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California Supreme Court Survey: A Review of Decisions
November 1988-January 1989

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

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I. ANTI-TRUST LAW

The Cartwright Act was not intended to apply to a bona fide merger. The Unfair Practices Act applies to ongoing conduct, not to only one merger: California ex rel. Van de Kamp v. Texaco, Inc.

I. INTRODUCTION

In California ex rel. Van de Kamp v. Texaco, Inc., the California Supreme Court, in a narrowly-divided opinion, held that the legislature did not intend the Cartwright Act (Act) to apply to a merger when one company purchases another and they lose their independent identities. The court relied extensively on its analysis of the legislative history of the Act and similar acts in other states, as well as cases interpreting these early acts. Further, the entire court agreed that because the Unfair Practices Act applied to continuing practices and not one action, such as the Texaco, Inc. (Texaco) and Getty Oil Co. (Getty Oil) merger, the attorney general failed to state a cause of action.

II. FACTUAL BACKGROUND

The attorney general’s cause of action against Texaco arose out of one of the largest merger agreements in history: Texaco’s 1984 acquisition of Getty Oil. Upon entering the agreement, Texaco and Getty Oil notified the Federal Trade Commission (FTC) and the United States Justice Department of the proposed merger. After finding possible federal antitrust violations which could result from the merger, the FTC issued a proposed complaint alleging violations of the Clayton Act and Federal Trade Commission Acts, as well as de-
tailing the potential anticompetitive effects of the merger.\textsuperscript{10} Although the merger would have a nationwide impact,\textsuperscript{11} one of the FTC's primary concerns was "the sale, pipeline transportation, and refining into petroleum products of heavy crude oil in the state of California."\textsuperscript{12} However, concurrent with the issuance of the proposed complaint, the FTC settled the complaint by entering into a proposed consent order agreement with Texaco.\textsuperscript{13} Six days after the FTC entered the final complaint and consent order,\textsuperscript{14} the attorney general filed a complaint against Texaco and Getty Oil.

The attorney general had alleged in his complaint that Texaco and Getty Oil had violated both the Cartwright\textsuperscript{15} and the Unfair Compe-
This would be the first, and now probably the last, time that the Cartwright Act would be used to prevent a merger. The attorney general began by defining the “relevant markets” which would be affected by the Texaco-Getty Oil merger. He then alleged:

The effect of the acquisition may be substantially to lessen competition in each of the specified relevant markets in California in violation of the Cartwright Act in the following ways, among others: (a) actual competition will be eliminated between Texaco and Getty in the marketing of California crude oil; (b) actual competition between competitors in general in the relevant product markets in California will be lessened; (c) California independent refiners may be denied access to California crude oil that is currently supplied by Getty and is necessary to the profitable operation of their refineries; (d) for reasons unrelated to the efficient use of resources, Texaco may have the incentive and ability to deny, and may in fact deny, independent refiners access to California crude oil and proprietary pipeline transportation, thereby increasing the difficulty of entry into California refining and decreasing the competitive significance of independent California refiners; (e) Texaco’s acquisition of Getty will result in significantly higher concentration ratios in the relevant markets; (f) already high barriers to entry in the California crude oil, refining, pipeline transmission systems, and retail product markets will be substantially raised; (g) actual competition between Texaco and Getty for the transportation in California of crude oil and refined products by pipelines will be eliminated; (h) competition in the marketing of motor gasoline and other refined products may be substantially lessened in California such that the prices of these commodities might be affected; (i) competition in the market for California crude oil may be substantially lessened such that its price may be affected; and (j) competition in the transportation of California crude oil by pipelines may be substantially lessened such that the price of the crude oil

a combination of capital, skill or acts by two or more persons... to create or carry out restrictions in trade or commerce... to make or enter into or execute or carry out contracts, obligations or agreements of any kind or description, by which they... agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any... article or commodity, that its price might in any manner be affected.


17. Texaco, 46 Cal. 3d at 1177, 762 P.2d at 404, 252 Cal. Rptr. at 240 (Mosk J., concurring and dissenting).

18. Carrizosa, supra note 6, at 1, col. 1.

19. “Relevant market,” in an antitrust context, is the geographic and product area where anticompetitive activities are alleged to occur or impact. Black’s Law Dictionary 874-75, 1160 (5th ed. 1979).

20. 46 Cal. 3d at 1177-80, 762 P.2d at 404-06, 252 Cal. Rptr. at 240-42 (Mosk, J., concurring and dissenting). The relevant product markets included crude oil, refining of crude oil, marketing of petroleum products, and transportation of crude oil through pipelines. Id. (Mosk, J., concurring and dissenting). Relevant geographic markets included California and submarkets within California. Id. (Mosk, J., concurring and dissenting).
might be affected.21

After alleging facts to support a Cartwright Act violation, the attorney general incorporated these facts into his contention that the merger also violated the Unfair Practices Act.22 The attorney general's requested relief for both violations was Texaco's divestment of Getty Oil's California assets.23

Texaco and Getty Oil demurred to the attorney general's complaint, and the trial court held that the scope of the Cartwright Act did not encompass mergers, and insufficient facts were alleged for an Unfair Competition Act violation.24 Moreover, the trial court stated that even though they did not rule on the issue of whether the FTC consent order preempted the attorney general's complaint, "[t]he Court could find that the relief sought in the complaint is therefore barred by the doctrine of preemption."25 Affirming the trial court's opinion, the court of appeal "concluded that the consent order preempted the action and [therefore] did not reach the other issues."26 The attorney general petitioned the California Supreme Court for review, reiterating the contentions made in his original complaint: the Texaco-Getty Oil merger violated the Cartwright and Unfair Competition Acts and the cause of action was not preempted by the FTC's consent order.27

III. THE MAJORITY OPINION

The majority addressed two major questions regarding the attorney general's contentions: (a) whether the Cartwright Act applies to mergers, and (b) whether the Unfair Practices Act applies to mergers.

A. The Cartwright Act and Mergers

The court addressed the attorney general's contention that the

21. Id. at 1179-80, 762 P.2d at 405-06, 252 Cal. Rptr. at 241-42 (Mosk, J., concurring and dissenting) (emphasis added). The attorney general was reiterating the concerns of the FTC staff. See supra note 12. "In other words, the complaint claimed the merge posed an incipient threat to competition." 46 Cal. 3d at 1152, 762 P.2d at 386, 252 Cal. Rptr. at 222 (emphasis added).
22. 46 Cal. 3d at 1180, 762 P.2d at 406, 252 Cal. Rptr. at 242 (Mosk, J., concurring and dissenting).
23. Id. (Mosk, J., concurring and dissenting); Carrizosa, supra note 6, at 2, col. 2.
24. 46 Cal. 3d at 1181, 762 P.2d at 406, 252 Cal. Rptr. at 242 (Mosk, J., concurring and dissenting).
25. Id. (Mosk, J., concurring and dissenting).
26. Id. (Mosk, J., concurring and dissenting).
27. Id. (Mosk, J., concurring and dissenting).
Cartwright Act applied to mergers by first setting forth the specific language of the Act. 28 The court questioned the attorney general's interpretation that "a combination of capital" 29 was broad enough to be applied to a "bona fide merger . . . [wherein] the entities lose forever their separate identities, and become a new, independent entity." 30 However, to resolve the conflicting interpretations, and thereby discover the intent of the Act's drafters, the court looked at three possible derivations of the Act: (1) the progeny of Senator Reagan's proposed bill that was an alternative to Senator Sherman's bill; (2) the Sherman Act; and (3) the common law. The court found that Senator Reagan's proposed bill, and those acts which evolved from it, were the most historically accurate derivations of the Cartwright Act, and therefore provided the best articulation of the probable intent of the drafters of the Act. 31

1. The Evolution of Senator Reagan's Bill

The court's discussion of the most probable precursor to the Cartwright Act began with Texas Senator Reagan's introduction of a "bill to define trusts" in 1888. The court noted that although the United States Senate did not debate the antitrust subject until 1890, several states began enacting their own antitrust statutes. 32 By 1890, two types of state antitrust legislation had developed: broadly worded statutes such as those enacted in Kansas and Maine which made all combinations for improper purposes illegal, and narrowly worded statutes such as the Texas Act which made "trusts" illegal and defined trusts as combinations for specific improper purposes. 33 The court concluded that the Texas act followed the original Reagan bill, and that Reagan's amended bill, which was debated in 1890 with Sherman's bill, was based on the Texas act. 34

Although the United States Senate adopted Sherman's bill instead of Reagan's bill, the court noted that several states had enacted antitrust statues similar to the Texas act. 35 Concurrent with this increased antitrust legislation, several cases interpreting the new statutes arose. The court analyzed several cases which held that the purchase of one company by another participating in the same busi-

28. See supra note 15.
30. Texaco, 46 Cal. 3d at 1152-53, 762 P.2d at 387, 252 Cal. Rptr. at 223. Merger was contrasted to those combinations which combine and then "perdur[e], i.e., continue to maintain separate identities and interests." Id. at 1152, 762 P.2d at 387, 252 Cal. Rptr. at 223 (footnote omitted).
31. Id. at 1153, 762 P.2d at 387, 252 Cal. Rptr. at 223.
32. Id. at 1154-55, 762 P.2d at 388-89, 252 Cal.Rptr. at 224-25.
33. Id. at 1155, 762 P.2d at 389, 252 Cal.Rptr. at 225.
34. Id.
35. Id. at 1155-56, 762 P.2d at 389, 252 Cal. Rptr. at 225.

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ness did not constitute a "combination" for purposes of the antitrust statutes because they did not maintain separate relationships. The court concluded that "at the time the Cartwright Act was enacted there was a recognizable body of case law construing the word 'combination' (in both Kansas-Maine and Texas-type acts) as not applying to the purchase of one business by another entity engaged in the same business."

At the same time the antitrust legislation was being enacted, and cases were narrowly interpreting the term "combination," several states amended their antitrust acts in order to regulate corporate mergers. During this time period, in 1907, the California legislature enacted the Cartwright Act. After detailing the Act's striking similarity to the Reagan bills and several bills which evolved, the court noted:

The Act embraced by our Legislature contained the well-known limitations on combinations in restraint of trade, but it (i) failed to include the latest invention of the evolving antitrust statutes—an antimerger provision—and (ii) embraced the term "combination," without attempting to modify the language in order to avoid the prevailing narrow construction of that term.

Further, the court opined that the legislature intended a similar "narrow" construction of "combination," as presumed from the evolution of similar language in other state statutes of the time, and the developing case law which had narrowly interpreted "combination." The court added that other legislatures had acknowledged the potential problems of mergers and had enacted legislation to combat the problem, but California did not amend accordingly; suggesting that the legislature intended a "limited scope" which did not

36. Id. at 1157-59, 762 P.2d at 390-91, 252 Cal. Rptr. at 226-27; see Gates v. Hooper, 90 Tex. 563, 39 S.W. 1079 (1897) (purchase of one mercantile company by another not a combination because did not maintain separate relationship); Hitchcock v. Anthony, 83 F. 779 (6th Cir. 1897) (purchase of one dockyard company by another not a combination because Michigan antitrust act did not apply to person who conveys business to another); A. Booth & Co. v. Davis, 131 F. 31 (1904) (Michigan act did not apply to purchase of one fishing company by another because act not intended to cover sale where seller retained no interest in property and no intent for its subsequent use).

37. Id. at 1159, 762 P.2d at 391, 252 Cal. Rptr. at 227.

38. Id. at 1159-60, 762 P.2d at 391-92, 252 Cal. Rptr. at 227-28 (noting 1899 TEX. GEN LAWS ch. 94, § 2(1), (2); 1905 ARK. ACTS No. 1, § 5).

39. Id. at 1160, 762 P.2d at 392, 252 Cal. Rptr. at 228.

40. Id. at 1160-62 n.14, 762 P.2d at 392-93 n.14, 252 Cal.Rptr. at 228-29 n.14. The court quoted relevant parts of the original Cartwright Act, the Reagan Bill of 1888, the Texas Act of 1889, the Reagan Bill of 1890, and the Michigan Act of 1800 to illustrate the nearly identical language and minor differences in each. Id.

41. Id. at 1160-61, 762 P.2d at 392-93, 252 Cal. Rptr. at 228-29.

42. Id. at 1162, 762 P.2d at 393-94, 252 Cal. Rptr. at 229-30.
apply to mergers. Moreover, the court noted that "although it has amended the Cartwright Act at least 26 times between 1909 and the present, [the legislature] has never enacted a merger provision." Finally, the court concluded that based on its analysis of the most probable evolution of the Cartwright Act, the legislature intended the Act to apply to those who perdue and not "to regulate the bona fide purchase and sale of one firm by another."  

2. The Sherman Act’s Applicability

The court next addressed the possibility that the Cartwright Act derived from the Sherman Act, since the Sherman Act applied to mergers. Based on its prior analysis of the legislative history of the Act, the court held that the Sherman Act "[was] not directly probative of the Cartwright drafters’ intent, given the different genesis of the provision under review." However, the court noted that even if it accepted the attorney general’s contention that the Cartwright Act derived from the Sherman Act, the argument of its applicability to the merger in the present case would fail because the Sherman Act requires proof of an "actual" restraint of trade, not just an "incipient" threat to competition as alleged by the attorney general. Therefore, the court held that neither the Cartwright Act nor the Sherman Act would apply to the Texaco-Getty Oil merger based on the facts alleged by the attorney general.

3. Pre-Cartwright Act Common Law

The court addressed Texaco and Getty Oil’s contention that the Cartwright Act codified the existing common law, and that the common law did not restrict mergers. The court noted that "the clear ‘majority view’ at common law was that certain forms of mergers or acquisitions were ‘illegal.’" However, "common law cases condemning mergers all involved clear, actual threats to competition, not merely incipient threats to competition." Further, the increased severity of punishment under the Cartwright Act, as opposed to that at

43. Id. at 1162-63, 762 P.2d at 394, 252 Cal. Rptr. at 230 (footnote omitted) (emphasis added).
44. Id. at 1163, 762 P.2d at 395, 252 Cal. Rptr. at 231.
46. Id. at 1164, 762 P.2d at 395, 252 Cal. Rptr. at 231.
47. See supra note 46.
49. Id. at 1165, 762 P.2d at 396, 252 Cal. Rptr. at 232.
50. Id. at 1167, 762 P.2d at 397, 252 Cal. Rptr. at 233 (emphasis added).
common law, the court to reiterate its earlier finding that: the drafters of the Cartwright Act intended to make their law applicable only to situations in which the parties improperly collude and continue as separate, independent entities, and not to situations in which, by virtue of purchase and sale, or merger, one or more of the entities ceases to exist.

Therefore, based on a thorough legislative analysis, the court concluded that the Cartwright Act did not apply to mergers or acquisitions.

B. The Unfair Practices Act and Mergers

The court quickly dismissed the attorney general’s claim that the Texaco-Getty Oil merger violated the Unfair Practices Act. “Unfair competition” under the Unfair Practices Act is defined as an “unlawful, unfair or fraudulent business practice.” Since the attorney general attacked only the merger, and did not allege a specific “pattern of behavior” or “course of conduct” sufficient to constitute a “practice,” the court held that the Unfair Practices Act did not apply to the Texaco-Getty Oil merger. Because the court decided that the Cartwright Act and Unfair Practices Act did not apply to the merger, the court did not discuss whether the action was preempted by either the Supremacy Clause or the Commerce Clause.

IV. JUSTICE MOSK’S CONCURRING AND DISSenting OPINION

Justice Mosk, in his extensive concurring and dissenting opinion, concurred with the majority in its holding that the Unfair Practices Act did not apply to the merger, but strongly attacked the majority’s holding that the Cartwright Act does not apply to mergers. Further, because he found that the attorney general stated a meritorious claim under the Cartwright Act, Justice Mosk spent several pages discuss-

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53. Under the common law, punishment was simply to declare the agreement void and unenforceable. Id. (citing United States v. Addyson Pipe & Steel Co., 85 F. 271, 279 (6th Cir. 1898)). However, under the Cartwright Act, punishment includes both civil awards and criminal punishment. Texaco, 46 Cal. 3d at 1167, 762 P.2d at 397, 252 Cal. Rptr. at 233.
54. Id.
55. Id. at 1169, 762 P.2d at 399, 252 Cal. Rptr. at 235.
56. CAL. BUS. & PROF. CODE § 17200 (West 1987).
57. Id. at 1170, 762 P.2d at 399, 252 Cal. Rptr. at 235 (quoting Barquis v. Merchant’s Collection Ass’n, 7 Cal. 3d 94, 113, 496 P.2d 817, 831, 101 Cal. Rptr. 745, 759 (1972)).
58. Id.
59. U.S. Const., art. VI, cl. 2.
60. U.S. Const., art. I, § 8, cl. 3.
61. Texaco, 46 Cal. 3d at 1170-1217, 762 P.2d at 399-430, 252 Cal. Rptr. at 235-66 (Mosk, J., concurring and dissenting).
ing the preemption issues that the majority did not address.\textsuperscript{62}

Justice Mosk’s primary attack on the majority’s opinion related to the almost nonexistent federal antitrust enforcement and the resultant obligation of states affected by threats of anticompetitive conduct to vigorously enforce their state antitrust laws for the protection of their citizens.\textsuperscript{63} Accordingly, if the Cartwright Act is interpreted “in accordance with the plain meaning of its express terms and with an eye on the object it seeks to achieve and the evil it aims to prevent,”\textsuperscript{64} Justice Mosk would have found a clear legislative intent to apply the Act to the Texaco-Getty Oil merger.\textsuperscript{65}

Further, Justice Mosk attacked the majority’s discussion of the derivation of the Cartwright Act and the application of other state’s acts and case law to the interpretation of the California legislation.\textsuperscript{66} He concluded that the Cartwright Act not only applied to mergers, but applied to mergers with \textit{probable}, as opposed to \textit{actual}, restriction on competition.\textsuperscript{67} Due to the potential anticompetitive effects alleged by the attorney general, Justice Mosk would have allowed the claim to proceed under the Cartwright Act.\textsuperscript{68}

After finding a probable violation of the Cartwright Act, Justice Mosk discussed the possible preemption of the action by the federal antitrust complaint, the subsequent consent order, and the Commerce Clause.\textsuperscript{69} He found that the attorney general’s claim was not preempted by either the consent order\textsuperscript{70} or the Commerce Clause.\textsuperscript{71}

\section*{V. Conclusion}

The majority’s well-reasoned opinion will be viewed favorably by companies in California and across the nation who are in the midst of, or contemplating, a merger or acquisition. States with acts similar

\footnotesize{\textsuperscript{62} Id. at 1194-215, 762 P.2d at 415-30, 252 Cal. Rptr. at 251-66 (Mosk, J., concurring and dissenting).
\textsuperscript{63} Id. at 1170-71, 762 P.2d at 399-400, 252 Cal. Rptr. at 235-36 (Mosk, J., concurring and dissenting).
\textsuperscript{64} Id. at 1170, 762 P.2d at 399, 252 Cal. Rptr. at 235 (Mosk, J., concurring and dissenting).
\textsuperscript{65} Id. at 1182-83, 762 P.2d at 407, 252 Cal. Rptr. at 243 (Mosk, J., concurring and dissenting).
\textsuperscript{66} Id. at 1184-92, 762 P.2d at 408-14, 252 Cal.Rptr. at 244-50 (Mosk, J., concurring and dissenting).
\textsuperscript{67} Id. at 1192, 762 P.2d at 414, 252 Cal. Rptr. at 250 (Mosk, J., concurring and dissenting).
\textsuperscript{68} Id. at 1194, 762 P.2d at 415, 252 Cal. Rptr. at 251 (Mosk, J., concurring and dissenting).
\textsuperscript{69} Id. at 1194-216, 762 P.2d at 415-30, 252 Cal. Rptr. at 251-66 (Mosk, J., concurring and dissenting).
\textsuperscript{70} Id. at 1209, 762 P.2d at 425, 252 Cal. Rptr. at 261 (Mosk, J., concurring and dissenting).
\textsuperscript{71} Id. at 1216, 762 P.2d at 430, 252 Cal.Rptr. at 266 (Mosk, J., concurring and dissenting).}
to the Cartwright Act, but which do not have specific antimerger provisions, may find the majority's analysis of the legislative intent of these acts persuasive enough to follow California's interpretation. Hopefully, for the protection of consumers, these states will heed the policy concerns of Justice Mosk and enact specific antimerger provisions which would allow their respective attorneys general to reduce anticompetitive behavior.

Consumers in California may feel the full effect of the majority's decision beginning in April, when the FTC consent order expires. However, the attorney general has said that he will continue to monitor any anticompetitive effects and actual harm suffered by Californians, especially independent refiners, and possibly file a new complaint against Texaco in federal court. The most promising solution to the restraints of trade problem in California, during an era of nominal federal antitrust prosecution, will be the attorney general's promise to keep fighting mergers through federal antitrust legislation in federal courts, and his pledge to pursue an antimerger amendment to the Cartwright Act.

MICHAEL J. GAINER

II. CIVIL PROCEDURE

The statute of limitations in section 3122.5 of the Civil Code for actions against lien release bonds is inoperative when the bond is recorded after suit to foreclose a mechanics' lien has been filed: Hutnick v. United States Fidelity & Guaranty Co.

In Hutnick v. United States Fidelity & Guaranty Co., 47 Cal. 3d 456, 763 P.2d 1326, 253 Cal. Rptr. 236 (1988), the court considered the relationship between actions to foreclose a mechanics' lien and those to foreclose a lien release bond. Although Civil Code section 3144.5 specifies that actions against the lien release bond must be instituted within six months after recording the bond, the court held this section applicable only when the release bond is obtained prior to a plaintiff taking any action to foreclose the mechanics' lien. CAL. CIV. CODE § 3144.5 (West Supp. 1989).

Hutnick improved certain property of Murieta Village Develo-
ment Company pursuant to a contract. After the services were rendered and only partial payment was received, Hutnick recorded a mechanics' lien against the property. Hutnick subsequently filed suit to foreclose the lien. After the suit was filed, a release bond was purchased from United States Fidelity & Guaranty (USF&G) and recorded. However, over six months passed between the recording of the bond and the surety being joined as a party to the suit. Although the principal was named, he was never served with the complaint. Additionally, the complaint was not amended to assert a cause of action against the bond within the six-month period required by section 3144.5, and USF&G successfully demurred to the amended complaint.

The court began its analysis by discussing the nature of the mechanics' lien as provided both by constitutional and legislative enactment. See Cal. Const. art. XIV, § 3; Cal. Civ. Code §§ 3110-3154 (West 1974 & Supp. 1989); see generally 13 W. Biel & C. Seneker, California Real Estate Law & Practice ch. 451 (1988 & Supp. 1988); 2 A. Bowman, Ogden's Revised California Real Property Law § 20 (1975 & Supp. 1987); 44 Cal. Jur. 3D Mechanics' Liens §§ 1-177 (1978 & Supp. 1988). The court reasoned that the legislature enacted the lien release bond provisions to ensure that workers receive the protection provided by the mechanics' lien procedure while also allowing for the alienability of real property. See M. Marsh, California Mechanics' Lien Law Handbook § 8.28 (3d rev. ed. 1988). Because the bond is merely a replacement for the improved property, the court determined that an action against the bond or the property was essentially the same.

However, sections 3144 and 3144.5 of the Civil Code provide differing statutes of limitations for actions against the property and the bond. Cal. Civ. Code §§ 3144, 3144.5 (West Supp. 1989). Section 3144 specifies that a mechanics' lien is valid only for ninety days, unless suit to foreclose the lien is filed during this time. Cal. Civ. Code § 3144 (West Supp. 1988). Section 3144.5 requires that actions against a lien release bond be instituted within six months of the recording of the bond. Cal. Civ. Code § 3144.5 (West Supp. 1989). The court declared that the legislature could not have intended to require a plaintiff to meet two statutes of limitation to obtain a single remedy; therefore, the periods must be considered as alternatives. If the defendant records a bond prior to the plaintiff's filing suit to foreclose the mechanics' lien, the plaintiff must institute proceedings against the bond within the six months required by section 3144.5. If the bond is not recorded prior to the filing of suit to foreclose the mechanics' lien, the suit must be filed within ninety days as required by section 3144. The court maintained that the existence of the bond did not alter the nature of the remedy and that the recording of the
bond did not impose any new time requirements on the plaintiff, provided the action to foreclose the mechanics' lien was timely filed.

The court likewise rejected USF&G's contention that, as surety, it was not made a party to the action in a timely manner. The court asserted that a surety was a successor in interest to the original parties against whom the action was timely filed; therefore, the surety could not assert a statute of limitations defense. See CAL. CIV. PROC. CODE §§ 385, 1908 (West 1973 & Supp. 1989).

The court also discussed the liability of the surety when the principal is not made a party to the action, and whether a principal has a right to be dismissed from the action after a bond is recorded. First, the court declared that a principal has no right to be dismissed when it was also the landowner, because the landowner is fully liable for the amount of the bond. See Borello v. Eichler Homes, Inc., 221 Cal. App. 2d 487, 34 Cal. Rptr. 648 (1963). The court declared that a surety could be liable even though the principal is not a party, provided the principal is notified of the proceeding by the surety. See CAL. CIV. PROC. CODE § 1912 (West 1983 & Supp. 1989). The court reasoned that because the principal is equally liable after such notification, this liability would motivate the principal to assist in the defense of the action.

In holding that the time requirements of section 3144.5 of the Civil Code are inapplicable when a plaintiff has already brought suit to foreclose a mechanics' lien, the court protected an important remedy for contractors and other improvers of property. Interpreting section 3144.5 as an additional, rather than as an alternative requirement would have interfered with the right to a quick and efficient enforcement procedure.

MARK G. KISICKI
III. CRIMINAL LAW

A parent who provides an ill child with prayer treatment instead of medical treatment may be prosecuted for involuntary manslaughter and felony child endangerment if the treatment denied can be shown to be necessary to the well-being of the child: Walker v. Superior Court.

I. INTRODUCTION

In Walker v. Superior Court, the supreme court decided that a parent may not claim protection of the first or fourteenth amendments or section 270 of the Penal Code when, based on strong religious beliefs, a parent solicits prayer treatment instead of medical treatment for a seriously ill child who subsequently dies as a result of the failure to obtain medical treatment. The court held that this denial of medical treatment may subject the parent to criminal prosecution for involuntary manslaughter and felony child endangerment. The court rejected all statutory defenses presented by the defendant parent, and further held that the prosecution of the defendant did not violate constitutional principles of free exercise of religion, or due process.

II. FACTUAL SUMMARY

The defendant's four-year-old daughter contracted a "flu-like" illness that was later diagnosed as acute purulent meningitis. The defendant, a Christian Scientist, believed that prayer was the sole appropriate healing method. She hired both a Christian Science "prayer practitioner" and a Christian Science nurse to attend to the sick child, but the defendant's daughter died seventeen days after initially exhibiting symptoms of the disease. At no time did the child

2. Walker, 47 Cal. 3d at 144, 763 P.2d at 873, 253 Cal. Rptr. at 22.
3. Id. at 120-34, 763 P.2d at 856-66, 253 Cal. Rptr. at 5-15.
4. Id. at 138-41, 763 P.2d at 869-71, 253 Cal. Rptr. at 18-20.
5. Id. at 141-44, 763 P.2d at 871-73, 253 Cal. Rptr. at 20-22.
6. Christian Scientists believe that "disease exists only because the mind, believing itself diseased, inflicts the illness on the body." Schneider, Christian Science and the Law: Room for Compromise?, 1 COLUM. J.L. & SOC. PROBS. 81, 81 (1965). A cure is not effectuated through traditional medical care, but rather through "remov[ing] the error of thinking that the disease exists." Id.
7. Church-approved "prayer practitioners" assist Church members in banishing illness. These practitioners must have a documented history of past "healings," must have "attend[ed] class instruction in Christian Science," and must "devote full time to healing." Id.

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receive any traditional medical care.\textsuperscript{8}

Relying on a criminal negligence theory, the state accused the defendant of felony child endangerment under section 273a of the Penal Code\textsuperscript{9} and involuntary manslaughter under section 192 of the Penal Code.\textsuperscript{10} After the court of appeal denied the defendant's petition for writ of prohibition and stay, the supreme court granted review to examine the defendant's contention that, based on five theories, her prosecution was invalid. The defendant alternatively asserted that 1) section 270 of the Penal Code barred her prosecution; 2) certain other relevant statutes excused her actions; 3) sufficient culpable conduct for prosecution did not exist; 4) the right of free exercise of religion gave her absolute protection; and 5) the presence of a lack of fair notice of the illegality of her conduct violated her due process rights.

III. MAJORITY OPINION

A. Defendant's Statutory Arguments

The court first examined the defendant's allegation that she is completely protected from prosecution based on the language of a 1976 amendment to section 270 of the Penal Code. Section 270 provides a misdemeanor penalty for parents who fail to provide their children with "certain necessities" of care. Section 270 states in part:

\begin{quote}
If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor.
\end{quote}

8. It is important to note that while medical treatment for illness is strongly discouraged by the Christian Science Church, members using traditional medical care are not "'stigmatized or expelled'" from the Church. Note, \textit{California's Prayer Healing Dilemma}, 14 \textit{Hastings Const. L.Q.} 395, 410 (1987) (quoting a Christian Science spokesperson). \textit{See also Walker, 47 Cal. 3d at 139, 763 P.2d at 870, 253 Cal. Rptr. at 19.}

9. \textsc{Cal. Penal Code} § 273a (West 1988) [hereinafter section 273a]. Subsection (1) states in part: "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering . . . is punishable by imprisonment . . . for 2, 4, or 6 years." \textit{Id.}

10. \textsc{Cal. Penal Code} § 192 (West 1988) [hereinafter section 192]. This section states in part: "Manslaughter is the unlawful killing of a human being without malice. . . . (b) Involuntary — in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act, which might produce death, in an unlawful manner, or without due caution and circumspection." \textit{Id.}

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The defendant asserted that her prayer treatment fulfilled this "other remedial care" standard as a fully sufficient alternative to traditional medical treatment.

The court began its analysis by reexamining People v. Arnold, a 1967 California Supreme Court case that is factually analogous to the instant case. The court recognized that the Arnold opinion noted in dictum: "The phrase 'other remedial care'. . . does not sanction unorthodox substitutes for 'medical attendance'. . . ." In light of this statement, the court analyzed both the plain language of section 270 and the legislative intent of the 1976 amendment, and concluded that the dictum in Arnold must be overruled. The court focused on the "or" that proceeded the phrase "other remedial care" within section 270, and held that "other remedial care" such as prayer treatment "represents an alternative to medical attendance under the terms of section 270." The court further noted that the legislative history of the 1976 amendment clearly indicated a legislative intent to protect parents who wished to use prayer as a substitute for standard medical treatment.

However, the court rejected the defendant's contention that this exemption from liability under section 270 will also bar prosecution for involuntary manslaughter within section 192 of the Penal Code and felony child endangerment within section 273(a) of the Penal Code. Stating that "[c]onduct that is legal in one statutory context . . . may be actionable under separate statutes created for different legislative purposes," the court refused to extend an "unqualified defense" to the defendant based on section 270. The court concluded that there was no common legislative goal linking section 270 to either section 192 or 273(a), since section 270 was not a punitive or a physically protective law, but one primarily concerned with assuring that solvent parents financially support a child's needs to reduce financial burden.

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11. CAL. PENAL CODE § 270 (West 1988) (emphasis added) [hereinafter section 270]. The italicized portion of this text represents the 1976 amendment.
13. Arnold involved a mother who was a member of the "Church of the First Born," a denomination that used faith healing instead of medical treatment. She used enemas, compresses, and prayer treatment when her thirteen-year-old daughter became seriously ill with an intestinal blockage. The child died eighteen days after becoming ill. The Arnold court however, reversed the manslaughter charge against the mother on grounds unrelated to the lack of medical care. Id. at 441, 426 P.2d at 517, 58 Cal. Rptr. at 117.
14. Walker, 47 Cal. 3d at 121, 763 P.2d at 856-57, 253 Cal. Rptr. at 5-6 (quoting Arnold, 66 Cal. 2d at 452, 426 P.2d at 524, 58 Cal. Rptr. at 124) (emphasis added).
15. Id. at 120-23, 763 P.2d at 856-58, 253 Cal. Rptr. at 5-7.
16. Id. at 122, 763 P.2d at 857, 253 Cal. Rptr. at 6 (emphasis added).
17. Id. at 122, 763 P.2d at 857-58, 253 Cal. Rptr. at 6-7.
18. Id. at 124, 763 P.2d at 858-59, 253 Cal. Rptr. at 7-8.
19. Id. at 126, 763 P.2d at 860, 253 Cal. Rptr. at 9.
state aid. Additionally, since the legislative history of section 270 did not specifically articulate an opinion on the issue of a possible section 270 defense to manslaughter and child endangerment, the court refused to "exempt prayer treatment, as a matter of law, from the reach of . . . [section 192 and section 273]."

The court next examined the defendant's contention that her prosecution is barred by certain prayer-related statutes involving California's child welfare services program, the Office of Child Abuse Prevention, and laws covering the reporting of alleged child abuses. The court interpreted these three categories in light of section 300 of the Welfare and Institutions Code and determined that the child dependency provision and its upcoming revision show a clear intent that "when a child's health is seriously jeopardized, the right of a parent to rely exclusively on prayer must yield." While recognizing both the important state interest in the protection of children and the important parental interest in child custody, the court stressed that a prayer-related exemption from felony prosecution would not apply once the child reaches a level of serious illness.

B. Defendant's Culpability Under the Criminal Negligence Standard

The defendant next asserted that her conduct did not reach the level of criminal negligence, the standard of culpability necessary for conviction under sections 192 and 273(a). The court first quoted People v. Penny to clarify that criminally negligent conduct "must be such a departure from what would be the conduct of an ordinary prudent or careful man under the same circumstances as to be incompat-


21. Walker, 47 Cal. 3d at 129, 763 P.2d at 862, 253 Cal. Rptr. at 11.


23. Id. §§ 18950-18964.


25. CAL. WELF. & INST. CODE § 300 (West Supp. 1989) (lists ten categories of children, any of which may be "adjudged . . . a dependent child of the court").

26. Walker, 47 Cal. 3d at 133, 763 P.2d at 866, 253 Cal. Rptr. at 15.

27. Id. at 134, 763 P.2d at 866, 253 Cal. Rptr. at 15.

ible with the proper regard for human life.'”29 The court then summarily dismissed the defendant's reliance on two 19th century English common law cases,30 and focused on an analysis of the defendant's course of action in attempting to cure her ill daughter.

The defendant stressed that she wholly believed her use of prayer treatment was in her daughter's best interest, and compatible with curing the sick child. In examining the reasonableness of the defendant's conduct however, the court noted that the appropriate standard was an objective one, and refused to emphasize the good faith aspect of the defendant's conduct.31 The court held that providing only prayer treatment to a seriously ill child, and depriving the child medical care, gives rise to a question of fact.32

C. Defendant's Constitutional Arguments

The first constitutional issue discussed by the court concerned the defendant's assertion that her prosecution was completely barred by the first amendment to the United States Constitution33 and article I, section 4, of the California Constitution,34 both of which state that federal and state governments cannot “prohibit[] the free exercise” of religion.35 The court first asserted the well-settled rule that religious conduct is “subject to regulation for the protection of society,”36 and is not absolutely constitutionally protected. The court further clarified that a regulation must be analyzed by balancing “the gravity of the state's interest . . . against the severity of the religious imposition,”37 and then guaranteeing that the regulation is the “least restrictive alternative available to adequately advance the state's objectives.”38

Noting that the strong state interest in child protection is unquestionable,39 and that Christian Scientists who fall back on traditional

30. Walker, 47 Cal. 3d at 135-36, 763 P.2d at 867-68, 253 Cal. Rptr. at 16-17.
31. Id. at 137, 763 P.2d at 868, 253 Cal. Rptr. at 17. See People v. Bouroughs, 35 Cal. 3d 824, 678 P.2d 894, 201 Cal. Rptr. 319 (1984) (involuntary manslaughter prosecution of faith healer allowed even though the defendant did not intend to harm the patient).
32. Walker, 47 Cal. 3d at 138, 763 P.2d at 869, 253 Cal. Rptr. at 18.
33. U.S. CONST. amend. I.
34. CAL. CONST. art. I, § 4.
35. Id.
36. Walker, 47 Cal. 3d at 139, 763 P.2d at 869, 253 Cal. Rptr. at 18 (quoting Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940)).
37. Id. at 139, 763 P.2d at 869, 253 Cal. Rptr. at 18 (citing Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).
38. Id. at 139, 763 P.2d at 869, 253 Cal. Rptr. at 18 (citing Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981)).
39. Id. at 139, 763 P.2d at 869, 253 Cal. Rptr. at 18.
medicine are not looked upon as "sinners," the court emphasized that "parents have no right to free exercise of religion at the price of a child's life." The court then held that the threat of prosecution of a parent who solely relies on prayer treatment was not an overly restrictive means of preventing a threat to the child's life.42

Lastly, the court examined the defendant's contention that the combination of sections 270, 192, and 273(a) of the Penal Code resulted in a lack of fair notice of the illegality of her conduct, thus constituting a violation of her due process rights under the fourteenth amendment to the United States Constitution, and article I, section 7 of the California Constitution. The court held that persons must be deemed aware of the language, intent, and history of certain statutes. The court cited its previous analysis of the three statutes at issue, and held that these laws "provide constitutionally sufficient notice to defendant that the provision of prayer alone . . . would be accommodated only [if], . . . the child was not threatened with serious physical harm or illness."46

IV. JUSTICE MOSK’S CONCURRING OPINION

Justice Mosk filed a detailed concurring opinion stating that the prayer-only parental exemption within section 270 violates the establishment clause within the first amendment to the United States and California Constitutions. Stressing that the downfall of this exemption is through its selective preference of one religion over others, Justice Mosk emphasized that through the legislative history of section 270, Christian Science Church members are illegally favored "in the face of indistinguishable religious conduct."48 Justice Mosk fur-
ther noted his concern that section 270 requires an unacceptable level of subjective analysis regarding whether religious groups are "recognized" within the language of the statute.49

V. JUSTICE BROUSSARD’S CONCURRING AND DISSENTING OPINION

Justice Broussard specifically rejected the majority’s holding that the defendant may be prosecuted for felony child endangerment under section 273a. Justice Broussard maintained that a parent who fulfilled the prayer-only exemption of section 270 may also escape liability under section 273a, since the legislative intent of both provisions have a common goal — the protection of children’s health.50 Justice Broussard criticized the majority’s view of section 270 as a purely fiscal law, and instead stressed that prosecution under section 273a should only lie when the parent’s conduct “willfully caus[es] or permit[s] child endangerment.”51 Since section 270 does not prohibit a parent from using prayer treatment, Justice Broussard concluded that the prayer-only exemption must apply “where the failure to provide necessary medical attendance endangers the child’s health but does not result in harm.”52

VI. CONCLUSION

The court’s decision to reject all statutory and constitutional defense and prosecute a parent who, because of deep religious conviction, denied an ill child medical treatment, now effectively shuts off any possibility that these parents may escape criminal liability for their good faith actions.53 The court realized that modern medicine has come too far to sanction its denial to seriously ill children, regardless of the sincerity of the religious belief of the parents. But when faith fails and a child dies, prosecution is a harsh result indeed for a parent who has already suffered the loss of a child.

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49. Walker, 47 Cal. 3d at 150, 763 P.2d at 877, 253 Cal. Rptr. at 26 (Mosk, J., concurring).
50. Id. at 153-55, 763 P.2d at 880, 253 Cal. Rptr. at 29 (Broussard, J., concurring and dissenting).
51. Id. at 155, 763 P.2d at 881, 253 Cal. Rptr. at 30 (Broussard, J., concurring and dissenting).
52. Id.
53. For an earlier historical perspective of the criminal liability of parents who deny their children medical care because of religious beliefs, see Trescher & O’Neill, Medical Care for Dependent Children: Manslaughter Liability of the Christian Scientist, 109 U. PA. L. Rev. 203 (1960). Over the past ninety years, numerous cases in numerous jurisdictions have been litigated on this issue, see, e.g., In re Sampson, 65 Misc. 2d 658, 317 N.Y.S. 2d 641 (1970); Craig v. State, 220 Md. 590, 155 A.2d 684 (1959); Mitchell v. Davis, 205 S.W.2d 812 (Tex. Civ. App. 1947); Bradley v. State, 79 Fla. 651, 84 So. 677 (1920); People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903).
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

Between July and December of 1988, the California Supreme Court decided twenty-six death penalty cases.\(^1\) The court reversed the death sentences in approximately thirty percent of these decisions.\(^2\) Although this represents a twenty percent increase over the


2. The court reversed the death penalty in eight cases. See Brown, 45 Cal. 3d at 1247, 756 P.2d at 204, 248 Cal. Rptr. at 817; Bunyard, 45 Cal. 3d at 1189, 756 P.2d at 795, 249 Cal. Rptr. at 71; Crandell, 46 Cal. 3d at 833, 760 P.2d at 424, 251 Cal. Rptr. at 227;
preceding three months, it does not seem to signify a major change in the Lucas court's conservative treatment of death penalty cases. None of the reversals represents a substantial departure from established principles of criminal law. Four of the eight reversals were for common instructional errors, while the others were reversed for insufficient evidence, conflict of interest, improper consideration of the automatic motion for modification of death penalty, or the trial court's failure to determine the defendant's competency to stand trial.

In addition to addressing reversible errors, this survey discusses a number of other arguments raised by the defendants. These include: additional instructional errors; jury selection and misconduct issues; evidentiary issues; prosecutorial misconduct; ineffective assistance and conflict of interest of counsel; the court's failure to permit both defense counsel to argue at the penalty trial; the denial of the defendant's request for advisory counsel; improper waiver of the accused's right to counsel; and intercase and intracase propor-

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tionality of the death sentence. Although these arguments were unsuccessful, they merit discussion because of their novelty or their careful consideration in a majority or separate opinion.

II. INSTRUCTIONAL ERRORS

Instructional error predicated the reversal of four of the cases reviewed in this survey. Although only claims of Ramos or Brown error were ultimately successful, capital defendants argued a variety of other instructional errors which also will be explored in this section.

A. Ramos Error

Defendants claimed Ramos error in nine of the twenty-six cases in this survey. Three death penalties were reversed because the court found prejudicial Ramos error.

18. See infra notes 217-52 and accompanying text.
19. These four penalty reversals amounted to half of the total number of reversals for the time period reviewed herein. See Bunyard, 45 Cal. 3d at 1245, 756 P.2d at 833, 249 Cal. Rptr. at 109 (reversing on Ramos grounds); Crandell, 46 Cal. 3d at 885, 760 P.2d at 453, 251 Cal. Rptr. at 256 (reversing on Brown grounds); Griffin, 46 Cal. 3d at 1032-33, 761 P.2d at 115-16, 251 Cal. Rptr. at 655-56 (reversing on Ramos grounds); Johnson, 47 Cal. 3d at 602, 764 P.2d at 1102, 253 Cal. Rptr. at 724 (reversing on Ramos grounds).
20. See Error Charts in the appendix of this article. See also Bean, 46 Cal. 3d at 955, 760 P.2d at 1019, 251 Cal. Rptr. at 490; Bunyard, 45 Cal. 3d at 1242, 756 P.2d at 831, 249 Cal. Rptr. at 107; Caro, 46 Cal. 3d at 1064-65, 761 P.2d at 698-99, 251 Cal. Rptr. at 775-76; Coleman, 46 Cal. 3d at 780-82, 759 P.2d at 1281-82, 251 Cal. Rptr. at 104-05; Griffin, 46 Cal. 3d at 1032-33, 761 P.2d at 115-16, 251 Cal. Rptr. at 655-56; Johnson, 47 Cal. 3d at 602-03, 764 P.2d at 1101-02, 253 Cal. Rptr. at 724-25; Keenan, 46 Cal. 3d at 507-08, 758 P.2d at 1099-2000, 250 Cal. Rptr. at 568-69; McLain, 46 Cal. 3d at 118, 757 P.2d at 581, 249 Cal. Rptr. at 642; Williams, 45 Cal. 3d at 1323, 756 P.2d at 253-54, 248 Cal. Rptr. at 897.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in the future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.
In *People v. Bunyard*, the court agreed that the jury received an unadorned Briggs instruction. The instruction read as follows:

You are instructed that under the state Constitution, a governor is empowered to grant a reprieve, a pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without the possibility of parole to a lesser sentence that would include the possibility of parole.

In opposition, the Attorney General made three arguments. First, the Attorney General argued that the court should have abrogated its holding in *People v. Ramos* and followed the directive of the United States Supreme Court in *California v. Ramos*. However, the court previously rejected this line of argument when *People v. Ramos* was reheard on remand from the United States Supreme Court. Moreover, the court remains unreceptive to this claim.

Second, the Attorney General asserted that the court's decision in *People v. Ramos* is erroneous because the majority failed to articulate "persuasive reasons" which would have justified resolving the case on adequate and independent state grounds. The court held that the

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*Ramos*, 37 Cal. 3d at 150, 689 P.2d at 438, 207 Cal. Rptr. at 808. The Bird court, in a six-to-one majority, held that the Briggs instruction was sufficiently misleading on its face to constitute a due process violation. *Id.* at 155, 689 P.2d at 441, 207 Cal. Rptr. at 811. The court found further support for this holding of due process contravention by arguing that the Briggs instruction "invites the jury to consider speculative and impermissible factors in reaching its decision." *Id.* at 159, 689 P.2d at 444, 207 Cal. Rptr. at 814.


23. *Bunyard*, 45 Cal. 3d at 1242, 756 P.2d at 831, 249 Cal. Rptr. at 107. "[W]e cannot confidently conclude that this instruction did not improperly taint the jury's decision making process." *Id.* at 1245, 156 P.2d at 833, 249 Cal. Rptr. at 109.

24. *Id.* at 1242, 756 P.2d at 831, 249 Cal. Rptr. at 107 (citing California Jury Instructions, Criminal (CALJIC) No. 8.84.2 (4th ed. West 1979)) (hereinafter CALJIC).


26. *Bunyard*, 45 Cal. 3d at 1243, 756 P.2d at 831, 249 Cal. Rptr. at 107. The Supreme Court's decision in *Ramos* noted that the California judiciary would be responsible for determining whether the Briggs instruction violated the California Constitution. *People v. Ramos*, 37 Cal. 3d 136, 151, 689 P.2d 430, 438-39, 207 Cal. Rptr. 800, 808-09 (1984) (citing California v. Ramos, 463 U.S. 992, 997-98 n.7 (1982)). In response, the California Supreme Court agreed and stated:

This conclusion . . . simply reflects one of the principal tenets of our federal system of government: just as the United States Supreme Court bears the ultimate judicial responsibility for determining matters of federal law, this court bears the ultimate judicial responsibility for resolving questions of state law, including the proper interpretation of provisions of the state Constitution.


Attorney General's reading of the Teresinski opinion was inaccurate, and that the defendant properly articulated that reliance on the California constitutional standard is proper if following the federal Constitution would abrogate the broader scope of rights a criminal defendant enjoys in the state of California. The court rejected the Attorney General's argument because to follow the federal rule would work a grave injustice on twenty years of California decisional law, effectively abridging a California defendant's rights.

Finally, the Attorney General argued that the doctrine of harmless error applies because the prosecutor's fleeting comment regarding the commutation power of the Governor was quickly countered with a curative instruction from the bench. The court maintained that the giving of the Briggs instruction could not have been harmless error because the prosecutor dwelled on the Governor's commutation power on two separate occasions, while the jury received only one brief admonition from the judge.

Similarly, the death penalty was reversed in People v. Griffin because of prejudicial Ramos error. Opposing arguments substantially similar to those raised in Bunyard were analyzed and rejected by the court. The court remarked that this case belonged to a limited class

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28. Teresinski, 30 Cal. 3d at 837, 640 P.2d at 761, 180 Cal. Rptr. at 625.
29. Bunyard, 45 Cal. 3d at 1243, 756 P.2d at 831-32, 249 Cal. Rptr. at 107-08.
31. The court noted:
   The [trial court's] admonishment of the jury to disregard the prosecutor's statements clearly fell far short of the functional equivalent of a 'curative' instruction. Rather, the court merely advised the jury to disregard the prosecutor's argument as to their [sic] being another arbiter, but did not tell the jury to disregard the court's . . . Briggs Instruction . . . .
Bunyard, 45 Cal. 3d at 1224, 756 P.2d at 832, 249 Cal. Rptr. at 109 (emphasis in original).
32. 46 Cal. 3d 1011, 761 P.2d 103, 251 Cal. Rptr. 643 (1988).
33. Id. at 1032-33, 761 P.2d at 115-16, 251 Cal. Rptr. at 655-56.
in which reversible error is presumed.34

People v. Johnson35 was the final case affected by the Ramos decision. Again the court rejected the People's contention that any error in giving the Briggs instruction was cured. The court held that evidence introduced by the defendant during the penalty phase suggesting that the possibility of any sentence commutation was remote at best did not make the error harmless.36 "Ramos error is generally reversible. . . . Thus when the court has instructed the jury with the unadorned Briggs Instruction and fails to ameliorate the potential for prejudice, we have reversed the death penalty judgment."37

In other instances of alleged Ramos error, the court refused to reverse the death penalty (1) when the jury was charged to disregard the Briggs instruction in determining the appropriate penalty pursuant to a subsequent instruction;38 (2) when the sole reference to the Governor's commutation power in the case came from a brief remark made by the prosecutor;39 or (3) when the instruction alluded to a Governor's power to commute criminal sentences, but was not a Briggs instruction.40

Although Ramos error provides an effective means for defense attorneys to obtain penalty reversals for their clients, the cases in this survey suggest that prejudicial error may come at a premium in the future. By now, trial judges and prosecutors know the pitfalls of giving.

34. The court stated that:

The instruction creates the risk that the jury will be misled and will make its penalty determination on the basis of speculation and misinformation. We do not countenance such a risk. Thus we have treated cases in which the Briggs Instruction was given without a curative instruction as belonging to the limited class of cases in which prejudice is presumed.

Id. at 1033, 761 P.2d at 115-16, 251 Cal. Rptr. at 655-56 (emphasis added).


36. The defendant called a former Director of Corrections, who testified that in his eight-year term of office, he knew of no act of executive clemency for inmates sentenced to life without parole. Id. at 603, 764 P.2d at 1102, 253 Cal. Rptr. at 725.

37. Id.

38. "[T]he court instructed the jurors not to consider 'such power by a governor to commute or modify a sentence . . . in determining whether the defendant should be sentenced to death or life imprisonment without the possibility of parole.'" McLain, 46 Cal. 3d at 119, 757 P.2d at 382, 249 Cal. Rptr. at 643. "[T]he jury was told it should not consider the possibility of commutation in determining the sentence. . . . The jury, having been so advised, could not have been misled as to the nature and scope of the commutation power. Viewing the two instructions together, . . . the Briggs Instruction error was not prejudicial." Coleman, 46 Cal. 3d at 782, 759 P.2d at 1282, 251 Cal. Rptr. at 105 (footnote omitted).

39. "[W]hile . . . [Ramos] . . . makes an instructional reference to the commutation power reversible per se, a similar result does not necessarily follow from isolated references by the prosecutor." Keenan, 46 Cal. 3d at 508, 758 P.2d at 1100, 250 Cal. Rptr. at 569 (emphasis in original).

40. "The instruction was never given, however." Bean, 46 Cal. 3d at 955, 760 P.2d at 1019, 251 Cal. Rptr. at 490. "[N]o instruction was given . . . which could have misled the jury with regard to defendant's future eligibility for parole or . . . any other modification . . . ." Caro, 46 Cal. 3d at 1065, 761 P.2d at 699, 251 Cal. Rptr. at 776.
ing the Briggs instruction, or its functional equivalent, to the jury. As long as an adequate curative instruction or clarifying argument informs the trier of fact that executive commutation must not affect the penalty decision, Ramos error challenges will most likely fail.

B. Brown Error

Defendants advanced a variety of Brown error claims in eighteen of the twenty-six cases reviewed in this survey.\textsuperscript{41} Significantly, on remand from the United States Supreme Court, the California Supreme Court again considered the case for which the error was named.\textsuperscript{42} Although the court found no Brown error on remand, the death penalty was reversed on different grounds.\textsuperscript{43} Brown error is a combination of two concerns acknowledged by the court in Brown I.\textsuperscript{44} The court feared that juries, after hearing the sentencing in-

\textsuperscript{41} Adcox, 47 Cal. 3d at 266-69, 763 P.2d at 940-43, 253 Cal. Rptr. at 89-91; Bean, 46 Cal. 3d at 955-56, 760 P.2d at 1019, 251 Cal. Rptr. at 490; Bonin, 46 Cal. 3d at 705-07, 758 P.2d at 1243-44, 250 Cal. Rptr. at 713-15; Boyle, 46 Cal. 3d at 252-55, 758 P.2d at 47-49, 250 Cal. Rptr. at 106-08; Brown, 46 Cal. 3d at 452, 758 P.2d at 1148, 250 Cal. Rptr. at 617; Brown, 45 Cal. 3d at 1251-55, 756 P.2d at 206-09, 248 Cal. Rptr. at 820-24; Caro, 46 Cal. 3d at 1065, 761 P.2d at 699, 251 Cal. Rptr. at 776; Coleman, 46 Cal. 3d at 783-84, 759 P.2d at 1283-84, 251 Cal. Rptr. at 106-07; Crandell, 46 Cal. 3d at 883, 760 P.2d at 451, 251 Cal. Rptr. at 254; Hamilton, 46 Cal. 3d at 149-53, 756 P.2d at 1362-64, 249 Cal. Rptr. at 334-36; Hernandez, 47 Cal. 3d at 367, 763 P.2d at 1321, 253 Cal. Rptr. at 230; Jennings, 46 Cal. 3d at 991, 760 P.2d at 492, 251 Cal. Rptr. at 296; Karis, 46 Cal. 3d at 645-47, 758 P.2d at 1208-10, 250 Cal. Rptr. at 678-80; Keenan, 46 Cal. 3d at 515-17, 758 P.2d at 1105-06, 250 Cal. Rptr. at 574-75; McDowell, 46 Cal. 3d at 575, 758 P.2d at 1075, 250 Cal. Rptr. at 544; McLain, 46 Cal. 3d at 114, 757 P.2d at 579, 249 Cal. Rptr. at 640; Walker, 47 Cal. 3d at 645-49, 765 P.2d at 93-97, 253 Cal. Rptr. at 886-90; Williams, 45 Cal. 3d at 1322, 756 P.2d at 253, 248 Cal. Rptr. at 866.

\textsuperscript{42} In People v. Brown, 40 Cal. 3d 512, 536-37, 709 P.2d 440, 452-53, 220 Cal. Rptr. 637, 649-50 (1985) [hereinafter Brown I], a five justice majority of the California Supreme Court reversed the defendant's death sentence because of an instruction given at the penalty phase. The supreme court held that directing the jury not to consider sympathy was violative of the United States Constitution. The United States Supreme Court granted certiorari and ultimately determined by a five justice majority that the instruction prohibiting the consideration of "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling" did not clash with the United States Constitution. California v. Brown, 479 U.S. 538, 539 (1987).


\textsuperscript{43} On remand to the California judiciary, Justice Eagleson determined that the penalty of death must be reversed because of the trial judge's failure to decide the automatic sentence modification motion. Brown, 45 Cal. 3d at 1264, 756 P.2d at 214, 248 Cal. Rptr. at 827 [hereinafter Brown II]. See infra notes 217-24 and accompanying text.

\textsuperscript{44} For a description of Brown I, see supra note 42.
struction, would be easily confused as to the scope of their sentencing discretion and as to the proper weighing of the evidence. The court resolved many Brown issues in favor of the People because arguments from the prosecution, and the defense or additional remarks from the court (or any combination thereof) eradicated any juror confusion regarding the scope of their sentencing discretion or their weighing of the evidence.

However, in People v. Crandell, the court reversed the death penalty because the prosecutor intensified latent instructional ambiguities, and neither the defendant, representing himself, nor the court provided any subsequent argument or instruction to insure that the jury had a clear understanding of the penalty determination process.

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45. Boyde, 46 Cal. 3d at 253, 758 P.2d at 48, 250 Cal. Rptr. at 106. The objectionable language came from Section 190.3 of the Penal Code:

After having heard and received all of the evidence, and after having heard and considered the arguments of 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 1988) (emphasis added). Ultimately, the language found its way into the instruction books: “If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.” CALJIC No. 8.84.2 (West 1979). Significantly, the United States Supreme Court recently granted defendant Boyde’s petition for certiorari, in which he challenges the instruction requiring jurors to vote for the death penalty if the aggravating factors outweigh the mitigating circumstances. See Carrizosa, Death Sentence Allowed Despite Bad Instruction, L.A. Daily J., June 9, 1989, at p. 1, col. 2.

The Boyde court also stated that “the weighing process . . . is not a mere mechanical counting of factors on each side of an imaginary scale but rather a mental balancing process.” Boyde, 46 Cal. 3d at 253, 758 P.2d at 48, 250 Cal. Rptr. at 106. Moreover, “use of the word ‘shall’ might mislead the jury as to the substance of the ultimate determination it was called upon to make.” Id. Therefore, to ascertain whether any reversible Brown error exists, the court has decided “that each [case decided before Brown I] must be examined on its own merits to determine whether the sentencer may have been misled to the defendant’s prejudice regarding the scope of its sentencing discretion.” Id. at 252, 758 P.2d at 48, 250 Cal. Rptr. at 106 (citing Brown I, 40 Cal. 3d at 544 n.17, 709 P.2d at 459 n.17, 220 Cal. Rptr. at 656 n.17). See generally Note, Constitutional Law: The Eighth Amendment and Sympathy Instructions to Juries in Death Penalty Cases: California v. Brown, 10 HARV. J.L. & PUB. POL’Y 757-62 (1987); Note, California v. Brown: Against the Antisympathy Instruction, 15 HASTINGS CONST. L. Q. 669-84 (1988).

46. Adcox, 47 Cal. 3d at 266-69, 763 P.2d at 940-42, 253 Cal. Rptr. at 89-91; Bean, 46 Cal. 3d at 955-56, 760 P.2d at 1019, 251 Cal. Rptr. at 490; Caro, 46 Cal. 3d at 1065-67, 761 P.2d at 699-700, 251 Cal. Rptr. at 776-77; Hernandez, 47 Cal. 3d at 367-68, 763 P.2d at 1321-22, 253 Cal. Rptr. at 230-31; Jennings, 46 Cal. 3d at 990-92, 760 P.2d at 491-93, 251 Cal. Rptr. at 295-96.

47. 46 Cal. 3d 833, 760 P.2d 423, 251 Cal. Rptr. 227 (1988).
The court stated:

The prosecutor’s argument exploited the potential ambiguities in the instructions and may have diverted the jury from a correct understanding of the weighing process by which the appropriate penalty is to be determined and from a correct understanding of its responsibility to consider all relevant mitigating evidence. The jury did not have the benefit of any defense argument, which might have restored a correct understanding of the penalty determination process. . . . In this case the court gave no other instructions which served to clarify the nature of the weighing process, the scope of the jury’s sentencing discretion, or its obligation to consider all mitigating evidence. Employing our case-by-case analysis of the arguments, under these circumstances it must be concluded that the prosecutor’s argument exacerbated the ambiguity in the instructions . . . .

Three cases in this survey disposed of asserted Brown error by specifically referring to “the theme of the prosecutor’s argument.” Each time the court stressed the fact that Brown concerns are not reversible when the thrust of the prosecutor’s argument only urged that the factors of aggravation grossly outweighed those of mitigation and, therefore, the evidence dictated the jury return a sentence of death.

The dissenting opinions in People v. Boyde and People v. Walker explained why Justices Arguelles and Broussard felt that penalty reversals were warranted because of prejudicial Brown error. Justice Arguelles asserted that the jury in Boyde was misinformed at the outset of trial because “[t]hroughout the lengthy voir dire process, counsel repeatedly informed potential jurors of this erroneous view of the jury’s task at the penalty phase . . . .” Although Justice Arguelles found no probable juror misunderstanding as to the weighing process, he believed “the jury . . . was clearly misled as to the scope of its discretion and the nature of its role in determining sentence.” Justice Broussard believed Brown error had occurred be-

48. Crandell, 46 Cal. 3d at 881-85, 760 P.2d at 450-53, 251 Cal. Rptr. at 253-56.
49. Id. at 882-84, 760 P.2d 450-52, 251 Cal. Rptr. 254-55.
50. Bonin, 46 Cal. 3d at 706, 758 P.2d at 1244, 250 Cal. Rptr. at 714; Hamilton, 46 Cal. 3d at 150, 756 P.2d at 1363, 249 Cal. Rptr. at 335; McLain, 46 Cal. 3d at 116, 757 P.2d at 579, 249 Cal. Rptr. at 641.
51. Bonin, 46 Cal. 3d at 706, 758 P.2d at 1244, 250 Cal. Rptr. at 714; Hamilton, 46 Cal. 3d at 150, 756 P.2d at 1363, 249 Cal. Rptr. at 335; McLain, 46 Cal. 3d at 116, 757 P.2d at 579, 249 Cal. Rptr. at 641.
54. Boyde, 46 Cal. 3d at 260, 758 P.2d at 53, 250 Cal. Rptr. at 111 (Arguelles, J., concurring and dissenting) (emphasis added).
55. Id. at 265, 758 P.2d at 56, 250 Cal. Rptr. at 114 (Arguelles, J., concurring and dissenting).
cause the prosecutor's argument regarding the defendant's background "was intended to persuade the jury that the evidence did not fit into the statutory scheme." In Broussard's opinion, the net effect of this line of argument was the creation of "a serious risk that the jury misunderstood one of the crucial tools it was to use in determining penalty, in that it did not understand the applicability of defendant's mitigating background evidence. The case in mitigation was truncated and the case in aggravation was enhanced ...."

The cases in this survey show that any juror confusion regarding the penalty determination procedure, brought on by the language of CALJIC No. 8.84.2, usually can be cleared up by further instruction, argument or comment in this regard. The sole reversal due to Brown error occurred only because of an overzealous prosecutor. The future will most likely show fewer defendants alleging Brown error and fewer instances of penalty reversal because the problem has been cured through legislative reform. Furthermore, once the court has exhausted the pre-Brown I cases still awaiting review, Brown error will become a distant memory.

C. Factor (k)

Closely allied to Brown concerns are the issues associated with section 190.3(k) of the Penal Code. Also termed Easley error, factor (k) error was alleged in twelve of the twenty-six cases considered in

56. Walker, 47 Cal. 3d at 651-52, 765 P.2d at 98, 253 Cal. Rptr. at 891 (Broussard, J., concurring and dissenting).
58. See supra notes 24, 45 and accompanying text.
59. Crandell, 46 Cal. 3d 833, 760 P.2d 423, 251 Cal. Rptr. 227. For a discussion of the prosecutor's misconduct, see infra notes 162-69 and accompanying text.
60. "[T]he language of factor (k) . . . may have misled the jurors to [the defendant's] prejudice about the scope of their sentencing discretion and responsibility under the Constitution and may also have misled them about the evidence they might consider in exercising that discretion and responsibility." McLain, 46 Cal. 3d at 113, 757 P.2d at 578, 249 Cal. Rptr. at 639.
61. In 1983 the California Supreme Court decided that factor (k) of section 190.3 of the Penal Code could mislead the jury about: (1) the scope of their sentencing discretion; and (2) what evidence was properly considered in determining the sentence. People v. Easley, 34 Cal. 3d 858, 881-84, 671 P.2d 813, 827-30, 196 Cal. Rptr. 309, 323-26 (1983).
Although alleged quite often and sometimes discussed at length, factor (k) error brought about no reversals in the present set of cases.

Subpoint (k) of section 190.3 of the Penal Code provides a "catch-all" phrase directing juries to balance the evidence adduced at trial with "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Every defendant claiming factor (k) error was read an instruction identical to the language of the Penal Code. Any problems associated with this instruction have been addressed in the 1986 legislative revision.

The most persuasive claim of factor (k) error arose in People v. Hamilton when the court agreed "that the language of factor (k), combined with the prosecutor's argument, may have misled the jurors to [the defendant's] prejudice about the evidence they might consider in determining penalty." Moreover, Justice Mosk, writing for the majority, believed that "the prosecutor's argument did nothing to cure, but actually exacerbated, the [factor (k)] instruction's potential to mislead: he told the jury in essence that defendant's mitigating evidence was simply irrelevant." While conceding the error, the Attorney General contended that the court effectively cured the harm

62. Adcox, 47 Cal. 3d at 264-66, 763 P.2d at 938-40, 253 Cal. Rptr. at 87-89; Bonin, 46 Cal. 3d at 708-09, 758 P.2d at 1245, 250 Cal. Rptr. at 715-16; Boyde, 46 Cal. 3d at 250-51, 758 P.2d at 46-47, 250 Cal. Rptr. at 105; Brown, 46 Cal. 3d at 451-52, 758 P.2d at 1147-58, 250 Cal. Rptr. at 517; Caro, 46 Cal. 3d at 1062-63, 761 P.2d at 696-97, 251 Cal. Rptr. at 773-74; Coleman, 46 Cal. 3d at 784-85, 759 P.2d at 1283-84, 251 Cal. Rptr. at 106-07; Hamilton, 46 Cal. 3d at 146-49, 756 P.2d at 1360-62, 249 Cal. Rptr. at 332-34; Hernandez, 47 Cal. 3d at 363-64, 763 P.2d at 1318-19, 253 Cal. Rptr. at 228; Keenan, 46 Cal. 3d at 514-15, 758 P.2d at 1104-05, 250 Cal. Rptr. at 573-74; Malone, 47 Cal. 3d at 39-43, 762 P.2d at 1271-74, 252 Cal. Rptr. at 547-50; McDowell, 46 Cal. 3d at 574-75, 758 P.2d at 1074-75, 250 Cal. Rptr. at 543-44; McLain, 46 Cal. 3d at 113-14, 757 P.2d at 578-79, 249 Cal. Rptr. at 639-40.


64. CALJIC 8.84.1(k) (West 1979).

65. The 1986 revision expanded factor (k) to read, in its entirety:

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle].

CALJIC No. 8.85 (West 1988).

67. Id. at 146, 756 P.2d at 1360, 249 Cal. Rptr. at 332.
68. Id. at 147, 756 P.2d at 1361, 249 Cal. Rptr. at 333.
when responding to the jury's inquiries. Although a forceful claim for prejudicial error had been made, the court, applying the Chapman standard, declared the error harmless because the evidence in aggravation grossly outweighed any evidence in mitigation.

Justice Broussard, the lone dissenter in Hamilton, believed that the prosecutor's statements to the jury "that they could not consider any of the defendant's mitigating character and background evidence because it did not relate to the statutory aggravating or mitigating factors" created prejudicial error. Further, he believed the court propagated this harm while ruling on the defendant's automatic application for modification of sentence motion.

Although factor (k)/Easley error remains a popular claim among capital defendants, the court has indicated that it is unlikely to produce penalty reversals. Even in Hamilton, where the prosecutor admitted improperly arguing that "there was no mitigating evidence," and where the court subsequently recognized that this claim had enormous "potential for misleading the jury in this crucial respect," a six justice majority found no prejudice.

D. Beeman Error/Accomplice Instructions

Claims of Beeman error arose in seven of the survey's twenty-six cases. Not surprisingly, complaints regarding instructions on accomplice testimony or liability were voiced in all but one of these seven; most likely because of the nature of a case in which Beeman error may occur. Whereas the court admitted the existence of

69. The court remained unpersuaded. Id. at 148, 756 P.2d at 1362, 249 Cal. Rptr. at 333-34.
70. Id. at 149, 756 P.2d at 1362, 249 Cal. Rptr. at 334.
71. Hamilton, 46 Cal. 3d at 158, 756 P.2d at 1369, 249 Cal. Rptr. at 340 (Broussard, J., concurring and dissenting).
72. "The trial judge repeated the prosecutor's error when, in ruling on the motion to modify the verdict, he concluded that defendant's evidence of his unhappy upbringing was not mitigating evidence." Id. at 158, 756 P.2d at 1369, 249 Cal. Rptr. at 341 (Broussard, J., concurring and dissenting).
73. Id. at 147, 756 P.2d at 1361-62, 249 Cal. Rptr. at 333. Chief Justice Lucas and Justices Panelli, Arguelles, Eagleson and Kaufman joined Justice Mosk's opinion.
74. Adcox, 47 Cal. 3d at 243-44, 763 P.2d at 924-25, 253 Cal. Rptr. at 73-74; Bean, 46 Cal. 3d at 949-50, 760 P.2d at 1015, 251 Cal. Rptr. at 486; Bunyard, 45 Cal. 3d at 1226-28, 756 P.2d at 819-21, 249 Cal. Rptr. at 95-97; Malone, 47 Cal. 3d at 48-50, 762 P.2d at 1278-79, 252 Cal. Rptr. at 554-55; Marks, 45 Cal. 3d at 1345, 756 P.2d at 268, 248 Cal. Rptr. at 881; Walker, 47 Cal. 3d at 631-33, 765 P.2d at 84-85, 253 Cal. Rptr. at 877-78; Williams, 45 Cal. 3d at 1315, 756 P.2d at 248-49, 248 Cal. Rptr. at 862.
75. Beeman error concerns jury instructions which bear on the mental state of the defendant with regard to accomplice testimony or liability. Before accomplice liability becomes an issue in a case, at least one other individual must be allegedly involved in the perpetration of the crime charged. Therefore, if two or more actors are potentially liable for the same crime, accomplice liability instructions can be anticipated. The following cases alleged errors involving accomplice liability instructions: Adcox, 47 Cal. 3d at 241, 763 P.2d at 923, 253 Cal. Rptr. at 72; Bunyard, 45 Cal. 3d at 1226-30, 756 P.2d
Beeman error in every case in which the defendant made the claim, no reversals were predicated upon it. In light of two recent United States Supreme Court decisions, the California judiciary has adopted the harmless error standard when reviewing claims of Beeman error.  

76 All Beeman error in the cases of this survey was found to be harmless beyond a reasonable doubt. In 1984 the California Supreme Court found the aiding and abetting instructions given in a capital case did not sufficiently apprise the jury of the requisite intent essential to convict a criminal defendant as an aider and abettor. People v. Beeman, 35 Cal. 3d 547, 674 P.2d 1318, 199 Cal. Rptr. 60 (1984). The instructions given are set out below:

**PRINCIPALS—DEFINED**

The persons concerned in the commission or attempted commission of a crime who are regarded by law as principals in the crime thus committed or attempted and equally guilty thereof include:

1. Those who directly and actively commit or attempt to commit the act constituting the crime, or
2. Those who, with knowledge of the unlawful purpose of the one who does directly and actively commit or attempt to commit the crime, aid and abet in its commission or attempted commission, or
3. Those who, whether present or not at the commission or attempted commission of the crime, advise and encourage its commission or attempted commission.

[One who aids and abets is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged.]

CALJIC No. 3.00 (West 1979).

**AIDING AND ABETTING—DEFINED**

A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the commission of such crime. [Mere presence at the scene of a crime and failure to take steps to prevent a crime do not in themselves establish aiding and abetting.]

CALJIC No. 3.01 (West 1979).

Consequently, in cases tried before Beeman, in which the same instructions were given to the jury, defendants could count on automatic reversal of their sentence because the court subscribed to a reversal-per-se standard as these instructions were subsequently determined to be constitutionally infirm. See People v. Dyer, 45 Cal. 3d 26, 59-65, 753 P.2d 1, 20-24, 246 Cal. Rptr 209, 228-32 (1988).


Those cases which only discussed instructional issues involving accomplice testimony fared no better than the cases raising both *Beeman* and accomplice instructional errors. In fact, in those three cases, the court found no error associated with accomplice testimony and summarily dismissed each issue.

The few cases dealing with *Beeman* error provide a fairly clear indication that errors of this type rarely will furnish a defendant with a viable basis for reversal. The court's decision to move away from a reversal-per-se approach to the *Chapman* standard has rendered claims of *Beeman* error obsolete.

### E. Age as an Aggravating Factor

Disputes regarding the prosecution's characterization of the defendant's age as a factor in aggravation arose in eight of this survey's cases. Section 190.3(i) of the Penal Code permits the jury to consider the age of the defendant while considering the sentence, if such a factor is relevant. Defendants maintained "that mere chronological age, a factor over which one can exercise no control, should not of itself be deemed an *aggravating* factor." However, the California Supreme Court subscribes to the theory that "[b]y the same token, mere chronological age itself should not be deemed a *mitigating* factor."

In three of these cases, the court reaffirmed its earlier position:

In our view, the word 'age' in statutory sentencing factor (i) is used as a meto-

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78. Additionally, three other cases in this survey raised issues regarding accomplice instructions but made no mention of *Beeman* error: *Boyde*, 46 Cal. 3d at 243, 758 P.2d at 41-42, 250 Cal. Rptr. at 100; *McLain*, 46 Cal. 3d at 106-74, 757 P.2d at 573-74, 249 Cal. Rptr. at 634-35; *Moore*, 47 Cal. 3d at 86-89, 762 P.2d at 1232-33, 252 Cal. Rptr. at 508-09.

79. *Boyde*, 46 Cal. 3d at 243, 758 P.2d at 41-42, 250 Cal. Rptr. at 100; *McLain*, 46 Cal. 3d at 106-74, 757 P.2d at 573-74, 249 Cal. Rptr. at 634-35; *Moore*, 47 Cal. 3d at 86-89, 762 P.2d at 1232-33, 252 Cal. Rptr. at 508-09.

80. *Adcox*, 47 Cal. 3d at 271-72, 763 P.2d at 493-44, 253 Cal. Rptr. at 92-93; *Brown*, 46 Cal. 3d at 456-57, 758 P.2d at 1151, 250 Cal. Rptr. at 620-21; *Caro*, 46 Cal. 3d at 1062-63, 761 P.2d at 696-97, 251 Cal. Rptr. at 773-74; *Hernandez*, 47 Cal. 3d at 360-62, 763 P.2d at 1316-17, 253 Cal. Rptr. at 226-27; *Jennings*, 46 Cal. 3d at 980-99, 760 P.2d at 490-91, 251 Cal. Rptr. at 294; *Keenan*, 46 Cal. 3d at 518, 758 P.2d at 1101, 250 Cal. Rptr. at 376; *Walker*, 47 Cal. 3d at 649, 765 P.2d at 97, 253 Cal. Rptr. at 890; *Williams*, 45 Cal. 3d at 1323, 756 P.2d at 254, 248 Cal. Rptr. at 867.

81. The statute reads: "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: ... (i) The age of the defendant at the time of the crime." CAL. PENAL CODE § 190.3(i) (West 1988). The instructions given to the jury in each case of this study were read verbatim. Additionally, the 1986 revision to the death penalty instructions did not affect the language of this part of the instruction. See CALJIC No. 8.84.1(i) (West 1979); CALJIC No. 8.85(i) (West 1988).


84. *Adcox*, 47 Cal. 3d at 271, 763 P.2d at 943, 253 Cal. Rptr. at 92-93; *Brown*, 46 Cal.
nym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case.\textsuperscript{85}

This language shows the court's disfavor of defense complaints stemming from a deleterious classification of something as benign as a defendant's age. Although defense attorneys may have difficulty preventing these age-related, court-condoned arguments, perhaps a more effective challenge can be asserted under section 352 of the Evidence Code.\textsuperscript{86} Perhaps prosecutorial arguments will be tempered if the prejudicial effect of these age-related claims substantially outweighs any probative value.

F. Court's Response to Jury Questions

Only four of the survey's cases addressed issues surrounding the court's response to jury inquiries.\textsuperscript{87} No reversals were based on the alleged improprieties, although substantial discussion was devoted to these concerns. In \textit{People v. Keenan},\textsuperscript{88} the defendant alleged that the court exercised improper coercion to sway a juror who refused to vote in favor of the death penalty.\textsuperscript{89} After one night of sequestration, two days of penalty deliberation, and additional guidance from the court,

\textsuperscript{85} Adcox, 47 Cal. 3d at 271, 763 P.2d at 943-46, 253 Cal. Rptr. at 92-93; Brown, 46 Cal. 3d at 456, 758 P.2d at 1151, 250 Cal. Rptr. at 621; Hernandez, 47 Cal. 3d at 361-62, 763 P.2d at 1317, 253 Cal. Rptr. at 227 (emphasis added). "Metonymy" is defined as:

\textit{[A] figure of speech that consists in [sic] using the name of one thing for that of something else with which it is associated (as in 'spent the evening reading Shakespeare,' 'lands belonging to the crown,' 'demanded action by City Hall'...): use of one word for another that it may be expected to suggest. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY—UNABRIDGED 1424 (16th ed. 1971). See also 4 CALIFORNIA CRIMINAL DEFENSE PRACTICE § 87.03[3] (Supp. 1988); B. WITKIN, CALIFORNIA CRIMES § 1026B (Supp. 1985); 22 CAL. JUR. 3D Criminal Law § 3344 (1985).

\textsuperscript{86} The rule states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." CAL. EVID. CODE § 352 (West 1989).

\textsuperscript{87} Hamilton, 46 Cal. 3d at 153-56, 756 P.2d at 1365-67, 249 Cal. Rptr. at 337-39; Keenan, 46 Cal. 3d at 527-35, 758 P.2d at 1112-18, 250 Cal. Rptr. at 582-87; McDowell, 46 Cal. 3d at 577-79, 758 P.2d at 1076-77, 250 Cal. Rptr. at 545-46; Walker, 47 Cal. 3d at 634-35, 765 P.2d at 86-87, 253 Cal. Rptr. at 879-80.

\textsuperscript{88} 46 Cal. 3d 478, 758 P.2d 1081, 250 Cal. Rptr. 550 (1988).

\textsuperscript{89} Id. at 527, 758 P.2d at 112-13, 250 Cal. Rptr. at 582. The defendant maintained that the court "expected and desired a quick verdict and improperly implied that the alternative was an 'investigation' of the minority juror." Id.
court, a note forwarded by the foreman stated: "Your Honor, we have a juror who cannot morally vote for the death penalty." The judge, commenting on the jury's failure to achieve unanimity, remarked that he was bound to inquire about the matter and that he presumed a verdict would have been returned by now. Considering these factors, the judge opted to give the jury the weekend to "search [their] conscience[s] . . . and recall . . . [their] duty and responsibility to follow the law and judge the case." 

The defendant claimed that "in obviously stressful circumstances, with assertedly only a single juror holding out against the death penalty, the court's expressed preference for a quick verdict, and its threat to 'investigate' the jury's 'problem,' unfairly coerced the minority juror." However, the California Supreme Court found nothing in the trial judge's language designed to isolate the dissenting juror from the rest of the petit jury and to extort a vote for death from that person. The court also failed to see how the provision for the weekend break amounted to coercion. Consequently, this claim of impropriety did not compel a penalty reversal.

In People v. McDowell, the trial court also received a note from the jury indicating an eleven-to-one split among the jurors in favor of the death penalty. The note read: "We have an 11-to-1 vote for death. The one juror emphatically feels the mitigating circumstances are equal to the aggravating circumstances. The other eleven jurors do not agree with the one juror's mitigating circumstances as all being testimony or evidence that should be considered." The trial judge feared any direction outside of that which had already been provided for the jury would be construed later as coercion.

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90. Id. at 528, 758 P.2d at 1113, 250 Cal. Rptr. at 583 (emphasis added).
91. Id. at 528, 758 P.2d at 1114, 250 Cal. Rptr. at 583.
92. Id. at 530, 758 P.2d at 1115, 250 Cal. Rptr. at 584. See also Rosenthal & Cordell, The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials, 38 Stan. L. Rev. 89 (1985) (hereinafter Judges' Behavior) (co-authored by Peter Blanck).
93. Keenan, 46 Cal. 3d at 534, 758 P.2d at 1118, 250 Cal. Rptr. at 587. "The express purpose of the recess was to relieve the jurors of excessive stress . . . ." Id. (emphasis in original).
94. 46 Cal. 3d 551, 758 P.2d 1060, 250 Cal. Rptr. 530 (1988).
95. Id. at 577, 785 P.2d at 1076, 250 Cal. Rptr. at 545.
96. Id. The note listed eight facts adduced at trial and sought the trial court's opinion as to the propriety of considering these facts as circumstances in mitigation. The list included:
   (1) [In]adequate or insufficient psychiatric help; (2) love-hate relationship with father/mother; (3) daily and extreme mental abuse by father, also witness to daily physical abuse to mother and siblings; (4) religious extremes confused defendant; (5) confusing sexual mores at home, parent incest with mother condoning or aware of incest/abuse; (6) accused of death of favorite sister; (7) stress of divorce from family; (8) rejection of mother's love during teen years.

Id.
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judge, therefore, specifically indicated upon which instructions the jury should focus to find the answer to its question. Justice Lucas, writing for a five justice majority, held that this tactic "adequately informed the jury regarding its consideration of defendant's mitigating evidence." 97

Justice Mosk joined Justice Broussard's dissent on the penalty affirmation solely because of the majority's analysis of the trial judge's handling of the questions from the jury. 98 "But the jury's very question demonstrated it did not understand these instructions. There is no point in reiterating language which has failed to enlighten the jury." 99 The dissent maintained that the trial court's failure to explain the instructions and to inform the jury that a "defendant's character and background evidence" are pertinent to the choice of penalty warranted reversal. 100

Although not responsible for any penalty reversals in the instant set of cases, issues relating to the court's response to juror questions may be fertile ground for defense counsel. On the whole, the court devoted substantial text to framing, analyzing and passing upon these issues. Whenever the trial court responds to a juror inquiry, concerns of defective instructions, coercion from the court, and improper argument by counsel should be examined closely. 101

III. JURY ISSUES

A. Jury Selection

The most consistently raised contentions by the capital defendants in this survey dealt with Witherspoon/Witt 102 challenges and repre-

97. McDowell, 46 Cal. 3d at 577-79, 758 P.2d at 1077, 250 Cal. Rptr. at 546. Although siding with the People because the jury had been satisfactorily advised, the majority conceded that the trial judge could have been more explicit. Id.
98. Id. (Broussard, J., concurring and dissenting).
99. Id. at 581, 758 P.2d at 1079, 250 Cal. Rptr. at 548 (Broussard, J., concurring and dissenting).
100. Id. at 579, 758 P.2d at 1077, 250 Cal. Rptr. at 546 (Broussard, J., concurring and dissenting).
102. In Witherspoon v. Illinois, 391 U.S. 510 (1968), the Supreme Court held that a prospective juror must announce an affirmative disposition opposing the death penalty, irrespective of any conceivable factual circumstances, before that venireman may be excused for cause. Several years later, the Court modified this mandate by allowing counsel to excuse for cause those prospective jurors whose personal views would "prevent or substantially impair the performance of [their] duties as a juror in accordance
sentative cross-section claims. In the aggregate, nineteen of the twenty-six cases dealt either with one of these claims or with both.103 No reversals were grounded on these challenges, nor did any dissenting opinions discuss these concerns. The sheer number of claims made, considered in conjunction with the complete lack of effectiveness or judicial interest, makes one wonder why defense attorneys continue to assert an error clearly disfavored by the court.104

B. Juror Misconduct

Defendants asserted instances of juror transgression in three of the cases discussed in this survey.105 In People v. Williams,106 the defendant claimed reversible error because the defendant had taken tranquilizers and conversed with her mother about “the religious aspects of the penalty phase” during trial.107 However, citing the vast discretion vested in the trial judge in deciding a motion for new trial,108 the court rejected the defendant’s claim.109


103. Adcox, 47 Cal. 3d at 250-51, 763 P.2d at 929, 253 Cal. Rptr. at 77-78; Bean, 46 Cal. 3d at 956, 760 P.2d at 1019-20, 251 Cal. Rptr. at 491; Boyde, 46 Cal. 3d at 244-47, 758 P.2d at 42-44, 250 Cal. Rptr. at 100-02; Brown, 46 Cal. 3d at 442, 758 P.2d at 1141, 250 Cal. Rptr. at 610-11; Caro, 46 Cal. 3d at 1061, 761 P.2d at 696, 251 Cal. Rptr. at 773; Coleman, 46 Cal. 3d at 763-71, 759 P.2d at 1268-74, 251 Cal. Rptr. at 91-97; Hamilton, 46 Cal. 3d at 136, 756 P.2d at 1354, 249 Cal. Rptr. at 326; Hernandez, 47 Cal. 3d at 539-40, 763 P.2d at 1302-03, 253 Cal. Rptr. at 211-12; Jennings, 46 Cal. 3d at 974-75, 760 P.2d at 480-81, 251 Cal. Rptr. at 284; Johnson, 47 Cal. 3d at 595, 764 P.2d at 1097, 253 Cal. Rptr. at 720; Karis, 46 Cal. 3d at 631-34, 759 P.2d at 1199-2000, 250 Cal. Rptr. at 668-70; Keenan, 46 Cal. 3d at 503, 758 P.2d at 1096, 250 Cal. Rptr. at 565-66; Malone, 47 Cal. 3d at 16, 762 P.2d at 1265, 252 Cal. Rptr. at 532; McDowell, 46 Cal. 3d at 561-62, 758 P.2d at 1065-66, 250 Cal. Rptr. at 553; McLain, 46 Cal. 3d at 106, 757 P.2d at 573, 249 Cal. Rptr. at 634; Moore, 47 Cal. 3d at 86, 762 P.2d at 1231-32, 252 Cal. Rptr. at 507-08; Morris, 46 Cal. 3d at 41, 756 P.2d at 869, 249 Cal. Rptr. at 145; Walker, 47 Cal. 3d at 624-26, 765 P.2d at 79-81, 253 Cal. Rptr. at 872-74; Williams, 45 Cal. 3d at 1309, 756 P.2d at 221, 248 Cal. Rptr. at 857-58.


105. Karis, 46 Cal. 3d at 642-45, 758 P.2d at 1206-08, 250 Cal. Rptr. at 676-78; Keenan, 46 Cal. 3d at 535-42, 758 P.2d at 1118-22, 250 Cal. Rptr. at 587-92; Williams, 45 Cal. 3d at 1318-19, 756 P.2d at 249-50, 248 Cal. Rptr. at 863-64.

106. 45 Cal. 3d 1268, 756 P.2d 221, 248 Cal. Rptr. 834 (1988).

107. Id. at 1318, 756 P.2d at 250, 248 Cal. Rptr. at 863.

108. "The determination of a motion for a new trial rests so completely within the court’s discretion that its actions will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." Id. at 1318, 756 P.2d at 250, 248 Cal. Rptr. at 863-64 (quoting Jimenez v. Sears, Roebuck & Co., 4 Cal. 3d 379, 387, 482 P.2d 681, 687, 93 Cal. Rptr. 769, 775 (1971)).
In *People v. Karis*, the court upheld another denial of a motion for new trial based upon juror misconduct. In this case, one juror provided the entire panel with a dictionary definition of "mitigating," while another juror told the others that the local branch of the public library carried no books authored by Dr. Loftus, an expert witness for the defense. Initially, the court recognized that "[r]esort to outside sources for amplification of instructions is not permitted. Jurors are not allowed to obtain information from outside sources either as to factual matters or for guidance on the law." Neverthe-
less, the defendant provided the court with no evidence of prejudicial harm associated with the jury's use of the dictionary. Accordingly, the court found no error even though it realized that "the dictionary definition of 'mitigating' may not have been particularly helpful to the jury in understanding the use of the term in [a legal] context . . . ."

Finally, in *People v. Keenan*, the court discussed at length two specific instances of alleged misconduct by one particular juror. First, the court considered a note passed from Juror W. to the victim's sister. When questioned by the trial judge about this incident, Juror W. recounted that a stranger had asked him to deliver the note to the victim's sister, a woman recognizable because of her long black hair. Juror W. identified this woman as the lady "on our side." The court thereupon reinforced the juror's understanding that "a juror . . . [is] an objective and impartial observer . . . not to pick sides in the case." The trial court denied the defense counsel's motion for mistrial grounded on Juror W.'s breach of the no communication rule and called into question Juror W.'s ability to remain impartial. The trial judge assumed, and Juror W. later con-

110. Id. at 642, 758 P.2d at 1206, 250 Cal. Rptr. at 676.
111. Id. (footnote omitted).
114. See supra notes 87-101 and accompanying text.
115. Juror W. carried the note in his pocket for days, never bothering to read it before he passed it to the intended recipient. Keenan, 46 Cal. 3d at 535-36, 758 P.2d at 1118-19, 250 Cal. Rptr. at 588.
116. Id.
117. Id. at 536, 758 P.2d at 1119, 250 Cal. Rptr. at 588.
118. Id. at 538, 758 P.2d at 1120, 250 Cal. Rptr. at 589.
firmed, that the "on our side" comment referred only to the physical layout of the courtroom. Therefore, "the brief communication had no relation to the issues in the case and did not impair [Juror W.'s] duty to serve impartially."119

Second, the defendant argued that the same juror coerced the final vote needed to impose the death penalty by berating another juror and threatening to kill her.120 The court found no reversible error even though "[t]he outburst described . . . was particularly harsh and inappropriate, but as the trial court suggested, no reasonable juror could have taken it literally. Manifestly, the alleged 'death threat' was but an expression of frustration, temper and strong conviction against the contrary views of another panelist."

IV. EVIDENTIARY ISSUES

A. Sufficiency of the Evidence

Eight separate cases raised issues challenging the sufficiency of the evidence in a variety of different postures.122 Although only one penalty was reversed,123 the court devoted a significant amount of the text to these discussions, and noted that in order to ascertain the sufficiency of the evidence adduced in the lower court, a reviewing court is not required to find a defendant guilty beyond a reasonable doubt, but only that "a rational trier of fact could find the defendant guilty beyond a reasonable doubt."124 The process for making this determination allows the reviewing court a presumption favoring the judgment while examining the entire record.125

119. Id. (footnote omitted).
120. Id. at 538-42. 758 P.2d at 1120-22, 250 Cal. Rptr. at 590-92. The defendant's motion for new trial pursuant to section 657(2) of the Code of Civil Procedure was denied.
122. Adcox, 47 Cal. 3d at 239-40, 763 P.2d at 922-23, 253 Cal. Rptr. at 71-72; Bean, 46 Cal. 3d at 932-34, 760 P.2d at 1003-05, 251 Cal. Rptr. at 474-76; Caro, 46 Cal. 3d at 1049-51, 761 P.2d at 688-89, 251 Cal. Rptr. at 765-66; Coleman, 46 Cal. 3d at 788-95, 759 P.2d at 1286-91, 251 Cal. Rptr. at 109-14 (Mosk, J., concurred and dissenting) (Broussard, J., dissenting); Crandell, 46 Cal. 3d at 867-69, 760 P.2d at 440-42, 251 Cal. Rptr. at 244-48; Hernandez, 47 Cal. 3d at 345-51, 763 P.2d at 1305-10, 253 Cal. Rptr. at 214-20; Jennings, 46 Cal. 3d at 982-87, 760 P.2d at 486-90, 251 Cal. Rptr. at 289-93; Morris, 46 Cal. 3d at 22-23, 756 P.2d at 856-57, 249 Cal. Rptr. at 132-33.
123. Morris, 46 Cal. 3d at 41, 756 P.2d at 869, 249 Cal. Rptr. at 145.
124. Hernandez, 47 Cal. 3d at 345-46, 763 P.2d at 1306, 253 Cal. Rptr. at 216; see also People v. Johnson, 26 Cal. 3d 557, 576, 606 P.2d 738, 750, 162 Cal. Rptr. 431, 443 (1980).
In *People v. Morris*\(^1\)\(^2\)\(^6\) the defendant was sentenced to death under a robbery-murder special circumstance. He was charged with shooting and killing a homosexual victim in a public bathhouse.\(^2\)\(^7\) The only evidence linking the defendant to the robbery of the victim was testimony that the defendant or someone "look[ing] like" the defendant used a Sears card which had been loaned to the victim prior to his death.\(^1\)\(^2\)\(^8\)

To find a robbery-murder special circumstance, the jury must find "1) substantial evidence of the robbery, and 2) substantial evidence that the murder was committed during the commission or attempted commission of the robbery."\(^1\)\(^2\)\(^9\) After reviewing the People’s speculative evidence, the court could not find that the state had proven "beyond a reasonable doubt" that a robbery had been committed or that the murder had occurred during such a robbery.\(^1\)\(^3\)\(^0\) Because the evidence did not support the special circumstance finding, the penalty for the murder could not be death; therefore, the supreme court reversed the death penalty.\(^1\)\(^3\)\(^1\)

In *People v. Coleman*\(^1\)\(^3\)\(^2\) Justices Mosk and Broussard wrote separate dissenting opinions arguing in favor of reversing the death penalty because the evidence against the defendant was "demonstrably [too] thin"\(^1\)\(^3\)\(^3\) and "so weak that this error [of admitting other harmful evidence] must be held prejudicial."\(^1\)\(^3\)\(^4\) However, Justice Mosk’s minority opinion failed to discuss the process of determining sufficiency of the evidence. Rather, he cited to his “interest of justice and . . . good conscience” to support his position.\(^1\)\(^3\)\(^5\) Justice Broussard offered a lengthy review of the facts and the inferences he deduced

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\(^1\)\(^2\)\(^6\) 46 Cal. 3d 1, 756 P.2d 843, 249 Cal. Rptr. 119.
\(^1\)\(^2\)\(^7\) Id. at 9-12, 756 P.2d at 847-49, 249 Cal. Rptr. at 123-25.
\(^1\)\(^2\)\(^8\) Id. at 19-20, 756 P.2d at 854, 249 Cal. Rptr. at 130-31. Aside from the possible credit card, no evidence existed indicating that the victim had any items on his person at the time of the murder. He was found clothed in only his shoes and socks. Id. at 20, 756 P.2d at 854, 249 Cal. Rptr. at 130.
\(^1\)\(^2\)\(^9\) Id. at 19, 756 P.2d at 854, 249 Cal. Rptr. at 130 (emphasis added).
\(^1\)\(^3\)\(^0\) Id. at 21-22, 756 P.2d at 855-56, 249 Cal. Rptr. at 131-32.
\(^1\)\(^3\)\(^1\) Id. at 22, 756 P.2d at 856, 249 Cal. Rptr. at 132. The court also noted that any further proceedings on the robbery allegation would subject the defendant to double jeopardy. Id.; see also 20 CAL. JUR. 3D Criminal Law §§ 2313, 2337 (rev. 1985 & Supp. 1988) (noting that a finding of insufficient evidence on appeal prohibits a retrial on the same issue).
\(^1\)\(^3\)\(^2\) 46 Cal. 3d 749, 759 P.2d 1260, 251 Cal. Rptr. 83 (1988).
\(^1\)\(^3\)\(^3\) Id. at 788, 759 P.2d at 1286, 251 Cal. Rptr. at 109 (Mosk, J., concurring and dissenting).
\(^1\)\(^3\)\(^4\) Id. at 789, 759 P.2d at 1287, 251 Cal. Rptr. at 110 (Broussard, J., dissenting).
\(^1\)\(^3\)\(^5\) Id. at 789, 759 P.2d at 1286, 251 Cal. Rptr. at 109 (Mosk, J., dissenting).
therefrom. Finally, he concluded by reviewing the entire record: "[T]his has to be one of the weakest cases to identify [the] defendant as the perpetrator of the crime that I have seen."\textsuperscript{136}

B. Cumulative Error

Claims of cumulative error were seen in four of the survey’s cases.\textsuperscript{137} In \textit{People v. Brown},\textsuperscript{138} Chief Justice Lucas announced his adherence to the reasonable possibility test for detecting error in the capital verdict of a penalty phase jury.\textsuperscript{139} "In deciding whether it is 'reasonably possible' that a given error or combination of errors affected a verdict, we will 'exclude the possibility of arbitrariness, whimsy, caprice . . . and the like. A defendant has no entitlement to the luck of a lawless decisionmaker.'"\textsuperscript{140} Therefore, before any singular or aggregate error may cause a death penalty reversal, the California Supreme Court must harbor the belief that a realistic possibility exists that the trier of fact in the lower court would have arrived at a different verdict, absent the errors.\textsuperscript{141}

With this standard in mind, Chief Justice Lucas summarily disposed of the defendant's allegation of prejudicial cumulative error.\textsuperscript{142} However, Justice Broussard dissented from the affirmance of the penalty after applying the reasonable possibility test to the cumulative errors.\textsuperscript{143}

C. Hypnosis

The testimony of previously hypnotized witnesses was placed in is-
sue in two of the reviewed cases.\textsuperscript{144} In the 1982 case of \textit{People v. Shirley},\textsuperscript{145} the California Supreme Court declared inadmissible any testimony directly bearing on the issues of the case from a witness, other than the defendant, who has undergone hypnosis to achieve memory enhancement.\textsuperscript{146}

In \textit{People v. Caro},\textsuperscript{147} one of the defendant’s victims submitted to hypnosis to try to enhance his memory of certain events.\textsuperscript{148} Although the hypnosis was unsuccessful, the defendant sought suppression of the victim’s testimony under the rule of \textit{Shirley}. However, the court denied the motion because it appeared that the victim was never really hypnotized, thereby eliminating any possible taint.\textsuperscript{149}

In \textit{People v. Johnson},\textsuperscript{150} the defendant’s rape victim, who was successfully hypnotized, offered convincing, valuable testimony in violation of the \textit{Shirley} rule.\textsuperscript{151} While the victim’s testimony greatly incriminated the defendant and “provided the strongest evidence linking defendant with the rape,”\textsuperscript{152} sufficient “evidentiary cross linking between the murder and the rape scenes . . . [tied the defendant to the crimes] even without the victim’s testimony . . . .”\textsuperscript{153} The court found no harm associated with the violation of the \textit{Shirley} rule.\textsuperscript{154}

\textbf{D. Probative vs. Prejudicial}

An intriguing demonstrative evidence issue arose in \textit{People v. Brown},\textsuperscript{155} wherein the prosecution dressed a mannequin in the slain

\textsuperscript{144} Caro, 46 Cal. 3d at 1047-49, 761 P.2d at 687-88, 251 Cal. Rptr. at 764-65; Johnson, 47 Cal. 3d at 599-02, 764 P.2d at 1099-1101, 253 Cal. Rptr. at 722-24.
\textsuperscript{145} 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982).
\textsuperscript{147} 46 Cal. 3d 1035, 761 P.2d 680, 251 Cal. Rptr. 757 (1988).
\textsuperscript{148} Id. at 1047-49, 761 P.2d at 687-88, 251 Cal. Rptr. at 764-65.
\textsuperscript{149} Id. at 1048-49, 761 P.2d at 687-88, 251 Cal. Rptr. at 764-65.
\textsuperscript{150} 47 Cal. 3d 576, 764 P.2d 1087, 253 Cal. Rptr. 710 (1988).
\textsuperscript{151} Johnson, 47 Cal. 3d at 601, 764 P.2d at 1100, 253 Cal. Rptr. at 723.
\textsuperscript{152} Id. at 600, 764 P.2d at 1100, 253 Cal. Rptr. at 723.
\textsuperscript{153} Id. at 601, 764 P.2d at 1101, 253 Cal. Rptr. at 724.
\textsuperscript{154} Id. Lucas relied on the reasonable probability test of \textit{Watson}. See \textit{supra} note 138 and accompanying text.
\textsuperscript{155} 46 Cal. 3d 432, 758 P.2d 1135, 250 Cal. Rptr. 604 (1988).
officer’s uniform to graphically depict the exact location of the fatal bullet wound fired by the defendant. After reviewing the record, Justice Lucas determined that the trial court gave thoughtful consideration to defendant’s claim that the mannequin was unreasonably prejudicial. The Chief Justice further stated that the “use of the mannequin was ‘a perfectly proper method of introducing highly relevant evidence.’”

V. PROSECUTORIAL MISCONDUCT

Defendants alleged prosecutorial misconduct in twenty-one of the twenty-six death penalty cases in this survey. Although the court actually found misconduct in nine of those cases, it reversed the


158. Adcox, 47 Cal. 3d at 235-38, 257-61, 763 P.2d at 919-21, 933-36, 253 Cal. Rptr. at 68-70, 82-86; Beam, 46 Cal. 3d at 951-53, 760 P.2d at 1016-18, 251 Cal. Rptr. at 487-89; Bonin, 46 Cal. 3d at 680-90, 700-02, 758 P.2d at 1228-34, 1239-41, 250 Cal. Rptr. at 668-704, 710-11; Boyle, 46 Cal. 3d at 255, 758 P.2d at 50, 250 Cal. Rptr. at 106; Brown, 45 Cal. 3d at 1260-63, 756 P.2d at 212-14, 246 Cal. Rptr. at 825-27; Brown, 46 Cal. 3d at 454-57, 758 P.2d at 1150-51, 250 Cal. Rptr. at 619-621; Bynum, 45 Cal. 3d at 1220-24, 756 P.2d at 815-18, 249 Cal. Rptr. at 91-94; Caro, 46 Cal. 3d at 1063-64, 761 P.2d at 697-98, 251 Cal. Rptr. at 774-75; Coleman, 46 Cal. 3d at 788, 759 P.2d at 1286, 251 Cal. Rptr. at 108; Crandell, 46 Cal. 3d at 877-79, 883-85, 760 P.2d at 447-48, 452-53, 251 Cal. Rptr. at 251-52, 255-56; Hamilton, 46 Cal. 3d at 141-42, 150-51, 756 P.2d at 1357-58, 1363-64, 249 Cal. Rptr. at 329, 335-36; Hernandez, 47 Cal. 3d at 359-64, 763 P.2d at 1315-19, 253 Cal. Rptr. at 225-28; Karis, 46 Cal. 3d at 648, 758 P.2d at 1210-11, 250 Cal. Rptr. at 680-81; Keenan, 46 Cal. 3d at 504-510, 758 P.2d at 1097-1101, 250 Cal. Rptr. at 566-571; Malone, 47 Cal. 3d at 29-32, 36-39, 762 P.2d at 1265-66, 1269-71, 252 Cal. Rptr. at 541-42, 545-47; McDowell, 46 Cal. 3d at 507-74, 758 P.2d at 1071-74, 250 Cal. Rptr. at 540-43; McLain, 46 Cal. 3d at 111-13, 757 P.2d at 576-78, 249 Cal. Rptr. at 637-39; Moore, 47 Cal. 3d at 91-93, 762 P.2d at 1235-36, 252 Cal. Rptr. at 511-12; Morris, 46 Cal. 3d at 35-36, 756 P.2d at 865-66, 249 Cal. Rptr. at 141-42; Walker, 47 Cal. 3d at 629-27, 629-30, 643-45, 765 P.2d at 81, 83-84, 92-93, 253 Cal. Rptr. at 874, 876-77, 885-86; Williams, 45 Cal. 3d at 1325-27, 1330-31, 756 P.2d at 255-56, 258-59, 248 Cal. Rptr. at 868-69, 872.

159. Bonin, 46 Cal. 3d at 690, 758 P.2d at 1233-34, 250 Cal. Rptr. at 703-04 (eliciting inadmissible testimony); Boyle, 46 Cal. 3d at 255, 758 P.2d at 50, 250 Cal. Rptr. at 108 (Davenport error); Brown, 45 Cal. 3d at 1261, 1263, 756 P.2d at 213-14, 248 Cal. Rptr. at 826-27 (Davenport error and improper comment regarding scope of defendant’s cross examination); Crandell, 46 Cal. 3d at 883-85, 760 P.2d at 452-53, 251 Cal. Rptr. at 255-56
penalty in only one, finding the other errors harmless.

In reversing the sentence in People v. Crandell, the court focused more on the unique circumstances of the case than on the prosecutor's misconduct. In Crandell, the defendant, who appeared pro se, refused to present any evidence in his defense at the penalty phase as he felt it would be an admission of guilt. Because the defendant did not correct or mitigate the prosecutor's improper exploitation of the ambiguities in the trial court's sentencing instructions, the court found that the jury was misled as to the scope of its sentencing responsibilities. However, the court indicated that had the penalty phase been less one-sided, the prosecutor's misconduct would have been harmless.

In his dissenting opinion, Chief Justice Lucas noted that the court has upheld death penalty judgments in cases involving prosecutorial activity "far more questionable" than that presented in Crandell.

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160. Id. at 883-85, 760 P.2d at 452-53, 251 Cal. Rptr. at 255-56.
161. Id. at 883-85, 760 P.2d at 452-53, 251 Cal. Rptr. at 255-56. The harmless error doctrine essentially broadens "the boundaries of prosecutorial misconduct by permitting the appellate courts to justify the offensive conduct of prosecutors in those cases where the crime or criminal is so abhorrent that basic human nature militates against the reversal of a conviction." F. LAWLESS, PROSECUTORIAL MISCONDUCT § 13.22 (1985). In deciding whether an error is reversible, the court should examine the strength of the evidence against the defendant, whether the error extends to the whole trial, and whether the prosecutor's conduct was intentional. Id.; see also 21 CAL. JUR. 3D Criminal Law § 2950 (1985 & Supp. 1988);
163. Id. at 881-82, 760 P.2d at 450, 251 Cal. Rptr. at 254.
164. Id. at 885, 760 P.2d at 452-53, 251 Cal. Rptr. at 255-56. The prosecutor erred by incorrectly depicting the balancing of the aggravating factors and the mitigating circumstances in the sentencing process and by intimating that no mitigating circumstances existed. Id. at 884-85, 760 P.2d at 452, 251 Cal. Rptr. at 255-56.
165. Id. at 885, 760 P.2d at 453, 251 Cal. Rptr. at 256; see supra note 49 and accompanying text.
166. Id. at 886, 760 P.2d at 453-54, 251 Cal. Rptr. at 257 (Lucas, C.J., concurring and dissenting).
For example, in *People v. Bonin*, the court upheld the death penalty even though the prosecutor elicited inadmissible trial testimony concerning fourteen additional murders allegedly committed by the defendant. The court found that even if the prosecutor's conduct was intentional, it was not reversible error since no "reasonable probability [existed] that in the absence of the 'misconduct' an outcome more favorable to defendant would have resulted." Unquestionably, the majority's skepticism concerning the strength of the state's death penalty case in *Crandell* played a significant role in its reversal.

Following allegations of prejudicial argument, the most common type of alleged prosecutorial misconduct was the so-called *Davenport* error, which occurs when a prosecutor improperly advises the jury during the penalty phase to consider as aggravating factors the absence of certain mitigating circumstances. Although this argument was rejected in every instance, Justice Broussard, concurring in *People v. Moore*, noted that the court's strict adherence to the curative requirements of *People v. Green* is inappropriate when applied to cases tried before the *Davenport* decision. Justice Broussard noted that expecting trial counsel to "foresee" future opinions simply "is asking too much." Nevertheless, he agreed that the *Davenport* error in *Moore* was non-prejudicial as it was not reasonably possible that the jury would have reached a different outcome in its absence.

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168. *Id.* at 690, 758 P.2d at 1233-34, 250 Cal. Rptr. at 704.
169. *Crandell*, 46 Cal. 3d at 886, 760 P.2d at 453, 251 Cal. Rptr. at 257. Although the defendant was convicted of brutally murdering two persons with whom he lived, the court enumerated a number of mitigating factors weighing against the imposition of the death penalty. These included the fact that the defendant had not been involved in any previous crimes, that he may have been intoxicated at the time of the murders, and that he had been gainfully employed and supportive of the household prior to the incident. *Id.* The court also recognized that the defendant had taken precautions after the murders to ensure that the seven-year-old daughter of one of the victims did not view the bodies. *Id.*
171. *Id.* at 63, 762 P.2d 1218, 252 Cal. Rptr. 494 (1988).
172. 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980). In *Green*, the court held that in order to maintain allegations of prosecutorial misconduct on appeal, trial counsel must place a timely objection on the record, unless such an objection would not have corrected the harm. *Id.* at 27-28, 609 P.2d at 483, 164 Cal. Rptr. at 16; see also *Death Penalty Survey, supra* note 3, at 469-70.
174. *Id.* at 95, 762 P.2d at 1238, 252 Cal. Rptr. at 514 (Broussard, J., concurring).
175. *Id.* (Broussard, J., concurring). Justice Broussard found that the prosecutor sufficiently mitigated the *Davenport* error by his "fair presentation of the law" during the penalty phase and his explanation to the jury that it was their responsibility to
Defendants also raised issues of prosecutorial conflict of interest,\footnote{176} intimidation of defense witnesses,\footnote{177} and improper comments to individual jurors,\footnote{178} all of which were rejected by the court, either on their merits or through failure to preserve the issue on appeal. These cases, as well as those decided between April and June, 1988,\footnote{179} indicate the court's respect for its own procedural rules, as well as its unwillingness to disturb death penalty judgments in the absence of egregious prosecutorial misconduct or questionable evidence supporting the penalty. With the exception of Crandell, none of the cases in this survey presented an example of reversible prosecutorial misconduct.\footnote{180}

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Seventeen cases in this survey sought reversal based upon errors involving defense counsel.\footnote{181} The defendants alleged that certain errors committed either by the court or their counsel deprived them of classify the evidence as either aggravating or mitigating, or neutral. \textit{Id.} (Broussard, J., concurring).

\footnote{176} \textit{Hamilton}, 46 Cal. 3d at 138, 756 P.2d at 1355, 249 Cal. Rptr. at 327. The defendant alleged that the entire Fresno District Attorney's office should have been removed from his case because one of the assistant district attorneys previously had represented an associate of the defendant. The court rejected the argument, noting that the assistant district attorney had been screened from the case and that no evidence of improper bias existed. \textit{Id.} at 138-141, 756 P.2d at 1355-57, 249 Cal. Rptr. at 327-29.

\footnote{177} \textit{Id.} at 141-42, 756 P.2d at 1357-58, 249 Cal. Rptr. at 329. The court did not reach the merits of this argument as it was not properly raised at trial. The court reasoned that if the defendant had raised the issue at trial, the prosecution could have submitted evidence showing that it had not intimidated the witness. \textit{Id.}

\footnote{178} \textit{Williams}, 45 Cal. 3d at 1330-31, 756 P.2d at 258-59, 248 Cal. Rptr. at 872. Although the defendant alleged that the prosecutor improperly gave inadmissible evidence to two jurors after the penalty phase, no evidence existed supporting the charge. \textit{Id.}

\footnote{179} \textit{See Death Penalty Survey, supra note 3, at 468-70.}

\footnote{180} For a good discussion of how to avoid reversible misconduct, see \textit{Special Project, supra note 161, at 814-820.}

\footnote{181} \textit{Adcox}, 47 Cal. 3d at 244-46, 763 P.2d at 925-26, 936-38, 253 Cal. Rptr. at 74-75, 85-87; \textit{Bean}, 46 Cal. 3d at 944-49, 760 P.2d at 1011-15, 251 Cal. Rptr. at 482-86; \textit{Bonin}, 46 Cal. 3d at 691-95, 758 P.2d at 1234-37, 250 Cal. Rptr. at 704-07; \textit{Boyd}, 46 Cal. 3d at 255-56, 758 P.2d at 50, 250 Cal. Rptr. at 108; \textit{Brown}, 46 Cal. 3d at 461, 758 P.2d at 1154, 250 Cal. Rptr. at 624; \textit{Bunyard}, 45 Cal. 3d at 1214-17, 756 P.2d at 811-13, 249 Cal. Rptr. at 84-85; \textit{Caro}, 46 Cal. 3d at 1047, 761 P.2d at 687, 251 Cal. Rptr. at 764; \textit{Coleman}, 46 Cal. 3d at 772-73, 759 P.2d at 1274-76, 251 Cal. Rptr. at 98-99; \textit{Crandell}, 46 Cal. 3d at 851-67, 760 P.2d at 429-40, 251 Cal. Rptr. at 233-44; \textit{Easley}, 46 Cal. 3d at 720-33, 759 P.2d at 494-503, 250 Cal. Rptr. at 859-68; \textit{Griffin}, 46 Cal. 3d at 1029, 761 P.2d at 113, 251 Cal. Rptr. at 653; \textit{Hernandez}, 47 Cal. 3d at 369-71, 763 P.2d at 1322-24, 253 Cal. Rptr. at 232-33; \textit{Johnson}, 47 Cal. 3d at 595-96, 764 P.2d at 1097, 253 Cal. Rptr. at 729; \textit{Karis}, 46 Cal. 3d at 653-57, 758 P.2d at 1241-17, 250 Cal. Rptr. at 684-87; \textit{Malone}, 47 Cal. 3d at 19-20, 33-34, 762 P.2d at 1237-58, 1267-68, 252 Cal. Rptr. at 533-34, 543-44; \textit{Moore}, 47 Cal. 3d at 74-78,}
their constitutional right to effective assistance of counsel.\textsuperscript{182} Although the court reversed only one such case,\textsuperscript{183} several of the issues raised are worthy of comment.

\textbf{A. Conflict of Interest}

The only successful claim of ineffective assistance of counsel occurred in \textit{People v. Easley}.\textsuperscript{184} In \textit{Easley}, the defendant claimed he was denied effective assistance of counsel because the attorney who represented him at the penalty retrial was simultaneously representing one of the prosecution's witnesses in another case.\textsuperscript{185} In fact, the attorney was in the tenuous position of arguing at the defendant's penalty retrial that the defendant did not commit an alleged arson, while at the same time trying to prove in a civil lawsuit that the defendant did indeed commit the arson.\textsuperscript{186} Although the issue of a possible conflict was raised several times before the retrial, the defendant repeatedly renewed his wish to have the attorney represent him.\textsuperscript{187}

The court noted that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."\textsuperscript{188} The court in \textit{Easley} had little trouble recognizing such adverse performance, because the attorney failed to use evidence concerning the pending civil lawsuit to impeach the prose-

\textsuperscript{762} P.2d at 1223-26, 252 Cal. Rptr. at 499-502; Williams, 45 Cal. 3d at 1305-06, 756 P.2d at 242, 248 Cal. Rptr. at 855.

\textsuperscript{182} The sixth amendment of the U.S. Constitution guarantees an accused the right to assistance of counsel during trial. U.S. CONST. amend. VI; see \textit{Gideon v. Wainwright}, 372 U.S. 335 (1963) (the right to assistance of counsel is mandatory upon the states). See also J. \textit{Cook, Constitutional Rights of the Accused—Trial Rights} §§ 20, 22 (1974 & Supp. 1984) [hereinafter J. \textit{Cook}]. Even if the accused retains counsel, "the assistance he receives may be so lacking in competence that a denial of the sixth amendment protection will result." \textit{Id.} at § 45 (citing \textit{Hauk v. Olson}, 326 U.S. 271 (1945)). To determine whether an attorney's performance is ineffective, the U.S. Supreme Court has directed that courts consider whether the lawyer's performance descended below reasonably acceptable professional standards, and, if so, whether the attorney's inadequate performance prejudiced the defendant. \textit{Strickland v. Washington}, 466 U.S. 668, 688-88 (1984); \textit{see J. CARR, 1988 Criminal Procedure Handbook} § 3.02[5] (1988) [hereinafter J. \textit{CARR}]. \textit{See generally Comment, A Coherent Approach to Ineffective Assistance of Counsel Claims, 71 Calif. L. Rev. 1516 (1983)}.

\textsuperscript{183} \textit{Easley}, 46 Cal. 3d at 733, 759 P.2d at 503, 250 Cal. Rptr. at 868.

\textsuperscript{184} 46 Cal. 3d 712, 759 P.2d 490, 250 Cal. Rptr. 855 (1988).

\textsuperscript{185} \textit{Id.} at 720, 759 P.2d at 494, 250 Cal. Rptr. at 859. Furthermore, the attorney previously had represented the defendant's sister in another matter. \textit{Id.} at 724, 759 P.2d at 496, 250 Cal. Rptr. at 861-62; see \textit{also 7 Cal. Jur. 3d Attorneys at Law} §§ 207-208, 211 (1973 & Supp. 1988).

\textsuperscript{186} \textit{Easley}, 46 Cal. 3d at 724-25, 759 P.2d at 497, 250 Cal. Rptr. at 862.

\textsuperscript{187} \textit{Id.} at 721-24, 759 P.2d at 494-96, 250 Cal. Rptr. at 859-82.

\textsuperscript{188} \textit{Id.} at 724, 759 P.2d at 497, 250 Cal. Rptr. at 862 (quoting \textit{Cuyler v. Sullivan}, 446 U.S. 335, 348 (1980)); \textit{see also J. CARR, supra note 182, at § 3.02[4]; J. COOK, supra note 182, at § 46; Special Project, supra note 161, at 766-770.

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cution witness or to try to minimize the defendant's participation in the arson.\textsuperscript{189} Furthermore, the court held that because the trial judge never fully explained the consequences of the conflict to the defendant, he could not have made a knowing waiver of the conflict.\textsuperscript{190} Accordingly, the supreme court reversed the defendant's death sentence.\textsuperscript{191}

B. Failure to Permit Both Defense Counsel to Argue at Penalty Phase

In \textit{Bonin}, the defendant alleged that the trial court's failure to permit both of his defense counsel to argue at the penalty trial deprived him of his constitutional right to the assistance of counsel.\textsuperscript{192} The supreme court ruled that the trial court abused its discretion under California law by denying the two arguments, but that no constitutional violation requiring reversal occurred.\textsuperscript{193} The court noted that both the federal and state constitutions merely guarantee "the right to have defense counsel present closing argument, not each member of the defense team."\textsuperscript{194}

After examining the transcript of the penalty trial, the court found that the lack of two arguments did not greatly restrict the defendant's participation during the penalty phase, and therefore did not violate the defendant's constitutional right to assistance of counsel.\textsuperscript{195} Further, because the evidence did not suggest that two arguments would have changed the jury's verdict, the court found that the trial court's failure to allow two defense arguments constituted harmless

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{189} \textit{Easley}, 46 Cal. 3d at 727-29, 759 P.2d at 499-500, 250 Cal. Rptr. at 864-65.
\item \textsuperscript{190} \textit{Id.} at 732, 759 P.2d at 502, 250 Cal. Rptr. at 867.
\item \textsuperscript{191} \textit{Id.} at 735, 759 P.2d at 504, 250 Cal. Rptr. at 869. The defendants in \textit{Adcox}, 47 Cal. 3d at 262, 763 P.2d at 938, 253 Cal. Rptr. at 87, and \textit{Williams}, 45 Cal. 3d at 1305, 756 P.2d at 242, 248 Cal. Rptr. at 855, made similar claims of conflict of interest, but both claims were rejected as lacking merit.
\item \textsuperscript{192} \textit{Bonin}, 46 Cal. 3d at 691, 758 P.2d at 1234, 250 Cal. Rptr. at 704. The defendant relied on the language of section 1095 of the California Penal Code: "If the offense charged is punishable with death, two counsel on each side may argue the cause. In any other case the court may, in its discretion, restrict the argument to one counsel on each side." \textsc{cal. penal code} § 1095 (West 1985); see \textit{Bonin}, 46 Cal. 3d at 693, 758 P.2d at 1235, 250 Cal. Rptr. at 705. See also 21 \textsc{cal. jur. 3d} criminal law § 2945 (1985).
\item \textsuperscript{193} \textit{Bonin}, 46 Cal. 3d at 694-95, 758 P.2d at 1236-37, 250 Cal. Rptr. at 706-07.
\item \textsuperscript{194} \textit{Id.} at 694-95, 758 P.2d at 1236, 250 Cal. Rptr. at 706 (emphasis in original).
\item \textsuperscript{195} \textit{Id.} The court emphasized that the defense counsel who presented the penalty argument gave a "full and unrestricted argument." \textit{Id.} Furthermore, the defendant's counsel even conceded at the penalty trial that the additional argument was dispensable. \textit{Id.}
\end{itemize}
\end{footnotesize}
C. Right to Advisory Counsel

In Crandell, the defendant alleged that the court's refusal to grant his repeated requests for advisory counsel to assist him in the presentation of his defense denied him effective assistance of counsel.\textsuperscript{197} Under People v. Bigelow,\textsuperscript{198} a court has discretion to appoint counsel to assist a pro se indigent defendant in the presentation of his case.\textsuperscript{199} If the court's failure to grant such a request for advisory counsel constitutes an abuse of its discretion, the supreme court must automatically reverse the conviction due to the inherent difficulty in determining prejudice.\textsuperscript{200}

Despite the precedent established by Bigelow, the trial judge in Crandell "summarily" dismissed the defendant's repeated requests for advisory counsel.\textsuperscript{201} In fact, the trial judge expressed total ignorance of the Bigelow rule and indicated that even if advisory counsel was permissible, he would not appoint such counsel to assist the defendant.\textsuperscript{202} Notwithstanding the trial court's complete misunderstanding of the law, the supreme court found that the trial court merely failed to exercise its discretion to grant advisory counsel, as opposed to actually abusing its discretion.\textsuperscript{203} Because the supreme court could not find that the result would have been different in the absence of the error, it declared the error harmless.\textsuperscript{204}

\textsuperscript{196} Id. at 695, 758 P.2d at 1237, 250 Cal. Rptr. at 707.
\textsuperscript{197} Crandell, 46 Cal. 3d at 851, 760 P.2d at 429-30, 251 Cal. Rptr. at 233.
\textsuperscript{199} Id. at 742, 691 P.2d at 1000-01, 209 Cal. Rptr. at 334-35.
\textsuperscript{200} Id. at 744-46, 691 P.2d at 1001-02, 209 Cal. Rptr. at 335-36; see also J. COOK, supra note 182, at § 37.
\textsuperscript{201} Id. at 862, 760 P.2d at 437, 251 Cal. Rptr. at 240.
\textsuperscript{202} Id. At one point, the trial judge explained to the defendant that "there is no such thing" as advisory counsel. Id. At another time, the judge, when informed that the public defender would not accept appointment in an advisory capacity, said that he "wouldn't appoint that kind of counsel anyway." Id. The court noted that the trial court never carefully looked at the circumstances to determine if the defendant's case warranted advisory counsel. Id. at 862, 760 P.2d at 437, 251 Cal. Rptr. at 240-41.
\textsuperscript{203} Id. The court concluded that the facts in Bigelow were far more supportive of the appointment of advisory counsel than those presented in Crandell. Id. The court observed that the defendant in Bigelow was much less sophisticated than the defendant in Crandell. Crandell had been born in California and had reached the eleventh grade, while Bigelow had no knowledge of California law and had dropped out of high school while still a freshman. Id. at 863-64, 760 P.2d at 438, 251 Cal. Rptr. at 241. Furthermore, Crandell had been charged with just one special circumstance, while Bigelow had to contend with four. Id. at 864, 760 P.2d at 438, 251 Cal. Rptr. at 241-42. The court then stressed the outstanding performance Crandell had given in his own defense. Id. at 865-66, 760 P.2d at 439-40, 251 Cal. Rptr. at 242-43; see supra note 213.
\textsuperscript{204} Id. at 864, 760 P.2d at 440, 251 Cal. Rptr. at 243. However, in separate opinions, both Justice Arguelles and Justice Broussard disagreed with the majority's holding. Justice Arguelles found that the trial court's failure to appoint counsel to assist the defendant was "prejudicial," particularly since the defendant did not offer any evi-
D. Marsden and Faretta Issues

The defendant in Crandell also raised Marsden and Faretta issues on appeal. He first alleged that he was not given ample opportunity, as required under People v. Marsden, to explain his reasons for rejecting the deputy public defender assigned to his case. In Marsden, the court held that a defendant who wishes to discard appointed counsel for alleged inadequate representation must be given adequate opportunity to explain the circumstances surrounding the allegations.

The defendant next alleged that his rights under Faretta v. California were violated since he never voluntarily waived his right to counsel. In Faretta, the United States Supreme Court ruled that a defendant has a constitutional right to select self-representation in lieu of legal counsel. However, the defendant’s request for self-representation must be timely, and the trial court must satisfy itself that the defendant is mentally competent to waive the right to counsel.

The supreme court rejected both arguments. It found that because the defendant had not specifically requested a change of counsel, he was not entitled to a Marsden hearing at the municipal court stage, and that the superior court actually had afforded him several opportunities on his own behalf at the penalty trial. Not only did Justice Broussard reiterate the fact that the defendant, in essence, “had no penalty trial at all,” he emphasized the seriousness of capital trials and that even a recent law school graduate is unlikely to be competent to handle one.

207. Marsden, 2 Cal. 3d at 124, 465 P.2d at 48, 84 Cal. Rptr. at 160; see also R. George, 1988 CALIFORNIA CRIMINAL TRIAL JUDGE’S BENCHBOOK 48.4-48.5 (1988) [hereinafter R. George] (noting that it is reversible error for a judge to refuse to appoint substitute defense counsel without giving the defendant an opportunity to “relate specific grounds” for the substitution); B. Witkin, CALIFORNIA CRIMINAL PROCEDURE, Trial § 368 (Supp. 1985).
208. 422 U.S. 806 (1975).
209. Crandell, 46 Cal. 3d at 853-55, 858-61, 760 P.2d at 431-32, 434-36, 251 Cal. Rptr. at 234-35, 238-39; see also J. Cook, supra note 182, at § 37; R. George, supra note 207, at 48.2-48.3.
210. Faretta, 422 U.S. at 819-21. For a discussion of Faretta and its progeny, see Special Project, supra note 161, at 772-76.
211. Crandell, 46 Cal. 3d at 854, 760 P.2d at 432, 251 Cal. Rptr. at 235.
tunities to state why he would not accept the assigned public defender. The court also found no *Faretta* violation as the defendant "unquestionably" had the mental capacity to waive his right to counsel.

Two months later the court rejected similar arguments in *People v. Moore*, but for different reasons. In *Moore*, the court dismissed the *Marsden* issue because the trial court conducted a proper *Marsden* hearing before denying the defendant's request to substitute counsel. The supreme court also upheld the denial of the defendant's motion for self-representation, because the defendant made the motion only a few days before his trial was scheduled to begin. The court reasoned that the *Faretta* motion was in fact a delay tactic, rather than a good faith request for self-representation.

**VII. OTHER ALLEGED ERRORS**

**A. Improper Denial of Automatic Motion for Modification of Verdict**

Nearly half of the defendants raised issues concerning the trial court's consideration of the automatic motion to modify a death sentence required under section 190.4(e) of the California Penal Code.

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212. Id. at 855, 858-59, 760 P.2d at 432, 435, 251 Cal. Rptr. at 235, 238. Specifically, the defendant believed that the deputy public defender was not diligently pursuing his defense and could not be trusted. The trial court disagreed. Id. at 858-860, 760 P.2d at 434-36, 251 Cal. Rptr. at 238-39. The defendant then stated he had "no alternative" but to represent himself. Id. at 855, 760 P.2d at 434, 252 Cal. Rptr. at 238.

213. Id. at 855, 861, 760 P.2d at 432, 436, 251 Cal. Rptr. at 235, 239. In fact, as to the defendant's level of competence, the trial judge remarked:

> Mr. Crandell did a job which absolutely astounded me. His level of questioning would compare to a seasoned trial lawyer with at least first degree homicides under his belt by way of defense. . . . [H]is performance here would put many defense lawyers to shame. . . . He got the medical examiner in this case to admit he was wrong in his opinions 50 percent of the time. I have never seen a skilled lawyer be able to do that.

*Id.* at 865, 760 P.2d at 439-40, 251 Cal. Rptr. at 243.


215. Id. at 76, 762 P.2d at 1224-25, 252 Cal. Rptr. at 500-01.

216. Id. at 80-81, 762 P.2d at 1227-28, 252 Cal. Rptr. at 503-04. Interestingly, the supreme court also upheld the denial of the defendant's motion for the appointment of an additional attorney. It found that the trial court did not abuse its discretion because the appointment of additional counsel is usually reserved for particularly complex capital cases. *Id.* at 76-78, 762 P.2d at 1225-26, 252 Cal. Rptr. at 501-02; *see* Keenan v. Superior Court, 31 Cal. 3d 424, 430, 434, 640 P.2d 108, 111, 113-14, 180 Cal. Rptr. 489, 492, 495 (1982) (holding that a second attorney should only be appointed in cases which are so complex that additional counsel is necessary "as a matter of law").

217. *See* *Adcox*, 47 Cal. 3d at 273-74, 763 P.2d at 944-45, 253 Cal. Rptr. at 93-94 (alleging trial judge's inadequate consideration of the evidence and the law in deciding motion); *Boyde*, 46 Cal. 3d at 256, 758 P.2d at 50, 250 Cal. Rptr. at 108 (alleging trial court's improper finding of no mitigating evidence); *Brown*, 46 Cal. 3d at 482, 758 P.2d at 1155, 250 Cal. Rptr. at 624-25 (alleging trial court's improper consideration of mitigating and aggravating circumstances); *Brown*, 45 Cal. 3d at 1263-64, 756 P.2d at 214, 248 Cal. Rptr. at 827 (alleging trial court's failure to state reasons for denial of motion); *Caro*, 46 Cal.
Section 190.4(e) specifically requires a trial judge to review any death sentence returned by a jury to determine "whether the jury's findings . . . that the aggravating circumstances outweigh the mitigating circumstances [is] contrary to law or the evidence presented." The statute also compels the trial judge to "state on the record the reasons for his [or her] findings." After reviewing the various defendants' claims, the supreme court rejected all but one. In People v. Brown, the court reversed the defendant's death sentence because the trial court failed to comply with the requirements of section 190.4(e). After hearing arguments on the motion for modification, the trial judge merely reaffirmed the death sentence without expressly ruling on the motion or stating the reasons for its denial. Because the judge did not make the mandatory record of his findings, the court remanded the case to the trial court for reconsideration of the motion for modification.

The supreme court's summary dismissal of section 190.4(e) claims in the other cases suggests its faith in the trial judge's assessment of the jury's findings. Although several defendants questioned the trial judge's understanding of the statutory factors to be considered in rul-

3d at 1067-68, 761 P.2d at 700, 251 Cal. Rptr. at 777-78 (alleging trial court's improper consideration of a nonstatutory aggravating factor—lack of remorse); Hamilton, 46 Cal. 3d at 156-57, 756 P.2d at 1367-68, 249 Cal. Rptr. at 339-40 (alleging trial court's improper consideration of mitigating evidence); Hernandez, 47 Cal. 3d at 371-75, 763 P.2d at 1324-26, 253 Cal. Rptr. at 233-36 (alleging trial judge's failure to properly state reasons for denial of motion for modification); Jennings, 46 Cal. 3d at 992-93, 760 P.2d at 493-94, 251 Cal. Rptr. at 297-98 (alleging trial court's misunderstanding of the factors to consider in ruling on motion); Karis, 46 Cal. 3d at 651-52, 758 P.2d at 1212-13, 250 Cal. Rptr. at 682-83 (alleging trial court's misunderstanding of the factors to consider in ruling on motion); Malone, 47 Cal. 3d at 57-59, 762 P.2d at 1284-86, 252 Cal. Rptr. at 560-62 (alleging trial court's improper "mechanical" consideration of mitigating and aggravating circumstances); Williams, 45 Cal. 3d at 1327-30, 756 P.2d at 256-58, 248 Cal. Rptr. at 869-71 (alleging both judicial misconduct in considering modification motion and the trial court's improper consideration of a probation report).

218. CAL. PENAL CODE § 190.4(e) (West 1988 & Supp. 1989). In 30 of the 37 states allowing the death penalty, the jury determines whether the penalty should be imposed. However, all states provide for judicial review of jury-imposed death sentences. Hans, Death by Jury, in CHALLENGING CAPITAL PUNISHMENT 172 n.1 (K. Haas & J. Inciardi ed. 1988).

221. Id. at 1263-64, 756 P.2d at 214, 248 Cal. Rptr. at 827.
222. Id. at 1264, 756 P.2d at 214, 248 Cal. Rptr. at 827. But see People v. Heishman, 45 Cal. 3d 147, 753 P.2d 629, 246 Cal. Rptr. 673 (1988) (trial judge's failure to state reasons did not prejudice defendant so as to require reversal of death penalty). The Brown court further stated that, if possible, the original trial judge should hear the motion for modification, although another judge of the same court could hear the motion. Brown, 45 Cal. 3d at 1264 n.7, 756 P.2d at 214 n.7, 248 Cal. Rptr. at 827 n.7.
ing on a motion for modification, the court refused to disturb the
trial judge's denial of the motion if the judge made some attempt—
however feeble—to justify the ruling. Thus, the present court is
unlikely to substitute its judgment for that of the trial court unless
the trial judge wantonly disregards the requirements of section
190.4(e).

B. Failure to Hold a Competency Hearing

People v. Marks was the only case in this survey to seek reversal
because the trial court failed to hold a pretrial hearing to determine
the defendant's fitness to stand trial. In Marks, the defendant was
convicted and sentenced to death for murdering a man in a murder-
for-hire scheme. Before trial, defense counsel informed the trial
court of the defendant's possible inability to comprehend the severity
of the charges against him and to assist in his defense. After expres-
sing some doubt as to the defendant's ability to stand trial, the trial
judge scheduled a competency hearing, which subsequently was can-
celled upon the request of defense counsel. The defendant was
then arraigned, and no further reference was made to his
competency.

Because the trial court did not follow through with a competency
hearing after it had expressed concern over the defendant's capacity
to stand trial, the supreme court reversed the defendant's sentence
and conviction. The court noted that section 1368(c) of the Penal
Code mandates that once a competency hearing has been ordered,
"all proceedings in the criminal prosecution shall be suspended until
the question of the present mental competence of the defendant has

223. See supra note 217. In considering a modification motion, the trial judge must
"review the evidence, consider, take into account, and be guided by the aggravating
and mitigating circumstances referred to in Section 190.3." CAL. PENAL CODE

224. For example, in Hernandez, 47 Cal. 3d 315, 763 P.2d 1289, 253 Cal. Rptr. 199,
the supreme court upheld the trial judge's denial of the modification motion even
though the trial judge's explanation of the denial was somewhat sketchy. The
supreme court noted that the judge's statements, "taken in the context of the immedi-
ately preceding hearing, [were] not so inadequate as to require a new hearing." Id. at
372, 763 P.2d at 1324, 253 Cal. Rptr. at 234 (emphasis added). The court further noted
that even if the trial court did err in failing to explain fully the reasons for the denial,
the error undoubtedly was harmless. Id.


226. Id. at 1338-39, 756 P.2d at 263-64, 248 Cal. Rptr. at 876-77.

227. Id. at 1338-1339, 756 P.2d at 263, 248 Cal. Rptr. at 876-77. Defense counsel ex-
plained to the trial court that the matter of the defendant's competency had been re-
solved because two psychiatrists had examined the defendant and determined that he
was able to assist in his defense. Defense counsel then asked that the defendant be
arraigned, and the trial court responded, "All right." Id. at 1339, 756 P.2d at 263, 248
Cal. Rptr. at 877.

228. Id.

229. Id. at 1347, 756 P.2d at 269, 248 Cal. Rptr. at 882.
been determined." Since the trial court did not actually determine whether the defendant was competent to stand trial, the supreme court found that the trial court lacked jurisdiction under section 1368(c) to proceed with the defendant’s trial. The court also found that the defendant’s apparent “waiver” of his right to the competency hearing was ineffective since “the matter is jurisdictional, and cannot be waived by counsel.”

The significance of Marks as a death penalty case is limited. The court merely affirmed its established rule that once the trial court acknowledges doubt as to the defendant’s competence, it must formally resolve the issue on the record or risk losing jurisdiction over the matter.

C. Proportionality Review

The defendants in ten cases alleged that their death sentences were disproportionate to their individual culpability for the crimes committed. Each defendant claimed either that his sentence was disproportionate to his own culpability for the crime, especially when compared to sentences received by his co-conspirators (intracase proportionality), or that his sentence was disproportionate to sentences received by persons convicted of similar crimes in other

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231. Marks, 45 Cal. 3d at 1340, 756 P.2d at 266, 248 Cal. Rptr. at 877.

232. Id. (quoting People v. Hale, 44 Cal. 3d 531, 541, 749 P.2d 769, 775, 244 Cal. Rptr. 114, 120 (1988)); see People v. Pennington, 66 Cal. 2d 506, 521, 426 P.2d 942, 951, 58 Cal. Rptr. 374, 383 (1967) (noting that under section 1368 of the Penal Code, the court has no authority to proceed with trial once it has questioned the defendant’s competency). See also 21 CAL. JUR. 3D Criminal Law § 2889 (1985).

233. The supreme court’s prior holdings clearly indicate that the trial court must, “at a minimum ... expressly and unmistakably state on the record, either orally or in writing, its determination as to whether the defendant is mentally competent to stand trial.” Id. at 1343, 756 P.2d at 266, 248 Cal. Rptr. at 879; see also People v. Hale, 44 Cal. 3d 531, 749 P.2d 769, 244 Cal. Rptr. 114 (1988).

234. Adcox, 47 Cal. 3d at 274-75, 763 P.2d at 945-46, 253 Cal. Rptr. at 94-95; Bean, 46 Cal. 3d at 956-58, 760 P.2d at 1020-21, 251 Cal. Rptr. at 491-92; Caro, 46 Cal. 3d at 1068, 761 P.2d at 701, 251 Cal. Rptr. at 778; Hamilton, 46 Cal. 3d at 158, 756 P.2d at 1368, 249 Cal. Rptr. at 340; Jennings, 46 Cal. 3d at 995, 760 P.2d at 495, 251 Cal. Rptr. at 298; Karis, 46 Cal. 3d at 649, 758 P.2d at 1211-12, 250 Cal. Rptr. at 681-82; Keenan, 46 Cal. 3d at 544, 758 P.2d at 1124, 250 Cal. Rptr. at 593-94; McLain, 46 Cal. 3d at 121, 757 P.2d at 583, 249 Cal. Rptr. at 644; Moore, 47 Cal. 3d at 93, 762 P.2d at 1236-37, 252 Cal. Rptr. at 512-13; Walker, 47 Cal. 3d at 650-51, 765 P.2d at 98, 253 Cal. Rptr. at 891.

235. Bean, 46 Cal. 3d at 956-58, 760 P.2d at 1020-21, 251 Cal. Rptr. at 491-92; Jennings, 46 Cal. 3d at 995, 760 P.2d at 495, 251 Cal. Rptr. at 298; McLain, 46 Cal. 3d at 121, 757 P.2d at 583, 249 Cal. Rptr. at 644; Moore, 47 Cal. 3d at 93, 762 P.2d at 1236-37, 252 Cal. Rptr. at 512-13.
cases (intercase proportionality), or both. The court rejected all ten claims.

In each case, the supreme court consistently noted that the eighth amendment of the United States Constitution does not require that courts assess proportionality by comparing their sentences with sentences previously imposed in similar situations. The court conceded, however, that death sentences are subject to review under the California Constitution to "ensure that the penalty is not disproportionate to the defendant's individual culpability."

Applying the above law, the supreme court in People v. Adcox found that the defendant's death sentence was proportionate to his individual culpability. In Adcox, the defendant embarked on a camping trip with his girlfriend and another friend. When the three campers ran out of money, they devised a plan to kill and to rob a nearby fisherman. While the girlfriend waited at the campsite, the defendant and his friend stalked the fisherman until the defendant was able to shoot him. After all three were convicted, the defendant complained that his accomplices received disproportionately light sentences. The girlfriend entered a plea in juvenile court to robbery, while the friend received life imprisonment for his participation in the murder.

Given the evidence of premeditation, the court was unwilling to

236. Hamilton, 46 Cal. 3d at 158, 756 P.2d at 1368, 249 Cal. Rptr. at 340; Walker, 47 Cal. 3d at 650-51, 765 P.2d at 98, 253 Cal. Rptr. at 891.
237. Adcox, 47 Cal. 3d at 274-75, 763 P.2d at 945-46, 253 Cal. Rptr. at 94-95; Caro, 46 Cal. 3d at 1068, 761 P.2d at 701, 251 Cal. Rptr. at 778; Karis, 46 Cal. 3d at 649, 758 P.2d at 1211-12, 250 Cal. Rptr. at 681-82; Keenan, 46 Cal. 3d at 544, 758 P.2d at 1124, 250 Cal. Rptr. at 593-94.
238. The eighth amendment provides: "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII (emphasis added).
240. See Cal. Const. art. I, § 17 (cruel or unusual punishment may not be inflicted).
241. Karis, 46 Cal. 3d at 649, 758 P.2d at 1211-12, 250 Cal. Rptr. at 681-82; see also People v. Dillon, 34 Cal. 3d 441, 477-84, 668 P.2d 697, 719-724, 194 Cal. Rptr. 390, 412-17 (1983) (holding that life imprisonment was an excessive penalty for a 17-year-old juvenile who panicked and killed his victim).
242. Id. at 207, 763 P.2d at 906, 253 Cal. Rptr. 55 (1988).
243. Id. at 274-75, 763 P.2d at 946, 253 Cal. Rptr. at 95.
244. Id. at 226-27, 763 P.2d at 913-14, 253 Cal. Rptr. at 62-63.
245. Id. at 274, 763 P.2d at 946, 253 Cal. Rptr. at 95.
246. Id. The girlfriend was 16 at the time of the incident, while the defendant was 20 and his friend was 18. Id. at 226, 763 P.2d at 913, 253 Cal. Rptr. at 62.
overturn the jury’s death sentence. Justice Broussard, in his concurring opinion, stated that he did “not believe it [was] unconstitutionally disproportionate to impose a more severe sentence upon [the] defendant, the actual killer, than upon his accomplices.” However, Justice Broussard speculated that whether a defendant receives a death sentence may depend more upon the resources available in the county where he is prosecuted than upon his actual culpability. Thus, the defendant in Adcox likely would have received a lesser penalty in an urban area, where the prosecutors, constrained by the sheer volume of cases, must be more selective in choosing those in which to pursue capital punishment.

Justice Mosk, on the other hand, disagreed with both the majority and Justice Broussard. He felt that the actions of the two accomplices were no less culpable than those of the defendant, because they all intended to kill the fisherman. Thus, he would have declared the defendant’s death sentence unconstitutionally disproportionate and remanded the case with instructions to impose a term of life imprisonment.

Excepting Adcox, the court was unwilling to give more than cursory treatment to the defendants’ proportionality arguments, which usually were addressed in the final paragraph of each opinion. However, the Adcox decision suggests that if the facts show clear intra-case or intercase disproportionality, the court may be willing to re-examine the jury’s findings.

VIII. CONCLUSION

The California Supreme Court reversed eight of the twenty-six death sentences it considered during the latter half of 1988. Although the number of reversals appears significant, it probably

247. Adcox, 47 Cal. 3d at 275, 763 P.2d at 946, 253 Cal. Rptr. at 95.
248. Id. (Broussard, J., concurring).
249. Id. at 275-76, 763 P.2d at 946-47, 253 Cal. Rptr. at 95-96 (Broussard, J., concurring). The defendant was tried and convicted in the Superior Court of Tuolumne County, which had a population of approximately 36,555 at the time of the killing. Id. at 233, 763 P.2d at 917, 253 Cal. Rptr. at 66. See generally Hubbard, “Reasonable Levels of Arbitrariness” in Death Sentencing Patterns: A Tragic Perspective on Capital Punishment, 18 U.C. DAVIS L. REV. 1113 (1985) (arguing that the death penalty is applied in an arbitrary, disproportionate manner).
250. Adcox, 47 Cal. 3d at 276, 763 P.2d at 947, 253 Cal. Rptr. at 96 (Mosk, J., concurring and dissenting).
251. Id. at 277, 763 P.2d at 947, 253 Cal. Rptr. at 96 (Mosk, J., concurring and dissenting).
252. Id. (Mosk, J., concurring and dissenting).
does not suggest a major change in the court's conservative view of capital punishment. Each of the reversals involved well-established principles of law clearly mandating a finding of reversible error.

The court's affirmance of the remaining eighteen death sentences raises some interesting and practical issues. Although the court treats each capital case as though a person's life truly hangs in the balance, one wonders if the public recognizes the actual impact of the court's decisions. For the past twenty-two years, no executions have occurred in California, even though the state's death rows are overflowing with inmates whose executions have been placed on hold. This suggests that, in California, a contemporary death sentence is the equivalent of a life sentence. In fact, at the present rate, death row inmates are likely to die of natural causes before the State receives permission to execute. In sharp contrast, the state of Louisiana has been labelled "Death Mill, USA" because of its exceptionally high "kill ratio" of death row prisoners; but at least one expert has hypothesized that Louisiana's commitment to emptying its death rows has quelled the number of death penalty judgments in its trial courts.

California taxpayers also continue to protest spending millions of dollars to house the growing number of death row inmates. Not only must the State dedicate substantial resources to obtaining death penalty judgments, but it also must expand and improve the facilities to house those presently condemned to die. In fact, eight years ago, when California's death row was sparsely populated, the State promised to upgrade the conditions on San Quentin's death row. Now that the population has multiplied, the State, citing the substantial increase in cost, is trying to renege.

As long as death row populations keep growing, and the execution

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255. Kaplan, Death Mill, USA, Nat'l Law J., May 8, 1989, at 38, col. 1. More than 30% of the death row population has been executed. Id. This efficiency ratio dwarfs those of Texas and Florida—the two states most often associated with capital punishment. Id.


257. Cox, supra note 253, at 16.

258. Magagnini, Death-Penalty Trials Burden Sierra County, L.A. Daily J., March 30, 1988, at 7, col. 1. In fact, Sierra County alone spends $1.2 million annually to prosecute homicide cases. Id.

259. Cox, supra note 253, at 16.

260. Id.
hiatus continues, such problems can only grow worse. Conservative treatment of capital cases exacerbates this problem and begs the question: "O death, where is thy sting?" However, perhaps the present court hopes that upholding death sentences as if "there is no tomorrow" means that eventually there won't be a tomorrow for the many inmates on death row.

JOHN A. MAYERS
SUSAN SIMMONS SEEMILLER

261. 1 Cor. 15:55.
APPENDIX

The following six charts visually depict the number and types of issues that arose in the cases of this survey. The purpose of these diagrams is to equip the reader with a useful reference guide and to provide a simple and efficient means of issue comparison between all of the twenty-six cases at the same time.

Each of the charts is titled according to the type of issues it displays. Titles can be found in the top left-hand corner of each chart. Chart topics include: counsel issues, evidentiary issues, instructional issues, jury issues, prosecutorial issues and a final table of miscellaneous issues entitled “other issues.”

The top row of each chart briefly describes the type of issue discussed by the supreme court. The column of names on the left-hand side is an abbreviation of each case name. The column of numbers directly to the right of these names contains the volume number of the official reporter in which each case may be found. The remaining numbers within the charts represent the page numbers in the official California reporter where the corresponding issues are discussed. The following legend explains the signals which accompany the page numbers:

- No designation: No error.
- h: Harmless error.
- i: If error existed, it was harmless.
- r: Reversible error.
- m: Dissent clashes with majority.
- c: Issue expanded by concurrence.
- d: Discussed in dicta.
- +: Issue discussed either at length or in a variety of spots within the opinion.
- A: Affirmed.
- R: Reversed.
- R&R: Reversed and remanded.
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V. ENVIRONMENTAL LAW

Under the California Environmental Quality Act, an environmental impact report must contain an analysis of project alternatives and the effects of reasonably foreseeable future activities. Laurel Heights Improvement Association of San Francisco, Inc. v. Regents of the University of California.

In Laurel Heights Improvement Association of San Francisco, Inc. v. Regents of the University of California, 47 Cal. 3d 376, 764 P.2d 278, 253 Cal. Rptr. 426 (1988), the supreme court reviewed the adequacy of an environmental impact report (EIR) prepared pursuant to the California Environmental Quality Act (CEQA). CAL. PUB. RES. CODE §§ 21000-21176 (West 1986 & Supp. 1989). The EIR was challenged by the Laurel Heights Improvement Association of San Francisco, Inc. (Association). The court unanimously found that the EIR was inadequate because it failed to sufficiently analyze the environmental effects of reasonably foreseeable future activities and discuss possible alternatives to the proposed project.

The cause of action arose as a result of the University of California Regents' purchase of a Laurel Heights building and the subsequent decision to relocate the University of California, San Francisco (UCSF) School of Pharmacy's biomedical research units to the building. Pursuant to the requirements of CEQA, UCSF prepared an EIR detailing the proposed move and its possible effects on the environment. See CAL. PUB. RES. CODE § 21000 (West 1986 & Supp. 1989); see generally 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Real Property §§ 58-60, 62 (9th ed. 1987); 61A AM. JUR. 2D Pollution Control § 47 (1981 & Supp. 1989); 50 CAL. JUR. 3D Pollution & Conservation Laws §§ 367-396 (1979 & Supp. 1989); Hildreth, Environmental Impact Reports Under the California Environmental Quality Act: The New Legal Framework, 17 SANTA CLARA L. REV. 805 (1977); Comment, California's Environmental Quality Act—A Significant Effect or Paper Pollution?, 5 PAC. L.J. 26 (1974); Comment, Environmental Decision Making Under CEQA: A Quest for Uniformity, 24 UCLA L. REV. 838 (1977). The EIR revealed several possible environmental effects, including the research units' use of "possibly toxic chemicals, possible carcinogens, and radioactive substances." Laurel Heights, 47 Cal. 3d at 389, 764 P.2d at 280-81, 253 Cal. Rptr. at 428-29.

The resultant controversy surrounded the possible impact of these effects on the nearby Laurel Heights, a mixed residential and commercial neighborhood. After a public review and comment on the EIR, UCSF proposed ways to mitigate the possible environmental impact of the proposed move. The Regents then certified the EIR.

The Association petitioned the superior court for a writ of mandate
to set aside the certification. The superior court upheld the certification as being consistent with CEQA. The court of appeal reversed, finding that the EIR insufficiently discussed possible cumulative effects and alternatives regarding the proposed move.

The supreme court began its discussion by describing EIRs in general and their use as a part of CEQA. The court noted that CEQA is intended by the legislature to protect the environment from damage by regulating public agency actions. See CAL. PUB. RES. CODE § 21000(g) (West 1986 & Supp. 1989). EIRs are required prior to public agency projects which “may have a significant effect on the environment.” See CAL. PUB. RES. CODE §§ 21100, 21065, 21068 (West 1986 & Supp. 1989); 50 CAL. JUR. 3D Pollution & Conversation Laws §§ 380-384 (1979 & Supp. 1989). EIRs thereby serve as public notice of potential environmental impacts, of possible impacts which may be mitigated, and of alternatives to the project in question. CAL. PUB. RES. CODE § 21061 (West 1986 & Supp. 1989). In addressing the standard of review when assessing the adequacy of EIRs, the court found the appropriate test to be the “substantial evidence” standard. This test does not require the court to weigh the evidence on either side, but requires the court only to find substantial evidence in support of the agency’s decision. See CAL. ADMIN. CODE tit. 14, § 15384(a) (1988).

The court additionally held that the EIR inadequately analyzed the probable future uses of the research facility and the resultant environmental impact. The court applied a two-part test for determining when an EIR must include an analysis of future action: “(1) [if] it is a reasonably forseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.” Laurel Heights, 47 Cal. 3d at 396, 764 P.2d at 285, 253 Cal. Rptr. at 433. Because the future uses of the facility were reasonably forseeable and would significantly change the environmental effects, the court held that the EIR was inadequate in its discussion of anticipated future uses.

The adequacy of the EIR’s discussion of alternatives was also found to be faulty. The court observed that only one and one-half pages out of the EIR’s 250 total pages identified any alternatives. The court emphasized that the public needed to be informed of the analytical steps taken in arriving at the proposed project, as that is one of the purposes of CEQA. Because the EIR failed to adequately discuss the
possible future uses and alternatives, UCSF was required to provide a new EIR.

The court next addressed the Regents' contention that substantial evidence supported their conclusion that the probable environmental effects identified in the present EIR would be mitigated. The evidence included two environmental studies performed at the existing research unit's location, the absence of studies involving the harmful effects of laboratory hood emissions, the absence of regulations on laboratory emissions, and the commitment by the Regents to monitor the air quality at the new research site. The court found that these steps combined to provide the substantial evidence of mitigation.

Although the Association challenged the Regents' finding of mitigation, the court found that the Regents presented substantial evidence that the environmental effects resulting from the proposed move would be mitigated. Nonetheless, the EIR was deemed inadequate; CEQA, however, was allowed to continue its existing activities at the site until a new EIR was certified.

By requiring the Regents to make public their analysis regarding future effects and alternatives, the court reaffirms the goal of CEQA: to bring public agency decisions involving potentially environmentally dangerous projects into the open. The court's analysis of both CEQA and the administrative guidelines involving CEQA should be encouraging to the public and public agencies. Forcing greater disclosure will encourage more public participation in the decision-making process of public agencies, thereby fostering greater concern for the environment and hopefully creating environmentally efficient decisions.

MICHAEL J. GAINER

VI. GOVERNMENT

Although police officers must be informed that statements they make regarding any internal investigations cannot be used against them in criminal proceedings, remedies granted for violation of this right must be reasonable: Williams v. City of Los Angeles.

In Williams v. City of Los Angeles, 47 Cal. 3d 195, 763 P.2d 480, 252 Cal. Rptr. 817 (1988), the court considered what remedies a trial court may order when a public officer's rights under the Public Safety Officers Procedural Bill of Rights (the Act) are violated. CAL. GOV'T CODE §§ 3300-3311 (West 1980 & Supp. 1989). Although the court found that Officer Williams' rights were violated, it held that the relief granted was not appropriate when it did not further the policies of the Act. See 42 CAL. JUR. 3D Law Enforcement Officers § 33 (1978

Williams was a police officer for the City of Los Angeles. He and his partner, Officer Lybarger, were questioned during an internal investigation regarding arrests they had made for bookmaking. Both officers were informed that if they remained silent their silence could be interpreted as insubordination and provide a basis for termination.

However, neither officer was informed that their comments could not be used against them in any criminal proceeding. Lybarger refused to cooperate and was dismissed; the supreme court ordered his reinstatement in Lybarger v. City of Los Angeles, 40 Cal. 3d 822, 710 P.2d 329, 221 Cal. Rptr. 529 (1985). Williams cooperated with the investigation, and the testimony he gave led to his dismissal. The trial court granted Williams' requests for reinstatement and for an injunction against the use of any of his earlier comments in further disciplinary actions.

A provision in the Act requires that if it appears that an officer may be subject to criminal charges before or during interrogation, then he must be apprised of his constitutional rights. Cal. Gov't Code § 3303(g) (West 1980 & Supp. 1989). The court discussed its application in its Lybarger decision, where it stated that the disclosure mandated by section 3303(g) must inform the officer that he may remain silent, but that his silence may be used as a basis for termination. This result is permissible because there is no constitutional or statutory protection for the refusal of an officer to cooperate in an internal investigation. See Cal. Gov't Code § 3303(e) (West 1980 & Supp. 1989); see generally Note, Application of the Constitutional Privacy Right to Exclusions and Dismissals from Public Employment, 1973 Duke L.J. 1037; Note, The Privacy Plight of Public Employees, 13 Hofstra L. Rev. 189 (1984); Annotation, Assertion of Immunity as Ground for Removing or Discharging Public Officer or Employee, 44 A.L.R. 2d 789 (1955 & Supp. 1989). The court in Lybarger also required that the department give a description of the immunity which would protect the officer's statements from being used against the officer in criminal proceedings.

The court contrasted Williams' situation with Lybarger's. The court's holding in Lybarger was premised on the fact that Lybarger might have chosen to cooperate with the investigation in an attempt to exonerate himself had he been aware that his testimony was protected by limited immunity. Without the benefit of this information,
Lybarger remained silent and was dismissed. Although Williams was not told of this limited immunity, he nonetheless chose to cooperate.

The court reasoned that, unlike Lybarger, Williams could not possibly have been affected by the disclosure. Limited immunity serves as an incentive to cooperate, not to remain silent. Since Williams chose to cooperate without the knowledge that his testimony was protected, the required disclosure could have only served as an additional reason to cooperate with the investigation. Therefore, the court concluded that although his rights were violated by the incomplete disclosure, the violation had no impact on Williams' cooperation and subsequent termination.

The court then addressed the relief granted by the superior court. The trial court has discretion in handling claims under the Act. CAL. GOV'T CODE § 3309.5(b) (West 1980 & Supp. 1989). Since the Act gives broad discretion to the courts in determining what remedies are appropriate, the court refused to hold that excluding an officer's testimony in further disciplinary proceedings is an improper remedy in any situation.

However, the court reasoned that the relief granted Williams was inappropriate because neither remedy substantively affected the parties. See Barber v. State Personnel Board., 18 Cal. 3d 395, 556 P.2d 306, 134 Cal. Rptr. 206 (1976). The trial court ordered that Williams be reinstated and that his previous testimony be excluded in subsequent proceedings by the department. Excluding Williams' statements would simply require the department to make the proper disclosure to Williams, at which point he could remain silent, or give the same testimony. The court asserted that regardless of which option he chose, Williams would be terminated.

The court concluded that ordering Williams' reinstatement was also inappropriate. The ultimate resolution still would be Williams' dismissal. Nor would his reinstatement serve to deter the department from conducting interrogations without the proper disclosure. The court saw no deterrent value in reinstating an officer who chose to cooperate without knowing that his statements had become privileged.

In analyzing the improper disclosure and its impact on Williams, the court's approach was similar to the harmless error rule it employs in criminal trials. Although error is found, reversal is not necessary unless the error was sufficiently harmful. In Williams, the flawed disclosure did not cause the officer to testify; therefore, the error was harmless and could not justify the remedies of exclusion of testimony and reinstatement.

MARK G. KISICKI

1214
VII. LABOR LAW

A. Section 351 of the Labor Code prohibits any dual level minimum wage system that requires a lower wage for employees who regularly receive tips: Henning v. Industrial Welfare Commission.

In Henning v. Industrial Welfare Commission, 46 Cal. 3d 1262, 762 P.2d 442, 252 Cal. Rptr. 278 (1988), the court found that section 351 of the Labor Code barred an Industrial Welfare Commission (IWC) order calling for a lower minimum wage for those employees who ordinarily receive tips of $60 or more per month. See CAL. LAB. CODE § 351 (West Supp. 1989). While the court noted that the IWC is not limited to fixing only a single level minimum wage scale, it concluded that the language and legislative history of section 351 prohibits a tip-based separate wage system.

The order, IWC Order No. MW-88, was adopted by the IWC in December 1987 and became effective in July 1988. It called for a ninety cent increase in the minimum wage for non-tip receiving employees, and a fifteen cent increase in the minimum wage for employees collecting more than $60 per month in tips. The dual classification represented a reversal of an earlier position advocated by the IWC in a 1980 California Supreme Court decision. See Industrial Welfare Commission v. Superior Court, 27 Cal. 3d 690, 729-31, 613 P.2d 579, 602-03, 166 Cal. Rptr. 331, 353-55 (1980) (minimum wage scales are not to be voided for “fail[ure] . . . to provide [for] a differentiated minimum wage for tipped and nontipped employees”).

The court began its analysis with a historical discussion of the role and authority of the IWC. The court confirmed that this “quasi-legislative” body of five members has the power to regulate minimum wages, hours of employment, and working conditions for all employees in California. See CAL. LAB. CODE §§ 70-74, 1173 (West Supp. 1989); 41 CAL. JUR. 3D Labor § 36 (1978 & Supp. 1988); see generally 48A AM. JUR. 2D Labor & Labor Relations § 2555 (1979). Historically, the IWC had construed section 315 as prohibitive of a separate, lower minimum wage for tipped employees. See Uelmen, Will ‘Judicial Restraint’ Court Defer on Minimum Wage?, L.A. Times, Sept. 7, 1988, at 7, col. 2. However, in adopting Order MW-88, the IWC specifically rejected this previous construction. While justification for this reversal was not clearly specified in the court’s opinion, the court noted that in 1976 and 1979 the hotel and restaurant industry persuaded the IWC to review the current minimum wage system, and consider a
lower scale for those employees receiving tips. The California Restaurant Association and the California Hotel and Motel Association successfully petitioned to intervene in the court of appeal action.

The court stated that the standard of judicial review of IWC decisions is confined to an inquiry of whether the IWC's actions were "arbitrary[,] . . . entirely lacking in evidentiary support[,] or . . . violat[ive of] . . . procedure required by law." Henning, 46 Cal. 3d at 1269, 762 P.2d at 446, 252 Cal. Rptr. at 282. The court further concluded that this deferential standard was inappropriate only when an administrative agency decision reverses a previous statutory interpretation by the agency, and the previous interpretation was accepted in a past judicial decision. See Crounse Corp. v. Interstate Commerce Commission, 781 F.2d 1176, 1186 (9th Cir. 1983).

Section 351 states in part:

No employer or agent shall collect, take or receive any gratuity or a part thereof, paid, given to or left for an employee by a patron, or deduct any amount from wages due an employee. . . . Every such gratuity is hereby declared to be the sole property of the employee. . . to whom it was paid, given, or left for [sic].

CAL. LAB. CODE § 351 (West Supp. 1989). The court noted that the current version of this statute evolved through a long history of attempted and successful amendments, beginning in 1917. This evolution was a result of pressure on the legislature to conclusively affirm that tips are the exclusive property of employees.

The court acknowledged that the specific language of section 351 does not "expressly bar" this dual wage scale, but after examining the legislative history of section 351, the court concluded that the ultimate intent of this law was to ban any form of "tip credit" that allows an employer to subtract tip amounts from total wages. See 2 B. Witkin, Summary of California Law, Agency and Employment § 337 (9th ed. 1987); 41 CAL. JUR. 3D Labor §§ 30, 35 (1978 & Supp. 1988); see generally 48A AM. JUR. Labor & Labor Relations § 2566 (1979). In rejecting Order MW-88 as violative of section 351, the court held that "in establishing the [dual level] system under review, the Commission has attempted to do the very thing the Legislature has prohibited." Henning, 46 Cal. 3d at 1279, 762 P.2d at 452, 252 Cal. Rptr. at 288.

In reaching its conclusion in this case, the court painstakingly recited an exhaustive history to support its conclusion that it was the legislature's intent to prevent such a two-tiered system. Nevertheless, it is clear that the powerful hotel and restaurant lobby will continue to push for a lower minimum wage for those employees receiving tips; however, to be effective, that pressure must be applied not on the IWC but on the legislature itself. Section 351 will continue to frustrate this attempted intrusion into the pockets of tipped

MARGARET LISA WILSON

B. Unions have a statutory, but limited, right of access to agricultural labor camps to exchange information: Sam Andrews' Sons v. Agricultural Labor Relations Board.

In Sam Andrews' Sons v. Agricultural Labor Relations Board, 47 Cal. 3d 157, 763 P.2d 881, 253 Cal. Rptr. 30 (1988), the court held that the Agricultural Labor Relations Board (ALRB) does not have express statutory authority to award attorney's fees and costs; that unions have a statutory right of access to agricultural labor camps for organizational purposes, although this right is not unrestricted as the employer has the right to make reasonable restrictions on the time, place, and manner of access; and that the ALRB can require the employer to allow one hour union meetings, on company time, to be paid for by the employer.

Sam Andrews' Sons (the grower) is an agricultural employer as defined under the Agricultural Labor Relations Act of 1975, and therefore is subject to the provisions of the Act. CAL. LABOR CODE § 1140.4(c) (West Supp. 1989); see generally 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Agency & Employment §§ 481-496 (9th ed. 1987); 41 CAL. JUR. 3D Labor §§ 214-225 (1978). The action arose out of allegations by the United Farm Workers of America (UFW) regarding the grower's unfair labor practices. See generally 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Agency & Employment § 485 (9th ed. 1987); 48A AM. JUR. 2D Labor & Labor Relations §§ 1735-1742 (1979); 41 CAL. JUR. 3D Labor §§ 219-223 (1978). Specifically, the UFW alleged, and the administrative law judge found, that the grower had repeatedly denied UFW representatives access to his fields and labor camps.

The ALRB accepted the findings of the administrative law judge and issued a cease and desist order barring the grower from future denials of access, and added the possibility of contempt sanctions for future violations. In addition, the ALRB ordered the grower to pay employees who attend one-hour meetings scheduled during working hours for talks with the UFW. Further, the ALRB required the grower to pay the UFW's attorneys' fees and costs incurred in bringing the action.

The court of appeal vacated the order requiring access, stating that unlimited access was overbroad. The court of appeal instructed the
ALRB to change the order to create reasonable access instead of unlimited access. The court of appeal also held that the required payment of UFW's attorney's fees and costs by the grower was invalid. Finally, the court of appeal disallowed the portion of the order requiring the grower to pay for workers to attend meetings, labeling it as punitive because there was a limit on the number of meetings which could be held.

The California Supreme Court began by addressing the ALRB's award of attorney's fees and costs to the UFW. The court held that the award was statutorily contradicted because section 1021 of the Civil Procedure Code states that "[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys . . . is left to the agreement . . . of the parties . . . ." CAL. CIV. PROC. CODE § 1021 (West Supp. 1989). Since the Act does not expressly provide for the payment of costs, the ALRB does not have the authority to award attorney's fees and costs.

The court next addressed the unfair labor practice issues. Although agreeing with the appellate court's affirmation, the court disapproved of its application of NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). Babcock & Wilcox provided that "when the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." Id. at 112; see generally 2 B. Witkin, SUMMARY OF CALIFORNIA LAW, Agency & Employment § 496 (9th ed. 1987); 41 CAL. JUR. 3D Labor § 217 (1978); Comment, Access to Farms as Mandated by the United States Constitution and by Action of the California Board of Agricultural Labor Relations, 8 Sw. U.L. REV. 165 (1976). The court found that the Babcock & Wilcox rule, which applied to the workplace, was not fully applicable to labor camp access, but held:

[that the right of agricultural employees and union representatives to exchange information at an agricultural labor camp is guaranteed under Labor Code Section 1152 [which provides the right to effectively participate in labor unions] and does not depend upon the proof in each case of the inadequacy of alternative means of communication.]

Sam Andrews' Sons, 47 Cal. 3d at 175, 763 P.2d at 893, 253 Cal. Rptr. at 42. Since the grower repeatedly denied access of the UFW to the workers, the court upheld the unfair labor practice finding. However, the court did note that the "inadequacy of alternative means" standard would apply to questions of reasonable access regarding a "time, place and manner regulation," but that the grower would have the burden of showing alternative means and their relation to "reasonableness." Id. at 175-76, 763 P.2d at 893, 253 Cal. Rptr at 42.
The reasonableness standard arose in the court's finding that the ALRB's order requiring the grower to allow unlimited and unrestricted access was overbroad. After noting that the order was "explicitly unrestricted," "in stark contrast to the field access order [calling for] . . . access at reasonable times," and allowed contempt sanctions for any violations, the court held that the ALRB intended the order to restrict the grower's ability to set any reasonable time, place or manner restrictions. *Id.* at 176-77, 763 P.2d at 894, 253 Cal. Rptr. at 43. The court held that the order was overbroad and affirmed the court of appeal's decision requiring the ALRB to reword the order requiring the grower to allow reasonable, but not unlimited, access.

In its final discussion, the court reversed the court of appeal by holding that the one hour of field access was not punitive in nature, because the order provided for only one hour on an agreed upon day and therefore was not overbroad. The order was justified based on the grower's repeated denial of field access.

By prohibiting the ALRB from awarding attorney's fees and costs, as well as allowing the growers to set the reasonable restrictions on access, the court gives little assistance to the already downtrodden farm worker who is trying to deal with an unresponsive and abusive employer. Although the court notes that the ALRB may order the grower to promulgate reasonable rules of access, without the ALRB being able to set reasonable standards, the door of continued abuse swings wide open.

The only consolation for workers at Sam Andrews' Sons is, contrary to the court's opinion, that the order allowing company-paid one-hour meeting time appears to allow such meetings on a daily basis. Therefore, workers will be paid for a one-hour break everyday.

MICHAEL J. GAINER

VIII. PROPERTY LAW

*An inverse condemnation suit for flood damages caused by the failure of a flood control levee cannot lie unless the public entity responsible for the levee acted unreasonably.* Belair v. Riverside County Flood Control District.

In *Belair v. Riverside County Flood Control District*, 47 Cal. 3d 550, 764 P.2d 1070, 253 Cal. Rptr. 693 (1988), the court addressed the issue

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of whether inverse condemnation damages can be recovered from a public entity when the failure of the public improvement causing the damage was not a result of any "unreasonable conduct" on the part of the operating public entity. While acknowledging that the flood levee in this case failed to function up to its expected capacity, the court held that proof of unreasonable conduct "in the design, construction, or maintenance" of the levee was required for recovery. The court rejected the plaintiffs' contention that absolute liability was the appropriate standard in flood damage cases.

The flooding at issue occurred in February 1980, after strong storms caused a flood control levee near the city of San Jacinto to break apart. Evidence at trial revealed that the levee collapse was the result of heavy water pressure that completely undermined the levee's foundation. The trial court noted that the levee was designed to accommodate over three times the amount of water flow that actually caused the levee's failure. Numerous downstream property owners suffered damage due to the flooding.

The trial court found in favor of the defendants. The court of appeal affirmed the judgment, concluding that liability could not lie since the plaintiffs' damages were not proximately caused by the levee, and that the defendant's participation in the design and the construction of the levee was insignificant. The supreme court granted review to examine the court of appeal's dual holding.

Inverse condemnation is defined as "[a] cause of action against a government agency to recover the value of property taken by the agency, though no formal exercise of . . . eminent domain had been completed." BLACK'S LAW DICTIONARY 740 (5th ed. 1979). The California Constitution specifically provides for this cause of action. See CAL. CONST. art. I, § 19 ("Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner."). See also 29 CAL. JUR. 3D Eminent Domain §§ 302-340 (1986 & Supp. 1988); see generally Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 S. CAL. L. REV. 1 (1970); Comment, Inverse Condemnation and the Alchemist's Lesson: You Can't Turn Regulations into Gold, 21 SANTA CLARA L. REV. 171 (1981).

The court first discussed the proximate cause requirement necessary for inverse condemnation recovery. See Albers v. County of Los Angeles, 62 Cal. 2d 250, 263-64, 398 P.2d 129, 137, 42 Cal. Rptr. 89, 97 (1965) (actual physical injury to real property proximately caused by the improvement is compensable). The court noted that this requirement is satisfied "where the public improvement constitutes a substantial concurring cause of the [property damage]." Belair, 47 Cal. 3d at 559-60, 764 P.2d at 1075, 253 Cal. Rptr. at 698 (emphasis in origi-
nal). See also Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431, 436 (1969). The court thus rejected the court of appeal's holding, and concluded that the levee's failure to function as expected fulfilled the proximate cause requirement. The court stressed the existence of good faith reliance and expenditures on the part of the plaintiffs who believed that the levee could accommodate the increase in water due to a heavy storm.

However, the court rejected the plaintiffs' allegation that the existence of proximate cause alone is sufficient for recovery. The court balanced the important public policy of encouraging construction of public flood control improvements, with the huge potential for flood damage should a public improvement fail, and held that an additional element of unreasonable conduct was necessary for inverse condemnation recovery. The court concluded that inverse condemnation liability applies "where the public agency's design, construction or maintenance of a flood control is shown to have posed an unreasonable risk of harm . . . and such unreasonable [conduct] . . . constitutes a substantial cause of the [plaintiffs'] damages." Belair, 47 Cal. 3d at 565, 764 P.2d at 1079, 253 Cal. Rptr. at 702. The court distinguished the cases cited by the plaintiffs by noting that absolute liability is appropriate when the flooding was caused by a public entity that, through its improvement, failed to properly divert water from its naturally flowing path. See, e.g., Yee v. City of Sausalito, 141 Cal. App. 3d 917, 190 Cal. Rptr. 595 (1983) (absolute liability imposed when diverted water from a collapsed storm drainage scheme caused property damage); Imperial Cattle Co. v. Imperial Irrigation District, 167 Cal. App. 3d 263, 213 Cal. Rptr. 622 (1985) (absolute liability imposed when an irrigation drainage system flooded due to unexpectedly heavy rainfall).

Regarding the reasonableness of behavior of the public entities, the court endorsed a case-by-case factual analysis. The majority opinion did not specifically refer to examples of unreasonable conduct, but the court noted that the failure of the levee in this case to function up to its expected capacity did not, in itself, establish unreasonable conduct on the part of the defendants.

Finally, the court disregarded the court of appeal's holding that proximate cause did not exist, and affirmed the judgment in favor of the defendants based on the lack of an "unreasonable act or omission." Belair, 47 Cal. 3d at 568, 764 P.2d at 1081, 253 Cal. Rptr. at 704. The court noted that this resolution precluded an examination of
whether the defendants were "a 'substantial participant' in the levee project." Id. at 568 n.10, 764 P.2d at 1081 n.10, 253 Cal. Rptr. 704 n.10.

The majority clearly recognized that the imposition of liability would only serve to deter or delay the future construction of California's much-needed public improvements. The added requirement of unreasonable conduct will serve to appropriately distribute the cost of these improvements between the public as beneficiaries, and the public entities as they are proved negligent. See generally Bacich v. Board of Control, 23 Cal. 2d 343, 350, 144 P.2d 818, 823 (1943) (a purpose of inverse condemnation is "to distribute throughout the community the loss inflicted upon the individual by the making of a public improvement"); Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility, 1966 Wis. L. REV. 3 (1966). However, since the levee's failure was due to water flow at less than a third of the levee's expected capacity, the court's assumption that this did not give rise to an issue of unreasonable conduct must have truly left a bitter taste in the plaintiffs' wallets.

MARGARET LISA WILSON

IX. TAX LAW

County auditors should consider executory contracts as "indebtedness" when distributing tax increment revenues to community redevelopment agencies: Marek v. Napa Community Redevelopment Agency.

In Marek v. Napa Community Redevelopment Agency, 46 Cal. 3d 1070, 761 P.2d 701, 251 Cal. Rptr. 778 (1988), the court held that executory contracts qualify as "indebtedness" for the purpose of determining how tax increment revenues are allocated to redevelopment agencies by county auditors. Although "indebtedness" is not defined in the relevant statutes, the court determined that redevelopment policies mandate a liberal interpretation of the term. See generally 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Real Property § 55 (9th ed. 1987)(discussing the genesis and evolution of community redemption law); 51 CAL. JUR. 3D Public Housing §§ 37-48 (1979 & Supp. 1988); see also 8 D. HAGMAN & R. VOLPERT, CALIFORNIA REAL ESTATE LAW & PRACTICE ZONING AND LAND USE CONTROL § 250.02 (1973 & Supp. 1988); Comment, Tax Increment Financing for Redevelopment in Missouri: Beauty and the Beast, 54 UMKC L. REV. 77, 78 (1985) (history of California Community Redevelopment Law).

This case arose when the Napa County Auditor, James H. Marek, refused to disburse funds to the Napa Community Redevelopment Agency (Agency). The Agency complied with section 33675 of the Health & Safety Code by filing an "annual statement of indebted-
ness” in order to receive funds under the tax increment financing scheme. CAL. HEALTH & SAFETY CODE §§ 33670, 33675 (West 1973 & Supp. 1989). Marek refused to consider as indebtedness the Agency’s inclusion of estimated future expenditures under a disposition and development agreement.

The court first addressed the fact that because the term “indebtedness” was not defined in the pertinent statutes, legislative intent must be ascertained from the circumstances surrounding its passage. See 73 AM. JUR. 2D Statutes § 145 (1974 & Supp. 1988); 58 CAL. JUR. 3D Statutes § 83 (1980). The intent of the Community Redevelopment Law was to revitalize depressed areas by providing a source of income whereby local agencies could finance urban renewal. See CAL. HEALTH & SAFETY CODE § 33334.6(a) (West Supp. 1989); Jacobs & Levine, Redevelopment: Making Misused and Disused Land Available and Usable, 8 HASTINGS L.J. 241, 250-53 (1957). Tax increment financing provides an agency with necessary funds. See Comment, Tax Increment Financing: Municipalities Avoiding Voter Accountability, 1987 DET. C.L. REV. 89, 92 (1987). Section 33670(b) provides that an agency qualifies for these funds to the full extent of its “indebtedness.” CAL. HEALTH & SAFETY CODE § 33670(b) (West 1973 & Supp. 1989). Because tax increment financing is the chief source of revenue for redevelopment agencies, “indebtedness” must be construed to promote the goals of the redevelopment scheme. This scheme, the court maintained, would be frustrated unless the Agency had the fiscal integrity necessary to enter into contracts which required future performance.

The court considered specific language of article XVI, section 16 of the California Constitution, and various sections of the Community Redevelopment Law as compelling a broad interpretation of “indebtedness.” See CAL. CONST. art. XVI, § 16; CAL. HEALTH & SAFETY CODE §§ 33603, 33670 (West 1973 & Supp. 1989). These provisions refer to a “special fund” where tax increment revenues are placed, and which is controlled by the particular redevelopment agency. The court believed that the legislature intended this “special fund” to be utilized by the agency to ensure its ability to meet future obligations.

Other provisions of the Community Redevelopment Law also indicated the legislature’s desire to allow redevelopment agencies to exercise discretion over the use of the incremental funds. Sections 33433 and 33447 allow agencies to use incremental funds to purchase and improve property, among other things. CAL. HEALTH & SAFETY CODE §§ 33433, 33447 (West 1973 & Supp. 1989). The court argued
that these sections indicated the legislature intended agencies to qualify for incremental funds based upon future actions.

The court also noted that the legislature had defined "indebtedness" (in an unrelated context) to include "[a] contractual obligation which, if breached, could subject the agency to damages or other liabilities." CAL. HEALTH & SAFETY CODE § 33801(c) (West Supp. 1989). Using this definition as a guide, the court demonstrated that the disposition and development agreement between the Agency and developer was such an obligation. For example, the court noted that it provided the developer various legal remedies if breached by the Agency, including rescission and the right of specific performance.

Finally, the court reflected Marek's claims that including executory contracts as "indebtedness" undermined the auditor's role. The court pointed to evidence which indicated that a broad interpretation of "indebtedness" was standard among county auditors throughout the state. Also, the court denied that the "annual statement of indebtedness" was required by the legislature as a means to protect the availability of tax increment funds for other entities. Rather, the court maintained that these tax entities were provided for through other statutory measures.

In articulating a broad definition of "indebtedness," the court has enhanced the ability of redevelopment agencies to engage in long term commitments without first issuing interest bearing bonds. An expansive definition is both fiscally sound and in accord with the purpose of redevelopment law. The narrow interpretation of "indebtedness" subscribed to by Marek in this case would have circumscribed an agency's ability to collect the necessary funds for early acquisition and development; it would also have increased an agency's reliance upon debt financing, with an added cost to taxpayers for every redevelopment project.

MARK G. KISICKI

X. Torts

A. The Employee Retirement Income Security Act preempts bad faith actions brought under section 790.03(h) of the Insurance Code: Commercial Life Ins. Co. v. Superior Court.


Joseph Juliano, an employee covered by an employer-provided insurance plan, was denied benefits by the insurer, Commercial Life Insurance Company and Automatic Data Processing (Commercial). Juliano filed suit against Commercial to compel payments. Although Juliano agreed that the policy was regulated by the ERISA, his complaint did not include a request for any ERISA remedy; rather, he complained of a violation of section 790.03(h) of the Insurance Code. The trial court refused to grant Commercial’s motion for summary judgment. The appellate court affirmed.

The ERISA is a legislative scheme which regulates employee insurance plans. See 60A AM. JUR. 2D Pensions and Retirement Funds § 1 (1988); Gregory, The Scope of ERISA Preemption of State Law: A Study in Effective Federalism, 48 U. PITT. L. REV. 427, 432 (1987). The court indicated that the remedies and enforcement provisions contained within the ERISA were both extensive and detailed. The court quoted the ERISA’s “broad” statement of preemption, noting, however, that state laws which “regulate insurance” are not preempted. See 60A AM. JUR. 2D Pensions and Retirement Funds § 115 (1988).

A state law is considered to regulate insurance when the law: 1) furthers the policy of spreading risks; 2) is a basic part of the insurance policy; and 3) is aimed at the insurance industry. See Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 743 (1985); Union Labor Life Ins. v. Pireno, 458 U.S. 119, 129 (1982); Gregory,

However, the California Supreme Court did not address the issue of whether section 790.03(h) regulated insurance. Instead, it argued that regardless of whether section 790.03 fell within the “savings clause,” it was preempted by the remedies provided in the ERISA, because Congress intended these remedies to be exclusive. See Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987). Because the ERISA remedies are exclusive, state granted rights which conflict are necessarily preempted. See Kanne v. Connecticut General Life Insurance Co., 859 F.2d 96 (9th Cir. 1987) (interpreting California law, holding that section 790.03(h) was preempted by the ERISA remedies). The court stated that allowing ERISA plaintiffs a remedy under section 790.03(h) would undermine an important policy of the act, namely, to provide that all protected employees receive similar treatment.

In determining that the ERISA preempted section 790.03(h), the court rendered a decision which affects important rights in a limited manner. The decision is meaningful because preemption affects the relationship between the federal and state governments. The court handled the preemption issue with proper deference to a significant federal scheme, recognizing the important federal policy in providing uniform remedies under the ERISA. Yet, as the court noted in conclusion, this holding is limited by its earlier determination in Moradi-Shalal v. Fireman's Fund Insurance Cos., 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P.2d 58 (1988). See Cal. Practicum, The Overruling Of Royal Globe: A "Royal Bonanza" For Insurance Companies, But What Happens Now? 16 Pepperdine L. Rev. 763 (1989). In Moradi-Shalal the court ruled that section 790.03(h) did not provide a private cause of action. Moradi-Shalal, 46 Cal. 3d at 304, 250 Cal. Rptr. at 126, 758 P.2d at 68. The court indicated that the case at bar would only affect those cases which were filed prior to Moradi-Shalal. Thus, while the Commercial Life Insurance Co. decision affects important rights, Moradi-Shalal significantly minimizes its impact.

Mark G. Kisicki
B. *Tortious breach of the implied covenant of good faith and fair dealing is not a viable cause of action in a wrongful termination suit. Remedies for bad faith discharge are founded in contract, not tort, law: *Foley v. Interactive Data Corp.*

I. INTRODUCTION

The long-awaited\(^1\) supreme court decision on the scope and viability of wrongful discharge claims was rendered by a narrowly-divided court in *Foley v. Interactive Data Corp.*\(^2\) Most significantly, the court refused to extend a cause of action based on tortious breach of the implied covenant of good faith and fair dealing to the employment contract situation.\(^3\) The court determined that a breach of an implied or oral contract of employment is the most viable and appropriate cause of action for bad faith discharge. Citing overriding policy concerns, the court restricted plaintiff’s remedies to those which are available under contract, rather than tort: “The expansion of tort remedies in the employment context has potentially enormous consequences for the stability of the business community.”\(^4\) Thus, recovery is limited to lost income and related economic loss stemming from the contract claim.\(^5\)

Additionally, the court reaffirmed its 1980 decision in *Tameny v. Atlantic Richfield Co.*,\(^6\) which allows employees terminated in violation of public policy to recover damage awards. However, the court stressed that the violation must relate to a policy which involves a clear public benefit and not one which merely relates to an em-

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1. The California Supreme Court first heard arguments in June 1986, during the tenure of former Chief Justice Rose Bird. Following a reconstitution of the court, reargument was heard in April 1987. The decision was rendered in December 1988, 20 months after reargument. *See L.A. Times, Dec. 30, 1988, § 1, at 1, col. 2.*


3. For the last major enunciation of this cause of action by the Bird court, see Seaman’s Direct Buying Service, Inc. v. Standard Oil Co., 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984) (cause of action for breach of implied covenant of good faith and fair dealing as it relates to standard commercial contract).

4. *Foley*, 47 Cal. 3d at 699, 765 P.2d at 401, 254 Cal. Rptr. at 239.


ployer's private interest.7

II. PROCEDURAL AND FACTUAL BACKGROUND

When hired in 1976 by Interactive Data Corporation (IDC), Daniel D. Foley was required to sign an employment agreement precluding his disclosure of confidential or proprietary information for a one-year period following his termination. Notably, nothing in the agreement limited the bases upon which Foley could be discharged. However, IDC did maintain "Termination Guidelines" which included a mandatory seven-step pre-termination procedure.

Throughout his nearly seven years of employment with IDC, Foley received excellent performance appraisals, together with regular raises and bonuses. By the time of his discharge in March 1983, he was the branch manager of the firm's Los Angeles office, receiving an annual salary in excess of $56,000. Two days prior to his discharge, Foley was given a merit bonus of $6,762.

Foley indicated that IDC orally assured him that his employment with IDC was secure providing his performance continued to be satisfactory. He asserted that his discharge was prompted when he informed management personnel in early 1983 that his new immediate supervisor was under an FBI investigation for embezzlement. Thereafter, Foley was offered the opportunity to transfer to Massachusetts or be demoted. Two weeks later, he was offered a second set of options—resign or be fired.

Foley's complaint alleged three causes of action: (1) tortious discharge in violation of public policy; (2) breach of oral employment contract; and (3) tortious breach of the implied covenant of good faith and fair dealing. The trial court sustained IDC's demurrer on all three causes of action. The court of appeal affirmed.

III. THE MAJORITY'S OPINION

A. Termination in Violation of Public Policy

The court initially addressed the alleged public policy violation. Noting an employer has the right to discharge at-will employees with or without good cause,8 the court emphasized that public policy concerns limit the employer's conduct.9 The foundation for a public-policy claim rests in the "disparagement of a basic public policy,"

8. See CAL. LABOR CODE § 2922 (West Supp. 1989) ("[a]n employment, having no specified term, may be terminated at the will of either party").
whether linked to a statutory or constitutional provision.\textsuperscript{10}

Declining to find a fundamental and substantial public policy violation, the court noted:

The absence of a distinctly "public" interest in this case is apparent when we consider that if an employer and employee were expressly to agree that the employee has no obligation to, and should not, inform the employer of any adverse information the employee learns about a fellow employee’s background, nothing in the state’s public policy would render such an agreement void. By contrast, in the previous cases asserting a discharge in violation of public policy, the public interest at stake was invariably one which could not properly be circumvented by agreement of the parties.\textsuperscript{11}

Thus, the court concluded that the employee’s duty of disclosure to his employer does not invoke the \textit{Tameny} rationale; rather, such a duty is designed to benefit the employer’s "private interest."\textsuperscript{12}

\subsection*{B. Implied-in-Fact Employment Contract}

Two issues were considered by the court under the breach of the employment contract cause of action: (1) whether IDC’s course of conduct and policies resulted in an oral contract to discharge only for good cause; and (2) whether the statute of frauds barred enforcement thereof.\textsuperscript{13} Relying on the rationale of \textit{White Lightning Co. v. Wolfson},\textsuperscript{14} that the statute of frauds\textsuperscript{15} does not apply to contracts performable within one year, the court reiterated that "an employment contract of indefinite duration" is thereby precluded since performance within the year is feasible.\textsuperscript{16} Citing decisions from California and other states, the court maintained that agreements to discharge

\begin{itemize}
\item \textsuperscript{11.} \textit{Foley}, 47 Cal. 3d at 670 n.12, 765 P.2d at 380 n.12, 254 Cal. Rptr. at 218 n.12 (emphasis in original).
\item \textsuperscript{12.} \textit{Id}. at 671, 765 P.2d at 380, 254 Cal. Rptr. at 218.
\item \textsuperscript{13.} \textit{Id}.
\item \textsuperscript{14.} 68 Cal. 2d 336, 438 P.2d 345, 66 Cal. Rptr. 697 (1968).
\item \textsuperscript{15.} \textit{CAL. CIV. CODE § 1624(2)} (West 1985).
\item \textsuperscript{16.} \textit{Foley}, 47 Cal. 3d at 672, 765 P.2d at 381, 254 Cal. Rptr. at 219 (citing \textit{White Lightning}, 68 Cal. 2d at 344, 438 P.2d at 349, 66 Cal. Rptr. at 701).
\end{itemize}
only for good cause are not within the statute of frauds. Consequently, since either Foley or IDC could have terminated the employment relationship within one year, the statute of frauds was not applicable.

The court then reviewed whether IDC's course of conduct, including oral representations to Foley that he would not be discharged without good cause, was sufficient to constitute an implied contract. Refusing to distinguish the holding in *Pugh v. See's Candies, Inc.* and its progeny which validated implied employment contracts, the court explained that basic contract principles may be supplemented by considerations of personnel policies and practices, length of service, and course of conduct to overcome the general at-will presumption. Thus, Foley's allegations were sufficient to establish an implied contract based on his six-year nine-month length of service, IDC's stated termination policy and procedure, and the non-compete agreement signed by Foley.

C. The Implied Covenant of Good Faith and Fair Dealing

"The covenant of good faith and fair dealing was developed in the contract arena and is aimed at making effective the agreement's promises." The court analyzed the viability of the covenant in the employment context, together with the appropriateness of various remedies. Noting that the covenant is implied in every contract, the court stated as a general rule that the breach of the covenant invokes

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18. Foley, 47 Cal. 3d at 675, 765 P.2d at 383, 254 Cal. Rptr. at 221.


contract, rather than tort remedies.  

However, the court acknowledged the exception to this rule in insurance contracts, where overriding policy considerations have encouraged California courts to allow recovery in tort for an insurer's bad faith breach of contract. Distinguishing the insurer-insured relationship, the court criticized prior decisions which justified extending such tort-based liability to the employment context:

"The underlying problem... lies in the decisions' uncritical incorporation of the insurance model into the employment context, without careful consideration of the fundamental policies underlying the development of tort and contract law in general or of significant differences between the insurer/insured and employer/employee relationships. [Footnote omitted]... The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purposes. The insurance cases thus were a major departure from traditional principles of contract law.

The court reasoned that while an insurer's interests are financially at odds with clients', an employer stands to benefit from retaining good employees. Thus, the relationship between the insured/insurer was not deemed sufficiently analogous to that of an employer/employee. Consequently, the court refused to justify an extension of the tortious breach of the implied covenant to employment contracts.

In further reliance on policy considerations, the court indicated that any extension of tort remedies in this context "is better suited for legislative decision making." Reviewing various approaches suggested by commentators, the court emphasized that the "fundamentally contractual" nature of the employment relationship mandated the application of contract remedies: "In order to achieve [commercial] stability, it is also important that employers not be unduly deprived of discretion to dismiss an employee by the fear that doing so will give rise to potential tort recovery in every case."

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28. Id. at 694, 765 P.2d at 397, 254 Cal. Rptr. at 235.
29. Id. at 696, 765 P.2d at 398-99, 254 Cal. Rptr. at 236-37. See generally J. Sebert,
IV. THE CONCURRING AND DISSENTING OPINIONS

A. Justice Broussard's Opinion

Although he concurred with the other portions of the majority’s opinion, Justice Broussard dissented from the court’s analysis of the cause of action for tortious breach of the implied covenant of good faith and fair dealing. The Justice viewed the majority’s findings as an improper attempt at judicial legislation, which left the wronged employee without a suitable recourse.30 Further, the majority’s abolition of the tortious breach of the implied covenant stemming from a bad faith discharge was unwarranted—especially considering that the well-established precedent which originated in the insurance cases, was adopted in Cleary v. American Airlines, Inc. in the employment context, and further expanded in Seaman’s Direct Buying Service, Inc. v. Standard Oil Co.31

B. Justice Kaufman’s Opinion

Justice Kaufman concurred with the majority in part, but expressed his dissent to the disposition of the implied covenant claim. While not as adamant as Justice Broussard that the tort cause of action was proper, Justice Kaufman argued that a bad faith discharge “may give rise to tort remedies.”32 Attacking the majority’s unwillingness to recognize the special nature of the employment relationship, Justice Kaufman commented that “no relationship . . . places more reliance upon the other, is more dependent upon the other, or is more vulnerable to abuse by the other, than the relationship between employer and employee.”33 Additionally, the Justice viewed the majority’s reluctance as an unusual abdication of “their responsibility for the upkeep of the common law,”34 particularly considering the court’s judicial activism in other areas.


30. Foley, 47 Cal. 3d at 701, 765 P.2d at 402, 254 Cal. Rptr. at 240 (Broussard, J., concurring & dissenting).
31. See id. at 703-15, 765 P.2d at 402-12, 254 Cal. Rptr. at 240-50 (Broussard, J., concurring & dissenting).
32. Id. at 715, 765 P.2d at 412, 254 Cal. Rptr. at 250 (Kaufman, J., concurring & dissenting) (emphasizing original).
33. Id. at 718, 765 P.2d at 415, 254 Cal. Rptr. at 253 (Kaufman, J., concurring & dissenting).
34. Id. at 719, 765 P.2d at 415, 254 Cal. Rptr. at 253 (Kaufman, J., concurring & dissenting) (quoting People v. Pearce, 61 Cal. 2d 879, 882, 395 P.2d 893, 895, 40 Cal. Rptr. 845, 847 (1964)).
C. Justice Mosk's Opinion

While generally agreeing with the comments of Justices Broussard and Kaufman, Justice Mosk's dissent focused on the public policy exception to the at-will doctrine.35 Noting Labor Code section 1102.5(b),36 which prohibits retaliation for "whistleblowing" to law enforcement agencies, Justice Mosk contended that to condone retaliatory discharge for disclosures to one's employer produced an "incongruous" result.37

V. IMPACT OF THE COURT'S DECISION

A recent study indicates that more than one thousand wrongful discharge claims are filed annually in California.38 Although most cases are resolved prior to trial for an average settlement to plaintiff of $20,000, the average jury award between 1980 and 1986 was $208,000.39

Nonetheless, Foley is not expected to significantly reduce the number of wrongful discharge claims.40 Mistreated employees can still assert claims based on discrimination, privacy issues, defamation, fraud, and false imprisonment. However, compensatory damages for emotional suffering and punitive damages for willful conduct—both associated with the manner in which the employee was discharged—are now essentially foreclosed under a bad faith theory.41 In fact, some legal commentators view Foley as indicative of the court's hostility to "efforts by employees to regulate arbitrary behavior by an employer through substantial monetary awards."42

35. See id. at 723-24, 765 P.2d at 418, 254 Cal. Rptr. at 256 (Mosk, J., dissenting).
37. Foley, 47 Cal. 3d at 724, 765 P.2d at 418, 254 Cal. Rptr. at 256 (Mosk, J., dissenting).
39. N.Y. Times, Dec. 30, 1988, § D, at 1, col. 1 (citing the September 1988 survey by the Rand Institute for Civil Justice). However, in 1987, the average settlement was over $916,000, an increase of 64% from 1986. 2 S.F. Bus. Times No. 24, Feb. 15, 1988, § 1, at 1.
41. See supra note 40. Also note that by basing the implied covenant claim in contract, plaintiffs can take advantage of the four-year statute of limitations, rather than the shorter tort period. See CAL. CIV. PROC. CODE § 337(1) (West 1982) (statute of limitations for contract claims).
The impact of Foley is not, however, likely to be limited to employment situations, but is anticipated to be far-reaching. Speculation exists that lenders will utilize Foley to avoid tort claims and associated punitive damage awards in bad faith claims initiated by disgruntled borrowers.43 These efforts will be buttressed by the court's refusal to adopt the Seaman's rationale which approved tort remedies in standard commercial contract interpretation.44

The court's opinion did not address the issue of retroactivity.45 Although the court is expected to resolve this question in Newman v. Emerson Radio Corporation,46 a recent decision by the Court of Appeal for the Second District47 held that Foley is not applicable to cases filed before the supreme court handed down its decision in December, 1988.

VI. CONCLUSION

California now joins the vast majority of states which have expressly or impliedly rejected tort damages in employment at will contracts.48 The California Supreme Court, now dominated by Governor Deukmejian's conservative appointees, continues to dismantle the expansive development of common law doctrines which were the hallmark of the Bird era.

Stemming the tide of wrongful discharge litigation will require more, however, than judicial fiat. Long overdue is action by the legislature to contain the barrage of employment litigation for which California has been so well known. As Professor Gould suggests, perhaps the answer lies in an arbitration system specially designed to resolve these complicated and emotional disputes.49

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44. See supra notes 25-27 and accompanying text.
45. See Foley, 47 Cal. 3d at 700 n.43, 765 P.2d 402 n.43, 254 Cal. Rptr. at 240 n.43.
46. No. LA 32284 (review granted Dec. 11, 1986).

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C. Religious organizations using coercive persuasion to recruit members may be subject to tort liability based on acts of fraudulent deception and cannot rely on the free exercise clause to protect this tortious conduct: Molko v. Holy Spirit Association.

I. INTRODUCTION

In Molko v. Holy Spirit Association, the court held that causes of action for fraud, intentional infliction of emotional distress, and restitution were available to former church members initially recruited through the use of fraudulent misconceptions regarding the true identity of the religious organization. The court based liability on the theory that the coercive and deceptive nature of the Church’s recruitment activities removed the first amendment protection regularly given to religious activity. Refusing to extend a cause of action based on false imprisonment, the court held that there was no physical restraint and that the imprisonment in the instant case was manifested through constitutionally protected religious speech. The court additionally noted that indemnity claims made by religious organizations against deprogrammers must include the element of concurrent liability.

II. FACTUAL BACKGROUND

David Molko and Tracy Leal were young adults uncertain of their future when they were initially approached by members of the Unification Church. Both were separately befriended by church mem-

2. Molko, 46 Cal. 3d at 1119-20, 762 P.2d at 61, 252 Cal. Rptr. at 137.
3. Id. at 1123, 762 P.2d at 63, 252 Cal. Rptr. at 139.
4. Id. at 1125, 762 P.2d at 65, 252 Cal. Rptr. at 141.
6. Molko, 46 Cal. 3d at 1123-24, 762 P.2d at 64, 252 Cal. Rptr. at 140.
7. Id. at 1127-28, 762 P.2d at 66-67, 252 Cal. Rptr. at 142-43.
8. This religious organization, founded by the Reverend Sun Myung Moon in 1954, claims over three million members. Its goal is to “unify the human family in ‘eternal happiness, completely liberated from ignorance and directed toward goodness.’” RUDIN & RUDIN, PRISON OR PARADISE? THE NEW RELIGIOUS CULTS 31-32 (1980).
bers while waiting at San Francisco bus stops—Molko in 1978 and Leal in 1979. The pattern of the church recruiters was the same with both. Molko and Leal were first invited to share a meal with the recruiters and after conversation with other group members and a slide show, both agreed to visit a group-owned "farm" a few hours away. At no time did the recruiters or the other group members reveal that they were affiliated with the Unification Church, even though Molko and Leal asked, before accepting the dinner invitation, whether the members were part of a religious organization. At the farm, Molko and Leal were both subjected to a rigorous schedule of exercise, lectures, group discussions, and "testimonials," and encouraged to stay at the facility. Still oblivious to the true nature of the group’s affiliation and continuing to question the members about it, both were experiencing uncertainty and disorientation. However, Molko and Leal agreed to attend another camp where they were further indoctrinated and finally told of the affiliation with the Unification Church. Both eventually became formal Church members and Molko was persuaded to give the Church $6000. Molko and Leal were later successfully "abducted" and convinced to abandon the Church by deprogrammers hired by their parents.

Molko and Leal sued the Church, claiming fraud and deceit, intentional infliction of emotional distress, and false imprisonment. Additionally, based on an allegation of undue influence, Molko sought restitution of the $6000 he had given to the Church. In a cross-complaint, the Church claimed that its civil rights were violated by Molko and the deprogrammer. The Church also sought from the deprogrammer full or partial indemnity regarding Molko's alleged injuries.

A summary judgment was granted in favor of the Church by the trial court on the issues of fraud, intentional infliction of emotional distress, and false imprisonment. The cross-complaint was dismissed. After consolidation of the appeals, the court of appeal reversed the dismissal of the Church's cross-complaint, but upheld the summary judgment granted in its favor.

III. MAJORITY OPINION

A. Cause of Action Based on Fraud

Molko and Leal asserted that they had "justifiably relied" on the Church's deliberate deceptions and subsequently were emotionally and monetarily injured from this coercion into Church membership.

9. Leal was not told of the group's true identity until 22 days after her first encounter with the recruiters; Molko was told after approximately two weeks. Molko, 46 Cal. 3d at 1102-12, 762 P.2d at 49-52, 252 Cal. Rptr. at 125-28.

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Molko and Leal based this assertion on the theory that the Church had “brainwashed” them through systematic psychological indoctrination at the camps. In reversing the court of appeal and allowing the fraud action, the court determined that the existence of covert “coercive persuasion” on the part of a religious organization may subject that organization to possible fraud liability. The court additionally held that no constitutional protection was available to shield deceptive recruitment conduct even though these practices were considered religiously motivated activity.

The court first discussed whether triable issues of fact remained regarding Molko and Leal’s justifiable reliance on the Church’s intentional misrepresentation of its identity. The Church conceded all the necessary elements of the fraud claim except one—maintaining that no justifiable reliance existed because the recruiters revealed the affiliation with the Church prior to Molko and Leal formally joining the organization. Molko and Leal, however, asserted that justifiable reliance was established when the Church “subject[ed] them, without their knowledge or consent, to an intense program of coercive persuasion,” which subsequently “rendered them incapable of deciding not to join the Church” once its true affiliation was revealed.

Citing numerous past decisions involving religious organizations and brainwashing, the court reasoned that since a controversy currently exists over the existence and effects of brainwashing techniques, triable issues of fact remained to prevent a granting of summary judgment in favor of the Church by the lower court. The
court further held that testimony by Molko and Leal's expert witnesses regarding coercive persuasion was admissible, thus rejecting the Church's assertion that this testimony was precluded by the free exercise clause of the first amendment.16

In analyzing the constitutional issues inherent within the regulation of religious activity, the court emphasized that "while religious belief is absolutely protected [by the free exercise clause], religiously motivated conduct is not."17 The court stressed that religious conduct "remains subject to regulation for the protection of society" and may be judicially restricted or banned.18 The court found the balancing test articulated in Wisconsin v. Yoder19 to be the appropriate standard for analyzing the Church's recruiting practices. In applying this test, "the importance of the state's interest is weighed against the severity of the burden imposed on religion."20 Additionally, the court held that any government regulation must be both non-discriminatory and not create a greater burden than necessary to achieve its purpose.21

The Church relied on Katz v. Superior Court22 for its assertion that judicial scrutiny into the truth or falsity of religious beliefs and any accompanying coercive persuasion, is prohibited by the first amendment. The court, however, in distinguishing Katz, held that the issue in the immediate case involved the examination of misleading and coercive religious conduct and not an inquiry into religious belief, i.e., the validity of the Church's religious teachings, or the validity of the member's faith.23

In applying the Yoder balancing test to the Church's recruitment actions, the court acknowledged that a burden on the free exercise of

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16. *Id.* at 1110-11, 762 P.2d at 55, 252 Cal. Rptr. at 131.
17. *Id.* at 1112, 762 P.2d at 56, 252 Cal. Rptr. at 132 (quoting Sherberr v. Vernor, 374 U.S. 398, 402-03 (1963) (emphasis in original)); see also Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) ("[T]he [f]irst [a]mendment embraces two concepts- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.").
21. *Id.* at 1118, 762 P.2d at 57, 252 Cal. Rptr. at 136; see Braunfeld v. Brown, 366 U.S. 599, 606 (1961) (Sunday closing law valid as only an "indirect burden on the exercise of religion").
22. 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977) (parental conservatorship action denied as too extreme a remedy where gullible adult children had been subjected to coercive persuasion by religious organization).
23. *Molko*, 46 Cal. 3d at 1115, 762 P.2d at 59, 252 Cal. Rptr. at 135.
religion would result if religious organizations were subject to fraud liability.24 Calling this burden insignificant, the court recognized that this liability would merely act as deterrent to “recruiting through deception.”25 The court found that the compelling state interest in protecting society from the threat to public safety posed by the use of coercive persuasion warranted this slight burden on the Church.26 The court further noted that the availability of a cause of action for fraud is both nondiscriminatory and the least burdensome method for ensuring that the public is shielded from the “harmful effects of fraudulent recruitment.”27

B. Cause of Action Based on Intentional Infliction of Emotional Distress

In assessing the viability of Molko and Leal’s cause of action for intentional infliction of emotional distress, the court first confirmed that first amendment protection would shield the Church if the basis of the claim consisted solely of “threats of divine retribution.”28 However, because Molko and Leal’s assertion that the fraudulent misrepresentations and brainwashing techniques used by the Church composed the heart of their claim, the court held that further analysis was appropriate.29

In establishing the necessary elements within this cause of action, the court noted that the Church challenged only the allegation that the recruiting practices were “extreme and outrageous” within the test enunciated in Cole v. Fair Oaks Fire Protection District.30 In defending its practices, the Church first claimed that its conduct was similar to actions taken by other religious organizations, and alterna-

24. Id. at 1117, 762 P.2d at 59, 252 Cal. Rptr. at 135.
25. Id. The court emphasized that:
Being subject to liability for fraud does not in any way or degree prevent or inhibit Church members from operating their religious communities, worshiping as they see fit, freely associating with one another, selling or distributing literature, proselytizing on the street, soliciting funds, or generally spreading the Reverend Moon’s message among the population.
Id. at 1117, 762 P.2d at 60, 252 Cal. Rptr. at 136.
26. Id. at 1117-18, 762 P.2d at 60-61, 252 Cal. Rptr. at 136-37.
27. Id. at 1119, 762 P.2d at 61, 252 Cal. Rptr. at 137.
28. Id. at 1120, 762 P.2d at 61, 252 Cal. Rptr. at 137.
29. Id. at 1120, 762 P.2d at 62, 252 Cal. Rptr. at 138.
30. 43 Cal. 3d 148, 155 n.7, 729 P.2d 743, 746 n.7, 233 Cal. Rptr. 308, 312 n.7 (1987) (citing Agarwal v. Johnson, 25 Cal. 3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979)). The other three elements are “intention to cause or reckless disregard of the probability of causing emotional distress,” “severe emotional suffering,” and “actual and proximate causation of the emotional distress.” Id.
tively, contended that any injury resulting was "self inflicted." The court summarily rejected these assertions stating that the Church practices were arguably outrageous based on "an abuse of 'a relation or position which gives [the Church] power to damage the plaintiff's interest.'"31 The court concluded that the lower court's granting of a summary judgment in favor of the Church on this claim was error.32

C. False Imprisonment Claim

Though conceding that she was not physically prevented from leaving the camps, Leal asserted that the Church falsely imprisoned her through threats that "her family 'would be damned in Hell forever'"33 should she depart the Church. In rejecting Leal's challenge to the summary judgment granted in favor of the Church, the court again stressed the constitutional protection given to religious speech. The court confirmed that tort liability cannot lie for mere threats of "divine retribution."34

D. Restitution Claim

Based on an allegation of undue influence caused by Church brainwashing, Molko sued for restitution of the $6000 donation he made to the Church. The court rejected the court of appeal assertion that judicial review of the gift was constitutionally prohibited by the free exercise clause, and instead, held that Molko's restitution claim was merely "a natural extension of his fraud theory."35 The court concluded that it was error for the appellate court to have affirmed the trial court's summary judgment in favor of the Church.36

E. Cross-Complaint Based on Civil Rights Violations & Indemnification

The Church cross-complained against the deprogrammer that abducted Molko, asserting that the Church's federal and state civil rights were violated by his actions, and that the deprogrammer should be subject to full or partial indemnity regarding the alleged

32. Molko, 46 Cal. 3d at 1123, 762 P.2d at 63, 252 Cal. Rptr. at 139.
33. Id. at 1124, 762 P.2d at 64, 252 Cal. Rptr. at 140. See generally Fowler v. Rhode Island, 345 U.S. 67 (1953). It is not "in the competence of the courts under our constitutional scheme to approve, disapprove, classify, regulate or in any manner control sermons delivered at religious meetings." Id.
34. Id. at 1124, 762 P.2d at 64, 252 Cal. Rptr. at 140.
35. Molko, 46 Cal. 3d at 1125, 762 P.2d at 65, 252 Cal. Rptr. at 141.
injuries to Molko. The Church based its civil rights claim on the assertion that "it had representational standing to sue for a violation of its members' constitutionally guaranteed right to travel."\footnote{Id. at 1126, 762 P.2d at 65, 252 Cal. Rptr. at 141.} The court upheld the court of appeal's reinstatement of the cross-complaint and rejected the deprogrammer's arguments, holding that issues of fact remained which made the granting of the demurrer inappropriate.\footnote{Id. at 1126-27, 762 P.2d at 66, 252 Cal. Rptr. at 142.}

The court lastly examined whether an indemnification action may lie in this case and concluded that the Church's claim against the deprogrammer for indemnity lacked the necessary element of concurrent liability for Molko's injuries.\footnote{Id. at 1127-28, 762 P.2d at 66-67, 252 Cal. Rptr. at 142-43.} This determination prevented the court from directly resolving the issue of whether comparative fault applies to indemnity actions by concurrent tortfeasors.

IV. CONCURRING AND DISSENTING OPINION

Justice Carl Anderson, Presiding Justice of the First Appellate District, filed a lengthy concurring and dissenting opinion proclaiming the belief that the majority erred in allowing judicial scrutiny of the Church's recruitment practices and that "religious conversion is simply not subject to judicial review."\footnote{Id. at 1128-29, 762 P.2d at 68, 252 Cal. Rptr. at 144 (Anderson, J., concurring and dissenting).} Anderson continually stressed his concern that the imposition of tort liability necessarily will lead courts into constitutionally forbidden scrutiny of the verity of religious beliefs.\footnote{For further discussion regarding judicial inquiry into religious beliefs, see Shapiro, Of Robots, Persons, and the Protection of Religious Beliefs, 56 S. CAL. L. REV. 1277 (1983).} In citing numerous cases supporting the position that church indoctrination practices are not actionable due to first amendment protection, Justice Anderson strongly emphasized the inherent inseparable entanglement of religious belief and religiously motivated conduct.\footnote{See generally United States v. Ballard, 322 U.S. 78 (1944); Founding Church of Scientology v. United States, 409 F.2d 1146 (1969), cert denied, 396 U.S. 963 (1969); Lewis v. Holy Spirit Ass'n, 589 F. Supp. 10 (D. Mass. 1983).}

Justice Anderson further sought to establish as analogous the conversion methods used by the Church, and similar methods used by
more traditional religious groups. He additionally questioned the majority's determination that the Church's conduct was outrageous. Noting that Molko's $6000 gift was "a product of free will," Justice Anderson stressed early in his opinion that "both before and after the disclosure of the group's true identity, both appellants retained their ability to think, to evaluate the events and to exercise their independent judgment."

V. CONCLUSION

The California Supreme Court's extension of tort liability to the recruitment practices of religious organizations is the proper deterrent needed to curtail the coercive brainwashing techniques used to indoctrinate unknowing persons unwillingly into these churches. Justice Anderson's well-meaning concern is groundless. The majority properly enunciated the bright line separating the Church's unprotected tortious conduct and its constitutionally protected religious beliefs.

In attempting to justify the Church's questionable method of proselytization through isolation from family, Justice Anderson's opinion noted that the Bible quotes Jesus as stating: "He who loves father or mother more than me is not worthy of me." However, the Bible also clearly speaks of "putting away lying," and letting "no corrupt communication proceed out of your mouth." Outright deception and exploitation of gullible young people has no place within any religion that seeks the protection of the free exercise clause. Regarding tort liability, it appears that in California, at least, the Church and other religious organizations like it will finally be answerable to a higher authority—the civil law.

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43. Molko, 46 Cal. 3d at 1137-38, 762 P.2d at 73-74, 252 Cal. Rptr. at 149-50 (Anderson, J., concurring and dissenting).
44. Id. at 1144, 762 P.2d at 78, 252 Cal. Rptr. at 154 (Anderson, J., concurring and dissenting).
45. Id. at 1131, 762 P.2d at 69, 252 Cal. Rptr. at 145 (Anderson, J., concurring and dissenting).
46. Id. at 1138, 762 P.2d at 74, 252 Cal. Rptr. at 150 (Anderson, J., concurring and dissenting) (citing Matthew 10:37 (King James version)).
47. Ephesians 4:25 (King James version).
48. Id. at 4:29.
D. Nontherapist counselors have no legally recognizable duty to refer suicidal persons to professional mental health experts, even if a future suicide attempt is foreseeable: Nally v. Grace Community Church.

I. INTRODUCTION

In Nally v. Grace Community Church, the court held that religious counselors who provide guidance to potentially suicidal persons have no duty to refer those persons to licensed practitioners. Citing public policy considerations, the court rejected the sweeping duty to refer imposed by the court of appeal. The court further denied the plaintiff's claim for wrongful death based on intentional infliction of emotional distress, since no facts existed that sufficiently proved outrageous conduct on the part of the defendant church.

II. FACTUAL BACKGROUND

Twenty-four year old Kenneth Nally was found dead in a friend's apartment on April 1, 1979, due to a self-inflicted gunshot wound. His suicide culminated a long bout with depression regarding family and girlfriend problems. Nally joined the Grace Community Church of the Valley ("the Church") as a student in 1974, when he was first experiencing depression. As "the largest Protestant church in Los Angeles County," the Church employed thirty counselors to administer "pastoral counseling" to those needing spiritual guidance regarding numerous kinds of problems. This pastoral counseling was primarily effectuated through prayer and one-on-one religious study; it was not "professional or clinical" in nature.

Between 1975 and his death, Nally shared his personal problems with three Church pastors, through both formal and informal relationships.

3. Nally, 47 Cal. 3d at 300, 763 P.2d at 961, 253 Cal. Rptr. at 110.
4. Id. at 300-04, 763 P.2d at 961-64, 253 Cal. Rptr. at 110-13.
5. Id. at 284, 763 P.2d at 950, 253 Cal. Rptr. at 99. The court noted that the Church's congregation numbered "more than 10,000." Id.
6. Id. Justice Kaufman disputes this in his separate opinion. He asserts that the counseling offered by the Church was much broader in scope and more sophisticated than what was portrayed by the majority. See infra notes 46-47 and accompanying text.
gious counseling. Nally’s depression worsened late in 1978, and he received treatment under the care of several physicians, but no psychiatrists. Nally evidenced suicidal tendencies, and in March 1979, was hospitalized for a deliberate overdose of a prescription drug. Nally was later released after he and his family strongly rejected the Church pastors’ and physicians’ suggestion of commitment to a psychiatric facility. Two weeks later, after two more physical examinations, more informal pastoral counseling, and a marriage proposal rejection, Nally took his own life.

A wrongful death action was brought against the Church and four of its pastors. The plaintiff parents based their claim on three theories: first, “clergyman malpractice,” asserting that the defendant Church and pastors breached a duty to prevent their son’s suicide; second, negligence in the “training, selection and hiring of [the] . . . spiritual counselors” and in the counseling Nally received after his first suicide attempt; and third, wrongful death based on intentional infliction of emotional distress.

III. PROCEDURAL HISTORY

A. Nally I

The trial court initially granted a summary judgment for the defendants. The court of appeal reversed, stressing the existence of triable issues of fact regarding the plaintiff’s allegation that intentional infliction of emotional distress played a role in their son’s suicide. The supreme court denied defendants’ petition for review, depublished the Nally I opinion, and remanded to the trial court.

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7. Nally, 47 Cal. 3d at 287, 763 P.2d at 952, 253 Cal. Rptr. at 101. Nally’s parents are apparently the first plaintiffs ever to assert this cause of action. See Ericsson, Clergyman Malpractice: Ramifications of a New Theory, 16 VAL. U.L. REV. 163, 164 & n.4 (1981). This article points to many of the difficulties courts will encounter in analyzing this cause of action, including lack of existing objective standards, and difficulty in analyzing the different counseling methods and objectives between the numerous different religious faiths. Id. at 166-73.

8. Nally, 47 Cal. 3d at 287, 763 P.2d at 952, 253 Cal. Rptr. at 101.

9. Id. at 287-88, 763 P.2d at 952-53, 253 Cal. Rptr. at 101-02.

10. Id. at 288, 763 P.2d at 953, 253 Cal. Rptr. at 102.

11. Id. The court of appeal cited three episodes that indicated outrageous conduct on the part of the defendant pastors: an incident where the plaintiff father discovered Nally “on his knees crying” in Pastor Cory’s office, deposition evidence that severe depression may be caused by pastoral counseling, and taped remarks by Pastor Thomson indicating that those who commit suicide can still enter heaven if they remain true to their faith. Id. Additionally, the defendants’ first amendment defenses were disallowed regarding Pastor Thomson’s taped statements. Id. at 288-89, 763 P.2d at 953, 253 Cal. Rptr. at 102.

12. Id. at 289, 763 P.2d at 953, 253 Cal. Rptr. at 102.
B. Nally II

On remand, the trial court found that the defendants' were entitled to a nonsuit, since there was insufficient justification for regulation of the Church's pastoral counseling, and no proof of any breach of duty by the Church and its pastors. The trial court also excluded Pastor Thomson's taped remark from evidence.

The court of appeal reversed the nonsuit, stating that by combining the plaintiff's cause of action for "clergyman malpractice" with the plaintiff's cause of action for negligence, a cause of action existed for the "'negligent failure to prevent suicide' by 'nontherapist counselors.'" It further held that this duty mandated nontherapist counselors to refer persons with suicidal tendencies to professionals trained to handle this specific problem. The court of appeal stated that this duty was constitutional under the free exercise of religion clause within the first amendment to the United States Constitution.

Additionally, the court of appeal held that the trial court's exclusion of Pastor Thomson's taped remarks was error. The supreme court granted review to resolve the conflicts within the Nally I and Nally II decisions.

13. Id. at 289-90, 763 P.2d at 954, 253 Cal. Rptr. at 103. If the court finds that "as a matter of law, the evidence presented by [the] plaintiff is insufficient to permit a jury to find in his favor," then a nonsuit may be granted to the defendant. Id. at 291, 763 P.2d at 955, 253 Cal. Rptr. at 102 (citing Cambell v. General Motors Corp., 32 Cal. 3d 112, 117-18, 649 P.2d 224, 227, 184 Cal. Rptr. 891, 894 (1982)); see also 7 B. WITKIN, CALIFORNIA PROCEDURE, Trial §§ 409-410 (3d ed. 1985) (plaintiff needs to put forth "substantial evidence").

14. Nally, 47 Cal. 3d at 289, 763 P.2d at 954, 253 Cal. Rptr. at 103.

15. Id. at 289-90, 763 P.2d at 954, 253 Cal. Rptr. at 103. The trial court based this exclusion on the discretionary provision within Evidence Code section 352 allowing a court to bar certain evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." CAL. EVID. CODE § 352 (West 1966 & Supp. 1989); see also Nally, 47 Cal. 3d at 289-90 n.5, 763 P.2d at 954 n.5, 253 Cal. Rptr. at 103 n.5.

16. Justice Cole filed a dissent with the court of appeal opinion that rejected both the majority's imposition of a duty of care and the allowing of the wrongful death cause of action that rested on intentional infliction of emotional distress. Nally, 47 Cal. 3d at 290-91, 763 P.2d at 954, 253 Cal. Rptr. at 103.

17. Id. at 290, 763 P.2d at 954, 253 Cal. Rptr. at 103.

18. Id.

19. The free exercise clause states that laws cannot "prohibit the free exercise of [religion]. . . ." U.S. CONST. amend. I.

20. Nally, 47 Cal. 3d at 290, 763 P.2d at 954, 253 Cal. Rptr. at 103.
IV. MAJORITY OPINION

A. Duty of Care Analysis

The court addressed the sweeping “duty to refer” imposed by the court of appeal on all nonprofessional counselors by analyzing whether this broad imposition genuinely created a viable legal duty which, if breached, gives rise to a cause of action in tort. The court noted the general rule that a special relationship “of custody or control” must exist between parties in order for a duty to protect to arise. The court further identified numerous other factors that must be examined before imposing a duty of care: foreseeability and certainty of injury, proximity between the plaintiff’s injury and the defendant’s actions, culpability of the defendant, the burdens involved with imposition of liability, and the existence of insurance coverage.

In examining the requirement of a special relationship, the court referred to two California Supreme Court cases, Meier v. Ross General Hospital, and Vistica v. Presbyterian Hospital, which both imposed a “duty to prevent a foreseeable suicide.” The court rejected the court of appeal and plaintiff’s contention that the Meier and Vistica duty of care should be extended to pastoral and other nonprofessional counselors. The court emphasized that these two cases specifically delineate a duty to prevent a suicide only when a specific relationship between the hospital and the deceased exists, namely, a “supervised medical relationship.”

The court similarly disapproved of the reliance by the court of appeal and the plaintiff on dictum expressed in Bellah v. Greenson. In distinguishing Bellah, the court noted the dictum in that case merely expressed the opinion that a traditional “professional malpractice"
action may be brought against professional counselors who fail to adequately treat suicidal patients. The court emphasized that the aforementioned cases all involved the existence of a certain special relationship that is not present in the case at bar—a licensed psychiatrist-patient or hospital-patient relationship.

B. Defendant's Conduct and Foreseeability of Harm

The court next examined whether the defendants' knowledge of Nally's continuing suicidal tendencies after his unsuccessful suicide attempt was sufficient to warrant levying a duty to refer upon professional therapists. The court held that the mere awareness of a person's suicidal tendencies and the foreseeability of a future successful suicide attempt will not give rise to a comprehensive duty to refer. The court reasoned that ruling otherwise could lead to a chilling effect on the giving of altruistic counseling.

C. Public Policy

In rejecting the plaintiff's causes of action, the court discussed several other policy considerations in addition to this chilling effect. The court remarked that troubled persons may be reluctant to seek any kind of counseling, for fear of the possibility of "involuntary commitment" by counselors obliged to take action once a duty to refer is applicable.

The court further noted evidence of indirect legislative support for the denial of the imposition of the duty to refer. The court specifically referred to the existence of "Good Samaritan" laws designed to inspire volunteer assistance to those in need, and to the clergy exemption from the licensing laws that regularly apply to professional counselors and psychiatrists. The court emphasized that the legislature "has recognized that access to the clergy for counseling should

31. Id. at 296, 763 P.2d at 958, 253 Cal. Rptr. at 107.
32. Id. at 297, 763 P.2d at 959, 253 Cal. Rptr. at 108.
33. Id.
34. Id.
35. Id. at 298, 763 P.2d at 960, 253 Cal. Rptr. at 109; see, e.g., CAL. HEALTH & SAFETY CODE § 1799.102 (West Supp. 1989) (persons who "render emergency care at the scene of an emergency" may escape civil liability if they acted "in good faith and not for compensation").
be free from state-imposed counseling standards.\textsuperscript{37}

\textbf{D. Wrongful Death Based on Intentional Infliction of Emotional Distress}

The court next addressed whether the conduct of the defendants in counseling Nally rose to the level of a legitimate claim for wrongful death based on intentional infliction of emotional distress.\textsuperscript{38} The court cited \textit{Tate v. Canonica}\textsuperscript{39} as the correct standard for imposing liability, stating that a plaintiff must "allege facts sufficient to show that defendant's conduct was outrageous \textit{and} a substantial factor in the . . . suicide."\textsuperscript{40}

The court focused on the trial court's exclusion of a taped lecture given by Pastor Thomson eighteen months after Nally's suicide. The taped statements allegedly confirmed the plaintiff's belief that the Church actively counsels that persons committing suicide will enter heaven so long as they remain faithful believers in God.\textsuperscript{41} The court of appeal overturned this exclusion, after determining that this evidence was crucial to plaintiff's proof that the defendant's counseling methods were outrageous, and held that the tape was admissible.\textsuperscript{42}

In upholding the trial court's exclusion, the supreme court held that the exclusion was proper under Evidence Code section 352, since this tape did not demonstrate that the defendants abetted Nally's suicide in any way, and the taped statement was "simply too temporally remote to establish any causal connection with Nally's suicide."\textsuperscript{43} The court explained that the pastoral counseling received by Nally would have been individualized, and any general statements about suicide made eighteen months later by the defendant pastor is only "at best marginally relevant."\textsuperscript{44}

\textbf{IV. Justice Kaufman's Separate Opinion}

Justice Kaufman agreed that the nonsuit was correct; however, he filed a separate opinion to assert that the defendants owed at least a

\textsuperscript{37} \textit{Nally}, 47 Cal. 3d at 298, 763 P.2d at 959-60, 253 Cal. Rptr. at 108-09.
\textsuperscript{38} For additional analysis regarding church liability and the tort claim of intentional infliction of emotional distress, see generally Note, \textit{Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise"?}, 84 MICH. L. REV. 1296 (1986) (a case-by-case factual analysis in light of the free exercise clause defense is appropriate where spiritual counseling allegedly causes emotional distress).
\textsuperscript{39} 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960).
\textsuperscript{40} \textit{Nally}, 47 Cal. 3d at 301, 763 P.2d at 961, 253 Cal. Rptr. at 110 (citing \textit{Tate}, 180 Cal. App. 2d at 909, 5 Cal. Rptr. at 36).
\textsuperscript{41} \textit{Id.} at 288, 302-03, 763 P.2d at 952-53, 962-63, 253 Cal. Rptr. at 101-02, 111-12.
\textsuperscript{42} \textit{Id.} at 301, 763 P.2d at 961-62, 253 Cal. Rptr. at 110-11.
\textsuperscript{43} \textit{Id.} at 303-04, 763 P.2d at 963, 253 Cal. Rptr. at 112.
\textsuperscript{44} \textit{Id.} at 304, 763 P.2d at 963, 253 Cal. Rptr. at 112.
“minimal” duty of care to Nally. Kaufman first focused on evidence indicating that the Church’s counseling services were more comprehensive than that portrayed by the majority, and the counselors were fully competent to deal with serious mental health problems. Kaufman then argued that the defendants specifically “undertook” the treatment of Nally’s psychological problems. However, Justice Kaufman concluded that a minimally adequate duty of care was met by the defendant pastors when they encouraged medical treatment for Nally.

VI. CONCLUSION

The majority’s rejection of a clergyman’s duty to refer clearly demonstrates a strong reluctance to interfere in the sensitive area of spiritual counseling. The court recognized the inherent difficulties that would arise in enforcement of this duty, and the important public policy of encouraging the altruistic counseling of those deeply troubled persons who seek either formal or informal religious guidance.

Apart from a forced commitment to a psychiatric hospital, only Nally himself could have prevented his tragic suicide. If a duty to refer is extended to nonexperts like pastors, priests, and ministers, this begs the question of where this duty really ends under the broad standards espoused by the plaintiffs and the court of appeal. Where should the line be drawn? After all, if such a sweeping duty is imposed, cannot it then be argued that it would also apply to the plaintiff parents, since they had the requisite knowledge that their son’s

45. Id. at 305, 763 P.2d at 964, 253 Cal. Rptr. at 113 (Kaufman, J., concurring in part and dissenting in part).
46. Kaufman notes that the Church’s annual report refers to its pastoral counseling as “a very important part of the ministry,” and that the Church counseled a large number of outsiders that were not Church members. Id.
47. Id. at 306-07, 763 P.2d at 965, 253 Cal. Rptr. at 114 (Kaufman, J., concurring in part and dissenting in part). Kaufman cites testimony by the pastors regarding this expertise, and refers to counseling details within a Church publication called “A Guide For Biblical Counselors.” Id.
49. Id. at 313, 763 P.2d at 970, 253 Cal. Rptr. at 119 (Kaufman, J., concurring in part and dissenting in part).
suicide was foreseeable, and also had a custodial-like, parental counseling relationship with him?

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XI. WELFARE & INSTITUTIONS CODE

Requiring parents whose children are wards of the court to reimburse AFDC-FC expenditures to support these children does not violate the equal protection clause, provided the reimbursement does not include any amounts spent on rehabilitation or societal protection: County of San Mateo v. Dell.

In County of San Mateo v. Dell, 46 Cal. 3d 1236, 762 P.2d 1202, 252 Cal. Rptr. 478 (1988), the court considered whether California can require parents to contribute to their children's support after their children are declared wards of the court. The court held that section 11350 of the Welfare and Institutions Code, which imposes this responsibility upon parents, does not violate the equal protection clause, even when protection of society is a consideration in a court's decision. See Cal. Welf. & Inst. Code § 11350 (West 1980); Annotation, Liability of Parent for Support of Child Institutionalized by Juvenile Court, 59 A.L.R. 3d 636 (1974).

After Dell, Jr., committed two serious crimes, the County of San Mateo removed him from his parents' custody and declared him a ward of the court under section 602 of the California Welfare and Institutions Code. See Cal. Welf. & Inst. Code § 602 (West 1980 & Supp. 1989). Although the county was concerned with protecting society, this was not the primary motivation for seeking such a declaration. Dell, Jr., was placed in a nonsecure group foster home.

Throughout this period, Aid to Families with Dependent Children—Foster Care (AFDC-FC) funds were used to support Dell, Jr. The county brought suit to compel the minor's parents to reimburse the portion of these funds relating to the support and maintenance of the youth pursuant to section 11350. See Cal. Welf. & Inst. Code § 11350 (West 1980). The trial court granted the county's request for reimbursement. The court of appeal reversed, holding that equal protection prohibited the state from placing a financial burden on an individual when one of the purposes of the removal was the protection of society.

In its decision, the supreme court first reviewed the nature of AFDC and its relation to state law. Through AFDC, the federal government provides states with funds which are distributed to needy families. One of the requirements of the federal program is that the state must seek reimbursement from parents when AFDC-FC funds
are utilized to support children who are removed from their parents' home by the state. See generally 42 U.S.C. § 601 (1982).


The court considered its earlier decision in the case of In re Jerald C., 36 Cal. 3d 1, 678 P.2d 917, 201 Cal. Rptr. 342 (1984). Jerald C. involved the question of forced parental contributions for a child declared a ward of the court under section 602. The court unanimously held that equal protection prohibited placing the burden of supporting a public program upon a few individuals. The court was divided, however, on whether the parents could be required to reimburse the county for the reasonable amounts expended on basic support of minors removed from parental custody. The lead opinion garnered the support of three members of the court; whereas, four justices signed the separate concurrence. Thus, the concurrence actually represented a majority decision, and was so labeled by the court in Dell. See 16 CAL. JUR. 3D Courts §§ 207, 208 (1983). The supreme court reasoned that because the court of appeals in the present case had relied upon the analysis of the lead opinion in Jerald C., its holding was flawed.

The court then reviewed the decision of Jerald C. Although the lead opinion maintained that the statutory requirement was not drawn narrowly enough to pass constitutional muster, the majority of the justices in Jerald C. believed that a parent could be required to pay the state “whatever he saves by not having to support” the child himself. Jerald C., 36 Cal. 3d at 11, 678 P.2d at 923, 201 Cal. Rptr. at 348 (Kaus, J., concurring).

Having reviewed its prior holdings, the court in Dell then focused on the nature and reasons for the removal of Dell, Jr., from his parents. Although Dell, Jr., was not placed in a secure facility, the court opined that confinement for the protection of society is anticipated to some degree in all such removals. However, the court reasoned that the nature of the facility or the reasons for the wardship did not af-
fect the legal obligations of support a parent owes to a child. Thus, the parent can be compelled to reimburse the county for such support. The court enunciated the standard by stating that “the county must bear the burden of demonstrating that the costs it seeks to impose are limited to the reasonable costs of support, and exclude any costs of incarceration, treatment, or supervision for the protection of society and the minor and the rehabilitation of the minor.” Dell, 46 Cal. 3d at 1254, 762 P.2d at 1213, 252 Cal. Rptr. at 489.

The court stated that equal protection principles forbid forcing any individual to bear a disproportionate amount of the costs of actions taken to protect society. See Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964); 8 B. Witkin, Summary of California Law, Constitutional Law §§ 593-594 (9th ed. 1988); 16A Am. Jur. 2d Constitutional Law §§ 784, 786-787 (1979); 13 Cal. Jur. 3d Constitutional Law §§ 303-341 (1974); Annotation, Liability of Parent for Support of Child Institutionalized by Juvenile Court, 59 A.L.R. 3d 636 (1974 & Supp. 1988). In asserting this principle, the court maintained that parents cannot be required to reimburse counties for funds expended to maintain state institutions which house their minor children.

However, the funds for which reimbursement is allowed under section 11350 are to be used to support the minor child to whom the parents are legally obligated. Thus, a legal duty to support minor children justifies a law which, like section 11350, limits the amount of parental obligation to support of the child, rather than support of the institution. Equal protection principles may prohibit placing the costs of protecting society upon the shoulders of nonresponsible parties, but parents should at least be required to reimburse the county for expenses which they otherwise would have incurred. By recognizing this fact, the court indicates that it will approach equal protection questions pragmatically.

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