PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 14 | Issue 2 Article 8

1-15-1987

California Supreme Court Survey: June 1986-August 1986

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California Supreme Court Survey
June 1986-August 1986

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 cases have been omitted from the survey.

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I. ATTORNEY'S FEES

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In *In re Head*, 42 Cal. 3d 223, 721 P.2d 65, 228 Cal. Rptr. 184 (1986), three prison inmates successfully challenged, in habeas corpus proceedings, the implementation procedures of the Department of Corrections for the work furlough program authorized under sections 6260 to 6265 of the Penal Code. The inmates were represented by the Prison Law Office, a privately supported group of attorneys who provide direct legal services at no cost to prison inmates. The superior court found that the procedures were constitutionally inadequate. In addition, the court held that the inmates should have been considered individually in order to determine their eligibility for participation in the program under procedures that would have afforded due process. The ruling was affirmed on appeal. The superior court granted attorney's fees of $3,350, pursuant to section 1021.5 of the Code of Civil Procedure [hereinafter section 1021.5].

The Director of Corrections appealed and the court of appeal reversed. The court of appeal held that section 1021.5 applied only to civil cases, and since habeas corpus proceedings were of a criminal nature, attorney's fees were not authorized under the statute. Accordingly, the supreme court reversed the decision of the court of appeal.

The supreme court noted that section 1021.5 was a codification of the inherent power of the court to award attorney's fees under the "private attorney general" rationale. Pursuant to this rationale, private litigants who successfully bring suits which enforce a strong public policy are awarded attorney's fees. Section 1021.5 recognizes the need for enforcement of public policies by private actions. In order to encourage private actions, there must be a mechanism authorizing the award of attorney's fees or the expense of litigation would deter private parties from initiating these actions.

The court noted that in the past, attorney's fees have been permitted for mandamus actions rather than for habeas corpus actions. No question would have been raised if the present action had been brought under a writ of mandamus, even though the same rights would have been vindicated. *See Daniels v. McKinney*, 146 Cal. App. 3d 42, 193 Cal. Rptr. 842 (1983) (mandate proceeding brought by jail inmates to vindicate their right to exercise).

The court of appeal held that section 1021.5 did not apply merely because the procedures for habeas corpus are found in the Penal

Code. Rather, the court relied upon the language in *Fogelson v. Municipal Court*, 120 Cal. App. 3d 858, 175 Cal. Rptr. 64 (1981), which stated that "attorney fees provisions in the Code of Civil Procedure do not deal with criminal actions, unless the words or context compel a holding that they do." *Id.* at 862, 175 Cal. Rptr. at 66. However, *Fogelson* is clearly distinguishable from the case at bar. The fees sought in *Fogelson* were for the defense and appeal in a criminal prosecution. The supreme court agreed with the court of appeal's conclusion that nothing in section 1021.5 could be construed to include an award of attorney's fees for the defense of criminal cases. Section 1021.5 does not apply in cases where the "primary effect is the vindication of the litigant's personal rights . . . ." *Head*, 42 Cal. 3d at 228, 721 P.2d at 68, 228 Cal. Rptr. at 186. Nor does it apply simply because the defense offered incidental benefits to other similarly situated defendants.

However, sections 1473 to 1509 of the Penal Code do not define or establish defenses. Rather, they merely create a procedure for inmates to vindicate their rights relating to confinement. The determinative factor is not *how* the action is brought but the *impact* of the litigation.

The court stated that inmates have numerous constitutional and statutory rights which are not only of interest to the inmates themselves, but to the public in general: freedom from cruel and unusual punishment; religious freedom; freedom from racial discrimination; due process; payment for labor; treatment of prisoners; and the work furlough program at issue in this case. Actions brought to enforce these rights bear no indicia to a criminal prosecution; their purpose is to "compel a state or local officer to comply with duties imposed on him by regulation, statute, or constitutional provision." *Head*, 42 Cal. 3d at 230, 721 P.2d at 69, 228 Cal. Rptr. at 188. Choosing to bring an action to vindicate these rights by habeas corpus rather than writ of mandamus does not alter the substance of the action.

The respondent's main argument was that section 1021.5 did not apply to criminal proceedings, of which habeas corpus is one. Furthermore, the respondent contended that the superior courts would become inundated with habeas corpus petitions that merely sought an award of attorney's fees. The supreme court rejected these arguments as unpersuasive stating that if the actions are not brought under habeas corpus proceedings, they could be brought by mandamus, declaratory relief, or by the individual inmates in propria persona. The effect of this would be to increase the burden on the

courts. "Without the assistance of counsel, in propria persona inmates would likely file many more petitions, and impose a greater burden on the judicial system, than that imposed by a single, well-researched, attorney-prepared petition." *Id.* at 231, 721 P.2d at 70, 228 Cal. Rptr. at 189. Moreover, mandamus and declaratory relief actions tend to be more complex than habeas corpus proceedings and are potentially subject to higher attorney's fees awards.

The court concluded that when ascertaining the legislative intent for the purposes of construing the language of a statute, there is a presumption "that the Legislature did not intend absurd results." *Id.* at 232, 721 P.2d at 70, 228 Cal. Rptr. at 189. To deny an award of attorney's fees in a habeas corpus proceeding but award fees in an action for declaratory relief or mandamus, which seeks to vindicate identical rights, would be anomalous and inconsistent with the rules of statutory construction. Statutes should be construed so as not to frustrate the legislative purpose. The court concluded that where a restriction on the availability of attorney's fees is not clearly mandated by the language of section 1021.5, one will not be judicially construed. Thus, section 1021.5 authorizes the award of attorney's fees to lawyers who initiate proceedings to vindicate rights of prison inmates, regardless of whether the action is brought by a complaint for declaratory relief, petition for mandamus, or petition for habeas corpus.

STEPHANIE FANOS

II. CIVIL PROCEDURE

A. *If a plaintiff fails to file a personal injury or wrongful death suit against a public entity within one hundred days, he is precluded from bringing a cause of action unless he seeks relief within a reasonable time showing that a timely claim was not made because of mistake, inadvertence, surprise, or excusable neglect, and that the public entity fails to demonstrate prejudice:* **Bettencourt v. Los Rios Community College District.**

In *Bettencourt v. Los Rios Community College District*, 42 Cal. 3d 270, 721 P.2d 71, 228 Cal. Rptr. 190 (1986), the supreme court held that the trial court should liberally grant relief under section 946.6 of the Government Code if the plaintiff's failure to file a claim with an appropriate public entity can be excused. Pursuant to section 911.2, the plaintiff was required to file a claim with the correct public entity within 100 days after the cause of action accrued. The court further held that excusable neglect can be found if the plaintiff's misapprehension about the defendant's legal status was reasonable

and if he showed diligence in pursuing the claim. In this case, the court found that the trial court's refusal to grant relief was an abuse of discretion.

The plaintiffs in this case were the parents of a student who drowned while on a field trip sponsored by the Sacramento City College. Pursuant to section 911.2 of the Government Code, plaintiffs' counsel filed a wrongful death claim with the State Board of Control under a mistaken belief that the college was a part of the state government. Actually, the college was a part of the Los Rios Community College District [hereinafter the District]. Section 911.2 requires claimants to file a claim with the correct public entity within 100 days. When the plaintiffs learned of the error, 100 days had already passed. Pursuant to section 911.4, the plaintiffs' counsel presented an application for leave to file a late claim to the defendant. The application, however, was denied. The plaintiffs' counsel then sought relief under section 946.6 by filing a petition to the superior court. This petition was also denied.

On appeal, the plaintiffs successfully contended that their counsel's failure to file a tort claim against the proper defendant was excusable. The court, in deciding whether the misapprehension was excusable, considered the following: 1) the nature of the error; and 2) whether the plaintiffs' counsel showed diligence in pursuing the claim.

In determining whether the nature of the error was reasonable, the court used the objective reasonable person test: whether a reasonably prudent person would make a similar mistake under the same circumstances. The court held that a reasonably prudent person could make a similar mistake. It noted that the counsel's unfamiliarity with the various college districts was reasonable considering that he neither lived nor practiced law in Sacramento. The court also commented on the complexity of California's higher education system. The defendant disagreed and argued that the plaintiffs' counsel had an opportunity to discover the error within the statutory period because he received correspondence on letterhead stationery which indicated that the college was part of the District. The court rejected this argument by holding that a reasonable person would focus on the content rather than the letterhead on the stationery.

In determining whether the plaintiffs' counsel was diligent, the court noted that his various activities showed due diligence. He contacted the defendant's legal advisor to request information and to advise him of any possible tort claims against the defendant. He also

hired an investigator. Additionally, he promptly responded to counter his mistake by filing various forms of relief from the 100-day requirement of section 911.2.

The court further reasoned that the policy consideration behind section 911.2 was to give notice to public entities of a possible claim. It held that when the plaintiffs' counsel informed the defendant's legal advisor of a possible claim, it served a function similar to that of section 911.2.

Based on the court's holding, several conclusions can be made. First, section 946.6 will be construed in favor of relief in order to enable the trial court to decide cases on the merits. Second, if the plaintiff shows diligence in pursuing a claim by promptly filing the action against the proper public entity, then the court seems to be more willing to find the mistake excusable.

SUNG-DO GONG

B. *The decision to grant or deny a preferential trial setting rests, at all times, in the discretion of the trial court in light of the totality of the circumstances:* Salas v. Sears, Roebuck & Co.

In *Salas v. Sears, Roebuck & Co.*, 42 Cal. 3d 342, 721 P.2d 590, 228 Cal. Rptr. 504 (1986), the California Supreme Court held that the trial court always has the discretion to grant or deny a motion for trial preference pursuant to section 36(d) of the Civil Procedure Code. This is true despite the five-year limitation period set forth in section 583.310 of the Civil Procedure Code. *See* CAL. CIV. PROC. CODE §§ 583.310-583.360 (West Supp. 1986) (reenacting in substance CAL. CIV. PROC. CODE § 583 (West 1955) (repealed 1984)).

On September 12, 1979, the plaintiffs filed an action against the defendants, Sears, Roebuck & Co. [hereinafter Sears], and a friend of the minor plaintiff. The plaintiffs alleged negligence, breach of warranty and strict liability. The action was based on the accidental shooting of the minor plaintiff by his friend, which occurred while testing a new rifle purchased from Sears. An at-issue memorandum requesting a jury trial was filed on June 3, 1980. The trial court sent a "Notice of Trial Setting Conference and Intention to Dismiss on Court's Own Motion" to the plaintiffs. This notice required that the plaintiffs, within ten days of receipt, provide the other parties with written notice of the hearing which was scheduled for September 21, 1983. *Salas*, 42 Cal. 3d at 344, 721 P.2d at 591, 228 Cal. Rptr. at 505. The plaintiffs, however, merely notified Sears by telephone the day before the hearing. Consequently, the court took the trial setting

conference off the calendar and removed the case from the civil active list.

During the following ten months, the plaintiffs did not attempt to reinstate their case on the civil active list nor have it set for trial. On August 1, 1984, they gave notice to Sears of an ex-parte application for an order shortening time, and for a hearing on a motion for trial preference under section 36(d). The latter was filed on August 3, 1984, forty days before the five-year bar set forth in former section 583(b) of the Civil Procedure Code.

Sears filed an opposition and urged the court to dismiss the action on its own motion pursuant to former section 583(a) of the Civil Procedure Code. This section provided the following: "[t]he court, in its discretion, may dismiss an action for want of prosecution pursuant to this subdivision if it is not brought to trial within two years after it was filed." CAL. CIV. PROC. CODE § 583(a) (West 1955) (repealed 1984) (reenacted in CAL. CIV. PROC. CODE § 583.410 (West Supp. 1986)).

The trial court's tentative ruling denied the motion for trial preference. However, it ordered a second hearing to be held three days later and urged the plaintiffs to file supplemental papers in the interim. The plaintiffs failed to submit any additional authority to support their position and the court denied their motion for preference.

The five-year limitations period lapsed without the plaintiffs taking any action to file either a motion for reconsideration or a second motion for preference. The court dismissed the case pursuant to section 583(b), in response to the defendant's motions to dismiss. The plaintiffs appealed and the court of appeal affirmed the dismissal, holding that the decision to grant or deny a motion for trial preference rested in the sound discretion of the trial court and no abuse of discretion was shown on the record.

The supreme court granted review due to a conflict in the appellate courts on this issue. *Compare Campanella v. Takaoaka*, 160 Cal. App. 3d 504, 206 Cal. Rptr. 745 (1984) (no discretion) *and Katoff v. Efseaff*, 172 Cal. App. 3d 991, 218 Cal. Rptr. 499 (1985) (no discretion) *with Karubian v. Security Pacific National Bank*, 152 Cal. App. 3d 134, 199 Cal. Rptr. 295 (1984) (discretion). The court disapproved *Campanella* and *Katoff* to the extent that they preclude the trial court from considering the plaintiff's unreasonable delay and lack of diligence in the determination of whether to grant or deny a motion for trial preference when the five-year limitation period of section

583(b) is imminent. *Salas*, 42 Cal. 3d at 345, 721 P.2d at 592, 228 Cal. Rptr. at 506.

The supreme court affirmed the lower court's decision. It rejected the plaintiffs' assertion that as a matter of law, forty days was adequate time to set their case for trial, and that therefore, the trial court had a mandatory duty to grant their motion for preference to avoid the impending five-year limitations period. *Id.*

The supreme court noted that section 36(d) specifically states that the trial court shall exercise its discretion in ruling on motions for trial preference. It provides the following: "[n]otwithstanding any other provision of law, the court may in its discretion grant a motion for preference served with the memorandum to set or the at-issue memorandum and accompanied by a showing of cause which satisfies the court that the interests of justice will be served by granting such preference." CAL. CIV. PROC. CODE § 36(d) (West 1982). The plaintiffs argued that as a matter of law, "cause" is shown when a preferential setting is necessary to avoid dismissal under section 583(b). They argued this is true even when the plaintiff is guilty of unreasonable delay and lack of diligence. The court rejected this argument stating that, while the approach of the five-year limit under section 583(b) is an important factor, under section 36(d) it is not exclusive. Therefore, the trial court should consider all of pthe surrounding circumstances.

The court compared its decision in *Wilson v. Sunshine Meat & Liquor Co.*, 34 Cal. 3d 554, 669 P.2d 9, 194 Cal. Rptr. 773 (1983), to the case at bar. In *Wilson*, the supreme court held that the considerations involved in a motion for preference under section 36(d) are the same as those involved in a motion to dismiss for failure to prosecute under section 583(a). " '[I]n each instance the motion is addressed to [the trial court's] sound legal discretion; the motivating factors in the exercise of that discretion would be pertinent to both motions.' " *Salas*, 42 Cal. 3d at 346, 721 P.2d at 592, 228 Cal. Rptr. at 506 (quoting *Wilson*, 34 Cal. 3d at 561, 669 P.2d at 13, 194 Cal. Rptr. at 777). The court is required to consider the totality of the circumstances, including the " 'dilatory action of the plaintiff, the condition of the court's calendar, the rights of other litigants, and the prejudice to the defendant resulting from the delay.' " *Id.* (quoting *Wilson*, 34 Cal. 3d at 561, 669 P.2d at 13, 194 Cal. Rptr. at 777). The *Wilson* court concluded that since identical considerations were involved under section 36(d) and section 583(a), the trial court could "dismiss sua sponte under [section 583(a)] in response to a plaintiff's motion for preferential setting [under section 36(d)] without notifying the plaintiff in advance of its intention to dismiss." *Id.* at 346-47, 721 P.2d at 592, 228 Cal. Rptr. at 506.

The court noted that in both *Wilson* and in the case at bar, the plaintiffs were guilty of a lack of diligence and offered no justification for the delay. In addition, the plaintiffs in both cases relied on the public policy favoring a trial on the merits. The court stated that the policy against disposing of litigation on procedural grounds will prevail only when a plaintiff makes a showing of excusable delay, which the plaintiffs did not do. The court stated that in light of *Wilson*, the issue becomes whether the trial court had the discretion to deny the plaintiffs' motion for trial preference when dismissal under section 583(b) was the likely result.

The plaintiffs, relying on language in *Weeks v. Roberts*, 68 Cal. 2d 802, 442 P.2d 361, 69 Cal. Rptr. 305 (1968), contended that, although the court did have the power to dismiss under section 583(a), as in *Wilson*, "it also had a mandatory duty to grant an early trial setting to prevent dismissal under section 583(b)." *Salas*, 42 Cal. 3d at 347, 721 P.2d at 593, 228 Cal. Rptr. at 507. In *Weeks*, the court stated that "[the] preferred procedure would be to grant preferential dates expressly without prejudice to a motion to dismiss." *Weeks*, 68 Cal. 2d at 808, 442 P.2d at 365, 69 Cal. Rptr. at 309. The court noted that this same dictum led to the holdings in *Campanella* and *Katoff*.

The court explained that the ruling in *Weeks* was prompted by a concern that the courts could dismiss an action merely as a convenience to the courts, even though the defendants had not sought dismissal. The court emphasized that at the time of *Weeks*, section 583(a) provided that "[t]he court may in its discretion dismiss any action for want of prosecution *on motion of the defendant and after due notice to the plaintiff* . . . . " *Salas*, 42 Cal. 3d at 348, 721 P.2d at 593, 228 Cal. Rptr. at 508 (citing CAL. CIV. PROC. CODE § 583(a) (West 1955) (repealed 1984)) (emphasis added). Thus, two separate proceedings were necessary, one to rule on the trial preference under section 36(d) and another to rule on the defendant's motion to dismiss under section 583(a). One year after *Weeks*, section 583(a) was deleted. Thus, the need for two separate proceedings, which *Weeks* required, was eliminated, and the court could dismiss sua sponte.

The court concluded that a trial court does not have a mandatory duty to grant a trial preference when the likely consequence is dismissal pursuant to the five-year limitation set forth in section 583(b). Rather the decision to grant or deny the motion rests at all times in the sound discretion of the trial court to be exercised in light of the totality of the circumstances. Moreover, a discretionary standard is consistent with the legislative purpose of encouraging "diligent and

orderly prosecution by requiring plaintiffs to make some showing of excusable delay." *Salas*, 42 Cal. 3d at 349, 721 P.2d at 594, 228 Cal. Rptr. at 508.

In conclusion, the court emphasized that the plaintiffs did not attempt to show excusable delay or justify their request. Their failure to initiate discovery and submit supplemental briefs in favor of their position evidenced their dilatory conduct. In light of such conduct, coupled with their failure to show cause for excusable delay, the plaintiffs forfeited their right to a preferential trial date. Therefore, dismissal was proper.

STEPHANIE FANOS

C. *As required by section 340.5 of the Civil Procedure Code, the statute of limitations for a minor in a medical malpractice action is three years from the date of the alleged wrongful act (or until the minor's eighth birthday), and it is not tolled, as it was at common law, until the negligence is discovered:* **Young v. Haines.**

I. INTRODUCTION

In *Young v. Haines*,[1] the supreme court unanimously held that section 340.5 of the Civil Procedure Code[2] [hereinafter section 340.5] is the applicable statute of limitations in medical malpractice actions and could be retroactively applied if the plaintiff was awarded a reasonable time in which to bring the action.[3] They further held that the tolling provision for adults should be read into the provision for

1. 41 Cal. 3d 883, 718 P.2d 909, 226 Cal. Rptr. 547 (1986). Chief Justice Bird wrote for the unanimous court, with Justices Mosk, Broussard, Reynoso, Grodin, Lucas and Panelli concurring.

2. CAL. CIV. PROC. CODE § 340.5 (West 1982) provides in part:

> In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person. *Actions by a minor shall be commenced within three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period. Such time limitation shall be tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor for professional negligence.*

Id. (emphasis added).

3. *See, e.g.*, Brown v. Bleiberg, 32 Cal. 3d 426, 651 P.2d 815, 186 Cal. Rptr. 228 (1982); Osborne v. Los Angeles County, 91 Cal. App. 3d 366, 154 Cal. Rptr. 129 (1979).

minors in order to provide minor plaintiffs with equal protection of the law. However, the court rejected the incorporation of the common law doctrine of the delayed-discovery rule[4] into section 340.5.

II. FACTUAL BACKGROUND

A minor plaintiff, Tracey Young, filed a complaint alleging that she sustained injuries as a result of hypoxic birth trauma[5] which was caused by negligent medical treatment given by the defendants—the doctors, the hospitals, and the other health care providers. The complaint was filed on October 22, 1980, approximately eighty-four days after the plaintiff's eighth birthday, and 100 days after the discovery of the cause. It further alleged that the plaintiff and her mother were unaware of the cause of her disability until on or about July 22, 1980, when a physician diagnosed her injuries as being the result of hypoxic birth trauma.

The defendants demurred on the ground that the action was untimely under section 340.5.[6] The plaintiff contended that the action was timely because the applicable statute of limitations was section 29 of the Civil Code[7] [hereinafter section 29] which adhered to the delayed-discovery rule.[8] However, the trial court sustained the de-

4. "Under the delayed discovery rule a cause of action does not accrue, nor [does] the statute of limitations start to run, until plaintiff discovers or in the exercise of reasonable diligence should discover the negligent cause of his or her injury." *Young*, 41 Cal. 3d at 890, 718 P.2d at 911, 226 Cal. Rptr. at 549. *See generally* Annotation, *When Statute of Limitations Commences to Run Against Malpractice Action Against Physician, Surgeon, Dentist, or Similar Practitioner*, 80 A.L.R. 2D 368 (1968).

5. Hypoxia refers to "deficiency of oxygen reaching the tissues of [the] body." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 717 (1971).

6. *See supra* note 2. For a general discussion see 36 CAL. JUR. 3D *Healing Arts and Institutions* § 179 (1977); Comment, *Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829 (1979); Note, *Price of Health Care Availability: Economics of Medical Malpractice*, 11 SW. U.L. REV. 1371 (1979).

7. CAL. CIV. CODE § 29 (West 1982) provides the following:

> A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interest in the event of its subsequent birth; but any action by or on behalf of a minor for personal injuries sustained prior to or in the course of his birth must be brought within six years from the date of the birth of the minor, and the time such minor is under any disability mentioned in Section 352 of the Code of Civil Procedure shall not be excluded in computing the time limited for the commencement of the action.

Id.

For a general discussion see Note, *Torts: Infants—Cause of Action for Prenatal Injury*, 3 HASTINGS L.J. 76 (1951); Note, *California's Response for Wrongful Death of a Stillborn Fetus: Justus v. Atchison*, 5 PEPPERDINE L. REV. 589 (1978); Comment, *The Fetus as a Legal Entity-Facing Reality*, 8 SAN DIEGO L. REV. 126 (1971).

8. In Myers v. Stevenson, 125 Cal. App. 2d 399, 270 P.2d 885 (1956), section 29 of

fendant's demurrer and held that section 340.5 was the controlling statute of limitations. The action was subsequently dismissed when the plaintiff failed to further allege facts necessary to toll the statute of limitations under section 340.5.

On appeal, the plaintiff raised several contentions. First, she contended that the applicable statue of limitations was section 29 of the Civil Code and not section 340.5 of the Civil Procedure Code. She also argued that if section 340.5 were the applicable statute, then applying it retroactively would unconstitutionally deprive her of the benefits of section 29 which adhered to the delayed-discovery rule.[9] She further contended that section 340.5 should be construed as retaining the delayed-discovery rule.[10]

III. THE COURT'S ANALYSIS

A. Section 340.5 is the Applicable Statute of Limitations

Since the plaintiff and her mother did not discover the cause of the disability until 100 days before the complaint was filed, the statute of limitations would have been tolled and the action would have been considered timely, pursuant to section 29 which governs prenatal and birth injuries. However, under section 340.5, which governs injuries resulting from medical malpractice, the action would have been barred as the complaint was filed eighty-four days after her eighth birthday, without any allegation of facts which would toll the limitation period. In solving this apparent inconsistency, the court examined section 1859 of the Civil Procedure Code[11] [hereinafter section 1859] and the legislative history of section 340.5.[12]

Pursuant to section 1859, "when a general and particular provision are inconsistent, the latter is paramount to the former."[13] In this case, both sections 29 and 340.5 were very specific. The former imposed limitations on actions relating to prenatal and birth injuries, while the latter governed personal injuries resulting from medical malpractice. The court held that section 340.5 was the applicable statute since it was a later enactment and it was a specific legislative response to medical malpractice insurance cases with the intent to

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the Civil Code was construed as incorporating the delayed-discovery rule. *Young*, 41 Cal. 3d at 892, 718 P.2d at 913, 826 Cal. Rptr. at 551.

9. The plaintiff's argument was based on the fact that her injury had occurred three years before the enactment of section 340.5.

10. The plaintiff's contention was based on the case of Black Kite v. Campbell, 142 Cal. App. 3d 793, 191 Cal. Rptr. 363 (1983) (incorporating the common law delayed-discovery rule into section 340.5). *Young*, 41 Cal. 3d at 895, 718 P.2d at 915, 226 Cal. Rptr. at 553.

11. CAL. CIV. PROC. CODE § 1859 (West 1982).

12. *Young*, 41 Cal. 3d at 894, 718 P.2d at 914, 226 Cal. Rptr. at 552.

13. CAL. CIV. PROC. CODE § 1859 (West 1982).

differentiate medical malpractice victims from other personal injury victims.[14]

B. Retroactive Application of Section 340.5 Did Not Preclude the Right to the Benefits of Section 29

In rejecting the plaintiff's argument that the retroactive application of section 340.5 would unconstitutionally deprive her of the right to enjoy the benefits of section 29,[15] the court simply held that the statute may have a retroactive effect if the plaintiff was given a reasonable time[16] in which to initiate the suit. In this case, the plaintiff was injured in 1972 and the code was enacted in 1975. Thus, since the plaintiff had five years to bring the cause of action, the court held that this was a reasonable amount of time.

C. Section 340.5 Does Not Retain the Delayed-Discovery Tolling Rule.

The plaintiff's final contention, that section 340.5 should be interpreted as retaining the delayed-discovery tolling rule, was based on two arguments. First, she argued that the provision did not expressly exclude the common law.[17] Second, she contended that interpreting section 340.5 without the delayed-discovery rule would deny minors equal protection of the law.[18] This was because the tolling provision for minors could be interpreted as being more restrictive than it was for the adults.[19]

In rejecting both arguments, the court held that the numerated tolling provision of section 340.5 was intended to replace the common law rules. Thus, the court reasoned that the legislative intent was to

14. *Young*, 41 Cal. 3d at 894, 718 P.2d at 914, 226 Cal. Rptr. at 552.

15. *Id.* at 891 n.5, 718 P.2d at 912 n.5, 226 Cal. Rptr. at 550 n.5.

16. *See, e.g.*, Osborne v. Los Angeles County, 91 Cal. App. 3d 366, 154 Cal. Rptr. 129 (1979).

17. *See supra* note 10. In *Young*, the supreme court rejected the *Kite* court's interpretation of section 340.5 and held that it did not incorporate the common law delayed-discovery rule. *Young*, 41 Cal. 3d at 895-96, 718 P.2d at 915, 226 Cal. Rptr. at 553-54.

18. U.S. CONST. amend. XIV; CAL. CONST. art. I, § 7.

19. In Kite v. Campbell, 142 Cal. App. 3d 793, 191 Cal. Rptr. 363 (1983), the court held that the tolling provisions in the second sentence of section 340.5 (fraud, intentional concealment, and the presence of a foreign body) were applicable only to actions by adults. The *Kite* court also noted that the statute began to run for adults on the "date of injury," while it began to run for minors on the "date of the wrongful act." In order to avoid this discrepancy, the *Kite* court read the common law delayed-discovery rule into section 340.5 for minors. This was rejected by the court in *Young*. *See supra* note 17 and accompanying text.

expressly exclude the common law delayed-discovery doctrine. However, the court recognized that the potential for the different treatment of minors could violate the equal protection clause.[20]

The court, citing *Reed v. Reed*,[21] held that a classification can be justified under the equal protection clause if it is reasonable and " 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "[22] Based on this test, the court upheld the classification of medical malpractice victims from other injury victims as a reasonable response to the medical malpractice insurance crisis. However, considering the strong public policy of protecting minors, the court ruled that distinguishing minors from adults within the category of malpractice could not be justified. Therefore, the court held that the separate tolling provision for minors was not exclusive, and that the tolling provision for adults should therefore be applied to the minors. Thus, the court found an alternative means to avoid the constitutional problem, while upholding the legislative intent to differentiate the statue of limitation of malpractice victims from other victims. Consequently, both adult and minor medical malpractice victims could evoke the tolling provision by alleging fraud, intentional concealment[23] or the presence of a foreign body. The case was subsequently remanded for further proceedings in order to give the plaintiff an opportunity to allege any facts that may toll the statutory period.

IV. CONCLUSION

Prior to *Young v. Haines*, the question of whether the delayed-discovery rule should be read into section 340.5 was an unsettled issue, resulting in sharp disagreement among the appellate courts. In *Young*, this question was settled by the court's rejection of the common law statute of limitation tolling rules in medical malpractice suits. Consequently, in medical malpractice suits, nondiscovery of the injury or the cause can no longer be an excuse to toll the statu-

20. "As *Kite* noted, serious constitutional problems would arise from an interpretation of section 340.5 which imposed harsher limitations on minors than adults." *Young*, 41 Cal. 3d at 896, 718 P.2d at 916, 226 Cal. Rptr. at 554. *See also id.* at 718, P.2d at 917, 226 Cal. Rptr. at 555.

21. 404 U.S. 71 (1971).

22. *Young*, 41 Cal. 3d at 900, 718 P.2d at 918, 226 Cal. Rptr. at 556 (quoting *Reed*, 404 U.S. at 75-76).

23. It should be noted that nondiscovery is differentiated from concealment. Nondiscovery cannot be an excuse while concealment without discovery can toll the statute. Following this line of reasoning, concealment by the defendant cannot toll the statute if the plaintiff discovered the injury. *See, e.g.*, Wells Fargo Bank v. Superior Court, 74 Cal. App. 3d 890, 141 Cal. Rptr. 836 (1977) (patient's ignorance and unawareness of the injury cannot toll the statute of limitation period).

tory period. However, there was one issue the court chose not to address: the inconsistency in the time of the commencement of the statutory period for adults and minors. On its face, the general commencement time is the "date of injury" while that of the minors is the "date of the alleged wrongful act." This difference can be less favorable to minors since certain injuries may not be detected for sometime. Nonetheless, the court, in a footnote, avoided the issue by stating that "this particular form of discrimination against minors is left for another day."[24] Given the court's discussion of the equal protection concerns, it is likely that if the difference is less favorable to minors, it would be unconstitutional.

SUNG-DO GONG

III. CONSTITUTIONAL LAW

Involuntary polygraph testing of government employees who are not public safety officers violates the constitutional rights to privacy and to equal protection: **Long Beach City Employees Association v. City of Long Beach.**

I. INTRODUCTION

In *Long Beach City Employees Association v. City of Long Beach*,[1] the supreme court considered whether polygraph testing of public employees, not public safety officers, was allowable as a condition of their employment. The court held that such testing was unconstitutional because it violated the right to privacy and to equal protection.

II. FACTUAL BACKGROUND

In 1982, the Long Beach Marine Bureau [hereinafter the Bureau], a subdivision of the Long Beach Tidelands Agency, a city government agency, suspected some of its employees of stealing from its boat launch ramp machines. Pursuant to an administrative investigation,

24. *Young*, 41 Cal. 3d at 897 n.10, 718 P.2d at 916 n.10, 226 Cal. Rptr. at 554 n.10.

1. 41 Cal. 3d 937, 719 P.2d 660, 227 Cal Rptr. 90 (1986). Justice Broussard wrote the majority opinion, with which Justices Mosk, Reynoso, Grodin, and Lui concurred. Justice Elwood Lui, Associate Justice of the Court of Appeal, Second Appellate District, was assigned by the Chairperson of the Judicial Council. Chief Justice Bird wrote a separate concurring opinion, with which Justice McClosky (Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chairperson of the Judicial Council) concurred.

the Bureau ordered that twenty-six employees undergo polygraph tests. The Long Beach City Employees Association [hereinafter the CEA], a representative of the employees, filed for and was denied a temporary restraining order and an injunction. Under threats of dismissal, most of the employees complied with the orders to undergo the tests. Only one employee ultimately refused to comply with the order to undergo the test.[2]

The CEA, as the representative of the government employees, asserted that the compulsory tests violated the employees' rights to privacy and to equal protection guaranteed by the California and United States Constitutions.[3]

III. ANALYSIS

A. *Involuntary Polygraph Tests Violate An Individual's Constitutionally Protected Right to Privacy.*

The right to privacy encompasses the right to mental privacy.[4] Involuntary polygraph tests impinge on the right to privacy in several ways. First, typical polygraph tests commence with a pre-test interview which is used by the examiner "to determine whether there are 'any emotional or psychological factors which would adversely affect the reliability of the test results.' "[5] This pre-test interview includes personal questions unrelated to employment.[6]

Second, polygraph tests are inherently intrusive because they record emotional responses to questions even when the subject does not verbally answer them.[7] Furthermore, an employee may decide not to refuse to answer personal questions for fear that his or her job may be threatened or that he or she will appear dishonest.[8]

The city argued that since all of the questions related to the employees' employment, there was no privacy violation.[9] The court re-

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2. *Id.* at 942-43, 719 P.2d at 661-62, 227 Cal. Rptr. at 91-92.

3. The California Constitution guarantees the right to privacy. CAL. CONST. art. I, § 1. The right to equal protection is guaranteed by the United States Constitution and the California Constitution. U.S. CONST. amend. XIV, § 1; CAL. CONST. art. 1, § 7.

4. White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975). *See also* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (discussing the origins and the concept of the right to privacy).

5. 41 Cal. 3d at 945, 719 P.2d at 664, 227 Cal. Rptr. at 94 (quoting Comment, *Privacy: The Polygraph in Employment*, 30 ARK. L. REV. 35, 36 (1976)).

6. 41 Cal. 3d at 945, 719 P.2d at 664, 227 Cal. Rptr. at 94.

7. *Id.* at 947, 719 P.2d at 665, 227 Cal. Rptr. at 95 (citing Gardner, *Wiretapping the Mind: A Call to Regulate Truth Verification in Employment*, 21 SAN DIEGO L. REV. 295, 305 (1984); Comment, *Regulation of Polygraph Testing in the Employment Context: Suggested Statutory Control on Test Use and Examiner Competence*, 15 U.C. DAVIS L. REV. 113, 117 (1981)).

8. *Id.* (citing Comment, *supra* note 7, at 118 n.21).

9. 41 Cal. 3d at 948, 719 P.2d at 665, 227 Cal. Rptr. at 95. The city relied on Gardner v. Broderick, 392 U.S. 273, 278 (1968), holding that a public employee (police of-

jected this argument since it was indisputable that some of the pretest and control questions asked were personal in nature and did not relate in any way to the employment responsibilities of the employees.[10] Furthermore, the court found that since polygraph tests record thoughts and feelings even absent verbal answers to questions, the tests "inherently intrude upon the constitutionally protected zone of individual privacy."[11]

B. Legislative Classification of Employees, Into Those Protected From Involuntary Polygraph Testing (Private Employees and Public Safety Officers) and Those Not Protected Serves No Compelling State Interest and Therefore Denies Those Not Protected of Their Constitutional Right to Equal Protection.

Section 432.2 of the Labor Code prohibits the administration of polygraph tests as a condition of employment, but excepts federal, state, and local government employees from this protection.[12] Section 3307 of the Government Code provides that public safety officers are protected from involuntary polygraph tests as a condition of their employment.[13] Therefore, only government employees who are not public safety officers can be compelled to undergo polygraph tests as a condition of their employment. The CEA claimed that such legislative classification impinged on its members' constitutionally protected right to equal protection.

The general rule is that "[a] legislative classification rationally related to achieving a legitimate state purpose will normally be deemed constitutional unless it infringes upon a fundamental interest or creates a suspect classification."[14] Since the court determined that the testing infringed on the employees' fundamental right to privacy, the city had the burden of proving a compelling governmental interest

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ficer) cannot be discharged for refusing to waive his constitutional right of self-incrimination and Szmaciarz v. State Personnel Bd., 79 Cal. App. 3d 904, 145 Cal. Rptr. 396 (1978), holding that in a noncriminal investigation into his conduct, a police officer may be compelled to answer questions under pain of dismissal without the opportunity to invoke the right against self-incrimination.

10. 41 Cal. 3d at 948, 719 P.2d at 666, 227 Cal. Rptr. at 96.

11. *Id. See also* 13 CAL. JUR. 3D *Constitutional Law* § 234 (1974); MCKINNEY'S DIGEST 3D *Privacy* § 3 (1984).

12. CAL. LAB. CODE § 432.2 (West Supp. 1986).

13. CAL. GOV'T CODE § 3307 (West 1980).

14. 41 Cal. 3d at 948, 719 P.2d at 666, 227 Cal. Rptr. at 96 (citing Serano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345, *cert. denied*, 432 U.S. 907 (1976)).

which was served by the classification.[15]

The city claimed that a "rational relationship" test should be applied rather than a "compelling interest" test, because the employees did not have a fundamental right to government employment, relying on *Civil Service Association v. Civil Service Commission*.[16] The supreme court overruled *Civil Service Association* to the extent that it held that a rational basis test should be used.[17] The court held that the fundamental interest being protected was the right to privacy rather than the right to continued public employment. Therefore, a higher degree of judicial scrutiny was required.

The city asserted that the compelling interests justifying separate treatment of regular government employees included the following: (1) the special position of trust which public employees are in; and (2) the right of the public to an honest and impartial government.[18] The court dismissed these arguments because it did not consider either of these interests strong enough to supersede the employees' fundamental right to privacy.[19] Furthermore, the court held that even if those state interests were compelling enough to supersede the employees' right to privacy, the classification in the statutes was not based on sound policy reasons.[20]

In *Civil Service Association*, the California Court of Appeal applied a rational basis test and upheld the legislative classification as not violative of the right to equal protection, on facts similar to those at hand.[21] The classification was upheld because the policy behind the statute which exempts public safety officers was to maintain good labor relations in those jobs where interruptions in performance could endanger the public.[22]

The court noted that the court of appeal did not consider the broad scope of the definition for "public safety officers," which includes positions which are not critical to public health and safety.[23] Therefore, the policy behind the classification did not apply to all of the public safety officers included in the statute.[24] Thus, the court held that the classification created unequal treatment which was not justified.[25] In

15. *Id.* (citing *Serano*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976); White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975)).

16. 139 Cal. App. 3d 449, 188 Cal. Rptr. 806 (1983).

17. 41 Cal. 3d at 952, 719 P.2d at 668, 227 Cal. Rptr. at 98. *See also* MCKINNEY'S DIGEST 3D *Constitutional Law* §§ 87, 94 (1984).

18. 41 Cal. 3d at 952-53, 719 P.2d at 669-70, 227 Cal. Rptr. at 99-100.

19. *Id.*

20. *Id.* at 955, 719 P.2d at 671-72, 227 Cal. Rptr. at 101-02.

21. *Id.*

22. *See* Civil Service Ass'n v. Civil Service Comm'n, 139 Cal. App. 3d 449, 459, 188 Cal. Rptr. 806, 813 (1983).

23. *See* CAL. GOV'T CODE § 3301 (West 1980).

24. 41 Cal. 3d at 955, 719 P.2d at 671, 227 Cal. Rptr. at 101.

25. *Id.* at 956, 719 P.2d at 672, 227 Cal. Rptr. at 102.

conclusion, the court held that the involuntary polygraph testing violated the employees' rights to privacy and to equal protection.[26]

IV. THE CONCURRING OPINION

Chief Justice Bird believed that the court should have seized the opportunity to rule that the involuntary polygraph tests violated the employees' right to privacy, and to base the holding of the opinion on that violation rather than on the equal protection basis.[27] The Chief Justice extensively analyzed the right to privacy and subjected the facts of the case to the *Bagley* test.[28] That test is used to determine whether a government entity can require an employee to waive a constitutional right as a condition of employment.[29]

The *Bagley* test requires that the government entity show the following: "(1) the condition reasonably relates to the purposes of the legislation which confers the benefit; (2) the value accruing to the public from the conditions imposed manifestly outweighs any resulting impairment of the constitutional right; and (3) there are no available alternative means less offensive to the constitutional right."[30] Chief Justice Bird reasoned that the second prong of the test was not met because of the significance of the right to privacy and the unreliability of the results of polygraph tests.[31] In addition, the third prong was not met because of the availability of other means of investigating theft.[32] Therefore, since the *Bagley* test was not met, Chief Justice Bird agreed with the majority that there was no compelling public interest which superseded the employees' right to privacy.[33]

V. CONCLUSION

Involuntary polygraph testing of public employees as a condition of their employment violated their constitutionally protected rights to privacy and to equal protection. The effect of this decision was to declare that the part of section 432.2 of the Labor Code which excepts government employees from the protection it offers other employees

26. *Id.*
27. *Id.* (Bird, C.J., concurring).
28. Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966).
29. *Id.*
30. 41 Cal. 3d at 959, 719 P.2d at 674, 227 Cal. Rptr. at 104 (Bird, C.J., concurring).
31. *Id.* at 960, 719 P.2d at 675, 227 Cal. Rptr. at 105 (Bird, C.J., concurring).
32. *Id.* at 961, 719 P.2d at 675, 227 Cal. Rptr. at 105 (Bird, C.J., concurring).
33. *Id.* (Bird, C.J., concurring).

was unconstitutional. This decision also overruled *Civil Service Association* to the extent that it conflicted with this holding.[34]

EILEEN M. LAVIGNE

IV. CRIMINAL LAW

A. *Unless otherwise provided, suspension of a jail term, imposed as a condition of probation, does not suspend compliance with the other terms of probation, and a municipal court does not lose jurisdiction to execute a jail term, stayed upon defendant's request, pending appeal when the appeal runs longer than the period of probation:* In re Bakke.

In *In re Bakke*, 42 Cal. 3d 84, 720 P.2d 11, 227 Cal. Rptr. 663 (1986), the supreme court held that unless otherwise provided, suspension of a jail term imposed as a condition of probation did not relieve the defendant of compliance with the other terms of probation. In addition, the court held that a municipal court does not lose its jurisdiction to execute the jail term stayed upon the defendant's request pending appeal, even though the appeal ran longer than the period of probation.

On December 20, 1979, David Roy Bakke was convicted of misdemeanor credit card forgery. His sentence was suspended and he was placed on three years formal probation with conditions including restitution and a 60-day jail term. Bakke was released on his own recognizance pending appeal, and the judgment was affirmed on May 2, 1984.

During the pendency of the appeal, Bakke's probation was revoked on two separate occasions because he violated the probation conditions. After the second violation on April 3, 1983, the period of probation was extended to April 4, 1984, and the court ordered a stay of execution of the jail term and ordered Bakke to comply with the restitution condition of his probation. Additional stays were issued on May 25, 1983, August 22, 1983, and October 28, 1983.

After the judgment was affirmed on June 13, 1984, the municipal court made an order extending the period of probation to June 13, 1986, and ordered the jail term to commence on July 19, 1984. Bakke then petitioned for a writ of habeas corpus and contended that the municipal court had lost its jurisdiction to execute the jail term because the appeal ran longer than the stipulated period of probation.

In denying Bakke's petition, the court disapproved of *In re Ken-*

34. Civil Service Ass'n v. Civil Service Comm'n, 139 Cal. App. 3d 449, 188 Cal. Rptr. 806 (1983).

nick, 128 Cal. App. 3d 959, 180 Cal. Rptr. 731 (1982), and *People v. Soukup*, 141 Cal. App. 3d 858, 190 Cal. Rptr. 635 (1983), to the extent that they were inconsistent with the court's analysis in the case at bar. In *Kennick*, the court of appeal held that unless the court provided otherwise, a stay of execution suspends all the probationary conditions, not just the jail term. The *Kennick* court reasoned that because confinement usually precedes release into society under probationary supervision, it would be the exception rather than the norm for a judge to stay only the jail term and not the other conditions of probation pending appeal. *Kennick*, 128 Cal. App. 3d at 963, 180 Cal. Rptr. at 733.

The supreme court noted that, although the stay in *Kennick* was similar to the stay in the case at bar, the defendant in *Kennick* had not been subjected to revocation and reinstatement of probation. In the instant case, the municipal court's intent that the other conditions of probation remain in effect during the pendency of the appeal was manifested in the revocations for violations of those conditions. If *Kennick* were correct, the municipal court would not have jurisdiction to enforce the probation as it did. The court further rejected the *Kennick* reasoning in stating that a trial court is not likely to release a recently convicted defendant into society without supervision. *Bakke*, 42 Cal. 3d at 88, 720 P.2d at 13-14, 227 Cal. Rptr. at 665. Thus, the supreme court held that, unless the municipal court provided otherwise, issuance of a stay of execution pending appeal does not suspend operation of any condition of the probation other than the provision for imposition of a jail term. *Id. See also In re Osslo*, 51 Cal. 2d 371, 377-78 n.6, 334 P.2d 1, 5-6 n.6 (1958).

The court stated that the general rule regarding probation jurisdiction is that "a probation order may be revoked or modified only during the period of probation." *Bakke*, 42 Cal. 3d at 89, 720 P.2d at 14, 227 Cal. Rptr. at 666. *See* CAL. PENAL CODE § 1203.3 (West 1982). *See also In re Daoud*, 16 Cal. 3d 879, 882, 549 P.2d 145, 146, 129 Cal. Rptr. 673, 674 (1976). However, a probationer may consent to a continuance of a proceeding beyond the period of time authorized by statute in which the court may act.

The court analogized the instant case to the situation in which a defendant requests a continuance of a revocation hearing to a date beyond the period of probation. A defendant cannot complain that the court lacks jurisdiction to render a decision in the continued hearing because it was extended beyond the date of the probation when he sought the extended date. *See People v. Ham*, 44 Cal. App.

3d 288, 188 Cal. Rptr. 591 (1975); *In re Griffin*, 67 Cal. 2d 343, 431 P.2d 625, 62 Cal. Rptr. 1 (1967). Also, a request for a stay of execution of a jail term, which is similar to a request for a continuance, necessarily presumes that the proceedings will resume at a later date. While the continuance is extended to a certain date, the stay is generally extended to the time the judgment is affirmed. Thus, the court concluded that the municipal court did not exceed its jurisdiction in ordering the execution of the jail term upon affirmance of the judgment even though the stipulated period of probation had passed.

STEPHANIE FANOS

B. *In the 1980 amendment to section 261 of the Penal Code, which defined rape, the legislature purposely omitted the requirement of resistance by the victim:* **People v. Barnes.**

In *People v. Barnes*, 42 Cal. 3d 284, 721 P.2d 110, 228 Cal. Rptr. 228 (1986), the California Supreme Court, in an opinion written by Chief Justice Bird, clarified the legislature's new position on whether a victim's resistance is a requirement of rape. In a unanimous decision, the court reversed the court of appeal which required a showing of resistance on the part of the victim.

During the rape in question, the victim had not forcibly resisted because she was afraid that the appellant was going to injure her further. The appellant had been threatening the victim prior to the rape and had flexed his muscles and told her he could make her do anything he wanted. The victim testified that she felt that the appellant was acting like a psychotic. During the sexual intercourse, the victim exchanged kisses with the appellant and fell asleep afterward. After returning home, the victim called Kaiser Hospital and reported to the sexual trauma center for an examination. The court of appeal, which relied in error on the pre-1980 statute, reversed the jury's conviction and held that the state had not met the statutory requirements for rape because the victim had not forcibly resisted the appellant's attack.

Prior to the 1980 amendment, the statute defined rape as an act of sexual intercourse in which the victim resists, but the "resistance is overcome by [the] force or violence" of the perpetrator, or in which the victim "is prevented from resisting by threats of great and immediate bodily harm, accompanied by [the] apparent power of execution . . . ." CAL. PENAL CODE § 261(2),(3) (West 1978). The amended statute substituted the resistance requirement with the requirement that the rape be "accomplished against a person's will by means of force or fear of immediate and unlawful bodily injury on the person or another." CAL. PENAL CODE § 261(2) (West 1986).

The appellant argued that the change in the statute did not change the requirements for establishing rape because resistance was never required prior to the amendment. Therefore, the appellant argued that the amendment was not applicable in determining whether the crime of rape was committed.

The court rejected this argument by referring to the legislative history of the amendment which clearly indicated that the purpose of the amendment was to delete the requirement of resistance. The court referred to special language in Assembly Bill number 2899 which stated that the amendment would delete the resistance requirement.

A thorough history of the requirement of resistance in rape cases was presented, and the court also discussed current research which has shown the following: (1) there are many ways in which rape victims react to the terror of sexual assault, including freezing and appearing relaxed and calm; (2) resistance by the victim may increase the risk of further injury; and (3) the victim should make the choice of whether to resist based on the circumstances of the situation. The 1980 amendment reflected these recent findings by eliminating the requirement of resistance, thereby bringing proof of the crime of rape into conformity with other heinous crimes, such as robbery and assault, which do not require a showing of resistance by the victim.

The victim in the instant case showed substantial fear of immediate and unlawful bodily injury despite the fact that she exchanged kisses with the appellant and fell asleep afterward. It was likely that the victim played along with the appellant in order to avoid further injury, and the fact that she fell asleep, perhaps only for a few minutes, was not important. The court suggested that the victim may have been physically and mentally exhausted after the trauma ended. The court also gave weight to the jury's finding of rape.

Thus, the court held that the State had met the evidentiary requirements of section 261(2) of the Penal Code, as amended. The appellant's convictions of rape and of the related crime of false imprisonment were affirmed, thereby reversing the court of appeal's judgment.

EILEEN M. LAVIGNE

C. *Sections 667 and 1192.7(c)(23) of the Penal Code, which allow sentence enhancement for repeat offenders, apply to assault with a deadly weapon and other serious felonies involving personal use of a dangerous weapon:* **People v. Equarte.**

In *People v. Equarte*, 42 Cal. 3d 456, 722 P.2d 890, 229 Cal. Rptr. 116 (1986), the supreme court broadly interpreted some of the recidivist sentence-enhancement provisions: sections 667 and 1192.7(c) of the Penal Code. The court rejected the defendant's argument that the enhancement provisions are inapplicable to the crime of assault with a deadly weapon and other crimes where the use of a dangerous weapon is an element of the crime itself. Instead, the court chose to focus on the scope of section 1192.7(c)(23) of the Penal Code. This section incorporates into the categories of serious felonies, any felony wherein a dangerous or deadly weapon is employed by the defendant himself, including assault with a deadly weapon. The ruling in *Equarte* expressly overruled *People v. Bradford*, 160 Cal. App. 3d 532, 206 Cal. Rptr. 899 (1985) and *People v. Sutton*, 163 Cal. App. 3d 438, 209 Cal. Rptr. 536 (1985).

In 1982, the voters of California approved Proposition 8 by ballot. Proposition 8 imposed an additional sentence of five years upon conviction of certain "serious felonies" when the defendant had previously been convicted of a felony of like magnitude. The five-year sentence enhancement provision of Proposition 8 is codified in section 667 of the Penal Code. The list of crimes triggering section 667 is contained in section 1192.7(c). Of the twenty-five specific offenses included, subsection (c)(23) provides that "any felony in which the defendant personally used a dangerous or deadly weapon," will activate the enhancement provisions. CAL. PENAL CODE § 1192.7(c)(23) (West 1982). A sentence would not be prolonged, however, unless both the current and prior offenses fell within the purview of the enhancement provisions.

In 1983, the defendant was arrested for assault with a deadly weapon. The state alleged that the defendant had a prior conviction of a "serious felony." Accordingly, the prosecution advocated the invocation of the five-year enhancement statute. The defendant admitted that his prior conviction was considered a "serious felony." However, the defendant offered four interrelated arguments to preclude his present conviction from being enhanced.

First, the defendant maintained that subsection (c)(23) should not include assault with a deadly weapon or any crime in which the use of a dangerous weapon is an element of the underlying offense. The defendant called the court's attention to California's other sentence enhancement statutes. For example, section 12022(b) of the Penal

Code adds a year to the prescribed sentence for a felony in which a dangerous weapon is used during the commission of the crime. This section, however, specifically exempts crimes in which the use of a dangerous weapon is a necessary element of the crime. Likewise, section 12022.7, which enhances a defendant's sentence by three years if the victim suffers great bodily injury, explicitly states that it is inapplicable to a crime having the infliction of great bodily injury as one of its components.

In further support of his argument, the defendant cited *People v. Bradford*, 160 Cal. App. 3d 532, 206 Cal. Rptr. 899 (1986). In *Bradford*, the defendant disputed the applicability of the enhancement provisions to his previous offense. The *Bradford* court narrowly construed the language of subsection (c)(23) to exclude felonies such as assault with a deadly weapon and other felonies having the use of a dangerous weapon as an essential element.

In rebuttal, the supreme court mentioned *People v. Jackson*, 37 Cal. 3d 826, 694 P.2d 736, 210 Cal. Rptr. 623 (1985) and *People v. Arwood*, 165 Cal. App. 3d 167, 211 Cal. Rptr. 307 (1985). The *Arwood* court found *Bradford* to be at odds with its view of the enhancement provisions. The *Arwood* court, which interpreted *Jackson*, found that it was the intent of the voters, in enacting Proposition 8, to prolong sentences to deter egregious criminal *conduct* regardless of whether such conduct fit neatly into one of the pre-existing criminal offenses listed in the enhancement provisions. In *Equarte*, the court sustained the *Arwood* statutory construction, and thus, disapproved *Bradford* and *People v. Sutton*, 163 Cal. App. 3d 438, 209 Cal. Rptr. 536 (1986) (a case relying on *Bradford's* analysis).

The defendant's second argument was that section 1192.7(c)(23) should not include assault with a deadly weapon because this would make sections (c)(11) and (c)(13) unnecessary. Subsection (c)(11) covers assault with a deadly weapon upon a police officer, and (c)(13) includes any use of a deadly weapon by an inmate. The court countered the defendant's conclusion by noting that the enhancement provisions were not precisely written. As an example, the court mentioned that attempted murder fits within three of the designations.

The defendant's third and fourth arguments addressed the adequacy of the People's case. The defendant contended that the complaint failed to allege that he personally used a dangerous weapon and the complaint also failed to set forth the number of the exact subsection of 1192.7(c) with which he was being charged. The court responded by reminding the defendant that he waived his ability to

raise this objection by failing to demurrer to the prosecution's complaint. The defendant also claimed that the jury never specifically found that he personally used the weapon. The court dismissed this argument also. There was no accomplice to the assault conviction, thus, no factual dispute existed as to the defendant's personal use of the dangerous weapon.

In conclusion, the court rejected all of the defendant's arguments in favor of broadly interpreting the enhancement provisions. The court's ruling provides that subsection (c)(23) applies to assault with a deadly weapon and other serious felonies where the use of a dangerous weapon is an element of the crime itself. In sustaining the liberal, substantive interpretations of both *Jackson* and *Arwood*, the court evidenced sympathy for the electorate's desire to protect themselves against habitual criminals.

VALERIE FLORES

D. *A trial judge exercising discretion under section 1170.1(h) of the Penal Code may strike a statutory sentence enhancement, provided the trial judge states for the record the circumstances in mitigation, and his decision is neither arbitrary, capricious, nor unsupported:* **People v. Jordan.**

In *People v. Jordan*, 42 Cal. 3d 308, 721 P.2d 79, 228 Cal. Rptr. 197 (1986), the supreme court reviewed the actions of the sentencing judge in exercising his discretion pursuant to section 1170.1(h) of the Penal Code by striking enhancements from the defendant's punishment. The prerequisite for the exercise of such discretion is that the judge must state for the record the mitigating circumstances prompting him to strike the additional punishment. Thereafter, in order to reverse the trial judge's action, the appellate court must find that the action was arbitrary, capricious or so unreasonable that it resulted in a miscarriage of justice.

A review of the trial judge's conduct in this case was complicated by the entangled factual record: the testimony was contradictory; the victimized witness was absent; and the evidence presented was conflicting. Nonetheless, the defendant was convicted of robbery and assault with a deadly weapon. The judge delivered the maximum sentence in consideration of the defendant's many prior offenses. However, the judge exercised his discretion not to impose the applicable statutory sentence enhancements. As his grounds for striking the enhancements, the judge cited three mitigating factors: 1) the petty nature of the defendant's prior convictions; 2) the defendant's advanced age of 59 years; and 3) the judge's belief that the crimes

were not egregious. Rather, the judge believed that the crimes resulted from a dispute over repayment for the cost of a hamburger. The People appealed the ruling, contending that the judge's decision not to apply the enhancements was an abuse of his discretion.

In order to examine the validity of the judge's conduct, section 667.5(b) of the Penal Code must be analyzed. This section mandates a one-year sentence enhancement for each past prison term received by the defendant. Thus, the defendant's past imprisonments invoked the application of this section.

The mandate of section 667.5(b) may be overcome, however, by section 1170.1(h). The latter provision gives a trial court discretion to strike an enhancement where mitigating circumstances are present and the judge states those circumstances for the record. The trial judge complied with this requirement by stating the three factors he considered important enough to mitigate the otherwise appropriate enhancements.

In light of the express grant of discretion given by section 1170.1(h), the supreme court in *Jordan* held that a judge enjoys extensive protection in the use of that discretion. The standard of review allows an appellate court to overturn a trial judge's sentencing decision only if that sentence is arbitrary, capricious, or so unreasonable that it results in a miscarriage of justice.

More particularly, the supreme court rejected the People's contention that the exclusive list of circumstances constituting proper mitigating factors was set out in Rule 423 of the California Rules of Court. The supreme court held that other nonlisted factors may support a trial judge's discretion to withhold sentence enhancements. Furthermore, the supreme court held that an exercise of discretion falls within Rule 423 when a judge states merely that his or her decision was based on "the facts of the case." Moreover, Rule 409 presumes that a trial court considered the Rules of Court in determining a sentence.

The court in *Jordan* also refused to accept the People's argument that the sentencing judge abused his discretion in accepting a version of disputed evidence which was not the most probable. The court ruled that a mix of evidence presented which provides a basis for a judge's understanding is sufficient.

In addition, the supreme court was not persuaded by the People's assertion that the aggravating factors outweighed the mitigating ones and, therefore, the trial judge acted improperly. The court stated that evidence for and against mitigation need not be weighed

mechanically. Section 1170.1(h) of the Penal Code gives a sentencing judge sufficient discretion to strike enhancements even when the aggravating factors outweigh the mitigating factors.

Thus, although section 667.5(b) of the Penal Code mandates specified sentence enhancements, section 1170.1(h) gives a trial judge extremely broad discretion in declining to extend a defendant's sentence. This discretion may not be questioned by an appellate court if it is supported in the record and is not arbitrary, capricious, nor so unreasonable as to result in a miscarriage of justice. Refusing to enhance a sentence is not proper, however, unless the judge states the mitigating factors on which the decision is based. A refusal based on a statement as vague as "the facts of the case" is permissible. A judge's interpretation of the evidence, even if not the most likely, will be allowed to provide the basis for striking an enhancement. Finally, the discretion of a sentencing judge is so broad that his action will not be set aside even where the aggravating circumstances outnumber the mitigating factors.

VALERIE FLORES

E. *If the Board of Prison Terms finds "substantial disparity" in the punishment, the trial court is required to reduce the sentence unless the court can justify the disparity:* **People v. Martin.**

In *People v. Martin*, 42 Cal. 3d 437, 722 P.2d 905, 229 Cal. Rptr. 131 (1986), the supreme court held that a trial court must accept the Board of Prison Terms' [hereinafter the Board] finding of "substantial disparity" between the sentences imposed on the defendant and the other defendants in similar offenses, unless the court finds that the Board erred in its review. The court further held that the trial court must give "great weight" to the Board's finding by reducing the sentence in accordance with the Board's recommendation, unless the court can justify the disparity.

In this case, the jury found the defendant guilty on five counts of robbery. In two counts, the defendant was found to have used a knife. Prior to sentencing, the defendant was arrested for two additional charges of robbery with a firearm, to which he plead guilty. Consequently, the trial court sentenced him to twelve years imprisonment: five years for the principal robbery; a one-year enhancement for the use of a knife; and six one-year terms for the six other robberies. Pursuant to section 1170(f)(1) of the Penal Code, the Board reviewed the sentence to determine the existence of a possible disparity.

In its initial study, the Board found a substantial disparity in the

sentencing in the present case as compared to similar cases. The Sentencing Review Unit then began a further examination of the record. The Board's studies revealed that section 1170.1 of the Penal Code limited consecutive sentences for subordinate terms to five years. Therefore, the Board found that the trial court's six one-year terms for the additional six robberies were incorrect. It also found that the average period of imprisonment for individuals convicted of crimes similar to the instant case was seventy-seven months. A panel of the Board further conducted an independent study, and concurred with the Board's findings. Consequently, the Board advised the court that its sentence was substantially disparate from the norm, and recommended five to ten years imprisonment as the appropriate punishment.

The trial court disagreed with the Board's methodology. The court argued that the Board had failed to examine the defendant's personality, his attitude, and the nature of the particular offense. Therefore, the trial court's acceptance of the Board's recommendation was limited to the legal correction, and it ignored the Board's finding on disparity. Thus, the defendant's sentence was reduced from twelve to eleven years.

On appeal, the defendant successfully contended that the trial court had abused its discretion in refusing to comply with the Board's recommended punishment. Therefore, the question presented before the supreme court was what degree of "weight" the trial court should give the Board's finding.

The court began its analysis by reviewing the legislative intent behind section 1170(f). The court reasoned that the purpose of the section, was to promote uniformity in sentencing by diminishing inequitable disparities which often result from the differing attitudes of judges. Therefore, the court adopted a two-step approach to the issue: 1) the trial court must accept the Board's finding of disparity unless the court, based upon substantial evidence, finds that the Board erred; and 2) the court must also reduce the sentence unless it could justify the disparity. When rejecting the Board's sentencing recommendation, the trial court is required to support its decision with an articulate statement of reasons.

The decision illustrates the court's desire to encourage uniformity in sentencing, but not at the expense of the trial court's right to exercise discretion in particular cases that warrant disparity. Consequently, the trial court was required to comply with the Board's findings on disparity. However, if a trial court finds a special need

for disparate sentencing in a particular case, there is room to exercise its discretion. In order to do so, the trial court must support its decision with an articulate statement.

SUNG-DO GONG

F. *A defendant could be convicted of, but not punished for, both sodomy and lewd conduct based on one criminal act:* **People v. Pearson.**

In *People v. Pearson*, 42 Cal. 3d 351, 721 P.2d 595, 228 Cal. Rptr. 509 (1986), the California Supreme Court held that a defendant could be convicted of, but not punished for, both sodomy and lewd conduct based on the same act. The defendant was convicted of two counts each of sodomy and lewd conduct based on his acts upon two children. Sentences for the two counts of sodomy were stayed.

The defendant based his argument on the rule stated in *People v. Cole*, 31 Cal. 3d 568, 645 P.2d 1182, 183 Cal. Rptr. 350 (1982). In *Cole*, the supreme court held that a defendant could not be convicted of two crimes based on one criminal act if one crime was a lesser included offense of the other. The defendant argued in the alternative: (1) lewd conduct was a lesser included offense of sodomy; or (2) sodomy was a lesser included offense of lewd conduct. The court rejected both of these arguments.

The court held that lewd conduct was not necessarily included in sodomy because lewd conduct, as stated in section 288(a) of the Penal Code, requires a specific intent of "arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child." Sodomy, however, is a general intent crime pursuant to section 286(c) of the Penal Code. CAL. PENAL CODE §§ 288(a), 286(c) (West Supp. 1986). Therefore, it is possible to commit sodomy without having the specific intent required for lewd conduct.

The court also held that sodomy was not necessarily included in the crime of lewd conduct. Section 954 of the Penal Code allows a defendant to be convicted of as many offenses as are charged, and does not provide an exception for necessarily included offenses. *See* CAL. PENAL CODE § 954 (West 1982). It is unclear why the court did not challenge the *Cole* rule with its interpretation of section 954 of the Penal Code and resolve the issue of whether a defendant could be convicted of multiple offenses arising out of the same criminal act when one of the offenses was a lesser included offense of the other.

The defendant also relied upon *People v. Greer*, 30 Cal. 2d 589, 184 P.2d 512 (1947), where the court concluded that rape was a lesser included offense to lewd conduct because the statutory provision for lewd conduct lists rape as an example. The court did not find *Greer*

controlling because its holding conflicted with the provisions of section 954. In addition, the court noted that the discussion in *Greer* was merely dictum since the conviction therein was reversed on other grounds prior to the court's reaching the issue of whether rape was a lesser included offense of lewd conduct. Therefore, the court held that the defendant could be convicted of both sodomy and lewd conduct. However, section 654 of the Penal Code prohibits punishment for multiple offenses arising out of the same act, so the sentence for sodomy was necessarily stayed.

Next, the court addressed the issue of whether the sodomy conviction, which was stayed, could be later used for enhancement purposes for subsequent offenses. The court noted that since section 654 of the Penal Code prohibits concurrent sentences for multiple convictions arising out of the same act, the sodomy conviction, which was the lesser offense, was required to be stayed. *See In re Wright*, 65 Cal. 2d 650, 422 P.2d 998, 56 Cal. Rptr. 110 (1967).

The court then decided that section 654 also prohibits enhancement based on stayed convictions. The court reasoned that such use of stayed convictions would in effect result in multiple punishment which is proscribed by section 654. The court held that this must be the rule unless and until the legislature provides otherwise.

Section 1170.1(i), which disallows limitations on the number of enhancements to be used in forcible sex offenses, did not apply to this case because sodomy and lewd conduct are not forcible sex offenses. *See* CAL. PENAL CODE § 1170.1(i) (West Supp. 1986). Furthermore, the statute does not express a clear intent to allow enhancement for multiple convictions based on the same act.

Article I, section 28(f) of the California Constitution, which provides that "[a]ny prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding," did not affect the court's holding because this holding allowed the use of multiple convictions for enhancement to the extent that the legislature so authorized. CAL. CONST. art. I, § 28(f).

The primary holding of this decision was that neither sodomy nor lewd conduct is a lesser included offense of the other. Justice Lucas, in his dissent, felt that the discussion of the use of the stayed conviction for enhancement purposes was effectively dicta since it was a premature issue.

EILEEN M. LAVIGNE

G. *Sections 667 and 1192.7(c)(8) of the Penal Code, which jointly provide a five-year sentence enhancement for repeat offenders, apply to prior convictions only if the prosecution can establish, without going beyond the record, that the defendant personally used a dangerous weapon:* **People v. Piper.**

In *People v. Piper*, 42 Cal. 3d 471, 722 P.2d 899, 229 Cal. Rptr. 125 (1986), the California Supreme Court was presented with a second opportunity to define the language of California's recidivist sentence enhancement provisions. The court chose to strictly construe sections 667 and 1192.7(c) of the Penal Code [hereinafter the Enhancement Provisions]. Therefore, the *Piper* opinion requires the prosecution to actually litigate the defendant's use of a dangerous weapon before the Enhancement Provisions may be invoked under subsection (c)(8).

Piper was charged with and convicted of arson in 1983. In addition to a two-year sentence for arson, the trial court imposed five consecutive years to the term pursuant to the Enhancement Provisions. The increase was attributed to the defendant's prior conviction for shooting at an occupied vehicle. The defendant appealed the sentence enhancements and the supreme court granted review.

Both the current and previous convictions must be "serious felonies" within the meaning of the Enhancement Provisions if a sentence is to be extended. Although arson is expressly listed as item (c)(14) of the 25 "serious felonies" of section 1192.7, the defendant's prior offense of shooting at an occupied vehicle is not specifically enumerated. The prosecution maintained, however, that the previous conviction was covered by the two general categories of the Enhancement Provisions: subsections (c)(8) and (c)(23) of section 1192.7.

Subsection (c)(23) includes "any felony in which the defendant personally used a dangerous or deadly weapon." CAL. PENAL CODE § 1192.7(c)(23) (West 1982). This subsection expressly states, and the court's opinion in *People v. Equarte*, 42 Cal. 3d 456, 722 P.2d 890, 229 Cal. Rptr. 116 (1986), confirms that in order for a crime to fall within the purview of that subsection, the People, as part of their case, must demonstrate that the defendant *personally* used a dangerous weapon.

Subsection (c)(8) covers "any felony in which the defendant used a firearm." CAL. PENAL CODE § 1192.7(c)(8) (West 1982). The prosecution urged an interpretation of subsection (c)(8) which did not include personal use by the defendant as an element. In response, the court made three observations. First, the grammatical composition of the subsection suggests that personal use is, in fact, a component. Second, the court echoed the principles previously set forth in *People v. Walker*, 18 Cal. 3d 232, 555 P.2d 306, 133 Cal. Rptr. 520 (1976), that

whenever vicarious liability is to be imposed, legislative intent to that effect must be clearly expressed. The *Piper* court held that in subsection (c)(8) no such legislative intent was evident. The court's third response to the prosecution's position was that if subsection (c)(8) was at all ambiguous, that ambiguity must be resolved in favor of the defendant. For those reasons, the court concluded that subsection (c)(8), as well as subsection (c)(23), require a demonstration of the defendant's personal use of a dangerous weapon.

The court further stated that whether the defendant personally shot at the occupied vehicle was neither actually nor necessarily litigated at defendant's previous trial. The defendant could have been an aider or abettor. Moreover, the court refused to allow the prosecution to go behind the record of the previous conviction to prove additional facts necessary to show personal use.

In summary, personal use is required by subsections (c)(8) and (c)(23) of section 1192.7 of the Penal Code. The prosecution in *Piper* was unable to establish that the defendant personally used a firearm in the past crime, as they were confined to the record of what was actually or by implication adjudicated. Thus, the court ruled that the five-year enhancement was improperly applied by the trial court. Even though the defendant's recent arson conviction constituted a "serious felony," the fact that the prior conviction did not fall within one of the crimes enumerated within the Enhancement Provisions prevented the defendant's sentence from being extended.

In *Equarte*, the companion case published immediately preceding *Piper*, the court also examined the Enhancement Provisions. There, the court, in a broad interpretation, held the general wording of subsection (c)(23) to apply to assault with a deadly weapon and other serious felonies involving personal use of a dangerous weapon, although the crimes were not expressly listed therein. The broad and flexible application given to the Enhancement Provisions in *Equarte* was undermined by the narrow *Piper* holding. *Piper* removes the likelihood of sentence enhancement for previous crimes which involved more than one defendant, where it is unclear from the record which defendant personally used a dangerous weapon or was convicted as an accomplice. Further, *Piper* burdens future prosecutions by requiring the foresight to develop an extensive factual record, showing personal use by the defendant, so that the conviction may one day be used as a prior offense capable of invoking the Enhancement Provisions. The *Piper* decision neglects the voters' objective, in enacting generic provisions in the Enhancement Provisions

which was to close loopholes which enable habitual criminals to continue to victimize society.

VALERIE FLORES

V. CRIMINAL PROCEDURE

A. *The lawful presence of a police officer on the basis of an exigent circumstance can justify the subsequent warrantless entry of another officer for the purpose of interpreting what the first officer had already seen:* **People v. Duncan.**

In *People v. Duncan*, 42 Cal. 3d 91, 720 P.2d 2, 227 Cal. Rptr. 654 (1986), the supreme court unanimously affirmed the exigent circumstance exception to the general warrant requirement. Specifically, the court held that the lawful presence of an officer on the basis of an exigent circumstance can further justify the subsequent warrantless entry of another officer who was present solely for the purpose of interpreting what the first officer had already seen. However, in the event of a disruption of the continuity of subsequent entries, the court required the state to establish independent exigent circumstances for those entries.

In this case, an officer entered the defendants' premises without a warrant, suspecting a burglary to be in progress. Instead, he found a laboratory with a strong odor of ether. Suspecting it to be an illicit drug laboratory, he requested the assistance of his supervising officer who, upon arrival, called a vice control officer. When a neighbor informed the officers that the defendant was approaching, they left the premises.

The vice control officer later arrived and detected the odor of ether from the driveway. The two officers then related what they had seen. At that point, the vice control officer called the fire department and the federal drug enforcement agency. He then entered the premises with the other officers and concluded that the laboratory was used to manufacture illicit drugs. When the firefighters arrived, he ordered them to ventilate the premises and to turn off both the electricity and the gas.

The defendants were charged with possession of methylamine and phenyl-2-propanone with intent to manufacture, transport and sell methamphetamine, and the transportation and sale of metamphetamine. At trial, they moved to suppress the evidence. Upon the court's denial of their motion, they pleaded guilty and the court ordered them to be placed on a conditional probation, to which the defendants appealed. On appeal, the state conceded that the burden of

justifying the warrantless entries was on the state, and relied on the exigent circumstance exception to the general warrant requirement.

To determine the existence of exigent circumstances, the court used a two-step test: 1) a factual question to determine whether the officers knew or believed that exigent circumstances existed; and 2) a legal question to examine whether the officers' responses were reasonable under the circumstances. In determining the reasonableness of the officers' conduct, the court further held that the officers must be able to point to and articulate specific facts which would warrant a reasonable person to take immediate action.

The court found exigent circumstances for the entry of the first officer on two grounds. First, the initial intrusion on the defendants' privacy was justified by the reasonable suspicion that a burglary was in progress. Second, his continued presence was justified by a new suspicion that the laboratory was used to manufacture illicit drugs which gave rise to a new exigent circumstance.

The court justified the supervising officer's warrantless entry through the lawful presence of the first officer. The court reasoned that the supervising officer was present solely for the purpose of interpreting what the first officer had already seen. Thus, the additional intrusion on defendants' privacy was minimal.

The court, however, required an independent justification for the third officer's warrantless entry. This requirement was premised on the theory that the continuity of the entry was disrupted when the two officers left the premises. The defendants contended that under *People v. Dickson*, 144 Cal. App. 3d 1046, 192 Cal. Rptr. 897 (1983), the officer's entry could not be justified because the odor of ether alone was held to be insufficient to constitute an exigent circumstance. The supreme court acknowledged that since ether has numerous legitimate uses, odor alone cannot constitute an exigent circumstance. However, the court disapproved *Dickson* to the extent that such reasoning implies that an officer who senses the odor of ether must cease further investigation. The court held that odor is "indicative" of possible danger. The court concluded that the officer was lawfully acting to preserve life and property, especially in light of the extremely volatile nature of ether. Therefore, his entry was justified as being reasonable.

The court's holding seems to indicate its willingness to limit private rights where the general public is endangered by private misconduct. When relying on exigent circumstances, however, the court

will require officers to justify warrantless entries with articulable and specific facts which would warrant immediate action.

SUNG-DO GONG

B. *In the absence of cross-admissibility of evidence, the trial court, in a capital case, may be required to sever separate charges of the same class of crimes:* **People v. Smallwood.**

In *People v. Smallwood*, 42 Cal. 3d 415, 722 P.2d 197, 228 Cal. Rptr. 913, *modified*, 42 Cal. 3d 710a (1986), the supreme court required cross-admissibility of evidence for the joinder of two or more different offenses of the same crime in capital cases. The court wanted to prevent "substantial prejudice" unless the benefit of the joinder could be shown to outweigh the prejudice. Consequently, the court found that the trial court's denial of the defendant's motion to sever separate murder counts to be an abuse of its discretion under section 954 of the Penal Code. The court's holding was based on its finding that a capital case "compelled" it to analyze the severance issue "with a higher degree of scrutiny and care." 42 Cal. 3d at 426, 722 P.2d at 203, 228 Cal. Rptr. at 920 (quoting *Williams v. Superior Court*, 36 Cal. 3d 441, 454, 683 P.2d 699, 707, 204 Cal. Rptr. 700, 708 (1984)). As a result, the court reversed the death penalty.

In this case, the state charged the defendant with two separate murder counts, which occurred seven months apart, each with special circumstances. Consequently, if the court were to try the two offenses separately, the evidence of one offense would be inadmissible at the trial of another. In a pre-trial motion, the defendant urged the court to sever the two charges in accordance with section 954 which authorizes the trial court to exercise its discretion to sever different offenses of the same class of crime. Considering the absence of cross-admissibility of the evidence, the defendant argued that joinder would prejudicially cause a "spillover effect," resulting in reinforcement of the weaker case with the evidence of the stronger case. 42 Cal. 3d at 425, 722 P.2d at 202, 228 Cal. Rptr. at 918. However, the trial court denied the motion, and the jury found the defendant guilty on one offense while it failed to reach a verdict on the other. Subsequently, the trial court, sitting without a jury, imposed the death penalty on the defendant.

On appeal, the defendant contended that the trial court erred in refusing to sever the two counts. Relying on *Williams*, the majority agreed and held that if "substantial prejudice" can be shown, the trial court's refusal to disjoin the charges constituted an abuse of discretion.

To determine the existence of "substantial prejudice," the majority

began its analysis by examining the cross-admissibility of evidence. The majority held that in the absence of cross-admissibility in capital cases, the court should review the severance issue with a "higher degree of scrutiny and care" by examining the possible "spillover" effect from the joinder. Consequently, although the majority acknowledged cross-admissibility as an element in its analysis, it essentially made cross-admissibility a prerequisite to joinder in capital cases. Since the present case lacked cross-admissibility, the majority had little difficulty finding a "substantial prejudicial effect" from the trial court's denial to sever the charges, despite the overwhelming evidence against the defendant. As a result, the majority reversed the death penalty.

The majority opinion, authored by Chief Justice Bird, with whom Justices Broussard, Reynoso, and Grodin concurred, may have little value as a precedent due to the recent ejection of Bird, Reynoso, and Grodin from the court. Therefore, further discussion of the dissenting opinion, authored by Justice Lucas, with whom Justices Mosk and Panelli concurred, was warranted in order to determine the new court's possible approach to the issue.

Justice Lucas strongly criticized the majority for reversing the death penalty solely on the basis of the trial court's error in refusing to sever the two murder charges. The dissenting justices disagreed with the majority with regard to the scope of discretion authorized under section 954 of the Penal Code, and in the use of cross-admissibility of the evidence in finding "substantial prejudice." The dissenting justices also argued that *Williams* was irrelevant to the issue presented before the court.

The dissenting opinion began its discussion by examining the scope of discretion given to the trial court. The dissent argued that section 954 allows broad discretion with respect to the disposition of a severance issue. Therefore, the dissent was not troubled by the trial court's exercise of discretion in denying the defendant's pre-trial motion.

The dissent also found fallacy in the majority's analysis of the "substantial prejudice" element. First, the dissent pointed out that cross-admissibility should be a factor in the inquiry and not a prerequisite to proper joinder. Justice Lucas wrote that "[t]he majority magically transmute[d] an element *guaranteeing* proper joinder into a *prerequisite* to proper joinder." *Smallwood*, 42 Cal. 3d at 434, 722 P.2d at 209, 228 Cal. Rptr. at 925.

The dissenting justices also differed with the majority in reviewing

the case for any "spillover" effect. The majority examined the evidence presented *at the time of the motion* to determine whether a potential for a "spillover" effect existed; the dissent, on the other hand, argued that the court should review the actual evidence presented *at the trial.* In doing so, the dissent found overwhelming evidence of the defendant's guilt on both counts. Furthermore, the justices disagreed with the majority's decision to require higher scrutiny of the severance issue in capital cases. It pointed out that the Penal Code authorized the trial court to exercise its discretion in *all* criminal charges. The code did not require the trial court to employ a higher standard for capital cases.

The dissent also pointed out that the cases cited by the majority were inapposite. The majority relied upon *Williams* and *Coleman v. Superior Court*, 116 Cal. App. 3d 129, 172 Cal. Rptr. 86, *cert. denied*, 451 U.S. 988 (1981). However, the dissenting opinion reasoned that both cases dealt with pretrial review of severance rulings and potential prejudice resulting from joinder of cases while the issue in this case was whether actual prejudice resulted from the denial of severance.

Based on the recent removal of Chief Justice Bird and Justices Reynoso and Grodin, the following conclusions are warranted. First, the absence of these three justices from the court will inevitably result in the overruling of the present case. Considering Governor Deukmejian's affirmative stance on capital punishment, the new court's view on the issue may drastically shift the pendulum to the other side. Second, assuming the court does change its view on capital punishment, the dissenting opinion serves as an indication of the future court's position. It is likely that the Bird court's various interpretations of criminal procedure to reverse death penalty decisions will be undone by the new court. What remains to be seen, however, is the magnitude of the change and the period of time the new court will take to inject its view.

SUNG-DO GONG

C. *When a prior felony conviction is an element of a crime and the defendant stipulates to it, Article I, section 28(f) of the California Constitution requires the trial court to reveal the fact, not the nature, of the prior conviction to the jury:* **People v. Valentine.**

In *People v. Valentine*, 42 Cal. 3d 170, 720 P.2d 913, 228 Cal. Rptr. 25 (1986), the supreme court held that when a defendant stipulates to a prior felony conviction which is an element of a crime, the California Constitution requires that the trial court disclose this stipulation

to the jury. CAL. CONST. art. I, § 28(f) [hereinafter section 28(f)]. However, the court held that the nature of the prior conviction should be withheld as such information would be irrelevant in determining the defendant's ex-felon status. It also addressed whether the trial court's incorrect disclosure concerning the nature of the defendant's prior felony convictions to the jury constituted harmless error.

In this case, the defendant, who was charged with armed robbery and possession of a concealed firearm by an ex-felon, agreed to stipulate to his prior convictions if the trial court would withhold such information from the jury. The trial court, however, held that the open court requirement of section 28(f) compelled the court to deny the defendant's request. As a result, the trial court allowed the jury to learn both the fact and the nature of the defendant's prior felony convictions.

On appeal, the defendant contended that section 28(f) retained the pre-existing rule of *People v. Hall*, 28 Cal. 3d 143, 616 P.2d 826, 167 Cal. Rptr. 844 (1980). In *Hall*, the court held that once the defendant stipulates, neither the fact nor the nature of the prior convictions could be revealed to the jury. The defendant further argued that the disclosure of his stipulation would be irrelevant.

The *Valentine* court rejected the defendant's argument and overruled *Hall*. The court reasoned that the *Hall* decision was not based on the question of relevance but on due process. The court then ruled that the constitutional amendment may be interpreted to limit the scope of existing state constitutional due process protections provided that the federal due process protections are not violated. Moreover, the court observed that the language of section 28(f) clearly expressed legislative intent to restore the common law prior to *Hall*. Therefore, the court overruled *Hall* to the extent that the jury may now learn of the defendant's stipulation to his prior convictions.

However, the court held that the nature of the prior convictions should be withheld from the jury. It noted that since the defendant's ex-felon status was established, the nature of his prior crimes was irrelevant to the current charge of "possession of a firearm by an ex-felon." The court further reasoned that disclosing the nature of the prior crime would violate the federal due process right to a fair trial. Therefore, the court concluded that the trial court had misconstrued section 28(f).

The People contended that the trial court's error was harmless, and that the prejudicial effect was dispelled when the defendant testified. The court disagreed, noting that had the trial court correctly

interpreted the section, the defendant might not have taken the stand. In concluding that the error was not harmless, the court also relied on the discrepencies between the victim's initial description and the defendant's appearance when arrested, the defendant's alibi and the temporal proximity of the prior conviction. Consequently, the court granted a new trial on all counts.

Finally, concerning the question of construing the first sentence of section 28(f) as allowing the trial court an unlimited use of prior convictions for impeachment purposes, the court held that the trial court retained discretion to balance the impeachment value and the prejudicial effect.

SUNG-DO GONG

D. *The discovery of a wounded victim during the investigation of a robbery gives an officer reasonable cause to enter and briefly search an apartment for additional persons:* **Tamborino v. Superior Court.**

In *Tamborino v. Superior Court*, 41 Cal. 3d 919, 719 P.2d 242, 226 Cal. Rptr. 868 (1986), the defendants unsuccessfully moved to suppress contraband evidence found during a warrantless walkthrough search of their home. The defendants sought a writ of mandate in the court of appeal to set aside the trial court's unfavorable decision. The supreme court subsequently denied the writ.

After receiving a radio call reporting a robbery and the presence of a bleeding victim, police arrived at the defendant's apartment, knocked, and forcibly entered after receiving no answer. The defendant was approaching the door barefoot, wearing a bathrobe with blood on his head, neck and hands. Due to the limited report, police were not sure if he was a victim or a suspect; thus, for their own safety, the officers brought him outside the apartment and handcuffed him. Without questioning him, the officers immediately reentered the apartment to perform a sweep search for other victims or suspects. During this limited warrantless search, narcotics paraphernalia was seized and the defendants were subsequently charged with possession of cocaine for the purpose of sale pursuant to section 11351 of the Health and Safety Code. CAL. HEALTH & SAFETY CODE § 11351 (West Supp. 1986).

The court began its analysis with a discussion of the "plain view" doctrine which allows the police to seize contraband found in plain sight during a lawful search. In order to justify their actions, however, the officers must show that their decision was based on specific and articulable facts. The court reasoned that the defendant's injuries, coupled with the limited police report, constituted articulable

facts warranting the brief search of defendants' apartment to ascertain whether additional persons, victims or suspects were inside. Relying on the "common sense" and "concern for human life" rationales, the court concluded that the officers' actions were not unreasonable.

In addition, the court compared the facts of this case to a homicide investigation case where the United States Supreme Court held that "when the police come upon the scene of a homicide, they [may legally] make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises." *Mincey v. Arizona*, 437 U.S. 385, 392 (1978). The court analogized the present investigation of a robbery involving a wounded victim with the homicide investigation and approved the officers limited walkthrough search. When a man is barefoot, bleeding, and wearing a bathrobe, "reasonable" suspicion is created in the officer's mind as to whether such person was a victim or a suspect. In addition, the reliability of the defendant's response created exigent circumstances affording the officers a right to reenter without a warrant. Rather than enjoying the "luxury" of questioning the defendant whether or not others were inside, the court concluded that "immediate action was warranted," and authorized the warrantless search.

ARIAN COLACHIS

VI. ELECTION LAW

A court will invalidate an absentee ballot only upon a showing of fraud, coercion, or ballot tampering: **Wilks v. Mouton.**

In *Wilks v. Mouton*, 42 Cal. 3d 400, 722 P.2d 187, 229 Cal. Rptr. 1 (1986), the supreme court held that a court will invalidate an absentee ballot only upon a showing of fraud, coercion, or ballot tampering. The election to incorporate the community of East Palo Alto passed by a margin of fifteen votes: 1,782 in favor and 1,767 opposed. Of those votes, 272 were cast by absentee ballots. The plaintiffs, voters in the election, sought to invalidate the election on the grounds of improper handling of certain absentee ballots. If the plaintiffs' challenges had been sustained, certain absentee ballots would have been invalidated and the result in favor of incorporation reversed.

In stating that its primary duty was to validate the election unless it was plainly illegal, the court continued to recognize the distinction

between mandatory and directory provisions in election laws. *Rideout v. City of Los Angeles*, 185 Cal. 426, 197 P. 74 (1921). A violation of a mandatory provision invalidates the election. A deviation from a directory provision, however, will not invalidate the election if there was substantial observance of the law and the outcome of the election was not affected, or if the voters' rights were not injured by such deviation. The court also stated that it was bound by the trial court's determination of the facts when they are supported by substantial evidence.

First, the plaintiffs challenged fifteen of the absentee ballots that the county clerk mailed to a third party. Those ballots were mailed to the third party because the absentee applications filed by the voters required the clerk to do so. The plaintiffs argued that the county clerk violated section 1007 of the Elections Code, which requires that ballots be mailed only to the voters' residences and not to third parties. CAL. ELEC. CODE § 1007 (West Supp. 1986). The court found that the plaintiffs' argument was groundless. The court stated that section 1007 did not contain such a requirement; on the contrary, other sections of the absentee ballot provisions allow the voter to designate a mailing address different from his residence address. *See* CAL. ELEC. CODE §§ 1006, 1451 (West Supp. 1986).

In addition, the court refused to be persuaded by the plaintiffs' supplemental argument. The plaintiffs argued that the California Attorney General's determination that section 1007 does not authorize delivery of absentee ballots to authorized representatives of the voter was controlling. *See* 62 Op. Att'y Gen. 439 (1979). The California Attorney General stated that the legislature intended that third party delivery is not allowed unless the voter meets the usual time requirement for applying for an absentee ballot. *Id.* at 442. In *Wilks*, the absentee voters met the time requirement for applying for their absentee ballots. Under the plaintiffs' argument, the absentee voters were not allowed to use a third party to deliver their ballots. Consequently, their ballots were void. The majority stated that the Attorney General's opinion was inconsistent with section 1001 of the Elections Code which states that the absentee ballot provisions should be liberally interpreted in favor of the absentee voters. CAL. ELEC. CODE § 1001 (West Supp. 1986). Since the legislature allowed voters to receive ballots at a location other than their residences, "we can assume that the Legislature anticipated that in some cases a third party would convey the ballot to the voter." *Wilks*, 42 Cal. 3d at 405-06, 722 P.2d at 191, 229 Cal. Rptr. at 4. Since no mandatory provisions of the Elections Code were violated, the court refused to invalidate these fifteen ballots.

Next, the plaintiffs challenged the validity of forty-five absentee

ballots that were completed with the assistance of incorporation proponents. Upon substantial evidence, the trial court determined the following: 1) the assistance was done at the request of the voter; 2) there was no fraud or coercion; and 3) any disclosures on the part of the voter were made voluntarily. Also, the trial court concluded that no ballot had been tampered with and that the absentee ballots which were cast represented the free choice of the voters. Assuming that the trial court's findings were true, the plaintiffs argued that the secrecy of voting was violated when the voter voluntarily made disclosures. Therefore, even in the absence of tampering, the ballots should be invalidated. The court disagreed with the plaintiffs' argument.

The court stated that the provision in the California Constitution relating to voter secrecy does not mean that absentee ballots be cast in secret. The provision " 'was never intended to preclude reasonable measures to facilitate and increase exercise of the right to vote such as absentee . . . voting.' " *Wilks*, 42 Cal. 3d at 409, 722 P.2d at 193, 229 Cal. Rptr. at 6 (quoting *Peterson v. City of San Diego*, 34 Cal. 3d 225, 230, 666 P.2d 975, 978, 193 Cal. Rptr. 533, 536 (1983)). *See also* CAL. CONST. art. II, § 7. Since the court determined, upon a showing of substantial evidence, that no absentee voter was coerced to give up the right to vote in secret, the forty-five absentee ballots were not invalidated. The court further stated, in dicta, that it is the legislature's responsibility—not the court's—to address any weaknesses in the absentee voting provisions which are open to potential abuse.

The plaintiffs also attacked forty-six absentee ballots that were personally delivered to the ballot box between May 9 and May 24, 1983 by the chairperson of EPACCI, the committee favoring incorporation. It was not until May 24, 1983, however, that the assistant county clerk informed the clerk in charge of the ballot box that absentee ballots could be delivered only by the voter. The plaintiffs contended that section 1013 of the Elections Code directs the voter to return the completed ballot personally or by mail. CAL. ELEC. CODE § 1013 (West Supp. 1986). Delivery of the absentee ballot by a third party was not contemplated by the statute and, therefore, the ballots delivered between May 9 and May 24, 1983 should have been invalidated.

The court agreed with the plaintiffs' contention that section 1013 did not condone the voters' use of a third party to deliver the absentee ballot. The court, however, did not agree "that the voters' and . . . clerks' inadvertent violation of this provision require[d] that we dis-

enfranchise the voter in the face of a trial court finding that there was no fraud or tampering with the challenged ballots." *Wilks*, 42 Cal. 3d at 411, 722 P.2d at 195, 229 Cal. Rptr. at 8. The court also disagreed with a court of appeal's decision that held that provisions prohibiting third party delivery of absentee ballots were essential to preserving the integrity of elections. *Fair v. Hernandez*, 138 Cal. App. 3d 578, 188 Cal. Rptr. 45 (1982).

The court regarded section 1013 as directory in nature and not mandatory. Since the section is directory in nature and the violation did not change the result of the election, the absentee ballots should not be invalidated. In addition, the court relied on the fact that section 1013 did not prevent the fair expression of the electorate will or injuriously affect the rights of the voters involved.

Lastly, the plaintiffs challenged sixteen absentee ballots returned in envelopes in which the voters' residence addresses failed to agree with the address on their affidavit of registration. The court concluded that section 1015 did not require the election official to compare addresses, but only the signatures on the identification envelope with the signature on the affidavit of registration. CAL. ELEC. CODE § 1015 (West Supp. 1986). Therefore, the absentee ballots were not invalidated.

RICHARD J. WITTBRODT

VII. EVIDENCE

The Luce rule is adopted prospectively, and a procedure is established for applying the Castro rule to cases tried prior to the Castro decision: **People v. Collins.**

In *People v. Collins*, 42 Cal. 3d 378, 722 P.2d 173, 228 Cal. Rptr. 899 (1986), the California Supreme Court prospectively adopted the rule established in *Luce v. United States*, 469 U.S. 38 (1984). In an opinion written by Justice Mosk, the court also established a procedure for appellate courts to follow in applying the rule set out in *People v. Castro*, 38 Cal. 3d 301, 696 P.2d 111, 211 Cal. Rptr. 719 (1985), for pre-*Castro* cases.

The defendant Collins was charged in 1983 with either burglary or receiving stolen property. At trial, the prosecution wanted to disclose prior burglary and robbery convictions for impeachment purposes if the defendant testified. The defendant moved to exclude the prior convictions, but the trial court denied the motion. The trial court held that it had no discretionary power as it was bound by article I, section 28(f) of the California Constitution. Section 28(f), which was adopted in 1982 as part of Proposition 8, authorizes impeachment of a

witness with prior felony convictions. The defendant chose not to testify and was convicted of second degree burglary.

At trial, the defendant argued that the court had the discretion to exclude evidence of the prior convictions pursuant to section 352 of the California Evidence Code. This section gave the court the discretion to exclude the use of a prior conviction when its probative value is outweighed by the risk of undue influence. *See People v. Beagle*, 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972).

In *Castro*, the California Supreme Court recently held that although section 28(f) authorizes the impeachment of a witness by prior felony convictions involving moral turpitude, section 352 does indeed provide the court with discretionary power in deciding whether to exclude or include the convictions. However, *Castro* was decided in 1985, subsequent to the present case. Therefore, the trial court did not rely upon *Castro* for its decision to allow the prosecution to use the convictions for impeachment.

The defendant appealed the denial of the motion to exclude. The prosecution urged the court of appeal to adopt the rule set out in *Luce*. The *Luce* rule prohibits a party from appealing a denial of a motion to exclude prior convictions if the defendant failed to testify. The court adopted the *Luce* rule, but held that it would take effect prospectively in order to avoid fundamental unfairness to the defendant who relied in good faith on the law in effect at the time he made his decision not to testify.

In adopting the *Luce* rule, the court held that it did not violate the defendant's privilege against self-incrimination either under the fifth amendment to the United States Constitution or under article I, section 15 of the California Constitution. The defendant had argued that the *Luce* rule would usurp his right to remain silent due to the resulting expense of not being able to appeal the denial of the motion to exclude. The court held that the *Luce* rule did not usurp the defendant's right to decide whether to testify, but only made that decision more difficult. The court held that the *Luce* rule was constitutional and would be applied prospectively. Therefore, the defendant was able to appeal the trial court's decision.

The court of appeal had affirmed the trial court's determination that it was bound by section 28(f) and, therefore, had no discretion to consider the motion to exclude. The supreme court reversed, and held that the *Castro* rule applies to those cases *tried* before the date of the *Castro* decision but which were still pending upon appeal. The

court then formulated a procedure for appellate courts to follow in applying the *Castro* rule.

The procedure established by the court can apply to factual situations analogous to the instant case. The procedure requires that the appellate court make an initial determination as to whether the prior convictions were inadmissible as a matter of law or upon the trial court's discretion. A conviction would be inadmissible as a matter of law in three situations: (1) if the conviction, pursuant to *Castro*, did not involve moral turpitude; (2) if the appellate court concluded that the trial court could only find it inadmissible, in the exercise of its discretion; or (3) if the conviction lost felony status by operation of law.

If the trial court's determination of admissibility was discretionary, and the defendant testified at trial, the appellate court must assess the probable effects of the impeachment on the disposition of the case. If the impeachment did not truly affect the outcome, the *Castro* error was harmless. Otherwise, the case must be remanded to the trial court, and the trial court must exercise its discretion and decide whether the error was harmless or prejudicial.

If the defendant did not testify at trial, the issue is automatically remanded to the trial court to exercise its discretion and to determine whether the error was harmless or prejudicial. In so determining, the trial court directs the defendant to offer proof *in camera* as to what his testimony would have been.

In applying the procedure to the instant case, the court held that since both burglary and robbery involve moral turpitude, those convictions were not inadmissible as a matter of law. Therefore, the decision whether to include or exclude them was discretionary. The court directed the court of appeal to remand the case to the trial court to follow the procedure outlined.

By adopting the *Luce* rule, an appeal of a denial of a motion to exclude use of prior convictions for impeachment is prohibited when the defendant fails to testify. A detailed procedure for the lower courts to follow in applying the *Castro* rule has now been clarified. The procedure will apply to cases tried prior to *Castro*, but which involve issues relating to article I, section 28(f) of the California Constitution and section 352 of the Evidence Code.

EILEEN M. LAVIGNE

VIII. FAMILY LAW

A California court is authorized to grant an ex-spouse an interest in the gross amount of a military retiree's pension omitted and unadjudicated in previous divorce proceeding: **Casas v. Thompson.**

In *Casas v. Thompson*, 42 Cal. 3d 131, 720 P.2d 921, 228 Cal. Rptr. 33 (1986), the supreme court held that the Federal Uniform Services Former Spouses' Protection Act [hereinafter FUSFSPA], authorizes a court to partition a gross amount of a military retiree's pension which was omitted from an earlier divorce decree, for the benefit of the former spouse. The court based its decision on the legislative intent behind FUSFSPA and past California case law precedent.

A regular or reserve commissioned officer of the United States who retires after twenty years of service is entitled to retirement pay. 10 U.S.C.A. §§ 1391, 3929 (West Supp. 1986). The plaintiff in *Casas*, brought an independent action, fourteen years after her divorce decree was entered, to divide her husband's military retirement pension, overlooked in the earlier divorce proceeding. The defendant had been receiving such payments for ten years prior to this action. In March of 1982, the trial court held, pursuant to *McCarty v. McCarty*, 453 U.S. 210 (1981), that the defendant's pension was his separate property, not subject to court divestiture. Before judgment was entered, the plaintiff urged the lower court to recognize FUSFSPA, which was enacted February 1, 1983, and allowed respective states to treat military retirement pensions as community property. 10 U.S.C.A. § 1408 (West Supp. 1986). Thereafter, the trial court found that the plaintiff was entitled to thirty percent of the retiree's disposable retirement payments from the time that she filed this complaint for partition.

Disposable pay, as defined in FUSFSPA, is the total or gross pay to which the military member is entitled, less certain statutory deductions. 10 U.S.C.A. 1408(a)(4) (West 1983). The decision to use "gross" pay rather than "disposable" pay was based on the individual tax liability already paid by the defendant on those sums, and to avoid a resulting "accounting nightmare." Both parties appealed. The plaintiff claimed that she had an interest in the gross, not disposable, pay from the time her ex-spouse received his first payment in 1970. The defendant contended that his retirement pay was not subject to apportionment, and in the alternative, that any award for future payments be limited to disposable pay.

The appellate court upheld the trial court's findings except with respect to the issue of disposable pay. The court of appeal ruled that "accounting nightmares" were not sufficient to justify such an award, and awarded the plaintiff an interest in the retiree's gross pay.

The supreme court was presented with several issues upon review. The plaintiff reiterated her right to the retirement pension from 1970 to 1980. The defendant presented the following arguments: (1) *McCarty* should be given retroactive application; (2) his retirement pension had not vested; (3) California law excludes retirement pay as community property; (4) FUSFSPA prevents partition of his retirement pension because *McCarty* was decided after his divorce; and (5) in the event that the pension was divided, FUSFSPA limits the apportionment to disposable, not gross, retirement pay.

It is settled law in California that in order for a former spouse to claim a valid interest in omitted, unadjudicated property, he or she must have had a divisible interest in it at the time of the dissolution. *See Henn v. Henn*, 26 Cal. 3d 323, 605 P.2d 10, 161 Cal. Rptr. 502 (1980). In addition, the classification of property as separate or community is determined at the time of acquisition. Prior to 1974, vested military retirement pensions were subject to both classifications. Thereafter, vested military pensions in California constituted community property. *In re Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal Rptr. 369 (1974). In 1980, the United States Supreme Court held that retirement pension payments were the sole property of the retiree, prohibiting its division. In 1983, Congress reacted by enacting FUSFSPA which, in effect, nullified *McCarty* prospectively, and, in part retroactively. In addition, it left the power to classify such property to the respective states. 10 U.S.C.A. 1006 (West 1983) (allows enforcement of pre-*McCarty* judgments). "Starting with the last paragraph of the *McCarty* opinion itself, the judicial and legislative branches, state and federal, cooperated in a massive and largely successful drive to make *McCarty* disappear—prospectively, presently and retroactively." *Aloy v. Mash*, 38 Cal. 3d 413, 421, 696 P.2d 656, 661, 212 Cal. Rptr. 162, 167 (1985).

Based on these facts and others, the court denied the defendant's first request to apply *McCarty* retroactively. The court relied on the legislative intent to eliminate *McCarty's* effect, and on the fact that *McCarty* established a new principal of law which overruled "clear and past precedent." In addition, the court recognized that retroactive application would produce "injustice or hardship." Thus, the court affirmed the lower court's finding of nonretroactivity.

Although the court refused to apply *McCarty* retroactively, it did not do so with respect to *Fithian*, which classified vested military retirement pensions as community property. *Fithian* neither over-

turned an established principal of law nor produced hardships by applying it retroactively. Since the defendant had more than twenty-one years of active service and was therefore eligible for a pension at the time of the divorce, his military pension had vested. This military pension represented deferred compensation entitling the plaintiff to a one-half community property interest in the defendant's pension.

The defendant's last argument was also refused. He argued that a state is prohibited from awarding a former spouse more than the one-half interest allowed in a retiree's disposable retirement pay. The court failed to see the proposed limitation and criticized the defendant's unsupported theory which would create disparate treatment among nonmember spouses with identical pension amounts. The defendant referred to the "implied preemption" issue addressed in *McCarty*. The court acknowledged that at the time *McCarty* was decided, circumstantial evidence existed to justify prohibiting application of state community property laws to military pensions. Those circumstances, which include the following, no longer exist: inability to purchase an annuity out of the depleting retiree's pension; the desire to award the retiree what is essentially his or her own; and decreased enlistment for fear of transfer to a community property state. All three predicates for *McCarty* disappeared with the enactment of FUSFSPA and the court found no violation of the supremacy clause. U.S. CONST. art. VI, cl. 2.

The defendant also relied on the express language of section 1408(c)(1) which provided that a state may treat disposable retired pay as property of the retiree and his or her spouse in accordance with state law. While the court recognized that FUSFSPA limited states from applying their own family laws, the limitation existed only as to "restrictions on garnishments of and direct payment from retiree's disposable pay." In essence, under FUSFSPA a former spouse is not limited to dividing disposable retirement income. Furthermore, California law before *McCarty* treated military retirement pensions like all other community property dividing the total "gross" benefits.

The court briefly analyzed the plaintiff's request for a community interest in the pension for the period 1970 to 1980. The plaintiff felt that because defendant had no recognized equitable defense, i.e., estoppel, waiver, laches or unjust enrichment, she was entitled to a one-half interest in all retroactive payments. Notwithstanding this fact, the court held that the determination of whether the retiree's

former spouse should receive past disbursements was ultimately left to the discretion of the court. Applying equitable principles, the supreme court affirmed the trial court's finding that it would be inequitable and unjust to require the defendant to compensate the plaintiff after he financially supported their five children before, during and after the divorce. Partition of her husband's retirement pension payments was limited to that received from 1980 forward.

ARIAN COLACHIS

IX. INSURANCE LAW

A. *Section 12993 of the Insurance Code exempts insurance companies from civil liability for making reports to the Bureau of Fraudulent Claims pursuant to section 12992, provided that there is no malice:* **Frommoethelydo v. Fire Insurance Exchange.**

In *Frommoethelydo v. Fire Insurance Exchange*, 42 Cal. 3d 208, 721 P.2d 41, 228 Cal. Rptr. 160 (1986), the supreme court held that section 12993 of the Insurance Code protected an insurance company from tort claims filed by the company's insured, when the tort claims were based on reports filed by the insurance company in compliance with section 12992 of the Insurance Code. Section 12992 requires that an insurance company file a report with the Bureau of Fraudulent Claims [hereinafter the Bureau] whenever the insurer has reason to believe that a fraudulent claim has been filed, unless subsequent information negates that belief.

The plaintiff filed a claim with the defendant insurance company for losses sustained in a June, 1979 burglary. One of the documents submitted to the insurer was a copy of a bill of sale for a stereo. The printed date on the cash register tape had been erased and a date in January was handwritten on the top of the bill of sale. Four other copies of the bill of sale were dated July 19, 1979. After questioning the plaintiff and the sales staff at the stereo store where the bill originated, the insurance company concluded that fraud may have occurred. The district attorney recommended prosecution, and the plaintiff was arrested on criminal charges. The insurer, in compliance with section 12992 of the Insurance Code, filed a report with the Bureau. The criminal charges were later dismissed when the plaintiff revealed that he had witnesses who would testify to seeing the stereo equipment at his residence prior to the burglary.

The plaintiff sued the insurance company for breach of the duty of good faith and fair dealing, breach of fiduciary duty, and violation of section 790.03 of the Insurance Code which requires reasonably prompt investigation and processing of insurance claims. The trial

court awarded damages for economic loss (based on the cost of the criminal defense and the amount of the claim, less the deductible), emotional distress resulting from the criminal proceedings, and punitive damages.

The California Supreme Court held that section 12993 protected the defendant from the tort claims filed by the plaintiff. Section 12993 provides a conditional privilege for insurance companies to report potentially fraudulent claims to the Bureau, providing that the report was not made with actual malice. Actual malice exists when "the publication was motivated by hatred or ill will towards the plaintiff *or* [when] . . . the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights." *Frommoethelydo*, 42 Cal. 3d at 217, 721 P.2d at 46, 228 Cal. Rptr. at 165 (emphasis in original) (citations omitted).

The court reasoned that the defendant did not act with actual malice because it was reasonable to believe that fraud may have occurred, based on the testimony of the sales personnel at the stereo store and the altered bill of sale. The plaintiff argued that since the defendant would profit from a determination of fraud by not being required to pay the claim, the report filed with the Bureau was submitted with actual malice. In rejecting this argument, the court reasoned that such a holding would mean that every report filed with the Bureau would be filed with actual malice since an insurance company would always benefit from a showing of fraud.

The plaintiff also argued that the insurance company had a duty to further investigate because of its duty of good faith and fair dealing, as well as its fiduciary duty toward the plaintiff. The plaintiff reasoned that since section 12992 did not require the filing of a report if subsequent evidence disproved fraud, the insurance company had a duty to search for that evidence. The court held that the privilege provided by the actual malice standard of section 12993 was not to be overcome by a lesser standard: the breach of a duty to investigate further. Since the plaintiff failed to prove actual malice on the part of the insurance company, the latter was not liable for damages arising from the report filed with the Bureau.

Nevertheless, the protection provided by section 12993 only applies when the claim arises out of a report filed under section 12992. Therefore, the insurance company was liable for failure to investigate further, subsequent to the criminal prosecution at which the defendant was informed of the existence of witnesses who could disprove

fraud. The court separated the damages claimed by the plaintiff into those arising from the filing of the report with the Bureau, and those arising from the defendant's failure to investigate the claim subsequent to receiving notice of the existence of evidence disproving fraud. Ruling that the damages for emotional distress, costs of defending the criminal prosecution, and the punitive damages were related to the filing of the report with the Bureau, the court only awarded damages to compensate the plaintiff for the value of the claim. In addition, the court noted that the plaintiff could retry the matter for other damages resulting from the defendant's failure to investigate the claim further.

EILEEN M. LAVIGNE

B. *Employer's liability insurance coverage does not extend to a non-employee who is employed by a related, though legally separate, corporation:* **Producers Dairy Delivery Co. v. Sentry Insurance Co.**

In *Producers Dairy Delivery Co. v. Sentry Insurance Co.*, 41 Cal. 3d 903, 718 P.2d 920, 226 Cal. Rptr. 558 (1986), the supreme court held that an employer-employee relationship must be established before employer's liability insurance coverage may be invoked. After examining the case's complicated factual situation, the court determined that the requisite employer-employee relationship did not exist where a worker was employed by a related, though legally distinct, corporation. In reaching its decision, the court reviewed the function, scope, and policy behind employer's liability insurance.

The related corporations in this case were Producers Dairy Delivery Company [hereinafter Producers], a supplier of milk, and LAS Corporation [hereinafter LAS], a distributing service. Producers and LAS purchased a "Workers' Compensation and Employer's Liability Insurance Policy" from Sentry Insurance Company [hereinafter Sentry], as well as a general liability insurance policy from Federal Insurance Company [hereinafter Federal]. Producers and LAS were jointly listed as the "insured" on each policy.

Although Producers was LAS's primary customer, LAS did distribute the products of other companies. Moreover, LAS was licensed as a common carrier by the Public Utilities Commission. When distributing milk for Producers, LAS independently contracted with Producers to furnish drivers for the trucks owned and maintained by Producers. During distribution, Henry Noyes, a driver employed by LAS, was injured on a truck owned and maintained by Producers. As a result of his injuries, Noyes collected benefits through LAS's workers' compensation coverage with Sentry.

Thereafter, Noyes filed a tort action against Producers, alleging that its negligent truck maintenance caused his injuries. Producers and Federal argued that Noyes was Producers' employee and therefore, was entitled only to the workers' compensation benefits he had already received. The trial court held the following: 1) Noyes was exclusively an employee of LAS; 2) Sentry properly paid Workers' Compensation benefits to Noyes on behalf of LAS; and 3) Producers and Federal were liable to Noyes on his tort claim. The court of appeal affirmed. However, prior to petitioning the California Supreme Court, Producers and Federal settled with Noyes for an amount less than the judgment.

Subsequent to their settlement with Noyes, Producers and Federal filed a suit against Sentry on two counts: 1) for declaratory relief seeking reimbursement of the sum paid to Noyes on the basis that the "employer's liability" portion of the Sentry policy extended coverage to Producers; and 2) for bad faith for refusing to defend Producers in the first action. The trial court judicially noticed the first suit and entered summary judgment in Sentry's favor.

Upon review by the supreme court, the focal point of the opinion was the employer's liability section of the policy issued by Sentry to Producers. The court first dealt with the collateral estoppel issue. In the first trial by Noyes against Producers, the question of whether Noyes was an employee of LAS or Producers was at issue. The trial court determined that Noyes was an employee solely of LAS. In the second action by Producers against Sentry, Producers sought to establish that Noyes was its employee in order to be reimbursed by Sentry. Sentry argued that the resolution of Noyes's employment status in the first action collaterally estopped the discussion of that issue in the second suit.

The court noted that the following elements were necessary to preclude litigation of an issue by collateral estoppel: 1) a necessary decision on the identical issue; 2) a final judgment on the merits of the first suit; and 3) the presence of Producers in the first suit. The third element was satisfied without discussion.

Producers maintained that the language of the employer's liability section of the policy issued by Sentry was ambiguous and permitted two reasonable interpretations of the term "employee." Thus, the first element requiring a decision on the identical issue was destroyed. The court ruled, however, that the policy language as to what constituted an employee was clearly applicable to both tort and

workers' compensation claims. Thus, the issues in the two suits were identical.

Producers also argued that the settlement of the Noyes suit prior to appeal to the supreme court did not render the necessary final judgment on the merits. The court, relying on *Sandoval v. Superior Court*, 140 Cal. App. 3d 932, 190 Cal. Rptr. 29 (1983), held that the settlement, especially after affirmance by the appellate court, was a final judgment on the merits for purposes of collateral estoppel.

Sentry established all of the elements required for application of collateral estoppel. Therefore, the court concluded that Producers was barred from alleging that Noyes was its employee in order to compel Sentry's participation in the payment of monies to Noyes.

After the collateral estoppel issue was resolved, the court focused on the employer's liability insurance which was issued by Sentry to Producers. The court described the employer's liability coverage as providing employers with "gap filler" coverage for liability that it incurs to an employee that is outside the scope of workers' compensation coverage (e.g., a tort action by an employee who is not subject to workers' compensation laws). Employer's liability insurance coverage provides general liability protection for an insured in its capacity as an employer. In the usual case, workers' compensation and employer's liability coverage are mutually exclusive.

Producers' main argument was that its close corporate relationship with LAS, as evidenced by the fact that the two companies were jointly listed as "insured" on the Sentry policy, together with the ambiguity in the language of the employer's liability provision, allowed for an interpretation that Sentry was obligated to Producers for Noyes' damages, notwithstanding the fact that Noyes was an employee of LAS.

The court began its analysis of Producers' argument by acknowledging the general rule that ambiguities in an insurance policy must be resolved in favor of the insured. The court then considered whether the policy was in fact ambiguous. Ambiguity exists when a provision may be reasonably interpreted (construing the words contained therein in their usual sense) in two reasonable ways. Producers introduced the testimony of an officer who worked for both Producers and LAS. The officer stated that both companies operated as a single entity.

Furthermore, he believed that the Sentry insurance policy covered Producers against claims of employees of either corporation. Notwithstanding this testimony, the court deemed Producers' interpretation to be strained, given that it required a construction finding that employer's liability insurance provided insurance for employees of a company that the director knew was legally distinct.

The court declined to consider Producers' interpretation reasonable on additional grounds. Initially, the court ruled that construing the policy to provide an employer with coverage for a non-employee, contravened the purpose behind the Insurance Code, which the court noted was to protect workers by making available to their employers specialized employer coverage at a low cost.

Moreover, the court noted that Producers' construction essentially contended that a company would be protected against the claims of non-employees whose actual employers were listed on the same policy as the company—an outcome which would detrimentally affect beneficial group insurance arrangements. Finally, the court pointed out that even if Producers' understanding were accepted, Producers would be denied coverage by an exclusion in the very same policy they sought to exploit. This fact led the court to hold secure in its denial of Producers' interpretation.

In conclusion, the supreme court determined that one of the inherent features of employer's liability insurance is that it provides coverage to an insured in its capacity as an employer. Producers was collaterally estopped from contending that Noyes was its employee. Therefore, Producers was confronted with the overwhelming task of demonstrating that the employer's liability provision of its Sentry policy protected it against claims of a non-employee. The court was unpersuaded that the subject provision was ambiguous enough to extend to non-employees. Further, the court rejected as unreasonable, Producer's understanding that the close corporate relationship between it and LAS made the policy more flexible. In addition, the court noted that a ruling for Producers would violate policy considerations behind the Insurance Code and would change the successful nature of group insurance. It would also trigger a policy exclusion which would prevent Producers' recovery in any event. Thus, the lower court's judgment in Sentry's favor was affirmed.

VALERIE FLORES

X. PRIVACY

Various provisions of the Civil and Vehicle Codes, designed to ensure privacy, prevent the Department of Motor Vehicles from releasing to third parties, fingerprint records of applicants provided on the driver's license application: **Perkey v. Department of Motor Vehicles.**

I. INTRODUCTION

In *Perkey v. Department of Motor Vehicles*,[1] the California Supreme Court considered whether disclosure by the Department of Motor Vehicles [hereinafter DMV], of an applicant's fingerprint records to third parties disinterested in motor vehicle safety violated the applicant's right to privacy guaranteed by article I, section 1 of the California Constitution.[2] In holding that the DMV's practice violated various provisions of both the Civil and Vehicle Codes, the majority prohibited the practice without addressing whether it also contravened the constitutionally guaranteed right to privacy. Chief Justice Bird, in addition to authoring the majority opinion, wrote a concurring opinion in which she detailed, in *dicta*, the intrusion into a person's privacy which would occur if the Civil and Vehicle Codes were not interpreted to preclude the DMV's dissemination of fingerprint information. Justice Mosk, in his dissent, disagreed with the majority's statutory interpretation and rejected entirely the proposition that one's right to privacy is inclusive of fingerprint data.

II. HISTORICAL BACKGROUND

In 1972, article I, section 1 of the California Constitution [hereinafter the Privacy Amendment][3] was amended to include privacy among those inalienable rights to be enjoyed by the citizens of California. Subsequently, the Information Practices Act of 1977[4] was enacted ex-

1. 42 Cal. 3d 185, 721 P.2d 50, 228 Cal. Rptr. 169 (1986). The majority opinion was authored by Chief Justice Bird, with Justices Broussard, Reynoso, and Grodin concurring. Chief Justice Bird also wrote a special concurring opinion. A separate dissenting opinion was written by Justice Mosk, in which Justice Lucas concurred.

2. This provision states the following: "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and privacy." CAL. CONST. art. I, § 1.

3. *See supra* note 2 and accompanying text.

4. The information Practices Act of 1977 provides the following:

> The Legislature declares that the right to privacy is a personal and fundamental right protected by Section 1 of Article I of the Constitution of California and by the United States Constitution and that all individuals have a right of privacy in information pertaining to them. The Legislature further makes the following findings:
>
> (a) The right to privacy is being threatened by the indiscriminate collec-

pressly as an enforcement instrument for the Privacy Amendment.[5]

III. FACTUAL BACKGROUND

This case was brought to the court's attention following the denial of a driver's license to the plaintiff, Christopher Ann Perkey, exclusively on the basis of her refusal to be fingerprinted. The plaintiff filed a writ of mandamus to compel the issuance of a license while concurrently attempting to have the DMV's fingerprint requirement ruled unconstitutional. Alternatively, the plaintiff argued that the DMV's release of her fingerprint information to third parties violated the right to privacy afforded by the Privacy Amendment.[6]

IV. THE MAJORITY OPINION

A. The Fingerprint Requirement: Section 12800(c)

The supreme court's consideration of the plaintiff's claims began with an inquiry into the constitutionality of the mandatory fingerprint requirement contained in section 12800(c) of the Vehicle Code.[7] The plaintiff's initial claim was that the DMV fingerprint requirement violated her substantive due process rights as no nexus existed between the requirement and the State's concern for highway safety. In addressing this allegation, the court echoed the finding in *Hernandez v. Department of Motor Vehicles*[8] that California does not recognize the right to drive as being fundamental.[9] Thus, the court stated that the appropriate standard under which to review the DMV's fingerprint policy was the rational basis test.[10]

In applying the rational basis test, the court examined the policy

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tion, maintenance, and dissemination of personal information and the lack of effective laws and legal remedies.

(b) The increasing use of computers and other sophisticated information technology has greatly magnified the potential risk to individual privacy that can occur from the maintenance of personal information.

(c) In order to protect the privacy of individuals, it is necessary that the maintenance and dissemination of personal information be subject to strict limits.

CAL. CIV. CODE § 1798.1 (West 1985).

5. *Perkey*, 42 Cal. 3d at 192, 721 P.2d at 54, 228 Cal. Rptr. at 173.

6. *See supra* note 2 and accompanying text.

7. Section 12800(c) reads as follows: "Every application for a driver's license shall contain all of the following information: . . . (c) A legible print of the thumb or finger of the applicant." CAL. VEH. CODE § 12800(c) (West Supp. 1987).

8. 30 Cal. 3d 70, 80, 634 P.2d 917, 922, 177 Cal. Rptr. 566, 571 (1981).

9. *Perkey*, 42 Cal. 3d at 189, 721 P.2d at 52, 228 Cal. Rptr. at 171.

10. *Id.*

behind section 12800(c). The majority credited the legislature with requiring fingerprints of license applicants to safeguard the accuracy of DMV records.[11] The court also noted the steady increase in the instances of fraud among drivers whose licenses had been revoked due to driving infractions.[12] The court then acknowledged that the State's attempt to promote public safety by intercepting fraudulent license applications of hazardous drivers was legitimate.[13]

The court subsequently shifted its discussion to whether fingerprinting was a proper means for the State's pursuit of accurate records. The opinion mentioned the unreliability of handwriting samples (too small and easily imitated) or photographs (possibility that appearance can be altered by wigs, makeup and facial hair).[14] Thus, the court ruled that suitable alternatives to fingerprinting for identification were unavailable.[15]

In summary, the court concluded that the DMV's fingerprint requirement was a reasonable means of protecting dangerous drivers from obtaining a license. Therefore, since it bore a rational relationship to highway safety, it did not violate the plaintiff's substantive due process rights.[16]

B. The Fingerprinting Process

The supreme court also discussed the contention that the DMV's fingerprinting procedure violated the plaintiff's fourth amendment right, under the United State Constitution, to freedom against unreasonable searches. The court stated that case law rejected the notion that the fingerprinting process itself was objectionable.[17] Further, the court distinguished fingerprinting, which does not penetrate the surface, from other more intrusive searches which are violative of the fourth amendment.[18] In addition, the majority acknowledged that there were cases in which fingerprinting requirements have been upheld.[19] Therefore, the court dismissed the plaintiff's second argument that the fingerprint process itself intruded into her

11. *Id.* at 190, 721 P.2d at 52, 228 Cal. Rptr. at 171.
12. *Id.*
13. *Id.* at 190, 721 P.2d at 53, 228 Cal. Rptr. at 171.
14. *Id.* at 190, 721 P.2d at 53, 228 Cal. Rptr. at 172.
15. *Id.*
16. *Id.*
17. *See* United States v. Sechrist, 640 F.2d 81, 86 (7th Cir. 1981).
18. *See, e.g.,* Rochin v. California, 342 U.S. 165 (1952) (forcible stomach pumping); People v. Scott, 21 Cal. 3d 284, 578 P.2d 123, 145 Cal. Rptr. 876 (1978) (involuntary extraction of semen).
19. *See, e.g.,* Miller v. Murphy, 143 Cal. App. 2d 337, 344-46, 191 Cal. Rptr. 740, 744-46 (1983) (involving a municipal ordinance which required all customers of pawnbrokers to supply fingerprints); People v. Stuller, 10 Cal. App. 3d 582, 593-97, 89 Cal. Rptr. 158, 165-67 (1970) (considering local police department ordinance which required the fingerprinting of bartenders).

constitutional rights.[20]

C. Dissemination of Fingerprint Data

The plaintiff's final assertion was that the protection guaranteed to her by California's Privacy Amendment was violated by the DMV's practice of releasing fingerprint information to other governmental agencies and private third parties.[21] The court analyzed the plaintiff's remaining contention by reviewing California's attempt to legislatively ensure privacy within the State. The court first recognized the protection of privacy contained in California's Privacy Amendment.[22] Also, the court stated that privacy in California is guarded by the Information Practices Act of 1977,[23] which the court found was specifically enacted to enforce the policy behind the Privacy Amendment.[24] Moreover, the court regarded as significant the privacy provided jointly by sections 1798.24 and 1798.3 of the Civil Code, which prohibit a governmental agency from disseminating descriptive, personal information.[25]

Despite the absence of a direct reference in the list of forbidden disclosures of section 1798.3, the court interpreted fingerprint data to be included by implication.[26] The court decided that fingerprints are descriptive, personal information; thus, they are more identifying than a mere name or address which is specifically mentioned in the statute.[27]

The majority, however, discussed a possible pitfall in its interpretation of the coverage of section 1798.3. It noted that section 1798.24(m), when read together with section 1808 of the Vehicle Code, expressly allows public inspection of all driver's license appli-

20. *Perkey*, 42 Cal. 3d at 191, 721 P.2d at 53, 228 Cal. Rptr. at 172.

21. The court mentioned that the DMV makes applicant's fingerprints available to nongovernmental entities such as private investigators. *Perkey*, 42 Cal. 3d at 193 n.8, 721 P.2d at 55 n.8, 228 Cal. Rptr. at 174 n.8.

22. *Perkey*, 42 Cal. 3d at 191, 721 P.2d at 54, 228 Cal. Rptr. at 172. *See supra* note 2 and accompanying text.

23. *See supra* note 4 and accompanying text.

24. *Perkey*, 42 Cal. 3d at 191-92, 721 P.2d at 54, 228 Cal. Rptr. at 172-73.

25. Section 1798.24 provides that "[n]o agency may disclose any personal information . . . ." CAL. CIV. CODE § 1798.24 (West Supp. 1987). "Personal information" is defined by section 1798.3(a) as "any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters and medical or employment history . . . ." CAL. CIV. CODE § 1798.3(a) (West Supp. 1987).

26. *Perkey*, 42 Cal. 3d at 193, 721 P.2d at 55, 228 Cal. Rptr. at 173.

27. *Id.*

cation information.[28] Further, the court mentioned that section 1810 of the Vehicle Code even permits the DMV to sell information provided on a driver's license application.[29] Although fingerprints are technically provided on a driver's license application, the court declined to construe these various Civil and Vehicle Code provisions to encompass fingerprints.[30] Consequently, the majority held that fingerprint data may not be viewed publicly, disseminated, or sold by the DMV to persons not connected with motor safety.[31]

Perhaps due to the court's discomfort in excluding fingerprints from the seemingly unambiguous mention of section 1798.24(m) of the Civil Code and sections 1808 and 1810 of the Vehicle Code, it enumerated support for its far-reaching conclusion. In that regard, the court focused attention on section 1808.5 of the Vehicle Code.[32] That section provides that those items on a driver's license application which relate to a person's physical condition may not be publicly viewed.[33] The majority used that section to support their exemption of fingerprints from the other application information available for disclosure. The opinion noted that eyesight information could not be disseminated because it was deemed to be related to an applicant's physical condition.[34] The court likewise considered fingerprints to be protected information relating to a physical condition.[35]

To further support its conclusions, the court cited the principle of statutory construction which provides that statutes should be interpreted so as to not conflict with constitutional protections.[36] The court stated that if sections 1808 and 1810 of the Vehicle Code were construed to allow the DMV to disseminate fingerprint data to the public, they might infringe upon the guarantees of the Privacy Amendment.[37]

Accordingly, the majority upheld the plaintiff's contention that the disclosure to third parties by the DMV of fingerprint information was improper. In reaching this decision, the court did not declare that the disclosure provisions violated the constitutional protections

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28. *Perkey*, 42 Cal. 3d at 193, 721 P.2d at 55, 228 Cal. Rptr. at 174.

29. *Id.*

30. *Id.* at 193-94, 721 P.2d at 55, 228 Cal. Rptr. at 174.

31. *Id.* at 197, 721 P.2d at 55-56, 228 Cal. Rptr. at 174.

32. Section 1808.5 of the Vehicle Code states, in pertinent part, that "[a]ll records of the [DMV] . . . relating to the physical or mental condition of any person, and convictions of any offense involving use or possession of controlled substances . . . not arising from circumstances involving a motor vehicle, are confidential and not open to public inspection." CAL. VEH. CODE § 1808.5 (West Supp. 1987).

33. *Id.*

34. *Perkey*, 42 Cal. 3d at 194, 721 P.2d at 55, 228 Cal. Rptr. at 174 (citing 26 Op. Cal. Att'y. Gen. 136 (1955) and 55 Op. Cal. Att'y. Gen. 122 (1972)).

35. *Id.*

36. *Id.*

37. *Id.*

of the Privacy Amendment. Rather, the court interpreted the various provisions of the Civil and Vehicle Codes to forbid its disclosure. The majority opinion, however, did suggest that dissemination of fingerprint information raised constitutional concerns.

V. THE CONCURRING OPINION

As a companion to her majority opinion, Chief Justice Bird filed a separate concurring opinion where she fully explored the privacy concerns to which the majority opinion merely alluded. Her stated purpose was to provide an alternate basis for finding the DMV'S fingerprint requirement invalid, in the event that the majority's statutory grounds were overturned.

The Chief Justice began by highlighting the relationship between the technological advancement of society and the enactment of California's Privacy Amendment.[38] She cited the court's opinion in *White v. Davis*,[39] for the proposition that the Privacy Amendment was enacted specifically to counter the rising level and sophistication of surveillance.[40]

Next, Chief Justice Bird discussed the peculiar character of fingerprints which makes their collection and dissemination in this computer age so threatening to privacy. She noted two unique aspects of fingerprints: they can positively identify their creators, and latent fingerprints can be lifted from a virtually infinite number of places.[41] The Chief Justice mentioned, by way of example, the DMV's former practice of lifting latent prints from the applications of those who had refused to be voluntarily fingerprinted.[42]

Thereafter, Chief Justice Bird discussed the nature of California's right to privacy. She equated privacy to the fundamental rights guaranteed by the first amendment to the United States Constitution.[43] Thus, she felt it was essential that any interpretation of privacy be

38. *Perkey*, 42 Cal. 3d at 195, 721 P.2d at 56, 228 Cal. Rptr. at 175 (Bird, C.J., concurring).

39. 13 Cal. 3d 757, 553 P.2d 222, 120 Cal. Rptr. 94 (1975). *White* involved the infiltration of a college campus by police posing as students. The police made unauthorized reports of the activities of campus organizations. This police conduct was struck down, in *White's* unanimous opinion, as violative *inter alia*, of California's Privacy Amendment.

40. *Perkey*, 42 Cal. 3d at 195, 721 P.2d at 56, 228 Cal. Rptr. at 175 (Bird, C.J., concurring) (citing White v. Davis, 13 Cal. 3d at 774, 533 P.2d at 233, 120 Cal. Rptr. at 105).

41. *Perkey*, 42 Cal. 3d at 196-97, 721 P.2d at 57, 228 Cal. Rptr. at 176 (Bird, C.J., concurring).

42. *Id.* at 197, 721 P.2d at 58, 228 Cal. Rptr. at 177 (Bird, C.J., concurring).

43. *Id.* at 197, 721 P.2d at 58, 228 Cal. Rptr. at 177 (Bird, C.J., concurring).

consistent with first amendment case law.[44]

Subsequently, the Chief Justice compared the nonspeech first amendment case of *People v. Chapman*,[45] to the case at bar. In *Chapman*, the court extended privacy protection to the defendant's unlisted telephone number which the police had wrongfully obtained without a warrant. Bird considered *Chapman* significant to *Perkey* in three ways: first, fingerprints are more identifying than a telephone number; second, one has a greater expectation of privacy in a fingerprint; third, in today's modern society, an individual needs a driver's license as much or more than a telephone.[46]

Chief Justice Bird also examined *Perkey* vis-a-vis *White v. Davis*.[47] Bird insisted that the police surveillance activities that were struck down in *White* were less intrusive than the DMV's activities in *Perkey*. As support for this belief, Bird noted that lifting latent fingerprints can detect a person's participation in activities. Also, the growing use of computers allows the capturer of a fingerprint to tie into a network which will disclose a whole dossier about a person.[48]

Further, Bird reiterated the four principal concerns of the Privacy Amendment as set forth in *White*.[49] Most applicable to *Perkey* was the third concern: information collected for a valid, narrow purpose would be improperly disseminated. Bird felt strongly that the DMV should not be allowed to require fingerprints without guaranteeing that they would not be endangered by misuse.

Obviously, Chief Justice Bird was convinced that the dissemination by the DMV of fingerprint data violated the Privacy Amendment. Facing voter polls which indicated that she would not be retained on the California Supreme Court, Bird wrote an impassioned concurrence in what appears to be an attempt to ward off a subsequent reversal of the *Perkey* holding.

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44. *Id.* at 197-98, 721 P.2d at 59, 228 Cal. Rptr. at 177 (Bird, C.J., concurring).

45. 36 Cal. 3d 98, 679 P.2d 62, 201 Cal. Rptr. 628 (1984).

46. *Perkey*, 42 Cal. 3d at 199-200, 721 P.2d at 59, 228 Cal. Rptr. at 178 (Bird, C.J., concurring).

47. 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975). *See supra* note 38 and accompanying text.

48. *Perkey*, 42 Cal. 3d at 201-02, 721 P.2d at 61, 228 Cal. Rptr. at 180 (Bird, C.J., concurring).

49. *Perkey*, 42 Cal. 3d at 202-03, 721 P.2d at 61-62, 228 Cal. Rptr. at 180 (Bird, C.J., concurring). The concerns of *White* included the following:

> (1) 'government snooping' and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing records.

White, 13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.

VI. THE DISSENTING OPINION

Justice Mosk filed a dissenting opinion directed at both the majority opinion and Chief Justice Bird's concurrence. He first attacked the majority's holding as resting on speculation and assailed its statutory solution. He then proceeded to rebut the conclusion of the concurrence that dissemination of fingerprint records by the DMV is necessarily an unconstitutional violation of privacy.

Justice Mosk discussed the speculative nature of the plaintiff's claim. He viewed the allegation of her complaint as only a remote suspicion that some unidentified authority might, at some future time, adversely impact an undisclosed person should fingerprint confidentiality be denied.[50] Mosk deemed the plaintiff's contentions to be too insubstantial to strike down the DMV's fingerprint requirement.[51]

Moreover, Mosk objected to the majority's statutory construction. Mosk placed emphasis on section 1798.24(m) of the Vehicle Code, which, when read in conjunction with sections 1800 to 1819 of the Vehicle Code, expressly allows the DMV to release information contained on a driver's license applicaton.[52] Among the exceptions to those items which the DMV may release,[53] fingerprints are not expressly mentioned. Mosk explained that the majority opinion attempted to overcome this deficiency by choosing to consider fingerprints to be a physical condition falling under the confidentiality requirement of section 1808.5 of the Vehicle Code.[54] Mosk noted, however, that physical condition has historically referred to medical impairments, not identifying characteristics.[55] Mosk concluded this argument by implying that the Vehicle Code is unambiguous in allowing dissemination of fingerprints and citing the principle that

50. *Perkey*, 42 Cal. 3d at 204, 721 P.2d at 62, 228 Cal. Rptr. at 181 (Mosk, J., dissenting).

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

52. *See supra* note 25 and accompanying text.

53. Section 1808.4 of the Vehicle Code prevents the DMV from releasing the home address of certain officials; section 1808.5 disallows the release of information concerning an applicant's physical or mental condition; section 1808.6 prohibits the DMV's dissemination of certain convictions; and section 1808.7 makes dismissals of traffic offenses confidential. CAL. VEH. CODE §§ 1808.4-1808.7 (West Supp. 1987).

54. *Perkey*, 42 Cal. 3d at 205, 721 P.2d at 63, 228 Cal. Rptr. at 182 (Mosk, J., dissenting). *See supra* note 52.

55. *Perkey*, 42 Cal. 3d at 205-06, 721 P.2d at 64, 228 Cal. Rptr. at 182-83 (Mosk, J., dissenting).

courts should not tamper with clear statutory directives.[56]

Justice Mosk's criticism of the concerns expressed in the concurrence is analytically weaker than his critique of the fragile statutory scheme relied on by the majority. Mosk began this section of his dissent by praising the value of fingerprints in assisting coroners and for identifying accident victims.[57] Mosk ignored entirely the main thrust of the plaintiff's argument: namely, that the DMV violates an individual's right to privacy by disseminating fingerprint records to government and private entities, such as private investigators, who are wholly unconcerned with motor vehicle safety. Presumably, the plaintiff would not object to the release of fingerprints to coroners and those identifying victims of accidents.

Subsequently, Mosk undermined his dissent by stating that if a nonspeculative allegation which demonstrated improper dissemination of fingerprints was made, he would join in the conclusion that the Privacy Amendment had been violated.[58] This statement by Mosk leaves open the possibility that one whose fingerprints were sold by the DMV to a private investigator could move the court to declare that the DMV's practice was unconstitutional.

VII. CONCLUSION

The court in *Perkey* held that neither the DMV's fingerprint requirement itself, nor its fingerprint process was unconstitutional. The court did, however, find that the dissemination by the DMV of fingerprint records contravened various provisions of the Vehicle and Civil Codes.

VALERIE FLORES

XI. PUBLIC FUNDS

Improper expenditures by a government official and members of a Governor's task force are not a basis for personal liability because the agencies and departments from which the funds were misappropriated were reimbursed by the Governor, and thus they sustained no injury: **Stevens v. Geduldig.**

I. INTRODUCTION

In *Stevens v. Geduldig*,[1] the California Supreme Court considered

56. *Perkey*, 42 Cal. 3d at 206, 721 P.2d at 64, 228 Cal. Rptr. at 183 (Mosk, J., dissenting).

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

58. *Id.* at 207, 721 P.2d at 64, 228 Cal. Rptr. at 183 (Mosk, J., dissenting).

1. 42 Cal. 3d 24, 719 P.2d 1001, 227 Cal. Rptr. 405, *modified*, 42 Cal. 3d 253(A)

three issues: (1) whether the improper use of public funds created personal liability in the perpetrators although the agencies and departments were reimbursed by the Governor; (2) whether in-kind contributions and use of manpower from different agencies and departments for purposes unrelated to such agencies and departments could create personal liability; and (3) whether an unsuccessful plaintiff who nevertheless brought about a public benefit could recover attorney's fees related to the lawsuit compelling such benefit. The court held that the defendants were not personally liable under the first two issues, and remanded the case to the trial court for a determination of the third issue.[2]

II. FACTUAL BACKGROUND

In 1972, the Governor established a task force to study taxation and spending in California, and named Lewis Uhler as chairman. The task force did not have its own budget and entered into an agreement with the Department of Health Care Services [hereinafter DHCS] to use the latter's revolving fund to account for its expenditures. Defendant Dwight Geduldig was then the director of the DHCS.[3]

Uhler entered into an agreement with the Department of Social Welfare [hereinafter DSW] whereby the DSW agreed to reimburse the DHCS up to $30,000.00 for the costs of a study of the tax impact on welfare spending. Uhler entered into the agreement on behalf of the task force and the DHCS, the DHCS being a party solely because of its agreement to use its revolving fund to account for the task force expenditures.[4]

At the time Uhler entered into the contract, he was not an agent of the DHCS; however, one month later, Geduldig delegated to Uhler the authority to enter into contracts pertinent to the task force, on behalf of the DHCS. Uhler entered into five subcontracts with consultants who were to perform the study for a total cost of $8,703.21. Although DSW never reimbursed the DHCS for the expenditures made by Uhler in performing the study, the Governor reimbursed the DHCS for such expenditures after this lawsuit was filed.[5]

Charles Hobbs was a member of the task force for less than three

(1986). Justice Broussard authored the opinion, with which Justices Mosk, Reynoso and Grodin concurred. Chief Justice Bird wrote a separate concurring opinion.

2. *Id.* at 28, 38, 719 P.2d at 1003, 1010, 227 Cal. Rptr. at 407, 414.
3. *Id.* at 28-29, 719 P.2d at 1003-04, 227 Cal. Rptr. at 407-08.
4. *Id.* at 29, 719 P.2d at 1003, 227 Cal. Rptr. at 407.
5. *Id.* at 28-30, 719 P.2d at 1003-04, 227 Cal. Rptr. at 407-08.

months, at which time he decided to become a private consultant. He entered into a consulting agreement with the Department of Human Resources Development [hereinafter DHRD]. Geduldig, who was then either director or deputy director of DHRD, studied unemployment and disability insurance, including the related tax aspects. The source of his payments was an appropriation to the DHRD "for the 'administration of unemployment compensation disability benefits . . . payable from the Unemployment Compensation Disability Fund.' "[6] The expenditures by the DHRD for payments to Hobbs were also reimbursed by the Governor after this lawsuit was filed.[7] Various other government agencies and departments[8] contributed in-kind funds and personnel services to the task force. These contributions were not reimbursed by the Governor's office.[9]

In November or December of 1972, the task force determined that a constitutional amendment was the best means of achieving a tax reduction. Although a proposed amendment was submitted, the legislature was unreceptive. The Governor decided that the amendment should be submitted to the electorate as an initiative. At the time, Uhler was also involved in preparing the measure for submission as an initiative and continuing his duties as director of the task force. He contended that he did not work on the initiative on state time.[10]

The task force was dissolved in June of 1973. Subsequently, both Hobbs and Uhler worked on the initiative. The plaintiff, a taxpayer, sued Uhler, Hobbs and Geduldig personally for improper use of public funds.[11] The plaintiff alleged, *inter alia*, the following: (1) Uhler had no authority to enter into the contract with DSW; (2) Uhler had no authority to enter into the subcontracts with the consultants; (3) Geduldig had no authority to delegate to Uhler such contracting authority; (4) payments to Hobbs by the DHRD were not appropriated for in the budget; (5) payments for Uhler's expenses were not appropriated for in the budget; and (6) the personnel and in-kind support received by the task force was not appropriated for in the budget.[12] The trial court agreed with the plaintiff and it held all three men were personally liable for such expenditures and awarded the plaintiff attorney's fees.[13]

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6. *Id.* at 30, 719 P.2d at 1004, 227 Cal. Rptr. at 408 (quoting 1972 Cal. Stat. 156).

7. 42 Cal. 3d at 30, 719 P.2d at 1004, 227 Cal. Rptr. at 408.

8. These included the Business & Transportation Agency, the Health & Welfare Agency, the Governor's office, and the Department of Finance. *Id.* at 30, 719 P.2d at 1004-05, 227 Cal. Rptr. at 408-09.

9. *Id.* at 30, 719 P.2d at 1005, 227 Cal. Rptr. at 409.

10. *Id.* at 30-31, 719 P.2d at 1004-05, 227 Cal. Rptr. at 408-09.

11. *Id.* at 31, 719 P.2d at 1005, 227 Cal. Rptr. at 409.

12. *Id.*

13. The trial court entered judgment against Uhler for $94,231, against Geduldig

III. ANALYSIS

A. Since Uhler was not an officer or employee of the DHCS, Geduldig could not delegate to him the authority to enter into contracts on behalf of the DHCS.

"[A] public official who controls public funds may be held personally liable to repay improperly expended funds if he has failed to exercise due care in permitting the expenditure."[14] In order to exercise due care, the official must only authorize expenditures which have been appropriated by the legislature.[15] The court held that the expenditures made through the DHCS for the task force were improper because Uhler had no authority to make such expenditures.

Section 12854 of the Government Code allows a secretary of an agency to delegate any powers he or she has to any officer or employee within the agency. Uhler was not employed by the DHCS, so Geduldig had no authority to delegate any powers to him. Furthermore, the expenditures for the consulting subcontracts were not related to the functions of the DSW. Therefore, those expenditures "violate[d] the principle that funds must be spent 'in accordance with the legislatively designated purpose.' "[16]

The court held that the Governor's authority to require reports from state agencies for budgetary and planning purposes did not legitimize the expenditures for Uhler's studies since the studies were too general to fit squarely within the purposes of the DSW. Therefore, the court held that Geduldig and Uhler acted negligently.

B. Expenditures by the DHRD for Hobbs' consulting contract were improper because the study went beyond the purposes of the DHRD.

The court held that Geduldig and Hobbs should be personally liable for the expenditures made by the DHRD to pay Hobbs on the consulting contract, because the study on spending and taxes was not related to the department's purpose of compensating disabled and unemployed workers. Therefore, the court held that Geduldig acted

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and Hobbs for $18,652.89, and against Geduldig for $8,703.21. It awarded attorney's fees of $18,750 against all three. *Id.* at 32, 719 P.2d at 1006, 227 Cal. Rptr. at 410.

14. *Id.* at 32, 719 P.2d at 1006, 227 Cal. Rptr. at 410 (citing Stanson v. Mott, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976)). *See also* AM. JUR. 2D *Public Officers and Employees* § 17 (1984).

15. *Stevens*, 42 Cal. 3d at 32, 719 P.2d at 1006, 227 Cal. Rptr. at 410.

16. *Id.* at 33, 719 P.2d at 1007, 227 Cal. Rptr. at 411 (quoting Stanson v. Mott, 17 Cal. 3d 206, 213, 551 P.2d 1, 6, 130 Cal. Rptr. 697, 702 (1976)).

negligently by violating his duty of due care. It also held that Hobbs should be liable on a theory of strict liability, since a contractor who obtains money from the state on an illegal contract must reimburse the state, even if the contract has been fully performed.[17]

C. Since the Governor reimbursed the DHCS and the DHRD, they sustained no injury upon which to predicate liability against Geduldig, Hobbs or Uhler.

The court held that the Governor properly reimbursed the DHCS and the DHRD for expenses of the task force.[18] Since the Governor had the authority to establish and fund a task force, he also had the power to reimburse the improperly charged departments.[19] Since the two departments were reimbursed, there was no injury, and the negligence actions against Geduldig and Uhler failed. Hobbs' strict liability was exonerated by the reimbursement in order to prevent unjust enrichment to the state.[20] Consequently, none of the three men were held liable on those actions.

D. Uhler was not liable for repayment of the value of the in-kind contributions and services because there was insufficient evidence as to their value or their inappropriateness.

The court held that Uhler would not be held liable for the value of the contributions and services the task force received even though the contributing agencies and departments, whose functions were unrelated to those of the task force, were not reimbursed. The court explained that the plaintiff did not present sufficient evidence as to the details of those transfers.[21] Furthermore, the court noted that the temporary sharing of resources and staff between departments and agencies should not be discouraged because limited use of such a procedure could provide flexibility when necessary.[22]

E. An unsuccessful party who nevertheless brings about a public benefit may be able to recover attorney's fees when his or her actions compel a modification of the other party's behavior.

Section 1021.5 of the California Civil Procedure Code allows a successful party to recover attorney's fees on a private attorney general

17. 42 Cal. 3d at 35, 719 P.2d 1008, 227 Cal. Rptr. at 412 (citing Pacific Inter-Club Yacht Ass'n v. Richards, 192 Cal. App. 2d 616, 13 Cal. Rptr. 730 (1961)). *See also* CAL. JUR. 3D *State of California* § 59 (1980 & Supp. 1986).
18. *Stevens*, 42 Cal. 3d at 35, 719 P.2d at 1008, 227 Cal. Rptr. at 412.
19. *Id.* at 36, 719 P.2d at 1008-09, 227 Cal. Rptr. at 412-13.
20. *Id.*
21. *Id.* at 37, 719 P.2d at 1009, 227 Cal. Rptr. at 413.
22. *Id.* at 37, 719 P.2d at 1010, 227 Cal. Rptr. at 414.

theory.[23] A party will be considered to have been successful under this statute, even if he or she loses the lawsuit, if a significant right is vindicated by compelling a modification of the other party's behavior.[24]

In the instant case, the taxpayer's filing of the lawsuit compelled the reimbursement to the DHCS and the DHRD by the Governor, thereby creating a significant public benefit. The court remanded this case to the trial court for a determination of this issue.

IV. CONCLUSION

The court based its decision as to the impropriety of the Uhler contracts upon a negligence theory. However, this theory failed because the element of damages was missing, since the injured parties were properly reimbursed by the Governor. The Hobbs' strict liability action failed because enforcement of that action would result in unjust enrichment and double recovery to the state due to Hobbs' uncompensated services. The court based its decision on the impropriety of the in-kind contributions and services on the plaintiff's failure to provide sufficient evidence. Since all of these holdings were based on traditional legal principles, this case merely affirms the Governor's authority to set up and fund task forces and to correct improper funding of them by subsequent reimbursement.

Chief Justice Bird's concurring opinion[25] followed the same analysis as the majority's. However, she emphasized the fact that Uhler's, Geduldig's and Hobbs' actions were improper, and that since the Gov-

23. This section provides the following:

> Upon motion, a court may award attorney's fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor.

CAL. CIV. PROC. CODE § 1021.5 (West 1980).

24. Maria P. v. Riles, 167 Cal. App. 3d 158, 214 Cal. Rptr. 20, *review granted*, 184 Cal. App. 3d 1227, 701 P.2d 1173, 215 Cal. Rptr. 855 (1985). *See also* MCKINNEY, CAL. DIGEST OF OFFICIAL REPORTS 3D *Costs* § 7.

25. 42 Cal. 3d at 38, 719 P.2d at 1010, 227 Cal. Rptr. at 414.

ernor reimbursed the injured departments *after* the suit was filed, the taxpayer's cause of action was validly filed.

EILEEN M. LAVIGNE

XII. REAL PROPERTY LAW

A. *The trial court appropriately exercised the independent judgment standard of review when it considered the denial by the California Coastal Commission of a developer's vested right exemption claim:* Halaco Engineering Company v. South Central Coast Regional Commission.

I. INTRODUCTION

In *Halaco Engineering Company v. South Central Coast Regional Commission*,[1] the supreme court discussed the proper standard of judicial review to be applied when considering the denial of a vested right exemption claim[2] by the California Coastal Commission.[3] The supreme court held that the trial court had properly exercised an independent judgment standard of review.[4]

II. HISTORICAL BACKGROUND

In 1972, the state adopted the California Coastal Zone Conservation Act[5] which was designed to protect the natural resources of the California coastline.[6] This preservation effort was superseded by the California Coastal Act of 1976 [hereinafter Coastal Act].[7] To further the efforts of the Coastal Act, a commission [hereinafter Commission] was established to oversee its application.[8] The Coastal Act requires developers to apply for and receive a permit from the Commission and from the local governments prior to conducting development

1. 42 Cal. 3d 52, 720 P.2d 15, 227 Cal. Rptr. 667 (1986). The opinion was authored by Justice Grodin with Justices Broussard, Lucas and Eagleson concurring. A separate dissenting opinion was authored by Justice Reynoso with Chief Justice Bird concurring.

2. *See* CAL. ADMIN. CODE tit. 14, §§ 13200-13500 (1981).

3. *See* CAL. PUB. RES. CODE §§ 30000-30900 (West 1986).

4. *Halaco*, 42 Cal. 3d at 66, 720 P.2d at 24, 227 Cal. Rptr. at 676.

5. 1972 Cal. Stat. A-181-88 (formerly CAL. PUB. RES. CODE §§ 27000-27650 which was automatically terminated in 1977 by § 27650; superseded by CAL. PUB. RES. CODE §§ 30000-30900 (West 1986)).

6. The express policy of the California Coastal Zone Conservation Act was "the permanent protection of the remaining natural and scenic resources of the coastal zone . . . ." Coastal Zone Conservation Act, 1972 Cal. Stat. A-181 (formerly CAL. PUB. RES. CODE § 27001) (West 1976).

7. CAL. PUB. RES. CODE §§ 30000-30900 (West 1986). [California Coastal Zone Conservation Act and California Coastal Act of 1976 both hereinafter Coastal Act].

8. CAL. PUB. RES. CODE §§ 30300-30355 (West 1986).

along the coast.[9]

The Coastal Act, however, recognized that certain developments (by virtue of their existence prior to adoption of the Coastal Act) have vested rights which render them exempt from its permit requirements.[10] A party seeking a vested right exemption to the Coastal Act's permit requirements was required to submit a claim for such status and receive approval from the Commission[11] before the vested right became absolute. A denial subjected a developer to the permit application process, which imposed conditions upon development.[12] However, denials by the Commission were judicially reviewable.[13]

Courts reviewing administrative decisions which have denied claims involving vested rights have consistently employed the independent judgment standard of review.[14] In *Halaco*, the Commission sought to persuade the supreme court of the impropriety of that standard.

III. FACTUAL BACKGROUND

In 1965, plaintiff Halaco Engineering Company [hereinafter Halaco] relocated its nonferrous scrap metal recycling plant to a coastal area in Oxnard, California, which was zoned for heavy indus-

9. CAL. PUB. RES. CODE § 30600 (West 1986). "Development" is defined broadly as "on land, in or under water, the placement or erection of any solid material or structure." *Id.* § 30106. The word "structure" encompasses such varying items as the following: "building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line." *Id.*

10. *See* CAL. ADMIN. CODE tit. 14, §§ 13200-13500 (1981).

11. Previously, the authority of the Commission was organized into several Regional Commissions and one State Commission. An applicant's first recourse was to file with the Regional Commission. If the Regional Commission rendered an unfavorable decision, an applicant had a right to appeal to the State Commission provided that the appeal presented a "substantial issue." CAL. PUB. RES. CODE § 30625 (West 1986). The State Commission succeeded to the power of the Regional Commission which was terminated in 1981. CAL. PUB. RES. CODE § 30305 (West 1986).

12. *See* Liberty v. California Coastal Comm'n, 113 Cal. App. 3d 491, 170 Cal. Rptr. 247 (1980).

13. CAL. CIV. PROC. CODE § 1094.5 (West Supp. 1986).

14. *See* Strumsky v. San Diego County Employees Retirement Ass'n., 11 Cal. 3d 28, 34, 520 P.2d 29, 40, 112 Cal. Rptr. 805, 808 (1974) (denial of employee death benefits to widow). For decisions involving Coastal Commission actions see Transcentury Properties, Inc. v. State of Cal., 41 Cal. App. 3d 835, 844, 116 Cal. Rptr. 487, 492 (1974) (denial of a permit to develop residential community pursuant to tract maps approved prior to adoption of Coastal Act); and Stanson v. San Diego Coast Regional, 101 Cal. App. 3d 38, 49, 161 Cal. Rptr. 392, 399 (1980) (denial of a permit to remodel a second-story storage room into a restaurant).

trial uses. The operation of the plant required scrap metal to be cleansed of impurities before its smelting. Waste water which resulted from the cleansing process was transferred to a settling pond to allow the particles in the water to settle out. Periodically, the pond was dredged and the settled material was used to form an expanding berm which served as the pond's boundaries.

Prior to construction, Halaco obtained the necessary permits from the City of Oxnard [hereinafter the City] for the plant structures. Halaco informed the City by letter of its intended use of a portion of the property as a waste disposal pond which would change in dimension and size. Halaco included with its letters of intent a sketch of the proposed pond which was not drawn to scale. Halaco actively inquired whether a permit was needed to operate the settling pond. Oxnard's Building Department, the Department of Public Works and the City Attorney informed Halaco that no permit was necessary. In 1970, Halaco began using the facility which included the pond. In 1972, the Oxnard City Council confirmed the prior administrative decision that no permit was required for Halaco's continued use of the settling pond.

The Coastal Act was passed that same year. Subsequently, Halaco installed an 18,000 gallon propane tank on its property. The passage of the Coastal Act did not prompt Halaco to seek a permit to continue its operations nor to seek a permit for the propane tank. However, in 1978, Halaco filed a vested rights exemption claim with the Commission for its entire operation. The filing was made in response to the supreme court's decision in *South Coast Regional Commission v. Gordon*,[15] and prior to any action against Halaco by the City of Oxnard or the Commission.

The Regional Commission granted Halaco's vested rights claim as to the plant, but excluded the settling pond and the recently installed propane tank. Halaco's subsequent appeal to the Commission was denied based upon the lack of a "substantial issue."[16] Halaco then filed suit seeking a writ of mandate to compel the Commission to recognize its vested right to unencumbered continuation of its entire operation. Halaco requested that the trial court use its independent judgment in review of the Commission's proceedings.

The trial court used the independent judgment standard of review in its decision. It ruled that the use of the settling pond in its present form was intended and considered in the original decision by the City of Oxnard. Further, the trial court held that the pond was not lim-

15. 18 Cal. 3d 832, 558 P.2d 867, 135 Cal. Rptr. 781 (1977). The court in *Gordon* held that a vested right may not constitute a defense to an action by the Commission absent a prior submission to the Commission of a claim for such vested right.

16. *See supra* note 11 and accompanying text.

ited to the size shown in the 1969 sketch. Therefore, Halaco had a vested right in the pond and the Commission was required to acknowledge this right. The court also held that the installment of the propane tank constituted a "development"[17] in the Coastal area to which no vested right attached and to which permit requirements applied. Both Halaco and the Commission appealed the trial court's findings.

IV. THE MAJORITY OPINION

A. Independent Judgment Standard of Review

The precedential issue decided by the court in *Halaco* was whether the independent judgment standard was the proper standard of review for a denial of a vested rights claim by the Commission. The Commission asserted that courts should limit their inquiry to whether or not the Commission's findings are supported by substantial evidence as viewed against the entire record.

The Commission prefaced its argument by acknowledging case law,[18] which has held that a court reviewing an administrative denial of a vested rights claim should use its independent judgment to determine the propriety of the denial.[19] The Commission, however, contended that a denial of a vested rights permit exemption claim does not affect the vested right itself. Rather, a denial merely subjects a development which has the benefit of a vested right to the administrative permit requirements.[20] A constitutionally vested right is impacted only if the burden of the permit process or any conditions imposed by the permit invades a claimant's due process rights. Thus, it is only appropriate for a court to exercise its independent judgment after action is taken by the Commission on the permit application.

While the court agreed with the Commission that a vested right is not affected by the denial of an exemption, the court rejected the Commission's conclusion.[21] The court relied upon the existence of contrary legislative intent as its rationale to uphold the use of the independent judgment standard of review.[22]

17. *See supra* note 9.
18. *See supra* note 14 and accompanying text.
19. Strumsky v. San Diego County Employer Retirement Ass'n, 11 Cal. 3d 28, 34, 520 P.2d 29, 40, 112 Cal. Rptr. 805, 816 (1974).
20. *Halaco*, 42 Cal. 3d at 64, 720 P.2d at 22, 227 Cal. Rptr. at 674. *See also* Liberty v. California Coastal Comm'n, 113 Cal. App. 3d 491, 170 Cal. Rptr. 247 (1980).
21. *Halaco*, 42 Cal. 3d at 64-65, 720 P.2d at 22-23, 227 Cal. Rptr. at 674-75.
22. *Id.* at 64-66, 720 P.2d at 22-24, 227 Cal. Rptr. at 674-76.

The court noted inter-related reasons why the legislative intent contradicted the Commission's argument against the application of the independent standard of review.[23] First, the court interpreted section 1094.5(c) of the Civil Procedure Code as a mandate that administrative decisions must, at some point, be subjected to the court's independent judgment.[24] Thus, if this standard were applied upon review of the rejection of the vested rights exemption, a future court reviewing the permit denial or conditions would be required to review the same facts arising out of the same hearing in order to meet the requirement of section 1094.5(c).[25] This would produce distinct proceedings since each would use a different standard of review.[26] The court held that this judicial inefficiency and confusion was not intended by the legislature and could not be tolerated.[27]

Moreover, the court hypothesized as to the outcome if the court were to decide that the first administrative decision, which concluded that no exemption applied, was erroneous. The court noted that if such a decision were made, the second administrative hearing on the permit would be futile.[28] The court held that the legislature's intent could not be interpreted to condone this administrative duplication and waste.[29] Thus, although no vested right is directly affected by an exemption denial, the court must undertake its judicial review utilizing independent judgment.[30]

B. Remand

In addition to arguing that the trial court employed an improper standard of review, the Commission claimed that the matter should be remanded to the Commission for consistent findings, rather than adjudicated by the court. The supreme court held that remand would be unnecessary.[31] The court stated that the Commission's decision was not supported by the evidence.[32] Further, the impact of the judicial holding left no discretion in the hands of the Commission.[33] In summary, the court ruled that remand was inappropriate given the Commission's unsupported decision and the court's obviation of the Commission's discretion in the resolution of the matter.[34]

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23. *Id.*
24. *Id.* at 66, 720 P.2d at 23, 227 Cal. Rptr. at 675.
25. *Id.*
26. *Id.* at 66, 720 P.2d at 23-24, 227 Cal. Rptr. at 675-76.
27. *Id.*
28. *Id.* at 65, 720 P.2d at 23, 227 Cal. Rptr. at 675.
29. *Id.*
30. *Id.* at 64-66, 720 P.2d at 22-24, 227 Cal. Rptr. at 674-76.
31. *Id.* at 77, 720 P.2d at 32, 227 Cal. Rptr. at 684.
32. *Id.* at 78, 720 P.2d at 32, 227 Cal. Rptr. at 684.
33. *Id.*
34. *Id.*

C. The Settling Pond

The dispositive factual issue presented by this case concerned the status of the settling pond. The Commission ruled that Halaco had no vested right in the pond beyond the parameters of the 1969 blueprint sketch supplied to the City of Oxnard. The Commission's finding was based on the requirement set forth in *AVCO Community Developers, Inc. v. South Coast Regional Commission*.[35] In *AVCO*, the court held that a vested right may attach only to one who, in good faith, relies upon a permit issued by the government and received before the law changed.[36] The Commission asserted that Halaco's lack of a use permit for the enlargement of the pond beyond its initial size precluded the vesting of any right to its continued operation and expansion.

Halaco argued that its entire project, including the settling pond, was an integrated whole for which appropriate permits had been acquired. In the alternative, Halaco argued that a permit was not required for the operation of the pond. Halaco based this allegation on the fact that the City of Oxnard interpreted its own ordinances as placing no permit requirements on the pond. Halaco also contended that it should not be limited to a drawing which it openly stated was not drawn to scale. Halaco argued that it notified Oxnard of the pond's expected growth, and that the City acknowleged that size change was an inherent feature of the pond, yet still required no permit.

The trial court, which exercised its independent judgment, ruled that Halaco had aggressively sought a determination from Oxnard about whether a permit was required. In reviewing the correspondence between Halaco and Oxnard, the trial court also held that Halaco had made Oxnard fully aware that the pond would grow in size and dimension. Aware of these facts, the City decided that a permit would not be required. Therefore, Halaco had satisfied the *AVCO* criteria for a vested right exception.

In deciding what weight to give to the trial court's conclusions, the supreme court cited the case of *Aries Development Company v. California Coastal Zone Conservation Commission*.[37] The court interpreted the *Aries* decision as holding that where undisputed facts do not establish one legal inference over another, the trial court's deter-

35. 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976).
36. *Id.* at 791, 553 P.2d at 549, 132 Cal. Rptr. at 389.
37. 48 Cal. App. 3d 534, 122 Cal. Rptr. 314 (1978).

mination of the legal issue was binding on an appellate court.[38] Thus, the supreme court was bound by the trial court's finding that Halaco's continued use and expansion of the settling pond created a vested right that fell outside the permit requirements of the Coastal Act.[39]

D. The Propane Tank

Halaco proferred two theories for exempting its 18,000 gallon tank, which was installed after the Coastal Act became effective, from permit requirements. First, Halaco argued that the tank did not constitute a "development" subject to the restraints of the Coastal Act because it was personalty and moveable. The Coastal Act's definition of "development" states that a non-structural item such as a pipe constitutes a "development"[40] and thus does not support Halaco's position.[41] The court pointed to the installation of the tank by crane, and the construction of concrete saddles to support it, as evidence that the tank was a "development."[42] Accordingly, the court rejected Halaco's first assertion that the tank was not a "development" subject to regulation.[43]

Second, Halaco stressed the fact that the tank's integration into the operation as a whole (the operation was exempt) would by extension preclude the tank from being singled out for regulation. The court pointed to persuasive arguments for refusing to exempt the tank.[44] The court noted that the tank had not been an "integral" component of the system prior to the passage of the Coastal Act.[45] Rather, it had recently been brought in for the convenience and economy of having on-site fuel.[46] Moreover, the court noted the fact that the City of Oxnard required an additional permit for the tank's installation.[47] For these reasons, the supreme court affirmed the trial court's judgment that the tank was a "development" and therefore, that the permit requirements of the Coastal Act applied.[48]

E. Attorney's Fees

Halaco requested an award of attorney's fees from the Commission.

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38. *Halaco*, 42 Cal. 3d at 74, 720 P.2d at 29-30, 227 Cal. Rptr. at 681-82.
39. *Id.* at 76, 720 P.2d at 30, 227 Cal. Rptr. at 682.
40. *See supra* note 9.
41. *Halaco*, 42 Cal. 3d at 76-77, 720 P.2d at 31, 227 Cal. Rptr. at 684.
42. *Id.* at 77, 720 P.2d at 31, 227 Cal. Rptr. at 683.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 77, 720 P.2d at 31-32, 227 Cal. Rptr. at 683-84.

Halaco's claim was based on section 800 of the Government Code.[49] The court refused to find that the Commission's denial of Halaco's vested rights claim was "arbitrary and capricious" as required by section 800.[50] As a foundation, the court cited the Commission's good faith ponderance of the evidence.[51] Even though that consideration failed to guide the Commission in drawing sound legal conclusions, the supreme court denied Halaco's claim for attorney's fees.[52]

V. THE CONCURRING AND DISSENTING OPINION

Justice Reynoso concurred with the majority except for its handling of the settling pond factual issue.[53] He framed the settling pond issue in terms of whether Halaco should be exempt from applying for a permit that allowed for continued waste dumping.[54] Justice Reynoso reiterated that the burden of applying for a permit does not infringe upon protected vested rights.[55] Thus, it is "guesswork" to conclude that the burdens of the permit process would do so.[56]

Justice Reynoso interpreted the Coastal Act as empowering the Commission to determine the *manner* in which developments may be performed, not just whether they may be made at all.[57] Thus, the dissent reasoned that Halaco may have vested rights against the outright denial of a permit for the pond, but not against the placement of reasonable permit conditions concerning the ongoing use of the pond.[58]

The thrust of the dissent was that the majority had applied case law dealing with "static" developments to facts involving continued

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49. This section provides as follows:

> [I]n any civil action to appeal or review the award, finding, or other determination of any administrative proceeding under this code or under any other provision of state law . . . where it is shown that the award, finding, or other determination of such proceeding was the result of *arbitrary or capricious* action or conduct by a public entity or an officer thereof in his official capacity, the complainant if he prevails in the civil action may collect reasonable attorney's fees, but not to exceed one thousand five hundred dollars ($1,500), where he is personally obligated to pay such fees, from such public entity, in addition to any other relief granted or other costs awarded . . . .

CAL. GOV'T CODE § 800 (West 1980) (emphasis added).

50. *Halaco*, 42 Cal. 3d at 79, 720 P.2d at 33, 227 Cal. Rptr. at 685.
51. *Id.*
52. *Id.*
53. *Id.* at 80, 720 P.2d at 33, 227 Cal. Rptr. at 685 (Reynoso, J., dissenting).
54. *Id.* (Reynoso, J., dissenting).
55. *Id.* (Reynoso, J., dissenting).
56. *Id.* at 82, 720 P.2d at 35, 227 Cal. Rptr. at 687 (Reynoso, J., dissenting).
57. *Id.* at 81, 720 P.2d at 34, 227 Cal. Rptr. at 686 (Reynoso, J., dissenting).
58. *Id.* at 81-82, 720 P.2d at 35, 227 Cal. Rptr. at 687 (Reynoso, J., dissenting).

use.[59] Justice Reynoso pointed to "continuing use" case law which held that non-conforming uses may be subject to legislation when they become a nuisance.[60] Justice Reynoso found this case law more applicable to the *Halaco* facts. The dissent would have reversed the trial court's granting a vested rights exemption to the continued use of the settling pond.[61]

VI. CONCLUSION

The supreme court held that the trial court had properly employed its independent judgment in reviewing the denial by the Coastal Commission of a vested rights exemption from the permit requirements. In summary, the court held the following: the continued interference was upheld; an 18,000 gallon tank (installed after the Coastal Act became effective) was subject to Commission permit requirements; and attorney's fees were not allowed, given the absence of evidence showing that the Commission's denial of Halaco's vested rights claim was capricious or arbitrary.

VALERIE FLORES

B. *A rent control ordinance which required consideration of the hardship to low-income tenants of a rent increase was neither arbitrary nor did it violate a landlord's due process rights:* Pennell v. City of San Jose.

In *Pennell v. City of San Jose*, 42 Cal. 3d 365, 721 P.2d 1111, 228 Cal. Rptr. 726 (1986), a landlord filed a declaratory relief action in Santa Clara Superior Court seeking a ruling on the constitutionality of the local rent control ordinance. The trial court declared that the portion of the ordinance which required a consideration of the hardship on low-income tenants of a rent increase was unconstitutional on its face. In a four-three vote, the California Supreme Court reversed. It rejected the contentions that the ordinance arbitrarily put the burden on landlords with hardship tenants and that it violated the due process rights of those landlords. The court further held that a yearly rental unit fee imposed on landlords to defray the administrative cost of the ordinance was not a "special tax" governed by article XIIIA, section 4 of the California Constitution.

In July, 1979, the City of San Jose enacted a rent control ordinance. The ordinance allowed the landlord to raise his rents accord-

59. *Id.* at 81, 720 P.2d at 34-35, 227 Cal. Rptr. at 686-87.

60. *See* Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510, *rev'd on other grounds*, 453 U.S. 490 (1980); City of Escondido v. Desert Outdoor Advertising, Inc. 8 Cal. 3d 785, 505 P.2d 1012, 106 Cal. Rptr. 172 (1973); County of San Diego v. McClurken, 37 Cal. 2d 683, 234 P.2d 972 (1959).

61. *Halaco*, 42 Cal. 3d at 82-83, 720 P.2d at 35, 227 Cal. Rptr. at 687.

ing to the highest of any of four methods of computation: (1) an automatic increase of eight percent; (2) a five percent increase plus specified pass-through costs; (3) an increased cost of debt service; or (4) an amount reasonable under the circumstances. In determining what is reasonable under the circumstances, the rent control hearing officer is directed to consider and balance any of seven factors, one of which is the hardship to a tenant.

Although the tenant hardship factor is to be balanced along with six other factors, it is given potentially overriding weight in a related section of the ordinance. This section provides that the hearing officer is permitted to disallow all or part of an increase which would impose an unreasonably severe financial or economic hardship on a particular tenant.

Both parties observed that no California case had addressed the specific issue posed here. Furthermore, the court itself stated that it was aware of no other rent control ordinance that contains a tenant financial hardship provision, much less one that operates in the same fashion as the San Jose ordinance.

The court first addressed the plaintiff's assertion that the ordinance arbitrarily selects those landlords with hardship tenants to bear the burden of the rent control ordinance. The court noted that it had often confirmed the propriety of local rent control legislation that in effect placed the burden of "subsidizing" tenants on the citizenry at large, but not on local landlords. The possibility that the local government could subsidize these tenants through a general tax revenue has never been considered a bar to the validity of such legislation. In disposing of the argument that the ordinance was arbitrary, the court noted that the ordinance grants a "generous" automatic increase of eight percent to all landlords along with the potential for an even more liberal increase. Furthermore, the financial hardship provision is consistent with the ordinance's stated purpose: the prevention of excessive and unreasonable rent increases and the alleviation of undue hardship upon individual tenants.

The court next turned to the equal protection argument. The plaintiff had suggested that the ordinance violated the rights of landlords under the fourteenth amendment because of its disparate treatment of landlords with and without hardship tenants. Relying on *Cotati Alliance for Better Housing v. City of Cotati*, 148 Cal. App. 3d 280, 195 Cal. Rptr. 825 (1983), the court stated that " 'equal protection is not denied simply because some landlords may receive rents different from those received by other landlords, *as long as there exists a*

rational basis for the distinction.' " *Pennell*, 42 Cal. 3d at 373, 721 P.2d at 1117, 228 Cal. Rptr. at 732 (emphasis in the original). The burden of disproving a rational basis was on the plaintiff, who had suggested nothing to convince the court otherwise. Again, the court emphasized the generous yearly increase of eight percent which the ordinance allowed. Finally, the court concluded that to attack the ordinance's tenant hardship provision under the equal protection clause, the ordinance must be applied to a *particular* landlord and a *particular* tenant.

The court affirmed the superior court's holding that the $3.75 annual rental unit fee imposed under the ordinance is not a special tax. First, the court noted that the relatively minor unit fee imposed here did not exceed a sum reasonably necessary to cover the cost of the regulatory purposes. Also, the special tax referred to in article XIIIA, section 4 of the California Constitution has never been held to embrace fees charged in connection with regulatory activities which do not exceed the reasonable cost of providing necessary services.

JEFF BOYKIN

C. *A former landowner is not liable for negligent construction of an improvement, when the defect is patent, after the sale and transfer of the premises:* **Preston v. Goldman.**

In *Preston v. Goldman*, 42 Cal. 3d 108, 720 P.2d 476, 227 Cal. Rptr. 817 (1986), the court discussed the issue of premises liability. In *Preston*, a child sought to recover damages against former property owners who had constructed the fountain in which the child sustained injuries. The court concluded that premises liability is tied to the possession and control of property. As such, liability for an owner-occupier terminates once control is lost by virtue of a sale or transfer.

In 1972, the Kubichans designed and constructed an inexpensive fountain and pond on property which they owned and occupied. The following year, they sold their property to Goldman who leased the property to the Reids, under an option-to-buy agreement. While in possession of the property, the Reids made numerous improvements to the pond's exterior wall. Thereafter, the Reids were entertaining the Preston family in the backyard. The adults, however, were separated from the children. After a while, the adults became concerned with the children's whereabouts. Upon searching, they discovered Clinton, the two-year old Preston child, submerged in the fountain. As a result of his prolonged submersion, Clinton sustained extensive brain damage and paralysis.

Clinton's parents filed a suit for damages on his behalf. The fol-

lowing were named as defendants: the Reids (lessees); Goldman (lessor); and the Kubichans (former owners and constructors of the pond). After a trial on the complaint, the jury specifically found that the Kubichans were not negligent. The plaintiff appealed, *inter alia*, the issue of the Kubichans' liability. The appellate court reversed the trial court's holding with respect to the Kubichans. The court of appeal likened them to developers, and found that they were negligent in their construction of the pond. The supreme court agreed to consider the case limiting its review to the Kubichans' liability.

The supreme court noted that three different theories have been applied to cases seeking to impose liability on a former owner for the condition of property subsequent to relinquishment of possession. First, the court noted that the ancient doctrine of *caveat emptor* still precludes liability. Second, the court mentioned the existence of a broader view of premises liability which allows for two exceptions to the doctrine of *caveat emptor*: one for latent defects in the property which the seller knows are unlikely to be discovered by the buyer; and, another for property which, when transferred, is so dangerous as to constitute an unreasonable risk of harm to persons outside the premises. The court stated that even courts recognizing exceptions to the *caveat emptor* doctrine have terminated liability when the new owner has had sufficient time to discover the defect, absent active concealment by the seller. The third doctrine that the court recognized was that merely transferring title should not relieve a vendor of liability when that vendor affirmatively created a dangerous condition.

The court also looked to jurisdictions other than California. In the recent New Jersey case of *Cogliati v. Ecco High Frequency Corp.*, 92 N.J. 402, 456 A.2d 524 (1983), the court found a previous owner liable where the owner had been factually responsible for the presence of the hazardous condition. The California Supreme Court was careful to point out, however, that the *Cogliati* ruling limited itself to *public* property. The supreme court also drew attention to the New York case of *Merrick v. Murphy*, 83 Misc. 2d 39, 371 N.Y.S.2d 97 (1975). Although *Merrick* advocated the imposition of liability on a previous owner, the California Supreme Court was quick to distinguish that case as involving property with a *latent defect*. In *Preston*, the court determined that the pond, if defective, was *patently* so as a matter of law. The court stated that a pond of any depth is hazardous to unsupervised children. Additionally, since the Reids drained and improved the pond, they had actual knowledge of its attributes.

In California, the court noted the existence and relevance of several cases, beginning with the landmark decision in *Rowland v. Christian*, 69 Cal. 2d 108, 433 P.2d 561, 70 Cal. Rptr. 97 (1968). The court in *Preston* credited the *Rowland* opinion with destroying the necessity of active/passive and invitee/licensee classifications for the imposition of liability. In addition, the court recognized several post-*Rowland* cases which noted that premises liability is related to the possession and control of property: *Mark v. Pacific Gas & Electric Co.*, 7 Cal. 3d 170, 496 P.2d 1276, 101 Cal. Rptr. 908 (1972) (no duty owed by landlord to tenant injured on balcony while replacing a street lamp, over which lamp the landlord had neither control nor ownership); *Sprecher v. Adamson Cos.*, 30 Cal. 3d 358, 636 P.2d 1121, 178 Cal. Rptr. 783 (1981) (uphill landowner owed duty to downhill owner due to uphill owner's possession and right to control and manage his property); and *Isaacs v. Huntington Memorial Hospital*, 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985) (summary judgment deemed appropriate where absence of ownership, possession or control of property was established). The supreme court's recitation of cases made it clear that, in California, cases imposing liability on a landowner have consistently done so on the basis of the owner's possession and inherent rights of control, management and supervision.

The supreme court also looked to statutory law for guidance in determining whether to impose liability on a former property owner. The court attributed significance to the shorter statute of limitations set forth in section 337.1 of the Civil Procedure Code for patent defects, as compared to the limitation contained in section 337.15 of the Civil Procedure Code for latent defects. In addition, since the legislature distinguished between sureties and professional home improvers to ensure that the latter's liability did not extend unreasonably into the future, the court concluded that the legislature intended to limit liability for those persons unable to exercise enough control to remedy property defects.

Lastly, the court weighed the general factors enumerated in *Rowland* to determine whether extending liability to previous landowners would be just. *Rowland* set the following guidelines for fairly imposing liability: 1) the foreseeability of harm to the plaintiff; 2) the degree of certainty of the plaintiff's suffering injury; 3) the proximity between the defendant's conduct and the plaintiff's injury; 4) moral blame attached to the defendant's conduct; 5) the policy of avoiding future harm; 6) whether finding liability would be burdensome to either the defendant or the community; and 7) the availability, cost and prevalence of insurance coverage for the risk involved. *Rowland*, 69 Cal. 2d at 112-13, 443 P.2d at 564, 70 Cal. Rptr. at 100. The court stated that the Kubichans' ability to foresee that the child of a future owner's guest would lie unattended in the pond was tenuous.

Neither did the court find any closeness between the Kubichans' building of the pond and the plaintiff's near drowning, especially in light of the inattentiveness of the adults. As to moral blame, if any, the court concluded that it should lie with those defendants who had more of an opportunity and power to prevent the accident at the time it occurred. Further, the court felt compelled to conclude that imposing liability on the Kubichans would be oppressive considering the time elapsed since their loss of control. Finally, the court found that imposing liability would be inequitable since insurance, the last factor in *Rowland*, was presently unavailable. However, even if insurance was available, it would likely be expensive and scarce.

In conclusion, the court rejected imposing liability on a former property owner whose patently negligent improvement caused injury. In making its determination, the court analyzed the three theories of premises liability, case law outside of California, California case law, insurance interpretation and statutory policies. The court also noted that the general principles set out in *Rowland* pointed to the injustice of imposing liability on a former landowner who did not have control at the time of the injury. However, since the facts in *Preston* presented the court with a *patent* defect, and the opinion was specifically couched in those terms, it remains to be seen whether *Preston* will provide authority for the extension of liability to a transferor who leaves the property with a latent defect.

VALERIE FLORES

XIII. TAXATION

A. *For purposes of Article XIIIA of the California Constitution, an ad valorem tax is any source of revenue derived from applying a property tax rate to the assessed value of property:* **Heckendorn v. City of San Marino.**

In *Heckendorn v. City of San Marino*, 42 Cal. 3d 481, 723 P.2d 64, 229 Cal. Rptr. 324 (1986), the supreme court was asked to determine the meaning of an ad valorem tax. The court held that an ad valorem tax is any source of revenue derived from applying a property tax rate to the assessed value of property.

On June 7, 1983, the voters of the City of San Marino [hereinafter the City] approved an ordinance drafted by the City pursuant to section 53978 of the Government Code. This ordinance allowed local agencies which provided fire protection or prevention services to "de-

termine and propose for adoption a special tax for fire protection and prevention provided by the local agency, or a special tax for police protection services provided by the local agency, or both . . . other than ad valorem property taxes." CAL. GOV'T CODE § 53978 (West 1983). The ordinance imposed a graduated tax based on the City's zoning classifications to be used for police and fire services. A flat tax rate was imposed on all parcels, despite any variation in size or property value.

The plaintiff, a property owner within the City, was taxed pursuant to the ordinance. He filed a complaint alleging that the ordinance was invalid because it violated article XIIIA of the California Constitution by imposing an ad valorem tax in excess of the maximum amount allowed, which was one percent of the full cash value of the property. The trial court sustained, without leave to amend, the City's demurrer which asserted that the ordinance was based solely on the parcel size and did not impose a tax based on the assessed value of the property. The plaintiff appealed contending that the trial court abused its discretion in sustaining the demurrer without leave to amend because he could amend his complaint to show that the tax is in substance an ad valorem tax due to a correlation between parcel size and value.

The supreme court recognized the general rule that complaints should be liberally construed. Thus, if there is a reasonable possibility that the plaintiff can cure a defective complaint by amending it, the trial court should not sustain the demurrer without leave to amend. However, if it is not reasonably possible to cure the defect pursuant to the applicable substantive law, then a trial court may, without abusing its discretion, sustain the demurrer without leave to amend.

First, the court had to determine the meaning of the term "ad valorem tax" as it is used in article XIIIA. Since article XIIIA does not define the term "ad valorem tax," the court had to look to extrinsic aids in ascertaining the meaning. "In the absence of evidence of a contrary legislative or popular intent, terms used in a constitutional amendment are normally construed in light of existing statutory definitions or judicial interpretations in effect at the time of the amendment's adoption." *Heckendorn*, 42 Cal. 3d at 487, 723 P.2d at 67, 229 Cal. Rptr. at 327. At the time that article XIIIA was approved as Proposition 13 in 1978, the legislature defined ad valorem in section 2202 of the Revenue and Taxation Code as "any source of revenue derived from applying a property tax rate to the assessed value of property." CAL. REV. & TAX CODE § 2202 (West 1986). The court held that under this definition the tax imposed by the City's ordinance does not constitute an ad valorem tax. In addition, the court ruled

that it was within the established tax scheme of section 53978 of the Government Code since parcels within a zone are taxed the same and no appraisals of value are made. *Heckendorn*, 42 Cal. 3d at 487, 723 P.2d at 67, 229 Cal. Rptr. at 327.

The court also noted "that the Legislature expressly authorized a special tax for police and fire protection in Government Code section 53978." *Id.* at 488, 723 P.2d at 68, 229 Cal. Rptr. at 328. Moreover, subdivision (b) of section 53978 states that a special tax "shall be levied on a parcel, class of improvement to property, or use of property basis, or a combination thereof . . . " CAL. GOV'T CODE § 53978 (West 1983). Thus, the "Legislature intended that a special tax levied on a parcel pursuant to section 53978 would be distinct from an ad valorem tax prohibited by article XIIIA, section 4." *Heckendorn*, 42 Cal. 3d at 488, 723 P.2d at 68, 229 Cal. Rptr. at 328. Therefore, the tax assessed pursuant to the City's ordinance, which was imposed for the special purpose of providing fire and police protection, fell within the definition of a special tax and not within the definition of an ad valorem tax.

The court concluded that its interpretation of ad valorem is consistent with the purpose of article XIIIA in requiring a two-thirds vote of the electors for a special tax " 'to prevent the government from recouping its losses from decreased property taxes by imposing or increasing other taxes.' " *Id.* at 489, 723 P.2d at 68, 229 Cal. Rptr. at 328 (quoting *Huntington Park Redevelopment Agency v. Martin*, 38 Cal. 3d 100, 105, 695 P.2d 220, 222, 211 Cal. Rptr. 133, 135 (1985)). The ordinance was approved by approximately eighty percent of the City's voters. The vote, which was in full compliance with the supermajority requirement of section 4 of article XIIIA, indicated the voters' willingness to be taxed for fire and police protection services. Thus, since there was no reasonable possibility under the substantive law that the plaintiff's complaint could be cured by amendment, the trial court correctly sustained the City's demurrer without leave to amend.

STEPHANIE FANOS

B. *Capacity fee charged by the Water District to fund capital improvements is a "special assessment," and not a "user fee," from which the School District, as a public entity, is exempt:* **San Marcos Water District v. San Marcos Unified School District.**

In *San Marcos Water District v. San Marcos Unified School District*, 42 Cal. 3d 154, 720 P.2d 935, 228 Cal. Rptr. 47 (1986), the California Supreme Court addressed the issue of whether the San Marcos Unified School District [hereinafter School District] was exempt from a fee assessed by the San Marcos Water District [hereinafter Water District] to fund its capital expenditures. The court held that the capacity fee charged was not a fee, but rather was a special assessment from which the School District was exempt as a public entity.

The facts were agreed to prior to trial. The School District was located in the territory of the Water District and was serviced by the latter's sewer system. For the ten years prior to 1981, the School District had been paying the capacity fees in question. The capacity fee, one of three types of fees charged by the Water District, was a one-time payment, with annual additions based on increased use by the users.

The general rule, set forth in *Inglewood v. County of Los Angeles*, 207 Cal. 697, 280 P. 360 (1929), provides that a public entity is not subject to special assessments absent express legislative authority to the contrary.

In upholding the assessment against the School District, the trial court based its decision on the statutory authority for the fee provided in section 39613 of the California Education Code and in section 31101.5 of the California Water Code which became effective in 1983. Although the court of appeal upheld the judgment of the trial court, it categorized the fee imposed as a "user fee" from which the School District was not exempt. In doing so, the appellate court refused to follow three contrary appellate court cases: *Regents of University of California v. City of Los Angeles*, 148 Cal. App. 3d 451, 196 Cal. Rptr. 14 (1983); *Regents of University of California v. City of Los Angeles*, 100 Cal. App. 3d 547, 160 Cal. Rptr. 925 (1979); and *County of Riverside v. Idyllwild County Water District*, 84 Cal. App. 3d 655, 148 Cal. Rptr. 650 (1978). Instead, the court of appeal relied on out-of-state case law to support its holding.

The supreme court reversed, holding that the capacity fee was a "special assessment" for which there was no legislative authority to tax the School District. Although the Water District argued that the fee was a "user fee" because it was based on anticipated usage, the court relied on the three cases mentioned above, and held that the

purpose of the charge was dispositive rather than the means of measurement. Therefore, since the funds were to be used for capital improvements rather than for everyday operating costs, it was a "special assessment" and not a "user fee."

The Water District's next argument, that the assessment against the School District was authorized by the Education Code and the Water Code, was rejected. In analyzing section 39613 of the Education Code, the court reasoned that although the code authorized the School District to acquire rights in a sewer system, this alone did not show an *express* intent of the legislature to allow the School District to appropriate money to pay special assessments. Section 31101.5 of the Water Code authorized the Water District to assess a fee against property not subject to district taxes for the *services* it provided. Like section 39613 of the Education Code, this section did not expressly authorize the Water District to assess the School District for its capital improvements.

The court refused the final two theories propounded by the Water District: first, that the School District had impliedly agreed to pay the capacity fee by entering into an agreement to use the Water District's sewer system; and, second, that the School District was estopped from discontinuing its payments by promissory estoppel. In rejecting the first theory, the court reasoned that the School District had no legislative authority to pay the special assessment. Therefore, to agree to do so would be a misappropriation of public funds, which would constitute a violation of article XVI, section six of the California Constitution. The second theory was rejected because of the rule that promissory estoppel cannot be used against the government if its implementation would contravene a strong public policy. *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1975). The court felt that the exemption of public agencies against special assessments on their property was a strong public policy.

The impact of this case will be to classify as special assessments all fees or assessments whose proceeds are used by a utility district for capital improvements which will benefit a specific geographic area. Absent legislative authority to the contrary, public entities will be exempt from these assessments.

EILEEN M. LAVIGNE

C. *Former section 225 of the California Revenue & Taxation Code violates the commerce clause of the United States Constitution by discriminating against a class of interstate commerce:* **Star-Kist Foods, Inc. v. County of Los Angeles.**

I. FACTUAL SUMMARY

In *Star-Kist Foods, Inc. v. County of Los Angeles*,[1] the court was asked to determine whether former section 225 of the Revenue and Taxation Code violated the commerce clause of the United States Constitution by discriminating against a class of interstate commerce. On March 1, 1976, the County of Los Angeles, City of Los Angeles, and City of Long Beach assessed and levied ad valorem taxes on the plaintiff's inventory of canned tuna located in its California warehouses. The plaintiff, Star-Kist Foods, Inc. [hereinafter Star-Kist], paid the tax and sought a refund pursuant to the exemption contained in section 225 of the Revenue and Taxation Code[2] [hereinafter section 225] for that portion of its inventory that had been manufactured or produced outside the United States and brought into California for shipment to other states for sale in the ordinary course of business.

Star-Kist brought suit for the refund in Los Angeles County Superior Court after exhausting its administrative remedies. The defendants asserted that section 225's exemption discriminated against interstate commerce in violation of the commerce clause of the federal Constitution[3] and, therefore, was invalid. The trial court denied the refund claim and Star-Kist filed an appeal.[4]

II. THE MAJORITY OPINION

A. Standing

The court first addressed whether the defendants had standing to challenge section 225; more specifically, "whether counties and mu-

1. 42 Cal. 3d 1, 719 P.2d 987, 227 Cal. Rptr. 391 (1986). The majority opinion was authored by Justice Reynoso in which Chief Justice Bird and Justices Broussard, Grodin, Mosk, and Uchiyama (Mikio) concurred. Lucas wrote a separate dissenting opinion. Justice Uchiyama (Mikio) was assigned by the chairperson of the Judicial Counsel.

2. Former section 225 of the Revenue and Tax Code provided an exemption from taxation for "[p]ersonal property manufactured or produced, (1) outside this state and brought into this state for transshipment out of the United States, or (2) outside of the United States and brought into this state for transshipment out of this state, for sale in the ordinary course of trade or business . . . ." 1975 Cal. Stat. 2746, § 1 (repealed in 1984). All business inventory is now exempt from taxation. CAL. REV. & TAX CODE § 219 (West Supp. 1986).

3. U.S. CONST. art. I, § 8, cl. 3.

4. *Star-Kist*, 42 Cal. 3d at 6, 719 P.2d at 989, 227 Cal. Rptr. at 393.

nicipalities may invoke the federal Constitution to challenge a state law which they are otherwise duty-bound to enforce."[5]

The general rule regarding standing is that cities and counties, as subordinate political entities, "may not challenge state action as violating the entities' rights under the due process or equal protection clauses of the fourteenth amendment or under the contract clause of the federal Constitution."[6] However, the rule is unsettled beyond the fourteenth amendment and the contract clause.

In *City of South Lake Tahoe v. California Tahoe*,[7] the Ninth Circuit Court of Appeals interpreted this rule as an absolute bar to subordinate political entities who wanted to challenge state statutes on federal constitutional grounds.[8] Unfortunately, the supreme court noted that "the *South Lake Tahoe* decision provides little guidance as to the court's reasoning in choosing a per se rule."[9]

Other courts have held that the "no standing" rule does not apply to challenges based on the supremacy clause.[10] Citing the Fifth Circuit Court of Appeals in *Rogers v. Brockette*, the *Star-Kist* court concluded that the "no standing" rule has historically been applied in two types of cases: (1) "those in which the state has altered political subdivisions' boundaries"; and (2) "those involving state modification of a benefit previously granted to a subdivision."[11]

In *San Diego Unified Port District v. Gianturco*,[12] the court held that the supremacy clause may provide subordinate political entities with a basis for objection, even though they may not raise other constitutional claims.[13] The purposes served by the supremacy clause and other constitutional provisions provide a relevant distinction. While the fourteenth amendment confers rights on individuals, the supremacy clause " 'establishes a structure of government which de-

5. *Id.* at 6, 719 P.2d at 990, 227 Cal. Rptr. at 394.

6. *Id.*

7. 625 F.2d 231 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980).

8. "[T]he City may not challenge . . . [the] plans and ordinances on *constitutional grounds*." *Id.* at 233 (emphasis added).

9. *Star-Kist*, 42 Cal. 3d at 7, 719 P.2d at 990, 227 Cal. Rptr. at 394.

10. Rogers v. Brockette, 588 F.2d 1057 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979); San Diego Unified Port Dist. v. Gianturco, 457 F. Supp. 283 (S.D. Cal.), *aff'd*, 651 F.2d 1306 (9th Cir. 1978), *cert. denied*, 455 U.S. 1000 (1982).

11. *Star-Kist*, 42 Cal. 3d at 8, 719 P.2d at 991, 227 Cal. Rptr. at 395.

12. 457 F. Supp. 283 (S.D. Cal.), *aff'd*, 651 F.2d 1306 (9th Cir.), *cert. denied*, 455 U.S. 1000 (1982).

13. *Gianturco*, 457 F. Supp. at 290.

fines the relative powers of states and the federal government.' "[14] Political subdivisions cannot assert constitutional rights conferred on individuals "but may invoke the supremacy clause to challenge preempted state law."[15]

The court concluded that the "no standing" rule does not apply to challenges based on the commerce clause. This conclusion was premised on the similarities between the supremacy clause and the commerce clause, and the line of reasoning in *Rogers* and *Gianturco*. Like the supremacy clause, the commerce clause "define[s] the relative powers of states and the federal government"[16] and limits the states' powers even in the absence of federal legislation.[17]

The defendants claimed that section 225's exemption "interferes with Congress' exclusive control over commerce by potentially nullifying the value of protective tariffs and by discriminating against domestic commerce."[18] The court stated that an additional reason for conferring standing to commerce clause challenges is the realization that such encroachments on the federal government's power may go unchecked unless political subdivisions are granted standing.

The court concluded that conferring standing in this case was consistent with the legislature's enactment of section 538 of the Revenue and Taxation Code in 1978. Section 538 was enacted in "direct response to Los Angeles County's refusal to implement section 225's exemption . . . ."[19] Instead of making the disputed assessment, section 538 requires the assessor who questions the constitutionality of a state tax provision to seek declaratory relief against the State Board of Equalization. Although section 538 generally refers to unconstitutionality without differentiating between state and federal constitutions, the court noted that the legislature, in light of past commerce clause challenges, anticipated potential federal constitutional claims.[20]

B. Commerce Clause Challenge

There are two competing interests involved in a commerce clause challenge to a state tax provision: 1) the national interest in free and open trade; and 2) the state's interest in exercising its taxing power.[21]

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14. *Star-Kist*, 42 Cal. 3d at 8, 719 P.2d at 991, 227 Cal. Rptr. at 395 (quoting *Gianturco*, 457 F. Supp. at 290).

15. *Id.*

16. *Id.* The commerce clause empowers Congress "[t]o regulate commerce with foreign nations, and among the several states, and with Indian tribes." U.S. CONST. art. I, § 8, cl. 3.

17. *See* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 328 (1977).

18. *Star-Kist*, 42 Cal. 3d at 9, 719 P.2d at 992, 227 Cal. Rptr. at 396.

19. *Id.* at 10, 719 P.2d at 992, 227 Cal. Rptr. at 396.

20. *Id.*

21. *Id.*

Each case must be decided on its own facts and the particular provisions of the statute in question.

The commerce clause grants Congress the power to regulate interstate commerce "among the several states" and foreign commerce "with foreign Nations." The court noted that there is authority for the proposition that "the Founders intended the scope of the foreign commerce power to be the greater."[22] The United States Supreme Court, in *Japan Line, Ltd. v. County of Los Angeles*, stated that "a more extensive constitutional inquiry is required" when dealing with foreign commerce as opposed to interstate commerce.[23] In addition to the general rule that prohibits state tax provisions from interfering with Congress' power to regulate foreign commerce, the *Japan Line* court set forth two additional factors to be considered: 1) "the risk of multiple taxation"; and 2) the "potential impairment of the nation's ability to 'speak with one voice' in foreign affairs."[24]

The United States Supreme Court in *Container Corp. v. Franchise Tax Board*,[25] implied that the risk of multiple taxation alone would not necessarily invalidate a state tax. The context in which the tax is applied, as well as feasible alternative modes of taxation, are pertinent factors to be considered. For example, a nondiscriminatory tax may result in multiple taxation but not interfere with Congress' exclusive power to regulate foreign commerce. Therefore, it would be valid.[26] The Court in *Michelin Tire Corp. v. Wages*[27] held the following:

> By definition, such a tax does not fall on imports as such because of their place of origin. It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation.[28]

The "one voice" standard is violated if a state tax either implicates foreign policy issues under the exclusive province of the federal gov-

22. *Id.* at 11, 719 P.2d at 993, 227 Cal. Rptr. at 397 (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979)).

23. 441 U.S. at 446.

24. *Star-Kist*, 42 Cal. 3d at 12, 719 P.2d at 994, 227 Cal. Rptr. at 398 (quoting *Japan Line*, 441 U.S. at 446).

25. 463 U.S. 159 (1983).

26. Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976). In *Michelin*, the Supreme Court upheld Georgia's nondiscriminatory ad valorem tax on business inventories, including imported goods, reasoning that the purpose behind the tax was to recover locally provided services such as fire and police protection.

27. *Id.*

28. *Id.* at 286.

ernment or violates an explicit federal directive.[29] The fact that a state tax has foreign resonances does not necessarily invalidate it as a violation of the "one voice" standard.

The *Star-Kist* case is distinguishable from the cases cited previously in that it does not involve the imposition of a tax on foreign goods, but rather an exemption. An exemption "that appears to discriminate against domestic commerce cannot be sustained on the traditional ground that the states may not interfere with congressional power 'to regulate commerce with foreign nations.' "[30] However, such an exemption "can be challenged as interfering with that power."[31] Thus, the rule set forth in *Michelin* is applicable.

Michelin held that a state tax "cannot be applied selectively to *encourage* or discourage any importation in a manner inconsistent with federal regulation."[32] A state provision that exempts imports from taxation would interfere with Congress' power to regulate foreign commerce by providing a state-originated advantage to foreign commerce. This "may operate to nullify the curative effect of federally imposed tariffs."[33]

A four part test is utilized to determine whether a state tax statute violates the interstate commerce clause. The tax is constitutional if it meets the following requirements: "[1] [the tax] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided."[34]

The court limited its inquiry to the third prong of the four prong test. Former section 225 exempted the following from the property tax: inventories of foreign companies transshipping through California; and domestic companies involved in importing and exporting. Section 225 thus provided a distinct tax advantage to domestic companies (such as Star-Kist) who were involved in importing over domestic companies which operated exclusively within the United States.[35] Thus, the court concluded that section 225 fails the *Complete Auto* test of constitutionality by discriminating against a class of interstate commerce and "constitutes an undue burden on interstate commerce in violation of the commerce clause."[36]

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29. *Star-Kist*, 42 Cal. 3d at 13, 719 P.2d at 994, 227 Cal. Rptr. at 398.

30. *Id.* at 14, 719 P.2d at 995, 227 Cal. Rptr. at 399 (quoting U.S. CONST. art. 1, § 8, cl. 3).

31. *Id.*

32. *Michelin Tire*, 423 U.S. at 286 (emphasis added).

33. *Star-Kist*, 42 Cal. 3d at 14, 719 P.2d at 995, 227 Cal. Rptr. at 399.

34. *Id.* at 15, 719 P.2d at 996, 227 Cal. Rptr. at 400 (quoting Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).

35. *Id.*

36. *Id.* at 16, 719 P.2d at 996, 227 Cal. Rptr. at 400.

III. THE DISSENT[37]

Justice Lucas stated that section 225 does not violate the foreign or interstate commerce clause or place an undue burden on interstate commerce. He stated that there are three policies behind the commerce clause: 1) to enable the federal government to speak with "one voice" in regulating foreign commerce; 2) to provide a major source of revenue to the federal government through import revenues; and 3) to promote harmony among the states by prohibiting the seaboard states from levying taxes on goods in transit.[38] Lucas contended that section 225 did not conflict with any of these policies.

The "one voice" standard is violated when there is a violation of a federal directive or where foreign policy issues are implicated which are in the exclusive province of the federal government. Lucas criticized the majority for failing to cite a directive that was violated by section 225. Additionally, there was no showing of an implication of foreign policy issues, only a mere "*possibility* that some hypothetical tariff may be impeded by the inventory exemption."[39] There was no concrete showing that the federal government was prevented from speaking with "one voice."

Next, Justice Lucas argued that the majority's use of the *Complete Auto* test is inappropriate. *Complete Auto* involved the applications of a *tax*, while section 225 involved an *exemption*; the majority failed to cite any cases which applied the *Complete Auto* test to an exemption.

In his view, the proper test was "whether the exemption statute, protecting only imports and exports, burdens the free flow of commerce among the several states."[40] The focus of the analysis was whether the tax or exemption "provide[s] a direct commercial advantage to local business."[41] The courts "must balance the national interest in free trade with the state's interest in exercising its taxing powers."[42] A state may not place a discriminatory burden on other

37. *Id.* at 17, 719 P.2d at 997, 227 Cal. Rptr. at 401; *see also* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449 n.14 (1979).

38. *Star-Kist*, 42 Cal. 3d at 17, 719 P.2d at 997, 227 Cal. Rptr. at 401 (Lucas, J., dissenting).

39. *Id.* at 18, 719 P.2d at 998, 227 Cal. Rptr. at 402 (Lucas, J., dissenting) (emphasis in original).

40. *Id.* at 20, 719 P.2d at 999, 227 Cal. Rptr. at 403 (Lucas, J., dissenting).

41. *Id.* at 20-21, 719 P.2d at 1000, 227 Cal. Rptr. at 404 (quoting Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 403 (1984)) (Lucas., J., dissenting).

42. *Id.* at 21, 719 P.2d at 1000, 227 Cal. Rptr. at 404 (Lucas, J., dissenting).

states in order to build up its own commerce.[43] However, a state's scheme to attract a particular segment of industry is constitutional if it is grounded on a permissible basis.[44]

Justice Lucas contended that section 225 "was not grounded on an impermissible basis."[45] In support of this contention, he listed various factors which included the following: 1) local interests were not favored by exemption; 2) the exemption was available regardless of the residency of the shipper; and 3) penalties were not imposed on the choice to transact business in another state.[46] Thus, section 225 did not burden interstate commerce by discriminating in favor of local interests at the expense of other states and, therefore, did not violate the commerce clause. His final contention was that the defendant's claim was really based on equal protection, and as such would be denied standing under the majority's analysis.[47]

STEPHANIE FANOS

XIV. TORTS

A. *A statement appearing in a newspaper review, set off in quotations, prefaced with a qualification that it was the author's impression, did not constitute defamation:* Baker v. Los Angeles Herald Examiner.

In *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 721 P.2d 87, 228 Cal. Rptr. 206 (1986), the supreme court considered whether a statement appearing to be a quote in a review column of a newspaper, was actionable defamation, even though the statement was prefaced as the author's opinion. After considering the article in its entirety, the court ruled that the statement was not defamatory.

The allegedly defamatory remark appeared in a television review column of the Los Angeles Herald Examiner [hereinafter Herald Examiner], on December 29, 1983. It was authored by the defendant, Peter Bunzel, whose featured articles appear regularly in the editorial section of the Herald Examiner. Bunzel critiqued a documentary produced by the plaintiff, Baker, entitled "Sex Education: How Far Should We Go."

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43. *See Westinghouse*, 466 U.S. at 406; Maryland v. Louisiana, 451 U.S. 725, 756 (1981).

44. *See* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 336-37 (1977). In *Boston*, the Court stated, "Our decision today does not prevent the states from structuring their tax systems to encourage the growth and development of intrastate commerce and industry."

45. *Star-Kist*, 42 Cal. 3d at 21, 719 P.2d at 1000, 227 Cal. Rptr. at 404 (Lucas, J., dissenting).

46. *Id.* at 22, 719 P.2d at 1000-01, 227 Cal. Rptr. at 404-05 (Lucas, J., dissenting).

47. *Id.* at 22, 719 P.2d at 1000, 227 Cal. Rptr. at 404 (Lucas, J., dissenting).

Bunzel began the review by relating his own childhood experience of being informed about sex by his father. Thereafter, Bunzel stated that parental timidity and the demise of the traditional family unit has shifted the burden of sex education to public schools. Concluding that sex education in schools is a controversial topic, Bunzel proceeded to review Baker's documentary on the subject.

Bunzel's first criticism was that Baker's show did "little to advance the subject and a lot to exploit it." Los Angeles Herald Examiner, Dec. 29, 1983, at C3, cols. 1-3. The following was the allegedly libelous statement:

> My impression is that executive producer Walt Baker, who is also vice president in charge of programs for Channel 9, told his writer/producer, Phil Reeder, "We've got a hot potato here—let's pour on titillating inneundo and as much bare flesh as we can get away with. Viewers will eat it up!"

Id. at C3, col. 2.

Bunzel cited examples of Baker's exploitation of this subject matter, including footage of a nude dancer who was photographed from the rear, erotic photographs, and an interview with a young, gay male. Bunzel, in conclusion, termed Baker's program "hypocritical sleaze." *Id.* at C3, col. 3.

In consideration of Baker's defamation suit against Bunzel and the Herald Examiner, the supreme court thoroughly analyzed the nature of defamation. To constitute defamation, a statement must be both false and of fact rather than of opinion. *Baker*, 42 Cal. 3d at 259-60, 721 P.2d at 90, 228 Cal. Rptr. at 208-09. To determine whether the statement in this case was one of opinion, which is protected by the First Amendment, the court employed a "totality of the circumstances" test. The court used this test to examine two aspects of the statement: 1) the actual language and punctuation; and 2) the context in which the statement was made, including the expected impression of the audience.

The court examined the actual language used by Bunzel. It emphasized his use of the word "impression" before the statement. The court noted that the dictionary defines the word "impression" as "opinion." AMERICAN HERITAGE DICTIONARY, 661, 921 (English Language 1970). The court also cited *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976) ("apparently"), and *Carr v. Warden*, 159 Cal. App. 3d 1166, 206 Cal. Rptr. 162 (1984) ("think"), in which similar qualifiers were found to preclude liability for defamation. By contrast, the court noted *Selleck v. Globe International, Inc.*, 166 Cal. App. 3d 1123, 212 Cal. Rptr. 838 (1985),

wherein words such as "says" and "explains" prompted that court to regard the accompanying statements as actionable.

The court also considered the punctuation surrounding Bunzel's statement. Baker asked the court to find that the statement was factual merely because it appeared in quotation marks. The court rejected Baker's argument. Rather, the court deemed that the statement was a hypothetical quote of what Bunzel imagined might have been said. In addition to giving weight to the actual language and punctuation, the court deemed essential the context in which the statement was made. In this regard, the court mentioned that the entire article was exceedingly critical. Further, it was qualified throughout by Bunzel's own experiences and opinions.

The court did acknowledge, however, that remarks which are frequently disguised as the author's view *imply* the existence of undisclosed defamatory facts. *Slaughter v. Friedman*, 32 Cal. 3d 149, 649 P.2d 886, 185 Cal. Rptr. 244 (1982). In *Slaughter*, the defamatory statement appeared in a businesslike letter which seemingly advanced the legal position of an insurance carrier. By way of contrast, the court characterized Bunzel's article as "flashy hyperbole." *Baker*, 42 Cal. 3d at 267, 721 P.2d at 95, 228 Cal. Rptr. at 214. Moreover, the entire review was sarcastic in nature.

Lastly, the court took note of the societal context in which the article was set. The court acknowledged that the column was a review, published in the opinion-editorial section. The supreme court deemed that readers of reviews do so to obtain the author's opinion on the subject. In addition, Bunzel's article discussed a very controversial subject: sex education in schools. The court stated that the more controversial the topic, the more heated the treatment of the issue was likely to be.

The court examined the actual language, punctuation, context, and audience expectation of the allegedly defamatory communication. It concluded that none of these factors supported Baker's contention that the statement was factual, as required to maintain an action for defamation. In conclusion, the court found that an undesirable chilling effect on a journalists' ability to inform the public might occur if unmeritorious defamation assertions were not cautiously scrutinized.

VALERIE FLORES

B. *The special damages requirement of section 45a of the Civil Code applies to action for false light invasion of privacy based on a defamatory publication:* Fellows v. National Enquirer, Inc.

I. INTRODUCTION

In *Fellows v. National Enquirer, Inc.*,[1] the California Supreme Court held that the special damage[2] requirement of section 45a of the Civil Code[3] is applicable to actions for false light invasion of privacy[4] based on defamatory publications. As a result, the court gave greater protection to publishers by requiring the plaintiff to plead special damages.[5]

II. FACTUAL BACKGROUND

On August 17, 1982, the National Enquirer carried a photograph of the plaintiff and actress Angie Dickinson. It reported that the plaintiff was the "new man" in Ms. Dickinson's life.[6] The court pointed out that the photograph was taken while the plaintiff and Ms. Dickinson were coming out from a restaurant where he and his wife had

1. 42 Cal. 3d 234, 721 P.2d 97, 228 Cal. Rptr. 215 (1986). The opinion was written by Justice Broussard with Chief Justice Bird, Justices Mosk, Reynoso, Grodin, Lucas and Panelli concurring. Chief Justice Bird also filed a separate concurring opinion.

2. For a definition of "special damages" *see* CAL. CIV. CODE § 48a.4.(b) (West 1982). " 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other . . . ." *Id. See generally*, Note, *Alternative to the General-Damage Award for Defamation*, 20 STAN. L. REV. 504 (1968).

3. CAL. CIV. CODE § 45a (West 1982) provides the following:

> LIBEL ON ITS FACE; OTHER ACTIONABLE DEFAMATORY LANGUAGE.
> A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code.

Id.

4. A cause of action for invasion of privacy can be based on any of the following: a) false light invasion of privacy; b) intrusion upon one's solitude or seclusion; c) public disclosure of private facts; and d) appropriation. *See* 42 Cal. 3d at 238, 721 P.2d at 99, 228 Cal. Rptr. at 218. *See also*, Prosser, *Privacy*, 48 CALIF. L. REV. 383, 398-401 (1960); Spiegel, *Public Celebrity v. Scandal Magazine—The Celebrity's Right to Privacy*, 30 S. CAL. L. REV. 280 (1957); Note, *Right of Privacy: Is "False Light" Recognized in California?* 50 CALIF. L. REV. 357 (1962). For general information on false light invasion of privacy *see*, 6 CAL. JUR.3D *Assault and Other Willful Torts* § 122 (1973).

5. *Fellows*, 42 Cal. 3d at 251, 721 P.2d 109, 228 Cal. Rptr. at 227.

6. *Id.* at 236, 721 P.2d at 98, 228 Cal. Rptr. at 216.

dined with Ms. Dickinson and a few other people.[7]

In the first complaint, the plaintiff alleged libel, false light invasion of privacy, and intentional and negligent infliction of emotional distress. In both counts of libel and false light invasion, he claimed that the defamation was based on extrinsic facts. The plaintiff alleged that the article was defamatory because those who knew of his marital status would assume he had been engaged in immoral conduct. The plaintiff, therefore, sought general and special damages.[8]

The defendant demurred, arguing that the plaintiff had pled special damages with insufficient specificity. He also contended that the claim for false light invasion was "superfluous" because of its similarity to the libel claim.[9]

The trial court allowed the plaintiff to amend the complaint. The first amended complaint was similar to the initial complaint. However, in the second amended complaint, the plaintiff conceded that he did not suffer any special damages. As a result, he dropped the action for libel. Nonetheless, he maintained the action for false light invasion of privacy.[10]

The defendant demurred, arguing that the court should bar the action for want of special damages. The trial court sustained the demurrer and dismissed the action. However, the court of appeal overruled the trial court's holding. It held that the special damage requirement should not be applicable to an action for false light invasion because it protected interests different from those protected by defamatory actions.[11]

III. ISSUE

The court stated that the issue of the case was whether the special damage requirement of section 45a of the Civil Code should apply to actions for false light invasion of privacy. However, the real issue was whether to impose the restrictions and limitations of defamation actions to false light invasion actions. In other words, whether to treat false light invasion as defamation. This issue was addressed by the court because it feared that "virtually every published defamation would support an action for false light invasion of privacy."[12]

Under the language of the statute, the special damage requirement is limited to a defamation action in which the defamatory language is

7. *Id.* at 236 n.3, 721 P.2d at 98 n.3, 228 Cal. Rptr. at 216 n.3.
8. *Id.* at 236-37, 721 P.2d at 98, 228 Cal. Rptr. at 217.
9. *Id.* at 237, 721 P.2d at 98, 228 Cal. Rptr. at 217.
10. *Id.* at 237-38, 721 P.2d at 99, 228 Cal. Rptr. at 217.
11. *Id.* at 238, 721 P.2d at 99, 228 Cal. Rptr. at 218.
12. *Id.* at 251, 721 P.2d at 108, 228 Cal. Rptr. at 227. *See also* 6 CAL. JUR. 3D *Assault and Other Willful Torts* § 122 (1973).

not libelous on its face.[13] Consequently, some facts which could not be actionable under defamation could be maintained under a different theory. In essence, the court sought to close the "loophole."[14] However, in doing so, the court applied a liberal view of the first amendment[15] which resulted in giving the publishers almost boundless "freedom."

IV. OPINION

The court began the discussion by briefly outlining the historical background of the right of privacy[16] and the United States Supreme Court's efforts to balance the first amendment[17] right with defamatory actions. In a landmark case, *New York Times Co. v. Sullivan*,[18] the Court held that the first amendment right of freedom of speech protected the media from defamatory actions brought by public officials unless the defamatory statements were made with "actual malice."[19] In a subsequent case, *Time, Inc. v. Hill*,[20] the Court examined the relationship between the right of privacy and the first amendment right. As a means of balancing the two conflicting rights, the United States Supreme Court adopted the "actual malice" standard to find liability.[21]

In California, the supreme court, through a series of cases, began to expand the concept of first amendment protection. In *Reader's Di-*

13. *See supra* note 3 and accompanying text.

14. "When the false publicity is also defamatory . . . (the) limitations . . . for the action for defamation should not be successfully evaded by proceeding upon a different theory . . . ." 42 Cal. 3d at 246, 721 P.2d at 105, 228 Cal. Rptr. at 223 (quoting RESTATEMENT (SECOND) OF TORTS § 652 E comment e (1977)).

15. *Id.* at 251, 721 P.2d at 108, 228 Cal. Rptr. at 227.

16. *Id.* at 238, 721 P.2d at 99, 228 Cal. Rptr. at 218. *See* Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). *See supra* note 4 and accompanying text.

17. U.S. CONST. amend. I.

18. 376 U.S. 254 (1964).

19. *Id.* "Actual Malice" is any statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Fellows*, 42 Cal. 3d at 239, 721 P.2d at 100, 228 Cal. Rptr. at 219 (quoting *New York Times, Co.*, 376 U.S. at 279-80 (1964)). CAL. CIV. CODE § 48a.4.(d) (West 1982) provides the following:

> "Actual malice" is that state of mind arising form hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice.

CAL. CIV. CODE § 48.4.(d) (West 1982).

20. 385 U.S. 374 (1967).

21. 42 Cal. 3d at 239, 721 P.2d at 100, 228 Cal. Rptr. at 219.

gest Association v. Superior Court,[22] the court expanded the requirement of actual malice to other causes of action. If the nondefamation claims, such as false light invasion of privacy and intentional infliction of emotional distress, are based on the defendant's defamatory actions, the court held that failure to allege facts which would indicate the presence of actual malice barred not only defamation claims but also other claims.[23]

In *Werner v. Times-Mirror Co.*,[24] the court of appeal imposed the requirement of section 48a of the Civil Code[25] on actions for invasion of privacy. In *Werner*, the plaintiff had not demanded a retraction and as a result, section 48a would have barred a libel action.[26] The *Werner* holding was adopted[27] by the supreme court in *Kapellas v. Kofman*.[28] In *Kapellas*, the court found that the plaintiff's claim for false light invasion was equivalent in substance to a libel action. Consequently, the court ordered the plaintiff to satisfy all the requirements of a libel action.[29]

In addition, if the nondefamation actions were based on defamatory language, the court has not hesitated in applying the restrictions of defamation actions to nondefamation claims.[30] For example, in *Grimes v. Carter*,[31] the court of appeal held that a nondefamation action based on defamatory language was not exempt[32] from the requirements of section 830 of the Civil Procedure Code.[33] Therefore,

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22. 37 Cal. 3d 244, 690 P.2d 610, 208 Cal. Rptr. at 137 (1984).

23. *Id.* at 265, 690 P.2d at 624, 208 Cal. Rptr. at 151.

24. 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961) (the plaintiff brought an action for invasion of privacy based on a newspaper article that alleged plaintiff's involvement in political scandals and crimes).

25. CAL. CIV. CODE § 48a. (West 1982) provides in part:

> In any action for damages for the publication of a libel in a newspaper, or of a slander by a radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

Id.

26. *Id. See generally* Bevier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 347 (1978).

27. 42 Cal. 3d at 241, 721 P.2d at 101, 228 Cal. Rptr. at 220.

28. 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969) (the plaintiff brought an action for false light invasion against the defendant who carried an editorial which reported that there were numerous complaints and arrests involving the plaintiff's children).

29. 42 Cal. 3d at 242, 721 P.2d at 102, 228 Cal. Rptr. at 221.

30. *Id.*, 721 P.2d at 102, 228 Cal. Rptr. at 221.

31. 241 Cal. App. 2d 694, 50 Cal. Rptr. 808 (1966).

32. 42 Cal. 3d at 243, 721 P.2d at 103, 228 Cal. Rptr. at 221-22.

33. CAL. CIV. PROC. CODE § 830 (West 1982) provides the following:

> UNDERTAKING; NECESSITY; AMOUNT; CONTENTS. *Before issuing the summons in an action for libel or slander*, the clerk shall *require a written undertaking*

in *Grimes*, the appellate court promptly dismissed the plaintiff's actions for invasion of privacy and intentional infliction of emotional distress for failure to satisfy section 830.[34]

The court noted that the basic policy behind these decisions was that privacy suits threaten the freedoms of speech and press in the same manner as defamation suits.[35] Consequently, the court has sought to prohibit independent causes of action based on the same facts under which a defamation action would not stand.[36]

Turning to the issue of the applicability of the special damage requirement to false light invasion actions, the court began the discussion by acknowledging that it was a question of first impression.[37] However, the unanimous court showed little hesitancy in overruling the appellate court. It reasoned that although the two separate actions protected different interests, they could, nonetheless, be based on the same publication.[38] The court recognized that "the purpose of the rule requiring proof of special damages when the defamatory meaning does not appear on the face of the language used is to protect publishers who make statements innocent in themselves that are defamatory only because of extrinsic facts known to the reader."[39]

Therefore, the court concluded that "[s]ince virtually every published defamation would support an action for false light invasion of privacy, exempting such actions from the requirement of proving special damages would render the statute a nullity."[40] Thus, the court found that section 45a applied to a cause of action for false light inva-

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on the part of the plaintiff in the sum of five hundred dollars ($500), with at least two competent and sufficient sureties, specifying their occupations and residences, to the effect that if the action is dismissed or the defendant recovers judgment, they will pay the costs and charges awarded against the plaintiff by judgment, in the progress of the action, or on an appeal, not exceeding the sum specified. *An action brought without filling the required undertaking shall be dismissed.*

Id. (emphasis added).

34. 42 Cal. 3d at 243, 721 P.2d at 103, 228 Cal. Rptr. at 221-22. For the court's further discussion of the expanded application of section 47 of the Civil Code, *see* 42 Cal. 3d at 244, 721 P.2d at 103, 228 Cal. Rptr. at 222-23 (discussion of decisions in other jurisdiction).

35. *Id.* at 241, 721 P.2d at 101, 228 Cal. Rptr. at 220.

36. *Id.* at 246, 721 P.2d at 104, 228 Cal. Rptr. at 222.

37. *Id.* at 247, 721 P.2d at 105, 228 Cal. Rptr. at 224.

38. *Id.* at 247-49, 721 P.2d at 105-07, 228 Cal. Rptr. at 224-25. *See also id.* at 247 n.12, 721 P.2d at 106 n.12, 228 Cal. Rptr. at 224 n.12.

39. *See id.* at 249, 721 P.2d at 107, 228 Cal. Rptr. at 225-26. (quoting Justice Traynor in McClead v. Tribune Publishing Co., 52 Cal. 2d 536, 550, 343 P.2d 36 (1959)).

40. *Fellows*, 42 Cal. 3d at 252, 721 P.2d at 109, 228 Cal. Rptr. at 227.

sion of privacy based on defamatory language.[41] However, the court noted that the holding would not apply to a false light invasion action which could also stand as an action for public disclosure of private facts.[42]

V. CONCURRING OPINION

Chief Justice Bird filed a separate concurring opinion to express her support for the minority view in *New York Times Co. v. Sullivan*.[43] The Chief Justice stated that "[t]o be truly free, the press must feel free—free to be wise and free to be foolish; free to be constructive and free to be destructive."[44] Concerning such an extreme view, it is suggested that "freedom" should always be distinguished from "irresponsibility."[45]

VI. CONCLUSION

Based on the court's holding, several conclusions are warranted. First, the court is continuing to treat actions for false light invasion as defamation actions; second, the press, under the umbrella of first amendment, will enjoy almost a boundless "freedom."

King Solomon once wrote, "[t]he mouth of the righteous is a fountain of life, [b]ut the mouth of the wicked conceals violence."[46] It is this author's opinion that before expanding the first amendment freedom of speech, the court should question the wisdom of allowing an untamed press from roaring in an irresponsible and destructive manner.[47]

SUNG-DO GONG

41. *Id.* at 252, 721 P.2d at 109, 228 Cal. Rptr. at 227.
42. *Id.* at 252 n.13, 721 P.2d at 109 n.13, 228 Cal. Rptr. at 227 n.13.
43. *Id.* at 252, 721 P.3d at 108, 228 Cal. Rptr. at 227 (Bird, C.J., concurring).
44. *Id.* at 252, 721 P.2d at 109, 228 Cal. Rptr. at 228 (Bird, C.J., concurring).
45. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 491, 640 (9th ed. 1983).
46. *Proverbs* 10:11.
47. The author does not oppose "free press," and the above statement should not be construed as suggesting such. It is, however, the author's view that one's freedom should not intrude upon the rights of others in a destructive manner. Consequently, the author believes that the press should bear a duty to make a reasonable investigation with respect to the truth of the matter.

Furthermore, the proverbs of King Solomon was quoted to suggest that societal freedom does not soley depend on a free press, but rather on responsible leaders who are sensitive to the needs of the general public.

C. *A tractor operator acts within the scope of his employment when, in the course of performing his duties as an employee, he extends an unauthorized invitation to another to ride on his employer's tractor, thereby triggering the doctrine of respondeat superior:* **Perez v. Van Groningen & Sons, Inc.**

The plaintiff in *Perez v. Van Groningen & Sons, Inc.*, 41 Cal. 3d 962, 719 P.2d 676, 227 Cal. Rptr. 106 (1986), received an unauthorized invitation to ride in the defendant's tractor solicited by the defendant's employee. While the employee was disking the defendant's orchard, a task he was employed to perform, the plaintiff accompanied him for an unauthorized ride. In the process, the plaintiff was injured, and he brought suit against the employer under the theory of respondeat superior.

The trial court instructed the jury that the defendant's employee negligently acted within the scope of his employment as a matter of fact, not law. The plaintiff appealed these instructions and the California Supreme Court reversed the trial court's decision regarding the scope of employment instructions, but affirmed the instructions that the employee was negligent as a matter of fact.

The court initially focused on the doctrine of respondeat superior, which imposes the risk of injury arising out of the employment on the employer as a consequence of doing business. Pursuant to this doctrine, an injured party may recover damages from the employer regardless of proof of the employer's fault, so long as the employee was acting within the scope of his employment.

Next, the court considered "whether the risk [acceptance of an unauthorized passenger] 'was one that may fairly be regarded as typical of or broadly incidental' to the enterprise undertaken by the employer [disking an orchard]." *Id.* at 968, 719 P.2d at 679, 227 Cal. Rptr. at 108 (quoting *Rogers v. Kemper Construction Co.*, 50 Cal. App. 3d 608, 619, 124 Cal. Rptr. 143, 149 (1975) (citation omitted)). Concluding that the risk was inherent in the enterprise, the court further held that the employee was acting within the scope of his employment because he had not " 'substantially deviated from his duties for personal purposes' " when the accident occurred. Rather, he operated the defendant's tractor in the defendant's orchards during working hours, as designated. 41 Cal. 3d at 968, 719 P.2d at 679, 227 Cal. Rptr. 109 (quoting *Hinman v. Westinghouse Electric Co.*, 2 Cal. 3d 956, 960, 471 P.2d 988, 990, 88 Cal. Rptr. 188, 190 (1970) (citation omitted)). The

defendant argued that because he had expressly forbidden his employees from allowing passengers on the one-seated tractor, the respondeat superior theory should not apply. The court disagreed, stating that "[a]s long as it is clear that at the time of the injury the employee was following his employer's instructions to disk the orchard, the fact that he was not authorized to take a passenger [was] immaterial." 41 Cal. 3d at 969, 719 P.2d at 679, 227 Cal. Rptr. at 109. *See Meyer v. Blackmun*, 59 Cal. 2d 668, 381 P.2d 916, 31 Cal. Rptr. 36 (1983), and *Foos v. Anothony Industries*, 139 Cal. App. 3d 794, 189 Cal. Rptr. 31 (1983) (liability imputed as a matter of law).

The defendant also argued that it should not be principally responsible under an agency theory because it did not benefit from its employee's action. The court refuted this contention and explained that the application of the doctrine of respondeat superior does not require that a benefit be conferred upon the employer. *See Carr v. William C. Crowell Co.*, 28 Cal. 2d 652, 171 P.2d 5 (1946) (employer is liable for employee's intentional tortious acts committed within the scope of employment despite lack of benefit to employer). Since the presence of an unauthorized invitee was not sufficient to take the employee outside the scope of his employment, the court ruled that the scope of employment should have been instructed as a matter of law, not fact.

The plaintiff's final contention was that the defendant's employee was negligent as a matter of law. Although the evidence supported this finding, the court concluded that it also supported a different conclusion, requiring the court to instruct the jury that the employee was negligent as a matter of fact, not law. The supreme court remanded the case for retrial so that proper jury instructions could be made.

ARIAN COLACHIS

XV. WORKERS' COMPENSATION

The Workers' Compensation Appeals Board may reserve its jurisdiction for the purpose of rating permanent disability of employees with progressive disease: **General Foundry Service v. Workers' Compensation Appeals Board.**

In *General Foundry Service v. Workers' Compensation Appeals Board*, 42 Cal. 3d 331, 721 P.2d 126, 228 Cal. Rptr. 243 (1986), the supreme court unanimously held that the Workers' Compensation Appeals Board [hereinafter the Board] may tentatively recognize the permanent disability of an employee with a progressive illness. In addition, the court held that the Board may also reserve its jurisdiction, despite the five-year statutory limitation on its jurisdiction, for a

first evaluation until the employee's condition becomes permanent or when the further deterioration would be irrelevant for the purpose of rating permanent disability. The case was then remanded with an instruction that the Board should examine the employee's eligibility for rehabilitation.

In this case, the disabled employee, a molder for General Foundry Service, developed lung cancer as a result of being exposed to asbestos and silica dust while at work. Consequently, he was prohibited from working in the same environment, although he was capable of working within his capacity. The court noted that the employee's condition was progressively deteriorating. As a result, the court first had to determine how the Board should rate the permanent disability of an employee with a progressive disease. The court was attempting to avoid the injustice of the five-year statutory limitation on the Board's jurisdiction which commenced once the disability was established as permanent.

In wrestling with the first question, the court struggled to find an appropriate definition for "permanent disability." It rejected the definition provided in section 9735 of Title 8 of the Administrative Code as being inadequate when applied to progressive disability. *See* CAL. ADMIN. CODE tit. 8, § R.9735 (1980). The court also overruled the appellate court's approach.

The court of appeal had ruled that the Board should rate a progressive disease as a permanent disability when the prognosis was "sufficiently ascertainable." The supreme court disagreed. First, the court pointed out that the employee's risk of preclusion from full compensation due to the five-year statutory limitation on the Board's jurisdiction made it inequitable. Second, the court noted that the present rating procedure would not make the scheme practical.

In conclusion, the court resolved the issue by allowing the Board to rate the employee's permanent disability while reserving jurisdiction to make a final determination once the illness became stationary. It reasoned that in accordance with the legislative intent, the statute of limitations must be liberally construed in favor of the employee.

The second question addressed by the court was the employer's duty to rehabilitate employees with progressive illnesses. The court emphasized that the employer had an affirmative duty to not only make rehabilitation available, but also to inform the disabled employee of his rights. The court further held that if the injured employee was qualified for the benefit, the employer was obligated to develop a plan which would provide him with maximum self-support.

Should the employer breach his duty, he would be required to pay rehabilitation benefits from the date of the breach.

Procedurally, the court instructed the Board to first determine whether the employee would qualify for a rehabilitation program. If he would not be eligible, the court directed the Board to consider it as a factor in evaluating the rate of permanent disability.

In conclusion, the court's decision should be welcomed for its practicality and fairness. First, the court wisely evaded the problem of defining "permanent disability" by enabling the Board to reserve its jurisdiction. As the court noted, this was the practical approach to which both parties agreed. Second, the court's reiteration of the employer's duty to provide his disabled employees with a rehabilitation program was fair and equitable. Such a program will not only encourage cooperation between employers and employees, but it will also uphold human dignity and give a disabled person a sense of self-worth. Therefore, the court's decision should be applauded.

SUNG-DO GONG