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California Supreme Court Survey - July 1990-December 1990

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CALIFORNIA SUPREME COURT SURVEY JULY 1990 - DECEMBER 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.

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I. ADMINISTRATIVE LAW

- A. *The Public Utilities Commission has the power to make findings of fact regarding interests in property with limited review by the courts: Camp Meeker Water System, Inc. v. Public Utilities Commission.*

I. INTRODUCTION

In *Camp Meeker Water System, Inc. v. Public Utilities Commission*,¹ the California Supreme Court recognized the broad power given to the Public Utility Commission (the "Commission") by the legislature. The court held that: (1) incident to its legislative power to rule on rate increases, the Commission could make determinations about interests in property as findings of fact;² (2) such factual findings must be afforded great deference by the courts;³ and (3) the Commission had sufficient evidence to find that the original owners of neighboring property had given Camp Meeker Water System, Inc. ("CMWSI") an express easement to water sources on their adjoining property.⁴ However, the court placed limits on the res judicata effect of such factual findings.

This action began when CMWSI filed a petition with the Commission seeking authorization for a rate increase.⁵ CMWSI claimed that the rate increase was needed so it could lease wells from the Chenoweth family, the current owners of the property adjacent to CMWSI.⁶ The Commission held, on rehearing,⁷ that the rate in-

1. 51 Cal. 3d 845, 799 P.2d 758, 274 Cal. Rptr. 678 (1990). The unanimous opinion was written by Justice Eagleson. Chief Justice Lucas and Justices Mosk, Broussard, Panelli, Kennard and Arabian all concurred.

2. *Id.* at 868, 799 P.2d at 772, 274 Cal. Rptr. at 692.

3. *Id.* at 863-65, 799 P.2d at 769-70, 274 Cal. Rptr. at 689-90.

4. *Id.* at 865-67, 799 P.2d at 770-71, 274 Cal. Rptr. at 690-91.

5. Article XII of the California Constitution gives the Commission control over "[p]rivate corporations and persons that own, operate, control or manage a . . . system for . . . furnishing of . . . water." CAL. CONST. art. XII, § 3. "[T]he Legislature has plenary power . . . to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken in eminent domain." CAL. CONST. art. XII, § 5. In accordance with this authority, the legislature granted the Commission the power to enforce section 451 of the Public Utilities Code, which provides that "[a]ll charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable." CAL. PUB. UTIL. CODE § 451 (Deering 1990).

6. *Camp Meeker*, 51 Cal. 3d at 850-51, 799 P.2d at 760-61, 274 Cal. Rptr. at 680-81. The Chenoweth family purchased the Camp Meeker Water System and the private lands owned by the Meeker family in 1951. In 1959, the Chenoweths incorporated the

crease was not warranted because the deed conveying the system granted CMWSI an easement for water rights on the adjacent Chenoweth property.⁸ As a result of this finding, the Commission ordered CMWSI: "(1) to enforce those water rights against the record titleholders; [and] (2) to record a notice of intent to preserve its easements pursuant to Civil Code section 887.060."⁹ Subsequently, CMWSI petitioned the supreme court for review of the Commission's order.¹⁰

II. TREATMENT OF THE CASE

The first issue examined by the court was the extent of CMWSI's standing. The court found that CMWSI could petition for review under section 1756 of the Public Utilities Code¹¹ to the extent that the factual findings impacted the Commission's decision denying the rate increase.¹² However, the court alleviated the underlying concerns, which caused CMWSI to raise these issues, in a footnote stat-

water system that the Meeker family had established on its land for service to the community.

7. In its first examination of the cause of action, the Commission found that the system did not have easements over the private Chenoweth property, but that the deed to the Chenoweth's was void because it was not approved by the Commission in accordance with section 851 of the Public Utilities Code. *See* CAL. PUB. UTIL. CODE § 1731 (Deering 1990) (allowing any party to a Commission action to petition for rehearing on any matter decided in that action).

8. The deed conveying the water system property was executed on November 29, 1951. Only 16 acres of land were actually transferred through the deed, however, the deed also conveyed:

all of the right, title, and interest of the said grantors in that certain property . . . including . . . *all rights, and privileges, and easements had, used, and enjoyed in the operation of said System and also all water and water rights appurtenant to said System and used and useful in its operation.*"

Camp Meeker, 51 Cal. 3d at 855, 799 P.2d at 764, 274 Cal. Rptr. at 684 (emphasis in original).

9. *Id.* at 851, 799 P.2d at 761, 274 Cal. Rptr. at 681. Section 887.060 of the Civil Code provides that "the owner of an easement may at any time record a notice of intent to preserve the easement." CAL. CIV. CODE § 887.060 (Deering 1990).

10. *Camp Meeker*, 51 Cal. 3d at 851, 799 P.2d at 761, 274 Cal. Rptr. at 681. The Commission argued that CMWSI's petition for review should have been denied since CMWSI was not an aggrieved party, however, the court held that it had jurisdiction under section 1756 of the Public Utilities Code. CAL. PUB. UTIL. CODE § 1756 (Deering 1990).

11. Section 1756 states in pertinent part:

Within 30 days after the commission issues its decision denying the application for a rehearing, or if the application was granted, then within 30 days after the commission issues its decision on rehearing, the applicant may apply to the Supreme Court of this state for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined.

CAL. PUB. UTIL. CODE § 1756 (Deering 1990).

12. *Camp Meeker*, 51 Cal. 3d at 851-52, 799 P.2d at 761, 274 Cal. Rptr. at 681. The Commission argued that CMWSI could not challenge its finding that the deed granted an easement because CMWSI was not aggrieved by the decision. CMWSI attempted to raise claims that "by determining CMWSI's interests in the Chenoweth parcel the

ing that the factual findings about the Chenoweth's property interests would not have *res judicata* effect.¹³ Therefore, the court only reached the merits of CMWSI's claim that the Commission erred in finding that they owned rights to the surface water and wells on the private Chenoweth parcel.¹⁴

Not only did the court take a limited view of its jurisdiction, it applied a very limited level of review. The standard of review for Commission decisions is established by section 1757 of the Public Utilities Code.¹⁵ In accordance with this section, the court's "review of Commission decisions 'is generally limited to a determination whether the Commission has regularly pursued its authority.'"¹⁶ However, the court noted that it did have some authority to examine the factual findings of the Commission, since any such findings not properly supported would imply that the Commission was acting outside its authority.¹⁷ At first, this seems contradictory to the language of section 1757, which requires that findings of fact by the Commission be final.¹⁸ However, the "support" required is sufficiency of uncontroverted evidence. The Commission's judgment on conflicting evidence

commission denied due process to members of the Chenoweth family" and exceeded its jurisdiction. *Id.* See also CAL. CIV. PROC. CODE §§ 760.020, 760.040 (Deering 1990).

13. *Camp Meeker*, 51 Cal. 3d at 852 n.3, 799 P.2d at 761 n.3, 274 Cal. Rptr. at 681 n.3. "This court has recognized that when the commission exercised its *judicial power*, its orders or decisions have 'the conclusive effect of *res judicata* as to the issues involved where they are again brought into question in subsequent proceedings between the same parties.'" *Id.* (quoting *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 630, 268 P.2d 723, 728 (1954)). However, the court insisted, "the commission exercises its *legislative power*, not its *judicial power*, when it fixes rates. Therefore, its determination of the property rights is subject to relitigation in any court of law which is asked to determine these interests." *Id.* (citations omitted).

14. *Id.* at 852, 799 P.2d at 762, 274 Cal. Rptr. at 682.

15. CAL. PUB. UTIL. CODE § 1757 (Deering 1990). Section 1757 provides in full:

No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State.

The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

Id.

16. *Toward Utility Rate Normalization v. Public Utilities Comm'n*, 44 Cal. 3d 870, 880, 750 P.2d 787, 793, 245 Cal. Rptr. 8, 14 (1988).

17. *Camp Meeker*, 51 Cal. 3d at 864, 799 P.2d at 793, 274 Cal. Rptr. at 689. "A decision that affects the rights of a party, but has no factual support, would not be one made in the regular pursuit of commission authority and could deny due process." *Id.*

18. CAL. PUB. UTIL. CODE § 1757 (Deering 1990). See also 7 B. WITKIN, CALIFOR-

that would allow more than one reasonable inference is final. If the evidence is uncontroverted, and only one reasonable inference can be drawn that is at odds with the decision of the Commission, the decision may be overturned by the court.¹⁹

The only exception to this deferential level of review arises when the Commission's decision is challenged on constitutional grounds. Under those circumstances, section 1760 of the Public Utilities Code gives the court "power to exercise its independent judgment on the law and the facts."²⁰ However, the court insisted that all constitutional claims raised by CMWSI were not properly before the court. Since the Commission merely construed the deed to CMWSI when it recognized the easement, the Chenoweth's were not denied due process, nor was their property taken without compensation in violation of the fifth amendment.²¹ In addition, CMWSI had no standing to bring these claims.²² Therefore, the court reviewed the Commission's decision only to insure that there was sufficient uncontroverted evidence to support the finding that the deed granted the easement over the Chenoweth property.

In determining the validity of this decision, the court first looked to the specific language of the 1951 deed conveying the Meeker's water system property to the Camp Meeker Water System. The deed conveyed only sixteen acres of real property and included all "easements had, used, and enjoyed in the operation of said System, and also all water and water rights appurtenant to said System and used or useful in its operations."²³ Logically, this language must refer to water rights over a separate tenement.²⁴ Since the CMWSI land was not and had never been burdened by any dominant tenement, an inference that the language in the deed was limited to easements over the 16 acres on which the system stood would be unfounded. Therefore, the court found that the deed adequately supported the Com-

NIA PROCEDURE *Judgment* § 221 (3d ed. 1985); 8 B. WITKIN, CALIFORNIA PROCEDURE *Extraordinary Writs* § 249 (3d ed. 1985).

19. See *Southern Pac. Co. v. Public Util. Comm'n*, 41 Cal. 2d 354, 362, 260 P.2d 70, 75 (1953); *Pacific Tel. & Tel. Co. v. Public Util. Comm'n*, 62 Cal. 2d 634, 647, 401 P.2d 353, 360, 44 Cal. Rptr. 1, 8 (1965).

20. CAL. PUB. UTIL. CODE § 1760 (Deering 1990). See also 8 WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* § 913 (9th ed. 1988); 53 CAL. JUR. 3D *Public Utilities* § 97 (1979).

21. *Camp Meeker*, 51 Cal. 3d at 864, 799 P.2d at 770, 274 Cal. Rptr. at 689. See also U.S. CONST. amends. V & XIV.

22. See *supra* note 9 and accompanying text.

23. *Camp Meeker*, 51 Cal. 3d at 865, 799 P.2d at 770, 274 Cal. Rptr. at 690. (quoting the deed, dated November 26, 1951, which transferred the water system to the Chenoweths).

24. See *Wright v. Best*, 19 Cal. 2d 368, 381, 121 P.2d 702, 710 (1942) "To the creation of an appurtenant easement, two tenements are necessary, a dominant one in favor of which the obligation exists, and a servient one upon which the obligation rests." *Id.*

mission's finding that an easement was conveyed over property other than the property then occupied by the water system.²⁵

Next, the court found that the easements referred to in the deed burdened the Chenoweth's private property. Section 1104 of the Civil Code provides that:

A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.²⁶

When the November 26 deed was executed, the Meekers, as grantor, also owned the adjacent land which now makes up the private Chenoweth estate. Therefore, the easements referred to may be inferred to be those in use over the Meekers other property.²⁷ This inference is especially warranted given the absence of any claimed or recognized easements over any other neighboring property.²⁸

Having determined that the private property was in fact burdened by the easements mentioned in the deed, the court reviewed the evidence certified by the Commission as adequate support for its finding that all of the water sources on the Chenoweth property were included. The scope of the express easement was dependent upon the scope of the quasi-easement that the Meekers had over their own property when they owned the system.²⁹ To make this determination, the court looked to the rules of easements by implication.³⁰ Thus, as expressed by the California courts in prior cases, the scope of such easements are not limited to the use authorized at the time of

25. *Camp Meeker*, 51 Cal. 3d at 865, 799 P.2d at 770, 274 Cal. Rptr. at 690.

26. CAL. CIV. CODE § 1104 (Deering 1990). See generally 28 CAL. JUR. 3D § 13 (1986); 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Real Property* § 452 (9th ed. 1987).

27. *Camp Meeker*, 51 Cal. 3d at 866, 799 P.2d at 770, 274 Cal. Rptr. at 690.

28. *Id.* at 866 n.17, 799 P.2d at 770 n.17, 274 Cal. Rptr. at 690 n.17.

29. 28 CAL. JUR. 3D *Easements and Licenses* § 21 (1986). "Where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and burdens that appear at the time of sale to belong to it, as between it and the property retained by the vendor." *Id.*

30. Comment b in section 484 of the Restatement of Property states:

The extent of an easement created by implication is to be inferred from the circumstances which exist at the time of the conveyance Yet it does not follow that the use authorized is to be limited to such use as was required by the dominant tenement at that time. It is to be measured rather by such uses as the parties might reasonably have expected from the future uses of the dominant tenement.

RESTATEMENT OF PROPERTY § 484 cmt. b (1944).

the conveyance.³¹ The court found that it was reasonable for the parties to contemplate any and all uses necessary for the continued ability of the water system to serve the community.³² There is evidence in the record that the Meekers were aware that their current sources of water were inadequate for the needs of the community, even at the time the land was conveyed.³³ Therefore, there were reasonably foreseeable uses for the entire Meeker estate beyond the then current water sources of the system.

The parties argued that the conveyance should be limited to the parties' intent. The Administrative Law Judge, presiding over an evidentiary hearing prior to rehearing by the Commission, found substantial evidence that the parties intended to transfer only those interests included in the sixteen acre parcel of real property.³⁴ He relied upon the testimony of the attorney who had represented the Chenoweths in the transaction, Mr. L.G. Hitchcock, who testified that he had met with a Commission staff member before the deed was executed to ensure that there were no encumbrances on the private land by the utility other than the acreage expressly owned by CMWSI. The Commissioner assured him that this was the case, and the parties executed the deed based upon this representation.³⁵ Therefore, the ALJ found that the "easements used and useful in the operation of the system," referred to in the November 26 deed, were intended to include only those on the property actually owned by CMWSI.³⁶ However, the Commission and the court found that this intent was negated by the plain language of the deed and the law of public utilities and easements.³⁷ They reasoned that either an ex-

31. *Fristoe v. Drapeau*, 35 Cal. 2d 5, 9, 215 P.2d 729, 732 (1950). *See also* *Faus v. Los Angeles*, 67 Cal. 2d 350, 431 P.2d 849, 62 Cal. Rptr. 193 (1967) (easement assumed to accommodate future use); *Norris v. California*, 261 Cal. App. 2d 41, 67 Cal. Rptr. 595 (1968) (easement construed liberally in favor of grantee).

32. *Camp Meeker*, 51 Cal. 3d at 866-67, 799 P.2d at 771, 274 Cal. Rptr. at 691. The Commission found that the public utility had a quasi-easement onto the private land before the conveyances "because as owners, [the Meekers] already possessed the right to explore for and develop new water sources [on the private part of their land]." *Id.* at 858-59, 799 P.2d at 766, 274 Cal. Rptr. at 686.

33. Three months prior to the execution of the sale agreement between the Meekers and the Chenoweths, the Commission had issued a decision where it "found that CMWSI had inadequate water sources to serve existing and future customers, and ordered that numerous improvements in the water supply be made." *Id.* at 860, 799 P.2d at 767, 274 Cal. Rptr. at 687.

34. *Id.* at 857, 799 P.2d at 765, 274 Cal. Rptr. at 685.

35. *Id.* There is some implication that this Commission staff member did not have the authority to make such assurances, yet the court never discussed the parties' right to rely on the assurances.

36. *Id.* at 857-58, 799 P.2d at 765, 274 Cal. Rptr. at 685.

37. *Id.* at 860 n.13, 799 P.2d at 766 n.13, 274 Cal. Rptr. at 686 n.13. "The commission found the deeds to be sufficiently ambiguous to warrant consideration of some . . . extrinsic evidence . . . but found the deeds themselves to be the best evidence of [the intent of the parties]." *Id.*

press or an implied easement must be read to include reasonably foreseeable future use by the dominant tenement.³⁸ Furthermore, without Commission approval, the second deed, which conveyed the private land to the Chenoweth's, could not have been valid since it purported to convey property useful to the water system.³⁹ After consideration of all the evidence before the Commission, the court found that its decision was amply supported by the record.⁴⁰

III. CONCLUSION

The court's decision in *Camp Meeker* is far less extraordinary substantively than it is procedurally. The Commission's decision regarding the presence of an easement over the Chenoweth property seems in line with both statutory and common law property principles. However, by recognizing the Commission's jurisdiction to make such a decision, the court significantly increased the power of the Commission beyond previously accepted limits. The Commission's power over rate-making decisions has been considered "quasi-legislative" and recognized as extremely broad.⁴¹ However, even these decisions were subject to supreme court review of varying degrees depending upon the presence of constitutional claims.⁴² Furthermore, these powers have been interpreted broadly because they are viewed as power to "regulate the relationship of the utility to the consumer."⁴³ In *Camp Meeker*, the court applies this broad power to a matter between private parties because the determination of the private matter

38. Comment a in section 484 of the Restatement of Property states:

The meaning of a conveyance is fixed by the conditions surrounding its execution. That meaning cannot be added to or altered by subsequently discovered needs. Yet the very creation of such an interest as an easement implies a contemplation of the future by those participating in the creation In the absence of language specifically negating it, it will be assumed that the parties contemplated changes in the use of the servient tenement made necessary by the normal development in the use of the dominant tenement.

RESTATEMENT OF PROPERTY § 484 cmt. a (1944).

39. CAL. PUB. UTIL. CODE § 851 (Deering 1990) (requiring that property necessary or useful to the public utility by disposed of only with Commission the approval of the Public Utilities Commission). See also 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* § 907(b) (9th ed. 1988).

40. *Camp Meeker*, 51 Cal. 3d at 868, 799 P.2d at 772, 274 Cal. Rptr. at 692. "The inferences drawn from that evidence are reasonable. The findings and conclusions are not subject to further review." *Id.*

41. See 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* §§ 903-904 (9th ed. 1988).

42. See CAL. PUB. UTIL. CODE § 1756 (Deering 1990).

43. 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* § 907(a) (9th ed. 1988).

is merely a finding of fact incident to a rate-making decision. The bottom line is that private parties may find an administrative agency making final determinations regarding their private rights and interests subject only to a very limited review by the courts.

The court's implication that under these circumstances the agency decision would not be *res judicata* is also a significant departure from the law governing the Commission. Previously, *all* agency decisions were considered reviewable *only* by petition to the California Supreme Court.⁴⁴ In the absence of that court overruling the decision, the *res judicata* effect was considered absolute.⁴⁵ Now, however, the implication of the court's opinion is that the Chenoweths could institute a collateral attack on the Commission's decision on constitutional grounds. This effectively nullifies the thirty day limit to petition for review by the supreme court. The problem in this case was that review was sought, but by the wrong party. Because the court did not have jurisdiction to review the constitutional claims of a party other than the petitioner, they chose to provide an alternative mode of redress for the interest of the private parties. However, if this right is expressly recognized in subsequent decisions, it will significantly undercut efforts by the legislature to make Commission decisions final and binding.

KAREN M. EISENHauer

- B. *Attorney's fees are available for representation on appeal pursuant to section 31536 of the Government Code in order to effect the legislative purpose behind the statute — to remedy the financial disparity between the county employee and the government agency in a contest for benefits: Morcos v. Board of Retirement.*

In *Morcos v. Board of Retirement*,¹ the California Supreme Court

44. See CAL. PUB. UTIL. CODE § 1756 (Deering 1990).

45. See 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* § 911 (9th ed. 1988).

1. 51 Cal. 3d 924, 800 P.2d 543, 275 Cal. Rptr. 187 (1990). Justice Broussard wrote the majority opinion and was joined by Chief Justice Lucas and Justices Panelli, Eagleson, Arabian, and White, sitting pro tem. *Id.* at 930, 800 P.2d at 547, 275 Cal. Rptr. at 191. Justice Mosk wrote a separate concurring opinion. *Id.* (Mosk, J., concurring).

The court heard the case of Morcos, a county employee, who applied for service-related disability retirement after a ceiling tile fell on him while he was sitting at his accounting desk. *Id.* at 926, 800 P.2d at 544, 275 Cal. Rptr. at 188. The Board of Retirement of the County of Los Angeles (hereinafter the "Board") denied his application, and Morcos' appeal to the superior court was successful. *Id.* The Board appealed to the court of appeal, which held for Morcos on the merits, but refused to award him attorney's fees. *Id.* at 926, 800 P.2d at 544-45, 275 Cal. Rptr. at 188-89. The supreme court granted review to consider whether fees incurred by Morcos on appeal could be recovered under section 31536 of the Government Code. *Id.* at 926, 800 P.2d at 545, 275 Cal. Rptr. at 189.

held that section 31536 of the Government Code² provides for attorney's fees³ for representation on appeal, in addition to fees incurred at the trial court level.⁴ Despite a lack of state supreme court case law on the issue,⁵ the court reviewed the germane lower court decisions and then propagated a general rule allowing courts to⁶ award attorney's fees on appeal.⁷ The court applied this general rule in *Morcos* even though section 31536 does not explicitly provide the superior court with discretionary power⁸ to award attorney's fees.⁹

2. CAL. GOV'T CODE § 31536 (West 1988). Section 31536 provides in pertinent part: "If a superior court reverses the denial by the board of an application for a retirement allowance . . . or benefit, the superior court in its discretion may award reasonable attorney's fees as costs to the [employee] who successfully appealed the denial of such application." *Id.* See generally *Van Hook v. Board of Retirement*, 148 Cal. App. 3d 714, 196 Cal. Rptr. 186 (1983) (finding award of attorney's fees under Government Code uniquely within court's discretion).

3. See generally *Dobbs, Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435 (general discussion of attorney's fees); 7 B. WITKIN, CALIFORNIA PROCEDURE *Judgment* § 159 (3d ed. 1985) (listing other California statutes providing for attorney's fees); Annotation, *Allowance of Attorney's Fees in Mandamus Proceedings*, 34 A.L.R. 4TH 457, 481-85 (1984) (discussing "statutes authorizing attorney's fees pursuant to judicial review of administrative rulings"); 16 CAL. JUR. 3D, *Costs* § 101 (1983); 20 AM. JUR. 2D *Costs* § 72 (1965).

4. *Morcos*, 51 Cal. 3d at 926, 800 P.2d at 544, 275 Cal. Rptr. at 188.

5. There are no other supreme court decisions construing section 31536 as evidenced by the court's reliance on lower court decisions. *Id.* at 928, 800 P.2d at 545-46, 275 Cal. Rptr. at 189-90. The court did, however, cite a supreme court opinion awarding attorney's fees on appeal pursuant to section 1021.5 of the Civil Procedure Code. *Id.* at 928 n.5, 800 P.2d at 545 n.5, 275 Cal. Rptr. at 190 n.5. See generally *Serrano v. Unruh*, 32 Cal. 3d 621, 186 Cal. Rptr. 754 (1982). *But see Holtz v. San Francisco Bay Area Rapid Transit Dist.*, 17 Cal. 3d 648, 658-59, 552 P.2d 430, 437, 131 Cal. Rptr. 646, 653 (1976) (denying attorney's fees on appeal under former section 1246.3 (now section 1036) of the Civil Procedure Code).

6. *Winick Corp. v. Safeco Ins. Co.*, 187 Cal. App. 3d 1502, 232 Cal. Rptr. 479 (1986) (interpreting Civil Code Section 3250); *Cooper v. Mitchell Bros.' Santa Ana Theater*, 165 Cal. App. 3d 378, 211 Cal. Rptr. 501 (1985) (interpreting Civil Code Section 3496), *cert. denied*, 474 U.S. 1077 (1986); *San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762, 192 Cal. Rptr. 415 (1983) (interpreting Government Code Section 54960.5); *Municipal Court v. Bloodgood*, 137 Cal. App. 3d 29, 186 Cal. Rptr. 807 (1982) (interpreting Government Code Section 27648); *Fed-Mart Corp. v. Pell Enters., Inc.*, 111 Cal. App. 3d 215, 168 Cal. Rptr. 525 (1980) (interpreting Corporations Code Section 317); *Leaf v. Phil Rauch, Inc.*, 47 Cal. App. 3d 371, 120 Cal. Rptr. 749 (1975) (interpreting Civil Code Section 2983.4); *T.E.D. Bearing Co. v. Walter E. Heller & Co.*, 38 Cal. App. 3d 59, 112 Cal. Rptr. 910 (1974) (interpreting Civil Code Section 1717); *Morcos* 51 Cal. 3d at 928-29, 800 P.2d at 545-46, 275 Cal. Rptr. at 189-90 (citing *Roberts v. Brian*, 30 Cal. App. 3d 427, 106 Cal. Rptr. 360 (1973) (interpreting Welfare & Institutions Code § 10962)).

7. *Morcos*, 51 Cal. 3d at 929, 800 P.2d at 547, 275 Cal. Rptr. at 191. See generally 20 C.J.S. *Costs* § 181 (1990) (discussing substantive laws, statutes, and rules authorizing attorney's fees on appeal); 16 CAL. JUR. 3D *Costs* § 101 (1983) (same).

8. See generally 20 C.J.S. *Costs* § 181 (1990) (discussing principle that court discretion to award attorney's fees creates eligibility rather than entitlement to fees).

The court also held that barring recovery of attorney's fees on appeal under section 31536 would contravene the intent of the legislature¹⁰ and the purpose of the statute.¹¹ The legislature's express intent was to narrow the disparity in litigation resources between employees on fixed incomes seeking retirement benefits,¹² and government agencies¹³ employing "house counsel."¹⁴ The court concluded that the purpose of the statute "would be lost if the government were free to pursue appellate review with its own counsel while the applicant is forced to incur nonrecoverable fees in defending the trial court's decision."¹⁵ Appealing to express legislative intent, the court awarded attorney's fees to Morcos for costs incurred on appeal despite the statute's silence on this issue.¹⁶

The court's decision is in accord with legislative intent to reduce the financial disparity between those seeking to procure benefits and government agencies opposing such recovery. By allowing an employee to recover attorney's fees on appeal, the court precludes the government agency from exhausting the employee's resources through the appellate process and thereby securing government victory by default. This ability to recover attorney's fees may encourage a county employee to pursue earned benefits to which he is entitled where he would otherwise be financially unable to do so.¹⁷

Furthermore, the decision is not inconsistent with the statutory language of section 31536. The statute allows "the superior court in its discretion [to] award reasonable attorney's fees . . . to the member . . . who *successfully appealed* the denial of such application."¹⁸ Certainly a denial of an application for benefits is not successfully appealed until the appellate process is exhausted and the benefits are awarded to the employee.¹⁹ Employees seeking benefits should not

9. "[T]he superior court in its discretion may award reasonable attorney's fees . . ." CAL. GOV'T CODE § 31536 (West 1988) (emphasis added).

10. *Morcos*, 51 Cal. 3d at 926, 800 P.2d at 544, 275 Cal. Rptr. at 188.

11. *Id.*

12. See generally 20 C.J.S. *Counties* § 119 (1990) (discussing county pension and retirement programs).

13. *Morcos*, 51 Cal. 3d at 929, 800 P.2d at 546, 275 Cal. Rptr. at 190.

14. *Black's Law Dictionary* defines "house counsel" as a "[l]awyer who acts as attorney for business though carried as an employee of that business and not as an independent lawyer." BLACK'S LAW DICTIONARY 666 (5th ed. 1979).

15. *Morcos*, 51 Cal. 3d at 929, 800 P.2d at 547, 275 Cal. Rptr. at 191.

16. *Id.* at 929-30, 800 P.2d at 547, 275 Cal. Rptr. at 191.

17. See generally Nicyper, *Attorney's Fees and Ruckelshaus v. Sierra Club: Discouraging Citizens From Challenging Administrative Agency Decisions*, 33 AM. U.L. REV. 775 (1984) (requiring success on the merits to qualify for attorney's fees provides less incentive for a citizen to challenge agency regulations).

18. CAL. GOV'T CODE § 31536 (West 1988) (emphasis added).

19. This was also the opinion of Justice Johnson in the appellate court decision. See *Morcos v. Board of Retirement*, 223 Cal. App. 3d 1081, 1095, 259 Cal. Rptr. 106, 115 (1989) (Johnson, J., dissenting).

be financially penalized because an agency wrongly contests the benefit. The court's decision in *Morcos* prevents such a penalty and may well provide strong support for awarding attorney's fees on appeal with respect to various other statutory sections.

DARREN M. CAMPF

II. CIVIL PROCEDURE

A. *A litigant's failure to object to a trial court's statement of decision constitutes a waiver and the appellate court may infer findings favoring the prevailing party: In re Marriage of Arceneaux.*

The California Supreme Court, in *In re Marriage of Arceneaux*,¹ announced that failure to bring alleged defects in the court's statement of decision to the attention of the trial court constitutes a waiver of the defect on appeal.² Therefore, the appellate court may make implied findings as to those issues in favor of the party who prevailed at the trial level.³ In *Arceneaux*, the supreme court interpreted the statutory language of sections 632 and 634 of the California Code of Civil Procedure as defining a two part process which must be satisfied to prevent a waiver: (1) the litigant must request a

1. 51 Cal. 3d 1130, 800 P.2d 1227, 275 Cal. Rptr. 797 (1990). Justice Mosk wrote the unanimous opinion of the court in which Chief Justice Lucas and Justices Broussard, Panelli, Eagleson, Kennard and Arabian concurred.

2. *Id.* at 1132, 800 P.2d at 1227, 275 Cal. Rptr. at 797. Appellant husband in a dissolution action requested a statement of decision from the trial court. The court allowed the wife to prepare a proposed statement and serve it upon the husband. The court signed a modified copy of the statement. The husband did not object to either of the statements.

On appeal, the husband claimed that the statement of decision had not decided two controverted matters and was inadequate in three additional ways. The court of appeal held that the appellant waived his right to raise these matters because he did not object to the statement of decision at the trial level and failed to move for a new trial or to vacate judgment. Therefore, the court of appeal inferred that the trial court decided these issues in favor of the wife because she was the prevailing party. The supreme court granted review.

3. *Id.* at 1133-34, 800 P.2d at 1229, 275 Cal. Rptr. at 798. The court asserted that "[a] judgment or order of a lower court is presumed to be correct on appeal, and all . . . presumptions are indulged in favor of its correctness." *Id.* at 1133, 800 P.2d at 1228, 275 Cal. Rptr. at 798 (citing *Aceves v. Regal Pale Brewing Co.*, 24 Cal. 3d 502, 507, 595 P.2d 619, 621, 156 Cal. Rptr. 41, 43 (1979) (court views and resolves factual matters in favor of prevailing party)); *Munoz v. Olin*, 24 Cal. 3d 629, 635-36, 596 P.2d 1143, 1147, 156 Cal. Rptr. 727, 731 (1979) (ruling that all legitimate and reasonable inferences [must be] indulged in to uphold the verdict if possible").

statement of decision as to specific issues,⁴ and (2) the litigant must bring to the court's attention any deficiencies within the statement to "avoid implied findings on appeal favorable to the judgment."⁵ The husband in *Arceneaux* satisfied only the first requirement and thereby waived his right to object to the deficiencies in the statement of decision upon appeal.⁶ Thus, the court of appeal correctly inferred that the trial court decided in favor of the wife on all issues not explicitly dealt with in the statement of decision.⁷

4. This half of the test was extracted from section 632 of the Code of Civil Procedure. In pertinent part, section 632 reads:

In superior, municipal, and justice courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. . . . After a party has requested such a statement, any party may make proposals as to the content of the statement of decision.

CAL. CIV. PROC. CODE § 632 (West Supp. 1991). See generally CAL. R. CT. 232(b) (regarding proposals following request for statement of decision); 7 B. WITKIN, CALIFORNIA PROCEDURE *Trial* § 396 (3d ed. 1985 & Supp. 1990) (a party may request a statement of decision specifying the controverted issues); CAL. CIV. PROC. CODE § 43 (West 1982 & Supp. 1991) (duties of the appellate court).

5. *Arceneaux*, 51 Cal. 3d at 1134, 800 P.2d at 1229, 275 Cal. Rptr. at 799. This portion of the rule derives from section 634 of the Code of Civil Procedure. In pertinent part, section 634 states:

When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 [motion for a new trial] or 663 [motion to vacate the judgment], it shall not be inferred on appeal or upon a motion under Section 657 or 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue.

CAL. CIV. PROC. CODE § 634 (West Supp. 1991). See generally 9 B. WITKIN, CALIFORNIA PROCEDURE *Appeal* § 311 (3d ed. 1985 & Supp. 1990) (where an objection could have been made but was not, appellate court will ordinarily not consider defects); 7 B. WITKIN, CALIFORNIA PROCEDURE *Trial* § 399 (3d ed. 1985); CAL. R. CT. 232(d) (objections must be made within 15 days after service of proposed statement of decision and judgment).

In 1959, section 634 of the Code of Civil Procedure was amended to abrogate the doctrine of "implied findings," which had allowed inferences to be made by the reviewing court in favor of the prevailing party upon material issues which had not been decided by the trial court. The amendment to the statute allowed the appellant to make a written request for a specific finding on a particular issue, thereby circumventing the inference that all issues had been decided in favor of the prevailing party.

This same theory was adopted in later versions of section 634. Currently, this section allows the party to use *any method* to bring the defect to the trial court's attention including a request for a specific finding. 7 B. WITKIN, CALIFORNIA PROCEDURE *Trial* § 389 (3d ed. 1985); See also *id.* at § 388.

In the instant case, the appellant attempted to equate his request for a statement of decision to a request for a special or specific finding. The court struck down this contention. *Arceneaux*, 51 Cal. 3d at 1135-36, 800 P.2d at 1230, 275 Cal. Rptr. at 800.

6. *Id.* at 1132, 800 P.2d at 1227-28, 275 Cal. Rptr. at 797-98.

7. *Id.* at 1133, 800 P.2d at 1228, 275 Cal. Rptr. at 798. See also *In re Marriage of Neal*, 153 Cal. App. 3d 117, 200 Cal. Rptr. 341 (1984) (without a showing that an omission in the statement of decision was pointed out to the trial court, inference arises that the trial court decided in favor of the prevailing party as to omitted issues).

Relying on old case law and former versions of the applicable statutes, the appellant contended that a party may *either* request a statement of decision as to issues in the case *or* bring the deficiencies in the statement of decision to the trial court's attention in order to avoid implied findings in favor of the judgment.⁸ Section 632 of the Code of Civil Procedure, however, explicitly requires the court to issue a statement of decision if requested to do so by a party at trial,⁹ and section 634 mandates that a party bring to the attention of the trial court any ambiguity or omission within the statement.¹⁰ The supreme court concluded that taken together, these statutes require notice of any deficiencies be brought to the attention of the trial court as a *prerequisite* to appellate review of the particular issues.¹¹ Without such notice, a party is barred from arguing these points for the first time on appeal,¹² and the appellate court may assume that

8. *Arceneaux*, 51 Cal. 3d at 1134, 800 P.2d at 1229, 275 Cal. Rptr. at 799. Some of the cases the appellant cited included references to an archaic version of section 634 of the Code of Civil Procedure. This version had no provision mandating that objections be made to any particular finding to avoid an inference on appeal in favor of the judgment. *Arceneaux*, 51 Cal. 3d at 1137, 800 P.2d at 1231, 275 Cal. Rptr. at 801.

Other cases cited relied upon pre-1981 versions of Sections 632 and 634. Prior to 1981, section 632 required that findings of fact and conclusions of law be made. *Id.* at 1134-35, 800 P.2d at 1229, 275 Cal. Rptr. at 799. See generally 5 CAL. JUR. 3D *Appellate Review* § 460 (1973 & Supp. 1991); 89 C.J.S. *Trial* § 609 (1955 & Supp. 1991) (defining findings of fact and conclusions of law).

At the same time, section 634 required that any omission, ambiguity or conflict within the finding be brought to the attention of the trial court. *Arceneaux*, 51 Cal. 3d at 1134-35, 800 P.2d at 1229, 275 Cal. Rptr. at 799. Thus, the litigant still had the duty to bring these deficiencies to the attention of the trial court, and any conclusion otherwise would have been a misreading of the statute. Finally, the appellant cited post-1981 cases which inferred that an objection was not necessary. The supreme court dismissed these cases as an incorrect reading of the statute. *Id.* at 1137-38, 800 P.2d at 1231, 275 Cal. Rptr. at 801.

9. CAL. CIV. PROC. CODE § 632 (West Supp. 1991). See *supra* note 4 for text of the statute.

10. CAL. CIV. PROC. CODE § 634 (West Supp. 1991). See *supra* note 5 for text of the statute.

11. *Arceneaux*, 51 Cal. 3d at 1134, 800 P.2d at 1229, 275 Cal. Rptr. at 799.

12. See generally *McKeon v. Hastings College of Law*, 185 Cal. App. 3d 877, 230 Cal. Rptr. 176 (1986); 4 CAL. JUR. 3D *Appellate Review* § 135 (1973 & Supp. 1991) ("Objection to a misnomer cannot be raised for the first time on appeal."); 4 CAL. JUR. 3D *Appellate Review* § 136 (1973) (technical irregularities not objected to at trial will not be reviewed on appeal, unless they affect substantial rights); 76 AM. JUR. 2D *Trial* § 1267 (1975) (objections not considered on appeal unless presented to trial court); 5 AM. JUR. 2D *Appeal & Error* §§ 545, 635 (1962 & Supp. 1991) (reviewing court generally only considers issues on appeal which the trial court considered).

See also *State v. Maupin*, 42 Ohio St. 2d 473, 330 N.E.2d 708 (1975); *State v. Morris*, 42 Ohio St. 2d 307, 329 N.E.2d 85 (1975), *cert. denied*, 423 U.S. 1049 (1976) (appellate court will not consider error when it could have been, but was not, called to the attention of the trial court).

all pertinent facts or issues were decided in favor of the prevailing party at the trial court level. The court reasoned that any ruling not requiring this notice would render section 634 a "nullity."¹³

At the cost of discounting valid contentions by the husband-appellant, the *Arceneaux* court strictly adhered to the language of the statutes. The court premised its decision upon the need to direct lower courts on this matter and upon a desire to promote fair advocacy. The court suspected that the appellant's attorney knew of the defects in the statement of decision prior to the judgment and planned to take advantage of them on appeal.¹⁴ This tactic seriously hindered the trial court from correcting the error. The court feared that such a practice would allow parties to appeal first on procedural issues and then again later upon substantive issues.¹⁵ Allowing this type of double appeal would further congest the courts, wasting judicial resources and tax dollars. The *Arceneaux* ruling furthers society's interest in "expeditious determination of appeals,"¹⁶ by creating an incentive for both clients and attorneys to remedy problems at the trial court level.

CYNTHIA EMRY

- B. *State courts lack subject matter jurisdiction to adjudicate issues of ownership or possession in connection with Indian property, and Indian tribal officials, who generally enjoy broad sovereign immunity, may be subject to tort liability for committing acts outside of territorial boundaries: Boisclair v. Superior Court.*

In *Boisclair v. Superior Court*,¹ the California Supreme Court considered two issues: 1) whether a state court may assume jurisdiction to adjudicate a claim involving the issue of ownership or possession of

13. *Arceneaux*, 51 Cal. 3d at 1136, 800 P.2d at 1230, 275 Cal. Rptr. at 800.

14. See generally 9 B. WITKIN, CALIFORNIA PROCEDURE *Appeal* § 311 (3d ed. 1985 & Supp. 1990) ("[I]t is *unfair to the trial judge and to the adverse party* [to allow an appellant's attorney] to take advantage of an error on appeal."); *Sommer v. Martin*, 55 Cal. App. 603, 204 P. 33 (1921) (ruling that it is appellant's duty to bring any allegedly violated legal principle to trial court's attention).

According to rule 232(f) of the California Rules of Court, the potential appellant may make proposals to the proposed statement of decision, and the court may grant a hearing to discuss such proposals. Thus, many problems may be remedied at this level through the use of such built-in procedural safeguards.

15. *Arceneaux*, 51 Cal. 3d at 1138, 800 P.2d at 1232, 275 Cal. Rptr. at 802.

16. *Id.*

1. *Boisclair v. Superior Court*, 51 Cal. 3d 1140, 801 P.2d 305, 276 Cal. Rptr. 62 (1990). Justice Mosk wrote the unanimous opinion of the court. The dispute concerned a granite company's claim for declaratory relief alleging that a particular road traversing defendant's land was either public or subject to an easement possessed by the company. The granite company also sought damages and injunctive relief because the defendant allegedly obstructed access to the road. *Id.*

Indian tribal property,² and 2) whether Indian tribal officers are subject to tort liability when acting outside of Indian territorial boundaries.³ The court held section 1360(b) of the United States Code⁴ bars a state from adjudicating claims involving the ownership of Indian trust land, therefore, the superior court's assumption of jurisdiction was improper.⁵ Furthermore, the court held that tribal Indians may be subject to tort liability for acts committed outside of territorial boundaries because sovereign immunity applies only to acts committed within tribal boundaries.⁶

Although six state courts,⁷ including California's, have jurisdiction over civil conflicts emanating from Indian territory and involving Indian litigants,⁸ section 1360(b) expressly precludes state jurisdiction to adjudicate the ownership of Indian trust land.⁹ Section 1360(b) provides in pertinent part that nothing in the federal statute "shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of [Indian] property or any interest therein."¹⁰ The court interpreted 1360(b) to preclude state jurisdiction where one possible result of impending litigation would be that the property at issue was indeed Indian trust property.¹¹ Authoritative support for the court's interpretation included: generally accepted canons of construction for Indian statutes and treaties, applicable statutory language, and the purpose of the statute.¹² The court reasoned that because Congress enacted section 1360(b) to protect Indian interests, the statute should be liberally

2. Indian tribal property is defined as "[p]roperty in which an Indian tribe has a legally enforceable interest. Such term refers to real property, the title to which is vested in the United States but held in trust for the Indian tribe." BLACK'S LAW DICTIONARY 395 (5th ed. 1983). See generally 42 C.J.S. *Indians* § 29 (1944) (discussing Indian reservations and grants to tribes); Ulmer, *Tribal Property: Defining the Parameters of the Federal Trust Relationship Under the Non-Intercourse Act: Catawba Indian Tribe v. South Carolina*, 12 AM. INDIAN L. REV. 101 (1985).

3. *Boisclair*, 51 Cal. 3d at 1144-45, 801 P.2d at 307, 276 Cal. Rptr. at 64.

4. 28 U.S.C. § 1360(b) (1976).

5. *Boisclair*, 51 Cal. 3d at 1146, 801 P.2d at 308, 276 Cal. Rptr. at 65. See generally Royster & Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581 (1989).

6. *Boisclair*, 51 Cal. 3d at 1158, 801 P.2d at 316, 276 Cal. Rptr. at 73.

7. The six states include: Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin. 28 U.S.C. § 1360(a) (1976).

8. *Boisclair*, 51 Cal. 3d at 1146, 801 P.2d at 308, 276 Cal. Rptr. at 65.

9. *Id.* See generally Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422 (1984).

10. 28 U.S.C. § 1360(b) (1976).

11. *Boisclair*, 51 Cal. 3d at 1152, 801 P.2d at 312, 276 Cal. Rptr. at 69.

12. *Id.*

construed in favor of Indian litigants.¹³ Furthermore, if Indian property interests were not protected from state jurisdiction, legal processes such as taxation and civil judgments would ultimately operate to exhaust Indian realty ownership and possession.¹⁴ After deciding that the "complete preemption doctrine" was applicable in *Boisclair*, the court concluded that the plaintiff's claim was a federal claim arising under federal law.¹⁵

Although Indian tribes possess broad sovereign immunity from lawsuits initiated in state courts, tribal officials may be subject to civil liability for committing acts outside Indian territorial boundaries.¹⁶ The *Boisclair* court stated that if the acts of the Indian defendants "were nothing more than those appropriate for excluding [persons] from tribal territory, and were taken *within tribal boundaries*, the Indian defendants acted with[in] the scope of their sovereign immunity."¹⁷ After stating that the facts before the court were insufficient to determine whether the Indian defendants had exceeded the scope of their sovereign immunity, the court remanded the case for further elaboration of the facts in connection with the plaintiff's allegations of Indian misconduct.¹⁸

The court's decision in *Boisclair* that the state superior court lacked subject matter jurisdiction is consistent with the statutory language of section 1360(b). Adjudication of the easement or plaintiff's alleged public right to the road would be improper because section 1360(b) precludes states from determining "the ownership or right to possession of [Indian trust] property or any interest therein."¹⁹ Although no such bar is presented to a plaintiff in federal court,²⁰ it is likely that such a plaintiff will be required to make a stronger evidentiary showing than would be necessary in state court. This conclusion follows logically from two premises: (1) the federal government's relationship with the Indians and their trust land is a fiduciary one,²¹ and (2) pursuant to generally accepted statutory con-

13. *Id.* at 1153, 801 P.2d at 312, 276 Cal. Rptr. at 69.

14. *Id.* at 1154, 801 P.2d at 313, 276 Cal. Rptr. at 70.

15. *Id.* at 1156, 801 P.2d at 315, 276 Cal. Rptr. at 72 (citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987)).

16. *Id.* at 1158, 801 P.2d at 316, 276 Cal. Rptr. at 73. *See generally* 38 CAL. JUR. 3D *Indians* § (1977).

17. *Boisclair*, 51 Cal. 3d at 1158, 801 P.2d at 316, 276 Cal. Rptr. at 73 (emphasis added). It is clear from the language used by the court, that the only acts by Indians that will be protected by sovereign immunity are those committed within the boundaries of the tribal reservation; regardless of whether acts committed outside of tribal boundaries could be construed as being necessary to the best interests of the reservation.

18. *Id.* at 1158, 801 P.2d at 316, 276 Cal. Rptr. at 73.

19. 28 U.S.C. § 1360(b) (1976).

20. *See generally* 65 A.L.R. FED. 649 § 4 (1983) (discussing federal jurisdiction over Indians in general).

21. *Boisclair*, 51 Cal. 3d at 1149, 801 P.2d at 310, 276 Cal. Rptr. at 67 (citing *Semi-*

struction, statutes dealing with such Indian matters are to be "liberally construed" in favor of the Indians.²²

The court's ruling that tribal officials may be subject to tort liability for acts committed outside of Indian tribal boundaries comports with previous case authority²³ and sound public policy. If Indian officials or members are free to commit acts on non-Indian lands under the protection of sovereign immunity, the public would be vulnerable to a plethora of civil damages without any recourse. The court's holding prevents this possibility by effectively foreclosing the defense of sovereign immunity for acts committed outside of Indian tribal boundaries. The court's holding creates a bright line rule by determining the applicability of sovereign immunity based on whether the Indian acts were committed within or outside of Indian tribal boundaries. Indian officials, who dare to engage in activities outside of Indian Territory, must bear the risk of litigious America and the possibility of tort liability.

DARREN M. CAMPF

C. *The filing of a timely claim against one public entity does not preclude an incapacitated plaintiff from filing late claims against other public entities: Draper v. City of Los Angeles.*

In *Draper v. City of Los Angeles*,¹ the supreme court granted a personal injury plaintiff relief from a claim filing requirement against a municipal defendant. *Draper* is significant to practicing attorneys for the drastically different approaches the justices took to resolve the issue, and the attitudes expressed regarding the conduct of the lawyers involved.²

On June 11, 1987, a car driven by a high school student struck and

nole Nation v. United States, 316 U.S. 286, 296-97 (1942)). See generally 41 AM. JUR. 2D *Indians* § 5 (1968) (discussing the Indian's relationship to the federal government).

22. *Boisclair*, 51 Cal. 3d at 1153, 801 P.2d at 312, 276 Cal. Rptr. at 69. See, e.g., *Menominee Tribe v. United States*, 391 U.S. 404, 406 n.2 (1968).

23. *Boisclair*, 51 Cal. 3d at 1157, 801 P.2d at 316, 276 Cal. Rptr. at 73 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949)).

1. 52 Cal. 3d 502, 802 P.2d 367, 276 Cal. Rptr. 864 (1990) (en banc).

2. No majority of the court concurred in either the lead or dissenting opinions. Justice Broussard joined in Justice Mosk's lead opinion, while Justices Kennard and Arabian concurred only in the judgment reached. Chief Justice Lucas and Justice Panelli concurred with Justice Eagleson's dissenting opinion.

Draper makes for poor precedent because the decision rests largely on the facts of

seriously injured nineteen year old Gayle Draper as she crossed the street using a crosswalk.³ Draper remained in a coma over a month after the collision, and could not meaningfully communicate when she finally emerged from the coma.⁴ Asserting that flaws in the intersection led to the accident, an attorney filed suit on Draper's behalf against the Los Angeles Unified School District in August of 1987.⁵ The published facts do not reveal if Draper ever authorized the filing of this claim, which was rejected the following month.⁶

On November 4, 1987, new counsel retained by Draper filed suit against the City of Los Angeles and other municipal entities, including the school district.⁷ However, the statute of limitations for this type of tort claim had expired nearly two months earlier.⁸ Draper argued that her severe brain injuries and extensive hospitalization excused her tardiness, but the superior court denied her claim because the time limit to petition for such a late claim had also expired.⁹

the case, which the majority opinion characterizes as both "peculiar" and "unusual." *Draper*, 52 Cal. 3d at 504, 507, 802 P.2d at 368, 370, 276 Cal. Rptr. at 866, 868.

Justice Eagleson, in his dissenting opinion, concludes: "This case [*Draper*] is an aberration and should remain one." *Id.* at 517, 802 P.2d at 376, 276 Cal. Rptr. at 874 (Eagleson, J., dissenting). Further, Justice Eagleson "caution[s] against any future reliance on this case." *Id.*

3. *Id.* at 504, 802 P.2d at 368, 276 Cal. Rptr. at 866. The accident occurred in Panorama City, a district in the City of Los Angeles. *Id.*

4. Neither the majority nor dissenting opinion indicates precisely how long Draper could not talk. The majority opinion describes her emerging from the coma immobile and thus totally dependent upon others to perform essential physical activities. Her only conversation abilities were comprised of "'yes-no responses' with 'lap board communication,'" and the identification of common objects. *Id.* at 504, 802 P.2d at 368, 276 Cal. Rptr. at 866.

5. The published opinions do not clearly explain the relationship between the attorney, George L. Hecker, and Draper. It is unclear whether Hecker was ever actually retained to file the claims. *Id.* at 508, 802 P.2d at 370, 276 Cal. Rptr. at 868. Hecker filed the suit on August 3, 1987, five months before Draper's discharge from the hospital. *Id.* at 505-06, 802 P.2d at 369, 276 Cal. Rptr. at 867.

6. Hecker's suit was rejected on September 11, 1987. Neither published opinion states the reason for this rejection. *Id.* at 505-06, 802 P.2d at 369, 276 Cal. Rptr. at 867.

7. *Id.* at 505, 802 P.2d at 368, 276 Cal. Rptr. at 866. Draper retained counsel on October 23, 1987. *Id.* at 516, 802 P.2d at 376, 276 Cal. Rptr. at 873 (Eagleson, J., dissenting).

8. The applicable statute of limitations allowed Draper one hundred days from the date of the accident within which to file a personal injury claim against municipal entities. CAL. GOV'T CODE § 911.2 (West 1987). This period expired September 17, 1987, approximately one and one half months before Draper filed suit.

The court noted that the state legislature has lengthened this statute of limitations to six months for accidents arising on or after January 1, 1988. *Draper*, 52 Cal. 3d at 505, 802 P.2d at 368, 276 Cal. Rptr. at 866. 1987 Cal. Stat. 1208. See 3 B. WITKIN, CAL. PROCEDURE, *Actions* §§ 187, 204-06 (3d ed. 1985 & Supp. 1990); C.E.B., CAL. GOV'T TORT LIABILITY PRACTICE §§ 5.51-5.62 (Supp. 1990).

9. Draper missed the one hundred day statute of limitations for her tort claim, as well as the forty-five day statute of limitations available to petition for the presentation of a late claim. *Draper*, 52 Cal. 3d at 505, 802 P.2d at 368, 276 Cal. Rptr. at 866. See CAL. GOV'T CODE § 911.6(c) (1989 & Supp. 1990).

In January 1988, pursuant to section 946.6(c)(3) of the Government Code,¹⁰ Draper petitioned the court to allow late filing in her case.¹¹ The defendants countered that this motion was not adequately supported by the evidence offered.¹² In March 1988, the hearing was continued to allow Draper to collect sufficient medical evidence of her incapacity.¹³ At the request of Draper's counsel, trial was to reconvene June 6, 1988.¹⁴ However, Draper's counsel submitted no new evidence before this date, and on June 6, Draper's counsel failed to appear in court. Accordingly, the court denied her petition.¹⁵

One week later,¹⁶ Draper filed for reconsideration of the denial claiming relief due to excusable mistake and neglect, pursuant to section 473 of the Code of Civil Procedure.¹⁷ The superior court denied the motion, holding that the first claim filed against the school district proved that Draper's medical condition did not prevent her pursuit of legal action, and thus her incapacitation could not have caused the late filing.¹⁸ In August 1988, Draper appealed the denial of her section 946.6(c)(3) and 473 motions.¹⁹ Finding no abuse of discretion by the superior court, the court of appeal affirmed both denials.²⁰

10. Government Code section 946.6(c)(3) states in pertinent part that the court shall grant relief if "[t]he person who sustained the alleged injury . . . was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of such disability failed to present a claim." CAL. GOV'T CODE § 946.6(c)(3) (West 1980 & Supp. 1991).

11. Draper supported her petition with a declaration from her attorney that the accident seriously damaged her brain and that she remained hospitalized throughout the entire filing time period. In response to the charge that the petition required qualified medical support, she submitted a declaration by one of her physicians. *Draper*, 52 Cal. 3d at 505, 802 P.2d at 369, 276 Cal. Rptr. at 866.

12. *Id.* Justice Eagleson agreed with the defendant's attack on the evidence presented, describing it as a non-medical, "bare assertion" in a "self-serving declaration." *Id.* at 510, 802 P.2d at 372, 276 Cal. Rptr. at 869-70 (Eagleson, J., dissenting). Justice Mosk conceded that the evidence presented "was somewhat conclusory," though minimally acceptable. *Id.* at 507-08, 802 P.2d at 370, 276 Cal. Rptr. at 868.

13. *Id.* at 505, 802 P.2d at 369, 276 Cal. Rptr. at 866-67.

14. The date for the resumption of trial was initially set for June 17, 1988, but Draper's counsel requested the hearing date be moved up to June 6, 1988. *Id.* at 510, 802 P.2d at 372, 276 Cal. Rptr. at 870 (Eagleson, J., dissenting).

15. *Id.* at 506, 802 P.2d at 369, 276 Cal. Rptr. at 867.

16. The precise date was June 15, 1987. *Id.* at 506, 802 P.2d at 369, 276 Cal. Rptr. at 867.

17. *Id.* Section 473 allows a court to grant relief to a party from a judgment arising from "mistake, inadvertence, surprise, or excusable neglect." CAL. CIV. PROC. CODE § 473 (West 1990).

18. *Draper*, 52 Cal. 3d at 506, 802 P.2d at 369, 276 Cal. Rptr. at 867.

19. *Id.*

20. *Id.*

Consequently, Draper requested review by the supreme court.²¹

The supreme court reversed the court of appeal's decision and granted Draper relief from the filing deadline requirement.²² The lead opinion, authored by Justice Mosk, held that Draper's post-accident condition had incapacitated her during the filing period, preventing the filing of a timely claim.²³

Justice Mosk's opinion focused on section 946.6(c)(3) of the Government Code. He framed the issue as whether Draper was incapacitated by the accident and whether her injuries caused her failure to file on time, and answers both questions affirmatively.²⁴ To best ensure the ability of disabled victims to exercise their right to pursue valid claims in the courts, Justice Mosk contended that remedial statutes deserve broad interpretation.²⁵

In sharp contrast, Justice Eagleson's dissenting opinion centered on very different issues. Foremost, his dissent stressed that in an appeal on a procedural matter the proper level of review is not *de novo*, but abuse of discretion.²⁶ Emphasizing the inadequacy of the evidence before the trial court,²⁷ Justice Eagleson found no indication of abuse of discretion, and thus advocated affirming the court of appeal's decision.²⁸

21. The supreme court granted review on November 16, 1989. 90 Cal. Tort Rptr. 5 (Vol. XI, No. 1, Jan.-Feb. 1990).

22. *Draper*, 52 Cal. 3d at 509, 802 P.2d at 370, 276 Cal. Rptr. at 869.

23. *Id.* at 508-09, 802 P.2d at 370-71, 276 Cal. Rptr. at 868-69.

24. *Id.* at 506-07, 802 P.2d at 370, 376 Cal. Rptr. at 867.

25. *Id.* at 507, 802 P.2d at 370, 276 Cal. Rptr. at 867. To support his holding, Justice Mosk cited to *Bettencourt v. Los Rios Community College Dist.*, 42 Cal. 3d 270, 273-74, 721 P.2d 71, 73, 228 Cal. Rptr. 190, 192 (1986); *Viles v. California*, 66 Cal. 2d 24, 32-33, 423 P.2d 818, 824, 56 Cal. Rptr. 666, 672 (1967); and *Tammen v. County of San Diego*, 66 Cal. 2d 468, 479-80, 426 P.2d 753, 760-61, 58 Cal. Rptr. 249, 256-57 (1967) (referring to the policy of liberal interpretation of statutory language to protect minors and to grant relief whenever possible).

26. Justice Eagleson laments that "the standard of review is not even mentioned in the lead opinion." *Draper*, 52 Cal. 3d at 511, 802 P.2d at 372, 276 Cal. Rptr. at 870 (Eagleson, J., dissenting). Further, he writes:

The only way the lead opinion can reach its result is to substitute its judgment for that of the trial court. Of course, doing so requires disregard for the long-established rule that a reviewing court must not substitute its judgment for that of the trial court on petitions to file late claims The lead opinion sub silentio ignores decades of California law and proposes the radical new rule that trial court determinations under section 946.6(c)(3) are subject in every case to *de novo* review in the appellate courts.

Id. at 511, 802 P.2d at 373, 276 Cal. Rptr. at 870 (Eagleson, J., dissenting).

27. As part of his attack on Justice Mosk's opinion, Justice Eagleson announced: "The lead opinion also errs by relying in large part on the facts not before the trial court." *Id.* at 511, 802 P.2d at 373, 276 Cal. Rptr. at 870 (Eagleson, J., dissenting). Hence, the dissent portrays the lead opinion as unfairly criticizing the trial judge for not considering facts not yet a part of the record. *Id.* (Eagleson, J., dissenting).

28. "The evidence does not remotely support the conclusion that the trial court abused its discretion." *Id.* at 517, 802 P.2d at 376, 276 Cal. Rptr. at 874 (Eagleson, J., dissenting). Justice Eagleson resolutely stated: "We should not substitute our judgment for that of the trial court. We should uphold the trial court's determination

Moreover, the dissenting opinion closely examined and castigated the conduct of Draper's attorneys. Justice Eagleson eviscerated the excuses that Draper's lawyers offered for failing to appear on the date they requested for the continued hearing,²⁹ and for the delays in obtaining medical evidence.³⁰ Thus, with respect to Draper's assertion of excusable neglect in filing late, Justice Eagleson responded that "the facts tell a tale of sloppy practice. There was no excusable neglect, just neglect."³¹

By supporting the judgment in Draper's favor without filing concurring opinions, Justices Kennard and Arabian did not disclose their reasoning. However, it seems fair to speculate that the severity of Draper's injuries swayed these two justices to rule in her favor. Likewise, in a footnote, Justice Mosk hinted that the tragic facts surrounding the accident strongly influenced the outcome of the case.³² However, the dissent avows, "If an ounce of the milk of human kindness courses in anyone's veins, it flows in sympathy toward this grievously injured plaintiff. She is a victim, however, not of the judicial process, but of incompetent counsel."³³

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under Code of Civil Procedure section 973 as did the Court of Appeal." *Id.* at 515, 802 P.2d at 375, 276 Cal. Rptr. at 873 (Eagleson, J., dissenting).

29. Justice Eagleson does not allow the attorneys to shift the blame to their "calendar clerk," charging that "ample indications [existed] in the record that counsel knew the correct hearing date . . ." *Id.* at 512-13, 802 P.2d at 367, 276 Cal. Rptr. at 871 (Eagleson, J., dissenting).

30. Justice Eagleson carefully scrutinizes the contentions made by the attorneys, their administrative assistant, and their law clerk. Finding no way to harmonize these with their previous statements, with the messenger service delivery slips, or with local traffic patterns, he concludes "counsel gambled on rushing to meet a deadline and he failed." *Id.* at 513-14, 802 P.2d at 374-75, 276 Cal. Rptr. at 871-72 (Eagleson, J., dissenting).

31. *Draper*, 52 Cal. 3d at 515, 802 P.2d at 375, 276 Cal. Rptr. at 872 (Eagleson, J., dissenting). "It is contrary to common notions of law practice to conclude that plaintiff's counsel acted with the prudence of a reasonable attorney. 'It is not the purpose of remedial statutes to grant relief from defaults which are the result of inexcusable neglect of parties or their attorneys . . .'" *Id.* at 515, 802 P.2d at 375, 276 Cal. Rptr. at 873 (Eagleson, J., dissenting) (citing *Tammen v. County of San Diego*, 66 Cal. 3d 468, 478, 426 P.2d 753, 759, 58 Cal. Rptr. 249, 255 (1967)).

32. Justice Mosk "reiterate[s] that the evidence in support of the motion for relief from the claim-filing requirements was the minimum acceptable, and in less peculiar and compelling circumstances might well not suffice." *Id.* at 508 n.5, 802 P.2d 370 n.5, 276 Cal. Rptr. 868 n.5.

33. *Id.* at 510, 802 P.2d at 371-72, 276 Cal. Rptr. at 869 (Eagleson, J., dissenting).

D. *A settlement offer made pursuant to section 998 of the California Civil Procedure Code is not revoked by a counteroffer, and if the offer is served by mail, the 30-day period for acceptance of the settlement offer is extended pursuant to section 1013 of the Code of Civil Procedure: Poster v. Southern California Rapid Transit District.*

In *Poster v. Southern California Rapid Transit District*,¹ the California Supreme Court was presented with two issues arising out of a settlement offer² made pursuant to section 998 of the California Civil Procedure Code.³ First, the court considered whether a section 998 offer is revoked by a counter-offer,⁴ and secondly, whether section

1. 52 Cal. 3d 266, 801 P.2d 1072, 276 Cal. Rptr. 321 (1990). While a passenger on the defendant's bus, Gregory Poster, the plaintiff, was beaten, thrown off the bus and run over by the vehicle. He filed a personal injury lawsuit and, on December 11, 1987, sent the defendant an offer by mail to settle the case for \$150,000. The defendant continued its attempts to negotiate with the plaintiff, submitting two counter offers which the plaintiff did not accept. Finally on January 12, 1988, 32 days after the plaintiff's initial settlement offer, the defendant agreed to accept. At first the plaintiff acknowledged the acceptance as effective, but he soon notified the defendant that he would not honor the agreement. After the defendant submitted a motion to enforce the settlement agreement, the question was presented for hearing before the trial court. The plaintiff's key argument was that the defendant's continued negotiations after the settlement offer constituted counter offers which revoked the plaintiff's offer. The trial court found that the defendant properly accepted the offer, stating that the defendant's continued bargaining was merely settlement negotiation, not a counter offers which would revoke the original offer. The court of appeal held that counter offers do not automatically revoke settlement offers made pursuant to section 998 of the Civil Procedure Code, but that the defendant's acceptance was too late because it was made after the 30-day statutory period for acceptance had expired. The court of appeal found that section 1013 of the Civil Procedure Code which concerns service by mail and extends response periods by five days, does not apply to section 998 offers. The supreme court subsequently granted review. *Poster v. Southern Cal. Rapid Transit Dist.*, 781 P.2d 1, 263 Cal. Rptr. 377 (1989). Justice Broussard authored the opinion of the unanimous court, in which he was joined by Chief Justice Lucas and Justices Mosk, Panelli, Eagleson, Kennard, and Arabian.

2. For a discussion of the formation of compromise agreements, see 15A AM. JUR. 2d *Compromise & Settlement* §§ 7-11 (1976 & Supp. 1991); 15A C.J.S. *Compromise & Settlement* § 7 (1967).

3. CAL. CIV. PROC. CODE § 998(b) (West Supp. 1991). Section 998(b) states in pertinent part:

Not less than 10 days prior to commencement of trial, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken in accordance with the terms and conditions stated at that time. . . . If the offer is not accepted prior to trial or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn

Id. For a general overview of section 998 offers, see B. WITKIN, CALIFORNIA PROCEDURE *Proceedings Without Trial* §§ 57-65 (3d ed. 1985 & Supp. 1991); 12 CAL. JUR. 3D *Compromise, Settlement & Release* §§ 65-66 (1974 & Supp. 1991).

4. *Poster*, 52 Cal. 3d at 268, 801 P.2d at 1072, 276 Cal. Rptr. at 321. For a discussion of revocation of settlement offers, see 6 B. WITKIN, CALIFORNIA PROCEDURE *Proceedings Without Trial* § 61 (3d ed. 1985 & Supp. 1991); 15A AM. JUR. 2D *Compromise & Settlement* § 9 (1976 & Supp. 1991); 15A C.J.S. *Compromise & Settlement* § 8 (1967); Note, *Revocation of Section 998 Offers: T.M. Cobb v. Superior Court*, 19 U.S.F. L. REV.

1013 of the California Civil Procedure Code⁵ is applicable to a section 998 offer that is served by mail, thereby extending the 30-day statutory acceptance period for section 998 offers by five days?⁶ Justice Broussard, writing for the unanimous court, declared that a section 998 offer is not revoked by a counter offer, but remains open for acceptance until deemed withdrawn under the statute or withdrawn by the offeror.⁷ Additionally, the court ruled that section 1013 applies to section 998 offers that are served by mail, thus in the instant case extending the statutory 30-day acceptance period to 35 days.⁸ Because the plaintiff's mailed settlement offer had not been revoked or withdrawn, and the defendants had accepted the offer 32 days after receiving it, the supreme court declared that the settlement agreement should be enforced.⁹

By concluding that counter offers do not revoke section 998 offers, the *Poster* court believed it was acting consistently with the legislative purpose behind the enactment of the statute—the important state policy of encouraging settlements. According to the court, per-

283 (1985); Posner, *Conflicting Appellate Decisions: Confusion Over 998 Revocability*, L.A. Daily J., June 17, 1983, at 4, col. 3.

5. CAL. CIV. PROC. CODE § 1013(a) (Deering Supp. 1991). Section 1013(a) states in pertinent part:

In case of service by mail . . . [t]he service is complete at the time of the deposit, but any prescribed period of notice and any right or duty to do any act or make any response within any prescribed period or on a date certain after the service of such document served by mail shall be extended five days if the place of address is within the State of California

Id. The defendant's address was located within the State of California.

6. *Poster*, 52 Cal. 3d at 272, 801 P.2d at 1075, 276 Cal. Rptr. at 324. This article will refer to the period of extension granted by section 1013 as *five days* because in the case at hand the offer was mailed to an address in California. If the offer had been mailed to an address outside of the state, the period of extension would have been longer. See CAL. CIV. PROC. CODE § 1013(a) (Deering Supp. 1991). For a general discussion of section 1013 and the extension of time for response where a notice or paper is served by mail, see 50 CAL. JUR. 3D *Process, Notices and Subpoenas* § 88 (1979 & Supp. 1991); 3 B. WITKIN, CALIFORNIA PROCEDURE *Actions* § 769 (3d ed. 1985); 6 B. WITKIN, CALIFORNIA PROCEDURE *Proceedings Without Trial* § 25 (3d ed. 1985). Although the defendant objected to the court of appeal's consideration of the section 1013 issue because the plaintiff failed to question the timeliness of the defendant's acceptance at trial, the supreme court agreed to address the question because the court of appeal had "thrown into doubt" the applicability of section 1013 to section 998 offers. *Poster*, 52 Cal. 3d at 273 n.3, 801 P.2d at 1076 n.3, 276 Cal. Rptr. at 325 n.3. Because the court ruled to uphold the agreement, the *Poster* court did not believe it necessary to discuss whether the plaintiff would have been able to assert this defense if the court had ruled that section 1013 did not apply. *Id.*

7. *Poster*, 52 Cal. 3d at 272, 801 P.2d at 1075, 276 Cal. Rptr. at 324.

8. *Id.* at 274, 801 P.2d at 1077, 276 Cal. Rptr. at 326.

9. *Id.*

mitting negotiations (including counter offers) to continue during the statutory 30-day acceptance period would facilitate settlement, while declaring that counter offers terminate section 998 offers could have a negative effect on the process of compromise.¹⁰ Although traditional contract law states that counter offers revoke offers,¹¹ the court refused to follow that principle due to the court's earlier ruling in *T.M. Cobb Company, Inc. v. Superior Court*¹² that traditional contract law principles should only be applied to section 998 offers where the application would be consistent with the legislative purpose behind the statute.¹³ In reaching their decision, the *Poster* court specifically disaffirmed *Glende Motor Company v. Superior Court*,¹⁴ in which the appeals court had relied on traditional contract law to declare that nonstatutory counter offers terminate section 998 offers.¹⁵ While the *Glende Motor* court had attempted to preserve the opportunity for compromise during the 30-day acceptance period by emphasizing that not all negotiations constitute counter offers,¹⁶ the *Poster* court believed that if the *Glende Motor* decision were followed it would discourage settlement and promote uncertainty concerning which communications do in fact constitute counter offers.¹⁷

In determining that section 1013 is applicable to section 998 offers and extends the statutory period of acceptance by five days, the court

10. *Id.* at 271, 801 P.2d at 1075, 276 Cal. Rptr. at 324.

11. RESTATEMENT (SECOND) OF CONTRACTS § 39 (1981). *See also* 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 51 (3d ed. 1957) (stating that a counter offer "operates as a rejection of the original offer"); J. CALAMARI & J. PERILLO, CONTRACTS §§ 2-23(d) (2d ed. 1977) (declaring that "an offeree's power of acceptance is terminated by a rejection or a counter offer unless the offeror or offeree manifests a contrary intention"). For a discussion of the effect of counter-offers, see 1 A. CORBIN, CORBIN ON CONTRACTS § 89 (1963 & Supp. 1980).

12. 36 Cal. 3d 273, 682 P.2d 338, 204 Cal. Rptr. 143 (1984).

13. *Id.* at 280, 682 P.2d at 342, 204 Cal. Rptr. at 147. The *T.M. Cobb* court utilized traditional contract law principles to hold that a 998 offer is revocable by the offeror prior to the end of the 30-day acceptance period. *Id.* at 278, 682 P.2d at 340-41, 204 Cal. Rptr. at 145-46.

14. 159 Cal. App. 3d 389, 205 Cal. Rptr. 682 (1984).

15. *Id.* at 396, 205 Cal. Rptr. at 686.

16. Attempting to preserve some ability to negotiate during the 30-day acceptance period for section 998 offers, the *Glende Motor* court declared that "[a] mere inquiry regarding the possibility of different terms, a request for a better offer, or a comment upon the terms of the offer, is ordinarily not a counter-offer." *Id.* at 398, 205 Cal. Rptr. at 688 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 39 comment b (1979)).

17. *Poster*, 52 Cal. 3d at 271-72, 801 P.2d at 1075, 276 Cal. Rptr. at 324. Referring to the *Glende Motor* court's statement that not all negotiations constitute counter offers, the *Poster* Court declared,

This aspect of the *Glende Motor* decision . . . introduces a significant and undesirable uncertainty into the section 998 procedure, and will inevitably spawn numerous disputes over whether a communication from an offeree is a counteroffer which operates to revoke the statutory offer or merely an "inquiry regarding the possibility of different terms" which leaves the offeree free to accept the outstanding section 998 offer.

Id. at 272, 801 P.2d at 1075, 276 Cal. Rptr. at 324.

observed that section 1013 has been broadly construed to apply to many types of documents and notices.¹⁸ The court noted that by its language section 1013 deals with a "notice or other paper"¹⁹ that is served by mail, which would appear to include section 998 offers. While section 1013 is not applicable to jurisdictional limitations,²⁰ the court found that the 30-day limit for acceptance under section 998 was not a jurisdictional limitation.²¹ Additionally, the court refused to find that the section 998 30-day limit upon acceptance was an exception to section 1013's rule of extending the response period for notices or papers served by mail.²²

The *Poster* decision is a reflection of the supreme court's great desire to encourage settlements. By allowing an offeree greater flexibility to negotiate after the section 998 offer has been made, it is more likely that the process of compromise will continue until some agreement has been reached. Because an offeror retains the power to revoke his offer at any time,²³ a party's decision to make a section 998 offer will be unaffected by the offeree's freedom to negotiate.²⁴ Ultimately, *Poster* is an important decision because it helps clear

18. *Id.* at 273, 801 P.2d at 1076, 276 Cal. Rptr. at 325 (citing *California Accounts, Inc. v. Superior Court*, 50 Cal. App. 3d 483, 123 Cal. Rptr. 304 (1975) (stating that section 1013 extends time for bringing motions for further answers to interrogatories); *Sinclair v. Baker*, 219 Cal. App. 2d 817, 33 Cal. Rptr. 522 (1963) (declaring that section 1013 extends time for filing a petition pursuant to section 1094.5 for administrative mandamus); *Montgomery v. Norman*, 120 Cal. App. 2d 855, 262 P.2d 360 (1953) (stating that section 1013 extended the time for answering a complaint after a demurrer was overruled). As the *Poster* court noted, "In general, adding five days for mailing pursuant to section 1013 has become a part of the mental calculations of most litigating attorneys." *Poster*, 52 Cal. 3d at 273, 801 P.2d at 1076, 276 Cal. Rptr. at 325.

19. CAL. CIV. PROC. CODE § 1013 (Deering Supp. 1991).

20. *Poster*, 52 Cal. 3d at 274, 801 P.2d at 1077, 276 Cal. Rptr. at 326 (citing *County of Los Angeles v. Surety Ins. Co.*, 162 Cal. App. 3d 58, 208 Cal. Rptr. 263 (1984)). See also 3 B. WITKIN, CALIFORNIA PROCEDURE *Actions* § 769 (3d ed. 1985) (stating that section 1013 "deals only with motions and similar proceedings, not with jurisdictional process").

21. *Poster*, 52 Cal. 3d at 274, 801 P.2d at 1077, 276 Cal. Rptr. at 326.

22. *Id.* at 275, 801 P.2d at 1077, 276 Cal. Rptr. at 326. The court stated:

The Court of Appeal also relied on the general proposition that where there are two conflicting statutes, one a general procedural statute and the other a statute dealing with more specific rights and procedures, the specific statute is regarded as an exception to the general statute. Section 998, however, is not part of a specific procedural scheme that conflicts with section 1013. . . . We see no conflict between them that would support excepting section 998 from the general operation of section 1013.

Id.

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

24. The *Poster* court refused to accept the *Glende Motor* court's reasoning that if counter offers do not revoke section 998 offers, a party may hesitate to make a section 998 offer for fear of being bombarded by counter offers. As the court stated, an offeror

some of the confusion that has arisen in the courts over the operation of section 998.

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III. CONSTITUTIONAL LAW

- A. *The Public Safety Officers Procedural Bill of Rights Act, codified at section 3303(f) of the Government Code, grants discovery rights to a peace officer who is the subject of an internal affairs investigation only after the initial interrogation of that officer: Pasadena Police Officers Association v. City of Pasadena.*

I. INTRODUCTION

The California Supreme Court in *Pasadena Police Officers Association v. City of Pasadena*¹ ruled that, in limited circumstances, the state's interest in maintaining the efficiency and integrity of the police force may outweigh an individual peace officer's right to due process protection under the Public Safety Officers Procedural Bill of Rights Act (the "Act").²

The court held that a peace officer, who is the subject of an internal affairs investigation, does not acquire discovery rights until *after* his initial interrogation by the Police Department.³ Justice Kennard's

may revoke an offer at any time and, thus, escape such "bombardment." *Poster*, 52 Cal. 3d at 272 n.2, 801 P.2d at 1075 n.2, 276 Cal. Rptr. at 324 n.2.

1. 51 Cal. 3d 564, 797 P.2d 608, 273 Cal. Rptr. 584 (1990) [hereinafter *Pasadena Police Officers Ass'n II*].

2. *Id.* at 569, 797 P.2d at 609, 273 Cal. Rptr. at 585.

3. In early 1986, the Pasadena Police Department (the "Department") and the Pasadena Police Officer's Association (the "PPOA") were involved in a labor dispute which culminated in an impasse in negotiations concerning a wage agreement. As a result, the vice president of the PPOA requested a computer printout of the list of block captains in the Pasadena Neighborhood Watch Program from a divisional supervisor of the Department. The PPOA wished to use the list to solicit support for the PPOA's resolution of the wage dispute. The request, however, was denied based on the alleged confidentiality of the materials. *Id.* at 569-70, 797 P.2d at 609-10, 273 Cal. Rptr. at 585-86.

In May 1986, the Department discovered that the plaintiff, Officer Dennis Diaz, president of the PPOA, had procured an unauthorized copy of the neighborhood watch list and had used it to send the proposed solicitation letters. Consequently, the internal affairs division began an investigation. The plaintiff was notified of the investigation and its purpose, in compliance with California Government Code section 3303, and was requested to attend an administrative hearing. Prior to the plaintiff's interrogation, the vice president of PPOA was interrogated. Although the plaintiff appeared at his own administrative hearing with counsel, he refused to answer any questions until given access to the notes taken during the interview of the vice president. *Id.*

The plaintiff then filed this lawsuit to enjoin the police department from continuing his interrogation until his discovery request for the notes was granted. He relied on Government Code section 3303, subdivision (f), as the basis for his claim, alleging it permitted pre-interrogation discovery. He also claimed that the department had a

majority opinion⁴ attempted to discern the legislative intent behind the operative statute, a portion of the Act codified as section 3303(f) of the California Government Code.⁵ In pertinent part, the statute states that "[t]he public safety officer shall be entitled to a transcribed copy of any notes [of his interrogation] made by a stenographer or to *any reports or complaints* made by investigators or other persons, except those which are deemed to be confidential."⁶ The trial court and the court of appeal concluded that this language necessitated the issuance of reports and complaints *prior* to the public safety officer's interrogation.⁷ Based upon its in-depth analysis of the legislature's intent, the supreme court reversed the appellate court's decision and concluded that discovery was not permissible until after the initial interrogation of the peace officer.⁸

II. TREATMENT

The Public Safety Officers Procedural Bill of Rights Act was enacted in 1976 to provide peace officers with procedural rights and protections.⁹ Such rights were intended to ensure stable employer-

practice of providing such notes or reports. Finally, Diaz asserted that the investigation was a statutorily prohibited interference with the labor activity of an individual public employee. The superior court granted the issuance of a preliminary injunction. The court of appeal affirmed, although it rejected the police department's claim that the requested notes were confidential. The supreme court granted review. *Id.* at 570-71, 797 P.2d at 610-11, 273 Cal. Rptr. at 586-87.

4. Chief Justice Lucas and Justices Mosk, Broussard, Eagleson and Arabian concurred in the majority opinion by Justice Kennard. Justice Panelli wrote a separate concurring and dissenting opinion.

5. CAL. GOV'T CODE § 3303(f) (West 1980 & Supp. 1991). See *infra* note 11 (text of the statute).

6. *Id.* (emphasis added).

7. See *Pasadena Police Officers Ass'n v. City of Pasadena*, 217 Cal. App. 3d 506, 509, 251 Cal. Rptr. 865, 870 (1988), *rev'd*, 51 Cal. 3d 564, 797 P.2d 608, 273 Cal. Rptr. 584 (1990) [hereinafter *Pasadena Police Officers Ass'n I*]. See also *Williams v. City of Los Angeles*, 47 Cal. 3d 195, 763 P.2d 480, 252 Cal. Rptr. 817 (1988) (holding that California Government Code section 3309.5 allows public safety officers to address appropriate grievances in superior court), *appeal after remand*, 220 Cal. App. 3d 1212, 269 Cal. Rptr. 869 (1990).

8. *Pasadena Police Officers Ass'n II*, 51 Cal. 3d at 568-69, 797 P.2d at 609, 273 Cal. Rptr. at 585. The case was remanded to the superior court to decide whether the plaintiff was entitled to injunctive relief based upon the Department's past practice of preinterrogation disclosure. *Id.* at 580, 797 P.2d at 617, 273 Cal. Rptr. at 593.

9. *Id.* at 572, 797 P.2d at 611, 273 Cal. Rptr. at 587. CAL. GOV'T CODE §§ 3300-3301 (West 1980 & Supp. 1991). The Act provides the public safety officer with numerous rights, including the following:

[T]he Act secures for peace officers — when off duty and not in uniform — the right to engage, or refrain from engaging, in political activity (§ 3302); it protects against punitive action or denial of promotion for the exercise of pro-

employee relations¹⁰ between the officers and their respective law enforcement agencies. Specifically, section 3303 of the Act acknowledges the protection available to a peace officer when interrogated during an internal affairs investigation which may subject the officer to punitive action including "dismissal, demotion, [or] suspension."¹¹

cedural rights granted under its own terms or under an existing grievance procedure (§ 3304, subd. (a)); it provides that no adverse comment be entered in an officer's personnel file until the officer has been given an opportunity to read and sign the comment (§ 3305); it mandates that when an adverse comment is entered in a personnel file, the officer shall have 30 days to file a written response to be attached to the adverse comment in the file (§ 3306); and it protects against compelled disclosure, except in limited circumstances, of an officer's financial status (§ 3308).

Pasadena Police Officers Ass'n II, 51 Cal. 3d at 572, 797 P.2d at 611, 273 Cal. Rptr. at 587-88. See also *Baggett v. Gates*, 32 Cal. 3d 128, 649 P.2d 874, 185 Cal. Rptr. 232 (1982) (observing that the Act secures rights to public safety officers which they may be unable to secure for themselves); *White v. County of Sacramento*, 31 Cal. 3d 676, 646 P.2d 191, 183 Cal. Rptr. 520 (1982) (holding that public safety officers are entitled to procedural rights during proceedings which may lead to punitive actions against the officers); 2 AM. JUR. 2D *Administrative Law* § 541 (1962 & Supp. 1991) (dealing with right of administrative appeal); 18 CAL. DIGEST 3D *Law Enforcement Officers* § 11 (McKinney 1990) (general survey of disciplinary proceedings); see generally 42 CAL. JUR. 3D *Law Enforcement Officers* § 23 (1978 & Supp. 1991) (noting that restraints imposed on police officer's constitutional rights must satisfy the compelling state interest test); 42 CAL. JUR. 3D *Law Enforcement Officers* § 33 (1978 & Supp. 1991); Note, *White v. County of Sacramento and Baggett v. Gates: Administrative Due Process for Public Safety Officers*, 15 U. WEST L.A.L. REV. 181 (1983) (discussing the extended right to an "administrative appeal" for peace officers); Van Alstyne, *The Constitutional Rights of Public Employees — A Comment on the Inappropriate Uses of an Old Analogy*, 16 UCLA L. REV. 751 (1969) (stating that constitutional rights are bestowed upon public employees). But see *Lybarger v. City of Los Angeles*, 40 Cal. 3d 822, 710 P.2d 329, 221 Cal. Rptr. 529 (1985) (ruling that police officers have no right to remain silent without threat of administrative discipline).

10. CAL. GOV'T CODE § 3301 (West 1980 & Supp. 1991). The Act also represents a legislative understanding that fairness to police officers must be balanced against the "[l]egislature's recognition of the necessity for internal affairs investigations to maintain the efficiency and integrity of the police force serving the community." *Pasadena Police Officers Ass'n II*, 51 Cal. 3d at 573, 797 P.2d at 612, 273 Cal. Rptr. at 588.

11. California Government Code § 3303 provides the following:

When any public safety officer is under investigation and subjected to interrogation by his commanding officer, or any other member of the employing public safety department, which could lead to punitive action, such interrogation shall be conducted under the following conditions. For the purpose of this chapter, punitive action is defined as any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.

(a) The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If such interrogation does occur during off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for off-duty time in accordance with regular department procedures, and the public safety officer shall not be released from employment for any work missed.

(b) The public safety officer under investigation shall be informed prior to such interrogation of the rank, name and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation. All questions directed to the public safety of-

Section 3303(f) provides the officer with an opportunity to tape rec-

ficer under interrogation shall be asked by and through no more than two interrogators at one time.

(c) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

(d) The interrogating session shall be for a reasonable period taking into consideration gravity and complexity of the issue being investigated. The person under interrogation shall be allowed to attend his own personal physical necessities.

(e) The public safety officer under interrogation shall not be subjected to offensive language or threatened with punitive action, except that an officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action. No promise of reward shall be made as an inducement to answering any question. The employer shall not cause the public safety officer under interrogation to be subjected to visits by the press or news media without his express consent nor shall his home address or photograph be given to the press or news media without his express consent.

(f) The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. *The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential.* No notes or reports which are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his own recording device and record any and all aspects of the interrogation.

(g) If prior to or during the interrogation of a public safety officer it is deemed that he may be charged with a criminal offense, he shall be immediately informed of his constitutional rights.

(h) Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters which are likely to result in punitive action against the public safety officer, that officer, at his request, shall have the right to be represented by a representative of his choice who may be present at all times during such interrogation. The representative shall not be a person subject to the same investigation. The representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from the officer under investigation for noncriminal matters.

This section shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities.

(i) No public safety officer shall be loaned or temporarily reassigned to a location or duty assignment if a sworn member of his department would not normally be sent to that location or would not normally be given that duty assignment under similar circumstances.

CAL. GOV'T CODE § 3303 (West 1980 & Supp 1991) (emphasis added). See also *White v. County of Sacramento*, 31 Cal. 3d 676, 646 P.2d 191, 183 Cal. Rptr. 520 (1982) (ruling that dismissal, suspension, reduction in salary, or written reprimand are punitive actions); *McManigal v. City of Seal Beach*, 166 Cal. App. 3d 975, 212 Cal. Rptr. 733 (1985) (where court acknowledged that legislature intended dismissals, demotions, suspensions, reductions in salary, and written reprimands to be per se disciplinary); *Hopson v.*

ord his or her interrogation and the right to have access to that or any other recording of the interrogation.¹² Section 3303(f) also gives an officer the right to a “transcribed copy of any notes made by a stenographer or to any [nonconfidential] reports or complaints made by investigators or other persons.”¹³ Nowhere in the Act, however, is the timing of the disclosure of the reports and complaints specified. Thus, the California Supreme Court attempted to ascertain whether the legislature intended the right to disclosure to attach *before* or *after* interrogation.¹⁴

The court pointed out the juxtaposition of the “notes made by a stenographer” provision and the “reports or complaints” provision within the same sentence and ruled that the proximity¹⁵ of the two provisions indicated legislative intent that the “discovery rights in each instance [are] coextensive.”¹⁶ Thus, the court concluded that because the tape or transcription of any notes made by the stenographer during the interrogation must be obtained *after* the interrogation, as they are a record of that interrogation, the requested reports and complaints must be acquired after the interrogation as well.¹⁷

The court determined that preinterrogation discovery was neither explicitly required by the statute, nor crucial to the fair disposition of an internal affairs investigation.¹⁸ Moreover, the court feared that such discovery might even “jeopardize public confidence”¹⁹ in the police force by leaving the system open to the threat of collusion.²⁰

City of Los Angeles, 139 Cal. App. 3d 347, 188 Cal. Rptr. 689 (1983) (report by a board of police commissioners reprimanding officer for violating Department policy considered punitive action).

12. CAL. GOV'T CODE § 3303(f) (West 1980 & Supp. 1991). See *supra* note 11 (full text of section 3303).

13. *Id.* (emphasis added).

14. *Pasadena Police Officers Ass'n II*, 51 Cal. 3d at 575, 797 P.2d at 614, 273 Cal. Rptr. at 590.

15. *Id.* at 576, 797 P.2d at 614, 273 Cal. Rptr. at 590.

16. *Id.*

17. *Id.* at 576-77, 797 P.2d at 614, 273 Cal. Rptr. at 590-91. The court supported this conclusion by acknowledging that the legislature used “prior to” in other portions of the statute to indicate its intent. *Id.* The court then analogized the instant case to a criminal procedure situation, but concluded that a peace officer is entitled to a lower level of protection than a criminal defendant. *Id.*

18. *Id.* at 578, 797 P.2d at 615-16, 273 Cal. Rptr. at 591-92.

19. *Id.* The court discussed the plaintiff's claims regarding the alleged confidentiality of the report and the Department's break from past practice, but declined to address either issue. The case was remanded for a determination as to the past practice of the Department. *Id.* at 579-80, 797 P.2d at 616-17, 273 Cal. Rptr. at 592-93.

20. “Disclosure before interrogation might color the recollection of the person to be questioned or lead that person to conform his or her version of an event to that given by witnesses already questioned.” *Id.* at 579, 797 P.2d at 616, 273 Cal. Rptr. at 592. See also *Pasadena Police Officers Ass'n I*, 204 Cal. App. 3d at 515, 251 Cal. Rptr. at 869 (where defendant Department contended that “the only way to obtain a spontaneous, unfettered version of the facts by Diaz is for the interrogation to proceed without

Justice Panelli concurred that the case should be remanded on the issue of whether the Department's past procedure favored preinterrogation.²¹ He dissented, however, because he supports the right of an accused officer to preinterrogation discovery.²² He reasoned that the other provisions of section 3303 refer to events which are to occur *before or during* the interrogation and, thus, subsection (f) should follow.²³ Justice Panelli also disclaimed the majority's fear of collusion, arguing that the investigating agency has a built-in protection against such misconduct because it retains control over the resources and timing of the interrogation.²⁴ Furthermore, he contended that preinterrogation may actually facilitate subsequent interrogations by refreshing the officer's memory.²⁵

III. CONCLUSION

Affording a peace officer due process and maintaining the integrity of and public confidence in the police force are important state concerns.²⁶ The court, in attempting to balance these interests, seems to have limited the rights of a peace officer. However, the court ambiguously held that the statute neither compels nor prohibits pre-interrogation discovery.²⁷ It also appears that the past practice of the Department is important, as this case was remanded to examine that

his access to the notes of the interview of Ford [PPOA's vice president]. Assuming that Diaz intends to tell the truth . . . there is no advantage or disadvantage to him in not having Ford's statement").

21. *Pasadena Police Officers Ass'n II*, 51 Cal. 3d at 581, 797 P.2d at 617, 273 Cal. Rptr. at 593 (Panelli, J., concurring and dissenting).

22. *Id.*

23. *Id.* at 586, 797 P.2d at 621, 273 Cal. Rptr. at 597 (Panelli, J., concurring and dissenting).

24. *Id.* at 584, 797 P.2d at 619, 273 Cal. Rptr. at 595-96 (Panelli, J., concurring and dissenting).

25. *Id.* at 584, 797 P.2d at 619, 273 Cal. Rptr. at 596 (Panelli, J., concurring and dissenting).

26. *Id.* at 569, 797 P.2d at 609, 273 Cal. Rptr. at 585. The appellate court argued that the uniqueness of a public safety officer's social service position caused his reputation within the public safety community to be very important to his future career. For that reason, the court concluded that the officer has a "special interest in nipping any allegations of misconduct in the bud before those charges blossom into a full-fledged disciplinary hearing." *Pasadena Police Officers Ass'n I*, 204 Cal. App. 3d at 516, 251 Cal. Rptr. at 870. What the court seemed to have discounted was that the initial interrogation of the public safety officer would take place prior to any formal charges being filed against the officer. *Pasadena Police Officers Ass'n II*, 51 Cal. 3d at 578, 797 P.2d at 616, 273 Cal. Rptr. at 592.

27. *Pasadena Police Officers Ass'n II*, 51 Cal. 3d at 579, 797 P.2d at 616, 273 Cal. Rptr. at 593.

consideration.²⁸ Thus, although the lower courts and police departments will have direction as to the court's preference and interpretation of the legislature's intent, the timing of the officer's discovery rights may still be at the discretion of each individual department. This will result in further litigation to determine whether the past practice of the departments is controlling.

CYNTHIA J. EMRY

B. *The Proposition 115 victims rights initiative is partially valid: although section three of the initiative constitutes an invalid revision of the California constitution, it is severable, and the remaining provisions of the initiative are valid, as they satisfy the single subject rule: Raven v. Deukmejian*

I. INTRODUCTION

In a surprising decision, the California Supreme Court in *Raven v. Deukmejian*¹ upheld the validity of all but one provision of Proposition 115, the "Crime Victims Justice Reform Act," which was approved by the California electorate in June of 1990.² Petitioners, who requested a writ of mandate to prohibit the enforcement of Proposition 115, challenged the crime victims initiative³ based upon its al-

28. *Id.* at 579-80, 797 P.2d at 616-17, 273 Cal. Rptr. at 592-93.

1. 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990).

2. *Id.* at 355-56, 801 P.2d at 1089-90, 276 Cal. Rptr. at 338-39. Proposition 115 hoped to provide "comprehensive reforms . . . in order to restore balance and fairness to the criminal justice system." Proposition 115, § 1(a) (1990).

Proposition 115 was passed by California voters on June 5, 1990 at the Primary Election. This initiative, the "Crime Victims Justice Reform Act," attempted to modify the California Constitution to ensure crime victims greater protection. These changes included: (1) eliminating postindictment preliminary hearings when a felony is prosecuted by indictment, (2) allowing hearsay evidence to be admitted at preliminary hearings, (3) allowing reciprocal discovery in criminal cases, (4) expanding the crimes covered by the felony murder statute, and (5) adding a newly defined crime of torture. *Raven*, 52 Cal. 3d at 342-45, 801 P.2d at 1080-83, 276 Cal. Rptr. at 329-32. Petitioners, as taxpayers and voters, sought writs of mandate or prohibition to prohibit respondents, as public officials and the courts responsible for execution of Proposition 115, from implementing the initiative. The petitioners claimed that (1) the initiative violated the single subject rule, and (2) section three of the proposition was a qualitative revision of the California Constitution and, therefore, invalid. Although the petition was originally filed with the court of appeal, the California Supreme Court exercised original jurisdiction because of the issue's "great public importance" and ensuing need for expeditious resolution. *Id.* at 340, 801 P.2d at 1079, 276 Cal. Rptr. at 328.

3. Article IV, section 1, of the California Constitution declares that "[t]he legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum." CAL. CONST. art. IV, § 1. For an analysis of the initiative process in California, see generally 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 120-21 (9th ed. 1989 & Supp. 1990); 15 CAL. DIGEST 3D *Initiative and Referendum* §§ 3, 6 (McKinney 1988 & Supp. 1990); Comment, *Lousy Lawmaking: Question-*

leged violation of the single subject rule and the rule requiring constitutional "revisions" to be governed by more formal procedures than the initiative process.⁴ In addressing the petitioners' challenges, Chief Justice Lucas's majority opinion⁵ held that Proposition 115 satisfies the single subject rule, which requires that an initiative embrace only one subject in order to be submitted to the voters.⁶ The court agreed with the petitioners, however, declaring section three of the measure invalid because it constituted a revision rather than a mere amendment to the California Constitution, violating California constitutional law.⁷ The remaining provisions of the proposition were salvaged under a severance clause in the initiative.⁸ The supreme court, therefore, granted the requested writ of mandate compelling respondents not to enforce section three of Proposition 115.⁹

II. TREATMENT OF THE CASE

The supreme court carefully analyzed the two issues set before it. The court first determined whether the proposition satisfied the sin-

ing the Desirability and Constitutionality of Legislating by Initiative, 61 S. CAL. L. REV. 733 (1988); Comment, *New Limits on the California Initiative: An Analysis and Critique*, 19 LOY. L.A.L. REV. 1045 (1986); Comment, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922 (1975).

4. *Raven*, 52 Cal. 3d at 346-48, 801 P.2d at 1083-84, 276 Cal. Rptr. at 332-33. For a discussion of the single subject rule, see *infra* notes 6 and 11. For a discussion of the processes necessary to invoke a constitutional revision see *infra* notes 7 and 25.

5. Justices Broussard, Panelli, Eagleson, Kennard and Arabian concurred in the majority opinion. Justice Mosk wrote a separate concurring and dissenting opinion.

6. *Raven*, 52 Cal. 3d at 346-48, 801 P.2d at 1083-84, 276 Cal. Rptr. at 332-33. The single subject rule is set forth in article II, section 8(d) of the California Constitution. It declares that "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect." CAL. CONST. art. II, § 8(d).

7. *Raven*, 52 Cal. 3d at 355, 801 P.2d at 1089, 276 Cal. Rptr. at 338. The California Constitution requires that a "revision" of the constitution be accomplished by convening a constitutional convention and ratification by popular vote. *Id.* at 349, 801 P.2d at 1085, 276 Cal. Rptr. at 334 (citing CAL. CONST. art. XVIII, § 2). For a more comprehensive analysis, see *infra* note 25 and accompanying text.

8. *Raven*, 52 Cal. 3d at 355, 801 P.2d at 1089, 276 Cal. Rptr. at 338. The severance clause set forth in section 29 of Proposition 115 provides:

If any provision of this measure or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the measure which can be given effect without the invalid provision or application, and to this end the provisions of this measure are severable.

See also 12 B. HOLZMAN, M. LANDIS, D. COFFEE, CALIFORNIA CRIMINAL DEFENSE PRACTICE, CALIFORNIA CRIME VICTIMS JUSTICE REFORM ACT: PROPOSITION 115 (1990) [hereinafter CALIFORNIA CRIMINAL DEFENSE PRACTICE].

9. *Raven*, 52 Cal. 3d at 355, 801 P.2d at 1089, 276 Cal. Rptr. at 338.

gle subject rule.¹⁰

A. *Single Subject Rule*

Article II, section 8(d), of the California Constitution states that “[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect.”¹¹ Although Proposition 115 included provisions dealing with a wide array of topics such as postindictment preliminary hearings, joinder and severance of cases, reciprocal discovery procedures, and modification of the felony-murder rule,¹² the supreme court found that the provisions were “reasonably germane”¹³ to one another and to the initiative as a whole, satisfying the single subject rule.¹⁴

Comparing the instant case to *Brosnahan v. Brown*,¹⁵ which dealt with another criminal justice reform initiative, the supreme court held that the provisions of Proposition 115 united to form a “comprehensive criminal justice reform package.”¹⁶ The proposition attempted to bolster the procedural and substantive safeguards for crime victims.¹⁷ Thus, the court concluded that the “single subject” was the protection of crime victims’ rights.¹⁸

To support its holding, the court noted that an auxiliary “unifying theme”¹⁹ of the proposition was to invalidate particular supreme

10. *Id.* at 346, 801 P.2d at 1083, 276 Cal. Rptr. at 332.

11. CAL. CONST. art. II, § 8(d). See 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 103 (9th ed. 1988 & Supp. 1990) (describing the single subject rule); CRIMINAL LAW PRACTICE AFTER PROPOSITION 115, CONTINUING EDUCATION OF THE BAR 255-57 (1990) (quoting J. VAN DE KAMP, PROPOSITION 115 MANUAL (1990)) (same); Lowenstein, *California Initiatives and the Single Subject Rule*, 30 UCLA L. REV. 936 (1983) (in-depth analysis of the single subject rule’s origins and shortcomings); see also *Amador Valley Joint Union High School Dist. v. State Board of Equalization*, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978) (holding that one purpose of the single subject rule is to eliminate voter confusion); *Insurance Indus. Initiative Campaign Comm. v. Eu*, 203 Cal. App. 3d 961, 250 Cal. Rptr. 320 (1988) (stating that insurance reform initiative does not violate the single subject rule because its aim encompasses insurance industry practices which are potentially unfair to consumers).

12. *Raven*, 52 Cal. 3d at 342-46, 801 P.2d at 1080-83, 276 Cal. Rptr. at 329-32.

13. *Id.* at 346, 801 P.2d at 1083, 276 Cal. Rptr. at 332. For the development of the “reasonably germane” standard, see *Evans v. Superior Court*, 215 Cal. 58, 8 P.2d 467 (1932); *Perry v. Jordan*, 34 Cal. 2d 87, 207 P.2d 47 (1949); *Amador Valley*, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239; *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982); *Tinsley v. Superior Court*, 150 Cal. App. 3d 90, 197 Cal. Rptr. 643 (1983) (ruling that initiative should have “one general object,” or a “single scheme,” but may deal with more than one constitutional issue); *California Trial Lawyers Ass’n v. Eu*, 200 Cal. App. 3d 351, 245 Cal. Rptr. 916 (1988) (stating that provisions must be reasonably germane to the general subject of the initiative’s title).

14. *Raven*, 52 Cal. 3d at 349, 801 P.2d at 1085, 276 Cal. Rptr. at 334.

15. 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).

16. *Raven*, 52 Cal. 3d at 347, 801 P.2d at 1083, 276 Cal. Rptr. at 332.

17. *Id.* at 347, 801 P.2d at 1083-84, 276 Cal. Rptr. at 332-33.

18. *Id.*

19. *Id.* at 347, 801 P.2d at 1084, 276 Cal. Rptr. at 333. See *Brosnahan*, 32 Cal. 3d 236,

court decisions which had expanded criminal defendant's rights.²⁰ The court also disclaimed the petitioners' contention that the respondents had attempted to include matters which would not have gained support by themselves.²¹ Finally, the court denied that the initiative was too complex for the average voter to understand.²² To refute the complexity claim, the court relied upon the measure summary and the Legislative Analyst's report included in the official voters' pamphlet.²³ After deciding Proposition 115 as a whole satisfied the single subject rule, the court considered whether section three of the initiative constituted a revision or an amendment to the California Constitution.

B. Constitutional Revision or Amendment

Article XVIII of the California Constitution allows the electorate to *amend* the constitution through the use of the initiative process.²⁴ *Revision* of the constitution, however, may come about only by the convening of a constitutional convention or through other legislative action.²⁵ Section three of Proposition 115 sought to add a new second

651 P.2d 274, 186 Cal. Rptr. 30 (finding that a similar general supplemental theme satisfied the single subject rule).

20. *Raven*, 52 Cal. 3d at 347, 801 P.2d at 1084, 276 Cal. Rptr. at 333.

21. *Id.* at 348, 801 P.2d at 1084, 276 Cal. Rptr. at 333. This procedure is often referred to as "logrolling." *Id.*

22. *Id.* at 349, 801 P.2d at 1085, 276 Cal. Rptr. at 333.

23. *Id.* See Legislature of California v. Deukmejian, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983) (holding that ballot summaries and arguments may be considered when discerning voter understanding of an initiative).

24. CAL. CONST. art. XVIII, § 1. See also 13 CAL. JUR. 3D *Constitutional Law* § 10 (1989 & Supp. 1990) (noting that amendments to the California Constitution may be achieved by either a two-thirds majority vote of the legislature or an initiative petition); 13 CAL. JUR. 3D *Constitutional Law* § 11 (1989 & Supp. 1990) (stating that amendments of the California Constitution must be submitted to the voters for ratification); 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 54 (9th ed. 1988 & Supp. 1990) (procedure for amendment to the California Constitution); Comment, *Judicial Review of Initiative Constitutional Amendment*, 14 U.C. DAVIS L. REV. 461 (1980) (survey of judicial decisions involving challenges to compliance with initiative process).

25. CAL. CONST. art. XVIII, § 2. See also 13 CAL. JUR. 3D *Constitutional Law* § 10 (1989 & Supp. 1990) (noting that revisions of California Constitution may be proposed by a two-thirds majority of the legislature or by convening a constitutional convention); 13 CAL. JUR. 3D *Constitutional Law* § 11 (1989 & Supp. 1990) (stating that constitutional revision must be submitted to the voters); 13 CAL. JUR. 3D *Constitutional Law* § 12 (1989 & Supp. 1990) (revision of constitution by convention called for that purpose or by legislature only); 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 54 (9th ed. 1988 & Supp. 1990) (noting that convention to revise constitution must be called by two-thirds vote of the legislature and obtain voter approval); 16

paragraph to article I, section 24, of the California Constitution.²⁶ The new paragraph was directly inapposite to the existing portion of section 24, which states that “[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.”²⁷ The new paragraph would have mandated that the California Constitution not be interpreted to afford greater rights to criminal defendants than the United States Constitution.²⁸ To determine the effect of this addition, the court used a two step test. First, the court considered the quantitative effect of Proposition 115.²⁹ The court determined that the quantitative changes would be no more extensive than those of prior cases, as the measure would delete no constitutional provisions and would affect merely one major article of the constitution.³⁰

Second, the court looked to the qualitative effect of the measure and concluded that new article I, section 24, “would vest all judicial *interpretative* power, as to fundamental criminal defense rights, in the United States Supreme Court”³¹ because the California courts would no longer be able to interpret the California Constitution to be more protective of rights than the federal courts in interpreting the United States Constitution.³² The new article would thus divest the

C.J.S. *Constitutional Law* § 8 (1984) (revision of state constitution by a constitutional convention).

26. The new paragraph stated:

In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to speedy and public trial, to compel the attendance of witnesses, to confront witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel and unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

Proposition 115, § 3 (1990) (proposed CAL. CONST. art. I, § 24).

27. CAL. CONST. art. I, § 24.

28. *Raven*, 52 Cal. 3d at 352, 801 P.2d at 1087, 276 Cal. Rptr. at 336. Such an abrogation of states' rights would be in direct conflict with the doctrine of federalism. At the “heart of the system of federalism” is the state courts' right to interpret state constitutions differently from federal court interpretation of the federal constitution. See CRIMINAL LAW PRACTICE AFTER PROPOSITION 115, CONTINUING EDUCATION OF THE BAR 126-27 (1990) (quoting STAFF OF SENATE COMMITTEE ON JUDICIARY, ANALYSIS OF CRIME VICTIMS JUSTICE REFORM ACT (1989)); 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE, *supra* note 8; Blum, *Toward a Radical Middle: Has a Great Court Become Mediocre?*, 77 A.B.A. J. 48 (Jan. 1991) (survey of California Supreme Court decisions following the liberal Bird Court).

29. *Raven*, 52 Cal. 3d at 351, 801 P.2d at 1086-87, 276 Cal. Rptr. at 334-35.

30. *Id.*

31. *Id.* at 352, 801 P.2d at 1087, 276 Cal. Rptr. at 336.

32. *Id.* See CRIMINAL LAW PRACTICE AFTER PROPOSITION 115, CONTINUING EDUCA-

California Constitution of its "independent force and effect."³³

Although the California Supreme Court recognized its policy of deference to the United States Supreme Court, it also noted the independent judgment it has in interpreting the California Constitution.³⁴ The court, therefore, concluded that section three of Proposition 115 would invalidly revise the California Constitution.³⁵ In an effort to save the proposition, however, the court found that the severance clause within the initiative allowed the remaining provisions to be grammatically, functionally and volitionally severable from the invalid portion.³⁶ The remaining provisions of the proposition were thus considered valid.³⁷

Justice Mosk in his concurring and dissenting opinion agreed with the majority on the issue of revision, but differed with respect to the single subject issue.³⁸ He interpreted the "reasonably germane" test to require an internal consistency and interrelation of provisions.³⁹ Thus, the substance of the initiative must concern a single subject, not merely fit under a particular label.⁴⁰ He found the single subject propounded by the majority⁴¹ to be a label of "indefinite scope."⁴² Justice Mosk concluded that the initiative was merely a "grabbag"⁴³ of unrelated issues and therefore violative of the single subject rule.⁴⁴

TION OF THE BAR 11 (1990) (quoting J. VESPER, PROPOSITION 115: THE CRIME VICTIMS REFORM ACT (1990)). The effect of this section would have been far-reaching. Some commentators feared that abortion rights in California could be threatened by adopting the initiative. See CRIMINAL LAW PRACTICE AFTER PROPOSITION 115, CONTINUING EDUCATION OF THE BAR 130 (1990) (quoting STAFF OF SENATE COMMITTEE ON JUDICIARY, ANALYSIS OF CRIME VICTIMS JUSTICE REFORM ACT (1989)) (noting that by specifically mentioning a right to privacy, the California Constitution provides greater protection to abortion rights than the United States Constitution). If this section were maintained, California courts might be forced to ignore the right of privacy because it is not found in the United States Constitution.

33. *Raven*, 52 Cal. 3d at 353, 801 P.2d at 1088, 276 Cal. Rptr. at 337.

34. *Id.*

35. *Id.* at 355, 801 P.2d at 1089, 276 Cal. Rptr. at 338.

36. *Id.* at 355-56, 801 P.2d at 1089-90, 276 Cal. Rptr. at 338-39.

37. *Id.*

38. *Id.* at 356, 801 P.2d at 1090, 276 Cal. Rptr. at 339 (Mosk, J., concurring and dissenting).

39. *Id.* at 360, 801 P.2d at 1092, 276 Cal. Rptr. at 341 (Mosk, J., concurring and dissenting).

40. *Id.* at 360-63, 801 P.2d at 1093-94, 276 Cal. Rptr. at 342-43 (Mosk, J., concurring and dissenting).

41. The single subject was the "promotion of the rights of actual and potential crime victims." *Id.* at 347, 801 P.2d at 1083-84, 276 Cal. Rptr. at 332-33.

42. *Id.* at 365, 801 P.2d at 1096, 276 Cal. Rptr. at 345 (Mosk, J., concurring and dissenting).

43. *Id.* (Mosk, J., concurring and dissenting).

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

III. CONCLUSION

As Justice Mosk feared, the majority's holding will very likely send a message to the courts and to those who develop and advocate the initiative process that an initiative may encompass a number of issues so long as these issues fit neatly under one title or label.⁴⁵ This divestiture of the single subject rule's strength and validity is not overtly displayed in the decision, but is evidenced by the diversity of the provisions found in Proposition 115.⁴⁶

Fortunately, the supreme court did acknowledge that section three of Proposition 115 was a revision of the constitution rather than a mere amendment. This revision would have substantially changed the California Supreme Court's role in interpreting a criminal defendant's rights under the California Constitution. By striking down this portion of the initiative, the court identified a limitation on the voters' initiative power over California courts.⁴⁷ This limitation may deter future initiatives from attempting to deprive the court of its historical power to interpret the state constitution.

CYNTHIA J. EMRY

- C. *When two propositions containing materially conflicting provisions are passed at the same election, only the initiative receiving the greater majority of votes will become operative: Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission.*

I. INTRODUCTION

The California Constitution has long provided that "the people reserve to themselves the powers of initiative and referendum."¹ Pursuant to this reserved power of direct democracy,² the people of

45. See *id.* at 360-63, 801 P.2d at 1093-94, 276 Cal. Rptr. at 342-43 (Mosk, J., concurring and dissenting).

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

47. See Blum, *Mixed Ruling on Crime Initiative: California Supreme Court Strikes Down Portion of Far-reaching Ballot Measure*, 77 A.B.A. J. 23 (March 1991). Santa Clara Law School Dean Gerald Uelmen, describing the court's ruling as a victory for the criminal defense, proclaimed "[w]e have a tool now . . . that puts some limits on what an initiative can do to the state constitution." *Id.* Other commentators have argued that "the ruling will restrict people's initiative power over the judicial branch of government." Chiang, *Court Rejects Key Section of Crime Victims Act but State Justices Rule in Favor of Most of Proposition*, San Francisco Chron., Dec. 25, 1990, at A1.

1. CAL. CONST. art IV, § 1.

2. California permits the enactment of statutes and amendments to the state constitution by either initiative or referendum. CAL. CONST. art II, § 8(a).

An initiative is a proposed law or constitutional amendment that the electorate may initiate independent of the legislature. The signatures of a fixed number or percentage of the voting electorate are required for an initiative to be placed on a ballot. In com-

California enacted Propositions 68 and 73. Both propositions sought to limit campaign contributions.³ The 1988 passage of these two propositions led the California Supreme Court to decide the case of *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission*.⁴ A majority of the court determined that these initiatives contained competing regulatory schemes and that only the proposition receiving the most votes could become operative.⁵ The court rejected any melding of the two propositions. The majority based its holding on its interpretation of article 2, section 10(b) of the California Constitution. This section states, "[i]f provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail."⁶ The majority relied heavily on past legislation to strengthen its interpretation of section 10(b).⁷ Furthermore, the court reasoned that voters would not have anticipated a hybrid regulation of the two propositions; therefore, the judiciary's interpretation would best serve the interests of the electorate.⁸

II. STATEMENT OF THE CASE

On June 4, 1974, California voters adopted the Political Reform Act of 1974.⁹ The Act created the Fair Political Practices Commission (hereinafter FPPC) whose duty is to implement and administer title 9 of the Government Code.¹⁰ On June 7, 1988, the electorate affirmatively voted for two propositions, each of which provided a "different" chapter 5 to title 9 of the Government Code.¹¹ Both propositions set limits on campaign contributions, but the limitations are signifi-

parison, a referendum is a law passed by the legislature that requires approval of a fixed number or percentage of the voters before it can become effective. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 508 n.4 (1982).

3. Full length duplications of the applicable propositions can be found in the appendix of *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 51 Cal. 3d 744, 784-98, 799 P.2d 1220, 1238-45, 274 Cal. Rptr. 787, 805-11 (1990) [hereinafter *Taxpayers v. FPPC*].

4. 51 Cal. 3d 744, 799 P.2d 1220, 274 Cal. Rptr. 787 (1990).

5. *Id.* at 771 n.12, 799 P.2d at 1236 n.12, 274 Cal. Rptr. at 803 n.12.

6. CAL. CONST. art. II, § 10(b).

7. *Taxpayers v. FPPC*, 51 Cal. 3d at 765-68, 799 P.2d at 1233-35, 274 Cal. Rptr. at 800-02.

8. *Id.* at 769, 799 P.2d at 1235, 274 Cal. Rptr. at 802.

9. CAL. GOV'T CODE §§ 81000-81016 (West 1987).

10. *Taxpayers v. FPPC*, 51 Cal. 3d at 784, 799 P.2d at 1222, 274 Cal. Rptr. at 789.

See also CAL. GOV'T CODE §§ 83100, 83111 (West 1987 & Supp. 1991).

11. *Taxpayers v. FPPC*, 51 Cal. 3d at 748, 799 P.2d at 1222, 274 Cal. Rptr. at 789.

cantly different.¹² Furthermore, Proposition 68 set forth additional restrictions and penalties not contained in Proposition 73. Proposition 73 received a greater majority of the votes.¹³

A. Legislative Counsel Opinion

On June 22, 1988, the Legislative Counsel decided the first legal opinion concerning enforcement of these measures.¹⁴ The Counsel utilized a provision by provision analysis and concluded that the electorate could not adopt any of the provisions of Proposition 68 because they expressly conflicted with provisions in Proposition 73.¹⁵ In addition, the Counsel determined that even the sections not in direct conflict were unenforceable because they were "logically inseparable."¹⁶ The Counsel also pointed out that both propositions sought a "comprehensive and interrelated system of campaign finance."¹⁷ Moreover, Proposition 68 contemplated public funding without which certain Proposition 68 provisions could not be valid.¹⁸ Proposition 73, on the other hand, specifically prohibited any such public funding.¹⁹ This primary disparity prevented the Counsel from effectively severing provisions from Proposition 68.²⁰ In short, the Counsel found Proposition 73 enforceable in its entirety,²¹ and Proposition 68 completely without effect.

B. FPPC Opinion

The California Political Attorneys requested that the FPPC issue an opinion to determine which, if any, provisions of Proposition 68 would become effective.²² The FPPC stated that section 10(b) of the constitution applies if there is a conflict between provisions.²³ After

12. See *supra* note 3.

13. *Taxpayers v. FPPC*, 51 Cal. 3d at 748, 799 P.2d at 1222, 274 Cal. Rptr. at 789. Proposition 73 received 58% of the "yes" votes and 47% of the "no" votes. Proposition 68 received 53% of the "yes" votes and 42% of the "no" votes. *Id.* at 760 n.7, 799 P.2d at 1230 n.7, 274 Cal. Rptr. at 797 n.7.

14. *Id.* at 755, 799 P.2d at 1226, 274 Cal. Rptr. at 793.

15. *Id.* at 756, 799 P.2d at 1227, 274 Cal. Rptr. at 794.

16. *Id.*

17. *Id.* at 755, 799 P.2d at 1226, 274 Cal. Rptr. at 793.

18. *Id.* at 755-56, 799 P.2d at 1226-27, 274 Cal. Rptr. at 793-94.

19. *Id.* at 765, 799 P.2d at 1227, 274 Cal. Rptr. at 794.

20. *Id.*

21. *Id.*

22. This fact came directly from the court of appeal opinion which has been omitted from publication in the California Appellate Reports due to its reversal by the supreme court. See 212 Cal. App. 3d 991, 260 Cal. Rptr. 898, 901 (1989), *rev'd*, 51 Cal. 3d 744, 799 P.2d 1220, 274 Cal. Rptr. 787 (1990).

23. *Taxpayers v. FPPC*, 51 Cal. 3d at 759, 799 P.2d at 1229, 274 Cal. Rptr. at 796. The FPPC also relied on *Estate of Gibson*, 139 Cal. App. 3d 733, 736, 189 Cal. Rptr. 201, 203 (1983) where the court determined that proposition 6, which received the greater majority of votes, would be given effect.

a provision-by-provision comparison, the FPPC decided that most provisions of Proposition 68 conflicted with those of Proposition 73 and were not severable.²⁴ However, the FPPC listed several provisions of Proposition 68 that did not conflict and that should be implemented.²⁵ Also, the FPPC concluded that Proposition 68's statement of purpose was operative, despite the fact that few of its substantive provisions were effective.²⁶

As petitioners, the sponsors of Proposition 68 filed a petition for a writ of mandate ordering the respondent, FPPC, to enforce certain additional provisions that they had previously found invalid.²⁷

C. Court of Appeal Decision

California's Second District Court of Appeal held that both initiatives should take effect because they were simultaneously approved by the electorate.²⁸ Utilizing traditional rules of statutory construction and article 2, section 10(b) of the California Constitution, the court of appeal reconciled or harmonized the conflicting provisions in an effort to give effect to every provision.²⁹ The court justified this procedure by stating that it was the voters' intent that both propositions should take effect because each had received a majority of votes.³⁰ This provision resulted in a hybrid regulation system where provisions of each initiative could be adopted literally. For example, Proposition 68 had a restriction that legislative candidates and committees could not accept contributions in any odd-numbered year (non-election year).³¹ Proposition 73 had no such limitation, but did

24. *Taxpayers v. FPPC*, 511 Cal. 3d at 759, 799 P.2d at 1229, 274 Cal. Rptr. at 796.

25. *Id.* at 758-59, 799 P.2d at 1228-29, 274 Cal. Rptr. at 795-96. The FPPC decided that the following list of provisions of Proposition 68 should become operative: section 68:85101 [findings and declarations]; section 68:85600 [disclaimer on mailings]; section 68:85604 [disclosures of independent expenditures over \$10,000]; section 68:5700, subdivisions (b) & (c) [FPPC to prescribe forms, and prescribe and release studies on impact of title]; section 68:83116 [amendment of existing section governing administrative penalties]; section 68:84106 [identification of committees]; and section 68:84302.5 [defining intermediary].

The court of appeal agreed that these sections should become effective along with several additional provisions of Proposition 68. *Id.* at 759-60, 799 P.2d at 1229, 274 Cal. Rptr. at 796.

26. *Id.* at 759, 799 P.2d at 1229, 274 Cal. Rptr. at 796.

27. *See supra* note 21 (260 Cal. Rptr. at 902; the court of appeal decision for the principle case is not available in the California Appellate Reports).

28. *Taxpayers v. FPPC*, 51 Cal. 3d at 760, 799 P.2d at 1229, 274 Cal. Rptr. at 796.

29. *Id.* at 761, 799 P.2d at 1230, 274 Cal. Rptr. at 797.

30. *Id.*

31. *Id.*

limit the amount of contributions that could be made by persons, political committees, and broadbased political committees in any fiscal year.³² Under Proposition 73, a senator could receive \$4000 from an individual during a four year period.³³ The court of appeal combined the two provisions, thus permitting a senatorial candidate to receive only \$2000 from an individual in four years because Proposition 68 prohibits contributions in non-election years.³⁴

Other Proposition 68 provisions that the court held to be reconcilable with Proposition 73 included aggregate contribution limitations, amendments to criminal and civil penalties, and certain definitions and purpose statements.³⁵ Thus, the petitioner's writ of mandate was granted by the court of appeal which resulted in the partial adoption of Proposition 68.³⁶

III. TREATMENT OF THE CASE

A. *The Majority Opinion*

The supreme court's majority began its treatment of the case by recognizing that article 2, section 10(b) of the California Constitution was susceptible to two possible interpretations.³⁷ The majority examined the provision-by-provision approach taken by the court of appeal and deemed it inappropriate for a section 10(b) analysis.³⁸ The majority criticized the lower court's assumption that both initiatives should become operative because they were approved by the voters. Justice Eagleson explained that while some voters would have been satisfied with the adoption of either proposition, this does not necessarily mean that the people wanted to adopt both propositions.³⁹ Additionally, the same individuals may not have cast a majority of the affirmative votes for each initiative.⁴⁰ Based on these possible scenarios, the majority believed that the intent of the electorate is best served by invalidating an entire initiative when it materially conflicts with a similar initiative that received more votes.⁴¹

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 760, 799 P.2d at 1229, 274 Cal. Rptr. at 796.

36. *See supra* note 21 (260 Cal. Rptr. at 900; the court of appeal decision for the principle case is not available in California Appellate Reports).

37. *Taxpayers v. FPPC*, 51 Cal. 3d at 765, 799 P.2d at 1233, 274 Cal. Rptr. at 800.

38. *Id.*

39. *Id.* at 769, 799 P.2d at 1235, 274 Cal. Rptr. at 802.

40. *Id.*

41. *Id.* Voter intent can be difficult to ascertain because many voters do not read or comprehend ballot measures. In fact, some people rely completely on advertisements to provide them with proposition information. *See King, Commercial Litmus Test: Will TV Viewers Buy It?*, L.A. Times, Nov. 14, 1984, pt. 1 at 28 col. 1; LEAGUE OF WOMEN VOTERS OF CALIFORNIA, INITIATIVE AND REFERENDUM IN CALIFORNIA: A LEGACY LOST? 1-11 (1984); D. MAGLEBY, DIRECT LEGISLATION 5 (1984); Note, *Lousy Law-*

The majority relied on past legislation to bolster its construction of section 10(b). An initiative that amended article IV of the California Constitution closely resembled the language of section 10(b).⁴² That particular initiative stated, “[i]f any provision or provisions of two or more measures, approved by the electors at the same election, conflict, the provision or provisions of the measure receiving the highest affirmative vote shall prevail.”⁴³ Recognizing this language as ambiguous, the ballot pamphlet for this amendment illustrated that usage of “provision(s)” does not indicate that “all individual nonconflicting provisions of both measures would become operative.”⁴⁴ It merely suggested that measures may contain more than one provision.⁴⁵ The 1911 amendment of the California Constitution, in which the above initiative was added, furthered the majority’s argument that section 10(b) was designed to void an entire conflicting measure. The pertinent part of this amendment states, “[i]f a conflict arise[s] between provisions adopted and approved by the electors at the same election, that receiving the highest vote shall prevail.”⁴⁶ The ballot pamphlet for this amendment inferred that the usage of the word “that” is singular and therefore refers to the measure itself.⁴⁷

The court also examined the language embraced within section 4058 of the former California Political Code, currently found in section 3717 of the California Elections Code.⁴⁸ This section directs that, “[i]f the provisions of two or more ordinances adopted at the same election conflict, then the ordinance receiving the highest number of affirmative votes shall control.”⁴⁹ The language selected for this section clearly states that an entire ordinance shall be void if its provisions conflict with another. The majority utilized this code section to demonstrate that the purpose of section 10(b), which contains very similar language, is to effectively void any conflicting

making: Questioning the Desirability and Constitutionality of Legislating by Initiative, 61 S. CAL. L. REV. 735, 738-42 (1988).

42. *Taxpayers v. FPPC*, 51 Cal. 3d at 766, 799 P.2d at 1233, 274 Cal. Rptr. at 800.

43. *Id.* (quoting the initiative provision that amended article IV of the California Constitution in 1911). This amendment authorized the use of initiatives to enact state and local laws and to amend the state constitution. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* (citing Ballot Pamphlet, argument in favor of Sen. Const. Amend. No. 22, Oct. 10, 1911).

47. *Id.*

48. *Taxpayers v. FPPC*, 51 Cal. 3d at 767, 799 P.2d at 1234, 274 Cal. Rptr. at 801.

49. *Id.*

measure.⁵⁰

The majority further asserted that when contrary ballot initiatives are to be treated differently, language explicitly requiring an implementation of provisions of both measures will be utilized.⁵¹ For example, provision (d) of the California Constitution specifically states that if one proposition relating to county charters receives a larger number of votes than other propositions receive, that proposition will control as to all matters in conflict.⁵² The ballot pamphlet for this amendment contended that its purpose was to create uniformity among county and city charters.⁵³ The majority concluded that article XI, section 3(d), and article II, section 10(b) of the California Constitution are similar in function because both allow only one measure to control.⁵⁴ Thus, section 10(b)'s language was not designed to permit all nonconflicting provisions of competing initiatives to become operative.

After considering the language of section 10(b), the majority focused its attention on the voters' intent.⁵⁵ The majority pointed out that because Propositions 68 and 73 were offered as competing measures on the ballot, the court could not assume that the same voters selected both propositions.⁵⁶ Furthermore, there is no case law that dictates the appellate court's approach of implementing certain provisions of one proposition into the regulatory scheme of another.⁵⁷ The supreme court determined that voters would not have expected the "amalgam" created by the court of appeal.⁵⁸ If this scheme was carried out it could effectively thwart the voters' intent.⁵⁹ Due to the increasing complexity in statewide ballot initiatives, the majority firmly asserted its construction of section 10(b) as necessary to avoid judicial legislation.⁶⁰

50. *Id.* at 768, 799 P.2d at 1234, 274 Cal. Rptr. at 802.

51. *Id.* at 768, 799 P.2d at 1234, 274 Cal. Rptr. at 801.

52. See CAL. CONST. art. XI, § 3(d).

53. *Taxpayers v. FPPC*, 51 Cal. 3d at 768, 799 P.2d at 1235, 274 Cal. Rptr. at 802.

54. *Id.*

55. The supreme court wrote this opinion under the presumption that voters read and understand ballot initiatives. See *Brosnahan v. Brown*, 32 Cal. 3d 236, 252, 651 P.2d 274, 283-84, 186 Cal. Rptr. 30, 39-40 (1982); *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 243-44, 583 P.2d 1281, 1299, 149 Cal. Rptr. 239, 256-57 (1978); *Wright v. Jordan*, 192 Cal. 704, 713, 221 P. 915, 918-19 (1923).

56. *Taxpayers v. FPPC*, 51 Cal. 3d at 769, 799 P.2d at 1235, 274 Cal. Rptr. at 802.

57. *Id.*

58. *Id.*

59. *Id.* The supreme court recognized that many voters rely almost exclusively on the title or the summary of the initiative in making their decisions. *Id.* at 770, 799 P.2d at 1236, 274 Cal. Rptr. at 803 (citing *Schmitz v. Younger*, 21 Cal. 3d 90, 99, 577 P.2d 652, 657, 145 Cal. Rptr. 517, 522 (1978)).

60. *Id.* at 769-70, 799 P.2d at 1236, 274 Cal. Rptr. at 803.

B. Justice Mosk's Concurring and Dissenting Opinion

Justice Mosk affirmed the majority's holding by determining that when two regulatory schemes are competing, the one receiving the highest number of votes should become effective.⁶¹ Justice Mosk emphasized that Propositions 68 and 73 are clearly alternative measures because the ballot arguments submitted to the public urged voters to cast their vote for one or the other.⁶² Furthermore, both initiatives were identically numbered to become chapter 5 of title 9.⁶³ Considering that both propositions could not become chapter 5, it is logical to assume that they were competing regulations. Justice Mosk also suggested that the majority should have used the language, "offered as [competing measures]" to plainly illustrate that the electorate were to choose between the two.⁶⁴

Justice Mosk was not entirely supportive of the majority's approach. In fact, he was careful to point out that the majority's construction will allow individuals to artfully disguise an initiative's actual objective in order for it to receive an affirmative vote.⁶⁵ Justice Mosk was concerned that whenever opposing initiatives are presented, there exists the opportunity for someone to exploit the voters' intent by making the ballot argument so incomprehensible that the individual does not realize that there is a competing measure.⁶⁶ Justice Mosk anticipated this scenario would become a problem, especially when dealing with complex legal issues where the public does not have adequate knowledge of the topic and relies on the ballot information to make their decision.⁶⁷

Justice Mosk further criticized the majority for not properly addressing the case of *Service Employees International Union v. Fair*

61. *Id.* at 774, 799 P.2d at 1246, 51 Cal. Rptr. at 813 (Mosk, J., concurring and dissenting).

62. *Id.* at 772, 799 P.2d at 1245, 274 Cal. Rptr. at 812 (Mosk, J., concurring and dissenting).

63. *Id.* (Mosk, J., concurring and dissenting).

64. *Id.* (Mosk, J., concurring and dissenting).

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

66. *Id.* (Mosk, J., concurring and dissenting). Many scholars have contended that initiatives are purposefully written in ambiguous or confusing terms. See Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43, 66 (1983) (ballot propositions are written by individuals who secretly share a common objective); D. MAGLEBY, *DIRECT LEGISLATION* 143-44 (1984) (landlords drafted misleading proposition regarding rent control).

67. 51 Cal. 3d at 772 n.1, 799 P.2d at 1246 n.1, 274 Cal. Rptr. at 813 n.1 (Mosk, J., concurring and dissenting).

Political Practices Commission.⁶⁸ In that case, the federal district court found Proposition 73 to be in violation of the first amendment of the United States Constitution and issued a restraining order to prevent its enforcement.⁶⁹ This restraining order was approved by the United States Supreme Court.⁷⁰ Justice Mosk contended that the California Supreme Court rendered an advisory opinion prior to the outcome of this case, because if Proposition 73 was held to be invalid for violating the United States Constitution, then the state supreme court's decision upholding it would be a "futility."⁷¹ However, Justice Mosk did not seem to take into account the primary result of the majority's decision in *Taxpayers v. FPPC*, which was a creative interpretation of section 10(b).⁷² In sum, Justice Mosk held Proposition 68 and 73 to be competing measures in which only the one receiving the greater majority of votes should become operative.⁷³ Moreover, this principle should be limited to situations where both initiatives have been found to be constitutional.⁷⁴

C. Justice Kennard's Dissent

Justice Kennard accused the majority of shirking its "constitutionally assigned responsibility" by adopting an "all or nothing" analysis of section 10(b).⁷⁵ She argued that the complexity of reconciling the many provisions of these two measures was not reason to draw on erroneous interpretation of section 10(b).⁷⁶ Justice Kennard stated that this section should be construed in its "natural and ordinary meaning."⁷⁷ Furthermore, she noted that, according to the rules of statu-

68. *Id.* at 773, 799 P.2d at 1246, 274 Cal. Rptr. at 813 (Mosk, J., concurring and dissenting) (citing *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 747 F. Supp. 580 (E.D. Cal. 1990)).

69. *Id.* (Mosk, J., concurring and dissenting). See U.S. CONST. amend. I.

70. *Taxpayers v. FPPC*, 51 Cal. 3d at 773, 799 P.2d at 1246, 274 Cal. Rptr. at 813 (Mosk, J., concurring and dissenting).

71. *Id.* (Mosk, J., concurring and dissenting). Justice Mosk considers this an advisory opinion if the *raison d'être* of Proposition 73 is found unconstitutional. "A statutory initiative is subject to the same state and federal constitutional limitations as are the legislature and the statutes which it enacts." *Legislature of Cal. v. Deukmejian*, 34 Cal. 3d 658, 674, 669 P.2d 17, 26, 194 Cal. Rptr. 781, 790 (1983).

72. *Taxpayers v. FPPC*, 51 Cal. 3d at 771 n.12, 799 P.2d at 1236-37 n.12, 274 Cal. Rptr. at 803-04 n.12.

73. *Id.* at 774, 799 P.2d at 1247, 274 Cal. Rptr. at 813 (Mosk, J., concurring and dissenting).

74. *Id.* at 774, 799 P.2d at 1246, 274 Cal. Rptr. at 813 (Mosk, J., concurring and dissenting).

75. *Id.* at 774, 799 P.2d at 1247, 274 Cal. Rptr. at 814 (Kennard, J., dissenting). The dissent reminded the majority of their recent holding that required administrative agencies to perform statutorily assigned tasks, regardless of their difficulty. *Id.* at 774 n.1, 799 P.2d at 1247 n.1, 274 Cal. Rptr. at 814 n.1 (Kennard, J., dissenting).

76. *Id.* at 774, 799 P.2d at 1247, 274 Cal. Rptr. at 814 (Kennard, J., dissenting).

77. *Id.* at 775, 799 P.2d 1247-48, 274 Cal. Rptr. at 814-15 (Kennard, J., dissenting). Justice Kennard acknowledged a line of cases that support her construction. See *Mutual Life Ins. Co. v. City of L.A.*, 50 Cal. 3d 402, 407, 787 P.2d 996, 998-99, 267 Cal. Rptr.

tory construction, every word in a piece of legislation should be given some meaning,⁷⁸ and no words should be considered surplusage.⁷⁹ Additionally, she pointed out that section 10(b) distinguishes between "measures" and "provisions of measures," and that the phrase "provisions of measures" appears to mean the *entire initiative*.⁸⁰ Rather than discarding the entire measure, Justice Kennard contended that only "provisions of measures" that conflict with "provisions of measures" receiving the majority of votes should be deleted.⁸¹ She argued that the majority's decision to examine the measure as a whole when there is a competing initiative is misconstrued because the language of section 10(b) unambiguously orders the court to conduct a provision-by-provision evaluation of the initiatives.⁸²

Next, Justice Kennard's dissent addressed the usage of the term "prevail" in section 10(b). Legislative history indicates that when one of two conflicting proposals is to "prevail," the other may still take effect.⁸³ The word "prevail" connotes a comparatively higher degree of rank or authority than a complete extirpation of rivals.⁸⁴ Justice Kennard referred to various sections of the Government Code to illustrate her interpretation of "prevail."⁸⁵ Further, she mentioned that the city of San Francisco's charter stated that if propositions were not presented as alternatives, the one receiving the highest number of votes would prevail; however, if propositions were offered

589, 591-92 (1990); *ITT World Communications, Inc. v. City and County of San Francisco*, 37 Cal. 3d 859, 865, 693 P.2d 811, 816, 210 Cal. Rptr. 226, 231 (1985); *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824).

78. *Taxpayers v. FPPC*, 51 Cal. 3d at 776, 799 P.2d at 1248, 274 Cal. Rptr. at 815 (Kennard, J., dissenting) (citing *City and County of San Francisco v. Farrell*, 32 Cal. 3d 47, 54, 648 P.2d 935, 938, 184 Cal. Rptr. 713, 716 (1982)).

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

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

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

82. *Id.* at 776-79, 799 P.2d at 1248, 1250, 274 Cal. Rptr. at 815, 817 (Kennard, J., dissenting).

83. *Id.* at 777, 799 P.2d at 1249, 274 Cal. Rptr. at 816 (Kennard, J., dissenting) (citing CAL. GOV'T CODE § 9605 (West 1980 & Supp. 1991)).

84. *Taxpayers v. FPPC*, 51 Cal. 3d at 778, 799 P.2d at 1249, 274 Cal. Rptr. at 816 (Kennard, J., dissenting). Justice Kennard's dissent has also interpreted "prevail" to mean *take precedence*. See *In re Thierry*, 19 Cal. 3d 727, 738, 566 P.2d 610, 616, 139 Cal. Rptr. 708, 714 (1977).

85. See CAL. GOV'T CODE § 9605 (West 1980 & Supp. 1991); CAL. PENAL CODE § 4530 (West 1982 & Supp. 1991); CAL. PENAL CODE § 669 (West 1988 & Supp. 1991). Section 4530 "prevailed" over section 669. However, portions of section 669 that did not conflict with section 4530 were found to be operative. *Taxpayers v. FPPC*, 51 Cal. 3d at 778, 799 P.2d at 1250, 274 Cal. Rptr. at 816 (Kennard, J., dissenting).

as alternatives then one would fail to pass.⁸⁶ She argued that this charter demonstrated that explicit language will be utilized when the legislature desires failure of a proposition.⁸⁷ According to the dissent, the importance of the usage of “prevail” in section 10(b) is that if one proposition prevails, but is later found invalid, the other proposition could still become enforceable.⁸⁸ This is especially relevant because Proposition 73 has been determined invalid by the district court.⁸⁹

Justice Kennard next examined two sections of the California Constitution which contain language similar to section 10(b). First, Justice Kennard compared article XI, section 3(d), which applies to “conflicts in measures to adopt or amend city or county charters” to section 10(b).⁹⁰ She referred to the California Constitution Revision Committee’s report which provided that the provisions of the measure with the highest affirmative vote will prevail and only provisions which were invalid shall fail.⁹¹ She argued that the Committee’s interpretation of article XI, section 3(d) requires that conflicting measures on the same ballot should be reconciled and harmonized whenever possible.⁹² Since both section 10(b) and article XI, section 3(d) are currently identical in form, she urged that Proposition 68 should be harmonized with Proposition 73.⁹³

Justice Kennard also compared section 10(b) to article XVIII, section 4 of the California Constitution, which applies to “conflicts in measures to amend the state Constitution.”⁹⁴ Similarly, the Revision Committee commented on article XVIII, section 4, stating “[i]f one portion of a measure fails because a conflicting measure receives more votes, the remainder of the measure not in conflict remains in effect.”⁹⁵

Justice Kennard’s dissent then contended that “any measure can

86. *Taxpayers v. FPPC*, 51 Cal. 3d at 777, 799 P.2d at 1249, 274 Cal. Rptr. at 816 (Kennard, J., dissenting).

87. *Id.* at 776, 799 P.2d at 1248, 274 Cal. Rptr. at 815 (Kennard, J., dissenting).

88. *Id.* at 778, 799 P.2d at 1249-50, 274 Cal. Rptr. at 816-17 (Kennard, J., dissenting).

89. *Id.* at 778 n.4, 799 P.2d at 1250 n.4, 274 Cal. Rptr. at 817 n.4 (Kennard, J., dissenting).

90. *Id.* at 779, 799 P.2d at 1250, 274 Cal. Rptr. at 817 (Kennard, J., dissenting) (citing CAL. CONST. art. XI, § 3(d)). It is interesting that both the majority and the dissent relied on this section to affirm their opposing constructions of section 10(b).

91. The dissent argued that the California Constitution Revision Committee provides an official source in which to ascertain meanings of constitutional provisions. *Id.* at 779, 799 P.2d at 1250, 274 Cal. Rptr. at 817 (Kennard, J., dissenting) (citing Cal. Const. Revision Commission, Proposed Revision at 56 (1968)).

92. *Id.* at 780, 799 P.2d at 1250, 274 Cal. Rptr. at 817 (Kennard, J., dissenting).

93. *Id.* at 781, 799 P.2d at 1251, 274 Cal. Rptr. at 818 (Kennard, J., dissenting).

94. *Id.* at 779, 799 P.2d at 1250, 274 Cal. Rptr. at 817 (Kennard, J., dissenting) (citing CAL. CONST. art. XVIII, § 4).

95. *Taxpayers v. FPPC*, 51 Cal. 3d at 780, 799 P.2d at 1250, 274 Cal. Rptr. at 817 (Kennard, J., dissenting) (quoting Cal. Const. Revision Comm’n at 111 (1968)).

establish conflict by express statement."⁹⁶ Without a broad statement of conflict within each provision, there is no irreconcilable conflict between measures.⁹⁷ She suggested that a "poison pill" be utilized to create conflict throughout a measure if irreconcilable conflict is the desired result. She determined that in the absence of a "poison pill," the conflicting provisions may be harmonized.⁹⁸ Before provisions can be considered reconcilable, however, they must first pass a severability test.⁹⁹

Finally, Justice Kennard introduced a three part severability test to carry out the voters' intent: "(1) the provisions must be mechanically and grammatically severable, (2) they must be functionally severable, and (3) it must appear that the electorate would likely have adopted the provision had it foreseen the partial invalidity of the initiative."¹⁰⁰ Since this severability test is commonly implemented to determine if any provisions can remain operational when a measure itself is found unconstitutional, Justice Kennard asserted that it should be applied when conflicting initiatives have been approved by the majority of voters in an election.¹⁰¹

IV. IMPACT

Regardless of whether Proposition 73 is determined to be unconstitutional, the majority's interpretation of section 10(b) will have a lasting impact on future elections. By adopting an all-or-nothing construction when two competing initiatives are passed by the electorate, the majority leaves the door open for committees and individuals to skillfully disguise an initiative's real objective.¹⁰² Although initia-

96. *Id.* at 782, 799 P.2d at 1252, 274 Cal. Rptr. at 819 (Kennard, J., dissenting).

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

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

99. *Id.* (Kennard, J., dissenting). Severability has been utilized to strike portions of conflicting statutes. See *Santa Barbara School Dist. v. Superior Court*, 13 Cal. 3d 315, 330, 530 P.2d 605, 617-18, 118 Cal. Rptr. 637, 649-50 (1989); *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 821, 771 P.2d 1247, 1268, 258 Cal. Rptr. 161, 180 (1989).

100. *Taxpayers v. FPPC*, 51 Cal. 3d at 782, 799 P.2d at 1252, 274 Cal. Rptr. at 819 (Kennard, J., dissenting).

101. *Id.* at 783, 799 P.2d at 1253, 274 Cal. Rptr. at 820 (Kennard, J., dissenting).

102. *Id.* at 772, 799 P.2d at 1245, 274 Cal. Rptr. at 812 (Mosk, J., concurring and dissenting).

This decision may also prompt the formation of reviewing committees. These committees would have the ability to assess initiatives before they appear on the ballot. Any criticisms or comments regarding an initiative would be included in its ballot pamphlet. This process would provide voters with unbiased information regarding a proposition's true objectives and would best effectuate the electorate's intent. It should be noted that these committees would not have the ability to keep a measure

tives have always been laden with complex and technical language,¹⁰³ the decision of *Taxpayers v. FPPC* will further muddy the drafting process. Many voters do not take the time to read the entire proposition, relying instead on the title or summary information in casting their votes.¹⁰⁴ As noted by Justice Mosk, "Trojan horse" initiatives may be created, meaning that the title and summary may be drafted in simple terms in order to gain votes, while the real objective of the proposition will be obscured.¹⁰⁵ This could result in a valid initiative being defeated by an initiative which has no real competing regulatory scheme. This practice would thwart the intent of the voters, because the initiative they choose will not be what they expected.

Despite the possibility of confusing the electorate, this decision may lead to clarity in initiatives to the extent that they may be clearly labelled as competing.¹⁰⁶ Drafters and advertisers of propositions will be careful to point out discrepancies between provisions of initiatives in order to avoid the result of *Taxpayers v. FPPC*. By clearly stating that provisions are conflicting, there will be no need to reconcile any part of competing measures. On the other hand, if reconciliation between the provisions of two initiatives is desired, drafters will readily include such language in their measures to avoid the results of the majority's all-or-nothing approach.

Taxpayers v. FPPC may also reduce the occurrence of judicial legislation, because the majority's approach does not allow judges to harmonize propositions when the measures themselves conflict.¹⁰⁷ This is likely to carry out the electorate's intent because most voters would not expect that two competing regulatory schemes could become intertwined.¹⁰⁸ Nevertheless, the majority's interpretation

off of the ballot or infringe upon the initiative power in any way. The only function of these committees would be to serve as a source of impartial information. Telephone interview with Justice Croskey, Second District, California Court of Appeal (Mar. 15, 1991).

103. See *supra* note 65.

104. *Taxpayers v. FPPC*, 51 Cal. 3d at 770, 799 P.2d at 1236, 274 Cal. Rptr. at 803. See also *Wallace v. Zinman*, 200 Cal. 585, 592-93, 254 P. 946, 948 (1927).

105. *Taxpayers v. FPPC*, 51 Cal. 3d at 773 n.2, 799 P.2d at 124 n.2, 274 Cal. Rptr. at 813 n.2 (Mosk, J., concurring and dissenting). Justice Mosk assumed that the majority's statement about remedying the initiative process was merely a recommendation. The majority suggested that there should be a "presentation at a subsequent election of a new initiative measure which the voters can consider in light of the scheme established by the measure that prevailed in the earlier election." *Id.* (Mosk, J., concurring and dissenting).

106. The dissent argued that if measures were not expressly competing then the provision-by-provision approach should be implemented. See *supra* notes 95-98 and accompanying text.

On the other hand, the majority held that if two significantly differing propositions were to regulate the same subject, then a conflict was automatically created. *Taxpayers v. FPPC*, 51 Cal. 3d at 765, 799 P.2d at 1233, 274 Cal. Rptr. at 800.

107. *Taxpayers v. FPPC*, 51 Cal. 3d at 765, 799 P.2d at 1233, 274 Cal. Rptr. at 800.

108. *Id.* at 769, 799 P.2d at 1235, 274 Cal. Rptr. at 802.

defeats the plain language of section 10(b).¹⁰⁹ The dissent's interpretation and statutory construction seem to better carry out the legislative intent behind the section.

V. CONCLUSION

The majority's construction of section 10(b) has the effect of invalidating any competing regulatory measure receiving a lesser majority of votes.¹¹⁰ This view of disregarding an entire measure instead of taking a provision-by-provision approach is met with great disfavor by the dissent. The dissent prefers implementation of a three-part severability test to protect voter intent.¹¹¹ Provisions passing this test would be reconciled with conflicting provisions of the prevailing measure. However, the majority determined that its interpretation was supported by past and current legislation and therefore was the most accurate application of section 10(b).¹¹² Justice Mosk, although agreeing with the majority, made an observation regarding future elections. He predicted initiatives will be designed simply to defeat their competitors, without any regulatory purpose.¹¹³ Furthermore, he stressed that the decision of *Taxpayers v. FPPC* is merely an advisory opinion pending a constitutional determination in federal court.¹¹⁴ The majority's holding will certainly have an impact on the drafting of future initiatives, regardless of Proposition 73's validity,

109. *Id.* at 776, 799 P.2d at 1248, 274 Cal. Rptr. at 815 (Kennard, J., dissenting).

110. *Id.* at 770-71, 799 P.2d at 1236, 274 Cal. Rptr. at 803-04.

111. *Id.* at 783, 799 P.2d at 1253, 274 Cal. Rptr. at 820 (Kennard, J., dissenting).

112. *Id.* at 765-68, 799 P.2d at 1233-34, 274 Cal. Rptr. at 800-01.

113. *Id.* at 772-73, 799 P.2d at 1245-46, 274 Cal. Rptr. at 812-13 (Mosk, J., concurring and dissenting).

114. Proposition 73 was determined to be in violation of the first amendment of the United States Constitution. Three court decisions have found statutory initiatives adding sections to the Political Reform Act to be unconstitutional. See *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33, 599 P.2d 46, 157 Cal. Rptr. 855 (1979), *cert. denied*, 444 U.S. 1049 (1980) (lobbyist conduct provisions ruled invalid); *Citizens for Jobs and Energy v. Fair Political Practices Comm'n*, 16 Cal. 3d 671, 547 P.2d 1386, 129 Cal. Rptr. 106 (1976) (aggregate spending limits found unconstitutional); *Hardie v. Eu*, 18 Cal. 3d 371, 556 P.2d 301, 134 Cal. Rptr. 201 (1976), *cert. denied*, 430 U.S. 969 (1977) (limitations on circulation spending held void). Cf. Note, *Statutory Limitations on Corporate Spending in Ballot Measure Campaigns: The Case for Constitutionality*, 36 HASTINGS L.J. 433 (1985). This article suggests that corporate spending limits should be imposed in order for direct democracy to function properly. Furthermore, this author asserts that there is no first amendment violation when the initiative is designed to protect compelling government interests.

because it firmly establishes that when two competing measures appear on a ballot, only one will become operative.

JODY L. GRAY

IV. CRIMINAL LAW

Materiality is an element of a perjury prosecution under the Political Reform Act that is properly submitted to the jury; and the trial court has the discretionary power to order an evidentiary hearing, regarding jury misconduct allegations, wherein jurors may be called to testify:
People v. Hedgecock.

I. INTRODUCTION

In *People v. Hedgecock*,¹ the California Supreme Court addressed two questions: (1) whether materiality in a perjury² prosecution pursuant to the Political Reform Act³ is an element properly considered by the jury, and (2) whether the trial court has the discretion to conduct an evidentiary hearing⁴ pursuant to jury misconduct allegations wherein jurors may be called to testify. The court held that materiality was indeed a separate element that the prosecution must prove as part of its case.⁵ Furthermore, the court held that materiality was an element that should be decided by the jury rather than the court.⁶ Failure to allow the issue to go before the jury was deemed prejudicial because the issue of materiality was not conceded by the defense, and the facts before the court were complex.⁷ The court also held

1. 51 Cal. 3d 395, 795 P.2d 1260, 272 Cal. Rptr. 803 (1990). Justice Kennard wrote the majority opinion joined by Justices Mosk, Broussard and Arabian. Justice Panelli wrote a separate concurring opinion, and Justice Eagleson and Chief Justice Lucas each wrote separate concurring and dissenting opinions.

2. BLACK'S LAW DICTIONARY 1139 (6th ed. 1990), defines perjury as: the willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being material to the issue or point of inquiry and known to such witness to be false. (emphasis added). See generally 70 C.J.S. *Perjury* § 22 (1987) (discussing perjury in connection with the filing of affidavits); 60A AM. JUR. 2D *Perjury* §§ 7-37 (1988) (discussing the elements of perjury); Tiersma, *The Language of Perjury: "Literal Truth," Ambiguity, and the False Statement Requirement*, 63 S. CAL. L. REV. 373 (1990).

3. CAL. GOV'T CODE § 81000 (West 1987) (commonly referred to as the Political Reform Act of 1974). See generally 28 CAL. JUR. 3D *Elections* § 102 (1986); Diamond, *California's Political Reform Act: Greater Access to the Initiative Process*, 7 SW. U.L. REV. 453 (1975).

4. An evidentiary hearing would encompass a separate proceeding in which the court would determine the validity of juror misconduct allegations.

5. *Hedgecock*, 51 Cal. 3d at 409, 795 P.2d at 1267-68, 272 Cal. Rptr. at 811.

6. *Id.*

7. *Id.* at 410, 795 P.2d at 1268, 272 Cal. Rptr. at 812.

that it is within the discretion of the trial court to grant an evidentiary hearing pursuant to a motion for a new trial that alleges jury misconduct.⁸ Although the court is not required to grant such a hearing, it may do so if it deems the allegations of misconduct have sufficient merit.⁹ Moreover, jurors may be called to testify at the hearing upon the request of the parties.¹⁰

II. BACKGROUND OF THE CASE

The Political Reform Act of 1974 requires the disclosure of certain financial information from an elected official or candidate.¹¹ The primary purpose of the Act was to ensure that "[r]eceipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited."¹² The Act requires that all public officials disclose pertinent financial information by filing annual economic interest statements.¹³ The Act also requires that officials and candidates file periodic statements disclosing campaign contributions and expenditures.¹⁴ Section 81004 of the Government Code requires that

8. *Id.* at 419, 795 P.2d at 1274, 272 Cal. Rptr. at 817.

9. *Id.*

10. *Id.*

11. *Id.* at 399-400, 795 P.2d at 1261, 272 Cal. Rptr. at 805.

12. *Id.* at 406, 795 P.2d at 1265-66, 272 Cal. Rptr. at 809 (citing CAL. GOV'T CODE § 81002(a)).

13. See CAL. GOV'T CODE § 87200 (West 1987) (specifying scope of Act's applicability); CAL. GOV'T CODE § 87203 (West 1987) (requiring persons specified in section 87200 to file annual statements regarding certain financial transactions); CAL. GOV'T CODE §§ 87206 & 87207 (West 1987) (describing the types of investment interests or income that must be reported under the Act). See also *Community Cause v. Boatwright*, 124 Cal. App. 3d 888, 177 Cal. Rptr. 657 (1981) (interpreting fair value disclosure requirements of investment under Government Code section 87206 to require only statement that investment exceeds the minimum amount required to be reported pursuant to the statute); *Fair Political Practices Comm'n v. Suitt*, 90 Cal. App. 3d 125, 153 Cal. Rptr. 311 (1979) (requiring campaign committees to report the benefit of campaign worker who is loaned out to the campaign by an employer just as if the employer had made a direct cash contribution).

14. CAL. GOV'T CODE § 84200 (West 1987) (which provides for periodic filing of statements disclosing contributions and expenditures). See also CAL. GOV'T CODE § 84211 (setting forth the required contents of such statements). See generally 29 C.J.S. *Elections* § 329 (1965 & Supp. 1991) (discussing various corrupt practices acts and expenditure statements); Annotation, *Power of Corporation to Make Political Contribution or Expenditure Under State Law*, 79 A.L.R.3d 491 (1979) (power of corporations to make political contributions); Note, *Statutory Limitations on Corporate Spending in Ballot Measure Campaigns: The Case for Constitutionality*, 36 HASTINGS L.J. 433 (1985); Note, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505 (1982); Annotation, *Validity and Construction of Orders and Enactments Requiring Public Officers and*

such statements be verified under penalty of perjury.¹⁵

From 1980 to 1984, the defendant served as a member of the San Diego County Board of Supervisors and successfully campaigned for the San Diego Mayor's office.¹⁶ During these years, the defendant filed various disclosure statements pursuant to the Political Reform Act.¹⁷ As required by the Act, each statement was verified by the defendant under the penalty of perjury.¹⁸ On the basis of various statements, or omissions, the defendant was charged with fourteen counts of perjury pursuant to the Political Reform Act, one count of conflict of interest,¹⁹ and one count of conspiracy to violate state and local financial disclosure laws.²⁰ The prosecution claimed that the defendant received various contributions and support without reporting them in derogation of local ordinances and the Political Reform Act.²¹ During the trial, the court instructed the jury on the elements of perjury, excluding *materiality* from the list of required elements.²² In fact, the court's instruction presupposed materiality without allowing the question to be presented to the jury.²³ The defendant was convicted of twelve counts of perjury and one count of conspiracy.²⁴

The trial court denied the defendant's request for a new trial and the defendant appealed.²⁵ After the court of appeal considered the

Employees, or Candidates for Office to Disclose Financial Condition, Interests, or Relationships, 22 A.L.R.4th 237 (1983).

15. CAL. GOV'T CODE § 81004 (West 1987). Section 81004 provides in pertinent part that "[a]ll reports and statements filed under this title shall be signed under penalty of perjury and verified by the filer. The verification shall state that the filer has used all reasonable diligence in its preparation, and that to the best of his knowledge it is true and complete." *Id.*

16. *Hedgecock*, 51 Cal. 3d at 400, 795 P.2d at 1261, 272 Cal. Rptr. at 805.

17. *Id.*

18. *Id.*

19. *Id.* at 403, 795 P.2d at 1263-64, 272 Cal. Rptr. at 807. *See generally*, 26 AM. JUR. 2D *Elections* § 287-290 (1966 & Supp. 1991) (discussing periodic statements).

20. *Hedgecock*, 51 Cal. 3d at 403, 795 P.2d at 1263, 272 Cal. Rptr. at 807.

21. *Id.* at 400, 795 P.2d at 1261, 272 Cal. Rptr. at 805. The prosecution alleged that two persons had made the following unreported contributions:

(1) financial support for Tom Shepard and Associates, which provided consultation services for defendant's mayoral campaign; (2) a donation of \$3,000 used to create a computer list of names for fundraising purposes; (3) Hoover's 'purchase' of a promissory note owed to defendant, who continued to receive interest payments on the note after the purchase; and (4) financial assistance for the remodeling of defendant's home. In addition, the prosecution contended that Harvey Schuster, one of defendant's supporters, had paid \$500 for legal services performed solely for defendant's benefit.

Id. *See generally* Mohr, *Liability of Political Candidates and Their Staffs for Campaign Committee Obligations*, 15 PEPPERDINE L. REV. 33 (1987).

22. *Hedgecock*, 51 Cal. 3d at 404, 795 P.2d at 1264, 272 Cal. Rptr. at 807.

23. *Id.* at 403, 795 P.2d at 1264, 272 Cal. Rptr. at 807.

24. *Id.*

25. *Id.*

case,²⁶ the California Supreme Court granted review to consider two questions: (1) whether materiality is an element of perjury under the Political Reform Act that is to be determined by the jury; and (2) whether allegations of jury misconduct²⁷ empower the court with the discretion to conduct an evidentiary hearing and call jurors to testify in order to determine the merit of such allegations.²⁸

At the supreme court level, the prosecution asserted several arguments: (1) the element of materiality is "fundamentally different" from other elements and is a question that should be decided by the court;²⁹ (2) even if the court holds that the question of materiality is one for the jury, the decision should not be applied retroactively since the defendant's trial occurred before the "new rule of law" was created in *People v. Figueroa*;³⁰ (3) that the alleged jury tampering or jury misconduct did not affect the jury deliberation process;³¹ (4) that an investigation of jury misconduct may be made by affidavit but not by way of an evidentiary hearing;³² and (5) that even if the court has the power to conduct an evidentiary hearing regarding jury misconduct, jurors cannot be called to testify.³³

III. THE COURT'S OPINION

A. *Materiality is an element of perjury under the Political Reform Act that should have been entrusted to the jury for consideration.*

The California Supreme Court held in *People v. Figueroa*³⁴ that each element of a crime must be presented to the jury for determina-

26. *People v. Hedgecock*, 214 Cal. App. 3d 1082, 247 Cal. Rptr. 404 (1988), review granted, 250 Cal. Rptr. 268, 758 P.2d 596 (1988), *aff'd in part & rev'd in part*, 51 Cal. 3d 395, 795 P.2d 1260, 272 Cal. Rptr. 803 (1990).

27. See, e.g., *People v. Veal*, 58 Ill. App. 3d 938, 374 N.E. 2d 963 (1978), *cert. denied*, 441 U.S. 908 (1979) (where a juror's consumption of a pint of liquor on the night before trial was considered grave misconduct). See also *People v. Haskett*, 52 Cal. 3d 210, 801 P.2d 323, 276 Cal. Rptr. 80 (1990) (trial court has the power to inquire into possible jury misconduct by asking whether juror is following court's instructions during the penalty phase of a murder trial). See generally 75 AM. JUR. 2D *Trial* § 978-998 (1974 & Supp. 1991); Note, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 YALE L. J. 187 (1988).

28. *Hedgecock*, 51 Cal. 3d at 399, 795 P.2d at 1261, 272 Cal. Rptr. at 804.

29. *Id.* at 408, 795 P.2d at 1267, 272 Cal. Rptr. at 810.

30. *Id.* at 409, 795 P.2d at 1268, 272 Cal. Rptr. at 811 (citing *People v. Figueroa*, 41 Cal. 3d 714, 715 P.2d 680, 224 Cal. Rptr. 719 (1986)).

31. *Id.* at 413, 795 P.2d at 1270, 272 Cal. Rptr. at 813.

32. *Id.* at 415, 795 P.2d at 1272, 272 Cal. Rptr. at 815.

33. *Id.* at 416, 795 P.2d at 1272, 272 Cal. Rptr. at 815.

34. 41 Cal. 3d 714, 715 P.2d 680, 224 Cal. Rptr. 719 (1986).

tion in order to produce a valid verdict.³⁵ Although the prosecution in *Hedgecock* conceded that materiality is an element of the crime of perjury,³⁶ the prosecution contended that the element of materiality is “‘fundamentally different’ from other elements” and is a “legal question best decided by the trial court.”³⁷ In support of its position, the prosecution asserted that numerous California and federal court cases regarding perjury have held that materiality is a question that is properly decided by the court.³⁸

The court, however, was not persuaded by the prosecution’s argument, and held that the element of materiality is a question properly decided by the jury.³⁹ The court reasoned that the cases cited by the prosecution were not analogous because they did not involve perjury prosecutions based on falsifications or omissions in connection with the filing of financial disclosure statements.⁴⁰ Instead, the court analogized the instant scenario to cases in various other contexts where materiality is an issue for the jury.⁴¹ The court concluded that these analogies constituted strong support for finding materiality as an element to be decided by the jury.⁴² The court stated that “the determination of materiality is not simply a question of law, . . . [but instead a question that] involves an evaluation of the significance of the defendant’s statements or omissions, in the circumstances in which they were made.”⁴³ In a criminal prosecution for perjury pursuant to the Political Reform Act, the court defined a fact as material:

if there is a substantial likelihood that a reasonable person would consider it important in evaluating (1) whether a candidate should be elected to, or re-

35. *Hedgecock*, 51 Cal. 3d at 407, 795 P.2d at 1266, 272 Cal. Rptr. at 809 (citing *People v. Figueroa*, 41 Cal. 3d 714, 715 P.2d 680, 224 Cal. Rptr. 719 (1986)).

36. *Id.* at 407, 795 P.2d at 1267, 272 Cal. Rptr. at 810. The Attorney General conceded during oral argument that materiality is an element of a perjury conviction under the Political Reform Act. However, the Attorney General argued that this element was one properly decided by the court rather than the jury. *Id.*

37. *Id.* at 408-09, 795 P.2d at 1267, 272 Cal. Rptr. at 810.

38. *Id.* at 408-09, 795 P.2d at 1267, 272 Cal. Rptr. at 810-11. The cases cited by the prosecution include: *People v. Pierce*, 66 Cal. 2d 53, 423 P.2d 969, 56 Cal. Rptr. 817 (1967); *People v. Lem You*, 97 Cal. 224, 32 P. 11 (1893); *Sinclair v. United States*, 279 U.S. 263 (1929); *Kungys v. United States*, 485 U.S. 759 (1988). *Hedgecock*, 51 Cal. 3d at 408-09, 795 P.2d at 1267, 272 Cal. Rptr. at 810-11.

39. *Hedgecock*, 51 Cal. 3d at 409, 795 P.2d at 1267, 272 Cal. Rptr. at 811.

40. *Id.*

41. *Id.* at 408, 795 P.2d at 1267, 272 Cal. Rptr. at 810 (citing *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876 (2d Cir. 1972) (prosecution based on federal securities law where jury determined whether information was material); *Warner Constr. Corp. v. City of Los Angeles*, 2 Cal. 3d 285, 466 P.2d 996, 85 Cal. Rptr. 444 (1970) (involving a civil fraud action where materiality was decided by the jury); *People v. Allison*, 48 Cal. 3d 879, 771 P.2d 1294, 258 Cal. Rptr. 208 (1989), *cert. denied*, 110 S. Ct. 1835 (1990) (involving a criminal prosecution where jurors considered materiality as part of evaluating the witness’ testimony).

42. *Id.*

43. *Id.*

tained in, public office, or (2) whether a public official can perform the duties of office free from any bias caused by concern for the financial interests of the official or the official's supporters.⁴⁴

The prosecution also argued that in the event the court should determine that materiality is a question for the jury, retroactivity concerns preclude this result in *Hedgecock*.⁴⁵ The prosecution's retroactivity argument included three premises: (1) *Figueroa* established a new rule of law by holding that materiality in a perjury action is a question for the jury; (2) *Figueroa* was decided after the trial in *Hedgecock* was complete; and (3) application of the factors set forth in *People v. Guerra*⁴⁶ suggest that the *Figueroa* holding should not be applied retroactively.⁴⁷ The court did not, however, reach the question of whether the decision in *Figueroa* should be applied retroactively because that decision did not constitute a new rule of law.⁴⁸ The court also refused to comment on whether *Hedgecock* may apply retroactively to other cases involving the same issue.⁴⁹

Because the court held that materiality is an issue to be submitted to the jury, the court then considered whether the trial court's failure to do so was prejudicial.⁵⁰ The court stated that application of either of two possible tests⁵¹ would require reversal of the court of appeal's decision.⁵² Since the fact issues were complex and the defendant did not concede the issue, failure to present the issue of ma-

44. *Id.* at 406-07, 795 P.2d at 1266, 272 Cal. Rptr. at 809.

45. *Id.* at 409, 795 P.2d at 1268, 272 Cal. Rptr. at 811. See generally, Annotation, *Prospective or Retroactive Operation of Overruling Decision*, 10 A.L.R.3d 1371 § 9-11 (1966) (discussing retroactivity in various contexts).

46. 37 Cal. 3d 385, 690 P.2d 635, 208 Cal. Rptr. 162 (1984).

47. *Hedgecock*, 51 Cal. 3d at 409, 795 P.2d at 1268, 272 Cal. Rptr. at 811. The *Guerra* retroactivity test considers: "(1) the purpose of the new rule, (2) the extent of reliance on the old rule, and (3) the burden imposed on the administration of justice by retroactive application of the new rule." *Id.*

48. *Id.*

49. *Id.* at 409-10, 795 P.2d at 1268, 272 Cal. Rptr. at 811. The court's refusal to find that *Figueroa* created a new rule of law, which would warrant the application of the *Guerra* retroactivity test, rested on the fact that in *Figueroa*, the issue of whether materiality is a jury question was not before the court. *Id.* at 409, 795 P.2d at 1268, 272 Cal. Rptr. at 811. Based on the court's comment and the fact that the issue was before the court in *Hedgecock*, it is probable that *Hedgecock* will be construed as creating a new rule of law. Whether the holding in *Hedgecock* will be applied retroactively will therefore depend on application of the *Guerra* test.

50. *Id.* at 410, 795 P.2d at 1268, 272 Cal. Rptr. at 811.

51. The court discussed two standards by which prejudice could be measured: the "harmless beyond a reasonable doubt" standard and the "fundamentally unfair" standard. *Id.* at 410, 795 P.2d at 1268, 272 Cal. Rptr. at 811-12. The court stated that application of either standard to the facts in *Hedgecock* would result in a finding of prejudice and require reversal. *Id.*

52. *Id.*

teriality to the jury was prejudicial and required reversal of the perjury convictions.⁵³ However, the conspiracy conviction, which did not include a materiality element, was not reversed pursuant to the court's materiality analysis.⁵⁴ Therefore, the validity of the conspiracy conviction rested on the court's determination of whether it had the discretion to order an evidentiary hearing pursuant to the defendant's motion for a new trial, which alleged jury misconduct.⁵⁵

B. The trial court improperly decided that it did not have the discretion to conduct an evidentiary hearing to determine the merit of the jury misconduct allegations.

The defendant's motion for a new trial on the basis of misconduct included two allegations: (1) bailiff misconduct influenced the jury's deliberations, and (2) juror alcohol consumption influenced jury deliberations.⁵⁶ The prosecution argued that an evidentiary hearing on the matter should not be granted because the allegations of juror misconduct may be investigated only by affidavit.⁵⁷ The court, however, rejected the prosecution's contention⁵⁸ and held that the court does have the discretion to order an evidentiary hearing based on allegations of jury misconduct.⁵⁹ In support of its position, the court cited Penal Code section 1181⁶⁰ which states nothing requiring such motions be supported by affidavit only.⁶¹

The prosecution then argued that regardless of the court's determination of whether the court could have conducted an evidentiary hearing, jurors may not be called as witnesses to participate in such a hearing.⁶² The prosecution contended that compelling jurors to tes-

53. *Id.* at 410, 795 P.2d at 1268-69, 272 Cal. Rptr. at 811-12.

54. *Id.* at 410, 795 P.2d at 1269, 272 Cal. Rptr. at 812.

55. *Id.* at 411, 795 P.2d at 1269, 272 Cal. Rptr. at 812.

56. *Id.* at 411-13, 795 P.2d at 1269-71, 272 Cal. Rptr. at 812-14. Allegations of misconduct included: Comments made by a bailiff to the jury while they were sequestered regarding what constitutes "reasonable doubt;" comments by a bailiff to members of the jury that he could predict how certain jurors would decide; and that one bailiff provided alcohol to jury members the night before the trial, which caused one juror to become so "hung over" on the final day of deliberations that the juror "had to go to the bathroom every 15 minutes to vomit." *Id.*

57. *Id.* at 415, 795 P.2d at 1272, 272 Cal. Rptr. at 815 (citing CAL. PENAL CODE § 1181 (West 1985)).

58. *Id.* The court rejected the Attorney General's contention because it felt that the prosecution's reliance on section 1181 of the Penal Code was misplaced. *Id.* Although the statute provides for affidavit submission pursuant to motions for new trial based on newly discovered evidence, it has no bearing on such a motion based on allegations of jury misconduct. *Id.*

59. *Id.* The court stressed that "discretion" does not require a court to order an evidentiary hearing but instead allows a court to do so when it feels misconduct allegations warrant such a hearing. *Id.*

60. CAL. PENAL CODE § 1181 (West 1985).

61. *Hedgecock*, 51 Cal. 3d at 415, 795 P.2d at 1272, 272 Cal. Rptr. at 815.

62. *Id.*

tify in such hearings would discourage jury service as well as juror discourse and debate during the course of deliberations, because jurors would fear having their mental processes scrutinized.⁶³ The court mentioned several reasons for rejecting this argument: (1) a trial court may refuse to compel jurors to testify to such matters when the testimony will relate to the "content" of jury decision-making; (2) the court can virtually ensure that jurors are treated acceptably by asking the questions of the jurors itself; and (3) section 1150 of the Evidence Code⁶⁴ protects jurors from having to reveal the mental processes by which they reach a particular verdict.⁶⁵

In response to the prosecution's assertion that the alleged misconduct did not affect jury deliberations, the court stated that the allegations made, if true, are "presumptively prejudicial."⁶⁶ After a brief discussion of the evolution of the law from a traditional policy disallowing jurors to present evidence, to a modern abandonment of such a policy, the court articulated several advantages of a rule that allows a court discretion to conduct a hearing in which jurors may be called to testify: (1) cross-examination⁶⁷ of jurors at a hearing is more likely to indicate whether misconduct actually occurred;⁶⁸ (2) a hearing would allow representative counsel, as well as the court, an opportunity to facilitate the jurors' recollection of the deliberations in order to determine truth;⁶⁹ and (3) allowing such discretion is "consistent with procedures at other stages of criminal proceedings."⁷⁰ The court concluded that the trial court's opinion that it was not empowered with the discretion to order an evidentiary hearing was an abuse of discretion.⁷¹ Furthermore, the court reversed the denial of the defendant's motion for a new trial⁷² and remanded the conspiracy con-

63. *Id.* at 418, 795 P.2d at 1274, 272 Cal. Rptr. at 817.

64. CAL. EVID. CODE § 1150 (West 1966 & Supp. 1991). See *Trammel v. McDonnell Douglas Corp.*, 163 Cal. App. 3d 157, 209 Cal. Rptr. 427 (1984) (certified for partial publication) (reasoning processes of jurors held inadmissible).

65. *Hedgecock*, 51 Cal. 3d at 418, 795 P.2d at 1274, 272 Cal. Rptr. at 817.

66. *Id.* at 419, 795 P.2d at 1275, 272 Cal. Rptr. at 818 (citing *People v. Honeycutt*, 20 Cal. 3d 150, 570 P.2d 1050, 141 Cal. Rptr. 698 (1977)). The court stated that either the bailiff's comments or the consumption of alcohol if true would be presumed to be prejudicial. *Id.*

67. See generally 3 B. WITKIN, CAL. EVIDENCE 3d, *Witnesses* § 1873 (1986) (discussing nature and purpose of cross-examination of witnesses); 81 AM. JUR. 2D *Witnesses* § 463 (1976 & Supp. 1991) (discussing cross-examination rules and procedures).

68. *Hedgecock*, 51 Cal. 3d at 417, 795 P.2d at 1273, 272 Cal. Rptr. at 816.

69. *Id.*

70. *Id.* at 417, 795 P.2d at 1273, 272 Cal. Rptr. at 816.

71. *Id.* at 420, 795 P.2d at 1275, 272 Cal. Rptr. at 816.

72. *Id.*

viction for consideration of whether misconduct actually occurred.⁷³

In summary, the court determined that materiality is an element of perjury under the Political Reform Act. The court further held that this element like most other elements is properly decided by the jury. The court rejected the argument that retroactivity precludes reversal of the perjury convictions and declined to comment on whether its decision should be applied retroactively. As a result, trial courts now possess the discretionary power to order an evidentiary hearing on a motion for a new trial premised on allegations of jury misconduct. Furthermore, the court held that a trial court may order jurors to testify at an evidentiary hearing in order to facilitate determination of the truthfulness of jury misconduct allegations.

C. *Concurring Opinion of Justice Panelli*

Although Justice Panelli concurred with most of the majority opinion, he criticized and refused to adopt the definition of materiality announced by the court.⁷⁴ He argued that the definition adopted by the majority was too subjective, as it would allow a jury to convict a defendant of perjury based upon the individual subjective biases that a voter may have towards a particular person or act.⁷⁵ After criticizing the majority's substantial reliance on an analogy between proxy statements⁷⁶ and financial disclosure statements under the Political Reform Act, Justice Panelli stated that unlike proxy statement scenarios, "there does not exist an objective standard by which we can measure the reasonableness of a person's behavior as a voter."⁷⁷ He also attempted to distinguish the character and purpose of a proxy statement from a financial disclosure statement.⁷⁸

73. *Id.*

74. *Id.* at 421, 795 P.2d at 1276, 272 Cal. Rptr. at 819 (Panelli, J., concurring). Justice Panelli suggested the following instruction for materiality: "[a] false statement in a required report is material if it is of substantial importance in determining whether a public official [or] candidate would be able to perform the duties of his or her office free from bias caused by his or her own financial interests or the financial interests of persons who have supported him or her." *Id.* at 423 n.2, 795 P.2d at 1277 n.2, 272 Cal. Rptr. at 820 n.2 (Panelli, J., concurring).

75. *Id.* at 421, 795 P.2d at 1276, 272 Cal. Rptr. at 819 (Panelli, J., concurring). Justice Panelli thought the definition espoused by the majority is too subjective because it requires the jury to determine the materiality of a statement or omission by considering whether a reasonable person would consider it important in evaluating whether a candidate should be elected to public office. *Id.* Justice Panelli stated that a reasonable person may consider "anything" to be important in such an evaluation, since the law allows voters to consider candidates' race and religion when voting for a candidate. *Id.*

76. BLACK'S LAW DICTIONARY 377 (6th ed. 1990) defines proxy statement as "[i]nformation required by SEC to be given stockholders as a prerequisite to solicitation of proxies for a security subject to the requirements of Securities Exchange Act."

77. *Hedgecock*, 51 Cal. 3d at 422, 795 P.2d at 1276, 272 Cal. Rptr. at 819 (Panelli, J., concurring).

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

D. Concurring and Dissenting Opinion of Justice Eagleson

Justice Eagleson concurred with the majority that a trial court has discretionary authority to order an evidentiary hearing and dissented with the majority's position that materiality is a question for the jury.⁷⁹ In his dissent, Justice Eagleson presented what he considered to be substantial and persuasive federal case authority for the proposition that materiality is not a question for the jury.⁸⁰ After indicating that a great majority of jurisdictions treat materiality as an issue for the court, he concluded that the general rule, which allows the court to decide materiality, is proper.⁸¹ He also opined that under the "harmless beyond a reasonable doubt" standard,⁸² the jury would have reached the same result as the court.⁸³ Therefore, it was not prejudicial to submit the question to the court rather than the jury.

E. Concurring and Dissenting Opinion of Chief Justice Lucas

In a separate opinion, Chief Justice Lucas joined in Justice Eagleson's dissent stating that there is no reason for departing from the traditional rule that materiality is a question for the court.⁸⁴ However, he joined the majority opinion regarding all other considerations.⁸⁵

IV. IMPACT

In holding that materiality is a jury question in a perjury prosecution under the Political Reform Act, the court has prudently placed

79. *Id.* at 423, 795 P.2d at 1277-78, 272 Cal. Rptr. at 820-21 (Eagleson, J., concurring & dissenting).

80. *Id.* at 427, 795 P.2d at 1280, 272 Cal. Rptr. at 823 (Eagleson, J., concurring & dissenting) (citing *United States v. Dipp*, 581 F.2d 1323 (9th Cir. 1979); *United States v. Bridges*, 717 F.2d 1444 (D.C. Cir. 1983); *Kungys v. United States*, 485 U.S. 759 (1988)). However, Justice Eagleson pointed out that two federal circuits have held that materiality is a jury question. *Id.* at 423 n.4, 795 P.2d at 1280 n.4, 272 Cal. Rptr. at 823 n.4 (Eagleson, J., concurring & dissenting).

81. *Id.* at 431, 795 P.2d at 1283, 272 Cal. Rptr. at 826 (Eagleson, J., concurring & dissenting).

82. See generally Annotation, *Modern Status of Law Regarding Cure of Error, in Instruction as One Offense, By Conviction of Higher or Lesser Offense*, 15 A.L.R.4th 118 (1982) (discussing harmless error in juror instruction scenarios).

83. *Hedgecock*, 51 Cal. 3d at 436, 795 P.2d at 1286, 272 Cal. Rptr. at 829 (Eagleson, J., concurring & dissenting). Justice Eagleson posited that since the conspiracy conviction was upheld, the jury's conviction established that the jury rejected the defendant's defense and thus, instructional error was not prejudicial. *Id.* (Eagleson, J., concurring & dissenting).

84. *Id.* (Lucas, C.J., concurring & dissenting).

85. *Id.* (Lucas, C.J., concurring & dissenting).

the power to convict unethical politicians where it belongs, with the laypersons of the jury. By vesting the jury with the power to decide materiality pursuant to perjury prosecution, the court has ensured the type of separation of powers that we have come to expect in the federal system.⁸⁶ Since the jury will decide materiality, the judiciary will not be compelled to influence the outcome of the prosecution in such a manner as it might otherwise.

The court's decision is also desirable because the defendant in a perjury prosecution under the Political Reform Act is generally one who was elected by the voting public to a position in the local government. Who better to determine the materiality of the statement or omission on an affidavit than a small portion of the voting public itself?

Although Justice Panelli criticized the majority's definition of materiality because it involves a subjective voter standard,⁸⁷ it is doubtful that Justice Panelli's concerns will materialize. He stated that the materiality definition is so subjective that it allows a juror to "consult his subjective biases"⁸⁸ and implies that race, sex and religion are factors that may be used by jurors to determine whether something is material.⁸⁹ Nothing in the majority's adopted definition implies such a probability.⁹⁰ In fact, when the definition is read in the context of a perjury prosecution under the Political Reform Act, it is clear that when a juror is to consider whether the fact is important in determining whether a candidate should be elected to office, he or she is to consider whether a *conflict of interest* exists that would be important in evaluating whether a candidate should be elected.⁹¹ It is doubtful that the materiality definition adopted will

86. Our federal system of government provides for a separation of powers between the executive, judicial and legislative branches. *Hedgecock* leaves less opportunity for state politicians to strike unsavory deals with the judiciary because allocating the question of materiality to the jury further limits the judiciary's ability to control the result of the prosecution. It is not being asserted that the judiciary would necessarily engage in unethical behavior, however, allocating the question to the jury precludes any speculation of judicial impropriety. In a time when public perception of the legal system has become less than laudatory, there is merit in avoiding the possibility or appearance of impropriety.

87. *Hedgecock*, 51 Cal. 3d at 423, 795 P.2d at 1277, 272 Cal. Rptr. at 820 (Panelli, J., concurring).

88. *Id.* at 421, 795 P.2d at 1276, 272 Cal. Rptr. at 819 (Panelli, J., concurring).

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

90. The majority defined materiality under the Act as a "substantial likelihood that a reasonable person would consider it important in evaluating (1) whether a candidate should be elected to, or retained in, public office, or (2) whether a public official can perform the duties of office free from any bias caused by concern for the financial interests of the official or the official's supporters." *Id.* at 406-07, 795 P.2d at 1266, 272 Cal. Rptr. at 809.

91. *Id.* at 406, 795 P.2d at 1266, 272 Cal. Rptr. at 809 (citing CAL. GOV'T CODE § 81002(c) (West 1987), which indicates that the purpose of the Act is to prevent political conflicts of interest).

cause jurors to stray from the purpose of the prosecution, which is to decide a defendant's guilt under the Act, and exercise such subjective biases as race, religion and sex.

The court's holding that a trial court has the discretion to order an evidentiary hearing is consistent with maintaining the integrity and fairness of the judicial process. By giving trial courts *discretion* to order such a hearing,⁹² the court has also given the trial courts the ability to discard meritless claims of misconduct. The discretion to order such a hearing does not bind the trial court to do so blindly if it feels that juror misconduct claims are not legitimate. Since the fairness and integrity of the judicial system depend upon the participation of the jury, it can hardly be said that the system will ensure a fair result if jury misconduct exists. If a defendant's liberty is going to be subject to the determination of guilt by the jury, it is imperative the jury performs its task diligently and without misconduct. Just as the consumption of alcohol impairs the motor skills of a driver on the highway, consumption of alcohol, no doubt, impairs the deliberate functions of persons participating on a jury panel. When egregious juror behavior is presented to the court, as was the case in *Hedgecock*, it is proper that the court should have the discretion to order a hearing regarding the allegations. Furthermore, it is desirable that it be the trial court that has such discretion. Since the misconduct is that which occurred at the trial court level, and the trial court is in the best position to determine what occurred during its own proceedings.

V. CONCLUSION

The California Supreme Court's decision in *Hedgecock* creates a new rule of law by holding that materiality is a jury question in a prosecution for perjury under the Political Reform Act.⁹³ The guilt or innocence of a politician prosecuted for perjury under the Act will

92. *Id.* at 419, 795 P.2d at 1274, 272 Cal. Rptr. at 817. The court states that "[t]he hearing should not be used as a 'fishing expedition' to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred." *Id.*

93. Although the court does not state this explicitly, it can be inferred by the court's statement that the only reason why *Figueroa* did not create a new rule of law was because the case did not present the issue of whether materiality was a jury question. *Id.* at 409, 795 P.2d at 1268, 272 Cal. Rptr. at 811. Since *Hedgecock* squarely placed this issue before the court, the holding in *Hedgecock* will likely be construed in the future as creating a new rule of law. The ramifications of whether a new rule of law is created will affect the retroactivity of the holding to other cases.

depend on the jury's resolution of whether the statements, or omissions are material. In light of the general public's distrust of politicians in general, the practical significance of the court's holding is that public officials prosecuted under the Act will experience more difficulty in absolving themselves.

In holding that the trial court has the discretion to order an evidentiary hearing upon allegations of juror misconduct, the California Supreme Court has demonstrated its distaste for juror misconduct. The court's holding comports with upholding the fairness and integrity of the judicial system because it gives a trial court that ability to ferret out juror misconduct by conducting an evidentiary hearing. Furthermore, the court's holding enables the trial court to order jurors to testify at such a hearing which gives the trial court the ability to make the most effective inquiry of alleged misconduct. Therefore, since the court stated that either juror alcohol consumption or bailiff statements to jurors during sequestration would, if true, be presumptively prejudicial, the prosecution should take precautions to ensure that everyone coming in contact with jurors conduct themselves appropriately.

DARREN M. CAMPF

V. CRIMINAL PROCEDURE

A. *Collateral estoppel does not attach to issues decided in probation revocation hearing: Lucido v. Superior Court.*

I. INTRODUCTION

The issue presented in *Lucido v. Superior Court*¹ was whether a ruling favorable to a defendant in a probation revocation hearing could act as collateral estoppel and consequently bar the state from subsequent judicial prosecution. The majority opinion, written by Chief Justice Lucas,² acknowledged that a finding in a probation revocation hearing could satisfy all the standard prerequisites for collateral estoppel.³ However, successful application of collateral estoppel requires more than the satisfaction of certain conventional requirements. Any particular instance of preclusion by collateral estoppel must also promote the underlying central precepts of the doctrine.⁴

1. 51 Cal. 3d 335, 795 P.2d 1223, 272 Cal. Rptr. 767 (1990) (en banc), *cert. denied*, 111 S. Ct. 2021 (1991).

2. Justices Panelli, Eagleson, Kennard, and Arabian concurred in the majority opinion of Chief Justice Lucas. Justice Eagleson wrote a separate concurring opinion. Justices Mosk and Broussard issued separate dissenting opinions.

3. *Lucido v. Superior Court*, 51 Cal. 3d 335, 341, 795 P.2d 1223, 1225, 272 Cal. Rptr. 767, 769 (1990).

4. *Id.* at 342-43, 795 P.2d at 1226, 272 Cal. Rptr. at 770.

Therefore, based upon policy considerations, the majority held that collateral estoppel does not apply in this situation.⁵ Specifically, the majority insisted that criminal trials, and not probation hearings, were the proper forum for conclusive determinations of criminal guilt or innocence.⁶

In direct opposition to the majority, the two dissenting Justices, concerned primarily with the rights of the accused, asserted that the doctrine of collateral estoppel should attach to specific findings determined at a probation revocation hearing.⁷

II. BACKGROUND

The doctrines of former adjudication, often collectively denoted by the term *res judicata*,⁸ prohibit the relitigation of identical claims or issues.⁹ These procedural doctrines were developed to assure the finality of judicial determinations and thus conserve judicial resources by preventing wasteful relitigation. In addition to considerations of judicial economy, the preclusion doctrines serve to avoid inconsistent rulings and prevent the harassment of vexatious litigation upon parties involved in prior actions.¹⁰

5. See *supra* note 74 and part IV of this note (discussing the majority opinion generally).

6. *Lucido*, 51 Cal. 3d at 348, 795 P.2d at 1230, 272 Cal. Rptr. at 774.

7. *Id.* at 353, 795 P.2d at 1233, 727 Cal. Rptr. at 778 (Mosk, J., dissenting); *Id.* at 361, P.2d at 1239; 272 Cal. Rptr. at 783 (Broussard, J., dissenting).

8. Former adjudication, also known as *res judicata*, and sometimes spelled "*res adjudicata*," are general terms used to describe procedural preclusion doctrines. RESTATEMENT (SECOND) OF JUDGMENTS Chapter 3, introductory note (1982).

The terminology to describe the doctrines in this field of law varies widely. The Restatement (Second) of Judgments divides former adjudication into "claim preclusion" (the doctrine coinciding with traditional *res judicata*) and "issue preclusion" (still commonly called collateral estoppel, as named in the first Restatement of Judgments). RESTATEMENT (SECOND) OF JUDGMENTS Chapter 1, introduction (1982). See 7 B. WITKIN, CALIFORNIA PROCEDURE, *Judgment* §§ 190(1), 193, 253 (3d ed. 1985 & Supp. 1990). The modern terms advocated by the Second Restatement are thought to more clearly express the functions of the doctrines described. See Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. CAL. L. REV. 357; 359 (1974) (suggesting the Second Restatement adopt the more descriptive names); see also J. FRIEDENTHAL, M. KANE, & A. MILLER, CIVIL PROCEDURE § 14.1 (1985).

9. For a discussion of the intended effects of the preclusion doctrines, see RESTATEMENT (SECOND) OF JUDGMENTS Chapter 1, introduction (1982). See also 7 B. WITKIN, CALIFORNIA PROCEDURE, *Judgment* § 188 (3d ed. 1985 & Supp. 1990).

10. See e.g., *Montana v. United States*, 440 U.S. 147, 153-54 (1979) (listing judicial economy, reliance on judicial action, and other factors, as policy reasons underlying collateral estoppel); *Chamblin v. Municipal Court*, 130 Cal. App. 3d 115, 119, 181 Cal. Rptr. 636, 638 (1982) (citing *People v. Taylor*, 12 Cal. 3d 686, 695, 527 P.2d 622, 628-29, 117 Cal. Rptr. 70, 76-77 (1974)).

One branch of former adjudication, the doctrine of collateral estoppel, prohibits the relitigation of issues of fact previously adjudicated on the merits.¹¹ A party asserting collateral estoppel must prove¹² five basic prerequisites to prevent the relitigation of an issue:¹³ the opposing party must be identical to or in privity with the opposing party in the previous proceeding;¹⁴ the issue sought to be precluded must be identical to that decided in the previous proceeding; the issue must have actually been litigated;¹⁵ the issue must have been essential to, or necessarily decided¹⁶ in, the previous judgment; and the previous decision must have been final¹⁷ and on the merits.¹⁸ The satisfaction of these requirements enables, but does not assure,¹⁹ successful issue preclusion. The judicial level at which the prior proceeding occurred is irrelevant because collateral estoppel attaches to the final judgments of all courts.²⁰ Thus, judgments from even the lowest ranking tribunals effectively bind higher courts.²¹

Collateral estoppel is traditionally viewed as a doctrine of civil, rather than criminal, procedure. However, modern statutory offenses have become so specific that a single act may give rise to a variety of crimes, each creating distinct prosecutions, but resolving identical questions of fact. Hence, contemporary criminal law has

11. In contrast, the doctrine of claim preclusion prevents the reassertion of a claim or cause of action in a subsequent suit. For a brief history of claim and issue preclusion that traces the origins of these doctrines back to the Roman Empire and ancient germanic tribes, see J. FRIEDENTHAL, M. KANE, & A. MILLER, *CIVIL PROCEDURE* § 14.2 (1985).

12. See, e.g., *Vella v. Hudgins*, 20 Cal. 3d 251, 257, 572 P.2d 28, 31-32, 142 Cal. Rptr. 414, 417 (1977) (the burden of proof rests on the party advancing collateral estoppel).

13. This five element list is enumerated by Chief Justice Lucas in *Lucido*, 51 Cal. 3d 335, 341, 795 P.2d 1223, 1225, 272 Cal. Rptr. 767, 769.

14. See 1 B. WITKIN & N. EPSTEIN, *CALIFORNIA CRIMINAL LAW, Defenses* §§ 343-45 (2d ed. 1988 & Supp. 1990) (discussing the requirement that the parties be the same or in privity).

15. See, e.g., *Todhunter v. Smith*, 219 Cal. 690, 695, 28 P.2d 916, 918 (1934).

16. See, e.g., *People v. Morgan*, 177 Cal. App. 3d 466, 470, 225 Cal. Rptr. 673, 674, cert. denied, 106 S. Ct. 2893 (1985) (emphasizing that defense of collateral estoppel requires that the issue be necessarily decided in the prior hearing, and not merely actually decided).

17. See 7 B. WITKIN, *CALIFORNIA PROCEDURE, Judgment* § 216 (3d ed. 1985 & Supp. 1990).

18. See 7 B. WITKIN, & EPSTEIN, *CALIFORNIA CRIMINAL LAW, Defenses* § 342 (2d ed. 1988 & Supp. 1990).

19. Exceptions to the doctrine of collateral estoppel exist. See *supra* note 28 and accompanying text.

20. This includes courts of special or limited jurisdiction, as well as courts in other states. However, an exception exists for small claims courts due to the uniquely informal procedures of such hearings. 7 B. WITKIN, *CALIFORNIA PROCEDURE, Judgment* § 202 (3d ed. 1985 & Supp. 1990).

21. 7 B. WITKIN, *CALIFORNIA PROCEDURE, Judgment* § 201 (3d ed. 1985 & Supp. 1990). Specifically, collateral estoppel applies to judgments from justice courts such as the court which revoked *Lucido's* probation. *Id.*

transformed collateral estoppel into a criminal defense.²²

Used as such a defense, collateral estoppel closely resembles the doctrine of double jeopardy²³ encountered in criminal procedure. Both serve to prevent wasteful and vexing relitigation.²⁴ However, the crux of this latter defense is the peculiar notion of "jeopardy" found only in criminal proceedings. A judicial proceeding places a criminal defendant in jeopardy when an imminent danger of conviction exists.²⁵ Double jeopardy was not a viable defense in *Lucido* because jeopardy does not attach to probation revocation hearings.²⁶

22. 1 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* § 340 (2d ed. 1988 & Supp. 1990). Regarding the use of collateral estoppel in criminal law, see generally 21 AM. JUR. 2D *Criminal Law* §§ 321-335 (1981 & Supp. 1990); 22 CAL. JUR. 3D (REV) *Criminal Law* § 3512 (1984 & Supp. 1990).

23. The double jeopardy clause of the fifth amendment to the United States Constitution provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend v. Double Jeopardy is an incorporated constitutional right, applicable to the states though the due process clause of the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Article I, section 15 of the California Constitution also contains a double jeopardy clause. See generally 1 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* §§ 271-72 (2d ed. 1988 & Supp. 1990).

Indeed the fifth amendment bar against double jeopardy contains the collateral estoppel principle, as explained by the Supreme Court of the United States in *Ashe v. Swenson*, 397 U.S. 436 (1970). In *Ashe*, a poker game was disrupted by several men who robbed the card players. The defendant was charged with the armed robbery of one of the players. The court acquitted the accused, holding that he was not one of the robbers. Later, this same defendant was convicted for the robbery of one of the other poker players. The Supreme Court reversed the conviction because the collateral estoppel portion of double jeopardy barred relitigation of the question whether the defendant was one of the robbers. *Id.* at 445-46. See also 1 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* § 341 (2d ed. 1988); 3 CALIFORNIA CRIMINAL DEFENSE PRACTICE § 63.02[7] (1990 & Supp. 1990) (discussing *Ashe*, double jeopardy, and collateral estoppel as a criminal defense).

For a comparison of collateral estoppel and double jeopardy, see J. FRIEDENTHAL, M. KANE, & A. MILLER, CIVIL PROCEDURE § 14.1 (1985); 21 AM. JUR. 2D *Criminal Law* § 322 (1981 & Supp. 1990).

24. Despite their similarity, double jeopardy and collateral estoppel are distinct criminal defenses. Under certain circumstances, including the situation in *Lucido*, an accused could not claim double jeopardy, but could assert collateral estoppel. See *United States v. Oppenheimer*, 242 U.S. 85, 87-88 (1916), where Justice Holmes, in arguing that an accused could use collateral estoppel as a criminal defense, writes "the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice." See generally 1 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* § 273 (2d ed. 1988 & Supp. 1990).

25. Typically, jeopardy attaches to a proceeding when either the jury or the first witness is sworn. See generally 1 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* § 278 (2d ed. 1988 & Supp. 1990).

26. A probation revocation hearing "neither threatens the probationer with the stigma of a new conviction nor with punishment other than that to which he was already exposed as a result of his earlier offense, [thus] it does not place the probationer

Ultimately, the existence of collateral estoppel rests upon policy considerations.²⁷ Consequently, other potentially more important policy considerations can outweigh those supporting collateral estoppel and nullify its application to a particular situation.²⁸ In *Lucido*, the California Supreme Court concluded that public policy interests balanced in favor of disallowing collateral estoppel effect to findings made at a probation revocation hearing.²⁹

III. STATEMENT OF THE CASE

Convicted in March of 1988 for indecently exposing himself,³⁰ Arasimo Settemo Lucido was placed on probation for three years.³¹ The probation mandated that Lucido reform his conduct to remain within the bounds of the law and stated expressly that he abstain from ingesting or possessing illegal drugs.³² Approximately six months into his probation, Lucido was again charged with indecent exposure,³³ this time in front of Mrs. Candice May Silva, her two-

in jeopardy." 51 Cal. 3d at 348, 795 P.2d at 1230, 272 Cal. Rptr. at 773. See also *id.* at 343 n.5, 795 P.2d at 1226 n.5, 272 Cal. Rptr. at 770 n.5; *United States v. Miller*, 797 F.2d 336, 341 (6th Cir. 1986).

27. See *supra* note 10.

28. See, e.g., *Jackson v. City of Sacramento*, 117 Cal. App. 3d 596, 603, 172 Cal. Rptr. 826, 827-28 (1981) (policy considerations may outweigh the use of collateral estoppel). See also J. FRIEDENTHAL, M. KANE, & A. MILLER, *CIVIL PROCEDURE* § 14.12 (1985); *RESTATEMENT (SECOND) OF JUDGMENTS* § 28(3).

29. Justice Lucas, writing for the majority, asserted "application of collateral estoppel under the circumstances presented here would ill serve the integrity of the criminal justice system as a whole." *Lucido*, 51 Cal. 3d at 347, 795 P.2d at 1229, 272 Cal. Rptr. at 773. See *infra* notes 68-78 and accompanying text.

30. Indecent exposure, a misdemeanor, violates CAL. PENAL CODE § 314(1) (West 1990). See generally 2 B. WITKIN & N. EPSTEIN, *CALIFORNIA CRIMINAL LAW, Crimes Against Decency & Morals* § 802 (2d ed. 1988 & Supp. 1990); 17 CAL. JUR. 3D *Criminal Law* § 841 (1984 & Supp. 1990); 50 AM. JUR. 2D *Lewdness, Indecency, & Obscenity* §§ 17-18; *California Penal Code Section 314(1); Nudeness or Lewdness?* 24 VI L. J. 1327 (1973) (authored by Walter Benjamin Fisherow).

Lucido was also convicted of another misdemeanor, the carrying a loaded firearm in a public place in violation of CAL. PENAL CODE § 12031(a) (West 1990). See generally 2 B. WITKIN & N. EPSTEIN, *CALIFORNIA CRIMINAL LAW, Crimes Against Public Peace & Welfare* § 1011 (2d ed. 1988 & Supp. 1990); 18 CAL. JUR. 3D *Criminal Law* § 1624 (1984 & Supp. 1990).

31. 51 Cal. 3d 335, 339-40, 795 P.2d 1223, 1224, 272 Cal. Rptr. 767, 768.

32. *Id.* at 340, 795 P.2d at 1224, 272 Cal. Rptr. at 768.

33. This second indecent exposure was a felony because the new complaint filed against Lucido noted his prior conviction for the same offense. See CAL. PENAL CODE § 314(2) (West 1990). See also *People v. Curry*, 76 Cal. App. 3d 181, 142 Cal. Rptr. 649 (1977) (making the second offense of indecent exposure a felony does not violate the constitutional prohibition on cruel and unusual punishment); *But cf. In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (sentence of life imprisonment for a second offense of indecent exposure violates the constitutional prohibition against cruel and unusual punishment); Recent Decisions, 6 LOY. L.A.L. REV. 416 (discussing *Lynch*). See 17 CAL. JUR. 3D *Criminal Law* § 841 (1984 & Supp. 1990).

year old son Ryan, and several other young children.³⁴

At Lucido's probation revocation hearing³⁵ his probation officer advised that probation be revoked based not only upon Lucido's second act of indecent exposure, but also because Lucido tested positive for narcotics.³⁶ Lucido then confessed to using illegal drugs while on probation. Based solely upon this confession the justice court could have revoked probation.³⁷ However, Lucido's probation revocation hearing continued, addressing the disputed charge of his second indecent exposure incident which occurred on June 23, 1988.³⁸

Both Lucido and the district attorney presented evidence and questioned witnesses regarding the indecent exposure.³⁹ Of the five eyewitnesses to the incident, the district attorney called only the adult, Mrs. Silva, to testify.⁴⁰ The hearing resulted in the revocation of Lucido's probation⁴¹ founded upon his drug use, "and not based upon the new indecent exposure charges," because the court found that the district attorney failed to demonstrate by clear and convincing evidence that a second indecent exposure occurred.⁴² No record of the proceedings was maintained.⁴³

When the district attorney filed an information against Lucido based on his second indecent exposure, Lucido argued that the prior probation hearing collaterally estopped the new charges. The supe-

34. *Lucido*, 51 Cal. 3d at 340 n.2, 795 P.2d at 1224 n.2, 272 Cal. Rptr. at 768 n.2.

The dissenting opinion from the court of appeal relates the facts of the disputed incident. Apparently, while a group of children played on the sidewalk, Mrs. Silva sat facing her apartment. The children yelled for her attention, but Mrs. Silva ignored their antics until her son Ryan shouted, "Mommy, he's got a big pee-pee!" This outburst evoked her concern and when she finally turned around to note the cause of the commotion she was greeted by the grinning gaze of Arasimo Settemo Lucido, standing stark naked on the sidewalk. This incident occurred only three months after Lucido had been convicted and placed on probation for a previous indecent exposure. *Lucido v. Superior Court*, 259 Cal. Rptr. 339, 343 (1989) (Anderson, P.J., dissenting).

35. The probation revocation hearing was held in the justice court in Little Lake Judicial District, Mendocino County. *Lucido*, 51 Cal. 3d at 340, 795 P.2d at 1224, 272 Cal. Rptr. at 768.

36. *Id.*

37. A valid revocation may occur on a showing of a violation of any provision of a probation. CAL. PENAL CODE § 1203.2 (West 1990). See 22 CAL. JUR. 3D *Criminal Law* §§ 3475, 3478 (1985 & Supp. 1990).

38. *Lucido*, 51 Cal. 3d at 340, 795 P.2d at 1224, 272 Cal. Rptr. at 768.

39. *Id.* Lucido called two witnesses to supplement his own testimony. *Lucido v. Superior Court*, 259 Cal. Rptr. 339, 343 n.1 (Anderson, P.J., dissenting).

40. *Lucido*, 51 Cal. 3d at 340 n.2, 795 P.2d at 1224 n.2, 272 Cal. Rptr. at 768 n.2.

41. Lucido's probation was simultaneously revoked, reinstated, and lengthened by an additional month. *Id.* at 341, 795 P.2d at 1225, 272 Cal. Rptr. at 768.

42. *Id.* at 340-41, 795 P.2d at 1224-25, 272 Cal. Rptr. at 768.

43. *Id.*

rior court initially denied Lucido's motion to dismiss.⁴⁴ However, Lucido petitioned for a writ of mandate, and the court of appeal, believing collateral estoppel appropriate, ordered the information dismissed.⁴⁵ The state subsequently filed a petition for review granted by the supreme court.⁴⁶ The supreme court reversed the court of appeal, directing a denial of Lucido's writ.⁴⁷

IV. TREATMENT

A. *Majority Opinion*

Justice Lucas began the majority's discussion with an analysis of the standard requirements for collateral estoppel as they apply to the facts of *Lucido*. The privity requirement was satisfied because the opposing parties at both the probation revocation hearing and the criminal prosecution were the state and Lucido.⁴⁸ Likewise, the disputed issue in both proceedings was whether Lucido indecently exposed himself before Mrs. Silva and the children.⁴⁹ This issue was actually litigated, because both sides had the opportunity to present a complete case,⁵⁰ and the decision of the justice court was final and on the merits.⁵¹

Lastly, a defense of collateral estoppel requires that the determination of the issue be essential to the judgment.⁵² In this case a decision, whether or not Lucido exposed himself, was not necessary to the revocation of his probation because his drug use provided independent grounds for revocation.⁵³ However, the justice court would probably have imposed a harsher penalty on Lucido had it de-

44. *Id.*

45. *Lucido v. Superior Court*, 211 Cal. App. 3d 343, 259 Cal. Rptr. 339 (1988) (majority opinion by Justice Poche, joined by Justice Perley; dissenting opinion filed by Presiding Justice Anderson).

46. *Lucido v. Superior Court*, 49 Cal. 3d 475, 777 P.2d 1120, 261 Cal. Rptr. 686 (1989).

47. *Lucido*, 51 Cal. 3d at 352, 759 P.2d at 1232, 272 Cal. Rptr. at 776.

48. *Id.* at 342, 795 P.2d at 1225, 272 Cal. Rptr. at 769.

49. *Id.* The fact that the justice court could only revoke probation, while the superior court could impose criminal penalties, was immaterial in concluding that the identical issue requirement had been satisfied. The question is not whether the potential punishments are identical, but rather whether the same factual allegation is disputed. *Id.*

50. *Id.* at 341, 795 P.2d at 1225, 272 Cal. Rptr. at 769. The key question here is whether each side has a chance to present all available evidence, and not whether all such evidence is actually presented. Thus, even though the State did not advance the strongest possible case against Lucido by calling every eye-witness, the State had the opportunity to do so. Hence, for purposes of collateral estoppel the issue was "actually litigated" at the probation revocation hearing. *Id.* at 340 n.2, 795 P.2d at 1224 n.2, 272 Cal. Rptr. at 768 n.2.

51. *Id.* at 341-42, 795 P.2d 1223, 1225, 272 Cal. Rptr. 767, 769.

52. See *supra* note 16 and accompanying text.

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

terminated that Lucido had indeed exposed himself as alleged. Thus, the issue was not wholly irrelevant to the judgement,⁵⁴ and so this final requirement was satisfied as well.

Having established that Lucido's case fulfilled every traditional prerequisite for collateral estoppel, the majority proceeded to evaluate the appropriateness of utilizing the doctrine in this case with regard to social policy.⁵⁵ The majority was especially concerned with reconciling *Lucido* with earlier decisions. Whether factual findings made at a probation revocation hearing could properly preclude subsequent prosecution was previously addressed by the court of appeal in the factually similar case of *Chamblin v. Municipal Court*.⁵⁶

In *Chamblin* police officers witnessed a traffic violation, pursued the defendant, and eventually captured him.⁵⁷ At his probation revocation hearing the state failed to prove that the defendant was the driver of the vehicle, but convinced the court that he had resisted arrest.⁵⁸ Thus, probation was revoked not based on the traffic offense, but upon other violations of probation. Later, when the state charged the defendant for the traffic violation he defended on the grounds that the probation court's finding that he was not the driver collaterally estopped the prosecution.⁵⁹ The court of appeal ruled that collateral estoppel did not apply because of the significant differences between a probation revocation hearing and a criminal prosecution.⁶⁰ The court feared that allowing collateral estoppel "would have the effect of barring full and fair litigation of . . . criminal guilt due to a less formal proceeding which involved entirely different purposes, policies, procedures and issues."⁶¹ Therefore, the *Chamblin*

54. Justice Lucas explained that the proper analysis questions whether the issue was "entirely unnecessary" rather than whether the issue was necessary. *Lucido*, 51 Cal. 3d at 342, 795 P.2d at 1226, 272 Cal. Rptr. at 770 (citing 7 B. WITKIN, CALIFORNIA PROCEDURE, *Judgment* § 268 (3d ed. 1985)).

55. Justice Lucas writes, "assuming all the threshold requirements are satisfied . . . our analysis is not at an end. We have repeatedly looked to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting." *Lucido*, 51 Cal. 3d at 342-33, 795 P.2d at 1226, 272 Cal. Rptr. at 770.

56. 130 Cal. App. 3d 115, 181 Cal. Rptr. 636 (1982). See 1 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* § 348 (2d ed. 1988 & Supp. 1990); 22 CAL. JUR. 3D (REV) *Criminal Law* § 3512 (1984 & Supp. 1990).

57. *Chamblin*, 130 Cal. App. 3d at 118, 181 Cal. Rptr. at 637.

58. *Id.* Resisting an arrest violates CAL. PENAL CODE § 148 (West 1990). The court also convicted the probationer of vandalism in violation of CAL. PENAL CODE § 594 (West 1990). *Id.*

59. *Id.*

60. *Id.* at 120, 181 Cal. Rptr. at 639.

61. *Id.* at 121, 181 Cal. Rptr. 639.

court directly confronted the issue presented by *Lucido* and explicitly denied preclusive effect to findings from probation revocation hearings.

Had the *Chamblin* decision existed alone in the sea of case law it could have provided sufficient precedent to support the denial of *Lucido's* writ, and the supreme court might not have granted *Lucido's* petition for review. However, another case, *People v. Sims*,⁶² decided by the supreme court, had eroded the effectiveness of *Chamblin*.⁶³ The *Sims* case did not involve a probation revocation hearing, but an administrative hearing, and the court held that administrative decisions could collaterally estop criminal prosecution.⁶⁴ Because administrative hearings procedurally resemble probation revocation hearings,⁶⁵ and both differ substantially from criminal trials, it appeared that the supreme court had implicitly overruled the lower court's analysis in *Chamblin*.⁶⁶ The court of appeal used this assumption to justify *Lucido's* writ of mandate.⁶⁷

However, the majority opinion in *Lucido* made clear that this assumption is erroneous. Chief Justice Lucas resolved that *Sims* and *Chamblin* "do not necessarily conflict."⁶⁸ Each remains valid precedent with regard to administrative hearings and probation hearings respectively. The majority distinguishes *Sims* from *Chamblin* by noting that the legislature required the administrative hearing in *Sims* prior to any criminal action, the major purpose of such hearing being to ascertain issues of guilt or innocence.⁶⁹ Thus, the court perceived an intent to give preclusive effect to those findings⁷⁰ which do not exist with respect to probation revocation hearings.⁷¹

The policy analysis of the majority opinion evaluated three specific social policies which underlie collateral estoppel. First, the court pondered what effect a ruling either way would have upon the integrity of judicial determinations.⁷² Beginning with the assumption that inconsistent findings endanger public faith in the judiciary, the majority noted that allowing collateral estoppel prevents any possibility

62. 32 Cal. 3d 468, 651 P.2d 321, 186 Cal. Rptr. 77 (1982). See California Supreme Court Survey, 10 PEPPERDINE L. REV. 875 (1983).

63. "*Chamblin* has been nullified sub silentio by the principles enunciated in *People v. Sims*." *Lucido v. Superior Court*, 259 Cal. Rptr. 339, 340 (1989).

64. *Sims*, 32 Cal. 3d at 489, 651 P.2d at 343, 186 Cal. Rptr. at 90.

65. Both types of proceedings are relatively informal; neither utilizes a jury, or the rules of evidence. See, e.g., *Lucido*, 51 Cal. 3d at 364, 795 P.2d at 1241, 272 Cal. Rptr. at 785 (Broussard, J., dissenting).

66. See *supra* note 63.

67. *Lucido v. Superior Court*, 259 Cal. Rptr. at 342-43.

68. *Lucido*, 51 Cal. 3d at 345, 795 P.2d at 1227, 272 Cal. Rptr. at 771.

69. *Id.* at 349, 795 P.2d at 1231, 272 Cal. Rptr. at 775.

70. *Id.* at 345, 349, 795 P.2d at 1227, 1231, 272 Cal. Rptr. at 771-72, 775.

71. *Id.* at 350, 795 P.2d at 1231, 272 Cal. Rptr. at 775.

72. *Id.* at 347-50, 795 P.2d at 1229-32, 272 Cal. Rptr. at 773-76.

of contradictory judgments.⁷³ However, the benefits of consistency between probation hearings and criminal trials must then justify eliminating altogether the latter, more formal and thorough proceeding.⁷⁴ The majority concluded that the minor value stemming from the eradication of hypothetically inharmonious judgments fails to justify this result.⁷⁵

Judicial economy was the second policy consideration the court considered.⁷⁶ Allowing findings from probation hearings to collaterally estop future criminal trials would undeniably diminish the number of trials and issues litigated, clearly conserving judicial resources.⁷⁷ In addition, if the state knew that a finding from a probation hearing could prevent a criminal prosecution, the state may opt to bypass the less formal hearing and directly initiate a criminal case.⁷⁸ If the criminal court acquits the defendant, the state may still invoke a probation revocation hearing because in California preclusion does not apply in this situation.⁷⁹ This too promotes judicial economy to some degree. However, the majority contended that these positive results do not warrant a rearrangement of the current organization of criminal courts. In the words of Chief Justice Lucas, "[w]hatever the efficiencies of applying collateral estoppel in this case, they pale before the importance of preserving the criminal trial

73. *Lucido*, 51 Cal. 3d at 347, 795 P.2d at 1229, 272 Cal. Rptr. at 773.

74. Justice Lucas aptly remarked that "[c]onsistency . . . is not the sole measure of the integrity of judicial decisions." *Id.*

75. "The differences between revocation hearings and criminal trials outweigh whatever adverse effect inconsistent factual determinations would have on the integrity of the judicial system." *Id.* at 350, 795 P.2d at 1232, 272 Cal. Rptr. at 776.

76. *Id.* at 350-51, 795 P.2d at 1232, 272 Cal. Rptr. at 776.

77. *Id.*

78. *Id.*

79. *In re Coughlin*, 16 Cal. 3d 52, 57-59, 545 P.2d 249, 252, 127 Cal. Rptr. 337, 340 (1976). The fact that the state has the lower burden of proof of "clear and convincing evidence" at a probation revocation hearing than the "Beyond a reasonable doubt" standard required at criminal trials seems to justify the lack of preclusion in this instance. *Accord* *Dunn v. State*, 65 Md. App. 637, 501 A.2d 881 (1985), *cert. granted*, 308 Md. 146, 517 A.2d 771 (1986); *Jackson v. State*, 420 N.E.2d 1239 (Ind. App. 1981); *Johnson v. State*, 240 Ga. 526, 242 S.E.2d 53, *cert. denied*, 439 U.S. 881 (1978); *State v. Jameison*, 112 Ariz. 315, 541 P.2d 912 (1975); *Russ v. State*, 313 So.2d 758 (Fla.), *cert. denied*, 423 U.S. 924 (1975).

Nevertheless, some states apply collateral estoppel in this situation, disregarding the reduced level of proof. *See, e.g.,* *People v. Grayson*, 58 Ill. 2d 260, 319 N.E.2d 43 (1974), *cert. denied*, 421 U.S. 994 (1975) (criminal acquittal prevents states from revoking probation in Illinois). *See, Note, Probation and Parole: Effect of Felony Acquittal on Probation Revocation*, 31 OKLA. L. REV. 474, 485 (1978) (indicating that Illinois is alone in this view). *But see* *Commissioner v. Brown*, 503 Pa. 514, 469 A.2d 1371 (1983) (indicating that Pennsylvania also shares this view).

process as the exclusive forum for determining guilt or innocence.”⁸⁰

Lastly the court addressed the policy against vexatious litigation.⁸¹ While it is true that denying Lucido’s collateral estoppel argument forces him to endure two separate hearings, this is to be expected because the state accused Lucido of committing two separate crimes: violating probation and indecent exposure. “The essence of vexatiousness . . . is not mere repetition. Rather, it is harassment through baseless or unjustified litigation.”⁸² Hence, the majority maintained that the subsequent criminal trial after Lucido’s probation revocation hearing was perfectly fair and not vexing in any way that justified barring the appropriate criminal prosecution.⁸³

B. Concurring Opinion

The short concurring opinion by Justice Eagleson serves to reiterate the majority’s conclusion that allowing collateral estoppel to attach to findings in probation revocation hearings would not suit the underlying social policies.⁸⁴ Furthermore, the concurring opinion addressed an argument raised by the dissenting justices not mentioned in the majority opinion. The dissenters worry that the holding of *Lucido* allows an oppressive government to prosecute the same charges against the same individual at two different hearings.⁸⁵ Justice Eagleson exposed this anxiety as illusory. He explained that in actuality a probation revocation hearing and a criminal trial exists as distinct proceedings, administered by different state representatives with dissimilar objectives, in separate courts, possibly in different counties.⁸⁶

C. Dissenting Opinions

Justice Mosk and Broussard filed separate dissenting opinions.⁸⁷ Both begin by emphasizing that the traditional requirements for collateral estoppel are met by showing that the facts of the case satisfy

80. *Lucido*, 51 Cal. 3d at 351, 795 P.2d at 1232, 272 Cal. Rptr. at 776.

81. *Id.* at 351, 795 P.2d at 1232, 272 Cal. Rptr. at 775.

82. *Id.*

83. *Id.* at 350, 795 P.2d at 1232, 272 Cal. Rptr. at 776.

84. 51 Cal. 3d at 352-53, 795 P.2d at 1233, 272 Cal. Rptr. at 777 (Eagleson, J., concurring).

85. “[T]he assumption underlying the dissenting opinions, that a monolithic ‘state’ prosecutes both the probation revocation proceeding and the new criminal charge . . . ignores . . . reality.” *Id.* at 352, 795 P.2d at 1233, 272 Cal. Rptr. at 777 (Eagleson, J., concurring). See also *infra* notes 94 & 96 and accompanying text.

86. *Lucido*, 51 Cal. 3d at 352, 795 P.2d at 1233, 272 Cal. Rptr. at 777 (Eagleson, J., concurring).

87. *Lucido*, 51 Cal. 3d at 353-61, 795 P.2d at 1233-39, 272 Cal. Rptr. at 777-83 (Mosk, J., dissenting); *Id.* at 361-67, 795 P.2d at 1239-44, 272 Cal. Rptr. at 783-87 (Broussard, J., dissenting).

each element.⁸⁸ Then, as in the majority opinion, both then address the policy considerations of collateral estoppel.⁸⁹

Justice Mosk viewed the fact that the state, as prosecutor in both the probation revocation and criminal hearings, dominates the progression of events as a critical consideration.⁹⁰ He views the majority decision as unjustly granting the state the choice to pursue either proceeding in any order and the power to attack the same defendant twice.⁹¹ Justice Broussard characterized this situation as “[h]eads I win, tails I flip again” for state prosecutors.⁹²

Justice Mosk also analyzed the same social policies as the majority arguing that the application of collateral estoppel furthers all three.⁹³ Especially concerned with the rights of the criminally accused, he contended that protection of due process better serves to promote public confidence in judicial integrity than the majority's concern for preserving determinations of guilt in criminal trials.⁹⁴ Likewise, in asserting that collateral estoppel promotes judicial economy, he assailed the result of the majority opinion that allows a failed prosecution to attempt to prove the same issue which it could not meet even at the lower burden of proof required at a probation revocation hearing.⁹⁵ Justice Mosk also advanced that the litigation, though not intentional harassment, still qualifies as vexatious.⁹⁶ Justice Broussard also briefly declared that the use of preclusion in this case furthers the three policy factors.⁹⁷

Granting that the revocation hearing did not place Lucido in jeop-

88. *Id.* at 353-55, 795 P.2d at 1233-35, 272 Cal. Rptr. at 777-79 (Mosk, J., dissenting); *Id.* at 361-63, 795 P.2d at 1239-41, 272 Cal. Rptr. at 783-85 (Broussard, J., dissenting).

89. *Id.* at 355, 795 P.2d at 1235, 272 Cal. Rptr. at 779 (Mosk, J., dissenting); *Id.* at 366, 795 P.2d at 1242-43, 272 Cal. Rptr. at 786 (Broussard, J., dissenting).

90. *Id.* at 353, 795 P.2d at 1233, 272 Cal. Rptr. at 777 (Mosk, J., dissenting). “[T]he People control the sequence of the proceedings. . . . They should be bound by the procedural choice they make.” *Id.* at 360-61, 795 P.2d at 1239, 272 Cal. Rptr. at 783 (Mosk, J., dissenting).

91. “Collateral estoppel demands that the People not be given two such opportunities at the expense of the rights of a criminal defendant.” *Id.* at 355, 795 P.2d at 1235, 272 Cal. Rptr. at 779 (Mosk, J., dissenting).

92. *Lucido*, 51 Cal. 3d at 367, 795 P.2d at 1243, 272 Cal. Rptr. at 787 (Broussard, J., dissenting).

93. See *supra* text accompanying notes 72-83.

94. *Lucido*, 51 Cal. 3d at 356, 795 P.2d at 1236, 272 Cal. Rptr. at 780 (Mosk, J., dissenting). Justice Mosk insists that “the majority needlessly threaten the due process rights of criminal defendants.” *Id.* (Mosk, J., dissenting).

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

96. *Id.* at 357, 795 P.2d at 1236, 272 Cal. Rptr. at 795 (Mosk, J., dissenting).

97. *Id.* at 366-67, 795 P.2d at 1243, 272 Cal. Rptr. at 786-87 (Broussard, J., dissenting).

ardy, Justice Mosk nevertheless seemed to feel that denying collateral estoppel preclusion verges on breaching the prohibition against double jeopardy.⁹⁸ Both he and Justice Broussard urged that recent expansions of the double jeopardy doctrine by the United States Supreme Court provide evidence that preclusion should apply.⁹⁹ However, the majority plainly disagreed.¹⁰⁰

Justice Broussard reasoned that if *Sims* allowed collateral estoppel for an administrative hearing, then *Lucido* should certainly allow it for a judicial decision.¹⁰¹ He alleged that the majority cannot meaningfully distinguish between the administrative hearing in *Sims* and the probation revocation hearing in *Lucido*.¹⁰² Thus, his dissent flatly charges that “[t]he majority presents no logical basis why the same conclusion [as reached in *Sims*] should not extend to . . . revocation hearing[s].”¹⁰³ Furthermore, even ignoring any differences between the hearings in *Sims* and *Lucido*, Justice Broussard’s permissive philosophy regarding preclusion stressed that “collateral estoppel depends on what issues are adjudicated, not the nature of the proceeding.”¹⁰⁴

V. IMPACT

As support for its decision, the majority opinion notes that more jurisdictions oppose the application of collateral estoppel to probation revocation hearings than allow it.¹⁰⁵ The ruling in *Lucido* thus con-

98. *Id.* at 357-59, 795 P.2d at 1237-38, 272 Cal. Rptr. at 780-82 (Mosk, J., dissenting).

99. Both Justices Mosk and Broussard cite to *Grady v. Corbin*, 110 S. Ct. 2084 (1990) as support. *Lucido*, 51 Cal. 3d at 358-59, 795 P.2d at 1237-38, 272 Cal. Rptr. at 781 (Mosk, J., dissenting); *Id.* at 366 n.7, 795 P.2d at 1243 n.7, 272 Cal. Rptr. at 786 n.7 (Broussard, J., dissenting).

100. Justice Lucas declared that “[n]othing in *Grady* affects our analysis here [in *Lucido*].” *Lucido*, 51 Cal. 3d at 343 n.5, 795 P.2d at 1227 n.5, 272 Cal. Rptr. at 771 n.5.

101. *Id.* at 364-65, 795 P.2d at 1241-42, 272 Cal. Rptr. at 785-86 (Broussard, J., dissenting).

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

103. *Id.* at 364, 795 P.2d at 1241, 272 Cal. Rptr. at 785 (Broussard, J., dissenting).

104. *Id.* at 365, 795 P.2d at 1242, 272 Cal. Rptr. at 786 (Broussard, J., dissenting).

105. The majority cited to five cases holding that collateral estoppel does not apply to probation or parole hearings: *United States v. Miller*, 797 F.2d 336 (1986); *Green v. State*, 463 So.2d 1139 (Fla 1985); *People v. Fagan*, 104 A.D.2d 252, 483 N.Y.S.2d 489 (1984), *aff’d*, 66 N.Y.2d 815, 489 N.E.2d 222, 498 N.Y.S.2d 335 (1985); *State v. Williams*, 131 Ariz. 211, 639 P.2d 1036 (1982); *State v. Dupard*, 93 Wash.2d 268, 609 P.2d 961 (1980). *Lucido*, 51 Cal. 3d at 345-46, 795 P.2d at 1228, 272 Cal. Rptr. at 772. Other cases denying collateral estoppel include: *State v. Jones*, 196 Ga. App. 896, 397 S.E.2d 209 (1990) (decided only twelve days after *Lucido*); *Maisonet v. Merola*, 69 N.Y.2d 965, 509 N.E.2d 341, 516 N.Y.S.2d 646 (1987); *State v. Chapman*, 111 Idaho 149, 721 P.2d 1248 (1986) (no application of collateral estoppel because no final judgment); *Chamblin*, 130 Cal. App. 3d 115, 181 Cal. Rptr. 636 (1982).

The court also cited to three cases which specifically allow collateral estoppel in this situation: *Ex parte Tarver*, 725 S.W.2d 195 (Tx. Crim. App. 1986); *State v. Bradley*, 51 Or. App. 569, 626 P.2d 403 (1981); *People v. Kondo*, 51 Ill. App. 3d 874, 366 N.E.2d 990 (1977). No other states appear to hold this view. *See generally* Appellate Decisions,

firms California's place in this more popular position.

Prior to *Lucido* it appeared that the *Sims* decision cast doubt over the precedential value of *Chamblin*. Now, the majority opinion reinvigorates *Chamblin* and makes clear that the court will interpret *Sims* narrowly. Given the conservative composition of the court,¹⁰⁶ this comes as no surprise.

A markedly liberal court decided the *Sims* case, heavily relied upon by the dissenting justices, but distinguished from *Lucido* by the majority. Former Chief Justice Bird authored the *Sims* opinion, joined by Justices Mosk, Richardson, Newman, Broussard, Reynoso.¹⁰⁷ Elections in 1986 unseated two of these judges,¹⁰⁸ and others have since retired.¹⁰⁹ Thus, the only justices still on the court at the time of *Lucido* were the two dissenters, Justices Mosk and Broussard.¹¹⁰ When commentators compared the California Supreme Court to the United States Supreme Court, these two justices were analogized to former Justices Brennan and Marshall, because each pair champions liberal views in an environment surrounded by a conservative majority.¹¹¹ Therefore, *Lucido* provides evidence of the court's trend towards more conservative holdings, especially in the

Extending the Doctrine of Collateral Estoppel to Include Determinations Made at Probation Revocation Proceedings, 23 ARIZ. L. REV. 1417 (1981) (authored by Stephen M. Bressler).

106. The influence of former republican Governor George Deukmejian shows clearly in *Lucido*. Deukmejian appointed Chief Justice Lucas, Justices Panelli and Arabian, and selected Justice Kennard for elevation from the court of appeal. This composes every member of the majority except Justice Eagleson who has since retired. Justice Baxter, another Deukmejian appointee has filled this vacant seat. See Blum, *Toward a Radical Middle*, 77 ABA Journal, Jan. 1991 at 48-52 (briefly outlining the historical and present composition of the California Supreme Court); See also Snider, *The Cinderella Justice*, 9 California Lawyer, No. 9, Sept. 1989, at 61 (profiles Justice Kennard).

Moreover, with the imminent retirement of Justice Broussard, Governor Pete Wilson has the opportunity to place yet another conservative on the court. See Hagar, *Liberal Justice Broussard to Retire in 1991*, L.A. Times, Feb. 8, 1991, at A1 & A41.

107. Justice Otto Kaus dissented.

108. Former Chief Justice Rose Bird, and Justice Cruz Reynoso. Justice Joseph R. Grodin also lost his seat on the bench. See Hagar, *supra* note 106, at A41.

109. See, e.g., Blum, *supra* note 97.

110. Democratic governor Edmund G. "Pat" Brown, Sr. appointed Justice Mosk in 1964. Similarly, democratic governor Edmund G. "Jerry" Brown, Jr. appointed Justice Broussard in 1981. These two liberal judges have dissented together often, especially in cases like *Lucido* involving the rights of criminal defendants. See Uelmen, *Mainstream Justice*, 9 Cal. Lawyer, No. 7, July 1989, at 37-41.

111. *Id.* This situation results in statistics which indicate that Justices Mosk and Broussard have the highest dissent rate percentages, nearly double that of any other justice on the court. *Id.* See also Hagar, *supra* note 97 at A41.

VI. CONCLUSION

Lucido v. Superior Court stands for the proposition that even if a finding determined at a probation revocation hearing favors the accused, collateral estoppel will not attach to the finding to preclude the state from criminally prosecuting the defendant for the same violation at a later trial. This is true regardless of whether the finding satisfies all the traditional requirements for the application of collateral estoppel, because the court has ruled that the policies underlying the preclusion doctrine do not suit the different purposes of probation hearings and criminal trials. The majority opinion emphasizes that public policy mandates questions of criminal guilt be determined only at criminal trials and not probation hearings.

Therefore, the state may proceed to prosecute Lucido for indecent exposure even though the justice court conducting his probation revocation hearing held that the state did not produce clear and convincing evidence of the crime.

BENJAMIN GROSS SHATZ

- B. *An indigent criminal defendant may not be required to demonstrate inadequate representation by his retained counsel before the defendant's timely motion to discharge his retained attorney will be granted by the trial court: People v. Ortiz.*

In *People v. Ortiz*,¹ the California Supreme Court resolved conflict-

112. "In the criminal arena . . . the court has clearly reflected what may be a national conservative mood, of downplaying the procedural rights of criminal defendants and emphasizing the interests of society." Blum, *supra* note 97, and 50 (quoting former Justice Joseph Grodin).

1. 51 Cal. 3d 975, 800 P.2d 547, 275 Cal. Rptr. 191 (1990). Justice Mosk wrote the majority opinion and was joined by Chief Justice Lucas and Justices Broussard, Panelli, Kennard and Arabian. Justice Eagleson concurred only in the judgment. The defendant, charged with murder, was declared indigent soon after the proceedings commenced. He was appointed a public defender, but retained Daniel and Arturo Hernandez to represent him instead. Soon after the first trial ended in a mistrial, the Hernandezes moved to withdraw because of the defendant's inability to pay their legal fees. Upon denial of this motion, the defendant requested their discharge. The court, in camera, denied the motion on the ground that the attorneys' incompetence had not been demonstrated.

After a series of motions and continuances, both the Hernandezes and the defendant requested a discharge. These motions were denied despite the listing of several factors by the defendant that indicated discharge of counsel would be appropriate. For example, counsel repeatedly failed to appear due to their concurrent representation of Richard Ramirez in the highly publicized "Night Stalker" case. Later, the defendant submitted the matter as a "Bunnell plea." See *Bunnell v. Superior Court*, 13 Cal. 3d 592, 531 P.2d 1086, 119 Cal. Rptr. 302 (1975) (a "Bunnell plea" is a second trial plea made by the defendant based on the condition that the charged offense shall not be

ing court of appeal decisions² by affording an indigent criminal defendant the opportunity to discharge retained³ counsel by a timely motion, without a showing of inadequate representation or identifying an irreconcilable conflict. In addition, the court determined that when a previously discharged attorney is appointed by the court to continue representation of an indigent defendant, the defendant must be granted a *Marsden* hearing,⁴ in which he may demonstrate why such appointment could abridge his sixth amendment rights.⁵ The need to preserve the right to counsel and the due process rights of the indigent defendant, coupled with a desire to establish consistency in the law, compelled the court to review *Ortiz*.⁶

The supreme court found that the trial court erred by not granting the indigent defendant's motion to discharge.⁷ The court recognized that the right to choose counsel also involves the right to discharge retained counsel.⁸ The court then concluded that the defendant's right to determine how to conduct his defense should be respected unless it results in "significant prejudice" or a "disruption of the

greater than second degree murder). The defendant was found guilty of second degree murder. The court of appeal reversed this conviction because defendant's timely motion to discharge retained counsel had been denied. The California Supreme Court here affirms that holding. 51 Cal. 3d at 982, 800 P.2d at 552, 275 Cal. Rptr. at 191.

2. The *Ortiz* opinion is consistent with *People v. Stevens*, 156 Cal. App. 3d 1119, 203 Cal. Rptr. 505 (1984), which held that an indigent criminal defendant was denied his right to effective assistance of counsel when the trial court "unjustifiably" denied his request to discharge his volunteer attorney. *Id.* at 1121, 203 Cal. Rptr. at 507. *Ortiz* effectively overrules contrary court of appeal decisions. See *South v. Superior Court*, 188 Cal. App. 3d 1055, 233 Cal. Rptr. 756 (1986); *People v. Barnes*, 146 Cal. App. 3d 663, 194 Cal. Rptr. 317 (1983).

3. To "retain" counsel is "[t]o engage the services of an attorney or counsellor to manage a specific matter or action or all legal matters in general." BLACK'S LAW DICTIONARY 1183 (5d ed. 1989). "Appointed counsel" refers to legal aid assigned by the court to represent an indigent defendant. Generally, an individual who is appointed counsel will not be required to pay legal fees. However, reimbursement may be sought if the defendant later becomes able to pay. See *Fuller v. Oregon*, 417 U.S. 40 (1974).

4. *People v. Marsden*, 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970) (defendant must make sufficient showing that denial of substitution would substantially impair his constitutional rights).

5. U.S. CONST. amend. VI. The Sixth Amendment provides the right to effective assistance of counsel and compulsory process to a defendant. See CAL. CONST. art. I, § 15. Article 1, section 15 was "adopted to secure the accused person all the benefits which may flow from the employment of counsel to conduct his defense. . . ." *People v. Avilez*, 86 Cal. App. 2d 289, 294, 194 P.2d 829, 833 (1948) (discussing former CAL. CONST. art. I, § 13 which is currently art. I, § 15).

6. *Ortiz*, 51 Cal. 3d at 981, 988, 800 P.2d at 551, 555-56, 275 Cal. Rptr. at 195, 199-200.

7. *Id.* at 975, 800 P.2d at 549, 275 Cal. Rptr. at 191.

8. *Id.* at 983, 800 P.2d at 552, 275 Cal. Rptr. at 196. See generally *Magee v. Superior Court*, 8 Cal. 3d 949, 954, 506 P.2d 1023, 1025, 106 Cal. Rptr. 647, 649 (1973).

orderly processes of justice unreasonable under the circumstances of the particular case.’”⁹ Furthermore, the court stressed that upon timely filing of a motion to discharge, adverse consequences are presumed unlikely and state interference should be kept to a minimum.¹⁰

The state has long recognized the nonindigent’s right to discharge retained counsel with or without cause.¹¹ The court observed that this right is not absolute, but rather, within the trial court’s reasonable discretion.¹² Nonindigent criminal defendants have never been required to demonstrate inadequate representation by counsel before a discharge is deemed appropriate.¹³ In contrast, indigent defendants seeking to substitute one appointed counsel for another are required to make a showing of incompetency or irreconcilable conflict between the defendant and his attorney.¹⁴ The rationale for demanding this presentation is that the defendant is “requesting duplicative representation and repetitive investigation at taxpayer expense.”¹⁵ Acknowledging the different concerns associated with appointed and retained counsel, the supreme court in *Ortiz* decided that the requirements for discharge should depend upon the type of counsel discharged, not the indigency of the defendant.¹⁶

9. *Ortiz*, 51 Cal. 3d at 982, 800 P.2d at 552, 275 Cal. Rptr. at 191 (citing *People v. Crovedi*, 65 Cal. 2d 199, 208, 417 P.2d 868, 875, 53 Cal. Rptr. 284, 290 (1966)).

10. *Id.* In *Ortiz*, the defendant’s timely filing “reflects [his] genuine concern about the adequacy of his defense rather than any intent to delay the retrial.” *Id.* at 987, 800 P.2d at 555, 275 Cal. Rptr. at 199. Similarly, the right to obtain counsel should be observed when defendant files a timely continuance. *People v. Courts*, 37 Cal. 3d 784, 693 P.2d 778, 210 Cal. Rptr. 193 (1985).

11. CAL. CIV. PROC. CODE § 284 (West 1982 & Supp. 1991). This section addresses change or substitution of counsel either by consent or order of the court. See 1 B. WITKIN, CALIFORNIA PROCEDURE § 82 (3d ed. 1985); *Mandell v. Superior Court*, 67 Cal. App. 3d 1, 4, 136 Cal. Rptr. 354, 355 (1977); *People v. Bouchard*, 49 Cal. 2d 438, 440-42, 317 P.2d 971, 973-74 (1957).

12. *Ortiz*, 51 Cal. 3d at 983, 800 P.2d at 552-53, 275 Cal. Rptr. at 196-97 (citing *People v. Lau*, 177 Cal. App. 3d 473, 478, 223 Cal. Rptr. 48, 51 (1986); *People v. Gzikowski*, 32 Cal. 3d 580, 586-87, 651 P.2d 1145, 1149, 186 Cal. Rptr. 339, 343 (1982)). See 19 CAL. JUR. 3D *Criminal Law* § 2155 (rev. ed. 1984 & Supp. 1991); 5 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW § 2746 (2d ed. 1989 & Supp. 1991); *People v. Maese*, 105 Cal. App. 3d 710, 164 Cal. Rptr. 485 (1980) (court denied substitution of counsel when request was made only hours before jury deliberation); see also *People v. Jeffers*, 188 Cal. App. 3d 840, 233 Cal. Rptr. 692 (1987) (“denial of defendant’s request for continuance to obtain alternate counsel was not an abuse of discretion”).

13. *Ortiz*, 51 Cal. 3d at 984, 800 P.2d at 553, 275 Cal. Rptr. at 197.

14. *Id.* (citing *People v. Crandell*, 46 Cal. 3d 833, 854, 760 P.2d 423, 439, 251 Cal. Rptr. 227, 242 (1988), *cert. denied sub nom.*, *Crandall v. California*, 490 U.S. 1037 (1989); *People v. Stankewitz*, 32 Cal. 3d 80, 93-94, 648 P.2d 578, 587, 184 Cal. Rptr. 611, 618-19 (1982), *cert. denied sub nom.*, *Stankewitz v. California*, 111 S. Ct. 1432 (1991) (defendant must identify an irreconcilable conflict to be granted a discharge); *In re Banks*, 4 Cal. 3d 337, 342, 482 P.2d 215, 218, 93 Cal. Rptr. 591, 594-95 (1971) (defendant must show inadequate representation to discharge appointed counsel)).

15. 51 Cal. 3d at 986, 800 P.2d at 554, 275 Cal. Rptr. at 198.

16. *Id.* See *People v. Stevens*, 156 Cal. App. 3d at 1128, 203 Cal. Rptr. at 512. For an instance where retained and appointed counsel have been treated equally, see gen-

The court's opinion focused on the synonymous interests of the indigent and nonindigent defendant desiring to discharge retained counsel. A reason traditionally given by nonindigents seeking to discharge their retained attorneys has been that the attorney-client relationship has deteriorated to such a degree that the client no longer has confidence in his counsel's ability.¹⁷ The necessity for trust and open communication between attorney and client is equally fundamental to the indigent defendant, especially where life or liberty is at stake.¹⁸ The court further justified allowing discharge of counsel by an indigent defendant by acknowledging that denial of such motions forces the defendant to proceed without legal assistance or be represented by a reluctant, uncompensated attorney.¹⁹ Clearly, either of these scenarios would be detrimental to the defendant. Accordingly, the court realized that discharge motions must be granted regardless of the economic stature of the defendant.²⁰

The California Supreme Court went one step further to delineate the proper procedure for appointing counsel after an indigent has discharged his retained council.²¹ Penal Code section 987.5 offers no barrier to appointment of previously discharged counsel, leaving such decisions within the court's discretion.²² When a court decides to reappoint an attorney, the indigent defendant must be afforded a *Marsden* hearing to explain how his sixth amendment rights will be

erally *People v. Taylor*, 39 Cal. App. 3d 495, 114 Cal. Rptr. 169 (1974) (rules applying to appointed counsel on indigent appeals also apply to retained counsel).

17. *Todd v. Superior Court*, 181 Cal. 406, 413, 184 P. 684, 687 (1919).

18. See *Smith v. Superior Court*, 68 Cal. 2d 547, 561, 440 P.2d 65, 72, 68 Cal. Rptr. 1, 8 (1968); *Griffin v. Illinois*, 351 U.S. 12, 19 *reh'g denied*, 351 U.S. 958 (1956).

19. *Ortiz*, 51 Cal. 3d at 984-85, 800 P.2d at 553, 275 Cal. Rptr. at 197 (citing *Scott v. Roper*, 688 S.W.2d 757, 768 (Mo. 1985) ("quality of the uncompensated service can be expected to decrease in almost direct proportion to the loss of choice of the professional rendering the service")); see Uelmen, *Simmering on the "Backburner": The Challenge of Yarbrough*, 19 LOY. L.A. L. REV. 285, 308-10 (1985); Gilbert & Gorenfeld, *The Constitution Should Protect Everyone — Even Lawyers*, 12 PEPPERDINE L. REV. 75, 88 (1984); *Cunningham v. Superior Court*, 177 Cal. App. 3d 336, 354-55, 222 Cal. Rptr. 854 (1986) (public defender was created due to lack of quality assistance being provided to indigent criminal defendants).

20. *Ortiz*, 51 Cal. 3d at 984, 800 P.2d at 553, 275 Cal. Rptr. at 197.

21. *Id.* at 989, 800 P.2d at 556-57, 275 Cal. Rptr. at 200-01.

22. CAL. PENAL CODE § 987.2 (West Supp. 1991). This section outlines the procedure for assigning counsel. The public defender replaces discharged retained counsel unless there is conflict of interest. *Id.* In addition, if the discharged counsel must be reappointed, he will be provided compensation pursuant to subdivisions (a) & (b) of this section. *Id.* See generally *People v. Owen*, 210 Cal. App. 3d 561, 258 Cal. Rptr. 535 (1989) (the trial court did not have to warn defendants of multiple representation dangers after appointing defendants' previously retained counsel).

impaired by the attorney's representation.²³ Ultimately, the supreme court concluded that failure to grant a *Marsden* hearing or to discharge retained counsel upon timely request will result in an automatic reversal because the defendant will, in effect, be denied his right to counsel.²⁴

The *Ortiz* decision expands indigent defendants' due process rights by placing them on equal footing with nonindigents in the area of discharging retained counsel. It also ensures against erosion of sixth amendment rights by making choice of counsel a reality to the indigent.²⁵ Lastly, *Ortiz* provides explicit direction to lower courts confronted with discharge situations.

It is unlikely this decision will spark an increase in discharges among indigent defendants as many prefer retained counsel, viewing appointed counsel as part of the "system," and therefore, biased against them.²⁶ Nevertheless, the ability to discharge a retained attorney will carry great significance to an individual who has been declared indigent after the proceedings have commenced and can no longer compensate retained counsel.²⁷

The *Ortiz* decision established that indigents must be afforded their constitutional rights, even at the expense of judicial and fiscal economy. In sum, the court determined that the right to discharge retained counsel is a fundamental component of the sixth amendment, and no individual should be required to make a showing of in-

23. See *supra* note 3. A *Marsden* hearing appears to be guaranteed to indigent defendants. Before *Ortiz*, this hearing had been entirely within the court's discretion.

24. *Ortiz*, 51 Cal. 3d at 988, 800 P.2d at 555-56, 275 Cal. Rptr. at 199-200 (citing *People v. Gzikowski*, 32 Cal. 3d 580, 589, 651 P.2d 1145, 1151, 186 Cal. Rptr. 339, 345 (1982)); see *People v. Hidalgo*, 22 Cal. 3d 826, 587 P.2d 230, 150 Cal. Rptr. 788 (1978) (reversible error when court denied defendant's timely motion to substitute appointed counsel without giving defendant an opportunity to state his grounds for the substitution). See also U.S. CONST. amends. VI & XIV; CAL. CONST. art. I, § 15; *People v. Pope*, 23 Cal. 3d 412, 424, 590 P.2d 859, 865, 152 Cal. Rptr. 732, 738 (1979) ("a conviction may not be upheld if the state has furnished an indigent with representation of lower quality than that of a reasonably competent attorney acting as a diligent conscientious advocate.").

25. Prior to the *Ortiz* decision, whether indigent defendants were being afforded their right to effective assistance of counsel had been questioned. See, e.g., Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986).

26. *Ortiz*, 51 Cal. 3d at 988 n.4, 800 P.2d at 554-55 n.4, 275 Cal. Rptr. at 198-99 n.4 (citing *In re JGL*, 43 Cal. App. 3d 447, 451-52, 117 Cal. Rptr. 799, 801-02 (1974)).

27. The defendant in *Ortiz* was declared indigent shortly after a preliminary hearing. 51 Cal. 3d at 979, 800 P.2d at 550, 275 Cal. Rptr. at 194. "The test of indigency for the purpose of funding investigators and experts is financial means to secure these services' . . . we concur . . . if defendant is able to pay counsel, by whatever means, his indigency has not been established." *People v. Worthy*, 109 Cal. App. 3d 514, 520, 167 Cal. Rptr. 402, 404 (1980) (citing *Anderson v. Justice Court*, 99 Cal. App. 3d 398, 403, 160 Cal. Rptr. 274, 277 (1979)).

adequate representation or irreconcilable conflict before exercising this right.

JODY L. GRAY

C. *The proper standard of proof in a probation revocation hearing is a preponderance of the evidence standard: People v. Rodriguez.*

In *People v. Rodriguez*,¹ the California Supreme Court examined the standard of proof applicable to a probation revocation hearing.² After reviewing the mandates of constitutional due process and California Penal Code section 1203.2,³ the supreme court concluded that facts in a hearing to revoke probation must be proven by a preponderance of the evidence, rather than by satisfaction of the clear and convincing standard.⁴ In this decision, the court sought to preserve judicial flexibility and discretion in the revocation process and to settle an issue of law which had received disparate treatment in the lower courts.⁵ Because Rodriguez's probation violation had been proven by a preponderance of the evidence, the supreme court af-

1. 51 Cal. 3d 437, 795 P.2d 783, 272 Cal. Rptr. 613 (1990). After a conviction for second degree burglary, Petitioner Rodriguez was placed on probation. In order to retain his freedom, he was required to refrain from any further violation of law. Subsequently, his probation officer sought to revoke his probation on the grounds that Rodriguez had allegedly committed another theft. At his revocation hearing, the court found that the state had proven this additional violation by a preponderance of the evidence and consequently revoked probation. The court of appeal reversed this decision on the grounds that the clear and convincing evidence standard was the proper measure of proof in a probation revocation hearing, and the supreme court subsequently granted review.

2. *Id.* at 440, 795 P.2d at 785, 272 Cal. Rptr. at 615.

3. CAL. PENAL CODE § 1203.2(a) (West Supp. 1991). Section 1203.2 provides, in pertinent part, that a "court may revoke and terminate such probation if the interests of justice so require and the court . . . has reason to believe . . . that the person has violated any of the conditions of his or her probation." *Id.* (emphasis added).

4. *Rodriguez*, 51 Cal. 3d at 447, 795 P.2d at 789, 272 Cal. Rptr. at 619.

5. Prior to *Rodriguez*, the supreme court had not made any firm declarations on the standard of proof applicable to probation revocation hearings. In *People v. Coleman*, the court acknowledged that the standard of proof in hearings to revoke probation was lower than that required in criminal proceedings and stated in dicta that proof by a clear and convincing standard was sufficient to revoke probation. *Coleman*, 13 Cal. 3d 867, 876-77 n.8, 533 P.2d 1024, 1033 n.8, 120 Cal. Rptr. 384, 393 n.8 (1975). However, as the *Rodriguez* court emphasized, this was mere dicta which simply declared the heightened standard of proof to be sufficient, not mandatory. See *infra* notes 14-15 and accompanying text. See 1 B. WITKIN, CALIFORNIA EVIDENCE, *Introduction* § 26(1) (3d ed. 1986) (noting the various standards that courts have found applicable to probation revocation hearings).

firmed the superior court's decision to revoke his probation.⁶

The supreme court determined that the preponderance of the evidence standard satisfies constitutional due process and thus may properly be applied to probation revocation hearings.⁷ Noting that a hearing to revoke probation is not part of a criminal prosecution, the court utilized the United States Supreme Court's decision in *Morrissey v. Brewer*⁸ to declare that due process requirements in probation revocation hearings are less stringent than those imposed upon the state in criminal trials.⁹ Thus, a lower standard of proof is permissible.¹⁰ The court noted that one explanation for lowered due process requirements is that a defendant in a probation revocation hearing is not being deprived of "the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special [] restrictions."¹¹

The *Rodriguez* court declared that the preponderance of the evidence standard was consistent with both the California Penal Code and California case law.¹² Writing for the court, Justice Panelli¹³ declared that California Penal Code section 1203.2, which authorizes a tribunal to revoke probation if it has "reason to believe" that a probationer has broken the terms of his probation, should be read to allow facts in a probation revocation hearing to be proven by a preponderance of the evidence.¹⁴ In addition, the court stated that no case law

6. *Rodriguez*, 51 Cal. 3d at 447, 795 P.2d at 789, 272 Cal. Rptr. at 619.

7. *Id.* at 441, 795 P.2d at 785, 272 Cal. Rptr. at 615. The fifth amendment to the United States Constitution declares that "no person shall be held to answer for a . . . crime . . . without due process of law." U.S. CONST. amend. V. The fourteenth amendment imposes a similar duty upon the states, declaring that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

8. 408 U.S. 471 (1972). The *Morrissey* Court stated that "the full panoply of rights due a defendant in [a criminal] proceeding does not apply to parole revocations." *Id.* at 480. Because due process requirements for parole revocation hearings and probation revocation hearings are generally parallel, the *Rodriguez* court concluded that *Morrissey* authorized the adoption of a lower standard of proof for hearings to revoke probation.

For a general discussion of probation proceedings and the due process rights of a defendant in this process, see Comment, *Thirteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1982-1983*, 72 GEO. L. J. 249, 642-49 (1983).

9. *Rodriguez*, 51 Cal. 3d at 441, 795 P.2d at 785, 272 Cal. Rptr. at 615.

10. *Id.* at 441, 795 P.2d at 785, 272 Cal. Rptr. at 615.

11. *Id.* at 442, 795 P.2d at 786, 272 Cal. Rptr. at 616 (citing *Coleman*, 13 Cal. 3d at 877 n.8, 533 P.2d 1033 n.8, 120 Cal. Rptr. 393 n.8 (quoting *Morrissey*, 480 U.S. 480)).

12. *Id.* at 442-44, 195 P.2d at 786-87, 272 Cal. Rptr. at 616-17.

13. Justice Panelli delivered the majority opinion of the court, in which Justices Mosk, Eagleson, Kennard and Arabian concurred. Chief Justice Lucas and Justice Broussard wrote separate concurring opinions.

14. *Id.* (quoting CAL. PENAL CODE § 1203.2 (West Supp. 1991)). See 3 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* § 1695 (2d ed. 1989 & Supp. 1991) (discussing a court's statutory authority to revoke probation). As the *Rodriguez* court noted, no California statute specifically addresses the issue of the proper

dictated a standard of proof higher than a preponderance of the evidence standard.¹⁵ While the court's dicta in *People v. Coleman*¹⁶ stated that facts in a probation hearing *might* be proven by clear and convincing evidence, the *Rodriguez* court emphasized that it had never declared that such a standard was mandatory.¹⁷

Finally, the court underscored the importance of preserving and respecting judicial discretion in the probation revocation process.¹⁸ Flexibility and discretion are fundamental to a trial court because of the potential danger to society that may be present when a convicted criminal is allowed to remain free, and because of the judicial system's limited resources.¹⁹ The *Rodriguez* court believed that imposing a standard of proof higher than a preponderance of the evidence would have the detrimental effect of lengthening revocation proceedings and creating additional work for already overburdened judges.²⁰

In *Rodriguez*, the California Supreme Court has finally given a firm declaration of the standard of proof applicable in probation rev-

standard of proof in a hearing to revoke probation. *Rodriguez*, 51 Cal. 3d at 442, 795 P.2d at 786, 272 Cal. Rptr. at 616. While Justice Broussard thought that a clear and convincing standard would better serve the interests of public policy, he believed the court to be bound in its decision by section 1203.2 of the California Penal Code, which suggests a preponderance of the evidence standard. *Id.* at 449, 795 P.2d at 791, 272 Cal. Rptr. at 621 (Broussard, J., concurring).

15. *Rodriguez*, 51 Cal. 3d at 443, 795 P.2d at 787, 272 Cal. Rptr. at 617. For a discussion of cases dealing with revocation of probation, see 22 CAL. JUR. 3D *Criminal Law* § 3478 (1985 & Supp. 1991); 21 AM. JUR. 2D *Criminal Law* § 578 (1981 & Supp. 1990); 24 C.J.S. *Criminal Law* § 1560 (1989).

16. 13 Cal. 3d 867, 876-77 n.8, 533 P.2d 1024, 1033 n.8, 120 Cal. Rptr. 384, 393 n.8 (1975).

17. *Rodriguez*, 51 Cal. 3d at 444, 272 Cal. Rptr. at 617, 795 P.2d at 787; see *infra* note 4. In his concurring opinion, Justice Lucas focused on the question of why a clear and convincing standard was not necessary in a probation revocation hearing. *Id.* at 447, 795 P.2d at 789, 272 Cal. Rptr. at 619 (Lucas, C.J., concurring). Justice Lucas concluded that

the fact that revocation of probation affects an interest tied to narrowly tailored restrictions distinguishes the revocation hearing from proceedings at which an intermediate standard applies. In short, the hearing threatens the probationer with a sanction less significant than those at stake in proceedings in which the high court has required proof by clear and convincing evidence.

Id. at 449, 795 P.2d at 791, 272 Cal. Rptr. at 621 (Lucas, C.J., concurring).

18. *Id.* at 445, 272 Cal. Rptr. at 618, 795 P.2d at 788. See 3 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* §§ 1695, 1696 (2d ed. 1989 & Supp. 1991) (discussing a court's broad discretion to revoke probation).

19. *Rodriguez*, 51 Cal. 3d at 445, 795 P.2d at 788, 272 Cal. Rptr. at 618.

20. *Id.* at 445-46, 795 P.2d at 788, 272 Cal. Rptr. at 618. The court stated that requiring a higher standard of proof "could result in poor-risk convicted criminals remaining at large and would further tax limited judicial resources by complicating and lengthening revocation proceedings." *Id.* at 446, 795 P.2d at 788, 272 Cal. Rptr. at 618 (citations omitted).

ocation hearings. This decision enables the lower courts to act with greater certainty when facing probation revocation issues. Because the court adopted the preponderance of the evidence standard, defendants in probation revocation hearings will face a greater danger of imprisonment than their counterparts in criminal prosecutions. Ultimately, the court's ruling in *Rodriguez* means that judges will maintain the flexibility in the probation process which is necessary to protect society.

MARY KAY ROGERS

VI. DEATH PENALTY LAW — SURVEY VI

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

The California Supreme Court rendered opinions on thirteen death penalty cases and one appeal concerning a writ of mandate involving a special circumstance decision¹ between July and December 1990.² The court affirmed all thirteen death sentences, relying heavily on

1. The court's review of only fourteen cases demonstrates its continuing difficulties in reducing its backlog due to the growing number of death penalty cases. See *California Supreme Court Survey — Death Penalty Law*, 18 PEPPERDINE L. REV. 716 (1991) [hereinafter *Death Penalty V*] (citing *The Exodus of California's High Court*, Nat'l L. J., May 14, 1990, at 29; *California Supreme Court Survey — Death Penalty Law*, 17 PEPPERDINE L. REV. 1095 (1990) [hereinafter *Death Penalty IV*]).

2. This survey addresses the following cases, listed alphabetically by defendants: *People v. Anderson*, 52 Cal. 3d 453, 801 P.2d 1107, 276 Cal. Rptr. 356 (1990); *In re Fields*, 51 Cal. 3d 1063, 800 P.2d 862, 275 Cal. Rptr. 384 (1990); *People v. Frank*, 51 Cal. 3d 718, 798 P.2d 1215, 274 Cal. Rptr. 372 (1990), *cert. denied*, 111 S. Ct. 2816 (1991); *People v. Gonzalez*, 51 Cal. 3d 1179, 800 P.2d 1159, 275 Cal. Rptr. 729 (1990), *petition for cert. filed*, (May 28, 1991) (No. 90-8163); *People v. Hayes*, 52 Cal. 3d 577, 802 P.2d 376, 276 Cal. Rptr. 874 (1990), *petition for cert. filed*, (July 11, 1991) (No. 91-5082); *People v. Kaurish*, 52 Cal. 3d 648, 802 P.2d 278, 276 Cal. Rptr. 788 (1990), *petition for cert. filed*, (May 28, 1991) (No. 90-8201); *People v. Kelly*, 51 Cal. 3d 931, 800 P.2d 516, 275 Cal. Rptr. 160 (1990); *People v. Medina*, 51 Cal. 3d 870, 799 P.2d 1282, 274 Cal. Rptr. 849 (1990); *People v. Sanders*, 51 Cal. 3d 471, 797 P.2d 561, 273 Cal. Rptr. 537 (1990), *cert. denied*, 111 S. Ct. 2249 (1991); *People v. Stankewitz*, 51 Cal. 3d 72, 793 P.2d 23, 270 Cal. Rptr. 817 (1990), *cert. denied*, 111 S. Ct. 1342 (1991); *People v. Taylor*, 52 Cal. 3d 719, 801 P.2d 1142, 276 Cal. Rptr. 391 (1990), *petition for cert. filed*, (June 12, 1991) (No. 90-8308); *People v. Whitt*, 51 Cal. 3d 620, 798 P.2d 849, 274 Cal. Rptr. 252 (1990), *cert. denied*, 111 S. Ct. 2816 (1991); *People v. Wright*, 52 Cal. 3d 367, 802 P.2d 221, 276 Cal. Rptr. 731 (1990), *modified*, 52 Cal. 3d 1282c, — P.2d —, — Cal. Rptr. — (1991), *petition for cert. filed*, (May 20, 1991) (No. 90-8130). The case examined on interlocutory appeal involving a writ of mandate was *Curl v. Superior Court*, 51 Cal. 3d 1292, 801 P.2d 292, 276 Cal. Rptr. 49 (1990). Hereinafter, subsequent histories will be omitted.

the "harmless error" doctrine.³ The court established new policies concerning timeliness for filing a writ of habeas corpus.⁴ First, the court increased the time allotted for the filing of the writ.⁵ Second, the court set forth new methods concerning what may establish absence of substantial delay or what demonstrates good cause for such delay in filing.⁶

This survey highlights selected defense arguments including ineffective assistance of counsel, instructional errors, prosecutorial misconduct, jury selection issues, proportionality of the death sentence, and constitutionality of the death penalty. For clarification of the issues addressed on automatic appeal this survey is divided into phases, as at trial. Although defendant claims differ according to the particular facts of each case, this survey addresses them in broad categories according to the general issue raised.⁷

II. NEW CALIFORNIA SUPREME COURT DEATH PENALTY POLICIES

The California Supreme Court amended the timeliness requirements for filing petitions for writs of habeas corpus.⁸ Under the amendment, the court expanded the rule that a petition must be filed "without substantial delay."⁹ Under standard 1-1.1, the court changed the definition of substantial delay from sixty to ninety days after the filing of appellant's reply brief on direct appeal becomes due.¹⁰

The court also amended its rules by allowing a petitioner to file an appeal after the allotted ninety days, but only upon defense counsel's

3. The court adhered to its previous approach that "error is not reversible unless it is prejudicial." See *Death Penalty IV*, *supra* note 1, at 1096 (citing 9 B. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 324 (1985)) (emphasis in original).

4. See *infra* notes 7-9 & 12 and accompanying text.

5. See *infra* notes 7, 8, & 10-12 and accompanying text.

6. See *infra* notes 7-12 and accompanying text.

7. Five previous surveys regarding the California death penalty are: *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) [hereinafter *Death Penalty III*]; *Death Penalty IV*, *supra* note 1; *Death Penalty V*, *supra* note 1.

8. CAL. R. CT., *Supreme Court Policies Regarding Cases Arising From Judgments of Death*, Policy 3, at 815 [hereinafter *Supreme Court Policies*].

9. *Id.*

10. Standard 1-1.1 reads: "[a] petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 90 days after the final due date for the filing of appellant's reply brief on the direct appeal. [As amended effective Sept. 19, 1990]." *Id.*

showing that the petitioner filed "within a reasonable time" after discovery of both a "factual" and "legal basis for the claim".¹¹ The court may dismiss the petition if it does not meet these two timeliness requirements or if the petitioner cannot demonstrate "good cause" for noncompliance.¹²

The timeliness standard allows the court to liberally use its discretion. Standard 1.3 states that even if a motion is untimely, the court "may," rather than "must," dismiss the motion.¹³ Thus, even though facially stringent, the rule allows the court to exercise its equitable judgment, especially in cases of extenuating circumstances.

III. *CURL V. SUPERIOR COURT*: CALIFORNIA SUPREME COURT ESTABLISHES THE APPROPRIATE METHOD OF REVIEW FOR COLLATERAL ATTACKS ON THE CONSTITUTIONAL VALIDITY OF PRIOR-MURDER CONVICTIONS UNDERLYING SPECIAL CIRCUMSTANCE ALLEGATIONS

In *Curl v. Superior Court*,¹⁴ the court granted review to "settle the question of whether the *constitutional validity* of a prior murder conviction underlying a prior-murder special-circumstance may be collaterally attacked via a pretrial motion to strike the special-circumstance."¹⁵ The court also determined the appropriate standard of proof a defendant must demonstrate before the prior-murder will be excluded from special circumstance.¹⁶

The court held that the defense in a penalty case may challenge the constitutional validity of a conviction by pretrial motion.¹⁷ Further, the defendant must be given an evidentiary hearing if a motion to strike is made.¹⁸ The court established that the defendant's bur-

11. Standard 1-1.2 allows counsel to prove an "absence of substantial delay" after ninety days if the petition "alleges with specificity facts showing [it] was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis for the claim. [As amended effective Sept. 19, 1990]." *Id.* (emphasis in original).

12. Standard 1-2 allows for any delay not meeting the requirements of standards 1-1.1 and 1-1.2 if the petitioner "demonstrate[s] good cause for delay." Standard 1-3 calls for the discretionary denial of any petition that does not meet the above requirements as untimely. *Id.* at 816.

13. *Supreme Court Policies*, *supra* note 8, at 816. See, e.g., *Death Penalty III*, *supra* note 6, at 538-39. *Death Penalty III* also provides an analysis on other timeliness issues addressed by the California Supreme Court in *Supreme Court Policies* including delays due to withdrawal of counsel and a review of habeas corpus procedures by a federal panel. *Id.* (citing *Supreme Court Policies*, *supra* note 8, Policies 2 and 3).

14. *Curl v. Superior Court*, 51 Cal. 3d 1292, 801 P.2d 292, 276 Cal. Rptr. 49 (1990).

15. *Id.* at 1295-96, 801 P.2d at 293, 276 Cal. Rptr. at 50 (emphasis in original).

16. *Id.* at 1296, 801 P.2d at 293, 276 Cal. Rptr. at 50.

17. *Id.*

18. The court stated the procedure would be governed by *People v. Coffey* and *People v. Sumstine*. *People v. Coffey*, 67 Cal. 2d 204, 217, 430 P.2d 15, 24, 60 Cal. Rptr. 457, 466 (1967) (establishing the five-step approach defendant and trial court must fol-

den of proof is a preponderance of the evidence.¹⁹

In *Curl*, the defendant's pretrial motion sought to strike a prior-murder conviction introduced as special circumstance, alleging he was on drugs when he pled guilty to the 1977 murder.²⁰ The trial court examined the merit of the motion in an evidentiary hearing and concluded the defendant had made a satisfactory showing shifting the burden to the prosecutor, who then established the conviction was valid by "clear and convincing evidence."²¹ The defendant unsuccessfully petitioned the court of appeal for a writ of mandate on the motion.²² The defendant then petitioned the California Supreme Court which granted review.²³

The supreme court stated that the first issue was whether the right to a jury trial on "the truth" of a prior conviction underlying special circumstance also includes the right to a jury trial when the defendant is trying to collaterally attack the prior conviction's "constitutional validity."²⁴ The court concluded that under Penal Code section 190.1(a), the trier of fact must concurrently decide the truth of the prior conviction as well as the defendant's guilt in the present case.²⁵ However, when the issue concerns a prior-murder underlying a special circumstance allegation, a separate hearing is required.²⁶

Second, the court held that when carrying out the additional proceeding under Penal Code section 190.4(a), it is the trier of fact who determines the truth of the alleged special circumstance.²⁷ The court concluded that when sections 190.1 and 190.4 are read together, they

low for a pretrial hearing on constitutional issue); *People v. Sumstine*, 36 Cal. 3d 909, 923, 687 P.2d 904, 913, 206 Cal. Rptr. 707, 716 (1984) (same).

19. *Curl*, 51 Cal. 3d at 1296, 801 P.2d at 293, 276 Cal. Rptr. at 50.

20. *Id.*

21. *Id.* at 1296-98, 801 P.2d at 293-95, 276 Cal. Rptr. at 50-52.

22. *Id.* at 1298-99, 801 P.2d at 295, 276 Cal. Rptr. at 52. The California Supreme Court noted that the court of appeal erroneously stated that the defendant's pretrial motion was governed by Penal Code section 995. *Id.* (citing CAL. PENAL CODE § 995 (West 1988)). The high court stated the appellate court erred when it held the applicable standard to be "whether 'reasonable cause' has been shown to bind the defendant over for trial on the special circumstance allegation" and that a new evidentiary hearing was not needed because the trial court applied the elevated clear and convincing evidence standard. *Id.*

23. *Id.* at 1299, 801 P.2d at 295, 276 Cal. Rptr. at 52.

24. *Curl*, 51 Cal. 3d at 1299, 801 P.2d at 295, 276 Cal. Rptr. at 52.

25. *Id.* (citing CAL. PENAL CODE § 190.1(a) (West 1988)).

26. *Id.* (citing CAL. PENAL CODE § 190.1(b) (West 1988)). The court noted that, under section 190.1(b), special circumstance allegations must be accompanied by "separate 'further proceedings'" to determine the truth. *Id.*

27. *Id.* at 1299-1300, 801 P.2d at 295, 276 Cal. Rptr. at 52 (citing CAL. PENAL CODE § 190.4(a) (West 1988)). The court interpreted this section to require the jury to decide

do not provide a right to a jury trial to decide the constitutional validity of a prior conviction.²⁸

The court noted that there are positive policy considerations in deciding the collateral attack before the present murder trial, stating that the current jury would be mentally unable to disregard a previous murder conviction, even if constitutionally invalid.²⁹ The trial court, however, should render a decision on the constitutional validity of the prior conviction only after the jury has returned a guilty verdict on the current murder charge.³⁰

The court then addressed the burden of proof required when such a challenge is made. The court reestablished the rule that the defendant bears the burden of proof for such a challenge³¹ and held that the appropriate level of proof is by a "preponderance of the evidence."³²

The court concluded by identifying the proper procedure for a defendant to collaterally attack a prior-murder special circumstance. The defendant must first submit facts sufficiently compelling to justify a pretrial hearing on the motion.³³ An evidentiary hearing must then be administered by the trial court.³⁴ Only after the prosecution has made a prima facie showing of the prior conviction's existence does the burden shift to the defendant to establish the conviction's constitutional invalidity by a preponderance of the evidence.³⁵

whether the defendant was actually convicted of the prior-murder. *Id.* at 1301, 801 P.2d at 296, 276 Cal. Rptr. at 53.

28. *Id.* at 1300 n.5, 801 P.2d at 296 n.5, 276 Cal. Rptr. at 53 n.5.

29. *Curl*, 51 Cal. 3d at 1302, 801 P.2d at 297, 276 Cal. Rptr. at 54 (citing *People v. Curtis*, 70 Cal. 2d 347, 360, 450 P.2d 33, 41, 74 Cal. Rptr. 713, 721 (1969) ("California policy clearly requires the question of the constitutionality of a prior conviction to be determined by the court and not the jury . . .")).

30. *Id.* at 1302, 801 P.2d at 297, 276 Cal. Rptr. at 54.

31. *Id.* at 1303, 801 P.2d at 298, 276 Cal. Rptr. at 55. The court stated that in this case the defendant bore the burden of proving that he was under the influence of drugs when he waived his constitutional rights. The supreme court affirmed the trial court's determination that, based on the evidence presented at the pretrial evidentiary hearing, the defendant had made a knowing waiver. *Id.* at 1304-05, 801 P.2d at 299, 276 Cal. Rptr. at 55-56. The supreme court further held that the court of appeal erroneously held that the prosecution bore the burden under section 190.4(a) which states that the People only bear the burden of proving "the truth" of the alleged prior conviction. *Id.* at 1305, 801 P.2d at 299, 276 Cal. Rptr. at 56.

32. *Id.* at 1305, 801 P.2d at 299, 276 Cal. Rptr. at 56. The court stated that because section 190.4 of the Penal Code is silent as to the burden of proving constitutional invalidity, section 115 of the Evidence Code governs, with its requirement of proof by a preponderance of the evidence. *Id.* (citing CAL. EVID. CODE § 115 (West 1988)). The court also cited case authority holding that the appropriate standard when determining similar constitutional questions is proof by a preponderance of the evidence. *Id.* at 1305-06, 801 P.2d at 300, 276 Cal. Rptr. at 57.

33. *Id.* at 1306, 801 P.2d at 300, 276 Cal. Rptr. at 57.

34. *Id.*

35. *Id.* at 1306-07, 801 P.2d at 300, 276 Cal. Rptr. at 57.

IV. GUILT PHASE ISSUES

A. Jury Issues

Seven of the cases surveyed involved alleged errors concerning jury selection during the guilt phase of the trial, raising issues of *Wheeler* and *Witherspoon-Witt* errors.³⁶ These errors concern the dismissal of jurors on voir dire.

1. *Wheeler* Error

Four cases specifically addressed *Wheeler* error on appeal.³⁷ *Wheeler* error occurs when a peremptory challenge is used to exclude from the jury any member of an identifiable class due to a presumed "group bias" based on "racial, religious, ethnic, or similar grounds."³⁸ If defense counsel wants to raise the issue of *Wheeler* error, a timely challenge must be made and a prima facie case of discrimination must be shown.³⁹

In *People v. Hayes*, the defendant claimed a violation of his cross-section right by the use of peremptory challenges to exclude black persons from the jury.⁴⁰ Because the defendant did not make a timely challenge, the court also refused to review the charge that persons with Spanish surnames had been improperly excluded.⁴¹ Moreover, even though the defense made a prima facie showing for review, the court held the prosecutor's exclusion explanations were

36. See *infra* notes 37 and 52 and accompanying text.

37. *People v. Hayes*, 52 Cal. 3d 577, 802 P.2d 376, 276 Cal. Rptr. 874 (1990); *People v. Sanders*, 51 Cal. 3d 471, 797 P.2d 561, 273 Cal. Rptr. 537 (1990); *People v. Stankewitz*, 51 Cal. 3d 72, 793 P.2d 23, 279 Cal. Rptr. 817 (1990); *People v. Wright*, 52 Cal. 3d 367, 802 P.2d 221, 276 Cal. Rptr. 731 (1990).

38. *People v. Wheeler*, 22 Cal. 3d 258, 276, 583 P.2d 748, 761, 148 Cal. Rptr. 890, 902 (1978). See generally *Batson v. Kentucky*, 476 U.S. 79 (1986) (jury discrimination based upon race not allowed). *Wheeler* error is based upon the constitutional right to a "trial by jury drawn from a representative cross-section of the community." *Wheeler*, 22 Cal. 3d at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903. See also U.S. CONST. amend. VI; CAL. CONST. art. I, § 16.

39. *Wheeler*, 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. The *Wheeler* court stated that a defendant wishing to raise the issue must keep an extensive record of the circumstances during voir dire, must establish that the excluded persons were "members of a cognizable group within the meaning of the representative cross-section rule," and must prove a "strong likelihood" that the exclusion was the result of group and not specific bias. *Id.* Once the trial court decides a prima facie case has been made, the burden shifts to the opponent to explain why the peremptory challenges were valid. *Id.* at 281-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 906.

40. *People v. Hayes*, 52 Cal. 3d 577, 603, 802 P.2d 376, 390-91, 276 Cal. Rptr. 874, 888 (1990). See *supra* note 38 (jury must be drawn from cross-section of the community).

41. *Hayes*, 52 Cal. 3d at 605, 802 P.2d at 392, 276 Cal. Rptr. at 889.

facially proper and gave considerable deference to the trial court's conclusion that the challenges were not based on group bias.⁴²

The court in *People v. Sanders* stated that despite a timely challenge, the defendant failed to make a prima facie showing that there was a strong likelihood of group bias against persons with Spanish surnames.⁴³ Again, the court showed its strong deference to the trial court's conclusion in such factual determinations.⁴⁴

The third case alleging *Wheeler* error was *People v. Stankewitz*.⁴⁵ In that case the court refused to even address the record because the defendant raised no objection at trial, the challenge was not timely, and no evidence establishing a prima facie case of group bias was presented.⁴⁶ Therefore, the burden never shifted to the prosecutor to justify his challenge.⁴⁷

People v. Wright did not raise a true *Wheeler* issue; however, the defense did allege the prosecutor discriminated against a black juror based upon race.⁴⁸ The court dismissed the claim for failure to establish a prima facie case because there could be no "purposeful discrimination or systematic exclusion" when only one black juror was peremptorily challenged.⁴⁹

42. *Id.* at 606, 802 P.2d at 393, 276 Cal. Rptr. at 890. The prosecutor excused one black juror based on an outstanding warrant for her arrest and because of her current divorce proceeding from a law enforcement employee. A second black juror was excused for death penalty scruples, while a third black juror was excused for reasons relating to police department employment and for suspiciously claiming to have a "photostatic" mind. The final black juror was excused because her daughter employed a man whose stolen wallet was found at the crime scene. *Id.* at 605-06, 802 P.2d at 392-93, 276 Cal. Rptr. at 890.

43. *People v. Sanders*, 51 Cal. 3d 471, 497, 797 P.2d 561, 574, 273 Cal. Rptr. 537, 550 (1990). The court upheld the challenges excluding four hispanics for individual and not ethnic violations on various grounds including reservations against the death penalty, language problems, financial difficulty, and prior arrest convictions. *Id.* at 498-500, 797 P.2d at 574-76, 273 Cal. Rptr. at 550-52.

44. *Id.* at 501, 797 P.2d at 576, 273 Cal. Rptr. at 552 (citing *People v. Johnson*, 47 Cal. 3d 1194, 1221, 767 P.2d 1047, 1057, 255 Cal. Rptr. 569, 579 (1989) (trial court aware of its duty to be sensitive when governing the use of peremptory challenges).

45. *People v. Stankewitz*, 51 Cal. 3d 72, 793 P.2d 23, 270 Cal. Rptr. 817 (1990).

46. *Id.* at 105, 793 P.2d at 45, 270 Cal. Rptr. at 839.

47. *Id.*

48. The defendant did not directly raise the *Wheeler* error issue alleging jurors were eliminated based on a cognizable group bias, but relied instead on *Batson v. Kentucky*, stating removal was for racial reasons violating the equal protection clause. *People v. Wright*, 52 Cal. 3d 367, 399, 802 P.2d 221, 241, 276 Cal. Rptr. 731, 751 (1990) (citing *Batson v. Kentucky*, 467 U.S. 79 (1986)). The court cited the test from *Batson* stating that to establish "discriminatory motive, 'the defendant must first show that he is a member of a cognizable racial group [citation], and that the prosecutor has exercised peremptory challenges to remove from the venire members of defendant's race.'" *Id.* (quoting *Batson*, 476 U.S. at 96).

49. *Id.* at 400, 802 P.2d at 242, 276 Cal. Rptr. at 752.

2. *Witherspoon-Witt* Error

A second type of jury selection issue is *Witherspoon-Witt* error.⁵⁰ This occurs when a juror is dismissed because of objections to the death penalty without a finding by the trial court that the juror would not be able to perform impartially the duties of a juror in applying the law.⁵¹

The court heard five appeals based on *Witherspoon-Witt* error.⁵² In *People v. Kaurish*, the supreme court reaffirmed the application of the *Witt* standard used in conjunction with *Witherspoon*,⁵³ stating that the veniremen in question were properly excused due to their continual contentions that they would be unable to apply the death penalty.⁵⁴ The court also rejected the defendant's contention that the veniremen's answers were ambiguous and, therefore, did not satisfy the exclusion standard.⁵⁵ The court further stated that even if the juror qualification is ambiguous, "the trial court's determination on substantial evidence of the juror's fitness is binding upon appellate courts."⁵⁶ The court warned, however, that a juror will not be automatically excused for merely expressing personal opposition if the belief would not substantially impair the administration of the juror's duty and oath.⁵⁷

50. The original error was labeled *Witherspoon* after *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *Witherspoon* error exists when jurors are excused "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522. However, the strict standard was later modified in *Wainwright v. Witt*, 469 U.S. 412 (1985). In *Witt*, the United States Supreme Court adopted a lesser standard, allowing removal when the prospective juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 424. The California Supreme Court adopted this standard in conjunction with *Witherspoon* in *People v. Ghent*, 43 Cal. 3d 739, 767, 739 P.2d 1250, 1268, 239 Cal. Rptr. 82, 100 (1987).

51. *Witt*, 469 U.S. at 425-26.

52. *People v. Kaurish*, 52 Cal. 3d 648, 802 P.2d 278, 276 Cal. Rptr. 788 (1990); *People v. Kelly*, 51 Cal. 3d 931, 800 P.2d 516, 275 Cal. Rptr. 160 (1990); *People v. Sanders*, 51 Cal. 3d 471, 797 P.2d 561, 273 Cal. Rptr. 537 (1990); *People v. Stankewitz*, 51 Cal. 3d 72, 793 P.2d 23, 270 Cal. Rptr. 817 (1990); *People v. Wright*, 52 Cal. 3d 367, 802 P.2d 221, 276 Cal. Rptr. 731 (1990), *petition for cert. filed*, (May 20, 1991) (No. 90-8130).

53. See *supra* note 50 (California Supreme Court adoption of the *Witt* standard).

54. *People v. Kaurish*, 52 Cal. 3d 648, 697-98, 802 P.2d 278, 304, 276 Cal. Rptr. 788, 814 (1990).

55. *Id.* at 698, 802 P.2d at 304, 276 Cal. Rptr. at 814.

56. *Id.* (citing *People v. Fields*, 35 Cal. 3d 329, 356, 673 P.2d 680, 696, 197 Cal. Rptr. 803, 820 (1983)). See also *People v. Stankewitz*, 51 Cal. 3d 72, 103, 793 P.2d 23, 44, 270 Cal. Rptr. 817, 838 (1990) (judge's discretion on conflicting testimony of juror's ability to be impartial is generally binding).

57. *Kaurish*, 52 Cal. 3d at 699, 802 P.2d at 304-05, 276 Cal. Rptr. at 814-15 (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)).

In *People v. Sanders*, the defendant was denied his appeal that the removal of the juror in question violated the *Witt* standard because the court reasoned the juror's "antipathy" towards the death penalty would substantially impair his duty as a juror.⁵⁸

In *People v. Stankewitz*, the court rejected the defendant's claim that the trial court erred by not allowing the defendant's challenges for cause made against a few prospective jurors for bias adverse to the defendant.⁵⁹ The court stated that because the defendant failed to exercise his remaining peremptory challenges, no error could be claimed.⁶⁰ The court rendered the same conclusion on similar facts in *People v. Kelly*.⁶¹

Finally, in *People v. Wright*, the defendant contended that two jurors were wrongly excluded under *Witherspoon*.⁶² After the court quickly ruled that the jurors had been properly excused due to their inability to vote for the death penalty, it also rejected defendant's assertion that the trial court's limit of only three questions for *Witherspoon* voir dire was prejudicial.⁶³

The court also curtly dismissed all contentions that the death penalty question qualification of jurors was unconstitutional.⁶⁴ Among the contentions raised and rejected was that the qualification violated a defendant's right to a fair, impartial, and representative jury.⁶⁵

3. Miscellaneous Jury Contentions

The court in *People v. Medina* briefly addressed whether an entire

58. *People v. Sanders*, 51 Cal. 3d 471, 503, 797 P.2d 561, 578, 273 Cal. Rptr. 537, 554 (1990). The supreme court also rejected the defendant's contention that the trial court had an obligation to instruct the juror that he had a "civic duty" to apply the law and disregard personal belief. *Id.* (citing *People v. Miranda*, 44 Cal. 3d 57, 96, 744 P.2d 1127, 1151, 241 Cal. Rptr. 594, 618 (1987) (trial court not obligated under *Witherspoon* to give civic duty instructions to jurors)).

59. *Stankewitz*, 51 Cal. 3d at 103-04, 793 P.2d at 43-44, 270 Cal. Rptr. at 837-38. The defendant claimed juror bias, alleging that some of the challenged jurors said they would "automatically vote" for the death sentence. *Id.*

60. *Id.* at 103, 793 P.2d at 44, 270 Cal. Rptr. at 838.

61. *People v. Kelly*, 51 Cal. 3d 931, 960, 800 P.2d 516, 533-34, 275 Cal. Rptr. 160, 177-78 (1990).

62. *People v. Wright*, 52 Cal. 3d 367, 417, 802 P.2d 221, 254, 276 Cal. Rptr. 731, 764 (1990).

63. *Id.* at 419, 802 P.2d at 255, 276 Cal. Rptr. at 764-65. The court noted that the right to voir dire stems from the idea of promoting impartial juries, not the United States Constitution. Though a trial judge may not completely eliminate counsel questions, the supreme court maintained that in this case a three-question maximum was permissible because the trial court had already conducted its own extensive questioning. *Id.*

64. *Id.*

65. *Id.* at 419, 802 P.2d at 255, 276 Cal. Rptr. at 752. The court repeatedly referred to *People v. Melton*, 44 Cal. 3d 713, 732, 750 P.2d 741, 750, 244 Cal. Rptr. 867, 876 (1988) and *Lockhart v. McCree*, 476 U.S. 162, 174-76 (1986), to support the constitutionality of the death penalty question qualification.

venire must be discharged when there is the possibility of prospective juror bias against the defendant.⁶⁶ The court stated that since the trial court held a bias hearing on the matter and that none of the jurors implicated actually served on the jury, the appropriate relief was further voir dire and not the more extreme solution of discharging the entire venire.⁶⁷

In *People v. Anderson*, the defendant alleged jury misconduct in its submission of questions before all the evidence had been presented.⁶⁸ The court stated that merely questioning prior to deliberations does not prove the jury began improperly developing premature conclusions.⁶⁹ The court also held that a juror substitution based on cause does not necessitate a mistrial.⁷⁰ In *People v. Gonzalez*, the court also rejected the defendant's contention that the substitution of the trial judge, absent defendant's consent, was error and in violation of the due process rights.⁷¹

B. Prosecutorial Misconduct

An important source of appeals in the guilt phase concerns accusations of prosecutorial misconduct. Nine of the thirteen cases reviewed addressed this allegation.⁷² The charges included failure to disclose material evidence,⁷³ improper direct examination,⁷⁴ and mis-

66. *People v. Medina*, 51 Cal. 3d 870, 888, 799 P.2d 1282, 1293, 274 Cal. Rptr. 849, 860 (1990).

67. *Id.* at 889, 799 P.2d at 1294, 274 Cal. Rptr. at 861.

68. *People v. Anderson*, 52 Cal. 3d 453, 471, 801 P.2d 1107, 1122, 276 Cal. Rptr. 356, 371 (1990). Under Penal Code section 1122, a jury must not form opinions concerning the case until all evidence has been offered. CAL. PENAL CODE § 1122 (West 1988).

69. *Anderson*, 52 Cal. 3d at 471, 801 P.2d at 1122, 276 Cal. Rptr. at 371-72.

70. *Id.* at 472, 801 P.2d at 1123, 276 Cal. Rptr. at 372. The court noted that if an alternate juror is accessible, the jury must only set aside its past deliberations and start again, including the new juror. *Id.* See also *People v. Wright*, 52 Cal. 3d 367, 420, 802 P.2d 221, 255-56, 276 Cal. Rptr. 731, 765-66 (1990) (no error for failure to give instruction because deliberations had not started).

71. *People v. Gonzalez*, 51 Cal. 3d 1179, 1211-12, 800 P.2d 1159, 1172-73, 275 Cal. Rptr. 729, 742-43 (1990) (holding that trial judge's absence for one day during jury deliberations was not an error, nor was the defendant's consent to substitution required).

72. *People v. Anderson*, 52 Cal. 3d 453, 801 P.2d 1107, 276 Cal. Rptr. 356 (1990); *People v. Frank*, 51 Cal. 3d 718, 798 P.2d 1215, 274 Cal. Rptr. 372 (1990); *People v. Gonzalez*, 51 Cal. 3d 1179, 800 P.2d 1159, 275 Cal. Rptr. 729 (1990); *People v. Hayes*, 52 Cal. 3d 577, 802 P.2d 376, 276 Cal. Rptr. 874 (1990); *People v. Kaurish*, 52 Cal. 3d 648, 802 P.2d 278, 276 Cal. Rptr. 788 (1990); *People v. Kelly*, 51 Cal. 3d 931, 800 P.2d 516, 275 Cal. Rptr. 160 (1990); *People v. Medina*, 51 Cal. 3d 870, 799 P.2d 1282, 274 Cal. Rptr. 849 (1990); *People v. Taylor*, 52 Cal. 3d 719, 801 P.2d 1142, 276 Cal. Rptr. 391 (1990); *People v. Wright*, 52 Cal. 3d 367, 802 P.2d 221, 276 Cal. Rptr. 731 (1990).

73. *Hayes*, 52 Cal. 3d at 611-12, 802 P.2d at 396, 276 Cal. Rptr. at 894 (holding failure to disclose amended complaint for impeachment of prosecutorial witness not preju-

conduct during closing statement.⁷⁵ The supreme court quickly dismissed a majority of these contentions where defense counsel had failed to make objections or admonitions at trial when the purported misconduct occurred.⁷⁶ The court relied heavily on its policy that if defendant raised no objection at that time or if an admonition might have cured the misconduct, the objection on appeal is waived.⁷⁷ Further, in cases examined for merit, the court concluded the error was not prejudicial, giving great deference to the "harmless error" doctrine.⁷⁸ The court was very thorough in its examination of alleged prosecutorial misconduct in all trial phases.⁷⁹

C. Ineffective Assistance of Counsel

Another broad area frequently raised on appeal is ineffective assistance of counsel. Although raised throughout all three phases of seven cases, the issue never resulted in reversal.⁸⁰ In order to obtain

dicial since there was no reasonable probability that proceeding would have resulted differently).

74. *Kaurish*, 52 Cal. 3d at 676-77, 802 P.2d at 289-90, 276 Cal. Rptr. at 799-800 (finding the prosecutor's comments regarding defendant's dealing in drugs fell within the prosecutor's privilege to make inferences from trial evidence). The court also held that discrediting the defendant's expert witness did not deny defendant a fair trial where an admonition would cure any impropriety. *Id.* at 678-79, 802 P.2d at 291, 276 Cal. Rptr. at 801.

75. *Wright*, 52 Cal. 3d at 436, 802 P.2d at 267, 276 Cal. Rptr. at 777 (holding the prosecution's comments on defendant's lack of remorse was proper and not misconduct).

76. The court repeatedly referred to *People v. Green*, 27 Cal. 3d 1, 27-29, 609 P.2d 468, 484, 164 Cal. Rptr. 1, 16-17 (1980), for the proposition that such objections must be raised at the time of the actual misconduct or the defendant cannot raise the issue on appeal. See also *People v. Bell*, 49 Cal. 3d 502, 535, 778 P.2d 129, 147, 262 Cal. Rptr. 1, 19 (1989). The *Bell* court, in citing *Green*, stated the applicable standard of review for defense objections not raised at trial:

[T]he initial question to be decided . . . is whether a timely objection and admonition would have cured the harm. If it would then [the] contention must be rejected . . . ; if it would not, the court must then and only then reach the issue whether [based] on the whole record the harm resulted in a miscarriage of justice within the meaning of the Constitution.

Id. (citing *Green*, 27 Cal. 3d at 34, 609 P.2d at 487-88, 164 Cal. Rptr. at 20-21). See, e.g., *Death Penalty IV*, *supra* note 1, at 1102.

77. For a discussion of the consequences of a failure to object, see *supra* note 76 and accompanying text.

78. For a discussion of the harmless error doctrine, see *supra* note 3 and accompanying text.

79. Allegations regarding prosecutorial misconduct were raised at every trial phase. The court rejected all contentions based on timeliness, harmless error, or proper prosecutorial conduct.

80. The following cases presented the ineffective assistance of counsel issue for review: *In re Fields*, 51 Cal. 3d 1063, 800 P.2d 862, 275 Cal. Rptr. 384 (1990); *People v. Frank*, 51 Cal. 3d 718, 798 P.2d 1215, 274 Cal. Rptr. 372 (1990); *People v. Gonzalez*, 51 Cal. 3d 1179, 800 P.2d 1159, 275 Cal. Rptr. 729 (1990); *People v. Hayes*, 52 Cal. 3d 577, 802 P.2d 376, 276 Cal. Rptr. 874 (1990); *People v. Kaurish*, 52 Cal. 3d 648, 802 P.2d 278, 276 Cal. Rptr. 788 (1990); *People v. Stankewitz*, 51 Cal. 3d 72, 793 P.2d 23, 270 Cal. Rptr. 817 (1990); *People v. Wright*, 52 Cal. 3d 367, 802 P.2d 221, 276 Cal. Rptr. 731 (1990).

reversal on this issue, a defendant must show: (1) the defense counsel was deficient,⁸¹ and (2) the deficiency must have actually prejudiced the defendant.⁸²

In six cases the court found that counsel's assistance did not fall below the minimum standards of assistance.⁸³ Five cases also found that the attorney error at issue was not prejudicial enough to fail the "reasonable probability" standard.⁸⁴ This standard was defined in *In re Fields*, where the court addressed defense counsel's failure to offer mitigating facts concerning defendant's background and character.⁸⁵

81. The court stated that a defendant must prove that the counsel's assistance was so defective as to fall "below an objective standard of reasonableness . . . under prevailing professional norms." *In re Fields*, 51 Cal. 3d at 1069, 800 P.2d at 865, 275 Cal. Rptr. at 387 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

82. The court applied a very strict standard as to what can establish a prejudicial error. The court stated:

[I]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding . . . [Paragraph] The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome.

In re Fields, 51 Cal. 3d at 1070, 800 P.2d at 865, 275 Cal. Rptr. at 387 (quoting *Strickland*, 466 U.S. at 693-94).

83. Some pertinent contentions include: *In re Fields*, 51 Cal. 3d at 1075, 800 P.2d at 869, 275 Cal. Rptr. at 391 (defense counsel's failure to investigate for further expert witnesses to prove mental incompetence not deficient); *Frank*, 51 Cal. 3d at 731-32, 798 P.2d at 1223, 274 Cal. Rptr. at 380 (defense counsel's failure to raise confrontation objection in penalty phase testimony not deficient due to strategic attack on witness in guilt phase); *Hayes*, 52 Cal. 3d at 623-24, 802 P.2d at 404-05, 276 Cal. Rptr. at 902-03 (defense counsel's adoption of defective defense strategy against adverse witness within "reasonable range of attorney competence"); *Kaurish*, 52 Cal. 3d at 677-78, 802 P.2d at 290, 276 Cal. Rptr. at 800 (defense counsel's failure to object to prosecutorial misconduct was tactical defense and not ineffective assistance where objection would have "accentuate[d] defendant's negative qualities"); *Stankewitz*, 51 Cal. 3d at 113-16, 793 P.2d at 50-53, 270 Cal. Rptr. at 844-47 (failure to impeach witness, request instruction, and to call medical witness was neither ineffective assistance nor prejudicial); *Wright*, 52 Cal. 3d at 411-15, 802 P.2d at 250-52, 276 Cal. Rptr. at 760-62 (misrepresentation of defense counsel's skill and experience, lack of request for second counsel, use of challenges in jury selection, failure to move to disqualify trial judge, and over-all ineffective trial strategy fails both prongs).

84. The noteworthy arguments include: *In re Fields*, 51 Cal. 3d at 1079, 800 P.2d at 872, 275 Cal. Rptr. at 394 (the court refused to examine the first prong because the appeal failed the second prong); *Gonzalez*, 51 Cal. 3d at 1179, 800 P.2d at 1202, 275 Cal. Rptr. at 772 ("though counsel might have done more in several areas," representation was not so severely deteriorated as to require reversal); *Hayes*, 52 Cal. 3d at 607-08, 612, 802 P.2d at 392-94, 397, 276 Cal. Rptr. at 891, 894-95 (failure to object to non-crucial testimony and introduction of amended prosecutorial complaint was not prejudicial). For a listing of other cases failing the first and second prongs, see *supra* note 83 and accompanying text.

85. *In re Fields*, 51 Cal. 3d at 1076-81, 800 P.2d at 869-73, 275 Cal. Rptr. at 391-95.

The court stated that where the challenge is to a death sentence, the test for prejudice is whether, " 'absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' " ⁸⁶ In general, the court is very conservative in examining ineffective assistance appeals, giving considerable deference to counsel strategy. ⁸⁷

D. *Miranda*

In *People v. Sanders*, the defendant asserted a violation of his *Miranda* rights, ⁸⁸ claiming he was not informed of the charges against him, thereby precluding a knowing waiver of his rights. ⁸⁹ The supreme court stated that although such an argument could be made, the contention is without merit following the United States Supreme Court decision in *Colorado v. Spring*, where the Court held the Constitution does not mandate a suspect be told of every possible consequence of any voluntary admissions. ⁹⁰

In *People v. Anderson*, the defendant alleged a *Miranda* violation in the special circumstance phase of the trial regarding his recorded confession and filmed reenactment of the crime. ⁹¹ He contended these were induced involuntarily due to his intense sleep deprivation and inadequate *Miranda* warning. ⁹² The court rejected the defendant's contentions, stating first that the evidence did not support a finding of sleep deprivation and, second, that the defendant had been repeatedly warned that his psychiatrists were working for the prosecution and that any admissions would be used against him. ⁹³

The court also rejected an appeal in *People v. Kelly*, where the defendant claimed the *Miranda* instruction he received was misleading

86. *Id.* at 1078, 800 P.2d at 871, 275 Cal. Rptr. at 393 (quoting *Strickland*, 466 U.S. at 695).

87. See *supra* notes 83-84 and accompanying text.

88. *Miranda v. Arizona*, 384 U.S. 436 (1966) (United States Supreme Court held that under the Fifth Amendment, a person in custody must be informed that the individual has the right to remain silent; that anything the individual says may be used adversely in a court of law; that the individual has the right to an attorney; and that if the individual is indigent, an attorney will be appointed). See generally 5 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW § 2679 (2d ed. 1989).

89. *People v. Sanders*, 51 Cal. 3d 471, 512, 797 P.2d 561, 583, 273 Cal. Rptr. 537, 559 (1990). The court noted that under *Miranda*, " 'the defendant may waive effectuation' of the rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly and intelligently.' " *Id.* Therefore, the court stated for an effective waiver, the defendant must have full knowledge of "the nature of the right being abandoned and the consequences of [his] decision to abandon it." *Id.* at 512 n.17, 797 P.2d at 584 n.17, 273 Cal. Rptr. at 560 n.17.

90. *Id.* at 513, 797 P.2d at 584, 273 Cal. Rptr. at 560 (citing *Colorado v. Spring*, 479 U.S. 564 (1987)).

91. *People v. Anderson*, 52 Cal. 3d 453, 801 P.2d 1107, 276 Cal. Rptr. 356 (1990).

92. *Id.* at 459-60, 801 P.2d at 1115, 276 Cal. Rptr. at 364.

93. *Id.* at 460-61, 801 P.2d at 1115-16, 276 Cal. Rptr. at 364-65.

and inaccurate because it, *inter alia*, failed to inform him of his right to have an attorney present during questioning.⁹⁴ The court held the warnings given were unequivocal and that a reasonable defendant could not have misunderstood them.⁹⁵

E. Shackling of Defendant

The supreme court heard two appeals alleging jury prejudice resulting from in-court shackling of the defendant.⁹⁶ The court stated that a defendant may be shackled only "as a 'last resort' . . . where a manifest need therefore arises and no lesser measure would suffice."⁹⁷ In both cases, the court noted that the shackles were manifestly necessary due to the defendants' prior violent behavior.⁹⁸ Further, the court stated that the shackles in both cases were not apparently visible to the jury, and even if noticeable, were not prejudicial.⁹⁹

V. SPECIAL CIRCUMSTANCE ISSUES

In California, a defendant may be given the death penalty only if he is charged and convicted of first-degree murder in the guilt phase of trial, and in conjunction, one or more of the special circumstances enumerated by statute are present.¹⁰⁰ Although the court addressed several special circumstance contentions, this survey addresses only the most prominent.

In *People v. Anderson*, the court addressed whether jury notification of the defendant's prior conviction and subsequent reversal of

94. *People v. Kelly*, 51 Cal. 3d 931, 948-49, 800 P.2d 516, 526, 275 Cal. Rptr. 160, 170 (1990).

95. *Id.* at 949, 800 P.2d at 526, 275 Cal. Rptr. at 170.

96. *People v. Medina*, 51 Cal. 3d 870, 799 P.2d 1282, 274 Cal. Rptr. 849 (1990); *People v. Stankewitz*, 51 Cal. 3d 72, 793 P.2d 23, 270 Cal. Rptr. 817 (1990).

97. *Medina*, 51 Cal. 3d at 897, 799 P.2d at 1299, 274 Cal. Rptr. at 866.

98. *Id.* (defendant turned over counsel table during competency hearing); *Stankewitz*, 51 Cal. 3d at 95-96, 793 P.2d at 38, 270 Cal. Rptr. at 832 (defendant had tried to escape from court house holding cell).

99. *Medina*, 51 Cal. 3d at 897-98, 799 P.2d at 1300, 274 Cal. Rptr. at 867; *Stankewitz*, 51 Cal. 3d at 95-96, 793 P.2d at 38-39, 270 Cal. Rptr. at 832-33.

100. CAL. PENAL CODE § 190.2(a) (West 1988 & Supp. 1991). See also 2 B. WITKIN, CALIFORNIA CRIMES § 1026C (Supp. 1985). The most common type of special circumstance is a finding that the defendant has committed a multiple murder. Under section 190.2(a)(3), the defendant need only be convicted of one or more murders in the first or second degree to satisfy the statutory requirement. CAL. PENAL CODE § 190.2(a)(3) (West 1988 & Supp. 1991). Other special circumstances satisfying the requirement include: murder-robbery, murder-arson, murder-burglary, and murder-rape. See generally CAL. PENAL CODE § 190.2(a).

the same offense was prejudicial.¹⁰¹ The court held that any prejudice would have affected the guilt rather than the special circumstance phase, which was already supported by overwhelming aggravating evidence.¹⁰² The court also stated that the defense counsel knew of, but did not object to, the admission of the evidence for tactical reasons, thereby waiving any appeal on this issue.¹⁰³ This issue was also addressed and rejected in *People v. Whitt* on identical facts.¹⁰⁴

The court in *People v. Gonzalez*, examined a special circumstance contention based on whether the defendant had shot and killed a police officer "engaged in the performance of [his] duties."¹⁰⁵ The defendant contended the police officer in question was acting pursuant to an invalid warrant when shot and, therefore, was not engaged in his "duties."¹⁰⁶ The court decided this issue of first instance by holding "that if a warrant is valid on its face, an officer carrying out its command to search or arrest is lawfully engaged in duty, and his attacker may be convicted and punished on that basis"¹⁰⁷

Another special circumstance issue raised concerned the jury instruction of intent to kill under a finding of felony-murder special circumstance. The court in *People v. Hayes*¹⁰⁸ noted that its decision in *Carlos v. Superior Court*,¹⁰⁹ requiring proof of intent to kill before a felony-murder special circumstance could be found, was overruled by *People v. Anderson*,¹¹⁰ which established that the death penalty could be given to a first degree felony-murderer, regardless of intent.¹¹¹ This issue was also addressed in *People v. Whitt*, where the

101. *People v. Anderson*, 52 Cal. 3d 453, 466, 801 P.2d 1107, 1112, 276 Cal. Rptr. 356, 361-62 (1990).

102. *Id.* at 466-67, 801 P.2d at 1113, 276 Cal. Rptr. at 362.

103. *Id.* at 467-68, 801 P.2d at 1113-14, 276 Cal. Rptr. at 362-63.

104. *People v. Witt*, 51 Cal. 3d 620, 639-41, 798 P.2d 849, 860, 274 Cal. Rptr. 252, 263 (1990) (defendant invited error by submitting a proposal statement on the matter and by a tactical failure to object).

105. *People v. Gonzalez*, 51 Cal. 3d 1179, 1217, 800 P.2d 1159, 1176, 275 Cal. Rptr. 729, 746 (1990). Section 190.2(a)(7) provides that special circumstances exist when the murder victim was a "peace officer . . . who, while engaged in the course of the performance of his or her duties, was intentionally killed, and defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his or her duties" CAL. PENAL CODE § 190.2(a)(7) (West 1988 & Supp. 1991).

106. *Gonzalez*, 51 Cal. 3d at 1217, 800 P.2d at 1176, 275 Cal. Rptr. at 746. The defendant contended that the trial court erred in not considering the search warrant's validity when giving the jury instruction that an officer acting pursuant to a search warrant is performing his duties. *Id.* at 1218, 800 P.2d at 1177, 275 Cal. Rptr. at 747.

107. *Id.* The court concluded that this would encompass the execution of a warrant, even where no probable cause existed, as long as the warrant was facially valid. *Id.*

108. *People v. Hayes*, 52 Cal. 3d 577, 802 P.2d 376, 52 Cal. Rptr. 874 (1990).

109. *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

110. *People v. Anderson*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987).

111. *Hayes*, 52 Cal. 3d at 632, 802 P.2d at 410, 276 Cal. Rptr. at 908. The court also

court held that retroactive application of *Anderson* was constitutional.¹¹² The issue of *Anderson*'s retroactivity was also challenged and rejected in *People v. Kaurish*.¹¹³

In *People v. Sanders*, the supreme court stated that the instruction allowing a jury to find a felony-murder special circumstance against the *actual* killer without a finding of intent to kill does not extend to a defendant who is only an aider and abetter.¹¹⁴ The high court held that the jury instructions provided by the trial court distinguishing the actual killing from the intent to aid and abet were not erroneous because the instruction required the jury to find that the defendant either was the actual killer, or if only an aider and abetter, possessed the intent to kill.¹¹⁵

VI. PENALTY PHASE ISSUES

A. Instructional Error

1. *Brown* Error

The supreme court in *People v. Brown*¹¹⁶ held that jury instructions concerning aggravating and mitigating circumstances may mislead a jury when given in isolation.¹¹⁷ In *Brown* error allegations

stated that *Anderson*'s retroactive application does not violate the due process clause. *Id.*

112. *People v. Whitt*, 51 Cal. 3d 620, 637-38, 798 P.2d 849, 858, 274 Cal. Rptr. 252, 261 (1990). The court also rejected the law-of-the-case doctrine which provides that "where an appellate court states a rule of law necessary to its decision," the rule shall be applied in a subsequent hearing of the same case even where the rule of law is incorrect. *Id.* at 638, 798 P.2d at 858, 274 Cal. Rptr. at 261. The court noted that an "exception [to this rule] exists where there has been a 'controlling' change in the law between the time of the first and second appellate decisions." *Id.* at 638-39, 798 P.2d at 858, 274 Cal. Rptr. at 261. The court concluded that since *Anderson* clarifies the death penalty statute, it represents a controlling change in the law, making retroactivity constitutional. *Id.* at 639, 798 P.2d at 859, 274 Cal. Rptr. at 262.

113. *People v. Kaurish*, 52 Cal. 3d 648, 696-97, 802 P.2d 278, 303, 276 Cal. Rptr. 788, 813 (1990).

114. *People v. Sanders*, 51 Cal. 3d 471, 515-16, 797 P.2d 561, 586, 273 Cal. Rptr. 537, 562 (1990).

115. *Id.* at 516-17, 797 P.2d at 586-87, 273 Cal. Rptr. at 562-63. The court also addressed and rejected the defendant's contention on a different special circumstance, concluding that a witness-killing special circumstance instruction should not be limited to a finding that a witness was killed for the sole purpose of preventing that person's testimony in a criminal proceeding. *Id.* at 519, 797 P.2d at 589, 273 Cal. Rptr. at 565.

116. *People v. Brown*, 40 Cal. 3d 512, 726 P.2d 516, 230 Cal. Rptr. 834 (1985), *rev'd on other grounds sub nom. California v. Brown*, 479 U.S. 538 (1987).

117. CALJIC 8.84.2 (West 4th ed. 1979) states: "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 ag-

surveyed,¹¹⁸ the court reiterated that an instruction stating that the jury "shall" impose death is not improper or misleading if another applicable instruction adequately informs the jury of its sentencing and discretionary responsibilities.¹¹⁹ In the cases raising this issue, the court repeatedly held that the instruction was not misleading and that the jury was fully aware of its duties.¹²⁰

gravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole." *Id.* In *People v. Brown*, the court stated that error exists when the jury believes it should arithmetically add mitigating and aggravating circumstances to determine which total is greater and impose its sentence from those findings alone. *Brown*, 40 Cal. 3d at 541, 726 P.2d at 531-32, 230 Cal. Rptr. at 849-50.

118. See *People v. Gonzalez*, 51 Cal. 3d 1179, 1228, 800 P.2d 1159, 1183-84, 275 Cal. Rptr. 729, 753-54 (1990) (the prosecution telling jury not to decide the appropriate penalty but to make a mechanical assessment of the mitigating and aggravating circumstances questioned as error); *People v. Hayes*, 52 Cal. 3d 577, 641-42, 802 P.2d 376, 416-17, 276 Cal. Rptr. 874, 914 (1990) (jury instruction implying a mechanical balancing test of aggravating and mitigating evidence was prejudicial); *People v. Kaurish*, 52 Cal. 3d 648, 711, 802 P.2d 278, 313, 276 Cal. Rptr. 788, 822-23 (1990) (defendant alleged error by prosecutor's statement that the jury had no discretion and must impose death if the aggravating factors prevail); *People v. Sanders*, 51 Cal. 3d 471, 521, 797 P.2d 561, 590-91, 273 Cal. Rptr. 537, 566-67 (1990) (defendant argued the words "shall impose a sentence of death" in jury instruction were misleading); *People v. Taylor*, 52 Cal. 3d 719, 745-46, 801 P.2d 1142, 1156, 276 Cal. Rptr. 391, 405-06 (1990) (modified jury instruction did not inform jurors that they could not return lesser verdict if appropriate); *People v. Whitt*, 51 Cal. 3d 620, 650, 798 P.2d 849, 867, 274 Cal. Rptr. 252, 270 (1990) (defendant alleges jury misled to believe death was "mandatory" in special situations); *People v. Wright*, 52 Cal. 3d 367, 438-39, 802 P.2d 221, 268-69, 276 Cal. Rptr. 731, 779 (1990) (defendant contended prosecutor misled jury by stating that jury "shall," and not "may," impose death).

119. See, e.g., *People v. Allison*, 48 Cal. 3d 879, 905-06, 771 P.2d 1294, 1313, 258 Cal. Rptr. 208, 225-26 (1989), *cert. denied*, 110 S. Ct. 1835 (1990) (word "shall" does not make instruction per se invalid); *People v. Grant*, 45 Cal. 3d 829, 858, 755 P.2d 894, 910-11, 248 Cal. Rptr. 444, 460-61 (1988) (reasonable jury understands the instruction does not compel it to give defendant death). The court also stated that no error exists for death cases properly tried under the 1977 and not the 1978 death statute because the 1978 statute is only "prospective in effect" and is actually less favorable to a defendant. *People v. Stankewitz*, 51 Cal. 3d 72, 108-09, 793 P.2d 23, 47, 270 Cal. Rptr. 817, 841 (1990).

120. See *Gonzalez*, 51 Cal. 3d at 1229-30, 800 P.2d at 1184-85, 275 Cal. Rptr. at 754-55 (prosecutor cured prior misleading statements by informing the jury it must weigh, rather than count, the factors and evidence presented); *Hayes*, 52 Cal. 3d at 642, 802 P.2d at 417, 276 Cal. Rptr. at 915 (additional jury instruction stating jury must use its discretion and not mechanically weigh the factors eliminated possible error); *Kaurish*, 52 Cal. 3d at 714, 802 P.2d at 314-15, 276 Cal. Rptr. at 824-25 (jury was not misled due to the prosecution's repeated statements stressing jury discretion); *Sanders*, 51 Cal. 3d at 521-24, 797 P.2d at 590-92, 273 Cal. Rptr. at 566-68 (in light of the whole record, jury understood and followed its discretionary duties); *Taylor*, 52 Cal. 3d at 745-46, 801 P.2d at 1156, 276 Cal. Rptr. at 405 (jury not misled by statement that it must choose death if mitigating factors do not outweigh aggravating factors); *Whitt*, 51 Cal. 3d at 650-51, 798 P.2d at 867, 274 Cal. Rptr. at 270 (trial court anticipated *Brown* issue and gave jury special instructions on jury's discretion in the weighing process); *Wright*, 52 Cal. 3d at 439-40, 802 P.2d at 269, 276 Cal. Rptr. at 779 (jury was not misled in light of prosecutor's and trial court's repeated instruction on the appropriate weighing process).

2. Factor (k) Error

Four of the cases surveyed¹²¹ alleged factor (k) error, addressing whether a jury may consider other extenuating circumstances as a mitigating factor, even if it does not legally excuse the crime.¹²² The original factor (k) was expanded to include 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."¹²³ Alleged error in cases tried under the original factor (k) must be examined in light of the instructions given, prosecutorial statements, and the record as a whole, to determine whether the jury knew it should consider all mitigating circumstances presented in the case.¹²⁴

The court in *People v. Gonzalez* rejected the defendant's contention that the jury was not able to consider his background and character.¹²⁵ The court held that the "catch all" factor in the mitigation instruction, telling the jury to consider "all of the evidence," eliminated any defect in the overall instruction.¹²⁶

In *People v. Hayes*, which was tried prior to the current instruction, the supreme court held that the jury was not prevented from considering other mitigating circumstances despite the lack of the expanded instruction.¹²⁷ The court based its holding on the fact that both the defense counsel and the prosecutor informed the jury that it should consider the defendant's character and background when making its judgment.¹²⁸

The court in *People v. Taylor* examined the trial court's definition of a "factor in mitigation" to see whether the instruction precluded the jury from taking the defendant's character and background into

121. *Gonzalez*, 51 Cal. 3d 1179, 800 P.2d 1159, 275 Cal. Rptr. 729; *Hayes*, 52 Cal. 3d 577, 802 P.2d 376, 276 Cal. Rptr. 874; *Taylor*, 52 Cal. 3d 719, 801 P.2d 1142, 276 Cal. Rptr. 391; *Wright*, 52 Cal. 3d 367, 802 P.2d 221, 276 Cal. Rptr. 731.

122. Factor (k) error concerns jury instruction under California Penal Code section 190.3(k). Under factor (k), a jury may contemplate as a mitigating factor "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." CAL. PENAL CODE § 190.3(k) (West 1988 & Supp. 1991). See also B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW § 1608 (2d ed. 1989).

123. The new expanded version of factor (k) is contained in CALJIC No. 8.85(k) (5th ed. 1988).

124. *People v. Ghent*, 43 Cal. 3d 739, 777, 739 P.2d 1250, 1275, 239 Cal. Rptr. 82, 107 (1987), cert. denied, 485 U.S. 929 (1988).

125. *Gonzalez*, 51 Cal. 3d at 1225, 800 P.2d at 1181-82, 275 Cal. Rptr. at 751-52.

126. *Id.*

127. *Hayes*, 52 Cal. 3d at 640-41, 802 P.2d at 416, 276 Cal. Rptr. at 913-14.

128. *Id.*

consideration.¹²⁹ The court held that in light of the jury's instruction to consider sympathy and any other mitigating factor raised by the defendant, the definition was not prejudicial error.¹³⁰

Finally, in *People v. Wright*, the jury was not read the factor (k) instruction verbatim.¹³¹ Despite the defendant's contention to the contrary, the supreme court found that the jury understood it was to weigh all the evidence presented.¹³² Both the prosecution and the defendant advised the jury to consider sympathy evidence and "any other factors in mitigation."¹³³

3. General Issues Regarding Aggravating and Mitigating Evidence

The defendant in *People v. Anderson* contended that the trial court erred by admitting a prior statement of his as a statutory aggravating factor.¹³⁴ The defendant alleged that the trial court should have specifically weighed the evidence's relevance against its possible prejudicial effect as required by section 352 of the Evidence Code.¹³⁵ The court stated that an express ruling under section 352 is not required unless the defendant specifically requests such a weighing or invokes this section as a ground for objection.¹³⁶

Five other cases addressed whether the court should have required additional instruction regarding a defendant's nonextreme mental disturbance as a nonstatutory mitigating factor.¹³⁷ The court rejected the contentions, stating that such evidence fell under the expanded "catchall" factor (k) instruction.¹³⁸

The defendant in *People v. Sanders* alleged that the court improperly instructed the jury on whether to consider "sympathy" as miti-

129. *Taylor*, 52 Cal. 3d at 746, 801 P.2d at 1156, 276 Cal. Rptr. at 405-06.

130. *Id.* at 746, 801 P.2d at 1157, 276 Cal. Rptr. at 406.

131. *Wright*, 52 Cal. 3d at 441, 802 P.2d at 270, 276 Cal. Rptr. at 780.

132. *Id.*

133. *Id.*

134. *People v. Anderson*, 52 Cal. 3d 453, 476, 801 P.2d 1107, 1119, 276 Cal. Rptr. 356, 368-69 (1990).

135. *Id.* at 477, 801 P.2d at 1120, 276 Cal. Rptr. at 369. See CAL. EVID. CODE § 352 (West 1988).

136. *Id.*

137. *People v. Frank*, 51 Cal. 3d 718, 740, 798 P.2d 1215, 1228, 274 Cal. Rptr. 372, 385 (1990), *cert. denied*, 111 S. Ct. 2816 (1991); *People v. Gonzalez*, 51 Cal. 3d 1179, 1226-27, 800 P.2d 1159, 1183, 275 Cal. Rptr. 729, 753 (1990); *People v. Kelly*, 51 Cal. 3d 931, 968-69, 800 P.2d 516, 539-40, 275 Cal. Rptr. 160, 183-84 (1990); *People v. Medina*, 51 Cal. 3d 870, 907-08, 799 P.2d 1282, 1306-07, 274 Cal. Rptr. 849, 873-74 (1990); *People v. Wright*, 52 Cal. 3d 367, 443-44, 802 P.2d 221, 271-72, 276 Cal. Rptr. 731, 781-82 (1990).

138. *Frank*, 51 Cal. 3d at 740, 798 P.2d at 1228, 274 Cal. Rptr. at 385; *Gonzalez*, 51 Cal. 3d at 1227, 800 P.2d at 1183, 275 Cal. Rptr. at 753; *Kelly*, 51 Cal. 3d at 969, 800 P.2d at 540, 275 Cal. Rptr. at 184; *Medina*, 51 Cal. 3d at 907-08, 799 P.2d at 1306-07, 274 Cal. Rptr. at 873-74; *Wright*, 52 Cal. 3d at 444, 802 P.2d at 272, 276 Cal. Rptr. at 782.

gating evidence in its penalty phase deliberations.¹³⁹ The defendant contended that earlier instructions ordering the jury not to consider sympathy in its guilt phase determination influenced consideration of sympathy at the penalty phase.¹⁴⁰ The court rejected the defendant's contention, citing three cases in which it had previously rejected the same argument.¹⁴¹

Sanders also addressed whether the defendant's refusal to present mitigating evidence at the penalty phase constituted reversible error.¹⁴² The court held that the defendant's failure to present mitigating evidence does not render the verdict constitutionally unreliable, nor does it convincingly show ineffective assistance of counsel.¹⁴³

The court in *People v. Taylor* and *People v. Wright* stated that California Penal Code section 190.3 requires the prosecution to present the defendant with written notice of the aggravating factors to be presented prior to trial.¹⁴⁴ The court held that although the prosecu-

139. *People v. Sanders*, 51 Cal. 3d 471, 528, 797 P.2d 561, 595, 273 Cal. Rptr. 537, 571 (1990).

140. *Id.* In *Sanders*, the jury was instructed prior to its guilt phase decision that it could not be "swayed by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Id.* Before deliberation on the penalty phase issue, the jury was instructed that it should be guided by the instructions given in the guilt phase. *Id.*

141. *Id.* (citing *People v. Gonzalez*, 51 Cal. 3d 1179, 1225, 800 P.2d 1159, 1182, 275 Cal. Rptr. 729, 752 (1990); *People v. Kaurish*, 52 Cal. 3d 648, 705, 802 P.2d 278, 308-09, 276 Cal. Rptr. 788, 818-19 (1990); *People v. Stankewitz*, 51 Cal. 3d 72, 107-08, 793 P.2d 23, 46-47, 270 Cal. Rptr. 817, 841 (1990)).

142. *Sanders*, 51 Cal. 3d at 524-25, 797 P.2d at 592, 273 Cal. Rptr. at 568. The court addressed two problems that might occur in such a situation: (1) that the death determination may be unreliable absent such mitigating factors; and (2) defense counsel performance might be considered ineffective for succumbing to his client's wishes rather than making an independent decision to present mitigating evidence. *Id.* at 525-26, 797 P.2d at 593, 273 Cal. Rptr. at 569.

143. *Id.* at 526, 797 P.2d at 593-94, 273 Cal. Rptr. at 569-70. The court noted that if the correct instructions and procedures under the 1978 death penalty statute are followed, the verdict is considered reliable. *Id.* Further, absent a showing of counsel's failure to search for available mitigating evidence, there is no error. *Id.* at 526, 797 P.2d at 594, 273 Cal. Rptr. at 570. The defendant made a constitutionally acceptable waiver of his rights during the penalty phase, and could not later claim error based on this waiver. *Id.* at 527, 797 P.2d at 594, 273 Cal. Rptr. at 570. The court also stated that nonparticipation in the penalty phase is not equivalent to a guilty plea, and does not require the defense counsel's consent. *Id.* (citing CAL. PENAL CODE 1018 (WEST 1988)).

144. *People v. Taylor*, 52 Cal. 3d 719, 736, 801 P.2d 1142, 1150, 276 Cal. Rptr. 391, 399 (1990); *People v. Wright*, 52 Cal. 3d 367, 422-23, 802 P.2d 221, 257-58, 276 Cal. Rptr. 731, 767-68 (1990) (prosecution substantially complied with section 190.3 by giving oral notice). See CAL. PENAL CODE § 190.3 (West 1988). The court noted the policy considerations behind this canon that provide defense counsel with sufficient warning to prepare an adequate defense. *Taylor*, 52 Cal. 3d at 736, 801 P.2d at 1150, 276 Cal. Rptr. at 399; *Wright*, 52 Cal. 3d at 422-23, 802 P.2d 257-58, 276 Cal. Rptr. at 767-68.

tion had not complied with the notice requirement, the effect was not prejudicial because the defendants received actual notice.¹⁴⁵

In *People v. Whitt*, the court rejected the defendant's contention that excluding a description of an execution denied his right to present relevant mitigating evidence.¹⁴⁶ The court stated that while the defense may introduce evidence of the defendant's background and character to elicit sympathy, it considered evidence concerning executions irrelevant to the jury's decision of whether a particular defendant deserves the death penalty.¹⁴⁷

The court also addressed the defendant's contention that he was denied his right to present mitigating evidence when the trial court excluded the defense counsel's questions concerning the defendant's desire to live.¹⁴⁸ The court held that such questions were admissible as evidence of defendant's character and humanity, but concluded the error was not prejudicial.¹⁴⁹

4. *Boyd* Error

As stated in the factor (k) discussion, the jury may consider all mitigating evidence that defense counsel presents.¹⁵⁰ However, the jury may consider only aggravating evidence that is specifically enumerated by statute.¹⁵¹ *Boyd* error occurs where the jury weighs aggravating evidence not enumerated in California Penal Code section 190.3.¹⁵² The supreme court addressed two cases asserting *Boyd* error.¹⁵³

In *People v. Anderson*, the prosecutor introduced evidence of both nonviolent criminal activity as well as noncriminal activity.¹⁵⁴ An-

145. *Taylor*, 52 Cal. 3d at 737, 801 P.2d at 1150, 276 Cal. Rptr. at 399; *Wright*, 52 Cal. 3d at 423, 802 P.2d at 258, 276 Cal. Rptr. at 768.

146. *People v. Whitt*, 51 Cal. 3d 620, 664-65, 798 P.2d 849, 862-63, 274 Cal. Rptr. 252, 265-266 (1990).

147. *Id.*

148. *Id.* at 647, 798 P.2d at 864, 274 Cal. Rptr. at 267.

149. *Id.* at 648 n.17, 798 P.2d at 865 n.17, 374 Cal. Rptr. at 268 n.17. *See generally* *Chapman v. California*, 386 U.S. 18, 24 (1967) (prejudicial effect regarding right to offer mitigating evidence is governed by the beyond-a-reasonable-doubt standard).

150. *See supra* note 123 and accompanying text.

151. *People v. Boyd*, 38 Cal. 3d 762, 775, 700 P.2d 782, 791, 215 Cal. Rptr. 1, 10 (1985).

152. *Id.* at 775, 700 P.2d at 791-92, 215 Cal. Rptr. at 10-11. *See* CAL. PENAL CODE § 190.3 (West 1988 & Supp. 1991). Under *Boyd*, "[e]vidence of defendant's background, character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, . . . [and] is therefore irrelevant to aggravation." *Id.* at 774, 700 P.2d at 790-91, 215 Cal. Rptr. at 9.

153. *People v. Anderson*, 52 Cal. 3d 453, 801 P.2d 1107, 276 Cal. Rptr. 356 (1990); *People v. Wright*, 52 Cal. 3d 367, 802 P.2d 221, 276 Cal. Rptr. 731 (1990).

154. *Anderson*, 52 Cal. 3d at 475, 801 P.2d at 1118, 276 Cal. Rptr. at 367. Specifically, the prosecution presented evidence of the defendant's burglaries, lack of meaningful employment, and his use of an alias. *Id.* at 475, 801 P.2d at 1118-19, 276 Cal. Rptr. at 367-68.

swering the defendant's assertion that this was *Boyd* error, the court held that the evidence was admissible because the defendant himself had introduced one of the disputed facts, waived his objection to another, while the third fact was properly admitted under an enumerated factor.¹⁵⁵

The court also examined improperly admitted evidence in *People v. Wright*.¹⁵⁶ The court, however, noted that mere *Boyd* error alone was not grounds for reversal.¹⁵⁷ The court also found that even though improper, the admission was harmless when examined in conjunction with the extensive, properly admitted aggravating evidence.¹⁵⁸

5. *Davenport* Error

Davenport error exists where the absence of mitigating evidence is presented as an aggravating factor.¹⁵⁹ In *People v. Whitt*, the court rejected the defendant's allegation of *Davenport* error, stating that although the prosecutor could not argue that the absence of certain mitigating factors was aggravating, he could point out which factors were statutorily deficient.¹⁶⁰ The same argument was addressed in *People v. Taylor*¹⁶¹ and *People v. Kaurish*.¹⁶² In *People v. Gonzalez*, the court stated that even though lack of remorse cannot be consid-

155. *Id.* at 475-76, 801 P.2d at 1119, 276 Cal. Rptr. at 368. The court also concluded that the evidence admitted was inconsequential and did not affect the verdict. *Id.* at 476, 801 P.2d at 1119, 276 Cal. Rptr. 368.

156. *People v. Wright*, 52 Cal. 3d 367, 802 P.2d 221, 276 Cal. Rptr. 731 (1990). The court found the testimony of nine witnesses recounting the defendant's various violent acts and threats inadmissible because they were not enumerated nor did they constitute "'criminal activity' in violation of a penal statute." *Id.* at 425-26, 802 P.2d at 259-60, 276 Cal. Rptr. at 769-70.

157. *Id.* at 426, 802 P.2d at 260, 276 Cal. Rptr. at 770. The court noted that in cases where reversal was granted it was based on a combination of prejudicial effects. *Id.* The court stated that a verdict will stand unless the defendant can reasonably prove that absent the error, the jury would not have rendered the death penalty. *Id.* at 428, 802 P.2d at 261, 276 Cal. Rptr. at 771.

158. *Id.* at 427, 802 P.2d at 260, 276 Cal. Rptr. at 770. The court held that in light of the defendant's violent criminal past, including the rape and murder of a 76-year-old woman, the erroneously admitted evidence was merely "cumulative" and did not alter the jury's already "damaging inferences." *Id.* at 429, 802 P.2d at 262, 276 Cal. Rptr. at 772.

159. *See People v. Davenport*, 41 Cal. 3d 247, 288-89, 710 P.2d 861, 888, 221 Cal. Rptr. 794, 821 (1985). For example, *Davenport* error would occur if the prosecution argued that the lack of the defendant's ability to prove that he was under extreme emotional distress was an aggravating factor.

160. *People v. Whitt*, 51 Cal. 3d 620, 653-54, 798 P.2d 849, 869, 274 Cal. Rptr. 252, 272 (1990).

161. *People v. Taylor*, 52 Cal. 3d 719, 744, 801 P.2d 1142, 1155, 276 Cal. Rptr. 391, 404

ered an aggravating factor, the prosecution's comments regarding defendant's overt remorse at the exact time of the crime is admissible under section 190.3 factor (a), which allows the jury to consider "all aggravating and mitigating aspects of the capital crime itself."¹⁶³

6. Ramos Error

In *People v. Ramos*, the Briggs instruction, which allows the trier of fact to consider the Governor's power to parole or commute a capital punishment sentence, was held to be both misleading and unconstitutional based on the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.¹⁶⁴ The United States Supreme Court reversed the constitutionality holding, however, and remanded for further consideration.¹⁶⁵ The California Supreme Court, on remand, again declared the Briggs instruction unconstitutional, this time basing the finding on a violation of the due process clause to the state constitution.¹⁶⁶

The court addressed this issue in only one other case, *People v. Whitt*.¹⁶⁷ In *Whitt*, the court held that under *Ramos* a trial court has the discretion to supply a modified Briggs instruction if there is a reasonable belief that the jury is speculating on the possibility of a future sentence reduction.¹⁶⁸ The court reasoned that because the trial court instructed the jury that considering the possibility of a reduced sentence would be a violation of its duty, no error existed, or in the alternative, was harmless.¹⁶⁹

In *People v. Kaurish*, the defendant claimed that a juror's remark on parole possibilities was as prejudicial as a Briggs instruction, and that the trial court erred by failing to instruct the jury not to consider such possibilities in its deliberations.¹⁷⁰ The supreme court

(1990) (holding prosecutor entitled to mention that particular mitigating factors are absent, as long as such absence is not presented as an aggravating factor).

162. *People v. Kaurish*, 52 Cal. 3d 648, 706, 802 P.2d 278, 309, 276 Cal. Rptr. 788, 819 (prosecution's statement that certain mitigating factors were not applicable was not error).

163. *People v. Gonzalez*, 51 Cal. 3d 1179, 1231-32, 800 P.2d 1159, 1186, 275 Cal. Rptr. 729, 756 (1990) (emphasis in original). The court noted, however, that post-crime remorse should not be presented as a factor in aggravation. *Id.* at 1232, 800 P.2d at 1187, 275 Cal. Rptr. at 757. The court also held that the prosecution's assertions of the defendant's lack of mitigating evidence regarding remorse was not error. *Id.*

164. *People v. Ramos*, 30 Cal. 3d 553, 600-01, 639 P.2d 908, 936, 180 Cal. Rptr. 266, 294 (1982), *rev'd sub nom.* *California v. Ramos*, 463 U.S. 992 (1983).

165. *Ramos*, 463 U.S. at 1014.

166. *People v. Ramos*, 37 Cal. 3d 136, 159, 689 P.2d 430, 442, 207 Cal. Rptr. 800, 814 (1984).

167. *People v. Whitt*, 51 Cal. 3d 620, 798 P.2d 849, 274 Cal. Rptr. 252 (1990).

168. *Id.* at 657, 798 P.2d at 871, 274 Cal. Rptr. at 274.

169. *Id.*

170. *People v. Kaurish*, 52 Cal. 3d 648, 708-09, 802 P.2d 278, 311, 276 Cal. Rptr. 788, 821 (1990).

stated, however, that the remark was not as prejudicial as either the Briggs instruction or an admonishment would have been.¹⁷¹ The court also reviewed a similar allegation in *People v. Stankewitz*, where the defendant claimed the trial court responded inadequately to jury questions regarding the possibility of parole.¹⁷² The supreme court held that because the trial court told the jury not to consider issues not before it when rendering sentence, no *Ramos* error occurred.¹⁷³

B. Factor (b) and (c) Error

When considering whether the death penalty should be imposed, a jury may consider evidence offered under factors (b) and (c) of California Penal Code section 190.3. Factor (b) allows the jury to consider evidence of the defendant's prior criminal conduct which "involved the use or attempted use of force or violence" as well as any "express or implied threat to use force or violence."¹⁷⁴ Under factor (c) a jury may consider "[t]he presence or absence of any prior felony conviction."¹⁷⁵

1. Factor (b) Error

The issue of whether prior criminal offenses, dismissed pursuant to a plea bargain, are admissible under factor (b) was addressed in *People v. Frank*.¹⁷⁶ The court stated that section 190.3, though not allowing evidence of violent criminal activity where the defendant was acquitted, does not preclude "bargained conviction[s] or dismissal[s]."¹⁷⁷ The court concluded similarly in *People v. Taylor* and *People v. Kaurish*, allowing evidence of the defendants' plea bargains to be admitted.¹⁷⁸

In *People v. Hayes*, the court addressed whether evidence of a prior

171. *Id.* at 709, 802 P.2d at 311, 276 Cal. Rptr. at 821.

172. *People v. Stankewitz*, 51 Cal. 3d 72, 110, 793 P.2d 23, 48, 270 Cal. Rptr. 817, 842 (1990).

173. *Id.* at 110-11, 793 P.2d at 48-49, 270 Cal. Rptr. at 842-43.

174. CAL. PENAL CODE § 190.3(b) (West 1988).

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

176. *People v. Frank*, 51 Cal. 3d 718, 728, 798 P.2d 1215, 1221, 274 Cal. Rptr. 372, 377-78 (1990).

177. *Id.* at 728-29, 798 P.2d at 1221, 274 Cal. Rptr. at 378. The court cited *People v. Melton*, stating that a capital sentencing jury may consider "prior dismissed or bargained charges" when deliberating in the penalty phase. *Id.* at 728, 798 P.2d at 1221, 274 Cal. Rptr. at 378 (citing *People v. Melton*, 44 Cal. 3d 713, 755, 750 P.2d 741, 765, 244 Cal. Rptr. 867, 892 (1988)).

178. *People v. Taylor*, 52 Cal. 3d 719, 742-43, 801 P.2d 1142, 1154, 276 Cal. Rptr. 391,

juvenile court proceeding could be considered under factor (b).¹⁷⁹ The court held evidence of violent criminal conduct could be considered whether done as a juvenile or adult.¹⁸⁰ The court in *People v. Sanders* rejected the defendant's contention that the jury instruction should have been modified, finding instead that the jury was adequately informed that factor (b) criminal activity does not include the activity for which the defendant is being tried.¹⁸¹

2. Factor (c) Error

The defendant in *People v. Taylor* alleged prejudice caused by the erroneous admission of aggravating evidence under factor (c) regarding two burglaries he committed which were not adjudicated until after the capital offense trial had begun.¹⁸² The defendant argued that under *People v. Balderas* prior felony convictions admitted under factor (c) must have been decided before the "commission of the capital crime."¹⁸³ While the court agreed with the defendant's contention, it concluded that because the jury was later told to disregard the evidence, and because the evidence was slight compared to other aggravating factors properly admitted, the error was harmless.¹⁸⁴ In *People v. Kaurish*, the court held that the prosecution could not admit evidence of either the defendant's prior prison escape or his post-capital offense; however, the court declined to reverse, stating the defendant had failed to object to admission of the evidence, thereby waiving the issue on appeal.¹⁸⁵ The court also rejected the defendant's contention that admission of prior felonies under factor (c) was unconstitutional.¹⁸⁶

403 (1990); *People v. Kaurish*, 52 Cal. 3d 648, 703, 802 P.2d 278, 307, 276 Cal. Rptr. 788, 817 (1990).

179. *People v. Hayes*, 52 Cal. 3d 577, 633, 802 P.2d 376, 411, 276 Cal. Rptr. 874, 908 (1990). The defendant originally argued that juvenile court proceedings are not considered criminal convictions and, therefore, are not admissible under section 190.3(c) as prior felony convictions. The court, however, noted that the evidence was properly admitted under factor (b). *Id.* at 633, 802 P.2d at 411, 276 Cal. Rptr. at 908-09.

180. *Id.* at 633, 802 P.2d at 411, 276 Cal. Rptr. at 909.

181. *People v. Sanders*, 51 Cal. 3d 471, 528, 797 P.2d 561, 595, 273 Cal. Rptr. 537, 571 (1990). The court noted that it had previously rejected such allegations, and that the prosecution's closing argument identified which previous crimes could be considered under factor (b).

182. *Taylor*, 52 Cal. 3d at 740, 801 P.2d at 1152, 276 Cal. Rptr. at 401.

183. *Id.* (citing *People v. Balderas*, 41 Cal. 3d 144, 201, 711 P.2d 480, 513, 222 Cal. Rptr. 184, 217 (1985)) (emphasis added).

184. *Id.*

185. *People v. Kaurish*, 52 Cal. 3d 648, 702, 802 P.2d 278, 306, 276 Cal. Rptr. 788, 816 (1990). The court held that the defendant, by failing to object, also waived the erroneous admission of his breach of probation, which is not admissible under either factor (b) or (c). *Id.*

186. *Id.* at 700-01, 802 P.2d at 305-06, 276 Cal. Rptr. at 815-16 (holding factor (c) does not violate Eighth Amendment by making the sentencing process "capricious and arbitrary").

C. Victim and Family Impact Evidence

The supreme court rejected ten challenges to the admissibility of evidence, in all trial phases, concerning the crime's impact on the victim and the victim's family.¹⁸⁷ Such evidence is precluded from admission at trial,¹⁸⁸ and statements made to elicit sympathy or pity on such grounds also are barred.¹⁸⁹ However, "brief references to the victims or their families" are not prevented.¹⁹⁰

Most appeals regarding victim and family impact evidence involve photographs of the victim's corpse, the crime scene, and the victim while alive, as well as evidence and statements regarding the victim's character and the crime's impact on the family.¹⁹¹ The main arguments presented by the defendants were that the challenged evidence was irrelevant to any disputed issue and that its probative value did not substantially outweigh its prejudicial effect.¹⁹²

The supreme court gave great deference to the trial courts' findings that the evidence was relevant to show: (1) facts incriminating the defendant;¹⁹³ (2) the defendant's intent or frame of mind;¹⁹⁴ (3)

187. *People v. Anderson*, 52 Cal. 3d 453, 801 P.2d 1107, 276 Cal. Rptr. 356 (1990); *People v. Frank*, 51 Cal. 3d 718, 798 P.2d 1215, 274 Cal. Rptr. 372 (1990); *People v. Gonzalez*, 51 Cal. 3d 1179, 800 P.2d 1159, 275 Cal. Rptr. 729 (1990); *People v. Kaurish*, 52 Cal. 3d 648, 802 P.2d 278, 276 Cal. Rptr. 788 (1990); *People v. Kelly*, 51 Cal. 3d 931, 800 P.2d 516, 275 Cal. Rptr. 160 (1990); *People v. Medina*, 51 Cal. 3d 870, 799 P.2d 1282, 274 Cal. Rptr. 849 (1990); *People v. Sanders*, 51 Cal. 3d 471, 797 P.2d 561, 273 Cal. Rptr. 537 (1990); *People v. Stankewitz*, 51 Cal. 3d 72, 793 P.2d 23, 270 Cal. Rptr. 817 (1990); *People v. Taylor*, 52 Cal. 3d 719, 801 P.2d 1142, 276 Cal. Rptr. 391 (1990); *People v. Wright*, 52 Cal. 3d 367, 802 P.2d 221, 276 Cal. Rptr. 731 (1990).

188. *Booth v. Maryland*, 482 U.S. 496, 507 (1987).

189. *South Carolina v. Gathers*, 490 U.S. 805 (1989). *But see Frank*, 51 Cal. 3d at 734, 798 P.2d at 1224, 274 Cal. Rptr. at 381 (quoting *People v. Hovey*, 44 Cal. 3d 543, 576, 749 P.2d 776, 795, 244 Cal. Rptr. 121, 140 (1988)). In *Frank*, the California Supreme Court stated that pictures appealing to jury sympathy may be properly admitted at the penalty phase where the jury must "'weigh the sympathetic elements of defendant's background against those that may offend the conscience'" so long as no "wholly irrelevant information or inflammatory rhetoric is employed." *Id.* The supreme court warned, however, that the use of a victim's photograph should be discouraged. *Id.*

190. *See Anderson*, 52 Cal. 3d at 470, 801 P.2d at 1121-22, 276 Cal. Rptr. at 370-71 (brief reference to victim's wish not to die was harmless); *Medina*, 51 Cal. 3d at 905-06, 799 P.2d at 1305, 274 Cal. Rptr. at 872 (quoting *People v. Douglas*, 50 Cal. 3d 468, 536, 268 P.2d 640, 680, 268 Cal. Rptr. 126, 166 (1990)); *Stankewitz*, 51 Cal. 3d at 112, 793 P.2d at 49-50, 270 Cal. Rptr. at 843-44 (brief reference to loss suffered by victim's family not prejudicial error).

191. *See, e.g., Gonzales*, 51 Cal. 3d at 1236-37, 800 P.2d at 1189-90, 275 Cal. Rptr. at 759-60 (photographs of victim's corpse); *Kelly*, 51 Cal. 3d at 962-63, 800 P.2d at 535, 275 Cal. Rptr. at 179 (photographs of victim and crime scene).

192. *See, e.g., Kelly*, 51 Cal. 3d at 962-63, 800 P.2d at 535-36, 275 Cal. Rptr. at 179-80; *People v. Wright*, 52 Cal. 3d 367, 434, 802 P.2d 221, 265, 276 Cal. Rptr. 731, 775.

193. *People v. Kaurish*, 52 Cal. 3d at 683-84, 802 P.2d at 294-95, 276 Cal. Rptr. at 804-

“circumstances of the crime;” and (4) prior violent criminal conduct.¹⁹⁵ In addition, the court agreed with the trial courts that the evidence was neither gruesome nor inflammatory.¹⁹⁶

The court further noted that such evidence was not barred during a sentence modification hearing, though it could not be considered by a judge when rendering his or her modification decision.¹⁹⁷ The court repeatedly held that if any error existed, it was harmless.¹⁹⁸ The high court also stated that a trial court’s admission of such photographs and testimony will not be overruled unless the prejudicial effect is clear.¹⁹⁹

D. Automatic Motion for Modification of Verdict

In every case where a death sentence is imposed, the trial court must consider whether the verdict should be modified.²⁰⁰ The court

05 (holding photographs of corpse showing markings and bodily fluids were relevant to establish that the defendant was the murderer).

194. *Kelly*, 51 Cal. 3d at 963-64, 800 P.2d at 536, 275 Cal. Rptr. at 180 (holding that even if evidence was only marginally relevant to establish the defendant’s frame of mind, the error was harmless).

195. *People v. Frank*, 51 Cal. 3d 718, 734, 798 P.2d 1215, 1224, 274 Cal. Rptr. 372, 381 (1990); *People v. Medina*, 51 Cal. 3d 870, 905, 799 P.2d 1282, 1305, 274 Cal. Rptr. 849, 872 (1990) (allowing evidence of victim’s passive nature to show whether victim would have resisted a robbery); *People v. Stankewitz*, 51 Cal. 3d 72, 111, 793 P.2d 23, 49, 270 Cal. Rptr. 817, 843 (1990) (victims’ assault testimony admissible under both factor (a) and (b)); *People v. Taylor*, 52 Cal. 3d 719, 741, 801 P.2d 1142, 1153, 276 Cal. Rptr. 391, 402 (evidence of victim’s terror relevant to show nature and circumstance of crime).

196. *See People v. Anderson*, 52 Cal. 3d 453, 474-75, 801 P.2d 1107, 1118, 276 Cal. Rptr. 356, 367; *People v. Gonzalez*, 51 Cal. 3d 1179, 1237, 800 P.2d 1159, 1190, 275 Cal. Rptr. 729, 760; *Kaurish*, 52 Cal. 3d at 683-84, 802 P.2d at 294-95, 276 Cal. Rptr. at 804-05; *Kelly*, 51 Cal. 3d at 963, 800 P.2d at 536, 275 Cal. Rptr. at 180; *People v. Sanders*, 51 Cal. 3d 471, 515, 797 P.2d 561, 586, 273 Cal. Rptr. 537, 562; *Wright*, 52 Cal. 3d at 434, 802 P.2d at 265, 276 Cal. Rptr. at 775. *But see Frank*, 51 Cal. 3d at 735, 798 P.2d at 1225, 274 Cal. Rptr. at 382 (though pictures of the victim were gruesome, their relevance outweighed their prejudice).

197. *See, e.g., Frank*, 51 Cal. 3d at 741-42, 798 P.2d at 1229-30, 274 Cal. Rptr. at 386-87. In *Frank*, the court addressed the allegation that admitting evidence from the murder victim’s grandmother prior to the modification hearing was prejudicial. *Id.* at 741, 798 P.2d at 1229, 274 Cal. Rptr. at 386. The court held that Eighth Amendment restraints do not apply to family impact evidence presented during a modification hearing, though the trial judge may not consider this evidence when rendering his decision. *Id.* at 742, 798 P.2d at 1229, 274 Cal. Rptr. at 386. *See also infra* note 208 and accompanying text (judge may not consider family impact evidence that is not admissible to the jury); *Medina*, 51 Cal. 3d at 911-12, 799 P.2d at 1309-10, 274 Cal. Rptr. at 876-77 (same conclusion concerning family impact and victim character evidence presented after the modification hearing but before formal sentencing).

198. *See Taylor*, 52 Cal. 3d at 747, 801 P.2d at 1157, 276 Cal. Rptr. at 406; *Kelly*, 51 Cal. 3d at 963, 800 P.2d at 536, 275 Cal. Rptr. at 180; *Frank*, 51 Cal. 3d at 734, 798 P.2d at 1224, 274 Cal. Rptr. at 381.

199. *See Sanders*, 51 Cal. 3d at 514, 797 P.2d at 585, 273 Cal. Rptr. at 561; *Wright*, 52 Cal. 3d at 434, 802 P.2d at 265, 276 Cal. Rptr. at 775; *see also Frank*, 51 Cal. 3d at 734, 798 P.2d at 1225, 274 Cal. Rptr. at 382 (failure to object to photograph admission constitutes a waiver on appeal).

200. CAL. PENAL CODE § 190.4(e) (West Supp. 1991). Section 190.4(e) requires, *inter*

has authority to render a modification under California Penal Code section 1385(a).²⁰¹ In rendering such a decision, the court must weigh the mitigating and aggravating circumstances to determine whether the jury's finding was "contrary to law or the evidence presented."²⁰² After a review of the application for modification, the judge must state the reasons for his or her conclusions on the record.²⁰³ The supreme court heard a total of eight appeals claiming improper consideration of the motion for modification.²⁰⁴ Although the supreme court did not reverse any decisions due to the trial courts' refusal to modify, it did address various errors that were non-prejudicial.

In *People v. Gonzalez*, the court noted that the trial judge had erred by considering a probation report that had not been submitted to the jury.²⁰⁵ The court stated that only evidence which was admitted in the penalty phase could be considered on a modification motion.²⁰⁶ In *People v. Whitt*, the court reached the same conclusion regarding the trial court's consideration of a probation report.²⁰⁷ The court in *People v. Frank* also stated that family impact evidence,

alia, that "[i]n every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant *shall be deemed to have made an application for modification* of such verdict . . ." *Id.* (emphasis added). See generally 3 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* § 1618 (2d ed. 1989 & Supp. 1991); 22 CAL. JUR. 3d *Criminal Law* § 3347 (1985); *Death Penalty III*, *supra* note 6, at 547-48; *Death Penalty V*, *supra* note 1, at —.

201. CAL. PENAL CODE § 1385(a) (West Supp. 1991). Section 1385(a) states, in pertinent part, "[t]he judge or magistrate may, either of his or her own motion . . . and in furtherance of justice, order an action to be dismissed." *Id.* The trial court may dismiss on a finding of special circumstances without reversing the entire conviction. *People v. Williams*, 18 Cal. 3d 420, 441-42, 556 P.2d 1101, 1114, 134 Cal. Rptr. 650, 663 (1981). See also CAL. PENAL CODE § 1181(7) (West 1988) (allowing judge to modify a verdict "by imposing [a] lesser punishment without granting or ordering a new trial . . .").

202. CAL. PENAL CODE § 190.4(e) (West 1988).

203. *Id.*

204. See *People v. Anderson*, 52 Cal. 3d 453, 801 P.2d 1107, 276 Cal. Rptr. 356 (1990); *People v. Frank*, 51 Cal. 3d 718, 798 P.2d 1215, 274 Cal. Rptr. 372 (1990); *People v. Gonzalez*, 51 Cal. 3d 1179, 800 P.2d 1159, 275 Cal. Rptr. 729 (1990); *People v. Hayes*, 52 Cal. 3d 577, 802 P.2d 376, 276 Cal. Rptr. 874 (1990); *People v. Kelly*, 51 Cal. 3d 931, 800 P.2d 516, 275 Cal. Rptr. 160 (1990); *People v. Taylor*, 52 Cal. 3d 719, 801 P.2d 1142, 276 Cal. Rptr. 391 (1990); *People v. Whitt*, 51 Cal. 3d 620, 798 P.2d 849, 274 Cal. Rptr. 252 (1990); *People v. Wright*, 52 Cal. 3d 367, 802 P.2d 221, 276 Cal. Rptr. 731 (1990).

205. *Gonzalez*, 51 Cal. 3d at 1237, 800 P.2d at 1190, 275 Cal. Rptr. at 760.

206. *Id.* at 1238, 800 P.2d at 1190, 275 Cal. Rptr. at 760. The court refused to address whether the defendant waived the error by submitting to the report's review, stating judgment on this issue was not necessary because the report was overwhelmingly outweighed by aggravating factors. *Id.* at 1238-39, 800 P.2d at 1190-91, 275 Cal. Rptr. at 760-61.

207. *Whitt*, 51 Cal. 3d at 660-61, 798 P.2d at 874, 274 Cal. Rptr. at 277.

though admissible at the modification hearing, was correctly disregarded by the trial judge because the evidence had not been presented to the jury.²⁰⁸

In *People v. Hayes*, the court declared that the defendant was not denied "meaningful oral argument" merely because the trial court had tentatively ruled on a motion before the defendant could present oral evidence.²⁰⁹ The court in *People v. Kelly*, held that due to the egregious nature of the defendant's crimes, the trial judge's failure to consider a mitigating factor was not prejudicial.²¹⁰

As with other issues appealed, the supreme court repeatedly gave great deference to the trial judge's ability to balance the mitigating and aggravating factors, finding no reversible error in any of the cases reviewed.

E. Proportionality Review

A final issue addressed on appeal concerned the proportionality of the death sentence under the federal Constitution's Eighth Amendment.²¹¹ There are two types of proportionality review: intercase and intracase. In intercase proportionality review, the trial court compares the penalties given the defendant with those given other defendants found guilty of the same or similar crimes.²¹² Such review is discretionary, however, since it is not guaranteed by the Constitution.²¹³ The California Supreme Court does, however, address intracase proportionality when the issue is raised on automatic appeal.²¹⁴

208. *Frank*, 51 Cal. 3d at 742, 798 P.2d at 1229-30, 274 Cal. Rptr. at 386-87. See also *supra* note 197 and accompanying text (admissibility of family impact evidence at modification hearing).

209. *People v. Hayes*, 52 Cal. 3d 577, 644-45, 802 P.2d 376, 419, 276 Cal. Rptr. 874, 916-17. The supreme court stated that it is "common practice" for a trial judge to formulate a tentative conclusion. The trial court is not bound by such a decision and may amend if so persuaded at the modification hearing. *Id.* at 645, 802 P.2d at 419, 276 Cal. Rptr. at 916-17.

210. *People v. Kelly*, 51 Cal. 3d 931, 970, 800 P.2d 516, 275 Cal. Rptr. 160, 185 (1990).

211. Such appeals generally asserted that the death penalty was disproportionate to penalties levied on other defendants who had committed similar crimes. Under the Eighth Amendment, "[e]xcessive bail shall not be required, no excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII (emphasis added). See also *Death Penalty IV*, *supra* note 1, at 1116.

212. See, e.g., *Pulley v. Harris*, 465 U.S. 37 (1984).

213. *Id.* at 50-51. The United States Supreme Court held that the Eighth Amendment does not require a "comparative proportionality review" in every death penalty case. In two cases that raised the intercase proportionality issue, *People v. Stankewitz* and *People v. Medina*, the California Supreme Court stated review is not mandatory. *People v. Stankewitz*, 51 Cal. 3d 72, 112, 793 P.2d 23, 50, 270 Cal. Rptr. 817, 844 (1990); *People v. Medina*, 51 Cal. 3d 870, 912-13, 799 P.2d 1282, 1310, 274 Cal. Rptr. 849, 877 (1990).

214. In *People v. Turner*, the court stated that under the California Constitution, punishment not proportionally based on "the defendant's individual culpability" was "preclude[d]." *People v. Turner*, 50 Cal. 3d 668, 718, 789 P.2d 887, 915, 268 Cal. Rptr. 706, 735 (1990).

The standard applied is not a strict comparison of similar punishments, rather, it is whether the sentence given was proportionate to the defendant's particular culpability.²¹⁵

Six of the fourteen cases surveyed raised the issue of either intercase or intracase proportionality.²¹⁶ The court rejected all six appeals that the death penalty was disproportionate, by finding either the sentence was justified on the particular facts of the case or by deferring to the trial court's refusal to review proportionality.²¹⁷

F. Cumulative Prejudice

The court addressed the issue of whether the cumulative effect of trial errors, though individually harmless, should result in a total reversal. The court stated that most of the errors were minimal and, even considered together, were not unduly prejudicial.²¹⁸

G. Constitutionality of Death Sentence

Seven of the thirteen defendants alleged the constitutional invalid-

215. *People v. Lang*, 49 Cal. 3d 991, 1043, 782 P.2d 627, 662, 264 Cal. Rptr. 386, 421 (1989).

216. *People v. Hayes*, 52 Cal. 3d 577, 802 P.2d 376, 276 Cal. Rptr. 874 (1990); *People v. Kaurish*, 52 Cal. 3d 648, 802 P.2d 278, 276 Cal. Rptr. 788 (1990); *People v. Medina*, 51 Cal. 3d 870, 799 P.2d 1282, 274 Cal. Rptr. 849 (1990); *People v. Sanders*, 51 Cal. 3d 471, 797 P.2d 561, 273 Cal. Rptr. 537 (1990); *People v. Stankewitz*, 51 Cal. 3d 72, 793 P.2d 23, 270 Cal. Rptr. 817 (1990); *People v. Wright*, 52 Cal. 3d 367, 802 P.2d 221, 276 Cal. Rptr. 731 (1990).

217. *Hayes*, 52 Cal. 3d at 645, 802 P.2d at 419, 276 Cal. Rptr. at 917 (death not disproportionate in light of brutal killing over money and cigarettes as well as a continual pattern of violence); *Kaurish*, 52 Cal. 3d at 716, 802 P.2d at 316, 276 Cal. Rptr. at 826 (death adequate sentence for molestation and murder of adolescent female); *Medina*, 51 Cal. 3d at 912-13, 799 P.2d at 1310, 274 Cal. Rptr. at 877 (court refused to address intercase proportionality); *Sanders*, 51 Cal. 3d at 529-30, 797 P.2d at 596, 273 Cal. Rptr. at 572 (death not disproportionate despite accomplice's lesser prison sentence because of defendant's motive and prior criminal activity); *Stankewitz*, 51 Cal. 3d at 112-13, 793 P.2d at 50, 270 Cal. Rptr. at 844 (facts of case do not produce intracase disproportionality); *Wright*, 52 Cal. 3d at 449, 802 P.2d at 275, 276 Cal. Rptr. at 785 (death appropriate because of defendant's violent criminal history combined with brutal murder and rape of an elderly woman).

218. See *People v. Frank*, 51 Cal. 3d 718, 736, 798 P.2d 1215, 1225, 274 Cal. Rptr. 372, 382 (1990) (majority of errors barred by failure to object while others lacked cumulative merit); *People v. Hayes*, 52 Cal. 3d 577, 644, 802 P.2d 376, 418, 276 Cal. Rptr. 874, 916 (1990) (record indicated few errors, and when considered together, did not require reversal); *People v. Kelly*, 51 Cal. 3d 931, 970, 800 P.2d 516, 540, 275 Cal. Rptr. 160, 184 (1990) (majority of errors rejected as meritless, leaving no basis for cumulative prejudice); *People v. Taylor*, 52 Cal. 3d 719, 750, 801 P.2d 1142, 1159, 276 Cal. Rptr. 391, 408 (1990) (cumulative error not reversible because, even absent errors, the jury could have reached no other verdict).

ity of the 1978 death penalty law and sentencing procedures.²¹⁹ The court dismissed the arguments in one paragraph opinions stating that such challenges have been continually rejected.²²⁰ The court stated that none of the defendants' contentions justified reconsideration of past decisions.²²¹

VII. CONCLUSION

The affirmation of all thirteen death penalty sentences underscores the Lucas court's reluctance to reverse death sentences on appeal. While noting that many harmless errors occur, the court rarely finds reversible error.

Perhaps the most predominate aspect of the death penalty affirmations was the dismissal without review of many possible noninstructional errors because defense counsel waived the issue on appeal by failing to object at trial. The court was also able to dismiss many issues under the harmless error doctrine, stating that the aggravating evidence was so compelling that the errors were not prejudicial. The court continued its policy of allowing defense counsel great leeway in using questionable tactics as part of the defense strategy. The court allowed the same latitude in the areas of prosecutorial misconduct and judicial discretion. For example, the court tolerated considerable

219. *People v. Anderson*, 52 Cal. 3d 453, 475, 801 P.2d 1107, 1125, 276 Cal. Rptr. 356, 374 (1990); *Peoplé v. Gonzalez*, 51 Cal. 3d 1179, 1228, 800 P.2d 1159, 1184, 275 Cal. Rptr. 729, 754 (1990); *People v. Kaurish*, 52 Cal. 3d 648, 715, 802 P.2d 278, 315, 276 Cal. Rptr. 788, 825 (1990); *People v. Medina*, 51 Cal. 3d 879, 915, 799 P.2d 1282, 1309, 274 Cal. Rptr. 849, 876 (1990); *People v. Taylor*, 52 Cal. 3d 719, 748, 801 P.2d 1142, 1158, 276 Cal. Rptr. 391, 407 (1990); *People v. Whitt*, 51 Cal. 3d 620, 661, 798 P.2d 849, 874, 274 Cal. Rptr. 252, 277 (1990); *People v. Wright*, 52 Cal. 3d 367, 448, 802 P.2d 221, 275, 276 Cal. Rptr. 731, 784 (1990).

220. The court cited: *People v. Jennings*, 46 Cal. 3d 963, 760 P.2d 475, 251 Cal. Rptr. 278 (1988); *People v. Bonin*, 46 Cal. 3d 659, 758 P.2d 1217, 250 Cal. Rptr. 687 (1988); *People v. Miranda*, 44 Cal. 3d 57, 744 P.2d 1127, 241 Cal. Rptr. 594 (1987); *People v. Rodriguez*, 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986); *People v. Jackson*, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980); *People v. Frierson*, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979).

221. Some of the grounds for reversal that the court rejected included: (1) that aggravating factors must be individually proven beyond a reasonable doubt; (2) that a finding of aggravating factors requires a unanimous jury; and (3) that aggravating factors outweighed mitigating ones must also be found beyond a reasonable doubt. See *Gonzalez*, 51 Cal. 3d at 1236, 800 P.2d at 1189, 275 Cal. Rptr. at 759; *Kaurish*, 52 Cal. 3d at 715-16, 802 P.2d at 315-16, 276 Cal. Rptr. at 825-26; *Taylor*, 52 Cal. 3d at 748-49, 801 P.2d at 1158, 276 Cal. Rptr. at 407; *Whitt*, 51 Cal. 3d at 661, 798 P.2d at 874-75, 274 Cal. Rptr. at 277-78. The court also rejected the contention that the death penalty law violates the Eighth Amendment "because it fails to replace arbitrary jury discretion with 'objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.'" *Wright*, 52 Cal. 3d at 448, 802 P.2d at 275, 276 Cal. Rptr. at 785 (citing *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976)). Finally, the court rejected allegations that the death penalty violates the equal protection clause because it requires no specific, written findings of aggravating factors relied on by the jury when making penalty determination. *Medina*, 51 Cal. 3d at 909-10, 799 P.2d at 1308, 274 Cal. Rptr. at 875.

Brown and factor (k) error by the People and trial court so long as some attempt to cure or clarify the instruction was made.

Overall, no one issue on appeal was predominant or particularly effective. The least effective challenge was to the constitutionality of the death penalty statute. The court rarely gave the issue even a one line renunciation. Most potentially reversible issues hinged on specific facts and did not fall within the specific appeal categories.

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VII. ELECTION LAW

An initiative is invalid if, at the time it is adopted, it is inconsistent with a city's general plan: Leshar Communications v. City of Walnut Creek.

I. INTRODUCTION

The use of initiatives and referenda by voters to change the land use decisions enacted by their local governments has become one of the newest trends facing courts throughout the country.¹ The California Supreme Court had the opportunity to decide the validity of such a practice in *Leshar Communications, Inc. v. City of Walnut Creek*.² The Court interpreted the California Planning and Zoning Law³ and found that a controlled growth initiative⁴ was invalid and unenforceable because it conflicted with the pro-growth general plan of the city.⁵

1. *Voters Rights Challenged in Land Use: Cases Pit People Against Developers*, Wash. Post, May 7, 1990, at F28 [hereinafter *Voters Rights*] (noting that land use initiatives will be considered in at least six states).

2. 52 Cal. 3d 531, 802 P.2d 317, 277 Cal. Rptr. 1 (1990). Justice Eagleson wrote the opinion of the court and was joined by Chief Justice Lucas and by Justices Broussard, Panelli, Kennard, and Arabian. Justice Mosk wrote a separate dissenting opinion.

3. The Planning and Zoning Law can be found in CAL. GOV'T CODE §§ 65000-66403 (West 1983 & Supp. 1991).

4. The initiative, known as "Measure H" and entitled the "Traffic Control Initiative," sought a building moratorium on new construction if the current or proposed peak hour traffic in the core business district exceeded 85%. *Leshar Communications, Inc. v. City of Walnut Creek*, 52 Cal. 3d 531, 536-37, 802 P.2d 317, 319, 277 Cal. Rptr. 1, 2-3 (1990) (hereinafter "*Leshar*"). The initiative was adopted by the voters on November 5, 1985, winning by a narrow margin of 9,562 to 9,162. *Leshar Communications, Inc. v. City of Walnut Creek*, 225 Cal. App. 3d 645, 649, 262 Cal. Rptr. 337, 339 (1989) (hereinafter "*Leshar Communications*") (describing the election process).

5. *Leshar*, 52 Cal. 3d at 546, 802 P.2d at 326, 277 Cal. Rptr. at 8 (1990). The general plan, as adopted in 1971, stated that its objectives were: "1) To enhance Walnut Creek's subregional position as the administrative and professional office center of Central Contra Costa County; 2) To strengthen and enhance Walnut Creek's position

While the case was pending before the court of appeal, the city's general plan was amended to incorporate the initiative's slow-growth provisions.⁶ The California Supreme Court nevertheless granted review to determine not only the effect of the initiative on the general plan, but the effect of the subsequent amendment of the general plan on the validity of the initiative.⁷ The court concluded, with one justice dissenting,⁸ that in order to be a valid exercise of the voting power, a zoning initiative must be consistent with the general plan in effect at the time the initiative is passed.⁹ If an adopted initiative is inconsistent with the general plan, it cannot become part of the plan, even if the plan is subsequently amended to conform with the ordinance.¹⁰

II. TREATMENT OF THE CASE

A. *Majority Opinion*

The court considered the implications of characterizing Walnut Creek's Measure H Traffic Control initiative as an amendment to the general plan¹¹ because the initiative would have been invalid if construed as a zoning ordinance.¹² The court noted that the Planning and Zoning Law allows the amendment of a general plan by a legisla-

as a subregional retail shopping center." See *Leshar Communications*, 225 Cal. App. 3d at 657, 262 Cal. Rptr. at 344. In 1977, the general plan noted that "[c]ommuter-hour congestion . . . will continue to increase as new development occurs. Although some minor improvements can be made . . . drivers will have to adjust to an increased level of congestion." *Leshar*, 52 Cal. 3d at 536, 802 P.2d at 319, 277 Cal. Rptr. at 3 (emphasis in original).

6. *Leshar*, 52 Cal. 3d at 538, 802 P.2d at 321, 277 Cal. Rptr. at 4. The case originated in 1986 when *Leshar Communications*, the largest employer in the city, sought to expand its building, but was hindered by the 1985 initiative. It brought suit to invalidate the initiative on the basis that it conflicted with the general plan. For a history of the litigation, see *Leshar Communications*, 225 Cal. App. 3d at 657, 262 Cal. Rptr. at 339-40. The superior court found the initiative to be invalid. *Id.* (describing the proceedings). The court of appeal heard the case and found the initiative to be valid, even though the city amended its general plan during the pendency of the action. *Id.* at 657, 262 Cal. Rptr. at 340-41.

7. *Leshar*, 52 Cal. 3d at 535, 802 P.2d at 318, 277 Cal. Rptr. at 2. See generally CAL. GOV'T CODE § 65860(c) (West 1977) (explaining an inconsistent zoning ordinance may be amended or conformed to a general plan, but not addressing the situation where a general plan is subsequently amended to conform to an inconsistent zoning ordinance).

8. Justice Mosk dissented on the grounds that the subsequent amendment to the general plan rendered the litigation moot. See *Leshar*, 52 Cal. 3d at 547, 802 P.2d at 327-28, 277 Cal. Rptr. at 11 (Mosk, J., dissenting).

9. *Leshar*, 52 Cal. 3d at 545-46, 802 P.2d at 327-28, 277 Cal. Rptr. at 9-10.

10. *Id.* at 545, 802 P.2d at 325, 277 Cal. Rptr. at 8.

11. *Id.* at 539, 802 P.2d at 321, 277 Cal. Rptr. at 4-5.

12. *Id.* at 541, 802 P.2d at 322, 277 Cal. Rptr. at 6. See generally, *deBottari v. Norco City Council*, 171 Cal. App. 3d 1204, 1210, 217 Cal. Rptr. 790, 793 (1985) (noting that if an initiative is a zoning ordinance it must be consistent with the general plan); *Sierra Club v. Kern County Board of Supervisors*, 26 Cal. App. 3d 698, 704, 179 Cal. Rptr. 261, 264 (1981) (emphasizing the importance of an internally consistent general plan).

tive act.¹³ Thus, the court reasoned that because a voter initiative is a legislative act, voters can amend a general plan.¹⁴ The initiative was not, however, presented to the voters as an amendment pursuant to the notice provisions of the Elections Code.¹⁵ The ballot summary simply explained that adoption of the initiative would change "existing law" and make the initiative's slow-growth plan consistent with the general plan.¹⁶ It did not indicate that the initiative was actually a proposed amendment to the general plan.¹⁷ Because it was not identified as an amendment, the supreme court opined that the voters saw the proposed initiative not as an amendment, but as a zoning ordinance.¹⁸ Hence, the court concluded that it could not arbitrarily convert the initiative into an amendment if the voters

13. The amendment process is as follows: First, the city requesting the amendment to the plan must hold a noticed public hearing before recommending the amendment. CAL. GOV'T. CODE § 65353(a) (West Supp. 1991). Then, the city files a request for hearing by the legislative body. *Id.* at § 65354.5. Next, the legislative body participates in the public hearing. *Id.* at § 65355. And finally, the legislative body may adopt, modify, or disapprove of the proposed amendment. CAL. GOV'T CODE § 65356 (West Supp. 1991). *See also*, 66 CAL. JUR. 3D, *Zoning and Other Land Controls* § 30 (1981 & Supp. 1991).

14. *Lesher*, 52 Cal. 3d at 539, 802 P.2d at 321, 277 Cal. Rptr. at 1. Initiative and referendum powers have been previously applied to zoning ordinances. The seminal case giving voters the right to effect the zoning plan of a region was *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 596, 557 P.2d 473, 479-80, 135 Cal. Rptr. 41, 48-49 (1976) (removing the notice and hearing requirements required when a legislative body adopts an ordinance). *See also* *Yost v. Thomas*, 36 Cal. 3d 561, 570-71, 685 P.2d 1152, 1158, 205 Cal. Rptr. 801, 807 (1985) (explaining that the adoption of a specific city plan is a legislative act subject to initiative or referendum); *Arnel Development v. City of Costa Mesa*, 28 Cal. 3d 511, 516-17, 620 P.2d 565, 572-73, 169 Cal. Rptr. 904, 907 (1980) (finding that California precedent mandates that all zoning measures are legislative acts, permitting the use of initiatives); 66 CAL. JUR. 3D, *Zoning and Other Land Controls* § 83 (1981 & Supp. 1991); 8 WITKIN, *SUMMARY OF CALIFORNIA LAW, Constitutional Law* § 829 (9th ed. 1988).

15. *Lesher*, 52 Cal. 3d at 542, 802 P.2d at 323, 277 Cal. Rptr. at 6-7. The California Elections Code requires that a ballot title and summary provided by the city attorney describe the proposed initiative. *See generally*, CAL. ELEC. CODE § 4002 (West Supp. 1991) (setting forth the notice requirements which mandate the initial filing of a "Notice of Intent to Circulate Petition"); CAL. ELEC. CODE § 4002.5 (West Supp. 1991) (pointing out that upon receipt of proposed measure, the city attorney must prepare a ballot title and summary); CAL. ELEC. CODE § 4003 (West Supp. 1991) (explaining that initiative's title and summary must be circulated to public); 38 CAL. JUR. 3D, *Initiative and Referendum* §§ 44-54 (1977 & Supp. 1991).

16. *Lesher*, 52 Cal. 3d at 543, 802 P.2d at 324, 277 Cal. Rptr. at 7.

17. *Id.*

18. *Id.* at 543-44, 802 P.2d at 324, 277 Cal. Rptr. at 7-8. *See generally*, Annotation, *Adoption of Zoning Ordinance or Amendment Thereto Through Initiative Process*, 72 A.L.R. 3D 991, 1008-15 (1976 & Supp. 1990) (explaining history and interpretation of the zoning through initiative process in California).

themselves did not recognize it as an amendment.¹⁹

Once the court identified the initiative as a zoning ordinance rather than an amendment, it examined the inconsistencies between the pro-growth general plan and the limited-growth ordinance. In doing so, it addressed the subsequent amendment to the plan as a possible remedy to those inconsistencies. Acknowledging the well-settled view that “[a] zoning ordinance that conflicts with a general plan is invalid at the time it is passed,”²⁰ the court concluded that even the 1989 amendment to the general plan could not cure the initiative since the *consistency and validity of an ordinance must be based on the general plan in force at the time of the adoption of the ordinance*.²¹ The court further posited that the city could not rely on provisions in the amendment to California Government Code section 65860²² to rescue an ordinance which was never valid. The court explained that the purpose of the statute was to bring existing zoning ordinances into compliance with the general plan rather than to validate ordinances which were inconsistent with the general plan at their adoption.²³ Finally, the court noted that the legislative intent of the Planning and Zoning Law would be frustrated if a general plan could be amended to conform to an inconsistent and invalid zoning order.²⁴ Based on these arguments, the court held the Measure H Traffic Control Initiative to be invalid, and gave no remedial effect to

19. *Leshner*, 52 Cal. 3d at 542, 802 P.2d at 323, 277 Cal. Rptr. at 6-7 (emphasizing the need to maintain a comprehensive plan).

20. *Id.* at 544, 802 P.2d at 324, 277 Cal. Rptr. at 8. *See generally*, *deBottari v. Norco City Council*, 171 Cal. App. 3d 1204, 1212, 217 Cal. Rptr. 790, 794 (1985) (an enacted voter referendum would result in an invalid zoning ordinance); *Sierra Club v. Board of Supervisors*, 26 Cal. App. 3d 698, 704, 179 Cal. Rptr. 261, 264 (1981) (legislative intent would be frustrated if ordinance could thwart general plan requirements); 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 844 (9th ed. 1988).

21. *Leshner*, 51 Cal. 3d at 545, 802 P.2d at 325-26, 277 Cal. Rptr. at 8. *But see*, *Building Industry Ass'n v. Superior Court*, 211 Cal. App. 3d 277, 297, 259 Cal. Rptr. 325, 338-39 (1989) (compliance decree is a preferable remedy to complete invalidation of ordinance).

22. “In the event a zoning ordinance becomes inconsistent with a general plan by reason of amendment to such plan . . . such *zoning ordinance* shall be amended . . . so that it is consistent with the general plan as amended.” CAL. GOV'T CODE § 65860(c) (West 1977) (emphasis added).

23. *Leshner*, 52 Cal. 3d at 546, 802 P.2d at 325-26, 277 Cal. Rptr. at 9 (noting that “[t]he obvious purpose of [the statute] is to ensure an orderly process of bringing [the zoning ordinance] into conformity with a new or amended general plan, not to permit development that is inconsistent with that plan”). *See* *Concerned Citizens of Calaveras County v. Board of Supervisors*, 166 Cal. App. 3d 90, 97, 103, 212 Cal. Rptr. 273, 278, 282 (1985) (a document that is full of contradictions and inconsistencies cannot be given effect, as it is impossible to ascertain what the plan actually means, but the invalid portion should be the only portion invalidated); 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 831 (9th ed. 1988) (general plan acts as a constitution and must be integrated).

24. *Leshner*, 52 Cal. 3d at 546, 802 P.2d at 325, 277 Cal. Rptr. at 8-9. *See generally* CAL. GOV'T CODE § 65300 (West Supp. 1991) (describing general plan as “comprehensive, long-term plan”); CAL. GOV'T CODE § 65358 (West Supp. 1991) (emphasizing the

the subsequent amendment to the general plan.²⁵

B. Dissenting Opinion

Unlike the majority, which focused on the initiative and its validity, Justice Mosk believed that the case should have been dismissed on abstention grounds in light of the subsequent amendment to the general plan.²⁶ Since a challenge to the 1989 amended plan was still pending, Justice Mosk initially claimed that the majority's invalidation of the 1985 initiative was moot and a waste of judicial resources.²⁷ Deferring to the court of appeal decision,²⁸ he noted that because continuing litigation in the instant case was apparent,²⁹ the majority decision was unnecessary and was destined to be "relegated to a footnote in future decisions involving the validity of the 1989 plan."³⁰ Justice Mosk further posited that the only way to cure the mootness issue would be to construe and determine the validity of the general plan as amended.³¹ However, Mosk pointed out that such an approach was inappropriate due to the ripeness considerations involved in hearing a case based on an amendment not in effect at the time it was heard before the court of appeal.³²

need for long-term general plan by limiting the number of times a plan may be amended).

25. *Leshner*, 52 Cal. 3d at 546-47, 802 P.2d at 325, 277 Cal. Rptr. at 10.

26. *Id.* at 547, 802 P.2d at 326-27, 277 Cal. Rptr. at 10 (Mosk, J., dissenting).

27. *Id.* at 549, 802 P.2d at 328, 277 Cal. Rptr. at 11-12 (Mosk, J., dissenting) (stating the majority's reliance on section 4013 of California Elections Code was not justified since the purpose of section 4013 was to satisfy the will of the voters). Section 4013 of the California Elections Code states, *inter alia*, that an ordinance passed by initiative and adopted by voters cannot be repealed unless the voters themselves repeal it or if the ordinance itself provides for the repeal. CAL. ELEC. CODE § 4013 (West 1977).

28. See *Leshner Communications v. City of Walnut Creek*, 225 Cal. App. 3d 645, 654, 262 Cal. Rptr. 337, 342 (1989) (appeal appeared moot, but case should be decided on its merits).

29. A second lawsuit, seeking to invalidate the 1989 amendment, is currently pending before the courts. See, *Court Curbs Anti-Growth Bid in Hotel Ruling*, L.A. Times, Jan. 1, 1991, at A1, col. 3.

30. *Leshner*, 52 Cal. 3d at 549, 802 P.2d at 328, 277 Cal. Rptr. at 11 (Mosk, J., dissenting). See generally *Sierra Club v. Board of Supervisors*, 26 Cal. App. 3d 698, 705, 179 Cal. Rptr. 261, 265 (1981) (finding the appeal moot since the zoning ordinance was made consistent by adoption of general plan); *Leshner Communications*, 225 Cal. App. 3d at 658, 262 Cal. Rptr. 342 (setting forth the rule relied upon by Justice Mosk in his dissent). The rule in the appellate court decision that Justice Mosk relied on stated that "[a]n inconsistent land use regulation is invalid at the time it is passed, but if the general plan is amended or a new general plan adopted to eliminate the inconsistency while an appeal is pending on that issue, the appeal will be dismissed as moot." *Id.*

31. *Leshner*, 52 Cal. 3d at 550, 802 P.2d at 328, 277 Cal. Rptr. at 12 (Mosk, J., dissenting).

32. *Id.* (Mosk, J., dissenting) (explaining the review was constitutionally unsound

Finally, Justice Mosk criticized the majority opinion not only for invalidating the will of the voters by nullifying the initiative,³³ but also for stating that any inconsistencies should be found in favor of the lawmaking body, which, in this case, was the voters.³⁴ The overriding view of Justice Mosk, therefore, was that the case should have been dismissed on abstention grounds, given the fact that the 1989 amendment was more appropriate for review than the initiative.³⁵

III. CONCLUSION

While developers may see the plan as a victory, the ramifications of *Leshner* are short term at best. This is especially true in light of the pending action based on the amendment to the general plan. Thus, little effect can be given to the decision as to the parties in the case.³⁶

A more troublesome issue, however, is the unwillingness of the court to respect the will of the voters.³⁷ Rather than broadly reading the Zoning and Planning Law and the initiative process in order to accommodate the wishes of the voters,³⁸ the court strictly interpreted the general plan.³⁹ The Supreme Court saw the plan as a strict mandate, rather than as a flexible document designed to meet the changing needs of a community.⁴⁰

because the appeal of litigation involving 1989 amendment was undecided). *See generally*, *Building Industry Assoc. v. City of Oxnard*, 40 Cal. 3d 1, 3, 706 P.2d 285, 287, 218 Cal. Rptr. 672, 673 (1985) (finding that only those legislative provisions in effect at the time of appeal are capable of appellate review in injunctive proceedings); *Selby Realty v. City of San Buenaventura*, 10 Cal. 3d 110, 125-26, 514 P.2d 111, 116, 109 Cal. Rptr. 799, 809 (1973) (evaluating a denial of building permit only as to those provisions in effect as of date of law in effect at time of denial).

33. *Leshner*, 52 Cal. 3d at 55, 802 P.2d at 329, 277 Cal. Rptr. at 12-13 (Mosk, J., dissenting). *See generally*, *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm.*, 51 Cal. 3d 744, 771, 799 P.2d 1220, 1245, 274 Cal. Rptr. 787, 812 (1990) (Mosk, J., concurring and dissenting) (explaining that duty of court in construing initiative is to further preserve intent of voters when construing an initiative).

34. *Leshner*, 52 Cal. 3d at 551, 802 P.2d at 329, 277 Cal. Rptr. at 13 (Mosk, J., dissenting).

35. *Id.* at 552, 802 P.2d at 329, 277 Cal. Rptr. at 13 (Mosk, J., dissenting) (stating that majority opinion "stymies" the court's later ability to evaluate the 1989 plan).

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

37. *See id.* at 551, 802 P.2d at 329, 277 Cal. Rptr. at 12 (Mosk, J., dissenting) (criticizing the majority for frustrating the desires of the voters of Walnut Creek).

38. *See Building Industry Ass'n v. City of Camarillo*, 41 Cal. 3d 810, 824, 718 P.2d 68, 76, 226 Cal. Rptr. 81, 89 (1986) (explaining that the requirement to make detailed findings by voters prior to initiative proposal would frustrate initiative process); *California Supreme Court Survey*, 14 PEPPERDINE L. REV. 194 (1987).

39. *Leshner*, 52 Cal. 3d at 551, 802 P.2d at 322, 277 Cal. Rptr. at 5. *See generally* *Legislature v. Deukmejian*, 34 Cal. 3d 658, 675, 802 P.2d 17, 27, 194 Cal. Rptr. 781, 791 (1983) (explaining that initiatives must be judicially construed with the same scrutiny as statutes); Note, *Instant Planning: Land Use Regulation by Initiative in California*, 61 S.C.L. REV. 497, 533 (1988) (pointing out that courts are given power to determine whether initiative addresses interests of voters).

40. *See Leshner*, 52 Cal. 3d at 546-47, 802 P.2d at 326, 277 Cal. Rptr. at 9. *See generally* *Concerned Citizens of Calaveras County v. Board of Supervisors*, 166 Cal. App. 3d

While the application of the initiative and referendum process to zoning has been criticized,⁴¹ the court seemed to adopt the view that a legislative body, rather than the voting public, is in a much better position to plan for changes in the community.⁴² In light of this ruling, the court set the stage for its eventual review of the 1989 amendment. If the court follows the rationale of *Leshner*, it is likely to invalidate the amendment,⁴³ thus paving the way for continued growth, and ultimately more traffic congestion in the City of Walnut Creek and other cities whose voters may attempt to use initiative power to slow continuing development.

SUSAN D. RESLEY

VIII. ENVIRONMENTAL LAW

Under the California Environmental Quality Act, a reviewing court shall deem an environmental impact report to be sufficient when it analyzes all feasible alternatives; in certain circumstances, the administrative record or the local coastal plan may be the basis for a feasibility determination: Citizens of Goleta Valley v. Board of Supervisors.

I. INTRODUCTION

Modeled after the National Environmental Policy Act,¹ the Cali-

90, 97, 212 Cal. Rptr. 273, 278 (1985) (holding that an inconsistent general plan cannot be given effect due to difficulty in determining intent of drafter).

41. Note, *supra* note 39, at 518-20 (stating that zoning changes by initiative 1) do not serve public welfare since general plans are created after numerous studies which may not be embarked upon by voters; and 2) are not democratic due to low voter turnout on such issues); Comment, *The Initiative and Referendum's Use in Zoning*, 64 CALIF. L. REV. 74, 103-05 (1976) (arguing that procedural leniency must be afforded in order to prevent the barring of zoning initiatives).

42. *Leshner*, 52 Cal. 3d at 544, 802 P.2d at 324, 277 Cal. Rptr. at 7-8 ("assuming," but not deciding, that electorate could amend general plan). See generally *Voter Rights Challenged*, *supra* note 1 (questioning whether some government issues may be "too important to be left up to the people"). But see *Associated Home Builders v. City of Livermore*, 38 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976) (noting that initiative powers are given to people in order to allow them to exercise their rights).

43. The court emphasizes the long-term and fairly inflexible nature of a general plan throughout its opinion. See *Leshner*, 52 Cal. 3d at 546, 802 P.2d at 325-26, 277 Cal. Rptr. at 9-10.

1. 42 U.S.C. §§ 4321-4370 (1982). See *Wildlife Alive v. Chickering*, 18 Cal. 3d 190, 201, 553 P.2d 537, 543, 132 Cal. Rptr. 377, 383 (1976) (considering NEPA as persuasive

ifornia Environmental Quality Act (CEQA)² attempts "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."³ The environmental impact report (EIR) is the mechanism which serves to achieve this goal by informing the public and its responsible officials of the potential environmental consequences of a certain project.⁴ The standard for determining reasonable alternatives is feasibility, which has been defined by the legislature as, "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors."⁵ Furthermore, the statutory requirements mandate that such alternatives be judged "against a rule of reason."⁶

The recent decision of *Citizens of Goleta Valley v. Board of Supervisors*⁷ reaffirms these already established principles by holding that only reasonable alternatives need be examined in an EIR.⁸ After a careful examination of the record, the supreme court determined that none of the alternative building sites, suggested by the public groups after the close of an official comment period, were feasible alternatives and, therefore, need not be included in the EIR.⁹

The Citizens of Goleta initially instituted a proceeding for a writ of mandate,¹⁰ alleging that the EIR had not adequately considered all feasible alternatives to the construction of a resort hotel on seventy-

authority for CEQA); see also 39A C.J.S. *Health & Env.* § 67 (1976) (discussion of environmental impact statements).

2. CAL. PUB. RES. CODE §§ 21000-21080 (West 1986 & Supp. 1991). See generally Selmi, *The Judicial Development of the California Environmental Quality Act*, 18 U.C. DAVIS L. REV. 197 (1984); J. LONGTIN, *CALIFORNIA LAND USE REGULATION* (2d ed. 1987) (providing a discussion of CEQA requirements).

3. *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 259, 502 P.2d 1049, 1056, 104 Cal. Rptr. 761, 768 (1972). This case represents a landmark decision because it broadly interpreted the CEQA to apply to private projects. Prior to this decision, the CEQA was construed applicable only to state-initiated developments.

4. CAL. PUB. RES. CODE § 21002.1 (West 1986). See also Hildreth, *Environmental Impact Reports Under the California Environmental Quality Act: The New Legal Framework*, 17 SANTA CLARA L. REV. 805 (1977).

5. CAL. PUB. RES. CODE § 21061.1 (West 1986).

6. See *Foundation for San Francisco's Architectural Heritage v. San Francisco*, 106 Cal. App. 3d 893, 910, 165 Cal. Rptr. 401, 410 (1980); see also *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978); *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 783 (9th Cir. 1980); *San Francisco Ecology Center v. San Francisco*, 48 Cal. App. 3d 584, 594, 122 Cal. Rptr. 100, 108 (1975).

In addition to these decisions, the instant case resolves that "there is no ironclad rule governing the nature or scope of the alternatives to be discussed in an EIR other than the rule of reason." *Citizens of Goleta Valley v. Board of Supervisors (Goleta II)*, 52 Cal. 3d 553, 576, 801 P.2d 1161, 1175, 276 Cal. Rptr. 410, 424 (1990).

7. 52 Cal. 3d 553, 801 P.2d 1161, 276 Cal. Rptr. 410 (1990).

8. *Id.* at 565, 801 P.2d at 1168, 276 Cal. Rptr. at 417.

9. *Id.* at 566-67, 801 P.2d at 1169, 276 Cal. Rptr. at 418.

10. *Id.* at 553, 801 P.2d at 1161, 276 Cal. Rptr. at 410.

three acres of undeveloped oceanfront land.¹¹ The EIR evaluating this land was certified in September, 1984.¹² It examined four possible alternatives along with its initial proposal of a 574 unit resort.¹³ Local coastal planning amendments were made to designate the land for visitor-serving commercial development, despite a previous "white hole" created by a disagreement between Santa Barbara County and the Coastal Commission.¹⁴ The trial court upheld the sufficiency of the EIR,¹⁵ but was swiftly overruled by the court of appeal on the ground that "'omission from the EIR of consideration of whether there was a feasible alternate site or sites was unreasonable and rendered the EIR inadequate, so as to make the [County's] actions with regard to it a prejudicial abuse of discretion.'" ¹⁶

11. *Id.* at 559, 801 P.2d at 1163, 276 Cal. Rptr. at 412. The land, known as Haskell's Beach, was vacant at the time of this dispute, but it had been previously utilized as an oil processing plant. This property presently contains various "environmentally sensitive species and habitats" and was once the site of a Chumash Indian settlement. *Id.* at 559, 801 P.2d at 1164, 276 Cal. Rptr. at 413.

Goleta II only briefly mentions the presence of Indian cemeteries at Haskell's Beach because the CEQA only protects archaeological resources which are shown to be scientifically or historically unique. See CAL. PUB. RES. CODE § 5097.98(c) (West 1986) (providing protection for Native American sacred sites). Therefore, if reburial of these remains occurs, there is a possibility that no EIR will be required. *Id.* at § 21083.2(a), (g) (discussing project's effect on archaeological resources). For further discussion on this topic, see Bowman, *The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict*, 13 HARV. ENVTL. L. REV. 147, 197-99 (1989).

12. *Goleta II*, 52 Cal. 3d at 560, 801 P.2d at 1164, 276 Cal. Rptr. at 413. Both supplemental and minor addendum were certified the same month. *Id.*

13. *Id.* "The four development alternatives were: no project; clustered high-density residential development; a smaller, 340-unit resort hotel and conference center south of the highway; and the alternative ultimately approved, a 400-unit hotel, with the potential for second-phase development of an additional 100 hotel rooms and 24 villas." *Id.*

14. *Id.* "White hole" was defined by the court as, "an area without any particular land-use designation or development policy." *Id.* In 1980, the state Coastal Commission rejected the County's "urban" designation. In turn, the County refused to accept the Commission's recommendation of "visitor-serving commercial development," thus creating a "white hole" in the local plan. *Id.* at 559-60, 801 P.2d at 1164, 276 Cal. Rptr. at 413.

The California Coastal Act requires mandatory local planning by cities and counties. Approval of these plans is within the Coastal Commission's discretion. The Commission considers the cumulative impact a particular project could have on the environment. See CAL. PUB. RES. CODE §§ 30000-30900 (West 1986). For a thorough examination of the California Coastal Act, see Rieser, *Managing the Cumulative Effects of Coastal Land Development: Can Main Law Meet the Challenge?*, 39 ME. L. REV. 321, 372-85 (1987).

15. *Goleta II*, 52 Cal. 3d at 553, 801 P.2d at 1161, 276 Cal. Rptr. at 410.

16. *Id.* at 560, 801 P.2d at 1164, 276 Cal. Rptr. at 413 (quoting *Citizens of Goleta Valley v. Board of Supervisors*, 197 Cal. App. 3d 1167, 1180, 243 Cal. Rptr. 339, 346 (1988)).

Realizing the concerns of the public, the County began preparing a supplemental EIR which included a detailed analysis of an alternative site for development: Santa Barbara Shores.¹⁷ The County rejected this suggestion because the land was not owned by the Hyatt Corporation, the company seeking to build the resort.¹⁸ Additionally, Santa Barbara Shores had more traffic congestion, less water resources, and deficient air quality.¹⁹ No other properties were examined because the project required beach-front land that could accommodate a large hotel.²⁰ In February 1988, the Planning Commission certified the final EIR.²¹ However, this decision was appealed by the Citizens of Goleta.²² This group submitted a letter the night before the board hearing requesting the County to consider several additional sites.²³ The Board specifically addressed each of the alternatives and found none to be a feasible site because none was "designated for large scale visitor-serving commercial development."²⁴ After approving the 400-unit resort hotel, the County filed its reply to the peremptory writ issued by the trial court.²⁵ The Citizens of Goleta asserted that the Board had not complied with the court of appeal's request for a factual discussion of alternative sites in the EIR. The California Supreme Court found the court of appeal to be in error.²⁶

II. TREATMENT

The California Supreme Court began its opinion by stating that the EIR is the "heart of CEQA"²⁷ because it "protects not only the en-

17. *Id.* at 560-61, 801 P.2d at 1164-65, 276 Cal. Rptr. at 414.

18. *Id.* at 561, 801 P.2d at 1165, 276 Cal. Rptr. at 414.

19. *Id.*

20. *Id.* (citing the final EIR).

21. *Id.*

22. *Id.* at 561-62, 801 P.2d at 1165, 276 Cal. Rptr. at 414.

23. *Id.* at 562, 801 P.2d at 1165, 276 Cal. Rptr. at 414. The Citizens' request was made well after the close of the official comment period. Hyatt, the developer, contended that withholding these comments was a dilatory tactic. *Id.* at 567, 801 P.2d at 1169, 276 Cal. Rptr. at 418.

The court concluded that these alternatives did not have to be included within the EIR. However, such alternatives did warrant discussion within the administrative record. *Id.* at 568, 801 P.2d at 1170, 276 Cal. Rptr. at 419.

24. *Id.* at 562-63, 801 P.2d at 1165-66, 276 Cal. Rptr. at 414-15. The additional sites included: Carpinteria Bluffs, More Mesa, West Devereaux, Naples, Dos Pueblos Canyon, El Capitan Ranch, and the Wallover property north of Highway 101. Each of these sites was determined infeasible for various reasons: (1) the property was no longer within the County's jurisdiction; (2) the property had previously been designated as "residential;" (3) the property contained an oil facility; or (4) the property carried a high seismic rating. *Id.*

25. *Id.* at 563, 801 P.2d at 1166, 276 Cal. Rptr. at 415.

26. *Id.*

27. *Id.* at 564, 801 P.2d at 1167, 276 Cal. Rptr. at 416 (quoting CAL. ADMIN. CODE tit. 14, § 15003(a) (1986)).

vironment but also informed self government."²⁸ The court's role in reviewing an EIR is to determine its sufficiency as an informative document, not whether the environmental conclusions reached within it are sound.²⁹ According to section 21168.5 of the Public Resources Code, a court's inquiry "shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence."³⁰ Furthermore, the court stated that it would "scrupulously enforce" all CEQA requirements.³¹

Project alternatives that could possibly mitigate adverse effects to the environment are the essential components of an adequate EIR.³² However, the court pointed out that section 21002 of the Public Resources Code permits project approval when no feasible alternatives or mitigating factors exist.³³ Despite this code section, the court found that *all reasonable alternatives* must be considered by the public agency whose duty it is to evaluate and include any significant environmental questions in the EIR.³⁴ The court concluded that Hyatt's supplemental EIR had considered the *only feasible* off-site alternative, Santa Barbara Shores, along with four on-site alternatives. Consequently, the court held that the Board's decision to issue a final EIR was not an abuse of discretion.³⁵

Next, the court addressed the time period within which a public group must present possible project alternatives to the CEQA in order for such alternatives to be included within the EIR. The public has a duty to inform the lead agency "as soon as possible" when adverse environmental effects of a proposed development become

28. *Id.* (quoting Laurel Heights Improvement Ass'n v. Regents of Univ. of Calif., 47 Cal. 3d 376, 390-91, 764 P.2d 728, 282-83, 253 Cal. Rptr. 426, 430-31 (1988)).

29. *Id.*

30. *Id.* (quoting CAL. PUB. RES. CODE § 21168.5 (West 1986)).

31. *Id.*

32. *Id.* at 565, 801 P.2d at 1168, 276 Cal. Rptr. at 416 (quoting CAL. PUB. RES. CODE § 21002.1(a) (West 1986)).

33. *Id.* (quoting CAL. PUB. RES. CODE § 21002 (West 1986)). See *Citizens for Quality Growth v. City of Mount Shasta*, 198 Cal. App. 3d 433, 243 Cal. Rptr. 727 (1988) (project approved despite harmful impact to wetlands where there were no mitigating factors or feasible alternatives).

34. *Goleta II*, 52 Cal. 3d at 565-66, 801 P.2d at 1168, 276 Cal. Rptr. at 417 (quoting *Wildlife Alive v. Chickering*, 18 Cal. 3d 190, 197, 553 P.2d 537, 540, 132 Cal. Rptr. 377, 380 (1976)).

35. *Id.* at 566-67, 801 P.2d at 1169, 276 Cal. Rptr. at 418.

known.³⁶ Through expeditious notification, the agency is able to thoroughly review these potential impacts and determine their significance. The court noted that the Public Resources Code does not require the agency to respond to the public in writing when the public's observations are submitted after the close of the comment period.³⁷ Consequently, the court held that the six off-site project alternatives proposed by the Citizens of Goleta did not have to be included within the EIR, because the alternatives were made well after the expiration of the comment period.³⁸ The court further held that in the event of such a delay, project alternatives are adequately addressed in the administrative records.³⁹ Additionally, the court noted that dilatory tactics could not be used to sabotage a particular project.⁴⁰

Use of the administrative record is also helpful when seeking detailed information about the reasons a recommended alternative was deemed infeasible. Generally, an EIR should set forth the rationale for each alternative's status, yet the court suggested that the administrative records were the appropriate source for more indepth discussion.⁴¹ The court held that when evidence of infeasibility of an alternative cannot be found in the EIR, "a court may look at the administrative record as a whole to see whether an alternative deserved greater attention in the [EIR]."⁴²

The court next addressed the issue of whether a local coastal plan may be used as the means for deciding whether a land site is a feasible alternative. A fundamental purpose of the County's general and local coastal plans was to identify land which was suitable for sizable resorts. The local coastal plan was a 235-page document which considered numerous environmental, social, and economic factors when evaluating the land.⁴³ In this decision, the local coastal plan could be relied upon by the Board because the County had previously deter-

36. *Id.* at 567, 801 P.2d at 1169, 276 Cal. Rptr. at 418 (quoting CAL. PUB. RES. CODE § 21003.1 (West 1986)). See also CAL. ADMIN. CODE tit. 14, §§ 15087, 15088, 15207 (1986).

37. *Goleta II*, 52 Cal. 3d at 567, 801 P.2d at 1169, 276 Cal. Rptr. at 418 (citing CAL. ADMIN. CODE tit. 14, § 15088(a) (1986)).

38. *Id.* at 570, 801 P.2d at 1171, 276 Cal. Rptr. at 420.

39. *Id.* at 569, 801 P.2d at 1171, 276 Cal. Rptr. at 420.

40. *Id.* at 567-68, 801 P.2d at 1169-70, 276 Cal. Rptr. at 418-19.

Hyatt suggested that the Citizens of Goleta intentionally withheld the six off-site alternatives in order to defeat the project. The court cites federal authority to demonstrate the widespread disdain for groups that purposefully try to impede development. *Id.* at 567-68, 801 P.2d at 1169, 276 Cal. Rptr. at 418 (citing Seacoast Anti-Pollution League v. Nuclear Regulatory Comm'n, 598 F.2d 1221, 1230-31 (1st Cir. 1979)).

41. *Id.* at 569, 801 P.2d at 1171, 276 Cal. Rptr. at 419-20.

42. *Id.* at 569, 801 P.2d at 1171, 276 Cal. Rptr. at 420 (quoting *Beshear v. Alexander*, 655 F.2d 714, 719 (6th Cir. 1981)).

43. *Id.* at 572, 801 P.2d at 1172-73, 276 Cal. Rptr. at 421-22. For a further explanation of land use designations in this case, see *supra* note 13 and accompanying text. See generally 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Real Property* § 61 (9th ed. 1987).

mined which areas were appropriate for commercial development.⁴⁴ Also, the court stated that regional land use policies could not be reconsidered in every EIR; to do so would thwart comprehensive development.⁴⁵

The Citizens of Goleta raised three additional arguments, which the court summarily dismissed. First, the Citizens asserted that the County must show that the local coastal plan "relate[s] to current conditions"⁴⁶ in order for the plan to be a feasibility indicator. This argument was without merit because local coastal plans must be updated regularly.⁴⁷ Second, it was contended that the six off-site alternatives could not be considered infeasible due to "inconsistent land-use designations," when the proposed site itself required amendments to the local plan.⁴⁸ The court distinguished the proposed site because it had been previously labeled a "white hole."⁴⁹ Finally, the Citizens argued that even though the developer did not own any of the alternative sites, this factor should not automatically render them infeasible.⁵⁰ The court rejected this argument by deciding that ownership of property directly correlates with the ability to swiftly complete a project thereon. However, the court carefully explained that situations could arise in which a private developer controls several feasible alternative sites, thereby illustrating that private developers are not totally exempt from consideration of off-site alternatives.⁵¹

44. *Goleta II*, 52 Cal. 3d at 573, 801 P.2d at 1173, 276 Cal. Rptr. at 422.

45. *Id.* at 572-73, 801 P.2d at 1173, 276 Cal. Rptr. at 422.

46. *Id.* at 573-74, 801 P.2d at 1173-74, 276 Cal. Rptr. at 422-23. See also CAL. PUB. RES. CODE § 30519.5 (West 1986) (noting that local coastal plan must be updated every five years).

47. *Goleta II*, 52 Cal. 3d at 573-74, 801 P.2d at 1173-74, 276 Cal. Rptr. at 422-23.

48. *Id.* at 574, 801 P.2d at 1174, 276 Cal. Rptr. at 423.

49. *Id.*

50. *Id.*

51. *Id.* at 574-75, 801 P.2d at 1174, 276 Cal. Rptr. at 423. The court stated that when the developer is a public, rather than a private agency, off-site alternatives become more feasible. This assertion is premised on the government's power of eminent domain. *Id.* at 547, 801 P.2d at 1174, 276 Cal. Rptr. at 423. See, e.g., *Porter County Chapter of Izaak Walton League, Inc. v. Atomic Energy Comm'n*, 533 F.2d 1011, 1017 (7th Cir. 1976), cert. denied, 429 U.S. 945 (1976); *Natural Resources Defense Council Inc. v. Callaway*, 524 F.2d 79, 92-93 (2d Cir. 1975); *Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal.*, 47 Cal. 3d 376, 403-04; 764 P.2d 278, 290-91, 253 Cal. Rptr. 426, 438-39 (1988); *Residents Ad Hoc Stadium Comm. v. Board of Trustees*, 89 Cal. App. 3d 274, 286-88, 152 Cal. Rptr. 585, 594-95 (1979).

III. CONCLUSION

The *Goleta II* decision strongly reiterates the requirements of the CEQA and the sufficiency of an EIR. The court stated that an EIR must examine the potential environmental consequences of a proposed project along with all reasonable alternatives.⁵² Reliance upon the local coastal plan and administrative record is permissible when determining the feasibility of alternatives, particularly when the alternatives have been suggested after the expiration of the comment period.⁵³

Use of these sources lightens the agency's burden by eliminating some duplicative findings from the EIR. The result is that an EIR will be more concise when analyzing feasibility. This may hamper the public's access to the rationale behind an EIR finding because one may have to examine several documents along with an EIR. However, this does not seem to be an onerous task when balanced against the benefit of the agency's decreased workload. In reaction to *Goleta II*, there may be an increased use of substitute authority to substantiate EIR findings.

The court's concern for carrying out the legislative purpose of the CEQA is quite clear from its opinion. However, the court maintains the position that a private developer generally cannot be asked to consider off-site alternatives which are not controlled by him.⁵⁴ Ownership is a great indicator of feasibility; however, if a developer is not required to consider off-site alternatives, a project could be approved which would negatively impact the environment, while a harmless alternative may go unconsidered.⁵⁵ This portion of the court's decision is practical, but at the expense of environmental protection.

Overall, *Goleta II* reemphasizes that a court is to rule on the sufficiency of the EIR based on a "rule of reason," not on the validity of its substance.⁵⁶ The approach taken by the court illustrates its re-

52. *Goleta II*, 52 Cal. 3d at 565-66, 801 P.2d at 1168, 276 Cal. Rptr. at 417.

53. *Id.* at 569-70, 573, 801 P.2d at 1170-71, 276 Cal. Rptr. at 419-20.

54. *Id.* at 574, 801 P.2d at 1174, 276 Cal. Rptr. at 423. The court recognized that "[o]ther circumstances may necessitate review of alternate properties." However, the court failed to elaborate on which situations would warrant an examination of feasible off-site alternatives. *Id.* at 575, 801 P.2d at 1174, 276 Cal. Rptr. at 423.

55. An agency must consider possible cumulative impacts of a project may have on the environment. See *Whitman v. Board of Supervisors*, 88 Cal. App. 3d 397, 406, 151 Cal. Rptr. 866, 870-71 (1979). "Cumulative impacts" has been defined as, "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. The individual effects may be changed resulting from a single project or a number of separate projects." CAL. ADMIN. CODE tit. 14, § 15023.5 (1977).

56. See *supra* note 6 and accompanying text.

gard for preserving the environment while at the same time calculating the development needs of a growing populace.

JODY L. GRAY

IX. FAMILY LAW

Where a wife's petition for dissolution fails to request child support, and the notice received by the husband also lacks such a request, a default judgment ordering the husband to pay such support is invalid as a denial of due process under section 580 of the California Code of Civil Procedure: In re Marriage of Lippel.

The California Supreme Court decision of *In Re Marriage of Lippel*¹ overruled a longstanding but outdated line of cases which had carved out an exception to section 580 of the California Civil Procedure Code.² In *Lippel*, the court reversed the denial of a motion to vacate a prior judgment against Ronald Lippel, which had ordered him to pay child support for his daughter Kristin.³ The supreme court held: (1) that the plain language of section 580 must be followed, limiting relief granted at a default hearing to that which was prayed for;⁴ (2) that the line of cases, which carved out an exception to section 580, beginning with *Cohen v. Cohen*,⁵ were no longer valid;

1. 51 Cal. 3d 1160, 801 P.2d 1041, 276 Cal. Rptr. 290 (1990). The majority opinion was written by Justice Panelli, who was joined by Chief Justice Lucas, and Justices Broussard, Eagleson, Kennard and Arabian. Justice Mosk filed a dissenting opinion.

2. CAL. CIV. PROC. CODE § 580 (Deering 1972). The statute provides in part: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint. . . ." *Id.* The *Cohen* exception allowed awards of child and spousal support even when not requested. *Cohen v. Cohen*, 150 Cal. 99, 88 P. 267 (1906).

3. *Lippel*, 51 Cal. 3d at 1163-65, 801 P.2d at 1043, 276 Cal. Rptr. at 292. Mr. Lippel and his wife were divorced in 1971. Mrs. Lippel had filed a petition for dissolution utilizing a statutorily authorized form. She checked several boxes on the form requesting specific relief, however, she left the box to request child support blank. Mr. Lippel never filed an answer, and a default hearing was held in May 1971. Mrs. Lippel was awarded custody of Kristin, and a support order was entered requiring Ronald to pay \$100 per month. Apparently, Mrs. Lippel never mentioned this order to Ronald, and the support was not paid for 16 years. In 1987, the City and County of San Francisco sought to have Ronald's wages assigned to the city as reimbursement for \$18,200 in money paid to Mrs. Lippel by Aid To Families with Dependant Children. The court granted the CCSF request and ordered that \$300 per month be deducted from Mr. Lippel's wages. Mr. Lippel filed this collateral challenge to the original order as a result.

4. *Lippel*, 51 Cal. 3d at 1167, 801 P.2d at 1043-44, 276 Cal. Rptr. at 292-93. See also 40 CAL. JUR. 3D *Judgments* § 31 (1985).

5. *Lippel*, 51 Cal. 3d at 1171, 801 P.2d at 1046, 276 Cal. Rptr. at 295 (citing *Cohen*)

and (3) that section 4700 of the California Civil Code, which gives broad power to the courts to order support at any proceeding where the care of a minor is at issue, does not allow such an order to be issued in denial of the individual's constitutional rights.⁶

Mr. Lippel claimed that the default judgment was void under section 580 and the fourteenth amendment,⁷ and as such was subject to collateral attack.⁸ First, the court examined its most recent interpretation of section 580, which limited awards in default hearings to the relief demanded in the complaint.⁹ This limitation is based upon a recognition that the trial court lacks jurisdiction to award relief not requested in the prayer.¹⁰ In applying this principle to the instant case, the court held that Mrs. Lippel should not have been awarded child support because when she filled out the petition for dissolution she left the box requesting child support blank.¹¹

In spite of this precedent, the superior court denied Mr. Lippel's motion to vacate, and the court of appeals reluctantly affirmed stating that they were bound by the *Cohen* line of cases.¹² *Cohen* was

v. *Cohen*, 150 Cal. 99, 88 P. 267 (1906) (holding a judgment for support or alimony was not void if awarded in connection with a prayer for general relief in a dissolution proceeding)).

6. *Id.* at 1171, 801 P.2d at 1047, 276 Cal. Rptr. at 296. (citing CAL. CIV. CODE § 4700(a) (Deering Supp. 1991) (operative until January 1, 1993)). Section 4700(a) provides in part: "In any proceeding where there is at issue the support of a minor child . . . the court may order either or both parents to pay any amount necessary for the support. . . ." See generally 11 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Husband & Wife* §§ 175, 178 (3d ed. 1985).

7. CAL. CIV. PROC. CODE § 580 (Deering 1972) and U.S. CONST. amend. XIV.

8. *Lippel*, 51 Cal. 3d at 1166, 801 P.2d at 1042-43, 276 Cal. Rptr. at 291-92. The United States Supreme Court has held that it is a denial of due process for judgment to be rendered against a defendant, unless he has received proper notice. *Mullane v. Central Hanover Bank*, 339 U.S. 306, 313-15 (1950). See also U.S. CONST. amend. XIV. California satisfies this requirement through section 580 of the Civil Procedure Code. See CAL. CIV. PROC. CODE § 580 (Deering 1972). See generally 2 B. WITKIN, CALIFORNIA PROCEDURE *Jurisdiction* § 84 (3d ed. 1985); 16A AM. JUR. 2D *Constitutional Law* §§ 827-838 (1979).

9. *Lippel*, 51 Cal. 3d at 1166-67, 801 P.2d at 1043-44, 276 Cal. Rptr. at 292-93. (citing *Burnett v. King*, 33 Cal. 2d 805, 205 P.2d 657 (1949) (trial court lacked jurisdiction to award marital property in a default proceeding when it had not been requested)); *Greenup v. Rodman*, 42 Cal. 3d 822, 824, 726 P.2d 1295, 1296, 231 Cal. Rptr. 220, 221 (1986) (concluding that "in all default judgments the demand sets a ceiling on recovery").

10. *Lippel*, 51 Cal. 3d at 1167, 801 P.2d at 1044, 276 Cal. Rptr. at 293. See generally 2 B. WITKIN, CALIFORNIA PROCEDURE *Jurisdiction* § 246 (3d ed. 1985); Annotation, *Doctrine of Res Judicata As Applied To Default Judgments*, 77 A.L.R.2D 1410 (1961 & Supp. 1990).

11. *Lippel*, 51 Cal. 3d at 1167, 801 P.2d at 1044, 276 Cal. Rptr. at 293. "Angela's petition simply did not request child support. In reliance on this petition, Ronald allowed a default judgment to be entered against him." *Id.*

12. *Lippel*, 51 Cal. 3d at 1167, 801 P.2d at 1045, 276 Cal. Rptr. at 294 (citing *Bowman v. Bowman*, 29 Cal. 2d 808, 178 P.2d 751 (1947); *Miller v. Superior Court*, 9 Cal. 2d 733, 72 P.2d 868 (1937); *Karlslyst v. Frazier*, 213 Cal. 377, 2 P.2d 362 (1931); *Parker v. Parker*, 203 Cal. 787, 266 P. 283 (1928); *Cohen v. Cohen*, 150 Cal. 99, 88 P. 267 (1906)).

based upon the premise that a general prayer for relief in a petition for dissolution constituted constructive notice of possible alimony and child support awards because these awards were "germane to the cause of action stated."¹³ The court noted, however, that the premise of the *Cohen* cases was faulty under The Family Law Act of 1970, which instituted a more specific petition form replacing a prayer for general relief with a prayer requesting more specific relief.¹⁴ Accordingly, with the new pleading form, there was no general prayer for relief and thus no constructive notice.¹⁵

Finally, the court addressed the argument advanced by the City and County of San Francisco that the trial court had jurisdiction to award support under section 4700 of the California Civil Code. The court rejected this argument for two reasons. First, it noted that a court may not order such support "at the expense of a person's fundamental and constitutional right to notice."¹⁶ Second, since trial courts have power to put the support at issue and mandate notice to the other party, there is still adequate protection for the rights of the child.¹⁷

The state has recently taken an aggressive stand toward non-custodial parents to insure that they do not shirk their responsibilities to support their children. Although this decision will no doubt be seen by some as a setback to this strategy,¹⁸ the court was primarily concerned with eliminating a procedural anomaly. Clearly, greater care will be required by a petitioner and his or her attorney when filling out the petition for dissolution. Unfortunately, this decision may initially provide a non-custodial parent with an easy escape from the

13. *Cohen*, 150 Cal. at 102, 88 P. at 269. Under *Cohen*, such judgments could be attacked as erroneous on direct appeal, but could not be challenged collaterally. *Id.* See also 7 B. WITKIN, CALIFORNIA PROCEDURE *Judgment* §§ 280-282 (3d ed. 1985).

14. *Lippel*, 51 Cal. 3d at 1169, 801 P.2d at 1045, 276 Cal. Rptr. at 294. (citing The Family Law Act of 1970 codified at CAL. CIV. CODE §§ 4000-5150 (Deering 1983 & Supp. 1991)).

15. *Id.* at 1170, 801 P.2d at 1046, 276 Cal. Rptr. at 295. The court specifically rejected an argument that a phrase in the act, requesting the judge to "render such judgments . . . or other orders as are appropriate," was a request for general relief. See also 5 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 846 (3d ed. 1985 & Supp. 1990).

16. *Lippel*, 51 Cal. 3d at 1171, 801 P.2d at 1047, 276 Cal. Rptr. at 296.

17. *Id.* at 1171-72, 801 P.2d at 1047-48, 276 Cal. Rptr. at 296-97.

18. This is the primary concern in Justice Mosk's dissent. In fact he begins by re-framing the issue as: "[M]ay a father avoid his statutory duty to support his child . . . merely because the mother neglected in divorce proceedings to specifically petition the court to make an award of child support?" *Id.* at 1173-74, 801 P.2d at 1053-54, 276 Cal. Rptr. at 302-03 (Mosk, J., dissenting). In spite of the options outlined by the majority, Mosk contends that their opinion would inequitably answer this question in the affirmative. *Id.*

burden of child support. However, the supreme court made it clear that this decision does not affect the rights of a child to pursue support, even when waived by the custodial parent.¹⁹ In addition, the state may still pursue such parents, at least for future support, using one of the techniques outlined by the majority.

KAREN M. EISENHAUER

X. INSURANCE LAW

In first party progressive loss cases, the one-year limitation on actions begins to run upon the discovery of the damage or when a reasonable person would have discovered the loss, the one-year period is equitably tolled between notification of the loss and the insurer's formal denial of the claim, and the insurer currently covering the risk upon the manifestation of the damage is solely liable for the loss: Prudential-LMI Commercial Insurance v. Superior Court.

I. INTRODUCTION

In *Prudential-LMI Commercial Insurance v. Superior Court*¹ the California Supreme Court handed down a landmark decision that will dramatically alter property insurance liability and litigation in California. Faced with a first-party case² involving successive insurers and a progressive property loss that remained undiscovered for several years, the court addressed three key issues: (1) at what point does the one-year limitation period for initiating insurance actions (the "one-year suit provision") begin to run, (2) whether the one-year suit provision should be equitably tolled from the time the insured notifies the insurance company of the damage until the company formally denies the claim, and (3) in cases of successive insurers, which insurer should be liable for a progressive property loss that remains undiscovered over a length of time.³

Limiting its holding to first-party progressive loss cases, the court

19. *Id.* at 1172 n.4, 801 P.2d at 1047 n.4, 276 Cal. Rptr. at 296 n.4.

1. 51 Cal. 3d 674, 798 P.2d 1230, 274 Cal. Rptr. 387 (1990). Chief Justice Lucas delivered the unanimous opinion of the court, in which Justices Mosk, Broussard, Panelli, Eagleson, Kennard, and Arabian concurred.

2. A first-party case involves no third party claims. 51 Cal. 3d at 678, 768 P.2d at 1232, 274 Cal. Rptr. at 389. "[I]f the insured is seeking coverage against *loss or damage sustained by the insured*, the claim is first party in nature. If the insured is seeking coverage against *liability of the insured to another*, the claim is third party in nature." *Garvey v. State Farm Fire and Casualty Co.*, 48 Cal. 3d 395, 399 n.2, 770 P.2d 704, 705 n.2, 257 Cal. Rptr. 292, 293 n.2 (1989).

3. *Prudential-LMI*, 51 Cal. 3d at 678, 798 P.2d at 1232, 274 Cal. Rptr. at 389.

adopted a "delayed discovery"⁴ rule, declaring that the one-year provision does not begin until a reasonable person would have discovered the damage and realized his duty to notify the insurer.⁵ Next, the court determined that the one-year suit provision should be equitably tolled between the filing of the claim by the insured and the insurer's formal denial of the claim.⁶ Finally, the court adopted the manifestation theory of liability among successive insurers: where loss is progressive and undiscovered over several policy periods, the insurer covering the risk at the time the damage manifests is solely liable for the claim.⁷

II. BACKGROUND

A. One-Year Suit Provision

1. Commencement of the Running of the Provision

In California, as in several other states,⁸ all fire insurance policies contain a one-year limitation period for actions brought under the policy.⁹ Although many state courts view the one-year suit provision as valid, they do not agree as to when the beginning of the one-year

4. *Id.* at 686-87, 798 P.2d at 1238, 274 Cal. Rptr. at 395. The term "delayed discovery" means the limitation period does not begin to run upon the actual occurrence of the damage, but commences upon reasonable discovery of the loss. *See id.*

5. *Id.* at 687, 798 P.2d at 1238, 274 Cal. Rptr. at 395.

6. *Id.* at 678, 798 P.2d at 1232, 274 Cal. Rptr. at 389.

7. *Id.* at 678-79, 798 P.2d at 1232, 274 Cal. Rptr. at 389.

8. *See, e.g.*, MICH. COMP. LAWS ANN. § 500.2832 (West 1983 & Supp. 1991). *Cf.* N.Y. INS. LAW § 304 (McKinney Pamph. 1984) (two-year provision).

9. *Prudential-LMI*, 51 Cal. 3d at 682, 798 P.2d at 1235, 274 Cal. Rptr. at 392. The California Insurance Code requires all fire insurance policies to be written on the California Standard Form Fire Insurance Policy. CAL. INS. CODE §§ 2070-71 (Deering 1976 & Supp. 1991). The form provides: "No suit or action on this policy for recovery of any claim shall be sustainable in any court of law or equity . . . unless commenced within 12 months next after inception of the loss." CAL. INS. CODE § 2071. The language of this statute was based on a New York statute that was originally created to bar fraudulent fire claims. *Prudential-LMI*, 51 Cal. 3d at 682-83, 798 P.2d at 1235, 274 Cal. Rptr. at 392 (citing in disagreement *Proc v. Home Ins. Co.*, 17 N.Y.2d 239, 243, 217 N.E.2d 136, 138, 270 N.Y.S.2d 412, 414 (1966)). Later the statute's scope was expanded beyond fire as other forms of property damage began to be insured. *Id.* Although California Insurance Code section 2071 is still referred to as a standard form fire insurance policy, it is also a standard form for other types of property damage policies. For a discussion of limitations upon actions, see W. VANCE, HANDBOOK ON THE LAW OF INSURANCE § 162 (3d ed. 1951); Denenberg and Tukel, *The Twelve-Month Limitation Provision: The "Formal Denial" Trap*, 35 FED'N OF INS. COUNS. Q. 43 (1984).

California Insurance Code sections 2070-71 were upheld in *C & H Foods Company v. Hartford Ins. Co.*, 163 Cal. App. 3d 1055, 1064, 211 Cal. Rptr. 765, 769 (1984) ("Such a provision has long been recognized in California.").

period, termed the "inception of the loss,"¹⁰ occurs. Courts in some states have found the point to be when the actual damage occurred, regardless of when the loss was discovered.¹¹ These courts believe that the language of the statute is plain and should be construed narrowly to provide a period of exactly twelve months from the date of the actual damage.¹²

California courts, however, have not construed the statute so strictly in cases involving non-fire-related property loss.¹³ In *Zurn Engineers v. Eagle Star Insurance Company*,¹⁴ the court specifically rejected the adoption of a strict interpretation of the one-year suit provision, stating:

California does not follow the strict rule of construction of the phrase "inception of the loss." Rather, our law requires that the policy be read as a whole so that, if the right to sue upon an insurance policy is postponed by action that must be taken by the insured as a prerequisite to suit, the limitation period does not commence to run until the insured has an opportunity to comply with the conditions precedent to litigation.¹⁵

In several other California cases, courts have favored the "delayed discovery" rule where the one-year suit provision begins to run when the damage is discovered or would have been discovered by a reasonable person.¹⁶ In *Lawrence v. Western Mutual Insurance Com-*

10. CAL. INS. CODE § 2071 (Deering 1976 & Supp. 1991). See generally Annotation, *Time Period For Bringing Action on Standard Form Fire Insurance Policy Provided for by Statute, as Running from Time of Fire (When Loss Occurs) or from Time Loss Is Payable*, 95 A.L.R.2d 1023 (1983).

11. See, e.g., *McGuire v. Continental Ins. Co.*, 39 Mich. App. 612, 197 N.W.2d 846 (1972); *Naghten v. Maryland Casualty Co.*, 47 Ill. App. 2d 74, 197 N.E.2d 489 (1964); *Margulies v. Quaker City Fire & Marine Ins. Co.*, 276 A.D. 695, 97 N.Y.S.2d 100 (1950). The *Naghten* court stated: "We realize that ascertainment of a loss which has resulted from a progressive latent condition is more difficult than the immediately obvious results of a fire. We do not believe, however, that the time of discovery of the loss can be left completely to the whimsy of the insured." 47 Ill. App. 2d at 75, 197 N.E.2d at 490.

12. See, e.g., *Ramsey v. Home Ins. Co.*, 203 Va. 502, 125 S.E.2d 201 (1962). The *Ramsey* court declared that

[t]he limitation involved in the present case is not in the language of the insurance company. It is in the language of the General Assembly and expressed in words which the statute requires to be inserted in the policy, word for word, line for line, number for number. It says in plain, unambiguous words that no suit shall be sustainable unless it is commenced within twelve months next after the inception of the loss.

Id. at 506, 125 S.E.2d at 204. See also *Proc v. Home Ins. Co.*, 17 N.Y.2d 239, 217 N.E.2d 136, 270 N.Y.S.2d 412, (1966).

13. *Prudential-LMI*, 51 Cal. 3d at 685, 798 P.2d at 1236, 274 Cal. Rptr. at 393.

14. 61 Cal. App. 3d 493, 132 Cal. Rptr. 206 (1976).

15. *Id.* at 499, 132 Cal. Rptr. at 210 (citing *Case v. Sun Ins. Co.*, 83 Cal. 473, 23 P. 534 (1890)). However, as the *Prudential-LMI* court noted, *Zurn* involved a third-party claim against an insurer and the holding was confined to the case's particular facts.

16. For a discussion of the relationship of an insured's discovery of the loss to the commencement of the one-year suit provision, see Annotation, *Property Insurance: Insured's Ignorance of Loss or Casualty, Cause of Damage, Coverage or Existence of Policy, or Identity of Insurer, as Affecting or Excusing Compliance with Requirements as to Time for Giving Notice, Making Proof of Loss, or Bringing Action Against Insurer*, 24 A.L.R.3d 1007 §§ 16-18 (1990).

pany,¹⁷ an insured discovered through a 1983 soils report that his property contained defects which existed before he purchased the land in 1968. The insured waited until 1985 to bring the action and the court deemed his claim untimely.¹⁸ The court indicated that if the insured had filed his claim within one year of receiving the report and discovering the damage, the suit would not have been time barred.¹⁹

In *Abari v. State Farm Fire & Casualty Company*,²⁰ an absentee landlord discovered small cracks in a house he owned in 1979. In 1984, the insured noticed that the aforementioned cracks had grown worse and that new cracks had appeared. After talking with neighbors whose houses had suffered similar damage about September 1984, the insured realized he had a claim under his insurance policy.²¹ He filed a claim in January 1985.²² The *Abari* court declared that "a cause of action under the discovery rule accrues when the plaintiff discovers or should have discovered all facts essential to the cause of action"²³ The court determined this point to be the time when the cracks were discovered, not when the insured realized the legal significance of the damage.²⁴ Therefore, the insured's claim was not timely, since it was not filed until six years after the discovery of the cracks.²⁵

2. Equitable Tolling of the Provision

Courts in various jurisdictions have reached inconsistent conclusions upon the question of whether the one-year suit provision should be tolled during the period between notification of the damage and formal denial of the claim by the insurer.²⁶ Some courts have declared that the one-year period cannot be tolled.²⁷ As one commenta-

17. 204 Cal. App. 3d 565, 251 Cal. Rptr. 319 (1988).

18. *Id.* at 573, 251 Cal. Rptr. at 322.

19. *Id.* at 572, 251 Cal. Rptr. at 322.

20. 205 Cal. App. 3d 530, 252 Cal. Rptr. 565 (1988).

21. *Id.* at 533, 252 Cal. Rptr. at 565.

22. *Id.* at 533, 252 Cal. Rptr. at 566.

23. *Id.* at 535, 252 Cal. Rptr. at 567 (emphasis omitted) (citing *April Enterprises, Inc. v. KTTV*, 147 Cal. App. 3d 805, 826, 195 Cal. Rptr. 421, 432 (1983)).

24. *Id.* The court declared, "It is the occurrence of some . . . cognizable event rather than knowledge of its legal significance that starts the running of the statute of limitations." *Id.* (quoting *McGee v. Weinberg*, 97 Cal. App. 3d 798, 804, 159 Cal. Rptr. 86, 90 (1979)).

25. *Id.*

26. See generally Comment, *Civil Procedure — Statutes of Limitations — Tolling Provisions in Standard Fire Insurance Policies*, 29 WAYNE L. REV. 1471 (1983).

27. *Id.* at 1477.

tor noted, “[c]ases which have arisen under the present Michigan statute, and its New York counterpart, have almost unanimously held that there is no tolling period implicit in the statute.”²⁸ Other courts have declared that the one-year period is tolled until the insurer formally denies the insured’s claim.²⁹ For example, in *Peloso v. Hartford Fire Insurance Company*,³⁰ the plaintiff promptly notified his insurance company of the loss he suffered when his building was destroyed by fire.³¹ The insurer did not formally deny the claim until nine months later.³² Although the plaintiff did not file suit until approximately nine months after the formal denial, the court found the claim to be timely because the one-year suit provision was tolled during the period between notification of the loss and formal denial by the insurer.³³ The court reasoned that because this period is provided for the insurer’s benefit, to enable the company to investigate the claim and pursue its rights, it should not be used to disadvantage the insured.³⁴ The court believed it was preserving the intent of the statute by tolling the period, and leaving the insured twelve full months in which to pursue his claim.³⁵

The California courts have treated this issue in a variety of ways.³⁶ In *Bollinger v. National Fire Insurance Company*,³⁷ the insured filed suit on a claim prior to the expiration of the one-year suit provision, yet because the insurer had not taken action on the claim, the court dismissed the suit as premature. Although the insured’s second attempt at filing came after expiration of the one-year provision, the court found that the claim was timely due to both equitable tolling and insurer procedural defaults.³⁸ Additionally, some California

28. *Id.*

29. See *Prudential-LMI Commercial Ins. v. Superior Court*, 51 Cal. 3d 674, 688, 798 P.2d 1230, 1239, 274 Cal. Rptr. 387, 396 (1990).

30. 56 N.J. 514, 267 A.2d 498 (1970).

31. *Id.* at 517, 267 A.2d at 499.

32. *Id.* at 518, 267 A.2d at 500.

33. *Id.* at 521, 267 A.2d at 502.

34. *Id.* at 520, 267 A.2d at 501.

35. *Peloso*, 56 N.J. at 521, 267 A.2d at 501-02. The court stated,

The fair resolution of the statutory incongruity is to allow the period of limitation to run from the date of the casualty but to toll it from the time an insured gives notice until liability is formally declined. In this manner, the literal language of the limitation provision is given effect; the insured is not penalized for the time consumed by the company while it pursues its contractual and statutory rights . . . and the central idea of the limitation provision is preserved since an insured will have only 12 months to institute suit.

Id. at 521, 267 A.2d at 501-02.

36. See *Tebbetts v. Fidelity & Casualty Co.*, 155 Cal. 137, 99 P. 501 (1909); *Case v. Sun Ins. Co.*, 83 Cal. 473, 23 P. 534 (1890).

37. 25 Cal. 2d 399, 154 P.2d 399 (1944).

38. *Id.* at 410-11, 154 P.2d at 405-06. The *Prudential-LMI* court noted that “[u]nder such circumstances . . . the insurer had a duty, arising from its obligation of good faith to the insured, to inform the insured of its intention to rely on a technical defense that would otherwise result in forfeiture of policy benefits.” *Prudential-LMI Commercial*

courts have recently found certain suits brought after expiration of the one-year provision to be timely, based on the equitable doctrines of estoppel and waiver.³⁹

B. *Progressive Loss and Successive Insurers*

Several California cases have addressed the issue of which insurer should be held liable when progressive property loss stretches over multiple policy periods.⁴⁰ In a 1962 first-party property loss case, *Snapp v. State Farm Fire and Casualty Company*,⁴¹ the insured's home was damaged by the movement of an unstable landfill. State Farm was the insurer when the loss was ascertained, but the damage continued into the next insurer's policy period. The court refused to find State Farm liable for only the damage that occurred up to the expiration of the policy.⁴² Instead, the court held that "the date of 'materialization' of a loss determines which carrier must provide indemnity for a loss suffered by the insured, and the carrier insuring the risk at the time the damage is first discovered is liable for the entire loss."⁴³

In *California Union Insurance Company v. Landmark Insurance Company*,⁴⁴ a third-party liability case decided in 1983, the insured's swimming pool began leaking during Landmark's period of insurance coverage. Although repairs were attempted during that policy period, the cause of the leak was not discovered and the damage continued into California Union's policy coverage. The court held both

Ins. v. Superior Court, 51 Cal.3d 674, 689, 798 P.2d 1230, 1240, 274 Cal. Rptr. 387, 397 (1990) (citing *Bollinger v. National Fire Ins. Co.*, 25 Cal. 2d 399, 410-11, 154 P.2d 399, 406 (1944)).

39. See *Elliano v. Assurance Co. of America*, 3 Cal. App. 3d 446, 83 Cal. Rptr. 509 (1970). For a general discussion of estoppel and waiver, see 18A G. COUCH, *CYCLOPEDIA OF INSURANCE LAW* §§ 75:182-195 (2d ed. 1983); 3 B. WITKIN, *CALIFORNIA PROCEDURE* § 523 (3d ed. 1985).

40. See generally *Lynch, Handling Continuing Damage Issues*, 9 Cal. Law., Sept. 1989, at 90.

41. 206 Cal. App. 2d 827, 24 Cal. Rptr. 44 (1962).

42. *Id.* at 831-32, 24 Cal. Rptr. at 46.

43. *Prudential-LMI Commercial Ins. v. Superior Court*, 51 Cal. 3d 674, 696, 798 P.2d 1230, 1244, 274 Cal. Rptr. 387, 401 (1990) (citing *Snapp v. State Farm Fire & Casualty Co.*, 206 Cal. App. 2d 827, 831-32, 24 Cal. Rptr. 44, 46 (1962)). The *Snapp* court declared:

Once the contingent event insured against has occurred during the period covered, the liability of the carrier becomes *contractual* rather than *potential* only, and the sole issue remaining is the extent of its obligation, and it is immaterial that this may not be fully ascertained at the end of the policy period.

Snapp, 206 Cal. App. 2d at 832, 24 Cal. Rptr. at 46 (emphasis added).

44. 145 Cal. App. 3d 462, 193 Cal. Rptr. 461 (1983).

insurers jointly and severally liable, stating this to be "a 'one occurrence' case, involving continuous, progressive and deteriorating damage."⁴⁵

In 1988, *Home Insurance Company v. Landmark Insurance Company*,⁴⁶ a first-party property loss case, involved the cracking and chipping of a hotel facade. The damage was discovered during Home's policy period, but continued into Landmark's period of coverage. The court followed the *Snapp* rule, determining that "as between two first-party insurers, one of which is on the risk on the date of the first manifestation of property damage, and the other is on the risk after the date of the first manifestation of damage, the first insurer must pay the entire claim."⁴⁷ Thus, Home was held solely liable for the damage to the hotel.⁴⁸

III. STATEMENT OF THE CASE

In *Prudential-LMI*, the plaintiffs insured their apartment building with four successive insurance companies between 1971 and 1986. The term of the defendant's all-risk homeowners policy ran from October 27, 1977 to October 27, 1980. Prudential's policy specifically excluded coverage of loss "caused by, resulting from, contributed to or aggravated by any earth movement."⁴⁹ Adopting several provisions from the "California Standard Form Fire Insurance Policy,"⁵⁰ Prudential's policy required the insured to give written notice to the company immediately following damage to the property, and to provide proof of the damage within sixty days of the loss. In addition, the agreement mandated that any action brought upon the policy had to be commenced within twelve months after "inception of the loss."⁵¹

In November 1985, the plaintiffs discovered cracks in the foundation and floor of their building. In December 1985, the plaintiffs' broker reported the damage to Prudential and all other insurance

45. *Id.* at 468-69, 193 Cal. Rptr. at 464-65.

46. 205 Cal. App. 3d 1388, 253 Cal. Rptr. 277 (1988).

47. *Id.* at 1393, 253 Cal. Rptr. at 281.

48. *Id.* at 1396, 253 Cal. Rptr. at 283.

49. *Prudential-LMI Commercial Ins. v. Superior Court*, 51 Cal. 3d 674, 679, 798 P.2d 1230, 1233, 274 Cal. Rptr. 387, 390 (1990).

50. Section 2071 of the California Insurance Code, entitled "California Standard Form Fire Insurance Policy," provides in pertinent part that "[t]he insured shall give written notice to this company of any loss without unnecessary delay, . . . and within 60 days after the loss, unless such time is extended in writing by this company, the insured shall render to this company a proof of loss . . ." CAL. INS. CODE § 2071 (Deering 1976 & Supp. 1991). Prudential's policy contained identical provisions. *Prudential-LMI*, 51 Cal. 3d at 679, 798 P.2d at 1233, 274 Cal. Rptr. at 390.

51. *Prudential-LMI*, 51 Cal. 3d at 680, 798 P.2d at 1233, 274 Cal. Rptr. at 390. This one-year suit provision is also part of the California Insurance Code. See CAL. INS. CODE § 2071 (Deering 1976 & Supp. 1991).

companies that had issued policies to plaintiffs during their ownership period.⁵² Prudential conducted a claim investigation in 1987. In August 1987, just before the insurer formally denied the claim based on the policy's earth movement exclusion, the plaintiffs filed suit against Prudential and the other insurers alleging breach of contract, bad faith, breach of fiduciary duties and negligence.⁵³

At trial, Prudential moved for summary judgment,⁵⁴ arguing that the plaintiffs had not proven that any loss occurred during Prudential's coverage period, and that the plaintiff's claim was time-barred because it was not brought within one year of the loss.⁵⁵ The court denied the motion, asserting that triable issues still remained.⁵⁶ Prudential then requested a writ of mandate from the court of appeal on the sole basis that the plaintiffs' claim was not timely. The court of appeal issued the writ, directing the lower court to grant the defendant summary judgment.⁵⁷ Adopting a "delayed discovery" rule,⁵⁸ the court of appeal declared that the time limit on this type of action begins to run when "the damage [to property is] sufficient to put a reasonable person on notice of the possibility of a defect."⁵⁹ Nevertheless, the court found the plaintiffs' claim untimely.⁶⁰ In dicta, the court of appeal further noted that equity required the apportionment of damages among insurers when damage is progressive and undiscovered over several policy periods.⁶¹ Both parties sought review from this decision.

The Supreme Court agreed to review the case to resolve three issues: (1) at what point does the statutorily-mandated⁶² one-year period of limitation commence running in cases of progressive property

52. *Prudential-LMI*, 51 Cal. 3d at 680, 798 P.2d at 1233, 274 Cal. Rptr. at 390.

53. *Id.* at 680-81, 798 P.2d at 1234, 274 Cal. Rptr. at 391.

54. In the alternative, Prudential requested summary adjudication of 16 issues emanating from the complaint. *Id.* at 681, 798 P.2d at 1234, 274 Cal. Rptr. at 391.

55. *Id.* at 681, 798 P.2d at 1234, 274 Cal. Rptr. at 391. The plaintiffs' action was commenced 20 months after their claim was filed. *Id.*

56. *Id.* According to the court, these issues concerned "whether the earth movement exclusion applied, whether the damage occurred during the policy period, and when the crack first appeared." *Id.*

57. *Prudential-LMI Commercial Ins. v. Superior Court*, 224 Cal. App. 3d 389, 413, 260 Cal. Rptr. 85, 99 (1989).

58. For a discussion of the delayed discovery rule, see *supra* note 4.

59. *Prudential-LMI*, 224 Cal. App. 3d at 412, 260 Cal. Rptr. at 98-99.

60. *Id.* at 412-13, 260 Cal. Rptr. at 99. The court stated that the plaintiffs "failed to bring their action on their claim within the contractual limitations period of 12 months after a reasonable person would have been placed on notice of possible defects in the property." *Id.*

61. *Id.* at 408, 260 Cal. Rptr. at 96.

62. Pursuant to California Insurance Code Section 2071, the one-year suit provi-

loss; (2) whether this limitation period should be equitably tolled during the interval between the notification of the loss and the insurer's formal denial of the claim; and (3) which insurer should indemnify the insured where there are successive insurers, the loss is progressive, and the damage is not discovered until well after it begins.⁶³

IV. TREATMENT

A. *California Insurance Code Section 2071: The One-Year Suit Provision*

The *Prudential-LMI* court began its discussion by affirming the validity of the one-year suit provision in Prudential's insurance policy. The court noted the provision was statutorily mandated,⁶⁴ and thus was "consistent with public policy."⁶⁵ The court declared the statute should not be construed strictly against the insurer.⁶⁶ Rather, the court sought to determine the point that the legislature intended to be the beginning of the one-year suit provision, when the insured does not immediately discover the damage.⁶⁷

B. *Delayed Discovery and Inception of the Loss*

The *Prudential-LMI* court adopted a "delayed discovery" rule for determining when the one-year suit provision begins to run.⁶⁸ Agreeing with the rationale in *Abari*, *Lawrence*, and *Zurn*,⁶⁹ the court declared that the twelve-month period did not begin to run when the actual damage occurred; instead, it commenced when the insured discovered or reasonably should have discovered the loss.⁷⁰ The court stated:

The insured's suit on the policy will be deemed timely if it is filed within one year after "inception of the loss," defined as that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered.⁷¹

However, the court declared that only an insured who is "diligent in the face of discovered facts" may utilize this discovery rule.⁷² Addi-

sion is contained in all fire insurance policies. CAL. INS. CODE § 2071 (Deering 1976 & Supp. 1991).

63. *Prudential-LMI Commercial Ins. v. Superior Court*, 51 Cal. 3d 674, 678, 798 P.2d 1230, 1232, 274 Cal. Rptr. 387, 389.

64. See *supra* notes 8-12 and accompanying text.

65. *Prudential-LMI*, 51 Cal. 3d at 684, 798 P.2d at 1236, 274 Cal. Rptr. at 393.

66. *Id.*

67. *Id.*

68. *Id.* at 686-87, 798 P.2d at 1238, 274 Cal. Rptr. at 395.

69. See *supra* notes 13-25 and accompanying text.

70. *Prudential-LMI*, 51 Cal. 3d at 686-87, 798 P.2d at 1238, 274 Cal. Rptr. at 395.

71. *Id.*

72. *Id.* at 687, 798 P.2d at 1238, 274 Cal. Rptr. at 395.

tionally, the court stressed that the standard of conduct necessary to fulfill the insured's duty of diligence may vary depending on the nature and degree of the damage sustained.⁷³ A greater duty of prompt notification is imposed on the insured in cases of extreme or unusual loss than in cases concerning more typical damage.⁷⁴

The court further announced that determining when the "inception of the loss" occurred is a question for the trier of fact.⁷⁵ An affirmative defense asserting the unreasonableness of the insured's time of discovery must be shown by a preponderance of the evidence.⁷⁶ Applying these rules, the court declared that questions remained concerning when the "inception of the loss" had occurred and, therefore, the plaintiffs should be allowed to amend their claim to explain why the time of discovery was reasonable.⁷⁷

C. Doctrine of Equitable Tolling

The *Prudential-LMI* court determined that the one-year suit provision should be equitably tolled during the period between the insured's notification of loss and the insurer's formal denial of the claim.⁷⁸ Following the rationale of *Peloso*,⁷⁹ the court concluded that the legislature intended the insured to have twelve full months to institute an action, not including the period given for the insurer's benefit.⁸⁰ The court believed it was acting consistently with a trend in other states toward equitable tolling of the one-year suit provision where the insurer's rights have been fully protected by prompt notice of loss.⁸¹

The court held that several policy considerations favored imposing an equitable tolling rule.⁸² First, while the defendant *Prudential* argued that tolling the one-year suit provision would frustrate the statute's goal of eliminating stale claims, the court pointed out that the

73. *Id.*

74. *Id.*

75. *Prudential-LMI*, 51 Cal. 3d at 687, 798 P.2d at 1238, 274 Cal. Rptr. at 395.

76. *Id.*

77. *Id.*

78. *Id.* at 691, 798 P.2d at 1241, 274 Cal. Rptr. at 398.

79. See *supra* notes 30-35 and accompanying text.

80. *Prudential-LMI*, 51 Cal. 3d at 691, 798 P.2d at 1241, 274 Cal. Rptr. at 398. This intent "can be inferred from the fact the period provided by section 2071 is considerably shorter than the usual four years for ordinary contracts . . . and ten years for an action against developers for property damage caused by latent defects." *Id.* (citations omitted).

81. *Id.*

82. *Id.*

statute's goal was to provide for an early trial and for a timely investigation.⁸³ The statute was *not* intended to forfeit the insured's rights by providing the insurer with a technical defense in the face of the insured's prompt notice of loss.⁸⁴

Second, the court determined that equitable tolling of the one-year suit provision "present[ed] several advantages in eliminating the unfair results that often occur in progressive property damage cases."⁸⁵ Third, where insureds are not required to file suit before the insurer has acted on a claim, insurers are forced to investigate claims, rather than wait until the one-year period has elapsed in an attempt to utilize this technical defense.⁸⁶ Fourth, the court believes this rule will streamline litigation by encouraging settlements and by reducing bad faith suits brought when insurers deny claims following expiration of the one-year period.⁸⁷

Fifth, the longer the insured waits to notify the insurer, the less time he will have after formal denial of the claim to initiate litigation.⁸⁸ Finally, the court declared that the equitable tolling rule is necessary because any action by the insured is premature until the insurer has denied the claim.⁸⁹ If, as in the case at hand, the insurer does not formally deny the claim until after the expiration of the one-year period, a "plaintiff's suit would have been untimely before the insurer denied coverage."⁹⁰ For these reasons, the court determined that the rule of equitable tolling should be applied to the one-year provision.⁹¹

Applying the rule of equitable tolling to the facts of *Prudential-LMI*, the court held that if the plaintiff's delayed discovery of the loss was reasonable, then because the plaintiff had notified the insurer within one month of the discovery of the loss, the plaintiff should have had eleven months after denial of the claim to institute suit.⁹² Thus, the plaintiff's suit was timely.⁹³

83. *Id.* Prompt notice provides the insurer with the opportunity to investigate the claim while the evidence is still fresh in order to prepare its defense.

84. *Id.*

85. *Prudential-LMI*, 51 Cal. 3d at 692, 798 P.2d at 1241, 274 Cal. Rptr. at 398.

86. *Id.* "Although an insurer is not required to pay a claim that is not covered or to advise its insureds concerning what legal arguments to make, good faith and fair dealing require an insurer to investigate claims diligently before denying liability." *Id.*

87. *Id.* Without the equitable tolling rule, such bad faith suits would be the insured's only hope of recovery. *Id.*

88. *Id.* at 692, 798 P.2d at 1242, 274 Cal. Rptr. at 399.

89. *Id.*

90. *Prudential-LMI*, 51 Cal. 3d at 692-93, 798 P.2d at 1242, 274 Cal. Rptr. at 399.

91. *Id.* at 693, 798 P.2d at 1242, 274 Cal. Rptr. at 399.

92. *Id.*

93. *Id.*

E. Progressive Loss Rule

Finally, the court adopted the manifestation theory of liability in progressive loss cases.⁹⁴ In situations involving progressive property loss, where the damage remains undiscovered over several insurers' policy periods, the insurer who is covering the risk at the time of the manifestation of the damage is solely liable for the loss.⁹⁵ The court relied on the holdings and rationale in *Snapp* and *Home Insurance*,⁹⁶ and distinguished the *California Union*⁹⁷ decision because it was a third-party liability case and it addressed different concerns.⁹⁸ The *Prudential-LMI* court specifically left open the question of whether the manifestation theory of liability should be applied in third-party progressive loss cases.⁹⁹

The court believed that by adopting the manifestation rule, the insured's expectations are best preserved because he could look to his current insurer for coverage of a manifested loss.¹⁰⁰ Additionally, the court reasoned that this rule helps insurance companies determine the extent of their liability because a company will be liable only for damage that manifests itself during its coverage period.¹⁰¹

The court also determined that the date of the "inception of the loss" was also the date of the "manifestation of the loss."¹⁰² The court noted that the date of these events, if uncertain, is a question for the fact-finder.¹⁰³ However, if the date is clear, an insurer who covered the loss prior or subsequent to the manifestation of the damage may obtain summary judgment of the claim against the company.¹⁰⁴ Because the date of the manifestation was not conclusive in *Prudential-LMI*, and because all the successive insurers had been joined in the litigation, the court refused to determine when the damage manifested, and thus, whether Prudential could be held liable for the damage.¹⁰⁵

94. *Id.* at 698, 798 P.2d at 1246, 274 Cal. Rptr. at 403.

95. *Prudential-LMI*, 51 Cal. 3d at 698, 798 P.2d at 1246, 274 Cal. Rptr. at 403.

96. *See supra* notes 41-43 and 46-48 and accompanying text.

97. *See supra* notes 44-45 and accompanying text.

98. *Prudential-LMI*, 51 Cal. 3d at 698, 798 P.2d at 1246, 274 Cal. Rptr. at 403.

99. *Id.* at 698, 798 P.2d at 1246, 274 Cal. Rptr. at 403.

100. *Id.* at 699, 798 P.2d at 1247, 274 Cal. Rptr. at 404.

101. *Id.*

102. *Id.*

103. *Prudential-LMI*, 51 Cal. 3d at 699, 798 P.2d at 1247, 274 Cal. Rptr. at 404.

104. *Id.*

105. *Id.* at 700, 798 P.2d at 1247, 274 Cal. Rptr. at 404.

V. IMPACT

Prudential-LMI will have a radical effect on first-party progressive loss litigation. Practically speaking, it will greatly streamline proceedings by reducing the number of issues presented in progressive property loss cases.¹⁰⁶ Parties no longer need to litigate whether the actual occurrence of the damage or the discovery of the loss triggers the one-year suit provision. Instead, they will deliberate upon the date of the "inception of the loss."¹⁰⁷ Courts need not debate allocating liability among successive insurers of progressive loss. There will be fewer parties to these suits because the manifestation rule limits liability to the insurer covering the risk at the time the damage is manifested.¹⁰⁸ Additionally, bad faith suits, brought when the insurer has postponed denial of an insured's claim until the one-year suit provision has expired, will become less frequent.¹⁰⁹

Homeowners will greatly benefit from *Prudential-LMI*. First, by adopting the delayed discovery rule, homeowners' rights under the policy are protected until the time when a reasonable person would have discovered the damage.¹¹⁰ An insured's one-year suit period can no longer expire before he could reasonably be expected to discover the loss. Second, the equitable tolling period requires the insurer to investigate the claim. The insured is no longer forced to file suit on a claim that is premature because it lacks formal denial, in order to preserve his rights under the one-year provision. Third, under the manifestation rule, the homeowner can know with certainty the insurer to whom he can look for indemnity.

Insurers appear to be those most detrimentally affected by *Prudential-LMI*.¹¹¹ Both the delayed discovery rule and the rule of equitable tolling work against insurers' interests. The liability of the insurer at the manifestation of the damage will not be apportioned among all the insurers who insured the property during the progressive loss. Some aspects of *Prudential-LMI*, however, may prove beneficial to insurers. For example the adoption of the manifestation rule provides greater certainty when an insurer is assessing its potential liability.

By not declaring coverage to be fixed when the damage occurs and

106. Pasich, "Continuous Loss" Coverage Depends on Policy, L.A. Daily J., Nov. 9, 1990, at 7, col. 3.

107. *Id.*

108. *Id.*

109. *Prudential-LMI Commercial Ins. v. Superior Court*, 51 Cal. 3d 674, 692, 798 P.2d 1230, 1241, 274 Cal. Rptr. 387, 398 (1990).

110. See Tilner, *Ruling on Property Damage Benefits Insurers*, L.A. Daily J., Dec. 3, 1990, at 7, col. 1.

111. See Carrizosa, *Lucas Opinions Humble Mighty Insurers*, L.A. Daily J., Nov. 28, 1990, at 7, col. 1.

thus not due under an older policy, the court has enabled insurers in many cases to avoid liability on damage caused by earth movement because newer policies often include broad earth movement exclusions.¹¹²

VI. CONCLUSION

The California Supreme Court has radically changed insurance law through its decision in *Prudential-LMI Commercial Insurance v. Superior Court*. It is important to remember, however, that this holding is specifically limited to first-party progressive property loss. The question of liability apportionment among successive insurers in third-party progressive damage cases remains unsettled. Nevertheless, insurance companies may seek to impose aspects of this holding on third-party cases.¹¹³ To be consistent with its decision in *Prudential-LMI*, the court should reject these efforts.

MARY KAY ROGERS

XI. LABOR LAW

The wrongful termination claims of a policy-making or confidential union employee, who is not a member of the union, are preempted by the Labor-Management Reporting and Disclosure Act's underlying purpose of insuring the responsiveness of elected union officials to the will of the membership: Screen Extras Guild v. Superior Court.

I. INTRODUCTION

In *Screen Extras Guild v. Superior Court*,¹ the California Supreme Court ruled that summary judgment must be granted for the defendant, Screen Extras Guild, on the wrongful discharge claim of a former nonmember employee. The court held that the state law remedies sought were preempted by the Labor-Management Reporting and Disclosure Act (LMRDA)² because recognition of the claims

112. Tilner, *supra* note 110, at 7, col. 2.

113. Pasich, *supra* note 106, at 7, col. 3.

1. 51 Cal. 3d 1017, 800 P.2d 873, 275 Cal. Rptr. 395 (1990). Justice Panelli wrote the majority opinion and was joined by Chief Justice Lucas and Justices Mosk and Kennard. Justice Eagleson wrote a dissenting opinion joined by Justice Broussard. Justice Arabian wrote a separate dissenting opinion.

2. 29 U.S.C. §§ 401-531 (1988).

would contravene the underlying purpose of the Act—to promote democratic control of union management. Therefore, the supreme court reversed the court of appeal's decision that refused to issue a writ of mandate to the superior court.³ The supreme court remanded to the court of appeal, directing them to grant the Guild's motion for summary judgment.⁴ The California Supreme Court, relying primarily on the United States Supreme Court's decision in *Finnegan v. Leu*,⁵ held (1) that elected union officials must be free to exercise unlimited discretion when making employment decisions regarding confidential or policy-making employees,⁶ and (2) that recognition of the state claims filed by the plaintiff, Ms. Smith, would contravene the purpose of the Act and, therefore, the state claims are preempted by the federal statute.⁷

II. TREATMENT OF THE CASE

Justice Panelli began his majority opinion with a general discussion of preemption.⁸ He contended that the cases in which the United States Supreme Court held that the supremacy clause mandates preemption may be divided into two categories—substantive preemption and jurisdictional preemption.⁹ According to Justice Panelli, substantive preemption prohibits state regulation of conduct protected by the federal government, and jurisdictional preemption prohibits state action in an area which is the primary jurisdiction of Congress and federal regulatory bodies.¹⁰ The key to this distinction,

3. *Screen Extras Guild v. Superior Court*, 257 Cal. Rptr. 242 (Ct. App. 1989).

4. *Screen Extras*, 51 Cal. 3d at 1033, 800 P.2d at 883, 275 Cal. Rptr. at 405. The court of appeal originally denied review. The supreme court reviewed this denial and directed the court of appeal to issue an extraordinary writ and review the superior court's decision. The court of appeal noted that the supreme court had not directed it to grant the relief sought but merely to grant review, which it did by affirming the superior court's decision. *Screen Extras Guild v. Superior Court*, 257 Cal. Rptr. 242, 244 (Ct. App. 1989).

5. 56 U.S. 431 (1982).

6. *Screen Extras*, 51 Cal. 3d at 1031, 800 P.2d at 882, 275 Cal. Rptr. at 404.

7. *Id.* at 1030-31, 800 P.2d at 881, 275 Cal. Rptr. at 403.

8. *Id.* at 1022, 800 P.2d at 875, 275 Cal. Rptr. at 397. Justice Panelli cited the general rule that "state action is preempted wherever it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" *Id.* (citing U.S. CONST. art. VI, cl. 2; *Brown v. Hotel Employees*, 468 U.S. 491 (1984) (quoting *Hines v. Davidowitz*, 312 U.S. 52 (1941))).

9. *Id.* at 1022-23, 800 P.2d at 875-76, 275 Cal. Rptr. at 397-98.

10. Both Justice Panelli, for the majority, and Justice Arabian, in his dissent, cited Lawrence Tribe's treatise, *American Constitutional Law*, to support conflicting delineations of the categories of preemption. Justice Arabian maintained that there are actually three categories of preemption: express, implied and conflict preemption. *Screen Extras*, 51 Cal. 3d at 1039, 800 P.2d at 887, 275 Cal. Rptr. at 409 (Arabian, J., dissenting). However, Justice Panelli contended that regardless of the name or number of categories, the test to be applied in this particular case remains unchanged. *Id.* at 1023 n.3, 800 P.2d at 875 n.3, 275 Cal. Rptr. at 398 n.3.

in the view of the court, is the test to be applied to determine whether preemption is warranted. In the case of jurisdictional preemption, a balancing test is warranted.¹¹ In the instant case, there was no federal jurisdiction over Ms. Smith's claims because she was not actually a member of the union. Therefore, the court held that this was not a case of jurisdictional preemption and, thus, the proper inquiry for a preemption analysis was "whether there is an actual conflict between permitting Smith to pursue her state law causes of action and federal labor policy as embodied in the LMRDA."¹²

The LMRDA was enacted in 1959 as a response to congressional concern over widespread corruption in union management.¹³ In order to eliminate the corrupt activities, Congress sought to make the union management more responsive to the will of the membership. The specific provisions intended to accomplish this goal are referred to generally as the "Bill of Rights of Members of Labor Organizations."¹⁴ The question for the court was whether subjecting union officials to wrongful discharge suits by confidential or policy-making employees was in actual conflict with the desired responsiveness promoted by this "Bill of Rights."¹⁵

11. *Id.* at 1023, 800 P.2d at 876, 275 Cal. Rptr. at 398. Justice Panelli insisted that under these circumstances "preemption involves balancing the competing federal and state interests at stake." *Id.*

12. *Id.* In applying the "actual conflict" test, Justice Panelli arrived at the same test that Justice Arabian used, although under a different analysis. See generally 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* § 7 (9th ed. 1988).

13. 29 U.S.C. § 401(a) outlines the purpose of the Act, stating:

The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; . . . and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

29 U.S.C. § 401(a) (1982).

14. 29 U.S.C. §§ 411-15 (1988). Section 411 contains most of the enumerated protections including:

- (1) — every member of a union has equal rights within the organization;
- (2) — every member has freedom of speech and assembly with other members;
- (3) — dues cannot be raised except through specifically provided procedures;
- (4) — members' rights to sue may not be limited, even if the union is the defendant;
- (5) — disciplinary action may not be imposed without proper procedural protection.

See 29 U.S.C. § 411(a) (1988). See also, 48 AM. JUR. 2D *Labor and Labor Relations* § 54 (1979) (discussing the scope of the LMRDA).

15. *Screen Extras*, 51 Cal. 3d at 1024, 800 P.2d at 876, 275 Cal. Rptr. at 399. The

The court relied primarily on the view of the LMRDA expressed by the United States Supreme Court in *Finnegan v. Leu*.¹⁶ The Supreme Court in *Finnegan* stated that "the Act's overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections."¹⁷ Therefore, the Court found it essential that elected officials be free to appoint confidential and policy-making employees willing to implement policies consistent with the views which led to their election.¹⁸ Allowing relief to union members who were discharged after opposing the newly elected president would undermine this purpose.¹⁹

The majority in *Screen Extras* found that this reasoning applied to Ms. Smith's situation as well. Although *Finnegan* involved an attempt to invoke the LMRDA rather than possible preemption of state law claims, the issue of the extent to which elected union officials may be free to choose their staff was common to both cases. Therefore, the court held that the claims against the Guild must be preempted to secure the ability of union officials to terminate policy-making employees at will.²⁰

The court recognized, but distinguished, a contrary holding by the Ninth Circuit in *Bloom v. General Truck Drivers*.²¹ The court determined that the *Bloom* decision was limited to the specific facts of that case: the employee was allegedly discharged for his failure to engage in illegal activity. The court in *Bloom* noted that such action "is not

court specifically noted that it made no finding as to the rights of nonconfidential or nonpolicymaking employees to bring state labor law claims. *Id.* at 1032 n.11, 800 P.2d at 882 n.11, 275 Cal. Rptr. at 404 n.11.

16. 456 U.S. 431 (1982). *Finnegan* involved a claim by discharged business agents, who were also members of the union for which they worked, that their discharge was in violation of the "Bill of Rights." The business agents had been discharged by a newly elected union president who had prevailed over the candidate supported by the discharged employees.

17. *Finnegan*, 456 U.S. at 441. See also 48 AM. JUR. 2D *Labor and Labor Relations* § 55 (1979 & Supp. 1991).

18. *Finnegan*, 456 U.S. at 441. "Nothing in the act evinces a congressional intent to alter the traditional pattern which would permit a union president under these circumstances to appoint agents of his choice to carry out his policies." *Id.* at 442.

19. *Id.* at 442; cf. *id.* at 442-43 (Blackmun, J., concurring) (limiting the denial of protection for discharged union members/employees to those members of a president's staff "who will be instrumental in evolving the president's administrative policies").

20. *Screen Extras*, 51 Cal. 3d at 1024, 800 P.2d at 877, 275 Cal. Rptr. at 399. "[C]ourts have recognized that the ability of elected union officials to select their own administrators is an integral part of ensuring that union administrations are responsive to the will of union members." *Id.*

21. 783 F.2d 1356 (9th Cir. 1986). *Bloom* involved a claim by a former union business agent that he had been fired in retaliation for his refusal to falsify the minutes of an executive board meeting. While the court affirmed summary judgment in favor of the union, it specifically held that the LMRDA did not preempt the plaintiff's claim. *Id.* at 1362.

the kind sanctioned by the [LMRDA]."²² Therefore, the *Bloom* decision, as interpreted by the California Supreme Court, made no determination about whether a claim for wrongful termination, based upon less extreme grounds, would be preempted. In fact, the *Bloom* court distinguished, rather than overruled, another case relied on by the California Supreme Court, *Tyra v. Kearney*.²³ In the only other consideration of the issue by California courts, *Tyra* held that "replacement of business agents by elected union officials is sanctioned by the LMRDA."²⁴

The California Supreme Court was persuaded that the reasoning of *Tyra* applied to Ms. Smith's claims. Ms. Smith asserted that her claim was distinguishable from that in *Tyra*, because rather than being discharged for having supported the opposing candidate in an election, hers was a "garden-variety wrongful termination" suit.²⁵ The court rejected this view stating, "[H]ow are we to distinguish that kind of discharge from one where it is alleged that a confidential or policy-making employee worked inefficiently or dishonestly in response to, or created obstacles to the implementation of, union policies, adopted by elected union officials, which he or she opposed?"²⁶ Because of the inherent difficulty in making this determination, the court foresaw increased litigation which "would surely have a chilling effect on all discharges."²⁷ According to the majority, this chilling effect constituted an "actual conflict" with the federal legislation. Finally, the court addressed and dismissed Ms. Smith's claims for intentional infliction of emotional distress and defamation. Although her claims were technically unrelated to the subject matter of the LMRDA, because they grew out of Ms. Smith's discharge, the court ruled that they were preempted as well.²⁸

Justice Eagleson's dissent, in which Justice Broussard joined, fo-

22. *Id.* at 1362. In fact, the court found that "the state cause of action actually advances the purpose of the Act." *Id.*

23. 153 Cal. App. 3d 921, 200 Cal. Rptr. 716 (1984).

24. *Id.* at 927, 200 Cal. Rptr. at 719. "[A] subsequent state claim would allow another forum to restrict the exercise of the right to terminate which *Finnegan* found 'an integral part of ensuring a union administration's responsiveness to the mandate of the union election.'" *Id.* (quoting *Finnegan*, 456 U.S. at 441).

25. *Screen Extras*, 51 Cal. 3d at 1027, 800 P.2d at 879, 275 Cal. Rptr. at 401. Smith specifically pointed to the lapse of time between the president's election and her termination as support for her assertion that she was not fired for political reasons. *Id.*

26. *Id.* at 1027-28, 800 P.2d at 879, 275 Cal. Rptr. at 401.

27. *Id.* at 1028, 800 P.2d at 880, 275 Cal. Rptr. at 402.

28. *Id.* at 1032, 800 P.2d at 883, 275 Cal. Rptr. at 405. The court also stated that Smith's claims may not have been barred if "significant additional tortious activity had been alleged against SEG or Brown." *Id.*

cused primarily on the other portions of the LMRDA which specifically evidence an intent not to preempt state law claims.²⁹ Justice Eagleson noted that *Finnegan* did not involve preemption and, therefore, did not consider the effect of these provisions.³⁰ He then emphasized the presumption of at-will employment in California law.³¹ Recovery for discharge is allowed only if "the termination contravened a valid express or implied agreement for job security, stemmed from a pernicious form of discrimination, or violated some other clear and fundamental public policy."³² None of these categories prohibit termination motivated by a need to insure implementation of administrative policies. Therefore, recognition of the state remedies, in Eagleson's view, does not impermissibly interfere with the policy behind the LMRDA. The response to these arguments by the majority was simple: the LMRDA protects union members only. Therefore, section 413 only saves state law remedies for *union members*. Because Ms. Smith was not a member of the union she did not fall within the jurisdiction of the LMRDA, including the saving provisions.³³

Justice Arabian wrote a separate dissent in which he conceded that preemption by the LMRDA is possible under some circumstances, but not those presented in this case. While Justice Arabian divided the types of preemption differently than Justice Pannelli did, Justice Arabian agreed that the test to be applied to the facts at bar was whether Ms. Smith's claims were in "actual conflict" with the federal legislation.³⁴ However, he insisted that this inquiry "is essentially a question of statutory construction."³⁵ He then discussed the savings

29. See, e.g., 29 U.S.C. § 413 (1988). Section 413 provides: "Nothing in this title [29 U.S.C. §§ 411-15] shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal or under the constitution and bylaws of any labor organization." *Id.*

30. *Screen Extras*, 51 Cal. 3d at 1034, 800 P.2d at 884, 275 Cal. Rptr. at 406 (Eagleson, J., dissenting).

31. See 2 B. WITKIN, *SUMMARY OF CALIFORNIA LAW Agency and Employment* § 165 (9th ed. 1987).

32. See *Foley v. Interactive Data Corp*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988); CAL. GOV'T CODE § 12,940 (Deering 1990); see generally 2 B. WITKIN, *SUMMARY OF CALIFORNIA LAW Agency and Employment* §§ 166-77 (9th ed. 1987 & Supp. 1991).

33. *Screen Extras*, 51 Cal. 3d at 1031 n.10, 800 P.2d at 881 n.10, 275 Cal. Rptr. at 403 n.10. "Just as Smith is not entitled to the substantive protections of the LMRDA, she cannot enjoy its savings clauses." *Id.*

34. *Screen Extras*, 51 Cal. 3d at 1039, 800 P.2d at 887, 275 Cal. Rptr. at 409 (Arabian, J., dissenting). Justice Arabian asserted that preemption may be "express"—where Congress has specifically defined the extent of preemption, "implied"—where the statute implies that congress intended state law to be preempted, or "conflict"—where state law is preempted to the extent it conflicts with the federal purpose. *Id.* See also, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-25 (2d ed. 1988).

35. *Screen Extras*, 51 Cal. 3d at 1042, 800 P.2d at 889, 275 Cal. Rptr. at 411 (Arabian, J., dissenting). "The intent of Congress is the 'ultimate touchstone' of preemption

clauses of the statute, as well as the applicable case law. Justice Arabian concluded that the majority erred in rejecting the distinction made by the plaintiff between discharges relating to the implementation of policy and "garden-variety wrongful termination."³⁶ He agreed with the court of appeal that these cases are outside the discretion which Congress intended to preserve for elected union officials.³⁷ Therefore, Justice Arabian would have limited the preemptive effect of the LMRDA to those cases where newly elected officials remove policy-making staff members so that they may be replaced by employees who support the programs upon which their election was based.

III. CONCLUSION

According to Justice Arabian, this decision will leave policy-making union employees completely unprotected from arbitrary termination by elected union officials.³⁸ However, the majority's acceptance of the holding in *Bloom* implies that retaliatory discharges are not intended to be preempted by the LMRDA. *Bloom* held that "the kind of discharge alleged, retaliation for refusal to commit a crime and breach of trust, is not the kind sanctioned by the [LMRDA], or by the courts in *Finnegan* and *Tyra*."³⁹ Because the majority did not contradict this holding, it would appear that terminations which would violate public policy survive the *Screen Extras* holding.⁴⁰ Furthermore, this case has limited effect because there are repeated references in the opinion which limit the holding to nonmember employees like Ms. Smith.⁴¹

analysis." *Id.* (citing Wisconsin Dep't of Indus., Labor and Human Relations v. Gould, Inc., 475 U.S. 282 (1986)).

36. *Id.* at 1051, 800 P.2d at 895, 275 Cal. Rptr. at 417. "This case has nothing to do with [union] democracy . . . this is a garden variety 'wrongful termination' case which just happens to be brought against a union . . ." *Id.* (quoting *Screen Extras Guild v. Superior Ct.*, 257 Cal. Rptr. 242, 245 (Ct. App. 1989)).

37. *Screen Extras*, 257 Cal. Rptr. at 245. "Union officials are not elected to *breach contracts* or commit torts and, if they do so, the fact they were 'democratically elected' is beside the point." *Id.* (emphasis added).

38. Justice Arabian dramatically ended his dissent by noting, "In earlier times it was said that 'Heaven will protect the working girl.' With today's decision, union employees may find that heavenly intervention is indeed their last best hope of protection." *Screen Extras*, 51 Cal. 3d at 1055, 800 P.2d at 898, 275 Cal. Rptr. at 420.

39. *Bloom*, 783 F.2d at 1362.

40. See *Foley*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211; see generally 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Agency and Employment* §§ 167-70 (9th ed. 1987 & Supp. 1991).

41. See *supra* notes 12 and 33 and accompanying text.

As a direct result of the court's decision in *Screen Extras*, California's policy-making union employees are left with far less protection than any other employees in the state. In fact, with respect to hiring decisions, the *Screen Extras* opinion gives greater freedom from interference to elected union representatives than has been given to the President of the United States.⁴²

KAREN M. EISENHAUER

XII. PROPERTY LAW

A bank's improper setoff against a depositor's account in partial satisfaction of the depositor's debt without first foreclosing its security interest in the depositor's property results in a waiver of the bank's security interest, but not a waiver of the underlying debt: Security Pacific National Bank v. Wozab

I. INTRODUCTION

In *Security Pacific National Bank v. Wozab*¹ the California Supreme Court determined the effect of a bank's improper setoff of a debtor's deposit accounts against the balance owed on the debtor's obligation upon both the bank's security interest in the debt and the status of the underlying debt.² The defendant, Anton Wozab, was the president and majority shareholder of a corporation which had a line of credit with Security Pacific exceeding \$1 million.³ Additionally, Wozab had a personal savings account and a demand deposit account with the bank.⁴ After the bank expressed concern over the financial stability of the corporation, Wozab pledged a deed of trust on his personal residence as security for the line of credit.⁵ When it became apparent to the bank that the corporation would probably file for bankruptcy, the bank setoff Wozab's personal accounts, which amounted to approximately \$3,000, against the amount owed on the debt.⁶ The bank took this action without first attempting to foreclose

42. See *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (holding that Congress could limit the ability of the President to remove executive branch officials who performed quasi-legislative or quasi-judicial functions).

1. 51 Cal. 3d 991, 800 P.2d 557, 275 Cal. Rptr. 201 (1990). Justice Eagleson wrote the majority opinion in which Chief Justice Lucas and Justices Panelli and Arabian concurred. Justice Broussard wrote a separate concurring and dissenting opinion in which Justices Mosk and Kennard concurred.

2. *Id.* at 996, 800 P.2d at 559, 275 Cal. Rptr. at 203.

3. *Id.* Wozab had executed personal guaranties promising to pay the underlying debt if the corporation failed to do so. *Id.*

4. *Id.* The corporation also had separate demand deposit accounts with the bank. *Id.*

5. *Id.*

6. *Id.* The bank also set off over \$100,000 of the corporation's deposit accounts,

its security interest in Wozab's residence.⁷

When Wozab challenged the setoff, the bank transferred the deed of trust to Wozab's residence back to Wozab. Then, the bank filed an action asserting that Wozab was personally liable based on written guaranties, which he had executed prior to pledging his residence,⁸ for the underlying debt.⁹ Both parties filed motions for summary judgment, with Wozab arguing that the bank's improper setoff of his deposit accounts amounted to both a waiver of the security interest in his residence and a waiver of the balance owed on the underlying debt.¹⁰ Although the trial court admitted the unfairness of allowing Wozab to escape liability for a debt of almost \$1 million, it felt bound by precedent established in *Bank of America v. Daily*,¹¹ compelling it to grant Wozab's motion for summary judgment.¹² The court of appeal affirmed, and the supreme court granted review.¹³

The supreme court agreed that when a bank improperly sets off a debtor's accounts against an obligation of the debtor, it loses its security interest in the debtor's property.¹⁴ However, the court refused to approve the additional "Draconian sanction" advocated by Wozab and the lower courts which would require the bank to forfeit its right to collect on the underlying debt.¹⁵

II. TREATMENT

The appropriate remedy for an improper setoff was discussed in *Bank of America v. Daily*.¹⁶ There, as in the *Wozab* case, a bank set-

but that portion of the setoff was not at issue on appeal of the case. *Id.* at 995, 996 n.5, 800 P.2d at 559 & n.5, 275 Cal. Rptr. at 203 & n.5. This left a balance due on the underlying debt of over \$900,000. *Id.* at 995, 800 P.2d at 559, 275 Cal. Rptr. at 203.

7. *Id.* at 995-96, 800 P.2d at 559, 275 Cal. Rptr. at 203.

8. See *supra* note 3.

9. *Wozab*, 51 Cal. 3d at 996, 800 P.2d at 559, 275 Cal. Rptr. at 203.

10. *Id.*

11. 152 Cal. App. 3d 767, 199 Cal. Rptr. 557 (1984). For a discussion of the *Daily* case, see *infra* notes 16-21 and accompanying text.

12. *Wozab*, 51 Cal. 3d at 996, 800 P.2d at 559, 275 Cal. Rptr. at 203.

13. *Id.*

14. *Id.* at 1001-02, 800 P.2d at 563, 275 Cal. Rptr. at 207. In doing so, the court gave credence to the "one-action rule" found at CAL. CIV. PROC. CODE § 726(a) (West Supp. 1991). For an explanation of the one-action rule, see *infra* note 18 and accompanying text.

15. *Wozab*, 51 Cal. 3d at 1002, 800 P.2d at 563, 275 Cal. Rptr. at 207. See *infra* notes 24-30 and accompanying text.

16. The court of appeal in *Daily* based its decision on the holding in the seminal supreme court case of *McKean v. German-American Savings Bank*, 118 Cal. 334, 50 P. 656 (1897).

off a debtor's accounts against a debt owed the bank instead of foreclosing on a security interest which it held in the debtor's real property.¹⁷ The court of appeal held that the setoff was a violation of the "one action rule" codified at section 726 of the California Code of Civil Procedure.¹⁸ As such, the court of appeal determined that the bank, by taking action to setoff the depositor's accounts,¹⁹ had waived its security interest in the debtor's property.²⁰ However, as the supreme court pointed out in *Wozab*, the bank in *Daily* made no effort to collect the underlying debt.²¹ Therefore, the court of appeal's comments in *Daily* regarding the proper remedy for the debtor as to the underlying debt constituted mere dicta.²² Hence, the *Wozab* case involved an issue of first impression,²³ and the lower courts had improperly determined that they were bound by any alleged holding on the issue in *Daily*.

Reversing the decision of the court of appeal, the supreme court determined that the proper solution in the case of an improper setoff was to prevent the bank from foreclosing its security interest,²⁴ but

17. *Daily*, 152 Cal. App. 3d at 770, 199 Cal. Rptr. at 558.

18. *Id.* at 773, 199 Cal. Rptr. at 560. The one-action rule provides, in pertinent part: "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property or an estate for years therein, which action shall be in accordance with the provisions of this chapter . . ." CAL. CIV. PROC. CODE § 726(a) (West Supp. 1991). See generally 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Security Transactions in Real Property* § 111 (9th ed. 1987); 27 CAL. JUR. 3D *Deeds of Trust* § 200 (1987 and Supp. 1991).

19. While the bank's setoff was not a judicial "action" within the meaning intended by the drafters of section 726 of the Code of Civil Procedure, the setoff still amounted to a violation of the section because the rule not only intends to protect a debtor from more than one lawsuit, but also intends that a bank take action to foreclose on any security interest before suing on the underlying debt. *Wozab*, 51 Cal. 3d at 998-99, 800 P.2d at 560-62, 275 Cal. Rptr. at 204-06. See also 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Security Transactions in Real Property* § 115(3) (9th ed. 1987). Thus the "one-action rule" embodies a "security first rule" as well. *Wozab*, 51 Cal. 3d at 999, 800 P.2d at 562, 275 Cal. Rptr. at 206. To the extent the court of appeal in *Daily* interpreted the term "action" in section 726 to include a bank's setoff of a depositor's accounts, the supreme court in *Wozab* disapproved of the decision. *Id.* at 999 n.7, 800 P.2d at 562 n.7, 275 Cal. Rptr. at 206 n.7.

20. *Daily*, 152 Cal. App. 3d at 773, 199 Cal. Rptr. at 560.

21. *Wozab*, 51 Cal. 3d at 1003, 800 P.2d at 564, 275 Cal. Rptr. at 208.

22. *Id.* at 1003, 800 P.2d at 565, 275 Cal. Rptr. at 209. The court in *Daily* had quoted a treatise which provides: "The classic sanction against the creditor who fails to exhaust all his security for the same debt in a single action is harsh, yet it follows inescapably from the availability of but one action to the creditor—he waives the balance of the security and he waives any claim to the unpaid balance of the debt." HETLAND, J., CALIFORNIA REAL ESTATE SECURED TRANSACTIONS, *Antideficiency Legislation* § 6.18 (Cont. Ed. Bar 1970).

23. *Wozab*, 51 Cal. 3d at 1003, 800 P.2d at 564, 275 Cal. Rptr. at 208.

24. Thus, protection would be afforded to the debtor from multiple lawsuits as intended by the one action rule. In effect, the debtor would be protected from having to sue the bank to recover the setoff funds while still remaining vulnerable to a later suit by the bank seeking to foreclose on its security interest. *Id.* at 1002, 800 P.2d at 563,

to allow the bank to still collect on the underlying debt.²⁵ The court felt this presented the most equitable solution in the instant case since Wozab voluntarily accepted the reconveyance of the deed of trust to his residence.²⁶ "By doing so, [Wozab] voluntarily relinquished the protection of the security-first rule."²⁷ The court opposed the option of allowing a debtor the opportunity to reclaim clear title to his or her property, unencumbered by the bank's security interest, as well as the chance to claim that the bank could not obtain a personal judgment against the debtor.²⁸ Such a result, the court opined, would be "a gross injustice to the bank and a corresponding windfall to the [debtors]."²⁹ Yet, depositors are still afforded some measure of protection under the court's holding since banks are deterred from infringing upon depositors through a setoff of their accounts, because if banks took such action, they would lose "their preferred position as secured creditors" and would be "reduced to the

275 Cal. Rptr. at 207. See generally 27 CAL. JUR. 3D *Deeds of Trust* § 201 (1987 & Supp. 1991).

It is important to note that the court did not address the issue of the effect upon a bank's security interest if the bank were to immediately return the setoff funds, as opposed to retaining them, as the bank did in *Wozab*. However, the court indicated that if such a case were before it, requiring the bank to forfeit its security interest might be an excessive remedy. Rather, the court felt that, should it be faced with such a case, it would probably be adequate merely to require the bank to pay compensatory damages to the depositor, if any damages actually occurred. *Wozab*, 51 Cal. 3d at 1001 n.8, 800 P.2d at 563 n.8, 275 Cal. Rptr. at 207 n.8.

25. *Id.* at 1004, 800 P.2d at 565, 275 Cal. Rptr. at 209 (citing *Salter v. Ulrich*, 22 Cal. 2d 263, 268, 138 P.2d 7, 9 (1943)). However, the court noted that if the debtor pleads the bank's security interest as an affirmative defense, the bank will be forced to foreclose on the security before seeking a judgment against the debtor personally. *Id.* at 1004 n.9, 800 P.2d at 565 n.9, 275 Cal. Rptr. at 209 n.9; see also 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Security Transactions in Real Property* § 119 (9th ed. 1987).

26. Instead, *Wozab* could have required the bank to foreclose on its security interest in the deed of trust. See *supra* note 25.

27. *Wozab*, 51 Cal. 3d at 1005, 800 P.2d at 566, 275 Cal. Rptr. at 210. For an explanation of the security-first rule, see *supra* note 19.

28. *Wozab*, 51 Cal. 3d at 1005, 800 P.2d at 566, 275 Cal. Rptr. at 210. The court noted that "[a]cquiescence in error takes away the right of objecting to it." *Id.* (citing CAL. CIV. CODE § 3516 (West 1970)).

29. *Id.* See also Mertens, *California's Foreclosure Statutes: Some Proposals for Reform*, 26 SANTA CLARA L. REV. 533, 555 (1986) (advocating against the unfairness of such a result).

The court also noted that *Wozab* had willingly executed personal guaranties for the amount of the underlying debt. Therefore, the court felt that *Wozab* should be subjected to personal liability in any event. *Wozab*, 51 Cal. 3d at 1005, 800 P.2d at 566, 275 Cal. Rptr. at 210. See also Rabin, *The Sequel to Bank of America v. Daily: Security Pac. Nat'l Bank v. Wozab*, 12 REAL PROP. L. REP. 204, 210 (Cont. Ed. Bar 1989) (pointing out that depriving the bank of the balance of the underlying debt would be an excessively punitive remedy).

status of unsecured creditors—a drastic sanction in the marketplace.”³⁰

Justice Broussard concurred that Security Pacific had acted improperly by setting off Wozab's personal accounts against the corporation's credit line.³¹ However, he dissented from the majority's conclusion that the forfeiture of the security interest provided an adequate remedy.³² He felt that such a ruling allowed banks to circumvent the statutory intent behind section 726 of the Code of Civil Procedure³³ of which, according to Justice Broussard, the security-first rule was the most important of all protections afforded debtors.³⁴ Under that rule, Justice Broussard contended that the bank had no other right of action other than foreclosing on the security.³⁵ Furthermore, he argued that the only remedy which would have the effect necessary to sufficiently protect debtors was one which would have a powerful deterring effect upon banks—one which would require the forfeiture of the underlying debt.³⁶

III. CONCLUSION

It is apparent from the *Wozab* decision that the supreme court wished to avoid excessively penalizing banks for setting off depositor's accounts. However, the court acknowledged that such a practice

30. *Wozab*, 51 Cal. 3d at 1004, 800 P.2d at 565, 275 Cal. Rptr. at 209 (citing Comment, *Mortgages and Deeds of Trust*, 12 REAL PROP. L. REP. 184, 186 (Cont. Ed. Bar 1989)).

31. *Id.* at 1006-07, 800 P.2d at 567, 275 Cal. Rptr. at 211 (Broussard, J., concurring and dissenting).

32. *Id.* at 1007, 800 P.2d at 567, 275 Cal. Rptr. at 211 (Broussard, J., concurring and dissenting). According to Justice Broussard, under such a remedy, certain dangers to debtors and their other creditors would not be prevented. For example,

[b]y exercising such a setoff, a bank not only deprives the debtor of the immediate possession of funds to which the debtor is then entitled, but the bank may obtain funds of the debtor to which the bank would never be entitled or to which other creditors have an equal or greater claim.

Id. at 1010, 800 P.2d at 569, 275 Cal. Rptr. at 213 (Broussard, J., concurring and dissenting).

33. *See supra* note 19 and accompanying text.

34. *Wozab*, 51 Cal. 3d at 1008, 800 P.2d at 568, 275 Cal. Rptr. at 212 (Broussard, J., concurring and dissenting). Justice Broussard quoted the precedent-setting case regarding a bank's ability to set off depositors' funds thus:

The reason of the rule that gives to banks the right to appropriate a deposit to the payment of the depositor's [sic] matured indebtedness does not apply where the bank has security for that indebtedness. . . . The lien given on the mortgaged premises . . . was intended to be in lieu and exclusive of all implied liens *The difficulty with [the bank's] argument is that it ignores the force and effect of section 726 of the Code of Civil Procedure.*

Id. at 1009, 800 P.2d at 568-69, 275 Cal. Rptr. at 212-13 (Broussard, J., concurring and dissenting) (quoting *McKean v. German-American Savings Bank*, 118 Cal. 334, 339-41, 50 P. 656, 659 (1897)).

35. *Id.* (Broussard, J., concurring and dissenting). *See supra* note 34.

36. *Id.* at 1010-12, 800 P.2d at 569-71, 275 Cal. Rptr. at 213-15 (Broussard, J., concurring and dissenting).

was wrongful and upheld what it felt was an appropriate sanction— forfeiture of the security interest. Debtors must be careful, however, in the case of an improper setoff to plead the affirmative defense of the security-first rule to avoid potential personal liability for the remainder of the underlying debt.³⁷

SELINA KATHERINE HEWITT

XIII. SALES LAW

A provision in a sales contract which imposes an eighteen percent annual interest fee for late payments does not violate the California usury law: Southwest Concrete Products v. Gosh Construction Corporation.

In *Southwest Concrete Products v. Gosh Construction Corporation*,¹ the California Supreme Court resolved a twelve year conflict among the courts of appeal regarding the application of the usury law² to certain types of sales contracts.³ The court declared that commercial

37. See Business Wire, *Firm Picks Top Real Estate Cases for the Year; Environmental Issues Dominate Legal Decisions on Real Estate in 1990*, Jan. 4, 1991. See also *supra* note 25 and accompanying text.

1. 51 Cal. 3d 701, 798 P.2d 1247, 274 Cal. Rptr. 404 (1990). Gosh Construction Corporation [hereinafter Gosh] purchased pipe from Southwest Concrete Products [hereinafter Southwest]. When Gosh refused to pay for the pipes, Southwest brought a breach of contract suit against Gosh. Gosh subsequently cross-complained, asserting that the late fee provision in the contract violated the usury law. The California Supreme Court granted review in order to determine whether or not the late payments clause violated the state usury law. Justice Panelli authored the opinion of the court and was joined by Chief Justice Lucas and Justices Eagleson, Kennard and Arabian. Justice Mosk, who was joined by Justice Broussard, wrote a separate opinion concurring in part and dissenting in part.

2. CAL. CONST. art XV, § 1(2). This subsection provides that for a loan or forbearance of money, the maximum interest rate is the higher of 10% per year or 5% per year plus the Federal Reserve Bank of San Francisco rate in effect on certain dates. *Id.* For an indepth discussion of the usury law, see 13 CAL. JUR. 3D *Consumer Borrower and Protection Laws* § 381 (rev. ed. 1985); 1 B. WITKIN, *SUMMARY OF CALIFORNIA LAW Contracts* § 465 (9th ed. 1987); Comment, *A Comprehensive View of the California Usury Law*, 6 SW. U.L. REV. 166 (1974).

3. The split among the circuits began in 1978 with *Crestwood Lumber Co. v. Citizens Sav. & Loan Ass'n*, 83 Cal. App. 3d 819, 824-25, 148 Cal. Rptr. 129, 132 (1978), where the first district found that an assessment of a finance charge constituted a forbearance subject to the usury law. *Id.* at 824-25, 148 Cal. Rptr. at 132. Since *Crestwood*, other districts have analyzed similar transactions differently. See, e.g., *Fox v. Federated Dep't Stores*, 94 Cal. App. 2d 867, 880, 156 Cal. Rptr. 893, 902 (1979) (where the second district contended that retail credit agreements were not subject to the usury law); *Mark McDowell Corp. v. LSM* 128, 214 Cal. App. 3d 1427, 1431, 263 Cal. Rptr. 310, 313 (1989) (where the fourth district believed that a subcontractor's late charges of 18% violated the usury law); and *O'Connor v. Televideo Sys.*, 218 Cal. App. 3d 709, 718,

sales contracts imposing eighteen percent annual interest rates on late payments are not subject to the usury law,⁴ reasoning that the usury law applies only to loans or forbearances.⁵ Since both parties conceded that the transaction was not a loan,⁶ the court questioned its classification as a forbearance.⁷ Initially, it reinforced the rule requiring examination of the substance over the form of the transaction when making the threshold determination of an agreement's classification as a loan or forbearance.⁸ After reviewing the nature of the late charge provision, the court concluded that the agreement was not a forbearance subject to the usury law.⁹ It reached its finding by pointing out that unlike a true forbearance, which is designed to give the buyer further time for payment, a late charge provision is merely an additional assessment for a payment not made by the due date.¹⁰

After finding that a late charge clause is not a forbearance subject to the usury law, the supreme court went one step further by mandating the application of two exceptions to the usury law.¹¹ The decision upheld the "time-price" doctrine, which holds that the usury law is not applicable when a seller agrees to sell goods at a higher price for credit than for cash.¹² The court also relied on the well-settled "debtor's voluntary act" exception which recites that a usurious transaction must be usurious at its inception and cannot become so simply because the buyer subsequently defaults on his payments.¹³

267 Cal. Rptr. 237, 242 (1990) (where the sixth district refused to find an 18% late charge assessment to a manufacturer usurious).

4. *Southwest Concrete*, 51 Cal. 3d at 709, 798 P.2d at 1252, 274 Cal. Rptr. at 409.

5. *Id.* at 705, 798 P.2d at 1249, 274 Cal. Rptr. at 406. See also CAL. CIV. CODE § 1912 (West 1985) (defining "forbearance"); *Calimco v. Warden*, 100 Cal. App. 2d 429, 440, 224 P.2d 421, 429 (1950) (defining "loan" for purposes of the usury law).

6. In his concurrence and dissent, Justice Mosk emphasized that Gosh contended that the transaction was a forbearance and not a loan. *Southwest Concrete*, 51 Cal. 3d at 710, 798 P.2d at 1253, 274 Cal. Rptr. at 410 (Mosk, J., concurring in part and dissenting in part).

7. *Id.* at 705, 798 P.2d at 1249, 274 Cal. Rptr. at 406.

8. *Id.* See generally *Boerner v. Colwell Co.*, 21 Cal. 3d 37, 44, 577 P.2d 200, 204, 145 Cal. Rptr. 380, 384 (1978); *Burr v. Capital Reserve Corp.*, 71 Cal. 2d 983, 989, 458 P.2d 185, 189, 80 Cal. Rptr. 345, 349 (1969).

9. *Southwest Concrete*, 51 Cal. 3d at 708, 798 P.2d at 1252, 274 Cal. Rptr. at 409.

10. *Id.*

11. *Id.* at 705, 798 P.2d at 1250, 274 Cal. Rptr. at 407.

12. *Id.* See generally *Verbeck v. Clymer*, 202 Cal. 557, 563, 261 P. 1017, 1021 (1927) (establishing that an offer to sell at a higher rate for credit than for cash does not constitute usury); *Boerner v. Colwell Co.*, 21 Cal. 3d 37, 45-46, 577 P.2d 200, 205, 145 Cal. Rptr. 380, 385 (pointing out that the time-price doctrine, or *bona fide* credit sale, was an exception to the usury law); Comment, *supra* note 2, at 216 (concluding that the time-price doctrine exempts installment sales contracts from the usury laws); and 13 CAL. JUR. 3D *Consumer Borrower and Protection Laws* § 374 (rev. ed. 1989) (noting that a higher credit price is not sufficient to subject the transaction to the usury law).

13. *Southwest Concrete*, 51 Cal. 3d at 706, 798 P.2d at 1250, 274 Cal. Rptr. at 407. This rule has been utilized by many authorities. See, e.g., *Penziner v. West Am. Fin. Co.*, 133 Cal. App. 578, 590, 24 P.2d 501, 506 (1933) (stating that excessive interest

The court emphasized this latter exception and criticized *Crestwood Lumber v. Citizens Savings and Loan Association*¹⁴ for not addressing the initial intent of the seller in ruling that a late charge provision is subject to the usury law.¹⁵ The *Southwest Concrete* court applied the exceptions to the agreement and found that a general late charge clause is not usurious. In its final analysis, the court refused to identify the charges as liquidated damages subject to the provisions of California Civil Code section 1671.¹⁶

In *Southwest Concrete*, the supreme court focused less on the threshold finding of a loan or forbearance than on the exceptions to the usury law.¹⁷ The elements of a usurious transaction are as follows: (1) a loan or forbearance; (2) which is absolutely repayable; (3) requiring payment at a rate in excess of the statutory maximum; and (4) a willful intent to exact a usurious rate of interest.¹⁸ Thus, as Justice Mosk pointed out in his concurrence and dissent, the essence of a usurious transaction is forbearance—if there is no forbearance, there can be no usury implications.¹⁹ Using this rationale, it follows

within the borrower's control is not usurious); *First Am. Title Ins. & Trust v. Cook*, 12 Cal. App. 3d 592, 596, 90 Cal. Rptr. 645, 647 (1970) (averring that late charges in the event of a default are not interest payments, but are penalties for nonperformance); *Boerner*, 21 Cal. 3d at 54, 577 P.2d at 211, 145 Cal. Rptr. at 391 (holding that usurious intent must be determined at the inception of the transaction).

14. 83 Cal. App. 3d 819, 148 Cal. Rptr. 129 (1978). In *Crestwood*, the court concluded that because the finance charge was added to the price after the maturity of the debt, it was a forbearance. *Id.* at 825, 148 Cal. Rptr. at 132.

15. *Southwest Concrete*, 51 Cal. 3d at 708, 798 P.2d at 1252, 274 Cal. Rptr. at 409. See also *O'Connor v. Televideo Sys., Inc.*, 218 Cal. App. 3d 709, 716, 267 Cal. Rptr. 237, 241 (1990) (criticizing *Crestwood's* failure to address the issue of intent).

16. *Southwest Concrete*, 51 Cal. 3d at 709, 798 P.2d at 1252, 274 Cal. Rptr. at 409.

17. This observation was made in Justice Mosk's concurrence and dissent. He argued that the time-price exception and the debtor's act rule were not applicable since the transaction was not a forbearance. He concluded that the transaction was merely an "ordinary single payment credit sale of goods by a wholesaler," which rendered the usury exceptions inappropriate. *Southwest Concrete*, 51 Cal. 3d at 716, 798 P.2d at 1257, 274 Cal. Rptr. at 414 (Mosk, J., concurring in part and dissenting in part).

18. Comment, *supra* note 2, at 174 (outlining the elements of a usurious transaction). See, e.g., *Glaire v. La Lanne-Paris Health Spa, Inc.*, 12 Cal. 3d 915, 927, 528 P.2d 357, 365, 117 Cal. Rptr. 541, 549 (1974) (where the court set forth the elements of a usurious transaction, but noted that once the forbearance factor is met, the critical issue is the willful intent of the parties).

19. *Southwest Concrete*, 51 Cal. 3d at 710, 798 P.2d at 1253, 274 Cal. Rptr. at 410 (Mosk, J., concurring in part and dissenting in part). See generally, *O'Connor*, 218 Cal. App. 3d at 717, 267 Cal. Rptr. at 242 (explaining that if late charge provisions were forbearances, "then the buyer could conceivably forbear *ad infinitum* . . .") 45 AM. JUR. 2D *Interest and Usury* § 117 (1969); 13 CAL. JUR. 2D *Consumer Borrower and Protection Laws* § 389 (rev. ed. 1989); 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Contracts* § 117 (1987).

that even without applying the exceptions to the usury law, as the court did, an agreement to pay eighteen percent per year in late charges does not constitute a forbearance and is not subject to the usury law. However, although the court failed to clearly state that the classification of a transaction as a "loan" or "forbearance" is the threshold determination for a usurious agreement, lower courts will likely find that typical commercial sales agreements do not constitute forbearances and are not subject to the usury law.²⁰

Unlike the court's decisions in previous cases involving contracts with usurious characteristics, the court chose to look at the contractual language rather than the relative bargaining strength of the parties.²¹ In doing so, it objectively examined the terms of the agreement instead of looking paternalistically at the parties to the transaction.²² In essence, the court has sent a message to lower courts to look only at the substance of the transaction to determine whether it is a loan or forbearance. Subjective factors, such as the bargaining strength and intent of the parties, can be subsequently examined when applying the exceptions to the usury law.²³

While the court may have resolved the application of the usury law to certain types of transactions, it left open the issue of whether a nonusurious agreement could be an invalid liquidated damages provision subject to section 1671 of the California Civil Code.²⁴ Previous

20. The majority pointed out that there was no need to apply the provisions of the Unruh Act, which governs finance charges in retail sales agreements such as revolving charge agreements. *Southwest Concrete*, 51 Cal. 3d at 707, 798 P.2d at 1251, 274 Cal. Rptr. at 408. See generally CAL. CIV. CODE § 1801-1810.2 (West 1985 & Supp. 1991) (Unruh Act); *Fox v. Federated Dep't Stores, Inc.*, 94 Cal. App. 3d 867, 873, 880, 156 Cal. Rptr. 893, 897, 902 (1979) (addressing the applicability of the Unruh Act and the usury law to revolving charge accounts).

21. In fact, there was no mention of the relative bargaining strength of the parties in either the court's decision or in Justice Mosk's concurrence and dissent. Other cases, however, have addressed the issue. See, e.g., *Boerner v. Colwell Co.*, 21 Cal. 3d 37, 53, 577 P.2d 200, 210, 145 Cal. Rptr. 380, 390 (1978) (noting that the bargaining strength of the parties bears no significance in determining whether a transaction is usurious). But see *O'Connor*, 218 Cal. App. 3d at 718, 267 Cal. Rptr. at 242 (which emphasized the relatively equal bargaining power of the parties in determining that the transaction was not usurious).

22. See *Wooten v. Coerber*, 213 Cal. App. 2d 142, 148, 28 Cal. Rptr. 635, 638 (1963) (declaring that the usury laws were designed to "protect the indigent, who are helpless to protect themselves in a practical sense"); Morris, *Consumer Debt and Usury: A New Rationale for Usury*, 15 PEPPERDINE L. REV. 151, 158 (1988) (explaining that the usury laws are designed to protect uninformed consumers).

23. Since the transaction at bar was not found to be a forbearance, there was little need to look at the intent of the parties. *Southwest Concrete*, 51 Cal. 3d at 711, 798 P.2d at 1254, 274 Cal. Rptr. at 411 (Mosk, J., concurring in part and dissenting in part). However, the court made no mention of the parties' bargaining strength when analyzing usurious intent.

24. *Southwest Concrete*, 51 Cal. 3d at 709, 798 P.2d at 1252, 274 Cal. Rptr. at 409. In his concurring and dissenting opinion, Justice Mosk indicated his discomfort with leaving open the liquidated damages issue, but concluded that it could not be properly reviewed since it was an issue brought forth by *amicus curiae*, rather than by either of

cases addressing the usury law have at least questioned the validity of late charges as liquidated damages provisions.²⁵ In fact, in the highly controversial *Crestwood Lumber* case, the court of appeal found a transaction imposing an eighteen percent annual rate of interest to be *both* usurious and an invalid liquidated damages provision.²⁶ The reluctance of the *Southwest Concrete* court to analyze this issue could cause another split among lower courts regarding the treatment of non-usurious late charges. Such a split may ultimately lead to a confusion similar to the pre-*Southwest Concrete* line of cases that questioned the application of the usury law to late charge clauses. The validity of late charges as liquidated damages provisions will become a larger issue in the future because charges that do not violate the usury law pursuant to *Southwest Concrete*, may, nonetheless, violate the liquidated damages law.

By finding that an agreement imposing an 18% annual interest rate for late payments is not a forbearance subject to the usury law, the court has established more stringent guidelines for proving a transaction usurious. Now, even if a transaction is not initially classified as a loan or forbearance subject to the usury law, it must be additionally shown that the transaction falls within an exception to the usury law, specifically, the "time-price" doctrine exception or the "debtor's voluntary act" exception. In light of the strong presumption in favor of sellers of goods and services, it is likely that there will be a decrease

the parties to the action. *Id.* at 716-17, 798 P.2d at 1257, 274 Cal. Rptr. at 414 (Mosk, J., concurring in part and dissenting in part).

California Civil Code section 1671(b) states that "a provision in a contract liquidating the damages for the breach of contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances." CAL. CIV. CODE § 1671(b) (West 1985). For a complete history and explanation of the liquidated damages law, see 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Contracts* § 503 (9th ed. 1987).

25. See generally *Garrett v. Coast & S. Fed. Sav. & Loan Ass'n*, 9 Cal. 3d 731, 738, 511 P.2d 1197, 1201, 108 Cal. Rptr. 845, 849 (1973) (where the supreme court admonished lower courts to examine late charges as liquidated damages provisions subject to section 1671 of the California Civil Code); *Fox v. Federated Dep't Stores*, 94 Cal. App. 3d 867, 885, 156 Cal. Rptr. 893, 905 (1979) (applying the liquidated damages statute to the transaction and finding it to be valid); *O'Connor v. Televideo Sys., Inc.*, 218 Cal. App. 3d 709, 718, 267 Cal. Rptr. 237, 243 (1990) (contending that a nonusurious transaction between suppliers met the statutory standards of reasonableness set forth in section 1671 of the California Civil Code).

26. *Crestwood Lumber*, 83 Cal. App. 3d at 826-27, 148 Cal. Rptr. at 132 (1978). But see *Loomis, Crestwood Lumber Company v. Citizens Savings & Loan Association: The Usury Law and Liquidated Damages in Sale of Goods Transactions*, 10 GOLDEN GATE U.L. REV. 553, 565-66 (1980) (hypothesizing that the *Crestwood* court actually meant that the liquidated damages law applies only if a transaction is not usurious).

in the number of claims and cross-claims by buyers who default on their payments and then attempt to seek judicial relief from their debt. However, since the court elected not to address the application of California Civil Code section 1671 to otherwise nonusurious transactions, a dissatisfied buyer may now assert that the late charge provisions in the contract were unreasonable liquidated damages provisions. Therefore, in *Southwest Concrete Products v. Gosh Construction Corporation*, the court's resolution of the usury law implications of a contract's late charge clause has opened the door to a new line of litigation based on its classification as a liquidated damages provision.

SUSAN RESLEY

IVX. TORT LAW

A complaint that a physician failed to disclose research and economic interests in a patient's cells before obtaining the patient's consent to medical procedures by which cells were extracted for commercial purposes states a cause of action for breach of the physician's fiduciary duty, but not for conversion: Moore v. Regents of the University of California

I. INTRODUCTION

The California Supreme Court's decision in *Moore v. Regents of the University of California*¹ was anxiously awaited by medical researchers and biotechnology companies because it was the first case to address the legal issues surrounding the rights and duties of physicians and researchers who seek to use human tissues for commercial purposes.² In establishing the relevant legal principles governing this burgeoning field of medical technology, the court declared that a physician must obtain a patient's informed consent before removing the patient's cells³ for research unrelated to the patient's health.⁴ In

1. 51 Cal. 3d 120, 793 P.2d 479, 271 Cal. Rptr. 146 (1990), *cert. denied*, 111 S. Ct. 1388 (1991).

2. L.A. Times, July 10, 1990, at A1, col. 2. See also N.Y. Times, July 10, 1990, at C8, col. 4; Wash. Post, July 10, 1990, at A3.

3. The term "cells" is used broadly in this Note to include blood cells, bone marrow, organs, or body tissues. See *Moore*, 51 Cal. 3d at 128 n.6, 793 P.2d at 483 n.6, 271 Cal. Rptr. at 150 n.6 (noting that the term "cells" in the court's discussion refers to "all of the cells taken from Moore's body, including blood cells, bone marrow, spleen, etc.").

4. *Moore*, 51 Cal. 3d at 129, 793 P.2d at 483, 271 Cal. Rptr. at 150. Justice Panelli wrote the majority opinion for the court in which Chief Justice Lucas and Justices Eagleson and Kennard concurred. A separate concurring opinion was written by Justice Arabian. Justice Broussard wrote a separate concurring and dissenting opinion. Justice Mosk also dissented separately.

order to meet the informed consent requirements, a physician must provide full disclosure of any research or economic interests in a patient's cells.⁵ If a physician fails to obtain the requisite informed consent, an aggrieved patient may bring an action for breach of the physician's fiduciary duty of disclosure.⁶

Despite this holding, however, the court declined to establish a cause of action for conversion for patients whose cells are removed for research purposes without their consent.⁷ The court based its ruling on the propositions that: (1) a patient retains no ownership interest in excised cells;⁸ (2) allowing a cause of action for conversion would chill valuable medical research;⁹ and (3) a patient's interests are adequately protected by the requirement of informed consent.¹⁰

II. HISTORICAL BACKGROUND

Although thirteen causes of action were brought by the plaintiff in *Moore*,¹¹ the court addressed only two: the causes of action alleging lack of informed consent and conversion.¹² A brief discussion of these two common law tort actions in the area of medical research provides a background for analyzing the ultimate decision as to each cause of action.

A. Informed Consent Requirements

In general, a physician must obtain a patient's informed consent before proceeding with any manner of treatment.¹³ For such consent to be effective, "it must have been . . . given after the patient . . . received a fair and reasonable explanation of the contemplated treat-

5. *Id.*

6. *Id.*

7. *Id.* at 142-43, 793 P.2d at 493, 271 Cal. Rptr. at 160.

8. *Id.* at 136-37, 793 P.2d at 488-89, 271 Cal. Rptr. at 155-56.

9. *Id.* at 143-44, 793 P.2d at 494, 271 Cal. Rptr. at 161.

10. *Id.* at 143-44, 147; 793 P.2d at 494, 496-97; 271 Cal. Rptr. at 161, 163-64.

11. See *infra* notes 84-85 and accompanying text. For a list of the causes of action, see *Moore*, 51 Cal. 3d at 128 n.4, 793 P.2d at 482 n.4, 271 Cal. Rptr. at 149 n.4.

12. *Id.* at 125, 793 P.2d at 480, 271 Cal. Rptr. at 147.

13. 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 187 (1981) (explaining that a patient must be aware of all dangers and risks of his contemplated treatment); 31 AM. JUR. PROOF OF FACTS 2D 487 (1982). See generally Annotation, *Malpractice: Physician's Duty to Inform Patient of Nature and Hazards of Disease or Treatment*, 79 A.L.R.2D 1028 (1961); Annotation, *Modern Status of Views as to General Measure of Physician's Duty to Inform Patient of Risks of Proposed Treatment*, 88 A.L.R.3D 1008 (1978); 15 AM. JUR. PROOF OF FACTS 2D 711 (1978) (discussing a physician's duty to obtain informed consent to new medical techniques and medical research).

ment or procedure and the potential dangers.”¹⁴ If a physician obtains a patient’s supposed “informed consent” to an operation, but the patient has not been provided with the full disclosure necessary to make a truly informed decision, the physician can be sued for negligence.¹⁵ To properly fulfill his or her duty, a physician must reveal any facts which are necessary to an intelligent decision by the patient.¹⁶

In the area of medical research, a physician might desire to use a patient as the subject of an experiment or innovative medical technique.¹⁷ In fact, in some cases, the research is for the sole benefit of the researcher and provides no medical benefits to the patient.¹⁸ Regardless of which party benefits, in any situation involving research or experimentation, although never expressly stated by a court before *Moore*, the American Medical Association has mandated that a researcher must obtain informed consent.¹⁹ Federal and California

14. 31 AM. JUR. PROOF OF FACTS 2D 487, 497 (1982) (footnote omitted). To properly obtain informed consent, the patient must also be told (1) who will be performing the procedure upon him, and (2) the nature, purpose, benefits, and risks of any alternative procedures, including the alternative of doing nothing. A. ROSOFF, INFORMED CONSENT 41-51 (1981).

15. *Cobbs v. Grant*, 8 Cal. 3d 229, 240-41, 502 P.2d 1, 8, 104 Cal. Rptr. 505, 512 (1972). See generally 36 CAL. JUR. 3D *Healing Arts and Institutions* §§ 152-154 (1977) (discussing physician’s disclosure obligation).

This duty to disclose arises because the physician is considered to bear a fiduciary relationship to his or her patient. *Berkey v. Anderson*, 1 Cal. App. 3d 790, 804, 82 Cal. Rptr. 67, 77 (1969) (citing *Bauman v. McPheeters*, 77 Cal. App. 2d 795, 800, 176 P.2d 745, 749 (1947)). Fiduciaries are charged with providing full disclosure to their principals. *Id.* Cf. Annotation, *Liability of Physician or Surgeon for Extending Operation or Treatment Beyond that Expressly Authorized*, 56 A.L.R.2D 695 (1957).

16. *Berkey*, 1 Cal. App. 3d at 803-04, 82 Cal. Rptr. at 77 (quoting *Salgo v. Leland Stanford Univ. Bd. of Trustees*, 154 Cal. App. 2d 560, 578, 317 P.2d 170, 181 (1957)). The test, as articulated by the California Supreme Court, requires that information must be divulged to the patient if it would be material to his or her decision. *Cobbs*, 8 Cal. 3d at 245, 502 P.2d at 11, 104 Cal. Rptr. at 515. *But cf.* 36 CAL. JUR. 3D *Healing Arts and Institutions* § 153 (1977) (describing four situations where the duty to obtain informed consent does not attach).

17. See generally 15 AM. JUR. PROOF OF FACTS 2D 711, 722 (1978) (discussing the need to acquire informed consent for medical research, as well as for treatment).

18. *Id.* at 726-27 (noting that the Nazi atrocities were an extreme situation).

19. *Id.* at 730, 743-44. See also JUDICIAL COUNCIL OF THE AMERICAN MEDICAL ASSOCIATION, PRINCIPLES OF MEDICAL ETHICS 14 (1960).

A successful plaintiff who has sued his physician for the breach of the fiduciary duty of full disclosure is entitled to damage awards for any of the following possible losses which the plaintiff is able to prove:

[a]ctual loss of income[,] . . . [d]ecrease in prospective earning capacity[,] . . . [p]ast and future medical expenses[,] . . . [d]isfigurement or other damage to plaintiff’s body[,] . . . [s]hortening of plaintiff’s life expectancy[,] . . . [d]amage to family life and enjoyment of life[,] . . . [p]ast and future pain and suffering[,] . . . [p]ast and future fright, anxiety, and mental anguish[,] . . . [a]ppropriate wrongful death damages, where patient has died as result of surgery to which informed consent was not given[,] . . . [and p]unitive damages, where action is grounded in assault and battery and surgeon’s conduct indicated a reckless disregard for and complete indifference to the patient’s welfare.

15 AM. JUR. 2D PROOF OF FACTS 2D 711, 745 (1978).

law also require that the patient be informed of "the purpose of the research and a description of any benefits that might accrue to the subject . . ."20 "[F]ederal law further requires a description of any benefits that might accrue to parties other than the subject."21

An important exception to the rule requiring informed consent to surgical procedures occurs when the physician is faced with an emergency.²² In such a case, the physician's action in performing an operation without the requisite consent is justified under the circumstances.²³ Likewise, if a physician can prove that the patient would have undertaken the recommended procedure, regardless of whether he or she was informed of all the attendant risks, the physician will not be held liable.²⁴ In such cases, the causation element of a negligence action is deemed to be lacking.²⁵ Thus, when the merits of the *Moore* case are finally resolved, the physician of plaintiff, John Moore, cannot be held liable in damages for negligence if the court decides that Mr. Moore would have undergone the surgical procedures, regardless of whether or not he was fully informed of the consequences.²⁶

B. The Tort of Conversion

Conversion involves "the wrongful exercise of dominion over [the] *personal property* of another."²⁷ The California Supreme Court recognizes conversion as "a tort that protects against interference with possessory and ownership interests in *personal property*."²⁸ As such,

20. Note, *Ownership of Human Tissue: Life After Moore v. Regents of the University of California*, 75 VA. L. REV. 1363, 1376 (1989) (citing CAL. HEALTH & SAFETY CODE § 24172(a), (d) (West 1984)).

21. *Id.* (citing 45 C.F.R. § 46.116 (a)(1), (3) (1988)). It is interesting to note that federal law prohibits the patient from waiving any of his legal rights in a consent form. *Id.*

22. A legitimate emergency arises when immediate action is necessary to save the patient's life or health. 36 CAL. JUR. 3D *Healing Arts and Institutions* § 154 (1977).

23. *Wheeler v. Barker*, 92 Cal. App. 2d 776, 781, 208 P.2d 68, 71 (1949) (explaining that an immediate, life threatening condition can make such consent "impracticable").

24. *Cobbs v. Grant*, 8 Cal. 3d 229, 245, 502 P.2d 1, 11-12, 104 Cal. Rptr. 505, 515-16.

25. *Id.*

26. See *Moore*, 51 Cal. 3d at 131 n.9, 793 P.2d at 484 n.9, 271 Cal. Rptr. at 151 n.9 (noting that disclosure of 'remote' risks and insignificant research interests on the part of a physician are not required).

27. B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 610 (9th ed. 1989) (emphasis added) (footnotes omitted). See also 14 CAL. JUR. 3D *Conversion* § 1 (1974); 18 AM. JUR. 2D *Conversion* § 1 (1985).

28. *Moore*, 51 Cal. 3d at 134, 793 P.2d at 487, 271 Cal. Rptr. at 154 (emphasis added). See also RESTATEMENT (SECOND) OF TORTS § 222A(1) (1965) (stating that conversion is "an intentional exercise of dominion or control over a chattel which so seriously

that which is the subject of a conversion must have the status of property.²⁹ Otherwise, the conversion cause of action is inapplicable to an allegedly aggrieved plaintiff's case. Thus, to succeed in a case against a physician and/or researcher for the conversion and commercial exploitation of human cells, the human subject must show that he held a property interest in the cells at issue.³⁰ A plaintiff who successfully challenges a defendant's conversion of his or her property interest is entitled to recover the fair market value of the thing converted.³¹

Questions surrounding whether rights in the human body constitute property rights or some other interest have generated very little debate until recently.³² This is because, prior to the recent birth of biotechnology,³³ no market for human body parts existed.³⁴ Traditionally, the dispute over whether the human body could be characterized as property arose only in the context of corpses.³⁵ The general common law rule, which was adopted in American jurisdictions from English precedent, recognized no property rights in dead bodies.³⁶ However, one exception to the general rule recognized the

interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel").

29. *Black's Law Dictionary* defines property, in the traditional sense, as: "the unrestricted and exclusive right to [dispose of] a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it." BLACK'S LAW DICTIONARY 1095 (5th ed. 1979). More generally, property is defined as a bundle of rights in an object. Macpherson, *The Meaning of Property*, in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 3-4 (C. Macpherson ed. 1978).

30. *Moore*, 51 Cal. 3d at 136-37, 793 P.2d at 488-89, 271 Cal. Rptr. at 155-56.

31. *Murphy v. Wilson*, 153 Cal. App. 2d 132, 135-36, 314 P.2d 507, 509 (1957) (applying the theory to an action against a lender for foreclosure of real property). See also 14 CAL. JUR. 3D *Conversion* § 38 (1974). For a discussion outlining the inherent problems in determining the value of body materials, see Note, *supra* note 20, at 1379-80.

32. Note, *Source Compensation for Tissues and Cells Used in Biotechnical Research: Why a Source Shouldn't Share in the Profits*, 64 NOTRE DAME L. REV. 628, 630 (1989).

33. The term "biotechnology" refers to:

any industrial process in which microorganisms . . . are used More commonly, the term biotechnology is used for those industrial processes in which modern genetic engineering techniques have been used to construct novel strains of organisms which have new applications; for example bacterial strains have been constructed . . . which can produce human insulin, growth hormone[s], or interferons on a commercial scale.

SINGLETON & SAINSBURY, *DICTIONARY OF MICROBIOLOGY AND MOLECULAR BIOLOGY* 113 (2d ed. 1987).

34. Note, *supra* note 32, at 630. "Before the advent of biotechnology, once a tissue was severed from a living human being's body, it either could be preserved for scientific research and used as a teaching aid or a subject of dissection, or it simply would be discarded and would ultimately decompose." *Id.* at 630 n.15. Basically, then, such body parts were "monetarily worthless." *Id.* at 630.

35. *Id.*

36. Comment, *Spleen for Sale: Moore v. Regents of the University of California and the Right to Sell Parts of Your Body*, 51 OHIO ST. L.J. 499, 502-03 (1990). This com-

quasi-property rights granted to family, friends and close relatives, and allowed them to claim a corpse for the limited purpose of burial.³⁷ Despite this exception, no commercial property interests in dead bodies were recognized.³⁸

Modern courts have generally moved away from quasi-property labels in favor of allowing recovery to grieving family members for mental anguish associated with a defendant's treatment of a corpse.³⁹ Nevertheless, at least where the state seeks to assert an interest in obtaining an organ for donation, several courts still recognize family members' quasi-property rights in corpses.⁴⁰ This limited property right allows the families "to prevent removal of body parts unless the state asserts a countervailing [sic] compelling state interest."⁴¹

In contrast, living bodies were often characterized as a form of property at common law. For example, under English common law, a debtor could be attached as payment for a debt.⁴² Further, a wo-

mon law notion evolved out of a reaction to the grotesque practices occurring in England when cadavers were allowed to be sold to medical schools. *Id.* at 501. Apparently, certain characters were exhuming recently buried bodies, while other, more merciless characters were actually murdering unsuspecting victims, all for profit. *Id.* at 501-02. In response, the British Parliament promulgated the Anatomy Act of 1932 which prohibited the theft in and/or trade of cadavers. *Id.* at 502.

37. *Id.* at 503 n.42 (citing P. JACKSON, *THE LAW OF CADAVERS* 159 (2d ed. 1950) (defining the "quasi-property" right)). See, e.g., *Gray v. Southern Pac. Co.*, 21 Cal. App. 2d 240, 246, 68 P.2d 1011, 1015 (1937) (recognizing that, in an action for wrongful performance of an autopsy, the wife had the quasi-property right of possession of her husband's dead body for burial purposes).

38. Note, *Personalizing Personality: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 227 (1990). Even in modern times, courts are reluctant to recognize full property interests in corpses. For example, one court has refused to allow corpses to be the subject of attachment or repossession as security for debts. *Morgan v. Richmond*, 336 So. 2d 342, 343 (La. Ct. App. 1976). Another court has refused to recognize a property interest in corpses by declining to hold a custodian of a corpse liable as a bailee for the misplacement of the body. *Brooks v. South Broward Hosp. Dist.*, 325 So. 2d 479, 479-80 (Fla. Dist. Ct. App. 1975), *cert. denied*, 341 So. 2d 290 (Fla. 1976).

39. Note, *supra* note 38, at 227-28. See also *Galvin v. McGilley Memorial Chapels*, 746 S.W.2d 588, 591 (Mo. Ct. App. 1987) (stating that quasi-property rights were fictitious labels used to protect next of kin from emotional distress); *Strachan v. John F. Kennedy Memorial Hosp.*, 109 N.J. 523, 531, 538 A.2d 346, 350 (1988) (remarking that the traditional recognition of quasi-property rights in dead corpses was actually a convenient way of allowing causes of action for wrongful infliction of emotional distress); *Carney v. Knollwood Cemetery Ass'n*, 33 Ohio App. 3d 31, 35-36, 514 N.E.2d 430, 434-35 (1986) (holding family entitled to award of damages for emotional distress due to defendant's action in digging up grave of grandmother and rejecting theory of quasi-property rights in dead bodies).

40. Note, *supra* note 38, at 229 (citing several courts' decisions).

41. *Id.*

42. *Dickens, The Control of Living Body Materials*, 27 U. TORONTO L.J. 142, 144 (1977).

man's body was considered to be the property of her husband.⁴³ Slavery was an even more graphic example of the recognition of property rights in human beings in that slaves were considered their owners' property.⁴⁴

More recently, with the growth of biotechnological science, living individuals have begun to assert property interests in their own body parts.⁴⁵ Tissue samples extracted from patients are generally used only in research and experiments.⁴⁶ Occasionally, however, an experiment yields results which have the potential of being converted into a commercial product.⁴⁷ In these situations, courts have been wary of using property law to protect interests in body parts.⁴⁸ For example, in *Mokry v. University of Texas Health Science Center*,⁴⁹ the plaintiff, whose eyeball was surgically removed and negligently washed down a drain, received a favorable ruling on his ability to recover for his mental anguish.⁵⁰ However, the court did not address whether the plaintiff possessed a property interest in the eyeball. Other courts have held that physicians and surgeons are not liable as bailees for the protection of body parts removed from their patients.⁵¹

Only two courts, in fact, have come close to recognizing that individuals possess a property interest in their body parts. The first was *Venner v. State*,⁵² where, rather than establishing that an individual has property rights in waste materials produced by his body, the court simply refused to hold that a person has no such property rights in waste materials in the absence of some attempt to establish ownership.⁵³ In the second case, *United States v. Garber*,⁵⁴ the Fifth Circuit implied that body parts might constitute a form of property,

43. S. BROWNMILLER, AGAINST OUR WILL 16-17 (1975). As such, a man charged with raping a woman was tried for a property crime against the woman's husband. *Id.* at 17.

44. R. SCOTT, THE BODY AS PROPERTY 26-27 (1981).

45. *Id.* at 3. "Dead or alive, the human body now has an intrinsic value. To be precise, that value inheres not in the body as an entity but in its component parts." *Id.*

46. Note, *supra* note 32, at 631.

47. *Id.* Such products include various vaccines, insulin, antibiotics, hormones, and cancer treatments. *Id.* at 628.

48. *Id.* at 632-33.

49. 529 S.W.2d 802 (Tex. Civ. App. 1975).

50. *Id.* at 805.

51. See, e.g., *Browning v. Norton-Children's Hospital*, 504 S.W.2d 713, 714 (Ky. 1974) (holding that a surgeon has no duty to "take a dismembered part of a human body into his care and custody").

52. 30 Md. App. 599, 354 A.2d 483 (1976), *aff'd*, 279 Md. 47, 367 A.2d 949, *cert. denied*, 431 U.S. 932 (1977).

53. *Id.* at 626-27, 354 A.2d at 498-99. In *Venner*, the defendant was hospitalized after swallowing twenty-one balloons containing marijuana. *Id.* at 602, 354 A.2d at 486. The police obtained the balloons from the defendant's excrement and used them as evidence at his trial. *Id.* at 601-02, 354 A.2d at 485-86.

54. 607 F.2d 92 (5th Cir. 1979).

based on its holding that the proceeds from the sale of body parts may be taxable income.⁵⁵ However, the court declined to conclusively determine whether the sale of body parts amounted to a sale of "tangible property" or a service performed for compensation.⁵⁶ Furthermore, the court never determined whether the defendant's profits were taxable, reasoning that the case was "an inappropriate vehicle for pioneering interpretations of tax law."⁵⁷ The issue arose once again when John Moore, in *Moore v. Regents of the University of California*, claimed that his property interest in his cells was unlawfully converted to the commercial benefit of his physician, researchers, and the biotechnology companies involved.⁵⁸

III. STATEMENT OF THE CASE

John Moore, a 44-year-old Seattle businessman,⁵⁹ was diagnosed with hairy-cell leukemia⁶⁰ in 1976.⁶¹ He sought treatment at the Medical Center of the University of California at Los Angeles,⁶² where Dr. David Golde, his treating physician, confirmed the diagnosis.⁶³ As is common practice with hairy-cell leukemia patients, Dr. Golde recommended that Moore's spleen be removed to arrest the

55. *Id.* at 100. In *Garber*, the defendant was convicted for wilfully evading payment of income taxes. *Id.* at 93. The defendant had received approximately \$80,000 per year for selling her blood plasma, and she had not paid taxes on these proceeds. *Id.* at 94 n.1.

56. *Id.* at 97.

57. *Id.* at 100. The dissent, however, vehemently argued that the defendant's proceeds were taxable because the sale of blood plasma amounted to a sale of property. *Id.* at 103-04 (Ainsworth, J., dissenting).

58. *Moore*, 51 Cal. 3d at 126-28, 793 P.2d at 481-82, 271 Cal. Rptr. at 148-49.

59. L.A. Times, July 10, 1990, at A1, col. 2.

60. Hairy-cell leukemia, or leukemic reticuloendotheliosis, is a rare form of cancer characterized by the presence of abnormal mononuclear cells in the blood, bone marrow, and other tissues. Golomb, *Diagnosis and Treatment of Hairy Cell Leukemia*, in 1 NEOPLASTIC DISEASES OF THE BLOOD 121 (P. Wiernik, G. Canellos, R. Kyle, C. Schiffer ed. 1985). Other characteristics include destruction of normal blood cells, enlargement of the spleen, and infiltration of the bone marrow, spleen, and lymph nodes by tumor cells. INTERNATIONAL DICTIONARY OF MEDICINE AND BIOLOGY 2476 (S. Landau ed. 1986).

61. *Moore*, 51 Cal. 3d at 125, 793 P.2d at 481, 271 Cal. Rptr. at 148. Since the supreme court's only purpose on review was to rule on the defendants' demurrers, the only facts before the court were those stated in the plaintiff's complaint. *Id.* at 125, 793 P.2d at 480, 271 Cal. Rptr. at 147. The court, therefore, assumed that the facts, as pleaded, were true. *Id.*

62. *Id.* at 125, 793 P.2d at 480, 271 Cal. Rptr. at 147.

63. *Id.* This he did after "withdr[awing] extensive amounts of blood, bone marrow aspirate, and other bodily substances." *Id.*

disease's progression.⁶⁴ The spleen was removed in October 1976 at the UCLA Medical Center.⁶⁵

Unbeknownst to Moore and before his operation, Dr. Golde and Shirley Quan, a researcher hired by the Regents of the University of California,⁶⁶ had planned to transfer portions of the spleen to a separate research lab for testing which was unrelated to Moore's medical treatment.⁶⁷ They had determined previously, and confirmed during this research, that Moore's cells were unique.⁶⁸ Apparently, the cells possessed a potential for great commercial value⁶⁹ contingent upon their development into a cell-line that would lead to the production of valuable pharmaceuticals used in the treatment of various diseases.⁷⁰ Their plans for commercial exploitation of the cell-line were never revealed to Moore.⁷¹ In fact, Dr. Golde and Shirley Quan specifically told Moore that the tissue had no commercial or financial value.⁷²

Through a genetic engineering process, the defendants were able to develop the planned cell-line.⁷³ During the development process, Moore was directed to return to the medical center several times between November 1976 and September 1983 for further treatment.⁷⁴ In actuality, the visits were not medically necessary, but were designed to allow the researchers to withdraw blood and other bodily

64. *Id.* at 126, 793 P.2d at 481, 271 Cal. Rptr. at 148.

65. *Id.* Moore signed a written consent form authorizing the operation. *Id.*

66. *Id.* at 125, 793 P.2d at 481, 271 Cal. Rptr. at 148.

67. *Id.* at 126, 793 P.2d at 481, 271 Cal. Rptr. at 148. It is important to note that although Dr. Golde and his research assistant were interested in obtaining portions of the spleen for their own personal reasons, the splenectomy did serve a therapeutic purpose as well. *Id.* at 133 n.11, 793 P.2d at 486 n.11, 271 Cal. Rptr. at 153 n.11. In fact, "Moore had a grossly enlarged spleen and . . . its excision improved his condition." *Id.*

68. *Moore v. Regents of the Univ. of Cal.*, 215 Cal. App. 3d 709, 715, 249 Cal. Rptr. 494, 498 (1988), *deleted by*, 51 Cal. 3d 120, 793 P.2d 479, 271 Cal. Rptr. 146 (1990), *cert. denied*, 111 S. Ct. 1388 (1991). These cells were unique because they overproduced certain lymphokines, which was a characteristic necessary to produce a valuable cell-line. *Moore*, 51 Cal. 3d at 127 n.2, 793 P.2d at 481-82 n.2, 271 Cal. Rptr. at 148-49 n.2; *see infra* note 143 and accompanying text.

69. The value was estimated to catapult to over three billion dollars by 1990. *Moore*, 215 Cal. App. 3d at 715, 249 Cal. Rptr. at 500. Moreover, Dr. Golde and the Regents of the University of California were paid several hundred thousand dollars during the process of developing a commercially exploitable cell-line from Moore's cells. *Id.* These payments were due under contracts entered into with firms who planned to market the cell-line following development. *Id.*; *Moore*, 51 Cal. 3d at 127-28, 793 P.2d at 482, 271 Cal. Rptr. at 149.

70. *Moore*, 215 Cal. App. 3d at 715, 249 Cal. Rptr. at 500.

71. *Id.*

72. *Id.* at 718, 249 Cal. Rptr. at 500.

73. *Id.* at 717, 249 Cal. Rptr. at 498. A cell-line is developed through the combination of segments of DNA from human cells with the cells of a microorganism to produce recombinant DNA. *Id.* at 715 n.3, 249 Cal. Rptr. at 498 n.3. This genetic engineering process produces cells which divide and can maintain a continuous culture for an indefinite period of time. *Id.*

74. *Id.* at 718, 249 Cal. Rptr. at 500.

substances needed for the development of the cell-line.⁷⁵

During a visit in April of 1983, the researchers asked Moore to sign a consent form allowing them to conduct research on his cells.⁷⁶ Moore signed the consent form, still unaware of the researchers' economic interests in his cells.⁷⁷ He was asked to sign another consent form in September of 1983.⁷⁸ Although Moore agreed to further removal of his body tissues, he expressly forbade the researchers from obtaining any commercial rights in a cell-line which might be developed through their research.⁷⁹ Despite this express lack of consent the defendants continued to commercially exploit Moore's cell line.⁸⁰

The Regents of the University of California applied for a patent on the cell-line in 1981.⁸¹ By agreement, any profits resulting from the patent were to be shared by the Regents, Golde, and Quan.⁸² The patent issued in 1984.⁸³

When Moore eventually discovered that Golde and Quan had misrepresented their actions, he brought suit against Golde, Quan, and the Regents, seeking damages for conversion of his spleen.⁸⁴ However, the Superior Court of California sustained the defendants' demurrers on the issue of conversion and dismissed the case.⁸⁵ The

75. *Id.*

76. *Id.* at 718-19, 249 Cal. Rptr. at 500. In reality, the research had been ongoing since 1976. *Id.* at 718, 249 Cal. Rptr. at 499-500.

77. *Id.* at 719, 249 Cal. Rptr. at 500-01.

78. *Id.* at 719, 249 Cal. Rptr. at 501.

79. *Id.* It is important to note that Moore, at that point, still had no idea of the ongoing research or economic intentions harbored by Golde and Quan in developing a marketable cell line from his body tissues. *Id.* It appears from the facts, however, that he was beginning to develop his own suspicions.

80. *Id.* at 719, 249 Cal. Rptr. at 501. In fact, the researchers changed the name of the cell-line from "Moore" to "RLC" to avoid exposing their scheme. *Id.* at 718, 249 Cal. Rptr. at 500.

81. *Moore*, 51 Cal. 3d at 127, 793 P.2d at 481-82, 271 Cal. Rptr. at 148-49.

82. *Id.* at 127, 793 P.2d at 482, 271 Cal. Rptr. at 149.

83. *See Moore*, 215 Cal. App. 3d at 754, 249 Cal. Rptr. at 516 (Appendix A to the court of appeal's opinion containing a copy of the patent).

84. *Id.* at 715, 249 Cal. Rptr. at 500-01. He also attempted to sue the biotechnology companies who had compensated Dr. Golde and the Regents for their development of the cell-line, but was unable to successfully challenge a demurrer brought by the companies in superior court. *Moore*, 51 Cal. 3d at 128, 793 P.2d at 482-83, 271 Cal. Rptr. at 149-50.

85. *Moore*, 51 Cal. 3d at 128, 793 P.2d at 482-83, 271 Cal. Rptr. at 149-50; *see generally Moore v. Regents of Univ. of Cal.*, No. C513755 (Super. Ct. L.A. Co. 1988). Although Moore brought thirteen causes of action against all of the defendants, the superior court considered only the conversion cause of action. *Moore*, 51 Cal. 3d at 128, 793 P.2d at 482, 271 Cal. Rptr. at 149.

California Court of Appeal reversed.⁸⁶

The court of appeal reasoned that Moore's cells amounted to his personal property over which he alone had an "unrestricted right to its use, enjoyment and disposition."⁸⁷ As such, the court of appeal held that Moore could sustain a cause of action against the defendants for conversion.⁸⁸ Furthermore, the court of appeal rejected the defendants' argument that Moore had abandoned his spleen.⁸⁹

The Supreme Court of California then granted review to determine whether John Moore had, in fact, properly stated a cause of action against the defendants for commercially exploiting his cells without his permission.⁹⁰

IV. THE COURT'S DECISION

A. *The Majority Opinion*

1. The Informed Consent Cause of Action

The majority initially reiterated three well known principles related to the requirement of informed consent: (1) a competent adult has the right to decide whether to undergo medical treatment; (2) for a patient's consent to be effective, it must be informed; and (3) the physician's duty of obtaining the patient's consent includes the duty of first disclosing all material facts related to the patient's decision.⁹¹ With these principles in mind, the majority easily concluded that a physician's personal interests in a patient's cells must be disclosed to avoid potential liability for breach of the physician's fiduciary duty.⁹²

The majority reasoned that any "reasonable patient would want to

86. *Moore*, 215 Cal. App. 3d at 722, 249 Cal. Rptr. at 502.

87. *Id.* at 725, 249 Cal. Rptr. at 504 (quoting 63A AM. JUR. 2D *Property* § 1 (1984)).

88. *Id.* at 728, 249 Cal. Rptr. at 507. The court characterized the defendants' assertion that they could claim a property right in Moore's tissue, while Moore could not, as one which was "fraught with irony." *Id.*

89. *Id.* at 732-33, 249 Cal. Rptr. at 510. The court cautioned that "intense moral, religious and ethical concerns" accompanied the concept of selling body parts without consent, so that an inference of abandonment, even with a diseased organ, was "inappropriate." *Id.*

90. *Moore*, 51 Cal. 3d at 124-25, 793 P.2d at 480, 271 Cal. Rptr. at 147.

91. *Id.* at 129, 793 P.2d at 483, 271 Cal. Rptr. at 150 (citing *Cobbs v. Grant*, 8 Cal. 3d 229, 242-46, 502 P.2d 1, 9-11, 104 Cal. Rptr. 505, 513-15 (1972)). See generally Annotation, *Modern Status of Views as to General Measure of Physician's Duty to Inform Patient of Risks of Proposed Treatment*, 88 A.L.R.3D 1008 (1978).

92. *Moore*, 51 Cal. 3d at 129, 793 P.2d at 483, 271 Cal. Rptr. at 150. Quoting *Cobbs*, the court stated that "[t]he scope of the physician's communication to the patient . . . must be measured by the patient's need, and that need is whatever information is material to the decision." *Id.* (quoting *Cobbs v. Grant*, 8 Cal. 3d 229, 245, 502 P.2d 1, 11, 104 Cal. Rptr. 505, 515, (1972)).

The majority noted an important exception to its holding: when a physician's personal interests are so insignificant in comparison to other facts necessary to the patient's decision, disclosure will not be required. *Id.* at 131 n.9, 793 P.2d at 484 n.9, 271 Cal. Rptr. at 151 n.9.

know whether a physician has an economic interest that might affect the physician's professional judgment."⁹³ They wanted to prevent conflicts of interest which might arise from affecting the mode of a patient's treatment without the patient's express consent.⁹⁴

The majority admitted that requiring disclosure of personal interests in a patient's cells may complicate the treatment process in that patients might focus on the economics involved, rather than implications for their health.⁹⁵ However, they deemed it important that the patient, and not the doctor, has the ultimate discretion to determine which method of treatment conforms with his or her best interests.⁹⁶

In evaluating the specific facts alleged in Moore's complaint, the majority held that Moore had adequately stated a cause of action against Dr. Golde for either breach of the fiduciary duty owed to him, or failure to obtain informed consent.⁹⁷ First, Moore alleged that prior to his splenectomy, Dr. Golde failed to inform him of his intent to obtain a portion of the spleen for purposes of researching its unique physical characteristics.⁹⁸ Second, he asserted that upon requesting postoperative blood samples, Dr. Golde assured Moore that he had no financial interest in his cells, which amounted to a concealment of an economic interest.⁹⁹ This interest clearly existed in light of Dr. Golde's attempt to obtain a patent on the developed cell-

93. *Id.* at 129, 793 P.2d at 483, 271 Cal. Rptr. at 150. They noted that the California Legislature had already indicated a desire to protect patients from conflicts of interest in physician-patient relationships as evidenced the enactment of by two statutes: Section 24173(c)(9) of the Health and Safety Code which requires a physician to disclose the funding source of any experiment he or she plans to conduct on the patient and section 654.2 of the Business and Profession Code, which mandates that physicians disclose any proprietary interest they hold in organizations to which they refer their patients. See CAL. HEALTH & SAFETY CODE § 24173(c)(9) (West 1984); CAL. BUS. & PROF. CODE § 654.2 (West 1990).

94. The majority noted that medical treatment decisions should be made by "weighing the benefits to the patient against the risks to the patient." *Moore*, 51 Cal. 3d at 130, 793 P.2d at 484, 271 Cal. Rptr. at 151 (emphasis in original). The court feared that when a physician has research interests in a patient's cells, he or she might "be tempted to order a scientifically useful procedure or test that offers marginal, or no, benefits to the patient." *Id.* (footnote omitted).

95. *Id.*

96. *Id.* at 131, 793 P.2d at 484-85, 271 Cal. Rptr. at 151-52. An exception might be available to a physician concerned only with the health of a patient; the physician has the option to withhold certain information which has the potential of severely upsetting a patient. However, the majority ruled that such an exception was inapplicable to a case where a physician's conflicting research interests are also involved. *Id.* at 131 n.9, 793 P.2d at 484 n.9, 271 Cal. Rptr. at 151 n.9.

97. *Id.* at 132-33, 793 P.2d at 486, 271 Cal. Rptr. at 153.

98. *Id.* at 132, 793 P.2d at 485, 271 Cal. Rptr. at 152.

99. *Id.* at 132-33, 793 P.2d at 485-86, 271 Cal. Rptr. at 152-53.

line.¹⁰⁰ The majority ruled that, in both instances, Dr. Golde had an obligation to disclose his personal interest in the procedures before undertaking them.¹⁰¹

As to the remaining defendants, the Regents and Shirley Quan, the majority held that they owed no fiduciary duty to Moore since they were not physicians.¹⁰² Additionally, the court ruled that they did not owe a duty of obtaining his informed consent to the procedures undertaken.¹⁰³

2. The Conversion Cause of Action

The majority considered Moore's argument that he had a right to share in the profits resulting from the cell-line developed by Dr. Golde and Shirley Quan. Moore claimed that he continued to maintain an ownership interest in his cells, even after their excision from his body, and as such, the defendants were liable for conversion of those cells.¹⁰⁴ Moore's argument seemed doomed from the start, however, as the majority was quick to note, "[n]o court . . . has ever in a reported decision imposed conversion liability for the use of human cells in medical research."¹⁰⁵ After a discussion of relevant statutory law and policy considerations, the court concluded that, in

100. *Id.* at 132, 793 P.2d at 486, 271 Cal. Rptr. at 153.

101. *Id.* at 132-33, 793 P.2d at 485-86, 271 Cal. Rptr. at 152-53. The majority rejected the superior court's holding which explained that in order for a plaintiff to properly state a cause of action for breach of the physician's fiduciary duty, the plaintiff had to allege that the procedure lacked a therapeutic purpose. *Id.* at 133, 793 P.2d at 486, 271 Cal. Rptr. at 153. Rather, the majority held that even if a certain procedure possessed a therapeutic purpose, the physician involved still owed a duty to disclose any accompanying research or economic interests, as the physician's alternative interests could conflict with and materially affect the patient's decision. *Id.*

102. *Id.* at 133, 793 P.2d at 488, 271 Cal. Rptr. at 153. However, they left open the possibility for the superior court, on remand, to determine whether the Regents or Shirley Quan could be held liable under the doctrine of respondeat superior. *Id.* at 134 n.14, 793 P.2d at 487 n.14, 271 Cal. Rptr. at 154 n.14.

Additionally, the majority noted that Moore was free to amend his complaint, on remand, to add the biotechnology companies as secondarily liable for Golde's actions. *Id.* at 134, 793 P.2d at 487, 271 Cal. Rptr. at 154; *see supra* note 84 and accompanying text.

103. *Moore*, 51 Cal. 3d at 133, 793 P.2d at 486, 271 Cal. Rptr. at 153 (explaining that the only way a duty could be found is under a respondeat superior theory). *Cf. infra* notes 137-140 and accompanying text; Annotation, *Liability of One Physician or Surgeon for Malpractice of Another*, 85 A.L.R.2d 889 (1962).

104. *Moore*, 51 Cal. 3d at 134-35, 793 P.2d at 487, 271 Cal. Rptr. at 154. If Moore had succeeded on his conversion claim, the defendants could have faced potential liability up to the amount of the cells' fair market value. *See supra* notes 31 and 70 and accompanying text. *See generally* Annotation, *Transfer of Possession of Personal Property with Owner's Consent, Obtained by Fraud, as Conversion*, 95 A.L.R. 615 (1935).

105. *Moore*, 51 Cal. 3d at 135, 793 P.2d at 487, 271 Cal. Rptr. at 154. In a footnote, the majority stated that the lack of precedent on the subject could not be explained by the recent birth of biotechnology since the development of human cell-lines had been common since the early 1950s. *Id.* at 135 n.15, 793 P.2d at 487 n.15, 271 Cal. Rptr. at 154 n.15 (citation omitted).

Moore's case, it would be improper to impose conversion liability.¹⁰⁶

Initially, the majority pointed to the lack of precedent to support Moore's ownership claim.¹⁰⁷ They reasoned that no such precedent existed¹⁰⁸ because courts have recognized that issues regarding human tissues, organs, and cells are better resolved by state legislatures, in order to attain favorable policy goals, than by courts applying property law.¹⁰⁹ The court pointed out that California statutes already "drastically limit[] any continuing interest of a patient in ex-

106. *Id.* at 147, 793 P.2d at 497, 271 Cal. Rptr. at 164.

107. *Id.* at 135, 793 P.2d at 487, 271 Cal. Rptr. at 154. The majority also seemed to find it important that Moore attempted to allege an ownership interest in genetic code materials extracted from his body which were common to all human beings. *Id.* at 138-39, 793 P.2d at 490, 271 Cal. Rptr. at 157. Moore's materials were unique because they were easier to identify in Moore's cells. *Id.* at 127 n.2, 793 P.2d at 481 n.2, 271 Cal. Rptr. at 148 n.2.

108. *Id.* at 137, 793 P.2d at 489, 271 Cal. Rptr. at 156. The majority rejected the court of appeal's conclusion that invasion of privacy cases were similar. *Id.* at 138, 793 P.2d at 489-90, 271 Cal. Rptr. at 156-57. The tort of invasion of privacy involves the wrongful publicity of a person's unique likeness. *Id.* The majority emphasized that the holdings in those cases were "irrelevant to the issue of conversion" of genetic materials because they were not based on property law which is the basis of the tort of conversion. *Id.* Also, the majority felt that individual privacy interests could be adequately protected "without accepting the extremely problematic conclusion that interference with those interests amounts to a conversion of personal property." *Id.* at 140, 793 P.2d at 491, 271 Cal. Rptr. at 158.

Moreover, the court asserted that wrongful publicity requires a unique characteristic of a person, like that person's name or facial image, to be the subject of exploitation. *Id.* at 138, 793 P.2d at 490, 271 P.2d at 156-57. That situation was not present in Moore's case where the stated purpose of the patent was to "manufacture lymphokines" which do not possess unique characteristics in different individuals. *Id.* at 138 n.29, 793 P.2d at 490 n.29, 271 Cal. Rptr. at 157 n.29.

Finally, the court rejected any analogy to the Maryland case of *Venner v. State*, where, by negative inference, the Maryland Court of Appeal concluded that an individual may have a property interest in his or her excrement. *Venner v. State*, 30 Md. App. 599, 626-27, 354 A.2d 483, 498 (1976), *aff'd*, 279 Md. 47, 367 A.2d 949, *cert. denied*, 431 U.S. 932 (1977); *see also supra* notes 52-53 and accompanying text. The *Moore* court distinguished *Venner* since it involved an issue of criminal procedure, rather than a civil dispute over which party was entitled to the profits derived from property. *Moore*, 51 Cal. 3d at 138 n.28, 793 P.2d at 489 n.28, 271 Cal. Rptr. at 156 n.28. The court emphasized that policy considerations in the two cases were markedly different. *Id.*

109. *Moore*, 51 Cal. 3d at 137, 142, 793 P.2d at 489, 493, 271 Cal. Rptr. at 156, 160. The majority reasoned that "[l]egislatures, in making such policy decisions, have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties [may] present evidence and express their views." *Id.* at 147, 793 P.2d at 496, 271 Cal. Rptr. at 163 (quoting *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 694 n.31, 765 P.2d 373, 397 n.31, 254 Cal. Rptr. 211, 235 n.31 (1988)). They pointed to the legislature's previous actions in promulgating statutes which already partially regulate the field of medical research on human tissues. *See infra* notes 110-114 and accompanying text. *See also Moore*, 51 Cal. 3d at 137 nn.21-27, 793 P.2d at 489 nn.21-27, 271 Cal. Rptr. at 156 nn.21-27.

cised cells.”¹¹⁰ The majority advocated deference to those particular statutes which address the proper methods of disposition of human body parts.¹¹¹ One such statute permits a competent individual to donate all or part of his or her body for medical research or transplant purposes, but prohibits that individual from receiving compensation for the donation.¹¹² Another statute requires that “recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state . . . to protect the public health and safety.”¹¹³ While the primary object of the latter statute is to protect the public health and safety, the majority emphasized that the secondary effect of the statute, which was to severely limit a patient’s control over surgically removed body parts and to provide for their ultimate destruction, mandated a conclusion that the legislature did not intend to promote property interests in the excised body parts.¹¹⁴ They pointed out that such interests would be inconsistent with the obvious purpose of the statute because the statute blatantly prohibits many of the ownership rights traditionally associated with personal property.¹¹⁵

Additionally, the majority felt that Moore’s claim was faulty since the Regents’ patented cell-line and the products developed from it were not originally Moore’s property, thus, they could not be the subject of a conversion action.¹¹⁶ The majority asserted that “the patented cell line is both factually and legally distinct from the cells taken from Moore’s body.”¹¹⁷ While the “primary cells” taken from Moore’s body were factually his cells, their makeup changed significantly while the cell-line was in the process of development.¹¹⁸ In fact, the majority noted that “naturally occurring organisms,” such as Moore’s originally extracted cells, are not patentable.¹¹⁹ They reasoned that only organisms which are the product of human invention and manipulation are patentable.¹²⁰ The majority concluded that the cell-line for which the Regents obtained a patent could not logically

110. *Moore*, 51 Cal. 3d at 137, 793 P.2d at 489, 271 Cal. Rptr. at 156. For an examination of statutes applicable in other jurisdictions, see Note, *supra* note 38, at 221-25.

111. *Moore*, 51 Cal. 3d at 140, 793 P.2d at 491-92, 271 Cal. Rptr. at 158-59.

112. CAL. HEALTH & SAFETY CODE §§ 7151, 7153, 7155 (West Supp. 1991).

113. CAL. HEALTH & SAFETY CODE § 7054.4 (West Supp. 1991).

114. *Moore*, 51 Cal. 3d at 140-41, 793 P.2d at 491-92, 271 Cal. Rptr. at 158-59.

115. *Id.* at 140-41, 793 P.2d at 492, 271 Cal. Rptr. at 159.

116. *Id.* at 141, 793 P.2d at 492, 271 Cal. Rptr. at 159.

117. *Id.*

118. *Id.* at 141 n.35, 793 P.2d at 492 n.35, 271 Cal. Rptr. at 159 n.35.

119. *Id.* at 141-42, 793 P.2d at 492, 271 Cal. Rptr. at 159 (citing *Diamond v. Chakrabarty*, 447 U.S. 303, 309-10 (1980)).

120. *Id.* at 142, 793 P.2d at 492-93, 271 Cal. Rptr. at 159-60. The majority reasoned that it is the “*inventive effort*” in creating the cell-line “that patent law rewards, not the discovery of naturally occurring raw materials.” *Id.* (emphasis in original).

be a product of Moore's body.¹²¹ Thus, whether or not "property" is the appropriate legal label to attach to body parts, Moore's actual body parts were not the same items which were subject to commercial exploitation and alleged to have been converted in this case.

Next, the majority examined two competing policy considerations relevant to Moore's conversion cause of action. First, they sought to maintain protection of patients' rights to determine what medical procedures to undertake.¹²² However, they felt that patients were already sufficiently protected by the tort doctrines creating physicians' fiduciary duties and mandating informed consent.¹²³ Second, the majority determined that important and valuable medical research should not be chilled by imposing conversion liability on physicians and researchers.¹²⁴ The majority expressly wished to prevent creating a cause of action which would be "detrimental to both academic researchers and the infant biotechnology industry."¹²⁵ That industry has already produced various treatments for "leukemia, cancer, diabetes, dwarfism, hepatitis-B, kidney transplant rejection, emphy-

121. *Id.*

122. *Id.* at 139-40, 143, 793 P.2d at 491, 493, 271 Cal. Rptr. at 158, 160.

123. *Id.* The majority concluded that "[l]iability based upon existing disclosure obligations, rather than an unprecedented extension of the conversion theory, protects patients' rights of privacy and autonomy without unnecessarily hindering research." *Id.* at 144, 793 P.2d at 494, 271 Cal. Rptr. at 161.

Furthermore, they advocated against expanding the tort of conversion, with its strict liability standard, to avoid facilitating the punishment of innocent researchers who were not responsible for the failure to obtain informed consent to the research. *Id.*

124. *Id.* at 135, 143, 793 P.2d at 487-88, 493, 271 Cal. Rptr. at 154, 160. The court stated:

[W]hat Moore is asking us to do is to impose a tort duty on scientists to investigate the consensual pedigree of each human cell sample used in research. To impose such a duty, which would affect medical research of importance to all of society, implicates policy concerns far removed from the traditional, two-party ownership disputes in which the law of conversion arose.

Id. at 135, 793 P.2d at 487, 271 Cal. Rptr. at 154 (footnote omitted).

125. *Id.* at 143, 793 P.2d at 493, 271 Cal. Rptr. at 160 (quoting U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, NEW DEVELOPMENTS IN BIOTECHNOLOGY: OWNERSHIP OF HUMAN TISSUES AND CELLS 27 (1987) [hereinafter U.S. CONGRESS]). Such a chill could be easily foreseen, the majority noted, in that:

"[b]iological materials are routinely distributed to other researchers for experimental purposes, and scientists who obtain cell lines or other specimen-derived products, such as gene clones, from the original researcher could also be sued under certain legal theories [such as conversion]. Furthermore, the uncertainty could affect product developments as well as research. Since inventions containing human tissues and cells may be patented and licensed for commercial use, companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists."

Id. at 143, 793 P.2d at 494, 271 Cal. Rptr. at 161 (quoting U.S. CONGRESS, *supra* note 125, at 27).

sema, osteoporosis, ulcers, anemia, infertility, and gynecological tumors.”¹²⁶ The majority reasoned that these areas of medical research would be significantly threatened by uncertainty as to whether patients retain legal title in removed body parts.¹²⁷

Access to existing raw materials for research would also be hindered, according to the majority, since many cell-lines are currently stored in the American Type Culture Collection and by the National Institutes of Health and the American Cancer Society.¹²⁸ These organizations store existing cell-lines for distribution to any medical researcher who asks for a sample.¹²⁹ Indeed, as the majority expressed, an organization’s willingness to distribute existing cell-lines, possibly crucial to the development of new disease inhibitors,¹³⁰ would be diminished if conversion liability could be imposed.¹³¹

Based on these considerations, the majority found that the best solution was to remand Moore’s case for consideration as to whether Dr. Golde had, in fact, breached his fiduciary duty of disclosure, but sustain the defendants’ demurrers to the conversion cause of action.¹³²

B. *The Concurring Opinions*

Justice Arabian wrote separately in an effort to emphasize the majority’s conclusion that the legislature, rather than the supreme court, could best determine whether a conversion action should lie with regard to commercially developed human cells.¹³³ He expressed favor for a proposed legislative solution which would involve the creation of a licensing scheme that would mandate a fixed rate of profit

126. *Id.* at 144, 793 P.2d at 494, 271 Cal. Rptr. at 161 (citing Note, *supra* note 32, at 628 n.1).

127. *Id.* at 144, 793 P.2d at 494, 271 Cal. Rptr. at 161.

128. *Id.*

129. *Id.* at 144-45, 793 P.2d at 494-95, 271 Cal. Rptr. at 161-62. The majority advocated the maintenance of the present system used by tissue banks. *Id.* Under that system, “many firms have access to the tissue so the probability of efficient use of those tissues increases.” *Id.* at 145 n.39, 793 P.2d at 495 n.39, 271 Cal. Rptr. at 162 n.39 (quoting U.S. CONGRESS, *supra* note 125, at 52; Note, *supra* note 32, at 635).

130. Most medical products for human treatment developed by biotechnology companies are created from human cell lines. *Id.* at 145, 793 P.2d at 495, 271 Cal. Rptr. at 162 (citing U.S. CONGRESS, *supra* note 125, at 56).

131. *Id.* at 145, 793 P.2d at 495, 271 Cal. Rptr. at 162. Likewise, researchers would be deterred from asking for access to the cell-lines where potential liability could be foreseen. See N.Y. Times, July 10, 1990, at C8, col. 4 (pointing out that once litigation began in Moore’s case, “researchers throughout the country immediately stopped using the cell-line”).

132. *Moore*, 51 Cal. 3d at 148, 793 P.2d at 497, 271 Cal. Rptr. at 164. The majority also sustained the demurrers of the other defendants, with leave to amend the causes of action for breach of fiduciary duty. *Id.*

133. *Id.* at 149, 793 P.2d at 498, 271 Cal. Rptr. at 165 (Arabian, J., concurring). See *supra* notes 109-116 and accompanying text.

sharing between researchers and medical patients.¹³⁴ He explained that such an arrangement would serve the moral principles involved by preventing an unlimited free market in body cells,¹³⁵ yet guarantee the source of the cells some measure of compensation to which he or she might rightfully be due.¹³⁶

Justice Broussard also wrote separately to concur in the portion of the majority's opinion which held that Moore had properly alleged a cause of action for breach of fiduciary duty against Dr. Golde.¹³⁷ However, Justice Broussard was willing to go one step further and hold that Moore had properly pled the same cause of action against all defendants, including Shirley Quan, the Regents, and the biotechnology companies involved.¹³⁸ He reasoned that because all of the named defendants were involved in the "commercial venture" at the time the covert postoperative procedures were being performed on Moore, it would be improper to absolve them of liability based on the

134. *Moore*, 51 Cal. 3d at 149-50, 793 P.2d at 498, 271 Cal. Rptr. at 165 (Arabian, J., concurring). One commentator has advocated this solution in Danforth, *Cells, Sales, and Royalties: The Patient's Right to A Portion of the Profits*, 6 YALE L. & POL'Y REV. 179, 198-201 (1988). All of the majority justices seemed open to this idea, as the same article was cited as a potential solution in the majority opinion. See *Moore*, 51 Cal. 3d at 147, 793 P.2d at 496, 271 Cal. Rptr. at 163. In contrast, another commentator cited by the majority, advocates prohibiting the sale of tissues to be used in medical research, just as organs to be used for transplant purposes cannot be sold. See *id.* (citing Note, *supra* note 32, at 643-45). Congress has prohibited the sale of human organs for transplant purposes in 42 U.S.C. § 274e (Supp. IV 1986), which provides:

(a) PROHIBITION. It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.

(b) PENALTIES. Any person who violates subsection (a) of this section shall be fined not more than \$50,000 or imprisoned not more than five years, or both.

Id.

135. Justice Arabian criticized Moore's request that the court establish an individual right to sell body cells for profit. He articulated that Moore "entreats us to regard the human vessel—the single most venerated and protected subject in any civilized society—as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane. He asks much." *Moore*, 51 Cal. 3d at 148, 793 P.2d at 497, 271 Cal. Rptr. at 164 (Arabian, J., concurring). See generally Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL., POL'Y & LAW 57 (1989) (which outlines the problems associated with organ sales).

136. *Moore*, 51 Cal. 3d at 149-50, 793 P.2d at 498, 271 Cal. Rptr. at 165 (Arabian, J., concurring).

137. *Id.* at 150, 793 P.2d at 499, 271 Cal. Rptr. at 166 (Broussard, J., concurring in part and dissenting in part). See *supra* notes 97-103 and accompanying text.

138. *Moore*, 51 Cal. 3d at 151-52, 793 P.2d at 499-500, 271 Cal. Rptr. at 166-67 (Broussard, J., concurring in part and dissenting in part). *Contra supra* notes 102-03 and accompanying text.

pleadings and without further discovery.¹³⁹

C. *The Dissenting Opinions*

Justice Broussard agreed in principle with the majority's opinion regarding the informed consent cause of action, but challenged the majority opinion on the conversion cause of action as unfocused.¹⁴⁰ He claimed that the majority failed to make an important distinction between cases where the commercial value of cells is discovered before they are removed from a patient's body and cases where the commercial value is discovered months or years after the cells are removed.¹⁴¹ The latter situation is the more common one when a patient is asked to consent to medical research.¹⁴² However, as Justice Broussard pointed out, Dr. Golde realized that Moore's cells had unique commercial value before they were ever extracted.¹⁴³ Broussard agreed that, in the more common situation, a patient retains no ownership interest in his excised cells.¹⁴⁴ However, he thought it was "clear under California law" that in the unusual instance where the value of the cells is determined before removal, the patient has the legal right to determine how the cells will be put to use after removal.¹⁴⁵

Furthermore, Justice Broussard contended that a conversion action

139. *Moore*, 51 Cal. 3d at 152, 793 P.2d at 499-500, 271 Cal. Rptr. at 166-67 (Broussard, J., concurring in part and dissenting in part). However, he conceded that the additional defendants could properly move for summary judgment if the evidence obtained in discovery revealed that those defendants played no part in the continuing breach of fiduciary duty. *Id.* at 152, 793 P.2d at 500, 271 Cal. Rptr. at 167 (Broussard, J., concurring in part and dissenting in part).

140. *Id.* at 151, 793 P.2d at 499, 271 Cal. Rptr. at 166 (Broussard, J., concurring in part and dissenting in part).

141. *Id.* at 153, 793 P.2d at 500-01, 271 Cal. Rptr. at 167-68 (Broussard, J., concurring in part and dissenting in part).

142. *Id.*

143. *Id.* at 150, 793 P.2d at 499, 271 Cal. Rptr. at 166 (Broussard, J., concurring in part and dissenting in part). *See supra* notes 68-70 and accompanying text.

144. *Moore*, 51 Cal. 3d at 151, 793 P.2d at 499, 271 Cal. Rptr. at 166 (Broussard, J., concurring in part and dissenting in part).

145. *Id.* (Broussard, J., concurring in part and dissenting in part). He pointed to the Uniform Anatomical Gift Act as the controlling statutory authority for a patient's right to determine what uses can be made of his or her cells after extraction. *Id.* at 154, 793 P.2d at 501, 271 Cal. Rptr. at 169 (Broussard, J., concurring in part and dissenting in part). The Act provides that an organ donor can donate an organ to a hospital or physician for research purposes, that the donor has the right to specify a certain donee of the organ, and that the donor has the power to limit the donated organ's use to specific purposes. CAL. HEALTH & SAFETY CODE §§ 7150.5(a), 7153(a)(1), (b) (West Supp. 1991).

While Broussard agreed with the majority that section 7054.4 of the Health and Safety Code severely restricts a patient's control over cells removed from his or her body, he maintained that the statute provided no basis for the conclusion that a patient's physician possesses any greater right to determine the proper use of such cells. *Moore*, 51 Cal. 3d at 156, 793 P.2d at 503, 271 Cal. Rptr. at 170 (Broussard, J., concurring in part and dissenting in part). *See supra* notes 113-14 and accompanying text.

could be maintained if this right is wrongfully interfered with by a physician.¹⁴⁶ Because this distinction was not made by the majority, he contested their decision as incorrectly based on a factual setting not before the court.¹⁴⁷ He stated that "[b]ecause plaintiff alleges that defendants wrongfully interfered with his right to determine, prior to the removal of his body parts, how those parts would be used after removal, I conclude that the complaint states a cause of action under traditional, common law conversion principles."¹⁴⁸

While Justice Broussard agreed that the cell-line which was eventually patented was distinct from the cells taken from Moore's body, he maintained that Moore was still entitled to economic recovery for the damage suffered from the loss of the right to control the use of his own cells.¹⁴⁹ Similarly, he dismissed the majority's reliance on the fact that Moore's cells were not unique.¹⁵⁰ He asserted that the uniqueness of the cells affected only the amount of damages Moore would be entitled to under a conversion action, not his ability to maintain the action at all.¹⁵¹

Additionally, Justice Broussard contended, in contrast to the majority decision, that the informed consent cause of action was insufficient to protect an aggrieved plaintiff.¹⁵² He posited that, even if the same remedy were available to a plaintiff under an informed consent cause of action as under a conversion action, such provision would provide no protection to a plaintiff who had no claim for breach of

146. *Moore*, 51 Cal. 3d at 157, 793 P.2d at 503, 271 Cal. Rptr. at 171 (Broussard, J., concurring in part and dissenting in part).

147. *Id.* at 151, 793 P.2d at 499, 271 Cal. Rptr. at 166 (Broussard, J., concurring in part and dissenting in part). He claimed that the majority justices strayed by focusing on the potential liability of physicians who would be conducting research on "existing cell repositories." *Id.* (Broussard, J., concurring in part and dissenting in part) (emphasis added).

148. *Id.* at 153, 793 P.2d at 501, 271 Cal. Rptr. at 168 (Broussard, J., concurring in part and dissenting in part).

149. *Id.* at 157, 793 P.2d at 503, 271 Cal. Rptr. at 170 (Broussard, J., concurring in part and dissenting in part). This conclusion would preclude, of course, any economic recovery based on the value of products derived from the patented cell-line. *Id.* (Broussard, J., concurring in part and dissenting in part). Justice Broussard asserted, however, that "the fact that plaintiff may not be entitled to all of the damages which his complaint seeks does not justify denying his right to maintain any conversion action at all." *Id.* (Broussard, J., concurring in part and dissenting in part).

150. *Id.* (Broussard, J., concurring in part and dissenting in part).

151. *Id.* (Broussard, J., concurring in part and dissenting in part). Justice Broussard stated that "ordinary property, as well as unique property, is . . . protected against conversion." *Id.* (Broussard, J., concurring in part and dissenting in part).

152. *Id.* at 158, 793 P.2d at 504, 271 Cal. Rptr. at 171 (Broussard, J., concurring in part and dissenting in part). See *supra* notes 122-23 and accompanying text.

fiduciary duty.¹⁵³ He hypothesized that this could occur if a patient's informed consent was obtained to undertake a specific research project, but some other entity later stole the cells and undertook a different project.¹⁵⁴

Finally, Justice Broussard attacked the majority's unstated, though inferrable, purpose¹⁵⁵ of preventing the sale of human tissues for profit.¹⁵⁶ He pointed out that while the majority opinion would prevent the source of tissue from benefitting economically, it still allowed researchers, who obtain tissue through wrongful means, to exploit the cells commercially to their full potential.¹⁵⁷ Therefore, Justice Broussard would allow a plaintiff in Moore's situation to maintain a cause of action for conversion.¹⁵⁸

Justice Mosk also separately challenged the majority's holding with regard to the conversion cause of action by contesting six of its major premises.¹⁵⁹ First, Justice Mosk found it unremarkable, in contrast to the majority justices, that no California precedent supported Moore's claims.¹⁶⁰ Instead, he found it significant that no such precedent rejected those claims.¹⁶¹ He found Moore's case to be merely one of first impression¹⁶² in which the court had the authority to decide under its power to interpret the ever evolving common law.¹⁶³

Second, Justice Mosk doubted the majority's conclusion that California statutory law interpretation mandated that patients could hold no property interest in their cells.¹⁶⁴ Specifically, Justice Mosk ar-

153. *Moore*, 51 Cal. 3d at 158, 793 P.2d at 504, 271 Cal. Rptr. at 171 (Broussard, J., concurring in part and dissenting in part).

154. *Id.* (Broussard, J., concurring in part and dissenting in part).

155. See *supra* note 135 and accompanying text. Justice Arabian articulated these unstated concerns in his concurrence. *Moore*, 51 Cal. 3d at 148, 793 P.2d at 497, 271 Cal. Rptr. at 164 (Arabian, J., concurring).

156. *Moore*, 51 Cal. 3d at 159-60, 793 P.2d at 505-06, 271 Cal. Rptr. at 172-73 (Broussard, J., concurring in part and dissenting in part).

157. *Id.* at 160, 793 P.2d at 506, 271 Cal. Rptr. at 173 (Broussard, J., concurring and dissenting in part).

158. *Id.* (Broussard, J., concurring and dissenting in part).

159. *Id.* at 160-61, 793 P.2d at 506, 271 Cal. Rptr. at 173 (Mosk, J., dissenting).

160. *Id.* at 161, 793 P.2d at 506-07, 271 Cal. Rptr. at 173-74 (Mosk, J., dissenting). Justice Broussard agreed with this point. *Id.* at 156, 793 P.2d at 502, 271 Cal. Rptr. at 169 (Broussard, J., concurring in part and dissenting in part).

161. *Id.* at 161, 793 P.2d at 506-07, 271 Cal. Rptr. at 173-74 (Mosk, J., dissenting).

162. *Id.* at 162, 793 P.2d at 507, 271 Cal. Rptr. at 174 (Mosk, J., dissenting).

163. *Id.* (Mosk, J., dissenting). He emphasized that the majority opinion acknowledged that "the law of conversion is a creature of the common law." *Id.* at 161, 793 P.2d at 507, 271 Cal. Rptr. at 174 (Mosk, J., dissenting). Justice Broussard expressed a similar conclusion. See *Moore*, 51 Cal. 3d at 155, 793 P.2d at 502, 271 Cal. Rptr. at 169 (Broussard, J., concurring in part and dissenting in part).

164. *Id.* at 165, 793 P.2d at 509, 271 Cal. Rptr. at 176 (Mosk, J., dissenting). He emphasized that "the same bundle of rights does not attach to all forms of property." *Id.* at 165, 793 P.2d at 509, 271 Cal. Rptr. at 176. For example, "some types of personal property may be sold but not given away, while others may be given away but not sold,

gued that, just because certain statutes¹⁶⁵ appear to severely limit a patient's control over excised cells, there was no basis to conclude that the minimal rights a patient retained could not be classified as a property interest.¹⁶⁶

Third, while conceding that Moore's cells might be distinguishable from the cells which were eventually patented, Justice Mosk concluded that the majority reached an unfair result by focusing on the fact that a patent was obtained.¹⁶⁷ Instead, Justice Mosk argued that "a patent is not a license to defraud"¹⁶⁸ and advocated that the defendants should be held responsible for their conversion of Moore's original tissue samples before the patent was obtained.¹⁶⁹ Moreover, he asserted that Moore should recover a portion of the profits flowing from the patent because access to his cells was so crucial to the development of the commercial product.¹⁷⁰

Fourth, Justice Mosk challenged the majority's policy goal of preventing a chill within the field of medical research.¹⁷¹ He maintained that researchers and biotechnology companies who use and distribute cell-lines could undertake an unburdensome record keeping process.¹⁷² He noted that these records could be referenced to determine the extent of consent granted by any cell source as to future

and still others may neither be given away nor sold." *Id.* at 166, 793 P.2d at 510, 271 Cal. Rptr. at 177 (Mosk, J., dissenting) (footnotes omitted).

165. Justice Mosk specifically referred to section 7054.4 of the Health and Safety Code, which the majority held "eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to 'property' or 'ownership' for purposes of conversion law." *Id.* at 140, 793 P.2d at 492, 271 Cal. Rptr. at 159. See *supra* notes 113-115 and accompanying text.

166. *Moore*, 51 Cal. 3d at 166, 793 P.2d at 510, 271 Cal. Rptr. at 177 (Mosk, J., dissenting).

167. *Id.* at 167-69, 793 P.2d at 511-12, 271 Cal. Rptr. at 178-79 (Mosk, J., dissenting).

168. *Id.* at 168, 793 P.2d at 512, 271 Cal. Rptr. at 179 (Mosk, J., dissenting) (footnote omitted).

169. *Id.* at 168, 793 P.2d at 511-12, 271 Cal. Rptr. at 178-79 (Mosk, J., dissenting).

170. *Id.* (Mosk, J., dissenting). Justice Mosk suggested an analogy to the case of a "joint inventor." *Id.* (Mosk, J., dissenting). Under federal law, a "joint inventor" is protected from scientists excluding him from sharing profits obtained under a patent if he "contribute[d] in a substantial way to a product's development." *Id.* at 169, 793 P.2d at 512, 271 Cal. Rptr. at 179 (Mosk, J., dissenting) (citing 35 U.S.C. § 116 (1988)). He noted that patients who serve as the source of biological materials contribute in the same substantial way as a joint inventor because, without the source, the product could never be developed. *Id.* (Mosk, J., dissenting). See also Danforth, *supra* note 134, at 197 (making the same analogy).

171. *Moore*, 51 Cal. 3d at 170, 793 P.2d at 513, 271 Cal. Rptr. at 180 (Mosk, J., dissenting).

172. *Id.* at 172, 793 P.2d at 514, 271 Cal. Rptr. at 181 (Mosk, J., dissenting). Mosk opined that the record keeping process would impose no real additional burden on researchers since they commonly keep extensive records regarding cell sources anyway.

research or commercial uses of his or her cells.¹⁷³ He posited that the court could then allow for potential conversion liability to a patient's cells without significantly inhibiting the field of medical science.¹⁷⁴ Thus, Justice Mosk argued that policy goals supporting fairness and prohibiting unjust enrichment far outweighed any alleged policy of promoting medical research.¹⁷⁵

Fifth, Justice Mosk opposed the notion expressed by the majority that the legislature should decide the validity of a conversion cause of action in body cells.¹⁷⁶ He did not contend that the legislature was not competent to decide the issue.¹⁷⁷ Rather, he felt that since the issue had not yet been resolved by the legislature, in the meantime, the court should not abdicate its own responsibility of interpreting and enforcing the common law.¹⁷⁸ He believed that a reluctance by the court was especially inappropriate in the present case, "when the rapid expansion of biotechnological science and industry makes resolution of these issues an increasingly pressing need."¹⁷⁹

Sixth, Justice Mosk argued that the informed consent cause of action was inadequate to protect a patient in a situation such as Moore's.¹⁸⁰ He pointed out that a patient in that situation faces an exceptionally difficult burden of proof.¹⁸¹ Initially, the patient would have to show that, even if he or she had been adequately informed of the physician's personal interests in his or her cells, the patient would not have granted consent to a possibly life-saving procedure.¹⁸² Next, the patient would have to show that, even under an objective

Id. (Mosk, J., dissenting) (citing Comment, *Toward the Right of Commerciality*, 34 UCLA L. REV. 207, 241 (1986)).

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

174. *Id.* (Mosk, J., dissenting). *Contra* Biotechnology Newswatch, July 16, 1990, at 1 (quoting executive director of the Association of Biotechnology Companies as asserting that such a record keeping process would impose "major complications in research, and delays in getting important products to market").

175. *Moore*, 51 Cal. 3d at 174-75, 793 P.2d at 516-17, 271 Cal. Rptr. at 183-84 (Mosk, J., dissenting) (citing Murray, *Who Owns the Body? On the Ethics of Using Human Tissue for Commercial Purposes*, in IRB: A REVIEW OF HUMAN SUBJECTS RESEARCH 5 (Jan/Feb 1986); Comment, *Toward a Right of Commerciality*, 34 UCLA L. REV. 207, 229 (1986)).

176. *Moore*, 51 Cal. 3d at 176, 793 P.2d at 517, 271 Cal. Rptr. at 184 (Mosk, J., dissenting).

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

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

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

180. *Id.* at 178, 793 P.2d at 519, 271 Cal. Rptr. at 186 (Mosk, J., dissenting). *See also* Martin & Lagod, *Biotechnology and the Commercial Use of Human Cells: Toward an Organic View of Life and Technology*, 5 SANTA CLARA COMPUTER AND HIGH TECH. L.J. 211, 222 (1989) (explaining that causation is difficult to prove).

181. *Moore*, 51 Cal. 3d at 179, 793 P.2d at 519, 271 Cal. Rptr. at 186 (Mosk, J., dissenting).

182. *Id.* at 179, 793 P.2d at 519, 271 Cal. Rptr. at 186 (citing *Cobbs v. Grant*, 8 Cal. 3d 229, 245, 502 P.2d 1, 11, 104 Cal. Rptr. 505, 515 (1972)). *See supra* notes 24-26 and accompanying text.

standard, a reasonable person in his or her position would have withheld consent.¹⁸³ Justice Mosk contended that a jury would not likely believe that a patient, much less a reasonable person, faced with a life threatening disease would refuse to have his or her diseased cells extracted just because the physician harbored research or economic interests in those cells.¹⁸⁴ Thus, he asserted that even though the informed consent cause of action would be available as an option to these plaintiffs, it might not provide an especially viable avenue for recovery. Hence, Justice Mosk concluded that the informed consent cause of action is "not an adequate substitute . . . for the conversion cause of action."¹⁸⁵

V. IMPACT OF THE COURT'S DECISION

The California Supreme Court's holding in *Moore* will undoubtedly prevent the evils which might result if property interests are recognized in body parts.¹⁸⁶ The idea of selling body parts in the free marketplace is distasteful at best.¹⁸⁷ Furthermore, as counsel for UCLA asserted in this case, the recognition of property interests in human cells could potentially deter valuable medical research and possibly "sound[] the death knell to the university physician-scientist."¹⁸⁸

Nevertheless, it remains to be seen how much protection is ac-

183. *Moore*, 51 Cal. 3d at 179, 793 P.2d at 519, 271 Cal. Rptr. at 186 (Mosk, J., dissenting). Justice Mosk noted that the purpose of the objective standard was to avoid reliance on "the 20/20 vision of hindsight" to determine if a breach of fiduciary duty occurred. *Id.* (Mosk, J., dissenting). It would only be natural for a plaintiff, after filing a claim, to claim that he, subjectively, would never have consented to the medical procedure had he been further informed. *Id.* (Mosk, J., dissenting). The requirement of meeting an additional objective standard would avoid a decision based solely on the plaintiff's self-serving statements. *Id.* at 179-80, 793 P.2d at 519-20, 271 Cal. Rptr. at 186-87 (Mosk, J., dissenting).

184. *Id.* at 180, 793 P.2d at 520, 271 Cal. Rptr. at 187 (Mosk, J., dissenting).

185. *Id.* at 182, 793 P.2d at 521, 271 Cal. Rptr. at 188 (Mosk, J., dissenting). At least one bioethicist, Dr. Arthur Caplan, would agree with this proposition. Dr. Caplan stated, "Mr. Moore will have a harder time receiving compensation for a breach of informed consent than he would have if he had proved a property interest. He may be able to prove he was wronged, but it will be harder to prove he was harmed." N.Y. Times, July 10, 1990, at C8, col. 4.

186. See *supra* note 135. *Contra* Swerdlow & Cate, *Why Transplants Don't Happen; Organ and Tissue Transplants*, ATLANTIC MONTHLY, October 1990, at 99 (advocating that allowing a market to exist in body parts will benefit society in that organ shortages will be reduced while the quality of organs available for transplant will be improved).

187. See Note, *supra* note 32, at 632-42 (describing the negative results which might occur if an individual were permitted to sell his or her body parts for profit).

188. National Law Journal, July 23, 1990, at 6.

corded a patient who finds himself the subject of undisclosed medical research. At a minimum, the *Moore* case establishes that physicians are required to provide information regarding their personal interests in a patient's cells in addition to disclosing medical risks.¹⁸⁹ The majority asserted that patients will receive adequate protection under this doctrine of informed consent.¹⁹⁰ However, in reality, it may be very difficult for a plaintiff to recover under such a theory.¹⁹¹ Specifically, it will be difficult for the plaintiff to show that the failure on the part of his or her physician to disclose information regarding research or economic interests caused the plaintiff any actual harm.¹⁹²

Nonetheless, a patient who succeeds in his or her informed consent cause of action, has a potential for greater damages than under a conversion cause of action.¹⁹³ This is because a physician could be liable for punitive damages under an informed consent action,¹⁹⁴ which are not as easily recoverable under a conversion action.¹⁹⁵ Furthermore, it might be difficult to prove the value of the cells alleged to have been converted under a conversion action because of the tenuous connection between the original cells and any later developed cell-line.¹⁹⁶ Thus, the actual protections afforded an aggrieved plaintiff

189. *Moore*, 51 Cal. 3d at 129, 793 P.2d at 483, 271 Cal. Rptr. at 150. "This decision will probably force researchers to talk more to patients—which is not a bad idea—and improve the general public's understanding of medical research and what it's all about." L.A. Times, July 10, 1990, at A1, col. 2 (quoting Cynthia Fruchtmann, an attorney and genetic engineering expert).

190. See *supra* notes 122-123 and accompanying text.

191. See *supra* notes 180-185 and accompanying text. Clearly, then, an ethical physician will not be able to make a "secret profit" off of a patient's cells. See Wash. Post, July 10, 1990, at A3. However, it is not a certainty that a patient will necessarily be able to share in any of these profits through a damage award. See N.Y. Times, July 10, 1990, at C8, col. 4.

192. See *supra* notes 180-182 and accompanying text.

193. National Law Journal, July 23, 1990, at 6.

194. *Moore*, 51 Cal. 3d at 153, 793 P.2d at 500, 271 Cal. Rptr. at 167 (Broussard, J., concurring in part and dissenting in part). See also 15 AM. JUR. PROOF OF FACTS 711, 744-45 (1978).

195. While good faith is not a defense to a conversion action, mere negligence on the part of defendant will not suffice to establish conversion liability. 18 AM. JUR. 2D *Conversion* § 2 (1985). Conversion is an intentional tort. *Id.* As such, plaintiffs will bear a greater burden establishing intent under conversion than they will by establishing the mere negligence required to prove the breach of a physician's fiduciary duty to obtain informed consent. See *id.* §§ 1-3; 14 CAL. JUR. 3D *Conversion* §§ 15, 31 (1974); 36 CAL. JUR. 3D *Healing Arts and Institutions* § 152 (1977). Likewise, it will be harder for plaintiffs to prove the malice, fraud, or oppression, beyond the intent requirement, necessary to qualify for punitive damages under a conversion action. In contrast, under an informed consent action, the plaintiff need only prove intent to qualify for an award of punitive damages. See 18 AM. JUR. 2D *Conversion* § 114 (1985); 14 CAL. JUR. 3D *Conversion* § 48 (1974); 36 CAL. JUR. 3D *Healing Arts and Institutions* § 149 (1977); 15 AM. JUR. PROOF OF FACTS 711, 744-45 (1978); see generally 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 611 (9th ed. 1988) (specifying remedies normally available in a conversion action).

196. See *supra* notes 116-121 and accompanying text. Indeed, the majority articulated that the greatest contribution to the value of a cell-line patent comes from the

under an informed consent versus a conversion action can only be tested over time as plaintiffs ask courts to award them some level of damages under claims alleging failure to obtain informed consent.

VI. CONCLUSION

The *Moore* case shows that the California Supreme Court is not entirely insensitive to the rights of patients to determine whether cells from their body will be removed and what can be done with those cells following extraction. If a physician removes a patient's cells without fully disclosing his research or economic interests, the patient can attempt to recover damages under a claim that the physician breached his or her fiduciary duty to the patient. The focus of that cause of action is the actual damages incurred by the patient as a result of not being informed, rather than the commercial value of any product which is later developed.

The court, however, refused to extend the potential liability of physicians under conversion causes of action. There, the focus of the cause of action is the value of the thing converted. Because drugs from human cell-lines often have great commercial value, a sympathetic jury might concentrate on the dollars which a patient allegedly "missed out on" rather than determining whether the patient incurred any actual harm.

In *Moore*, for example, the value of the product which was developed from the patented cell-line is now worth over three billion dollars.¹⁹⁷ However, a reasonable person in Moore's position in October 1976 when his diseased spleen threatened his life, would probably choose to have his spleen removed, regardless of any personal interests on the part of the physician. This is the scenario on which the supreme court wants triers of fact to concentrate.

At the time of this writing, the *Moore* case has been remanded to the superior court for a determination of the informed consent cause of action which survived against Dr. Golde.¹⁹⁸ Dr. Golde wants that

work of medical researchers and biotechnology companies, rather than from any value inherent to the source cells. *Moore*, 51 Cal. 3d at 141-42, 793 P.2d at 492-93, 271 Cal. Rptr. at 159-60; see also *id.* at 159, 793 P.2d at 505, 271 Cal. Rptr. at 172 (Broussard, J., concurring in part and dissenting in part).

197. See *supra* note 69.

198. *Moore*, 51 Cal. 3d at 148, 793 P.2d at 497, 271 Cal. Rptr. at 164; N.Y. Times, July 10, 1990, at C8, col. 4. A petition for certiorari was filed in December 1990 and denied without comment in March 1991. *Moore v. Regents of the Univ. of Cal.*, 51 Cal. 3d 120, 793 P.2d 479, 271 Cal. Rptr. 146 (1990), petition for cert. filed, 59 U.S.L.W. 3483 (U.S. Dec. 28, 1990) (No. 90-1037), cert. denied, 111 S. Ct. 1388 (1991). Moore's lawyer did not

court to focus on the fact that he saved Moore's life.¹⁹⁹ In contrast, Moore wants the court to focus on the high level of anxiety he experienced on subsequent visits to the medical center under the uninformed belief that they were medically necessary.²⁰⁰

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express surprise at the Court's ruling. L.A. Daily News, March 26, 1991, at 4, col. 2. He noted that "the conservative [C]ourt is reluctant to make groundbreaking decisions in new areas of law." *Id.*

As to Moore's informed consent cause of action, Moore's lawyer claimed, "If Mr. Moore had been informed that the physician stood to gain financially from the use of his organs before consenting to the surgery, maybe he would have wanted another opinion. He was deprived of his right to give informed consent." *Id.*

199. U.S.A. Today, July 11, 1990, at 2A.

200. *Id.*

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