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California Supreme Court Survey
July 1989-December 1989

The California Supreme Court Survey is a synopsis of decisions by the Supreme Court of California. The survey's purpose is to supply the reader with information and a basic understanding of the issues addressed by the court, as well as to provide a starting point for research of the topical areas involved. Toward this end, each summary discusses one recent case before the court, while analyzing it according to the importance of the holding and the extent to which the court expands or modifies existing law. The survey treats death penalty decisions cumulatively every six months in a single article devoted to the recurrent issues within each case. Attorney discipline decisions are omitted from the survey.

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A. A court may not compel, nor does the Election Code mandate, a county to implement a plan to deputize its employees as registrars to stimulate minority and low-income voter registration: Common Cause v. Board of Supervisors.

In Common Cause v. Board of Supervisors, the court vacated a preliminary injunction requiring the County of Los Angeles Board of Supervisors (the "County") to implement an employee deputization program to register voters. The court ruled, as a matter of law, that the relief sought could not be granted.

The supreme court rejected two theories advanced in support of the preliminary injunction. The court reasoned that Election Code sections 302(b), (e), and 304 give the County discretion to deputize employees having regular contact with those subgroups of the community, including non-whites and low-income persons, who have lower rates of voter registration than the white and high-income subgroups of the community. Common Cause, 49 Cal. 3d at 437 n.2, 777 P.2d at 612 n.2, 261 Cal. Rptr. at 576 n.2 (quoting the preliminary injunction granted by the trial court).


2. Id. at 447, 777 P.2d at 619, 261 Cal. Rptr. at 583. Courts consider two factors in deciding whether to issue a preliminary injunction: "(i) the likelihood that the party seeking the injunction will ultimately prevail on the merits of his claim, and (ii) the balance of harm presented, i.e., the comparative consequences of the issuance and nonissuance of the injunction." Id. at 441-42, 777 P.2d at 615, 261 Cal. Rptr. at 579. See also King v. Meese, 43 Cal. 3d 1217, 1227, 743 P.2d 889, 895, 240 Cal. Rptr. 829, 835 (1987) ("The more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue.").

3. The injunction required the County Registrar to deputize certain County employees having regular contact with "those subgroups of the community, including nonwhites and low-income persons, who have lower rates of voter registration than the white and high-income subgroups of the community." Common Cause, 49 Cal. 3d at 437 n.2, 777 P.2d at 612 n.2, 261 Cal. Rptr. at 576 n.2 (quoting the preliminary injunction granted by the trial court).

4. Id. at 443, 777 P.2d at 616, 261 Cal. Rptr. at 580. The plaintiff sought both a mandatory injunction and a writ of mandate. Id. at 442, 77 P.2d at 615, 261 Cal. Rptr. at 579. Because mandamus is the traditional remedy to use in compelling public officials to perform their duties, and because an injunction in this case would not differ in substance from a writ of mandate, the court applied mandamus principles of review. Id. See 42 AM. JUR. 2D Injunctions §§ 19, 43 (1969); 43 C.J.S. Injunctions § 3 (1978); 43 CAL. JUR. 3D Mandamus and Prohibition § 36 (1978). For a discussion on the court's use of the principles of mandamus, see infra note 9 and accompanying text.

5. Common Cause, 49 Cal. 3d at 443-46, 777 P.2d at 616-18, 261 Cal. Rptr. at 580-82. The court of appeal believed that there was a strong likelihood of success on the merits at trial based on two theories. First, Election Code sections 302 and 304, see infra notes 6 and 7, if read together, mandate employee deputization provided such a program maximized voter registration. Common Cause, 49 Cal. 3d at 443-44, 777 P.2d at 616-17, 261 Cal. Rptr. at 580-81. Second, even if the Election Code did not require the County to act, a court could compel the County to implement a program as a remedy for violating the statutory scheme. Id. at 438, 777 P.2d at 612, 261 Cal. Rptr. at 576.

6. Section 302 states in pertinent part: (b) . . . (C)ounty clerks . . . shall deputize as registrars qualified citizens in such a way as to reach most effectively every resident of the county . . . . (e) In furtherance of the purposes of this section, the governing board of any county . . . may authorize and assign any of its officers or employees to become deputy registrars of voters . . . .

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employees for the purpose of voter registration. Furthermore, even assuming the County violated the statutory scheme, a court may not specifically order the County to implement a deputization plan which simply substitutes its discretion for that of the County's.

The court's decision does not bar other legal attempts to boost minority or low-income voter registration. The County remains vulnerable to suit should it fail to comply with the mandatory duty to maximize registration of citizens. The court also left open challenges based upon equal protection guarantees.

BARRY J. REAGAN

CAL. ELEC. CODE § 302 (West 1977) (emphasis added).

7. Section 304 provides:
   It is the intent of the Legislature that voter registration be maintained at the highest possible level. The Secretary of State shall adopt regulations requiring each county to design and implement programs intended to identify qualified electors who are not registered voters, and to register such persons to vote. The Secretary of State shall adopt regulations prescribing minimum requirements for such programs. If the Secretary of State finds that a county has not designed and implemented a program meeting such prescribed minimum requirements, the Secretary of State shall design a program for such county and report the violation to the Attorney General.

CAL. ELEC. CODE § 304 (West 1977) (emphasis added).

8. Construing the statutory language, the court reasoned that section 302(b) mandates deputization because it uses the word “shall,” while section 302(e) merely permits deputization because it uses the word “may.” The court concluded that section 302(b) imposes a general duty to deputize “citizens” while section 302(e) imposes a specific duty to deputize a particular group of citizens, namely “employees.” The court believed that, when read together, the specificity of section 302(e) modifies section 302(b). Thus, the mandatory language in section 302(b) should not be read to override the discretionary language in section 302(e). Common Cause, 49 Cal. 3d at 443-45, 777 P.2d at 616-17, 261 Cal. Rptr. at 580-81. See CAL. CIV. PROC. CODE § 1859 (West 1983) (“In the construction of a statute . . . when a general and particular provision are inconsistent, the latter is paramount to the former.”). The court also concluded that the court of appeal's use of section 304 was misplaced because that section imposes duties only on the secretary of state, not on any particular county. Common Cause, 49 Cal. 3d at 444, 777 P.2d at 616-17, 261 Cal. Rptr. at 580-81.

9. Common Cause, 49 Cal. 3d at 445-46, 777 P.2d at 617-18, 261 Cal. Rptr. at 581-82. Mandamus may compel the performance of a ministerial duty, but not a discretionary one, subject to the exception that mandamus will “correct an abuse of discretion by an official acting in an administrative capacity.” Id. at 442, 777 P.2d at 615, 261 Cal. Rptr. at 579. See 8 B. WITKIN, CALIFORNIA PROCEDURE, Extraordinary Writ § 80 (3d ed. 1985). In dissent, Justice Broussard argued that the decision to implement a plan is administrative, and not quasi-legislative as the majority claimed. He asserted that a court could order the County to act because the County had abused its discretion not only in failing to implement section 302 but also, and more importantly, in failing to implement a means of identifying unregistered voters. Common Cause, 49 Cal. 3d at 448-49, 777 P.2d at 619-20, 261 Cal. Rptr. at 583-84 (Broussard, J., dissenting).

10. See supra note 6.

11. Common Cause, 49 Cal. 3d at 447, 777 P.2d at 619, 261 Cal. Rptr. at 583.
B. Under the Educational Employment Relations Act, an organizational security fee paid for by a nonunion member may not be used for any activities beyond the organization's exclusive representational obligations; while the service fee may be collected through involuntary payroll deductions, the union carries the burden of accounting for the expenditure of a dissenting employee's service fee: Cumero v. Public Employment Relations Bd.

I. INTRODUCTION

In Cumero v. Public Employment Relations Bd.1 a high school teacher challenged the organizational security service fee2 involuntarily deducted from each of his paychecks. The case presented the California Supreme Court with the opportunity to study the limitations of the Educational Employment Relations Act3 ("EERA") and the manner in which the first and fourteenth amendments impact a labor organization's expenditure of a nonunion member's service fee.4

In Cumero, the petitioner filed an unfair practice charge5 with the


2. See CAL. GOV'T CODE § 3540.1(i) (West Supp. 1990). This section provides: "Organizational security" means . . . (2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization for the duration of the agreement, or a period of three years from the effective date of the agreement, whichever comes first.

3. See GOV'T CODE § 3540 (West Supp. 1990). This section states in part: It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certified employees a voice in the formulation of educational policy.

Id.; see generally 51 C.J.S. Labor Relations §§ 52, 150 (1989).


5. The petitioner was employed by King City Joint Union High School District (the "District"), which was represented by the King City High School District Association, CTA/NEA (the "Association"). The California Teachers Association ("CTA")
Public Employment Relations Board ("PERB"). The PERB hearing officer decided that some of the union's activities paid for by petitioner's service fee were improper and that the fee could no longer be involuntarily deducted. The petitioner then appealed this decision to PERB itself, claiming that the Association's use of his service fee to pay for organizational activities with which he disagreed violated his first amendment rights. Displeased with the outcome of this hearing, and the ensuing outcome from the appellate court, the petitioner appealed to the supreme court. The court reversed the court of appeal, stating that while the EERA authorizes mandatory payroll deductions, the EERA does not allow a union to use a nonmember's service fee toward any activities beyond the organization's exclusive representative obligations, and the union is the party that carries the burden of proof regarding the manner in which the service fees are expended.

and the National Education Association ("NEA") are affiliates of the association. Subject to the EERA, the District and the Association entered into a one-year collective bargaining agreement. The agreement provided for an organizational security arrangement, see supra note 2, which allowed a union service fee to be involuntarily deducted from any nonmember teacher's paycheck. As such, the petitioner, who declined to be a member of the union, was still required to pay the service fee to the union. The petitioner brought the unfair practice charge, alleging the service fee was an EERA violation because:

it exceeded the association's cost of performing its representational obligations to him as a nonmember, that he should not be required to contribute any amount whatsoever to the affiliates because neither of them is the designated employee representative, and that the district could not lawfully withhold the fee, without his consent.

Id. at 582-83, 778 P.2d 176-77, 262 Cal. Rptr. at 48-49. The District, the Association, and the Association's affiliates were joined as respondents in the PERB hearings.

6. See CAL. GOV'T CODE § 3541 (West Supp. 1990) (creating PERB and designating it an independent state agency). The court reaffirmed its holding that PERB is specifically empowered to administer the EERA. Cumero, 49 Cal. 3d at 582, 778 P.2d 177, 262 Cal. Rptr. at 49 (citing San Mateo City School Dist. v. Public Employment Relations Bd., 33 Cal. 3d 850, 856, 663 P.2d 523, 526-27, 191 Cal. Rptr. 800, 803-04 (1983)).

7. PERB held, inter alia, that the petitioner should not be required to supplement activities beyond union representation; approved the affiliates use of petitioner's service fee; declared that the petitioner had the burden of proving improper fee use; upheld the mandatory payroll deductions; and ruled in the petitioner's favor regarding campaign fees. Id. at 584, 778 P.2d at 178, 262 Cal. Rptr. at 50.

8. Id. at 585, 778 P.2d at 178, 262 Cal. Rptr. at 50. The case below is Cumero v. PERB, 204 Cal. App. 3d 87, 213 Cal. Rptr. 326 (1985). The court of appeal upheld PERB's decision allowing the application of service fees toward lobbying, ballot propositions, and any benefits provided for by the affiliates. The court reversed on the matters regarding organization and recruitment. The court further decided that the district could make mandatory payroll deductions and that dissatisfied employees carried the burden of proving unlawfully spent service fees.

9. Cumero, 49 Cal. 3d at 581-82, 778 P.2d at 176, 262 Cal. Rptr. at 48. The court
II. TREATMENT OF THE CASE

The court began its analysis by examining the union's obligations when functioning as the exclusive representative of King City Union High School teachers. The union's primary duties are (1) to convene and negotiate with the public school employer regarding terms and conditions of employment, and (2) to confer with the employer regarding educational and curricular matters that fall within the employer's discretion. The court emphasized that the union may not negotiate with the employer about subject matters outside the scope of representation nor contract proposals in opposition to the Education Code. The EERA's sole expressed limitation is that a nonmember's service fee may not be in excess of the union's standard initiation fee, periodic dues, and general assessments. The court specified that the EERA authorizes that nonunion member service fees can be spent only for activities falling within the union's obligations as an exclusive representative, but "[t]he fact that an expenditure of the union is for a purpose beyond its representational obligations and therefore not properly chargeable to nonmember service fees by no means precludes the expenditure altogether." The court believed that clearly some of the expenditures were a rightful use of the service fees paid voluntarily by union members.

The purpose of the EERA provided the rationale behind the court's decision:

EEERA authorizes organizational security arrangements . . . to assure that nonmembers pay their fair share of the labor organization's costs of "performing the duties of an exclusive representative of the employees in dealing with the employer on labor management issues," and the nonmembers' residual statutory right not to participate entitles them to refuse payment of more than their fair share of such expenses.
The court pointed out that any employee who wishes to abstain from participation must affirmatively do so or else be deemed to waive any objection. The court concluded that any uses permitted by the EERA are constitutional; therefore, the petitioner’s constitutional rights had not been violated. Furthermore, the court declared that under the EERA, enforcement of the organizational security agreement was proper.

Asserting that the EERA had expanded its definition of “employee organization” to include persons authorized to act on the organization’s behalf, the court held that the union could permit an affiliate to conduct its representative obligations, and an affiliate may therefore spend a nonmember’s service fee. As to the burden of proof of the expenditure, the union must provide an accounting of the nonmember’s service fee in order to afford the employee with safeguards for their constitutional rights.

In dissent, Justice Mosk interpreted the EERA to allow the application of service fees for a broader range of representational activities. He concluded that nonmember fees could be used for lobbying and ballot proposition campaigns so long as the end result was the improvement of employee welfare. Justice Arguelles also dissented, and reasoned that to preclude a union from collecting nonmember’s service fees for lobbying activities is an inaccurate interpretation of the EERA. Rather, he believed that the EERA does not contain service fee limitations because both members and nonmembers are benefitted by a union’s employment-related legislative lobbying.

17. Id. at 590, 778 P.2d at 183, 262 Cal. Rptr. at 55 (citing Teachers v. Hudson, 475 U.S. 292, 310 (1986)) (nonmembers must be given information about union expenditures, an opportunity to challenge the amount of his or her financial obligation to the union before an impartial decision-maker, and protection in the form of an escrow of amounts reasonably in dispute while such challenges are pending).

18. Id. at 595, 778 P.2d 186, 262 Cal. Rptr. at 58.

19. Id. at 606, 778 P.2d at 194, 262 Cal. Rptr. at 66.

20. Id. at 604, 778 P.2d at 192, 262 Cal. Rptr. at 64.

21. Id. at 605, 778 P.2d at 193, 262 Cal. Rptr. at 65 (citing Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 306 (1985)) (union carries the burden of persuasion). “The nonmember’s burden is simply the obligation to make his objection known.” Teachers, 475 U.S. at 306 n.16.

22. Id. at 609-10, 778 P.2d at 194-95, 262 Cal. Rptr. at 66-67 (Mosk, J., dissenting).

23. Id. (Mosk, J., dissenting).


25. Id. at 612, 778 P.2d at 197-98, 262 Cal. Rptr. at 69-70 (Arguelles, J., dissenting).
III. IMPACT

Cumero upholds the legislative intent of the EERA to prevent the possibility of “free-riders,” while maintaining every individual’s freedom to decide not to join a union because of his own individual beliefs. To continue to allow the mandatory service fee deduction is justified because many of the union’s efforts benefit members and nonmembers alike, to say nothing of collection expenses that would occur were the union not allowed to take an involuntarily deduction. The court has left unresolved the potential conflict that future dissatisfied nonmember employees will argue arises from the general concept of “within scope of employment.” This term is clearly very broad, thereby permitting a scope of union activities beyond that which is strictly for employee welfare. More exact statutory guidelines could prevent future litigation in regard to this issue.

CALIFORNIA SURVEY STAFF

C. The Agricultural Labor Relations Board may reopen a case and consider vacating its order in a case that is not yet final when there has been an intervening change in the controlling rules of law: George Arakelian Farms v. Agricultural Labor Relations Board.

In George Arakelian Farms v. Agricultural Labor Relations Board1 (Arakelian II), the California Supreme Court2 held that finality for purposes of appellate review of interlocutory orders decided pursuant to section 1160.8 of the Labor Code3 is not the same as finality for

1. 49 Cal. 3d 1279, 783 P.2d 749, 265 Cal. Rptr. 162 (1989) [hereinafter Arakelian II]. On remand, the Agricultural Labor Relations Board [hereinafter the Board] denied an employer’s motion to reopen George Arakelian Farms v. A.L.R.B., 49 Cal. 3d 654, 710 P.2d 288, 221 Cal. Rptr. 488 (1985) [hereinafter Arakelian I], where the California Supreme Court had previously affirmed the Board order imposing make-whole relief, a compensatory remedy that places employees in the same position that they would have been in had there not been a bad faith delay in the collective bargaining process, against the employer due to his “technical” refusal to bargain with the employee’s labor union. In Arakelian II, the employer sought to have the case reopened in light of Dal Porto v. A.L.R.B., 191 Cal. App. 3d 1195, 237 Cal. Rptr. 206 (1987), which dealt with an employer’s failure to reach a contract with the employees’ union in the context of surface bargaining. In Dal Porto, the court of appeals annulled the Board’s order and remanded the case.

2. Justice Mosk authored the majority opinion, in which Chief Justice Lucas and Justices Panelli and Eagleson concurred. A separate concurring opinion was written by Justice Kennard, in which Justice Broussard concurred. A dissenting opinion was written by Justice Agliano, the presiding justice for the Court of Appeal for the Sixth District.

3. Section 1160.8 of the Labor Code states in pertinent part:

   Any person aggrieved by the final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the court of appeal having jurisdiction over the county wherein the unfair labor practice in question was alleged to have been engaged in. . . . The court shall

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purposes of res judicata. Therefore, the court concluded that the Board could consider vacating a previous order, that is not final, if there has been a change in the controlling rule of law. However, the court further held that decisions which apply to surface bargaining cases are not controlling when applied to cases involving a "technical" refusal to bargain.

In reaching its decision, the court focused on the Board’s bifurcated process for analyzing unfair labor claims, a process which has both a liability and compliance phase. The court determined that the make-whole order was interlocutory in nature since it established liability, but the determination as to the amount of liability was postponed. Based upon this foundation, the court then held that its previous decision in Arakelian I, which affirmed the Board’s make-whole order, was merely an affirmation of an interlocutory order after the liability phase. Thus, the plaintiff in Arakelian II was not precluded by res judicata from introducing intervening changes in the controlling rule of law before the compliance phase of the case.
was completed.13

However, the court went on to state that agencies are not free to act inconsistently with court orders and, absent unusual circumstances, the decisions of reviewing courts are binding upon such agencies in all further proceedings.14

The court also stated that this holding applies only to situations in which the controlling rules of law have changed and that not all changes in the law can act as rationalizations for agencies to disregard the established law in the case.15 Regarding the case at hand, the court carefully read Dal Porto16 and determined that it should not be applied to cases involving a “technical” refusal to bargain because surface bargaining cases are distinguished17 and require different procedures for evaluating the employer’s inappropriate conduct than “technical” refusal cases.18 The court then lauded the Board’s refusal to accept Dal Porto as controlling, when “technical” bargaining violations are considered, and upheld the Board’s order which denied Arakelian’s motion for reconsideration.19

The court was correct in characterizing the make-whole order as interlocutory in nature. As a result, the Board may now set aside an order if there has been a change in the controlling rule or law without going through another court proceeding. At the same time, the court has allowed the litigant an opportunity to benefit from a change in the controlling law before his case is finally decided.

The problem, however, arises in the procedure by which the Board decides cases. By bifurcating the proceeding, a skillful attorney or litigious party is given ample opportunity to appeal every step of the

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13. Arakelian II, 49 Cal. 3d at 1289-90, 783 P.2d at 755-56, 265 Cal. Rptr. at 168-69 (1989). The court also stated that “finality for purposes of appellate review is not the same as finality for purposes of res judicata.” Id. at 1290, 783 P.2d at 756, 265 Cal. Rptr. at 169. See also RESTATEMENT (SECOND) OF JUDGMENTS § 13 comment b (1982) (the fact that a lower court order may be reviewable by interlocutory appeal does not mean that the order is final for purposes of res judicata).

14. Arakelian II, 49 Cal. 3d at 1291, 783 P.2d at 756, 265 Cal. Rptr. at 169. The court stated that “[i]t is inherent in our system of judicial review of agency adjudication that once a court has passed on a question of law in its review of agency action, the agency cannot act inconsistently with the court’s orders.” Id. (citing American Farm Lines v. Black Ball, 397 U.S. 532, 541 (1970)).

15. Arakelian II, 49 Cal. 3d at 1292-93, 783 P.2d at 757, 265 Cal. Rptr. at 170.


17. Arakelian II, 49 Cal. 3d at 1292-93, 783 P.2d at 757, 265 Cal. Rptr. at 170. For example, in surface bargaining cases, the employer can present evidence of actual negotiations to show that the collective bargaining would have been futile despite the employer’s wrongful conduct. On the other hand, in “technical” refusal cases, any evidence that the parties would have not entered into an agreement would be speculative since no collective bargaining took place. Id.


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proceeding several times before a final decision is made. Nowhere is this more clear than in Arakelian II, a case which has already undergone thirteen years of litigation. A possible alternative might be for the Board to combine the liability and compliance phases into one proceeding, thereby giving the litigant one chance to appeal the Board's decision.

DANIEL RHODES

D. The recipient of welfare benefits may assert the defense of equitable estoppel in an administrative hearing in which the government seeks recoupment of overpayment: Lentz v. McMahon.

In Lentz v. McMahon, the California Supreme Court unanimously held that the defense of equitable estoppel may be asserted by a welfare recipient at Department of Social Services ("DSS") hearings. The court determined that the defense is available in judicial proceedings if the circumstances of overpayment meet the four general requirements of equitable estoppel and pass the "application of estoppel to government" test set out in City of Long Beach v. Mansell.


2. Id. at 407, 777 P.2d at 91, 261 Cal. Rptr. at 318. In Lentz, three recipients of welfare benefits were notified that they had received excess payments. At the hearings, the judge applied the doctrine of equitable estoppel barring the county welfare department from collecting the overpayment. Prior to 1983, estoppel was generally imposed to alleviate the harsh results caused by collecting overpayments when such overpayments were caused by agency error. In 1983, the director of the DSS changed the policy by stating that "equitable remedies are not appropriate in administrative hearing decisions." Id. at 397, 777 P.2d at 84, 261 Cal. Rptr. at 311. The director of DSS changed the decisions of the hearing judge to conform with the new policy. The trial court held in favor of the welfare recipients, but the court of appeal reversed, holding that the application of equitable estoppel would violate the "separation of powers" clause of CAL. CONST. art. III, § 3 and the "reservation of judicial powers to the courts" clause of CAL. CONST. art. VI, § 1. Id., at 397-98, 777 P.2d at 85, 261 Cal. Rptr. at 312.

3. Lentz, 49 Cal. 3d at 399, 777 P.2d at 85, 261 Cal. Rptr. at 312.

   (1) [T]he party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to this injury.

   Id. (quoting City of Long Beach v. Mansell, 3 Cal. 3d 462, 489, 476 P.2d 423, 442, 91 Cal. Rptr. 23, 42 (1970)).

4. Id. at 400, 777 P.2d at 86, 261 Cal. Rptr. at 313. In Mansell, the court adopted a balancing approach to determine the appropriateness of applying equitable estoppel to actions involving the government. Mansell, 3 Cal. 3d at 496-97, 476 P.2d at 449, 91 Cal. Rptr. at 49. The court will apply estoppel if "the injustice which would result from a

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After determining that estoppel may be appropriately raised against welfare agencies, the court decided that the defense is also available during the administrative hearing as opposed to preclusion of the defense prior to resolution at a judicial proceeding. In reaching this conclusion, the court determined that neither the state constitution nor the applicable statutes precluded the use of equitable remedies in administrative hearings.

In determining that, under certain circumstances, equitable estoppel is an appropriate defense against a welfare agency, the court looked to previous decisions in which equitable estoppel was applied in a variety of contexts to the government, and to the reasoning of the court of appeal in *Canfield v. Prod.* Relying on its decision in *Woods v. Superior Court* as well as an analysis of the statutory scheme of the welfare system, the Supreme Court held that a claim

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5. *Lentz,* 49 Cal. 3d at 401-02, 777 P.2d at 87, 261 Cal. Rptr. at 314.
6. *Id.* at 404, 777 P.2d at 89, 261 Cal. Rptr. at 316.
7. *Id.* at 407, 777 P.2d at 91, 261 Cal. Rptr. at 318.
8. *Id.* at 401-02, 777 P.2d at 87, 261 Cal. Rptr. at 314. Equitable estoppel is appropriately asserted against a welfare agency when "a government agent has negligently or intentionally caused a claimant to fail to comply with a procedural precondition to eligibility, and the failure to invoke estoppel would cause great hardship to the claimant." *Id.* (emphasis in original). The court specifically left open the question of substantive preconditions to eligibility. *Id.* at 402, 777 P.2d at 87-88, 261 Cal. Rptr. at 314-15.
10. 67 Cal. App. 3d 722, 137 Cal. Rptr. 27 (1977). Prior to *Lentz,* the court of appeal was the highest California court to address the issue of estoppel in the context of public assistance. The supreme court adopted the *Canfield* reasoning for three reasons: Welfare benefits are intended to provide for basic necessities. A confidential relationship exists between the welfare workers and the welfare recipients. Justifiable reliance by the recipient on a representation of the welfare worker could cause "compelling hardship." *Lentz,* 49 Cal. 3d at 400-01, 777 P.2d at 87, 261 Cal. Rptr. at 314. Addressing the policy issue, the court found that applying estoppel against a welfare agency's assertion that the recipient failed to meet procedural preconditions for eligibility, when such failure was caused by agency error, would not undermine any "underlying statutory policy of safeguarding accurate and orderly administration of the welfare system." *Id.* at 401, 777 P.2d at 87, 261 Cal. Rptr. at 314.
11. 28 Cal. 3d 668, 620 P.2d 1032, 170 Cal. Rptr. 484 (1981). In *Woods,* the court held that an applicant's challenge to the validity of certain regulations at the DDS hearings furthered the twin goals of avoiding both delay as well as unnecessary expenses of judicial proceeding. *Id.* at 680-81, 620 P.2d at 1038-39, 170 Cal. Rptr. at 490.
of equitable estoppel may be considered at the DSS hearings.13

DSS argued that application of equitable estoppel constituted "judicial power" within the meaning of article VI, section 1 and article III, section 3 of the California Constitution,14 and that such power was reserved to the courts, not to legislatively created administrative agencies.15 The court rejected this contention because it not only ignored the development of administrative law, it also contradicted applicable case law.16

By allowing a welfare recipient to assert equitable estoppel during a DSS hearing, the court advances two important goals. Addressing the estoppel issue at the hearing furthers the statutory mandate of a speedy and informal hearing process.17 This practice in turn promotes judicial economy because it may in fact end the hearing.

JOHN M. BOWERS

E. An administrative agency may hold hearings, resolve complaints, and award restitutive damages without violating the judicial powers clause, so long as substantive and procedural limitations are respected: McHugh v. Santa Monica Rent Control Board.

I. INTRODUCTION

In 1939, the California Supreme Court, in Jersey Maid Milk Products Co. v. Brock,1 held that the power of an administrative agency to hear and resolve disputes, and to award damages, violated the judicial powers clause of the California Constitution.2 Forty years later, the

13. Id. at 404, 777 P.2d at 89, 261 Cal. Rptr. at 316.
14. CAL. CONST. art VI, § 1 states in pertinent part: "The judicial power of this state is vested in the Supreme court, courts of appeal, superior courts, municipal courts, and justice courts." CAL. CONST. art. III, § 3 states: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."
15. Lentz, 49 Cal. 3d at 405, 777 P.2d at 89-90, Cal. Rptr. at 316-17.
17. See CAL. WELF. & INST. CODE §§ 10952, 10955.
1. 13 Cal. 2d 620, 91 P.2d 577 (1939).
2. Id. at 651-52, 659, 91 P.2d at 594-98. The court ruled against the constitutionality of the Milk Stabilization Act, which permitted the Director of Agriculture to set minimum prices for milk, to hear and resolve disputes, and to award damages. For the relevant text of the judicial powers clause see infra note 8.
City of Santa Monica passed the Santa Monica Rent Control Charter Amendment (Charter Amendment). This initiative gave the Santa Monica Rent Control Board (the Board) the authority to set rent controls, adjudicate complaints, and order relief. Recently, in McHugh v. Santa Monica Rent Control Board, a landlord-plaintiff relied on Jersey Maid Milk as authority to contend that the Board's remedial powers violated the judicial powers clause of the California Constitution. The supreme court declined to follow Jersey Maid Milk, holding instead that article VI, section 1, of the California Constitution generally permits an agency such as the Board to hear and resolve disputes and award restitutive damages. However, the court did hold that the Board's power to award treble damages and to authorize the withholding of future rent payments violated the


4. Id. For general constitutional requirements of rent control ordinances, see 42 CAL. JUR. 3D, Landlord and Tenant, § 141 (1978 & Supp. 1989).


6. McHugh, 49 Cal. 3d at 358, 777 P.2d at 96, 261 Cal. Rptr. at 323.

7. The court justified its decision by noting the cursory treatment the issue received from the Jersey Maid Milk court, and reasoned that strict adherence to the fifty-year-old decision would place California behind in the treatment given to administrative agencies by other states. Id. at 358, 777 P.2d at 96-97, 261 Cal. Rptr. at 323-24.

8. The judicial powers clause currently provides that: "The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts. All . . . courts are courts of record." CAL. CONST. art. VI, § 1.

9. McHugh, 49 Cal. 3d at 375, 777 P.2d at 108-10, 361 Cal. Rptr. at 335-36. The Board found that one tenant had been overcharged in the amount of $816.00 and that the other tenant was overcharged by $470.50. Id. at 354, 777 P.2d at 94, 261 Cal. Rptr. at 321. See also McKee v. Bell-Carter Olive Co., 186 Cal. App. 3d 1230, 1238, 231 Cal. Rptr. 304, 308-09 (1986), which upheld the power of the Director of the Bureau of Marketing Enforcement to condition the suspension of a processor's license upon payment of restitution.

10. The Charter Amendment provided in pertinent part:

A landlord who [violates the rent control regulation] shall be liable . . . to the tenant . . . for reasonable attorney's fees and costs as determined by the court, plus damages in the amount of five hundred dollars ($500) or three (3) times the amount by which the payment . . . received or retained exceeds the maximum lawful rent, whichever is the greater. McHugh v. Santa Monica Rent Control Bd., 49 Cal. 3d 348, 353, 777 P.2d 91, 93, 261 Cal. Rptr. 318, 320 (1989). This subdivision has since been amended to allow for treble damages only in a court action, while a penalty is allowed only in an administrative proceeding. See id. at 354 n.2, 777 P.2d at 93 n.2, 261 Cal. Rptr. at 320 n.2.

11. The Charter Amendment stated: "In lieu of filing a civil action as provided . . . the Board shall establish by rule and regulation a hearing procedure [to determine claimed violations of the regulatory system.] After said determination, the tenant may deduct the penalty from future rent payments in the manner provided by the Board." McHugh, 49 Cal. 3d at 354, 777 P.2d at 93, 261 Cal. Rptr. at 320.

In McHugh, the Board had authorized one of the tenants to withhold rent and ruled
II. TREATMENT

To comply with the judicial powers clause, the supreme court, in *McHugh*, set forth both substantive and procedural limitations that an administrative agency exercising remedial powers must respect. The substantive limitation requires that the powers be "reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes." To this end, the remedial power must be authorized by legislation or statute and be incidental to the agency's regulatory purpose. The procedural limitation requires that the enforcement scheme respect the "principle of check." That is, "the 'essential' judicial power [must remain] ultimately in the courts, through review of agency determinations." The court also believed that so long as the substantive limitations required by the judicial powers clause are met, the remedial powers of an administrative agency would not violate the constitutional right to a trial by
In a separate concurring opinion, Justice Panelli emphasized that the issue of whether an award of general compensatory damages would violate the judicial powers clause was not decided. He stated, however, that general compensatory damages would trigger the right to a jury trial because of the substantial private interest in remuneration involved.

Justice Broussard agreed with the majority’s limitations on an administrative agency’s power to adjudicate matters. Contrary to the majority, however, he maintained that these limitations should permit the Board to award treble damages because judicial review would resolve the majority’s concern that treble damages present a high risk of arbitrariness. He also argued that an agency such as the Board could authorize immediate withholding of rent prior to judicial review, because immediate withholding of rent is no different than orders by other administrative agencies which call for immediate compliance.

III. CONCLUSION

In McHugh, the court set forth both substantive and procedural limitations on an administrative agency’s power to adjudicate, while holding that an agency may constitutionally award restitutive, but not treble, damages. The issue of whether an agency may order penalties or small punitive damages was not considered, but the court did note that both of these types of damages have been upheld in other states and in the federal courts. By discarding Jersey Maid Milk, the court in McHugh began to clarify the extent to which administrative agencies may expand their adjudicative powers.

Although far from a total abdication of control, the court relaxed the strictures governing the constitutional limits of administrative power. While this is indeed in line with both state and federal principles concerning such power, Justice Panelli’s concerns over the breadth of the McHugh holding are noteworthy. Whether the court will uphold broader agency attempts to adjudicate compensatory or

18. Id. at 379-80, 777 P.2d at 111-12, 261 Cal. Rptr. at 338-39.
19. Id. at 386-87, 777 P.2d at 117, 261 Cal. Rptr. at 344 (Panelli, J., concurring).
21. Id. at 386, 777 P.2d at 118, 261 Cal. Rptr. at 345 (Broussard, J., concurring and dissenting).
22. Id. at 390, 777 P.2d at 119, 261 Cal. Rptr. at 346 (Broussard, J., concurring and dissenting). See also supra note 15.
23. McHugh, 49 Cal. 3d at 391-92, 777 P.2d at 120-21, 261 Cal. Rptr. at 347-48 (Broussard, J., concurring and dissenting).

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punitive claims remains to be seen. State administrative agencies are likely to extend their power to constitutional limits, resulting in expanded adjudicatory roles. Therefore, though the court departed from its New Deal-era precedent of *Jersey Maid Milk*, should administrative agencies attempt to flex broad adjudicative muscle, the court can rein in this power.

BARRY J. REAGAN

F. The Tanner Act neither repeals nor preempts local air pollution control district emissions regulations, and assigning a local air pollution control officer to draft a proposed list of toxins to be regulated does not constitute an impermissible delegation of rule-making authority: *Western Oil & Gas Association v. Monterey Bay Unified Air Pollution Control District*.

I. INTRODUCTION

In *Western Oil & Gas Ass’n v. Monterey Bay Unified Air Pollution Control Dist.*,1 the California Supreme Court considered a petroleum industry charge that the Tanner Act,2 codified as Health and Safety Code sections 39650-39674,3 had either repealed or preempted an air pollution control district (APCD) local rule4 regulating stationary source air pollution.5 The plaintiff also argued that the APCD had

2. The plaintiff, a petroleum industry trade association, changed its name during this litigation from Western Oil & Gas Association to Western States Petroleum Association. *Id.* at 411 n.1, 777 P.2d at 158 n.1, 261 Cal. Rptr. at 385 n.1.
4. *CAL. HEALTH & SAFETY CODE* §§ 39650-39674 (Deering 1986 & Supp. 1990). The statutes direct several state agencies to collaborate in a complex procedure for identifying and regulating toxic air contaminants. *See id.* Local air pollution control districts are specifically given the power to establish standards higher than the state minimums set pursuant to these statutes. *Western Oil*, 49 Cal. 3d at 414, 777 P.2d at 160, 261 Cal. Rptr. at 387 (quoting *CAL. HEALTH & SAFETY CODE* § 39666(d) (Deering 1986)).
5. *MONTEREY BAY UNIFIED AIR POLLUTION CONTROL DISTRICT Rule 1000* (1986). This rule places a number of pollution restrictions on new or modified nonvehicular pollution sources. The regulations take effect upon application for a construction or operation permit. The district adopted its air pollution control officer’s list of more than 148 carcinogens or other toxins, all of which the state considered to be hazardous workplace substances. *Western Oil*, 49 Cal. 3d at 415, 777 P.2d at 160-61, 261 Cal. Rptr. at 387-88 (construing *MONTEREY BAY VERIFIED AIR POLLUTION CONTROL DISTRICT Rule 1000*).
6. After enactment of the local rule, the plaintiff sought a writ of mandate and declaratory relief in the superior court. After both parties moved for summary judg-
impermissibly delegated its rule-making power to the pollution control officer who drafted the list of controlled emissions. Because the majority of nonvehicular air pollution restrictions are written and enforced by APCD’s, the defendant’s position would have led to a virtual elimination of such controls in California. The supreme court ruled that the Tanner Act did not preclude local air pollution controls, and declared that APCD’s could identify and regulate pollutants which were not state-designated toxins under the Act. The court also concluded that the APCD had not improperly given rule-making authority to its pollution control officer.

II. THE COURT’S DECISION

In Western Oil, the court asserted that APCD’s had been charged with regulating air pollution since the passage of California’s first broad pollution control act in 1947. The plaintiff contended that the Tanner Act repealed authority by implication. The court stressed a strong presumption against implied repeal, particularly when the original law benefits the public and has been widely understood and followed. Implied repeal requires a showing of “no possi-

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7. Id. at 412, 777 P.2d at 163, 261 Cal. Rptr at 388-89.
9. Western Oil, 49 Cal. 3d at 426, 777 P.2d at 168, 261 Cal. Rptr at 395.
10. Id. at 429, 777 P.2d at 170, 261 Cal. Rptr at 377.
11. Id. at 417-19, 777 P.2d at 162-63, 261 Cal. Rptr at 389-90. See 1947 Cal. Stat. 632. See also Western Oil & Gas Ass’n v. Air Resources Bd., 37 Cal. 3d 502, 520-21, 691 P.2d 606, 617, 208 Cal. Rptr. 850, 861 (1984) (discussion of long history of local pollution control); Orange County Air Pollution Control Dist. v. Public Util. Comm’n, 4 Cal. 3d 945, 948, 484 P.2d 1361, 1363, 95 Cal. Rptr. 17, 19 (1971) (APCD is “the agency charged with enforcing both statewide and district emission controls.”).
bility of concurrent operation” of the laws, and “undebatable
evidence” of legislative intent to repeal the prior act.14 The court
found no impediment to concurrent operation as long as APCD rules
were not less stringent than state standards.15 Furthermore, the
court’s reading of the Tanner Act found a legislative intent to retain,
rather than eliminate local controls. An avowed purpose of the Act
is to “create a program . . . which complements existing authority.”16
Rapid action to reduce pollution, another of the Act’s goals, would be
defeated by dismantling the extensive network of local controls
pending enactment of state regulations.17 The court, therefore, found
no implied repeal.18

The court then turned to the plaintiff’s alternative argument that
the Tanner Act preempted local pollution control prior to state iden-
tification and regulation of toxins.19 As the Act does not expressly
preempt local rules, the court reiterated three tests for implied pre-
emption: (1) the subject has been completely covered by state law
and is clearly a matter for exclusive state control; (2) the subject has
been partially covered by state law in terms that clearly indicate a
paramount state concern that bars additional local action; or (3) the
subject has been partially covered by state law, and the local ordi-
nance places a burden on transient citizens that outweighs any bene-
fit to the locality.20 The court emphasized that implied preemption is
not easily demonstrated, particularly in light of the “long tradition of
local regulation” to protect public health and safety.21 In response to
the plaintiff’s claim that state law completely covered the subject
matter, the court acknowledged the Tanner Act’s comprehensive

14. Western Oil, 49 Cal. 3d at 420, 777 P.2d at 164, 261 Cal. Rptr. at 391 (quoting
Hays v. Wood, 25 Cal. 3d 772, 784, 603 P.2d 19, 24, 160 Cal. Rptr. 102, 107 (1979)) (em-
phasis omitted).
15. Id.
16. Id. at 421, 777 P.2d at 164, 261 Cal. Rptr. at 391 (quoting CAL. HEALTH &
SAFETY CODE § 39650(l)(Deering 1986)).
17. Id. at 421, 777 P.2d at 164-65, 261 Cal. Rptr. at, 391-92.
18. Id. at 419-22, 777 P.2d at 163-66, 261 Cal. Rptr. at 390-93. The Act’s objective of
using “the best available scientific evidence” does not mandate the elimination of ex-
isting standards prior to achieving this goal. Id. at 422, 771 P.2d at 165, 261 Cal. Rptr. at
392 (quoting CAL. HEALTH & SAFETY CODE § 39650(d) (Deering 1986)).
19. Id. at 423, 777 P.2d at 166, 261 Cal. Rptr. at 393. Statutes on the same topic
should be harmonized, if possible. See 82 C.J.S. Statutes § 366 (1953 & Supp. 1989); 45
20. Western Oil, 49 Cal. 3d at 423, 777 P.2d at 166, 261 Cal. Rptr. at 393 (quoting People ex rel. Deukmejian v. County of Mendocino, 36 Cal. 3d 476, 485, 683 P.2d 1150,
1155-56, 204 Cal. Rptr. 897, 902-03 (1984).
21. Id., at 424, 777 P.2d at 166, 261 Cal. Rptr. at 393 (quoting People ex rel.
Deukmejian, 36 Cal. 3d 476, 484, 683 P.2d 1150, 1135, 204 Cal. Rptr. 897, 902).
scope. However, in rejecting the preemption claim, the court stated that the Act was intended to create a "safe minimum level of protection throughout the state" as quickly as possible. Because the Act contained no provisions for interim regulation during its lengthy process of investigating and identifying toxins, the court concluded that the legislature intended APCD rules to protect the public before, as well as after, state identification of toxins.

Finally, the plaintiff accused the APCD of improperly delegating its rule-making authority to the pollution control officer who had compiled the local rule's list of toxins. The court ruled against this charge, explaining that the officer had merely helped prepare a proposed rule that was later adopted by the APCD. Even if the compilation of the list by the officer had been improper, the APCD adopted and ratified his acts when the rule was enacted.

III. CONCLUSION

In summary, the court found no repeal or preemption of APCD authority by the Tanner Act, and no improper delegation of the APCD's rule-making powers. The court upheld the local rule, as well as the APCD's authority to identify and regulate nonvehicular air pollution.

The court's unanimous decision to uphold the local rule reflects

22. Id. at 423, 777 P.2d at 166, 261 Cal. Rptr. at, 393 (1989).
23. Id. at 424, 777 P.2d at 166, 261 Cal. Rptr. at 393. The court observed that the agency charged with administering the Tanner Act, the state Air Resources Board, had repeatedly asserted that the Act neither repealed nor preempted local controls. The court also noted that the agency's construction of its principal statute should be given great deference. Id. at 425, 777 P.2d at 167, 261 Cal. Rptr. at 394 (quoting Western Oil & Gas Ass'n v. Air Resources Bd., 37 Cal. 3d 502, 520, 691 P.2d 606, 617, 308 Cal. Rptr. 850, 861 (1984)). See also 73 AM. JUR. 2D Statutes § 168 (1974 & Supp. 1989).
25. Western Oil, 49 Cal. 3d at 427, 777 P.2d at 168-69, 261 Cal. Rptr. at 395-96.
26. Id. at 427, 777 P.2d at 169, 261 Cal. Rptr. at 396. The plaintiff accused the pollution control officer of rule-making without public notice. The court dismissed this theory by pointing out that the list had been attached when the local rule was proposed, and thus had been subject to review when the rule was enacted. Id.
27. Id. at 427-28, 777 P.2d at 169-70, 261 Cal. Rptr. at 396-97 (1989). See California School Employees Ass'n v. Personnel Comm'n, 3 Cal. 3d 139, 145, 474 P.2d 436, 439, 89 Cal. Rptr. 620, 623 (1970) ("an agency's subsequent approval or ratification of an act delegated to a subordinate validates the act, which becomes the act of the agency itself"). The court did not decide the plaintiff's contention that any future additions by the officer to the list of toxins would be improper, finding it a premature challenge to a situation that might never arise. Western Oil, 49 Cal. 3d at 428, 777 P.2d at 169-70, 261 Cal. Rptr. at 396-97.
28. Id. at 429, 777 P.2d at 170, 261 Cal. Rptr. at 397.
the seriousness of the public health risk created by air pollution.\textsuperscript{29} Although the legislature intended the Tanner Act to address this peril, its procedures are so cumbersome that the state identified only nine airborne toxins during the six-year period between the Act's passage and the resolution of this case.\textsuperscript{30} The local rule challenged in Western Oil listed 139 additional carcinogens or toxins.\textsuperscript{31} Clearly, an elimination of APCD regulations statewide would not have advanced the Tanner Act's goal of reduced emissions. By supporting local pollution regulation, the court voted against changing air quality from bad to worse.

**ROBERT J. MILLS**

II. CONSTITUTIONAL LAW

A. An employer may not assert the fourth or fifth amendment as a defense to an administrative subpoena \textit{duces tecum} for records of a kind which all employers are required by law to maintain: Craib v. Bulmash.

In Craib v. Bulmash,\textsuperscript{1} the California Supreme Court unanimously agreed that a subpoena issued by the California Labor Commission (the "Commission") does not constitute an unreasonable search or seizure and that the standard of "probable cause" required for criminal subpoenas is inapplicable.\textsuperscript{2} However, by a narrow 4-3 vote,\textsuperscript{3} the

\begin{itemize}
  \item \textsuperscript{29} See id. at 426 & n.17, 777 P.2d at 168 & n.17, 261 Cal. Rptr. at 395 & n.17. See generally Slawson, The Right To Protection From Air Pollution, 59 S. CAL. L. REV. 672 (1986).
  \item \textsuperscript{30} Western Oil, 49 Cal. 3d at 414, 777 P.2d at 160, 261 Cal. Rptr. at 387. The court pointed to inorganic arsenic as an example of the state program's slow pace: After four years of work, the state was still unable to identify the substance as a toxin. \textit{Id.}
  \item \textsuperscript{31} \textit{Id.} at 415, 777 P.2d at 161, 261 Cal. Rptr. at 388. See supra note 5.
  \item 1. 49 Cal. 3d 475, 777 P.2d 1120, 261 Cal. Rptr. 686 (1989). Bulmash was served with a subpoena \textit{duces tecum} ordering him to appear before the Division of Labor Standards Enforcement ("the Division") and to produce time and wage records as well as names and addresses for all persons employed by a trust for which he was the trustee. Bulmash failed to appear and the Division sought enforcement of the subpoena in superior court. Bulmash contended that the subpoena constituted an unreasonable search and seizure because it was not based on probable cause. The trial court disagreed and ordered Bulmash to appear. The court of appeal reversed the order stating that "because 'criminal' sanctions could be imposed for certain wage and hour violations, the subpoena was a 'search' for criminal 'evidence' which must meet the standards applicable to search warrants." \textit{Id.} at 480, 777 P.2d at 1123, 261 Cal. Rptr. at 689.
  \item 2. \textit{Id.} at 485 n.12, 777 P.2d at 1127 n.12, 261 Cal. Rptr. at 693 n.12. See generally Annotation, The Supreme Court and Administrative Subpoenas, 78 L. Ed. 2d 940 (1985); Annotation, Supreme Court's Views as to Application of Fourth Amendment

drafted for this context.
court held that there is no reasonable expectation of privacy in records statutorily required to be kept and maintained by an employer.4

In deciding the fourth amendment issue, the court relied on the United States Supreme Court's decision in Oklahoma Press Publishing Co. v. Walling,5 which set forth a test to determine the "reasonableness" of an administrative subpoena.6 Under that test administrative subpoena is reasonable if: (1) the investigation is for a "lawfully authorized purpose"; (2) the documents sought are relevant to the investigation; and (3) the documents are reasonably specified in the subpoena.7 After concluding that the Commission's subpoena met the requirements of the Oklahoma Press Publishing test, the California Supreme Court held that the fourth amendment does not protect an employer from an administrative subpoena for the production of records lawfully required to be kept and maintained for the purpose of agency inspection.8

In deciding the fifth amendment issue, the court began its analysis by noting a line of United States Supreme Court decisions, beginning with Shapiro v. United States,9 which created the "required records doctrine."10 This doctrine states that the privilege against self-incrimination cannot be asserted with respect to records kept pursuant to law.11 The doctrine was limited in Marchetti v. United States,12

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3. Justice Eagleson authored the opinion of the court, with Chief Justice Lucas, and Justices Panelli and Kennard concurring. Justice Mosk wrote a separate opinion, concurring in the fourth amendment issue and dissenting on the fifth amendment issue, with Justice Broussard concurring. Justice Kaufman also wrote a separate opinion following the reasoning of Justice Mosk.

4. Craib, 49 Cal. 3d at 490, 777 P.2d at 1130, 261 Cal. Rptr. at 696. Although federal constitutional law does not protect the contents of documents or the act of producing those documents under the fifth amendment, the dissenters believed that California's counterpart, CAL. CONST. art. I, § 15, provides greater protection against self-incrimination and thus, "allows [an individual] to refuse to answer any question or to produce any material which may reveal potentially incriminating information." Craib, 49 Cal. 3d at 492, 777 P.2d at 1132, 261 Cal. Rptr. at 698. The dissent also stated that the traditional way to allow the government to compel production of the records, consistent with the California Constitution, is to protect the individual by offering use immunity for the act of production and the contents of the documents. Id.; see Annotation, Supreme Court's Views as to Application of Fifth Amendment Privileges Against Self-Incrimination to Compulsory Production of Documents, 48 L. Ed. 2d 852 (1977 & Supp. 1989); see also 31 CAL. JUR. 3D Evidence § 477 (1976).

5. 327 U.S. 186 (1946).

6. Craib, 49 Cal. 3d at 483, 777 P.2d at 1125, 261 Cal. Rptr. at 691.

7. Id. at 482, 777 P.2d at 1124, 261 Cal. Rptr. at 690 (citing Oklahoma Press Publishing, 327 U.S. at 209).

8. Id. at 485, 777 P.2d at 1127, 261 Cal. Rptr. at 693.


10. Craib, 49 Cal. 3d at 487, 777 P.2d at 1128, 261 Cal. Rptr. at 694.

11. Shapiro, 335 U.S. at 33.

where the Court applied a two-prong test to determine whether the requirement to keep records may be considered compulsion with respect to self-incrimination. The Court concluded that a requirement for keeping and maintaining records is not compelled self-incrimination if: (1) it is imposed in an "essentially noncriminal and regulatory area of inquiry"; and (2) it is not directed at a "selective group inherently suspect of criminal activities." In *Craib*, the California Supreme Court concluded that, because the statutory requirement directing employers to keep records was an "‘appropriate’ subject of a lawful regulatory scheme" and because the statute applies to all employers who are not inherently suspect of criminal activities, the privilege against self-incrimination does not apply to a subpoena for documents required by law to be kept and maintained.

The court's treatment of the reasonableness of an administrative subpoena comes as no surprise. Of significant interest, however, is the court's interpretation of the self-incrimination clause contained in the California Constitution. Traditionally, self-incrimination under this clause has been afforded greater protection than under its federal counterpart. Whether this practice continues to hold true appears open to debate.

JOHN M. BOWERS

B. *A criminal defendant’s right to a jury of the vicinage is satisfied when the jurors are selected from any portion of the county wherein the crime was committed, even if that portion excludes residents of the scene of the crime: Hernandez v. Municipal Court*

The California Supreme Court’s decision in *Hernandez v. Municipal Court* expressly overruled the sixteen-year precedent of *People...*
v. Jones\(^2\) which required that jury panels selected in criminal cases include residents of the superior court judicial district encompassing the location of the crime.\(^3\) The court in Hernandez announced a new vicinage\(^4\) rule, holding that juries may be drawn from anywhere in the county in which the crime was committed.\(^5\)

Defendant Hernandez was convicted by a jury panel summoned and Arguelles (retired, but assigned to this case by the Judicial Council Chairperson) concurred. Justices Mosk and Broussard wrote dissenting opinions.

2. 9 Cal. 3d 546, 510 P.2d 705, 108 Cal. Rptr. 345 (1973). The defendant in Jones asserted that his sixth amendment right to a jury trial (made applicable to the states through the fourteenth amendment) included the right to be tried by a jury selected from residents of the state-drawn district wherein the crime was committed. Id. at 549, 551, 510 P.2d at 707, 709, 108 Cal. Rptr. at 347, 349. Although the court seemed to mandate that all jurors be drawn from that district, it adhered to the principle that if the jury were selected from a larger area, such as the county, such selection would not violate the defendant's constitutional vicinage right provided the selection process did not systematically exclude residents of the district wherein the crime was committed. Id. at 551, 553-54, 510 P.2d at 709-11, 108 Cal. Rptr. at 349-51.

3. 49 Cal. 3d at 729, 781 P.2d at 557, 263 Cal. Rptr. at 523 (Mosk, J., dissenting); see infra note 9. The court in Jones interpreted “district” as necessarily including the location of the crime's commission. 9 Cal. 3d at 554, 510 P.2d at 711, 108 Cal. Rptr. at 351. The concept of vicinage is distinct from the representative cross-section guarantee which ensures that jurors will not be systematically excluded on the basis of race, religion or other association. Id. at 716, 781 P.2d at 548, 263 Cal. Rptr. at 514 n.1. Rather than such a demographic requirement, vicinage is a geographic requirement based on the common law right to a jury drawn from the vicinity or neighborhood wherein the crime occurred. Id.; 47 AM. JUR. 2D Jury § 25 (1969); see BLACK'S LAW DICTIONARY 1405 (5th ed. 1979). This common law right has been constitutionally preserved, but significantly altered, in the wording of the sixth amendment which states in part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .” U.S. CONST. amend. VI.

4. Hernandez, 49 Cal. 3d at 729, 781 P.2d at 557, 263 Cal. Rptr. at 523. The issue in Hernandez centers around the interpretation of the word “district.” The court in Jones interpreted “district” as necessarily including the location of the crime's commission. 9 Cal. 3d at 554, 510 P.2d at 711, 108 Cal. Rptr. at 351. The court in Zicarelli v. Gray, 543 F.2d 466 (1976), and other federal and state courts have interpreted “district” broadly as the federal judicial district, which in some cases encompasses an entire state. Id. at 482. The California Supreme Court concluded in Hernandez that “district” means “county,” including any portion thereof. 49 Cal. 3d at 719, 781 P.2d at 550, 263 Cal. Rptr. at 516; see also 41 CAL. JUR. 3D Jury § 46 (1978 & Supp. 1989) (Vicinage is “the county designated by law as the place of trial;” it is a right belonging to both the defendant and the community). The court reasoned that such a rule better conformed to the historical notions of vicinage and decisions made by other state and federal courts. Id. at 719, 781 P.2d at 550, 263 Cal. Rptr. at 516.

The trial court denied defendant's vicinage motion. The court of appeal reversed, holding that the defendant's vicinage right had been violated because the statute excluded from jury selection residents surrounding the area of the crime. Id. at 718, 781 P.2d at 550, 263 Cal. Rptr. at 516.

In sustaining the conviction, the supreme court unnecessarily limited the defendant's vicinage right. The court could simply have stated that a criminal defendant's vicinage right is not violated when the jurors are selected from within the judicial district of the crime even if the selection process excludes residents surrounding the scene of the crime. Instead, the court expanded the prosecution's freedom to prosecute the defendant in almost any district within the county. See id. at 731, 781 P.2d at 558, 263 Cal. Rptr. at 524 (Broussard, J., dissenting); see also infra note 9.
from the superior court judicial district encompassing the scene of the crime, but no resident was summoned from the exact "location" or "census tract area" in which the crime occurred. The court found no violation of the defendant's sixth amendment right to a jury of the vicinage by such a jury composition. Although the holding in Jones is consistent with this ruling (since the Hernandez jury came from the superior court judicial district surrounding the scene of the crime), the supreme court in Hernandez nonetheless overruled Jones in finding against the defendant. The court reasoned that the vicinage requirement in Jones had been too narrowly construed for three reasons: (1) jurors are no longer allowed to have personal knowledge of the case; (2) they are not required to travel great distances; and (3) a narrow construction unjustifiably restrains the "orderly administration of justice."
Thus the supreme court broadened prosecutorial powers by limiting the criminal defendant's vicinage right. The ruling may permit a defendant who commits a crime in one superior court district to be tried by a jury composed entirely of residents of another superior court district within Los Angeles County even if the two districts have drastically different racial compositions.12

DAWN M. SOLHEIM

C. California Constitution, article I, section 28(d), mandates the court to lower the prosecution's standard of proof to "preponderance of the evidence" when establishing whether a confession is voluntary: People v. Markham.

In People v. Markham,1 the California Supreme Court announced that the state must prove by a "preponderance of the evidence" that a waiver of Miranda2 rights or any subsequent confession or admission was voluntary, knowing, and intelligent.3 The court reasoned that Proposition 8,4 when adopted in 1982, abrogated its prior judicially created standard of "beyond a reasonable doubt."5

Id. at 730-31, 781 P.2d at 558-59, 263 Cal. Rptr. at 524-25 (Broussard, J., dissenting).
3. Markham, 49 Cal. 3d at 71, 775 P.2d at 1047, 260 Cal. Rptr. at 278. The defendant was convicted of robbing a drug store. At the time of his arrest and subsequent interrogation, it appeared that the defendant was under the influence of a depressant drug. Nevertheless, the police informed him of his Miranda rights, which he waived. He later confessed to committing the robbery. The defendant argued that because he was under the influence of a drug, his waiver was involuntary, and the state should have the burden to prove "beyond a reasonable doubt" that his waiver was voluntary. Id. at 66-67 & n.3, 775 P.2d at 1043-44 & n.3, 260 Cal. Rptr. at 274-76 & n.3.
4. See CAL. CONST. art. I, § 28(d). The court called this the "truth-in-evidence law." Id. at 65, 775 P.2d at 1043, 260 Cal. Rptr. at 274. This provision, added to the California Constitution by Proposition 8 in 1982, states:
   (d) Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and postconviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782, or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.
   Id.
5. Markham, 49 Cal. 3d at 70-71, 775 P.2d at 1046-47, 260 Cal. Rptr. at 277-78. See People v. Jimenez, 21 Cal. 3d 595, 580 P. 2d 672, 147 Cal. Rptr. 172 (1978). The issue in Jimenez was one of first impression for the court. Notwithstanding knowledge that the United States Supreme Court embraced the lower standard of preponderance of the evidence, the court still pronounced the higher "beyond a reasonable doubt" standard

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By relying upon two of its earlier decisions interpreting Proposition 8, the supreme court held that the provisions added to the state constitution abrogate any judicially created remedy that has the effect of excluding relevant evidence otherwise admissible under the federal Constitution. Thus, because the higher standard of "beyond a reasonable doubt" results in the exclusion of relevant evidence that would otherwise be admissible under the lower federal standard of "preponderance of the evidence", Proposition 8 overturned the court’s previous, stricter rule.

The Markham holding lowers the standard of proof necessary to determine the voluntariness of a waiver of Miranda rights. Additionally, the court reaffirmed the mandate of Proposition 8 that, absent express statutory authority, California courts may only exclude relevant evidence that would be excluded by the United States Constitution. If California is ever to retrieve its expanded exclusionary rules, it must either wait for a rethinking by the United States Supreme Court, or else wait for two-thirds of the Legislators from


7. Markham, 49 Cal. 3d at 71, 775 P.2d at 1047, 260 Cal. Rptr. at 278. The court in Lance W. examined California's "vicarious exclusionary rule," which provided for the exclusion of all evidence seized in violation of state or federal Constitutions even if a third party's rights were violated. The court held that Proposition 8 abrogated this rule because the federal Constitution requires that one must have "standing" to invoke the exclusionary rule, while California had no such requirement. Lance W., 37 Cal. 3d at 881-87, 694 P.2d at 748-752, 210 Cal. Rptr. at 636-39. The court in May ruled that Proposition 8 abrogated People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976), because that decision did not permit statements obtained in violation of Miranda to be used for impeachment, even though admissible for such a purpose under federal law. May, 44 Cal. 3d at 318-20, 748 P.2d at 312-13, 243 Cal. Rptr. at 374-75. See Harris v. New York, 401 U.S. 222, 225 (1971) (statements obtained in violation of Miranda may be used for impeachment purposes). See generally Gorman, Proposition 8 Comes of Age: An Introduction, 13 W. St. U.L. Rev. 1 (1985); Comment, Proposition 8: California Law After In re Lance W. and People v. Castro, 12 Pepperdine L. Rev. 1059 (1985); Comment, Disbrow Confronts Proposition 8: Will Miranda Violative Statements be Admitted to Trial for Impeachment? 17 Pac. L.J. 1337 (1986).


9. Markham, 49 Cal. 3d at 69-71, 775 P.2d at 1046-47, 260 Cal. Rptr. at 277-78.
both houses\textsuperscript{10} to create stricter exclusionary rules.\textsuperscript{11}

BARRY J. REAGAN

D. Judicial districts are appropriate communities to use when determining the constitutionality of jury pool composition: Williams v. Superior Court.

\textit{Williams v. Superior Court}\textsuperscript{1} involved an appeal to quash venire in a murder trial held in a Los Angeles County judicial district, wherein the percentage of blacks was significantly less than in the county as a whole. The defendant contended that the proportion of black individuals on jury panels in the judicial district was “unconstitutionally underrepresentative” of the racial makeup of the county as a whole.\textsuperscript{2} The supreme court held that the judicial district is an appropriate community for analysis of a constitutional cross-section representation in criminal juries.\textsuperscript{3}

The right to a jury composed of a representative cross-section of the community is established under the Constitutions of both the United States\textsuperscript{4} and California.\textsuperscript{5} According to the court, this right is

\textsuperscript{10} See \textit{supra} note 4.

\textsuperscript{11} Justice Broussard noted that he concurred under compulsion of \textit{May}, discussed \textit{supra} at note 7. \textit{Markham}, 49 Cal. 3d at 71, 775 P.2d at 1047, 260 Cal. Rptr. at 268 (Broussard, J., concurring). Justice Mosk conceded that Proposition 8 mandated the new standard, but he expressed concern over the abridgement of individual rights. \textit{Id.} at 71-73, 775 P.2d at 1047-49, 260 Cal. Rptr. at 278-80 (Mosk, J., concurring).


2. \textit{Id.} at 739, 781 P.2d at 538, 263 Cal. Rptr. at 504. The defendant, a black man, was accused of murdering a white man in the West Superior Court District of Los Angeles County; trial was scheduled in Santa Monica Superior Court. It was presumed that 5.6% of the West Superior Court District was comprised of eligible black jurors, while the county as a whole presumptively contained 11.4% eligible black jurors. \textit{Id.} The defendant sought to transfer the case to either the Central or South Central District, both of which had higher percentages of presumptively eligible black jurors. The motions were denied by the trial court on the basis that jury selection procedures were “fair and reasonable.” \textit{Id.} at 740, 781 P.2d at 538-39, 263 Cal. Rptr. at 504-05. The appellate court denied the defendant’s petition for writ of prohibition and/or mandate on the grounds that the defendant had not made a prima facie showing of systematic underrepresentation, and further held that the community against which to test for underrepresentation was determined by a 20-mile radius from the appropriate courthouse. \textit{Id.} at 740, 781 P.2d at 539, 263 Cal. Rptr. at 505.

3. \textit{Id.} at 739, 781 P.2d at 538, 263 Cal. Rptr. at 504.

4. See \textit{Taylor v. Louisiana}, 419 U.S. 522, 530 (1975) (sixth amendment guarantees jury drawn from representative cross-section of community); see also 41 CAL. JUR. 3D Jury § 50 (1978) (“[T]he Sixth and Fourteenth Amendments of the United States Constitution guarantee a criminal defendant in a state trial the right to be tried by an impartial jury comprising a representative cross section of, and selected from residents of, the judicial district where the crime was committed.”).
fulfilled as long as the jury pool is drawn by random selection from an entire community. The test for discriminatory selection, therefore, requires comparison to “the community.” The court recognized that in the federal system juries may be drawn from subdivisions of federal districts despite the fact that these subdivisions do not conform to the demography of the district as a whole. In O'Hare v. Superior Court, the California Supreme Court previously held that the jury need not be drawn from, nor be representative of, the entire county. Instead, two requirements must be satisfied: (1) the scene of the crime must be included in the community; and (2) no member of the local community may be arbitrarily or unnecessarily excluded. The supreme court in Williams refined O'Hare, and held that judicial districts in the county where the crime occurred were adequate communities for determining the constitutionality of jury pool selection. The court examined the historical pattern of judicial district development and concluded that the legislature intended to create just such a definition of “community.”

This was a sensitive and difficult decision for the court as it recognized both “the practical problems posed by a far-flung megapolis” and the “balkanized” nature of Los Angeles County. Justice Brous-
sard, in a particularly sharp dissent, accused the majority of lacking an awareness of the practical impact on jury venires in this and other recent cases addressing representative juries. Justice Kaufman represented Justice Broussard's personal attack on the majority's motives and, instead, indicated that the court was striving to achieve a workable practice of jury selection wholly devoid of preference to any definable group. There is truth to Justice Kaufman's statement that "justice is not achieved by rules and procedures which sound perfect in theory but are unworkable in practice." The difficulty remains, however, that racism, while neither admired nor encouraged, may yet be practiced, and it is this possibility against which the court must fashion its decisions.

CALIFORNIA SURVEY STAFF

E. A local court rule transferring the duties of the superior court clerk from the county clerk to a court-appointed executive officer is valid under Government Code section 69898; article VI, section 4 of the California Constitution gives the county clerk no right to serve as court clerk, but instead creates an obligation to perform only those duties not otherwise delegated: Zumwalt v. Superior Court.

In Zumwalt v. Superior Court, the California Supreme Court settled a "turf war" between San Diego County's superior court and the petitioner county clerk over control of the superior court clerk's duties. The petitioner attacked a local superior court rule that transfers the court clerk's duties from the county clerk to a court-appointed executive officer pursuant to Government Code section

1. Id. at 750-52, 781 P.2d at 545-47, 263 Cal. Rptr. at 511-13 (Broussard, J. concurring and dissenting).
2. Id. at 747-48, 781 P.2d at 543-44, 263 Cal. Rptr. at 509-10 (Kaufman, J., concurring).
3. Id. at 747, 781 P.2d at 543, 263 Cal. Rptr. at 509 (Kaufman, J., concurring).
4. 49 Cal. 3d 167, 776 P.2d 247, 260 Cal. Rptr. 545 (1989). The majority opinion was written by Justice Eagleson, with a concurring opinion by Justice Kaufman. Justice Mosk wrote a concurring and dissenting opinion, in which Justice Broussard joined.
5. This description was used by the court of appeal below in Zumwalt v. Superior Court, 211 Cal. App. 3d 821, 826, 244 Cal. Rptr. 273, 277 (1988), aff'd, 49 Cal. 3d at 180, 776 P.2d at 255, 260 Cal. Rptr. at 553 (1989).
6. Zumwalt, 49 Cal. 3d at 170-71, 776 P.2d at 248-49, 260 Cal. Rptr. at 546-47. In May 1987, the San Diego Superior Court adopted a local rule under which several court-related duties and court employees were placed under control of a court executive officer. The county clerk, from whom the duties and employees were transferred, sought a writ of mandate to prevent the changes and rescind the rule. The county clerk alleged that the rule impermissibly infringed upon his duties. The court of appeal summarily denied the petition. The state supreme court reviewed the petition and instructed the court of appeal to issue an alternative writ. When the petition was again denied, the supreme court granted review. Id.
California Supreme Court Survey

69898. The supreme court held: (1) California Constitution article VI, section 45 does not create a separate court clerk's office with inherent rights or powers, and (2) as ex officio clerk of the superior court, the county clerk is given the obligation to perform only statutory court-related functions which the legislature has not otherwise delegated. Because all duties of the court clerk are statutory, and can therefore be changed by subsequent legislation, the court found that Government Code section 69898 validly authorizes a superior court to transfer any or all court duties to an executive officer.

In Zumwalt, the petitioner claimed that the state constitution assigned both the office and the “core” duties of the court clerk to the clerk of the county. Because constitutional provisions are

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4. CAL. GOV'T CODE § 69898 (Deering 1989). The statute provides in pertinent part:

(a) Any superior court may appoint an executive officer who shall hold office at the pleasure of the court and shall exercise such administrative powers and perform such other duties as may be required of him by the court. (c) In every superior court having an executive or administrative officer appointed under the provisions of this section ... that officer has the authority of a clerk of the superior court.

Id. (emphasis added).

5. CAL. CONST. art. VI, § 4.


9. Id. at 176-77, 776 P. 2d at 252-53, 260 Cal. Rptr. at 550-51. The petitioner claimed his “core” duties were: “receiving all filings; indexing the court files; maintaining the records of the court; attending all court sessions and making a record of the proceedings in the court minutes; and keeping the seal of the court.” Id. Only the last duty was addressed at length by the court. The opinion pointed out that the California Constitution does not require courts to have a seal, therefore it was impossible that the same constitution could mandate that the county court keep such a seal. The petitioner also insisted that judgments must be authenticated by the county clerk to receive full faith and credit from other jurisdictions. The court disagreed, finding that the county clerk’s authorization would be an acceptable, although not exclusive means, to satisfy the requirements of other jurisdictions. States may adopt their own standards for establishing authenticity of documents. Id. at 177-78, 776 P.2d at 253, 260 Cal. Rptr. at 551 (citing Price v. Price, 4 Ohio App. 3d 217, 447 N.E.2d 769 (1982); Murphy v. Murphy, 581 P.2d 489 (Okla. Ct. App. 1984); Medical Adm’rs, Inc. v. Koger Properties, Inc., 668 S.W.2d 719 (Tex. Ct. App. 1983)). See also 16 CAL. JUR. 3D Courts § 6 (1983 & Supp. 1989); 40 CAL. JUR. 3D Judgments § 316 (1978 & Supp. 1989). Whether or not a document authenticated by the court’s executive officer will satisfy the Federal Rules of Evidence’s admissibility requirements was not a question before the court. Zumwalt, 49 Cal. 3d at 179, 776 P.2d at 254, 260 Cal. Rptr. at 552.
"mandatory and prohibitory," the petitioner argued that any transfer of those duties would be unconstitutional. After examining state constitutional history, the court concluded that while the constitution does establish the county clerk as ex officio clerk of the superior court, the duties of the court clerk have always been assigned by statute. Thus, the court reasoned, because the legislature defines these duties, it may also change or transfer them without violating the constitution. Government Code section 69898 authorizes such transfers, allowing the superior court of each county to appoint an executive officer who will have "the authority of a clerk of the superior court." The local rule in Zumwalt gave the executive officer the duties of the court clerk and other administrative positions closely related to courtroom operation. The court announced that section 69898 allows the complete transfer of a court clerk's duties, and therefore that the local rule was a proper exercise of power granted by the legislature to the court. The supreme court disapproved cases which suggest that a total transfer of duties would lead to a "destruction of the office" of court clerk. The court concluded

12. Id. at 177, 776 P.2d at 253, 260 Cal. Rptr. at 551.
13. Id. at 170 n.1, 776 P.2d at 248 n.1, 260 Cal. Rptr. at 546 n.1 (quoting CAL. GOV'T CODE § 69898). See supra note 4.
14. Zumwalt, 49 Cal. 3d at 170, 776 P.2d at 248, 260 Cal. Rptr. at 546. The petitioner stated that 15 work classifications encompassing 121 employees would be transferred.
15. Id. at 179-80, 776 P.2d at 254-55, 260 Cal. Rptr. at 552-53. Justice Mosk's concurring and dissenting opinion addressed this issue. Justice Mosk felt that the local rule was acceptable because it allowed the county clerk to retain several court related functions. These tasks include maintaining indices of the parties in actions; issuing process, notices, and summons; and accepting papers for filing. Id. at 184, 776 P.2d at 258, 260 Cal. Rptr. at 556 (Mosk, J., concurring and dissenting). However, Justice Mosk disagreed that all court clerk duties could be transferred to an executive officer. He believed that treating the ex officio court clerk clause as a "default provision" would violate the court's duty to give meaning to article VI, section 4, of the constitution. Id. at 182, 776 P.2d at 256-57, 260 Cal. Rptr. at 55 (citing ITT World Communications, Inc. v. City & County of San Francisco, 37 Cal. 3d 859, 867, 693 P.2d 811, 817, 210 Cal. Rptr. 226, 232 (1985)). Based on a technical reading of Government Code section 69898, Justice Mosk argued that the code does not allow all court clerk duties to be transferred: the statute states that a superior court may determine "which" of the court clerk's duties will be transferred, instead of "any" or "all" of them. Zumwalt, 49 Cal. 3d at 183-84, 776 P.2d at 257-58, 260 Cal. Rptr. at 555-56 (Mosk, J., concurring and dissenting) (quoting CAL. GOV'T CODE § 69898(d)). Therefore, Justice Mosk found that the constitution creates a superior court clerk's office that may be diminished but not destroyed. Id.
17. Id. at 180 n.16, 776 P.2d at 255 n.16, 260 Cal. Rptr. at 553 n.16. Price v. Superior Court, 186 Cal. App. 3d 156, 230 Cal. Rptr. 442 (1986) and St. John v. Superior Court, 87 Cal. App. 3d 30, 150 Cal. Rptr. 697 (1978) were disapproved to the extent that they pro-
that the constitution makes the county clerk available for the legislature to use as needed for court clerk duties without creating a separate office with any inherent rights or powers. The title “ex officio clerk of the superior court” confers only obligations; the county clerk must only perform those statutory court-related duties which are not otherwise delegated to an executive officer.\footnote{Zumwalt, 49 Cal. 3d at 179-80, 776 P.2d at 254-55, 260 Cal. Rptr. at 552-53. In a concurring opinion, Justice Kaufman agreed with the majority, but went further to say that there are no constitutional barriers preventing elimination of the county clerk’s office. The only remaining state constitutional reference to the county clerk is as ex officio court clerk. \textit{CAL. CONST.} art. VI, § 4; \textit{see also CAL. CONST.} art XI, § 5 (1970 revision deleted mention of the county clerk’s office). The concurrence argued that this judicial reference alone should not force counties to maintain a clerk’s office. Therefore, Justice Kaufman would say that if there is a county clerk, and if the legislature has assigned court-related duties to the county clerk or court clerk, and if any such duties have not been delegated to an executive officer, then the county clerk would be obligated to perform them. Zumwalt, 49 Cal. 3d at 180-81, 776 P.2d at 255, 260 Cal. Rptr. at 553 (Kaufman, J., concurring).}

The San Diego superior court local rule places all courtroom duties and staff under the control of judges by means of their authority over the court-appointed executive officer. This should serve the twin goals of judicial economy and speedy administration of justice. It will make day-to-day courtroom operation easier for the superior court by permitting judges to choose compatible clerks and to adjust courtroom administrative procedures. The courts are likely to run more smoothly if political skirmishes between the judges and the county clerk are avoided. Several other counties have adopted similar rules and submitted amicus briefs in support of the executive officer system.\footnote{Id. at 178 n.13, 776 P.2d at 254 n.13, 260 Cal. Rptr at 552 n.13. Fresno, Imperial, Lassen, Madera, Mendocino, Orange, Riverside, San Joaquin, Santa Clara, and Solano counties have adopted similar local rules in the interest of courtroom efficiency. The court emphasized that its decision was based on constitutional construction rather than upon the efficacy of local rules.}

However, whether conflict will arise in San Diego between the respective bureaucracies of the county clerk and executive officer remains to be seen. If significant conflict arises, it may offset any improvement in efficiency otherwise gained from the new system. To those counties where county clerks still execute all duties of the superior court clerk, Zumwalt sends a clear message: the county clerk can either win the support of the bench or lose its court-related powers.

ROBERT J. MILLS
III. CRIMINAL LAW

A. Section 667 of the California Penal Code is designed to increase an existing sentence by five years for every prior conviction of a serious felony and requires a formal division of the convictions, beginning with the filing: In re Harris.

Section 667 of the California Penal Code adds five consecutive years to a defendant's sentence for each prior conviction of a serious felony.1 Section 667 is applicable only when the convictions are based on "charges brought and tried separately."2 In re Harris3 addressed the question of whether two prior convictions arising out of a single complaint were "brought" separately.4 The court answered in the negative, reasoning that the prior convictions must be entirely separate from the date of filing through the final adjudication.5

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1. CAL. PENAL CODE § 667 (West Supp. 1990). This section provides:

HABITUAL CRIMINALS; ENHANCEMENT OF SENTENCE; AMENDMENT OF SECTION
(a) In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of a serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.
(b) This section shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this section to apply.
(c) The Legislature may increase the length of the enhancement of sentence provided in this section by a statute passed by a majority vote of each house thereof.
(d) As used in this section "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.
(e) Subdivision (a) shall not apply to a person convicted of selling, furnishing, administering or giving, or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any precursors of methamphetamine unless the prior conviction was for a serious felony described in subparagraph (24) of subdivision (c) of Section 1192.7.
(f) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

Id.

2. Id.
4. At trial, the defendant was convicted of both attempted robbery and robbery. The trial court added ten years to the defendant's sentence, through application of section 667, because he admittedly had two prior felony convictions. The trial judge held that the two prior convictions were "brought" separately because each guilty plea arose from a separate information. The appellate court affirmed. The defendant petitioned for a writ of habeas corpus upon finding that the two prior convictions stemmed from a single complaint and preliminary hearing in municipal court. Id. at 133-34, 775 P.2d at 1058-59, 260 Cal. Rptr. at 289-90.
5. Id. at 136, 775 P.2d at 1060, 260 Cal. Rptr. at 291.
In its decision, the court analyzed the statutory phrase "charges brought and tried separately" by looking to similar language set forth in former Penal Code section 644. Section 644 was interpreted as applicable only when completely separate proceedings leading to distinctly different convictions could be identified. Because section 667 was based upon the prior section 644, the court presumed that section 667 would carry the same meaning. Ultimately, no evidence was presented to rebut this presumption. The court granted the defendant's writ of habeas corpus, holding that his two prior convictions were not "brought" in separate proceedings and, therefore, the defendant should have been subject to only one five-year enhancement, not two.

Section 667 has the potential of adding many blocks of years to a recidivist defendant's sentence. As the number of prior felony convictions increase, the number of sentence enhancements confronting criminal defendants will increase accordingly. In re Harris held that the separation of prior convictions begins at the filing stage and must remain formally distinct throughout the entire adjudication.

BARRY J. REAGAN

   (a) Every person convicted in this State of [specified crimes], . . . who shall have been previously twice convicted upon charges separately brought and tried, and who shall have served separate terms therefor in any state prison and/or federal penal institution either in this State or elsewhere, of [specified crimes], . . . shall be adjudged a [sic] habitual criminal and shall be punished by imprisonment in the state prison for life. . . .
   Harris, 49 Cal. 3d at 135 n.4, 775 P.2d at 1059 n.4, 260 Cal. Rptr. at 290 n.4 (emphasis added).
7. Id. at 135, 775 P.2d at 1059-60, 260 Cal. Rptr. at 290-91; see People v. Ebner, 64 Cal. 2d 297, 411 P.2d 578, 49 Cal. Rptr. 690 (1966) (defendant admitted two previous, separate convictions).
8. Harris, 49 Cal. 3d at 135-36, 775 P.2d at 1059-60, 260 Cal. Rptr. at 290-91.
9. Id.
10. Id. at 137, 775 P.2d at 1061, 260 Cal. Rptr. at 292.
11. Id.
B. In a criminal contempt action for maintaining a public nuisance in violation of a Red Light Abatement Law injunction, the owners and manager of a theater offering live "adult" entertainment were entitled to a jury trial; the trial court’s alternative order allowing sentencing under a statute that did not require a jury was invalid, and each day the lewd conduct occurred constituted a single violation: Mitchell v. Superior Court.

In Mitchell v. Superior Court, the owners and manager of a theater featuring live sex shows appealed a contempt judgment for violating an injunction against lewd conduct on their premises. The injunction was issued pursuant to the Red Light Abatement Law (RLAL), codified as sections 11225-11235 of the Penal Code. The petitioners James and Artie Mitchell owned a San Francisco theater that featured adult films and live sex performances. Petitioner Vincent Stanich was the theater manager. In 1981, the business was declared a public nuisance and an injunction was issued to prevent future lewd conduct on the premises. The conduct complained of can be put into two categories: off-stage conduct, where performers permitted (if not encouraged) patrons to fondle genitals, breasts and buttocks, to engage in digital intercourse and oral copulation in return for tips; and secondly, on-stage conduct, where performers masturbated, inserted dildos in their vaginas, and engaged in oral copulation with other performers.


petitioners contended that they were unconstitutionally denied a jury at their contempt hearing. They also attacked the trial court's alternative order, which directed that the petitioners be sentenced for contempt under section 1218 of the Code of Civil Procedure if an appellate court found that the RLAL, unlike section 1218, carried a right to a jury trial. The petitioners also challenged the finding of sixty-two separate acts of contempt during a four-day period, denied that the acts performed were lewd, and claimed that their efforts to comply with the injunction were adequate.

The California Supreme Court held that the petitioners had a state constitutional right to a jury because RLAL contempt actions carry penalties equivalent to misdemeanors. Since the petitioners were denied a jury, the judgment against them was void. The lower court's alternative sentencing order was rejected as a due process violation. Finally, the supreme court ruled that the RLAL allowed only one contempt charge per day, that lewd conduct had occurred on the


7. Id. at 1236-39, 783 P.2d at 734-36, 265 Cal. Rptr. at 148-50.

8. Id. at 1241, 783 P.2d at 737, 275 Cal. Rptr. at 150. The maximum imprisonment for a misdemeanor is one year. CAL. PENAL CODE § 19.2 (West Supp. 1990). However, unless otherwise indicated by a statute, the penalty for a misdemeanor may not exceed six months in jail, a $1,000 fine, or both. CAL. PENAL CODE § 19 (West 1988). See generally 3 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW §§ 1439-1441 (2d ed. 1989); 22 CAL. JUR. 3D (Rev.) Criminal Law § 3333 (1985 & Supp. 1989). All criminal defendants charged with felonies or misdemeanors are entitled to a jury; only infractions which are not punishable by incarceration carry no right to jury trial. Mitchell, 49 Cal. 3d at 1240-41, 783 P.2d at 737, 265 Cal. Rptr. at 150. See also Mills v. Municipal Court, 10 Cal. 3d 288, 298-99 n.8, 515 P.2d 273, 280-81 n.8, 110 Cal. Rptr. 329, 336-37 n.8 (1973) (interpreting CAL. CONST. art I, § 16). The penalties imposed for contempt of a RLAL injunction, like many misdemeanors, include a fine of $200 to $1,000, imprisonment from one to six months, or both. CAL. PENAL CODE § 11229 (West 1982 & Supp. 1990). See also infra notes 11-17 and accompanying text.

9. Mitchell, 49 Cal. 3d at 1252, 783 P.2d at 745, 265 Cal. Rptr. at 158. See also infra notes 18-20 and accompanying text.
premises, and that the petitioner-owners had failed to exercise their power to prevent the injunction violations.10

In *Mitchell*, the supreme court used a historical analysis to find a RLAL right to a jury. The court determined that the delegates at the state's 1879 constitutional convention had expressly rejected the federal standard that gives a jury trial right only for "serious" offenses.11 Instead, the state constitution was drafted more broadly to allow a jury trial whenever the accused faces imprisonment.12 A departure from this rule, found in sections 1209 and 1218 of the California Civil Procedure Code, allows for a maximum incarceration of five days for civil contempt with no accompanying right to a jury.13 Because this provision antedated the 1879 constitution, the court has historically treated it as an exception intended by the constitution's drafters.14 Although section 11229 of the RLAL is silent regarding a jury, it mandates penalties of $200 to $1000 or incarceration for one to six months, or both, for each violation.15 Contempt statutes with similar penalties, such as section 166 of the Penal Code,16 describe contemners as misdemeanants with an express jury right. Against this constitutional and statutory backdrop, and in light of RLAL penalties that are equal to many misdemeanors, the court recognized a state constitutional jury trial right in RLAL contempt proceedings and annulled the judgment against the petitioners.17

The court then rejected the trial judge's alternative sentencing order. The order provided for sentencing under section 1218 of the

10. *Mitchell*, 49 Cal. 3d at 1236, 1254-55, 783 P.2d at 734, 746-47, 265 Cal. Rptr. at 147, 159-60. See also infra notes 21-27 and accompanying text.
12. See supra note 8.
17. *Mitchell*, 49 Cal. 3d at 1244-45, 783 P.2d at 739-40, 265 Cal. Rptr. at 152-53. By finding a state constitutional jury trial right, the court did not decide whether the sixth amendment of the U.S. Constitution would require a jury in *Mitchell*. However, the court opined that the lengthy jail terms and substantial fines involved might well have met the federal definition of "serious" penalties requiring trial by jury. Id. See, e.g., Girard v. Coins, 575 F.2d 160, 164 (8th Cir. 1978) (determining the "seriousness" of a fine by examining its impact on the defendant). But see Blanton v. North Las Vegas, 109 S. Ct. 1289, 1293-94 (1989) (a six month jail term and $1,000 fine does not trigger the federal jury right).
Code of Civil Procedure if an appellate court found that the denial of a jury during the RLAL action had been improper. Section 1218 provides less severe penalties but carries no right to a jury.\textsuperscript{18} The court acknowledged that prosecutorial discretion would have allowed the petitioners to be charged under either the section 1218 general contempt statute or the more specific RLAL provisions.\textsuperscript{19} However, section 1218 was never mentioned in the lower court until the trial had ended. The supreme court disallowed the order on due process grounds, stating that the petitioners were denied "fair notice [in the original declarations] of the nature of the penalties and proceedings" against them.\textsuperscript{20}

To aid the trial judge on remand, the court addressed the three remaining issues. The court disagreed with the finding of sixty-two separate contempt violations during four days at the theater. The RLAL defines a nuisance as a "building or place used for the purpose of . . . lewdness."\textsuperscript{21} The court construed this language as focusing a RLAL injunction on the premises where the RLAL violations occurred rather than on the occupants' individual acts. Therefore, it was not the acts themselves that violated the injunction, but the maintenance of the theater where they occurred. The court concluded that each day the nuisance existed thus constituted one specific punishable violation. The petitioners should have been charged

\textsuperscript{18} Mitchell, 49 Cal. 3d at 1250-51, 783 P.2d at 743-44, 265 Cal. Rptr. at 156-57. The penalties under section 1218 may not exceed five days imprisonment, a $1,000 fine, or both. \textit{CAL. CIV. PROC. CODE} § 1218 (West 1982 & Supp. 1990). \textit{See also supra} notes 5, 13, & 14 and accompanying text. The trial court's alternative order would have imposed a total jail term of six months on each petitioner; no fines would have been levied. \textit{Mitchell}, 49 Cal. 3d at 1249, 783 P.2d at 742-43, 265 Cal. Rptr. at 155-56.

\textsuperscript{19} Mitchell, 49 Cal. 3d at 1251-52, 783 P.2d at 744-45, 265 Cal. Rptr. at 157-58. Thus, section 11229 of the RLAL is not the exclusive remedy for violations of RLAL injunctions. \textit{Id}. The prosecutor is free to select among remedies, even if the choice denies a defendant access to a jury. \textit{Id}. However, the court noted that a general law could not be chosen over a specific law with less severe penalties unless there was clear legislative intent to allow such a selection. \textit{Id}.

\textsuperscript{20} \textit{Id}. at 1252-53, 783 P.2d at 745, 265 Cal. Rptr. at 158. Although substituting section 1218 in place of the RLAL action would have resulted in less severe penalties for the petitioners in \textit{Mitchell}, the court was concerned about a case where the converse might arise, that is, a defendant tried under one statute might be sentenced under a more severe law. Therefore, the court announced that prosecutors must identify in the initial declaration the contempt statute under which they are proceeding. \textit{Id}. Finally, the court pointed out that the alternative order was void, regardless of notice, because it resulted from a trial where the petitioners were unconstitutionally denied a jury. \textit{Id}.

\textsuperscript{21} \textit{Id}. at 1246, 783 P.2d at 741, 265 Cal. Rptr. at 154 (quoting \textit{CAL. PENAL CODE} § 11225) (italics omitted).
with four acts of contempt rather than sixty-two. The court then affirmed that the conduct on the premises was lewd as defined by section 647(a) of the Penal Code, which prohibits certain acts "if the actor knows or should know of the presence of persons who may be offended." The petitioners argued that no violations occurred because no patrons had been offended. The justices insisted that customers were not "adequately warn[ed]" of the acts being performed; apparently, the mere possibility that patrons would be surprised satisfied the "offended person" requirement. The court remanded the action against the petitioner-owners because they had failed to use their authority to halt lewd acts at the theater. However, the ac-

22. Id. at 1246-48, 783 P.2d at 741-42, 265 Cal. Rptr. at 154-55. See also Board of Supervisors v. Simpson, 36 Cal. 2d 671, 674-75, 227 P.2d 14, 16 (1951) (dictum declaring that "[e]ach and every day a public nuisance is maintained is a separate offense."); Maita v. Whitmore, 508 F.2d 143, 145 (9th Cir. 1974), cert. denied, 421 U.S. 947 (1975) (each day's contempt charge was the result of multiple violations). The court felt it would be unreasonable to punish the petitioners for each individual act on the premises. If the petitioners had been sentenced to six months in jail for each of the 62 acts, their terms would have run 31 years. This would clearly be disproportionate compared to other nuisance statutes. Mitchell, 49 Cal. 3d at 1248, 783 P.2d at 742, 265 Cal. Rptr. at 154. For example, the maximum incarceration for 62 acts of contempt under section 1218 of the Code of Civil Procedure would be less than one year. CAL. CIV. PROC. CODE § 1218. See supra notes 5, 13, 14 & 18 and accompanying text. The court disapproved of Reliable Enterprises v. Superior Court, 158 Cal. App. 3d 604, 620-22, 204 Cal. Rptr. 768, 796-97 (1984), to the extent that it found each individual act to be a punishable violation. Mitchell, 49 Cal. 3d at 1248 n.13, 783 P.2d at 742 n.13, 265 Cal. Rptr. at 155 n.13. The Mitchell court suggested that other criminal statutes would provide more appropriate means for prosecuting individual acts. Id. at 1246 n.12, 783 P.2d at 741 n.12, 265 Cal. Rptr. at 154 n.12. See, e.g., CAL. PENAL CODE § 647 (West 1988 & Supp. 1990) (anyone who engages in lewd conduct in a public place is guilty of a misdemeanor).


24. Mitchell, 49 Cal. 3d at 1253, 783 P.2d at 746, 265 Cal. Rptr. at 159 (quoting Pryor v. Municipal Court, 25 Cal. 3d 238, 256, 599 P.2d 636, 647, 158 Cal. Rptr. 330, 341 (1979) (interpreting CAL. PENAL CODE § 647(a))). The forbidden acts include "the touching of the genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance or offense . . . [in public view]." Id.

25. Id. at 1254-55, 783 P.2d at 746-47, 265 Cal. Rptr. at 159-60. The petitioners argued that their customers would not be offended, and were in fact paying a substantial entrance fee for the purpose of seeing the sexual acts. The theater also contained signs notifying visitors that the shows dealt "frankly and explicitly with sexual matters" and asked patrons to leave if they might be offended. Id. The court agreed with the trial judge's finding that the signs did not satisfactorily warn customers, because not "everyone" who entered the premises would anticipate seeing the explicit acts committed therein. Id. The court did not decide if signs could ever satisfy the burden of excluding persons who might be offended. Id.

26. Id. at 1255, 783 P.2d at 747, 265 Cal. Rptr. at 160. The court believed that the petitioner-owners could have complied with the injunction by directing their employees not to engage in lewd conduct. The petitioner-owners' "token" efforts to comply,
tion against the petitioner-manager was dismissed because the court did not find evidence beyond a reasonable doubt that he could have prevented the lewd conduct.27

The supreme court’s announcement of a jury trial right for RLAL injunction violations, nearly eighty years after the law’s adoption, is unlikely to have widespread impact.28 However, it may cause prosecutors in such actions to balance the RLAL’s stiff penalties against the additional time and expense required for jury trials. The result may be a shift to prosecution of RLAL contemners under unrelated contempt statutes. The court’s rejection of the alternate sentencing order, and its adoption of a new requirement that the underlying contempt statute be clearly identified in the initial declarations, should protect RLAL defendants against unpleasant surprises. Additionally, the limit of one contempt violation per day will prevent the RLAL’s imprisonment provisions from being applied in a Draconian manner. While stating that the patrons in Mitchell were not sufficiently warned of the acts being performed, the court offered little guidance on how theater owners could adequately warn and exclude patrons who might be offended by sexually oriented shows and materials. Thus future cases may indicate that the acts described in Mitchell...
will always be legally offensive when performed in non-private settings.

ROBERT J. MILLS

C. The "wanton disregard for human life" definition of implied malice adequately informs the jury that second degree murder requires a finding that the defendant was subjectively aware of the life-threatening risk created by his or her conduct: People v. Dellinger.

In People v. Dellinger, the California Supreme Court upheld a conviction for second degree murder under Penal Code section 187, which provides that a conviction under any murder charge requires a showing of malice aforethought. If the state is unable to prove express malice of "deliberate intent," malice may be implied if the circumstances attending the killing demonstrate "an abandoned or malignant heart." Understandably, most juries would not be familiar with this language, and when incorporated into a jury instruction, the Penal Code's relatively vague definition does little to aid the average juror in determining the existence of malicious intent.

The court has written several opinions attempting to arrive at a definition that a layman could understand and apply, culminating in People v. Watson where the court combined the definitions set out in two earlier cases. The instruction relied upon by the trial court in

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2. Section 187 of the Penal Code states: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." CAL. PENAL CODE § 187 (West 1988) (emphasis added).
3. CAL. PENAL CODE § 188 (West 1988). In Dellinger, the defendant's actions surrounding the death could be characterized as grossly negligent, but there remained a question of fact as to his intent or awareness that his actions could be lethal. He claimed that his stepdaughter had died after falling down the stairs in his apartment, yet there was testimony that the defendant had hit her on at least one previous occasion. An autopsy revealed a fractured skull and contusion of the spinal cord, but it was not clear whether he could have inflicted the injuries with a blow from his hand. The autopsy also revealed a potentially lethal dose of cocaine in her stomach and, while the defendant maintained that he had not given the drug to her, he admitted giving her wine that evening to "quiet her down." Dellinger, 49 Cal. 3d at 1216, 783 P.2d at 202, 264 Cal. Rptr. at 843.
6. In Watson, the court held that second degree murder based on implied malice occurs when "a person 'does an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" Id. at 300, 637 P.2d at 285, 179 Cal. Rptr. at 49 (citing People v. Phillips, 64 Cal. 2d 574, 587, 414 P.2d 353, 363, 51 Cal. Rptr. 225, 235 (1966)). The court then wrote: "Phrased in a different way, malice may be implied when defendant does an act with a high
Dellinger incorporated the Watson language virtually verbatim, providing in part that malice could be implied where a defendant's life-threatening conduct was carried out with a “wanton disregard for human life.”

The defendant in Dellinger argued that the “wanton disregard” language did not adequately convey the requirement of section 187, namely, that a defendant be subjectively aware of the life-threatening risk created by his or her conduct. The California Jury Instructions, Criminal (“CALJIC”) defined malice aforethought by either the wanton disregard standard or by the definition recited in People v. Phillips. Because the language of the instruction used the disjunctive “or,” the defendant in Dellinger argued that the jury may have convicted him based upon the wanton disregard language alone, merely finding his conduct to be “wanton” but not finding that he was subjectively aware that his conduct was life-threatening.

The court disagreed with this argument, concluding that a reasonable jury would have interpreted the instructions as a whole, rather than isolating the “wanton disregard” language from the rest of the instruction. The court held that the instruction, read in its entirety, makes it clear that a finding of subjective awareness is necessary for a finding of guilt. More importantly, the court held that even if a probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life.” Id. (citing People v. Washington, 62 Cal. 2d 777, 782, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965)) (emphasis added). This is the “wanton disregard for human life” or the “wanton disregard” definition of implied malice.

7. Id. at 1217, 783 P.2d at 202, 264 Cal. Rptr. at 843.
8. In Washington, the court held that a finding of implied malice requires a determination by the finder of fact that the defendant subjectively appreciated the risk to life created by his or her conduct. Washington, 62 Cal. 2d at 782, 402 P.2d at 134, 44 Cal. Rptr. at 446. See generally 1 B. Witkin & N. Epstein, California Criminal Law, Elements of Crimes § 107 (1988); 40 C.J.S. Homicide §§ 15-16 (1988).
9. See supra note 6. In Dellinger, the jury was instructed according to the 1983 revision of CALJIC No. 8.11, which provides in pertinent part:
Malice is implied when the killing results from an intentional act involving a high degree of probability that it will result in death, which act is done for a base, antisocial purpose and with a wanton disregard for human life or when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.

10. Dellinger, 49 Cal. 3d at 1214, 783 P.2d at 202, 264 Cal. Rptr. at 843.
11. Id. at 1221, 783 P.2d at 205, 264 Cal. Rptr. at 846.
12. Id. See also People v. Benson, 210 Cal. App. 3d 1223, 1230, 259 Cal. Rptr. 9, 14 (1989) (use of “or” instead of “phrased in another manner” in jury instruction did not
jury were to consider the “wanton disregard” definition in isolation, the jury would recognize that it must find a subjective awareness on the part of the defendant that his conduct was a threat to life.13

While upholding the validity of the instructions in Dellinger,14 the court nevertheless recognized that the term “wanton” is not in common use by laypersons; therefore, it saw no reason to continue the use of what it found to be obscure language in jury instructions.15 On that basis, the court voiced its approval of the 1988 revision of CALJIC No. 8.11, which eliminates any reference to the “wanton disregard” definition of implied malice.16

MATTHEW J. STEPOVICH

D. The second degree felony murder doctrine is applicable to any defendant who commits a felony which, when considering the specific felony in its abstract sense, is determined to be inherently dangerous to human life because it carries with it a high probability that its commission will result in death: People v. Patterson.

The California Supreme Court in People v. Patterson1 addressed the issue of whether a defendant may be charged with second degree felony murder2 after supplying cocaine to a person who dies from its improperly enunciate two alternative and different tests for determining whether implied malice existed).

13. Dellinger, 49 Cal. 3d at 1221, 783 P.2d at 205, 264 Cal. Rptr. at 864. See People v. Rosenkranz, 198 Cal. App. 3d 1187, 1203, 244 Cal. Rptr. 403, 410-13 (1988) (upholding instruction where only the “wanton disregard” definition was read to jury); but see People v. Protopappas, 201 Cal. App. 3d 152, 164, 246 Cal. Rptr. 915, 922 (1988) (instruction was erroneous but harmless because the case was tried only on the theory of conscious appreciation of risk).

14. Justice Broussard dissented separately, maintaining that a reasonable jury might believe that the instruction outlined two tests, and that the jury in Dellinger may have relied solely upon the “wanton disregard” test in convicting the defendant. Dellinger, 49 Cal. 3d at 1223, 783 P.2d at 207, 264 Cal. Rptr. at 848 (Broussard, J., dissenting). He pointed out that “wanton disregard” could encompass situations where a defendant gave no thought at all to a risk and, thus, the jury could have convicted the defendant even if it believed that he was not aware of the risks created by his conduct. Id. (Broussard, J., dissenting).

15. Dellinger, 49 Cal. 3d at 1221-22, 783 P.2d at 205, 264 Cal. Rptr. at 846.


1. 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989). Justice Kennard wrote the majority opinion. Chief Justice Lucas, joined by Justices Kaufman and Eagleson, wrote a separate concurring and dissenting opinion, as did Justice Mosk, joined by Justice Broussard. Justice Panelli also wrote a concurring and dissenting opinion.

2. Justice Panelli noted that the second degree felony murder doctrine was created judicially. Patterson, 49 Cal. 3d at 641, 778 P.2d at 567-68, 262 Cal. Rptr. at 213-14 (Panelli, J., dissenting); see also 17 CAL. JUR. 3D Criminal Law § 212 (1984). The court defined second degree felony murder in People v. Ford, 60 Cal. 2d 772, 388 P.2d 892, 36 Cal. Rptr. 620, cert. denied, 377 U.S. 940 (1964), as “[a] homicide that is a direct causal result of the commission of a felony inherently dangerous to human life (other than

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The court confirmed that second degree felony murder may be found only where the felony charged is determined to be "inherently dangerous to human life." The court remanded the case for a determination of whether furnishing cocaine is an "inherently dangerous felony," which is defined as one bearing a "high degree of inherent danger." The California Penal Code section 189 states in part:

All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

CAL. PENAL CODE § 189 (West 1989). The Penal Code further defines as involuntary manslaughter a death which results from "an unlawful act, not amounting to a felony . . . ." Id. at § 192. Thus, the Penal Code addresses killings which occur in carrying out both felonies amounting to first degree murder and crimes less than felonies amounting to involuntary manslaughter, but leaves undefined those killings which occur in the course of felonies outside the six mentioned in section 189. For a historical background on the development of second degree murder, see Pike, What Is Second Degree Murder in California?, 9 S. CAL. L. REV. 112 (1936).

3. Patterson, 49 Cal. 3d at 617, 778 P.2d at 551, 262 Cal. Rptr. at 197. The victim and her friend had used cocaine daily for months prior to the night the defendant furnished them with cocaine in his motel room. When the victim became ill, her friend called an ambulance and the defendant remained with the two until paramedics arrived. The victim never recovered, and died from acute intoxication.


5. People v. Patterson, 49 Cal. 3d 615, 625, 778 P.2d 549, 557, 262 Cal. Rptr. 195, 203 (1989). The lower court believed that the requirement that the felony be viewed "in the abstract" when determining inherent danger to human life, demands consideration of all the lesser offenses listed in the statute under which the defendant was prosecuted. People v. Patterson, 202 Cal. App. 3d 165, 175-76, 247 Cal. Rptr. 885, 892 (1988). Finding that section 11352 of the Health and Safety Code included lesser offenses not inherently dangerous to human life, such as the transportation of a controlled substance, the appellate court held that the trial court properly dismissed the second degree felony murder charge. Id. at 178, 247 Cal. Rptr. at 893-94. The lower courts did not determine whether the defendant's actual offense was inherently dangerous.

Section 11352 of the Health and Safety Code provides in relevant part:

Except as otherwise provided in this division, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified in [the relevant sections] or (2) any controlled substance classified . . . [as] a narcotic drug, unless upon the written prescription of a [licensed doctor].
probability” that death will result when the specific felony is viewed in the abstract.6 The court explained that its requirement to consider the felony “in the abstract” means consideration of the specific offense—in this case, the furnishing of cocaine—where the statute prescribes more than one primary element of crime.7 The court reasoned that viewing the felony in its abstract sense was imperative because the felony murder doctrine would be invoked only where a death actually occurred, and if juries were permitted to weigh all the facts surrounding only the death, they might unjustly be led to conclude that almost any crime was inherently dangerous.8

Without much harmony among its members,9 the court’s holding creates a stricter definition of inherent danger to life, making it more difficult to get a second degree felony murder conviction for death resulting from the ingestion of drugs that have been furnished by the accused. This, in turn, creates a new uncertainty as to whether a statute’s proscriptions should be viewed as a whole or severally.o

Chief Justice Lucas and Justice Panelli criticized the high threshold established in this case. Because it is purely a judicial creation, the

shall be punished by imprisonment in the state prison for three, four, or five years.


6. Patterson, 49 Cal. 3d at 627, 778 P.2d at 558, 262 Cal. Rptr. at 204. Justice Kennedy asserted that analogy to the implied malice element of second degree murder in other cases compelled this definition. Id. at 626-27, 778 P.2d at 557-58, 262 Cal. Rptr. at 203-04. In his dissent, Chief Justice Lucas contended that by requiring a “high probability of death,” the court set the standard so high that it “will be impossible to satisfy in any case arising under the [drug offense] statutes.” Id. at 628, 778 P.2d at 558-59, 262 Cal. Rptr. at 204-05 (Lucas, C.J., dissenting). Stating that such definition is “unrealistic, unwise and unprecedented” in light of recent supreme court cases requiring only “a substantial risk that someone will be killed” or “an inherent danger to life,” he declared that the court succeeded only in silently reversing its own decisions and those of the courts of appeals. Id. at 628-29, 778 P.2d at 558-59, 262 Cal. Rptr. at 204-05 (Lucas, C.J., dissenting).

7. The court distinguished this case from other cases requiring consideration of whether a violation of the statute as a whole was inherently dangerous to life, and noted that those statutes proscribed one primary element of crime, such as “the practice of medicine without a license” or “escape” from prison. Id. at 623-24, 778 P.2d at 555-56, 262 Cal. Rptr. at 201-02. The court reasoned that section 11352 of the Health and Safety Code proscribed many severable crimes which had been consolidated into one statute solely for the purpose of convenience. Id. at 624-25, 778 P.2d at 556, 262 Cal. Rptr. at 202. However, Justice Mosk argued in dissent that considering a felony in the abstract requires consideration of the statute as a whole. Id. at 630-40, 778 P.2d at 560-67, 262 Cal. Rptr. at 206-13 (Mosk, J., dissenting).

8. Id. at 622, 778 P.2d at 554, 262 Cal. Rptr. at 200.

9. Justice Panelli noted that this case created “some uneasiness” as the members of the court had acted more like legislators than judges. Id. at 641-42, 778 P.2d at 567-68, 262 Cal. Rptr. at 213-14 (Panelli, J., dissenting). Additionally, he was unsure whether this second degree felony murder rule was constitutional. Id.

10. Id. at 630-40, 778 P.2d at 560-67, 262 Cal. Rptr. at 206-13 (Mosk, J., dissenting) (noting, for example, that Penal Code § 4532 which makes escape from prison a felony, also proscribes a number of lesser crimes which, when considered in light of the whole statute, were not inherently dangerous to life).
legislature may respond appropriately if it wishes to allow more vigorous prosecution of deaths attributable to the supply aspect of drug-related deaths.

DAWN SOLHEIM

IV. DEATH PENALTY LAW

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

I. INTRODUCTION

The California Supreme Court decided only six death penalty cases between July and December of 1989. Compared to the Lucas court's first two years, this represents a substantial reduction in the number of death penalty cases reviewed. This decrease, which may be predominantly attributed to the October 17, 1989 earthquake, marks a significant setback in the court’s attempt to reduce its back-


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log of death penalty cases. The court affirmed the death sentence in all six of the cases, continuing its conservative approach and extensive use of the “harmless error” doctrine. The court closely followed the traditional rule that “error is not reversible unless it is prejudicial.”

The only reversible error during this period occurred in the case of People v. Lang. In Lang, the trial court severed a count of concealable weapon possession by a felon from the charges of murder and robbery. Although the supreme court reversed the weapon conviction, the death sentence was based on the other charges that were upheld.

This survey will discuss the single finding of reversible error, as well as defense arguments that were rejected by the court. These arguments encompass jury selection issues, prosecutorial misconduct, a defendant’s prior murder conviction as a special circumstance, instructional errors, ineffective assistance of counsel.


The State Building in San Francisco, which houses both the state supreme court and the First District Court of Appeal, suffered severe damage due to a 1989 earthquake. Plaster fell from the walls in many places and the walls buckled and cracked through the cinder blocks in others. Because of the damage and fear of asbestos danger, the court relocated its courtroom and the justices’ chambers resulting in delays in hearing and deciding cases. L.A. Daily Journal, Oct. 24, 1989, at 4, col. 2.

5. The court employed the harmless error doctrine in all six cases, emphasizing the reasonable doubt standard set forth in Chapman v. California, 386 U.S. 18 (1966). The United States Supreme Court, in Chapman, “approved the application of the harmless error test to constitutional errors in criminal trials . . . . the reviewing court must decide first whether constitutional error occurred and then whether, beyond a reasonable doubt, the error occurred and then whether, beyond a reasonable doubt, the error affected the outcome of the trial.” Comment, Harmless Error and the Death Penalty, 54 U. Chi. L. Rev. 740, 742-743 (1987). See generally Traynor, The Riddle of Harmless Error — A Process in Need of a Rationale, 125 U. Pa. L. Rev. 15, 16-36 (1976); Goldberg, Harmless Error: Constitutional Sneak Thief, 71 J. Crim. L. & Criminology 421 (1980); 1 J. Wigmore, Evidence § 21 (3d ed. 1940).


7. Lang, 49 Cal. 3d 991, 782 P.2d 627, 264 Cal. Rptr. 386; see infra notes 50-54 and accompanying text.

8. Id. (the defendant’s motion to sever the charges was granted by the trial court prior to the commencement of the trial on the capital charge).

9. Id. at 1046, 782 P.2d at 664, 264 Cal. Rptr. at 423.

10. See infra notes 50-54 and accompanying text.

11. See infra notes 40-49 and accompanying text.

12. See infra notes 55-70 and accompanying text.

13. See infra notes 82-99 and accompanying text.

14. See infra notes 100-10 and accompanying text.

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This survey will also cover two related topics: the use of hypnotically enhanced testimony in a first degree murder case, and the aborted attempt to carry out California's first execution in 23 years.

II. IMPACT OF SCHEDULED END TO EXECUTION HIATUS IN CALIFORNIA

The affirmance of recent death penalty sentences was dramatized when the execution of Robert Alton Harris was scheduled for April 3, 1990. He was to be the first person sent to California's gas chamber since 1967. Harris had made numerous appeals to both the state and federal supreme courts during the decade after his conviction, and had apparently exhausted his options. In an eleventh hour appeal to the Ninth Circuit Court of Appeals in San Francisco, however, attorneys for Harris argued that Harris had been denied his right to competent psychiatric examination during his trial.

Judge John T. Noonan, presiding over the hearing, issued a stay of execution for Harris on March 30, 1990, holding that Harris had established "substantial grounds upon which relief might be granted." Noonan's order emphasized the defendant's right to com-

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15. See infra notes 149-58 and accompanying text.
16. See infra notes 159-72 and accompanying text.
17. See infra notes 71-81 and accompanying text.
18. See infra notes 19-39 and accompanying text.
19. See L.A. Times, Mar. 6, 1990, at A3, col. 1. When asked about possible implications of the execution upon future death penalty cases, California Attorney General John Van de Kamp stated "[i]mplementation of the death penalty in California is a giant step closer." Id.
20. L.A. Times, Mar. 6, 1990, at A3, col. 4. The last man to die in the gas chamber was Aaron C. Mitchell in 1967.
22. Harris v. Vasquez, 901 F.2d 724, 726-27 (9th Cir. 1990). Harris claimed that, due to a lack of funds, he was denied thorough psychiatric assistance during his trial in 1979, despite evidence of mental disturbance that could have affected his actions. Harris alleged that competent assistance would have produced a strong mitigating factor for his crimes. L.A. Times, March 31, 1990, at A1, col. 2.
23. Id. at 727 (emphasis in original). Attorneys for the state lost their United States Supreme Court appeal to overturn the Ninth Circuit's stay of execution. The United States Supreme Court upheld the stay on April 2, and sent the case to a three-judge appeals panel in accordance with Judge Noonan's order. 110 S. Ct. 1799 (1990). Chief Justice Rehnquist and Justices Scalia and Kennedy dissented, asserting that the stay should be overruled. Id. at 1799-1800.
petent psychiatric assistance. "The Supreme Court has stated that 'when the State has made the defendant's mental condition relevant to his criminal capability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense.'"24 The stay for Harris halted a drama of theatrical proportions within California's criminal justice system.25

However, on August 29, 1990, a three-judge panel of the Ninth Circuit Court of Appeals denied Harris' petition for a writ of habeas corpus on the grounds of incompetent psychiatric assistance at trial.26 The split panel held that Harris had no right to psychiatric assistance at the guilt phase of his trial under Ake v. Oklahoma, because he had not previously raised a sanity defense.27 The justices also found that Harris had no right to psychiatric assistance during the penalty phase of his trial because the prosecution had not offered psychiatric evidence to establish his dangerousness.28

Furthermore, the Ninth Circuit noted that Harris had received state-funded psychiatric assistance at both the guilt and penalty phases of his trial, even though such assistance was not constitutionally required.29 The court also concluded that the "new constitutional rule" announced in Ake should only be applied on collateral review if it fell within two narrow exceptions.30 Harris' claim was not found to fall within either exception.31 Additionally, Harris' claim of newly discovered evidence of his alleged brain disorders was rejected, because he had not alleged that the disorders were unknown to the psychiatric community at the time of trial or that his psychiatrists had failed to consider them.32

Some observers believed that Harris' impending execution might lead to heightened scrutiny of California's death penalty laws.33 Cap-

24. Harris, 901 F.2d at 726 (quoting Ake v. Oklahoma, 470 U.S. 68, 80 (1985)).
25. California Governor George Deukmejian granted Harris' request for a clemency hearing at which Harris would have been allowed to argue why his life should be spared. When Deukmejian stated that he would personally preside over the hearing, Harris withdrew the request. The clemency hearing, originally scheduled for March 27, 1990, was cancelled. Additionally, Mother Theresa unsuccessfully attempted to contact Governor Deukmejian in the plea for Harris' life. L.A. Times, Apr. 22, 1990, at A2, col. 4.
26. Harris v. Vasquez, 913 F.2d 606 (9th Cir. 1990). The opinion was written by Judge Brunetti and joined by Judge Alarcon. Judge Noonan wrote a concurring and dissenting opinion.
27. Id. at 617-18.
28. Id. at 619 (citing Bowden v. Kemp, 767 F.2d 761, 763-64 & 763 n.5 (1985)).
29. Id. at 620.
30. Id. at 621 (citing Teague v. Lane, 109 S. Ct. 1060 (1989)).
31. Id. at 621-22.
32. Id.
33. It has been suggested that a commitment to carry out the death penalty may reduce the number of death penalty verdicts in the trial courts. See Death Penalty...
capital punishment has instead received resounding support from both the United States Supreme Court and the population at large.\textsuperscript{34} This may be due in part to the atrociousness of the crimes involved. Harris' brutal murder of two San Diego teenagers horrified citizens throughout California. In order to steal the boys' car, Harris and his brother kidnapped the sixteen year olds from a fast food restaurant and drove them to a secluded lake area.\textsuperscript{35} There, as the victims begged for their lives, Harris shot one boy in the back and fired three shots at point-blank range into his head after the boy fell.\textsuperscript{36} Harris then followed the sounds of frightened screams to find the other boy crouched behind some bushes, where Harris shot him four times.\textsuperscript{37}

Harris exhibited neither hesitation nor remorse. He laughed after killing the boys, and then ate the remnants of their lunches. After noticing a piece of flesh hanging on the end of his gun barrel, Harris commented on the shot to the boy's head and flicked the skin out into the street.\textsuperscript{38} The egregiousness of Harris' crimes made him the "perfect" murderer for the resumption of capital punishment in California. His execution, however, has been postponed indefinitely.\textsuperscript{39}

Whether Harris will be the person that ends California's self-imposed hiatus from executions remains unclear. Law enforcement authorities and death penalty foes agree that the question is no longer if, but when an execution will occur. Judge Noonan's favorable response to Harris' claim, however, may lead death penalty appellants to raise issues not addressed in their initial appeals. This may thus set off a new round of appeals by inmates on death row, further postponing any executions in California.

\textit{Law II, supra note 3, at 1202; Kaplan, Death Mill, USA, NAT'L. LAW J., May 8, 1989, at 38, col.1.}

\textsuperscript{34} See Powell, Capital Punishment, HARV. L. REV. 1035 (1989). Retired United States Supreme Court Justice Lewis F. Powell, Jr. argued in favor of a more efficient process in death penalty cases that would avoid endless delays caused by "multi-layered appeals." \textit{Id}. For an overview of this proposal, see \textit{Death Penalty Law III, supra} note 3, at 539-40.

\textsuperscript{35} People v. Harris, 28 Cal. 3d at 944-45, 623 P.2d at 243-44, 171 Cal. Rptr. at 683-84.

\textsuperscript{36} \textit{Id.}

\textsuperscript{37} \textit{Id}. Harris was subsequently convicted of two counts of first degree murder and was sentenced to die. Most of the evidence against him was provided by the testimony of his brother, Daniel Harris, who was present at the time of the crimes. \textit{L.A. Times}, Apr. 2, 1990, at A1, col. 3.

\textsuperscript{38} \textit{L.A. Times}, Apr. 2, 1990, at A1, col. 3.

III. GUILT PHASE

A. Jury Issues

Two death penalty defendants in the cases being reviewed herein, claimed that their jury trial rights were violated. Although the claims differed, they are treated here within a single broad category.40

In People v. Bell,41 the defendant claimed a violation of his constitutional right to a "trial by an impartial jury drawn from a representative cross-section of the community,"42 based on an underrepresentation of blacks in the jury pool.43 The court decided that the defendant had failed to make the prima facie showing of "systematic exclusion" required by Duren v. Missouri.44 The court conceded that blacks were consistently underrepresented,45 but it refused to accept that fact alone as proof of systematic exclusion.46 The court refused to find systematic exclusion because the jury pool selection criteria were neutral with regard to creed, color, and religion.47

Justice Broussard wrote in a dissenting opinion, that evidence of underrepresentation of blacks over a period of time should force the

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40. For an examination of jury issues in earlier death penalty cases, see Death Penalty Law I, supra note 3, at 453-54; Death Penalty Law II, supra note 3, at 1181-84; Death Penalty Law III, supra note 3 at 542.
41. 49 Cal. 3d 502, 778 P.2d 129, 262 Cal. Rptr. 1 (1989). In Bell, the defendant used a gun to rob and kill a jewelry store manager. He was convicted of first degree murder, robbery, and the attempted murder of a store employee who was present during the robbery. Id. at 513-15, 778 P.2d at 132-33, 262 Cal. Rptr. at 4-5. The majority opinion was written by Justice Eagleson and was joined by Chief Justice Lucas and Justices Panelli, Kaufman. Justice Arguelles concurred and dissented. Justices Mosk and Broussard wrote separate dissenting opinions.
42. See U.S. CONST. art. VI; CAL CONST. art. I, § 16.
43. Bell, 49 Cal. 3d at 524-25, 778 P.2d at 139-40, 262 Cal. Rptr. at 11-12.
44. Id. (citing 439 U.S. 357 (1979)). The Duren three-prong test states:
In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. See id.; 439 U.S. at 364. See generally Comment, Race and the Criminal Process, 101 HARV. L. REV. 1472, 1557-88 (1988).
45. Bell, 49 Cal. 3d at 524, 778 P.2d at 139, 262 Cal. Rptr. at 11. The court addressed similar jury issues in the recent cases of Hernandez v. Municipal Court, 49 Cal. 3d 713, 781 P.2d 547, 263 Cal. Rptr. 513 (1989) (vicinage requirements) and Williams v. Superior Court, 49 Cal. 3d 736, 781 P.2d 537, 263 Cal. Rptr. 503 (1989) (jury selection and formation). The court in Williams employed the Duren test but did not reach the third prong, which was the issue in Bell. See Williams, 49 Cal. 3d at 746, 781 P.2d at 543, 263 Cal. Rptr. at 509.
46. Bell, 49 Cal. 3d at 524, 778 P.2d at 139, 262 Cal. Rptr. at 11. Duren defines "systematic" as "inherent in the particular jury-selection process utilized." Duren, 439 U.S. at 366.
47. Bell, 49 Cal. 3d at 524, 778 P.2d at 139, 262 Cal. Rptr. at 11.
prosecution to rebut a presumption of unconstitutional discriminatory exclusion.48 Justice Broussard maintained that a defendant who proves "systematic underrepresentation of a cognizable class has fulfilled the three Duren prongs and made out a prima facie case."49

In People v. Lang,50 the defendant’s bench trial conviction on a weapons count was reversed when the supreme court found that he had not expressly waived his right to a jury trial.51 The trial court had severed the weapons charge from the murder and robbery counts that led to the death sentence at a separate jury trial. At the subsequent weapons count trial, the judge incorrectly believed that the defendant had waived his jury trial right.52 The supreme court held that no express waiver had occurred, and set aside the weapons conviction.53 However, the reversal of this severed count had no effect on the court’s affirmance of the death penalty.54

B. Predominant Issues

The majority of guilt phase issues appealed by the death penalty defendants involved allegations of prosecutorial misconduct. These

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48. Id. at 565-66, 778 P.2d at 169, 262 Cal. Rptr. at 40-41 (Broussard, J., dissenting). The majority addressed this assertion, stating: “Unlike Justice Broussard we do not understand the United States Supreme Court to have created such a minimal burden that a defendant need demonstrate only that underrepresentation has occurred over a period of time.” Id. at 524, 778 P.2d at 139, 262 Cal. Rptr. at 11.

49. Id. at 565-66, 778 P.2d at 169, 262 Cal. Rptr. at 40 (Broussard, J., dissenting). Justice Mosk wrote a separate dissenting opinion discussing a clearly hearsay statement put before the jury by the prosecutor. Justice Mosk did not believe that this statement passed the “reasonable doubt” harmless error standard set forth in Chapman. Id. at 557-62, 778 P.2d at 162-65, 262 Cal. Rptr. at 34-37 (Mosk, J., dissenting); see also supra note 5 and accompanying text for a discussion of Chapman and the harmless error doctrine.

50. 49 Cal. 3d 991, 782 P.2d 627, 264 Cal. Rptr. 386 (1989). In Lang, the defendant killed a deer hunter, then stole his wallet and recreational vehicle. The defendant was convicted of murder, robbery, and possession of a concealable firearm by a convicted felon. The possession count was severed entirely from the murder and robbery counts that led to the death sentence.

51. Id. at 1028-29, 782 P.2d at 651-52, 264 Cal. Rptr. at 411. The majority opinion in Lang was written by Justice Kaufman. The court was unanimous regarding the reversal of the possession count. The court noted that the prosecutor had conceded “the validity of defendant’s argument.” Id. at 1046, 782 P.2d at 664, 264 Cal. Rptr. at 423.

52. Id.

53. Id. at 1029, 782 P.2d at 652, 264 Cal. Rptr. at 411. There are three ways that a defendant’s right to a jury trial can be waived: failure to appear at trial, express consent, or noncompliance with requirements. There cannot be “waiver by implication.” 7 B. WITKIN, CALIFORNIA PROCEDURE, Trial § 102 (1985) (citing CAL. CODE CIV. PROC. § 631).

54. Lang, 49 Cal. 3d at 1046, 782 P.2d at 664, 264 Cal. Rptr. at 423.
issues ranged from improper direct examination to misconduct during closing argument. The California Supreme Court quickly dismissed most of these arguments on the grounds that defense counsel had not made the objections during trial at the time of the actual misconduct. The court stated that if an objection and an admonition of the jury had been made immediately, any possible harm or effect of the misconduct could have been cured. The court thus reaffirmed the principle that a defendant who fails to object at trial has waived the objection.

In People v. Jackson, the supreme court did not decide whether an objection was waived when not raised at trial, because the court found no evidence of prosecutorial misconduct. The defendant in Jackson was convicted of murdering a police officer. The officer had been called when the defendant, under the influence of PCP, was causing a loud disturbance in a neighborhood street. The defendant thereupon shot the officer who was attempting to calm him. The court found that it was not misconduct for the prosecutor to point out at trial that the defendant had pleaded guilty to misdemeanor PCP.

55. See People v. Carrera, 49 Cal. 3d 291, 777 P.2d 121, 261 Cal. Rptr. 348 (1989). In Carrera, the defendant and an accomplice robbed and killed a married couple who were motel owners. The defendant was convicted of capital murder. Id. at 300, 777 P.2d at 124, 261 Cal. Rptr. at 351. On appeal, he contended that the prosecutor had elicited tainted testimony during direct examination, because the testimony directly contradicted the same witness' earlier statements at the separate trial of an accomplice. Id. at 315, 777 P.2d at 134, 261 Cal. Rptr. at 361.

56. See id. at 319-20, 777 P.2d at 137, 261 Cal. Rptr. at 364. The defendant claimed that the prosecutor asserted certain facts during closing argument that had not been proven, including purported confessions by the defendant that the defendant threatened witnesses in order to silence them, and that the killings were premeditated.

57. See infra note 64 and accompanying text.

58. See Carrera, 49 Cal. 3d at 317, 777 P.2d at 135, 261 Cal. Rptr. at 362; Lang, 49 Cal. 3d at 1040-41, 782 P.2d at 660, 264 Cal. Rptr. at 419-20.

59. Bell, 49 Cal. 3d at 535, 778 P.2d at 147, 262 Cal. Rptr. at 19. The Bell court explained its standard for reviewing defense objections that were 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 the contention must be rejected ... ; if it would not the court must then and only then reach the issue whether on the whole record any harm resulted in a miscarriage of justice within the meaning of the Constitution.

60. 49 Cal. 3d 1170, 783 P.2d 211, 264 Cal. Rptr. 852 (1989).

61. Id. at 1192, 783 P.2d at 221, 264 Cal. Rptr. at 862.

62. Id. at 1181-82, 783 P.2d at 214-15, 264 Cal. Rptr. at 855-56.
charges after being charged with the murder of the police officer. The defendant unsuccessfully argued to the California Supreme Court that the prosecution had implied that the guilty pleas were entered merely to fabricate an "under the influence" defense to the murder charge.63

In analyzing these prosecutorial misconduct questions, the Lucas court made extensive use of the "harmless error" doctrine.64 In People v. Bell, the court ruled that the improper admission of a clearly hearsay statement65 did not reach the height of reversible error, as defined in Chapman v. California.66 The court was "satisfied beyond a reasonable doubt that [the] instance of prosecutorial misconduct alone did not affect the verdict," because the evidence presented through hearsay was supported by other "uncontradicted testimony."67

Thus, the supreme court is not quick to find reversible error caused by prosecutorial misconduct. However, the court's analysis of these arguments is very thorough, both for the guilt and penalty phases of the trial.68 Although, the court may be the only check on misbehavior by a prosecutor,69 the court has nevertheless made it clear that defense counsel must raise these objections at trial and request an immediate admonition of the jury; otherwise, the issue may be waived on appeal.70

63. Id. at 1191-1192, 783 P.2d at 221, 264 Cal. Rptr. at 862.
64. See Comment, Harmless Error: Abettor of Courtroom Misconduct, 74 J. CRIM. L. & CRIMINOLOGY 457, 470-75 (1983) (discussing advantages of instituting automatic reversal for deliberate misconduct); see supra note 5 and accompanying text (discussing harmless error doctrine).
65. See Bell, 49 Cal. 3d at 532-33, 778 P.2d at 145, 262 Cal. Rptr. at 17. The prosecutor introduced a hearsay statement indicating that the defendant had been in possession of the murder weapon. The person who originally made the statement was unavailable for cross-examination by the defense. The supreme court referred to this action by the Bell prosecutor as "particularly egregious." Id.
66. See supra note 5 and accompanying text.
67. Bell, 49 Cal. 3d at 534, 778 P.2d at 146, 262 Cal. Rptr. at 18.
68. Of the four cases wherein prosecutorial misconduct was alleged during the guilt phase, in all but Jackson the same allegations were made regarding the penalty phase of the trials.
70. See, e.g., Bell, 49 Cal. 3d at 535, 778 P.2d at 147, 262 Cal. Rptr. at 19; Lang, 49 Cal. 3d at 1040-41, 782 P.2d at 660, 264 Cal. Rptr. at 419.
C. Hypnotically-Enhanced Testimony

The case of \textit{People v. Hayes}\footnote{49 Cal. 3d 1260, 783 P.2d 719, 265 Cal. Rptr. 132 (1989). In \textit{Hayes}, the defendant and another assailant entered and burglarized the married victims' home, then killed the husband and raped the wife. The defendant was convicted of first degree murder, burglary, rape, and forcible oral copulation. He was sentenced to life imprisonment without the possibility of parole. \textit{Id.}} involved a sentence of life without the possibility of parole. Although the jury chose not to impose the death penalty, the defendant's successful appeal, based on the improper use of hypnotically enhanced testimony,\footnote{\textit{Id.} at 1274-75, 783 P.2d at 728, 265 Cal. Rptr. at 141.} will be analyzed to make the discussion of the Lucas court's approach to guilt phase arguments more complete.

In \textit{Hayes}, the supreme court disagreed with the trial court's decision to admit witness testimony that was enhanced by hypnosis.\footnote{\textit{Id.} at 1269, 783 P.2d at 725, 265 Cal. Rptr. at 138.} The court relied on the holding in \textit{People v. Shirley}\footnote{31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982). The defendant in \textit{Shirley} was convicted of rape. The California Supreme Court reversed the guilty verdict, based on the defendant's contention that the victim's testimony was fully established only after she had undergone hypnosis to aid her memory. \textit{Id.} at 70, 641 P.2d at 806, 181 Cal. Rptr. at 275.} that "testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible."\footnote{\textit{Id.} at 66, 641 P.2d at 804, 181 Cal. Rptr. at 273.} The \textit{Shirley} court declared such testimony to be inadmissible based on the incompetence of the witness and the inherent unreliability of hypnotically-enhanced testimony. "[A]t the present time the use of hypnosis to restore the memory of a potential witness is not generally accepted as reliable by the relevant scientific community."\footnote{\textit{Id.} at 66, 641 P.2d at 804, 181 Cal. Rptr. at 272. (emphasis in original).}

The \textit{Hayes} court rejected outright the prosecution's contention that the victim's testimony should be admitted under the harmless error doctrine.\footnote{\textit{Hayes}, 49 Cal. 3d at 1269-1270, 783 P.2d at 725, 265 Cal. Rptr. at 138.} The court stressed that the witness' identification of the defendant was not made until \textit{after} she had undergone hypnosis,\footnote{\textit{Id.} at 1270, 783 P.2d at 725, 265 Cal. Rptr. at 138.} and was therefore inadmissible posthypnotic testimony under \textit{Shirley}.\footnote{\textit{Id.}}

The supreme court reversed and remanded the conviction in \textit{Hayes}, but stated that the admission of \textit{prehypnotic} statements is not completely restricted. "[A] witness is permitted to testify to events that the trial court finds the witness both recalled and related to others \textit{before} undergoing hypnosis."\footnote{\textit{Hayes}, 49 Cal. 3d at 1273, 783 P.2d at 727, 265 Cal. Rptr. at 140 (emphasis added) (citing State \textit{ex rel.} Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982); Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983); State v. Patterson, 213

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reversed the conviction on inadmissible evidence grounds, it was clear that a retrial of the defendant would not require the exclusion of the witness' entire testimony.81

IV. ISSUES CONCERNING SPECIAL CIRCUMSTANCES

The California Supreme Court did not reverse any of the trial court special circumstance findings in the six death penalty cases.82 However, the supreme court in *People v. Andrews*83 did give much consideration to the treatment of a defendant's prior murder conviction in Alabama as a special circumstance. In *Andrews*, the defendant argued that the trial court had erred in its interpretation of another jurisdiction's law.84 The defendant further asserted that his constitutional equal protection rights85 would be violated by using his

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81. *Hayes*, 49 Cal. 3d at 1272-73, 783 P.2d at 727, 265 Cal. Rptr. at 140 (statements made by victim prior to the hypnosis that were not discussed during the hypnotic sessions would be admissible).

82. Few special circumstance issues were raised in these cases. *Jackson, Hunter,* and *Bell* did not include special circumstance discussions, and *Lang* considered special circumstance issues only within the guilt-phase discussion. See *People v. Lang*, 49 Cal. 3d 991, 1008, 782 P.2d 627, 637, 264 Cal. Rptr. 386, 396 (1989).


The majority opinion in *Andrews* was written by Justice Kennard, and was joined by Chief Justice Lucas and Justices Broussard, Panelli, Eagleson, and Kaufman. Justice Mosk concurred with the majority on the special circumstance finding, but wrote a separate opinion explaining his disagreement with the majority's analysis.

84. *Id.* at 221-22, 776 P.2d at 298-99, 260 Cal. Rptr. at 596-97. The other jurisdiction's law appears irrelevant since the California Penal Code clearly states that: "[A]n offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree." CAL. PENAL CODE § 190.2 (a)(2) (West 1988).

prior murder conviction as a special circumstance. 86 

In 1967 at the age of sixteen, Andrews was convicted of murder in Alabama. This prior conviction was found to be a special circumstance in the California trial wherein he received the death sentence. 87 The defendant was twenty-eight years old at the time of the California conviction. However, the supreme court did not discuss the length of time between the two crimes as a possible factor in the analysis of the special circumstance. 88

In addressing the defendant’s arguments, the supreme court first interpreted the provision of section 190.2 of the California Penal Code, 89 which applies to treatment of convictions in foreign jurisdictions. 90 The court found that the statute did not require the trial court to “determine whether the guilt ascertainment procedures of that jurisdiction afforded the same procedural protections as those in California.” 91 As a result of this finding, the court dismissed the defendant’s assertion that the Alabama offense must “without doubt have been punishable as murder in California” to be grounds for a special circumstance finding. 92 Instead, the supreme court held that the offense may be considered a special circumstance if it could have been punishable as murder in California. 93 The court concluded that, because California does allow certain sixteen year olds to be tried as adults, the defendant’s murder conviction in Alabama could have been paralleled in California courts if the offense had been committed within California’s jurisdiction. 94

86. Andrews, 49 Cal. 3d at 223, 776 P.2d at 299, 260 Cal. Rptr. at 598.
87. Id. at 221, 776 P.2d at 298, 260 Cal. Rptr. at 597. In Andrews, the defendant went to an apartment where two men and one woman were to help him obtain illegal drugs. The defendant robbed and killed the men, and then raped and killed the woman. The defendant was convicted of capital murder. Id. at 206-08, 776 P.2d at 287-89, 260 Cal. Rptr. at 586-87.
88. See id. at 221-25, 776 P.2d at 297-300, 260 Cal. Rptr. at 596-99.
89. The present section 190.2, which defines findings of special circumstance in first degree murder cases, was added by voter initiative in 1978. However, subdivision (a)(2) of the death penalty statute, which specifically allows prior murder convictions to be findings of special circumstance, is identical to subdivision (c)(5) of former section 190.2 of the death penalty statute passed by the Legislature in 1977. See Andrews, 49 Cal. 3d at 222, 776 P.2d at 298, 260 Cal. Rptr. at 597; CAL. PENAL CODE § 190.2 (West 1988).
90. Andrews, 49 Cal. 3d at 223, 776 P.2d at 299, 260 Cal. Rptr. at 597. (“[I]t would have been possible for him to have been convicted of murder as an adult [in California]. The offense thus ‘would be punishable’ as murder if committed in California, within the meaning of section 190.2, subdivision (a)(2).”) (emphasis in original).
91. Id. at 222, 776 P.2d at 298-99, 260 Cal. Rptr. at 597.
92. Id. at 222, 776 P.2d at 298, 260 Cal. Rptr. at 597 (citations omitted).
93. Id. at 223, 776 P.2d at 299, 260 Cal. Rptr. at 597. The court did find the defendant’s offense to be punishable as murder in California: “Any minor between the ages of 16 and 18 who commits murder in California, and has been found unfit to be treated as a juvenile, can be tried and convicted as an adult and thus be liable to punishment as a murderer.” Id. at 222, 776 P.2d at 298, 260 Cal. Rptr. at 597.
94. Id. at 223, 776 P.2d at 299, 260 Cal. Rptr. at 598. However, the court refused to
The defendant in *Andrews* claimed that treating the prior conviction as a special circumstance was a denial of equal protection, because a sixteen year old facing trial as an adult in California is entitled to a fitness hearing prior to trial. In Alabama, the defendant did not receive such a hearing. The California Supreme Court concluded that, although the two states followed different procedures, there was no denial of equal protection by giving the Alabama conviction equal weight in California for purposes of a special circumstance finding. “As long as the guilt ascertainment process in the foreign jurisdiction is not in and of itself constitutionally flawed, there is no constitutional bar against treating a murder conviction from a foreign state in the same manner as a California conviction for the same offense.” Because they found no such “constitutional flaw,” the majority upheld the special circumstance finding.

V. PENALTY PHASE

A. *Boyde v. California: Implications for California Supreme Court Reviews of Death Penalty Cases*

The recent United States Supreme Court decision in *Boyde v. California* has been heralded as the ruling that “eliminates [the] last sweeping challenge to [the] California [death] statute.” In that case, the Court held that jury instructions required by section 190.3 of the California Penal Code (formerly CALJIC 8.84.1) do not violate express a view on the “validity of a prior-murder special-circumstance finding which is based on the conviction of defendant under the age of 16 in a jurisdiction which permits such a minor to be tried as an adult.” *Id.* at n.19 (emphasis added).

95. *Id.* at 223, 776 P.2d at 299, 260 Cal. Rptr. at 598. This equal protection argument was also flatly rejected by Justice Mosk’s concurrence. He stated that section 190.2(a)(2) specifically allows for equal treatment of murder convictions from different jurisdictions that use completely different processes. *Id.* at 235-36, 776 P.2d at 307-08, 260 Cal. Rptr. at 606 (Mosk, J., concurring & dissenting). (“What defendant seems to be attempting to raise is, strictly speaking, a claim of denial of due process . . . he fails, however, to adequately support such a point.”).

96. *Id.* at 223, 776 P.2d at 299, 260 Cal. Rptr. at 598.
97. *Id.* at 224, 776 P.2d at 299, 260 Cal. Rptr. at 598.
98. *Id.*
99. *Id.*
100. 110 S. Ct. 1190 (1990) (affirming People v. Boyde, 46 Cal. 3d 212, 758 P.2d 25, 250 Cal. Rptr. 83 (1988)). The defendant in *Boyde* was convicted of murdering a clerk at a 7-Eleven store in Riverside, California. The defendant contended on appeal that the jury was not instructed on the possibility of considering mercy and the defendant’s background as mitigating factors. *Id.* at 1194; see also *Death Penalty Law II*, supra note 3, at 1173.

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a defendant's rights, because a reasonable juror would understand that the instructions permit the consideration of factors such as sympathy and the defendant's background. The Boyde decision also affirmed the California Supreme Court's earlier ruling that "the jury was adequately informed as to its discretion in determining whether death was the appropriate penalty."

In Boyde, the defendant's principle argument was that the jury instructions given in accordance with section 190.3 misled the jury. The defendant asserted that the jury misunderstood its duty

102. 110 S. Ct. at 1198-99; see also CAL. PENAL CODE § 190.3 (West 1988); infra note 104.

103. See Boyde, 110 S. Ct. at 1195 (quoting People v. Brown, 40 Cal. 3d 512, 541, 726 P.2d 516, 531, 230 Cal. Rptr. 834, 849 (1985)).

104. Section 190.3 provides the basis for instructions on the jury's responsibility in determining both aggravating and mitigating factors when deciding whether to sentence a convicted murderer to death or life imprisonment without the possibility of parole. It provides, in part:

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
(c) The presence or absence of any prior felony conviction.
(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
(h) Whether or not defendant at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.
(i) The age of the defendant at the time of the crime.
(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

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

CAL. PENAL CODE § 190.3 (West 1985) (emphasis added).

105. People v. Boyde, 46 Cal. 3d at 255, 758 P.2d at 49, 250 Cal. Rptr. at 108; see infra notes 113-23 and accompanying text for a description and analysis of the history of such instructional errors.
in determining the appropriate sentence, resulting in a "mere mechanical counting" of factors.\(^{106}\) In addressing this argument, the United States Supreme Court focused on the likelihood of an improper imposition of the death penalty by the jury.\(^{107}\) The Court concluded that the jury instructions\(^{108}\) did not remove from the jury's consideration such relevant circumstances as the defendant's background and character, and the jury's own sympathy for the defendant.\(^{109}\) The Court emphasized the context in which the instructions were given: both the prosecutor and the defense counsel stated that other factors could be considered in mitigation, and that the weighing process gave broad discretion to the jury.\(^{110}\)

Thus, the Supreme Court's opinion in *Boyde* approved of California's statutory and judicial treatment of aggravating and mitigating circumstances in death penalty cases. Chief Justice Lucas had stated previously: "We believe we have made substantially accurate law in the death penalty field."\(^{111}\) The United States Supreme Court agreed in the *Boyde* decision.\(^{112}\)

\(^{106}\) *Boyde*, 110 S. Ct. at 1195. See also People v. Boyde, 46 Cal. 3d at 253, 758 P.2d at 48, 250 Cal. Rptr. at 106.

\(^{107}\) *Boyde*, 110 S. Ct. at 1197. Specifically, the opinion stated: "We think the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 1198.

\(^{108}\) In *Boyde*, the instructions given were CALJIC 8.84.1, stated as follows:

*In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable: . . .*

CAL. JURY INSTR. CRIM. § 8.84.1 (West 4th 1979) (the instruction has since undergone several revisions). Instructions as to aggravating and mitigating factors were then given according to section 190.3 of the California Penal Code. See *supra* note 104 for text of section 190.3.

\(^{109}\) *Boyde*, 110 S. Ct. at 1198-1201.

\(^{110}\) *Id.*

\(^{111}\) L.A. Times, Oct. 5, 1988, at A1, col. 2; see also *Death Penalty Law I*, *supra* note 3, at 452.

\(^{112}\) The state supreme court followed the United States Supreme Court's *Boyde* decision in affirming death sentences in three of the six cases reviewed. See People v. Jackson, 49 Cal. 3d 1170, 783 P.2d 211, 264 Cal. Rptr. 852; see also *supra* notes 60-63 and accompanying text (analyzing *Jackson*); People v. Andrews, 49 Cal. 3d 200, 776 P.2d 285, 260 Cal. Rptr. 583; see also *supra* notes 83-99 and accompanying text (analyzing *Andrews*); People v. Hunter, 49 Cal. 3d 957, 782 P.2d 708, 264 Cal. Rptr. 367; see *infra* notes 130-40 (analyzing *Hunter*). The *Boyde* decision has thus been credited with a "cloud that has hung over more than 100 convictions." L.A. Times Mar. 6, 1990, at A3, col. 1 (describing a statement by California Attorney General John Van de Kamp).
B. Instructional Errors

1. Brown error

The foregoing discussion of Boyde provides an introduction to penalty phase jury instruction issues on appeal. In 1985, the California Supreme Court held in People v. Brown that instructions based on CALJIC 8.84.2 created the possibility of misleading the jury. However, the California court’s opinions reviewed during this survey period involving Brown error allegations emphasized that the standard CALJIC 8.84.2 instructions were not given in isolation.

Therefore, the court in these cases ruled that there was no possibility of a misinformed jury. In asserting this, the California court stressed a proposition fully endorsed by the United States Supreme Court in the Boyde decision: given the context of the instructions, a

114. The instruction 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 aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.
CALJIC 8.84.2 (West 4th ed. 1979).
115. Brown, 40 Cal. 3d at 536-37, 726 P.2d at 528-29, 230 Cal. Rptr. at 846-47. The court in Brown reversed the death sentence, based on the defendant’s claim that the jury was misinformed as to its actual discretion in sentencing. The court held that it is error to give an antisympathy instruction at the penalty phase of a capital trial in conjunction with CALJIC 8.84.2. Id. The court specifically asserted that a jury might misunderstand the scope of its discretion in the penalty phase of the trial. In cases following Brown, the court said: “Our concerns [are] twofold and interrelated: that a juror might understand his function as (i) merely the ‘counting’ of factors and then (ii) reaching an ‘automatic’ decision, with no exercise of personal responsibility for deciding, by his own standards, which penalty was appropriate.” Hunter, 49 Cal. 3d at 984-85, 782 P.2d at 624, 264 Cal. Rptr. at 383 (quoting People v. Milner, 45 Cal. 3d 227, 256, 733 P.2d 689-688, 246 Cal. Rptr. 713, 722 (1988)).
116. See Jackson, 49 Cal. 3d at 1208, 783 P.2d at 231, 264 Cal. Rptr. at 872 (defendant claimed instruction was erroneous because it called for a “mechanical application of the weighing process”); Andrews, 49 Cal. 3d at 228-29, 776 P.2d at 302-03, 260 Cal. Rptr. at 601-602 (defendant asserted that the instruction misrepresented the scope of jurors’ sentencing discretion); Hunter, 49 Cal. 3d at 985, 782 P.2d at 624, 264 Cal. Rptr. at 383 (defendant specifically pointed to prosecutor’s comment that the jury’s duty was a “simple . . . balancing test” in asserting that the jury was misled as to their actual sentencing discretion).
117. See Jackson, 49 Cal. 3d at 1208, 783 P.2d at 231, 264 Cal. Rptr. at 872 (court stated that both the prosecutor and defense counsel had informed the jury of its discretion in weighing each factor); Andrews, 49 Cal. 3d at 229, 776 P.2d at 303, 260 Cal. Rptr. at 602 (“[the prosecutor] never told the jury to engage in a mechanical counting of aggravating and mitigating circumstances”) (emphasis added); Hunter, 49 Cal. 3d at 985, 782 P.2d at 625, 264 Cal. Rptr. at 384 (court pointed out that the prosecutor told jurors that a single mitigating factor could outweigh multiple aggravating factors, depending on the importance the jury gave to each).
118. In the cases discussing Brown error, the court stated that counsels’ arguments were important factors when considering whether a reasonable jury could have been misled about its duty in determining the sentence.
"reasonable juror" would not have been misled.\textsuperscript{119} The Court in \textit{Boyde} emphasized that "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning . . . . Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with common sense understanding of the instructions in light of all that has taken place at the trial . . . ."\textsuperscript{120}

The California Supreme Court follows the \textit{Boyde} analysis in reviewing appeals alleging \textit{Brown} error:

A majority of the justices of the U.S. Supreme Court, upon reviewing our \textit{Brown} decision, stressed the necessity of analyzing the record in each case to determine whether the jury instructions, taken as a whole, and read in conjunction with prosecutor's arguments, adequately informed the jury of its responsibility to consider all of the mitigating evidence of the case.\textsuperscript{121}

Thus, as in \textit{Brown},\textsuperscript{122} severe implications of possible error in jury instructions may lead to a death penalty reversal. However, given the California and the United States Supreme Courts' strict attention to all statements made by prosecution and defense counsel, the odds for a successful \textit{Brown} error appeal are weighed heavily against the defendant.\textsuperscript{123}

\textbf{2. Factor (k) Error}

Two of the death penalty appeal cases in this survey that claimed \textit{Brown} error also alleged factor (k)\textsuperscript{124} instructional error.\textsuperscript{125} Factor

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{119} See \textit{Jackson}, 49 Cal. 3d at 1208, 783 P.2d at 231, 264 Cal. Rptr. at 872; \textit{Andrews}, 49 Cal. 3d at 228-29, 776 P.2d at 303-04, 260 Cal. Rptr. at 601; \textit{Hunter}, 49 Cal. 3d at 986, 782 P.2d at 625, 264 Cal. Rptr. at 384.
\item \textsuperscript{120} \textit{Boyde v. California, 110 S. Ct.} 1190, 1198 (1990).
\item \textsuperscript{121} \textit{People v. Ghent, 43 Cal. 3d 739, 777, 739 P.2d 1250, 1275, 239 Cal. Rptr.} 82, 107 (1987).
\item \textsuperscript{122} See supra note 115 and accompanying text.
\item \textsuperscript{123} In most cases, instructions specifically state that the jury has discretion to weigh the aggravating and mitigating circumstances. In \textit{Hunter}, the court pointed to an instruction given in addition to the standard CALJIC 8.84.2 that specified the discretion given to the jury in weighing each factor:

In weighing the aggravating and mitigating factors, you are not to merely count the numbers on each side. You are instructed rather, to weigh and consider the factors. One mitigating or aggravating circumstance may be sufficient to support a decision that death is or is not the appropriate punishment in this case. The weight you give to any factor is for you, individually, to decide. The particular weight of such opposing circumstances is not determined by the relative number, but rather by their relative convincing force on the ultimate question of punishment. \textit{Hunter}, 49 Cal. 3d at 985, 782 P.2d at 624, 264 Cal. Rptr. at 383.
\item \textsuperscript{124} "Factor (k)" refers to section 190.3(k) of the California Penal Code. The factor (k) instruction allows a jury to consider in mitigation "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." \textbf{CAL PENAL CODE § 190.3(k)} (West 1988); see supra note 104 and accompanying text.
\end{enumerate}
\end{footnotesize}
(k) error is also known as *Easley* error, referring to the case holding that “factor (k) could in some situations unduly limit the jury's consideration of evidence relating to the general character, family background, or other aspect of the defendant.” In the cases alleging factor (k)/*Easley* error, each defendant sought reversal because the jury was not instructed that it could consider any aspect of a defendant's background or character as a possible mitigating circumstance.

The defendants in both *People v. Jackson* and *People v. Hunter* argued that the language in section 190.3(k) of the Penal Code limits the mitigating factors that a jury may consider, particularly with regard to a defendant's background and character. The court disagreed with this claim in both cases, pointing to prosecution and defense counsel statements made during trial. The majority opin-

(quoting California Penal Code § 190.3); see People v. Lanphear, 36 Cal. 3d 163, 680 P.2d 1081, 203 Cal. Rptr. 122 (1984) (death penalty reversed because the jury was instructed explicitly that it could not consider sympathy or pity in mitigation); see also Death Penalty Law I, supra note 3, at 459-462, and Death Penalty Law II, supra note 3, at 1174-75 (discussing previous appeals alleging factor (k) error).

125. See People v. Jackson, 49 Cal. 3d 1170, 1207, 783 P.2d 211, 231, 264 Cal. Rptr. 852, 872 (1989); *Hunter*, 49 Cal. 3d at 989-90 782 P.2d at 627, 264 Cal. Rptr. at 386; see infra notes 141-45 (facts of *Hunter*).

126. *Jackson*, 49 Cal. 3d at 1207, 783 P.2d at 231, 264 Cal. Rptr. at 872 (citing People v. Easley, 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983)). The supreme court in *Jackson* approved of the trial court's additional instructions given pursuant to the suggestion in *Easley*. *Id.* The instructions given were as follows:

As to those factors that you find to be mitigating, they are only examples of some of the factors that you may consider in determining punishment of this case. You should pay careful attention to them and give them the weight to which you find them to be entitled. You are not required to limit your consideration of mitigating circumstances to these factors. You may also consider other circumstances relating to the case or to the defendant as reasons for not imposing the death sentence. Any mitigating circumstance, standing alone, may be sufficient to support a decision that life without the possibility of parole is the appropriate punishment, provided that the mitigating circumstance or circumstances outweigh(s) any aggravating circumstance or circumstances.

*Id.* (the jurors were also instructed that they could consider sympathy or pity in mitigation) (emphasis in original).

127. *Jackson*, 49 Cal. 3d at 1207, 783 P.2d at 231, 264 Cal. Rptr. at 872; *Hunter*, 49 Cal. 3d at 989-90, 782 P.2d at 627, 264 Cal. Rptr. at 386.

128. See supra note 104 and accompanying text.

129. *Jackson*, 49 Cal. 3d at 1207, 783 P.2d at 231, 264 Cal. Rptr. at 872 (“[d]efendant [asserts] the jury was not instructed that it might consider as a mitigating factor any aspect of defendant's character or record”); *Hunter*, 49 Cal. 3d at 989-90, 782 P.2d at 627, 264 Cal. Rptr. at 386 (“defendant maintains that the court's instructions improperly limited the jury's consideration of his mitigating background and character evidence”).

130. *Jackson*, 49 Cal. 2d at 1207, 783 P.2d at 231, 264 Cal. Rptr. at 872; *Hunter*, 49 Cal. 3d at 989-90, 782 P.2d at 627, 264 Cal. Rptr. at 386. In *Hunter*, the jury heard a modified factor (k) instruction that expressly permitted the consideration of factors “including but not limited to the defendant's character, background, history, mental condition, and physical condition.” *Hunter*, 49 Cal. 3d at 989, 782 P.2d at 627, 264 Cal. Rptr. at 386.
ions in Jackson\textsuperscript{131} and Hunter\textsuperscript{132} stressed that these statements prevented any possible misinterpretation of the instruction. Relevant statements cited by the supreme court included the Jackson defense counsel’s marked reference to the “impoverished environment” in which the defendant was raised\textsuperscript{133} and the prosecutor’s remark in Hunter addressing the defendant’s background as “potentially mitigating evidence.”\textsuperscript{134} The court in both cases thus rejected claims that a reasonable juror could have mistakenly assumed that background and character were not mitigating factors. Therefore, the court concluded that in light of all the evidence admitted, including the statements made during the trial,\textsuperscript{135} there was no factor (k)/Easley error in Jackson or Hunter.\textsuperscript{136}

Again, the United States Supreme Court’s recent decision in Boyde supports the California Supreme Court’s position. In Boyde, the United States Supreme Court found no legitimate basis for the alleged factor (k) error: “Even were the language of the [factor (k)] instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner’s background and character could be considered in mitigation.”\textsuperscript{137} The Court ruled that background and character clearly are factors that may “extenuate the gravity of the crime” and, therefore, their possible use in mitigation is clearly allowed by the factor (k) instruction.\textsuperscript{138}

The California Supreme Court also employed the controversial factor (k) instruction as the saving remedy for other defense claims based on instructional error. In People v. Hunter, the defendant additionally contended that his emotional problems\textsuperscript{139} would not constitute “extreme mental or emotional disturbance,” as described in

\textsuperscript{131} Justice Panelli wrote the opinion of the court in Jackson. Justice Mosk concurred separately, and was joined by Justice Broussard.

\textsuperscript{132} Justice Kaufman wrote the opinion of the unanimous court in Hunter.

\textsuperscript{133} Jackson, 49 Cal. 3d at 1207, 783 P.2d at 231, 264 Cal. Rptr. at 872.

\textsuperscript{134} Hunter, 49 Cal. 3d at 990, 782 P.2d at 627, 264 Cal. Rptr. at 386.

\textsuperscript{135} See Jackson, 49 Cal. 3d at 1207-08, 783 P.2d at 231, 264 Cal. Rptr. at 872; Hunter, 49 Cal. 3d at 989-90, 782 P.2d at 627, 264 Cal. Rptr. at 386.

\textsuperscript{136} Jackson, 49 Cal. 3d 1208, 783 P.2d at 231, 264 Cal. Rptr. at 872; Hunter, 49 Cal. 3d at 990, 782 P.2d at 627, 264 Cal. Rptr. at 386.

\textsuperscript{137} Boyde v. California, 110 S. Ct. 1190, 1199 (1990).

\textsuperscript{138} Id.

\textsuperscript{139} In Hunter, the defendant was convicted of murder and sentenced to death for the premeditated killing of his father and stepmother. The defendant claimed that he was emotionally disturbed because of mental and physical abuse inflicted by his father. Testimony by a psychiatrist attested to the possible effect of such abuse. Hunter, 49 Cal. 3d at 987-88, 782 P.2d at 625-26, 264 Cal. Rptr. at 384-85.
section 190.3(d) of the California Penal Code. The defendant thus claimed that the jury may not have considered this "lesser" disturbance in mitigation, because of the lack of such a specific instruction. Justice Kaufman, writing for a unanimous court, disagreed with the defendant's assertion. The opinion stressed the importance of the factor (k) instruction which was given, because it allows the jury to consider a broad range of factors in mitigation of a crime. Therefore, any emotional disturbance that would not be categorized as "extreme" for purposes of section 190.3(d) could still be regarded as a mitigating factor under the "catchall" provision of section 190.3(k).

The defendant in People v. Lang also argued that the lack of a specific instruction to ensure consideration of background and character in mitigation established reversible error. However, he additionally challenged the trial court's definitions of "aggravating" and "mitigating." The supreme court rejected these arguments, again asserting that the inclusion of section 190.3(k) instructions allowed jurors to consider many factors that were not specifically identified in the instructions.

Thus, the cases reviewed in this survey period suggest that both Brown and factor (k)/Easley claims may be in decline. The court's emphasis on viewing jury instructions in the context of the entire trial makes it difficult for defense attorneys to successfully attack the language of section 190.3 instructions.

C. Ineffective Assistance of Counsel

In People v. Lang, the defendant's attorney acceded to his client's

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140. Id. See supra note 104 and accompanying text (quoting CAL. PENAL CODE § 190.3 which was given in the case).
141. Hunter, 49 Cal. 3d at 987-88, 782 P.2d at 626, 264 Cal. Rptr. at 384-85.
142. Hunter, 49 Cal. 3d at 987-88, 782 P.2d at 626, 264 Cal. Rptr. at 385 ("this 'catchall' provision is sufficient to permit the penalty jury to take into account a mental condition of the defendant which, though perhaps not deemed 'extreme,' nonetheless mitigates the seriousness of the offense"). The court also emphasized the defense counsel's statements regarding the jury's ability to consider the defendant's emotional disturbance in mitigation. Id.
143. Id.
144. 49 Cal. 3d 991, 782 P.2d 627, 264 Cal. Rptr. 386 (1989).
145. Lang, 49 Cal. 3d at 1035, 782 P. 2d at 656-57, 264 Cal. Rptr. at 415-416. The defendant based his argument on the definition of "mitigate" given to the jury ("to make less severe or painful; to cause to become less harsh or hostile"). The defendant claimed that this definition implied that only factors which "pertain directly to the crime" could be considered in mitigation, thus ruling out background and character. Id.
146. Id. at 1036-37, 782 P.2d at 657, 264 Cal. Rptr. at 416. The jury heard a modified factor (k) instruction that allowed consideration of "any ... circumstance which attenuates the gravity of the crime even though it is not a legal excuse for the crime, and any other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death." Id.
request not to call the defendant's grandmother as a character witness. 147 Although this agreement resulted from the defendant's express request, the defendant claimed on appeal that it was the result of an ineffective counsel. The court, focusing upon the defendant's role, rejected this as a grounds for reversal. 148 The court asserted that it was "not on any antecedent act or omission of counsel" that defendant based his claim, but on defendant's own action. 149 Although the court conceded that the presentation of mitigating evidence was important, it pointed out that other mitigating evidence had been presented at trial. 150 After determining that evidence presented at trial of the defendant's good behavior during incarceration could have been considered in mitigation, 151 the court refused to label as "ineffective" the attorney's decision to follow his client's wishes. 152

The court additionally explained that even if the counsel's action was inappropriate, the "invited error" doctrine would prevent a reversal. 153 This theory distinguishes between an error produced solely by the justice system and one that is actually instigated by the party. 154 The doctrine "operates to estop a party from asserting error

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147. 49 Cal. 3d at 1029, 782 P.2d at 652, 264 Cal. Rptr. at 411. The grandmother was to have testified regarding the defendant's background and emotional state. "Counsel stated that defendant, to his credit as a human being... did not want to put his elderly grandmother through that kind of experience of the emotional trauma of having to come [to the trial] and testify." Id. (citations omitted).

148. Id. at 1032-33, 782 P.2d at 654, 264 Cal. Rptr. at 413.

149. Id. The court asserted that counsel had not acted unreasonably in refusing to call the defendant's grandmother: "While selection of defense witnesses is generally a matter of trial tactics over which the attorney, rather than the client, has ultimate control... it does not necessarily follow that an attorney acts incompetently in honoring a client's request not to present certain evidence for non-tactical reasons." Id. at 1031, 782 P.2d at 653, 264 Cal. Rptr. at 412.

150. Id. at 1030, 782 P.2d at 653, 264 Cal. Rptr. at 412.

151. Id. ("[I]n the present case, some mitigating evidence was presented, in the form of the jail officer's testimony to defendant's good conduct while incarcerated pending trial.")

152. Id. at 1033, 782 P.2d at 654, 264 Cal. Rptr. at 413. The court stated: "To require defense counsel to present mitigating evidence over the defendant's objection would be inconsistent with an attorney's paramount duty of loyalty to the client and would undermine the trust, essential for effective representation, existing between attorney and client." Id. at 1031, 782 P.2d at 653, 264 Cal. Rptr. at 412 (citing Bonnie, The Dignity of the Condemned, 74 VA. L. REV. 1363, 1380-89 (1988); Carter, Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death, 55 TENN. L. REV. 95, 130-45 (1987)).

153. Lang, 49 Cal. 3d at 1031-32, 782 P.2d at 654, 264 Cal. Rptr. at 413 (citing People v. Perez, 23 Cal. 3d 545, 549-50 n.3, 591 P.2d 63, 65-66 153 Cal. Rptr. 40, 42-43 (1979)).

when the party's own conduct has induced its commission." 155 The court thus found no error since the challenged actions resulted from the defendant's specific request. 156

D. Proportionality Review

A final issue that continues to be a frequent basis for appeal of death penalty cases is the assertion that the lack of intercase proportionality violates federal eighth amendment rights. 157 Intercase proportionality review involves contrasting the penalties given to different defendants convicted of similar crimes. Four of the six cases reviewed herein included proportionality claims, all of which were rejected by the court. 158

The United States Supreme Court's decision in Pulley v. Harris 159 concluded that the eighth amendment does not require intercase proportionality review in California's death penalty cases. The Pulley court stated that, "[t]here is . . . no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it . . . We are not persuaded that the eighth amendment requires us to take that course." 156

In People v. Andrews, the California Supreme Court focused on the brutality of the defendant's acts to determine that the death sentence was not a disproportionate punishment. 161 Similarly, the majority in People v. Carrera stressed that, "[t]here is nothing in this death sentence disproportionate in any sense to the culpability of a defendant found guilty of the deaths of two victims from multiple stab wounds in the course of a robbery." 162 The court, therefore, rejected the two

155. Lang, 49 Cal. 3d at 1031-32, 782 P.2d at 654, 264 Cal. Rptr. at 413.
156. Id. at 1032, 782 P.2d at 654, 264 Cal. Rptr. at 413.
160. Id. at 50-51.
161. 49 Cal. 3d at 234, 776 P.2d at 307, 260 Cal. Rptr. at 605; see supra note 87 and accompanying text for a description of the defendant's crimes in Andrews.
162. 49 Cal. 3d at 346, 777 P.2d at 156, 261 Cal. Rptr. at 383; see supra note 55 and accompanying text describing the defendant's crimes in Carrera.

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claims that the death penalty was disproportionate to the crimes committed.

The defendants in three of the cases raising disproportionality claims alleged that California's "disparate sentence" law violated their equal protection rights because it treats capital defendants differently than noncapital defendants. The disparate sentence statute provides for the review of noncapital cases by the Board of Prison Terms to ensure intercase sentencing proportionality.

The court rejected all three claims, citing its decision in People v. Allen, which stated that "equal protection does not require 'disparate sentence' review of death sentences under section 1170, subdivision (f)." The court in Allen enumerated three reasons why such a review is not constitutionally required: (1) it is primarily the jury's duty to determine sentencing in first degree murder cases, and that responsibility should not be usurped by review long after the jury has been discharged; (2) the disparate sentence law is intended to prevent a penalty beyond the "normal range" given for similar crimes; because the death penalty and life without the possibility of parole are the only two sentences for first degree murder, neither is beyond the narrow "normal range;" and (3) "nonquantifiable" factors such as the defendant's background and character must be allowed to play a major role in capital sentencing.

Although the supreme court has emphatically rejected claims that intercase proportionality was constitutionally required for capital cases, it has been suggested that such a review might legitimize death sentences by ensuring their consistent and evenhanded application.
However, the court is reluctant to displace any of the jury's responsibility in determining the appropriateness of the death sentence for first degree murder.169

VI. CONCLUSION

The affirmance of all six death penalty appeals reviewed in this survey period reflects the Lucas court's continuing emphasis on viewing the totality of a case when determining whether flaws at trial constitute reversible error. This was evident in the California Supreme Court's analysis of jury instruction issues, where it examined instructions in the context of all that was said by the defense and prosecution during the trial.

The guilt phase of the trial in the cases reviewed provided only one reversal, on a severed count which did not result in the reversal of the defendant's death sentence. In reviewing claims of prosecutorial misconduct, the court emphasized the lack of objection by defense counsel at the time of the misconduct. The court deemed any such lack of objection as a waiver of the objection.

While the special circumstance phase of trial triggered a lengthy analysis on only one claim of error, the penalty phase allowed the Lucas court to elaborate on its interpretation of Brown and factor (k) instructional errors. The court emphasized the "reasonable juror" standard,170 and, in a timely approval of the Lucas court's approach to such claims, the United States Supreme Court affirmed the California Supreme Court approach in Boyde v. California,171 using a very similar analysis.

In employing a thorough review of the entire trial and not merely of the alleged errors, the Lucas court continued its dependence on the "harmless error" doctrine. In doing so, the court was emphatic in its stance that when the crimes are particularly egregious and the evidence is overwhelming, minor procedural flaws during the trial will not lead to a reversal of a jury's death sentence.

The death penalty has become a timely issue and groups on both sides are voicing their opinions in a more organized and effective way. The Lucas court's reaction to this significant public awareness will become much more evident in future death penalty reviews. Although Robert Alton Harris may not be the man that will end the execution hiatus in California, his scheduled execution nonetheless set the stage for a climax that will occur. The implementation of the death penalty in California is imminent. The impact of an actual death at the hands of the criminal justice system in California may

169. See supra note 100-58 and accompanying text.
170. See supra note 111 and accompanying text.
171. See supra notes 100-12 and accompanying text.
bring to the foreground legitimate issues on appeal that were not introduced in appeals immediately following the trial.

STATHY PANOPOLIOS
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V. EVIDENCE LAW

A. The required affidavit showing "good cause" for the discovery of peace officer personnel records pursuant to Evidence Code section 1043(b) may be based on information and belief: City of Santa Cruz v. Municipal Court.

I. INTRODUCTION

The California Supreme Court's decision in Pitchess v. Superior Court\(^1\) and the subsequent codification of that decision in the California Penal\(^2\) and Evidence Codes\(^3\) allow a defendant to seek discovery of the personnel records of a peace officer if the information sought is both relevant and material to the litigation of his case.\(^4\) Section 832.8\(^5\) of the Penal Code defines "personnel records," while section

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1. 11 Cal. 3d 531, 522 P.2d 305, 113 Cal. Rptr. 897 (1974). The court in Pitchess stated:

    [A]n accused in a criminal prosecution may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial. The requisite showing may be satisfied by general allegations which establish some cause for discovery other than "a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime."

Id. at 536-37, 522 P.2d at 309, 113 Cal. Rptr. at 901 (citations omitted). Motions following this decision were called "Pitchess motions." See generally 2 B. Witkin, California Evidence, Discovery and Production of Evidence § 1641 (3d ed. 1986).


5. Section 832.8 states in pertinent part:

As used in Section 832.7, "personnel records" means any file maintained under that individual's name by his or her employing agency and containing records relating to:
832.76 states that those records are "confidential" and subject to discovery pursuant only to procedures set forth in sections 10437 and 10468 of the Evidence Code. Evidence Code section 1043(b) requires that the motion seeking discovery of the personnel records contain, *inter alia*, an affidavit showing both good cause for need of the information as well as its materiality to the case.9 The issue in *City of Santa Cruz v. Municipal Court*10 was whether "good cause" under section 1043(b) requires that the affidavit be based on the affiant's personal knowledge, or whether the affidavit could be based merely on information and belief.11 The supreme court ruled that an affidavit for a showing of good cause may be based solely on information and belief.12 The court also held that the type of information sought need not be particularized nor based on personal knowledge; however, the request must be made with sufficient specificity so as to pre-

(d) Employee advancement, appraisal, or discipline;
(e) Complaints, or investigations of complaints, concerning an event or transaction in which he participated, or which he perceived, and pertaining to the manner in which he performed his duties; or
(f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.

**CAL. PENAL CODE** § 832.8 (Deering 1986).
8. Section 1046 provides:
   In any case, otherwise authorized by law, in which the party seeking disclosure is alleging excessive force by a peace officer in connection with the arrest of that party, the motion shall include a copy of the police report setting forth the circumstances under which the party was stopped and arrested.

**CAL. EVID. CODE** § 1046.
9. Section 1043(b) provides, in pertinent part, that a motion for discovery of peace officer personnel records shall include:
   (1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard,
   (2) A description of the type of records or information sought,
   (3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.

**CAL. EVID. CODE** § 1043(b).
11. *Id.* at 78, 776 P.2d at 223, 260 Cal. Rptr. at 521. The defendant was charged with brandishing a knife and resisting arrest. The police report confirmed the use of force to subdue the defendant. Defense counsel moved for discovery of all prior complaints of excessive force or violence with respect to the arresting officers. The motion was based on the police report and counsel's affidavit on information and belief.
12. *Id.* at 89, 776 P.2d at 231, 260 Cal. Rptr. at 529.
vent a "fishing expedition" by the defendant.13

II. TREATMENT

A. Majority Opinion

Underlying the supreme court's decision is the basic proposition that an accused has a fundamental right to a fair trial. As part of a fair trial, the accused must be given an intelligent defense in light of "all relevant and reasonably accessible information."14 Another fundamental right at issue, however, is the peace officer's right of privacy. The court determined that the criminal defendant's need for relevant information, and the peace officer's need to protect confidential information, were each sufficiently safeguarded by sections 1043 and 1045 of the Evidence Code.15

The California Supreme Court noted that the United States Supreme Court previously stated that "'the value of averments on information and belief in the procedure of the law is recognized.'"16 By this, the California Supreme Court rejected the notion that an affidavit is presumed to be based on personal knowledge, and held that information and belief alone are sufficient to support the affidavit.17

After deciding that an affidavit based on information and belief is sufficient in a variety of contexts, the court then determined that section 1043 itself did not require an affidavit based on personal knowledge.18 Most persuasive to the court was the fact that the legislature, when drafting section 1043, considered and rejected a requirement of personal knowledge with respect to the affidavit.19 The court concluded that the legislative history and case law20 pointed convincingly to the acceptability of an affidavit on information and belief in

13. Id. at 92-93, 776 P.2d at 233-34, 260 Cal. Rptr. at 531-32.
15. City of Santa Cruz, 49 Cal. 3d at 94, 776 P.2d at 234-35, 260 Cal. Rptr. at 532-33.
16. Id. at 87, 776 P.2d at 229, 260 Cal. Rptr. at 527 (quoting Berger v. United States, 255 U.S. 22, 34 (1921)).
17. City of Santa Cruz, 49 Cal. 3d at 88, 776 P.2d at 230, 260 Cal. Rptr. at 528.
18. Id. at 88-89, 776 P.2d at 230-31, 260 Cal. Rptr. at 528-29.
19. Id. at 89, 776 P.2d at 231, 260 Cal. Rptr. at 529 (discussing legislative history).
this context.  

The court then dismissed the "catch 22" reasoning that the affiant must demonstrate personal knowledge of the particular items of information sought.  

Section 1043 requires only a "description of the type of information sought."  The section also states that the affidavit must be based "upon reasonable belief" that the governmental agency "has the records or information from the records."  Moreover, the legislature expressly rejected an early draft of the bill containing a description of the "particular" records and information sought, while requiring only a description of the "type."  The court concluded that "[i]n requiring only a 'reasonable belief' that the governmental agency has the 'type' of information sought, the statute says what it means and means precisely what it says."  

The court, however, was mindful of the privacy concerns of a peace officer, and the possibility of using the discovery tool as a means of harassment, annoyance, or oppression.  The court noted that the legislature went beyond the court's holding in Pitchess when enacting section 1045 of the Evidence Code which governs the procedure by which personnel records are made discoverable.  The section not only provides for in camera viewing of the information, but also sets guidelines for what information is discoverable and how the information may be used.  With these statutory safeguards, the court determined that the peace officer's legitimate privacy concerns were not sacrificed in favor of the needs of the accused.  

B. Dissenting Opinions 

Chief Justice Lucas, in a separate dissenting opinion, stated his concern over the unforeseeable abuses and demands for discovery that the majority's holding might permit.  In what appears to be a note to the legislature, he stated that the legislature "retains the authority to review this decision and take appropriate responsive

21. City of Santa Cruz, 49 Cal. 3d at 89, 776 P.2d at 231, 260 Cal. Rptr. at 529.
22. Id. at 90, 776 P.2d at 231, 260 Cal. Rptr. at 529. Following the appellate court's reasoning, an accused would need to know the name of a prior complainant in order to discover the name of that prior complainant.
24. Id. at § 1043(b)(3). The court found it persuasive that the legislature did not include the standard phrase "information and belief," but adopted the lower standard of "reasonable belief."  City of Santa Cruz, 49 Cal. 3d at 93 n.9, 776 P.2d at 234 n.9, 260 Cal. Rptr. 532 n.9.
25. City of Santa Cruz, 49 Cal. 3d at 92, 776 P.2d at 233, 260 Cal. Rptr. at 531.
26. Id. at 92-93, 776 P.2d at 233, 260 Cal. Rptr. at 531.
27. Id. at 84, 94, 776 P.2d at 227, 234, 260 Cal. Rptr. at 525, 532.
28. Id. at 94, 776 P.2d at 234, 260 Cal. Rptr. at 532.
29. See CAL. EVID. CODE § 1045 (Deering 1986).
30. City of Santa Cruz, 49 Cal. 3d at 94, 776 P.2d at 234, 260 Cal. Rptr. at 532.
31. Id. at 95, 776 P.2d at 235, 260 Cal. Rptr. at 533 (Lucas, C.J., dissenting).

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Justice Panelli dissented for several reasons. Contrary to the majority's analysis, he stated that the legislative intent was to limit access to personnel files. One basis for this conclusion was the fact that the attorney general originally drafted the bill to protect the rights of law enforcement officers. The focus of his concern was that the court's holding would increase the ease with which an accused could gain access to the confidential personnel files of law enforcement agencies.

III. Conclusion

The court concluded that the legislature created a "fair and workable balance" between the defendant's right to a fair trial and to acquire information relevant to his defense on the one hand and, on the other, the peace officer's right to be protected from an unwarranted invasion of confidential information. Section 1043 allows the defendant to seek confidential information as long as it is relevant and material to the pending litigation. Section 1045 protects the peace officer by imposing procedural limitations on disclosure. The court's decision appears to have little or no effect on the "pro forma" method of discovery of peace officer personnel records currently used in California. In fact, the court simply affirmed the established practice previously approved by all courts of appeals addressing the issue prior to the decision here granted review.

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32. Id. (Lucas, C.J., dissenting).
33. Id. at 96-98, 776 P.2d at 236-37, 260 Cal. Rptr. at 534-35 (Panelli, J., dissenting).
34. Id. at 96, 776 P.2d at 236, 260 Cal. Rptr. at 534 (Panelli, J., dissenting).
35. Id. at 101-02, 776 P.2d at 240, 260 Cal. Rptr. at 536 (Panelli, J., dissenting).
36. Id. at 94, 776 P.2d at 234, 260 Cal. Rptr. at 532.
37. Id. at 95, 776 P.2d at 235, 260 Cal. Rptr. at 533 (Panelli, J., dissenting). Justice Panelli equated the "fill in the blank" motion used by the defense to a "fishing expedition." Id.
38. See City of Santa Cruz v. Superior Court, 190 Cal. App. 3d 1669, 236 Cal. Rptr. 155 (1987). The court of appeal in the instant case had relied on this recent, prior decision from its jurisdiction, which has now been overruled. For previous lower court decisions in line with the supreme court's analysis, see City of Santa Cruz v. Municipal Court, 49 Cal. 3d 74, 86, 776 P.2d 222, 229, 260 Cal. Rptr. 520, 527.
B. A psychologist's expert opinion based on standardized written personality tests regarding the good character of a criminal defendant need not satisfy Kelly/Frye requirements for new scientific evidence. The opinion is admissible, and its exclusion possibly prejudicial, if such testimony meets traditional requirements of expert opinion: People v. Stoll.

The California Supreme Court in People v. Stoll1 determined that, in order to be admissible to show the defendants' good character, a psychologist's expert opinion testimony based partially on standardized written personality tests2 need not meet the Kelly/Frye3 test of general acceptance in the field. That test is normally required of expert testimony based on procedures novel to science and the law.4


In Stoll, two defendants, who were both convicted of several counts of lewd and lascivious acts with children, had attempted to present the testimony of a psychologist who would have testified that the female defendant's personality profile displayed no "possibility for sexual deviation" and that the male defendant had tested "within the range of normal heterosexuality." Stoll, 49 Cal. 3d at 1150-51, 783 P.2d at 706, 265 Cal. Rptr. at 119. The psychologist deduced these findings from personal interviews with the defendants, professional comparisons with others similarly charged, and two written standardized personality tests with "built-in validity scales" to assure the defendants' veracity. Id. at 1149, 783 P.2d at 705, 265 Cal. Rptr. at 118. The trial court excluded the expert testimony on Kelly/Frye grounds, reasoning that the defense had proven neither that such personality profiles of child molesters were generally accepted in the field of psychology, nor that a defendant who tests within "normal" limits has not sexually harmed children. Id. at 1150-51, 783 P.2d at 706, 265 Cal. Rptr. at 119, see infra note 3 for a discussion of the Kelly/Frye test.

2. The expert in Stoll relied primarily on the Minnesota Multiphasic Personality Inventory (MMPI) which has existed for 37 years and consists of 566 true-false questions. The psychologist also relied on the more recent Millon Clinical Multiaxial Inventory (MCMI) which was copyrighted in 1976. Id. at 1147, 783 P.2d at 704, 265 Cal. Rptr. at 117.

3. See Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (enunciating the test for determining whether a new scientific technique has "gained general acceptance in the particular field in which it belongs" and applying it to exclude expert testimony regarding a systolic blood pressure test used for detecting lies); People v. Kelly, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976) (expressly adopting the test used in Frye and clarifying additional requirements that the burden fall on the proponent of the evidence, that the method be shown reliable by expert testimony, that the testifying witness be properly qualified as an expert, and that proper scientific procedures be used in administering the technique). For an explanation of the Kelly/Frye test and its application by the California Supreme Court, see Carter, Admissibility of Expert Testimony in Child Sexual Abuse Cases in California: Retire Kelly-Frye and Return to a Traditional Analysis, 22 Loy. L.A.L. Rev. 1103 (1989).

4. Stoll, 49 Cal. 3d at 1161, 783 P.2d at 714, 265 Cal. Rptr. at 127. But see Annotation, Admissibility of Expert Testimony as to Criminal Defendant's Propensity Toward Sexual Deviation, 42 A.L.R. 4th 937 (1985 & Supp. 1989) (listing cases from other states where exclusion of such expert testimony was upheld); 31 AM. JUR. 2D Expert and Opinion Evidence § 192 (1989).
The court further held that exclusion of such expert testimony unfairly prejudiced the jury by withdrawing from its consideration evidence relevant to the defendants' good character as specifically allowed by section 1102 of the California Evidence Code.

Although the California Supreme Court previously established that the Kelly/Frye rule extends to new scientific procedures based solely upon psychological evidence, the court in Stoll found the rule inapplicable to the personality tests used by the defendants' expert here. The court reasoned that personality tests cannot be considered new scientific techniques because they have been used for years in the psychological and legal fields, and that a jury would not erroneously interpret them to be incapable of error. The court asserted that the

5. See generally 1 B. Witkin, California Evidence § 483 (3d ed. 1986) (stating that reversible error may be committed when expert opinion testimony is wrongfully excluded).

6. Stoll, 49 Cal. at 1153, 783 P.2d at 708, 265 Cal. Rptr. at 121. Section 1102 in its entirety states:
   In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:
   (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.
   (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).
   CAL. EVID. CODE § 1102 (West 1966); see also 17 CAL. JUR. 3D Criminal Law § 617 (1984) (opinion or reputation evidence of a defendant's good character is admissible to prove that his conduct was in accordance with such character).


8. Stoll, 49 Cal. 3d at 1157-59, 783 P.2d at 711-12, 265 Cal. Rptr. at 124-25. The majority criticized the dissent's assertion that the use of the personality tests to prove that these defendants could not have committed the charged offenses, rather than simply to opine a defendant's mental state, warranted the application of Kelly/Frye. Id. at 1158, 783 P.2d at 712, 265 Cal. Rptr. at 125. See also id. at 1167, 783 P.2d at 718, 265 Cal. Rptr. at 131 (Lucas, C.J., dissenting).

9. Stoll, 49 Cal. 3d at 1156-57, 783 P.2d at 710, 265 Cal. Rptr. at 123. The policy of Kelly/Frye is to prevent jury "blindsid[ing]" produced by testimony based upon either
proper test for admissibility is whether the testimony meets "traditional limits" on expert opinion set forth in section 801 of the California Evidence Code. The court then reversed the convictions of the defendants, claiming that the exclusion of the expert opinion in this case was prejudicial. The court considered that the victims had challenged the defendants' credibility, and the defense had little to rely on to boost its credibility except for personal denials. The court concluded that the jury might have been influenced by an expert's opinion favorable to the defendants.

The court attempted to clarify the use of the Kelly/Frye test with regard to psychological techniques and to allow criminal defendants more opportunity to prove their "good character" through the use of expert opinion testimony interpreting such personality tests. By holding the exclusion of such expert testimony prejudicial because the child victims varied in the specifics of their accounts of the sexual abuse, and because the defendants chose to rely on their own denials and alibis, the court may have succeeded only in burdening child victims while bestowing favor on the criminals who abused them.

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an unrecognized technique or one which "appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury." Id. The court concluded that the personality tests would not be misleading because the expert was willing to concede that at least one "admitted" child molester had tested within the normal range of the primary test and that, as to psychotically disturbed test-takers, the test was wholly invalid. Id. at 1159, 783 P.2d at 712, 265 Cal. Rptr. at 125.

10. Stoll, 49 Cal. 3d at 1154, 783 P.2d at 708, 265 Cal. Rptr. at 121. The court declared that the psychologist's testimony met the requirements of section 801 because his testimony could inform the jurors of the defendants' good personality traits which they could not otherwise deduce from the defendants' testimony. Id. See CAL. EVID. CODE § 801 (West 1966).


13. The court downplayed the fact that four child victims gave the same account of a group sex event in which all four children and all four defendants were naked in one room while various acts were committed on their persons. Stoll, 49 Cal. 3d at 1143, 783 P.2d at 701, 265 Cal. Rptr. at 114. Instead, the court placed great weight on the children's disagreement as to the exact date and part of the house in which the events took place and the identity of the photographer(s) who took pictures as the offenses were committed. Id. at 1143-44, 783 P.2d at 701-02, 265 Cal. Rptr. at 114-15. Further, the court focused on the inconsistencies between the preliminary interview testimony and the trial testimony given by two children regarding the female defendant, who was their mother. Id. at 1145, 783 P.2d at 702, 265 Cal. Rptr. at 115.

14. The children had only each other as witnesses and may understandably have been confused as to specifics, especially in view of their young age (between six and nine years old at the time of trial) and the trauma of the events as they occurred. Chief Justice Lucas, in dissent, emphasized this along with the fact that the children were subjected to prolonged cross-examination of their character for truth, while the defendants could freely bring in "experts" who used scientific-sounding methods to say
VI. INSURANCE LAW

When an insurer breaches its duty to make a good faith settlement attempt, expert witnesses and attorneys retained by the insurer are not liable as civil conspirators because the duty applies exclusively to the insurer, not to its agents: Doctors' Company v. Superior Court.

In Doctors' Co. v. Superior Court, the California Supreme Court decided that an insurer's expert witnesses and retained attorneys cannot be held liable as civil conspirators when they are involved in the insurer's failure to make a good faith settlement effort as required by section 790.03(h)(5) of the Insurance Code. The court re-

that the offenders could not have committed the sexual acts. Id. at 1168, 783 P.2d at 718, 265 Cal. Rptr. at 131-32 (Lucas, C.J., dissenting) (noting that the expert's offer of proof included statements that the tests he used were more than 70% accurate and that built-in "validity scales" ensured that no deviant traits could intentionally be concealed).


2. Justice Kaufman wrote the opinion for a unanimous court.

3. In the underlying action, the insurer defended a third party claim by Jose Antonio Valencia, the real party in interest. Valencia had brought a medical malpractice claim against M.F. Osman, M.D. The plaintiff offered to settle before trial for the $500,000 policy limit but, over the objections of Dr. Osman and his personal attorney, the carrier refused to settle. At trial, the plaintiff won a $2 million judgment. Valencia then filed a claim charging that the insurer had failed to make a good faith settlement effort. See infra note 4. A second action claimed that the insurer, its expert witnesses, and its retained attorneys conspired to present misleading testimony at trial, thus justifying the insurer's failure to settle. Both complaints alleged that this conduct denied Valencia the benefits of a fair settlement. The trial court denied the defendants' demurrers to the conspiracy complaint. When the court of appeal rejected the defendants' petition for a writ of mandate, the supreme court granted review. The opinion in Doctors' Co. focuses on the conspiracy action; the first cause of action against the insurer alone was not contested before the court.


4. CAL. INS. CODE § 790.03(h)(5) (West 1972 & Supp. 1989). This section declares that "[n]ot attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear" is a prohibited, unfair
solved a conflict among the appellate courts\(^5\) by holding that the statutory duty applied only to the insurer.\(^6\) The expert witnesses and attorneys acted only as agents of the carrier and, therefore, could not be held liable as civil conspirators.\(^7\)

In *Doctors' Co.*, the plaintiff argued that the expert witnesses and attorneys retained by the insurer should be liable under section 790.03 because they had conspired with the insurer to cause a breach of the insurer's duty.\(^8\) The court followed *Gruenberg v. Aetna Ins. Co.*,\(^9\) however, and found that such collusion would not create a cause of action under this statute\(^10\) because, as agents of the insurer, any efforts by the witnesses and attorneys to induce a breach of duty were privileged.\(^11\) The court did not suggest that torts had not been

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6. *Doctors' Co.*, 49 Cal. 3d 39, 46, 775 P.2d 508, 512, 260 Cal. Rptr. 183, 187 (1989); see also CAL. INS. CODE § 790.01 ("[t]his article applies to . . . insurers . . . [insurance] agents, brokers, solicitors . . . as well as all other persons engaged in the business of insurance.").


8. The court disregarded the plaintiff's argument that the witnesses and attorneys were independent contractors rather than agents. *Doctors' Co.*, 49 Cal. 3d at 46 n.4, 775 P.2d at 512 n.4, 260 Cal. Rptr. at 187 n.4. Instead, the defendants were found to be agents and independent contractors because they worked on behalf of their principal but controlled their own physical performance. *Id.*; see also *City of Los Angeles v. Meyers Bros. Parking Sys.*, 54 Cal. App. 3d 135, 138, 126 Cal. Rptr. 545, 546 (1975).


committed by the agents, but found that the plaintiff could not proceed against the expert witnesses and attorneys by using a statute aimed exclusively at the insurer. The court's holding expressly disapproved Wolfrich Corp. v. United Services Automobile Ass'n, which had allowed recovery against an attorney for conspiracy to violate this statute.

The Doctors' Co. decision is limited to situations where agents or employees are working on behalf of a principal, and where the duty violated is owed solely by that principal. In cases where agents are also acting for individual gain, or where attorneys violate their own duties to a plaintiff, the court's holding in Doctors' Co. does not apply. The Doctors' Co. decision will also not protect corporate officers or directors who are involved in a corporation's tortious activities.

Finally, the court noted that this case was unusual because the duty imposed by the Insurance Code is explicitly limited to insurers. Had the court permitted the conspiracy action to proceed, this


12. Doctors' Co., 49 Cal. 3d at 44, 775 P.2d at 510, 260 Cal. Rptr. at 185.

13. 149 Cal. App. 3d 1206, 1211, 197 Cal. Rptr. 446, 449 (1983). In finding a lawyer liable for conspiracy to violate § 790.03(h)(5) of the Insurance Code, the Wolfrich court distinguished its tort claim from the contract issue in Gruenberg. Id.

14. Doctors' Co., 49 Cal. 3d at 49, 775 P.2d at 514, 260 Cal. Rptr. at 189. The Doctor's Co. court believed that the Wolfrich court misunderstood the rationale of Gruenberg and erroneously distinguished the two cases. The Gruenberg court dismissed conspiracy claims against agents because the duty breached was owed exclusively by the insurer; it was irrelevant whether the claims were based in tort or contract. Id. at 45-46, 775 P.2d at 511-12, 260 Cal. Rptr. at 186-87.

15. Id. at 46, 775 P.2d at 512, 260 Cal. Rptr. at 187; see also Black v. Sullivan, 48 Cal. App. 3d 557, 568-69, 122 Cal. Rptr. 119, 127 (1975) (civil conspiracy arose when an attorney with a personal interest in the matter induced induced a violation of a duty owed exclusively by his principal).


18. Doctors' Co., 49 Cal. 3d at 48, 775 P.2d at 513, 260 Cal. Rptr. at 188; see also Wyatt v. Union Mortgage Co., 24 Cal. 3d 723, 785, 598 P.2d 45, 52, 157 Cal. Rptr. 392, 399 (1979) (officers and directors who use a corporation to defraud customers may be personally liable as civil conspirators).

19. Doctors' Co., 49 Cal. 3d at 48, 775 P.2d at 514, 260 Cal. Rptr. at 189; see, e.g., Cal. Gov't Code § 12955(g) (West 1980 & Supp. 1989) (unlawful for "any person" to aid or encourage acts prohibited by the Fair Employment & Housing Act); Cal.
would have resulted in substantial broadening of the statute. Anyone working with a carrier that failed to make a good faith settlement effort might have faced liability for conspiracy to violate the statute, thus contradicting the clear language of the Insurance Code. Because the Doctors’ Co. rule is so narrowly drawn, it may serve primarily to discourage attempts to extend limited statutes through civil conspiracy theories. Thus, plaintiffs may be better served by tort actions such as actual fraud and breach of fiduciary duty in their suits against agents and employees involved in the breach of a principal’s exclusive duty.

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VII. JUDICIAL DISCIPLINE

A. A judge may be removed from office for willful misconduct or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Furthermore, the combination of investigatory and adjudicative functions of the Commission on Judicial Performance does not deny due process, and any delay caused in commencing disciplinary proceedings does not violate due process where the judge has prior notice of the investigation and suffers no actual prejudice: Kloepfer v. Commission on Judicial Performance. In Kloepfer v. Commission on Judicial Performance, the California Supreme Court agreed with the findings and recommendation of the Commission on Judicial Performance, and ordered the removal


20. The impact of the opinion is further restricted by the elimination of a private cause of action under § 790.03 of the Insurance Code mandated by Moradi-Shalal. See supra note 4.

1. 49 Cal. 3d 826, 782 P.2d 239, 264 Cal. Rptr. 100 (1989). A unanimous opinion was submitted “by the court.”

2. The Commission on Judicial Performance derives its power to recommend disciplinary action against judges to the California Supreme Court from article 6, section 18(c), of the California Constitution. The section states in relevant part:

On recommendation of the Commission on Judicial Performance the Supreme Court may . . . censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judge’s current term that constitutes willful misconduct in office . . . or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

CAL. CONST. art. VI, § 18(c).


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of Municipal Court Judge Kenneth Lynn Kloepfer from office. The Commission found that Judge Kloepfer had committed five acts of willful misconduct and twenty acts of conduct prejudicial to the administration of justice. Kloepfer's conduct lacked appropriate judicial temperament, thereby violating Canon 3(A)(3) of the California Code of Judicial Conduct. Rejecting Kloepfer's due process claims, the court held that the combination of investigatory and adjudicatory functions of the Commission did not deny judges due process and that delay in formal notice to judges due to investigation of numerous complaints is not prejudicial.

Judge Kloepfer argued that because the Commission performed all of the investigatory, accusatory and adjudicatory functions of the disciplinary proceedings, it was not a neutral forum, and thus he was denied due process. The supreme court rejected this argument because the Commission appointed special masters to investigate the charges and then reviewed the findings independently. Thus, no unacceptable bias was established. The court further held that formal notice

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3. "Willful misconduct" occurs when the judge knows, or should know, that he acts beyond his authority "for reasons other than the faithful discharge of his duties." Kloepfer, 49 Cal. 3d at 832, 782 P.2d at 241, 264 Cal. Rptr. at 102 (quoting McCullough v. Commission on Judicial Performance, 49 Cal. 3d 186, 191, 776 P.2d 259, 261, 260 Cal. Rptr. 557, 559 (1989)). To meet the requirement of bad faith, the judge need only show a general disregard for the legal system; he need not necessarily act against anyone in particular. Id. (quoting McCullough, 49 Cal. 3d at 191, 776 P.2d at 261, 260 Cal. Rptr. at 560).

4. "Prejudicial conduct" occurs when a judge creates a negative public impression of the judiciary, even though acting in good faith. Id.

5. During 1981-1985, the Commission determined that Judge Kloepfer had: (1) on ten occasions behaved in a rude and abusive manner toward attorneys, court reporters, witnesses, and litigants during court proceedings; (2) on five occasions failed to protect criminal defendants' rights; (3) on five occasions abused the contempt power and his authority to make orders to show cause and issue bench warrants; (4) on three occasions failed to remain objective in a case before him or disqualify himself; and (5) on two occasions abused his power to make fee orders. Id. at 839-44, 782 P.2d at 246-62, 264 Cal. Rptr. at 107-23.

6. CAL. CODE OF JUDICIAL CONDUCT Canon 3(A)(3) (Cal. Compendium of Prof. Resp. Pt. IV(B) 1989). Canon 3(A)(3) states that: "Judges should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom judges deal in their official capacity . . ." Id.

7. Kloepfer, 49 Cal. 3d at 836-37, 782 P.2d at 243-44, 264 Cal. Rptr. at 104-05.

8. Id. at 833-35, 782 P.2d at 241-43, 264 Cal. Rptr. at 102-03. Kloepfer was unable to provide any authority for this position.

9. Id. at 834-35, 782 P.2d at 242, 264 Cal. Rptr. at 103. The supreme court relied on the United States Supreme Court's decision in Withrow v. Larkin, 421 U.S. 35 (1975), where it stated that "[t]he contention that the combination of investigative and
was necessary only after the informal investigation of all of the charges, not after each one individually.10

In reviewing each of the formal charges against Judge Kloepfer, the court affirmed the Commission’s findings, holding that his conduct had been willful and prejudicial.11 Consequently, the California Supreme Court found that the Commission’s recommendation of removal from office was fully supported by clear and convincing evidence.12 The court then considered whether any mitigating circumstances existed to offset the nature and number of the wrongful acts.13 Because of a continued pattern of willful misconduct and prejudicial conduct, the evidence failed to show that Judge Kloepfer had, or could, overcome his lack of judicial temperament. The court ordered his removal from the bench in order to protect the public as well as the reputation of the judicial system.14

JEANETTE E. RIENSCHER


In McCullough v. Commission on Judicial Performance, the supreme court ordered Bernard P. McCullough removed as judge of adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators . . . .” Id. at 47. Risk of actual bias or prejudgment caused by conferring investigative and adjudicative power on the same individual must be proven. Id. Even if the Commission is prematurely aware of the investigation reports, this is not sufficient bias to assert the Commission’s impartiality. McCartney v. Commission on Judicial Qualifications, 12 Cal. 3d 512, 519-20, 526 P.2d 268, 273, 116 Cal. Rptr. 260, 265 (1974). Furthermore, other similar challenges to administrative procedures have been denied in contexts where the investigative and adjudicative functions were much more closely aligned. See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 8.2 (2d ed. 1978 & Supp. 1989); 1 C. KOCH, ADMINISTRATIVE LAW AND PRACTICE, § 6.8 (1985); B. SCHWARTZ, ADMINISTRATIVE LAW 495 (2d ed. 1983).

10. Kloepfer, 49 Cal. 3d at 837, 782 P.2d at 244, 264 Cal. Rptr. at 105.
11. Id. at 838-64, 782 P.2d at 245-62, 264 Cal. Rptr. at 106-23. For an analysis of the charges, see supra note 5. In only one incident did the supreme court depart from complete agreement with the Commission by finding only prejudicial conduct, not willful misconduct. See Kloepfer, 49 Cal. 3d at 859-60, 782 P.2d at 258-59, 264 Cal. Rptr. at 119-20.
12. Id. at 864, 782 P.2d at 262, 264 Cal. Rptr. at 123.
13. “The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing ‘lack of temperament and ability to perform judicial functions in an even-handed manner.’” Wenger v. Commission on Judicial Performance, 29 Cal. 3d 615, 653, 630 P.2d 954, 975, 175 Cal. Rptr. 420, 441 (1981) (quoting Cannon v. Commission on Judicial Qualifications, 14 Cal. 3d 678, 707, 537 P.2d 898, 918, 122 Cal. Rptr. 778, 798 (1975)).
the Justice Court of the San Benito Judicial District, San Benito County, after finding that he committed four acts of willful misconduct and one act of persistent failure to perform his judicial duties. The Commission on Judicial Performance had recommended McCullough's removal based on the findings of three special masters appointed by the supreme court. McCullough petitioned the supreme court for review of the Commission's recommendations.

Agreeing with the special masters, the supreme court found that
McCullough committed willful misconduct when he: (1) violated a defendant's right to a fair trial by telling the jurors that he wanted them to enter a guilty verdict, an action clearly exceeding McCullough's judicial authority;9 (2) used his judicial power to benefit a personal friend;10 and (3) denied legal representation to the defendants in two separate cases in violation of their sixth amendment right to counsel. In one case, neither the defendant nor her attorney were present, while in the other, the attorney was absent from the courtroom.11 The court characterized the judge's action in the former case as "willful misconduct" despite the Commission's characterization of it as prejudicial conduct.12 In addition to finding willful misconduct, the supreme court agreed with the Commission that the judge persistently failed to perform his judicial duties in neglecting to sign a judgment order for more than six years after granting a motion.13

The court dismissed contentions that the Commission violated the judge's right to confidentiality,14 and that he had been the victim of a vendetta by the local district attorney's office.15 While removing him


10. After speaking with a friend about pending charges the day before arraignment, Judge McCullough then continued the case for two years before finally dismissing it. The court called this a "casebook example of willful misconduct." *McCullough*, 49 Cal. 3d at 194, 776 P.2d at 262, 260 Cal. Rptr. at 561; see CAL. CODE JUD. CONDUCT, canon 2B (personal relationships influencing judicial conduct); *Id.* at canon 3C(1)(a) (disqualification when personal bias raises question of impartiality).


12. *McCullough*, 49 Cal. 3d at 195, 776 P.2d at 265, 260 Cal. Rptr. at 563. While prejudicial conduct is considered less severe than willful misconduct, either one constitutes grounds for removal from office under the state constitution. See supra notes 2 & 3.

13. *McCullough*, 49 Cal. 3d at 197, 776 P.2d at 265-66, 260 Cal. Rptr. at 563-64 (1989). The court found the judge's action to be particularly egregious because he had been publicly censured in April of 1987 for his neglect in this matter and several others. Despite the censure, Judge McCullough waited 11 more months before he signed the judgment. *Id.* (citing In re McCullough, 43 Cal. 3d 534, 535, 734 P.2d 987, 988, 236 Cal. Rptr. 151, 152 (1987)).

14. *Id.* at 198, 776 P.2d at 266, 260 Cal. Rptr. at 564. A prosecutor was present when McCullough was served with notice of the Commission proceedings against him, and a newspaper article on the proceedings was published the next day. The court noted that these facts do not show that the Commission violated its rules of confidentiality. *Id.* The Commission is allowed to issue statements to the media in certain circumstances, and there was no evidence in this case that the Commission had provided the newspaper with the published information. *Id.*; see CAL. JUR. 3D Judges § 65 (1978 & Supp. 1989).

15. *McCullough*, 49 Cal. 3d at 198, 776 P.2d at 266, 260 Cal. Rptr. at 564. The court stated that the friction between the district attorney's office and McCullough would be significant only if it could be used to discredit the testimony of those who testified at the hearing. *Id.*
as a judge, the supreme court's order allowed McCullough to practice law, provided he pass the state Professional Responsibility Examination.16

PAUL J. McCUE

VIII. PROBATE LAW

California Probate Code section 910 impliedly empowers courts to award probate attorneys compensation from the estate for time spent asserting and defending their own fee claims: In re Estate of Trynin.

The California Supreme Court in In re Estate of Trynin1 decided whether Probate Code section 910,2 which authorizes a court to order from an estate additional "just and reasonable" attorneys' fees for extraordinary services,3 also implicitly authorizes the court to allow fees for time and costs reasonably spent defending their own fee claims.4 The lower court believed that claims which benefited only the attorneys' private interests, and did not enhance the estate, were not compensable and thus left them without authorization to award such fees.5 The supreme court,6 however, determined that an attor-

16. Id. at 198-99, 776 P.2d at 267, 260 Cal. Rptr. at 565. Friends had testified at Judge McCullough's hearing to his good character, and the San Benito County Bar Association backed him with an amicus curiae brief. Furthermore, he was elected to the judicial post twice. In addition to these favorable factors, the supreme court noted that as a practicing attorney, Judge McCullough will not have "access to the power that he abused as a judge." Id.


2. CAL. PROB. CODE § 910 (West 1990) provides:
Attorneys for executors and administrators shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as are allowed by the previous article as commissions to executors and administrators; and such further amount as the court may deem just and reasonable for extraordinary services.

This section further states that extraordinary services may also include the services of paralegals working for the attorney. Id.


4. Trynin, 49 Cal. 3d at 871, 782 P.2d at 232-33, 264 Cal. Rptr. at 93-94.

5. Estate of Trynin, 205 Cal. App. 3d 1040, 1044, 252 Cal. Rptr. 787, 788-89 (1988) (court distinguished cases allowing compensation for extraordinary services which benefited the estates, such as services aiding trustees to recover their fees, services opposing a petition for appointment of a guardian, and services rendered in defending the accountings of administrators and executors).

6. Justice Kaufman authored the unanimous opinion of the court.

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ney's "right to full and fair compensation" necessarily included the right to compensation for the time reasonably spent asserting and defending his own fee claims.8

In Trynin, co-administrators of the decedent's estate contested their attorneys' fee claims for their extraordinary services rendered in the litigation and appeal of a creditor's estate-threatening claim.9 The fee claim hearings spanned ten weeks, consuming seven half-day sessions, and ended in the trial court's award of several thousand dollars for each attorney's extraordinary services. The attorneys then petitioned the trial court for time and expenses involved in defending their fee claims.10 The trial court denied their petitions and the court of appeal affirmed.11 The supreme court reversed, reasoning that attorneys would be dissuaded from performing the extraordinary services necessary to fully protect decedents' estates if their fees could be watered down by the expense of defending fee claims.12

Although the court discussed several issues under which attorneys' fees, including fee-litigation fees, had been properly assessed against the opposing party, the court stated that the mere fact that a statute authorizes attorneys' fees for extraordinary services is not sufficient

7. This "right" is derived from Estate of Byrne, 122 Cal. 260, 54 P. 957 (1898), modified, 54 P. 1015 (1898), wherein the court stated that "[e]very attorney should be fully and fairly paid for his services." Id. at 266, 54 P.2d at 960. In Byrne, the court acknowledged that the compensation the attorney had received was "extremely meager, and far less than the sum we should have been willing to approve," but the court noted, on rehearing, that there were no proper grounds for reversal absent a clear abuse of the trial court's discretion. Id. at 268, 54 P.2d at 1015. However, in Trynin, the lower court was clearly in error for refusing to consider the attorney's request for additional compensation for costs incurred in defending his fees. However, the supreme court stated that if a trial court hears the evidence and determines that the attorney has been fully and fairly compensated for all services, the court would not be abusing its discretion in denying the fees. Trynin, 49 Cal. 3d at 880, 782 P.2d at 239, 264 Cal. Rptr. at 100.

8. 49 Cal. 3d at 880, 782 P.2d at 239, 264 Cal. Rptr. at 100.

9. The estate was valued at $409,000, and the creditor claimed $738,000. Pachter, Gold & Shaffer represented the co-administrators in a jury trial that resulted in a reduced recovery by the creditor of $125,000 plus costs. The co-administrators then engaged attorney Eckardt to prosecute an appeal, which successfully reversed the judgment. Eckardt subsequently made a motion for withdrawal as counsel because the co-administrators refused to cooperate in the payment of his fees. The court granted the motion. The co-administrators later persuaded Eckardt to aid them in the retrial. However, a settlement was successfully negotiated just prior to retrial. Two months later, both Pachter, Gold & Shaffer and Eckardt petitioned the court for compensation for the extraordinary services rendered in opposing the creditor's claim. The co-administrators hired other attorneys to contest these fee claims. Id. at 871-72, 782 P.2d at 233, 264 Cal. Rptr. at 94.

10. The trial court awarded the law firm of Pachter, Gold & Schaffer $49,980.54 and attorney Eckardt $5,364.09. The attorneys then respectively requested $61,360.25 and $23,210.00 for costs incurred in defending their initial fee claims. Estate of Trynin, 205 Cal. App. 3d 1040, 1042, 252 Cal. Rptr. 782, 787-88 (1988).

11. Trynin, 49 Cal. 3d at 872, 782 P.2d at 233-34, 264 Cal. Rptr. at 94-95.

12. Id. at 871, 782 P.2d at 233, 264 Cal. Rptr. at 94.
to warrant fee-related fees. The court distinguished this case from the statutory fee-shifting cases and the common-fund and common benefit cases. Section 910 of the Probate Code states that fees for extraordinary services must be paid out of the estate pursuant to statutory authority and court approval. Thus, compensation from the estate is the attorneys' only means of recovery for services performed. In providing authority for the payment of such fees from decedent's estate, the court analogized a probate attorney to a testamentary trustee, a guardian of an estate, and bankruptcy counsel, all of which were allowed compensation from the estate for their fee-litigation fees.

Thus, the court vested broad discretion in the trial courts to hear fee claims for fee-litigation and to approve or deny the claims as they saw fit. With this grant of discretion, the California Supreme Court reiterated its confidence in the lower court's ability to stop superfluous litigation over fee claims.

DAWN SOLHEIM

13. Id. at 876, 782 P.2d at 236, 264 Cal. Rptr. at 97.
14. Id. at 876-77, 782 P.2d at 236-37, 264 Cal. Rptr. at 97-98. These cases serve to shift the burden of paying the prevailing party's attorney fees to the losing party. Id. at 872, 782 P.2d at 236, 264 Cal. Rptr. at 97.
15. For a discussion of the fund method of paying attorney fees, see Dawson, Lawyers and Involuntary Clients: Attorney Fees From Funds, 87 Harv. L. Rev. 1597 (1974) (theory of extracting attorney fees from funds accumulated through successful litigation has become an "escape route" from the American rule requiring parties to bear their own litigation costs).
17. Id. at 877, 782 P.2d at 237, 264 Cal. Rptr. at 98 (citing In re Griffith's Estate, 97 Cal. App. 2d 651, 656, 218 P.2d 149, 152-53 (1950)) (trustee entitled to reimbursement for payment of attorney fees from corpus of the trust).
18. Trynin, 49 Cal. 3d at 877-78, 782 P.2d at 237, 264 Cal. Rptr. at 95 (citing Riley v. Superior Court, 49 Cal. 2d 305, 310-12, 316 P.2d 956, 959-60 (1957)) (payment of attorney fees taken as a charge against the ward's estate).
20. Trynin, 49 Cal. 3d at 880, 782 P.2d at 239, 264 Cal. Rptr. at 100. See also supra note 7 and accompanying text.
IX. PROPERTY LAW

The interests of the beneficiaries of a deed of trust are not affected by the foreclosure of a mechanic's lien upon the trust property when notice of the suit to foreclose is given to the trustee but not to the beneficiaries: Monterey S.P. Partnership v. W.L. Bangham, Inc.

California courts have long recognized the difference between deeds of trust and traditional trusts,¹ and thus have refused to apply general principles of trust law to the relationships created under trust deeds.² In Monterey S.P. Partnership v. W.L. Bangham, Inc.,³ the court further emphasized this distinction by holding that service to the trustee of a deed of trust does not satisfy notice requirements insofar as the beneficiaries are concerned.⁴ Therefore, any default judgment obtained in a mechanic's lien foreclosure action when the trustee is served, but not the beneficiaries, is ineffectual as against the beneficiaries’ interests, or those of their successors and assignees.⁵

In Monterey, the court focused on the nature of deeds of trust. As an instrument that operates as a security interest, a trust deed is the

1. A deed of trust is an instrument “taking place and serving the uses of a mortgage, by which the legal title . . . is placed in one or more trustees, to secure . . . repayment of . . . money . . . or . . . performance . . . .” BLACK LAW DICTIONARY 373 (5th ed. 1979). A trust is a “right of property . . . held by one party for the benefit of another.” Id. at 1352.


4. Id. at 457, 777 P.2d at 624, 261 Cal. Rptr. at 588. In 1982, W. L. Bangham, Inc. (“Bangham”) secured a mechanic’s lien against property it had improved, and filed an action to foreclose the lien later that same year. Bangham took no further action until January of 1984, when it recorded a lis pendens on the property. Additionally, Bangham did not serve the complaint until May 3, 1984, when it served Western Mutual Corporation (“Western”), the trustee under a deed of trust that named Oak Knoll Partnership as the trustor, and some 252 persons as beneficiaries. Bangham served Western as a “doe” defendant, but failed to serve the beneficiaries, although they were named parties. On May 4, 1984, Western executed a planned trustee’s sale, and Monterey eventually purchased the property. Monterey filed this action to establish clear title to the property, which was clouded by a sheriff’s deed Bangham received when it purchased the property at a public sale ordered subsequent to Bangham’s obtaining a default judgment in the suit to foreclose the mechanic’s lien. Monterey moved for summary judgment for lack of notice, which the trial court granted. The appellate court reversed, holding that notice requirements to the beneficiaries of a deed of trust were satisfied by providing actual notice to the trustee. See id. at 464, 777 P.2d at 629, 261 Cal. Rptr. at 593.

5. Id.
the equivalent of a mortgage and not a traditional express trust. While the trustee of an express trust is required to act in the best interests of the beneficiary, the duties imposed upon the trustee of a deed of trust are limited only to those stipulated in the instrument. The court indicated that the deed of trust in Monterey, like most such instruments, did not impose any obligation upon the trustee either to defend a suit on the beneficiaries' behalf or to provide them with notice. Although the trustee of an express trust may be authorized to defend certain actions against the trust, the court found the question of authorization inapplicable to the situation in Monterey. Here, the issue was not whether the trustee was authorized to defend, but whether the beneficiaries were bound by a default judgment when the trustee did not defend. The court also rejected the argument that the trustee of a deed of trust was analogous to the trustee of an express trust, due to the obvious differences between the two types of trusts.


10. Monterey, 49 Cal. 3d at 462, 777 P.2d at 627, 261 Cal. Rptr. at 591.

11. Id. at 462, 777 P.2d at 628, 261 Cal. Rptr. at 592. The court discussed various differences between the two types of trusts, including the fact that a trustee of an express trust must consent to being so named, while the trustee of a deed of trust need not consent. Id. (citing Burns v. Peters, 5 Cal. 2d 619, 55 P.2d 1182 (1936)). Additionally, the court pointed to the discretionary powers of an express trustee, and the fiduciary duties imposed upon such persons. Id. at 462-63, 777 P.2d at 628, 261 Cal. Rptr. at 592.
In holding that actual notice must be given to the beneficiaries of a deed of trust, the court again demonstrated that a deed of trust is little more than a mortgage instrument, and the real parties in interest must be given the opportunity to defend any action adversely affecting these interests. Although this holding may place a substantial burden on claimants seeking to foreclose a mechanic's lien, the burden is offset by the legal importance of notice in our justice system and the practical purpose of ensuring the deed of trust as a viable method of mortgaging property.

MARK G. KISICKI

X. TAX LAW

A. The test for determining whether improvements are taxable fixtures is whether, considering "annexation, adaptation and other objective manifestations of permanence," a reasonable person would find the item to be a permanent part of the real estate, which is primarily a legal determination requiring a de novo standard of review. Crocker Nat'l Bank v. City & County of San Francisco.

The supreme court in Crocker Nat'l Bank v. City and County of San Francisco, enunciated a uniform test for classifying fixtures for

12. For example, Justice Mosk indicated that the claimant of the mechanic's lien in Monterey would be required to ascertain the identities and addresses of 252 beneficiaries, which is a substantial burden on the ordinary artisan for whom the mechanic's lien remedy is intended. Id. at 464, 777 P.2d at 629, 261 Cal. Rptr. at 593 (Mosk, J., concurring). However, Chief Justice Lucas, in the majority opinion, noted that personal service is not required, as the Code of Civil Procedure specifies several alternatives. Monterey, 49 Cal. 3d at 461 n.4, 777 P.2d at 627 n.4, 261 Cal. Rptr. at 591 n.4 (citing CAL. CIV. PROC. CODE §§ 382, 416.90, 415.50 (West 1973 & Supp. 1990)).


14. This policy is self-evident; however, the use of trust deeds is not confined to standard real estate transactions, but extends to corporate finance. Many corporations pledge property through a deed of trust as security for bond issues. See 4A R. POWELL, THE LAW OF REAL PROPERTY § 574 (Cum. Supp. 1990). The desirability of such a financial arrangement would be greatly diminished if creditors of the corporation might lose their secured interest without being given the chance to defend against adverse claims.

1. 49 Cal. 3d 881, 782 P.2d 278, 264 Cal. Rptr. 139 (1989). Justice Mosk authored the unanimous opinion of the court. Crocker National Bank had received exemption on its personal property and taxation on its real property. Thus, classification of its data processing equipment as fixtures, within the definition of real property, substantially increased the bank's taxes over six years. When Crocker's refund request was denied, litigation was instituted, wherein the City of San Francisco alleged that Crocker's action was barred on procedural grounds. Although the trial court dismissed the procedural grounds, it held for the city in finding that the equipment was properly classified as fixtures.

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taxation purposes and determined that an independent standard of review is required on appeal. The dispute in Crocker centered upon the city's classification of a bank's electronic data processing equipment as fixtures which are taxable within the definition of improvements, and the city's refusal to refund the bank's six years of taxes paid on such property. The trial court upheld the city's classification and the court of appeal, believing the classification to be a factual determination, applied the substantial-evidence standard of review and affirmed.

The supreme court addressed the issues of classification and standard of review. Working toward achieving a uniform, "workable" rule that would promote efficiency by clarifying classification to both taxpayer and tax assessor, the court held that the proper test is "whether a reasonable person would consider the item to be a permanent part of the property, taking into account annexation, adaptation, and other objective manifestations of permanence." Under this policy of uniformity, the court found that uniform taxation could

2. See S. CAL. REV. & TAX. CODE §§ 104(c), 105(a) (West 1987) (for purposes of property taxation, "real property" includes improvements, and improvements include fixtures); see also B. WITKIN, SUMMARY OF CALIFORNIA LAW, Taxation § 128 (9th ed. 1989).

3. Crocker, 49 Cal. 3d 881, 890, 782 P.2d 278, 282, 264 Cal. Rptr. 139, 143 (1989) (annexation requires consideration of whether attachment to the real property is accomplished by means of cement, bolts, and other permanent means, indicating a permanent fixture, or by easy to disconnect standardized plugs or other means allowing ready mobility); see also San Diego Trust & Sav. Bank v. San Diego, 16 Cal. 2d 142, 105 P.2d 94 (1940) (bank vault door with frame cemented into a concrete vault found to be a fixture).

4. Crocker, 49 Cal. 3d at 890, 782 P.2d at 282, 264 Cal. Rptr. at 143. Adaptation includes consideration of whether the building or equipment was designed or changed to accommodate the other. However, minor design implementations and changes such as extra air conditioning units or power outlets made specifically for the equipment are not enough to prove permanence and do not transform the equipment into fixtures. See also Specialty Restaurants Corp. v. County of Los Angeles, 67 Cal. App. 3d 924, 136 Cal. Rptr. 904 (1977). The Queen Mary, incapable of sailing and surrounded by

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be achieved only by proper classification, and that proper classification would be better achieved by independent review.10

The court reasoned that the classifying of fixtures was a mixed question of law and fact involving primarily the sifting of legal principles in a factual context, thus demanding de novo review.11 The court concluded that a reasonable person would not consider the bank’s data processing equipment a permanent part of the real estate, and that the court of appeal erred in employing the substantial-evidence standard of review.

The court in Crocker selected a test which would avoid arguments over particular language12 and yet provide a clear-cut framework within which trial courts can determine whether items are fixtures for purposes of taxation. This determination is primarily legal and

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10. Crocker, 49 Cal. 3d at 888-89, 782 P.2d at 281, 264 Cal. Rptr. at 142. Prior to enunciating this test, the court reviewed the “well settled” California test concerning fixtures in other areas of law. That test, also in three parts, is the same except for the third factor which is “the intention with which the annexation is made.” Id. at 887, 782 P.2d at 281, 264 Cal. Rptr. at 142. The court noted that this third factor was the controlling one, with the first two factors being subsidiaries of the third. Id. The court then replaced the intention factor with “other objective manifestations of permanence” when determining fixtures for taxation purposes. Id. at 887-88, 782 P.2d at 281, 264 Cal. Rptr. at 142. The court did not state whether this substitute factor would retain the same controlling weight as the third factor in the previous test.

“Objective manifestations” include consideration of the owner’s “constructive” intent to make the items in question a permanent part of the building. As the court noted, “[w]ere mere weight and necessity for business purposes sufficient, then circus elephants would be fixtures.” Allstate, 161 Cal. App. 3d at 891, 207 Cal. Rptr. at 896. Thus, this third factor allows for consideration of all the circumstances surrounding the placement of the items in question within the building.

11. Crocker, 49 Cal. 3d at 888, 782 P.2d at 281, 264 Cal. Rptr. at 142. If the determination primarily involved applying “experience with human affairs,” the question would be factual and would require the substantial-evidence standard of review.

12. See supra note 9.
will not prohibit appellate courts from independently reviewing the trial court's classification.

DAWN SOLHEIM

B. A tax assessor's demand for information is subject to prepayment judicial review prior to payment of a tax if the assessee can show that the information sought is "not reasonably relevant" to the proposed tax: Union Pacific R.R. Co. v. State Bd. of Equalization.

I. INTRODUCTION

Although the California Constitution requires payment of a contested tax prior to judicial review under Article XIII, section 32 ("section 32"),1 the California Supreme Court modified this blanket proscription in Dupuy v. Superior Court,2 subjecting the mandate of section 32 to the protective provisions of the federal due process clause.3 In Western Oil & Gas Ass'n v. State Bd. of Equalization,4 the court held that the State Board of Equalization (the "Board") "may compel the disclosure of information if: (1) its inquiry is authorized; (2) the requests are specific; and (3) the information sought is reasonably relevant to the inquiry."5 Thus, according to Western Oil, if an assessee contends that a demand for information by the Board infringes upon a federal constitutional right, the section 32 prepayment requirement does not apply and the superior court has jurisdiction to determine the matter.6

Applying the reasoning of Western Oil the California Supreme Court...
Court held in Union Pacific R.R. Co. v. State Bd. of Equalization\(^7\) that a tax assesse has a right to prepayment judicial relief if the assesse can show that the information sought is not "reasonably relevant" to the proposed tax.\(^8\) Furthermore, if the trial court determines that the assesse is not required to disclose such information, it has the authority to prohibit the imposition of any penalty assessment for such nondisclosure.\(^9\)

II. TREATMENT

A. Majority Opinion

Disagreeing with the Board's interpretation of Western Oil\(^10\) the court rejected the notion that judicial review prior to payment of the disputed tax is allowed only when there is "no conceivable basis" for that tax.\(^11\) In Union Pacific,\(^12\) the court concluded that a conceivable basis for a tax, standing alone, is insufficient to preclude judicial review prior to tax payment.\(^13\) The court reasoned that such an interpretation ignores the requirement of "reasonable relevance" imposed by the fourth amendment ban on unreasonable searches and seizures.\(^14\) Thus, the court held that the general prepayment requirement of section 32 does not apply to the Board's demands of an assesse for information which infringes upon federally protected constitutional rights. Therefore, "if the assesse can show that the information is not reasonably relevant to a proposed tax," the as-
The court also held that an assessee who makes an appropriate showing of nonrelevance has a right to prepayment judicial relief from any penalty levied as a result of the nondisclosure. The court empowered the trial court to temporarily abate an assessment until it makes a determination of the relative merits of a judicial challenge.

The court determined that the information demanded by the Board in Union Pacific regarding future acquisitions was not reasonably relevant to the assessment process because the Board was unable to demonstrate how the future acquisition of property could affect the fair market value of existing property. While the court acknowledged that portions of the withheld plan were arguably relevant, the court decided that the Board was not entitled to any of the undisclosed information for two reasons: (1) Union Pacific contended that such information was not relevant, and (2) the Board failed to request an in camera inspection of the documents to determine relevance.

The court expressly held that relief is appropriate "if the assessee

15. 49 Cal. 3d at 147, 776 P.2d at 271, 260 Cal. Rptr. at 569.
16. Id. at 156, 776 P.2d at 278, 260 Cal. Rptr. at 576.
17. Id.
18. Id. at 155, 776 P.2d at 277, 260 Cal. Rptr. at 575.
19. Id. at 148, 776 P.2d at 272, 260 Cal. Rptr. at 570. Union Pacific's property is annually assessed pursuant to CAL. CONST. art. XIII, § 19. See also CAL. REV. & TAX. CODE § 721 (West 1987). The Board is also required to assess the property at its fair market value. CAL. CONST. art. XIII, § 1. "It [fair market value] is a measure of desirability translated into money amounts, and might be called the market value of property for use in its present condition." 49 Cal. 3d at 148, 776 P.2d at 272, 260 Cal. Rptr. at 570 (quoting De Luz Homes, Inc. v. County of San Diego, 45 Cal. 2d 546, 562, 290 P.2d 544, 554 (1955)) (citation omitted) (brackets and emphasis in original).

Notwithstanding the Board's concession that it had the authority to assess only existing property, the Board contended that information concerning future acquisitions would affect the current value of existing property and was therefore reasonably relevant. The court disagreed, pointing out that the Board's own regulations required that the income approach (the authorized method of valuation of property) be applied only to existing property. Id. at 149, 776 P.2d at 273, 260 Cal. Rptr. at 571; see CAL. CODE REGS. tit. 18, § 8(c) (1989); see also CAL. REV. & TAX. CODE § 723 (West 1987) (unit valuation used to value assessee's properties operated as a unit in a primary function; nonunitary property valued by the Board through consideration of current market value information of comparable properties provided by the assessor). The court stated that the Board "confused the concept of future income with that of future property." Union Pacific, 49 Cal. 3d at 149, 776 P.2d at 273, 260 Cal. Rptr. at 571 (emphasis in original).

20. 49 Cal. 3d at 153 & n.13, 776 P.2d at 275-76 & n.13, 260 Cal. Rptr. at 573-74 & n.13. The cost of potentially taxable replacement track and rolling stock was included within the withheld portions of the plan. Id.

21. Id.
can show that the information is not reasonably relevant to the proposed tax.”22 The only “showing” made by Union Pacific was its representation that the information was not reasonably relevant.23 Thus, the court appeared to create a rebuttable presumption of nonrelevance. After a showing of nonrelevance by the assessee based on the assessee’s own assertion, the court shifted the burden of proof to the Board to prove that the information was relevant. The court stated that just because “a particular future acquisition may be relevant does not mean that all possible future acquisitions are relevant.”24 In other words, had the Board requested only the relevant portions of the plan, as opposed to the entire plan, the Board may have been successful in obtaining the information.

B. Dissenting Opinion

The dissent25 concluded that such a result was unacceptable for several reasons.26 Requiring the Board to prove the actual relevance of information sought as opposed to its possible relevance makes section 32 of article XIII a “nullity” according to the dissent.27 The purpose of section 32 is to ensure an unabated collection of taxes during the litigation process.28 The dissent stated that by requiring actual relevance before requiring payment of a tax or penalty, the majority contravened the purpose of section 32, rendering it useless.29

The concern over the impairment of the Board’s ability to obtain information from taxpayers was critical to this conclusion. The dissent disagreed with the majority’s elevated standard of proof which required the Board to establish actual relevance.30 Rather, the dissent would apply the “reasonable relevance” test of federal cases, thus holding that the government need show only that the material had “potential” relevance.31 To meet this burden, the government must show that the information “might throw some light upon the

22. Id. at 147, 776 P.2d at 271, 260 Cal. Rptr. at 569 (emphasis added).
23. Id. at 153 n.13, 776 P.2d at 276 n.13, 260 Cal. Rptr. at 574 n.13.
24. Id. at 153, 776 P.2d at 276, 260 Cal. Rptr. at 574.
25. Justice Mosk authored the dissenting opinion, joined by Justice Broussard.
26. Id. at 159-66, 776 P.2d at 280-85, 260 Cal. Rptr. at 578-83 (Mosk, J., dissenting).
27. Id. at 159, 776 P.2d at 280, 260 Cal. Rptr. at 578 (Mosk, J., dissenting).
28. Id. (Mosk, J., dissenting); see also Pacific Gas & Elec. Co. v. State Bd. of Equalization, 27 Cal. 3d 277, 283, 611 P.2d 463, 467, 165 Cal. Rptr. 122, 126 (1980) (delay in the collection of taxes could interrupt essential public services). Justice Mosk stated that “[b]ecause any delay in collection [of taxes] may cause serious detriment to the public, courts have been ‘extremely reluctant’ to interfere in the taxation process before the taxpayer pays the levies assessed.” Union Pacific, 49 Cal. 3d at 160, 776 P.2d at 280, 260 Cal. Rptr. at 578 (Mosk, J., dissenting) (quoting Pacific Gas, 27 Cal. 3d at 282, 611 P.2d at 466, 165 Cal. Rptr. at 125).
29. Id. (Mosk, J., dissenting).
30. Id. at 161, 776 P.2d at 281, 260 Cal. Rptr. at 579 (Mosk, J., dissenting).
31. Id. (Mosk, J., dissenting).
correctness of the taxpayer's return' or 'illuminate any aspect of the return.'”32 Under the “might be relevant” test, the dissent would have denied the trial court jurisdiction to allow Union Pacific's refusal to disclose the information sought by the Board.33

The dissent also took exception to the majority's denial of an in camera inspection simply because the Board had not initially requested one.34 The dissent stated that California law does not require a request for an in camera inspection, but permits such an inspection made on the court's own motion.35 If confidential information is critical to a trial court decision, and the trial court fails to order such an inspection, appellate courts have either held such failure to be erroneous or remanded the case and ordered the inspection.36 The dissent concluded that the Union Pacific case should have been remanded to the trial court for a determination of the relevance of the plan's undisclosed portions.

III. CONCLUSION

Where previously a taxpayer was required to pay a tax or penalty and then seek redress in an action for refund, the taxpayer may now assert that the information sought by the Board is irrelevant in whole or in part, thereby shifting the burden of proof to the Board to


Because the burden on the government would be too great if it were required to prove the relevance of material which it does not have by the standards applied to the admissibility of evidence at trial, it need not prove that the information is actually relevant in any technical, evidentiary sense.

33. Id. at 160, 776 P.2d at 281, 260 Cal. Rptr. at 579 (Mosk, J., dissenting).

34. Id. at 165, 776 P.2d at 284, 260 Cal. Rptr. at 582 (Mosk, J., dissenting).

35. Id. (Mosk, J., dissenting). "If some parts of the plan are irrelevant, the solution is not to deny discovery of the entire plan but to require the court to examine the plan in camera so that it may separate the relevant from the irrelevant parts of the plan." Id. at 164, 776 P.2d at 283, 260 Cal. Rptr. at 581 (Mosk, J., dissenting); see City of Santa Cruz v. Municipal Court, 49 Cal. 3d 74, 94, 776 P.2d 222, 234-35, 260 Cal. Rptr. 520, 532-33 (1989) (in camera inspection required by statute); Valley Bank of Nev. v. Superior Court, 15 Cal. 3d 652, 658, 542 P.2d 977, 980, 125 Cal. Rptr. 553, 556 (1975) (in camera inspection accommodates considerations of disclosure and confidentiality); In re Lifshutz, 2 Cal. 3d 415, 438, 467 P.2d 557, 572-73, 85 Cal. Rptr. 829, 844-45 (1970) (court should take precautions to protect confidentiality); El Dorado Sav. & Loan Ass'n v. Superior Court, 190 Cal. App. 3d 342, 346, 235 Cal. Rptr. 303, 305 (1987) (court should examine information in camera and disclose only relevant material); Saddleback Community Hosp. v. Superior Court, 158 Cal. App. 3d 206, 209, 204 Cal. Rptr. 598, 600 (1984) (in camera hearing must be held to protect both parties).

36. See cases cited supra note 35.
establish that the information is relevant. If the information is not relevant, or if the Board fails to expressly request an in camera inspection of the information or fails to meet the higher standard of proof, the taxpayer may bar the government from further inquiry. This decision may encourage resistance to Board subpoenas by taxpayers.\(^\text{37}\) In light of the opportunity to avoid payment of taxes or penalties during years of litigation,\(^\text{38}\) this fear does not appear to be without basis.

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XI. TORT LAW

Notice to public health care entities of intention to sue triggers statutes requiring public entities to notify claimants of claim deficiencies or to waive all defenses as to such deficiencies: Phillips v. Desert Hospital District.

In Phillips v. Desert Hospital District,\(^\text{1}\) the California Supreme Court declared that notice of intention to bring suit for monetary damages against a public entity for alleged professional health care negligence triggers government codes requiring the public entity to notify the claimant of any claim deficiencies.\(^\text{2}\) Failure to notify the claimant results in a waiver of all defenses as to the claim's defectiveness.\(^\text{3}\)

The issue before the court was whether the plaintiffs' notice, although insufficient to meet the claim requirements of the Tort

\(^{37}\) Union Pacific, 49 Cal. 3d at 165, 776 P.2d at 285, 260 Cal. Rptr. at 583 (Mosk, J., dissenting).

\(^{38}\) For example, Union Pacific was contested for five years. Id. at 166, 776 P.2d at 285, 260 Cal. Rptr. at 583 (Mosk, J., dissenting).


3. Phillips, 49 Cal. 3d at 711, 780 P.2d at 357, 263 Cal. Rptr. at 127. The plaintiffs' attorney sent a letter to the defendant hospital announcing the plaintiffs' intention to sue for monetary damages on charges of medical malpractice. When the hospital failed to respond after three months, the plaintiffs filed their complaint. The hospital demurred because the complaint failed to allege that the plaintiffs had complied with the requirements of the Tort Claims Act for claim presentation against a public entity. The demurrer served as the first notification to the plaintiffs that the defendant was a public, not private, hospital. Thereafter, the plaintiffs sought to comply with the statute, but their original notice of intention to sue had been sent too late to comply fully. The trial court sustained the defendant's demurrer and dismissed the plaintiffs' complaint. The appellate court affirmed on the ground that the plaintiffs' notice did not substantially comply with the Act's requirements for presenting a claim.

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Claims Act (the Act), could trigger the notice and defense-waiver provisions of the Act.\textsuperscript{4} The court held that if the notice satisfied the purpose of the Act, which is to furnish the public entity with enough information to allow it to investigate claims that can possibly be settled without litigation,\textsuperscript{5} then the notice and defense-waiver provisions were triggered.\textsuperscript{6} The court reasoned that the legislature designed the waiver provisions to spur public entities to investigate claims promptly and notify claimants of their findings, so that claimants could complete their claims.\textsuperscript{7} Thus, upon notice by the claimant, the public health care entity must inform the claimant of any insufficiencies in content or timeliness under the Act, or else waive any defenses because of those insufficiencies.\textsuperscript{8}

The court provided greater protection to claimants while enforcing the heavy burden placed upon public entities by the defense-waiver provision. Although the provisions may originally have been

\textsuperscript{4} See CAL. GOV'T CODE § 911.3 (West 1980 & Supp. 1990). This section currently provides, in part:

(a) When a claim that is required by section 911.2 to be presented not later than six months after accrual of the cause of action is presented after such time without the application provided in section 911.4, the board or other person designated by it may, at any time within 45 days after the claim is presented, give written notice to the person presenting the claim that the claim was not filed timely and that it is being returned without further action.

(b) Any defense as to the time limit for presenting a claim described in subdivision (a) is waived by failure to give the notice set forth in subdivision (a) within 45 days after the claim is presented.

The six month provision was added in 1987 to extend the previous 100-day limit, although this case arose prior to that amendment. \textit{Id.}

\textsuperscript{5} Phillips, 49 Cal. 3d at 709, 780 P.2d at 356, 263 Cal. Rptr. at 127.

\textsuperscript{6} The court approved Foster v. McFadden, 30 Cal. App. 3d 943, 106 Cal. Rptr. 685 (1973), in determining that the controlling issue is the notice the public entity actually receives, not the intention of the claimants. Phillips, 49 Cal. 3d at 710-11, 780 P.2d at 356-57, 263 Cal. Rptr. at 126-27. Although the plaintiffs in Phillips did not intend their notice to operate as a claim under the Act because they did not know that the defendant was a public entity, the public entity received sufficient notice to accomplish the Act's purpose. \textit{Id.} at 709-10, 780 P.2d at 356, 263 Cal. Rptr. at 126.

\textsuperscript{7} \textit{Id.} at 702, 780 P.2d at 351, 263 Cal. Rptr. at 121.
designed to aid the claimant who filed his claim without the aid of a lawyer, the court made no distinction on that basis. Furthermore, the court did not appear to be swayed by the severity of the plaintiff’s injuries in this case, but instead afforded all claimants the added benefit of notice by the public entity.

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9. Professor Arvo Van Alstyne, the consultant for the California Law Revision Commission which authored sections 910.8 and 911 of the California Government Code, asserted that requiring public entities to notify claimants of claim insufficiencies was necessary because nonlawyers often write claims; however, the Foster court specifically noted that this extra protection extended equally to claimants whose claims were filed by lawyers. Foster, 30 Cal. App. 3d at 947-48, 106 Cal. Rptr. at 687-88.

10. The plaintiffs alleged that the defendant hospital negligently performed a medically unnecessary bilateral mastectomy and reconstructive surgery, which resulted in disfigurement, gangrene, and other complications.