rptr. at 781.

35. *Id.* at 731, 789 P.2d at 961, 268 Cal. Rptr. at 780.

36. *Id.* at 731-32, 789 P.2d at 961, 268 Cal. Rptr. at 780.

37. *Id.* at 732, 789 P.2d at 961, 268 Cal. Rptr. at 780.

38. *Id.* at 738, 789 P.2d at 965, 268 Cal. Rptr. at 784.

the court seized upon the broader opportunity to resolve judicial confusion regarding the tort of negligent misrepresentation resulting in physical harm, and decisively established it as a separate and distinct cause of action in tort.³⁹

First, the majority acknowledged that imposing liability for negligent misrepresentations involving risk of physical harm was an exception to the general rule which traditionally recognized liability only for negligent misrepresentations involving injuries solely commercial or financial in nature.⁴⁰ The majority also asserted that "the duty to use reasonable care in giving information applied *more broadly* when physical safety is involved."⁴¹ Accordingly, the majority flatly rejected the contention that this tort only applied to "economic injuries" and summarily declared that "it is unnecessary to look beyond the *ordinary rules* that determine when misrepresentations are actionable."⁴²

Relying on section 311,⁴³ the majority outlined the prima facie case or *ordinary rules* of when negligent misrepresentations resulting in physical harm are actionable. First, the defendant must owe a duty to the plaintiff.⁴⁴ Second, the defendant must have failed to exercise reasonable care in ascertaining the accuracy of the information, or in communicating the information.⁴⁵ Third, there must have been actual and reasonable reliance on the misrepresentation.⁴⁶ Finally, the

39. *Garcia*, 50 Cal. 3d at 734, 789 P.2d at 963, 268 Cal. Rptr. at 782.

40. *Id.* at 735, 789 P.2d at 964, 268 Cal. Rptr. at 782.

41. *Id.* at 735, 789 P.2d at 964, 268 Cal. Rptr. at 783 (emphasis added).

42. *Id.* at 734, 789 P.2d at 963, 268 Cal. Rptr. at 782 (emphasis added). See also RESTATEMENT (SECOND) OF TORTS § 311 (1965) (negligent misrepresentation involving risk of physical harm). Section 311 states in its entirety:

(1) One who *negligently* gives false information to another is subject to liability for *physical harm* caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other, or

(b) to such third persons as the actor should expect to be put in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or

(b) in the manner in which it is communicated.

RESTATEMENT (SECOND) OF TORTS § 311 (1965) (emphasis added).

43. See *supra* note 42.

44. *Garcia*, 50 Cal. 3d at 735, 789 P.2d 963, 268 Cal. Rptr. at 782. The majority observed that while parole officers initially have no duty to volunteer information, once they take it upon themselves to do so, they must do so without negligence. Accordingly, the duty is established once the officer voluntarily speaks. *Id.* at 736, 789 P.2d at 964, 268 Cal. Rptr. at 783.

45. *Id.* at 736, 789 P.2d at 965, 268 Cal. Rptr. at 784.

46. *Id.* at 737, 789 P.2d at 965, 268 Cal. Rptr. at 784. This is the element of the

plaintiff must show that reliance on the misrepresentation proximately caused the injury.⁴⁷ After applying the above elements to the case at bar, the majority determined that the plaintiffs failed to satisfactorily plead the third element.⁴⁸

Accordingly, the majority held that the plaintiffs were entitled to amend their complaint in order to "allege facts sufficient" to show that the deceased actually and reasonably relied on the defendant's misrepresentations,⁴⁹ and thus, to allege a cause of action premised on negligent misrepresentation.⁵⁰

B. *The Concurring Opinion*

In his concurrence, Chief Justice Lucas enthusiastically adopted the majority's position that section 311 imposes liability in tort for negligent misrepresentations resulting in physical harm.⁵¹ Thus, the Chief Justice took the opportunity to clarify the majority's holding and to criticize Justice Mosk's dissent.

The Chief Justice pointed out that by allowing a claim for negligent misrepresentation for physical injury, a plaintiff would be precluded from bringing a claim under "ordinary negligence."⁵² The Chief Justice asserted that the majority opinion "implicitly held"

plaintiffs' claim that the majority found deficient. *Id.* at 733, 789 P.2d at 962, 268 Cal. Rptr. at 781.

47. *Id.* at 737, 789 P.2d at 965, 268 Cal. Rptr. at 784.

48. *Id.*

49. *Id.*

50. *Id.* at 738, 789 P.2d at 965, 268 Cal. Rptr. at 784. The majority also dealt with another issue regarding whether the plaintiffs have a valid cause of action under section 1983 of the Civil Rights Act of 1871. *Id.* at 738-39, 789 P.2d at 965-66, 268 Cal. Rptr. at 784-85; see also 42 U.S.C. § 1983 (1982). The majority, relying on *Will v. Michigan Dep't of State Police*, 488 U.S. 1039 (1989), declared that "neither a state nor a state official acting in his official capacity is a 'person' subject to suit under section 1983." *Garcia*, 50 Cal. 3d at 739, 789 P.2d at 966, 268 Cal. Rptr. at 785. Additionally, the majority, relying on *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989), asserted that "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Garcia*, 50 Cal. 3d at 739, 789 P.2d at 966, 268 Cal. Rptr. at 785 (quoting *DeShaney*, 489 U.S. at 200). The majority concluded that Ybarra left the decedent "in the same position as before, still free to take any measures she wished to protect herself from Johnson." *Id.* at 741, 789 P.2d 967-68, 268 Cal. Rptr. at 786-87. The dissent agrees with the majority's analysis and holding on this issue. *Id.* at 761, 789 P.2d at 982, 268 Cal. Rptr. at 801 (Mosk, J., dissenting).

51. *Garcia*, 50 Cal. 3d at 744, 789 P.2d at 970, 268 Cal. Rptr. at 789 (Lucas, C.J., concurring).

52. *Id.* at 741, 789 P.2d at 968, 268 Cal. Rptr. at 787 (Lucas, C.J., concurring). This position seems to be correct since the tort of negligent misrepresentation imposes a higher standard on a plaintiff, i.e., reasonable reliance, in which the plaintiff bears the initial burden of pleading and proof. Under an "ordinary negligence" action a plaintiff need only show duty, breach, causation and damages. By acknowledging that an action may lie in tort for negligent misrepresentation resulting in physical injury, and by further acknowledging its higher standard of reasonable reliance, it logically follows that

that proposition.⁵³

Moreover, Chief Justice Lucas denounced Justice Mosk's dissent and the commentators on this tort in general as having "mis-perceive[d] the true state of the common law by asserting without qualification that actions for negligent misrepresentation have long been analyzed under simple 'negligence' principles."⁵⁴ He directly confronted the authorities in support of position that one need apply only "ordinary negligence" principles to maintain an action for negligent misrepresentation resulting in physical harm.⁵⁵ The Chief Justice noted that "[i]n each case cited . . . the court implicitly or expressly recognized a need for *reasonable reliance* by the plaintiff . . ."⁵⁶ He further asserted that in cases where reasonable reliance was not found, recovery was not allowed.⁵⁷ Accordingly, he reasoned, "[t]he Restatement did not alter th[e] common law rule, but merely 'codified' it; the majority opinion, by following the Restatement, does not depart from the common law rule, but rather adheres to it."⁵⁸

Finally, the Chief Justice observed the "legitimate jurisprudential and policy reasons" why, when imposing liability for negligent misrepresentations resulting in physical injury, a plaintiff must prove reasonable reliance. He reasoned that:

In such situations the plaintiff will often be in the best position, and have the final opportunity, to avoid any risk of harm. He must ultimately decide, based on his own assessment of the circumstances known to him, whether to act on the representations of the defendant. Moreover, a plaintiff will often be the party most capable of correctly evaluating a risk. Finally, fairness dictates that a plaintiff justify his reliance, and that the reliance be reasonable, lest the speaker incur liability out of all proportion to his culpability for careless speech.⁵⁹

Thus, the Chief Justice concluded by reasserting the majority's position "to adopt the Restatement view of liability for negligent misrep-

a cause of action for negligent misrepresentation based on "ordinary negligence" with its lower standard would probably be barred. See *infra* note 64.

53. *Garcia*, 50 Cal. 3d at 741, 789 P.2d at 968, 268 Cal. Rptr. at 787 (Lucas, J., concurring).

54. *Id.* at 743, 789 P.2d at 969, 268 Cal. Rptr. at 788 (Lucas, C.J., concurring).

55. *Id.* at 742, 789 P.2d at 968, 268 Cal. Rptr. at 787 (Lucas, C.J., concurring).

56. *Id.* (Lucas, C.J., concurring) (emphasis added). See *infra* note 64 & *supra* note 52. The Chief Justice also noted that both commentators cited by the dissent "cite section 311 of the Restatement in support of their" positions. *Garcia*, 50 Cal. 3d at 742, 789 P.2d at 969, 268 Cal. Rptr. at 788 (Lucas, C.J., concurring). This is inconsistent with their positions because section 311 requires reliance by the injured party. See *id.* (Lucas C.J., concurring).

57. *Id.* at 743, 789 P.2d at 969, 268 Cal. Rptr. at 788 (Lucas, C.J., concurring).

58. *Id.* at 744, 789 P.2d at 970, 268 Cal. Rptr. at 789 (Lucas, C.J. concurring).

59. *Id.* at 744, 789 P.2d at 970, 268 Cal. Rptr. at 789 (Lucas, C.J. concurring).

resentation resulting in physical harm, to the exclusion of a 'traditional' negligence action."⁶⁰

C. *The Dissenting Opinion*

Justice Mosk sharply criticized the majority's holding and asserted that it "create[d] new law that is ill-advised and potentially mischievous."⁶¹ He emphasized that the tort of negligent misrepresentation "is generally confined to injuries to pecuniary interests, such as sales and credit transactions."⁶² He reasoned that negligent misrepresentations resulting in physical harm are not a separate and distinct tort in which a plaintiff must plead *reasonable reliance*.⁶³ Rather, when confronted with negligent misrepresentations which result in physical harm, only the simple rules of *negligence* must be applied.⁶⁴

Justice Mosk cited cases which held that the tort of negligent misrepresentation applied only to financial or commercial interests.⁶⁵

60. *Id.* (Lucas, C.J. concurring).

61. *Id.* at 745, 789 P.2d at 970, 268 Cal. Rptr. at 789 (Mosk, J., dissenting).

62. *Id.* at 748, 789 P.2d at 973, 268 Cal. Rptr. at 792 (Mosk, J., dissenting).

63. *Id.* at 745, 789 P.2d at 971, 268 Cal. Rptr. at 790 (Mosk, J., dissenting).

64. *Id.* (Mosk, J. dissenting). Justice Mosk asserted that negligent misrepresentations resulting in physical harm have been premised on actions in "ordinary negligence" for many years prior to the distinct common law tort of negligent misrepresentation which generally only protects interests that are economic or financial. *Id.* at 746, 789 P.2d at 971, 268 Cal. Rptr. at 790 (Mosk, J. dissenting). He acknowledged, however, that "during the first half of this century there was considerable controversy and confusion over the theory of negligent misrepresentation." *Id.* at 751, 789 P.2d at 974, 268 Cal. Rptr. at 793 (Mosk, J. dissenting). Justice Mosk declared that "Johnson and its progeny put the confusion to rest." *Id.* See *supra* notes 9-18 and accompanying text. Justice Mosk asserted correctly that *reasonable reliance* is not an element in "any cause of action for negligence . . ." *Id.* at 755, 789 P.2d at 978, 268 Cal. Rptr. at 797 (Mosk, J., dissenting). When confronted with the issue in the instant case, however, Mosk claimed that "[w]ithout question, a plaintiff who suffers physical injuries as a result of a defendant's misrepresentation must allege sufficient facts to show that he relied on those misrepresentations. Without such facts, there is no showing of causation, an essential element of a cause of action for negligence." *Id.* (emphasis added). Mosk is correct in stating that absent a plaintiff's reliance there is no showing of causation. However, as he stated, reliance is not an element of negligence, it is an element of misrepresentation. Accordingly, the two causes of action have different focuses. The emphasis in a negligence action is on the *defendant's conduct* i.e., duty, breach and causation. The emphasis switches to the plaintiff's conduct only to establish comparative negligence. In California, however, this only reduces rather than bars a plaintiff's recovery. The focus in a negligent misrepresentation action, on the other hand, is on the *plaintiff's conduct*, i.e., reasonable reliance. If his reliance is not deemed reasonable he cannot recover. Hence, it appears that the two torts are distinct. Since Justice Mosk acknowledges the reliance requirement, it appears his reasoning indirectly supports the majority's holding that negligent misrepresentation resulting in physical harm is a separate and distinct tort. For other distinctions between these torts, see *supra* note 52.

65. *Garcia*, 50 Cal. 3d at 748-50, 789 P.2d at 972-74, 268 Cal. Rptr. 791-93 (Mosk, J., dissenting). See *Johnson v. State*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); *In re Michael J.*, 201 Cal. App. 3d 859, 247 Cal. Rptr. 504 (1988); *Bastian v. County of San Luis Obispo*, 199 Cal. App. 3d 520, 245 Cal. Rptr. 78 (1988); *Connelly v. State*, 3 Cal. App. 3d 744, 84 Cal. Rptr. 254 (1970).

He noted that the cases permitted an action under "ordinary negligence" principles.⁶⁶ He further stated that the purpose of the negligence tort is to protect against harm to person and property, whereas the purpose of the tort of negligent misrepresentation is to protect against harm which is economic or commercial in nature.⁶⁷ Justice Mosk, therefore, concluded that the majority's opinion created new law and "reintroduce[d] confusion into an area of law that the courts and commentators ha[d] endeavored to clarify."⁶⁸

Finally, Justice Mosk applied "ordinary negligence" principles to the case at bar to determine whether the plaintiffs had stated a viable cause of action. Relying on seven factors from *Rowland v. Christian*,⁶⁹ he concluded that six weighed in favor of the plaintiffs, and therefore stated a valid cause of action in negligence.⁷⁰

V. IMPACT OF THE COURT'S DECISION

The holding in *Garcia* has significant impact on cases involving claims based on negligent misrepresentation resulting in physical harm. As with most issues in which there is lower court confusion, a supreme court decision brings judicial conformity. For example, plaintiffs in jurisdictions that recognized this tort in ordinary negligence must now meet a higher standard. In an "ordinary negligence jurisdiction," the plaintiff must establish duty, breach, causation and damages, the emphasis being on the defendant's conduct. With negligent misrepresentation as a separate and distinct tort, however, a plaintiff must establish *reasonable reliance* on the defendant's misrepresentation, as well as the standard elements of negligence. Thus the emphasis is on the *plaintiff's* conduct. Accordingly, it is much

66. *Garcia*, at 750, 789 P.2d at 974, 268 Cal. Rptr. at 793 (Mosk, J. dissenting).

67. *Id.* at 748, 789 P.2d at 973, 268 Cal. Rptr. at 792 (Mosk, J. dissenting).

68. *Id.* at 757, 789 P.2d at 979, 268 Cal. Rptr. at 798 (Mosk, J., dissenting).

69. *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). The factors include: "(1) foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (7) the availability, cost, and prevalence of insurance for the risk involved." *Id.* at 112-13, 443 P.2d at 564, 70 Cal. Rptr. at 100.

70. Justice Mosk stated that the first six factors weigh in favor of the plaintiffs and that the last factor, even if deemed to weigh in the defendant's favor, "could not support a departure from the fundamental principle that all persons are responsible for injuries caused by their failure to exercise due care." *Garcia*, 50 Cal. 3d at 761, 789 P.2d at 982, 268 Cal. Rptr. at 801 (Mosk, J., dissenting).

more difficult for plaintiffs to establish claims as they carry the initial burden of pleading and proof as to whether *their* conduct was reasonable.⁷¹

A potential benefit to plaintiffs is that comparative negligence is not a defense in misrepresentation. However, since California is a pure comparative negligence state a defendant's inability to use the defense actually works to the plaintiff's detriment. For instance, under pure comparative negligence, a plaintiff will be allowed to recover damages even when his negligence is substantially greater than defendant's negligence. Thus, a plaintiff may be ninety percent comparatively negligent and still recover ten percent of his damages. With this defense abolished, however, a plaintiff who is ninety percent comparatively negligent would probably not be deemed to have reasonably relied on the defendant's misrepresentations and therefore will be precluded from recovery.

Defendants will also feel an impact, but it will be a positive one. They will benefit from the reasonable reliance requirement. Rather than a court solely looking at the defendant's conduct, as in an "ordinary negligence" action, the court will also consider the plaintiff's conduct. If the plaintiff cannot meet the higher standard of reasonable reliance, then the claim will not be sustained.⁷² Moreover, since comparative negligence cannot be used, a defendant who is minimally negligent need no longer pay damages commensurate with his negligence where the plaintiff fails to satisfy the reliance requirement.

VI. CONCLUSION

The California Supreme Court's strong language declaring that negligent misrepresentations resulting in physical harm are a separate and distinct cause of action gives much needed guidance to the lower courts. This doctrinal consistency will enable litigants to deal with the more substantive merits of their claims and not clutter the court dockets.

Additionally, the court seems to have struck an equitable balance between the respective rights of plaintiffs and defendants. As Chief Justice Lucas observed:

In such situations the plaintiff will often be in the best position, and have the final opportunity, to avoid any risk of harm. He must ultimately decide, based on his own assessment of the circumstances known to him, whether to act on the representations of the defendant. Moreover, a plaintiff will often be the party most capable of correctly evaluating a risk. Finally, fairness dictates that a plaintiff justify his reliance, and that the reliance be reasonable, lest

71. See *supra* note 64.

72. In other words, in an action based on negligent misrepresentation, if a plaintiff does not act reasonably he is precluded from recovery. Under an ordinary negligence claim, however, if a plaintiff does not act reasonably he would only have his recovery reduced; he could still recover something. See *supra* note 64.

the speaker incur liability out of all proportion to his culpability for careless speech.⁷³

Defendants now have protection against careless misstatements that, prior to this holding, could have exposed them to liability "out of all proportion" to their culpability. On the other hand, plaintiffs are still protected against personal injuries resulting from a defendant's careless misstatements as long so they can show their reliance on the defendant's misstatement was reasonable.

BRIAN DOSTER CHASE

- B. *A plaintiff seeking to state a claim for intentional interference with contract or intentional interference with prospective economic advantage due to a defendant inducing a contracting party to undertake litigation to terminate the contract according to its terms, must allege that the party brought the litigation without probable cause and that the litigation concluded in the plaintiff's favor: Pacific Gas & Electric Company v. Bear Stearns & Company.*

I. INTRODUCTION

In *Pacific Gas and Electric Company v. Bear Stearns & Company*,¹ the California Supreme Court considered whether inducing a contracting party to seek a judicial determination on whether they can terminate the contract according to its terms states a valid cause of action in tort for intentional interference with contract, or intentional interference with prospective economic advantage. The unanimous court decisively resolved that a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage due to a defendant inducing a contracting party to undertake litigation to terminate the contract according to its terms, must allege that the party brought the litigation without probable cause and that the litigation concluded in the plaintiff's favor.²

In *Pacific Gas & Electric Company*, the plaintiff, Pacific Gas &

73. *Garcia*, 50 Cal. 3d at 744, 789 P.2d at 970, 268 Cal. Rptr. at 789 (Lucas, C.J. concurring).

1. 50 Cal. 3d 1118, 791 P.2d 587, 270 Cal. Rptr. 1 (1990). Justice Broussard wrote the majority opinion in which Chief Justice Lucas and Justices Mosk, Eagleson, Kennard, Arabian and Puglia, Presiding Justice of the Court of Appeal, Third Appellate District, sitting under assignment by the Chairperson of the Judicial Council, concurred.

2. *Id.* at 1137, 791 P.2d at 598, 270 Cal. Rptr. at 12.

Electric Company (PG & E), had a long term contract with the Placer County Water Agency (Agency). The contract was entered into in 1963 and was to "terminate in 2013 or at the end of the year in which the Agency completed retirement of its project bonds, whichever occurred first."³ Due to rising energy prices, the Agency wanted to terminate the contract and sell its power at more favorable prices. Defendant Bear Stearns & Company (Bear Stearns), an investment brokerage firm, successfully sought to induce the Agency to attempt to terminate its contract with PG & E. Bear Stearns agreed to pay for legal fees to determine whether the Agency could terminate the contract in return for 15 percent of any resulting increase in the Agency's revenues above \$2.5 million for 20 years. In addition, Bear Stearns was soliciting buyers for the Agency's power.⁴

PG & E filed suit against Bear Stearns alleging intentional interference with contract, intentional interference with prospective economic advantage and attempted inducement of breach of contract.⁵ At the trial court level, Bear Stearns' demurrer was sustained without leave to amend.⁶ The court of appeal reversed the trial court's holding as to the interference claims declaring that, while "no breach of contract was threatened . . . either cause of action may be stated without alleging an actual or threatened breach."⁷ The California Supreme Court reversed and remanded the judgment of the court of appeal with directions to affirm the trial courts judgment to dismiss the action.⁸

II. TREATMENT OF THE CASE

The California Supreme Court noted at the outset the well established rule that "a stranger to a contract may be liable in tort for intentionally interfering with the performance of the contract."⁹ The

3. *Pacific Gas & Elec. Co.*, 50 Cal. 3d at 1124, 791 P.2d at 588, 270 Cal. Rptr. at 2.

4. *Id.*

5. PG & E filed a separate suit against the Agency. The Agency then sought a declaratory judgment "asserting that the contract could be terminated early by retiring the project bonds. The trial court entered a judgment on the pleadings in favor of the Agency." *Id.* at 1124, 791 P.2d at 588-89, 270 Cal. Rptr. at 2-3. The court of appeal reversed, declaring that the trial court erred because it failed to consider extrinsic evidence which showed that the parties did not intend to terminate the contract before 2013. *Id.* As of the publication of the instant case, the action against the Agency is still pending.

6. *Id.* at 1125, 791 P.2d at 589, 270 Cal. Rptr. at 3.

7. *Id.*

8. *Id.* at 1137-38, 791 P.2d at 598, 270 Cal. Rptr. at 12.

9. *Id.* at 1126, 791 P.2d at 589, 270 Cal. Rptr. at 3 (citing *Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33, 112 P.2d 631 (1941); *Lumley v. Guy*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853)). See RESTATEMENT (SECOND) OF TORTS § 766 (1977). For a general history and current status of these torts in California, see 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 638-73 (9th ed. 1988). See also Dowling, *A Contract Theory for a Complex Tort: Limiting Interference With Contract Beyond the Unlawful Means*

main issue before the court, however, was whether inducing a party to a contract to seek a judicial determination on whether it can terminate the contract according to its terms states a valid cause of action in tort for intentional interference with contract or prospective economic advantage.¹⁰ More specifically, the court narrowed the issue to whether it would be appropriate to subject someone to liability for inducing a "potentially meritorious lawsuit."¹¹

Test, 40 U. MIAMI L. REV. 487 (1986); Perlman, *Interference with Contract and Other Economic Expectancies: A Case of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61 (1982); Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728 (1928); Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663 (1923).

10. The prima facie case for intentional interference with contract is: (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant must have knowledge of the contract; (3) an intentional act by defendant designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship must occur; and (5) resulting damage. *Pacific Gas & Elec. Co.*, 50 Cal. 3d at 1126, 791 P.2d at 589-90, 270 Cal. Rptr. at 3-4. See *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984); *Ramona Manor Convalescent Hosp. v. Care Enters.*, 177 Cal. App. 3d 1120, 225 Cal. Rptr. 120 (1986); *Farmers Ins. Esch. v. State*, 175 Cal. App. 3d 494, 221 Cal. Rptr. 225 (1985). The prima facie case for intentional interference with prospective economic advantage is: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Pacific Gas & Elec. Co.*, 50 Cal. 3d at 1126 n.2, 791 P.2d at 590 n.2, 270 Cal. Rptr. at 4 n.2 (quoting *Youst v. Longo*, 43 Cal. 3d 64, 71 n.6, 729 P.2d 728, 733 n.6, 233 Cal. Rptr. 294, 298 n.6 (1987)). See also *Blank v. Kirwan*, 39 Cal. 3d 311, 703 P.2d 58, 216 Cal. Rptr. 718 (1985); *Buckaloo v. Johnson*, 14 Cal. 3d 815, 537 P.2d 865, 122 Cal. Rptr. 745 (1975). The court noted that the distinction between intentional interference with contract and intentional interference with prospective economic advantage is that a plaintiff need not show proof of a legally binding contract in an action dealing with interference with prospective economic advantage. *Pacific Gas & Elec. Co.*, 50 Cal. 3d at 1126, 791 P.2d at 590, 270 Cal. Rptr. at 4.

The court also dealt with the issue of whether actual interference is sufficiently alleged by inducing litigation on the contract. The court asserted that if the interference makes the performance of the contract more expensive or burdensome, then actual interference is sufficiently alleged. *Id.* at 1129, 791 P.2d at 592, 270 Cal. Rptr. at 6. The court then inferred that here the only additional burden or expense placed on the contract is attributable to the instant litigation, which, if meritorious, is not sufficient to satisfy the expense or burden requirement. *Id.* at 1137, 791 P.2d at 598, 270 Cal. Rptr. at 12. Accordingly, the court held that the plaintiffs had not sufficiently plead that the defendant had made the enjoyment of the benefits of the contract more expensive or burdensome. *Id.*

11. *Pacific Gas & Elec. Co.*, 50 Cal. 3d at 1127, 791 P.2d at 587, 270 Cal. Rptr. at 4 (emphasis added). It is important to note the court's use of the phrase "potentially meritorious lawsuit" because the court also asserted that, generally, an action may lie in tort for intentional interference of contract or prospective economic advantage for inducing a party to a contract to terminate the contract according to its terms *if there is no colorable claim*. See *id.* at 1126-27, 791 P.2d at 590, 270 Cal. Rptr. at 4. The court

Writing for the unanimous court, Justice Broussard asserted that express termination provisions do not create a privilege to interfere with the contractual relationship.¹² He reasoned that since courts protect economic relationships which are solely *prospective* from outside interference, then courts must also protect contractual relationships which are *currently in effect* but subject to termination.¹³

Next, the court dealt with the issue of whether it would be appropriate to subject someone to liability for inducing a potentially meritorious lawsuit. First, the court noted that the only actionable tort for instigating a lawsuit is malicious prosecution.¹⁴ It then reasoned that if by bringing a colorable claim a party could be subject to liability, the law, then, would inhibit free access to the courts and the right to petition for redress of grievances which is guaranteed by the federal and state constitutions.¹⁵

Justice Broussard concluded by declaring that the "malicious prosecution cases strike [an] appropriate balance between the right to free access to the court and the interest in being free from the cost of defending [meritless] litigation."¹⁶ The court thus adopted the elements of the tort malicious prosecution and adapted them to the "in-

analogized this claim to an at-will contract wherein either party can terminate the contract at his or her will. The court asserted that "interference with an at-will contract is actionable interference with the contractual relationship, on the theory that a contract 'at the will of the parties, respectively does not make it one at the will of others.'" *Id.* at 1127, 791 P.2d at 590-91, 270 Cal. Rptr. at 4-5 (quoting *Speegle v. Board of Fire Underwriters*, 29 Cal. 2d 34, 39, 172 P.2d 867, 870 (1946), quoting *Truax v. Raich*, 239 U.S. 33, 38 (1915)). The court reasoned that "it is the contractual relationship, not any term of the contract, which is protected against outside influence." *Id.* at 1127, 791 P.2d at 590, 270 Cal. Rptr. at 4. The court further expounded upon this point by emphasizing that "the contractual relationship is at the will of the parties, not at the will of outsiders." *Id.* at 1127, 791 P.2d at 591, 270 Cal. Rptr. at 5.

12. *Id.* at 1128, 791 P.2d at 591, 270 Cal. Rptr. at 5. See also *supra* note 2.

13. *Id.*

14. *Id.* at 1131, 791 P.2d at 593, 270 Cal. Rptr. at 7. Malicious prosecution occurs where one party forces another party "to expend financial and emotional resources to defend a baseless claim." *Id.* The plaintiff who asserts a malicious prosecution claim must show that "the prior action was brought without probable cause and was [decided] in the plaintiff's favor." *Id.* (citations omitted).

15. *Id.* at 1135, 791 P.2d at 597, 270 Cal. Rptr. at 11. See U.S. CONST. amend. I; CAL. CONST. art. I, § 3. The court acknowledged that it is the *litigant* that is protected from liability for bringing a colorable claim and that here Bear Stearns is not the litigant bringing the claim, but rather the one inducing the litigant to bring a claim. Nevertheless, the court asserted that "the constitutional doctrine assuring the right to petition may 'impose the outer limits upon the category of conduct that may be subject to liability on the basis of common law doctrine, and thus serve to shape the doctrine itself.'" *Pacific Gas & Elec. Co.*, at 1135, 791 P.2d at 597, 270 Cal. Rptr. at 11 (quoting *Environmental Planning & Information Council v. Superior Court*, 36 Cal. 3d 188, 195, 680 P.2d 1086, 1091, 203 Cal. Rptr. 127, 132 (1984)). The court further reasoned that its "concern not to *chill* the right to petition the courts for redress of grievances must inform [its] view of whether the act of inducing litigation is a tort." *Id.* at 1136, 791 P.2d at 597, 270 Cal. Rptr. at 11 (emphasis added).

16. *Pacific Gas & Elec. Co.*, 50 Cal. 3d at 1137, 791 P.2d at 598, 270 Cal. Rptr. at 12.

ducing litigation" issue with regard to the torts intentional interference with contract and prospective economic advantage. Accordingly, the court held that in order for a plaintiff to assert a claim for intentional interference with contract or prospective economic advantage due to a defendant inducing a party to a contract to seek a judicial determination on whether they can terminate the contract according to its terms, the plaintiff must allege that "the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor."¹⁷

III. CONCLUSION

The development of the law involving intentional interference with contract and intentional interference with prospective economic advantage has been shaped by two competing interests. First, there is the contracting parties interest, as well as perhaps an even greater societal interest, in protecting contractual stability. Second, there is the societal interest in maintaining a free and competitive market or economy. However, the California Supreme Court in *Pacific Gas & Electric Company*, had to consider a third interest due to the specific facts of the case. That interest being, a person's federal and state constitutional right to petition the government for redress of grievances.

The court's treatment of the issues seems to have struck an equitable balance between these respective interests. First, contractual stability is protected *via a vis* the probable cause requirement which protects parties to a contract from meritless claims. Moreover, contracting parties will now know that express termination provisions in contracts are "invitations" for outside interference, which, in turn, should enhance contractual stability by alerting individuals to be more careful in drafting their contracts.

Second, this holding actually enhances free and competitive markets. Individuals are now permitted to induce a party to a contract to terminate the contract according to its terms without having to worry about a tortious interference suit so long as they have probable cause. Accordingly, as in the instant case, if a party wants out of a contract in order to sell its product at more favorable prices, or if an individual wishes to induce a contracting party to seek a judicial determination on whether they can terminate the contract, they will be allowed to do so as long as the requisites of this hold are satisfied.

17. *Id.*

Lastly, and more specific to the issue presented in the instant case, the court found a way to protect an individual's constitutional right to petition the courts for redress of grievances while at the same time allowing protection to the contractual relationship and the free and competitive market. By adopting the elements of the tort of malicious prosecution and applying them to the tortious interference issue presented here, the court maintained an individual's right to petition the courts. For instance, if a plaintiff has probable cause to initiate a lawsuit, then he may do so regardless of whether he intends on interfering with an existing contract or some prospective economic advantage. On the other hand, the probable cause requirement places an appropriate limit on the instigation of this type of suit, thus protecting contractual relationships and the free market.

BRIAN DOSTER CHASE